SPECIAL FEATURE

RETHINKING RELIGIOUS MARRIAGES WHEN DONE WITHOUT ANY CIVIL MARRIAGE: NON-MARRIAGE, NEO-MARRIAGE, MARRIAGE, OR SOMETHING ELSE?

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In an era in which relationships that look like marriage, but are not civilly recognized as such, are common, states face questions of how to regulate these "quasi-marital" relationships. Constitutional questions surround the regulation of consensual sexual relationships. In response, many states permit these relationships to occur with minimal governmental involvement. Some states may find, based on the couple's actions, that the individuals are common law married. Other states will simply never recognize the parties as married. Beyond marital status, some states find that the relationship has implications for support and benefits. Additional questions arise when the parties to a "quasi-marital" relationship attempt to marry in the eyes of God, without also seeking a civil marriage. The regulation of a solely religious marriage is fraught with First Amendment concerns, and yet, many states criminalize the solemnization of a purely religious marriage in some fashion. How and whether these laws are enforced impact an individual's exercise of religion. Governmental non-regulation of other premarital sexual arrangements suggests that there is no state interest in the regulation of a solely religious marriage.

This Article provides a foray into the law that governs solely religious marriages. It addresses the factors that motivate individuals to enter into a religious marriage without also entering into a civil marriage, discusses models of religious marriage regulation abroad and within the United States, and provides insight into how the government treats quasi-marital relationships in general. This Article advocates that states ought to treat all persons who have chosen to avoid the secular marriage process the same. That is, the regulation of individuals who have crafted a marital relationship that is purely religious should be consistent with the regulation of other non-marital sexual arrangements. In deciding whether a solely religious marriage constitutes non-marriage, neo-marriage, marriage, or something else, the government should pay no attention to the man behind the curtain,[1] which in this case is the existence of a religious marriage.

Key Points for the Family Court Community

- As sexual freedoms evolve in the United States, many individuals are finding themselves in committed relationships that are not civilly defined as "marriage."
- The existence of a religious marriage between parties in the absence of a civil marriage is increasingly common.
- Despite First Amendment concerns, many states have laws that seek to regulate the religious solemnization of a purely religious marriage.

Special regulation of a solely religious marriage ought not to occur and these relationships should be treated the same as other non-marital sexual arrangements.

Keywords: *First Amendment; Marital Benefits; Marriage Regulation; Religious Arbitration; Religious Freedom; Religious Marriage.*

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The authors thank Ashley Stern Mintz who did an excellent job editing an earlier version of this article and Albertina Antognini and Kaiponanea T. Matsumura for their wise comments. Thank you to each member of the Roundtable on Non-marriage and the Law which took place at the University of Arizona James E. Rogers College of Law in Tucson, Arizona in 2020 for their comments as well.

I. INTRODUCTION

In an Orthodox Jewish community, the true "out-of-wedlock" birth rate is fairly low.[2] Orthodox Judaism is a fairly conservative faith with low rates of both teen pre-marital sexual intimacy and higher rates of teen marriage, particularly in its more fundamentalist (Haredi) variations. But yet, with some regularity, governmental officials are concerned with the high "out-of-wedlock" birth rate in both the Haredi and the Hasidic communities.[3] The reason for this phenomenon is a dissociation between religious marriage and civil marriage. These communities have pockets of people in them who do not register their religious marriages with the state, and these high rates of "out-of-wedlock" child births are a function of how the government identifies "out-of-wedlock" child births—women who are married religiously but not civilly, yet have children are viewed as giving birth out-of-wedlock. New York and New Jersey have no way to track who is getting religiously married, so the state assumes that the women who are giving birth in these communities and who are not civilly married are not married at all and are having children without the benefits of marriage. This is, presumptively, civilly true. But these women are religiously married and see themselves as married. As a result, there is a tension between what the government identifies the out-of-wedlock birth rate to be and what local communities identify as the out-of-wedlock birth rate. This tension in identifying the out-of-wedlock birth rate, therefore, suggests that in the United States there are religious marriages that are entered into in the absence of a civil marriage.

While traditional notions of marriage often conflate civil marriage with religious marriage, there is a rise in the number of people entering into religious marriages without any civil marriage. States face unique challenges regarding the regulation of solely religious marriages. The classification of a religious marriage without any civil marriage depends on how one understands the term marriage; a solely religious "marriage" could be viewed as not a marriage at all, as neo-marriage, as marriage, or as something completely different. States are free to regulate marriage, subject to a few constitutional limitations. Analyzing how different areas of the law and how different states treat religious marriages in the absence of a secularly sanctioned marriage provides insight into what this model of marriage means in American society.

We note that the existing approaches taken by the many states result in differing treatment of a solely religious marriage. This article proposes that the secular legal system in the United States ought to ignore the existence of a solely religious marriage. The existence of a common law marriage, in states that permit such marriages, should turn on the relationship between the parties rather than merely the existence of a religious ceremony. Additionally, a solely religious marriage should not be criminalized, which it surprisingly is in many jurisdictions.[4] Finally, in assessing support obligations, such as alimony or pension benefits, states ought to assess the facts of the individual situation in the absence of a religious marriage.

This Article begins with a discussion of why there is a separation between religious marriages and civil marriages in the United States. Part I analyzes different reasons why people may pursue solely religious marriages. It then looks at the ways in which people govern religious marriages through arbitration. Part II moves to a discussion of the regulation of religious marriages internationally. This Part compares different models of marriage and what these models mean for the individuals who are regulated by them. It concludes with a discussion of marriage regulation in the United States generally. Part III looks at the specific ways in which marriage is regulated in the various different states, focusing attention on how religious marriages are regulated in the absence of a civil marriage. Finally, Part IV discusses why governmental treatment of solely religious marriages matters in the United States. Part IV focuses in great detail on the basis for the termination of spousal support obligations. The Article concludes with commentary on how states should regulate a religious marriage that is not coupled with a civil marriage.

II. SEPARATION BETWEEN RELIGIOUS MARRIAGE AND CIVIL MARRIAGE IN THE UNITED STATES

In the United States, religious and civil marriages are treated as unique and separate. Courts recognize the separation and distinguish between a religious marriage and a civil marriage.[5]

A religious marriage is not required for a civil marriage.[6] Likewise, a civil marriage is not required for a religious marriage, at least in theory.[7] The legality of non-government sanctioned marriages aside, there are many reasons why people desire to enter into marital relations that are not sanctioned by the government. This Part will begin by discussing some examples of why individuals may seek to enter into a religious marriage without entering into a marriage that is recognized by the government. Section B will then discuss how arbitration law in the United States provides an incentive for people to enter into a marriage that is only valid religiously.

A. NO "MARRIAGE," NO PROBLEM

Historically, premarital sexual relations were considered immoral; an understanding that was reflected both legally and culturally. To engage in sexual relationships, the parties to the relationship needed to be married. The coalescence between sex and marriage can be seen through state enactment of fornication and adultery laws. Fornication and adultery criminal laws were enacted in the Colonies and expanded across the United States with the addition of new states.[8] As early as 1942 the Supreme Court recognized and reinforced the connection between sex and marriage.[9] The illegality of sexual relations in the absence of marriage was paralleled with a cultural disapproval. In 1968, a mere fifteen percent of American women had a permissive attitude towards premarital sex.[10]

In recent years, the stigma associated with sexual relationships in the absence of marriage has begun to subside. Cultural acceptance of premarital sex has greatly increased.[11] Laws regulating sexual relationships have been labeled "relic[s] of more puritanical times,"[12] and states have rendered them dead-letter law.[13] By 2002, the vast majority of states had "repealed or overturned their fornication statutes."[14] Some state judiciaries even found these laws to be unconstitutional.[15] In 2003, the Supreme Court further questioned the legitimacy of these statues when it pronounced the right to engage in consensual sexual activity in the home without intervention of the government in *Lawrence v. Texas*.[16] In the wake of *Lawrence*, additional states have begun to repeal laws that criminalize consensual sexual relations.[17] Taken together, the pronouncement by the Supreme Court and state efforts to repeal laws that criminalize consensual sexual interactions between adults shows that government no longer cares to regulate consensual sexual relationships.

As a result of the non-enforcement of adultery and fornication laws[18] and the decriminalization of sexual relations in the absence of a civilly valid marriage,[19] many people may enter into solely religious marriages without fear of prosecution. Cohabitation and sexual relations outside of marriage are common. Should the government not recognize a religious marriage as civilly valid, the parties to the religious marriage may, in theory, continue to engage in marital relations without stigma or fear of punishment. Therefore, the decoupling of sex and marriage creates a culture in which parties are more likely to enter into a solely religious marriage.[20]

Haredi and Hasidic Jewish communities, such as the ones discussed in the Introduction, are not the only communities in which a dissociation between religious and civil marriages exists. People pursue solely religious marriages—religious marriages that are not accompanied by civil marriages—for a variety of reasons. Some, but by no means all, of the reasons why people pursue a solely religious marriage include:

1. They wish to be ecclesiastically married—that is, married in the eyes of God—but do not want their civil marriage to be recognized. Essentially, even if they could get the benefits of civil marriage, they would have no interest in obtaining them.[21]
2. They are receiving pension or divorce benefits from a prior marriage. A civil marriage would result in a termination of the benefits; thus, these people choose to marry religiously. While they would like to be civilly married to the person they are religiously marrying, the couple has decided that it is better for them to continue to receive the benefits from their prior marriage.

3. At least one of them is a single parent receiving government benefits as a single parent. Although they would like to be civilly married, they would rather continue to acquire those benefits. Once the "single" parent no longer qualifies for government benefits, for example once the child reaches the age of majority, they expect to be civilly married.
4. Their local jurisdiction will not permit them to marry civilly because at least one of them has not yet successfully civilly ended their previous marriage. Having found another spouse, they seek to enter into a religious marriage in the meantime. However, they expect to be civilly married as soon as it is possible to do so.
5. They would like to be married civilly, but the law prohibits issuing particular types of relationships a marriage license, such as polygamous relationships. Another example is when a sexual relationship is legal in a particular state, but a marriage license would never be issued. For example, parent–child incest between two consenting adults is legal in New Jersey, but the state will not issue a marriage license in such a case.[22]
6. Although they do not particularly object to marriage, they object to the secular regulation of marriage as a matter of religious principle. More generally, they deny the government jurisdiction in this area and will not comply with such a secular registration regime.

These categories are not an exhaustive list of why people may seek to be married religiously, but not within the eyes of the government, but they do shed light on how some individuals may come to the decision to enter into a solely religious marriage. Given the many and diverse reasons why people may seek to enter into a solely religious marriage, it is not surprising that people are doing so.

Indeed, these categories do not always convey the nuances of particular cases which can sometimes be very "faith specific" and exceedingly fact specific and complex. As a rabbinical court judge, one of us was involved in the following case: A couple (husband and wife, in the Jewish tradition) are happily married for many years. However, the wife suffers from early-onset Alzheimer's and is now fully demented and living in a care home, unaware of her husband's existence. Divorce by her husband—while legally possible under American law—would leave her without health insurance to pay for her very expensive care, since her health insurance is a spousal benefit and divorce would leave this mentally incapacitated women here without the resources to care for herself. Thus, the rabbinical court ruled that a secular divorce would violate Jewish Law. Her husband has met another woman and wishes to marry this woman in a Jewish (religious) ceremony. They plan to sign a private arbitration contract to regulate their relationship. Jewish Law has a special and exceedingly rare provision to allow nominal[23] polygamy in such a case.[24] How should the secular legal system view this second Jewish marriage? Is this a violation of the bigamy rules? What other problems can arise? Without the existence of solely religious marriages, these questions need not be answered. In the United States, religious marriages without a civil marriage not only exist, but they are desired as a solution to certain ethical problems. This is, in part, due to the arbitration law which provides an alternative to the family law system that govern marriages.

B. IMPUTING LAW: ARBITRATION LAW AS AN INCENTIVE

Before answering questions about how the secular legal system views and controls a religious marriage in the absence of a civil marriage, it is worth discussing the legality of a private arbitration contract that seeks to regulate a religiously married couple's relationship. It is clear that some people *want* to enter into religious marriages without simultaneously entering into a civil marriage, but they will not necessarily act on these desires. As it becomes more practical to enter into a solely religious marriage, more people will act on their desires. In the United States, arbitration law makes religious marriages more practical, thereby incentivizing parties to enter into religious marriages, both with and without the formation of a civil marriage.

Under the Federal Arbitration Act, which was enacted in 1925, parties are encouraged to use arbitration to resolve disputes.[25] In the years following its enactment, the Supreme Court of the United States pronounced a federal policy in favor of arbitration.[26]

Within the Traditional Orthodox Jewish community, arbitration agreements for the regulation of marriage are a common phenomenon. People realize that the Federal Arbitration Act has created a statutorily anomalous situation: parties can use a combination of both choice of law and choice of forum selection clauses to regulate consensual, contractual relationships that they have entered into.[27] Simply put, just like the Mitsubishi Motor company can agree with its dealers that should there be any dispute between them, the dispute will be adjudicated in the Japanese Chamber of Commerce, even when that will cause American Antitrust law not to be faithfully applied,[28] two people can enter into a marriage and agree that "Jewish law" will govern the financial relationship between them. Such agreements are common and widely enforced.[29]

Religious arbitration in the United States provides for dispute resolution that is governed by religious law and exists for a variety of religions. "Religious arbitration is often viewed as a tool that will permit the faithful to preserve their communities by enabling them to opt out of secular cultural and legal standards and instead order their business and family relationships in accordance with their religious convictions."[30] Peacemaker Ministries is a Christian arbitration service in the United States which offers different forms of dispute resolution, including legally binding arbitration.[31] "Peacemaker Ministries conducts about 100 "conciliations" each year, which include mediations, arbitrations, and church interventions."[32] The Beth Din of America is a Jewish arbitration tribunal that resolves commercial and family disputes.[33] "The Beth Din of America conducts about 400 "family" matters each year—probate matters, divorces, and status determinations."[34] Arbitrations are also utilized in Islamic dispute resolution.[35]

Arbitration law gives the parties the ability to "craft their own law" without reference to the binding family law of their local jurisdiction at the time of divorce. They can reach agreements about their finances, govern their conduct in the marriage, and regulate their divorce as well. Other than child custody matters,[36] the general consensus of American law—pushed heavily by the Federal Arbitration Act and the thirty-five years of United States Supreme Court jurisprudence around it—is that parties can agree to arbitration of both private contract rights and public law rights, and mere disobedience of the law is not grounds for the reversal of an arbitration award. Practically, parties can waive their rights to alimony, equitable distribution, communal property, fault adjudication (in certain states), and many others by dint of arbitration law.

How does this impact religious marriages when there is no civil marriage? The answer is that arbitration law enables people even further to avoid the need for civil marriage. Arbitration law can govern disputes arising out of a relationship even when, in the eyes of the government, that relationship is not a valid marriage. Within the Jewish community, once a couple wishes to be religiously married and decides to negotiate a binding arbitration agreement governing the dissolution of their marriage, they see that they can accomplish almost any goal they wish without the benefits and burdens of marriage. Other than the tax-free transfer provisions of inheritance and other governmentally granted benefits such as employer provided family leave or social security survivor benefits, a proper arbitration agreement provides religious marriages with almost the same rights as the parties would have after a civil marriage, In short, arbitration agreements may give the parties to a solely religious marriage close to the same private property rights they would have if they had been civilly married.

Arbitration law assures the parties that their religious marriage has the backing of law. The combination of arbitration law and religious family law may provide enough legal rules to allow the parties a high level of confidence that their marital agreement will be enforced while violations will result in fiscal penalties. This is very similar to what would occur in secular court had they been civilly married. Therefore, the use of an arbitration agreement and religious family law may be sufficient to regulate the relationship.

One such arbitration agreement between couples who are religiously married but not civilly married looks like this (generally):

BINDING ARBITRATION AGREEMENT

This agreement made on the _____day of the month of _____ in the year 2014, in the city of _____ State of _____ between: Man:_____ residing at: _____ and Woman:_____ residing at: _____.

The parties, who eventually intend to be civilly married in the near future but are marrying now according to their religious law and cohabitating now, hereby agree as follows:

This is a cohabitation agreement between two people who wish to be married as a matter of Jewish law but do not wish at this moment to be civilly married. Should they ever marry legally, they expect to have a pre-nuptial agreement which would supersede clauses V, VI and VII of this agreement, but not the rest of this agreement, which shall survive any future agreement and civil marriage. This agreement is lawful in the jurisdiction it is being signed in, and the parties agree that California state law should govern this agreement.

Should a dispute arise between the parties, they agree to refer their dispute to an arbitration panel, namely, the Beth Din of America, Inc. (305 Seventh Avenue, New York, NY 10001, www.bethdin.org, 212-807-9042), for a binding decision. The decisions of the Beth Din of American shall be determined consistent with Jewish law as it understands it. The decision of the Beth Din of America shall be fully enforceable in any court of competent jurisdiction.

[Substance of the agreement between the parties is deleted]

The structure of federal arbitration law plays an important role: it would be difficult—given the current interpretations of the Federal Arbitration Act and federal constitutional law about non-marital sexuality[37]—for states to have a valid policy not allowing cohabitation or agreements about cohabitation. Furthermore, special state rules governing religious marriages or religious arbitration would be in violation of *Good News*, a case in which the state rented out public school classrooms to any and all who wished, but not to religious institutions.[38] The Supreme Court ruled this to be unconstitutional discrimination against religion.[39] Rights that are given generally to all—even when coming from a law and not the Constitution—must be given to religions and religious groups as well. The Supreme Court recently affirmed this approach in both *Trinity Lutheran Church*[40] and *Espinoza*,[41] and there is no reason to doubt it is, doctrinally, good law. Thus, there is reason to suspect (and many courts aver)[42] that states cannot ban religious arbitration, neither in the sense of Alternative Dispute Resolution (ADR) under a religious legal system nor by a religious tribunal, while simultaneously permitting secular arbitration. Given the federal government's mandate through the Federal Arbitration Act to generally permit arbitration, arbitration by religious tribunals and under religious law must also be permitted under the same rules.

Simply put, a legal framework that permits and enforces non-religious arbitration—while not giving the same benefit to religious dispute resolution—raises concerns about the free exercise of religion. Based on the Supreme Court's Establishment Clause jurisprudence, a scheme in which courts were instructed to enforce religious arbitration agreements and awards, but not irreligious ones, would constitute an unlawful establishment of religion because it would endorse and advance religion. But "if giving special benefits to religion is favoritism, advancement, and endorsement, then discriminating against religion is hostility, inhibition, and disapproval."[43] Therefore, if American law is to permit private arbitration that meets certain qualifications, it cannot categorically refuse to recognize and enforce religious dispute resolution processes that satisfy the same requirements.

What this means, practically, is clear: parties that want to introduce a law-like structure into their religious marriages—even without ever getting civilly married—can do so with no difficulty. How? They sign a binding arbitration agreement that introduces a set of legal rules into the end of their religious relationship. By doing so, the parties, who would otherwise have no legal rules to regulate their relationship, are able to introduce rules to regulate their relationship all while still remaining unmarried in the eyes of the government. The above sample does so with a reference to Jewish Law

and a rabbinical court, but there is no logical reason to limit this. Parties have such agreements in reference to state law and foreign national law, and countless arbitration panels have heard such cohabitation cases. Frequently, if they are in a faith tradition that has a "divorce ritual" (such as Judaism or Islam), then these agreements also mandate that the religious divorce ritual be prescribed.

Furthermore, given the general trend of arbitration law, even if such agreements were to be contested based on the alleged violation of the criminal law, the Supreme Court has repeatedly held that arbitration agreements that are used to govern illegal contracts between parties are still enforceable.[44] Practically, what that means is that if party X was civilly married to party Y but entered into a religious marriage ceremony with party Z, if there was an arbitration agreement between parties X and Z, it would govern their relationship—even in a state (like Utah) that might deem that religious marriage to be a violation of the constitution and bigamy laws of the state.[45] While this rule does not prevent the state from prosecuting the unlawful conduct, it does provide for legal enforcement of the contract that governs the illegal relationship when the terms of the agreement itself do not constitute a crime.

In short, arbitration law introduces a tool that can provide law-like structure to regulate a couple's religious marriage in both the presence and absence of civil marriage recognition, thereby making a solely religious marriage a more viable option.

III. MODELS OF REGULATING RELIGIOUS MARRIAGES

Religious marriages in the absence of a civilly recognized marriage is not a phenomenon that is seen around the world. This is due, in large part, to how different countries regulate marriage. The models of marriage regulation that are found around the world often reflect a culture's values. It is, therefore, no surprise that different models treat marriages differently. This Part will begin by discussing the international models of regulating religious marriages. Section A will compare how different nations treat religious marriages. Section B will then analyze the "general" model of marriage in the United States.

A. COMPARING NATIONS: INTERNATIONAL MODELS OF MARRIAGE

Different countries have crafted varying models for regulating religious marriages which can help us understand the models and evolution of models of marriage in the United States. While these models have evolved over time, the core understanding of how religious marriages interact with civil marriages has remained constant. European nations today feature three different models: (1) Ireland, the United Kingdom, Scandinavia, Austria, and Greece (the U.K. Model) recognize most religious marriages formed in the church as civilly valid automatically, provided that the conditions of civil marriage are met. So, for example, people who marry in the Church of England are automatically married under the laws of England with no further activity. There is a unity of the state and the church with regard to the performance of marriage. In this legal system, the church and state work hand in hand—no church marriages are performed that are not also civilly valid. (2) Spain, Portugal, Italy, and Poland (the Spanish Model) follow the above rule, but only with regard to marriages performed in the Catholic faith; marriages performed under all other faiths must be coupled with a civil marriage. (3) In France, Belgium, Holland, parts of Germany, and Turkey (the French Model), civil registration is the sole means of having a valid marriage. In this model, timing is legally important—the performance of a religious marriage without an initial civil ceremony is prohibited, and all religious marriages are optional and without any legal effect from the state's perspective. As Professor John Witte Jr. observes, "some states will penalize priests and parties if the religious wedding ceremony precedes the state registration" in order to demonstrate that the religious ceremony is of no legal value at all.[46]

Outside of Europe, nations like Israel and Indonesia (the Millet Model) have assigned to faith groups the sole legal authority to marry. In this model, only religious groups can perform marriages, and only religious marriages are valid. We will not spend time on this model as it is profoundly incompatible with the Constitutional model present in the United States.[47]

Excluding the United States, there are four key models of marriage regulation internationally:

Model	Jurisdiction	Can there (as a matter of secular law) be religious but not civil marriages?	Can there (as a matter of secular law) be civil but not religious marriages?	Are all faiths treated identically?	Notes
Religious officials cannot conduct civil marriages	France, Turkey, and elsewhere	No	Yes	Yes	Full and complete separation
All religious marriages are civilly valid	England and others	No	Yes	Yes	Requires a repeal of the First Amendment to govern marriage in the United States
Some religious marriages are civilly valid	Spain, Italy and others	No	Yes	No	Requires a repeal of the First Amendment to govern marriage in the United States
There are only religious marriages	Millet nations (Egypt, parts of India, Israel)	No	No	Yes	No civil marriages at all. First Amendment would need to be repealed to govern marriage in the United States.

Under each jurisprudential model, policy outcomes may be very different. Of course, what flows from these models is an inversion of the United States' Establishment Clause that is beyond the direct scope of this paper: the direct entanglement of government with religion in the field of marriage produces a desire by faith groups to regulate who the government will issue civil marriage licenses to. This issue is beyond the scope of the paper but explains much of the political structure about marriage in some societies. The government recognizes that religion has a say in marriage law and makes that clear. Such is not the case in America.

Consider the French Model as our first example, which prohibits religious marriages that are not preceded by a civil ceremony. Having decided that all marriages must be civil under French law, the government is placed in the distinct position of regulating religious speech and resulting pure religious conduct. In France, cohabitation—even long-term and with children—is permitted, but cohabitation without civil marriage that is preceded by religious marriage is a crime.

Under the U.K. Model, religious marriages are automatically valid civilly. Organized religious communities can issue valid marriage licenses. Similar to the French Model, there can be no bifurcation of a religious and civil marriage, but the models vary in how they achieve that end. While the French Model demands a civil ceremony as a precondition to a religious marriage, the U.K. Model opts to conflate the religious ceremony with the civil ceremony, should the parties

choose to enter into a religious marriage. By finding all religious marriages to be civilly valid, the U.K. Model permits religious actors to confer legal status on the parties.

The Spanish Model finds that marriages performed in the Catholic faith are automatically valid civilly, but all other religious marriages must be coupled with a civil marriage. Catholic marriages are treated the same as religious marriages under the U.K. Model and religious marriages under all other denominations are treated like religious marriages under the French Model. This model permits *some* religious actors to confer legal status on the parties, but not all. Only specified and privileged religious communities have the authority to issue valid marriage licenses.

Finally, the Millet Model assigns faith groups the sole legal authority to marry. Under this model, there are no civil marriages, but rather only religious marriages. All faiths are treated equally, but marital status becomes the sole province of the religious communities. Unlike the French Model, the U.K. Model, and the Spanish Model, it is not possible to have a civil marriage without a religious ceremony under the Millet Model.

B. MARRIAGE REGULATION IN THE UNITED STATES

The United States, by dint of its constitution, takes a different approach to regulating marriage than its international counterparts. As a preliminarily matter, the term "U.S. Model" does not refer to the model of marriage regulation found in all fifty states, as there is no singular model of marriage in the United States, but rather the model of marriage regulation that is likely demanded by fidelity to the Constitution. Two clauses of the First Amendment restrict the regulation of religious marriages in the United States. First, the Establishment Clause demands that the government refrain from "an establishment of religion."[48] Second, the Free Exercise Clause prohibits the government from preventing the free exercise of religion.[49]

Based on constitutional restrictions, the United States has moved—for more than 150 years now—into a different model from any of the nations discussed above: only civil marriages are valid (or common law marriages), but civil marriages could be solemnized by church officials who exercised both ecclesiastical and temporal authority at one time and by means of the religious ceremony also conducted a civil one, but only if a civil marriage license is issued. Although this process has been subject to repeated challenge asserting that the government is delegating civil authority to clergy, this challenge has not been found to be convincing. As a general proposition, the government is allowed to authorize parties to choose a private religious model to fulfill their civil obligation, so long as there is no excessive entanglement. This is particularly true in the United States when the government permits any and all ministers and does not select any particular minister for any particular party.

Adding the United States to the chart above looks as follows:

Model	Jurisdiction	Can there (as a matter of secular law) be religious but not civil marriages?	Can there (as a matter of secular law) be civil but not religious marriages?	Are all faiths treated identically?	Notes
Religious officials can conduct civil marriages	U.S.	Yes	Yes	Yes	No restrictions on clergy choices

The dominant view in the United States is that this delegation of civil authority to clergy, as well as to many non-ecclesiastical officials, survives constitutional challenge under the Establishment Clause.[50] That is, there is no Establishment Clause violation when the government permits religious

actors to also solemnize a civil marriage. Furthermore, it has so far survived the political challenges from those who are indignant of the fact that there are many church officials who will decline to marry same-sex couples who are now legally entitled to marry.[51]

Under the U.S. Model, as demanded by the Free Exercise Clause, regulation of religious marriages should occur only when the regulation applies to *all* marriages. Free Exercise issues are avoided when the parties voluntarily couple a religious marriage with a civil marriage. When the parties wish to be both religiously and civilly married, states can regulate certain aspects of the marriage freely. For instance, many states will not recognize a marriage as valid unless the parties have first obtained a marriage license.[52] Common law marriages, which can be entered into without a license, are valid only in ten states and the District of Columbia.[53] For the forty states that require a marriage license, religious marriages can be regulated, to the extent that the parties also wish to be civilly married, through the requirements for obtaining a license. Georgia's license requirement, by way of example, provides that:

> A marriage license shall be issued on written application therefor, made by the persons seeking the license, verified by oath of the applicants. The application shall state that there is no legal impediment to the marriage and shall give the full present name of the proposed husband and the full present name of the proposed wife with their dates of birth, their present addresses, and the names of the father and mother of each, if known. If the names of the father or mother of either are unknown, the application shall so state. The application shall state that the persons seeking the license have or have not completed premarital education pursuant to Code Section 19-3-30.1. If the application states that the applicants seeking issuance of the license have completed premarital education, then the applicants shall submit a signed and dated certificate of completion issued by the premarital education provider.[54]

Under Georgia law, the parties must affirm that they are legally allowed to be married and provide the judge of the probate court or his clerk at the county courthouse[55] with their names and other personal information. Through the license requirement, Georgia is able to regulate religious marriages when the parties are also seeking a civil marriage. Restrictions to marriage include age, the existence of a living spouse from a previous undissolved marriage, and certain familial relationship.[56] Every state has some limit on who may marry, and most prohibit bigamous marriages and incestuous marriages as well as providing for some form of age restriction on who may marry.[57]

Rhode Island, like many other states, prohibits a person from marrying "his or her sibling, parent, grandparent, child, grandchild, stepparent, grandparents' spouse, spouse's child, spouse's grandchild, sibling's child or parent's sibling."[58] Should a person enter into such a prohibited marriage, it will be null and void.[59] While Rhode Island follows the common trend of prohibiting incestuous marriages, there is an exception to this rule. Rhode Island is the only state with a carve out for marriages of kindred allowed by a particular religion. Under Rhode Island law, the prohibition on incestuous marriages "shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jewish people, within the degrees of affinity or consanguinity allowed by their religion."[60] To this extent, Rhode Island is atypical of the United States model of marriage. Rhode Island treats a Jewish marriage differently from other religious marriages and from solely secular marriages. This law is likely unconstitutional in that it treats Jewish marriages uniquely, but it remains on the books today. While it has not been repealed, this law was put forward in a different era and does not reflect the mores or constitutional understandings of today. As a result, it has likely been rendered dead letter by a lack of enforcement and prosecution.

Along the same lines, some states require that the officiant be registered with the state before he or she is authorized to solemnize a marriage. Delaware requires the Clerk of Peace in each county to "maintain an online registry through which clergypersons or ministers of any religion must register."[61] Eight other states require registration before a religious representative is authorized to solemnize a marriage.[62]

Rules regulating how the parties may obtain a marriage license, what constitutes a valid marriage generally, and the requirements to be authorized to solemnize a marriage must be complied with

when parties to a marriage seek to be married both religiously and civilly, thus allowing the government to regulate religious marriages when the parties also seek a civil marriage. Religious actors are permitted to officiate weddings in all fifty states and the District of Columbia,[63] which often results in symmetry between marital status from a religious and civil perspective, but when the parties to the marriage do not also seek to be civilly married, regulation of religious marriages is much more complicated.[64]

Unlike the international models discussed above, the U.S. Model, which permits civil marriage ceremonies to be performed by religious officials, does not bar individuals from entering into a religious marriage without also entering into a civil marriage. This is in large part due to the First Amendment's decree that Americans have the right to exercise religion freely. Any attempts by the government to regulate a religious marriage uniquely would run afoul of the First Amendment.

To understand how the U.S. Model plays out in practice, one must first understand how and in what ways marriage can be regulated in the United States. As alluded to earlier, the regulation of marriage in the United States is largely the province of the states rather than the federal government.[65] As Justice Blackmun said in his concurrence in *Ankenbrandt v. Richards*, states possess "virtually exclusive primacy … in the regulation of domestic relations."[66] The Court has further noted that civil marriages are central to state domestic relations law applicable to its residents and citizens.[67] While states possess the primary authority to regulate marriages, their authority is not unfettered. "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject to those guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'"[68]

State regulation of marriage generally must pass muster under the Fourteenth Amendment. In *Obergefell v. Hodges*, the Supreme Court announced that the "right to marry is a fundamental right inherent in the liberty of the person."[69] Therefore, restrictions on the right to marry must pass constitutional scrutiny.[70] This includes restrictions that apply to all Americans as well as restrictions that apply to a specified group of Americans.

State regulation of a religious marriage is further restricted by the First Amendment. The First Amendment applies to state regulation of marriage through its incorporation against the states through the Fourteenth Amendment.[71] While, as a general matter, the refusal to recognize a marriage in the absence of a marriage license may pass constitutional scrutiny, laws that prevent religious marriage ceremonies in the absence of a marriage license have an additional hurdle to clear. When the government limits the ability to engage in a religious ceremony, whether related to marriage or not, it implicates the First Amendment. The First Amendment prohibits the government from preventing the free exercise of religion.

Under the First Amendment, attempts by government to restrict purely ecclesiastical activity (such as a religious wedding ceremony) are subject to strict scrutiny. One would have to show an otherwise currently unattainable governmental interest for this law to survive such review. While one could imagine—in a different time and culture—a strong governmental interest in preventing out-of-wedlock fornication that maybe could survive strict scrutiny, such is no longer the case in our secular society. For example, in current social security law, benefits from a deceased husband cease only upon remarriage as determined by state law. The government does not care whether a widow is engaged in a quasi-marital sexual relationship; thus, a religious ceremony merely provides Divine blessing to what is considered a non-marital sexual relationship by the secular government. In this regard, the law has dramatically changed in the last sixty years—previously, welfare and social security laws allowed the government to inspect residences for aid recipients to ensure that no adult of the opposite sex was secretly sharing the residence. Such searches are not widely conducted anymore although overt cohabitation can be considered by courts for a variety of matters.[72]

Notions of religious freedom, separation of church and state, and fundamental liberties guide the U.S. Model of marriage regulation. Based on these constitutional prohibitions, the U.S. Model demands freedom to enter into a solely religious marriage. But abstract promises of constitutional guarantees provide little guidance. While the U.S. Model may be the exemplar for constitutional marriage regulation, less may be required under the Constitution. In truth, this religious freedom

topic is beyond the scope of this article. Constitutionality aside, a discussion of the models of marriage found in the United States must include fifty-one different models of marriage.

No U.S. state follows the U.K. Model—in which organized religious communities can issue valid marriage licenses, nor the Spanish Model—in which only specified and privileged religious communities do this. In addition, no state follows the Millet Model—in which only religious marriages are recognized as valid. Rather, the states allow clergy to serve as officiates of secular marriage with no constitutionally valid limitations on their ability to also perform religious marriages without any civil validity. Clergy ought not to be precluded from also performing purely religious marriages, but we acknowledge that some states regulate marriage in a manner that is more similar to the French Model than the U.S. Model. Other states follow the U.S. Model and simply do not regulate religious marriages.

IV. THE AMERICAN CONUNDRUM

While the Constitution is the supreme law of the land, the First Amendment's applicability is largely guided by Supreme Court jurisprudence. Without a clear answer from the Court, it may be argued that regulating a solely religious marriage is unconstitutional, but that cannot be said with certainty. In the absence of certainty, states have taken different approaches to the regulation of solely religious marriages. Despite questionable constitutionality, many states punish participants to a solely religious marriage. Therefore, as a practical matter, many states in the United States invoke a model of marriage more similar to the French Model of marriage than the U.S. Model. Several states criminalize some form of conduct that is necessary to enter into a solely religious marriage. The specific means, the form of punishment, and who may be punished varies between states. Some states attempt to make people who have entered into a solely religious marriage common law married. Other states faithfully ignore religious ceremonies and simply view people who are married religiously but not civilly as not married. This Part will discuss each group of states in turn.

It should also be noted at the outset that some states fall between categories. These states treat a solely religious marriage as invalid but simultaneously recognize the import of such relationships.[73] In these states, a solely religious marriage is treated as a quasi-marriage or a neo-marriage. Religious marriages have implications in family law and can impact the support and benefits a party receives, but they do not confer legal marital status on parties. These states will be discussed further in Part IV.

A. CRIMINALIZING CONDUCT

Marriage laws, which must be complied with when a party desires to be civilly married, apply differently when the parties to a religious marriage do not also desire to be civilly married. As discussed in Part I, there are many reasons why individuals may desire to be religiously married without being civilly married. As a result, people are increasingly entering into solely religious marriages. States do, and should, treat all solely religious marriages the same, regardless of the impetus behind the parties' decision to seek a solely religious marriage. Several states undertake to regulate religious marriages in the absence of a civil marriage. These states, which ultimately reach the same outcome as the French Model, seek to prevent the bifurcation of civil and religious marriages. This Section will begin by discussing laws that punish an officiant for conducting a religious marriage that is not civilly recognized. It will then look at the ways in which states punish the parties to the marriage.

1. Punishing the Officiant

New York, for example, has taken some steps to prevent the bifurcation of civil and religious marriages from occurring. New York Domestic Relations Law Article 3, Section 17 states:

> If any clergyman or other person authorized by the laws of this state to perform marriage ceremonies shall solemnize or presume to solemnize any marriage between any parties without a license being presented to him or them as herein provided … he shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not less than fifty dollars nor more than five hundred dollars or by imprisonment for a term not exceeding one year.

New York prohibits clergymen from solemnizing a marriage without a license, thereby indirectly prohibiting the formation of a religious marriage without first or simultaneously entering into a civil marriage. The law's express regulation of specifically religious conduct may implicate questions of constitutionality, but New York is not alone in its regulation of clergymen. Georgia,[74] Idaho,[75] Nevada,[76] New Hampshire,[77] New Jersey,[78] North Carolina,[79] Rhode Island,[80] and Virginia[81] all explicitly punish ministers, clergymen, or other religious actors for solemnizing a marriage without a license.

Other states reach the same result but avoid constitutional concerns. For example, Arizona provides:

A. It is unlawful for any person who is authorized to solemnize marriages to:
   1. Knowingly participate in or by his presence sanction the marriage of a person under the age of eighteen years who obtained a marriage license without consent in writing of the parent or guardian lawfully entitled to give consent.
   2. Solemnize a marriage without first being presented with a marriage license as required by the laws of this state.
   3. Fail to file the marriage license with the act of solemnization endorsed on the marriage license within thirty days of the ceremony.
   4. Knowingly make a false return of a marriage or pretended marriage to the clerk of the superior court.
B. A violation of this section is a class 2 misdemeanor.[82]

Arizona makes it a class 2 misdemeanor for any person authorized to solemnize a marriage to do so without first receiving a marriage license. In the nine states with regulations similar to Arizona,[83] any person who is authorized to solemnize a marriage is punished for doing so in the absence of a marriage license. These laws regulate religious officiants because every state permits clergymen or other religious actors to solemnize a marriage. Under both the model of regulation seen in New York and the model of regulation seen in Arizona, the clergyman or other religious leader who performs a religious marriage in the absence of a civil marriage may be punished. The specific punishment varies between states, but punishments range from a financial penalty,[84] to an infraction,[85] to a misdemeanor.[86]

Beyond regulating the conduct of those authorized to solemnize marriage, other states seek to punish any individual who undertakes to solemnize a marriage without a marriage license. As with states that regulate the conduct of any person who is authorized to solemnize a marriage, these states do not undertake to regulate the conduct of religious leaders in a unique manner. Instead, they provide blanket prohibitions on any person who solemnizes a marriage. These laws, given their wide-reaching prohibition, regulate the conduct of religious officiants. Connecticut, one of such states, provides that "[a]nyone who joins any persons in marriage without having received such license from them shall be fined not more than one hundred dollars."[87] Under Connecticut law, *any* person who officiates a wedding without first receiving a marriage license may be subject to a financial penalty. Sixteen other states similarly punish any person who officiates a wedding without a marriage license.[88]

It is worth noting that punishments for clergy for conducting a marriage ceremony in the absence of a marriage license exist in some common law marriage states. Iowa, a common law marriage state, finds that "[i]f a marriage is solemnized without procuring a license, the parties married, and all persons aiding them, are guilty of a simple misdemeanor."[89] Common law marriage in Iowa has been affirmed as recently as 2016,[90] but Iowa nonetheless punishes persons who solemnize a

marriage without a license. Similarly, New Hampshire punishes a minister or justice of the peace for solemnizing a marriage without a certificate with a financial penalty.[91] Unlike Iowa, New Hampshire does not punish the parties to a religious marriage in the absence of a civil marriage, but officiants who undertake conducting a solely religious marriage are subject to threat of punishment.

Similarly, Rhode Island punishes "[e]very minister, elder, justice, warden, or other person who joins persons in marriage" in the absence of a marriage license.[92] The punishment in Rhode Island is imprisonment not exceeding six months or a fine not exceeding $1000.[93] Utah also punishes an individual for knowingly solemnizing a marriage without a license, but does so with a much harsher penalty.[94] In Utah, it is a felony for any individual to solemnize a marriage without a license.[95] Texas indirectly punishes any wedding officiant for solemnizing a marriage in the absence of a license. The person conducting the marriage ceremony must complete and sign the license and return it to the county clerk who issued the license.[96] Punishment for failing to complete, sign, or return the license in the specified time period is a fine not less than $200 nor more than $500.[97] The officiant is punished for conducting a marriage ceremony without a marriage license because the officiant cannot complete, sign, or return a license without a license. While one could claim that this applies to a secular marriage as well, upon reflection one sees that only clergy would actually run afoul of this law, as they might well perform a religious ceremony without a civil one. A governmental official would not perform such.

Additionally, states often punish an officiant for solemnizing a marriage that is prohibited or unlawful.[98] Most states, through their marriage code, prohibit parties from entering into a bigamous marriage.[99] In these states, a person who is authorized to solemnize marriage may be punished for solemnizing a marriage when he or she knows that one of the parties is currently married.[100] An important aspect of these laws is that the officiant know that at least one of the parties is currently married to someone else. In the event that a person is seeking to enter into a solely religious marriage while remaining civilly married to another person, these laws may further punish the officiant conducting the purely religious ceremony.

2. Punishing the Parties to the Marriage

Officiants are not the only individuals that state laws take aim at. Some laws threaten the parties to a solely religious marriage or bigamous marriage, rather than the party solemnizing the marriage, with punishment. As with the penalties imposed on officiants, these laws indirectly demand that a religious marriage be coupled with a civil marriage. For example, Section 2-401 of the Maryland Code makes it a misdemeanor for an individual to marry in the state "without a license issued by the clerk for the county in which the marriage is performed."[101] Iowa also punishes the parties who marry without a license if the marriage is solemnized.[102] Other states punish a person for contracting a marriage in violation of the marriage chapter. Maine makes it "a civil violation for which a forfeiture of $100 may be adjudged" for contracting a marriage in violation of the Maine marriage chapter.[103] Under that chapter, there is no express requirement that the parties marry pursuant to a marriage license, but there is a prohibition against polygamous marriages.[104] Therefore, the parties to a marriage may be penalized for entering into a solely religious marriage prior to the dissolution of a previous marriage. Logic indicates that these laws focus on clergy exactly because they might solemnize a religious marriage without a civil license. This is impossible in a civil marriage situation alone.

Another way that the parties to a solely religious marriage may face punishment is through a state's criminal bigamy or adultery laws. Many states seek to regulate religious marriages through criminal bigamy laws. Every state prohibits bigamy, but the specific elements of the crime vary from state to state. For states which include purporting to be married in their definition of bigamy, entering into a solely religious marriage can result in criminal sanctions even if the latter marriage is not treated as valid. For example, the Utah Code states, "A person is guilty of bigamy when, knowing the person has a husband or wife or knowing the other person has a husband or wife, the

person purports to marry and cohabitates with the other person."[105] As the Chief Justice of the Utah Supreme Court said in *State v. Holm*[106] in his dissent from a bigamy prosecution:

> As interpreted by the majority, Utah Code section 76-7-101 defines "marriage" as acts undertaken for religious purposes that do not meet any other legal standard for marriage—acts that are unlicensed, unsolemnized by any civil authority, acts that are indeed entirely outside the civil law, and unrecognized as marriage for any other purpose by the state—and criminalizes those acts as "bigamy." I believe that in doing so the statute oversteps lines protecting the free exercise of religion and the privacy of intimate, personal relationships between consenting adults.

Chief Justice Durham raises complicated questions of the constitutionality of Utah's bigamy law which includes the criminalization of relationships that the state does not recognize as marriage. Indeed, the majority concedes that this is exactly the purpose of the law but thinks such laws are constitutional. This is highlighted by the fact that, in *Holm*, the spouses intentionally avoided legally marrying and instead participated in religious ceremonies, and yet these ceremonies were used as evidence in support of the prosecution.[107] Seventeen other states also make it a crime to purport to marry another person when he or she has a living spouse.[108]

Five states include cohabitation in their definition of bigamy.[109] Colorado provides that "[a]ny married person who, while still married, marries, enters into a civil union, or *cohabits* in this state with another person commits bigamy."[110] Unlike any other state, Maryland's definition of bigamy is entering into a marriage ceremony with another while lawfully married to a living person.[111] Regardless of the language used, these states all define "marriage" in the context of bigamy as something that does not meet the legal standard for marriage.

In addition to criminalizing bigamy, sixteen states have adultery laws on the books.[112] These laws may violate the Fourteenth Amendment as interpreted in *Lawrence v. Texas* to include the right to engage in consensual sexual activity in the home without intervention of the government,[113] but they nonetheless exist in sixteen states. Constitutionality aside, adultery laws also work to prevent the bifurcation of religious and civil marriages. If at least one of the people to a religious marriage is civilly married to someone else, the married individual may be subject to criminal prosecution by cohabitating and engaging in sexual intercourse with the spouse to their religious marriage. Such a threat could discourage an individual from entering into a solely religious marriage, thereby encouraging symmetry between religious and civil marital status.

B. WITHHOLDING A DIVORCE

Uniquely in the United States, New York regulates the connection between religious and civil marriages both at the formation and at the end of the relationship. At the beginning, New York (as explained above) prohibits the formation of religious marriages without first entering into a civil marriage. Consistent with that model of insisting on the unity of civil and religious marriage, New York regulates the exit from marriage as well.[114]

The first of these laws was passed in 1984, which states that a plaintiff will not be granted a civil divorce until he or she has removed all barriers to the other spouse's ability to remarry. While the law was facially neutral, it was designed to put pressure on Jewish and Muslim husbands who refused to give their wives a religious divorce by preventing them from obtaining a civil divorce settlement.[115] In 1992, New York passed a law directing courts to consider "the effect of a barrier to marriage" as one of the thirteen factors that must be considered when adjudicating a division of marital assets.[116] In cases where one party (typically the husband) refuses to provide their spouse with a religious divorce, the law permits courts to award the wife a larger portion of the marital assets than she would otherwise be entitled to.[117] All of these legislative attempts are driven by the New York adoption of the "French" model, which is designed to make sure that each party's religious marital status is identical to their civil marital status.[118]

C. RELIGIOUS MARRIAGE AS EVIDENCE OF A COMMON LAW MARRIAGE

Although some common law marriage states may punish religious leaders for conducting a marriage ceremony in the absence of a marriage license, not all states do. Colorado, Kansas, Montana, Oklahoma, South Carolina, and the District of Columbia are all common law marriage jurisdictions that do not punish the solemnization of a marriage without a license. In these states, the parties may enter into a solely religious marriage without facing penalties for failing to obtain a marriage license.

Under this model, a religious marriage itself does not *per se* mean that the parties are common law married, but rather it is evidence of how the parties hold themselves out. In Oklahoma, evidence relevant to finding the formation of a common law marriage include "cohabitation, actions consistent with the relationship of spouses, recognition by the community of the marital relationship, and declarations by the parties."[119] Other common law marriage states require similar evidentiary showings. A religious marriage is relevant to a determination of whether the parties have entered into a common law marriage or not because entering into a religious marriage represents conduct consistent with the relationship of spouses and a recognition by the community that the individuals are married.

D. THE GOVERNMENTAL BLIND EYE

In many states, it seems that religious marriage is simply unregulated. From a law and religion perspective, this is to some extent the ideal American model: religion and law exist on two planes that are disconnected from each other. People who want to be religiously married but not civilly married may do so, or vice-versa. People who want to be religiously married to one person and civilly married to another may do that. People who want to use their religious marriage as a bridge to a future civil marriage may also do that, or vice-versa. Minnesota provides a prime example of this model. The marriage regulation in Minnesota is explicitly limited to the regulation of civil marriages.[120] While bigamy is a crime in Minnesota,[121] as it is in every state, and adultery is also a crime,[122] punishments for violating the marriage provisions do not apply to solely religious marriages. In this sense, Minnesota does not, either directly or indirectly, regulate a solely religious marriage.

While Minnesota is a prime example of governmental non-regulation, other states do not punish the parties to the marriage or the officiant for entering into or solemnizing a marriage in the absence of a license. In these states, a license is required for there to be a valid marriage, but there are no consequences, either for the parties or the officiant, for entering into a solely religious marriage. Effective August 29, 2019, Act 2019-340 repealed Section 30-1-20 of the Alabama Code which penalized officiants for solemnizing a marriage without a license.[123] Other jurisdictions that do not penalize the solemnization of a marriage in the absence of a marriage license include California,[124] Colorado,[125] Florida,[126] Hawaii,[127] Kansas,[128] Louisiana,[129] Mississippi,[130] Montana,[131] Pennsylvania,[132] South Carolina,[133] and the District of Columbia.[134] The regulation of marriage in these states is much more akin to the true U.S. Model than the French Model.

In addition to states that do not provide for criminal penalties, there are many states that do not enforce the laws that seek to prevent the bifurcation of civil and religious marriages. Between First Amendment questions of religious freedom[135] and the post-*Lawrence* Fourteenth Amendment's protection of sexual freedom,[136] the enforcement of laws that punish the officiant or parties to a solely religious marriage is fraught with questions of constitutionality. Questionable constitutionality coupled with the de-stigmatization of premarital sexual relationships[137] has placed states in a situation in which the costs of enforcing these laws outweighs the benefits of enforcement. In response and in order to avoid constitutional concerns, states have willfully turned a blind eye to violations of these laws and simply do not prosecute their violations. As a result, states have rendered laws that regulate a solely religious marriage dead-letter; they have laws on the books, but the laws are not enforced due to constitutional problems.[138] Therefore, there is a disconnect between a state's

theoretical model of marriage regulation and a state's model of marriage regulation in practice at large. Understanding how a state regulates solely religious marriages in practice or in theory is only part of the picture. The legality of certain behaviors sends a message to citizens regardless of whether they are prosecuted for engaging in these behaviors. On the flip side, outlawing certain behaviors without enforcement allows actors to engage in those behaviors without sanction by the government.

The means by which a state regulates religious marriages has a great impact on the individuals to be married. States are largely free to regulate marriage however they please, provided that the regulation passes constitutional muster. As a result, there are varying levels of regulation of a solely religious marriage found throughout the United States. Understanding both the theoretical model and practice model of marriage provides insight into how states view a solely religious marriage. Consider a few simple cases:

1. Person A is civilly married to person B but wants to also religiously marry person C. New York would prohibit this, as would Georgia, Michigan and Iowa.[139] Utah might seek a prosecution for bigamy, but most states would allow the religious marriage between persons A and C, notwithstanding the civil marriage between persons A and B.
2. Person D is in a sexual relationship with their sibling, person E, whom they wish to religiously marry in New Jersey where adult sexual relationships between siblings are permissible. Such a religious wedding is permitted in New Jersey.
3. Person F was married to person G, who is now dead. Person F is receiving a pension based on their prior marriage to G. Person F now wishes to religiously, but not civilly, marry person H. New York (and a few other states) would prohibit it, but other states would not object to that religious marriage.[140]
4. Person I and Person J would like to religiously but not civilly marry; New York (and the other states that follow its lead) would prohibit that marriage, and other states would not object.
5. Person K is religiously and civilly married to person L. They agree to divorce religiously and civilly; the religious divorce is uncontested and prompt, but the civil divorce is contested and has not yet been granted. Person L now wishes to religiously and civilly marry person M. A civil marriage is not yet possible; no marriage license will be granted, as bigamy is a crime. Person L religiously marries person M with the understanding that a civil marriage will follow as soon as possible. New York (and the states that follow its lead) can prohibit the religious marriage of person L to person M but cannot prohibit the religious divorce of person K and person L. Utah might charge person L with bigamy. Other states do not perceive this whole story as a problem.

In short, the regulation of solely religious marriages varies across states. In some states, the religious marriage is completely deregulated and unrestricted, meaning that the parties are free to enter into a solely religious marriage without fear of legal consequences. In other states, a solely religious marriage is much more regulated and entering into such a marriage may be grounds for legal consequences, even when such a marriage is not recognized as a valid marriage.

V. THE IMPORTANCE OF BEING MARRIED … OR NOT MARRIED

Regulation of religious marriages, both with and in the absence of a civil marriage, is inconsistent across the United States. How a religious marriage is treated within a state is of great importance to the individuals entering into the marriage. Governmental treatment of these relationships matters for many reasons. Criminal consequences may deter many parties from entering into a solely ecclesiastic marriage, but these threats will not deter all parties from entering into a solely religious marriage. Additionally, not all states seek to punish parties for entering into a religious marriage that is not civilly recognized. Governmental regulation of a solely religious marriage,

beyond invocation of the above-mentioned consequences, is limited. At the end of the day, while these parties may face some form of punishment for solemnizing or entering into a religious marriage that is not sanctioned by the state, the religious marriage itself is not contrary to the law in many states. Rather, it is often simply not recognized by law. Whether a religious marriage is recognized as a valid marriage will impact whether the parties qualify for certain governmental benefits. How a religious marriage impacts qualification for particular government benefits will affect the parties. This Part will first look at the benefits of entering into a governmentally sanctioned marriage and the advantage individuals must forego if they choose to enter into a marital relationship that is not recognized by the government. Next, this Part will discuss the potential detrimental effects a solely religious marriage may have on the married persons.

A. FORMATION OF MARRIAGE

Marital status triggers unique governmental benefits. Marriage is the basis for a wide range of governmental rights and benefits. "These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules."[141] Married people may find themselves paying less in taxes, paying less for or receiving better health insurance, receiving discounts on long-term care insurance, auto insurance, and home insurance, as well as qualifying for better credit and better loan terms.[142] For people who are not opposed to being married civilly, but are only seeking a religious marriage, asymmetry between civil and religious marital status will have consequences. Namely, they are not enjoying the benefits of a legally valid marriage. These individuals who seek to marry, benefit from state attempts to prevent the bifurcation of civil and religious marriages because they are encouraged to enter into a relationship that they are not opposed to and that provides them with added benefits. Individuals who are opposed to being married civilly opt to leave these benefits on the table.

Regardless of a person's desires, marital status has an impact on everyone's life. The recognition of the formation of a marriage matters in that it provides the parties to the marriage with benefits, but it also saddles the parties with additional burdens. In twenty-seven states and the District of Columbia, bigamy requires that the parties, one of whom is currently married to another, actually marry.[143] Under these bigamy laws, a determination of whether the parties have formed a valid marriage or not may affect whether they are subject to criminal punishment. Part III Section C, *supra*, discussed common law marriage states that do not punish a religious leader for solemnizing a marriage without a license. In these states, individuals may be subject to bigamy charges that similarly situated couples are not subject to in non-common law marriage states. Should a religious marriage be viewed as evidence of intent to enter into a common law marriage, then couples to a solely religious marriage will have no choice in whether they have formed a marriage that is subject to the advantages and burdens that come with being married in the eyes of the government.[144]

B. TERMINATION OF BENEFITS

Marital states will provide individuals with certain financial benefits, but the formation of a marriage, or in some states a quasi-marital relationship, will also result in the termination of other benefits. In many states, once a party has been found to be remarried, they lose many of the benefits that they received from their prior marriage, including alimony and pension benefits. Therefore, how a state views a particular relationship matters. By granting a solely religious marriage quasi-marital recognition for the purposes of terminating benefits, some states view a solely religious marriage as neo-marriage.[145]

An example of when benefits may be terminated will be illustrative of how different states treat a religious marriage when done without a civil marriage. The textbook *Family Law* (Harris, Carbone & Teitelbaum, 5th ed) presents the following problem:

> Ernest and Irene, who were both widowed and retired, participated in a wedding ceremony performed by a minister but did not obtain a marriage license. Irene believed that if she remarried, she would lose her pension benefits as the surviving spouse of her first husband. After the wedding, Ernest and Irene lived together, referred to themselves as husband and wife, and were generally known among their friends as spouses. They filed their income taxes as single people and did not notify the Social Security Administration or the administrators of their private pensions that they were married.[146]

The problem then continues with several questions and permutations:

> Ernest has died, and Irene claims rights as his surviving widow on the theory that they had a common law marriage. Ernest's brother, executor of the estate, denies her claim. What arguments should the parties make?

But in fact, the possible permutations of this type of problem abound and the literature discusses these cases in a few permutations.

> Irene is receiving alimony from her previous marriage. Has she entered into a relationship that will result in the termination or modification of her alimony award?

Or:

> Ernest has minor children who reside with him from a previous marriage. The settlement agreement with his divorced spouse stated that neither party was to have overnight guests of the opposite sex unless a marriage has taken place. Is this condition satisfied?

Generally, absent an agreement by the parties to some other rules, most states rule that spousal support does not automatically terminate because the recipient is cohabiting with someone else.[147] A few different reasons can be provided to support this. One is a rule of formalism: on its face, cohabitation does not create a legally enforceable support obligation between the parties—thus cohabitation is no substitute for marriage. Additionally, cohabitation is transitory and much more rapidly changing in many people's lives than marriage is (studies show that the average cohabitant is less than 30 months, and the average marriage is about 100 months). Losing permanent financial rights for a temporary relationship seems unfair. One may also understand the rules around cohabitation as another example of "modification grounded in changing circumstances."[148]

The vast majority of states permit termination of modification of spousal support upon a showing of material and substantial change in circumstances.[149] Some states statutorily declare that courts may (or must) consider cohabitation as evidence of a relevant change in circumstances. Connecticut states that the court modifying the alimony award has the discretion to undertake modification based on "a showing that the party receiving the periodic alimony is living with another person under circumstances which … cause such a change of circumstances as to alter the financial needs of that party."[150] Missouri requires the court, in assessing whether a substantial change in circumstances has occurred, to consider "the extent to which the reasonable expenses of either party are, or should be, shared by a spouse or other person with whom he or she cohabits."[151]

Whether cohabitation is relevant to a finding of a change in circumstances may not be determined statutorily, but rather judicially. In a number of states, what constitutes a sufficient change in circumstances is not defined by statute.[152] Some of these states, such as Delaware, permit consideration of cohabitation as evidence of a substantial change in circumstances, but such a showing does

not alone constitute grounds for terminating support.[153] Other states, like Michigan, hold that cohabitation does not constitute "changed circumstances," but permit inquiry into "other related facts showing an improvement in the party's financial position might constitute a change in circumstances."[154]

Other states see cohabitation as a more serious type of relationship and legally treat it the same as a marriage for purposes of modifying spousal support. Most prominent in this group is Alabama, whose statute explicitly states that if one is "living openly or cohabiting with a member of the opposite sex,"[155] one automatically loses the right to payments from one's previous spouse. This is similar in Puerto Rico, which (translated into English) states that one loses one's payment when one "lives in public concubinage" with a woman who functions as a wife.[156] Other states—large and small—have similar views. These states include Arkansas,[157] Illinois,[158] Louisiana,[159] North Carolina,[160] North Dakota,[161] Pennsylvania,[162] South Carolina,[163] and Utah.[164] In these states, certain cohabitation may automatically terminate an order for spousal support, require modification to an order for spousal support, or bar the issuance of an award of support because the relationship is treated as "marriage" for the purposes of support determinations. Religious marriage should be treated in this same way.

Some states treat cohabitation as a quasi-marital relationship. Under this approach, the courts examine the relationship between the cohabitating parties and assess whether it is sufficiently similar to a marital relationship. Oklahoma law permits a court "reduce or terminate future support payments" based on "voluntary cohabitation of a former spouse with a member of the opposite sex."[165] In this context, cohabitation is defined as "the dwelling together continuously and habitually of a man and a woman who are in a private conjugal relationship not solemnized as a marriage according to law, or not necessarily meeting all the standards of a common law marriage."[166] While cohabitation may be evidence of a substantial change of circumstances, the court must look at the relationship between the parties beyond the mere fact that the parties live together. In this sense, Oklahoma treats certain non-marital relationships as quasi-marital.

Other states provide that cohabitation of a certain degree is *grounds* for termination or modification of spousal support, unrelated to a "material change in circumstances" standard. In these states, cohabitation does not automatically terminate spousal support, but it may be a basis for termination or modification. California,[167] Florida,[168] Georgia,[169] New Hampshire,[170] New Jersey,[171] New York,[172] Tennessee,[173] and Virginia[174] all find that cohabitation is an independent ground for termination or modification. Some states have more nuance here than others. California law directs that "cohabiting with a nonmarital partner" creates a rebuttable presumption of decreased need for support.[175] Tennessee[176] and Virginia[177] have also adopted this rule.

Under the vast majority of these laws, the definition of cohabitation requires more than mere living together. The relationship between the parties must be sufficiently similar to a martial relationship to warrant termination or modification of support. Only Tennessee does not specify the degree of relationship required between persons living together.[178] California simply states that parties must be partners.[179] Georgia requires a meretricious relationship and living together continuously and openly.[180] New York demands that the parties habitually live together and that they hold themselves out as married.[181] Virginia finds that cohabitation requires habitually living together in a relationship that is analogous to a marriage.[182] Other states have adopted more nuanced rules to determine the scope of the relationship. New Hampshire[183] and New Jersey[184] both specify the evidence a court must consider in determining whether cohabitation exists. The Florida statute is quite nuanced and complex to deal with pre-marital relationships. It reads as follows:

> (b)The court may reduce or terminate an award of alimony upon specific written findings by the court that since the granting of a divorce and the award of alimony a **supportive relationship has existed between the obligee and a person with whom the obligee resides**. On the issue of whether alimony should be reduced or terminated under this paragraph, the burden is on the obligor to prove by a preponderance of the evidence that a supportive relationship exists. (emphasis added).

In determining whether an existing award of alimony should be reduced or terminated because of an alleged supportive relationship between an obligee and a person who is not related by consanguinity or affinity and with whom the obligee resides, the court shall elicit the nature and extent of the relationship in question. The court shall give consideration, without limitation, to circumstances, including, but not limited to, the following, in determining the relationship of an obligee to another person:

> The extent to which the obligee and the other person have held themselves out as a married couple by engaging in conduct such as using the same last name, using a common mailing address, referring to each other in terms such as "my husband" or "my wife," or otherwise conducting themselves in a manner that evidences a permanent supportive relationship.
> The period of time that the obligee has resided with the other person in a permanent place of abode.
> The extent to which the obligee and the other person have pooled their assets or income or otherwise exhibited financial interdependence.
> The extent to which the obligee or the other person has supported the other, in whole or in part.
> The extent to which the obligee or the other person has performed valuable services for the other.
> The extent to which the obligee or the other person has performed valuable services for the other's company or employer.
> Whether the obligee and the other person have worked together to create or enhance anything of value.
> Whether the obligee and the other person have jointly contributed to the purchase of any real or personal property.
> Evidence in support of a claim that the obligee and the other person have an express agreement regarding property sharing or support.
> Evidence in support of a claim that the obligee and the other person have an implied agreement regarding property sharing or support.
> Whether the obligee and the other person have provided support to the children of one another, regardless of any legal duty to do so.[185]

The following is the final paragraph of the law and is added to show that Florida does not wish to return to common law marriage:

> **This paragraph does not abrogate the requirement that every marriage in this state be solemnized under a license, does not recognize a common law marriage as valid, and does not recognize a de facto marriage. This paragraph recognizes only that relationships do exist that provide economic support equivalent to a marriage and that alimony terminable on remarriage may be reduced or terminated upon the establishment of equivalent equitable circumstances as described in this paragraph. The existence of a conjugal relationship, though it may be relevant to the nature and extent of the relationship, is not necessary for the application of the provisions of this paragraph.** (emphasis added).[186]

Florida wants to make the law clear: this "relationship" is not a marriage at all, but it has some characteristics that resemble marriage and will be considered a "neo" marriage for many purposes.

Unlike states that look at and/or require cohabitation as grounds for terminating spousal support, Iowa requires the court modifying the spousal support award to consider the "[p]ossible support of a party by another person."[187] Under this rule, a quasi-marital relationship, even in the absence of cohabitation may be grounds to terminate alimony. In this way, Iowa may at times treat a solely religious marriage as a "neo" marriage for certain purposes in a manner unlike any other state.[188]

Specifics aside, one can look at a religious marriage's impact on existing familial support benefits in one of three ways:

The "common law marriage" approach: States that still have common law marriages might view couples who religiously marry and are eligible to be civilly married as married. They might deny that one can merely intend to be "religiously married" and aver that if one intends to be married at all, one is civilly married also.[189] This would help resolve a subset of cases in which parties

are seeking a religious but not civil marriage to avoid available consequences of marriage.[190] Under this approach, an attempted "solely" religious marriage would result in the termination of spousal support obligations.

The "supporting relationship" approach: The second approach is to find that religious marriages are civilly invalid, but demonstrative of a supporting relationship (often when coupled with cohabitation) that has many implications in family law and can have an impact on support and other such provisions.

The "ignore religion and cohabitation" approach: The third approach is to ignore religious marriages and cohabitation when determining support obligations.[191] In these states, religious marriages would be ignored, and the state policy of ignoring cohabitation would seem to mandate that the cohabiting aspects of this relationship be ignored also.[192]

Now, to conclude, let us return to our original problem. We opened with a textbook hypothetical:

> Ernest and Irene, both widowed and retired, participated in a wedding ceremony performed by a minister but did not obtain a marriage license. Irene believed that if she remarried, she would lose her pension benefits as the surviving spouse of her first husband. After the wedding, Ernest and Irene lived together, referred to themselves as husband and wife, and were generally known among their friends as spouses. They filed their income taxes as single people and did not notify the Social Security Administration or the administrators of their private pensions that they were married. **(1)** Ernest has died, and Irene claims rights as his surviving widow. His brother, executor of his estate, has denied her claim. **(2)** Irene is receiving alimony from her previous marriage. Does she lose her alimony? **(3)** Ernest has minor children who reside with him from another previous marriage which ended in divorce. The settlement agreement with his previous spouse stated that neither party was to have overnight guests of the opposite sex unless a marriage has taken place. Is this condition satisfied?

Question (1): The "common law marriage" approach would label them as married since they identified themselves as such; thus, she is a surviving spouse and is entitled to certain benefits. The "supporting relationship" approach would find that they are not married for any purposes directly related to marriage based merely on their religious marriage. Thus, she has no rights to the estate. The "ignore religion and cohabitation" approach would just ignore this relationship and also find that they are not married. Under this approach, Ernest's brother would be correct in denying her claim. (It should be noted that under the certain models of marriage regulation, as discussed in Part III, *supra*, Irene and the officiant may be punished for their conduct. State regulation of marriage and regulation of spousal support may treat a solely religious marriage differently).[193]

Question (2): The "common law marriage" approach would label them as married since they identified themselves as such; thus, she loses her alimony. The "supporting relationship" approach would agree that they are not married for any purposes directly related to marriage, but there is little doubt that this relationship was supporting in that way. Thus, she would lose her alimony. The "ignore religion and cohabitation" approach would just ignore this relationship. Under this approach, she would keep her alimony.

Question (3): The "common law marriage" approach would label them as married since they identified themselves as such. Therefore, Ernest's conduct is permitted. The "supporting relationship" approach is unclear. It is likely that this approach would consider a clause of this type to be a "support clause" and would not penalize Ernest, but such cannot be said with certainty. The "ignore religion and cohabitation" approach would ignore this relationship. Thus, Ernest is in a non-marital sexual relationship; Irene is a mere overnight guest of the opposite sex and their conduct is not permitted.

VI. CONCLUSION

On the one hand, it is clear that there is no statutory consensus among the states in the United States on how to regulate a religious marriage in the absence of a civil marriage. Each state

regulates marriage uniquely, making it impossible for there to be a national approach to the regulation of a solely religious marriage. On the other hand, states seem to be aware that enforcement of these laws is fraught with religious freedom and other constitutional problems[194] and thus these laws are best left unenforced.

In an era where non-marital sexual relations are both legal and common, it makes no sense to view only religious marriages, and no other sexual arrangement, as marriage. Provided that the government does not sanction the relationship as a marriage, there should be no difference between a religious marriage and a similar areligious non-marital relationship. Additionally, in determining whether to recognize a relationship as a "marriage," religious ceremonies should not be treated any differently than non-religious behaviors. In modern times, the regulation of a solely religious marriage results in religious marriages being treated differently from similar non-religious sexual arrangements, a policy that is not consistent with American ideals. While there cannot be a "United States approach" to addressing the question of what to do when a religious marriage is not coupled with a civil marriage, the secular legal system in the United States ought to ignore the existence of a solely religious marriage. No other solution is consistent with the basic and well-established constitutional rules of the First and Fourteenth Amendments.[195]

The existence of a common law marriage, in states that permit such marriages, should turn on the relationship between the parties rather than merely the existence of a religious marriage. Meaning that while the existence of a religious marriage may be a factor in the common law marriage analysis, it should not be the sole factor. So too, a solely religious marriage should not uniquely be criminalized. Parties and officiants should not be subject to prosecution for entering into or performing a solely religious marriage. Such a criminalization flies in the face of the notion of religious freedom. In assessing support obligations, such as alimony or pension benefits, states ought to assess the facts of the individual situation in the absence of a religious marriage. In the event that a state's criminal law and civil law approaches treat consensual nonmarital relationships differently, the criminal and civil implications of a solely religious marriage may vary, but the treatment of a solely religious marriage should not differ from other nonmarital relationships. Whether a solely religious marriage constitutes non-marriage, neo-marriage, marriage, or something else should be decided without consideration of the existence of a religious marriage.

ENDNOTES

[1]The Wizard of Oz (Metro-Goldwyn-Mayer 1939).

[2]Professor Broyde is an active member of an Orthodox Jewish community in Atlanta, Georgia.

[3]Professor Broyde is contacted by these governmental officials with some regularity to help address this problem. Mostly, these are child welfare officials who are sincerely worried about the wellbeing of the children.

[4]*See infra* Section III.A. Some states have laws that punish an officiant, including a religious officiant, for performing a marriage ceremony without a valid license. States may also punish the parties to a solely religious marriage for not obtaining a marriage license.

[5]*See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

[6]*Id*.

[7]*Id*..; *see also* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

[8]JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 Loy. U. Chi. L.J. 127, 132 (2014).

[9]*See Skinner v. Oklahoma*, 316 U.S. 535 (1942); *see also* Hannah Alsgaard, *Decoupling Marriage & Procreation: A Feminist Argument for Same-Sex Marriage*, 27 Berkeley J. Gender L. & Just. 307 (2012) (analyzing the Court's discussion in *Skinner*).

[10]Jesus Fernández-Villaverde et al., *From Shame to Game in One Hundred Years: A Macroeconomic Model of the Rise in Premarital Sex and its De-Stigmatization*, PCS Working Paper Series (2011).

[11]Charlotte Alter, *Exclusive: Millennials More Tolerant of Premarital Sex, But Have Fewer Partners*, TIME (May 5, 2015), https://time.com/3846289/boomers-generations-millennials-sex-sex-trends-sexual-partners/.

[12]Briana Bierschbach, *Minnesota legislator wants to decriminalize adultery*, Star Tribune (Mar. 5, 2020, 9:44 PM), https://www.startribune.com/minnesota-legislator-wants-to-decriminalize-adultery/568524612/?refresh=true.

[13]Joanne Sweeny, *Adultery and fornication: Why are states rushing to get these outdated laws off the books?*, SALON (May 6, 2019, 10:00 AM), https://www.salon.com/2019/05/06/adultery-and-fornication-why-are-states-rushing-to-get-these-outdated-laws-off-the-books/; *see also* Press Release, American Civil Liberties Union, ACLU Challenges Georgia's Antiquated "Fornication" Law Barring Sex Outside of Marriage (June 25, 2002), https://www.aclu.org/press-releases/aclu-challenges-georgias-antiquated-fornication-law-barring-sex-outside-marriage.

[14]*See* Press Release, *supra* note 13.

[15]*See, e.g.*, Casey Leins, *Sex Before Marriage Is Now Legal in Virginia*, U.S. NEWS (Mar. 5, 2020, 2:56 PM), https://www.usnews.com/news/best-states/articles/2020-03-05/virginia-repeals-law-banning-sex-before-marriage; Ben Winslow, *Adultery and sodomy among consenting adults are no longer illegal in Utah*, FOX13 (Mar. 25, 2019, 9:35 PM), https://fox13now.com/2019/03/25/adultery-and-sodomy-among-consenting-adults-are-no-longer-illegal-in-utah/.

[16]*Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

[17]*See* Briana Bierschbach, *supra* note 12; *Massachusetts law about sex: Adultery*, Mass.gov, https://www.mass.gov/info-details/massachusetts-law-about-sex#adultery- (last visited Apr. 16, 2020); An Act Relative to Reproductive Health, CH. 155, SEC. 2, § 14, 2018 MASS. ACTS; H.B. 40, 2019 LEG., GEN. SESS. (Utah) (repealing criminal offenses of adultery and sodomy); Casey Leins, *supra* note 15.

[18]*See, e.g.*, Sasha Ingber, *Utah Repeals 1973 Law That Criminalized Sex Outside of Marriage*, NPR (Mar. 29, 2019 3:20 PM), https://www.npr.org/2019/03/29/708042810/utah-repeals-1973-law-that-criminalized-sex-outside-of-marriage.

[19]*See* Press Release, *supra* note 13; Briana Bierschbach, *supra* note 12.

[20]Although there is some speculation in this footnote, I have little doubt that the practice of seeking to prevent second religious marriages prior to a civil divorce, which started in America about a century ago under the direction of Rabbi Joseph Elijah Henkin's leadership derives from a sense that the government cared about adultery and fornication. These concerns have diminished in the last decades as has the concern of the Jewish Law community that people not be seen as engaging in fornication as a matter of secular law.

[21]*See generally* Kaiponanea T. Matsumura, *A Right Not to Marry*, 85 FORDHAM L. REV. 1509, 1515–17 (2015) (discussing some of the reasons people may choose not to be married, regardless of the benefits married persons receive).

[22]Ben Horowitz & Louis C. Hochman, *Q&A: Is incest really legal in New Jersey?* NJ.com (Mar. 29, 2019), https://www.nj.com/news/2015/01/incest_qa_daughter_plans_to_marry_dad.html.

[23]Nominal in the sense that the first marriage is legally valid but factually over.

[24]Called "permission from 100 rabbis to take a second wife." *See generally Heter meah rabbanim*, WIKIPEDIA, https://en.wikipedia.org/wiki/Heter_meah_rabbanim (last visited Apr. 16, 2020).

[25]Nicholas Walter, *Religious Arbitration in the United States*, 52 SANTA CLARA L. REV. 501, 517 (2012).

[26]*Id*.

[27]*See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1 (1984).

[28]*See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (The United States Supreme Court upheld an agreement between two American corporations that contained an arbitration clause requiring that any disputes under the agreement be arbitrated in Japan under the rules of the Japan Commercial Arbitration Association (JCAA)).

[29]You can see one such set of examples at www.theprenup.org.

[30]Michael Broyde, *Sharia in America*, VOLOKH CONSPIRACY (June 30, 2017, 8:01 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/30/sharia-in-america/.

[31]Walter, *supra* note 25, at 519–20 (2012).

[32]*Id*. at 520.

[33]*Id*.

[34]*Id*. at 521.

[35]R. Seth Shippee, *Peacemaking: Applying Faith to Conflict Resolution*, 10 DISP. RESOL. MAG. 3, 4–5 (2002).

[36]Child custody is the exception that proves the rule. In child custody matters, exactly because children are not assets and may not be contractually divided, binding arbitration is limited: Judges cannot fundamentally engage in only a procedural review; they must also engage in substantive review to determine the best interests of the child. They have no choice but to ask whether the arbitration panel reached the right, or a plausibly right, answer. Whether the arbitration panel is reviewed de novo or for harm or under some other standard, the predicate of child custody analysis is not procedural due process but some form of substantive due process. *See, e.g.*, *Glauber v. Glauber*, 192 A.D.2d 94, 97 (N.Y. App. Div. 1993) (finding that "the court must always make its own independent review and findings" in child custody cases, despite an arbitration award); *Fawzy v. Fawzy*, 973 A.2d 347, 350 (N.J. 2009) (finding a N.J. constitutional right to child custody arbitration albeit with de novo review). As shown elsewhere, it is the majority view in the Jewish tradition as well that the best-interest-of-the-child analysis should be used. *See* Michael J. Broyde, *Child Custody in Jewish Law: A Conceptual Analysis*, 37 J. HALACHA & CONTEMP. SOC. 21 (1999).

[37]*Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

[38]*Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

[39]*Id*. at 110.

[40]**Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. __ (2017).**

[41]*Espinoza v. Mo. Dep't of Revenue*, 591 U.S. __ (2020).

[42]Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. UNIV. L. REV. 537 (2016); Erin Sisson, *The Future of Sharia Law in American Arbitration*, 48 VAND. J. TRANSNATIONAL L. 891 (2015);

James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 Seton Hall L. Rev. 717 (2015); Eun-Jung Katherine Kim, *Islamic law in American Courts: Good, Bad, and Unsustainable Uses*, 28 Notre Dame J.L. Ethics & Pub. Pol'y 287 (2014).

[43]Eugene Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L., Ethics & Pub. Pol'y 341 (1999).

[44]Rent-a-Center West, Inc. v. Jackson, 561 U.S. 63 (2010).

[45]Utah Const. art. 3.

[46]John Witte, Jr., Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties 320 (2019).

[47]It is worth noting that nations that have the Millet Model also have vibrant protections of non-married cohabitants exactly because so many people opt out of the marriage rites due to their religious nature. *See* Shahar Lifshitz, *The External Rights of Cohabiting Couples in Israel*, 37 Israel L. Rev. 346 (2004).

[48]U.S. Const. amend. I.

[49]*Id*.

[50]John Witte, *supra* note 46 at 310–15 (summarizing the current law and its history).

[51]*See id*. at 324–26.

[52]Ala. Code § 30-1-9.1 (2020); Alaska Stat. § 25.05.061 (2019); Ariz. Rev. Stat. Ann. § 25-111 (2020); Ark. Code Ann. § 9-11-201 (2020); Cal. Fam. Code § 350 (West 2020); Conn. Gen. Stat. Ann. § 46b-24 (West 2020); Del. Code Ann. tit.13, § 107 (2019); Fla. Stat. Ann. § 741.08 (West 2020); Ga. Code Ann. § 19-3-1.1 (2019); Haw. Rev. Stat. Ann. § 572-1 (West 2019); Idaho Code § 32-201 (2020); 750 Ill. Comp. Stat. Ann. § 5/214 (West 2019); Ind. Code Ann. § 31-11-4-1 (West 2020); Ky. Rev. Stat. Ann. § 402.080 (West 2020); La. Stat. Ann. § 9:205 (2019); *Pierce v. Sec'y of U.S. Dep't. of Health, Educ. & Welfare*, 254 A.2d 46, 48 (Me. 1969); Md. Code Ann., Fam. Law § 2-401 (West 2020); *Sutton v. Valois*, 846 N,E.2d 1171, 1175 (Mass. App. Ct. 2006); Mich. Comp. Laws Ann. § 551.101 (West 2020); Minn. Stat. Ann. § 517.01 (West 2020); Miss. Code Ann. § 93-1-15 (2020); Mo. Ann. Stat. § 451.040 (West 2019); Neb. Rev. Stat. Ann. § 42-104 (West 2020); Nev. Rev. Stat. Ann. § 122.010 (West 2019); N.J. Stat. Ann. § 37:1-2 (West 2020); N.M. Stat. Ann. § 40-1-10 (West 2020); N.Y. Dom. Rel. Law § 13 (McKinney 2019); N.C. Gen. Stat. § 51-6 (2019); N.D. Cent. Code § 14-03-10 (2019); Ohio Rev. Code Ann. § 3101.09 (West 2020); Or. Rev. Stat. Ann. § 106.041 (West 2020); 23 Pa. Stat. and Cons. Stat. Ann. § 1301 (West 2020); S.D. Codified Laws § 25-1-10 (2020); Tenn. Code Ann. § 36-3-103 (2020); Vt. Stat. Ann. tit. 18, § 5145 (2019); Va. Code Ann. § 20-13 (2019); Wash. Rev. Code Ann. § 26.04.140 (West 2020); W. Va. Code Ann. § 48-2-101 (West 2020); Wis. Stat. Ann. § 765.05 (West 2020); Wyo. Stat. Ann. § 20-1-103 (2020).

[53]*Gill v. Nostrand*, 206 A.3d 869, 874 (D.C. 2019); Utah Code Ann. § 30-1-4.5 (West 2020); Tex. Fam. Code Ann. §§ 1.101, 2.401–2.402 (West 2019); S.C. Code Ann. § 20-1-360 (2020); *Luis v. Gaugler*, 185 A.3d 497, 503 (R.I. 2018); *Standefer v. Standefer*, 26 P.3d 104, 107 (Okla. 2001); N.H. Rev. Stat. Ann. § 457:39 (2020); In re Estate of Ober, 62 P.3d 1114, 1115 (Mont. 2003); Kan. Stat. Ann. §§ 23-2502, 23-2714 (West 2020); In re Marriage of Capalite, 886 N.W.2d 616 (Iowa Ct. App. 2016); Colo. Rev. Stat. § 14-2-109.5 (2019).

[54]Ga. Code Ann. § 19-3-33(a) (2019).

[55]Ga. Code Ann. § 19-3-30(a) (2019) ("Marriage licenses shall be issued only by the judge of the probate court or his clerk at the county courthouse between the hours of 8:00 A.M. and 6:00 P.M., Monday through Saturday.").

[56]Ga. Code Ann. § 19-3-2 (2019).

[57]*See, e.g*., Ga. Code Ann. § 19-3-2 (2019).

[58]R.I. Gen. Laws § 15-1-2 (2020).

[59]R.I. Gen. Laws § 15-1-3 (2020).

[60]R.I. Gen. Laws §§ 15-1-4 (2020).

[61]Del. Code Ann. tit.13, § 106(b) (2019).

[62]Haw. Rev. Stat. Ann. § 572-11 (West 2019); La. Stat. Ann. § 9:204 (2019); Mass. Gen. Laws Ann. ch. 207, § 38 (West 2020); Nev. Rev. Stat. Ann. § 122.062 (West 2019); N.Y. Dom. Rel. Law § 11-b (McKinney 2019); Ohio Rev. Code Ann. § 3101.10 (West 2020); Va. Code Ann. § 20-23 (2019); W. Va. Code Ann. § 48-2-402 (West 2020).

[63]Ala. Code § 30-1-7 (2020); Alaska Stat. § 25.05.261 (2019); Ariz. Rev. Stat. Ann. § 25-124 (2020); Ark. Code Ann. § 9-11-213 (2020); Cal. Fam. Code § 400 (West 2020); Colo. Rev. Stat. § 14-2-109 (2019); Conn. Gen. Stat. Ann. § 46b-22 (West 2020); Del. Code Ann. tit.13, § 106 (2019); Fla. Stat. Ann. § 741.07 (West 2020); Ga. Code Ann. § 19-3-30 (2019); Haw. Rev. Stat. Ann. § 572-12 (West 2019); Idaho Code § 32-303 (2020); 750 Ill. Comp. Stat. Ann. § 5/209 (West 2019); Ind. Code Ann. § 31-11-6-1 (West 2020); Iowa Code Ann. § 595.10 (West 2020); Kan. Stat. Ann. § 23-2504 (West 2020); Ky. Rev. Stat. Ann. § 402.050 (West 2020); La. Stat. Ann. § 9:202 (2019); Me. Stat. tit. 19-A, § 655 (2019); Md. Code Ann., Fam. Law § 2-406 (West 2020); Mass. Gen. Laws Ann. ch. 207, § 40 (West 2020); Mich. Comp. Laws Ann. § 551.7 (West 2020); Minn. Stat. Ann. § 517.04 (West 2020); Miss. Code Ann. § 93-1-19 (2020); Mo. Ann. Stat. § 451.100 (West 2019); Mont. Code Ann. § 40-1-301 (West 2019); Neb. Rev. Stat. Ann. § 42-108 (West 2020); Nev. Rev. Stat. Ann. § 122.062 (West 2019); N.H. Rev. Stat. Ann. § 457:31 (2020); N.J. Stat. Ann. § 37:1-13 (West 2020); N.M. Stat. Ann. § 40-1-2 (West 2020); N.Y. Dom. Rel. Law § 11 (McKinney 2019); N.C. Gen. Stat. § 51-1 (2019); N.D. Cent. Code § 14-03-09 (2019); Ohio Rev. Code Ann. § 3101.08 (West 2020); Okla. Stat. tit. 43, § 7 (2020); Or. Rev. Stat. Ann. § 106.120 (West 2020); 23 Pa. Stat. and Cons. Stat. Ann. § 1503 (West 2020); 15 R.I. Gen. Laws § 15-3-5 (2020); S.C. Code Ann. § 20-1-20 (2020); S.D. Codified Laws § 25-1-30 (2020); Tenn. Code Ann. § 36-3-301 (2020); Tex. Fam. Code Ann. § 2.202 (West 2019); Utah Code Ann. § 30-1-6 (West 2020); Vt. Stat. Ann. tit. 18, § 5144

(2019); VA. CODE ANN. § 20-23 (2019); WASH. REV. CODE ANN. § 26.04.050 (West 2020); W. VA. CODE ANN. § 48-2-401 (West 2020); WIS. STAT. ANN. § 765.16 (West 2020); WYO. STAT. ANN. § 20-1-106 (2020); D.C. CODE § 46-406 (2020).

[64]It should be noted that this question is complicated when the parties to a relationship do not agree on whether they wish to be civilly married. *See* Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2004-05 (2017). While such a disagreement may complicate the question, it does not change how the states ought to treat a solely religious marriage. The disagreement may be evidence for finding the existence or absence of a valid marriage, but that should simply be one element of the consideration.

[65]*United States v. Windsor*, 570 U.S. 744, 766 (2013).

[66]*Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992).

[67]Windsor, 570 U.S. 744, 766 (2013) (citing *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

[68]*Id*. (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)) (internal citations omitted).

[69]*Obergefell v. Hodges*, 576 U.S. 644 (2015).

[70]*Id*. at 2602–03 (discussing the constitutionality of prohibiting same-sex couples from marrying).

[71]*Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

[72]*See* C. P. Jhong, Annotation, *Effect of Divorce, Remarriage or Annulment on Widow's Pension or Bonus Rights or Social Security Benefit*s, 85 A.L.R.2D 242, 246 (1997); Randall J. Gingiss, *Second Marriage Considerations for the Elderly*, 45 S.D. L. REV. 469 (2000).

[73]*See infra* Section IV.B.

[74]GA. CODE ANN. § 19-3-46 (2019) ("The Governor or any former Governor of this state, any judge, city recorder, magistrate, minister, or other person authorized to perform the marriage ceremony").

[75]IDAHO CODE § 32-406 (2020) ("If any such minister or officer shall presume to solemnize any marriage between parties without such a license").

[76]NEV. REV. STAT. ANN. § 122.220 (West 2019) ("Any Supreme Court justice, judge of the Court of Appeals, judge of a district court, justice of the peace, municipal judge, minister or other church or religious official authorized to solemnize a marriage, notary public, commissioner of civil marriages, deputy commissioner of civil marriages, marriage officiant or mayor").

[77]N.H. REV. STAT. ANN. § 457:34 (2020) ("If a minister of justice of the peace shall join any persons in marriage").

[78]N.J. STAT. ANN. § 37:1-15 (West 2020) ("[A]ny person or religious society, institution, or organization, authorized to solemnize").

[79]N.C. GEN. STAT. § 51-7 (2019) ("Every minister, officer, or any other person authorized to solemnize a marriage under the laws of this State").

[80]R.I. GEN. LAWS § 15-3-10 (2020) ("Every minister, elder, justice, warden, or other person who joins persons in marriage").

[81]VA. CODE ANN. § 20-24 (2019) ("If any minister, authorized to celebrate rites of marriage, fails to [certify record of marriage], he shall be subject to forfeit twenty-five dollars."). Virginia's regulation of ministers is indirectly related to solemnization without a license. Officiant is penalized for solemnizing a marriage without certifying the record of marriage, which requires a license.

[82]ARIZ. REV. STAT. ANN. § 25-128 (2020).

[83]DEL. CODE ANN. tit.13, § 103 (2019) ("Whoever, being authorized to issue a marriage license"); IND. CODE ANN. § 31-11-11-5 (West 2020) ("A person who: (1) is authorized to solemnize marriages"); KY. REV. STAT. ANN. § 402.990 (West 2020) ("Any authorized person"); MASS. GEN. LAWS ANN. ch. 207, § 49 (West 2020) ("Whoever, being duly authorized to solemnize marriages in the commonwealth"); MICH. COMP. LAWS ANN. § 551.14 (West 2020) ("If a person is authorized to solemnize marriages knowingly"); OR. REV. STAT. ANN. § 106.990 (West 2020) ("No person authorized to solemnize marriage"); TENN. CODE ANN. § 36-3-303 (2020) ("One authorized"); WASH. REV. CODE ANN. § 26.04.240 (West 2020) ("any person authorized to solemnize marriage"); W. VA. CODE ANN. § 48-2-504 (West 2020) ("If a person who is authorized").

[84]WASH. REV. CODE ANN. § 26.04.240 (West 2020).

[85]IND. CODE ANN. § 31-11-11-5 (West 2020).

[86]N.Y. DOM. REL. LAW § 17 (McKinney 2019).

[87]CONN. GEN. STAT. ANN. § 46b-24(c) (West 2020).

[88]ALASKA STAT. § 25.05.361 (2019) ("A person who solemnizes"); ARK. CODE ANN. § 9-11-216 (2020) ("Any person who presumes to solemnize marriage"); IOWA CODE ANN. § 595.9 (West 2020) ("the parties married, and all persons aiding them"); 750 ILL. COMP. STAT. ANN. § 5/215 (West 2019) ("any person who violates"); ME. STAT. tit. 19-A, § 659 (2019) ("A person who contracts a marriage in violation of this chapter"); MD. CODE ANN., FAM. LAW § 2-406(e)(2) (West 2020) ("An individual who violates"); MO. ANN. STAT. § 451.120 (West 2019) ("Any person who shall solemnize any marriage wherein the parties have not obtained a license"); NEB. REV. STAT. ANN. § 42-113 (West 2020) ("If any person shall undertake"); N.M. STAT. ANN. § 40-1-19 (West 2020) ("A person who performs the marriage ceremony"); N.D. CENT. CODE § 14-03-28 (2019) ("any person violating"); OHIO REV. CODE ANN. § 3101.99 (West 2020) ("Whoever violates"); S.D. CODIFIED LAWS § 25-1-31 (2020) ("the parties so married and all persons aiding in such marriage"); TEX. FAM. CODE ANN. § 2.206 (West 2019) ("The person who conducts a marriage ceremony"); UTAH CODE ANN. § 30-1-13 (West 2020) ("if an individual knowingly solemnizes without a license"); VT. STAT. ANN. tit. 18, § 5146 (2019) ("A person who solemnizes a marriage"); VA. CODE ANN. § 20-28 (2019) ("If any person").

[89]IOWA CODE ANN. § 595.9 (West 2020).

[90]In re Marriage of Capalite, 886 N.W.2d 616 (Iowa Ct. App. 2016).

[91]N.H. Rev. Stat. Ann. § 457:34 (2020).

[92]R.I. Gen. Laws § 15-3-10 (2020).

[93]*Id*.

[94]Utah Code Ann. § 30-1-13 (West 2020).

[95]*Id*.

[96]Tex. Fam. Code Ann. § 2.206 (West 2019).

[97]*Id*.

[98]*See, e.g*., Ark. Code Ann. § 9-11-216 (2020) ("(a) Any person who presumes to solemnize marriage in this state contrary to the provisions of this act shall be adjudged guilty of a misdemeanor and upon conviction shall be fined in any sum not less than one hundred dollars ($100) nor more than five hundred dollars ($500)."). Of course, it is possible that this is directed at "marriage fraud" (i.e., performing a religious ceremony that people think is civilly valid) but if this were directed at fraud, the law should have said something along those lines. This is a status crime and not a mens rea crime.

[99]*See, e.g*., Alaska Stat. § 25.05.021 (2019).

[100]*See, e.g*., 750 Ill. Comp. Stat. Ann. § 5/219 (West 2019) ("[A]ny person authorized to solemnize marriage who shall knowingly solemnize such a marriage shall be guilty of a Class C misdemeanor.").

[101]Md. Code Ann., Fam. Law § 2-401 (West 2020).

[102]Iowa Code Ann. § 595.9 (West 2020).

[103]Me. Stat. tit. 19-A, § 659 (2019).

[104]Me. Stat. tit. 19-A, § 701 (2019).

[105]Utah Code Ann. § 76-7-101 (West 2020).

[106]*State v. Holm*, 137 P.3d 726 (Utah 2006).

[107]*Id*. at 737.

[108]Ala. Code § 13A-13-1 (2020); Alaska Stat. § 11.51.140 (2019); Ark. Code Ann. § 5-26-201 (2020); Conn. Gen. Stat. Ann. § 53a-190 (West 2020); Del. Code Ann. tit.11, § 1001 (2019); Haw. Rev. Stat. Ann. § 709-900 (West 2019); Ky. Rev. Stat. Ann. § 530.010 (West 2020); Me. Stat. tit. 17-A, § 551 (2019); Mo. Ann. Stat. § 568.010 (West 2019); Mont. Code Ann. § 45-5-611 (West 2019); N.J. Stat. Ann. § 2C:24-1 (West 2020); N.Y. Penal Law § 255.15 (McKinney 2019); Or. Rev. Stat. Ann. § 163.515 (West 2020); 18 Pa. Stat. and Cons. Stat. Ann. § 4301 (West 2020); Tenn. Code Ann. § 39-15-301 (2020); Tex. Penal Code Ann. § 25.01 (West 2019); Wash. Rev. Code Ann. § 9A.64.010 (West 2020).

[109]Colo. Rev. Stat. § 18-6-201 (2019); Ga. Code Ann. § 16-6-20 (2019); Ohio Rev. Code Ann. § 2919.01 (West 2020); 11 R.I. Gen. Laws § 11-6-1 (2020); Tex. Penal Code Ann. § 25.01 (West 2019).

[110]Colo. Rev. Stat. § 18-6-201 (2019) (emphasis added).

[111]Md. Code Ann., Crim. Law § 10-502 (West 2020).

[112]Ala. Code § 13A-13-2 (2020); Ariz. Rev. Stat. Ann. § 13-1408 (2020); Fla. Stat. Ann. § 798.01 (West 2020); Ga. Code Ann. § 16-6-19 (2019); Idaho Code § 18-6601 (2020); 720 Ill. Comp. Stat. Ann. § 5/11-35 (West 2019); Kan. Stat. Ann. § 21-5511 (West 2020); Mich. Comp. Laws Ann. § 750.30 (West 2020); Minn. Stat. Ann. § 609.36 (West 2020); Miss. Code Ann. § 97-29-1 (2020); N.Y. Penal Law § 255.17 (McKinney 2019); N.D. Cent. Code § 12.1-20-09 (2019); Okla. Stat. tit. 21, § 871 (2020); S.C. Code Ann. § 16-15-60 (2020); Va. Code Ann. § 18.2-365 (2019); Wis. Stat. Ann. § 944.16 (West 2020).

[113]Lawrence, 539 U.S. 558, 578 (2003).

[114]*See* Michael J. Broyde, Marriage, Divorce, and the Abandoned Wife in Jewish law: A Conceptual Understanding of the Agunah Problems in America 12-13, 35 (2001).

[115]*See generally* Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law*, 15 Pace L. Rev. 703, 728–33 (1995).

[116]Michael J. Broyde, Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West 250 (2017).

[117]*See* Broyde, *supra* note 114, at 35.

[118]It is surely correct that the motives of the New York legislature in this case is to address the power imbalances present in religious marriages, which is not the same as the motives of the French legal system, driven by general concerns of laicite.

[119]*Standefer v. Standefer*, 26 P.3d 104, 107 (Okla. 2001).

[120]*See* Minn. Stat. Ann. ch. 517-519a (West 2020).

[121]Minn. Stat. Ann. § 609.355 (West 2020).

[122]Minn. Stat. Ann. § 609.36 (West 2020).

[123]S.B. 69, 2019 Leg., Gen. Sess. (Ala.), Act No. 2019-340. We have sought information on why this was done and have not found any explanation.

[124]*See generally* Cal. Fam. Code (West 2020).

[125]Colo. Rev. Stat. tit. 14 (2019).

[126]1948 Florida Op. Atty. Gen. 580 ("It is not a misdemeanor to perform a marriage ceremony without a license, nor is it a misdemeanor for the official performing a marriage ceremony to fail to return the certificate to the county judge within ten days.").

[127]Haw. Rev. Stat. Ann. tit. 31 (2019).

[128]A person authorized to solemnize a marriage is subject to a penalty for failing to comply with the Marriage Act, but a license is not required to solemnize a marriage. Kan. Stat. Ann. §§ 23-2513, 23-2502 (West 2020).

[129]*See generally* La. Stat. Ann. tit. 9, cdbk. I, cdtl. IV, ch. 1 (2019).

[130]*See generally* Miss. Code Ann. tit. 93, ch. 1 (2020).

[131]*See generally* Mont. Code Ann. tit. 40, ch. 1 (West 2019).

[132]*See generally* 23 Pa. Stat. and Cons. Stat. Ann. ch. 11 (West 2020).

[133]*See generally* S.C. Code Ann. tit. 20, ch. 1 (2020).

[134]*See generally* D.C. Code tit. 46, subt. I, ch. 4 (2020).

[135]*See Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963) (discussing the law's impact on appellant's free exercise of religion and finding it unconstitutional).

[136]*Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (discussing the right to engage in consensual sexual activity in the home without intervention of the government)

[137]*See* Jesus Fernández-Villaverde et al., *From Shame to Game in One Hundred Years: A Macroeconomic Model of the Rise in Premarital Sex and its De-Stigmatization*, PCS Working Paper Series 7 (2011) (discussing the de-stigmatization of premarital sex).

[138]*See Carrick v. Snyder*, No. 15-cv-10108, 2016 WL 520942, at *3–5 (E.D. Mich. Feb. 10, 2016) (dismissing plaintiff's claim that Michigan's law punishing clergy for solemnizing a marriage without a license is unconstitutional for lack of standing and discussing a lack of enforcement of Michigan's law).

[139]Iowa Code Ann. 595.9 (West 2020) ("If a marriage is solemnized without procuring a license, the parties married, and all persons aiding them, are guilty of a simple misdemeanor.")

[140]This is because a solely religious marriage is not treated as legally valid in states that do not, in effect, follow the French Model. When a valid marriage occurs subsequently to the death of Person G, the pension terminates. When there is no recognized marriage, the pension does not terminate. Therefore, whether Person F continues to receive the pension turns on whether there is a legally valid subsequent marriage.

[141]*Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

[142]Tim Parker, *Why Marriage Makes Financial Sense*, Investopedia (Jan. 20, 2020), https://www.investopedia.com/financial-edge/0412/why-marriage-makes-financial-sense.aspx.

[143]Ariz. Rev. Stat. Ann. § 13-3606 (2020); Cal. Penal Code § 281 (West 2020); Fla. Stat. Ann. § 826.01 (West 2020); Idaho Code § 18-1101 (2020); 720 Ill. Comp. Stat. Ann. § 5/11-45 (West 2019); Ind. Code Ann. § 35-46-1-2 (West 2020); Iowa Code Ann. § 726.1 (West 2020); Kan. Stat. Ann. § 21-5609 (West 2020); La. Stat. Ann. § 14:76 (2019); Mass. Gen. Laws Ann. ch. 272, § 15 (West 2020); Mich. Comp. Laws Ann. § 750.439 (West 2020); Minn. Stat. Ann. § 609.355 (West 2020); Miss. Code Ann. § 97-29-13 (2020); Neb. Rev. Stat. Ann. §28-701 (West 2020); Nev. Rev. Stat. Ann. § 201.160 (West 2019); N.H. Rev. Stat. Ann. § 639:1 (2020); N.M. Stat. Ann. § 30-10-1 (West 2020); N.C. Gen. Stat. § 14-183 (2019); N.D. Cent. Code § 12.1-20-13 (2019); Okla. Stat. tit. 21, § 881 (2020); S.C. Code Ann. § 16-15-10 (2020); S.D. Codified Laws § 22-22A-1 (2020); Vt. Stat. Ann. tit. 13, § 206 (2019); Va. Code Ann. § 18.2-362 (2019); W. Va. Code Ann. § 61-8-1 (West 2020); Wis. Stat. Ann. § 944.05 (West 2020); Wyo. Stat. Ann. § 6-4-401 (2020); D.C. Code § 22-501 (2020).

[144]*See generally* Matsumura, *supra* note 62.

[145]*See generally* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. Rev. 1276 (2014) (discussing some of the consequences of nonmarriage in general).

[146]Leslie Joan Harris et al., Family Law 238 (5th ed. 2014).

[147]*See id*. at 500 for a list of all the states that do consider cohabitation and in what way. Most states do not.

[148]*See, e.g*., In re Marriage of Dwyer, 825 P.2d 1018 (Colo. App. 1991).

[149]*See, e.g*., Ariz. Rev. Stat. Ann. § 25-327 (2020) ("only on a showing of changed circumstances that are substantial and continuing"); Ind. Code Ann. § 31-15-7-3 (West 2020) ("upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable").

[150]Conn. Gen. Stat. Ann. § 46b-86 (West 2020).

[151]Mo. Ann. Stat. § 452.370(1) (2019).

[152]*E.g*. Ariz. Rev. Stat. Ann. § 25-327 (2020).

[153]*E.g. Glass v. Glass*, 537 A.2d 552, 554 (Del. Fam. Ct. 1987) ("[C]ohabitation, in and of itself, should not be the basis for termination or modification of an alimony order or decree. Rather, there must be some showing that the cohabitation has led to a real and substantial change in the recipient spouse's economic circumstances.").

[154]*E.g. Ianitelli v. Ianiteli*, 502 N.W.2d 691, 693 (Mich. Ct. App. 1993).

[155]Ala. Code § 30-2-55 (2020).

[156]P.R. Laws Ann. tit. 31, § 385 (2011) (wife "lives in public concubinage").

[157]Ark. Code Ann. § 9-12-312(a)(2)(D) (2020) ("liability for alimony shall automatically cease upon … [t]he living full time with another person in an intimate, cohabitating relationship.").

[158]750 Ill. Comp. Stat. Ann. § 5/510(c) (West 2019) ("[T]he obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis.").

[159]La. Civ. Code Ann. art. 115 (2019) ("The obligation … is extinguished upon … a judicial determination that the oblige has cohabited with another person of either sex in the manner of married persons.").

[160]N.C. Gen. Stat. § 50-16.9(b) (2019) ("If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse … engages in cohabitation, the postseparation support or alimony shall terminate.").

[161]N.D. Cent. Code § 14-05-24.1(3) (2019) ("[B]ased upon a preponderance of the evidence that the spouse receiving support has been habitually cohabiting with another individual in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support.").

[162]23 Pa. Stat. and Cons. Stat. Ann. § 3706 (West 2020) ("No petitioner is entitled to receive an award of alimony where the petitioner … has entered into cohabitation with a person of the opposite sex who is not a member of the family of the petitioner within the degrees of consanguinity.").

[163]*Love v. Love*, 626 S.E.2d 56, 58–59 (S.C. Ct. App. 2006) ("Living with another, whether it is with a live-in lover, a relative, or a platonic housemate, changes [a person's] circumstances and alters [his or] her required financial support." (quoting *Vance v. Vance*, 287 S.C. 615, 618 (S.C. Ct. App.1986)). South Carolina "courts will treat the relationship between a supported spouse and a third party as "tantamount to marriage" and terminate alimony when the two cohabitate for an extended period of time and some degree of economic reliance between them is established." *Id*. at 59.

[164]Utah Code Ann. § 30-3-5(10)(1) (West 2020) ("[A]n order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse, after the order for alimony is issued, cohabits with another person, even if the former spouse is not cohabiting with another person when the party paying alimony files the motion to terminate alimony."). Not only does Utah find that cohabitation is grounds for termination of spousal support, it also finds that the court is permitted to consider fault when issuing (or not issuing) an award of alimony. Utah Code Ann. § 30-3-5(8)(b) (West 2020). Under the Utah Code, "fault" includes "engaging in sexual relations with a person other than the party's spouse." Utah Code Ann. § 30-3-5(8)(c)(i) (West 2020).

[165]Okla. Stat. tit. 43, § 134(C) (2020).

[166]Okla. Stat. tit. 43, § 134(C) (2020).

[167]Cal. Fam. Code § 4323 (West 2020) ("[T]here is a rebuttable presumption … of decreased need for spousal support if the supported party is cohabiting with a nonmarital **partner**. Upon a determination that circumstances have changed, the court may modify or terminate the spousal support.") (emphasis added). The parties do not need to hold themselves out as married to constitute cohabitation. *Id*.

[168]Fla. Stat. Ann. § 61.14(b) (West 2020) ("The court may reduce or terminate an award of alimony upon specific written findings by the court that … a supportive relationship has existed between the obligee and a person with whom the obligee resides.").

[169]Ga. Code Ann. § 19-6-19 (2019) ("[T]he voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of the former spouse."). Cohabitation "means dwelling together continuously and openly in a meretricious relationship with another person, regardless of the sex of the other person." *Id*.

[170]N.H. Rev. Stat. Ann. § 458:19-aa(VII) (2020) ("[T]he court may make orders for the modification or termination of term alimony upon a finding of the payee's cohabitation."). "[C]ohabitation exists, if there is a relationship between an alimony payee and another unrelated adult resembling that of a marriage, under such circumstances that it would be unjust to make an order for alimony, to continue any existing alimony order, or to continue the amount of an existing alimony order." N.H. Rev. Stat. Ann. § 458:19aa(VIII) (2020).

[171]N.J. Stat. Ann. § 2A:34-23(n) (West 2020) ("Alimony may be suspended or terminated if the payee cohabits with another person."). "Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household." *Id*.

[172]N.Y. Dom. Rel. Law § 248 (McKinney 2019) ("The court in its discretion … upon proof that the payee is habitually living with another person and holding himself or herself out as the spouse of such other person, although not married to such other person, may modify such final judgment and any orders made … directing payment of money for the support of such payee.").

[173]Tenn. Code Ann. § 36-5-121(f)(2)(B) (2020) ("In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is raised that: (i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or (ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.").

[174]Va. Code Ann. § 20-109(A) (2019) ("[U]pon clear and convincing evidence that the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more commencing on or after July 1, 1997, the court shall terminate spousal support and maintenance unless … the spouse receiving support proves by a preponderance of the evidence that termination of such support would be unconscionable.").

[175]Cal. Fam. Code § 4323 (West 2020).

[176]Tenn. Code Ann. § 36-5-121(f)(2)(B) (2020).

[177]Va. Code Ann. § 20-109(A) (2019).

[178]Tenn. Code Ann. § 36-5-121(f)(2)(B) (2020).

[179]Cal. Fam. Code § 4323 (West 2020).

[180]Ga. Code Ann. § 19-6-19 (2019).

[181]N.Y. Dom. Rel. Law § 248 (McKinney 2019).

[182]Va. Code Ann. § 20-109(A) (2019).

[183]To determine whether cohabitation exists, the court must consider evidence of the payee and the other person: "(a) Living together on a continual basis in a primary residence; (b) Sharing of expenses; (c) The economic interdependence of the couple, or economic dependence of one upon the other; (d) Joint ownership or use of real or personal property, including financial accounts; (e) The existence of an intimate relationship between the persons; (f) Holding themselves out to be a couple through statements or representations made to third parties or are generally reputed to be a couple; and (g) Any other factors that the court finds material and relevant." N.H. Rev. Stat. Ann. § 458:19aa(VIII) (2020).

[184]To determine whether cohabitation exists, the court must consider: "(1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities; (2) Sharing or joint responsibility for living expenses; (3) Recognition of the relationship in the couple's social and family circle; (4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship; (5) Sharing household chores; (6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and (7) All other relevant evidence." N.J. Stat. Ann. § 2A:34-23(n) (West 2020).

[185]*Id.*

[186]*Id.*

[187]Iowa Code Ann. § 598.21C(1)(h) (West 2020).

[188]*See generally* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. Rev. 1 (2017) (discussing termination of alimony cases and finding that courts are generally willing to terminate alimony on the basis of a nonmarital relationship).

[189]We mean that any state with a common law marriage doctrine should examine the relationship in question independent of the religious ceremony to determine if the state's common law marriage doctrine bell has been rung.

[190]Beyond the scope of this paper is that this exact conversation has taken place in the Jewish tradition many times in the inverse. Is a couple that is civilly married, but decided not to get married according to Jewish law, actually married according to Jewish law? In the 20th century this was a dispute between the two great Jewish law sages in America, Rabbi Joseph Elijah Henkin and Rabbi Moses Feinstein. Rabbi Henkin posited that the Jewish tradition has only one status "married" and if a couple is eligible to be married according to Jewish law, and they marry according to the law of the land, they are also married according to Jewish law as well. Rabbi Moses Feinstein disagreed and argued that the Jewish tradition has distinct statutory requirements for marriage that are procedurally mandatory, and merely because one has a civil marriage in no way shape or form creates a Jewish marriage. Michael J. Broyde, *Jewish Law and the Abandonment of Marriage: Diverse Models of Sexuality and Reproduction in the Jewish View, and the Return to Monogamy in the Modern Era*, *in* Marriage, Sex and Family in Judaism 88, 110–11 (Michael J. Broyde & Michael Ausubel eds., 2005).

[191]*See, e.g.*, *Aflalo v. Aflalo*, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996).

[192]We acknowledge that this would create an odd result as Professor Albertina Antognini notes to us. A religiously married couple would be able to evade termination of alimony, but a loosely cohabiting couple would not.

[193]Religious arbitration allows some model of law to regulate their marriage.

[194]*Supra* Section III.D.

[195]*See supra* Section III.D; Section II.B.

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