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THE PRACTICE OF MARRIAGE

Katharine B. Silbaugh*

Is marriage a legal or social institution? Is marriage an event marked by a state license, or a social practice arising out of cultural norms? This Article will examine the role of the observable social practices that we, and our courts, know as “marriage.” Recent developments call for renewed analysis of the formal license as compared to the functional response to social practices in family law. What do recent controversies teach us about the state’s relationship to the social as well as legal attributes of marriage?

Over the past forty years, robust law has developed addressing the treatment of non-marital cohabitants. This law has developed along numerous tracks, from quasi-licensed statuses such as domestic partnership laws,1 to recognition by private entities such as employee benefits plans,2 and to adjudicated obligations on quasi-contractual grounds.3 Consequently, marriage no longer enjoys exclusivity when it comes to legal benefits for intimate relationships. Nonetheless, legal marriage, while no longer the exclusive sanctioned relationship, is

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2. Gregory et al., supra note 1; at 30.
3. Id. at 26-29.
still held out as a unique institution. At the very least, marriage enjoys a social meaning distinct from simple cohabitation. In light of the development of substantial alternatives to licensed marriage, it becomes more interesting to investigate the state’s current role in articulating and managing, as well as responding to, the social meaning of marriage.

In this Article, I will examine three recent high-profile cases that address the relationship between socially practiced marriage and legally consequential marriage in different ways. The first is the recent prosecution of polygamist Tom Green in Utah on charges of bigamy. Green sought to categorically distinguish his socially and religiously practiced marriages from legal marriages. He embraced the social marriages, but denied that he had any legal marriages. It was to no avail: his practices were determined to be criminally culpable legal marriages, despite his very clear, intentional, formal opt-out of licensed marriage.

Second, in the Massachusetts same-sex marriage case, Goodridge v. Department of Public Health, the court emphasized a notion called "civil marriage." The plaintiff couples were already free to declare themselves "married" in a social sense. It appears that the term "civil marriage" was used to emphasize the legal attributes of marriage, to thus distinguish it from religious marriage at least, and possibly social marriage as well. At the same time, the court in Goodridge emphasized that civil marriage is unique because it has social meaning, and confers both tangible (i.e., legal) as well as intangible (cultural) benefits on the parties. In this sense, civil licensed marriage confers something distinct from its legal consequences, something like the cultural labeling of a social practice through licensing. The plaintiff couples after Goodridge would no longer be labeling themselves "married" by a social definition that was distinct from the legal one. Goodridge rejoined the social and the legal.

The third case involves the marriage of Michael and Terri Schiavo. Ten years ago, well after Terri Schiavo’s 1990 heart attack, Michael Schiavo met Jodi Centonze, whom he referred to as his fiancée. The two live together and have two children together. They

4. Marriage still has significant legal consequences distinct from legally recognized cohabitation. Nothing in this Article should be read to diminish that different legal value. This Article focuses, however, on the new light cast on the social meaning of marriage by the reduction in the difference between marriage and cohabitation.


8. Thompson, supra note 7; Wikipedia, supra note 7. They have since married, nine months after Terri Schiavo’s death. Wikipedia, supra note 7.
are a functional family, though the State of Florida does not recognize common law marriage, having abolished it in 1968.\textsuperscript{10} Nonetheless, Michael Schiavo's marriage to Terri retained significant legal strength in the battle over her health care decision-making, despite its departure from the conventional indicia of social marriage practice.\textsuperscript{11}

The \textit{Goodridge} and \textit{Green} cases are both in some part responses to individuals who used the cultural, social symbolism of marriage in a non-state context. In both cases, the state attempted to take jurisdiction over non-state, cultural use of the marriage symbol, discouraging polycentric sources of authority over the meaning of the \textit{social} as well as the legal concept of marriage. In \textit{Green}, the State of Utah did so by criminalizing the social use of the marriage concept. In \textit{Goodridge}, the State of Massachusetts did so by bringing socially practiced same-sex marriages within the state licensing regime. In both cases, the state attempts to enforce an exclusive power over the labels that will be used to describe socially practiced marriages. In the Schiavo case, by contrast, the state-recognized marriage may have in substance diverged greatly from the cultural practice of marriage, while at the same time having retained its legal legitimacy. Conventional social practices can bring people within the marriage label, but once the use of the label is \textit{licensed} by the state, the diverse social practices within that institution may grow unhindered by the threat of state policing. If it had chosen to police its social practices \textit{after} issuing a license, the state would have undermined its own labeling authority. Thus, like the \textit{Goodridge} and \textit{Green} cases, the handling of Schiavo reinforced the superiority of the licensing power as against social judgments about the legitimacy of a marriage.

Utah’s response to \textit{Green} was to say he \textit{cannot} call his relationships “marriages.” Utah works to prevent the marriage institution from developing along a private, non-state track. \textit{Goodridge} is also a response to marriage-like social practices of same-sex couples. Those social practices will no longer develop along a private, non-state track using the marriage label, but instead will be brought into the legal marriage fold. This expands the marriage pool and reflects social influences on legal actors, but like the \textit{Green} prosecution, the decision exerts state discipline over non-state uses of the marriage concept. These are contradictory responses to a similar question: after the rise of licensing, and the rise of non-marital obligations, to what extent are the cultural symbols of \textit{marriage} state-owned now, and what relative strength does the polycentric model now have? In both cases, it is the polycentrism to which the states responded. Utah opted for the command and control, criminalization route, while Massachusetts chose the cooptation route, but they are movements toward the same goal:

\begin{enumerate}
\item Thompson, \textit{supra} note 7; \textit{Id}.
\item Thompson, \textit{supra} note 7; Wikipedia, \textit{supra} note 7.
\end{enumerate}
centralizing state control over marriage-like social practices that seek the "marriage" label.

The Schiavo marriage was licensed, unlike the Green and Goodridge marriages.\textsuperscript{12} Yet, the social bona fides of the marriage were repeatedly assaulted, based on its unconventional practices.\textsuperscript{13} The license held, nonetheless.\textsuperscript{14} Social practices can earn people the marriage label, either through common law marriage or over time through the availability of a license, as with Goodridge. Once the label "marriage" adheres and the licensing regime is offered by the state, practices on the other side of the license process are harder for the state to police without undermining its own licensing system. Thus, the marriage license becomes the license sanctioning the least conventional behaviors and practices that may occur with significant legal legitimacy. When the state does not police the social practices of people like the Schiavos who are married by a license, it is effectively defending its significant control over the marriage label by backing up the consequences given to the license when it is challenged by cultural judgments about the validity of the marriage. Unifying all three cases, to some extent, is the state’s attempt to control not only the legal meaning of marriage, but its social meaning as well. In Schiavo, the social meaning of marriage is "that which the state licenses," not "that which the community judges conventional."

Normatively, this centralized version of marriage as a creature of the state\textsuperscript{15} is an unfortunate development. It puts the state at the center of disputes over social meaning that state actors are ill-equipped institutionally to handle. The state clumsily manages ideological positions about family behavior that can account only fitfully and late for the evolution in the conduct of intimate relationships. This always awkward role in family law has been worsened by the developments of non-marital alternatives, in light of which the state can no longer be said to be primarily managing benefits with its marriage decision-making. The state is instead managing only that aspect of marriage that it is least equipped to manage—how it will be understood in the social order.

Before looking at these individual cases, section I will first review the basic history of common law marriage. It will then look at the evolution of non-marital obligations over the past forty years. An understanding of these two developments sheds light on the continued


\textsuperscript{13} Wolfson Report, \textit{supra} note 12, at 10-14, 17.

\textsuperscript{14} Id. at 17.

\textsuperscript{15} See, e.g., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) ("Simply put, the government creates civil marriage.").
issues surrounding the social practice of marriage as addressed by courts.\textsuperscript{15}

I. Traditional and Evolving Treatment of Social Practices: From Common Law Marriage to Non-Marital Obligations

A. The Era of Common Law Marriage

For much of the nation’s history, particularly throughout the nineteenth century, marriages could come about either from a moment of licensing and solemnization, or through conduct and practice evaluated at some moment of legal significance, such as the death of one spouse or the need for legitimating a child.\textsuperscript{17} The licensing procedures were sufficient but not necessary, and were not understood to exhaust the field.\textsuperscript{18} The latter method of making a marriage, through daily conduct, was (and in a few jurisdictions is still) known as “common law marriage.”\textsuperscript{19}

The conduct that was needed to make a common law marriage generally includes these elements: consent, cohabitation, and “holding out” as married.\textsuperscript{20} It can be hard to prove the moment of consent, but when a couple holds themselves out as married or is understood by the community to be married, that is generally enough.\textsuperscript{21} Therefore, the conduct that constitutes holding out, as well as the related cohabitation, serves as the core of common law marriage for evidentiary and practical purposes. While some courts took proof of consent as a distinctive element, more commonly, simply acting married was sufficient evidence of consent.\textsuperscript{22} No jurisdiction, however, dispensed with the theoretical importance of consent: marriage was still first and foremost an agreement between individuals, without which the state could not impose marriage upon them.\textsuperscript{23}

\textsuperscript{16} That is not to minimize the conclusion that a licensed marriage has more certainty to it than an unlicensed relationship.


\textsuperscript{18} See Dubler, supra note 17, at 1885-86.

\textsuperscript{19} See Bowman, supra note 17, at 715; Dubler, supra note 17, at 1888-89.

\textsuperscript{20} See Bowman, supra note 17, at 712-14 (adding capacity as an element of common law marriage and using the term “agreement” rather than consent), 718 (noting that the European common law elements include community recognition of the marriage); see also Dubler, supra note 17, at 1889 & n.18 (explaining that although requirements for common law marriage varied by jurisdiction, all recognizing states listed consent as one of the elements, and generally included cohabitation and holding out to the community as married).

\textsuperscript{21} See Bowman, supra note 17, at 714.

\textsuperscript{22} Dubler, supra note 17, at 1889 n.17 (stressing that the “presumption of marriage only arises from matrimonial cohabitation; where the parties not only live together as husband and wife, but hold themselves out to the world as sustaining that honorable relation to each other”).

\textsuperscript{23} Id. at 1891.
Common law marriages were established at the time a relationship ended, either at death or dissolution. Primarily private-law consequences were at stake, such as the elective share of an estate or the legitimacy of a child whose inheritance hinged on the marital status of her parents. The adjudication of marriage in this context reflected the state's recognition *ex post* of the couple's social practices, which had occurred without state license or label. The doctrine of common law marriage, then, acknowledged the cultural practice of marriage and gave it legal consequences. This is a process that responds to social facts, rather than the licensing process which authorizes them. During this time, the marriage name and symbol were known to be social as well as legal judgments, and the authority over the label was polycentric: when a couple used the term "marriage" to describe themselves to others, consistently, and lived together in a social practice thought of culturally as marriage, that marriage became a legal fact.

B. *The Decline of Common Law Marriages*

Common law marriages were eliminated in most states over the course of the twentieth century. The causes of the decline were multiple. Urbanization eliminated the problem of scarce clergy and magistrates to formalize marriages. The legislatures and the courts that interpreted the prohibition statutes referred to the risk of fraud, ordinarily a reflection on cases of women seeking to establish a common law marriage after a man's death to obtain a share of his estate. But other circumstances lent themselves to the decline of common law marriage as well.

As more legal consequences turned on the fact of marriage, it became increasingly important to have clear public records as to who was married. These consequences would generally be of two sorts. First, it became useful to know who was married for the purpose of registering property. Second, following the establishment of public benefits that rode on marriage, ranging from post-World War I widows' benefits to the establishment of the social security system, the administrative convenience of a publicly recorded marriage system

24. *Id.* at 1892.
25. *Id.* at 1892, 1894-95.
29. *Id.* at 731-33.
30. *See id.* at 733-35, 741-42 (expressing skepticism that there was a great risk of fraud, or at least that a non-meritorious case would have been effectively adjudicated as a marriage).
31. *Id.* at 735.
32. *Id.* at 735-36.
took on greater significance. Most nineteenth-century common law marriage cases were in effect property disputes, not implicating public resources.

The state's desire for easy classification, however, does not completely control the behaviors people will engage in; rather, it only controls the legal consequences of that behavior. The new mandatory licensing scheme, then, provides the bright-line legal categories that common law marriage does not, but at the expense of accurately grasping social facts. It is a political decision to move to a top-down approach of creating categories that allow people to access legal benefits, rather than providing those benefits in response to social facts.

Additional factors in the decline of common law marriage include social anxieties over the practices of diverse cultural groups within the United States, ranging from African Americans to Native Americans to immigrant groups. Related licensing regulations intended to screen for the eugenic concerns of their age, from interracial unions to mental health and disease screening, reflected heightened anxiety about leaving common informal practices unregulated. These factors combined with a statutory codification movement more generally. The passage of statutes that eliminated common law marriage and made the marriage licensing scheme the exclusive avenue to legitimate intimate relationships arose out of these numerous social and legal circumstances. By the 1960s, common law marriage survived in only fifteen states, and today that number is around twelve.

By moving to near-universal licensing, the state's relationship to marriage transitioned to the top-down approach under which people sought state license, in the sense of permission, to engage in social relationships. This was a change from the previous more grass-roots relationship between state and citizen in which the state responded directly to the behavior of couples who claimed legitimacy for the social facts of their relationship. The possibility of state legitimacy has

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33. Id. at 746-47.
34. Id. at 746-48.
35. Id. at 737-40.
36. Id.
37. See generally id. at 740-49, for a clear elaboration of the circumstances that led to the prohibition of common law marriage.
an influence on how people live, but it does not completely control people's lives. Highly relevant to the contemporary cases we will consider below, this top-down approach centralized control over the practice of marriage in the state, a practice that had hitherto derived its legitimacy from social and cultural judgments. Our contemporary cases, Goodridge and Green in particular, reflect states' ongoing management of the monopoly over marriage, in response to polycentric assertions of cultural authority to define the institution in competition or along parallel tracks with the state.

When common law marriage was recognized more broadly, it served as a very practical mechanism for responding to the needs and equities arising from stable, residential, long-term relationships. While people needed to be married to receive rights, and in this regard the era officially recognized only conventionality, it responded nonetheless to the unconventionality of some couples by bringing them within the norm based on their conduct. Couples were co-opted into conventionality.\textsuperscript{39} After its elimination, for practical purposes, a more stark contrast arose between married and unmarried, as non-licensed relationships could not by dint of conduct be transformed into the only relationship that received recognition within family law.

C. The Rise of Non-Marital Obligations

There were practical difficulties with the new bright-line approach, which limited marriages to licensed events while continuing to treat marriage as the only allowable intimate relationship with beneficial legal consequences. Simply put, not everyone obtained a license.\textsuperscript{40} These practical difficulties may have made the evolution toward obligations in non-marital relationships inevitable once common law marriage was eliminated. The results would otherwise be too harsh for couples whose conduct suggested that many of the underlying reasons for legal obligations to one another were present. So after a period of time following the elimination of common law marriage, courts, legislatures, and private entities began crafting responses to the social practices of unlicensed cohabitants who, due in part to the elimination of common law marriage, needed to find the source of their mutual obligations outside of the marriage institution.

1. Marvin v. Marvin and Contractual Approaches

When Marvin v. Marvin\textsuperscript{41} was decided in 1976, it began a trend toward finding obligations between unmarried cohabitants in long-

\textsuperscript{39} Dubler, supra note 17, at 1886.

\textsuperscript{40} See id. at 1888-90.

\textsuperscript{41} 557 P.2d 106 (Cal. 1976). After six years living together without marrying, but using the same name and functioning stereotypically as husband and wife, including the wife giving up a career to keep house, the Marvins split up. Id. at 110. Mrs. Marvin sued for a share of Mr. Marvin's wealth accumulation under the Family Law Act as if they were married but divorcing. Id. The court held that while the Family
term, stable relationships. Founded on implied agreement instead of licensed marriage, the doctrine nonetheless resembled common law marriage in many regards, while at the same time formally disclaiming a connection to that widely discarded doctrine. In fact, Marvin’s contract-basis, apparently built on agreement between the parties, is significantly watered down by the ability to infer agreement from conduct, in precisely the way courts would infer agreement to marry from the “holding out” during the more robust era of common law marriage.

The implied contract regime from Marvin solved the same practical problem that common law marriage solved in the nineteenth century: how to provide legal remedies where it seems there should be some, without unsettling the conventions of the day. The conventions of the day differed, however. During the era of common law marriage, the relevant convention was that only a marriage could be legitimate legally, and the response was to sweep more relationships into that category. In the post-Marvin era, by contrast, the relevant convention is that marriage is one distinctive kind of intimate relationship that should be clearly delineated from others, hence the Marvin model does not seek to label the relationships “marriage.”

The implied contract paradigm of Marvin took a different stand on the centrality of marriage than did the common law marriage doctrine. After Marvin, one of marriage’s distinctive qualities—its exclusive exhaustion of the options—disappeared. It was replaced with a regime where conduct could give rise to family obligations, with or without marriage. The claims of a rising number of same-sex couples seeking redress and legitimacy in courts furthered the establishment of remedies in non-marital relationships. While same-sex couples represent less than half of all cohabiting couples, their ability to apply identity-based political pressures influenced the later development of this law to a great extent.

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Law Act does not apply to unmarried cohabitants, they could state a claim against one another for express agreement or implied agreement based on their conduct. Id. The sexual nature of the relationship would not invalidate a contractual remedy. Id. at 113. This was the first case to permit such a remedy, but after Marvin similar remedies were provided in most states on related theories to non-marital cohabitants. See generally id.

42. WALTER WADLINGTON & RAYMOND G. O’BRIEN, FAMILY LAW IN PERSPECTIVE 42-48 (2001).
43. In Marvin, the court rejects an attempt to divide the couple’s assets under the state’s Family Law Act, precisely because that act applies only to actual marriages, and the court makes clear that its decision in Marvin should not be understood to be elevating the Marvin relationship to the legal status of marriage. 557 P.2d at 120-22.
45. Id. at 1267-69.
46. Id. at 1287-68.
47. Id. at 1289.
Following *Marvin*, nearly every jurisdiction adopted some standards for recognizing claims between non-marital cohabitants.\(^{48}\) Many continued *Marvin*'s implied contract-basis,\(^{49}\) while some required express agreements,\(^{50}\) and one state, Washington, set out obligations between non-marital cohabitants with no contractual basis at all.\(^{51}\) An approach similar to Washington’s developed in other countries, most notably Canada,\(^{52}\) which bases obligations between cohabitants on their social practices, not on their agreement to be legally bound.

This movement of the basis of obligation away from marriage and into non-licensed relationships solved a practical problem. If these proliferating relationships were left unaddressed by law entirely, the law’s exclusive role in legitimizing relationships would be challenged. The development of a law of non-marital obligations may be seen as what Reva Siegel calls "preservation through transformation": the legal system re-inserting its regulatory role where social practices threaten to eclipse the licensed marriage regime.\(^{53}\) At the same time, the recognition of non-marital relationships unsettles the significance of legal marriage. The cases we will look at in Part II represent efforts to address that issue.

2. Small Top-Down Approaches: Domestic Partnerships and Employee Benefits

Approaches to non-marital cohabitants also took more formal shapes than the post-hoc private adjudication between individuals of the *Marvin* case, again partly in response to the social emergence of same-sex couples. These more socially organized responses included domestic partnership ordinances, providing couples who sought formality some local benefits.\(^{54}\) They also included a rise in employee benefits, such as health and pension benefits, extended to non-marital cohabiting couples, particularly to same-sex couples.\(^{55}\) Especially among larger employers, this private trend reflects the social recognition afforded to same-sex couples in the past several decades.\(^{56}\) That social recognition challenged state control over the legitimacy of relationships.

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48. *Id.* at 1294; *see also* WADLINGTON & O’BRIEN, *supra* note 42.
50. *Id.*
3. Non-Marital Obligations Without Contract

The American Law Institute’s (ALI’s) recent Principles of the Law of Family Dissolution have proposed significant financial obligations arising between non-marital cohabitants based on conduct rather than contractual relationships. Canada and a number of other countries have similarly expanded their law of non-contractual non-marital obligation in recent years. The ALI looks in some ways like a suggestion for reviving (in modern terms) the basic tenets of common law marriage, without the “marriage” label. The ALI proposal, while controversial and easily susceptible to criticism, does reflect the new pluralism with respect to how practices can define relationships in much the way licenses do. The ALI defines the property consequences that would flow from an established non-marital relationship in relation to the consequences of marriage. It imposes the property effects of marriage in cases where a couple engages in marriages’ social practices without either obtaining a license or consenting to the status.

4. The Newly Highlighted Social Benefits of Legal Marriage

In this Article, I will ask what new can we say about licensed marriage itself in light of the development of this many-layered robust regime recognizing non-marital relationships? Courts and legislatures have routinely expressed anxiety about maintaining the legal privileges of marriage, and this is frequently cited when establishing the lower value of the rights courts and legislatures give when they do recognize non-marital relationships. At the same time, the social value of marriage was thrown into more stark relief as its exclusive legal benefits faded somewhat (this is not to downplay the ongoing legal significance of the benefits of marriage).

In policing the marriage license, the state is now more clearly policing the social benefits and the symbolism that come with marriage, having given over many of its legal benefits to non-marital relationships. Unlike its status in the era of common law marriage as the only relationship of legal significance, marriage has become one of several relationships with legal significance, perversely highlighting the role of social status in marriage’s ongoing exclusivity and uniqueness. The social status that accompanies the conferral of the marriage

59. However, since the ALI removes consent to be legally bound from the requirements of a Marvin-type obligation between cohabitants, it finds obligations where neither Marvin, common law marriage, nor licensed marriage would, since both rely on some form of consent between adults.
60. AM. LAW INST., supra note 57, at 937-38.
61. Id.
license rises in significance, in other words, as the legal value of the license becomes less exclusive.

What does the state do to manage that social benefit conferred with the legal marriage license? How is the exclusivity in social value to be maintained by state authorities if it is no longer done by the thorough denial of legal benefits? Below we investigate state responses to individuals’ attempts to use marriage’s social benefits without gaining license from the state. I ask, to what extent are the state’s responses an attempt to exercise a monopoly over marriage by managing the social benefits conferred by the use of the concept of marriage? I conclude that while the approaches of the courts are quite different, they each assert the same right to manage the use of marriage’s social practices outside of the licensed regime. The Green and Goodridge cases involve individuals who are practicing marriage outside of the state licensing regime. The Schiavo example, in contrast, involves the state’s assertion of the meaning of its licensing regime against claims of fraudulent social practices.

II. THREE RECENT CASES

A. State v. Green: Marriage Without License or Consent

Tom Green was convicted of four counts of bigamy by a Utah jury in 2001. Obviously, a charge of bigamy assumes multiple marriages. In Mr. Green’s case, however, it was reasonable to ask whether there was in fact even one single marriage. If there were, it was not because the parties in any way intended or consented to a civil marriage. Instead, it was because Green ostentatiously practiced marriage socially, while taking pains to reject its legal definitions.65

Between 1970 and 1996, Green formed conjugal-type, simultaneous relationships with nine women. He fathered twenty-five children as a result of these relationships.67 According to the opinion in Green:

[T]hey resided together in a collection of shared mobile homes that the family called “Green Haven.” Green quartered in one mobile home, while the women and children quartered in others . . . . The women spent nights individually with Green in his mobile home on a rotating schedule.68

64. Green, 2004 UT 76, ¶ 1, 99 P.3d 820. Green was also convicted of criminal non-support and the far more serious charge of felony child rape (one of his wives was thirteen years old). Id. at ¶ 40 n.14, 99 P.3d 820.
65. Id. at ¶ 3, 99 P.3d 820.
66. Id. at ¶ 2, 99 P.3d 820.
67. Id.
68. Id. at ¶ 4, 99 P.3d 820.
Green was convicted of violating a statute that provided, in relevant part:

A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.69

This statute is different than most bigamy statutes, in that cohabiting with a second person is adequate to constitute bigamy, so long as the relationship with the first spouse is a legal marriage. Utah is also one of the few states that recognizes common law marriage,70 although common law marriage is defined there by a statute passed in 1987.71 In Green’s prosecution, the first marriage was established as a common law marriage, the subsequent ones by cohabitation.72

Green claimed that he was not ever married to two people at the same time, nor did he cohabit with any other woman while married to one woman.73 He married a number of the women legally in Utah, obtaining valid licenses.74 But in each case he quickly obtained a divorce from that same woman in Nevada, which had equal legal effect in Utah.75 Thus, his defense to the marriages was that he had legally ended them. Although they continued to practice cultural marriage of a sort, Green carefully distinguished civil from religious marriage. For example, he testified at trial, “In the eyes of the government, I consider myself single. In the eyes of God, I consider myself married.”76

In speaking with Dateline NBC in 2001, Mr. Green said the following: “If I had applied for more than one marriage license, then I would have been intentionally trying to break the law. I was intentionally trying to stay within what the law allowed.”77 The prosecutor reported the same state of mind, but with a different sense of its appropriate consequences, and said, “Green has intentionally made very complex his legal relationships to his wives . . . . He has done so exactly to make any bigamy prosecution very difficult.”78

70. Bowman, supra note 17, at 715 n.24.
71. UTAH CODE ANN. § 30-1-4.5 (1998). Statutory “common law” marriage is a bit of an oxymoron, of course.
72. Green, 2004 UT 76, ¶¶ 8, 9, 99 P.3d 820.
73. Id. at ¶ 3, 46, 99 P.3d 820.
74. Id. at ¶ 3 n.4, 99 P.3d 820.
75. Id.
The prosecutor alleged that with at least one woman, Green was in a common law marriage. The prosecutor established, through a motion to the court, a common law marriage between Green and Linda Kunz, although the two denied that one existed, and in fact had obtained a legal divorce from what had been a licensed marriage at an earlier point in time. That common law marriage made the subsequent cohabitations with other women a violation of the statute. Green denied first that he had a legal marriage to Linda Kunz, and second that he actually cohabited with the other woman.

This raises the question: can the conduct, the marriage practice, though sufficient to establish a common law marriage, be adequate even in a case of overt and deliberate statements to the contrary—even after an actual divorce has been obtained in the relationship? The conventional common law marriage case arose where a surviving party to that marriage alleged that they both had practiced marriage in agreement before the death of one, or at the time of dissolution where the two parties disagreed about the facts. Common law marriage was not typically asserted by third parties for this purpose. In Green, the parties were in agreement that they were not legally married. Nevertheless, in the legal realist mold, the State of Utah judged their social practices adequate to establish a common law marriage.

As used by the prosecutor in the Green case, the concept of common law marriage must be in some sense not consent-based, because Green opted out through legal channels, by filing a divorce, as well as by declaration when he told many media outlets about the legal/religious distinctions that he made. The court did not look to whether Green consented or did not consent to be legally bound. Rather, it was looking merely for a consent to gain the cultural power of the concept of marriage by engaging in marriage’s social practices. The necessary consent under Utah law, in other words, does not recognize the formalist distinction that Green tried to make; instead Green’s consent to the religious marriage incorporated the consent to the legal one, Green’s affirmative disavowal notwithstanding. The state’s argument, in effect, is that by making marriages that were culturally real, Green made legally real ones over his own objection.

What is striking about the finding of a common law marriage based on Green’s social practices is that those practices were undeniably unconventional, even without the prior declaration of divorce. They lived in a clearly non-exclusive relationship, one the state sought

80. Id. at ¶ 3, 99 P.3d 820.
81. See id. at ¶¶ 46, 54, 99 P.3d 820.
82. Bowman, supra note 17, at 710-11; see also Hendrik Hartog, Martial Eats and Martial Expectations in Nineteenth-Century America, 80 Geo. L.J. 95, 122-23 (1991) (stating that some “judges were remarkably accepting and accommodating” even where criminal penalties for crimes such as bigamy were at stake).
83. See Green, 2004 UT 76 at ¶ 47, 99 P.3d 820.
to legitimize only for the purpose of de-legitimizing it. The prosecution likely occurred because of Green’s express assertions of socially made marriage, and it is reasonable to conclude that those public assertions caused the prosecutors to act.\textsuperscript{84}

In addition to protesting the establishment of his common law marriage with Linda Kunz, Tom Green challenged his conviction on the grounds that the cohabitation provision in the bigamy statute was unconstitutionally vague.\textsuperscript{85} Green was well aware of the statute involved, and did not live under the same roof with more than one woman at the same time because of their mobile home arrangement.\textsuperscript{86} The Supreme Court of Utah characterized his argument as follows: “[B]ecause ‘cohabit’ is not specifically defined within the statute, the statute left him ‘in a quandary’ over how often he could legally reside with and have sexual contact with the women.”\textsuperscript{87}

The Green case is a modern illustration of the imposition of marriage on individuals in order to restrict the range of available relationship forms. It prevents Green from gaining the social power of marriage without passing through the state’s procedures.

Katherine Franke’s history of the Reconstruction era response to the marriage practices of formerly enslaved people describes a similar phenomenon.\textsuperscript{88} While enslaved, people did not have the legal capacity to marry.\textsuperscript{89} A number of social practices arose that mimicked licensed marriage.\textsuperscript{90} But the range of social practices was wider, and many different types of relationships, both more and less formally bound together, were practiced and tolerated.\textsuperscript{91} With emancipation came the formal right to marry, which many formerly enslaved people greeted happily.\textsuperscript{92} At the same time, other formerly enslaved people found the state forcing their relationships into molds that did not fit their practices very well, particularly where individuals had more than one significant relationship.\textsuperscript{93} The southern states declared that individuals may be married to one person alone, and aggressively prosecuted people that it had declared married for activities with others

\textsuperscript{84} There are more than 30,000 polygamists living in Utah, Wikipedia, Polygamous Mormon Fundamentalist, http://en.wikipedia.org/wiki/Polygamous_Mormon_fundamentalists, but the Green prosecution was unusual, as noted in the opinion itself, Green, 2004 UT 76 at ¶ 62; 99 P.3d 820 (Durham, C.J., concurring).
\textsuperscript{85} Green, 2004 UT 76 at ¶ 15, 42, 46, 99 P.3d 820.
\textsuperscript{86} Id. at ¶ 4, 47, 99 P.3d 820.
\textsuperscript{87} Id. at ¶ 46, 99 P.3d 820. Green also believed his prosecution was politically motivated, as he was a leading pro-polygamy activist. By analogy, jailing only gay rights advocates on sodomy charges while leaving everyone else alone would likely have been considered a troubling response to political speech.
\textsuperscript{88} Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of African American Marriages, 11 Yale J.L. & Human 251, 278 (1999).
\textsuperscript{89} Id. at 252.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 256, 266-67.
\textsuperscript{92} Id. at 253.
\textsuperscript{93} Id. at 253, 273-74.
with whom they may have had long-standing relationships. As was the case for Green, states forced marriage onto couples in order to delineate appropriate from inappropriate, and indeed criminal, relationships.

Green deliberately opted out of legal marriage, while publicly claiming cultural and religious marriage. In essence, Utah's common law marriage statute created a marriage out of social practices. Consent remains part of that statute, and was always the basis of marriage-like findings, even if it meant consent by practice—similar to Marvin's implied contract. In the Green prosecution, the scope of legal marriage is broadened to self-conscious formal legal dissenters, to capture their social consent to marriage. The perverse end to that disciplining process, to bringing them into conformity, is to make it possible to prosecute their nonconformity. Green's crime, then, appears to be attempting to use the social force of marriage without asking for its legal legitimacy. Green asserted the authority to participate in defining marriage for some purposes despite a state-centered definition contrary to his own.

The Green case shows the state policing the cultural use of the marriage symbol, and a state's attempted assertion of its own exclusive license over the use of that symbol. We see a similar phenomenon occasionally surrounding the cultural use of marriage by same-sex couples. I turn next to an exploration of the social and the legal in the case of same-sex couples.

B. Goodridge v. Department of Public Health: Licensing Social Practices

In the fall of 2003, the Massachusetts Supreme Judicial Court decided Goodridge v. Department of Public Health. This case starkly outlines the social practices that make even a state-recognized marriage more than its legal consequences. The Goodridge opinion is quite sensitive to the practices that give authenticity to a marriage and the responsibilities of the state to acknowledge those practices.

The Goodridge case may be better understood in the context of two phenomena: the social practice of unlicensed but publicly celebrated same-sex marriages throughout the 1980s and 1990s on one hand, and the rise of legally recognized civil unions on the other. We will consider the developing legal relations first.

94. Id. at 278.
95. See generally id.
96. One might argue that for a criminal prosecution we need bright line rules and clarity—the kind of clarity a licensing regime or a divorce might best provide. Here the state is an aggressive manager of what social practices that look marital will mean. Practices trump formalities, even in the face of an express opt-out.
98. See, e.g., CAL. FAM. CODE § 297 (West 2004) (defining and establishing requirements for domestic partnership); VT. STAT. ANN. tit. 15, § 1201 (2002); Baker v.
1. Civil Unions

In 1999, the Vermont Supreme Court addressed an equal protection question functionally similar to the one presented in *Goodridge*. does the equal protection provision in the state constitution prohibit the exclusion of same-sex couples from the state’s legal marriage procedures? It came to the following conclusion: 1. the prohibition against same-sex marriage did violate the state’s constitution; 2. same-sex couples are entitled to all the legal benefits that the state confers on opposite-sex couples through its marriage law; and 3. the state can confer those legal benefits, so long as they are the same, without licensing same-sex marriages. The state legislature responded by enacting a law that provided for civil unions. A number of other state legislatures subsequently debated the possibility of creating civil unions in their states. Several have recently done so, including California and Connecticut.

The civil union model purports to give all of the benefits of legal marriage. In fact, Vermont defines the legal consequences of civil union in terms of the legal consequences of marriage: civil union is to give everything that the State of Vermont allows under marriage law. Yet, Vermont asserts that it is not “marriage,” if only because it is separated out under a different title. If the two are exactly the same in terms of legal consequences, but are still different, the question is nicely posed: what is there in legal marriage that is not exhausted by its legal consequences? Whatever that “x” factor is, precisely that is what separates legal marriage from civil union.

Civil union appears to withhold only the cultural symbol or power of marriage, slicing finely the formality of the licensing concept. If

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State, 744 A.2d 864 (Vt. 1999); An Act Concerning Civil Unions, 2005 Conn. Acts 10, 14 (Reg. Sess.) ("Parties to a civil union shall have all the same benefits, protections, and responsibilities under [state] law . . . as are granted to spouses in a marriage . . . .") See generally Ellen Lewin, Recognizing Ourselves: Ceremonies of Lesbian and Gay Commitment (1999) (examining the non-legal strategies same-sex couples engage in to ceremonialize their unions, including marriage).

100. *Id.*
101. *Id.*
103. CAL. FAM. CODE § 297 (defining and establishing requirements for domestic partnership); An Act Concerning Civil Unions, 2005 Conn. Acts 10, 1, 14-15 (Reg. Sess.) ("Parties to a civil union shall have all the same benefits, protections, and responsibilities under [state] law . . . as are granted to spouses in a marriage . . . .").
104. Same-sex marriages could in theory confer benefits in other jurisdictions, where civil unions are limited by their terms to those benefits conferred by Vermont law. However, since in fact the federal government has affirmatively disclaimed recognition of same-sex marriages regardless of state law, and since at the time *Baker* was decided, no other state would recognize a same-sex marriage, this theoretical possibility did not confer any actual legal benefits.
the power of that cultural symbol can be withheld by the state, what makes it a cultural matter? Anxieties over the legal legitimacy of the social meaning of marriage were coming to a head in Baker. Those anxieties of state influence have been heightened in recent years as the same-sex marriage question unfolds nationally.

2. The Cultural Same-Sex Marriage

At the same time, there is no systematic prohibition against using the cultural and religious label "marriage" to describe unlicensed same-sex relationships. Indeed, there is a significant recent history of same-sex couples employing the social symbol of marriage to describe their relationships, overtly contesting the state's effort to monopolize a practice that it by all accounts did not invent. A couple in Vermont could gain all the legal benefits of a Vermont-conferred marriage through a civil union, and they may also have the cultural and religious symbol of marriage with a religiously blessed marriage ceremony and formal declaration that they are spouses. This has distinguished same-sex cultural marriage from polygamous cultural marriage for a number of years: same-sex cultural marriage had been "de-criminalized" if you will, unlike polygamy (or interracial marriage as presented in Loving v. Virginia).

Occasionally, a court struggles with the attempts by same-sex couples to assert an ability to use marriage's cultural valence even where it is not licensed. In the case In re Bacharach, a New Jersey trial court, denied a woman's request for a name change that would have given her and her social spouse, another woman, the same name. The women did not claim to have a legal marriage, but needed to engage the law with respect to name changes in order to effectuate one of marriage's social practices: a common last name. In reversing the lower court's decision to deny the petition, the appellate court noted that the trial judge based his decision on "his perception of the law and public policy of the state against recognition of same-sex marriage." The appellate court quoted the trial judge's reasoning:


107. Lawrence v. Texas, 539 U.S. 558 (2003), completed the decriminalization process. For practical purposes, cultural marriage had been decriminalized long before Lawrence with its increasing occurrence and prevalence, and the non-enforcement and repeal of state sodomy laws.


110. Id. at 580.

111. Id. at 583-84.

112. Id. at 581.
[This State of New Jersey] does not recognize same sex marriages, unions; unlike the State of Vermont, which has . . . recognized unions. . . . That’s Vermont, this is New Jersey . . .

Despite the winds of change that are going on and possibly will get stronger as the applicant hopes down the road, that this understanding of a marriage is almost universal, that is, the same sex marriage. There is no doubt in my mind that this state follows the overwhelming majority of that it is unlawful at this stage. If this Court would give even the slightest imprimatur of any legitimacy to this type of arrangement, life term partners, it would seem to me that it is against public policy to allow that, or to even allow a perception, appearance or a recognizable union. [I]t’s also, as far as this Court is concerned, against public policy to even allow the petitioner and the lifetime partner to [hold] themselves out as being married, with the perception of marriage, or the appearance of marriage, which is completely in contravention of the law as it stands today. 113

The appellate court, correctly reflecting the conventional legal tolerance toward an independent, non-civil, cultural same-sex marriage, said the following:

This concern is misconceived. Appellant and her partner can exchange rings, proclaim devotion in a public or private ceremony, call their relationship a marriage, use the same surname, adopt and rear children. All these actions may be taken in full public view. None are offensive to the laws or stated policies of this state. To deny the applicant a statutory change of a portion of her surname to that of her same-sex partner on the hypothesis that some members of the public may be misled about the legal status of same-sex marriages in New Jersey is far-fetched and inherently discriminatory. 114

The landscape before Goodridge, then, was a visibly decentralizing concept of marriage: licensable, or culturally practiced (or both for straight couples only). The ceremonial, social thread that was always an attribute of marriage took on new significance in light of the evolution toward more public status for same-sex unions. The In re Bacharach appellate court did not insist that the “real” marriage between the two should declare itself.

Following the In re Bacharach decision, a marriage lawsuit similar to Goodridge was filed, which is pending in New Jersey still. 115 New Jersey passed a watered-down form of civil union subsequent to the filing of that lawsuit. 116 Should this continue to be the trend in state legislatures, the In re Bacharach appellate court would be describing what would evolve into conventional practice for same-sex couples:

113. Id.
114. Id. at 585.
obtain a civil union license in order to obtain the legal benefits of marriage from the state, and participate in a private "marriage" ceremony. This process would de-link the legal from the social attributes of marriage, furthering the process begun with Marvin's recognition of marriage-like legal obligations in non-marital relationships. This disaggregation, while presenting enormous equality problems, does challenge the state's attempt to assert complete control over the social meaning of marriage.

The outcome of the civil union case Baker v. Vermont was frustrating to the same-sex marriage movement, because the plaintiff won the case but still did not obtain the remedy: the integrated social and legal marriage. It was against that backdrop that the Goodridge litigation was framed.

3. Goodridge, Marriage, and Civil Unions

The plaintiffs in Goodridge placed before the court repeated reference to the symbolic, as well as material, consequences of marriage itself. The court in Goodridge apparently found these arguments persuasive. Ample mention is made in the Goodridge opinion of the very particular and unique status of marriage itself, extending beyond legal details into deep social meaning. The first line of the opinion reads, in its entirety, "Marriage is a vital social institution" (emphasis added). A few further examples will suffice:

[M]arriage provides an abundance of legal, financial, and social benefits. [Same-sex couples are] arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. Tangible as well as intangible benefits flow from marriage. It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a "civil right."

It is a "social institution of the highest importance."

Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply per-

118. Goodridge, 798 N.E.2d at 948.
119. Id.
120. Id. at 949.
121. Id. at 955.
122. Id. at 957. The Goodridge court here has listed numerous concrete benefits associated with marriage, many of which are not available under the law of cohabitant obligation begun with Marvin; nothing in this Article is intended to suggest that there are no longer tangible benefits to marriage, only that the unique benefits have been significantly reduced.
123. Id. at 954.
sonal commitment to another human being and a highly public celebration . . . . 124

"It . . . promotes a way of life, not causes . . . ." 125

Because it fulfills yearnings for security, safe haven, and connection that expresses our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition. 126

We see the court in Goodridge regularly referencing the cultural significance of marriage. Tracking the litigation history of same-sex marriage cases, this was highly significant language: the court did not intend to sever legal marriage from its cultural heft, as the Vermont court had. The social practices that were recognizable to courts—those that in a prior era would have led to a finding of common law marriage on the basis of practice for opposite-sex couples—were declared by the court to be legible to the state when practiced by same-sex couples.

At the same time, the court repeatedly used a term that had not been a recognized part of the legal discourse before that time: “civil marriage.” 127 In the majority opinion alone, the court repeats the term over fifty times. It is tempting to think that this “civil marriage,” as distinct from the more conventional term “marriage,” must be tied up in the legal consequences of the state’s licensing procedure. Indeed, it brings to mind the newly invented “civil union” of Vermont. 128 The court describes its perspective on the peculiar status of marriage: a social institution, but one that the government legitimizes. The Goodridge court wrote, “We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage.” 129

If this term is used to emphasize the legal attributes of marriage, it may be designed to thus distinguish civil marriage from religious marriage. However, it seems that the repetition of the word “civil” throughout the opinion also distinguishes it from the cultural and social institutions of marriage, especially in light of the court’s claim that the government creates civil marriage—an implausible claim with respect to marriage’s social history. 130 The court’s claim might make sense if it were careful to stay within the bounds of legal equalities: that is, if the court does not purport to formally grant social and religious equalities. At the same time, the same court had the task of dis-

124. Id.
125. Id. at 954-55 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).
126. Id. at 955.
127. Id. at 948.
129. Goodridge, 798 N.E.2d at 954.
130. See MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 5, 19-20 (1989) (explaining that marriage as an institution predates the state and was considered a private matter, not a legal one).
tistinguishing "civil marriage" from "civil unions" of the sort that had been granted in Vermont. The civil union remedy was a clear option for the Goodridge court, and in the imagination of all of the parties to the case following Baker v. Vermont. Civil marriage status is described by the Goodridge court as being made up of both tangible and intangible benefits and incidents. The court gestured toward limiting itself to the legal, simply "rendering unto Caesar what is Caesar's." But by dwelling on the intangible benefits and the social significance of marriage, the state wades into the entanglement of the social practices of marriage and the legal responses thereto, the same issues posed by the Schiavo and Green marriages in different contexts.

Under this integrated view, civil marriage is not a benefit emanating from the state licensing statute, nor is it a simple recognition of entirely social practices. It is both an organizer of social practices and a responder to social practices that can be organized without the state. It is neither a state nor a non-state creature. The Goodridge court acknowledges, in a footnote, the "paradoxical" status of civil marriage as a state creation and, at the same time, as a personal right of "fundamental importance." The United States Supreme Court has expressed this as a freedom, a fundamental liberty interest, though such liberties are not ordinarily discussed in terms of a need for affirmative state action. Civil marriage licenses, though, purport to license social practices and understanding, as well as the exercise of that personal liberty interest. The Goodridge opinion navigates this aspect of marriage, its fusion of the legal and the cultural, by inviting same-sex couples to enjoy the social power that the state confers with its merely legal license. In this sense, Goodridge legitimates the social practices of same-sex couples; it reads those social practices as adequate to constitute both social and legal marriage.

Yet, after Goodridge, to be a married same-sex couple in Massachusetts is to be licensed by the state. In that regard, the Goodridge opinion substantially extinguished the separate cultural use of marriage by same-sex couples who were unable to license their relationships—the cultural use that had arisen over several decades and was discussed by the trial court in Bacherach. The Goodridge opinion, then, manages the independent, non-state, cultural use of marriage by same-sex couples, but by co-opting it into the state process. This asserts a state monopoly over marriage by incorporating what was a threat to that monopoly: the independent, non-state cultural practices of mar-

131. Goodridge, 798 N.E.2d at 955.
132. Id. at 957 n.14 (quoting Zablocki v. Redhail, 434 U.S. 374, 383 (1978)).
riage.\textsuperscript{135} While a far different approach to the unlicensed use of the symbol than Utah's approach in the Green prosecution, both states in effect cut off the polycentric control over the unique institution of marriage.

C. *The Marriage of Michael and Terri Schiavo: A License that Defeated Social Judgments*

Many of the facts of the Schiavo case are well-known, therefore only a few will be summarized here. In 1984, Terri Schindler married Michael Schiavo.\textsuperscript{136} By all accounts, their marriage and its social practices were conventional.\textsuperscript{137} In 1990, Terri Schiavo suffered a cardiac arrest, the oxygen deprivation from which causing her severe brain damage.\textsuperscript{138} All available evidence suggests that this was due to very low potassium levels in her system that resulted from her diet. Michael Schiavo, as her next of kin, was named her legal guardian.\textsuperscript{139} In 1995, Michael Schiavo met Jodi Centonze, with whom he later had two children.\textsuperscript{140} In 1998, after no improvement in Terri Schiavo's condition and a consistent medical diagnosis of "persistent vegetative state," Michael Schiavo petitioned to have her feeding tube removed.\textsuperscript{141} The widely publicized battle with Terri Schiavo's parents ensued over this request. Terri Schiavo eventually died on March 31, 2005, after the court-ordered removal of her feeding tube.\textsuperscript{142}

Michael Schiavo was Terri Schiavo's legally recognized husband at the time of the cardiac arrest, at the time he was named guardian, at the time of the request to remove the feeding tube, at the time he became involved with Jodi Centonze, and at the time his relationship with Jodi Centonze became residential, parental, and as a matter of conduct, marriage-like.\textsuperscript{143}

Yet, there were many *functional* ways in which Michael Schiavo's status as Terri Schiavo's family could be questioned. To the extent that Michael Schiavo had a residential, marriage-like relationship with someone else, his social practices with Terri Schiavo did substantially challenge the social practices that constitute marriage. His post-Centonze relationship with Terri Schiavo, in other words, would not have gained any legal status under the old or modern common law marriage doctrine, under the implied contract doctrine of *Marvin v.*

\textsuperscript{135} It should be obvious that the “state monopoly” I speak of has not been achieved. Rather, state movement toward attempting to assert control over marriage’s social meaning must be seen in light of the diminished legal exclusivity of marriage, and in light of increasingly overt non-state marriages.

\textsuperscript{136} Wikipedia, *supra* note 7.

\textsuperscript{137} Id.

\textsuperscript{138} Wolfsen Report, *supra* note 12, at 7.

\textsuperscript{139} Id. at 8.

\textsuperscript{140} Wikipedia, *supra* note 7.

\textsuperscript{141} Id.

\textsuperscript{142} Id.

\textsuperscript{143} Thompson, *supra* note 7.
Marvin, or under the ALI's law of cohabitant obligation. It was insufficiently marriage-like.

Nonetheless, seemingly absolute rights arose from the actual marriage license between Michael and Terri Schiavo. The significance, then, of having a licensed marriage was determinative, as Michael and Terri Schiavo would have had nothing else to rely on in order to establish a relationship with legal consequences. As the breakdown between Terri Schiavo's parents, the Schindlers, and Michael Schiavo worsened, there were several attempts by the Schindlers to have Michael Schiavo removed as Terri Schiavo's guardian. While the guardian did not have an absolute right to make the necessary decisions for Terri Schiavo, the practical significance of being the guardian responsible for making proxy decisions for her became obvious as the battle lines in the case were drawn.

Michael Schiavo's relationship with Jodi Centonze was the basis of the legal attempts by the Schindlers to change the guardian designation. That relationship was also the basis of countless criticisms in the media. In questioning Michael Schiavo's ability to serve as Terri's guardian, the Schindlers argued in some detail that Michael Schiavo had in fact "moved on"; he had been living with another woman for ten years, and they had children together. This argument for removal of Michael as guardian was made in court on several occasions. In March of 2005, the Schindlers went to court again, this time seeking a divorce for their daughter, on the grounds that

144. Even though it is an aside to my argument, given the context of this case, I must also point out that I think there are quite obvious ways that we can talk about Michael Schiavo's conduct toward Terri Schiavo as consistent with a coherent version of marital conduct and obligation in our time. He fulfilled a promise to her, but because he viewed himself as nearly a widower due to her brain damage, that promise could be fulfilled consistent with making new attachments. He sought to take care of Terri Schiavo, which included allowing her a dignified death, while continuing with his own life after her accident in a way that we can speculate Terri Schiavo may have approved of. I am perfectly comfortable with that version of their story, but think it not relevant to this Article's point about the legal status of marriage practices.


146. Wikipedia, supra note 7.

147. The guardian had the obligation to do the best job possible implementing the wishes of Terri Schiavo herself. See, e.g., In re Browning, 568 So. 2d. 4, 13 (Fla. 1990) (stating that guardianship is not about the best choice in the guardian's opinion or in the view of other constituents; it is only about "mak[ing] the medical choice that the patient, if competent, would have made").


149. Thompson, supra note 7.

150. Id.

151. Michael and Terri's marriage had lasted six years before Terri's heart attack. Wikipedia, supra note 7.

152. Id.
there was no marriage left between Michael and Terri in light of Michael’s new relationship.\(^{153}\)

In this sense, the argument was made that the Schiavos’ marriage, lacking in the eyes of many the functional (social) attributes of marriage, should not be accompanied by all of the legal consequences of marriage. In exactly the way a legally licensed marriage may not entitle a couple to the immigration advantages given to most married couples if the appropriate conduct is not also present, it was argued that the Schiavo license should not end the marriage inquiry.\(^{154}\)

Moreover, to the extent guardianship law is always based on enacting the wishes of the incapacitated person rather than those of the guardian,\(^{155}\) the higher right given to a spouse would not seem absolute, but instead responsive to conduct. If Michael had in fact been acting maliciously toward Terri Schiavo, or had life insurance to gain, or had her medical condition actually been ambiguous (which it was not), it would not seem that the marriage license and absence of a divorce should sensibly be used as a proxy for her best interests when he was not functioning as a spouse. In this regard, the Schindlers’ claim based on Michael’s new family was at least colorable (though in fact, there was no additional evidence that he was acting in any way other than her best interests). The mere marriage license, had the facts differed, probably should not have prevented us from looking behind the formality and to Michael Schiavo’s conduct.\(^{156}\) The license in this kind of case, it could be argued, should not be enough to make a marriage with these legally meaningful consequences. Had the facts differed somewhat, there may very well have been a social consensus on that point.

Here, one can see an argument that a marriage license does too much work. It is the kind of argument posited by immigration laws that mandate looking beyond a marriage license and into the conduct of a married couple in deciding whether to confer the immigration benefits given in light of family attachments.\(^{157}\) Nonetheless, in this case, the license is strong enough to withstand unconventional social


\(^{154}\) Without being socially critical of Michael Schiavo, we can acknowledge that if Florida had common law marriage or the sort of cohabitation-based polygamy statute used against Tom Green in Utah, the facts of Michael’s relationship with Centonze would likely have been adequate to establish a common law marriage, and enough of a basis for a polygamy prosecution. It would also have been enough to give rise to marriage-like financial obligations under the AIP’s Principles of Family Law, as well as under the law of many other countries, including Canada.


\(^{156}\) It was difficult to miss the irony at the time, as social conservatives cared not for the sanctity of the Schiavo marriage, and social liberals argued for its inviolability.

\(^{157}\) See GREGORY ET AL., supra note 1, at 58-59.
practices. From the standpoint of my argument about courts policing the social use of marriage, the Schiavo case is more puzzling than both Goodridge and Green. At the same time, the Schiavo case does reinforce the state’s control in a different way: once the license has been issued and the marriage is state-sanctioned, cultural nonconformity cannot dislodge it. The judgment of the community that there is no conventional marital conduct between the Schiavos was insufficient to influence the legal outcome of the case, because of the license. By upholding the Schiavo marriage, the State of Florida asserted an exclusive authority with respect to marriage.

Combining this with the state policing of social uses of the marriage label in Green and Goodridge, we might conclude that the state licenses marriage, and no socially contrary conclusions can challenge the authority of that license (as in Schiavo). In addition, the state will carefully monitor any private assertions of a social marriage, even when it is accompanied by the couple’s acknowledgement that the social marriage has no legal consequences.\(^{158}\)

III. Lessons of the Three Cases

Marriage has gone from sweeping in and co-opting all cohabitants during the era of common law marriage to being an optional category under the ALI—one of a set of relationships that have legal significance. The ALI expands the grounds for legal obligation to many more couples, depreciating (to an extent) the strictly legal impact of marriage itself. The ALI does nothing to marriage’s social significance, but parses the legal from the social, and makes an actual license optional to the creation of legal obligation. As the exclusivity of legitimate legal status disappears post–Marvin v. Marvin and post–ALI, a new exclusivity emerges for the marriage status. That new exclusivity no longer has its basis in legal consequences alone, but instead finds it in the cultural power of the social institution. In three recent high-profile cases, we see courts responding to dilemmas posed by the relationship between social and legal marriage, and wrestling with the court’s role in managing the discord.

In the Schiavo case, the license controls the marriage label despite the absence of social practices that would normally be expected in order to earn that name. The power of the state license is hereby displayed as against social judgments. Oddly, using a marriage license

\(^{158}\) That is not to say that in all cases, a license will protect an unconventional couple. A twenty-one-year-old Nebraska man was charged with statutory rape this summer for engaging in sex with his fourteen-year-old wife. The two had crossed state lines to Kansas to obtain their marriage license, which can be had there at age twelve; in Nebraska the minimum age is seventeen. Jodi Wilgoren, Rape Charge Follows Marriage to a 14-Year-Old, N.Y. Times, Aug. 50, 2005, at A10. The prosecutor in the case was widely criticized for the move, but this case illustrates the occasional limits of even a marriage license. Id.
is the only opportunity for seriously non-conforming practices to still lead to legal benefits.

In the Green case, solely the social practice of marriage, in the absence of a license, garners some of legal marriage's darker consequences: a criminal prosecution, against overt protesters from the legal marriage regime. The State of Utah argued that it was protecting the institution of marriage through the prosecution.\textsuperscript{159} Since Green did not claim to be legally married,\textsuperscript{160} the only part of that institution the prosecution could have been protecting was the social one. Like the "protection" small businesses get from the mafia, implicit in the need for protection is the threat to the state's control over the meaning of marriage, of a social as well as legal variety.

In Goodridge, the court acknowledged that the state does more than license legal consequences.\textsuperscript{161} The court acknowledged that the state civilly licenses social consequences, as well as the interpretation of social practices.\textsuperscript{162} The Goodridge opinion arose in the context of same-sex couples who were living together and gaining social recognition as being married.\textsuperscript{163} The social recognition, in addition to entitling the couples to a license in the eyes of the state, also threatened to undermine the State of Massachusetts' control over the integration of legal functions with social ones. The Goodridge opinion simultaneously delivers a civil right, and effectively re-integrates the social and legal understandings of marriage under the single authority of the state. In Goodridge, the social practices of same-sex couples are cited by the court as an explanation for allowing them access to the licensing procedures.\textsuperscript{164} These social practices are acknowledged to be larger than the state, but at the same time regrettably in the state's control.

A return to the formalist time between the elimination of common law marriage and the rise of Marvin-type obligations would be worse still. That time gave only the marriage license itself the substantial power to provide a bright line separating the legally consequential from the legally outcast. Giving legal consequences to social practices is necessary, as well as inevitable. The post-Marvin development of a law of cohabitant obligation is generally a positive development. It represents a bottom-up approach to intimate relationships, with law responding to the social facts of relationships rather than licensing those facts. Yet, marriage itself cannot be made from the license, or not entirely made from the license. Instead, it is made from social practices either in combination with the license or sometimes without

\textsuperscript{159} State v. Green, 2004 UT 76, ¶ 72, 99 P.3d 820 (Durrant, J., concurring) (citing Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985)).
\textsuperscript{160} Id. at ¶ 54, 99 P.3d 820.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 949, 963.
\textsuperscript{164} Id.
a license. If anything, today we see more management of the social and cultural practice by state governments than is appropriate, given that social practice evolves in a more organic fashion than legal institutions can license.

I do not mean to suggest that alternative legal statuses such as civil unions or that enjoyed by the parties in the *Marvin* case have erased the concrete legal benefits marriage gives; those statuses are still lesser in terms of benefits.165 At the same time, with the rise of those alternatives, we should expect to see courts struggle more with defining the elusive element that makes licensed marriage different, and struggle with deciding to what extent that special difference is a creature of the state, to be managed by the state.

The “state monopoly” that I suggest in this Article has not been fully achieved. But, states’ attempts to assert control over marriage’s social meaning must be seen in light of the diminished legal exclusivity of marriage, and in light of increasingly overt non-state-sanctioned marriages. In general, it seems preferable for the state not to have complete control over what is increasingly primarily a social institution—or even over the particularly social elements of a multi-faceted institution. There are many downsides to intimate social practices that are prevented from operating in open distinction from state-defined forms.166 One such loss is the natural evolution in practices suited to the material and cultural circumstances of the time. The benefits of the *Goodridge* decision are obvious. At the same time, however, the state’s control over the social meaning of marriage is not healthy. More, we see that it is becoming less healthy as marriage’s legal significance declines. The state regulation of marriage becomes more awkward and problematic as its focus is more directly on cultural contests.

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165. Indeed, many readers of this Article would object to the premise that marriage lacks material significance, and they would be correct to a point. One only need read either the briefs or the opinions in the cases challenging states’ prohibitions against same-sex marriage to find the list of legal benefits dependent on marriage. My argument, however, is based on the drastically reduced legal consequences available only within marriage post-*Marvin* and *Marvin*-type developments, and post-*Lawrence v. Texas*, in comparison to the period between the widespread elimination of common law marriage and the rise of these non-marital obligations.

166. The licensing regime is suited to many purposes of course, including the administration of benefits, but at a cost. See, e.g., Franke, supra note 88.