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## Breaking Down Status

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## Law Review

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### BREAKING DOWN STATUS

KAIPONANEA T. MATSUMURA\*

#### ABSTRACT

*The law regulates some of society's most significant relationships through status. Yet social and legal changes can diminish a status's effectiveness and importance. The debates surrounding worker classification and nonmarital relationship recognition provide two pressing examples. By some estimates, over one quarter of all U.S. workers are part of the gig economy. If these gig workers are classified as employees, many rights will flow to them by virtue of that status; if they are instead classified as independent contractors, they get almost none of them. This binary approach exists in the family law context as well. Over 35 million adults are in committed nonmarital relationships marked by some combination of physical or emotional intimacy, property sharing, cohabitation, and shared childrearing. But the law will treat the overwhelming majority of them as single, meaning that unlike spouses, they will find themselves without legal*

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*protections and subsidies throughout the relationship and at its end. The problem in both contexts is a mismatch between established statuses and emerging social realities.*

*This Article investigates the persistence of status-based regulation through the lenses of employment and marriage. In doing so, it makes four contributions. First, it identifies the relevant features of status and the tradeoffs inherent in regulating through status. Second, using the examples of gig workers and nonmarital partners, it shows how the features of status lead to the emergence of regulatory voids. Third, it argues that status-based regulation is inevitable, both because of practical political considerations and because the most obvious alternative to status-based regulation, contract, is necessarily shaped by the relational context and therefore devolves to status. Fourth, with reform as the only possibility, the Article proposes institutional design questions to guide future reform efforts.*

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## INTRODUCTION

In his *Commentaries on the Laws of England*, William Blackstone organized the private economic rights of persons into “three great relations,” that of husband and wife, master and servant, and parent and child.<sup>1</sup> “Employer” and “employee” have replaced “master” and “servant” in modern parlance,<sup>2</sup> so it may seem odd from our current perspective to group the master-servant relation with others that we now consider family relationships. But servants lived and worked as members of a household in England and the American colonies throughout the seventeenth and eighteenth centuries. At the time, “[t]he notion of a labor market in which individuals freely sold their labor did not exist,” and “until the nineteenth century, there were practically no people in employment relationships.”<sup>3</sup> The head of a household—always a man—was charged with the duty and granted the corresponding authority to “maintain[] a well-governed home,” which was composed of “spouses and their offspring, apprentices, servants,

1. 1 WILLIAM BLACKSTONE, COMMENTARIES \*410.

2. Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302 (2001).

3. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 13, 14 (2004) (noting that “[m]erchants, artisans, and members of the learned professions all engaged in remunerative activities, but they did not work for wages”).

‘bound-out’ youths, and other dependents . . . .’<sup>4</sup> Whether agrarian or mercantilist, the household was the unit of economic production, meeting the financial and support needs of its members.<sup>5</sup> The status of householder also gave a man political significance, making him “the sovereign of a domain, able to meet with other rulers and to participate with them in government.”<sup>6</sup> Blackstonian statuses therefore bound up personal, economic, and political duties and located them within the home.

Although the status of master and servant has migrated outside the home, leaving behind the status of husband and wife, both have undergone several similar developments since Blackstone’s time. Now known as employment and marriage, they have become more contractual in nature, tolerating significant customization. They have become easier to exit and correspondingly less permanent. They have also inched away from their hierarchical social meanings. Nevertheless, both retain aspects of status. Whether someone is an employee or spouse still triggers mandatory rights and duties between the parties, as well as between the parties and the state.

Status can be an effective regulatory tool because the status determination gives the status holders and third parties that interact with them clarity about their rights and obligations. When status works, it becomes a powerful organizing principle that fades into the background—many people in this country, for instance, are lucky enough not to question their citizenship and all the rights that follow from it.<sup>7</sup> Despite Henry Sumner Maine’s oft-quoted pronouncement that “the movement of the progressive societies has hitherto been a movement *from Status to Contract*,”<sup>8</sup> status still abounds: as we move through the world, the law

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4. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 5 (1985).

5. See *id.* at 4 (“Family responsibilities ranged from economic production and the transmission of estates to craft training and dependent care.”); see also Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 8 (2010). Indeed, successful households met the dependency needs of others who could not support their own. Men who could not sustain their own households, as well as single women between the ages of twelve and forty, could be “compel[ed] by two justices to go out to service, for the promotion of honest industry. . . .” BLACKSTONE, *supra* note 1, at \*413.

6. HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 101 (2000).

7. This is not to say that immigration law is immune from problems similar to the work and family law contexts. The DACA program arose in large part to provide legal protections to people who are functionally similar to citizens. See Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1, 3–4 (2017). “Dreamers” are only one visible subset of immigrants with “liminal” legal status, those who move in and out of different formal legal statuses, or who struggle to access the full benefits of citizenship. See Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 710, 713, 718–30 (2015); see also Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOC. 999, 100 & *passim* (2006) (describing the liminal status of Salvadoran and Guatemalan immigrants whose temporary legal status is uncertain and exploring the effects of that uncertainty on their lives).

8. HENRY SUMNER MAINE, ANCIENT LAW 170 (London, John Murray 1874) (1861).

continues to respond to us as citizens, spouses, employees, tenants, patients, parents, clients, limited partners, and more.

The very features of status that make it effective can also result in ossification, encumbering its response to inevitable social change. Status depends on identity categories that can become contested or rendered obsolete. Its mandatory, bundled nature hampers its ability to adapt to changed circumstances. And the inequalities that flow from its mandatory rules invite contestation. The juxtaposition of employment and marriage casts these shortcomings of status-based regulation in sharp relief.<sup>9</sup>

Every person who works for a wage is either an employee or an independent contractor—nothing in between. The rapid evolution of the online “gig” economy in the last decade has revealed the limits of work law’s binary approach to employees.<sup>10</sup> By some estimates, between one quarter and one third of all U.S. workers are part of the gig economy—for instance, they may drive for Uber or deliver packages for Amazon.<sup>11</sup> Employees are entitled to many legal protections from their employers, such as reimbursement for expenses and a minimum wage, while independent contractors are entitled to virtually none.<sup>12</sup> Technology companies classify most gig workers as independent contractors, a status that some workers have contested through lawsuits and political mobilization. These are high-stakes disputes. To characterize these workers as employees would cost

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9. These shared classification challenges have largely been analyzed in isolation. A few scholars have broadly compared employment status and marital status. *See, e.g.,* Marion Crain, *Arm’s-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL’Y 163 (2011); Stephen Nayak-Young, *Revising the Roles of Master and Servant: A Theory of Work Law*, 17 U. PA. J. BUS. L. 1223 (2015). Some have observed how employment law helps to produce the distinction between economic and non-economic work. *See* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 862 (2008). And other scholars have observed the common status origins of employees and spouses. *See* Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 2 (2011) (arguing that wives and servants were “not just subordinate; they were similarly subordinate”). But I am not aware of any articles on worker classification that discuss relationship classification or any articles on relationship classification that discuss worker classification.

10. *See* V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 67 (2017) (noting the relationship between current gig economy workers and the longstanding debate over whether taxi drivers are more like employees or independent contractors).

11. *See* EDISON RSCH., THE GIG ECONOMY 2 (Dec. 2018), <http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf> [<https://perma.cc/65VE-VSV4>] (24% of Americans earn income by working in the gig economy); James Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy*, MCKINSEY GLOB. INST. (Oct. 10, 2016), <https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy#> [<https://perma.cc/4AVT-J9ZH>] (concluding that 20–30% of the working age population in Europe and the United States engages in some form of gig work); TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018, 6:30 PM), <https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy/#2851e5e37118> [<https://perma.cc/3Y2D-CLDQ>].

12. *See* *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015).

companies hundreds of millions of dollars and potentially drive them out of business; but the opposite conclusion leaves millions of workers ineligible for valuable benefits. The challenge is that many of these workers do not look like either traditional employees or independent contractors. Gig workers often work as little or as much as they want, often simultaneously for multiple firms, sometimes even for direct competitors; yet many do not perform tasks requiring special skills, exercise very little discretion in the work that they do, and can be terminated if they fail to adhere to the company's precise guidelines.<sup>13</sup> These facts led one judge in an employee misclassification case to observe that the jury would be "handed a square peg and asked to choose between two round holes."<sup>14</sup>

In the family law context, informal nonmarital relationships are the square peg; singleness and marriage are the two round holes. An informal relationship may involve emotional and sexual intimacy, commitment, resource sharing, cohabitation, and joint childrearing, but it may not involve all of those things. Over thirty-five million adults in the United States are in these types of relationships.<sup>15</sup> People in these relationships are clearly not single as a practical matter, but they have not taken the consequential step of formalizing their relationships through marriage. Like the designation of "employee," the formal status of marriage is the gateway to thousands of legal rights and responsibilities, such as inheritance, favorable tax treatment, standing to sue for various torts, and qualification for family leave and Social Security retirement benefits.<sup>16</sup> That means that people in relationships bearing various degrees of similarity to marriage will find themselves without legal protections, subsidies, and obligations throughout the relationship and at its end.

New social arrangements render millions of individuals illegible to the binary and heavily laden statuses of employment and marriage. Some individuals find freedom in this void in that they owe fewer duties than they would if their relationships were regulated. Others find their socioeconomic and personal vulnerabilities magnified.

If status is the problem, one response might be to turn to contract law as a solution. Although status-based regulation has persisted since Maine's pronouncement 150 years ago, Maine was surely correct that legal relations previously governed by status have become more contractual, in the sense that they tolerate greater individual customization.<sup>17</sup> Why not go all the way

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13. *Id.*

14. *Id.* at 1081.

15. Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1013 (2018) (combining cohabitants and individuals living apart in committed relationships).

16. *See Obergefell v. Hodges*, 576 U.S. 644, 669–70 (2015).

17. *See* Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. L. 249, 260–83 (2010) (examining the phenomenon of private ordering across various family law contexts).

and entrust the parties with control over the legal consequences of their relationship, shedding some unfortunate historical baggage in the process?

For various reasons, however, regulation of these relationships through contract is not the option it seems at first glance. Either because of a desire to efficiently administer legal entitlements, privatize dependency, protect parties with less bargaining power, or control the meaning of the relationship itself, lawmakers have shown little interest in loosening their grip on these societally important relationships.

But even if the law were to embrace a contractual approach, the nature of the underlying relationships would inevitably exert influence over the administration of legal obligations in status-like ways. Although contract law largely respects individual choice, the doctrine retains mandatory aspects. Through doctrines such as unconscionability and public policy, the law imposes limits on the terms to which parties can agree.<sup>18</sup> Rules governing who can enter into agreements and under what circumstances regulate the conduct of the contracting parties, making them more than legal strangers even if they are transacting at arm's length.<sup>19</sup> Even the act of interpreting the terms of the parties' agreement requires a court to consider the context in which the promises were made, which means that aspects of the relationship itself might comprise the terms of the exchange.<sup>20</sup> Legal rules based on these archetypal relationships arise, such as rules preventing cohabitants from contracting for marital-like financial obligations based on the performance of domestic labor.<sup>21</sup> Contract folds back into status.<sup>22</sup>

If some degree of status-based regulation is inevitable, the question is not *whether* to regulate through status, but *how*. That inquiry is complicated, however, because status is undertheorized. In contrast to the contract end of the contract/status binary, which has been deconstructed and reconstructed repeatedly in the scholarly literature,<sup>23</sup> the meaning of status has largely

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18. See, e.g., Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965 (2019) (unconscionability); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159 (2013) (public policy).

19. See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000 (1985).

20. See Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 881–82 (2000) (describing the tenets of relational contract theory, first of which is that transactions are embedded in social relations).

21. See Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. (forthcoming 2021) (on file with author).

22. I will explain and defend this claim in Part III, *infra*.

23. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1985) (identifying and arguing against the assumptions of classical contract theory); GRANT GILMORE, *THE DEATH OF CONTRACT 6–7 & passim* (Ronald K. L. Collins ed., 1995) (discussing the birth and death of classical contract doctrine); Dalton, *supra* note 19 (performing one such deconstruction).

been assumed to be in opposition to contract.<sup>24</sup> Status, as I have been using the term up to this point, is a form of legal governance; a way of imposing a fixed bundle of rights and obligations based on a discernable characteristic. But it has multiple overlapping meanings, any of which might be invoked by courts and scholars at any given moment. Maine, for instance, uses status to describe legal obligations that are fixed by virtue of one's relationship to the head of the family.<sup>25</sup> Implicit in this patriarchal model are the identities themselves—wives, children, slaves—which denote greater or lesser social standing.<sup>26</sup> Thus, status can describe specific identities or social hierarchies in addition to the package of legal consequences that flows from the determination that one belongs to a given legal category. The goal of this Article is to explore how to reform status as a regulatory device, but these other meanings inevitably complicate that project. The fight over same-sex marriage, for instance, was both a fight over access to a package of legal rights and a fight for social respectability.<sup>27</sup>

In pursuing its goal, this Article makes four contributions. First, it defines status by unraveling its different features and exploring their interrelationship. This exercise lays bare the stakes of a status determination, which involves tradeoffs between promoting autonomy, addressing vulnerability, and regulating conduct efficiently. Second, it documents the ways in which status's bundled, mandatory features can render it out of step with social change, leading to the emergence of regulatory voids. Third, it shows that contract doctrine itself has embedded within it significant aspects of status, making it impossible to avoid the types of policy questions that underlie status-based regulation.

These contributions ground the fourth, which is to identify the mechanisms by which statuses can be adjusted to accomplish the state's regulatory goals. Comparing worker classification and relationship recognition proves instructive, in that they reveal institutional design questions that apply whenever established statuses begin to fray.<sup>28</sup> First,

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24. There are a few recent and notable exceptions. *See, e.g.*, Hanoch Dagan & Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 51 (Paul B. Miller & Andrew S. Gold eds., 2017); Paul B. Miller, *The Idea of Status in Fiduciary Law*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 25 (Paul B. Miller & Andrew S. Gold eds., 2017).

25. *See MAINE*, *supra* note 8, at 123–36, 167.

26. *See id.*

27. *See Obergefell v. Hodges*, 576 U.S. 644, 669 (2015) (noting that marriage provides “symbolic recognition and material benefits”); *see also id.* at 656, 668 (noting that marriage “promise[s] nobility and dignity” and that the deprivation of marriage would stigmatize same-sex families as “somehow lesser”).

28. For example, the presence of undocumented minors who have assimilated into this country tests the boundaries of citizenship. *See, e.g.*, Press Release, U.S. Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities

aggregation or disaggregation: how to tailor the package of legal consequences associated with the status by adding to or disaggregating those consequences, thereby changing the stakes of the classification.<sup>29</sup> Second, binarism or pluralism: whether to keep one meaningful status designation and its opposite (employee v. independent contractor, married v. single), or introduce one or more alternate statuses. Third, boundary policing: when and how to determine whether someone falls within the status, and whether to make it easy or difficult to transition in and out. Lurking in the background and informing the answers to all these questions is the fact that the statuses of marriage and employment, as well as many other favored statuses, frequently overlap, swaddling some individuals in multiple layers of legal protections while leaving others out in the cold. Proposals to reform a single status, while valuable, only partially address the primary values of autonomy and vulnerability. Deep and lasting change requires a comprehensive status consciousness.

This Article proceeds in four parts. Part I provides a typology of the various meanings of status and identifies the core features of legal status. It also lays out the stakes of regulating through status. Part II uses marriage and employment to show how the very features of status can sometimes undermine its effectiveness. Part III takes a step back and reflects on a broader question: is it possible *not* to regulate through status? This Part shows that the temptations of regulating through status are simply too great for partisans to ignore, and further, that the law inevitably takes relationships into account when imposing consequences, importing critical features of status and making it impossible to escape some version of status-based regulation. Part IV charts a path forward by identifying institutional design questions to guide reform efforts.

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(June 15, 2012), <https://www.nilc.org/wp-content/uploads/2015/11/PD-children-DHS-PR-2012-06-15.pdf> [<https://perma.cc/F9PY-Z7T8>] (noting the unjustness of removing from the country young people who were brought to the country as children, do not pose a security risk, and are productive members of society). Adults who care for children without a formal legal relationship test the boundaries of parental status. See Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941, 951–78 (2019) (documenting the various situations in which functional parenting claims by non-legal parents arise); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 48, 53–59 (2007) (noting, despite the presumption that a child will have two and only two parents, that many children may have “significant family ties to more than two adults concurrently”).

29. See Kaiponanea T. Matsumura, *The Integrity of Marriage*, 61 WM. & MARY L. REV. 453, 494 (2019) (analyzing costs and benefits of preserving marriage as a single status); Guy Davidov, *The Reports of My Death Are Greatly Exaggerated: ‘Employee’ as a Viable (Though Over-used) Legal Concept*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 133, 134 (Guy Davidov & Brian Langille eds., 2006) (arguing that an employment status is necessary as an organizing principle).

## I. DEFINING STATUS

The concept of status has been used loosely to refer to a range of interrelated legal and non-legal phenomena, so discussions of status tend to be shifting and imprecise. Although conceptually distinct, these various features often combine to produce thick institutions, constructs of rules, norms, and practices that “facilitate or constrain behavior, coordinate action, delegate or allocate decisionmaking authority, create or maintain identity, intermediate between groups and between individuals and the state, [and] constitute social reality.”<sup>30</sup> This Part teases out and examines the features of status as well as the stakes of status-based regulation.

### A. Features

Maine’s status-to-contract construct has proven to be a generative one in the study of the way statuses function in the law, so it provides a good starting point. Maine noticed a general trend in “primitive” societies to organize legal relations around the patriarchal family, rather than the individual.<sup>31</sup> This family structure not only governed the legal relationships between members, subordinating women to their male family members, but also the relationships of guardians and wards, household slaves, and more.<sup>32</sup> Familial roles not only triggered rights and duties within the family but also shaped private law obligations.<sup>33</sup>

This was the “status” from which Maine’s “modern” law escaped. By “contract,” Maine was not referring to classical contract doctrine in particular but legal obligations oriented around individuals and based on their free agreement.<sup>34</sup> The evolution from a fixed law of succession to

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30. Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 88 (2016); see also *id.* at 91 (noting that “thick” institutions are often “textually specified,” with highly stable and observable rules, customs, and norms).

31. See MAINE, *supra* note 8, at 123.

32. *Id.* at 154, 159–67. As Hendrik Hartog has noted, to be married was to become a wife or husband: “The past was extinguished, annihilated, ‘sunk or drowned’ into the deed. . . . Once married, you had only the rights and remedies derived from an identity as a wife or husband.” HARTOG, *supra* note 6, at 99.

33. See MAINE, *supra* note 8, at 134. “[P]ublic authorities set the terms of the marriage”: “its obligations were fixed[.]” NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11 (2000). Likewise, being a servant led to a predetermined set of rights and responsibilities characterized by the servant’s subservience and dependence. See Carlson, *supra* note 2, at 302.

34. See MAINE, *supra* note 8, at 168. See also Halley, *supra* note 5, at 15 (noting that contracts are not entirely private and that Maine’s concept of contract was not the opposite of status but its supplement); Katharina Isabel Schmidt, *Henry Maine’s “Modern Law”: From Status to Contract and Back Again?*, 65 AM. J. COMPAR. L. 145, 155 (2017) (“What Maine really intended with his juxtaposition of status and contract had been to draw attention to the contrast between ‘primitive’ collectivism and progressive individualism.”).

testamentary disposition provides an example of this elevation of individual will.<sup>35</sup>

Maine's "status" had at least five separate features. First, legal rules flowed from a *particular identity*, like paterfamilias or wife. Second, they were *bundled*: one's identity triggered various types of legal obligations. Third, the legal rules were *mandatory*. Fourth, the relationships governed by status were *hierarchical*: the fixed legal relationships conferred authority on some to subordinate others.<sup>36</sup> And fifth, status had a clearly defined *social meaning*.<sup>37</sup>

When discussing status, courts and scholars have carried forward and modified these various features since Maine elaborated them. Critically, there is little dialogue,<sup>38</sup> much less consensus, on whether and to what extent these aspects define or merely describe status. This Part begins that discussion.

First, status refers to legal rules that flow from a particular identity. Maine associated status with innate identities, such as infancy or lunacy.<sup>39</sup> Such identities either flowed from accidents of birth, or became salient because of a desire to protect categories of persons who (in the view of those at the time) lacked "the faculty of forming a judgment in their own interest."<sup>40</sup> Even today, status flowing from innate characteristics that fall beyond one's control strikes some scholars as especially status-like: Katharine Silbaugh, for example, has called it "the most offensive sort of status."<sup>41</sup> The objection to this type of involuntary status owes to the fact that people are regulated without their consent and based on factors over

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35. See MAINE, *supra* note 8, at 178.

36. See *id.* at 154 (noting that women were subordinated within the family); see also Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 798 (1983) (characterizing status as the relationship between a "power bearer" and "dependent").

37. Others have observed different, overlapping features. See Schmidt, *supra* note 34, at 154 ("Status may refer to the totality of a person's rights and obligations. It may also refer to someone's *personal* rights and obligations (e.g., being a minor or an 'imbecile') as opposed to their *proprietary* relations (e.g., being a tenant or an agent). Finally, it may refer to rights and obligations imposed upon a person by law and without his or her consent instead of voluntarily and by way of agreement.") (citing FREDERICK POLLOCK, INTRODUCTION AND NOTES TO SIR HENRY MAINE'S "ANCIENT LAW" 34–36 (1914)). Schmidt's list overlaps significantly with my own, although it omits the hierarchical nature of the status relationships that I believe is inherent in Maine's account.

38. Dagan & Scott, *supra* note 24, come closest to providing an accounting of the features of status, although they focus on the "identitarian" and involuntary aspects without commenting on the relationship between those features and the positive law of status. See *id.* at 56.

39. See *id.* at 53–54 (arguing that, to Maine, status was both comprehensive and inalienable, and identifying status with that extreme position); Otto Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MODERN L. REV. 635, 636 (1967) (arguing that Maine "gave a 'restricted' meaning to the term 'status,'" referring to rights and obligations "which society confers or imposes upon individuals irrespective of their own volition").

40. Kahn-Freund, *supra* note 39, at 636.

41. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 115 (1998).

which they exercise no control.<sup>42</sup> Slavery and illegitimacy are prime examples.<sup>43</sup> As a result, laws classifying based on traits assumed at birth, like race or sex, are largely viewed with suspicion and have fallen out of use,<sup>44</sup> although a few, like those centered around disability, remain.<sup>45</sup>

It is not clear, however, that Maine would have insisted on innateness as a defining feature of status. His paradigmatic example of status, the family, included at least one role—that of wife—that was voluntarily assumed.<sup>46</sup> Indeed, courts and scholars have long considered marriage a status notwithstanding the fact that people choose to enter it.<sup>47</sup> Citizenship, characterized by some as a so-called “true” (meaning ascriptive) status,<sup>48</sup> can be voluntarily altered through renunciation, immigration, and so forth.<sup>49</sup> Moreover, as Jack Balkin has noted, even so-called immutable identities like race have chosen aspects—“dress, speech, bodily movements, consumption patterns, etc.”—that often prompt discrimination.<sup>50</sup> Ultimately, the fact that a particular identity grounds the imposition of legal consequences matters more than the degree to which the identity is imposed. As I will discuss momentarily, the defining feature of these identities is that

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42. See Halley, *supra* note 5, at 24–25 (contrasting consent with ascription, and arguing that the ascriptive nature of legal rules makes them more status-like). The constitutional prohibition on status crimes stems from the similar instinct that criminalizing traits (as opposed to conduct) over which a person exerts little to no control is improper. See *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

43. See Halley, *supra* note 9, at 24 (noting that the legitimacy of a child flowed from the circumstances of her birth and affected many legal rights); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1719 (1993) (showing how the law transmitted slave status through the rule that “children of Blackwomen assumed the status of their mother”).

44. See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2325 n.33 (1997).

45. Some disabilities are acquired, but others are innate. A person born with mental incapacity may not be able to marry, enter into contracts, and make his own medical decisions.

46. See MAINE, *supra* note 8, at 154 (discussing wives as part of the status system of the family); Carleton Kemp Allen, *Status and Capacity*, 46 L.Q. REV. 277, 284 (1930) (noting that “there are other cases in this catalogue [of statuses at common law] in which we cannot say that status arises involuntarily,” like coverture).

47. See Halley, *supra* note 9, at 7–48 (tracing the reconceptualization of marriage from contract to status over the nineteenth century). The idea that marriage is always the product of choice is itself overly simplistic. See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 969 (2000) (noting the use of common law marriage as a tool to convert illicit sexual relationships into licit marital relationships, sometimes against the parties’ will); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 21–23 (2012) (suggesting that the availability of marriage as a bar to prosecution for the crime of seduction effectively induced people to marry).

48. See, e.g., Kahn-Freund, *supra* note 39, at 636, 639; see also Dagan & Scott, *supra* note 24, at 4 (calling citizenship “the least disputed example” of status).

49. See, e.g., 8 U.S.C. § 1481(a)(5) (governing the renunciation of U.S. citizenship); 8 U.S.C. § 1427 (setting forth naturalization requirements for legal permanent residents).

50. Balkin, *supra* note 44, at 2323, 2325 (noting that characteristics giving rise to statuses “can be mutable or immutable, physical or ideological, matters of behavior or matters of appearance”); see also Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2110, 2112–13 (2018) (noting that although the constitution constrains discrimination based on “key personal characteristics or statuses,” the Court has not enforced a rigid distinction between status and conduct).

they are relational—they describe relationships between private parties or between individuals and the state.

A second feature of status is that it involves the bundling of multiple legal rules that turn on the relevant identity. In *Maynard v. Hill*,<sup>51</sup> the Supreme Court distinguished marriage from other contracts, which involve “*certain, definite, fixed private rights of property*,” as opposed to the marriage relation, which was so pervasive as to form an “institution.”<sup>52</sup> Bundling is implicit in scholarly characterizations of status as totalizing or universal,<sup>53</sup> but has rarely been noted as a feature of status qua status. A simple thought experiment illustrates the degree to which bundled legal rights have become synonymous with status. Every legal rule depends on some triggering aspect. The act of using electronic communications to advance a scheme to defraud people, perhaps by falsifying admissions materials and exchanging payments in order to gain admission to elite universities, might support a conviction for wire fraud.<sup>54</sup> If prosecution and punishment were the only consequences of such an act, most people would not think of “wire fraudster” as a cognizable status, in the same way that countless other one-off acts result in legal consequences without imputing status. But wire fraud is a felony, and laws imposing collateral consequences on convicted felons, from the loss of voting rights to the loss of economic benefits to the deprivation of professional licenses, coalesce in such a way that the felon designation becomes a status.<sup>55</sup> The more rights and duties that arise by virtue of the identity, the more status-like the identity becomes.<sup>56</sup>

A third feature of status is that its rules are mandatory and standardized. In *Maynard*, the Court noted that although marriage was often denominated a “civil contract” by courts and scholars, marriage, in contrast to contract, creates “a relation between the parties . . . which they cannot change.”<sup>57</sup>

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51. 125 U.S. 190 (1888).

52. *Id.* at 210–11.

53. *See, e.g.*, Harris, *supra* note 43, at 1719–20 (describing how the various laws regulating slavery resulted in the total commodification of slaves).

54. *See* 18 U.S.C. § 1343; *see also Investigations of College Admissions and Testing Bribery Scheme*, U.S. DEP’T OF JUST. (OCT. 7, 2020), <https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme> [<https://perma.cc/JH89-ANL6>] (identifying the co-conspirators and criminal charges in the highly publicized college admissions prosecution).

55. *See, e.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 & *passim* (1999); Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 7–9 (2018) (showing how economic sanctions following criminal convictions create debtors—arguably another status).

56. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015) (noting that marriage is the “basis for an expanding list of governmental rights, benefits, and responsibilities” including over 1000 federal laws).

57. *Maynard*, 125 U.S. at 211.

When people marry, “they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations.”<sup>58</sup> Numerous scholars have emphasized this aspect of status: that its rules are fixed by law and cannot be changed by the parties to the relationship.<sup>59</sup> When lawmakers transform some marital rules, such as those regarding property and alimony, into defaults that the spouses can alter through private agreement, they merely change some of the status’s core features while leaving others intact.<sup>60</sup>

A less remarked corollary to the mandatory aspect of status is that the legal identities become standardized: the more that rights and duties are set forth by the state, the more consistent the meanings of those identities.<sup>61</sup> It is only possible to speak of wives or parents and for those concepts to be legally intelligible because all members of those categories are subject to the same legal duties.<sup>62</sup>

A fourth feature of status is its inevitable normativity. Statuses arise to govern societally important relationships. As a result, they say something about the nature of those relationships as well as the position of those relationships relative to others.

Statuses typically involve relationships involving power differentials or dependency.<sup>63</sup> These relationships can be explicitly defined by hierarchy,

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58. *Id.* (citing *Adams v. Palmer*, 51 Me. 481, 483 (1863)).

59. *See, e.g.*, Bix, *supra* note 17, at 259 (noting that “once one becomes a spouse or parent, certain rights and obligations follow”); Dubler, *supra* note 47, at 972; Halley, *supra* note 9, at 4 (associating status with state investment in ascriptive rules); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 835 (2004) (noting that status is associated with legal relations that the parties cannot change); Miller, *supra* note 24, at 27 (noting that statuses have normative meanings and social and moral implications beyond the determination of the parties). Statuses can clearly be comprised of a combination of mandatory and default rules; whether they can be comprised entirely of default rules presents a harder question. One could imagine a thicket of default rules so pervasive, or so deeply majoritarian, that the effect would be to set aspects of the status beyond the parties’ control.

60. Statuses can clearly be comprised of a combination of mandatory and default rules (business associations present another example of this phenomenon, see generally Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L.Q. 369, 374–80 (1995) (noting the relationship between off-the-rack default business forms and mandatory rules)). Whether they can be comprised entirely of default rules presents a harder question. One could imagine a thicket of default rules so pervasive, or so deeply majoritarian, that the effect would be to set aspects of the status beyond the parties’ control.

61. *See* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 39 (1917) (arguing that the basic difference between status and contract is really standardized relations versus individualized relations).

62. *Cf.* Dubler, *supra* note 47, at 974 (showing that the doctrine of common law marriage, and the social norms embodied in it, helped to establish the meaning of marriage more broadly).

63. *See, e.g.*, Kahn-Freund, *supra* note 39, at 640 (noting various circumstances in which “the law operates upon an existing contractual relation, but it moulds this relation through mandatory norms which cannot be contracted out to the detriment of the weaker party (employee, passenger, customer in general)”).

like employment, which is premised on the employer's authority to control certain actions of the employee.<sup>64</sup> Marriage, by contrast, now imposes duties in gender-neutral terms and no longer openly subjugates the wife to her husband.<sup>65</sup> Of course, one might question whether such facial neutrality is enough to eliminate manifestations of hierarchy within the relationship due to the fact that such rules exist upon a foundation of different property entitlements,<sup>66</sup> and whether, because of those differing entitlements, it is possible to completely eliminate intra-status hierarchies. But even if the law no longer empowers the husband to control his wife, spouses continue to owe each other open-ended duties of support, both financial and emotional, and depend on each other for their fulfilment.<sup>67</sup> Vulnerability is therefore a feature of the relationship, as are the law's prescriptions to meet that vulnerability.<sup>68</sup>

Additionally, the imposition of rights/privileges and duties/disabilities inevitably creates inter-status hierarchies by favoring or disfavoring some identities over others. To be clear, status might refer to a purely social construct: the degree of prestige or honor that groups enjoy and that individuals enjoy because they are members of that group.<sup>69</sup> "Status symbols," used in this popular sense, describes consumption goods or services that indicate high socioeconomic status.<sup>70</sup> Social status is conceptually separable from legal status. Balkin argues, for example, that "legal status . . . is primarily concerned with legal meanings and legal

64. See *infra* notes 156–161, and accompanying text. See also Carlson, *supra* note 2, at 304.

65. See Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247, 1251 (2019) (noting that marriage laws are formally equal, promoting interdependency instead of dependency).

66. On the latter point, see Emily J. Stolzenberg, *Properties of Intimacy*, 80 MD. L. REV. (forthcoming 2021) (on file with author).

67. See Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1301 (2015) (noting that marriage imposes "imperfect duties" on the spouses: duties involving "(1) substantial latitude in the required conduct and (2) an intrinsic connection to subjective motivations").

68. Kahn-Freund notes that many of these relationships rest on a voluntary, if not contractual, foundation, see Kahn-Freund, *supra* note 39, at 640. Statuses stemming from the relationship between an individual and the state are arguably different. Yet citizenship, like these other relationships, involves vulnerability and also reciprocal obligations. See Dominique Leydet, *Citizenship*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2017), <https://plato.stanford.edu/entries/citizenship/> [<https://perma.cc/WB4W-FSCN>] ("A citizen is a member of a political community who enjoys the rights and assumes the duties of membership."). Moreover, philosophers have long justified the state's exercise of authority "first because we are vulnerable to the depredations of others, and second because we can all benefit from cooperation with others." Ann Cudd & Seena Eftekhari, *Contractarianism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2018), <https://plato.stanford.edu/entries/contractarianism/> [<https://perma.cc/4FDH-XN8R>].

69. Balkin, *supra* note 44, at 2321 (citing, among others, 1 MAX WEBER, *ECONOMY AND SOCIETY* 391 (Guenther Roth & Claus Wittich eds., U. of Cal. Press 1978) (4th ed. 1956)).

70. See, e.g., Jennifer Steinhauer, *When the Joneses Wear Jeans*, N.Y. TIMES (May 29, 2005), <https://www.nytimes.com/2005/05/29/us/class/when-the-joneses-wear-jeans.html> [<https://perma.cc/ES4S-W24J>].

consequences,” and that “legal status has increasingly been divorced from the task of directly mapping or constituting social status categories,” citing the replacement of “concepts like ‘pauper’ or ‘servant’” with “‘AFDC recipient’ or ‘part-time employee.’”<sup>71</sup>

However, legal status effectively reinforces social hierarchies to such an extent that the concepts can barely be disaggregated.<sup>72</sup> Lawmakers will sometimes state, point blank, that some legal statuses are superior to others. The Supreme Court has told us that marriage, for example, “promise[s] nobility and dignity to all persons,” “offers unique fulfillment,” “is essential to our most profound hopes and aspirations,” and is “a two-person union unlike any other in its importance to the committed individuals.”<sup>73</sup> Unsurprisingly, some commentators have criticized the opinion for unnecessarily denigrating single people and people in nonmarital relationships.<sup>74</sup> But others would see nothing wrong with it, because, to them, state privileging of status goes hand in hand with status itself.<sup>75</sup>

Rhetoric is one thing; rights and benefits are another. As the Court noted, marriage offers “material benefits to protect and nourish the union.”<sup>76</sup> These benefits reward people who marry and leave nonmarital families comparatively less protected and less stable.<sup>77</sup> In this way, marriage law creates hierarchy by elevating one group rather than by burdening another. But laws sometimes create hierarchy by imposing burdens. Until relatively recently, the legal system also elevated marriage by criminalizing extramarital sex and cohabitation, and punishing out-of-wedlock

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71. Balkin, *supra* note 44, at 2325.

72. Although Balkin claims that the law is doing much less to prop up social status than it once did, he acknowledges that the law still has a powerful role, using citizenship as an example. *See id.* at 2343. For an examination of the relationship between the law and the social status of workers, see Noah D. Zatz & Eileen Boris, *Seeing Work, Envisioning Citizenship*, 18 EMP. RIGHTS & EMP. POL'Y J. 95, 102–03 & *passim* (2014). For a critique of the law's centering of marriage in discourse around the family, see Anibal Rosario-Lebrón, *For Better and Better: The Case for Abolishing Civil Marriage*, 5 WASH. U. JUR. REV. 189, 222–29 (2013).

73. *Obergefell v. Hodges*, 576 U.S. 644, 656–57, 666 (2015).

74. *See, e.g.*, Noah Feldman, *Marriage Is a Right, Not an Obligation*, BLOOMBERG (June 28, 2015, 10:00 AM), <https://www.bloomberg.com/opinion/articles/2015-06-28/marriage-is-a-right-not-an-obligation> [<https://perma.cc/6UYK-TY4L>] (arguing that Justice Kennedy's discussion of loneliness “went too far” and “has the effect of devaluing the fullness of lives conducted outside the bounds of marriage”); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIRC. 126, 131–32 (2015) (observing that *Obergefell* ignored the feminist legacy of striking down laws that penalized unmarried women).

75. *See* MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 94–96 (1993) (arguing that marriage has independent moral significance because of its role in promoting relational identity); *see also* Bix, *supra* note 17, at 259–60, 260 n.32 (noting that some defenses of marriage depend on the view that marriage in a particular form is worth preserving in that form because of history and tradition).

76. *Obergefell*, 576 U.S. at 669.

77. *See id.* at 668 (noting that the lack of benefits imposes “material costs”).

childbirth.<sup>78</sup> Public benefits recipients, to use Balkin’s earlier example, may have to submit to invasive questioning about their spending and finances, consent to unannounced home visits and drug testing, and identify the parent or parents of nonmarital children for the purpose of enforcing child support obligations.<sup>79</sup> These state interventions, too demeaning to impose on the average citizen,<sup>80</sup> result in measurable harms to recipients, including stress, fear, and feelings of degradation, and send the unmistakable message that recipients are less worthy than others of respect.<sup>81</sup>

True, any law that confers a benefit or imposes a disability will create hierarchy under this definition. But status is particularly normative in that these laws are both bundled and identity-based. Those aspects of status render the privileging or burdening of certain identities particularly salient. Moreover these benefits and burdens are often meant to shape conduct by encouraging or deterring behavior.<sup>82</sup> Whether or not they function perfectly, statuses exist to promote legislative or other purposes.

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The foregoing features define status. Attributes of each feature can make the status feel more or less status-like. A status comprised of comparatively few legal incidents, only some of which are mandatory, like tenancy, might

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78. Through much of the Nation’s history, marriage was the exclusive site for sex and procreation, policed by criminal laws prohibiting extramarital sex and property laws governing inheritance and making distinctions between legitimate and illegitimate children. *See* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 27–77, 238–39 (2011); Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1353 (2010).

79. *See* Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1397–1400 (2012).

80. The fact that courts have analyzed these types of investigatory practices under the Fourth Amendment shows that they are not completely routine. *See, e.g., Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 923–26 (9th Cir. 2006).

81. Gilman, *supra* note 79, at 1404; *see also* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646 (2009) (“[T]oday, some of the key purposes of welfare policies are to regulate the home and to degrade welfare recipients to such a degree that they are deterred from using welfare.”).

82. *Cf. Califano v. Jobst*, 434 U.S. 47, 54 (1977) (recognizing the possibility that Social Security rules that would terminate a person’s existing benefit upon marriage would impact the choice to marry, but contrasting the incidental impact of such rules with attempts to interfere with an individual’s decision to marry). Statuses do not function perfectly in this regard because individuals and policymakers alike may have competing incentives. *See* Matsumura, *supra* note 29, at 472–74 (noting, within the context of marriage, that there is substantive disagreement as to how marriage should be defined and what values it should promote). For instance, parental status confers privileges, like the ability to spend time with and make decisions concerning one’s child. But it also imposes obligations, including a duty to provide financial support. An individual’s desire to become a parent may therefore depend on whether he or she values the privileges more than the obligations. *Cf. Tianna N. Gibbs, Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 556 (2019) (noting that for unmarried fathers, in particular, acknowledging paternity involves balancing access and obligation).

feel less status-like than marriage which, as currently constituted, feels less status-like than chattel slavery.

When people invoke status, they can be referring to any of the meanings discussed above, including the purely social aspect, as well as any combination of the legal features, but they rarely intend to analyze status systematically. As a result, discussions about whether to alter particular statuses tend to talk past each other. Some accounts focus on the social aspects to the exclusion of the legal, or the legal aspects to the exclusion of the social, or some legal aspects to the exclusion of others. For example, one persuasive critique of the *Obergefell* decision is that the Court unnecessarily chose between competing social understandings of marriage—either companionate/egalitarian or gender-differentiated/repronormative.<sup>83</sup> The implication of this argument is that the Court could make changes to the legal status of marriage without disturbing or picking and choosing between competing social meanings. Another critique, coming from a different direction, is that marriage should be avoided, or at least viewed with suspicion, because of its disciplinary aspects, which now inhere in marriage's social meaning.<sup>84</sup> This argument deemphasizes the construction of marriage as a legal status except with regard to its normative implications. Both arguments are independently valuable; they just focus on selective, and different, aspects of status.

Statuses are also linked on a deeper level. Consider the following example. Among firms that provide health benefits to employees, 94% offer coverage to spouses.<sup>85</sup> Approximately 40% of employers now provide health benefits to unmarried couples, up from approximately 30% in 2013.<sup>86</sup> Management level employees are more than twice as likely to receive these benefits as service level employees.<sup>87</sup>

It is arguably a good thing that employers are crafting their own solutions to the gaps left open by marriage. But notice that unmarried employees are less than half as likely as married employees to receive health benefits for their partners. And notice further that these benefits are going to members of an already privileged status, employees. Unmarried non-employees are therefore doubly excluded.

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83. See, e.g., Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 25–26 (2015).

84. See Murray, *supra* note 47, at 51–52 (arguing that even as the law ceased to police the boundaries of marriage by criminalizing extramarital intimacy, norms of behavior control individual behavior).

85. 2019 *Employer Health Benefits Survey*, KAISER FAM. FOUND. (Sept. 29, 2019), <https://www.kff.org/report-section/ehbs-2019-section-2-health-benefits-offer-rates/> [https://perma.cc/Z8AT-HYU T].

86. Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 *ARIZ. ST. L.J.* 1325, 1339 (2019).

87. *Id.* at 1339 n.69.

This exclusion is mutually reinforcing and places many in a double bind. Marriage provides social and other advantages that enable men to succeed at work, giving them greater access to management level positions.<sup>88</sup> Yet economic insecurity is one of the leading reasons that people defer marriage,<sup>89</sup> so exclusion from employee benefits only pushes marriage further out of reach. To marriage and employment, we could potentially add other statuses: citizenship; home ownership; whiteness; the list goes on.<sup>90</sup>

### *B. Costs and Benefits*

The decision whether to regulate through status involves tradeoffs between several basic values.

One value is autonomy. Maine's quarrel with status, as discussed above, is that one's rights were fixed by virtue of one's place in the patriarchal family. The progression to "contract" was really about the triumph of individually chosen—as opposed to family-derived—obligations.<sup>91</sup> Blackstone's emphasis on the contractual aspects of marriage and servitude anticipates this critique.<sup>92</sup> In contrast to slavery, which he declared "repugnant to reason, and the principles of natural law" for the reason that "an absolute and unlimited power is given to the master over the life and

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88. See Trina Jones, *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1253, 1269–70, 1278 (2014) (reviewing studies showing that marriage increases men's wages by as much as 26%, and that positive social views about marriage (or conversely, negative views about the unmarried) are likely to be the cause).

89. See *infra* notes 231–233, and accompanying text. I thank Emily Stolzenberg for sharpening this point.

90. Although few laws explicitly classify based on race, several scholars have shown that many legal rules still operate to provide material benefits to white people, sometimes based on whiteness itself. See, e.g., Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 334–35 (2009) (showing that tax subsidies for housing disproportionately benefit white families); Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111, 111–13 (2004) (noting that the effect of the Social Security two-earner penalty is to reward white couples, or, conversely, penalize Black couples); Harris, *supra* note 43. Immigration status also draws harsh lines between those with access to resources and those without. The coronavirus stimulus bill passed in the spring of 2020, for instance, would not distribute stimulus checks to United States citizens married to undocumented immigrants. See Caitlin Dickerson, *Married to an Undocumented Immigrant? You May Not Get a Stimulus Check*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/us/coronavirus-undocumented-immigrants-stimulus.html> [<https://perma.cc/Z2QS-2SUT>] (noting that the law prohibits stimulus payments to people who file taxes jointly with someone who uses an Individual Taxpayer Identification Number, commonly used by undocumented immigrants). People in the country provisionally also face increased prospects of exploitation and abuse, even if they have formal employment. Temporary workers, for example, are exposed to harsh working conditions and wage theft, among other injustices. See Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 500 (2020). In this context, employment is not a shield for injustice.

91. See *supra* note 34, and accompanying text.

92. See BLACKSTONE, *supra* note 1, at \*413 (describing the relationship between master and domestic servant as contractual); see *id.* at \*421 (describing marriage as a civil contract).

fortune of the slave,”<sup>93</sup> Blackstone characterized marriage and servitude as freely chosen.<sup>94</sup> To be sure, Blackstone’s account ignores the fact that these choices were made amidst conditions that practically constrained many people’s options. He takes for granted that some people will be “gentlemen” while others will be “poor,” and glosses over the fact that individuals without “visible livelihood” could be compelled into service.<sup>95</sup> Yet central to his conception of these relationships was the idea that they were “willing.”<sup>96</sup>

The inability to control whether one is a member of a particular status explains why ascribed statuses—statuses imposed upon people by virtue of their birth—are so troubling.<sup>97</sup> But statuses also limit autonomy by regulating entrance and exit as well as tailoring the package of rights and duties that are designed to promote desirable behavior.

Consider employment. Despite resting on the foundation of an at-will contractual relationship, many aspects of the employment relationship—including whether a worker is an employee in the first place—continue to be mandated by law. Whether a worker is an employee or independent contractor cannot be settled by the parties in advance, but can only be resolved by a court after the fact.<sup>98</sup> Duties flow from employment status, including the employer’s right to control numerous aspects of the employee’s performance and the employer’s corresponding obligation to third parties for acts of the employee,<sup>99</sup> as well as numerous statutory rights and obligations.<sup>100</sup>

Unlike employment, spouses have greater control over whether they are married. The gradual liberalization of divorce laws, culminating in the adoption of no-fault divorce, has given spouses the power to enter and exit marriages at their discretion, making marriage more like other “contracts”

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93. *Id.* at \*411.

94. Marriage was contractual in the sense that it was theoretically consensual. To marry, parties had to establish that they were “willing to contract,” “able to contract,” and “actually did contract, in the proper forms and solemnities required by law.” *Id.* at \*421. Blackstone noted that the master and servant status was also predicated on notions of consent. *See id.* at \*414 (noting that minors could bind themselves as apprentices and describing the basis of the relationship as an exchange of money for training).

95. *See id.* at \*413–14.

96. *Id.* at \*422 (saying of marriage, “FIRST, they must be *willing* to contract”).

97. *See supra* notes 41–43, and accompanying text.

98. *See Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) (observing the law’s reliance on a judicially administered *ex post* analysis).

99. For example, employers cannot contract around liability to third parties for an employee’s acts committed in furtherance of the employment relationship. *See* 1 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 7:6 (2d ed. 2020) (discussing how employers cannot use written agreements that characterize their employees as independent contractors to escape liability).

100. *See, e.g., infra* note 200, and accompanying text.

that can be breached by either party as they see fit.<sup>101</sup> Yet the State has never ceased to enact laws centering on the marital unit. Inheritance, tort, evidence, and other laws turn on marital status.<sup>102</sup> Congress has made marital status relevant to over one thousand other laws.<sup>103</sup> Most of these are mandatory in the sense that they cannot be altered by the parties' agreement.

Yet statutes can promote autonomy if the decision to enter the particular status is one that the parties wish to make. Courts have embraced an increasingly autonomy-based rationale for striking down laws restricting the right to marry, focusing on the importance of choice and self-definition at the expense of state authority.<sup>104</sup> The same-sex couples in *Obergefell*, for instance, sought to marry "because of their respect—and need—for [marriage's] privileges and responsibilities."<sup>105</sup> Workers, too, can attain a sense of purpose or belonging from being an employee, despite the restrictions that accompany the status.<sup>106</sup>

A second value is efficiency. Is status the best way to regulate the relationship and promote social goods? One way to look at this question is through the lens of wealth maximization.<sup>107</sup> Within the employment

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101. See William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1955 (2012) (arguing that no-fault divorce changed marriage significantly by making it "a choice-based relationship"). Janet Halley has noted that state control over entrance and exit heightens the status-ness of marriage. See Halley, *supra* note 5, at 23. See also *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888) (noting, in its articulation of marriage as status, that the state controlled exit); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1445. To be clear, although states have relinquished control over divorce to a great extent, parties are still not free to legally dissolve their marriages without state supervision.

102. Although courts increasingly began to recognize the ability of spouses to enter legally enforceable agreements regarding the property consequences of their relationship, see Singer, *supra* note 101, at 1458–65, many spousal duties are nondelegable. It has long been clear, for instance, that courts will not enforce contracts for domestic services, see Hasday, *supra* note 59, at 840, or noneconomic duties, see Matsumura, *supra* note 18, at 177–90; Silbaugh, *supra* note 41, at 71–74. It is also important to note that some jurisdictions still impose limitations upon agreements, for instance, by insisting upon additional procedural protections like independent counsel or greater opportunities to review their substantive fairness. See Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 321–24 & *passim* (2012).

103. See *United States v. Windsor*, 570 U.S. 744, 765 (2013).

104. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (limiting the state's ability to interfere with one's choice of spouse); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (locating the choice to marry within the zone of constitutional privacy interests); *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015) (noting that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy").

105. *Obergefell*, 576 U.S. at 658.

106. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886–92 (2000) (exploring the relationship between work, citizenship, community, and identity); see also Dubal, *supra* note 10, at 105–09 (noting, through ethnographic research, that some taxi drivers currently classified as independent contractors longed for employment because of its association with worker protections and a "glorious labor history"). *But see id.* at 112–20 (noting that immigrant taxi drivers preferred the independence, control, and entrepreneurship that comes from being an independent contractor rather than an employee).

107. See, e.g., Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 605–09 (noting that mandatory status rules can be compared to individualized contract terms to determine which produces more optimal economic outcomes).

context, this question finds its expression in Ronald Coase's classic account of the nature of the firm, which analyzes the tradeoffs inherent in the decision to hire help and focus on internal production (thereby expanding the firm) or contract out for a particular task or product.<sup>108</sup> The marital family has also been the subject of this type of economic analysis.<sup>109</sup> However, I take a broader view of efficiency here, by which I mean, in addition to the maximization of wealth, the tendency of the bundle of rules to channel desired behavior, promote morality, satisfy individuals' subjective desires, and more. This usage brings to mind Carl Schneider's classic discussion of the functions of family law, in particular, the channeling function, through which "the law creates or (more often) supports social institutions which are thought to serve desirable ends."<sup>110</sup> Not everyone agrees on these goods, and, indeed, marriage and employment are fertile sites of disagreement.<sup>111</sup> That said, they unquestionably impact whether to regulate through status.

A third value is protecting vulnerable parties from exploitation by powerful parties. The mandatory nature of status rules is a mighty counterweight to power imbalances. In the early nineteenth century, the status-based master/servant relationship was replaced by a free labor model in which workers negotiated rights to their labor.<sup>112</sup> In this new world, "it was taken for granted that adult individuals, whether or not they happened to be employed in someone's household, should be their own rather than their master's responsibility."<sup>113</sup> Workers lost the protections of status.<sup>114</sup>

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108. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390–98 (1937).

109. See, e.g., GARY BECKER, *A TREATISE ON THE FAMILY* (1981) (analyzing the allocation of spousal resources between various domestic and market tasks); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 *V.A. L. REV.* 509, 575–93 (1998) (analyzing egalitarian marriage through an economic lens and concluding that it produces various inefficiencies).

110. Carl E. Schneider, *The Channeling Function in Family Law*, 20 *HOFSTRA L. REV.* 495, 498 (1992); see also *id.* at 499–503 (explaining the mechanisms by which the law performs this channeling, including by providing favorable legal treatment); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 *CARDOZO L. REV.* 2133, 2152–55 (2007) (discussing the channeling function and how statuses serve their purposes). Because statuses impose standardized obligations, they also generate interpretive networks such as judicial precedents that can help to clarify the meaning of those obligations, reducing ambiguity, inconsistency, and incompleteness. See Ribstein, *supra* note 60, at 376 (noting these benefits of standard forms for business organizations). These interpretive networks help people to organize their lives in the ways they prefer, what Schneider would call the "facilitative" function," and help courts resolve disputes, what Schneider would call the "arbitral" function." Schneider, *supra*, at 497.

111. See, e.g., Matsumura, *supra* note 29, at 472–73 (noting a disagreement over whether the primary purpose of marriage is personal and emotional fulfillment or the production and rearing of children); Schultz, *supra* note 106, at 1899–1906 (noting a debate between feminist scholars over whether expanding access to market employment furthers or harms women's equality).

112. ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH & AMERICAN LAW AND CULTURE, 1350–1870* 148 (1991).

113. *Id.* at 155.

114. See *id.* at 186–87.

Yet these changes did not disturb the parties' preexisting legal entitlements, meaning that employers had even greater authority to set the terms of their interactions.<sup>115</sup>

Much of the development of the employment relationship starting in the late nineteenth century and accelerating in the first half of the twentieth century responded to this vulnerability. To compete for workers, firms adopted hierarchical promotion schemes—hiring for only the lowest-level jobs and promoting from within—and corporate welfare programs, like pensions, profit-sharing plans, and insurance benefits.<sup>116</sup> By the 1970s, most large firms created these types of internal labor markets, based on the implicit promise of long-term employment.<sup>117</sup>

This private welfare system arose not only because of market forces, but also through the efforts of organized labor. Workers' rights organizations emerged to address disparities in bargaining power between employers and workers. Status was seen as an antidote to exploitation, a means of protecting workers.<sup>118</sup> In addition to various state-run insurance programs such as social security and workers' compensation, Congress passed legislation creating the National Labor Relations Board based on concerns about inequality of bargaining power between employees and large firms,<sup>119</sup> and enacted antidiscrimination laws based on concerns about disparate pay and inequality of opportunity within firms.<sup>120</sup> State law has enacted overlapping legal protections, such as workers' compensation and unemployment insurance,<sup>121</sup> based on similar assumptions about worker vulnerability.

Marriage has gradually become more egalitarian since Blackstone's time. Women have won the right to hold property in their own names,<sup>122</sup> to

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115. *See id.* at 148, 157.

116. STONE, *supra* note 3, at 41–43; DAVID WEIL, *THE FISSURED WORKPLACE* 34–37 (2014); David Charny, *The Employee Welfare State in Transition*, 74 *TEX. L. REV.* 1601, 1607–08 (1996); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 *UCLA L. REV.* 519, 530–31 (2001).

117. Stone, *supra* note 116, at 532–35; *see also* WEIL, *supra* note 116, at 31–34 (explaining the rise of the large corporation as a response to the technological innovations that vastly increased and complicated production of goods).

118. *See generally* Katherine V.W. Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509, 1512–13, 1518 (1981) (noting the role of unions in addressing bargaining power deficiencies).

119. National Labor Relations Act, 29 U.S.C. § 151.

120. STONE, *supra* note 3, at 158–59.

121. *See, e.g.*, CAL. LAB. CODE § 3700 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.) (workers' compensation); CAL. UNEMP. INS. CODE § 976 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.) (unemployment insurance).

122. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 *YALE L.J.* 1073 (1994); Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 *YALE J.L. & FEMINISM* 163 (2014).

make contracts,<sup>123</sup> and to vote.<sup>124</sup> Later in the twentieth century, Supreme Court decisions gave women more control over reproductive decision-making and subjected laws resting on sex-based classifications to heightened scrutiny.<sup>125</sup> These changes paved the way for women to enter the workforce and to be less dependent on marriage for their economic security.<sup>126</sup> Yet many laws turning on marital status, like tax filing,<sup>127</sup> eligibility for Social Security benefits,<sup>128</sup> immigration,<sup>129</sup> public assistance,<sup>130</sup> insurance, and benefits programs like workers' compensation schemes<sup>131</sup> assume that wives are dependent on their husbands' economic contributions, and that laws should reflect this dependency.<sup>132</sup>

It bears mentioning that statuses can meet dependency needs by privatizing that dependency, making the more economically powerful parties bear the costs of the economically vulnerable parties' support. Within the work context, the centrality of the private welfare model has enabled the government to play a supporting role, providing a safety net for those who fall outside of the employment system.<sup>133</sup> Likewise, the law has long treated the family as an important source of individual support, so much so that some scholars have argued that privatizing dependency is family law's "ultimate" value.<sup>134</sup>

These values—autonomy, efficiency, protection of the vulnerable—raise various conflicts. The challenge of managing the tension between dependency and autonomy is perhaps *the* central theme in the evolution of

123. Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3 (1985).

124. U.S. CONST. amend. XIX.

125. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (subjecting sex-based classifications to heightened scrutiny); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (striking down restrictions on the use of contraception by married persons); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (extending the right to access contraceptives to unmarried persons); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (recognizing the right to abortion).

126. Many scholars have noted that this progress narrative is not a simple or straightforward one, and that vestiges of coverture remain to this day. See, e.g., Hasday, *supra* note 59, at 833, 842.

127. See Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 702–06 (2013); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1157 (1981).

128. 42 U.S.C. § 1382c; see also Alstott, *supra* note 127, at 706–08.

129. 8 U.S.C. § 1186a.

130. Blumberg, *supra* note 127, at 1138–39.

131. *Id.* at 1140.

132. See Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1417 (1975) (tax); Naomi Cahn, *The Golden Years, Gray Divorce, Pink Caretaking, and Green Money*, 52 FAM. L.Q. 57, 61–62 (2018) (reviewing various federal programs); Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 21–22 (Social Security).

133. See Charny, *supra* note 116, at 1601–02.

134. Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866 (2014); see also Susan Frelich Appleton, *Obergefell's Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 966–67 (2016) (calling privatization of dependency family law's "guiding principle").

employment and marriage.<sup>135</sup> Whether it is possible to address dependency without simultaneously promoting subordination is another.<sup>136</sup> In a world where adults can cohabit without formally marrying, for example, the partner with greater earning power can benefit from the other's domestic labor without ultimately having to share his or her property accumulated during the relationship.<sup>137</sup> Some scholars have proposed that the law impose marriage or marriage-like obligations on the powerful partner to protect the vulnerable one.<sup>138</sup> Such a solution, however, not only disregards the parties' *ex ante* preferences, but absolves the state of the obligation to meet the dependency needs of its citizens. In the gig worker context, some states, like California, have passed laws making it much easier to classify workers as employees, with the goal of shifting financial responsibility for worker dependency onto technology companies.<sup>139</sup> The technology companies have warned that if they are ultimately required to classify these workers as employees, the workers will, like other traditional employees, be required to work mandatory hours in set shifts and lose the ability to decide which jobs to take.<sup>140</sup> Their dependency needs will be met at the cost of loss of freedom.

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135. Emily Stolzenberg has examined one critical manifestation of this tension—"between choice about obligations and privatizing dependency"—in the family law context. Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1987 (2018).

136. During Blackstone's time, "[d]ependency was a normal part of a deferential system of rank and degree in which everyone, adult and child, had and knew his or her place. Every man, woman, and child was then bound 'in a web of dependency and subordination to the will of others and ultimately of the universe.'" STEINFELD, *supra* note 110, at 119.

137. See, e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979).

138. See, e.g., CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 221–28 (2010) (proposing to impose property obligations on cohabitants who live together for more than two years or have a common child, irrespective of their consent); Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 711 (1996) (arguing for the revivification of common law marriage to protect vulnerable women).

139. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted). In November 2020, the California voters approved Proposition 22, which provides that app-based drivers are independent contractors and not employees as long as the technology company ("network company" under the language of the statute) does not unilaterally prescribe working times, control worker hours, or restrict the driver from performing services for other companies. See Cal. Proposition 22 (adding Cal. Bus. & Prof. Code § 7451; see also Kate Conger, *Uber and Lyft Drivers in California Will Remain Independent*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html?action=click&module=Spotlight&pgtype=Homepage> [<https://perma.cc/QT36-NRWE>] (noting that Proposition 22 passed with 58% of the vote and discussing the ramifications of the new law).

140. See Kate Conger, *It's a Ballot Fight for Survival for Gig Companies Like Uber*, N.Y. TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/technology/uber-lyft-california-prop-22.html> [<https://perma.cc/Q2UJ-9DGS>] (noting that Uber planned to cut 75% of its drivers if Proposition 22 failed to pass); Cal. Proposition 22 (adding Cal. Bus. & Prof. Code § 7449(d), which notes in its findings that California's Assembly Bill 5 threatened to interfere with worker flexibility, and could result in set shifts and mandatory hours).

## II. SECOND-GUESSING STATUS

The questions of whether and how to regulate through status sit on a shifting social substrate. These changes strain the ability of statuses to regulate effectively. This Part examines how the features of status identified in the previous Part can lead to regulatory voids. It illustrates the phenomenon through the challenges currently posed by informal relationships and gig workers.

Millions of individuals structure their lives outside the ways the statuses of employment and marriage are currently demarcated.

The rise of globalization and focus on short-term cost reductions in the 1970s saw an accompanying rise in alternative employment arrangements—people employed as independent contractors, on-call workers, temporary agency workers, and workers provided by contract firms.<sup>141</sup> These workers are atypical in the sense that they lack a specific employer or any long-term attachment to a firm.<sup>142</sup> The percentage of workers in alternative arrangements has remained relatively steady since the late 1990s at a little over 10% of the workforce, or 15.5 million people.<sup>143</sup>

The growth of alternative employment relationships is only one part of the story. Expectations about the employment relationship have also changed. Since 1995, the Bureau of Labor Statistics has measured “contingent workers,” workers who do not expect their jobs to last.<sup>144</sup> By some estimates, contingent workers make up 20 to 30% of the workforce.<sup>145</sup> Moreover, job tenure, as well as the percentage of workers who had job tenure of more than a decade, has decreased significantly.<sup>146</sup> As a result of this shifting landscape, even workers with non-contingent jobs are being told that they should not expect permanent employment.<sup>147</sup>

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141. See STONE, *supra* note 3, at 83–86 (interrogating the causes of the breakdown of the psychological contract); see also KAREN KOSANOVICH, U.S. BUREAU OF LAB. STAT., WORKERS IN ALTERNATIVE EMPLOYMENT ARRANGEMENTS (2018), <https://www.bls.gov/spotlight/2018/workers-in-alternative-employment-arrangements/pdf/workers-in-alternative-employment-arrangements.pdf> [<https://perma.cc/M6TW-3BDC>] (defining “alternative employment arrangements”).

142. STONE, *supra* note 3, at 69.

143. See KOSANOVICH, *supra* note 141, at 2 (adding together the four categories of alternative arrangements).

144. KAREN KOSANOVICH, U.S. BUREAU OF LAB. STAT., A LOOK AT CONTINGENT WORKERS 2 (2018), <https://www.bls.gov/spotlight/2018/contingent-workers/pdf/contingent-workers.pdf> [<https://perma.cc/2ATT-3S7C>] (defining “contingent workers” as people who do not expect their jobs to continue for personal reasons, such as retirement or returning to school); *New Data on Contingent and Alternative Employment Examined by BLS*, U.S. BUREAU OF LAB. STAT. (Aug. 17, 1995), [https://www.bls.gov/news.release/history/conemp\\_082595.txt](https://www.bls.gov/news.release/history/conemp_082595.txt) [<https://perma.cc/7R8L-QFPY>].

145. See Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 158–59 (2003).

146. STONE, *supra* note 3, at 74–83.

147. *Id.* at 71–72.

Marriage, too, regulates far fewer familial relationships than it once did. In 1967, a little over 70% of adults lived in married households.<sup>148</sup> In 2019, that figure dropped to just over 51%.<sup>149</sup> Approximately 20% of adults have never married, and one quarter of adults aged twenty-five to thirty-four may never do so.<sup>150</sup> During the same period, the number of adults living with a nonmarital partner grew from 542,000 to over 18 million, or from less than one-half of one percent of households to over seven percent.<sup>151</sup> And scholars estimate that the number of individuals who live in separate households but consider themselves to be in committed intimate relationships exceeds that of cohabitants.<sup>152</sup> As I have detailed in other work, the 35 million people in nonmarital relationships may structure those relationships in different ways: for instance, they may or may not be raising children or pooling their financial resources.<sup>153</sup> Yet many of these relationships bear significant similarities to marriage, both in their expectations for an ongoing relationship of mutual support, and because of the way they commingle their property and jointly raise children.<sup>154</sup> As such, many millions of people in marriage-like relationships are unregulated by marriage, or any other laws for that matter.<sup>155</sup>

We see, then, that the relationships upon which the statuses are predicated no longer pertain to significant portions of the population, leaving many people without rights and obligations that the law has deemed important. Here, I show how the features of status discussed in the previous Part lead to corresponding regulatory challenges.

### *A. Identity: Identification Challenges*

The reliance on identity becomes problematic when the relevant identities are indeterminate. Despite assumptions about the nature of employment and marriage, the law has struggled to come up with satisfactory tests to identify when relationships should trigger legal consequences.

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148. Matsumura, *supra* note 15, at 1016.

149. See *Table AD-3. Living Arrangements of Adults 18 and Over, 1967 to Present*, U.S. CENSUS BUREAU (Nov. 2019) [hereinafter *Table AD-3*], <https://www.census.gov/data/tables/time-series/demo/families/adults.html> [<https://perma.cc/U48K-T8PF>].

150. Matsumura, *supra* note 15, at 1016.

151. *Table AD-3*, *supra* note 149.

152. Matsumura, *supra* note 15, at 1016.

153. See *id.* at 1029–30.

154. See *id.* at 1037.

155. As I will discuss in Part III, the fact that marriage laws do not cover people in nonmarital relationships does not mean that marriage does not influence those people's legal rights, or lack thereof. See *infra* notes 270–275 and accompanying text.

In the work law context, the common law test for when someone was an employee originated to determine when an employer should be liable in tort for the employee's acts. The touchstone was control: "the control test depended on an apparent (though usually unstated) comparison of the employer's supervision or opportunity to supervise on the one hand, and the worker's independence and self-sufficiency on the other."<sup>156</sup>

In the intervening years, some courts have suggested that considerations other than control should be paramount to determining whether someone is an employee. Judge Learned Hand articulated what has come to be known as the "economic realities" test, which focuses on the economic power that an employer exerts over its workers, as well as the integration of the workers into the employer's business.<sup>157</sup> This test focuses on the nature of the employer's business and the role the worker plays in that overall business practice, with an emphasis on the extent to which the business depends on the particular worker.<sup>158</sup> Judge Hand also introduced a "statutory purpose" approach, under which the concept of employment would depend on the goals of the legislation, like the regulation of workplace conditions.<sup>159</sup> Legislation designed to be broadly protective might apply to a broader group of workers than respondeat superior liability.

All these tests are notoriously sprawling. For example, the control test articulated by the Supreme Court in several cases consists of a non-exhaustive list of twelve factors:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>160</sup>

The sheer number of factors and the different possibilities for balancing them make it difficult to predict with certainty whether the requisite control is present.<sup>161</sup> And this is thought to be the predictable test. For example, the

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156. Carlson, *supra* note 2, at 305.

157. *Id.* at 312–13.

158. *Id.*; Dubal, *supra* note 10, at 72.

159. *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914).

160. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

161. *See, e.g.*, Carlson, *supra* note 2, at 311.

Supreme Court has criticized the statutory purpose test for being “infected with circularity and unable to furnish predictable results.”<sup>162</sup>

Although the Court has repeatedly endorsed the control test over these other approaches,<sup>163</sup> courts and scholars recognize that all the tests are functionally the same.<sup>164</sup> That is, none of the different tests are in fact capable of resulting in predictable outcomes.<sup>165</sup>

Marriage is different because the availability of formalities helps couples to identify their relationship. Couples obtain a marriage license and participate in a ceremony conducted by an approved officiant to legally enter a marriage.<sup>166</sup> Court clerks and ministerial officials, rather than judges, police these formal requirements.<sup>167</sup>

These formalities do little, however, for the millions in informal relationships. Common law marriage allows courts to recognize informal relationships as legal marriages if the parties hold themselves out as married, among other requirements.<sup>168</sup> But only a handful of jurisdictions still recognize common law marriage, in large part because of the fact-intensive nature of determining the parties’ intentions.<sup>169</sup>

As discussed in the following Section, most states purport to enforce agreements between intimate partners regarding property, but when parties claim that they agreed to exchange marriage-like performances for marriage-like property consequences,<sup>170</sup> they almost always fail. And a small handful of states impose marital property laws when the parties have lived in a “stable, marital-like relationship,”<sup>171</sup> although in that context, as well, what it means to be in a marriage-like relationship, or share a life together, is challenging to determine.

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162. *Darden*, 503 U.S. at 326.

163. *See id.* at 327.

164. *See, e.g.*, *Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 945 (9th Cir. 2010).

165. *See* Befort, *supra* note 145, at 167; Carlson, *supra* note 2, at 335; Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1531–32 (2016); Blake E. Stafford, *Riding the Line Between “Employee” and “Independent Contractor” in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1226–34 (2016).

166. *See* Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2010 (2017).

167. *See id.* at 2011.

168. *See id.* at 2019–20; *see also* Dubler, *supra* note 47, at 969 (noting that common law marriage was an alternative to the threats of illegitimacy and criminal prosecution).

169. *See* *Stone v. Thompson*, 833 S.E.2d 266, 269 (S.C. 2019) (noting, in its decision to abolish common law marriage, that “courts struggle mightily to determine if and when parties expressed the requisite intent to be married, which is entirely understandable given its subjective and circumstantial nature”).

170. *See, e.g.*, *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (based on the claim that plaintiff would “devote her full time to defendant . . . as a companion, homemaker, housekeeper and cook” in exchange for defendant providing “all of plaintiff’s financial support and needs for the rest of her life”).

171. *See, e.g.*, *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc).

In all of these situations, courts find it difficult to get over the fact that the partners, however else they arrange their affairs, have not formalized their relationship.<sup>172</sup> That fact looms large over other “spousely” acts, like giving up one’s career, taking over domestic tasks, and even changing one’s surname.<sup>173</sup>

In sum, identity categories are rarely as straightforward as they seem and can struggle to track changing social conditions.

### *B. Mandatory Rules: Inadequate Options*

Our legal system has chosen to regulate work and intimate relationships through the binary statuses of employment and marriage. To be an employee or spouse is to be subject to many rights and obligations; to fall outside those statuses is to be subject to almost none of them. A worker for a firm is either an employee or an independent contractor.<sup>174</sup> A person in an informal relationship is either regulated as single or effectively married.<sup>175</sup> This form of binary regulation is not an inherent feature of status: in both areas, lawmakers could instead provide a menu of options. The current binary format, however, stems directly from the mandatory nature of status.

As discussed above, the status of employee comes with a bundle of rights and obligations, none of which attach if the worker is an independent contractor. When a worker is an employee, the firm has the right to control the worker’s schedule and the manner in which the worker completes her tasks. By controlling the worker’s schedule, the firm can effectively limit the worker’s ability to work simultaneously for a competitor. In exchange, employers must take on responsibilities such as contributing to insurance programs such as workers’ compensation, Social Security, and

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172. See, e.g., *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994) (rejecting a woman’s claim for equitable division of the relationship’s assets in large part because the woman had expressly declined to formally marry, declaring, “[w]hen opportunity knocks, one must answer its call”).

173. See, e.g., *Marvin*, 557 P.2d at 110.

174. Carlson, *supra* note 2, at 297; see also Gali Racabi, *Despite the Binary: Looking for Power Outside the Employee Status*, TUL. L. REV. (forthcoming 2021) (manuscript at 3 & n.2, 11–12) (describing the binary view as “canonical” and citing numerous articles that have characterized the law’s approach to workers as such) (on file with author). This is not to say that each status is completely monolithic. For instance, some employees are exempt from minimum wage and maximum hour requirements if, for example, they are “employed in a bona fide executive, administrative, or professional capacity. . . .” 29 U.S.C. § 213(a)(1). These and other variations preserve most of the bundle of regulations that flow from employment and do not undercut the significance of the employee/independent contractor distinction.

175. This is a bit of an oversimplification, which I explain in notes 186–196, *infra*.

unemployment.<sup>176</sup> From a worker's perspective, employment is a tradeoff between these benefits and the corresponding loss of freedom.<sup>177</sup>

Gig workers for technology companies such as Uber and Lyft challenge this binary paradigm. Workers are not required to do a fixed amount of work. In fact, they can work for multiple platforms simultaneously, allocating their time and resources based on which platform promises the highest compensation.<sup>178</sup> Some have full-time jobs and perform gig work on the side for extra cash; some do gig work full time between more permanent jobs; others solely perform gig work.<sup>179</sup> Depending on their work patterns, they can look more like independent contractors or employees, a topic explored below. The point here is that the law classifies them as one or the other: a binary classification system necessarily lacks in subtlety.

Most efforts at reform only double down on the binary approach. Worker advocates have argued that gig workers are not independent contractors but employees.<sup>180</sup> State legislative proposals all involve making it easier to classify gig workers as either employees or independent contractors. California, for example, enacted a law expressly intended to make it easier to classify gig workers for technology companies<sup>181</sup> as employees.<sup>182</sup> In 2019, the states of New Jersey, New York, Oregon, and Washington all

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176. See Means & Seiner, *supra* note 165, at 1514; see also Befort, *supra* note 145, at 162–63.

177. Befort, *supra* note 145, at 161 (observing that workers seek out flexible arrangements because of job, school, or family obligations). Gali Racabi has observed that despite the law's binary structure, gig workers have been able to leverage tools outside of employment status, like the threat of misclassification litigation, informal organizing, and political action, in order to extract some concessions from technology companies. See Racabi, *supra* note 174, at 53–55. Racabi's work is a reminder that laws alone, while consequential, do not fully occupy the field of regulation.

178. Henry H. Perritt, Jr., *Don't Burn the Looms—Regulation of Uber and Other Gig Labor Markets*, 22 SMU SCI. & TECH. L. REV. 51, 73 (2019).

179. See, e.g., V.B. Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy* 17–18 (U.C. Hastings L., Working Paper No. 381, 2019).

180. See, e.g., *In re Vega*, 162 A.D.3d 1337 (N.Y. App. Div. 2018), *rev'd*, 149 N.E.3d 401 (N.Y. 2020); *Razak v. Uber Techs., Inc.*, No. 16-573, 2018 WL 1744467 (E.D. Pa. Apr. 11, 2018), *rev'd*, 951 F.3d 137 (3d Cir. 2020).

181. A product of significant lobbying on behalf of various interest groups, the law includes many carve-outs for workers such as “licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services,” and more. Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (enacted), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5) [<https://perma.cc/P4YP-JDHV>].

182. California's Assembly Bill 5 codified what has come to be known as the “ABC test”: “a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business.” *Id.*

introduced similar laws.<sup>183</sup> Arizona, Florida, Indiana, Kentucky, Tennessee, and Texas have all passed rules or legislation intended to make it more difficult to classify gig workers as employees.<sup>184</sup> All of these responses embrace the binary nature of the classification despite significant evidence that workers, at least, are ambivalent about the optimality of either status.<sup>185</sup>

At first glance, it appears that the law creates several legal options in addition to marriage or singleness.<sup>186</sup> Virtually all states have allowed nonmarital partners to enter into legally enforceable contracts.<sup>187</sup> Several other states, like California, Colorado, Hawaii, and Illinois, have created domestic partnerships or civil unions and have opened those statuses up to all couples.<sup>188</sup> Colorado has gone even further, creating a designated beneficiary status that allows partners to select various rights and assign them to their designees.<sup>189</sup> Finally, a handful of states have adopted a status-based approach, imposing marital property obligations on relationships that bear sufficient similarities to marriage.<sup>190</sup> In practice, however, these alternatives to marriage do little to recognize relationships at all, much less relationships that fall outside of marriage's mold.<sup>191</sup>

183. S. 4204, 218th Leg., Reg. Sess. (N.J. 2019), [https://www.njleg.state.nj.us/2018/Bills/S4500/4204\\_11.HTM](https://www.njleg.state.nj.us/2018/Bills/S4500/4204_11.HTM) [<https://perma.cc/F6VJ-3N8P>]; S. S6699A, 2019 Leg., Reg. Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/s6699> [<https://perma.cc/P7CV-7UBL>]; H. 2498, 80th Leg. Assemb., Reg. Sess. (Or. 2019), <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2498> [<https://perma.cc/6J3Z-3245>]; S. 5513, 66th Leg., Reg. Sess. (Wash. 2019), <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5513.pdf?q=20200902201052> [<https://perma.cc/B9YK-P2TP>].

184. H. 1286, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018), <http://iga.in.gov/legislative/2018/bills/house/1286/> [<https://perma.cc/4RRM-HFZ5>]; H. 220, 2018 Gen. Assemb., Reg. Sess. (Ky. 2018), <https://legiscan.com/KY/bill/HB220/2018> [<https://perma.cc/RS98-YSZ6>]; S. 1978, 2018 Gen. Assemb., Extraordinary Sess. (Tenn. 2018), <http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB1978&ga=110> [<https://perma.cc/9G6L-RG93>]; H. 221, 2017 Leg., Reg. Sess. (Fla. 2017), <https://www.flsenate.gov/Session/Bill/2017/0221> [<https://perma.cc/MC49-L6ZT>]; H. 2652, 52d Leg., 2d Reg. Sess. (Ariz. 2016), <https://www.azleg.gov/legtext/52leg/2r/bills/hb2652h.pdf> [<https://perma.cc/3S44-SCHW>]; 40 TEX. ADMIN. CODE § 815.134 (2019).

185. Dubal, *supra* note 179, at 4 (noting several significant surveys suggesting a worker preference for independent contractor status, but noting the complexities underlying both those studies and actual worker preferences).

186. See Eskridge, *supra* note 101, at 1889–90, 1949 (arguing that family law has moved in the direction of a pluralist regime consisting of alternatives to marriage, and that the alternatives are meaningfully different from marriage).

187. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976); Matsumura, *supra* note 15, at 1017.

188. See Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1517–19 (2016).

189. John G. Culhane, *Cohabitation, Registration, and Reliance: Creating a Comprehensive and Just Scheme for Protecting the Interests of Couples' Real Relationships*, 58 FAM. CT. REV. 145, 149–50 (2020).

190. See, e.g., *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc).

191. For a comprehensive accounting of the states with formal nonmarital statuses as well as a discussion about the obstacles to nonmarital contracting, see Mary Charlotte Carroll, Note, *When Marriage Is Too Much: Reviving the Registered Partnership in a Diverse Society*, 130 YALE L.J. 478, 503–05 (2020).

Although most states will purportedly enforce agreements between cohabitants not resting on sexual consideration, contract has not made much of an impact in the nonmarital space. In the first place, the number of contract claims that are brought is infinitesimal compared to the number of informal relationships that end. Moreover, when a partner brings a contract claim premised on the exchange of marriage-like performances for marriage-like property consequences, effectively seeking retroactively to recognize the relationship as a marriage, these claims almost never succeed, not even when they are part of express agreements.<sup>192</sup>

Domestic partner and civil union statuses offer a technical alternative to marriage, but are modeled on legal marriage such that they are essentially marriage by another name.<sup>193</sup> Perhaps confirming this characterization, these alternate statuses have experienced a significant decline in popularity once same-sex couples were allowed to marry.<sup>194</sup> Status-based approaches have proved to be a useful tool for the jurisdictions that recognize them, but they too require that the parties cohabit in a “stable, *marital-like* relationship.”<sup>195</sup>

For nonmarital relationships to be recognized, which is rare, they must be essentially marital, regardless of what they are called. Thus, two basic options remain: marriage and singleness.<sup>196</sup>

The consequence of this binary approach to regulation is that the diverse, highly textured landscapes of work or nonmarital relationships must reduce to two options. This situation not only creates the possibility of sharp distinctions between the favored and disfavored statuses, but can mean that a status is defined by a wide array of conduct, potentially diluting the meaning of the status itself.

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192. Antognini, *supra* note 21; *see also* Courtney G. Joslin, Untitled 28–31 (Sept. 3, 2020) (unpublished manuscript) (on file with author) (showing that claims based on a theory of family partnership fail). Partners have had a bit more success bringing claims based on discrete financial contributions within the context of an intimate relationship, although the number of these cases is still small. *See id.*

193. *See* Culhane, *supra* note 189, at 150; *cf.* CAL. FAM. CODE § 297.5(a) (2007) (stating that domestic partners will have the same rights and obligations as married spouses).

194. *See* Matsumura, *supra* note 15, at 1018. Although Colorado’s designated beneficiary status deviates from this approach and opens the possibility that the state will recognize relationships for vastly different purposes, few have opted in. *See* Culhane, *supra* note 189, at 149–50.

195. *Connell*, 898 P.2d at 834 (emphasis added).

196. Halley, *supra* note 5, at 31. As I will discuss in Part III, *infra*, the law’s conception of singleness is not exactly the same thing as being in an arm’s length relationship. “Single” people do not qualify for the legal benefits reserved for married people, but they also cannot contract with intimate partners in the same way that they would with strangers. *See infra* notes 273–275, and accompanying text.

### C. Bundling: Heightened Stakes

The consequences of the binary approach to regulation are heightened by the sheer number of legal rights tied to employment and marital status.<sup>197</sup> The conclusion that a person is an employee or a spouse changes that person in the eyes of the State and third parties and imposes serious consequences on the other party to the relationship.

Many consequences flow from the conclusion that a worker is an employee. Because these consequences are established by different state and federal laws, it is possible that a single work relationship could give rise to different conclusions about whether someone is an employee.<sup>198</sup> However, despite (or perhaps due to) the failure of Congress and state legislatures to define “employee” with particularity in the various statutes in which the term appears, courts have converged on relatively overlapping tests to determine whether someone is an employee.<sup>199</sup> The Supreme Court has applied the common law control test to federal statutes like the Taft-Hartley Act, Social Security Act, Copyright Act, ERISA, Title VII of the Civil Rights Act, Age Discrimination in Employment Act, and the Americans with Disabilities Act.<sup>200</sup> Where the factors differ, the fact-specific nature of the inquiry makes it impossible to determine whether minor differences in legal tests produce different outcomes, and most scholars assume they do not.<sup>201</sup>

And even in the face of these different tests, courts presume that employers will make a single classification decision and, on that basis, pay “federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, provid[e] worker’s compensation insurance, and . . . comply[] with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees.”<sup>202</sup> In short, the concept of employment is relatively stable across different contexts.<sup>203</sup>

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197. Cf. Halley, *supra* note 5, at 33 (noting that steep drop-offs between marriage and singleness make marriage more status-like).

198. See Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 487 (2016) (noting that some states define employment status more expansively than others).

199. Carlson, *supra* note 2, at 322–27; Dubal, *supra* note 10, at 72 (noting the convergence of the various tests); cf. Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 666 (2013) (arguing that although the tests may differ on a formal level, “there is a consistent meaning to the idea of employment”).

200. Carlson, *supra* note 2, at 324–25; Bodie, *supra* note 199, at 677–80.

201. Carlson, *supra* note 2, at 324.

202. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 5 (Cal. 2018).

203. See Bodie, *supra* note 199, at 662. *But see* Dubal, *supra* note 10, at 76 (noting one instance in which courts came to different conclusions about employment status under different laws).

Indeed, the whole notion of “misclassification” suggests that employment is a fixed and knowable category. Congress has chastised the courts and the National Labor Relations Board for complicating the inquiry beyond common understandings, presupposing that such understandings exist.<sup>204</sup> Reflecting similar assumptions, the California legislature has accused technology companies of “unfair[ly]” depriving workers of “basic rights and protections *they deserve*,”<sup>205</sup> as if the concept of employment is beyond contestation.

Like the work law context, marriage bundles together a set of legal incidents that flow from the status determination. Each state, as well as the federal government, has the authority to regulate and define marriage in its own way. Many federal laws turn on marital status as defined by the state in which the marriage is solemnized, providing a significant degree of consistency. For example, the Internal Revenue Service has expressly incorporated state definitions of marriage when interpreting the Internal Revenue Code.<sup>206</sup> But some federal laws do not incorporate state definitions, adding additional requirements to prove the existence of a valid marriage (as in the immigration context),<sup>207</sup> or treating couples as married even in the absence of any legal marriage under state law (as in the supplemental security income benefits context).<sup>208</sup> And differences between eligibility requirements between states mean that some marriages may be recognized in some states but not others.<sup>209</sup>

That said, it is generally true that the act of legally marrying will subject a couple to a whole host of legal obligations, and that couples generally understand that this different set of legal rules applies to them, even if they are unaware of how those specific laws work.<sup>210</sup> Moreover, through a combination of choice of law rules, the federalization of various aspects of marriage, and constitutional holdings preventing discrimination in how the right to marry is defined, the definition of marriage is generally consistent across jurisdictions.<sup>211</sup>

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204. Carlson, *supra* note 2, at 321.

205. Assemb. B. 5, 2019-2020 Leg., Reg. Sess. § 1 (Cal. 2019) (enacted) (emphasis added), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5) [<https://perma.cc/P4YP-JDHV>].

206. Rev. Rul. 58-66, 1958-1 C.B. 60, 1958 WL 10653.

207. See Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 30–31 (2012).

208. Matsumura, *supra* note 166, at 2022.

209. Matsumura, *supra* note 29. Both interracial marriage and same-sex marriages were inconsistently recognized by states. *Id.* at 492–93. First cousin marriages are allowed in some states but not in others, with at least some states, like Arizona, indicating that they would decline to recognize first-cousin marriages on public policy grounds. *Id.* at 464.

210. See *id.* at 468.

211. See *id.* at 485–86.

With few exceptions, courts and lawmakers in both the marriage and employment contexts presume that those statuses are singular things, and that the various legal consequences naturally flow from those statuses. The fact that so many laws turn on the statuses makes the consequences of an erroneous determination more severe.<sup>212</sup>

#### *D. Hierarchy: Status Arbitrage*

Given that statuses reward, incentivize, burden, or deter,<sup>213</sup> parties will inevitably have incentives—often conflicting—to claim one status or the other.<sup>214</sup> Most obviously, the more economically powerful party may attempt to evade the support obligations that flow from the status.<sup>215</sup> Where status impacts eligibility for valuable government-provided benefits, parties may also have incentives to manipulate their identities to claim those benefits.<sup>216</sup> Policymakers have understandably attempted to respond to instances of status arbitrage. It is not always possible, however, to generalize about a party's motives, much less the motives of an entire class of actors. Attempts to prevent status arbitrage risk simplifying or ignoring the incentives of one or both parties in the relationship.

In the work law context, courts and scholars have observed that employers will often have significant financial incentives to classify workers as independent contractors rather than employees. Financial contributions to workers and the state and federal governments based on employment status can be substantial. The California Supreme Court pointed out that employers that misclassify their workers gain an “unfair competitive advantage” over compliant competitors; they also avoid making billions of dollars of payments to the federal and state governments.<sup>217</sup>

Although firms may intentionally mischaracterize workers in order to reap these unfair competitive advantages, there are non-pernicious reasons for firms to avoid hiring people as employees. As David Weil has shown, describing a phenomenon he has labeled the “fissured workplace,”

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212. See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015); Matsumura, *supra* note 166, at 2014–23 (giving examples of cases in which erroneous determinations of marital status resulted in the imposition of obligations or denial of benefits).

213. See *supra* Part I.A.

214. See Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010) (defining “regulatory arbitrage” as the act of “exploit[ing] the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system’s intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision”).

215. See Bagchi, *supra* note 107, at 583 (arguing for the use of “status based” reforms to address unequal bargaining power).

216. See generally Abrams, *supra* note 207, at 6.

217. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 5 (Cal. 2018); see also Carlson, *supra* note 2, at 337.

businesses have faced increasing pressure to reduce costs and focus on core competencies.<sup>218</sup> Technological developments have reduced coordination costs, making it possible to outsource non-essential tasks to intermediaries.<sup>219</sup> For example, it may now be cheaper and more efficient for hotels to hire housekeepers through third-party agencies rather than to employ those housekeepers in-house.<sup>220</sup> Weil concludes that “[w]orkplace fissuring arises as a consequence of the integration of three distinct strategic elements, the first one focused on revenues (a laser-like focus on core competency), the second focused on costs (shedding employment), and the final one providing the glue to make the overall strategy operate effectively . . . .”<sup>221</sup> Although gig economy workers often work directly for technology companies and not for intermediaries, Weil’s analysis reminds us that the decision not to hire workers as employees can arise in a variety of contexts and for a variety of reasons.

Workers, too, have complicated preferences and motivations. Several studies of Uber drivers have found that a majority of Uber drivers prefer to be classified as independent contractors rather than employees.<sup>222</sup> Although these studies report worker preferences in terms of a binary choice, a recent survey study by V.B. Dubal reminds us that the preference for independent contractor status reflects ambivalence about the options: many drivers who expressed a preference for independent contractor status would welcome the benefits that flow from being an employee but were afraid about how employee status might affect their job flexibility, which they valued more.<sup>223</sup> In other words, if the current status categories were reoriented, worker preferences might change. Yet the binary and bundled classification regime smooths over those complexities.

The proposals to regulate nonmarital relationships similarly respond to concerns about misaligned incentives. The American Law Institute’s Principles of the Law of Family Dissolution (“ALI Principles”) would presumptively impose marital property rules on cohabiting relationships over a certain duration to curb the wealthier partner’s incentive to avoid

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218. WEIL, *supra* note 116, at 10–11.

219. *See id.*

220. *See id.* at 7.

221. *Id.* at 11.

222. *See, e.g.,* Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States*, 71 ILR REV. 705 (2018); Thor Berger, Carl Benedikt Frey, Guy Levin & Santo Rao Danda, *Uber Happy? Work and Well-Being in the ‘Gig Economy’*, 34 ECON. POL’Y 429 (2019). These studies have received criticism for presenting compound options to workers and then representing the results as a simple binary choice. *See* Dubal, *supra* note 179, at 12.

223. Dubal, *supra* note 179, at 12–15.

marriage's financial consequences.<sup>224</sup> Supporters note that courts typically disregard or discount the value of domestic contributions to a nonmarital relationship, enriching the more economically powerful partner at the other's expense.<sup>225</sup> Additionally, they argue that incentives break down on gender lines, with men being much more reluctant to marry, putting women at their mercy.<sup>226</sup>

Some relationships track this pattern.<sup>227</sup> However, relationships between wealthy men and stay-at-home women are increasingly uncommon for several reasons. First, women are earning more compared to their partners than was the case decades ago.<sup>228</sup> Second, people are increasingly likely to partner with people who have comparable levels of education and wealth, a phenomenon some call assortative mating.<sup>229</sup> People who marry are more likely to be highly educated and well off, whereas people who cohabit are more likely to have lower levels of education and wealth.<sup>230</sup> Many within this latter cohort are less likely to commit to each other and commingle their assets because of a lack of trust; they fear the negative consequences of linking their financial future to someone unreliable.<sup>231</sup> Notably, many of the people expressing this hesitancy are women.<sup>232</sup> Sociologists Kathryn Edin and Maria Kefalas suggest that the "domestic abuse, chronic infidelity, alcoholism or drug addiction, repeated incarceration, or a living made from crime" that characterizes many lower-income cohabiting relationships renders the reluctance to marry "quite reasonable."<sup>233</sup> In short, the desire to

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224. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02 cmt. b (AM. LAW INST. 2002) [hereinafter ALI PRINCIPLES] (noting that imposing obligations promotes "fairness," requires people to "assume some economic responsibility" for the circumstances in which cohabitants find themselves, and "reduces the incentive to avoid marriage . . . in order to avoid responsibilities to a partner").

225. See, e.g., Courtney G. Joslin, *Autonomy in the Family*, 66 UCLAL. REV. 912, 934–37 (2019); Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2145 (2019) (observing the phenomenon without advocating for a status-based remedy).

226. See, e.g., Joslin, *supra* note 225, at 923–24; Blumberg, *supra* note 127, at 1163 (arguing that there is ample support for the assertion that "marriage is something asked by women and agreed to by men").

227. Many litigated cases fall into this mold. See Antognini, *supra* note 21, at 36–47 (describing cases). For the reasons that follow, however, it is unlikely that this is the dominant pattern.

228. See June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 68 (2016) (noting that women have achieved greater economic independence and often seek out partners with comparable earning power).

229. See Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 43–47 (2018).

230. See RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 27 (2011); Matsumura, *supra* note 15, at 1038.

231. Carbone & Cahn, *supra* note , at 100.

232. See *id.*

233. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 216, 216–17 (2005); see also June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1205–11 (analyzing the studies of relationship formation that reveal demographic disparities based on wealth and education level and coming to the same conclusion).

avoid financial obligations may stem not from a powerful party's desire to exploit a vulnerable one, but from a mix of different motives.

The hierarchical nature of status regulation provides incentives to enter into or avoid employment and marriage. Power differentials, however, manifest in shades of gray rather than black and white, affected by the whole bundle of rights and obligations, some of which may operate at cross-purposes. Anything less than a full accounting of these incentives may result in reforms that miss the mark.

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This Part has shown how features of status create regulatory challenges, ultimately resulting in a mismatch between established statuses and realities on the ground. Proposals to address just one problem are likely to divert uncertainty to the others.<sup>234</sup> Merely simplifying the common law test for employment classification, for example, would not alter the parties' incentives to claim one status or another; it would just prompt workarounds.<sup>235</sup> This suggests that successfully addressing the underlying problem of providing workers and nonmarital partners with the appropriate legal benefits and obligations requires a systemic approach.

### III. ESCAPING STATUS

Considering the shortcomings of status discussed above, one might ask whether it makes sense to continue regulating relationships through status. As Cynthia Estlund has observed, “[t]here is a certain irony in the almost-romantic attachment of some contemporary worker advocates to the standard employment relationship, with its signature features of worker dependency and managerial domination.”<sup>236</sup> Indeed, history teaches that statuses inevitably produce hierarchies, both within status relationships themselves and between identity groups. Despite modernization, for instance, “wifely” work is still discounted regardless of the sex of the person performing it,<sup>237</sup> and women continue to perform a disproportionate

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234. Cf. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (noting that in a hydraulic system, understanding why the water (or political money) “flows where it does and what functions it serves when it gets there requires thinking about the system as a whole”).

235. See Michelle Cheng, *Independent Contractors Are Already Finding Ways to Work Around AB5*, QUARTZ (Jan. 30, 2020), <https://qz.com/1793028/california-workers-are-setting-up-more-llcs-after-ab5/> [<https://perma.cc/G475-A7TZ>] (describing how some California workers are incorporating as LLCs to strengthen their status as independent contractors).

236. Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 325 (2018).

237. Antognini, *supra* note 225, at 2145.

share.<sup>238</sup> The privileging of marriage over other forms of intimate relationships promotes further inequality. Given the perpetuation of hierarchies through status, what, then, explains advocates' persistent pursuit of benefits through employment<sup>239</sup> or relationships<sup>240</sup> rather than some other way?

A practical answer is that the strategic goals of enough stakeholders—whether scholars, advocates, lobbyists, lawmakers, or the affected individuals themselves—weigh in favor of status. Given their interest in privatizing dependency, state legislators may align themselves with workers' rights advocates, who may be agnostic (or realistic) about where increased benefits come from. Some conservatives allied themselves with same-sex marriage advocates to preserve the popularity of marriage and build consensus around the status, rather than watching marriage steadily decline.<sup>241</sup>

There is an even more fundamental reason why status-based regulation persists, however: there is really no other realistic option. Status is inevitable.

The law depends on categories to create meaning. Our system is based on generally applicable laws that apply across the board to particular types of conduct or particular classes of people.<sup>242</sup> Laws that single out individuals for punishment, for example, are constitutionally prohibited;<sup>243</sup> civil laws that accomplish the same result are similarly disfavored.<sup>244</sup>

Moreover, statuses simplify the imposition of legal consequences. It would be impracticable to administer programs like Social Security, determine rates of taxation, or determine standing to sue for relationship-

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238. See Katherine Schaeffer, *Among U.S. Couples, Women Do More Cooking and Grocery Shopping than Men*, PEW RSCH. CTR. (Sept. 24, 2019), <https://www.pewresearch.org/fact-tank/2019/09/24/among-u-s-couples-women-do-more-cooking-and-grocery-shopping-than-men/> [<https://perma.cc/HGD3-4J7M>].

239. See, e.g., *Turning "Gig" Jobs into Good Jobs*, NAT'L EMP. L. PROJECT, <https://www.nelp.org/campaign/turning-gig-jobs-into-good-jobs/> [<https://perma.cc/LJ8S-WN7Q>] (pursuing employment status to provide a "decent income[], an adequate safety net, and basic rights").

240. See, e.g., ALI PRINCIPLES, *supra* note 224, § 6.02 cmt. b (requiring partners to "assume some economic responsibility" for the circumstances in which cohabitants find themselves).

241. See, e.g., David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <https://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html> (expressing the desire to "build new coalitions" to "strengthen marriage"); Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK (Jan. 8, 2010), <https://www.newsweek.com/conservative-case-gay-marriage-70923> [<https://perma.cc/L84D-9RYS>] (noting the shared "conservative" goals of "strong families" and "lasting domestic relationships").

242. See Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 656–58 (2014) (noting the jurisprudential foundations for a theory of legislative generality).

243. U.S. CONST. art. I, §§ 9–10 (Bill of Attainder clauses).

244. See Zoldan, *supra* note 242, at 650–60. *Cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 533 (1993). *But see* Zoldan, *supra* note 242, at 632–40 (noting that in practice, Congress frequently enacts civil laws that benefit or burden specific individuals).

based torts on an individual basis.<sup>245</sup> Statuses provide conceptual categories that sort individuals and identify the rights that attach by virtue of their membership in the relevant identity category.<sup>246</sup> Reliance on these categories is far more efficient than idiosyncratic individualized determinations.<sup>247</sup>

Although some rights that fall within status bundles can—and should—be broken off and distributed on some other basis, that will not, practically speaking, circumvent status-based regulation. Imagine, for example, that health insurance were provided by the state instead of private employers.<sup>248</sup> Or that the state provided a whole range of services designed to assist families,<sup>249</sup> even up to a universal basic income.<sup>250</sup> Those benefits would still have to be distributed on some basis, whether citizenship, residency, or some other way.<sup>251</sup> A reform like universal health care still begs the question, “universal to whom?” The answer is an existing status (like citizenship) or a new status, which will in turn become the site of contestation.<sup>252</sup>

Status-based regulation is made all the more inevitable because of the status-izing of contract. Each of the features of status—identity-based,

245. See, e.g., *Elden v. Sheldon*, 758 P.2d 582, 587 (Cal. 1988) (noting the “necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society,” as well as the “difficult burden on the courts” of opening up individualized inquiries).

246. As Paul Miller puts it, “[s]tatuses simplify semantically by giving us a provisional conceptual characterization of the normative position held by a person, . . . thereby relieving us of the burden of fully articulating . . . our conceptualization of that position in each and every case. . . . [S]tatuses simplify (narrow) practical reasoning, inviting those who rely upon them to bypass questions concerning the characterization of the normative position of the person . . . in favor of questions relating to the normative consequences of occupation of that position in a particular case.” Miller, *supra* note 24, at 35.

247. See *id.* at 36–37.

248. See, e.g., June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 1024 (2017) (arguing that that if individuals and the state, rather than employers, were responsible for providing health insurance, workers would be less dependent on their employers and better equipped to move between jobs, as well as less vulnerable during periods of unemployment); Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. (forthcoming 2021) (manuscript at 48–54) (arguing in favor of de-linking various forms of government support from marriage and employment) (on file with author).

249. See, e.g., MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (2019).

250. See, e.g., GUY STANDING, *BASIC INCOME: A GUIDE FOR THE OPEN-MINDED* (2017).

251. Compare Miranda Perry Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. 625, 671–79 (2020) (analyzing potential eligibility determinants such as age, work status, and immigration status, and concluding that universal basic income should be made available without respect to age and to citizens and legal permanent residents, but not other immigrants), with William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1890 (2001) (assuming that universal basic income, if ever implemented, would be distributed to citizens).

252. Another well-known example from the family law context is Martha Fineman’s proposal to “abolish marriage as a legal category” and replace it with the mother-child relationship, which would “be the base entity around which social policy and legal rules are fashioned.” MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 5–6 (1995). The relevant status would be “Mother/Child,” with motherhood qualifying a person for “privacy (without paternity), subsidy (without strings), space (to make mistakes).” *Id.* at 233.

bundled, mandatory rules that reflect and reinforce social hierarchies—are part of modern contract doctrine.

If there was ever a moment in which relationships did not “deform”<sup>253</sup> classical contract doctrine, it was brief and has certainly passed. Classical contract doctrine is premised on the belief in a set of neutral principles that are “blind to details of subject matter and person.”<sup>254</sup> A contract is nothing more than the product of the will of these depersonalized parties.<sup>255</sup> “Contract law describes itself as more private than public, interpretation as more about objective than subjective understanding, consideration as more about form than about substance.”<sup>256</sup> The emergence of contract law as a unification of principles governing negotiable instruments, sales, insurance, and more under the umbrella of “contract” was a nineteenth century invention<sup>257</sup> designed to express the ideology of the nineteenth century market economy.<sup>258</sup>

Numerous scholars have shown that the formalistic view of contract law as abstract and depersonalized has always been largely fictional. The identity of the contracting parties has always mattered. Morton Horwitz has shown, for example, that nineteenth century courts treated labor contracts differently from building contracts when it came to breaches of agreements to work for a fixed period of time.<sup>259</sup> Likewise, longstanding concepts like promissory estoppel and unjust enrichment focus on the conduct of the parties within the context of their relationship and provide legal relief beyond what the parties may have objectively willed.<sup>260</sup>

Indeed, virtually every aspect of contract doctrine expresses normative views about the law’s proper purposes and the ways in which parties should interact within a given relationship.<sup>261</sup> Defenses like public policy and

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253. Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 36 (2003).

254. GILMORE, *supra* note 23, at 7 (quoting LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20–24 (1965)).

255. See Snyder, *supra* note 253, at 41.

256. Dalton, *supra* note 19, at 1000.

257. See GILMORE, *supra* note 23, at 12 (noting that the law of “contracts” emerged after laws governing specialties such as negotiable instruments, sales, insurance, and more already came into existence); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 160 (1992) (“Modern contract law is fundamentally a creature of the nineteenth century.”); Snyder, *supra* note 253, at 39–40 (noting the origin of contract law in a “series of various kinds of transactions and different remedies”).

258. HORWITZ, *supra* note 257, at 185.

259. *Id.* at 186–87.

260. See GILMORE, *supra* note 23, at 62–80; see also Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 578–79 (1933) (noting that promissory estoppel is “social,” based on what reasonable people would do under the circumstances, and akin to “other civil wrongs or torts”).

261. See Cohen, *supra* note 260, at 587 (“[W]e also need care that the power of the state be not used for unconscionable purposes, such as helping those who exploit the dire need or weakness of their fellows.”).

unconscionability obviously express the law's (or at least a particular judge's) normative views about the subject matter of the contract or the reasonableness of the terms of the agreement or the parties' conduct.<sup>262</sup> The decision not to enforce a particular agreement based on its substance effectively transfers an entitlement from one party to the other, affecting the parties' rights.<sup>263</sup> Even the act of interpretation cannot be divorced from the context in which the agreement arose. The whole purpose of the parol evidence rule, for instance, is to determine when a written agreement is final and impervious to supplementation or interpretation through extrinsic evidence.<sup>264</sup> But the finality of the agreement is rarely assessed in a vacuum and often considers the parties' dealings and trade usage.<sup>265</sup>

In the realm of contract, then, the law is imposing substantive limits on the parties' commitments and conduct, enforcing norms embedded within the types of relationships at issue, and subverting the will of the parties to the preferences of the decision-makers.<sup>266</sup> In effect, contract law, just like status, imposes a package of duties and obligations that can extend to both the subject matter of the parties' exchange, as well as the ways in which the parties are obliged to interact.

We see the impact of relationships in the contexts of employment and nonmarriage. Courts have adopted default rules based on the perceived disparities in bargaining power between workers and employers, for instance, by construing ambiguous terms against employers<sup>267</sup> or varying the usual rules regarding specific performance.<sup>268</sup> The pervasiveness of unconventional contract outcomes in employment cases has led one scholar to bemoan work law's "unfortunate effects on contract doctrine."<sup>269</sup>

To see contract doctrine slide into status, one need look no further than nonmarital relationships. Courts have frequently refused to enforce agreements between intimates based on the subject matter of the agreement,

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262. See Russell, *supra* note 18, at 971–72 (unconscionability); Matsumura, *supra* note 18, at 163 (public policy).

263. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1114 (1972) (noting that "[p]rohibiting the sale of babies makes poorer those who can cheaply produce babies and richer those who through some nonmarket device get free an 'unwanted' baby").

264. See Dalton, *supra* note 19, at 1048–49.

265. *Id.* at 1049. Even if the court were to refuse to look at extrinsic evidence to determine whether the parties intended the agreement to be final, the court would have to rely on some other means—whether experience or intuition—to come to her conclusion; that experience or intuition would be based on the judge's own education, upbringing, and other personal circumstances.

266. Gregg Strauss has analyzed the use of these types of relational norms to inform the application of tort and contract doctrines to conclude that some form of status-based regulation of intimate relationships is unavoidable. See Strauss, *supra* note 67, at 1288–99.

267. See Bagchi, *supra* note 107, at 584 & n.13.

268. See Snyder, *supra* note 253, at 34 & n.11.

269. *Id.* at 35.

like promises to exchange domestic support for money, or to engage in or refrain from sexual conduct.<sup>270</sup> In a recent article, Albertina Antognini shows that although most jurisdictions claim to enforce agreements between cohabitants, courts frequently refuse to enforce even express agreements exchanging property for domestic services.<sup>271</sup> But they will enforce agreements when they involve the pooling of financial resources, like jointly running a business or purchasing real property.<sup>272</sup>

To state the obvious, people in arms' length relationships are welcome to contract for things like taking care of children, cooking, or cleaning the house; hence the existence of babysitters, nannies, and housekeepers. The fact that these same services are inalienable within the context of a cohabiting relationship shows that status is masquerading as contract. Non-enforcement transfers value from one party to the other. By refusing to enforce an exchange of domestic services for money, the law enables the wealthy party to get services from the other party for free.<sup>273</sup>

If one is in a cohabiting relationship, one can pursue joint financial projects, but cannot exchange money for domestic labor. Unlike strangers or spouses, partners who provide domestic services do so for free. These disabling impacts apply in combination with the lack of access to the default legal protections that spouses enjoy. As discussed above, in most jurisdictions, partners lack access to default property distribution, inheritance rules, and standing to sue based on injuries suffered by the other. They also lack access to federal benefits premised on marriage, like Social Security survivor's benefits,<sup>274</sup> although the same relationship may render them ineligible for Supplemental Security Income administered by the same agency.<sup>275</sup>

The totality of these consequences is a bundle of regulation—a status of “singleness”—that stems from the salient feature of the parties as unmarried cohabitants. Numerous scholars have shown that contract doctrine bears little resemblance to the narrow, abstract, and depersonalized conception with which it is often identified. These examples go further. They show that, with respect to relationships that society values, contract doctrine as currently constituted is status-like.

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270. See Matsumura, *supra* note 18, at 190–95; Silbaugh, *supra* note 41, at 78.

271. See Antognini, *supra* note 21, at 10–11.

272. See *id.* at 12.

273. See Calabresi & Melamed, *supra* note 263, at 1099 (noting the importance of where the law places initial entitlements to the distribution scheme).

274. See Liu, *supra* note 132, at 11–12.

275. See *Dutko v. Colvin*, No. 15-CV-10698, 2015 WL 6750792 (E.D. Mich. Nov. 5, 2015) (treating a cohabiting couple as married under Social Security Administration guidelines in order to deprive one of the partners of Supplemental Security Income benefits).

That some form of status regulation is inescapable does not mean that status systems are neutral with respect to values like autonomy and egalitarianism. Statuses can be broken down and reconstituted to better serve those values. Tailoring statuses to the needs and preferences of a greater percentage of the population would enhance autonomy, as would introducing a plurality of statuses to reflect a greater diversity of preferences.<sup>276</sup> A menu of options could moderate the disparities stemming from the current binary approaches, putting more people on comparable—or comparably different—legal footing. In so doing, a plural approach could also disrupt social meanings that favor some groups over others.

Reorienting legal rights around a status like citizenship rather than marriage or employment could have different salutary effects. As many have observed, citizenship does not practically guarantee equal enjoyment of legal privileges or equal distribution of the law's burdens.<sup>277</sup> Yet aspirationally, at least, citizenship connotes equal treatment and full membership in society.<sup>278</sup> It is therefore a powerful foundation from which to argue, as Kenneth Karst has, that “organized society treat each individual as a person, one who is worthy of respect,” or, “[s]tated negatively,” that organized society may not “treat an individual either as a member of an inferior or dependent caste or as a nonparticipant.”<sup>279</sup>

Shifting legal rights from the statuses of marriage and employment to something broader like citizenship would simultaneously ensure greater access to valued benefits and emphasize the importance of belonging at the national level. Significant dependency would be transferred from private parties to the state, reducing disparities between those parties. Allowing more people to fully participate in society would also foster a sense of national community.<sup>280</sup> As discussed above, citizenship has its own administrative and conceptual limits. The presence of undocumented minors, temporary workers, and others has tested the appropriateness of relying on citizenship as a defining characteristic.<sup>281</sup> Indeed, the very

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276. See *infra* Part IV.B.

277. See, e.g., Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 1–7 & *passim* (1988) (noting the nation's long struggle to abolish racial inequality and achieve equal citizenship); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 19–33 (1969) (examining how the experience of poverty deprives citizens of access to various valued rights).

278. See Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5 (1977).

279. *Id.* at 6.

280. See *id.* at 9 (arguing that “the opportunity to participate promotes the ‘sense of wholeness’ that must be maintained if America’s ‘segmented society’ is to function”).

281. As Hiroshi Motomura has observed, the question of “who belongs enough [in this country] to assert civil rights” has a long history. Motomura, *supra* note 90, at 476; see also LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 3 (2008) (“The experiences

concept of civil rights is predicated on borders: the ability to identify an “in” group to whom rights should flow.<sup>282</sup>

These difficult questions, however, merely illustrate the extent to which social hierarchies depend upon the ways legal statuses are constituted. That overarching question is the focus of the next Part.

#### IV. REFORMING STATUS

If social patterns and norms inevitably shift over time, then status, as a bundle of regulation stemming from a fixed identity, will eventually require reform.<sup>283</sup> The very features of status that undermine its operation point to related institutional design questions. We can ask whether to pursue a pluralistic approach instead of a binary one; to disaggregate legal incidents or keep them bound up in the relevant statuses; and how to police the boundaries of the status, for instance, by abandoning *ex post*, fact-intensive analyses for *ex ante* formalities, or making it easier to transition between statuses thereby mitigating the harsh consequences of leaving one status for another. Importantly, regulatory reforms must ask all of these questions simultaneously.

##### A. *What’s in the Bundle?*

As discussed in Part I, one of the characteristics of status is that it makes multiple legal rules turn on a single identity. An important institutional design question is how legal incidents should be bound up in a status or disaggregated. Lawmakers have constantly appended additional rights onto

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of being a citizen and enjoying citizenship, it turns out, are not always aligned as a practical matter; status noncitizens are the subjects of what many call citizenship in a variety of contexts.”). Jennifer Chacón and her collaborators have shown that citizenship-adjacent statuses such as Temporary Protected Status and DACA ultimately test understandings of what it means to be a citizen while simultaneously revealing the tenuousness of formal legal citizenship itself. See Jennifer M. Chacón et al., *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 13–22, 39–41, 54–66 (2018). Chacón notes that the “statist, territorial, rights-based, bounded and dialectic” understanding of citizenship has been contested, and that it might be more accurate to understand citizenship as “an iterative product of reciprocal exchange between ‘citizen’ and ‘state’ in which contextual notions of rights and obligations emerge discursively . . . .” *Id.* at 76.

282. Motomura notes that the purpose of national borders is “to divide ‘us’ from ‘them.’” *Id.* at 472. The concept of civil rights depends upon identifying the relevant community entitled to those rights, a task to which borders are central. See *id.* at 471–74; see also BOSNIAK, *supra* note 281, at 1 (“The idea of citizenship is commonly invoked to convey a state of democratic belonging or inclusion, yet this inclusion is usually premised on a conception of a community that is bounded and exclusive.”). A human rights framework, in contrast to civil rights, “cast[s] doubt on the centrality of state sovereignty” but is so broad that it has gained little traction. Motomura, *supra* note 90, at 473–74.

283. Looking beyond marriage and employment, Linda McClain has observed, for example, that the social understanding of parentage has shifted from primarily marital, to one that is increasingly nonmarital, tied to factors like biology and caregiving. See McClain, *supra* note 110, at 2135–37.

the frameworks of marriage and employment, making those statuses more consequential.<sup>284</sup> They could theoretically do the opposite.

An initial consideration is whether the status has inherent legal content. I am unaware of any scholars who argue that employment has a pre-political or inherent meaning. The same is not true for marriage, however. Some have argued that marriage is a permanent union of a man and a woman that is fulfilled through the bearing and rearing of children.<sup>285</sup> They ground this definition in religion or natural law and view the law as a reflection of these pre-legal meanings.<sup>286</sup> Those who believe that certain features of marriage law are divinely mandated or “natural” will oppose disaggregation, at least as to those features. At the moment, there is no support for this position on the Court,<sup>287</sup> although that could always change.

Assuming the substance of a status is not preordained, one important consideration when thinking about what rights should flow from a status is that those rights can make the status attractive to individuals, thereby inducing people to enter it.<sup>288</sup> Changes to the positive law of the status can affect its importance to individuals.<sup>289</sup> The more widespread the status, the more effective it will be at promoting socially desirable behavior.<sup>290</sup> Of course, some would advocate in favor of disaggregating status for the express purpose of diminishing its authority, which, in their view, would disrupt built-in hierarchies.<sup>291</sup>

Beyond the desire to promote or undercut the statuses themselves, aggregation and disaggregation are also tools to refine the ability of a status

284. See *supra* Parts I.B and II.C.

285. See, e.g., Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 246 (2011).

286. See Michael Boucai, *Before Loving: The Lost Origins of the Right to Marry*, 2020 UTAH L. REV. 69, 73–76; Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y 171, 176–77 (2008) (contending that natural law is connected to human dignity, specifically, “the quite literally awe-inspiring power to be an uncaused causing”).

287. See *Obergefell v. Hodges*, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting) (“[The Fourteenth Amendment] certainly does not enact any one concept of marriage.”); *id.* at 713 (Scalia, J., dissenting) (“The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can afford them favorable civil consequences, from tax treatment to rights of inheritance.”).

288. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (reasoning that marriage laws “offer an inducement” for couples to “make a solemn, long-term commitment to each other”), *abrogated by Obergefell*, 576 U.S. 644; *Califano v. Jobst*, 434 U.S. 47, 54 (1977) (recognizing that laws regulating based on marital status may have the effect of encouraging or deterring the choice to marry).

289. See Abrams, *supra* note 207, at 66 (arguing that the disaggregation of rights from marriage would change incentives to marry and might mitigate the unequal impact on individuals who cannot marry).

290. Cf. Schneider, *supra* note 110, at 498.

291. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 90 (2008) (advocating that we “knock marriage off its perch”); *id.* at 151 (wanting to “mak[e] marriage matter less”); see also ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 5 (2012) (providing a comprehensive critique of the inequities of marriage and advocating for “minimal marriage”).

to accurately impose legal consequences.<sup>292</sup> Marriage and employment do not always regulate coherently. Several influential scholars have argued, for example, that marriage is a poor proxy for benefit eligibility because it can be overinclusive or underinclusive: it doesn't prevent people from getting married for instrumental purposes, and it also fails to deliver benefits to people whose relationships justify those benefits.<sup>293</sup> If the purpose of subsidizing time off from full-time work is to provide caregiving, marriage is not the best way to determine who qualifies because of the number of people providing caregiving outside of marriage.<sup>294</sup> Richard Carlson has taken the argument a step further in the work law context. He has proposed “an approach to statutory coverage based on the character of the transactions between the parties instead of the status of the parties.”<sup>295</sup> Each legal consequence would depend on the nature of the work relationship at issue, rather than the status of the worker.<sup>296</sup> Carlson's approach would completely unravel employment status in favor of individualized, functionalist determinations.<sup>297</sup>

Although these arguments for functional disaggregation are compelling, these proposals tend not to consider the impact of disaggregation on the coherence of statuses. The enactment or elimination of any given marriage law can undermine a function that marriage promotes: the expansion of no-fault divorce, for example, challenged the understanding of marriage as a

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292. Lee Anne Fennell has observed that “law can make it easier or harder to slice up unified things or assemble fragmented things.” LEE ANNE FENNEL, *SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE* 24 (2019). The phenomenon of aggregating legal incidents, which she calls “lumpiness,” bears on the optimal configuration of resources and can also influence decision-making in favor or against the lumpy goods. *See id.* at 26.

293. *See* POLIKOFF, *supra* note 291, at 123–31 (noting that marriage law has various purposes, not all of which are best served by including marital relationships to the exclusion of others); Abrams, *supra* note 207, at 54–55. Linda McClain has argued that the thought experiment of disaggregating the benefits of marriage and assigning them to relationships based on function would not only help to answer whether and how to regulate nonmarital relationships, but would also clarify whether the government should be relying on relationships as the fulcrum of regulation in the first instance. *See* LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 201–02 (2006) (also noting that the task would “be quite burdensome and time-consuming”).

294. *See* Abrams, *supra* note 207, at 56–57. Other family law scholars have proposed disaggregating benefits from marriage and assigning them based on the functions they perform, based on the same desire to more accurately provide rights to those who deserve them. *See* POLIKOFF, *supra* note 291, at 123–31; Blumberg, *supra* note 127, at 1140 (analyzing laws governing “workers’ compensation, social security, . . . spousal support . . . , public assistance, and income taxation” to see whether cohabitants should be included based on “the underlying purpose of the statute”).

295. Carlson, *supra* note 2, at 301.

296. *Id.* at 356. The same California statute that protects employees but not independent contractors from discrimination in hiring and firing, for example, extends protections against harassment to “person[s] providing services pursuant to a contract.” CAL. GOV'T CODE § 12940(j)(1).

297. Carlson, *supra* note 2, at 301. Other proposals are content merely to subtract the rights that do not make sense, while continuing to distribute the bulk through the status itself. *See, e.g.,* Estlund, *supra* note 236, at 303–15; Perritt, *supra* note 178, at 123–46.

permanent union.<sup>298</sup> Every change to the positive law of a status has the potential to affect the status's coherence with respect to the functions the status is expected to perform.<sup>299</sup> The more coherent the status, the more effective it will be at governing conduct and serving its intended purposes.<sup>300</sup>

Proponents of disaggregation rarely ask about the impact on the other regulatory features of the status. Carlson, for example, assumes that “[e]mployee status matters mainly because our employment laws make it matter,”<sup>301</sup> without considering whether the concept of employment helps to regulate behavior beyond merely being a conduit for rights. He does not ask whether a relatively stable and capacious conception of employment helps workers to figure out their obligations, such as tax filing, or what duties are owed to them by their employers, such as family leave benefits.<sup>302</sup> Similarly, proposals to disaggregate marital rights have not first articulated answers to the questions, “What do we want marriage to do, and what is marriage capable of doing?”<sup>303</sup> It may well be that disaggregation would improve regulation, but we cannot simply jump to that conclusion.

### B. One Form or Many?

As discussed above, statuses impose mandatory consequences—awarding benefits or imposing burdens at least some of which are beyond the power of the parties to change. Under a binary approach, the law chooses between the two options and imposes legal consequences accordingly. In contrast, a pluralistic approach would regulate work and intimate relationships through multiple statuses.

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298. See James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 41–44 (2003); Matsumura, *supra* note 29, at 481.

299. See Matsumura, *supra* note 29, at 473–74, 483–84; see also Abrams, *supra* note 207, at 64 (suggesting that “[w]e could . . . think about what combinations of functional categories might ideally make up modern marriage, and which categories we could instead split off altogether”); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 313–14 (2004) (proposing to identify the functions marriage is expected to perform and to configure rights to serve those, and only those, functions); Lebrón, *supra* note 72, at 193 (arguing against the privileging of family forms instead of the social goods that the law should legitimately promote). For a discussion of these ideas within the context of parental status, see Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J.L. & GENDER 119, 133 (2018).

300. See Matsumura, *supra* note 29, at 479.

301. Carlson, *supra* note 2, at 368.

302. Studies of the role of social norms in the regulation of employment relationships from contexts other than worker classification suggest that norms could be a valuable tool to educate workers about their legal rights and obligations. See Pauline T. Kim, *Norms, Learning and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447, 499–506.

303. Abrams, *supra* note 207, at 64; see also Matsumura, *supra* note 29, at 473 (noting the importance of identifying a hierarchy of functions marriage performs before assessing the desirability of changes to the positive law of marriage). *But see* Hamilton, *supra* note 299 (identifying functions of marriage and arguing that some should be disregarded).

Scholars have offered several arguments in favor of pluralism. The dominant argument is rooted in autonomy. Increasing the number of statuses increases the range of options available for people from which to choose.<sup>304</sup> A multiplicity of options is important for several reasons. First, it recognizes that the world is composed of a plurality of goods, many of which are incommensurable.<sup>305</sup> Because these goods cannot be ranked, the law cannot determine that one is best, requiring that the choice be made instead by people who hold different values.<sup>306</sup> Second, people should be the authors of their own lives, and this authority requires meaningful options from which to choose.<sup>307</sup> In fact, “[f]or choice to be effective, for autonomy to be meaningful, there must be (other things being equal) ‘more valuable options than can be chosen, and they must be significantly different.’”<sup>308</sup> Where statuses are defined by the state—and where most of the rights associated with those statuses fall beyond the scope of private agreements—the state has a duty “to create a diversity of social institutions that enable the individual to make genuine and meaningful choices between various alternatives.”<sup>309</sup> Expanding options expands choice, which expands autonomy.

There is a related utilitarian justification for a pluralistic approach. William Eskridge has argued that “most human beings potentially flourish in relationships, and American family law ought, presumptively, to provide a supportive context for such relationships and for the rearing of children.”<sup>310</sup> Where different forms of relationships give rise to valued goods such as “pleasure, sociability, and collective advancement,” the law should sanction and support those forms of relationships.<sup>311</sup> Eskridge notes that the law can support such beneficial relationships by promoting commitment and stability, providing efficient decision rules governing topics like medical decision making and inheritance, and protecting

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304. See, e.g., Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1569 (2009).

305. WILLIAM A. GALSTON, *LIBERAL PLURALISM* 30 (2002). Galston notes that pluralism is not the same as relativism. That is, there is “a nonarbitrary distinction between good and bad or good and evil.” *Id.* Within the realm of genuine goods, however, ranking may not be possible. *Id.*; see also Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 328 (2016).

306. See GALSTON, *supra* note 305, at 30–31; Lifshitz, *supra* note 304, at 1571 (noting the importance of state “tolerance for couples’ life-styles”).

307. See HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 69 (2017) (citing JOSEPH RAZ, *THE MORALITY OF FREEDOM* 372 (1986)); Lifshitz, *supra* note 304, at 1593.

308. DAGAN & HELLER, *supra* note 307, at 69.

309. Lifshitz, *supra* note 304, at 1593 (characterizing this duty as a positive obligation rather than the negative duty to refrain from imposing formal limitations on individual choice); see also RAZ, *supra* note 307, at 265 (noting the importance of multiple frameworks to support choice).

310. Eskridge, *supra* note 101, at 1890.

311. *Id.* at 1898, 1900.

vulnerable persons.<sup>312</sup> Many of the proponents of pluralism appear to endorse this utilitarian justification, proceeding under a sort of “is as ought” view<sup>313</sup> in which the legal structures ought to arise to reflect evolving relationship structures.<sup>314</sup>

A binary choice regime could also deter beneficial conduct in situations where a person would be willing to engage in some, but not all, of the conduct necessitated by the binary choice. Lee Fennell observes that “[i]f a socially beneficial [option] falls just short of being privately worthwhile, it may not be produced at all—even if the actor would have been willing to undertake most of the socially desirable action if it had been sliced up into smaller increments, with proportionate costs and benefits attached to each increment.”<sup>315</sup> Uber, for instance, has expressed a willingness to provide medical and disability coverage for injuries suffered on the job, as well as antidiscrimination protections and other benefits.<sup>316</sup> If required to treat drivers as employees or independent contractors, though, it will opt for the latter.<sup>317</sup>

Finally, tying together this Section and the previous, a plurality of statuses may have the effect of making differences between the options less consequential, essentially making any given status matter less as compared to the others. Such a move would likely disrupt social hierarchies.<sup>318</sup> Additionally, with less riding on a single privileged status, lawmakers might be less reluctant to experiment with and revise the various options. Corporate law provides an example of both pluralism and an openness to experimentation. State statutes typically distinguish between domestic and

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312. See *id.* at 1946–47.

313. Cf. Barbara Fried, *Is as Ought: The Case of Contracts*, 92 VA. L. REV. 1375, 1389 (2006) (noting the tendency to confuse “what is” for “what ought to be”).

314. See, e.g., Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 273 (2013) (noting that some advocates of same-sex relationship recognition called for the recognition of many different kinds of relationships in furtherance of equality); David J. Herzig, *Marriage Pluralism: Taxing Marriage After Windsor*, 36 CARDOZO L. REV. 1, 3 (2014) (noting that the creation of new legal approaches arose to accommodate “new social pluralism”).

315. FENNELL, *supra* note 292, at 74.

316. See Dara Khosrowshahi, Opinion, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html> [<https://perma.cc/622E-ZUZE>].

317. Several scholars have engaged this question in the family law realm. Linda McClain has analyzed whether allowing partners to calibrate (or tailor) their levels of commitment will “have a detrimental effect on marriage as an aspirational model of commitment.” MCCLAIN, *supra* note 293, at 208. She concludes that the benefits of allowing partners to tailor their commitments would “advance personal goods like security and caring for others, as well as social goods like ensuring care in the case of incapacity or providing financially for one’s survivors.” *Id.* at 209. Mary Charlotte Carroll has argued, in the marriage context, that many individuals may want some of marriage’s rights and obligations, but might stop short of marriage because it is just “too much.” See Carroll, *supra* note 191, at 483–88.

318. See *id.* at 507–13 (examining the growth in popularity of the French pacte civil de solidarité and Belgian legal cohabitation statuses as alternatives to marriage).

foreign corporations, as well as for-profit and nonprofit corporations.<sup>319</sup> They also impose different rules for closely held corporations.<sup>320</sup> Corporations may fall into additional types, including public or private, professional, municipal, religious, educational, charitable, and more.<sup>321</sup> The law is constantly evolving, creating new forms of business entities such as limited liability companies, limited liability partnerships, and limited liability limited partnerships.<sup>322</sup> In an already pluralistic system, the creation of new forms hardly seems problematic.

There are several arguments against a pluralistic approach. I have previously argued that limiting the number of statuses or forms can help to settle parties' expectations and convey information about that status's legal content.<sup>323</sup> My argument builds on the work of Thomas Merrill and Henry Smith, who have hypothesized that property rights track a limited number of standard forms—what they call the *numerus clausus*—to reduce the costs of processing information about those rights.<sup>324</sup> Merrill and Smith argue that standardization of rights makes it easier to determine the duties arising from a particular piece of property and to identify the appropriate rightsholder.<sup>325</sup> Although scholars have taken aim at this influential theory, most agree that the *numerus clausus* facilitates the acquisition of important information even if they disagree on how and for what purpose that information should be used.<sup>326</sup> When it comes to the regulation of the family, the *numerus clausus* of marriage satisfies various informational needs, including notice to the spouses themselves that they are actually married; notice to the spouses of the legal duties that they owe to the state, third parties, and each other; and notice to third parties that the spouses are married.<sup>327</sup>

The opposite of the *numerus clausus*—a proliferation of statuses—can be cognitively taxing, and may impair choice by making it too difficult to comprehend the various options.<sup>328</sup> Even if the number of options does not rise to the level of cognitive overload, the presence of multiple statuses poses two risks: first, that people (including the parties to the relationship as well as third parties) will not understand the differences between the

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319. See 1A FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 70.

320. See *id.*

321. See *id.* § 49.

322. See *id.* § 17 (noting that these forms are of recent vintage).

323. See Matsumura, *supra* note 29, at 497.

324. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–8 (2000).

325. See *id.* at 8.

326. See Matsumura, *supra* note 29, at 499.

327. *Id.* at 500. Guy Davidov has pointed out the importance of the informational function in the employment context, noting that a “unified concept” of employment “makes it possible for people to know their status and rights.” Davidov, *supra* note 29, at 133, 150.

328. See DAGAN & HELLER, *supra* note 307, at 128 (discussing the problem of cognitive overload); Matsumura, *supra* note 29, at 517.

options or will manipulate the boundaries between them;<sup>329</sup> and second, to the extent that inclusion is subject to fact-intensive determinations, that adjudication will be complicated and costly.<sup>330</sup> In either case, a pluralistic approach may destabilize expectations unless the different statuses and their entry requirements are distinct and well-defined.<sup>331</sup>

These considerations should guide debates over whether to address worker classification and relationship recognition problems through the introduction of additional statuses. In particular, policymakers should analyze whether additional statuses would expand meaningful choice or interfere with it; and promote beneficial relationships or gamesmanship and status arbitrage.

In the relationship context, I have argued, based on these considerations, that proposals to allow spouses to dictate the legal consequences of their own marriages (creating an infinite variation of marital statuses)<sup>332</sup> or to promote the proliferation of nonmarital statuses could end up impacting both autonomy and relationship stability.<sup>333</sup> After a certain point, whether three or four or more, the addition of statuses could make it difficult for people to understand the legal significance of their relationship, interfering with their ability to make a self-defining choice.<sup>334</sup> It would also make it more difficult for third parties to determine the consequences of interacting with the partners, imposing investigation costs and preventing them from enforcing social norms.<sup>335</sup> In short, the status options must be meaningfully distinct.<sup>336</sup>

California's domestic partnership status is an example of what could have been. It currently provides registrants with the same rights and responsibilities as married couples under state law.<sup>337</sup> The initial version of

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329. See DAGAN & HELLER, *supra* note 307, at 129.

330. Katharine Baker has observed that many family law rules of decision have grown more formulaic even as family forms have become more diverse. See Katharine K. Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law when There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 364–65. She speculates that the willingness of judges to accept formulas governing subjects like child support and property division reflects a “frustration with flexible standards” and a desire on the part of courts, lawyers, and the litigants themselves to avoid invasive, time-consuming, and expensive determinations. *Id.* at 365–66; see also Katharine K. Baker, *What Is Nonmarriage?*, 73 SMU L. REV. 201, 209 (2020) [hereinafter Baker, *What Is Nonmarriage?*].

331. Cf. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 489 (1983) (noting the destabilizing effect of leaving relationship status to subjective determinations).

332. See, e.g., Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1490–91 (2001).

333. See Matsumura, *supra* note 29, at 513. I have argued that the same concerns arise from allowing spouses to enter agreements governing the property consequences of their marriage, which might be a reason to restrict certain types of marital contracts. See *id.* at 518.

334. See *id.* at 514–16.

335. See *id.*

336. See *id.* at 516–17.

337. CAL. FAM. CODE § 297.5(a) (West, Westlaw through Ch. 372 of 2020 Reg. Sess).

the law, however, included a much more limited set of rights: domestic partners were allowed to register their relationship, to obtain coverage under state health and benefit plans if they were state employees, and to visit their partners in hospitals without fear of being turned away.<sup>338</sup> The early version of domestic partnership shows that a status with a different and more limited set of rights is possible to enact and would recognize a very different type of relationship.<sup>339</sup>

The same principles should be used to assess proposals to create alternate statuses to employment. Seth Harris and Alan Krueger, for example, have proposed the creation of a status for “independent workers.”<sup>340</sup> The status would apply to workers who find themselves in a triangular relationship between customers needing a service (e.g. a car ride or food delivery) and an intermediary, typically a technology company (e.g. Uber or Postmates).<sup>341</sup> Harris and Krueger propose that these independent workers be allowed to collectively bargain and receive civil rights protections, and that intermediaries be allowed to withhold taxes and opt into workers’ compensation regimes, but that the workers would not be subject to wage and hour protections or unemployment insurance, among other things.<sup>342</sup>

That the status would turn on a highly salient feature of the parties’ relationship minimizes the likelihood that the additional status would cause confusion or dilute the meaning of the existing statuses. The rights and obligations also appear to be tailored to the specific features of the relationship like the fact that the relevant unit of compensation may be measured in services performed (like deliveries or rides) rather than hours worked. However, because workers and firms would not be able to choose the worker’s employment status, whether the Harris and Krueger proposal better protects party autonomy rests completely on whether a greater number prefer it to the other options. And although workers would receive collective bargaining rights and civil rights protections, among other things, one might still ask whether the benefits to workers optimally protect them

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338. See Kaiponanea T. Matsumura, Comment, *Reaching Backward While Looking Forward: The Retroactive Effect of California’s Domestic Partner Rights and Responsibilities Act*, 54 UCLA L. REV. 185, 189 (2006) (describing the impact of Assembly Bill 26, enacted in 1999).

339. Cf. Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 300–03 (2013).

340. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* (The Hamilton Project, Discussion Paper No. 2015-10, 2015).

341. *Id.* at 9.

342. *Id.* at 15–21. Other proposals vary the definition of the relevant identity category by focusing on slightly different aspects of the relationship and then tailor legal obligations accordingly. See, e.g., Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1441 (2016) (proposing a new status for workers “who use excess capacity—but still work for companies that exercise a strong degree of control”); Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J.L. & TECH. 443, 480–81 (2018) (proposing an “independent employee” status).

from exploitation while still allowing the firms to make reasonable profits. Nonetheless, solutions like these appear to reap several benefits of a pluralistic approach.

### C. *Who Is in?*

After the law determines the scope of the status or statuses, it must also decide second-order questions pertaining to the administration of those statuses. One aspect of this inquiry focuses on how to determine whether a person falls within a status category. A second aspect regulates the transition between statuses.

#### 1. *Timing, Tests, and Decision-Makers*

As discussed above, firms and workers cannot definitively classify a worker as an employee or independent contractor at the outset of their relationship. Instead, employment status is only ever definitively established at some later time through a judicially administered, fact-intensive test.<sup>343</sup> Marriage, by contrast, has moved in the direction of formality. That means that nonmarital partners have not invoked formalities otherwise available to them.<sup>344</sup> Like employment status, disputes therefore arise at the end of the relationship, whether due to dissolution or death.<sup>345</sup>

The comparison between these contexts reveals several design variables: timing, the role of formalities, and institutional actors.

On the question of timing, the determination whether a person falls within a particular status can be made at the beginning of the relationship—*ex ante*—or sometime down the road—*ex post*. A primary benefit of *ex ante* determination is that the parties “know the legal rules before they act” rather than having to wait “until litigation has been completed.”<sup>346</sup> They can therefore adjust their behavior accordingly.

The benefits of *ex ante* determinations become clearer when considering the costs delaying the determination. *Ex ante* ambiguity increases the likelihood of horizontal inequity: the possibility that similarly situated

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343. See Carlson, *supra* note 2, at 298 (“The real work of identifying ‘employees’ and their employment relationship has always been in the courts.”).

344. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1770–72 (2005); Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 782–85 (2015).

345. There are a few exceptions to this statement. See, e.g., Matsumura, *supra* note 166, at 2035 (discussing immigration and SSI cases); Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1327, 1344 (2019) (discussing insurance cases).

346. *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring); see also Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 976 (1995).

people will be treated differently.<sup>347</sup> For every status determination that is adjudicated by the courts, many more relationships end without oversight. Workers who could be classified as employees and intimate partners who could establish implied agreements to share property as if married will never bring those claims. Similarly situated relationships may therefore result in completely different legal treatment. This inconsistency impedes the development of clear social norms around these statuses: if people who are similarly situated are treated differently under the law, then it becomes difficult to identify particular factual characteristics and circumstances with particular statuses.<sup>348</sup> The lack of clear norms deprives the law of a powerful enforcement mechanism that would otherwise be available to reinforce the status.<sup>349</sup>

Leaving status adjudications to later in the relationship, if ever, also affects the rights of the State and third parties. Take an example from the family law context. Suppose that a cohabiting couple shares a residence and pools earnings and expenses, but does not get legally married because they would owe more in federal taxes or one of them would become ineligible for Supplemental Security Income payments.<sup>350</sup> The chance that the government will pursue these individuals for back taxes or benefits is extremely low, because many of the underlying facts will not be presented to the relevant decision makers.<sup>351</sup> The government is therefore deprived of resources to which it might otherwise be entitled. An *ex post* enforcement regime relies heavily on individuals within putative status relationships to bring the relationships to the law's attention when they seek judicial resolution of private disputes, but most people are simply not motivated to bring these challenges.

Yet *ex post* determination has its benefits. As Adam Cox and Eric Posner have observed, *ex ante* screening systems are based on limited information

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347. The concept of horizontal equity is frequently used in the tax context to refer to similarly situated individuals paying similar amounts of tax. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 580 (1986).

348. See Matsumura, *supra* note 29; Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 360–63 (2015).

349. See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1907 (2000) (arguing that “the social norms surrounding marriage create in the individual spouse a sense of obligation to behave as expected”).

350. See Alstott, *supra* note 127, at 705 (describing the impact of the marriage penalty); Matsumura, *supra* note 166, at 2036 (noting the incentives that some have to avoid marriage in order to obtain means-tested benefits).

351. The IRS recognizes common law marriages, but only when a state has already deemed the marriage to exist. Rev. Rul. 58-66, 1958-1 C.B. 60, 1958 WL 10653. The Social Security Administration will apply its own definition of marriage, which extends to people “living together in the same household” who “lead people to believe that [they] are husband and wife.” 20 C.F.R. § 416.1806(a)(3) (2019). The fact that Westlaw contains only ten cases citing to this regulation suggests that denials of benefits based on an informal relationship are exceedingly rare.

and may therefore be less accurate. Statuses aim to regulate relationships marked by certain traits, whether that is control, interdependency, vulnerability, commitment, or a combination of those and other traits. In making its classification decisions, the goal of the legal system is to accurately match the desired trait(s) with the appropriate status.<sup>352</sup> Cox and Posner note that *ex ante*, it might be difficult to determine whether a particular individual belongs to a particular status because that person might not know whether she possesses the relevant traits, or may actively be trying to conceal that information.<sup>353</sup> They use as an example whether an immigrant is assimilable—she may not know whether she will fit in or, if she plans to commit crimes in the country, she will not say.<sup>354</sup> A gig worker might be in the same boat at the outset of the relationship—she might not currently plan to work a full schedule on the technology company platform; likewise, a nonmarital partner might not know whether the relationship will develop into one of mutual dependency. We will always know more about the nature of an employment or nonmarital relationship when a dispute arises than at the outset.

A related design question has to do with the use of formalities. Formalities provide several benefits. In his classic work, *Consideration and Form*, Lon Fuller argued that formalities serve three functions: evidentiary, cautionary, and channeling.<sup>355</sup> Whether through a writing, attestation, or notarization, a formality provides evidence of the thing that matters.<sup>356</sup> Formalities also act “as a check against inconsiderate action.”<sup>357</sup> Fuller refers to the gravity of affixing and impressing the wax seal; more than one movie has featured a wedding ceremony inducing “cold feet.” Finally, formalities focus the parties’ attention such that proof of formalities becomes proof of the thing itself.<sup>358</sup> In marriage, this is the license and ceremony.<sup>359</sup> Jessica Clarke has argued that this channeling function has implications for public ordering as well: “by informing parties of the steps they should take to claim a particular legal status,” formalities ensure that people will end up in uniform status categories, making it easier to administer the legal consequences that flow therefrom.<sup>360</sup>

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352. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 824 (2007) (“A central second-order design question [of immigration law] is how to sort applicants for immigration, so that only the desired types are admitted, where the desired type is just the type of person who satisfies the criteria derived from a state’s first-order immigration goals.”).

353. See *id.* at 824–26.

354. *Id.* at 824.

355. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941).

356. *Id.* at 800; see also Clarke, *supra* note 344, at 771.

357. Fuller, *supra* note 355, at 800.

358. *Id.* at 801.

359. Matsumura, *supra* note 166, at 2011.

360. Clarke, *supra* note 344 at 773, 786.

Like *ex ante* determinations, formalities can enhance autonomy by facilitating self-defining choice, reducing uncertainty about the legal consequences of one's actions, and encouraging parties to make relationship-specific investments that they might otherwise avoid.<sup>361</sup> Formalities also promote autonomy by reducing the possibility of judicial or other forms of interference. Mary Anne Case has observed that formalities provide spouses who invoke them with substantial freedom to structure their relationships as they see fit. Wielding a marriage license, a married couple "is by and large free to have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, to commingle their finances or keep them separate, to live together or separately," and more, all while being recognized as married by the state.<sup>362</sup> To put it another way, formalities shield people in a relationship from prying inquiries about the nature of their relationship, assuming one can take advantage of them.<sup>363</sup> Conduct-based tests, in contrast, provide opportunities for the state to express more fine-grained views about the "proper" nature of the regulated relationships.<sup>364</sup>

This same shielding function becomes a problem, however, if one of the parties to the relationship is vulnerable to exploitation or abuse. Tests based on the conduct of the parties allow courts to peer behind the parties' status determinations, providing some degree of protection for the more vulnerable parties.<sup>365</sup> Whether to rely on formalities therefore depends on the risk that one of the parties will engage in status arbitrage or other forms of exploitation.

A final consideration is whether to commit the classification decision to courts or other entities. Clerks or ministerial officials rather than courts currently process marriage licenses; courts or adjudicative bodies rather than ministerial officials determine employment status. But the law could

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361. See Matsumura, *supra* note 166, at 2030–31.

362. Case, *supra* note 344, at 1765.

363. See Baker, *What Is Nonmarriage?*, *supra* note 330, at 203–04. The fact that many states amended their marriage laws to restrict same-sex couples from obtaining marriage licenses shows that formalities can also communicate its expectations about ideal relationships. The point here, though, is that once the state makes the formalities available, its power to pry into the relationship is substantially diminished.

364. Some jurisdictions will actually impose marriage on formally unmarried people in order to prevent them from engaging in conduct the law disapproves, whether failing to support an intimate partner, *see* Dutko v. Colvin, No. 15-CV-10698, 2015 WL 6750792 (E.D. Mich. Nov. 5, 2015) (treating a cohabiting couple as married under Social Security Administration guidelines in order to deprive one of the partners of Supplemental Security Income benefits), or living in a polyamorous relationship, *see* State v. Green, 99 P.3d 820 (Utah 2004) (in which the state applied the common law marriage statute to an avowed polygamist who avoided being formally married to more than one wife at a time in order to prosecute him for bigamy).

365. Yuval Feldman, *Ex-Ante vs. Ex-Post: Optimizing State Intervention in Exploitive Triangular Employment Relationships*, 30 COMP. LAB. L. & POL'Y J. 751, 757 (2009) (noting the pressure employers face to cut their production costs by classifying workers as independent contractors).

manipulate these pairings to allow courts to perform *ex ante* determinations of status, or parties to register their relationships after the fact.<sup>366</sup> The main considerations are cost and expertise: courts have the tools to examine complicated and conflicting factual accounts, but those inquiries are also resource-intensive.

The foregoing insights help to sharpen analysis of status reform proposals. When it comes to the regulation of nonmarital relationships, most scholarly attention has focused on *ex post* solutions.<sup>367</sup> A common objection to the imposition of obligations on cohabitants after the fact is that it interferes with individual autonomy.<sup>368</sup> Many cohabitants, however, are not deciding to enter a relationship because of expectations about the legal consequences of their relationship or making a conscious choice to enter a particular type of relationship at all.<sup>369</sup> The lack of clear *ex ante* rules is not thwarting their attempts to plan a concrete course of action (not having one anyway). A more serious objection is that significant legal consequences—including redistribution of property titled in their name—are being imposed without notice: the law has not assisted them in choosing that consequence.<sup>370</sup> Another problem with the *ex post* approach is that it invites invasive, moralistic inquiries in an area—the regulation of intimacy—where the Court has told us we should be especially concerned about states passing judgment.<sup>371</sup> The inquiries are also likely to be inefficient in two, mutually exclusive respects: first, many people who fit the definition will never come to the courts' attention,<sup>372</sup> meaning that the *ex post* approach will not be accomplishing its objectives; second, adjudications will be fact-intensive, consuming party and judicial resources.<sup>373</sup>

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366. Courts already perform some *ex ante* status determinations. For example, they approve adoptions, see DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & LINDA C. MCCLAIN, CONTEMPORARY FAMILY LAW 377–78 (5th ed. 2019), and, in some jurisdictions, pre-approve surrogacy contracts that confer parental rights, see, e.g., CAL. FAM. CODE § 7962(e) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.).

367. But see Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573 (2013); Culhane, *supra* note 189.

368. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 856 (2005).

369. Joslin, *supra* note 225, at 971–72 (citing social science research suggesting that cohabitants “slide” into their relationships).

370. See Lifshitz, *supra* note 304, at 1593.

371. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (condemning efforts by the state to “seek to control a personal relationship” or “define the meaning of the relationship”).

372. See, e.g., Antognini, *supra* note 21 (noting the small number of nonmarital contracts cases).

373. See Baker, *What Is Nonmarriage?*, *supra* note 330, at 205, 222–24.

## 2. *Transitions*

Related to the question of how to determine whether someone is a member of the relevant identity group—really, a question about entrance—is the question about how to facilitate exit—really, a question about transition. Rules can reinforce the connections between parties (what I will call tethering rules) or facilitate portability and movement (what I will call transition rules). The choice of a tethering or transition rule can affect the ease with which people move between statuses.

Tethering rules reinforce status relationships by encouraging the partners to become more interconnected or making it more difficult for them to disentangle from each other. Virtually all the legislative proposals to deal with worker classification in the face of gig employment fall under this description.<sup>374</sup> Making it easier to classify a worker as an employee promotes dependency on the employer.<sup>375</sup> Another critical focus of workers' rights advocates has been to make it harder for employers to terminate workers, substituting "just cause" termination for "at-will" employment.<sup>376</sup> By requiring terminations to be non-arbitrary, the just cause standard is another rule that tightens the relationship between worker and employer. There are also rules designed to encourage workers, as opposed to employers, to stay in an established relationship. Many retirement plans do not become the worker's property immediately, but vest over time, either when a "cliff" is reached (for instance, three years of employment), or graded over time (for instance, 20% ownership after two years, 40% after three years, etc.).<sup>377</sup> Many employee stock plans similarly vest over time, meaning that an employee will only realize the full value of stock options or stock-based compensation if she remains employed for a predetermined period of time.<sup>378</sup> Although employers have the ability to set vesting rules, the parameters of those rules are determined by ERISA.<sup>379</sup> Finally, pensions can be structured to promote an ongoing relationship between employer and

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374. See *supra* notes 181–184 (discussing legislation enacted or proposed in response to the online gig economy).

375. See Estlund, *supra* note 236, at 325 (noting that the "signature features" of the standard employment relationship are "worker dependency and managerial domination").

376. Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 9–11 (2010) (identifying just cause employment as one of the signature accomplishments of organized labor).

377. See *Retirement Topics – Vesting*, IRS (June 18, 2020), <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-vesting> [<https://perma.cc/SYB2-PDGV>].

378. See, e.g., Steve Blank, *How to Make Startup Stock Options a Better Deal for Employees*, HARV. BUS. REV. (Apr. 3, 2019), <https://hbr.org/2019/04/how-to-make-startup-stock-options-a-better-deal-for-employees> [<https://perma.cc/9KMG-4HUE>].

379. See *FAQs About Retirement Plans and ERISA*, DEP'T OF LAB., <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-compliance.pdf> [<https://perma.cc/ND8K-YYVQ>].

worker, even after workers retire. General Electric, for example, is responsible for paying billions of dollars in lifetime benefits to close to 400,000 former employees.<sup>380</sup> The former employees remain dependent on GE and its continuing solvency.<sup>381</sup>

Family law has its tethering rules as well. Marital property rules make spouses economic partners by subjecting property earned during the marriage to equitable division and holding spouses liable for marital debts.<sup>382</sup> States impose waiting periods for no-fault divorce, literally extending the period in which the spouses are treated as a unit.<sup>383</sup> Alimony extends one spouse's support obligation beyond the end of the marital relationship, in some instances making a former spouse support the other for an indefinite period of time.<sup>384</sup> Proposals to impose status-based obligations on cohabitants extend marital property and alimony rules to people in marriage-like relationships. The ALI Principles, for example, would, for the most part, apply marital property rules when dividing property between cohabitants,<sup>385</sup> and would treat them the same for purposes of awarding alimony.<sup>386</sup>

Tethering rules encourage parties to stay in the relationship and promote dependency by making it more difficult for parties to avoid their obligations to each other. However, they have several downsides. They function less effectively if the parties ultimately control entrance and exit from the relationship. Even just cause termination rules, for instance, do not provide much protection to workers because of the difficulty of proving arbitrary termination.<sup>387</sup> If responsibilities end with the relationship, then the more vulnerable party faces a potentially steep drop-off. If the rules instead promote contact between the parties after they have exited the status, that has its own drawbacks. The financial fate of the former GE employees discussed above, for instance, turns on the ability of the company's current managers to preserve the company's solvency. And alimony promotes

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380. Thomas Gryta, *GE to Freeze Pensions for 20,000 Workers*, WALL ST. J. (Oct. 7, 2019, 5:15 PM), <https://www.wsj.com/articles/ge-unveils-pension-plan-changes-aimed-at-paring-deficit-debt-load-11570447318> [<https://perma.cc/QQ5T-MMWY>].

381. *See id.* (noting that GE's pension is underfunded by \$27 billion, and that health care obligations for former employees alone are \$4.8 billion).

382. *See* ABRAMS ET AL., *supra* note 366, at 633–34.

383. *See id.* at 535.

384. *See, e.g.*, *Broemer v. Broemer*, 109 So. 3d 284, 289 (Fla. Dist. Ct. App. 2013) (noting that a long-term marriage gives rise to a presumption of permanent alimony that lasts until the death of either party or the remarriage of the obligee).

385. ALI PRINCIPLES, *supra* note 224, § 6.04–.05 (discussing characterization and division of property).

386. *Id.* § 6.06.

387. *See* Arnov-Richman, *supra* note 376, at 17–23.

contact between the former spouses, sometimes also triggering litigation over modification or termination.<sup>388</sup>

Finally, these rules often encourage inefficient investments of human capital. As David Charny has observed, in the 1980s and 1990s, firms faced “enormous overcapacity” in human capital assets: they had a glut of workers “with much experience in their jobs, whose skills produce[d] goods that [were] no longer in sufficiently great demand to justify full employment.”<sup>389</sup> Tethering rules make it more likely that this overcapacity will develop, along with the accompanying cutbacks that inevitably follow.<sup>390</sup> A related problem arises in the family law realm: marriage, through a combination of marital property rules and gender norms, often induces one spouse, historically the wife, to invest in the other’s economic success in exchange for a deferred promise of shared gains in later years.<sup>391</sup> That investment only makes sense if the marriage is likely to last, and many marriages do not. A rule preventing the creation of marital property would logically provide a greater incentive for both spouses to remain in the workforce, making it more likely that a person would be independently financially secure.<sup>392</sup>

Transition rules would make it easier for parties to leave, or move between, status relationships. In contrast to the dominant legislative approach to the worker classification problem, which has focused on “shor[ing] up the fortress of employment,”<sup>393</sup> many work law scholars have proposed rules making the transition between statuses or relationships less disruptive. Katherine Stone, for example, has argued that workers should focus on skill acquisition rather than job security.<sup>394</sup> Job training, upskilling, networking opportunities, microlevel job control, and market-based pay all contribute to the worker’s ongoing employability.<sup>395</sup>

With this in mind, Stone argues that attempts by former employers to control workers’ human capital should be scrutinized.<sup>396</sup> Covenants not to compete, for example, can limit a worker’s postemployment opportunities

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388. See Marshal S. Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. AM. ACAD. MATRIM. L. 153, 227–28 (2014).

389. Charny, *supra* note 116, at 1621.

390. See *id.*

391. See, e.g., Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 42–43 (1989).

392. Cf. Jane R. Bambauer & Tauhidur Rahman, *The Quiet Resignation: Why Do So Many Female Lawyers Abandon Their Careers?*, 110 U.C. IRVINE L. REV. 799, 804 (noting that marriage provides an opportunity for women’s career divestment). Of course, there are many good reasons to have marital property rules that distribute the property earned by the spouses during marriage. My point is not to challenge marital property regimes, but to point out the potential impact of tethering rules on partner behavior.

393. Estlund, *supra* note 236, at 320–21.

394. Stone, *supra* note 116, at 570.

395. See *id.* at 572.

396. See *id.* at 576–77.

and ability to capitalize on the skills she has developed.<sup>397</sup> Another barrier to worker mobility is discrimination. Unlike discrimination in the past, which could be observed within firms because of well-defined hierarchies (for instance, the failure to promote women and minorities, as evidenced by the absence of women and minorities in key positions), discrimination might take the form of unequal access to formal and informal training opportunities, as well as networking opportunities.<sup>398</sup>

Rules protecting the ability to transition are central to addressing these types of harms. To this end, Stone proposes the adoption of a “workplace-specific alternative dispute resolution [system] that uses a neutral outsider to scrutinize workplace conduct and apply equal opportunity norms.”<sup>399</sup> Similarly, Rachel Arnow-Richman has argued that employers should be required to provide advance notice of termination or continue to pay salary and benefits during the notice period.<sup>400</sup> This protection would help workers to make the inevitable transition between jobs rather than encourage workers to get into a fight that they may not win over a job.

Within the family law realm, few scholars have considered the desirability of transition rules as opposed to tethering rules. Yet it is important to at least consider whether and how to make it easier for people to exit relationships in a way that minimizes disruption and maximizes the collective benefit to the partners. If nonmarital relationships are less stable than marriages and more likely to last for a shorter length of time, it may be more common for couples to have to decide who remains in a rent-controlled apartment, or what to do about a shared vehicle, than whether to divide the higher income owner’s accumulated property.<sup>401</sup>

Under these circumstances, transition payments calculated based on how long it will take to get the displaced partner on his or her feet could be a better option than a rule premised on equitable distribution of assets and liabilities.<sup>402</sup> Policymakers could also consider procedural innovations

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397. *See id.* at 578–79.

398. *See id.* at 605–08.

399. *Id.* at 612. Stone notes that internal dispute resolution systems will often fail because the very perpetrators of the problematic conduct are placed in the position to adjudicate the claims. Yet the types of complaints at issue about marginalization or exclusion seem more like questions of etiquette than the types of acts that typically ground civil liability. An outside neutral with expertise in workplace disputes could thread this needle, resolving grievances through the application of evolving, external workplace norms. *Id.*

400. Arnow-Richman, *supra* note 376, at 36–37.

401. *See* Matsumura, *supra* note 15, at 1037–39 (noting that cohabitants have fewer assets than married couples, and many cohabitants will have little assets at all).

402. What such a system would look like is beyond the scope of this Article. One might factor in expenses having to do with relocation, such as moving expenses, the costs of setting up a new household, or the difference between the previous and new housing costs. In some cases, this amount would be much lower than what an ex-partner would get if marital property rules applied, but not in all cases. If

designed to resolve disputes between partners without onerous adjudication. Under the existing contract and status approaches, one partner must sue the other to recover a share of the other partner's assets, a process which is likely to be contentious and costly. Instead, states could create an alternative dispute resolution system similar to the one proposed by Stone in the work context.<sup>403</sup> Another option would be to take a cue from California's domestic partner laws, which allow domestic partners in California to file a Notice of Termination without judicial supervision if the partners do not share a common child and do not have significant property interests or liabilities.<sup>404</sup> A reframing around transition brings to light these and other possibilities, which may otherwise have been obscured.

#### EPILOGUE—TOWARD A BROADER STATUS CONSCIOUSNESS

If status-based regulation is inevitable, then fights over status are inevitable as well. This Article ends with a reminder that those fights are interconnected in multiple respects.

The starting point of this Article is the failure of two hoary statuses, marriage and employment, to extend rights and obligations to millions of people who bear striking similarities to those who are regulated. By focusing on the problem within the silos of work law and family law, insufficient attention has been paid to the ways in which the status-based approaches are failing *as statuses*. Just as importantly, the siloed view has hindered a discussion of the ways in which those statuses are mutually reinforcing.

This phenomenon has been exposed for all to see by the COVID-19 pandemic. Cohabitants on average have lower levels of education, lower incomes, and less stable jobs than married people.<sup>405</sup> They are also in less stable unions, with the possibility of conflict only exacerbated by shelter-in-place orders.<sup>406</sup> As discussed above, technology companies like Uber do not pay into state unemployment systems, leaving many gig workers

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these types of payments became institutionalized, they would represent a much greater transfer of property across the board than under the current system. The bottom line is that transition has been insufficiently explored in the context of nonmarital relationship dissolution.

403. See *supra* note 399 and accompanying text.

404. CAL. FAM. CODE § 299 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.) (requiring, in addition to the characteristics described above, that the partnership period be shorter than five years and that the partners live in a rental unit with a lease under one year).

405. See Sharon Sassler & Amanda Miller, *The Challenges Facing Cohabitators During COVID-19*, PSYCH. TODAY (May 13, 2020), <https://www.psychologytoday.com/us/blog/cohabitation-nation/2020/05/the-challenges-facing-cohabitators-during-covid-19> [<https://perma.cc/GL6Z-47HS>].

406. See *id.*

without coverage under those systems.<sup>407</sup> Many gig workers also fall within the essential worker category, which includes workers in healthcare facilities, farms, factories, grocery stores, and public transportation, and is disproportionately non-white.<sup>408</sup> Workers in the food and agricultural sector, which accounts for 20% of all essential workers, or more than 11 million people, earn particularly low hourly wages,<sup>409</sup> and a significant portion of them are gig workers.<sup>410</sup> Many of them are also undocumented.<sup>411</sup>

In short, those lacking protection because they fall outside of one type of favored status are somewhat more likely to lack protection under other favored statuses as well. Legal status and social status—while different concepts—are inextricably intertwined and mutually reinforcing. Although the evolution of marriage and employment are a testament to the possibility of incremental change, a broader status consciousness is needed to bring about more lasting, systemic change.

It remains to be seen what results will be produced by the dual shocks of the COVID-19 pandemic and the heightened race consciousness triggered most recently by the killings of George Floyd and others. But there are some indications that lawmakers are willing to reconsider entrenched aspects of status in light of pressing realities.

In response to widespread unemployment and underemployment brought about by the COVID-19 pandemic, Congress passed legislation providing stimulus payments to U.S. citizens and U.S. resident aliens with incomes below a threshold amount.<sup>412</sup> Congress also extended unemployment benefits to workers not typically eligible, including gig

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407. See Shannon Bond, *'We Can't Take Your Call': Uber Drivers, Other Gig Workers Struggle for Unemployment*, NPR (May 19, 2020), <https://www.npr.org/2020/05/19/858410180/we-can-t-take-your-call-uber-drivers-other-gig-workers-struggle-for-unemployment> [https://perma.cc/63JG-2WPU].

408. See *Health Equity Considerations and Racial and Ethnic Minority Groups*, CDC (July 24, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html](https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html) [https://perma.cc/QLD2-DBEG] (noting in particular the overrepresentation of Black and Hispanic people).

409. See Celine McNicholas & Margaret Poydock, *Who Are Essential Workers? A Comprehensive Look at Their Wages, Demographics, and Unionization Rates*, ECON. POL'Y INST. (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/> [https://perma.cc/9PNU-LMG5].

410. See Jack Kelly, *Proposed Hazard Pay Law for Gig-Workers Is Part of the New Battle Between Workers and Big Companies*, FORBES (Jun. 11, 2020, 2:13 PM), <https://www.forbes.com/sites/jackkelly/2020/06/11/proposed-5-hazard-pay-law-for-gig-workers-is-part-of-the-new-battle-between-workers-and-big-companies/#394a30ae7a1f> [https://perma.cc/UEK6-LGU6].

411. See Lissandra Villa, *'We're Ignored Completely.' Amid the Pandemic, Undocumented Immigrants Are Essential but Exposed*, TIME (Apr. 17, 2020, 4:46 PM), <https://time.com/5823491/undocumented-immigrants-essential-coronavirus/> [https://perma.cc/X9TE-MVQA].

412. See *A Guide to COVID-19 Economic Stimulus Relief*, CONSUMER FIN. PROT. BUREAU (Jul. 7, 2020), <https://www.consumerfinance.gov/about-us/blog/guide-covid-19-economic-stimulus-checks/> [https://perma.cc/8RYS-ARVX] (individuals with incomes under \$75,000 get the full amount; individuals with incomes under \$99,000 get a reduced amount).

workers.<sup>413</sup> These measures appear to recognize the importance of addressing economic hardship regardless of employment status.

The intertwined health and financial crises brought about by the COVID-19 pandemic have also prompted the federal government to provide paid family leave for employees with a “bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider) . . . .”<sup>414</sup> As one might expect, the law covers spouses and children; perhaps surprisingly, however, eligibility is determined by caregiving. Cohabitants, and even mere roommates, can qualify. The law, like COVID-19, does not discriminate on the basis of family status.

Although federal legislation has restricted coverage to U.S. citizens and others with preferred immigration statuses, some states have recognized the importance of supporting members of the community who would otherwise fall through the cracks. California, for example, has provided one-time, state-funded disaster relief assistance to approximately 100,000 undocumented adults who are ineligible for other forms of assistance.<sup>415</sup> States, of course, have little power over immigration policy, but the popular sentiment reflected in California’s action suggests a shift in attitudes about citizenship and belonging.

These developments show that the current tumult has awakened people to the shortcomings of the status frameworks that structure our lives. Though seemingly minimal and nascent, they signal a willingness to reconsider the relationships between statuses and the rights that flow from them. Now is the time to build on them.

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413. See 15 U.S.C. § 9021; see also *U.S. Department of Labor Announces New CARES Act Guidance on Unemployment Insurance for States in Response to COVID-19 Crisis*, U.S. DEP’T OF LAB. (Apr. 2, 2020), <https://www.dol.gov/newsroom/releases/eta/eta20200402-0> [<https://perma.cc/LC4P-8S WQ>]. But see Kelly, *supra* note 410 (noting that gig workers still struggle to navigate the unemployment system by virtue of their unconventional status).

414. *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP’T OF LAB. WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave#:~:text=Up%20to%20an%20additional%2010,care%20provider%20is%20closed%20or> [<https://perma.cc/N9U J-D5X7>].

415. See *Coronavirus (COVID-19) Disaster Relief Assistance for Immigrants*, CAL. DEP’T SOC. SERVS., <https://www.cdss.ca.gov/inforesources/immigration/covid-19-drai> [<https://perma.cc/72RJ-MS4 7>] (providing payments of \$500 per adult, up to \$1000 per household).