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AN ESSAY ON CONTRACT AND STATUS: RACE, MARRIAGE, AND THE MERETRICIOUS SPOUSE

*Howard O. Hunter**

THE notions of contract and status present one of the great paradoxes in Anglo-American jurisprudence: the two concepts are antithetical, yet they overlap significantly in those areas where private interests and public interests collide or coincide. The source of this antithesis is in the origins of the concepts. Contract emerges from private transactions, but status is publicly imposed. Examining the overlap reveals the tendency of late twentieth century American judges to intermingle contradictory legal concepts when faced with difficult social problems.

Although other areas of the law exhibit such a tendency, cases dealing with problems involving race and marriage merit particular study for two reasons. First, both race and marriage have been part of the social fabric of America since the seventeenth century.[1] When the law deals with problems of such enduring complexity, the solutions reflect significant social, moral, and political forces.[2] The study of cases under the rubric of "contract" that involve racial or marital issues thus assists in understanding significant changes in societal mores and standards. Contract traditionally has been viewed as the quintessential common law,[3] and the degree to which the state interferes in this area of private law tends to reflect the currently prevailing attitude toward the importance of public law

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[1] *See generally* W. JORDAN, WHITE OVER BLACK 136-67 (1968); E. MORGAN, THE PURITAN FAMILY 29-65 (1966).

[2] In retrospect, what one generation considers to be significant forces may seem to a later generation to have been transient concerns of the moment. This statement and the one in the text admittedly reflect training the author received in legal realism. For a somewhat different approach, see R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[3] Modern American decisional law is often not strictly speaking "common law" in that decisions hinge on statutory interpretation rather than case-law precedent. Nonetheless, many general and reasonably vague statutory pronouncements have given rise to whole new areas of decisional law that, in context, might be characterized as a form of "common law." An antitrust lawyer, for instance, does not rely on the Sherman Act in advising his clients; rather, he looks to the decisional law that is in fact the substantive law in the area. For an interesting discussion of changing approaches to the common law and case law, see Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

in the ordering of society.[4]

Second, rules relating to both race and marriage recently have been subjected to great pressures, requiring courts to reexamine older resolutions of the conflict between status and contract. Race has become almost as important in enforcing a "freedom" to contract (the result of which may be another form of status) as it once was in demarcating status, most notably that of slavery. Marriage, a traditional status, has seen some inroads from contract, but the more significant pressures on marriage have derived from transactions between unmarried couples who have a long term living arrangement. Before discussing these developments, however, delineation of a framework for understanding the current usage of "contract" and "status" is necessary.

I. Toward a Definitional Framework

A. The Concept of Promise

From the time of the earliest social organizations, humans have been concerned with dividing work responsibilities and securing predictable behavior. Central to this concern has been the problem of promise.[5] Rational creatures have an abstraction of the future and continually attempt to project the present into the future through the making of promises.[6] Once promises are made, society needs some mechanism for their enforcement.[7] Accepting that some de-

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[4] As one commentator recently observed, the common law, including that of "contract," represents a compromise reflecting the desiderata of the day, with the caveat, however, that one day's desiderata may become the next day's rigid and obsolete rules. *See* Fridman, *The Basis of Contractual Obligation: An Essay in Speculative Jurisprudence*, 7 Loy. L.A.L. Rev. 1, 22 (1974). Fridman basically was expanding the opinion expressed by Professor Ames 90 years ago: "Nothing impresses the student of the Common Law more than its extraordinary conservatism." Ames, *The History of Assumpsit* (pt. 2), 2 Harv. L. Rev. 53, 53 (1888). For more on this point, see W. Friedmann, Law in a Changing Society 54, 126-29 (2d ed. 1972). For criticism of the study of contracts as being irrelevant to an understanding of the operation of commerce in a technological, regulated society, see Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of our New Commercial Law*, 11 Vill. L. Rev. 213, 220 (1966); *The Relevance of Contract Theory: A Symposium*, 1967 Wis. L. Rev. 803.

[5] Nietzsche characterized promise as the essential dilemma of rational man: "To breed an animal with the right to make promises—is not this the paradoxical problem nature has set itself with regard to man? And is it not man's true problem?" F. Nietzsche, The Genealogy of Morals 189 (Anchor Books ed. 1956).

[6] *See* MacNeil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691, 696-712 (1974). MacNeil has suggested four primal roots of contract: (1) specialization of labor and exchange, (2) some freedom to choose, or at least a perception of choice, (3) a conscious awareness of past, present, and future, and (4) the social matrix, especially language. *Id.*

[7] *See id.* at 783-90.

gree of stability and certainty is desirable in human relations, the person who hoes the beans wants to know that he can rely on the hunter to provide meat for dinner. Ants may be able to accomplish these tasks by genetic coding that directs their activities; humans, however, must find or create social means for accomplishing them. Contract is certainly not the only means for dealing with social organization, but the problem of promise is the basis for the development of contractual theory and law. As Professor Havighurst has said: "[W]e do not have promises because we have a law of contracts; we have a law of contracts because we have promises."[8]

Havighurst was discussing volitional promises,[9] but promise also may be imposed. The prevailing social structure or governing authority may create a public duty to do a certain act or to incur an obligation. This process requires both an abstraction of the future and an acceptance of the imposition of the duty. "Promise" as the word usually is understood is not a particularly artful description of acquiescence in the imposition of a public duty. Nevertheless, in the sense that an individual agrees to accept a public duty (admittedly, the acceptance may be coerced) and to perform the acts necessary to fulfill that duty, he has "promised" to perform a task or tasks and others may rely on this "promise" in the ordering and planning of their lives.[10]

Although the concept of promise is essential to a rational ordering of society, the selection of which promises are important enough to be imposed or enforced and the means of enforcement enable society to maintain stability and predictability. The theoretical constructs of status and contract help explain how promises have been selected and enforced. Movement between status and contract has indicated and facilitated significant social changes over the past several centuries. This movement has reflected, to a greater or lesser extent, evolving concepts of individual liberty and necessary community control.

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[8] H. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 10 (1961). *See generally* Leff, *Contract As Thing*, 19 AM. U.L. REV. 131, 138 (1970); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 941-42 (1958).

[9] *See* H. HAVIGHURST, *supra* note 8, at 9-10.

[10] A duty of this sort also may be privately created. *See* text accompanying notes 38-56 *infra*. That the acceptance of a legal duty is in some sense volitional lies at the heart of contractarian social theory: "There is but one law which, from its nature, requires unanimous consent; it is the social compact; for civil association is the most voluntary act in the world; every man being born free and master of himself, no one can, under any pretext whatever, enslave him without his consent." J. ROUSSEAU, THE SOCIAL CONTRACT 164 (2d ed. R. Harrington trans. 1906).

B. Implementing Promise: Status and Contract

Almost 120 years ago Sir Henry Maine found in history a steady progression from status to contract.[11] Maine limited his definition of status to those standardized personal relationships derived from "the powers and privileges anciently residing in the Family."[12] Status, for instance, decreed that the first son would inherit the father's land. Scholars might argue as to the proper historical antecedents of status in Anglo-American jurisprudence, but the essence of the construct was that certain roles were imposed on a person by accident of birth or by choice of vocation, the latter often being limited by the former. The division of labor was preordained and was based on some arbitrarily assigned characteristic.[13] The agricultural South prior to the Civil War, and to a lesser extent thereafter, was such a society in which status played a dominant part in social ordering.[14]

Professor Rehbinder, in an interesting and provocative article,[15] pointed out that Maine's definition of status was significantly different from the meaning of the word in the civil-law tradition.[16] The Romans used status to denote full legal capacity (*caput*), which consisted of three elements: liberty (*status libertatis*), civil rights (*status civitatis*), and head of household (*status familiae*).[17] The loss of any one of these elements connoted a restricted legal capacity (*capitis deminutio*).[18] The civil law derived two distinctly different concepts of status from Roman law. One, *status civilis*, developed from the Roman *caput* and related to an individual's position in the legal order. The other, *status naturalis*, referred to capacity based on physical and mental differences.[19] An individual's *status*

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[11] *See* H. MAINE, ANCIENT LAW 168-70 (London 2d ed. 1864).

[12] *Id.* at 170. *See* Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 39 (1917).

[13] Julius Stone has identified the Indian caste system as a classic example of a status-oriented society. There, as in many cultures, religion plays an extraordinarily important role in structuring the culture. The Hindu principle of Karma holds that each life is predetermined from birth into a particular caste and that this predestination is determined by the quality of the soul's prior life. To change castes would be to impose human choice on the will of the divine, which to a true believer would be heresy. Thus the system retains a great deal of strength despite secular laws that superimpose Western notions of democracy, individual free will, and social equality. *See* J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 139-41 (1966).

[14] *See generally* K. STAMPP, THE PECULIAR INSTITUTION (1967); C. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974).

[15] Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941 (1971).

[16] *See generally id.* at 941-47.

[17] *See id.* at 943.

[18] *See id.*

[19] *See id.*

naturalis might also have an effect on his *status civilis.*[20]

Rather than denoting the possession of full legal rights and capacities, the term "status" in common law more often has been used to identify the privileges and obligations of a given individual or class in the currently prevailing social order, with naturally occurring characteristics often serving as the means for identifying a certain status. Women, lunatics, blacks, Indians, and others have been limited from time to time in their legal rights and capacities simply by reason of their sex, color, ethnic background, or mental abilities—characteristics over which the individual has little control. Freedom of choice and volitional promise usually have played a relatively small role in status-dominated societies. Once status predetermines an individual's responsibilities, privileges, obligations, and duties, the inability to change that status ensures predictability and an arguably rational division of labor.[21]

These elements of status provide a good backdrop for a definition of contract. I shall not attempt to redefine "contract" because that has been done with varying degrees of success by scores of legal commentators.[22] Certain useful identifying characteristics,[23] how-

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[20] *See id.* at 943-44. In a meritocracy, this still occurs if *status naturalis* applies to mental as well as physical capacity.

[21] Of course, the perceived rationality of the division of labor in any society depends to a considerable extent on the observer's status within that social order.

[22] *See, e.g.*, notes 23, 36 *infra.*

[23] I particularly like Professor Leff's approach. Instead of trying to reach a precise definition, he suggests that contract partakes of certain identifying criteria:

> First of all, contracts seem to be some species of interpersonal behavior (as opposed to person-thing interactions). Second, the interpersonal behavior demanded for a contract seems to be more or less communicative (rather than directly effective, like a punch in the mouth). Moreover, the communication, to look contracty, ought to have a lot of future tense in it, and bear somewhat on the speakers' expected role in that future. Next, bargain and trade seems to smell more of contract than beneficence; there is the continual pressure to separate deals from gifts. Next is the limitedness of contract. There seems to be something significant to contract in the bordered relationship, "the deal," as opposed to more long-term, non-limit-bound interpersonal relationship like husband-wife and father-son. Last . . . closely allied to the trade-bargain idea, is the process aura of contract. Contract seems to presuppose not only a deal, but dealing. It is the product of a joint creative effort. At least classically, the idea seems to have been that the parties combine their impulses and desires into a resulting product which is a harmonization of their initial positions. What results is neither's will; it is somehow a combination of their desires, the product of an ad hoc vector diagram the resulting arrow of which is "the contract".

Leff, *supra* note 8, at 137-38 (footnotes omitted). Leff's analysis is extraordinarily useful because it helps with the identification of "contract" in much the same way that identifying characteristics help in the classification of flora and fauna. If a creature has hair, bears live young, is warm-blooded, and the female produces milk, it must be a mammal. Unfortu-

ever, do contrast with the common-law meaning of status. The first, and most important, difference is the scope of choice. One may be free to choose a status, but one does not necessarily have the right or the power to affect the impact of that status on legal capacity. Moreover, in choosing a status one has control over fewer variables in the transaction. A young man may freely join the army, but as a soldier he does not have much say in the way the army orders his life. Contracting parties have the opportunity, on the other hand, to determine for themselves the parameters of their transaction. They create their own status; they do not simply choose it. As Rehbinder has said: "Contract law burdened man by forcing him to create for himself a legal position . . . ."[24]

Other distinctions are individually less compelling, but cumulatively they define a process and a result that reasonably may be distinguished from the concept of status. Like the tango, contract takes two. A single young man may join the army and thereby choose the status of soldier by himself;[25] that same young man needs an active colleague to create a contract. A contract also requires a promise; thus it has some element of futurity.[26] Finally, a contract also has some element of "bargaining," although in many, if not most, consumer transactions that fall under the general rubric of "contract" very little actual negotiation occurs.[27] A relationship that involves a plurality of actors, private volition, futurity, and some bargaining would, therefore, be more properly characterized as being governed by a contractual model than by a status model.

These theoretical distinctions, however, fray at the edges. A "contract" may lead to the assumption of a socially imposed status rather than to one that is the creation of the contracting parties. John and Mary may freely agree to marry, and they may negotiate

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nately, there still is the platypus. For a somewhat more cynical view, see Snyder, *Contract—Fact or Legal Hypothesis?*, 21 MISS. L.J. 304, 306 (1950).

[24] Rehbinder, *supra* note 15, at 955.

[25] This assertion is not quite true. The army can accept or reject the application of the volunteer thus creating a certain duality, but if the individual meets the preordained requirements no negotiation of the terms of the new status occurs, except to the extent that the volunteer may state a preference for a particular branch.

[26] When I ask a gasoline attendant to fill my car, implicit in my request is a promise to pay when he has completed filling the tank, even though the entire transaction may occur within a short span of time. Not more than five minutes might pass altogether, but I do not usually pay until after I get the gasoline, even though I promise to pay for it before the attendant removes the cap on the tank.

[27] *See generally* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Leff, *supra* note 8.

about matters such as time, place, and guests. That agreement has the earmarks of a contract, and indeed if it is broken, the courts will entertain an action for breach of contract.[28] Nevertheless, marriage itself is governed by a status construct: the law imposes certain duties and responsibilities upon the partners wholly without regard to any expression of individual will.[29]

C. Liberty Through Contract or Status: An Historical Perspective

As noted previously,[30] Maine saw a progression throughout history from status to contract. Implicit in Maine's statement about "progress" was the notion that a linear legal development from the crudity of status to the refinement of liberty in and through contract had occurred. In terms of events up until Maine's day, such a thesis has some merits. Developments since he wrote, however, have cast doubt on contract as the sole means of achieving liberty.

Feudalism, both in England and on the continent, rested largely on status.[31] Lack of central government and an agricultural economy led to a hierarchical society where the serf received protection from his lord in return for labor.[32] This form of social organization led to significant restrictions on freedoms, both for serfs and for those higher up in the system.[33]

The Renaissance, the Reformation, the voyages of expedition, and the increase in commerce beginning in the fifteenth century heralded the end of feudalism and presaged social change of an unprecedented degree.[34] One such change was an increase in social mobility evidenced by the growing opportunity to choose one's status and to change it from time to time. Indeed, Professor Rehbinder suggested that Maine's comment really described a movement from imposed or "ascriptive" status to assumed or achieved status.[35] The oppor-

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[28] *See, e.g.*, 1 A. CORBIN, CONTRACTS § 134 (1962).

[29] *See generally* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974); Note, *Marriage, Contracts and Public Policy*, 54 HARV. L. REV. 473 (1941); text accompanying notes 131-70 *infra*.

[30] *See* text accompanying note 11 *supra*.

[31] *See, e.g.*, M. BLOCH, FEUDAL SOCIETY 255-74 (1961).

[32] *See id.* at 273.

[33] *See generally id.* at 270-74; A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 30-35 (1973); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 506-20 (5th ed. 1956).

[34] *See generally* G. ELTON, REFORM AND REFORMATION (1977).

[35] Rehbinder noted:

> According to Linton, periods of social change—especially the period after the breakdown of the European class society—were characterized by a profusion of achievable statuses. Julius Stone drew on Linton in reformulating Maine's thesis of progress. The

tunity to exercise individual free will in the choice of a status did provide a setting for the emergence (or revival) of volitional promise. For example, scholars traditionally have argued that choice of a status sparked the development of assumpsit,[36] the basis for modern contract law. John Locke even moved beyond the narrow commercial meaning of "contract" to develop a political theory based on a voluntary social agreement that ultimately rested government on free will.[37]

The individualism and free will inherent in the contract relationship and the negotiating process were particularly appealing to nineteenth century minds; in the course of the industrial revolution and its aftermath contract theory became dominant.[38] Freedom of

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development from status to contract is more accurately "a movement from 'ascriptive' status, fixed by birth and family rights, to status acquired on the basis of individual achievement." The modern trend, resting in part upon the distinctions of Linton and Stone, is to refer to ascribed status as status and to describe status achieved through merit and effort as achieved position. Thus status has become merely a certain kind of position in a hierarchic system of order.

Rehbinder, *supra* note 15, at 954 (footnotes omitted) (discussing R. LINTON, THE STUDY OF MAN 115, 129 (1936); S. NADEL, THE THEORY OF SOCIAL STRUCTURE 29 (1957); J. STONE, *supra* note 13, at 639).

[36] *See generally* Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53 (1888); Llewellyn, *What Price Contract? An Essay in Perspective,* 40 YALE L.J. 704 (1931). One of the more interesting characteristics of the Anglo-American jurisprudence of promissory transactions has been the difficulty for the state in enforcing promise as envisaged by the ecclesiastical and equity courts on the one hand and by the secular law courts on the other. In England, the Church and the Chancellor proceeded from the premises that promises were made to be kept and that the state should enforce them except in unusual circumstances. The law judges proceeded from the opposite premise: the state should not interfere with matters of private agreement except in rare cases. *See generally* Farnsworth, *The Past of Promise: An Historical Introduction to Contract,* 69 COLUM. L. REV. 576, 591-96 (1969). The differing treatment of damages in contract and tort cases and the rare decree of specific performance are constant reminders that the law judges prevailed.

[37] *See* Laslett, *Introduction* to J. LOCKE, TWO TREATISES OF GOVERNMENT 112 (P. Laslett ed. 1960) ("the transmutation [of contract] into the social and political condition must not be looked on in a legal way; it is a variable thing and a pretty loose one too"). The eighteenth century built on Locke's and similar theories in an effort to free humanity from all forms of bondage, whether social, political, or intellectual. *See generally* 2 P. GAY, THE ENLIGHTENMENT: AN INTERPRETATION (1969). Professor Gay has termed the approach of the philosophes "the science of freedom." *See id.* at ix-xi.

[38] Professor Lawrence Friedman has noted:

> In the 19th century, contract law, both in England and America, made up for lost time. This was a natural development. The law of contract was a body of law well suited to a market economy. It was the general branch of law that made and applied rules for arm's-length bargains, in a free, impersonal market. The decay of feudalism and the rise of capitalist economy made the law of contract possible; and the age of Adam Smith made it indispensable.

L. FRIEDMAN, A HISTORY OF AMERICAN LAW 244 (1973). *See generally* L. FRIEDMAN, CONTRACT LAW IN AMERICA 15-27 (1965).

contract became almost synonymous with liberty. One English court in 1875 stated: "[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts . . . shall be enforced by the Courts of justice."[39] On this side of the Atlantic, the Supreme Court went so far as to hold that legislation limiting the working hours of bakers was an unconstitutional limitation on the freedom of bakers to contract to work longer hours.[40]

In theory, this notion was all well and good. But, like laws that prohibit both rich and poor from sleeping under bridges,[41] the obeisance of the Supreme Court to the god of contract caused the Justices to lose sight of some important facts. A system allowing free will to negotiate and bargain works fairly only if the parties are in reasonably equivalent positions of power. If a baker has the freedom to choose to work eighty hours a week or not to work at all, it stretches the truth to suggest that he is a free man, at least insofar as his economic livelihood is concerned. The classic theory of contract so hallowed by laissez-faire economists came to be criticized as a tool of the wealthy and not an instrument of liberty.[42] The status construct had not really died but was being imposed in the name of contract by private aggregations of capital. This phenomenon amounted to a *private* rather than a *public* predetermination and ordering of societal roles. Although this might not have been "status" in the sense of a public imposition of duties and responsibilities, the origin of imposed obligations in private law rather than

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[39] Printing & Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462, 465 (1875).

[40] Lochner v. New York, 198 U.S. 45 (1905). The different treatment accorded women at this stage of American history is clearly illustrated by a comparison of *Lochner* with Muller v. Oregon, 208 U.S. 412 (1908). In *Muller*, the Supreme Court upheld the validity of a statutory limitation on the right of women to contract for their labor as a reasonable exercise of the police power. Liberty of contract thus was not so important as to interfere with the status of femininity protected by the state.

[41] *See* A. FRANCE, THE RED LILY 91 (1924 ed.).

[42] *See, e.g.*, Isaacs, *supra* note 12; Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). At least one commentator still adheres to the view that contract law as taught continues to favor the wealthy:

> [Contract law] serves massively and systematically as an *intensifier* of economic advantage and disadvantage. It does this because people and businesses who are in strong bargaining positions, or who can afford expensive legal advice, can and epidemically do exact of necessitous and ignorant people contractual engagements which the general law never would impose.

Black, *Some Notes on Law Schools in the Present Day*, 79 YALE L.J. 505, 508 (1970) (emphasis in original).

in public law probably made little difference to those subject to the obligations.

These criticisms fueled attacks by academic circles on the dogged adherence of courts to the enforcement of private bargains that met the formal requisites of classical contractual theory. In 1917 Nathan Isaacs even suggested that status constructs might be more conducive to liberty than freedom of contract.[43] This theory was heresy in terms of Maine's dictum, but Isaacs's point was quite simple: state interference could help equalize the bargaining power of the baker and his employer. This approach would necessarily reduce the power of the employer, but the net result would be more in keeping with the basic utilitarian principle of maximizing benefit.[44] Isaacs's view came to be predominant, and today the state plays a significant role in ordering promissory transactions. Debate may continue about whether classical contractual theory is dead,[45] but the impact

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[43] Isaacs proposed a greater standardization of contractual relationships as a means for the development of a "status law" that would be conducive to liberty:

> The movement toward status law clashes, of course, with the ideal of individual freedom in the negative sense of "absence of restraint" or *laissez faire*. Yet, freedom in the positive sense of presence of opportunity is being served by social interference with contract. There is still much to be gained by the further standardizing of the relations in which society has an interest, in order to remove them from the control of the accident of power in individual bargaining.

Isaacs, *supra* note 12, at 47. Many of our normal, everyday transactions have become highly standardized. Thus a more recent essay has suggested the use of standards based on the public interest as opposed to traditional contractual principles for determining the enforceability of consumer transactions:

> If contract law is to provide the basis for a democratic system of private law and for a competitive economy which works in the interests of consumers—indeed, if it is to meet the minimal requirements of rationality—it must take into account the two pervasive conditions under which modern contracting takes place. Most contracts today are made quickly, often without thought as to any but their major terms, and many contracts are made without one party having any real alternative but to accept the terms which the other party sets.

Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 565-66 (1971).

[44] *See generally* J. RAWLS, A THEORY OF JUSTICE (1971).

[45] Grant Gilmore, for one, has proclaimed that contract is dead. *See* G. GILMORE, THE DEATH OF CONTRACT (1974). Although he later said that he had meant the phrase more as a rhetorical flourish than as a definitive statement, *see* G. GILMORE, THE AGES OF AMERICAN LAW 107 (1977), he did manage to provoke a lively controversy. *See* Milhollin, *More on the Death of Contract*, 24 CATH. U.L. REV. 29 (1974); Gordley, Book Review, 89 HARV. L. REV. 452 (1975); Gordon, Book Review, 1974 WIS. L. REV. 1216; Mooney, Book Review, 55 ORE. L. REV. 155 (1976); Reitz, Book Review, 123 U. PA. L. REV. 697 (1975); Speidel, Book Review, 27 STAN. L. REV. 1161 (1975). Reflecting on Gilmore's comment about the demise of contract, Professor Speidel stated:

> In retrospect, it would seem that Professor Gilmore's heady glass of tort wine is half full, his stale glass of contract beer is half empty, and his tolerance for static-model

of antitrust laws, securities laws, labor laws, consumer protection laws, and the myriad of regulations issued daily by administrative agencies have made fundamental changes in the contracting process. If we accept Wolfgang Friedmann's definition of "status" as "a useful collective description of legal conditions imposed upon the individual by *public law*,"[46] then little doubt remains that a significant increase in the importance of status constructs as a means of societal ordering has occurred. If contract was the central legal symbol of the ideal laissez-faire state, status is the legal banner of the ideal welfare state.[47]

D. Three Modern Approaches to Contract and Status

The Maine-Isaacs debate has continued for the last half century. The controversy has tended to center on whether we are moving to a status-dominated social order, to a revival of contract, or to some other means of dealing with the problem of promise. Professors Rehbinder, MacNeil, and Friedmann, among others, have considered these questions and have come to somewhat different but not inconsistent conclusions.

Rehbinder rejected the suggestion that modern law tends to return to status. His rejection was premised upon a definition of status that is limited to the hierarchical ordering of feudal society.[48] He went on, however, to describe modern Western societies as ones in which an individual is free to choose among a wide variety of roles for various ends. These "roles" are created, defined, and protected by the state:

> As social life constantly increases in complexity, there is a growing need for more preformed and safeguarded roles. This leads to a growth in the size and scope of the legal system. Freedom of the individual today consists less in a freedom of role creation than in a freedom of role choice. This combination in our social system of "personal mobility with relational stability" is also a characteristic

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economists and empiricists who just count has expired. This impatience is understandable, for both the beer and some social scientists have frequently resisted the perceived requirements of justice.

Speidel, *supra* at 1182 (footnotes omitted).

[46] Friedmann, *Some Reflections on Status and Freedom*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 222, 226 (R. Newman ed. 1962) (emphasis in original).

[47] *See id.* at 229. *See generally* Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962).

[48] *See* Rehbinder, *supra* note 15, at 947-48.

> of modern law: It is a law of roles preformed and safeguarded by the state, yet open and subject to constant change.[49]

Rehbinder may prefer the use of the term "role," but the "roles" he described certainly bear a striking resemblance to assumed statuses. His roles are not the creatures of private bargaining; they are created and imposed by the state. The roles may be constantly undergoing changes, but these changes are the result of state, not private, action. Individual volition plays a part only in the assumption of a role or a set of roles. The understanding of status may not be the same as that of Maine,[50] in that Rehbinder's "roles" are not creatures of the family tradition nor derivatives of feudalism. Nonetheless, they do reflect the imposition of *public* obligations and restrictions.

MacNeil distinguished between "contract transactions" and "contractual relations."[51] The former are more closely akin to what we tend to think of as contracts and the latter are closer to status. MacNeil was aware of the impossibility of isolating these concepts and recognized that they are simply part of a continuum. No "transaction" is wholly without "relation" and no "relationship" is wholly without transactional discreteness.[52] He concluded:

> Contract has thus always meant—even if this has not always been admitted—far more than promise-in-transaction-measured-exchange-truly-specified-and-truly-communicated. And the burdens of the other aspects constantly increase as we in modern societies find ourselves increasingly engaged in exchange relations involving complex mixtures of internalization, command, relational expectations, specific promise and other even more vague psychological and cultural motivators.[53]

MacNeil's analysis is especially useful because he accepted what common sense and common experience teach us—that most relationships involving exchange are a reflection of mutual expectation and reliance rather than of a carefully negotiated bargain. To improve the reliability of such transactions and to foster economic stability and predictability, a natural tendency exists toward the growth of "relations" that take the place of discrete transactions.

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[49] *Id.* at 955 (citations omitted).

[50] *See* notes 11-14 *supra* and accompanying text.

[51] *See* MacNeil, *supra* note 6, at 723.

[52] *See id.* at 725.

[53] *Id.* at 733 (footnote omitted).

The widget manufacturer wants his market to expand profitably, but he also wants his market to be as predictable as possible so that he may plan for a rational allocation of his resources.[54] MacNeil's thesis was that the complexities of technological society demand increased use of relational constructs as opposed to transactional ones.[55] One reason is that people simply do not have the time to negotiate all the separate transactions necessary to be a functioning member of society. MacNeil's relations, like Rehbinder's roles,[56] usually can be chosen. Unlike Rehbinder, MacNeil believed that private individuals may create and define their relations instead of having them all preformed by the state.

The late Professor Wolfgang Friedmann was most straightforward in his analysis of the role of status as an organizational construct in modern society. Friedmann's definition of "status" included all publicly imposed legal conditions on individual activity.[57] This notion was much broader than either Maine's use of the word in the context of family relationships or the limitation of "status" to the antithesis of "contract." Friedmann's definition can provide a means for testing cyclical changes in the balance between individualism and collective, communal needs: "In short, 'status' thus becomes a convenient shorthand description of the shifting balance between freedom of will and freedom of movement—which is essentially the province of private law—and the public policies of the modern welfare state expressed in terms of public law."[58] Friedmann's definition of status did not, however, include privately or-

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[54] The widespread use of requirements or output contracts is reflective of this general desire for stability and predictability. *See generally* 1A A. CORBIN, *supra* note 28, §§ 158, 168. Of course, a good thing may be taken too far. The cooperation necessary to create a stable and predictable market may become anticompetitive and cause antitrust problems. For instance, the National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195, promoted the use of trade associations to encourage cooperative efforts aimed at stabilizing various sectors of the economy. After the Act was declared unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), many of these trade associations continued to flourish. Their activities led the Justice Department to launch 72 criminal and 58 civil antitrust actions between 1939 and 1943. In all but three of these cases, the defendants agreed to a consent order or lost the trial. Sadd, Huth, Cortesio, & Hunter, *Report on Antitrust Implications of Joint Industry Activities Under Price Controls*, 44 ANTITRUST L.J. 423, 426 (1975). *See also* MacCauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); MacCauley, *The Use and Nonuse of Contracts in the Manufacturing Industry*, PRAC. LAW., Nov. 1963, at 13; MacNeil, *supra* note 6, at 729-30.

[55] *See* MacNeil, *supra* note 6, at 720-21.

[56] *See* text accompanying note 49 *supra*.

[57] *See* Friedmann, *supra* note 46, at 225-26.

[58] *Id.* at 228.

dained and created statuses. MacNeil's privately created "relation" would not, therefore, be characterized by Friedmann as a "status."[59] The distinction lies in the role of the state: as a practical matter, a New York baker at the turn of the century was locked into a restricted economic situation by certain aggregations of private capital and wealth, but this situation was not publicly imposed or created although it continued to exist partly as a result of the refusal of the state to become involved. Insofar as the individual baker was concerned, it probably made little difference to him that his status was privately imposed under the rubric of freedom of contract and was not the result of public action.[60] Friedmann's definition, broad as it may be, does not include all the "roles" that might be practically classified under the heading of "status," but it is an easier definition to use for legal analysis than MacNeil's broader use of relational constructs. Friedmann's definition can more readily serve as a barometer for changing governmental attitudes toward the permissible limits of state interference in commercial and personal relationships between individuals because it is concerned with active, direct state intrusions rather than with passive acquiescence by the state in privately created relationships.

Having formulated his definition, Friedmann turned to the problem of whether status or contract is more conducive to personal liberty. Like Maine,[61] Friedmann perceived a decline in the importance of status in the regulation of family relationships and a concomitant increase in the use of contract in such situations.[62] Moreover, Friedmann saw this trend as conducive to personal liberty: "It is, of course, not an accident or caprice that in the field of family law the movement should still be from status to contract. It is in this field that freedom of contract on the whole genuinely expresses social and economic liberation from traditional inequality and immobility."[63] Although the trend in domestic relations vindicated Maine's thesis that contract leads to liberty, "an examination of status in the wider sense might lead us to a rather different conclusion."[64] More particularly, Friedmann concluded that status had

[59] Conversely, Rehbinder's roles correspond to Friedmann's statuses in this respect. *See* text accompanying note 49 *supra*.

[60] *See* notes 40-47 *supra* and accompanying text.

[61] *See* notes 11-12, 35 *supra* and accompanying text.

[62] *See* Friedmann, *supra* note 46, at 235-36.

[63] *Id.* at 236.

[64] *Id.* at 226.

come to play an increasingly important role in the ordering of commercial activities.[65] Much of our commerce now represents a mingling of publicly imposed regulations, conditions, and limitations on private volitional bargaining. Friedmann perceived this interference by the state as generally conducive to individual liberty,[66] echoing Isaacs's view of a half century before.[67] Thus a seemingly contradictory trend can be found in modern law: contract leads to freedom in domestic relations, while status produces liberty in other areas.

Of course, not everyone has accepted Friedmann's theory.[68] What the remainder of this article does is test Friedmann's thesis against a series of recent cases in two areas traditionally characterized by extensive use of status constructs. One is race and the other is marriage, or, more expansively, long term intimate relationships between men and women.[69] Such an analysis reveals that neither status nor contract alone leads to freedom in either of the two areas. Rather, the complexity of the social, political, and moral issues involved requires a more delicate and careful mixing of contract and status.

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[65] *See id.* at 229-33.

[66] *See id.* at 237.

[67] *See* note 43 *supra* and accompanying text.

[68] Among the most notable of those who have not fully accepted Friedmann's thesis is Professor Harry Jones, who stated in a lecture given in honor of the memory of his late colleague:

> What has happened . . . is that areas of decision formerly subject to the rule of superior economic power have been brought within the reach of law. The incidence of genuine contractual bargaining has not been reduced necessarily; indeed, government interventions designed to establish equality of bargaining power may conceivably make contract a more vigorous institution in our day than in Sir Henry Maine's.
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> . . . The employment relation may have become a relationship of status for the typical industrial worker, but practically every other relationship of his life is arrived at and regulated by the contracts he enters into with landlords, grocers, physicians, car dealers, banks and others. Even his church contribution is not a prescribed tithe, as when church membership was an imposed status, but a contractual pledge. So I suspect that old Sir Henry Maine is nearer to the truth, even in contemporary conditions, than most of his critics. From status to contract is a long historical movement, and we have not really reversed the trend, however much we may have compromised it or set new ground rules for negotiation.

Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43, 50 (1975) (footnote omitted). *See also* Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958).

[69] The validity of Friedmann's thesis in the area of commerce is beyond the intended scope of this particular article, but the impact of commercial regulation can be felt in some of the cases that are considered.

II. The Removal of Race as a Valid Basis for Discrimination in the Making of Private Contracts

An element of free agreement between the contracting parties has been essential to all classical theories of contract.[70] One of the most significant aspects of "liberty" in contracting traditionally has been the freedom to choose the identity of the other party to the agreement.[71] A status construct can remove free choice from the selection of a contracting party by imposing on one or the other a duty to contract regardless of personal desires. A crucial development in the movement from feudal concepts of status to contract in the nineteenth century sense was the recognition of a right to refuse to contract for reasons safe unto oneself.[72] The corollary was the right to pick a contracting party for reasons other than rational economics.

Recently, courts have limited the privilege to discriminate racially in the selection of a contracting partner. In 1968 in *Jones v. Alfred H. Mayer Co.*,[73] the Supreme Court breathed new life into a section of one of the nineteenth century Civil Rights Acts[74] by construing it as based upon the thirteenth amendment, thereby removing the necessity of showing state action.[75] The Court held that section 1982[76] prohibits racial discrimination in the private sale or rental of housing because such discrimination is one of the "badges of slavery" that the thirteenth amendment and its enabling legislation were intended to eradicate.[77]

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[70] *See* notes 22-24 *supra* and accompanying text.

[71] *See, e.g.*, Restatement of Contracts § 19(b) (1936).

[72] A comparison of the famous Horse Doctor's Case, Y.B. Hil. 19 Henry 6, f.5, pl. 49 (1441), with the celebrated case of Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901), illustrates this change. In the *Horse Doctor's Case*, the court held that the injured party assumed the risk unless the other expressly assumed it. Thus a mere promise to give medicine to a horse did not mean the promisor promised to cure the animal properly. Had the defendant in the *Horse Doctor's Case* been a "common horse doctor," there might have been no need to consider whether there had been an individual "undertaking" or "promise" to cure because the court could have implied such a promise from his status, and the development of the assumpsit action might have been delayed even further. In *Hurley* there was no question that the defendant was a licensed physician, but the court refused to place upon him any legal duty to attend the sick. He was free to contract to treat a patient or not according to his own whim.

[73] 392 U.S. 409 (1968).

[74] Civil Rights Act of 1866 § 1, 42 U.S.C. § 1982 (1976).

[75] *See* 392 U.S. at 422-26.

[76] Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1976).

[77] *See* 392 U.S. at 439-40. Several cases followed *Jones* and used § 1982 as the basis for an

Since *Jones*, section 1982 has been broadly interpreted. In *Tillman v. Wheaton-Haven Recreation Association*,[78] a residential community maintained a neighborhood swimming pool. Families who lived within a three-quarter mile radius of the pool could belong to the swimming pool association. When a black family moved into the neighborhood, the association passed resolutions that barred blacks from membership and limited guests to relatives of members. The Supreme Court ruled that the association was not a private club within the meaning of an earlier decision;[79] therefore the refusal of membership was an effective denial of a property right. The history of eligibility for membership that went with ownership in the area helped the Court in finding this property right.[80] In any event, although section 1982 is directed toward rights in property, its prohibition on discrimination in the sale or rental of housing directly affects the bargaining function by limiting the offeror's freedom to restrict his offer to persons of a certain race.

The companion provision to section 1982, section 1981,[81] has been construed in pari materia with it.[82] Section 1981 provides: "All per-

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attack on housing discrimination. *E.g.*, Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974).

In 1968, Congress passed the Fair Housing Title of the Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3631 (1976)). Congress specifically intended to lessen housing discrimination, *see* 42 U.S.C. § 3601 (1976), but *Jones* exceeded the scope of that Act. Section 3603(b)(1) exempts from the coverage of the Act single family homes offered for sale or rent by the owner. Section 3603(b)(2) contains what is popularly known as the exemption for "Mrs. Murphy's boarding house"—one in which four or fewer families, including the owner, reside. Arguably, § 1982, as construed in *Jones*, would reach discriminatory acts facially exempted from the impact of the Fair Housing Act by §§ 3603(b)(1) and 3603(b)(2). *See* Jones v. Alfred H. Mayer Co., 392 U.S. at 478 (Harlan, J., dissenting).

Section 3607 allows religious organizations and private clubs to limit sales or rentals to members of that club or religion. The first amendment may immunize legitimate religious groups from the coverage of § 1982. Thus the constitutional *status* of religious groups may increase their freedom to *contract* concerning housing. *See generally* notes 102-06 *infra* and accompanying text.

[78] 410 U.S. 431 (1973).

[79] *Id.* at 438-39 (distinguishing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (discrimination by a private club does not violate the fourteenth amendment)). *Accord*, Sullivan v. Little Hunting Park, 396 U.S. 229 (1969).

[80] *See* 410 U.S. at 438-40. Thus if the swimming pool association had been formed after the neighborhood was desegregated, the case might have been more difficult for the Court.

[81] 42 U.S.C. § 1981 (1976). Like § 1982, § 1981 dates from the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. Significant debates, however, preceded its reenactment in the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140. *See generally* Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976). The 1866 and 1870 debates have been thoroughly discussed by the litigants and the judges who have been involved in the recent series of § 1981 and § 1982 cases. The debates, like most congressional debates, contained support for almost any position. *Compare id. with id.* at 195-205 (White, J., dissenting).

[82] The Court stated in *Tillman*: "In light of the historical interrelationship between § 1981

sons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."[83] The private-school desegregation case, *Runyon v. McCrary*,[84] is the most important recent decision involving section 1981. The Supreme Court held that the statute prohibited private, commercially operated, nonsectarian schools from denying admission to prospective students because they were black.[85] Black parents had sought to have their children admitted to each of two private schools located in the Virginia suburbs of Washington, D.C. Some factual dispute took place in the lower courts about the reasons for denial of admittance,[86] but in the Supreme Court the case proceeded on the assumption that the schools practiced racial selectivity.[87] The schools contended that such discrimination was permissible because they were private and could contract or refrain from contracting with parents of applicants on whatever grounds they saw fit, subject only to reasonable state regulations to ensure compliance with mandatory school attendance laws and to establish minimum standards for accreditation. The Supreme Court did not disagree with the basic argument in favor of the freedom to choose one's contracting partner and terms, but the Court did eliminate one element of choice: no longer could the decision to agree or not to agree be based solely upon a racial preference. Justice Stewart stated for the majority: "It is now well established that § 1 of the Civil Rights Act of 1866 . . . prohibits racial discrimination in the making and enforcement of private contracts."[88]

What is remarkable about the preceding quotation is that no Court ever had construed section 1981 so broadly, nor did the facts of *Runyon* compel such a sweeping prohibition of racial discrimination in private promissory transactions.[89] Indeed, Justice Stewart made some attempts to soften the impact of his statement. For instance, the majority left undisturbed the Court's previous holding that a private social organization could limit its membership on

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and § 1982, we see no reason to construe these sections differently when applied . . . ." 410 U.S. at 440.

[83] 42 U.S.C. § 1981 (1976).

[84] 427 U.S. 160 (1976).

[85] *See id.* at 167-75.

[86] For the lower court proceedings, see Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973), *aff'd*, 427 U.S. 160 (1976), and McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976).

[87] *See* 427 U.S. at 168.

[88] *Id.* (footnotes omitted).

[89] *See* notes 102-07 *infra* and accompanying text.

racial grounds[90] and specifically left open the question whether section 1981 might apply to private sectarian schools that practice racial discrimination on religious grounds.[91]

Most of the cases under section 1981 prior to *Runyon* had dealt with employment discrimination,[92] although they had handled a smattering of other issues.[93] In fact, section 1981 had become an alternative to title VII of the Civil Rights Act of 1964[94] in much the same way that section 1982 had become an alternative to the 1968 Fair Housing Act.[95] For example, *McDonald v. Santa Fe Trail Transportation Co.*,[96] the companion case to *Runyon,* was yet another employment discrimination case, but the plaintiffs were white. The Court decided that, under the appropriate circumstances, both title VII of the 1964 Civil Rights Act and section 1981 protect white as well as nonwhite persons from racial discrimination in private employment.[97]

Runyon and *McDonald* set the stage for a more expansive reading of section 1981 and present some interesting dilemmas. The majority in *Runyon* made the following statement: "[A] Negro's § 1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees."[98] If *McDonald* means what it says, then the preceding sentence could be rewritten to insert "Caucasian" in place of "Negro" and "black" in place of "white." Does that mean, then, that a private Negro college,[99] founded for the express purpose of providing higher educa-

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[90] *See* 427 U.S. at 167 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)).

[91] *See id.*

[92] *See generally* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment,* 7 HARV. C.R.-C.L. L. REV. 56 (1972).

[93] *See generally* Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action,* 90 HARV. L. REV. 412, 412 n.6 (1976).

[94] 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1976).

[95] *See* note 77 *supra.*

[96] 427 U.S. 273 (1976).

[97] *See id.* at 280.

[98] 427 U.S. at 170-71 (citations omitted).

[99] Some time will elapse before the Court reaches a firm rule on preferential treatment of blacks by publicly supported universities. In Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978), the Court ruled narrowly that a federally funded medical school's special program that kept open a specified number of positions for minority applicants was invalid under title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976). *See id.* at 2744-47, 2761-64; *id.* at 2811-15 (Stevens, J., concurring and dissenting). The Court also held, however, that race may be taken into account in making admissions decisions. *See id.* at 2760-63; *id.* at 2789-91 (Brennan, J., concurring and dissenting). The disparate rationales of the various Justices preclude any confident prediction of how willing they might be to bar the exclusion

tion for Negroes, endowed for that purpose and supported by alumni and friends, must offer the "same opportunity to enter into contracts" (as students or as faculty or staff) to whites as to blacks? That is what the words quoted above seem to indicate.[100] Countervailing policy considerations may, of course, cause the Court to soften the apparent impact of *Runyon* and *McDonald,* and the Court only scratched the surface of the underlying issues in *Regents of the University of California v. Bakke.*[101]

Runyon, despite Justice Stewart's wholesale statements, was limited to discrimination by *private, nonsectarian, commercial* schools.[102] Two factors seemed to be especially important in the Court's reasoning. First, the schools advertised in the yellow pages and made their existence and purposes known to the world at large. Nothing in their commercial solicitations indicated that their educational services were not generally available to the public.[103] Second, the schools were performing what was essentially a public function—the education of children of a certain age. Justice Stewart noted: "The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools . . . that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered

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of a white from a private black college under § 1981. *See generally* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L.J. 699 (1971).

[100] In Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978), Justice Stevens, writing for four members of the Court, implied that title VII might preclude preferential hiring of minorities. Citing *McDonald,* he wrote: "Congress responded to the problem of employment discrimination by enacting a provision that protects all races . . . ." *Id.* at 2811 (Stevens, J., concurring and dissenting) (citing McDonald v. Sante Fe Trail Transp. Co., 427 U.S. at 279).

Justice Stevens, however, writing for the majority in *McDonald,* specifically excluded "affirmative action programs" from the scope of the decision. 427 U.S. at 280 n.8. Courts today are split on the issue of whether title VII prohibits preferential hiring or promotion of members of racial minorities by employers who have not previously discriminated by race in employment practices. *Compare* Equal Employment Opportunity Comm'n v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 98 S. Ct. 3145 (1978) (upholding racial classifications in a promotion plan embodied in a consent decree), *with* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977) (striking down racial quotas in a promotion plan adopted through collective bargaining where there had been no showing that employer had previously discriminated), *cert. granted,* 47 U.S.L.W. 3408 (U.S. Dec. 11, 1978) (No. 78-435).

[101] 98 S. Ct. 2733 (1978). *See* notes 99-100 *supra.* For a discussion of some possible approaches to the problem, see Note, *supra* note 93, at 440-52.

[102] *See* 427 U.S. at 168.

[103] *See id.* at 172-73. Being involved in a commercial enterprise does not automatically mean that one can be compelled to contract with all comers. It may, however, mean that one cannot be racially exclusive in making offers to contract.

by reasonable government regulation."[104] Even though state action sufficient to invoke the protection of the fourteenth amendment was not found,[105] a private school still is engaged in the performance of an important function normally undertaken by the state, and that fact may serve to limit the impact of *Runyon.* A private black college provides a service that is often, but not universally, provided by the state. It does not, however, perform a function the state would otherwise have to perform. A significant qualitative difference therefore exists between the two educational institutions.[106]

In a concurring opinion, Justice Powell provided an alternative analysis for a limitation on *Runyon*'s impact:

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[104] *Id.* at 178.

[105] *Id.* Even if state action had been found, it is possible that no real question of state interference with private bargaining would have been present because one party (the school) would be acting as a quasi-public institution. One commentator has argued that by performing the public function of teaching children, a private school acts as an extension of the state and thereby becomes subject to the provisions of the fourteenth amendment. *See* Note, *The Desegregation of Private Schools: Is Section 1981 the Answer?*, 48 N.Y.U.L. REV. 1147, 1151 (1973). *See also* O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970). The state action argument generally has not been successful, even when the discriminating schools were receiving direct and indirect state and federal support. On what constitutes state action in education, see Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); Brown v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Braden v. University of Pittsburgh, 392 F. Supp. 118 (W.D. Pa. 1975); Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa. 1974); Isaacs v. Board of Trustees of Temple Univ., 385 F. Supp. 473 (E.D. Pa. 1974); Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973); Powe v. Miles, 294 F. Supp. 1269 (W.D.N.Y.), *aff'd as modified*, 407 F.2d 73 (2d Cir. 1968); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968). *See generally* Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973).

[106] Private universities and colleges are, nevertheless, subjected to a great deal of governmental interference. Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1976), title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1682 (1976), and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), require private universities to refrain from acts of discrimination based on race, sex, or handicap on pain of being made ineligible for federal funds. For the regulations implementing these statutes, see 45 C.F.R. §§ 80-81, 84, 86 (1977). The procedures that must be followed to terminate federal assistance to an institution of higher learning are lengthy and provide the recipient school with a number of opportunities to plead its case. *See* 20 U.S.C. § 1682 (1976); 42 *id.* § 2000d-1; 45 C.F.R. § 80.8(c) (1977). A termination is certainly possible, however. Bob Jones University, a fundamentalist school in South Carolina, denies admission to unmarried black students. The federal government terminated veterans' benefits to students in attendance at Bob Jones, and the university challenged the government's action. The federal district court and the Court of Appeals for the Fourth Circuit upheld the cutoff of funds. Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975). For a discussion of the impact of such regulations on academic freedom in higher education, see Hunter, *Federal Antibias Legislation and Academic Freedom: Some Problems with Enforcement Procedures*, 27 EMORY L.J. ___ (1978) (forthcoming).

> In certain personal contractual relationships, however, such as those where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association (such as, for example, that between an employer and a private tutor, babysitter, or housekeeper), there is reason to assume that, although the choice made by the offeror is selective, it reflects "a purpose of exclusiveness" other than the desire to bar members of the Negro race. Such a purpose, certainly in most cases, would invoke associational rights long respected.
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> . . . § 1981, as interpreted by our prior decisions, does reach certain acts of racial discrimination that are "private" in the sense that they involve no *state* action. But choices, including those involved in entering into a contract, that are "private" in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts. The open offer to the public generally involved in the cases before us is simply not a "private" contract in this sense.[107]

Justice Powell thus tried to draw a distinction between agreements that involve particularly private matters or long term personal intimacy on the one hand and those that are "commercial" in the sense that they are widely offered and widely available on a more or less standardized basis.

This distinction is not wholly satisfactory. If a parent places an advertisement in the classified section of the newspaper for a housekeeper at $3.00 per hour, forty hours a week, is that an offer made "generally or widely" for a commercial transaction that is subject to the provisions of section 1981, or is that an offer for a private agreement protected from statutory interference by generally recognized rights of association and privacy? Although Justice Powell may have wished to carve a broader exception to the majority's opinion, his rationale seems to be based on the notion that the state

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[107] 427 U.S. at 187-89 (Powell, J., concurring) (emphasis in original). Justice Powell's definition of a "private" contract free from the impact of § 1981 is extremely narrow. It is doubtful that any member of the Court or any of the advocates in *Runyon* considered that the statute would intrude upon peculiarly domestic and individualized relationships such as those involving private tutors, babysitters, or housekeepers. Moreover, the application of § 1981 to such arrangements might intrude upon the constitutionally protected zone of privacy that surrounds an individual's home and domestic life, *see generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 544-61 (1970); Note, *supra* note 93, at 436-37; Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973).

cannot force persons to take someone into their home against their wishes however reprehensible their reasons for objecting to the individual may be. The focus on the agreement itself is misplaced in that some of the services that Justice Powell mentions certainly may be "commercial."

Whatever the limitations on *Runyon,* it does impose a significant restriction on the choice of a contracting party, never so clearly articulated in any prior decision. Accepting that *Runyon, McDonald,* and similar cases seek to make certain private transactions color blind, what is the import of this rule from the perspective of the status and contract models?[108] Race, as noted above,[109] has often been a demarcator of status. Certainly that was true in the antebellum South.[110] To the extent that the inability to make legally enforceable contracts was an aspect of the status of slavery,[111] the thirteenth amendment can be regarded as removing that limitation. Former slaves were brought into the mainstream of citizenship in a number of ways—the capacity to contract being one of the attributes of full citizenship. Nevertheless, in the 1860's the status of "citizen" was not uniform. A "citizen" might not be able to vote if female, nor to hold office in certain areas if not a freeholder. White adult males who had never been convicted of a crime and who owned real property were, generally speaking, the only "citizens" possessed of what the Romans would have called *caput.*[112]

A legal limitation on the exercise of some rights might not have been a "badge of slavery" in that other groups or classes, who were not slaves, also suffered similar limitations. At the time the thirteenth amendment was passed, "freedom of contract" was not an automatic concomitant of emancipation. That aspect of freedom depended, to a large degree, upon other statuses, particularly age, sex, and mental competence. No one would seriously argue, for instance, that a slave who was a minor would have become able to make and enforce contracts the same as an adult upon release from his status as a slave. What emancipation did, in terms of contract law, was to subject former black slaves to the same set of privileges, rights, obligations, duties, and limitations as white citizens.

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[108] *See generally* notes 5-68 *supra* and accompanying text.

[109] *See* note 69 *supra* and accompanying text.

[110] *See generally* J. BLASSINGAME, THE SLAVE COMMUNITY (1972); E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974); K. STAMPP, *supra* note 14. *See also* W. JORDAN, *supra* note 1.

[111] *See* W. JORDAN, *supra* note 1, at 134; K. STAMPP, *supra* note 14, at 341.

[112] *See generally* text accompanying notes 17-20 *supra.*

For the dissenters in *Runyon,* this goal was all Congress intended section 1981 to accomplish.[113] Slaves, by their status, had been incompetent to make contracts in the same way that lunatics and infants were. Section 1981 made clear that sane blacks of the age of majority could enter into enforceable contracts to the same degree as sane, white adults.[114] But the dissenters urged that section 1981 did not grant to Negroes any greater freedom to contract than that enjoyed by whites, and they pointed out that a white person competent to contract could not, as a general rule, force a contract upon an unwilling partner whether or not the unwillingness was motivated by personal dislike or racial bias:

> The right to make contracts, enjoyed by white citizens, was therefore always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the "same rights" to contract as is enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract.[115]

In short, the right to make a contract did not include the right to be free from the racial bias of prospective contractual partners.

The majority's view, however, was that the thirteenth amendment and the Civil Rights Acts went further and removed individual racial bias as a permissible determining factor in the making of private contracts. In so doing, the Court in *Runyon* used liberating status constructs, continuing a trend that began with the criticism of the laissez-faire approach to contract.[116] As Isaacs suggested in 1917, state interference to create certain relationships based on status may be more conducive to the development of liberty generally than adherence to the formalities of freedom of contract.[117]

In a pure contractual model, the individual must fend for himself. An offeror may pick and choose his offerees; the offerees may do the same. The resulting "bargain" is whatever the best negotiating techniques of the two parties produce. Under this model, if whites

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[113] *See* 427 U.S. at 192-94 (White, J., dissenting). Justice Rehnquist joined in Justice White's dissent. *Id.* at 192. The two also dissented in *McDonald* on the same grounds. *See* 427 U.S. at 296 (White, J., dissenting).

[114] *See* 427 U.S. at 170-71.

[115] *Id.* at 194 (White, J., dissenting). The dissent did point out, however, that the combined effect of *Runyon* and *McDonald* was to preclude a black from refusing to contract with a white on the ground of race. *See id.* at 211.

[116] *See* notes 41-47 *supra* and accompanying text.

[117] *See* notes 43-47 *supra* and accompanying text.

only deal with whites, then blacks must use their individual inventiveness to figure out some means of commercial and economic survival. The state simply stays out of the picture and lets individualism have its free run of matters.

Yet inequality of wealth and power may result over time in the creation of a social structure impervious to change, substituting a privately created static society for a state-imposed dynamic one. The modern state seeks to avoid this result through a variety of means related to contract. Legislatures and regulatory agencies often decree what may or may not be in an agreement, and they impose all manner of limitations on substantive terms, such as interest, time of payment, validity, and extent of warranties.[118] Moreover, courts no longer have as much difficulty in refusing to enforce bargains that are grossly one-sided and that represent what is perceived to be an unfair overreaching by the party with superior bargaining power.[119] Indeed, the Uniform Commercial Code specifically states that a court may refuse to enforce an "unconscionable" contract.[120] Of course, these limitations and constraints do not apply in all instances. Many situations still exist where parties of relatively equal bargaining power negotiate and create their own deals. No one seriously disputes, however, that we have substantially greater direct state interference with the bargaining function now than seventy-five years ago.[121] In effect, the state interferes with the

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[118] *See generally* Woodard, *supra* note 47.

[119] For two of the classic cases in the area, see Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).

[120] U.C.C. § 2-302. The literature on unconscionability is enormous. For some helpful articles, see Ellinghaus, *In Defense of Unconscionability,* 78 YALE L.J. 757 (1969); Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485 (1967); Spanogle, *Analyzing Unconscionability Problems,* 117 U. PA. L. REV. 931 (1969). The concept of unconscionability is not a modern phenomenon. It has its roots firmly set in Anglo-American jurisprudence. *See* Armstrong v. M'Ghee, Addison 261 (Pa. Westmoreland Cty. 1795), *reprinted in* F. KESSLER & G. GILMORE, CONTRACTS 109 (2d ed. 1970). *See also* Scott v. United States, 79 U.S. (12 Wall.) 443, 445 (1870).

[121] For example, both the state and the federal governments regulate consumer credit. *See* H. KRIPKE, CONSUMER CREDIT 1-5 (1970). The federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1692 (1976), contains extensive standards for disclosure. *See generally* Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts,* 63 VA. L. REV. 841 (1977). For a discussion of one state's disclosure standards, see American Home Improvement Co. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964).

An interesting example of a regulatory agency's intrusion into the contracting process is the FTC's increasing criticism of the doctrine of holder in due course. Although the FTC has not directly tried to outlaw the doctrine, it has sought to require full disclosure of its effects and to prevent its enforcement in certain instances "where it is demonstrated that the doc-

"how" of contracting; the seller's methodology is what is primarily at stake. Once the state has intervened, however, the seller must use the same methodology with everyone, whether he is dealing with a wealthy lawyer or an illiterate indigent.

Runyon goes a step further, but in a different direction, by dealing directly with the "who" of contracting as opposed to the "how." Courts and legislatures have been willing to say that allowing a sharp salesman to take advantage of a trusting, naive, or innocent consumer is unfair. *Runyon* says that it is unfair for an individual to be denied the *opportunity* to contract merely because of race, a factor over which the individual has absolutely no control. In a society founded on notions of free enterprise, saying that skin color is not a permissible basis for the exclusion of persons from participation in private commercial transactions is perhaps less radical than saying that the naive, the stupid, and the innocent will be protected from the Darwinism of free enterprise capitalism.

The dissenters in *Runyon* thus really beg the question. Historically, whites simply have not been subjected to racial discrimination in making contracts. To say that blacks can make enforceable contracts but no white person need contract with them would be insufficient. Blacks could contract among themselves, but whites historically have controlled the economy. Integration of blacks as citizens into the mainstream of American commerce necessitates interracial transactions.

What *Runyon* does is substitute a public status construct for one developed from private ordering. Race is, in the civil-law sense, a *status naturalis*. Private, individual discrimination created a situation in which this *status naturalis* came to determine part of an individual's *status civilis*.[122] For blacks subjected to this form of exclusion from private bargaining, the result was not much different from that experienced by other groups, such as the bakers in *Lochner v. New York*.[123] The bakers were denied a freedom of economic choice because they lacked a counterbalancing economic power; blacks excluded from the opportunity to contract by reason of race similarly were denied a free choice in matters directly affecting their lives. Changes in the approach of courts and legislators to

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trine is unfair to consumers." *In re* Certified Building Prods., Inc., 83 F.T.C. 1004, 1040 (1975). *See generally* All-State Indus., Inc. v. FTC, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970).

[122] *See generally* notes 17-20 *supra* and accompanying text.

[123] 198 U.S. 45 (1905) (discussed at notes 40-47 *supra* and accompanying text).

matters of contract, coupled with the growth of trade unions and a number of other social changes, put the bakers in a position of reasonable equivalence with their employers.[124] *Runyon* performs a similar function with respect to blacks by giving them the initial opportunity to engage in the bargaining process. This fact necessarily limits one aspect of freedom of choice: a racially prejudiced person cannot use racial bias as a factor in determining whether or not to contract. On the other hand, it opens an avenue of choice for a class of persons who have suffered from a certain absence of opportunity by reason of a *status naturalis.* In the sense that the state limits the individual freedom of choice of some, it does impose a status construct.[125] Thus a paradox of American law continues—the state attempts to enhance and preserve the free market by limiting the discretion of participants in the market.[126]

The general goal of *Runyon* and similar cases is to promote freedom in commercial intercourse by furthering the integration of racial minorities into the mainstream of the American economy. This does not mean that *Runyon,* and particularly *McDonald,* might not operate contrary to other legislative, executive, and judicial policies also designed to promote social, political, and economic integration. As mentioned above,[127] *Runyon* and *McDonald* can be read to prohibit voluntary affirmative action programs in employment, although such programs have been accepted as one means for the equalization of the races in American society.[128] Similarly, social movements or attempts to promote ethnic or racial identity through separatist organizations could run afoul of these decisions.

Thus the application of Friedmann's thesis[129] to this area of the law means we must qualify his notion that status is conducive to

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[124] *See* notes 40-47 *supra* and accompanying text.

[125] Professor Cohen suggested some forty-odd years ago that the regulation of commercial transactions of this sort was a proper and reasonable exercise of sovereignty. He compared regulation of contract with regulation of traffic where limitations on vehicular traffic are necessary for the protection of the general freedom to travel on highways. Regulation of the "how" and "who" of contracting can, if properly designed, promote the general freedom of commercial intercourse. *See* Cohen, *The Basis of Contract,* 46 HARV. L. REV. 553, 585-92 (1933).

[126] *Runyon* also evidences another recurring phenomenon of American decisional and statutory law: the manipulation of market mechanisms for social or political purposes.

[127] *See* note 100 *supra* and accompanying text.

[128] For a discussion of the effect of § 1981 on affirmative action programs, see Note, *supra* note 93, at 440-42. For an amusing discussion of the limitations of this approach, see D. BOORSTIN, THE SOCIOLOGY OF THE ABSURD (1970).

[129] *See* notes 57-67 *supra* and accompanying text.

liberty in nonmarital matters. *Runyon* leads to the conclusion that the question is a relative one, depending on whose liberty is involved and on who is imposing the status. The cases reveal two trends that shed light on this idea. First, attempts to deal with the single problem of racial discrimination have resulted in the development of contradictory status constructs. An "affirmative action" program requires that one be aware of racial, ethnic, and sexual distinctions. *Status naturalis* becomes an essential factor in the creation of a contractual relationship. Equality is unquestionably more laudable than the social inequality that has characterized much of American history, but the means are precisely the same as those of the "Jim Crow" statutes. On the other hand, *Runyon* and *McDonald,* by suggesting that private promissory transactions should be color blind, remove the element of prejudice from individual free choice. Affirmative action programs impose an element of prejudice on individual free choice. In the first case, one loses the freedom to be racially prejudiced; in the second, one loses the freedom to be color blind.

Second, the courts have moved from *private* to *public* imposition of status. Although one may doubt the efficacy of either *Runyon* or affirmative action programs in fostering social change, little doubt remains that both mark significant state interference with a fundamental aspect of the bargaining process—the choice of a bargaining partner. This restriction means that the freedom *to* contract is broadened for a significant segment of society, but at the cost of a portion of the freedom *in* contracting.

These two trends reveal the relative nature of Friedmann's thesis. He himself defined status as a publicly created relationship, which was consistent with Isaacs's belief that the state's status should replace that of employers.[130] The validity of a status thus depends on who imposes it. Moreover, the bigot's lost "freedom" to be prejudiced cannot be viewed as an isolated matter. It must be weighed against the total social benefit that accrues from according blacks greater freedom to contract. In a sense, the liberty portion of Friedmann's formula relates to aggregate social freedom, just as the other half requires collective imposition of status.

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[130] *See* notes 57, 43-47 *supra* and accompanying text.

III. The Competing and Changing Functions of Contract and Status in Long Term Intimate Relationships

A. Marriage as Status

Marriage usually has been regarded as a relationship governed by a status construct.[131] At common law, a woman's legal rights and capacities merged with those of her husband upon their marriage so that the two became a single legal entity with the husband as the controlling figure. Although the husband was in legal command of the relationship, he was obligated to provide his spouse and offspring with the necessities of life.[132] Beginning in the nineteenth century, a number of states passed what were generally called "Married Women's Acts." These statutes together with some judicial decisions created a limited separate legal identity for married women.[133] This development followed Maine's thesis that legal progress removes status generated by the family and replaces it with the capacity to contract.[134]

For the most part, the recognition of a wife's separate legal identity has been in the context of dealings with third parties or with respect to separate interests in property,[135] but some specific classes

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[131] *See, e.g.*, MacNeil, *supra* note 6, at 725. For one of the most comprehensive discussions of the history and background of marriage, see H. Clark, Law of Domestic Relations (1968).

[132] For a comprehensive discussion of traditional obligations of the marital relationship, see Weitzman, *supra* note 29. *See generally* Clark, *The New Marriage*, 12 Willamette L.J. 441 (1976).

[133] *See generally* Weitzman, *supra* note 29. A Georgia court in the midnineteenth century noted that the doctrines of the Bible and of the common law were being superseded by the introduction of a new principle from the civil law that husbands and wives were distinct persons and separate legal entities. *See* Wylly v. S.Z. Collins & Co., 9 Ga. 223 (1851). Judges often were reluctant to afford a liberal interpretation to attempts at emancipating females. Illustrative of this reluctance were cases involving the marriage of a woman to a man who was her debtor. The common-law rule was that marriage erased the antecedent debt. *See* Burleigh v. Coffin, 22 N.H. (2 Foster) 118, 127 (1850). Some courts construed the Married Women's Acts to abrogate this common-law rule, but others were unwilling to do so. For a collection of the cases, see Annot., 45 A.L.R.2d 722 (1956).

[134] *See* notes 11-14 *supra* and accompanying text.

[135] For instance, no one seriously disputes that a wife may take title to real property during coverture and hold the same as part of her separate estate in a common-law jurisdiction. (In a community property state, her spouse would have a 50% interest in property acquired during the marriage.) Husbands and wives may also become separately liable on contracts for services or products used in the marital relation, although sometimes the relationship itself may create a liability on the part of the husband (as the spouse charged with support) for something that the wife did in a situation where the husband would have no liability absent the marital relationship. *See, e.g.*, Chas. S. Martin Distrib. Co. v. Foster, 140 Ga. App. 12, 230 S.E.2d 77 (1976); Nabors v. Blanche Reeves Interiors, Inc., 139 Ga. App. 638, 229 S.E.2d 117 (1976); Gibbs v. Carolina Portland Cement Co., 50 Ga. App. 229, 177 S.E. 760 (1934).

of contracts between husband and wife have been recognized as valid and enforceable. Antenuptial agreements with respect to property settlements usually have been enforced, unless they make a provision for property division upon divorce. In the latter instance, the contract usually has been treated as void because it may promote a dissolution of the marriage.[136] Married couples may also enter into valid contracts about matters outside the context of the marital relationship itself, such as business agreements or property sales.[137] Nevertheless, enforcing such agreements may be difficult because of limitations imposed on litigation between spouses.[138]

Courts have refused to enforce agreements that seek to alter one or more aspects of the marital relationship itself as it is defined by law.[139] The reasons given for this refusal have been many and varied. One fear has been that the intimacy of marriage might make possible an agreement fraudulent toward a third party.[140] Additionally, the state's continuing interest in the stability of the family as the basic organizational structure of society has been considered so great that the state has taken on the responsibility for defining the duties, obligations, and limitations of the relation.[141] Courts steeped in contractual theory also have repeated the formula that judges cannot enforce intramarital contracts because the parties do not intend that such agreements be attended by legal consequences,[142]

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[136] *See, e.g., In re* Marriage of Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); Warren v. Warren, 235 Ga. 234, 219 S.E.2d 161 (1975); Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961). *Cf. In re* Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) (adopting objective test as to whether agreement promotes dissolution). *See generally* 6 A. CORBIN, *supra* note 28, § 1474; note 156 *infra* and accompanying text.

[137] *See generally* 3 C. VERNIER, AMERICAN FAMILY LAWS 65-71 (1935); McDowell, *Contracts in the Family*, 45 B.U.L. REV. 43, 46 (1965); Comment, *Marital Contracts Which May Be Put Asunder*, 13 J. FAM. L. 23, 24-28 (1973).

[138] For comprehensive discussions of the problems peculiar to litigation between spouses, see Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650 (1966); Note, *An Analysis of the Enforceability of Marital Contracts*, 47 N.C.L. REV. 815 (1969).

[139] For a general discussion and collection of the leading cases, see Note, *Marriage as Contract: Towards a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROB. 607, 616-21 (1973) [hereinafter cited as Note, *Marriage as Contract*]; Note, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U.L. REV. 1161 (1974) [hereinafter cited as Note, *Marriage Contracts for Services*].

[140] *See, e.g.*, Kennedy v. Lee, 72 Ga. 39 (1883).

[141] *See, e.g.*, McDowell, *supra* note 137, at 48-49.

[142] One of the classic statements of this presumption was Balfour v. Balfour, [1919] 2 K.B. 571. Lord Judge Atkin stated: "The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts." *Id.* at 579. *See also* Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386, 390 (1932).

which is simply another way of saying that courts would have more difficulty in fashioning an appropriate remedy in a marital contractual dispute than in a typical commercial bargain.[143] Judges also have shied away from intruding into what they perceive to be private matters that should be privately settled, even though the disagreement sometimes derives from a publicly imposed obligation.[144] Finally, the short answer supplied by many courts has been that a postnuptial contract affecting intramarital duties may not be enforced for either of two reasons: (1) it lacks consideration in that one party or the other simply agrees to do what the law already requires,[145] or (2) it seeks to amend statutorily imposed duties and therefore is contrary to public policy.[146] Regardless of which justification has been cited by a particular court, little doubt remains that marriage historically has been governed by status in Anglo-American jurisprudence.

B. Marriage as Contract

Recently, a number of commentators have suggested fundamental changes in both the legislative and judicial approaches to marriage to allow the parties greater flexibility in structuring the form of their relationship.[147] Taken together, these proposals indicate the

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[143] *See, e.g.*, McDowell, *supra* note 137, at 48-50. *See generally* Fleischmann, *Marriage by Contract: Defining the Terms of Relationship*, 8 FAM. L.Q. 27 (1974); Havighurst, *supra* note 142, at 397-98.

[144] As one court said not so long ago: "The law and equity not only allow but strongly encourage private settlements of family affairs." Trammell v. West, 224 Ga. 365, 366, 162 S.E.2d 353, 355 (1968) (citing Folds v. Folds, 187 Ga. 463, 1 S.E.2d 4 (1939); GA. CODE ANN. § 20-1205 (1977)). For a discussion of the distaste some courts have had for spousal contracts, see Cropsey v. Sweeney, 27 Barb. 310 (N.Y. App. 1858); notes 157-62 *infra* and accompanying text.

[145] For an interesting discussion of the question of preexisting duty in the context of the famous New York case of DeCicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807, 163 N.Y.S. 823 (1917), see 1A A. CORBIN, *supra* note 28, § 177. *See also* Lloyd v. Fulton, 91 U.S. 479 (1875); Holsombeck v. Caldwell, 218 Ga. 393, 128 S.E.2d 47 (1962); Young v. Cockman, 182 Md. 246, 34 A.2d 428 (1943).

[146] *See, e.g.*, Towles v. Towles, 256 S.C. 307, 182 S.E.2d 53 (1971); McDowell, *supra* note 137, at 47-48; Weitzman, *supra* note 29, at 1259-63; Comment, *supra* note 137, at 34-35.

[147] *See, e.g.*, B. FRIEDAN, THE FEMININE MYSTIQUE 150-81, 233-57 (1963); R. LAING, THE POLITICS OF EXPERIENCE 50-67 (1967); K. MILLETT, SEXUAL POLITICS 66-73, 120-27 (1969); Davids, *New Family Norms*, TRIAL, Sept.-Oct. 1972, at 14; Edmiston, *How to Write Your Own Marriage*, Ms., Spring 1972, at 66; Fleischmann, *supra* note 143; Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMP. L. 1 (1975); McDowell, *supra* note 137; Rheinstein, *The Transformation of Marriage and the Law*, 68 NW. U.L. REV. 463 (1973); Note, *Marriage as Contract*, *supra* note 139; Note, *Marriage Contracts for Services*, *supra* note 139.

presence of basic inequalities in the status of marriage as currently defined. Unfairness may result from strict adherence to the rule that intramarital bargains ordinarily will not be enforced. The marriage "contract," the terms of which are imposed by the state, supersedes any private arrangement, no matter how clearly desired by both parties. In criticizing this approach, one commentator has said:

> The marriage contract is unlike most contracts: its provisions are unwritten, its penalties are unspecified, and the terms of the contract are typically unknown to the "contracting" parties. Prospective spouses are neither informed of the terms of the contract nor are they allowed any options about these terms. In fact, one wonders how many men and women would agree to the marriage contract if they were given the opportunity to read it and to consider the rights and obligations to which they were committing themselves.[148]

Nevertheless, the courts on the whole have not reacted favorably to the call for greater freedom of contract as between married couples.[149] An express contract about a subject outside the marital relation may well be enforced, but agreements that seek to amend marital obligations or that may appear to be in derogation of the mar-

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[148] Weitzman, *supra* note 29, at 1170 (footnote omitted). Commentators have a strong feeling that women tend to get the worst part of the deal despite changes in marital laws to allow them to retain a separate legal identity. *See, e.g.*, sources cited note 147 *supra*. For discussion of what effect the equal rights amendment might have on family law to redress inequalities, see Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 936-54 (1971); Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234 (1971). In a very direct way, the traditional legal view of marriage has contributed to inequities in the taxing system that have affected both men and women. For a discussion of this general problem and suggestions for a new approach, see McIntyre & Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573 (1977).

[149] *See generally* notes 139-46 *supra* and accompanying text. The slightly ambivalent but generally negative reaction of courts to suggestions for fundamental changes in the marital relationship is probably a reflection of the general societal reaction. Professor Clark has stated:

> [A] majority of Americans still marry in the traditional way and continue to regard marriage as the most important relationship in their lives. It therefore seems that contemporary attitudes toward marriage differ fundamentally between a minority taking an essentially hostile view of it and a majority upholding it with equal fervor. There is perhaps a third group of indeterminate size who see some merit in the arguments on both sides but who do not take a fixed position. If we could analyze the individuals in all three groups we might discover much greater ambivalence in their feelings about marriage than would be suspected from their public utterances. Ambivalence has always characterized people's reactions to this complex relationship, and there is no reason to suppose that our contemporaries are subject to any less conflicting emotions than were our ancestors.

Clark, *supra* note 132, at 444 (footnotes omitted).

riage are not much more likely to be enforced now than they ever have been.[150] Some cases, however, show a tendency to give greater flexibility to bargaining between married partners. An agreement may be enforced with respect to the *resumption* of marital obligations in certain circumstances if the purpose of the agreement is to stabilize a marriage.[151] Normally, an agreement to cohabit would be unenforceable as between spouses because the agreement would be to do only what the law already mandated.[152] This rule, however, may be relaxed in certain contexts. When the husband, for example, has acted in such a way as to forfeit his rights to cohabitation, the wife's agreement to live with him may be good consideration for his promise to transfer property.[153] This agreement supports a reconciliation and does not derogate the marital relationship. The couple have contracted in a manner consistent with and supportive of the status construct.[154]

More controversy has arisen with respect to antenuptial contracts that attempt to deal with property settlements and alimony in the event of dissolution of the marriage. Such agreements by their very nature contemplate the possibility of divorce. Even though a divorce may never occur or may be highly improbable, courts have been reluctant to enforce such agreements on the theory that they might provide a financial incentive to break up a marriage.[155] A few courts recently have modified this rule and have enforced such agreements.[156] The assumption that an antenuptial agreement for the

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[150] *See generally* notes 139-46 *supra* and accompanying text.

[151] *See, e.g.*, Holsombeck v. Caldwell, 218 Ga. 393, 128 S.E.2d 47 (1962).

[152] In Holsombeck v. Caldwell, 218 Ga. 393, 128 S.E.2d 47 (1962), the court stated the general rule:

> "The mere promise of an undivorced wife to live with her husband and perform such duties as are ordinarily imposed upon her by the marriage contract is only a repetition of the promise made at the time the marriage contract was entered into. The law, seeking to regulate the marriage relation for the welfare of the State, will not allow married persons to discard this relation without justification and renew it for money."

Id. at 395, 128 S.E.2d at 49 (quoting Young v. Cockman, 182 Md. 246, 252-53, 34 A.2d 428, 432 (1943)).

[153] *See id.*

[154] *See, e.g.*, McDowell, *supra* note 137, at 47, 51 n.35; Note, *Marriage Contracts for Services*, *supra* note 139, at 1166-67. For a discussion of the rationale, see Lacks v. Lacks, 12 N.Y.2d 268, 273, 189 N.E.2d 487, 490, 238 N.Y.S.2d 949, 952 (1963) (Fuld, J., concurring).

[155] *See, e.g., In re* Marriage of Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); Warren v. Warren, 235 Ga. 234, 219 S.E.2d 161 (1975); Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961); Weitzman, *supra* note 29, at 1263-66.

[156] *See, e.g.*, Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds on rehearing*, 257 So. 2d 530 (Fla. 1972); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); Unander v. Unander, 265 Or. 102, 506

division of property in the event of divorce will encourage couples to dissolve their marriages is essentially an unprovable proposition. An equally valid argument is that an agreement entered into when the parties are friendly is likely to result in a reasonably fair division. At the very least, such agreements might be helpful in smoothing the separation process and thereby minimize the attendant emotional distress.

Except in the relatively limited context of these cases, courts do not enforce interspousal contracts amending state-imposed marital responsibilities.[157] *Department of Human Resources v. Williams*,[158] a 1973 decision of the Georgia Court of Appeals, came close to the enforcement of such a contract. Mr. Williams was permanently and totally disabled, and welfare was his sole means of support. A portion of his welfare payment (up to $100 per month) was earmarked for the employment of someone to perform personal and domestic services, and his wife agreed to do the necessary nursing work herself for the $100 allotment. When the state welfare agency found out about this arrangement, it cut off the extra payment, reasoning that Mrs. Williams merely was performing her spousal obligations as defined by law. Mr. Williams challenged the ruling and argued that his wife was acting beyond the requirements of duty.[159] The court agreed and ordered the reinstatement of the extra allotment:

> As the husband's correlative legal duty of support does not legally bind him to support his wife in luxurious idleness, the wife's duty of performing ordinary household services can not legally bind her to render those extensive personal care services required by a husband who has suffered such brain damage that he must be tended as is a young child.
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> . . . .

P.2d 719 (1973). *But cf.* Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972) (upholding legitimacy of antenuptial agreements in general but invalidating antenuptial agreement for liquidated damages). *See generally* Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413, 435-38 (1976); Weitzman, *supra* note 29, at 1259-69.

[157] In some instances, courts have enforced an implied agreement of agency to protect the interests of a third party. Usually such an agency relationship has been implied from the husband's statutory duty of support. *See, e.g.*, Oglesby v. Farmers Mut. Exchange, 128 Ga. App. 387, 196 S.E.2d 674 (1973). A wife may bind herself separately, however, and the husband may not be liable even with respect to necessaries in a proper case. *See, e.g.*, Nabors v. Blanche Reeves Interiors, Inc., 139 Ga. App. 638, 639, 229 S.E.2d 117, 118 (1976) (dictum). Of course, many, perhaps most, couples vary the terms of the marriage contract in some particulars through informal agreements.

[158] 130 Ga. App. 149, 202 S.E.2d 504 (1973).

[159] *See id.* at 149-50, 202 S.E.2d at 505.

> . . . It is law in Georgia that a husband is not entitled to the salary or wages of his wife, and shall not receive them without her consent. Code Ann. § 53-512. In the shadow of this statute, if nowhere else, stands the right of a married woman to the employment that will give her salary or wages. Her surrendering of this legal right to become a personal attendant to her husband is sufficient consideration for the express contract of employment, as she has suffered a legal detriment.[160]

Williams did not involve a dispute directly between the spouses, but if the court had applied its logic to a suit for wages by Mrs. Williams against her husband, she might have had a reasonably good chance of prevailing. The opportunities for fraud are obvious, particularly where public funds are used to pay the costs of the contract, but the presence or absence of fraud is a factual matter and not a legal impediment to recognizing the possibility of contracting. *Williams* explicitly recognizes the validity of an intramarital contract for personal services of a private nature, provided those services are beyond the scope of the duties normally imposed by law.[161] The decision also recognizes that a spouse's surrender of the opportunity to work for a salary outside the home is a good and valuable consideration for a promise by the other spouse to make payments or to transfer property.[162]

If courts do broaden the reasoning in *Williams* to cover interspousal disputes, they will have to confront the problem of what relief to accord a victorious plaintiff. *Williams* makes sense in the particular context of its facts, but even such a facially simple case illustrates the severe problem of remedies inherent in any attempt to validate intramarital contracts during the term of marriage itself. Specific performance does not lie if the contract is one for personal services,[163] so the remedy must be limited to money damages. Any monetary award in such a case, however, might amount to nothing more than a transfer from the estate of one spouse to another, which

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[160] *Id.* at 152-53, 202 S.E.2d at 507-08.

[161] As to what constitutes "ordinary domestic services," see Galway v. Doody Steel Erecting Co., 103 Conn. 431, 130 A. 705 (1925); Lee v. Savannah Guano Co., 99 Ga. 572, 27 S.E. 159 (1896); Bituminous Cas. Corp. v. Wilbanks, 60 Ga. App. 620, 4 S.E.2d 916 (1939).

[162] In recognizing such consideration, *Williams* anticipated in part the rationale of the California Supreme Court in Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (discussed at text accompanying notes 200-07 *infra*).

[163] *See* 5 A. CORBIN, *supra* note 28, § 1184. A court or legislature faced with this problem might, of course, decide to create an exception and to impose specific performance for family disputes.

might not make any economic sense if the family is viewed as an economic unit. This does not mean that a court should never order transfers from the estate of one spouse to the estate of another in recognition of a valid interspousal economic transaction.[164] Nevertheless, in many instances relief might amount to a transfer without economic substance.

Even putting aside the problem of a remedy, what justifies the approach in *Williams*? Commentators advocating greater recognition of intramarital contracts must suppose that judges would be useful arbiters of domestic disagreements.[165] Suggestions such as these have been backed with carefully considered arguments, but they all necessarily proceed from two assumptions: (1) greater freedom for individuals to structure a marriage in ways that make sense to them is desirable, regardless of the state's interest, and (2) courts are appropriate forums for the resolution of disputes in such privately ordered marital relationships. The first assumption necessarily suggests that the state's role in defining the status of such relationships should be diminished, but the second necessarily implies that the state has a continuing right, or even duty, to exercise supervisory control over the relationship. The provisions enforced may be more of the couple's choosing, but the state will be present enforcing remedies during the course of the relationship rather than at its termination. In addition, the second assumption also reflects the lessened importance of societal institutions other than the state; court replaces family, community, church, or synagogue as the guiding institution.

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[164] If the couple in Holsombeck v. Caldwell, 218 Ga. 393, 128 S.E.2d 47 (1962) (discussed at notes 151-53 *supra* and accompanying text), both had not been killed in an automobile accident, the wife might well have been entitled to an order requiring her husband to transfer the property he had promised her for her agreement to resume marital relations. If, on the other hand, she had reneged, the problem of a remedy would have become exacerbated. He could have interposed her breach as a defense to a suit by her seeking transfer of the property, but could he have tendered and sought damages? How would they have been measured? For a discussion of this point, see Towles v. Towles, 256 S.C. 307, 182 S.E.2d 53 (1971).

[165] *See, e.g.*, Note, *Marriage Contracts for Services*, *supra* note 139, at 1189. The author stated:

> Of course, marriage contracts would not be wholly amenable to interpretation according to the same rules used for commercial contracts, but there does not appear to be a significant conceptual distinction between the state's rightful interest in promoting good faith in a business deal and its interest in promoting honesty and fairness in a marital agreement.

Id. (footnote omitted). Another commentator has suggested that small fines might be used in lieu of traditional contractual remedies as a means for enforcing intramarital bargains. *See* Comment, *supra* note 137, at 44-46.

Another more compelling argument in favor of a greater use of contract in marriage is the notion that contract may help preserve marriage and the family, two institutions fundamentally important to the maintenance of stability in a democratic society. One writer has suggested that marriage itself is too easy and that the parties should go through a more formal bargaining process at the outset to be educated as to the seriousness of the undertaking.[166] In this model, greater use of contract and individual bargaining would screen out those couples who are not serious or who discover that they are fundamentally at odds with each other on matters important to the ultimate stability of the marital pact.[167]

The idea that contract may serve to strengthen marriage as a form of family orientation is intriguing, but it is still untested and perhaps unprovable. A greater use of contract would not, however, remove the state from interference in the marital relation. Under the status construct now prevalent, the state superimposes the structure on the partners, but (except for problems relating to dissolution, death, or desertion) the state allows, even requires, the parties to work out their own problems within the context of the marriage. This "hands-off" policy keeps the state from directly intruding upon the private, day-to-day affairs of a couple.[168] The use of

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[166] *See* Note, *Marriage as Contract, supra* note 139, at 643-44. Although parties should be made aware of the seriousness of marriage prior to embarking on the marital adventure, some of the other premises of this note are doubtful. The author is opposed categorically to the use of status concepts in a modern, pluralistic society, *see id.* at 635-36. The author also seems to be unfamiliar with Isaacs and other writers, *see* text accompanying notes 43-68 *supra*, because the piece bases its arguments on the more restrictive concept of status employed by Maine, *see* text accompanying notes 11-14 *supra*. The thesis that regulation of marriage by statutory law serves "no discernible public welfare function," Note, *Marriage as Contract, supra* note 139, at 621, also is questionable.

[167] *See* Note, *Marriage as Contract, supra* note 139, at 643. Professor Fleischmann, in a similar vein, has made the argument that traditional marriage is in trouble, but contract may save it:

> The preservation of conventional marriage against such innovations as group marriage, successive marriages, or unsolemnized union is desirable. We have considerable societal experience in the problems of conventional marriage and their solution. A form so long accepted should not lightly be discarded. Thus, if the proposal of this article is thought questionable because of its novelty, it should be observed that this proposal offers a means to preserve through adaptation an institution which is in serious danger. Its approach is therefore fundamentally conservative.

Fleischmann, *supra* note 143, at 49.

[168] For Maine, the status of persons in ancient society stemmed from the jurisdictional autonomy of the family: "[T]he peculiarities of law in its most ancient state lead us irresistibly to the conclusion that it took precisely the same view of the family group which is taken of individual men by the systems of rights and duties now prevalent throughout Europe." H. MAINE, *supra* note 11, at 139. Thus domestic autonomy may rest on the withdrawal of state

enforceable contracts to organize the marital structure might provide a couple initially with greater freedom in the ordering of their lives, but resolution of disputes necessarily will involve more direct interference by the state. The state will not be removed from the picture; it simply will intrude at a different point, and this intrusion could be more objectionable than intrusion by way of an ordering of status at the outset.[169] For the time being, however, a contractual model for marriage exists only in the periodicals and not in the cases.[170] The situation is considerably different for unmarried couples.

C. *Long Term Cohabitation Without Marriage—Contract, Status, or Neither?*

Some men and women always have chosen to live with one another outside the traditional marital relationship. In the absence of the accepted forms and ceremonies of church or state, such couples usually have not been subjected to the status obligations of marriage even though they may have acted as if they were married and appeared so to the world at large.[171]

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control over private disputes. The desire to have both domestic autonomy and state mediation of disputes between members through enforcement of private contractual provisions might be described as "indulging in the great American dream of wishing to have their cake and eat it too." Clark, *supra* note 132, at 452 (speaking of the desire to have property rights imposed on unmarried, cohabitating couples).

[169] For more on this point, see Clark, *supra* note 132, at 449-52. Fundamental to the whole problem is the appropriate role of the state. One may argue that the state has no business interfering with individual decisionmaking as to the form of a long term personal relationship, but if such relationships form the basis for societal order and organization, does not the state have a vital interest? Full consideration of these issues is beyond the intended scope of this article. For some interesting discussions of similar issues with respect to the state's interest in regulating pornography, see Berns, *Pornography vs. Democracy: The Case for Censorship*, PUB. INTEREST, Winter 1971, at 3; Frankel, *The Moral Environment of the Law*, 61 MINN. L. REV. 921 (1977); Gellhorn, *Dirty Books, Disgusting Pictures and Dreadful Laws*, 8 GA. L. REV. 291 (1974); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[170] That many of the laws regulating marriage are archaic or oppressive to the female does not necessarily imply that adopting private contract as the *governing* construct for the marital relation would be better. Social changes can result in political changes and more desirable statutes if widespread support for revision exists. We are not concerned here with archaic laws that disadvantage a minority. The state's attitude toward male-female relationships affects *all* of us.

[171] This statement requires one qualification. In some states, if two people hold themselves out as a married couple for a certain period of time, the state will declare them to be married the same as if they had oberved the recognized forms. Such a "common-law marriage" is legally the same as a traditional marriage. The majority of American states do not, however, recognize common-law marriages, and even in those that do the couple must live together

Such unmarried couples may wish to provide for various divisions of responsibility, to divide property and income, to provide for children of the union, and to work out some equitable means for settling property upon a termination of the arrangement. In a traditional marriage, statutory law generally defines the means by which such matters are to be handled.[172] In a nonmarital situation, usually no applicable statutory provisions exist, and attempts by the parties to order their affairs through the means of private contract have met with limited success. Courts have believed that living together outside the bonds of marriage implies that the partners are engaged in illicit sexual relations. This fact poisons any agreement within the context of the affair because if the consideration is sex, then, say the courts, the contract is essentially one for prostitution and not enforceable.[173] A contract between partners in an illicit sexual affair, however, may be enforceable if the subject matter of the contract and its consideration are severable from the sexual relationship.[174] Thus couples who are partners in a legitimate business can enforce their business arrangements with each other even if they might also be having an affair.[175]

This general approach has created some significant problems not only for the parties directly involved but also for judges who try to administer the law in a reasonably equitable fashion. The cases usually have involved couples engaged in one of three different kinds of relationships that for short can be called the faithful mistress, the putative spouse, and the meretricious spouse. The first is not generally characterized by cohabitation as are the second and third. The putative spouse is usually regarded as "innocent" in that he or she has believed the marriage to be valid only to discover that

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for a significant period of time before the status attaches. For a general discussion of common-law marriage, see H. CLARK, *supra* note 131, at 45-58. Subsequent to the publication of that text, New Hampshire also enacted a statute providing for common-law marriage. *See* N.H. REV. STAT. ANN. § 457:39 (1968). *See also* Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization,* 28 U. CHI. L. REV. 88 (1960).

[172] *See* notes 131-70 *supra* and accompanying text.

[173] Professor Corbin has stated this rationale quite bluntly:

> A promise is not enforceable if part or all of the consideration for it is illicit sexual intercourse or the continuance of such an illicit relationship. This is true even though the relationship is not adulterous or otherwise criminal; the bargain is contra bonos mores in any case and the parties are regarded as in pari delicto.

6A A. CORBIN, *supra* note 28, § 1476, at 621-22 (footnotes omitted).

[174] "A bargain between two persons is not made illegal by the mere fact of an illicit relationship between them, so long as that relationship constitutes no part of the consideration bargained for and no promise in the bargain is conditional upon it." *Id.* at 622 (footnotes omitted).

[175] *See* notes 210-15 *infra* and accompanying text.

the mate has been duplicitous or that some technical formality has not been fulfilled.[176]

The faithful mistress has fared least well. Almost a half-century ago, Professor Havighurst called for greater recognition of an implied agreement to pay for nonsexual services performed by a mistress for the benefit of her lover,[177] but apparently no court has allowed a woman to prevail on such a theory in the absence of actual cohabitation for a significant period of time. Lengthy cohabitation essentially transforms the position of the woman from that of a classic "mistress" to that of a putative or meretricious spouse.[178]

Nevertheless, some courts have been willing to afford the mistress an opportunity to try to prove an express agreement severable from the illicit affair. In a California case,[179] the plaintiff had been the mistress of a man who was determined not to get married. For fifteen years prior to his death she had acted variously as his hostess, housekeeper, and nurse. Disappointed to learn that he had failed to remember her in his will, she brought an action against his executor seeking to collect a reasonable sum for the value of her housekeeping and nursing services.[180] The court was not ready to countenance an implied contract, but it was willing to let her try to make out a case for an express agreement:

> In view, then, of the admitted meretricious relationship in this case, and that there can be no implied contract for services, plaintiff had the burden of showing (a) that there was an express agreement . . . and (b) that such agreement was not in contemplation of or dependent upon the illicit relationship.[181]

Under this test, a woman who performed various tasks not required by law and normally performed for pay would not be prevented from recovery on an express agreement if she could prove that sex was not part of the consideration.[182] Thus the court simply applied the sever-

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[176] For a general definition of "putative" spouse, see Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453, 460-62 (1976) (citing, *inter alia*, Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948); Smith v. Smith, 255 Wis. 96, 38 N.W.2d 12 (1949)).

[177] *See* Havighurst, *supra* note 142, at 398.

[178] The same would be true of a male lover, but the reported cases usually deal with a female suing the man.

[179] Lovinger v. Anglo Cal. Nat'l Bank, ___ Cal. App. ___, 243 P.2d 561 (1952).

[180] *Id.* at ___, 243 P.2d at 564.

[181] *Id.* at ___, 243 P.2d at 569. *Accord*, Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

[182] The deceased male partner had the money, and the female had just provided her time,

ability doctrine outlined above.[183]

The difficulty in severing an express agreement from an illicit affair was made clear in the recent New Jersey case of *Naimo v. La Fianza*.[184] Elsa and Mario, a married man, began to have an affair in 1950. Mario and his wife had an adopted child, but he wanted to have a natural child and persuaded Elsa to bear him one. Elsa gave birth to Mario's son in 1964, and Mario acknowledged the child openly, supported him, gave him his name, and was by all accounts a doting father.[185] Some evidence existed that Mario had made an express promise to remember the child adequately in his will, but when Mario died suddenly in October 1975, the will had no provision for his son. Elsa sued as a guardian ad litem for the child on the promise to make a will, but she lost because the court found that the contract was not severable from the adulterous affair:

> We cannot be unmindful of the fact that here one party was unmarried and the other was married. Despite our changing standards of morality, the family unit is an integral part of our society and must be preserved and maintained. We cannot countenance the relationship of a married man and his mistress or lover. The mere fact that one party desires to produce a child of his own, while a noble motive, does not justify the means to that end. Even though the act of adultery may be decriminalized by legislative enactment, public policy cannot tolerate illicit relationships of this kind and any agreements arising therefrom.[186]

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care, and services. The woman's case might be stronger if she could show direct financial contributions from her separate estate.

[183] *See* notes 174-75 *supra* and accompanying text. In Williams v. Bullington, 159 Fla. 618, 32 So. 2d 273 (1947), the Florida Supreme Court applied a similar test to a case involving an alleged agreement with respect to a real estate transfer. The court held:

> If the land transaction had been in furtherance of or in consideration for the illicit relation there might be substance to this contention [that it was unenforceable]. It might likewise be true if legal precepts were required to parallel moral precepts, but that is not the case. The illicit relation was commenced years before the land contract was made, and had no connection with or dependence on it. One might recoil under the knowledge that another's home was paid for with the proceeds of bootleg liquor but there is no theory under the law that it could be confiscated for that reason.

Id. at 622, 32 So. 2d at 275. For other cases grappling with this problem, see Karoley v. Reid, 223 Ark. 737, 269 S.W.2d 322 (1954); Hill v. Westbrook's Estate, 39 Cal. 2d 458, 247 P.2d 19 (1952); Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973).

[184] 146 N.J. Super. 362, 369 A.2d 987 (Ch. Div. 1976). This case did not involve cohabitation.

[185] *See id.* at 365-67, 369 A.2d at 989-90.

[186] *Id.* at 370-71, 369 A.2d at 992.

For all the court's piety, not only Elsa but also her son, who was innocent of any wrongdoing, suffered the loss of a means of support. The child was not allowed to proceed on the theory that he was the third party beneficiary of the agreement between Mario and Elsa because the principal "contract" had been tainted with immorality. The sins but not the riches of the father were visited upon the son.

Unlike the faithful mistress, the putative spouse usually has been treated as if she were a legitimate spouse,[187] although courts have had to resort to a variety of devices such as resulting trusts, implied partnerships, express or implied contracts to make a will, and express or implied joint ventures to protect an innocent partner caught in an illegal union.[188] A decidedly moralistic tone runs throughout the decisions: the mistress has knowingly flaunted convention, but the putative spouse has been the victim of circumstance or deceit.

More recent cases focus on the third kind of relationship—the couple who choose to cohabit essentially as husband and wife but without the benefit of the sanction of church or state. The tendency of some courts is to allow such couples to order their living arrangements by enforceable private contract. Other courts create a new status and treat such couples almost as if they were married, and still other courts continue to invoke the "meretricious spouse" rule[189] and refuse to give the couple judicial assistance in their disputes, with results akin to those in cases involving the faithful mistress.

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[187] *See generally* Folberg & Buren, *supra* note 176, at 460-62. Such has not always been the case. The "putative" spouse in Cropsey v. Sweeney, 27 Barb. 310 (N.Y. App. Div. 1858), certainly did not meet with much sympathy in the legal system. She had lived with James Ridgeway as his wife for 26 years after going through a formal wedding ceremony. She bore him 12 children. After Ridgeway died, she discovered that he had never been legally divorced from his first wife and that this "marriage" of 26 years had never been valid in the eyes of the law. She was not allowed to take as a spouse under the laws of intestate succession, and so she sought to recover the reasonable value of her services as manager of the couple's domestic affairs and as a helpmate to Ridgeway in the accumulation of his estate. She was unsuccessful because the court said no express or implied contractual arrangement could arise where the woman had thought herself properly married and performed the ordinary domestic duties of a wife with no expectation of pecuniary reward. The "widow" could not take from the estate because she was not a "widow," and she could not recover as an employee because she had considered herself to be a "wife" and did not *intend* that the performance of her "spousal" duties should be attended by legal consequences. *See id.* at 314-15. *Compare id. with* Shaw v. Shaw, [1954] 2 Q.B. 429 (C.A.) (similarly situated "widow" sued for breach of a promise to marry; court awarded her a widow's share reasoning that the "husband" had breached a continuing warranty that he was free to marry).

[188] For a general collection and discussion of the cases, see Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services,* 10 FAM. L.Q. 101 (1976); Annot., 31 A.L.R.2d 1255 (1953).

[189] *See generally* Bruch, *supra* note 188, at 112-13.

As in so many aspects of cultural change, California has led the way. California courts seemed initially disposed to protect the property rights of unmarried couples by imposing the community property rights of a married couple upon them. *In re Marriage of Cary*[190] first reached this result when the court reasoned that the passage of a "no-fault" divorce statute[191] signalled a legislative intent to remove considerations of "fault" from an assessment of an "unmarried living arrangement" with sufficient resemblance to a normal family.[192] In short, *Cary* shifted such couples "from the category of meretricious to the category of putative spouse,"[193] if they were engaged in an "ostensible marital . . . [and] actual family relationship."[194] Thus upon dissolution the relationship would be treated as a marriage for the purpose of allocating property. This approach amounted to a direct imposition of a status construct without regard to private agreement, express or implied.

Cary has been subjected to harsh criticism both for its logic and for the utility of the remedy it devised. One commentator pointed out that it left open three vital and ultimately unanswerable questions:[195] (1) What proof is necessary to show that the couple have an "ostensible marital and actual family relationship"? Some couples who want to avoid the marital status might be caught in it and vice versa. (2) How much of the statutory law should be applied? If property is to be divided upon dissolution of the relationship as if the couple were married, then should the couple be treated in all respects as if married in connection with questions about workmen's compensation, death benefits, or homestead exemptions? (3) What if one of the partners to the meretricious relationship is legally married to a third party? This commentator went on to suggest that the

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[190] 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

[191] California Family Law Act of 1969, CAL. CIV. CODE §§ 4000-5138 (West 1970).

[192] 34 Cal. App. 3d at 351-52, 109 Cal. Rptr. at 865.

[193] Comment, *Property Rights upon Termination of Unmarried Cohabitation:* Marvin v. Marvin, 90 HARV. L. REV. 1708, 1712 (1977) (footnote omitted). Clark pointed out that the effect of *Cary*, and those cases that followed it, "is to reinstitute common law marriage in California after it has been abolished by the legislature." Clark, *supra* note 132, at 449.

[194] 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 867.

[195] *See* Note, *In re Cary: A Judicial Recognition of Illicit Cohabitation,* 25 HASTINGS L.J. 1226, 1227-29 (1974). One might also ask what should become of a meretricious "bigamist," one who is not legally married to anyone but who manages to carry on an ostensible marital and actual family relationship with two partners. *See also* Note, In re Marriage of Cary: *Equitable Rights Granted to the Meretricious Spouse,* 9 U.S.F.L. REV. 186 (1974). For earlier case history, see Note, *Illicit Cohabitation: The Impact of the Vallera and Keene cases on the Rights of the Meretricious Spouse,* 6 U.C.D.L. REV. 354 (1973).

court had created unnecessary difficulties by treating the relationship as one equivalent to the status of marriage. The same result could have been reached by using doctrines of trust or contract, which would have given each partner a fair share of the property and also would have recognized the separate legal identities of the parties.[196] In effect, the court created a status but did not define its parameters.

In re Estate of Atherley[197] amply demonstrates the theoretical and practical confusion inherent in *Cary*. Harold and Ruth were married in 1933, but in 1945 Harold met Annette and fell in love with her. He left Ruth for Annette in 1947 and lived with her, to all outward appearances as husband and wife, until his death intestate in 1969. In 1961, Harold obtained a divorce in Mexico from Ruth and "married" Annette in Las Vegas the next year. California did not recognize Mexican divorces, and Harold was never legally divorced from Ruth nor legally married to Annette insofar as California was concerned.[198] The court applied *Cary* to give Annette a one-half interest in the property of her "marriage" to Harold but treated Ruth as the legitimate heir for purposes of intestate succession. This Solomon-like decision resulted in a sharing of the estate between Harold's two women and a limitation on the status of a *Cary* spouse. Had *Cary* been followed to its logical conclusion, Annette might well have been treated as the surviving spouse and taken the bulk of the estate,[199] but that also would have given de facto recognition to Mexican divorces, which would have been contrary to another long-standing California policy.

Recently, the California Supreme Court changed the theoretical course of law in this area in the celebrated case of *Marvin v. Marvin*.[200] Michelle and Lee Marvin began living together in October 1964 and continued to do so until May 1970, when Lee asked her to leave the house they had been sharing, which was in his name. Lee continued to provide Michelle with a substantial monthly in-

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[196] *See* Note, *In re Cary: A Judicial Recognition of Illicit Cohabitation, supra* note 195, at 1245-46. *Cf.* Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975) (different panel refused to follow *Cary* and employed meretricious spouse rule).

[197] 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

[198] *See id.* at 764, 119 Cal. Rptr. at 44.

[199] Had the court treated Annette like Harold's wife, she would have had a one-half interest in the property acquired during cohabitation and also would have taken a spouse's share according to the rules of intestate succession. *See* CAL. PROB. CODE §§ 221, 223 (West 1956).

[200] 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). For a comprehensive discussion of this case, see Comment, *supra* note 193.

come until November 1971, when he terminated the payments. Michelle then initiated a lawsuit in which she sought an equal division of the property acquired during cohabitation, claiming that she had given up her movie career and had performed the usual domestic services of a housewife in return for Lee's oral promise to make such a division. Lee denied any liability and interposed the defense of a meretricious relationship: not only had they cohabited without being married, but for two of the years they lived together Lee was married to another woman.[201] The trial court granted Lee's motion to dismiss the complaint for failure to state a cognizable claim for relief, but the California Supreme Court reversed and held that Michelle had set forth a prima facie case. The court's analysis was considerably different from that used by the court of appeals in either *Cary* or *Atherley*; *Marvin* decided that the Family Law Act did not apply to nonmarital relationships.[202] The court reiterated the severability rule and ensured it a useful legal future by narrowly construing the meretricious spouse rule:

> In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. . . . So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.[203]

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[201] 18 Cal. 3d at 668, 557 P.2d at 112, 134 Cal. Rptr. at 821.

[202] *Id.* at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.

[203] *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825. In reaching this decision, the court took express notice of fundamental changes in societal mores:

> [W]e believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.
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> . . . .
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> The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.

Id. at 683-84, 557 P.2d at 122, 134 Cal. Rptr. at 831. This court was adopting an approach that the late Wolfgang Friedmann suggested was appropriate and desirable for common-law judges:

> In his application of precedent, as in the interpretation of statutes, the judge must take note of major shifts in public opinion and social policy, of developments sufficiently

Thus unmarried couples may regulate all the economic incidents of their relationship by private agreement, so long as sexual practices form no apparent part of the consideration.

The court further proclaimed its willingness to enforce contracts implied from the conduct of the parties and make available equitable remedies to de facto spouses.[204] Justice Clark dissented from this portion of the opinion, fearing that the availability of equitable remedies amounted to the imposition of marital status on the parties:

> When the parties to a meretricious relationship show by express or implied in fact agreement they intend to create mutual obligations, the courts should enforce the agreement. However, in the absence of agreement, we should stop and consider the ramifications before creating economic obligations which may violate legislative intent, contravene the intention of the parties, and surely generate undue burdens on our trial courts.
>
> By judicial overreach, the majority perform a nunc pro tunc marriage, dissolve it, and distribute its property on terms never contemplated by the parties, case law or the Legislature.[205]

Clark's concern would be valid if the court actually had been reintroducing *Cary* by the backdoor. Not only would the judicially implied marriage be difficult to reconcile with the reality of Lee's legitimate marriage for the period up to January 1967, but it also would have created a status for the parties that neither apparently desired.

Marvin, however, did not purport to apply *Cary.* The majority merely said that if the provision of sexual services was severable, then the agreement could be enforced as being founded upon valid consideration (domestic labor and the surrender of a career). This statement was altogether different from saying that because the two had cohabited for a time they should be treated as married for the purposes of property settlement upon dissolution of the arrange-

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> fundamental to be accepted by the consensus of public opinion and to be expressed by the general trend in legislative policy. The theoretical formulation of such an approach must always remain somewhat vague, for the ways in which changes in public opinion express themselves in a democratic society are many and it is not an easy task for a court to fix the borderline between accepted evolutions in public opinion, on the one hand, and personal philosophy or prejudice, on the other.

W. FRIEDMANN, *supra* note 4, at 54.

[204] *See* 18 Cal. 3d at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

[205] *Id.* at 686, 557 P.2d at 123-24, 134 Cal. Rptr. at 832-33 (Clark, J., concurring in part and dissenting in part).

ment. *Marvin*'s importance lies in the court's willingness to use quasi-contractual theories to create an agreement from the context of the relationship. This approach is not a departure from the traditional contractual model, but it does apply a contractual construct in a domestic situation where courts have been somewhat reluctant to tread.[206] In effect, California has moved steadily from the meretricious spouse rule, which is status-oriented, to a contractual approach.[207]

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[206] As pointed out above, *see* notes 131-46 *supra* and accompanying text, courts historically have been hesitant about imposing theories of commercial law on a marital relationship. The same generally has been true of domestic services by family members, or even perhaps close friends, where a long and intimate relationship exists. Such services are, so courts say, performed for reasons of love and affection rather than for pecuniary reward. *See generally* Havighurst, *supra* note 142; McDowell, *supra* note 137.

[207] Oregon has proceeded in a similar manner, yet far more abruptly. The Supreme Court of Oregon, in Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976), simply wiped out the meretricious spouse rule:

> We conclude that we should abandon dubious legal distinctions to accomplish what this court has believed in the past to be a just result. We hold that an agreement such as that pleaded in this case, is not void as against public policy. . . .
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> . . . .
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> The application of the principle that such a contract will not be enforced has often resulted in the male keeping the assets accumulated in the relationship and the female being deprived of what she jointly accumulated. Although the parties have been jointly accumulating property for 19 years, that would be the result in this case if the principle were applied. While not condoning the parties' conduct, such a result seems to be unduly harsh.

Id. at 426-27, 547 P.2d at 146-47. The abandonment of the meretricious spouse rule in Oregon does not automatically mean that a spousal-like division of property upon the dissolution of an unmarried partnership will occur. *Latham* was a suit on an express contract, and the case did not focus on whether the relationship itself might give rise to an implied contract or to a status akin to that of marriage.

Similarly, Michigan courts for some time have taken a jaundiced view of the meretricious spouse rule. The case of Burns v. Stevens, 236 Mich. 447, 210 N.W. 483 (1926), decided more than fifty years ago, stated:

> [T]he rule that if the parties to a suit are in pari delicto a court of equity will leave them where they have placed themselves should not be here applied. . . . The question to be determined in this case . . . is whether the party acquired an interest in the property or a security for the money advanced. The manner in which they were then living is immaterial to the issue except in its bearing upon the weight to be given to their testimony. The doors of courts are not closed to people who lead immoral lives when contracts between them untainted with illegality or fraud are involved.

Id. at 452-53, 210 N.W. at 485.

Burns provided the basis for the enforcement of a contract between the partners to a meretricious relationship in the much more recent case of Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973). The male partner had died and the woman sought to enforce an alleged oral agreement by the decedent to convey a house. Despite some obvious evidentiary problems, clear evidence existed that the woman had contributed a substantial sum toward the purchase of the house. In reliance on *Burns*, the court did not have any trouble disposing of the argument that the deal could not be enforced because the parties had engaged in an

The state of Washington has faced similar problems but has followed a somewhat different tack. In *Creasman v. Boyle*,[208] decided in 1948, the Supreme Court of Washington held that a partner in an illicit relationship had no community rights in property acquired during the period of cohabitation.[209] Some twenty-four years later the same court stopped just short of overruling *Creasman* in *In re Estate of Thornton*.[210] Lucy Antoine and Roy Thornton lived together from 1953 until his death in 1969. They had four children and lived as man and wife, but at all times Roy continued to be married to Theo Thornton, from whom he had separated in the early fifties. In addition to her normal domestic duties, Lucy also was actively engaged with Roy in the management of a thriving cattle business, and the evidence indicated that her work had significantly contributed to the profits of the business.[211] Roy died testate, but his will named Theo as executrix and did not provide for Lucy. Lucy sued the estate as a creditor; she expressly avoided a direct attack on *Creasman* and did not seek to use the nature of her relationship with Roy as the basis for a claim of community property. Instead, she sought to prove the existence of an implied partnership or joint venture in the cattle business. The court stated the issue as

> whether the surviving member of a couple living in a meretricious relationship may prove the existence of a partnership or joint venture agreement involving business property ostensibly or seemingly owned by the deceased partner, by showing the surrounding circumstances and the acts of the couple, rather than by proving the existence of an express contract of partnership.[212]

The court answered its question affirmatively. The "meretricious spouse" rule did not apply because the "contract" was one related to a business operation and not one founded upon the illicit relationship.[213] The case is noteworthy both for giving recognition to implied as well as express agreements and for applying the severability

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illicit affair. *See id.* at 575-77, 205 N.W.2d at 597-99. *Tyranski* recognized the punitive effect that strict application of the meretricious spouse rule might have. The court also noted that a number of judges had paid lip service to the rule while fashioning some exception so as to avoid rewarding one party and punishing the other. *See id.* at 577, 205 N.W.2d at 598-99.

[208] 31 Wash. 2d 345, 196 P.2d 835 (1948).

[209] *See id.* at 357-58, 196 P.2d at 841-42.

[210] 81 Wash. 2d 72, 499 P.2d 864 (1972), *on remand*, 14 Wash. App. 397, 541 P.2d 1243 (1975).

[211] *See id.* at 74-75, 499 P.2d at 865.

[212] *Id.* at 75, 499 P.2d at 865.

[213] *See id.* at 81, 499 P.2d at 868.

rule to implied agreements.[214]

After *Thornton,* the rule in *Creasman* still worked to prevent recovery of an interest akin to that of a spouse based on the nature of the relationship itself, but *Thornton* did provide a large exception to *Creasman* in that it recognized the validity of an *implied* business agreement as to ownership of property between the partners to a meretricious relationship. Couples in Washington were freed from the necessity of showing a separate express agreement and from the evidentiary problems inherent in trying to prove a trust.[215] Indeed, the result in *Thornton* was not much different from that subsequently reached by the California Supreme Court in *Marvin.*

The Washington Supreme Court had another opportunity to overrule *Creasman* in *Latham v. Hennessey,*[216] but it only further narrowed the precedent's impact. The court suggested a significant and new variation on the possible theories of recovery in similar situations:

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[214] The court, however, went beyond its holding and emphasized that it would be favorably disposed to overrule *Creasman* were the issue directly presented. *See id.* at 79, 499 P.2d at 866-67.

Lucy sought alternatively to recover on a theory of breach of contract to make a will in her favor. The court was willing to accept such a theory, but Lucy did not have the facts to substantiate this claim. The court remanded the case for a trial on the merits, *see id.* at 81, 499 P.2d at 869, but Lucy was not very successful. After hearing all the evidence, the trial court determined that the relationship between Lucy and Roy in the cattle business was that of employer-employee, and therefore Lucy was not entitled to an interest in Roy's estate on the basis of an implied partnership, joint venture, or trust. This decision was affirmed by the Washington Court of Appeals. *See In re* Estate of Thornton, 14 Wash. App. 397, 541 P.2d 1243 (1975).

[215] To prove a constructive trust the plaintiff must make some showing of "fraud, overreaching or inequitable conduct." A resulting trust requires proof that one party intended to hold property in trust for another who furnished the consideration. Both require a "clear, cogent, and convincing standard of proof." Omer v. Omer, 11 Wash. App. 386, 390-91, 523 P.2d 957, 960 (1974). That case involved litigation between former Israeli citizens who were divorced in 1959. They emigrated to New York and entered into "sham" marriages to facilitate the naturalization process, but at all times they lived as man and wife. The male partner went off to Washington to make his fortune and sometime later his "wife" joined him, but they permanently broke up in 1969. The evidence indicated that the woman had worked during most of the time they had been in the United States and had been, to a great extent, the financial supporter of the relationship. *See id.* at 388, 523 P.2d at 959. She sought a community property interest in the property acquired during cohabitation in Washington. Because they technically had been living in a meretricious relationship, *Creasman* prevented direct application of community property rules, but the court reached essentially the same result by applying a constructive trust. In reaching this decision, the court noted that the couple had never intended to be divorced. The whole divorce-remarriage process was meant to be a fraud for purposes of getting through naturalization, and therefore the court was somewhat reluctant to give the "husband" the benefit of the meretricious spouse rule. *See id.* at 393, 523 P.2d at 961.

[216] 87 Wash. 2d 550, 554 P.2d 1057 (1976) (en banc).

> There also appears to be a viable alternative approach to the *Creasman* presumption and its exceptions. A court could ascertain whether there exists a long-term, stable, nonmarital family relationship. Such relevant factors include continuous cohabitation, duration of the relationship, purpose of the relationship, and the pooling of resources and services for joint projects. If a relationship exists, it is reasonable to assume that each member in some way contributed to the acquisition of the property. A court could then examine the relationship and the property accumulations and make a just and equitable disposition of the property. Also, if warranted by the facts of a particular case, the court could apply the community property laws by analogy to determine the rights of the parties.[217]

This statement was dictum and therefore has no actual precedential value, but the opinion was unanimous and en banc. Thus a direct attack on *Creasman* probably would meet with general approval. In the meantime, *Latham* significantly narrows the impact of *Creasman* and suggests a relational construct that is a de facto status. If a Washington court finds a particular relationship to meet certain standards of seriousness and intimacy, it may impose a marital-like status for the division of property interests as between the partners.[218] Thus while California moves resolutely from implying the status of a de facto marriage to resting on more purely contractual theories, Washington appears to be sliding in the other direction.

Minnesota courts seem to wish to split the difference between the status and contract approaches. In *Carlson v. Olson,*[219] the couple never married but held themselves out as man and wife for twenty-one years. They raised a son to majority, acquired a home and the usual possessions of a middle-class couple, and he worked and supported the family while she acted as a housewife.[220] They eventually parted and the woman brought an action to partition the property of the union. Minnesota does not recognize common-law marriage, but the court allowed an even division of the property "on the theory that the parties had an agreement to share their accumulations, and that the contributions of each was [*sic*] an irrevocable gift to the other of one-half of the assets placed in joint tenancy and of the

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[217] *Id.* at 554, 554 P.2d at 1059 (dictum).

[218] This raises some of the same problems as those suggested by *In re* Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). *See* notes 190-96 *supra* and accompanying text.

[219] ___ Minn. ___, 256 N.W.2d 249 (1977).

[220] *See id.* at ___, 256 N.W.2d at 250.

household and other personal property as well."[221] The trial court had reviewed all the particulars of the relationship and had determined that the manner in which the parties had lived was so closely akin to marriage that an inference of an agreement for a division of property was justifiable. In reliance on the rationale of *Marvin,* the supreme court affirmed the approach of the trial court.[222]

Other courts recently faced with the plight of the meretricious spouse have refused to imply a legal status or to enforce a private agreement. In *Davis v. Misiano,*[223] the Supreme Judicial Court of Massachusetts refused to impose a general duty of support arising from the termination of a meretricious relationship, despite the pathetic circumstances of the female plaintiff.[224] The court stated:

> In view of the extensive involvement of the Legislature in providing for awards of separate support and alimony to married persons, we decline at this time to extend such payments to those who have cohabited without a formal marriage in the absence of an appropriate legislative enactment. In so far as the complaint sought to compel the defendant to provide generalized financial support for the plaintiff, we hold that it was properly dismissed.[225]

The court, however, carefully refrained from deciding whether parties to a nonmarital relationship could enforce express or implied contracts between themselves as to the distribution of property.[226]

The meretricious spouse rule has not fallen into total desuetude even with respect to express agreements. The Georgia Supreme Court strictly applied the rule in *Rehak v. Mathis.*[227] Hazel Rehak and Archie Mathis lived together for eighteen years essentially as man and wife, but they never held themselves out to be married. When they separated in 1975, Hazel was surprised to learn that the

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[221] *Id.* (syllabus by the court).

[222] *See id.* at ___, 256 N.W.2d at 255.

[223] ___ Mass. ___, 366 N.E.2d 752 (1977).

[224] In July 1975, Louis Misiano moved in with Gale Davis and lived with her until May 28, 1976, when he left to return to his wife and family in another state. Gale was several months pregnant when Louis walked out, and she brought an action in the probate court seeking general support for herself plus prenatal costs and child support for the child that Louis fathered. Her lawyer raised the issue of paternity in the wrong court because the probate court was without jurisdiction to determine paternity. Jurisdiction was proper as to the claim for general support, but Gale's request was denied. *See id.* at ___, 366 N.E.2d at 753.

[225] *Id.* at ___, 366 N.E.2d at 754 (footnote omitted). In a companion case, the court ruled that the baby had no separate cause of action for support but that such a claim inhered in the mother. *See* Baby X v. Misiano, ___ Mass. ___, 366 N.E.2d 755 (1977).

[226] *See* ___ Mass. at ___, 366 N.E.2d at 754 n.1.

[227] 239 Ga. 541, 238 S.E.2d 81 (1977).

house in which they had lived was in Archie's name alone, even though Archie apparently had led her to believe that they owned it jointly. Hazel filed an action in equity alleging that she and Archie jointly had purchased the house in 1957, that she had made all the mortgage payments for 1957 and 1958, and that from 1959 through February 1975 she had contributed one-half of each monthly payment. She sought payments of $100 a month for the provision of housekeeping services over eighteen years and title to the house.[228] The trial court granted summary judgment for Archie and the supreme court affirmed. The parties admittedly had cohabited; therefore, the law presumed an illicit sexual relationship; therefore, this sexual relationship must have formed part of the consideration, and the court would not entertain an action in equity to enforce a contract between the two.[229] The court stated that Hazel had to rebut the presumption that illicit sex formed part of the consideration and that she had not proffered any evidence in rebuttal.[230] Although the majority did recognize the severability rule, they certainly interpreted its applicability narrowly.[231]

These cases reveal much about the use of contract or status in the ordering of long term intimate relationships.[232] Comparison leads to the conclusion that contract is playing an increasingly important role, but the applicability of contractual theory is determined in

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[228] *See id.* at 543, 238 S.E.2d at 82.

[229] *Id.*

[230] *Id.*

[231] Justice Hill wrote the dissenting opinion in which Justice Hall joined:

> In the case before us, the movant has not carried the burden on a movant for summary judgment of showing that sex was any part of the consideration of this alleged contract. This court has simply presumed that sex was agreed to. We will not guess at the terms of contracts in other cases but here we knowingly imagine what the terms of this agreement were. In my opinion we should not use conjecture to imagine what the parties agreed to do.
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> Let the defendant state under oath what he says was agreed to and what he says was done and if the contract be illegal let the district attorney represent the state. This court should not deny relief to the plaintiff based on our inference as to what constituted the consideration for the alleged agreement sued on here.

Id. at 544-45, 238 S.E.2d at 83 (Hill, J., dissenting).

[232] Taken together these various cases have one common theme apart from their relevance for status and contract: judges in the latter part of the twentieth century are willing to be somewhat less strict in the application of moral judgments. That, however, is merely a judicial reflection of general societal attitudes. Couples who live together without marriage simply are not subjected to the social disapprobation formerly attending such arrangements. The frequency of such unions and their gradual social acceptance are reflected in the willingness of courts to fashion exceptions to the meretricious spouse rule or to do away with it altogether. The strength of traditional values is evident, however, in decisions such as *Rehak v. Mathis* and *Davis v. Misiano*.

large part by the *status* of the parties in terms of their legal and traditional obligations toward one another. Neither the meretricious spouse nor the legitimate spouse can contract with their partner because of their legal status. Courts that strictly apply the meretricious spouse rule prevent the plaintiff from asserting any binding agreement because they presume that any such contract is tainted by the illicit sexuality at the core of the relationship. More modern courts liberate such parties legally from the status of immorality, giving them the ability to contract, and retain "meretriciousness" only as a contractual principle invalidating the recognition of sexual services as consideration. Moreover, these courts may infer an agreement for a sharing of property, but it is inferred for the reason that the recalcitrant partner, unlike a spouse, is under no preexisting duty to share the property.

Courts are more likely to enforce agreements between unmarried couples when they need not pass any moral judgment on the affair. The doctrine of severability itself provides a ground for judges to avoid condoning the conduct of the couple. In *Williams v. Bullington,*[233] the Florida Supreme Court was willing to enforce a real estate transaction between a man and a woman having an illicit affair. The court reasoned that an express contract of a typically commercial nature should be enforceable regardless of the legitimacy of the parties' relationships in other areas. *Williams* involved an express agreement that "had no connection with or dependence on"[234] the illicit relationship. This case was a straightforward application of the long-recognized severability rule.[235] By way of comparison, the evidence in *Naimo v. La Fianza*[236] supported the contention that an express agreement to make a will had occurred, but the New Jersey court could not sever this agreement from the adulterous affair between the principals because sexual services were the explicit consideration. The beneficiary of the alleged agreement was, in fact, the product of the affair itself.[237] In dealing with a situation like the one in *Williams,* a court is not required to make any moral judgments; it is simply called upon to enforce an ordinary contract. *Naimo* made the moral issue unavoidable, although the

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[233] 159 Fla. 618, 32 So. 2d 273 (1947) (discussed at note 183 *supra*).

[234] *Id.* at 622, 32 So. 2d at 275.

[235] *See* note 174 *supra* and accompanying text.

[236] 146 N.J. Super. 362, 369 A.2d 987 (Ch. Div. 1976) (discussed at notes 184-86 *supra* and accompanying text).

[237] *See* notes 184-86 *supra* and accompanying text.

unavoidability of the issue did not compel the result.

Where no express agreement appears, the courts have had more difficulty. In a case such as *Williams,* the only real question is whether the transaction at issue is severable from the meretricious aspects of the relationship. In the absence of an express agreement, the court necessarily must examine the nature of the relationship to determine whether or not an agreement may be implied from the factual context and then must apply the severability test to decide whether the implied agreement is enforceable. If a state has a presumption, as does Georgia,[238] that illicit sex is part of the consideration, the plaintiff is confronted with a significant problem of burden of proof, and severability may not be available as a practical matter. The application of quasi-contractual theories allowing recovery on implied contracts and the creation of relational rights akin to those of a marital status, therefore, have marked the most fundamental shifts in judicial approach to transactions between unmarried couples.

For example, *Marvin v. Marvin*[239] suggests that one party might recover for domestic services just as if that partner had provided the services to an employer. The plaintiff in *Marvin* did allege that she had also given up a promising career to her detriment.[240] Whether the provision of domestic services alone would have been enough is not clear, but the court's language seems to support an argument that recovery would be appropriate in such a case. This type of case should be distinguished from a situation like the one in *In re Estate of Thornton,*[241] where the litigation centered around interests in a thriving cattle business and the question was whether a contract of partnership could be implied in a clearly commercial context. To allow recovery for domestic services on a theory of quantum meruit in the context of a meretricious affair is to give partners to such an affair a somewhat different, and perhaps more desirable, status than that given to married couples. Normally, quantum meruit is

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[238] *See* Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977); text accompanying notes 227-31 *supra.*

[239] 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (discussed at notes 200-07 *supra* and accompanying text).

[240] *See* text accompanying notes 200-01 *supra.* In Department of Human Resources v. Williams, 130 Ga. App. 149, 202 S.E.2d 402 (1973) (discussed at notes 158-67 *supra* and accompanying text), the Georgia Court of Appeals recognized the possibility that the surrender of a career might be good consideration for a contract within the context of the marital union itself. *See* note 162 *supra* and accompanying text.

[241] 81 Wash. 2d 72, 499 P.2d 864 (1972) (discussed at notes 210-15 *supra* and accompanying text).

only available where payment is generally to be expected.[242] In a domestic or family situation, most people do not generally expect that parties will be paid for doing the ordinary chores of life. Perhaps they should be entitled to payment, but, so courts reason, such duties usually are undertaken for reasons of love, affection, and mutual support or because they are imposed by law.[243] Allowing a quasi-contractual recovery for the monetary value of such services implies a commercialization of the relationship, or a recognition that the services are beyond the ordinary call of duty, or a recognition of a status somewhat the same as that of a spouse who, upon separation or death, would be entitled to community property, alimony, or a share of the estate. Any one of these possibilities involves some considerations of status. If the parties are to be treated in a commercial manner, that necessarily reflects on the perceived form of the relationship and transforms it into one governed by master-servant limitations rather than by domestic or familial considerations. On the other hand, treating such services as beyond the ordinary call of duty suggests that a duty exists that derives from the relationship.

The decision in *In re Marriage of Cary*[244] and the dicta in *Latham v. Hennessey*[245] go somewhat further and actually impose a status construct on the parties to certain meretricious relationships. As the criticism of *Cary* indicates,[246] this approach can lead to some troublesome problems. If a state rejects common-law marriages, then judicial recognition of a relationship giving rise to marital-like obligations may amount to an inconsistent de facto recognition of a common-law marriage. *Cary* has, apparently, been abandoned subsequently by *Marvin,* but the willingness of *Marvin* to consider the entire context of a relationship to determine whether or not a con-

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[242] This rule is a reflection of the general theory that agreements will not be enforced absent some compelling state policy when the parties do not intend for their actions to be attended by legal consequences. *Compare* Sheldon v. Thornburg, 153 Iowa 622, 133 N.W. 1076 (1912), *with* Hertzog v. Hertzog, 29 Pa. 465 (1857). *See generally* Havighurst, *supra* note 142, at 390; McDowell, *supra* note 137. For a fascinating case, see Upton-on-Severn Rural Dist. Council v. Powell, [1942] 1 All E.R. 220 (C.A.). For a collection of cases, see F. KESSLER & G. GILMORE, *supra* note 120, at 120, 129, 140.

[243] For a general discussion of policy reasons for refusing to allow recovery for domestic services and the difficulties in monitoring household services, see Bruch, *supra* note 188, at 110-14; Havighurst, *supra* note 142; Note, *Marriage Contracts for Services, supra* note 139.

[244] 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973) (discussed at notes 190-99 *supra* and accompanying text).

[245] 87 Wash. 2d 550, 554 P.2d 1057 (1976) (en banc) (discussed at notes 216-18 *supra* and accompanying text).

[246] *See* text accompanying notes 195-96 *supra.*

tract should be implied could lead the California courts to the development of a test akin to the "relational" one suggested by the Washington court in *Latham*.

Largely from a perceived need to do justice, courts have been willing to ignore traditional moral impediments to the enforcement of obligations between parties to a particular kind of relationship. In practical effect, this willingness could mean that meretricious partners might be able to organize the economic aspects of their relationship with greater flexibility than married couples. None of these cases directly addresses this problem, but what if an unmarried couple in a state with community property rules expressly contract for a division of property acquired during cohabitation that significantly differs from the division compelled by law for married couples. Should such a contract be enforced? If they have a "relationship" that is almost the same as "marriage," then should they be freed from the limitations placed on married couples? Three alternatives could be used to treat this problem: (1) treat married and unmarried couples differently, (2) use a "relationship" test to create a "status" for unmarried couples that is as much like the status of marriage as possible, or (3) allow greater individual freedom to married couples to structure their relationships independent of state guidelines.

The cases so far have adopted either the first or the second approach. Either the strict application of the meretricious spouse rule or the enforcement of contracts between unmarried couples results in different treatment for those who are not married as compared with those who are married. In the first instance, moral condemnation by courts of the life-style of unmarried partners makes it more difficult for them to create enforceable agreements even with respect to simple matters, resulting in injustice to one of the parties. On the other hand, the enforcement of agreements generally between unmarried partners may well give them greater flexibility than the state accords to married partners. Whatever the result, the treatment is essentially different, and the reason for the difference derives from the legitimacy of the union.

In trying to be fair, some courts have created a marital-like status where none exists. This method may be adequate to deal with one case or another, but it has shortcomings as an overall approach, not the least of which is that two people who choose to live together without marriage often may be seeking to avoid the status obligations of marriage itself. Furthermore, is the status to attach in all particulars? When does it attach? How is this approach to be recon-

ciled with a legislative policy against the recognition of "common-law marriages" in states that do not recognize such marriages? Must such a couple go through divorce proceedings to terminate their affair? That leaves the third alternative—loosening the structures of the marital status. This alternative has received much critical comment and has been suggested as the best and fairest way not only to reconcile differences in treatment between married and unmarried couples but also to improve the quality of the marital relationship itself.[247] To date, the courts have not followed the commentators, and marriage is still a status in which contract and quasi-contract play a very limited role.

Yet marriage as a status has at least one significant advantage that outweighs the greater freedom unmarried couples have in ordering their affairs. As noted above,[248] the enforcement of an express or implied contract necessarily involves the state in interpreting and rearranging the relationship between the parties. The nature of the services each has provided must be identified, proven, and evaluated; such consideration must be then severed from any conjugal services. Contractual disputes invite the state to inspect all relevant details of the relationship and determine who has breached.[249] Under modern marriage and divorce laws, married couples need not undergo this scrutiny. Property divisions follow objective standards and divorce may be obtained without investigation of fault. Disputes within the marriage, except where they violate the law, are properly left for resolution to the nonlegal forces of love and informal community mediation. By accepting the status approved by the state, the married couple shield themselves from state inspection.

Once again, Friedmann's thesis[250] requires some qualification. Treating unmarried cohabitation as a contractual arrangement and marriage as the acceptance of a status generally seems to comport with the intentions of the various parties. To impose a marital status on an unmarried couple, as in *Cary,* can both embroil the parties in the very obligations they sought to avoid and render legally meaningless the differences between marriage and "living together." Neither life-style will disappear; both have their costs and benefits. Treating marriage as status and cohabitation as contract

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[247] *See* notes 147-48 *supra* and accompanying text.

[248] *See* notes 165-69 *supra* and accompanying text.

[249] Of course, in some states unmarried couples probably would not have much success in seeking judicial enforcement of their agreements anyway.

[250] *See* text accompanying notes 57-67 *supra.*

can legally preserve those elements of each relationship that led a couple to adopt either form of relationship.[251] But in considering disputes between unmarried couples, courts should be careful not to fashion rules that unfairly advantage such couples as compared to couples who have complied with social and legal norms and actually have married each other. Indeed, status is not the sole means to achieving freedom in domestic relations. In this context, "liberty" means letting the parties choose between status and contract.[252]

IV. Conclusion

Friedmann defined status as "a useful description of legal conditions imposed upon the individual by *public law*."[253] This article has inquired into the conditions status places upon the individual's freedom to contract. Status does limit that freedom: the racist, after *Runyon v. McCrary*,[254] the meretricious spouse, traditionally, and the legitimate spouse, indefinitely, all have had significant borders placed around their ability to contract.

As the expression of public policy, status enforces community norms. *Runyon* proclaims social disapproval both of discrimination that confines the economic and educational opportunities of minorities and of allowing irrational prejudices to skew economic decision-making.[255] On the other hand, the decline of the disabling status of the "meretricious spouse" mirrors the recession of social disapproval of long term, unmarried cohabitation. Like the feudal serf or lord, one's estimation of these enforced norms will vary according to one's perspective. The status limitations attached to married couples are more problematic. Archaic laws make contract appealing to some as a means for allowing individuals greater freedom to order their own affairs, but traditional marriage as a social institution endures.

Maine theorized that an increase in contractual freedom was con-

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[251] In a sense, this is what Folberg and Buren have suggested in their argument for the recognition of a "domestic partnership." *See* Folberg & Buren, *supra* note 176, at 479-85.

[252] Such a notion does not mean the state cannot create the status. Rehbinder felt that private choice was not inconsistent with publicly defined status. *See* pp. 1049-50 *supra*.

[253] Text accompanying note 46 *supra*.

[254] 427 U.S. 160 (1976).

[255] *Runyon* is also an example of modern American "common law" in the sense of judicial interpretation and modification of general statutory pronouncements. *See* note 3 *supra*.

ducive to general individual liberty. Friedmann claimed that this statement might be true for the family but that the government imposed status in other areas as a tool of liberation in the modern industrial state. This review of two areas of contemporary law has shown the elements of truth in each hypothesis, as they demonstrate the dynamic interplay between contract and status in modern law.[256] The state imposes a status on the white racist so blacks may participate more readily in the marketplace. The goal is enhanced contractual freedom, the means are a limitation on that same freedom at a different point. In the area of domestic relations, courts are cautiously expanding the ability of unmarried couples to arrange their economic affairs. But the greater judicial oversight of intrahousehold disputes necessitated by these contractual relations suggests that the status of marriage too can confer on an intimate union a freedom from outside interference.

Status and contract do not denote ideal forms that persist beyond specific laws. They are descriptive terms the use of which can be justified only by the increased clarity they offer jurisprudential thinking; one must not be insensitive to the implications of the legal construct employed to resolve social dilemmas. Drawing lines between contract and status forces us to examine the nature of the private interest and the justifications for and rationality of the public interest. For so long as our society values both the individual and the commonweal, contract and status will endure in a shifting, creative dialectic.