

The Veil of Matrimonial Ignorance: Creating Justice as Equity in Family Law

by
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In modern society, marriage remains the dominant form of familial relations and a pillar of social structures. The evolving status of marriage, from who may enter a marriage to considerations upon dissolution of that status, has done little to erode its enduring character. Despite such ubiquity, laws pertaining to marriage remain perplexing to the general public. Important decisions can be, and certainly often are, reached without full understanding of the consequences. But when it comes to marriage, lack of foresight can portend particularly devastating consequences. Ignoring the conventional wit and wisdom of Richard Saunders, it would appear many marriages begin with eyes half shut only to later open.¹ The observations of Benjamin Franklin under his *nom de plume* notwithstanding, careful research of divorce law is not likely to appear on many wedding preparation checklists. Better understanding of how laws impact marriages would lead to both better laws and better marriages.

In addressing separate aspects of social formation, Professor John Rawls provided an eminent contribution to the philosophical underpinning of political systems. In *A Theory of Justice*, Rawls detailed how an extended thought experiment might produce more enlightened decision-making.² Constructing metaphorical blinders, Rawls proceeded to open eyes to resulting principles designed to maximize, yet balance, liberty and equality in pursuit of just ends. As he explained, properly understanding the social

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¹ To accurately quote the memorable admonition, “Keep your eyes wide open before marriage, half shut afterwards.” See *Poor Richard, 1738*, FOUNDERS ONLINE, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-02-02-0035> [Original source: 2 THE PAPERS OF BENJAMIN FRANKLIN 190-98 (Leonard W. Labaree ed. 1961)].

² JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

contract – the theoretical antecedent to civil society which he branded the “original position” – required creating an imagined veil of ignorance about the decisionmakers’ positions in society. He argued that if people were to architect a just society without knowing whether the governing rules they were creating would benefit themselves individually, principled decisions would follow.³ More than a generation of commentary later, his original work and subsequent enlargement remain required reading for many students of multiple disciplines.

These two seemingly unrelated currents of thought converge. In considering the formation of individual marriages, the question necessarily involves how those collective choices influence social structures. In evaluating how a thought experiment might suggest better, and more just, legal systems, inquiry demands subsequent application to end results. Combining the two, questions emerge: how might a similar thought experiment aid in understanding, and perfecting, the laws governing families as they form and dissolve? How might the thought experiment allow application of a hypothetically blinding veil of ignorance to overcome difficulties attendant to partially blinded decisions to wed? To answer these questions, due consideration involves re-framing the experiment, considering the law as it exists, and suggesting how better results may emerge. The end goal of the inquiry is to create similar principles for application in service of yielding greater equity in the body of law dedicated to families.

This article will explore the underpinnings of how decision-makers should consider these questions before assessing how they are applied. Part I provides a background of Rawls’ theory. Understanding his theory, and his later restatement of it, also requires understanding relevant commentary. These considerations of background source materials also delve into framing their use for this experiment. Part II focuses attention on the contemporary structure of matrimonial law. The goal of this section is not a full overview of relevant law, but rather a more limited attempt to assess the common principles of current systems. Finally, Part III will turn to application of Rawlsian theory to relevant principles to develop proposed outcomes of this applied experiment. The goal here is to better understand what system and law might result

³ *Id.* at 136-42.

from considering justice as fairness as applied to relevant topics in family law. To that end, the final section includes both suggested resulting principles and specific outcomes consistent with the underlying premise.

I. Setting Up the Thought Experiment: Rawls' Theory and Criticism

Before consideration of hypothetical applications, or even the philosophical bases for such an experiment, history compels attention. Modern political philosophy, like its antecedents, often resorts to hypotheticals to understand the actual. Social contract theory traces its lineage through the Greeks, past the Enlightenment, and into modern forms.⁴ Construction of this well-known yet entirely artificial contract involves recognition that government exists as the result of, first, a series of contracts between would-be citizens to form society and, second, the as-formed society evolving to form a further contract of government identifying and binding subjects with their rulers.⁵ Through many iterations, constructing explanations for extant institutions involved both defenses of social structures and arguments for their perfection. Moving beyond the pre-social, the contract may involve the self-governing compact of Rousseau, the delegation of authority that permeates Locke's contract, or still other iterations to better explain the justification for structure.⁶ By the mid-twentieth century the fertile fields of social contract theory had already produced abundance.

A. A Theory of Justice as Fairness

Justice as fairness built on this tradition. One would imagine that great works which later enter the popular consciousness are first conceived in fruitful minds before gestating in small conference rooms. In 1971, Rawls formally introduced a full explication of a theory that previously percolated as journal presentations

⁴ See generally DOUGLAS BARKER, SOCIAL CONTRACT Introduction (Oxford University Press Paperback, 1960).

⁵ *Id.* at xii-xiii.

⁶ *Id.*

and circulated drafts.⁷ Rawls introduced a modern take to classical theory in a way that one contemporary noted as “describing the theories in the field in a fresh way, in light of developments in economics and the social sciences, and thus providing a new vocabulary that will no doubt be used even in criticism of its own arguments.”⁸ Rawls’ work drew praise for a “plot that is readily grasped in its broad outlines” as well as for a conceit that harnessed the “sophisticated apparatus and techniques of the professional philosopher.”⁹ The “theory” praised as philosophy found a broader audience that spanned additional disciplines and reached popular attention.¹⁰

Theory begins by looking backward to traditional concepts and forward to new results.¹¹ As Rawls explains the state of nature, which he christens the original position, it corresponds to parallels in traditional notions of social contract. Acknowledging the obvious, Rawls’ theory does not depend on actual history but rather a “purely hypothetical situation.”¹² Here, theory departs from its predecessors’ explanations of how principles of justice might be achieved to construct instead an appropriate environment for their creation. In Rawls’ conception, the original position explaining the state of nature lies behind a “veil of ignorance.”¹³ So conceived, the veil requires that “no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.”¹⁴ Furthermore, the parties in the original position are also ignorant of their special abilities, including psychological, all designed to ensure that the actors obtain no advantage and similarly suffer no ill advantages in the process of developing principles of justice. As is axiomatic, and clear from the text, a party ignorant of their own circumstances is ill-suited to selecting principles that benefit their own circumstances. Rather,

⁷ NORMAN DANIELS, *READING RAWLS: CRITICAL STUDIES ON RAWLS’ A THEORY OF JUSTICE* xxxi (Basic Books ed., 1989).

⁸ Ronald Dworkin, *Social Contract*, SUNDAY TIMES (London), July 9, 1972.

⁹ DANIELS, *supra* note 7, at xxxii.

¹⁰ *Id.*

¹¹ RAWLS, *supra* note 2, at 12.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

the resulting justice as fairness depends on the idea that advantage in creation of principles is impossible and instead the product of natural chance.¹⁵

This basic framework yields resulting principles of a just society:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.¹⁶

These two basic principles recognize the necessity of equal liberty and the existence of natural inequalities. However, order matters, and when in conflict, the first principle controls. As Rawls explained, the priority principle compels that departure from "equal liberty," as required by the first proposition here, "cannot be justified by, or compensated for by, greater social and economic advantages."¹⁷ Continuing to refine application and interplay, use of these now established principles must also yield to what Rawls terms "the difference principle."¹⁸ Having already recognized that equal liberty may yield natural inequalities, further refinement requires a limiting check. As applied, this means that unequal distribution is only tolerable where inequalities benefit all and are specifically aimed at improving the expectations of the "least advantaged members of society."¹⁹ Otherwise, equal distribution is preferable. In this circle of competing values, the potential inequality is always linked back to maximizing liberty while tolerating beneficial inequality.²⁰ Here, liberty is restricted only where it

¹⁵ *Id.* Notably, the basic terminology underlying Rawls' conceptual framework for his theory all appear in a single paragraph of the first chapter despite the entire work spanning nearly 600 pages. For all its merits, Rawls' work is burdened by its repetitiveness in addition to its density. The basic terms that form this framework could just as easily invite reference to most sections, the majority of chapters, and countless pages within the entire text.

¹⁶ *Id.* at 60.

¹⁷ *Id.* at 61.

¹⁸ *Id.* at 75-80.

¹⁹ *Id.* at 75.

²⁰ *Id.* at 76. In any summary of lengthy work, editing is not only natural but required. Here, the analysis must skip explanation of how unequal distribution results to focus on ameliorating the consequences.

leads to greater overall liberty, while inequality is tolerated to the extent it is actual beneficial, i.e. liberty-enhancing.

With established principles, pursuit of justice next extends to developing an application for their framework. Here, Rawls suggests a four-stage sequence for application that involves judging the justice of legislation and policy, creating a constitutional arrangement to reconcile conflicting opinions, and finally favoring enactments that will allow majority rule as opposed to rejecting them in favor of higher principles.²¹ Explaining the sequence, Rawls suggests adoption of principles, followed by a constitutional convention, then a legislative phase to develop policy pursuant to constitutional requirements, and finally the action of judges and administrators to apply adopted rules to specific circumstances. This framework contains the basic description of developing the rule of law in a constitutional democracy, but in Rawls' universe it is further restrained by specific principles predating the constitution and emanating from a carefully constructed hypothetical condition.

The remainder of Rawls' source material further refines application to establish principles for specific scenarios and identified problems. Rawls defends civil disobedience, subject to limitations and only where it involves serious violations of liberty.²² Morality and psychology both appear, always with due regard to principles previously established. Rawls anticipates that envy may arise where even limited inequalities remain tolerable, and he rejects hedonism, but concludes with a justification for the ultimate congruence of the competing individual views of justice and goodness within individuals.²³ His parting remarks provide a final justification for a harmonized three-part theory of justice as fairness: first, the theoretical structure; second, the institutions of justice; and third, how the preceding parts operate to create a feasible system of justice that transcends its imaginative origins.²⁴

As with any important work, revisions and improvements followed. After further editions and other writings, Rawls issued a recapitulation which incorporated subsequent lectures. Paying homage to the original lectures on justice as fairness, this final

²¹ *Id.* at 195.

²² *Id.* at 371.

²³ *Id.* at 530, 554, 567.

²⁴ *Id.* at 577.

addition in an independent work bore the suitable subtitle as a restatement.²⁵ Improving the two principles that began and permeated his original theory, Rawls amended to posit:

- (a) Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).²⁶

As restated, the principles contain updated language and look forward to subsequent applications. Rawls ends with the same structure that typified his original theory: circling back to refine, reinforce, and apply as the experiment proceeds through application.

B. *Limitations and Criticism of Rawls*

A generation of commentary followed. Available titles multiplied, growing to include substantial commentary, reader guides, critical evaluations, and collections. A basic search yields a veritable library.²⁷ The brief focus here is improving understanding of the essential theory to establish an appropriate framework for the instant application.

One leading compendium contains both critical commentaries arranged topically and views from other disciplines.²⁸ The original position, as explained by Rawls, is undoubtedly unrealistic as a construct. To achieve a true veil of ignorance, information must be withheld. Indeed, the nature of the thought experiment requires withholding information. However, suppressing information that may lead to self-interested decisions carries inherent risk. Individuals constrained by their ignorance must also be deprived of potentially valuable information that would aid them in

²⁵ JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001).

²⁶ *Id.* at 42.

²⁷ Interested readers may quickly find a blend of introductions, commentary, companion readers, and even biographies of Rawls himself. *See, e.g.*, Percy B. Lehning, *JOHN RAWLS: AN INTRODUCTION* (2006); John Mandle & David A. Reidy, *A COMPANION TO RAWLS* (2013); Shaun P. Young, *REFLECTIONS ON RAWLS: AN ASSESSMENT OF HIS LEGACY* (2009).

²⁸ DANIELS, *supra* note 7, at xxxi.

reaching informed, perhaps even more just, decisions.²⁹ In turn, the original position is limited as Rawls assumes that unanimity requires ignorance, even at the expense of denying information that is morally relevant. The result here may be disparate treatment from the outset, as the very act of compelled ignorance has unequal impact.³⁰

Similarly, the original position is constrained by the potential injustice of after-acquired knowledge. The quality of judgments must include the information available in aid of those judgments in considering the justness of ultimate results. For example, a wager made with little knowledge may not be fairly enforced even after acquisition of better information. Otherwise, the justice of a contemporary choice is judged fair merely because it would have been fair earlier, under very different circumstances.³¹ It may well be impossible to make fair rules, if they are made without any information, when such rules must then be applied notwithstanding subsequent developments. Here, the thrust of the criticism is that the strength of ignorance as a protection from vice does not prevent other forms of injustice once the initial limitations are removed.

Critical evaluation of theoretical constructs also compels evaluation of methodology. For example, in Rawls' conception, the starting point requires robust application of its limitations in what may be described as the "thickness of the veil."³² If individuals are deprived of all information, natural tendencies suggest a default to utilitarian decisions. A "thicker" veil thereby fails to distinguish between useful information and information that would invite misuse. In the absence of the veil of ignorance, asymmetrical information may benefit the party with more information to the detriment of one without such information. However, the veil

²⁹ For example, the veiled ignorance of the original position strips actors of knowledge of their specific circumstances, such as personal predisposition for a particular career, but also necessarily deprives them of subjective value judgments about the relative merits of specific fields.

³⁰ DANIELS, *supra* note 7, at 8; Thomas Nagel, *Rawls on Justice*, 82 PHIL. REV. 220, 227 (1973).

³¹ See DANIELS, *supra* note 7, at 20; Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 503 (1973).

³² DANIELS, *supra* note 7, at 101; R.M. Hare, *Rawls' "A Theory of Justice,"* 23 PHIL. Q. 91 (1973). For a longer development of the same essential criticism, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed., 1998).

may eliminate this problem by creating another. Forced ignorance removes useful, and not harmful, information by the same contrived device that restricts potentially harmful knowledge. The baby and the bathwater are both lost to the wrong side of the veil, so conceived.

The announced principles themselves are subject to valid criticism. For example, Rawls' principles prioritize the total quantum of liberty over potential evaluation of qualitative distinctions. This problem is exacerbated by the sequential analysis which suggests settling priorities as part of constitution-making rather than specific enforcement. To cite one example, restricting liberty by military conscription may be justified based on maximizing total liberty. However, the same ordering, and sequential application, loses merit when applied to conflicting individual rights.³³ Quantitative evaluation of liberty as the path to justice may come at the expense of *qualitative* evaluation on the merits. For example, by resolving liberty conflicts at the constitutional stage, Rawls does not allow judicial balancing and individual analysis. Of course, if the goal is justice, and the means are liberty-maximizing principles, then case by case analysis may be an exception that swallows the rule.

As this analysis demonstrates, the veil required in the original position is exceedingly thick and suggests that utility may be the final tipping point of decision-making. But, as a separate matter, it is reasonable to inquire about the ability of individuals constrained by required ignorance to retain the capacity for reasoned judgment. Here, Rawls does not deprive his hypothetical participants of all knowledge. They are generally aware of probabilities, talents, structure, interests, and various aspects of social structure in the abstract. Required ignorance instead strips participants of any individualized knowledge of their own selves. As a consequence, the veil of ignorance may partially shed those in the original position of the basic humanity required to perform core functions. For example, individuals may retain the capacity to appreciate the conception of individual interests, or abilities, but would be stripped of any frame of reference in the process. Stated differently, "[m]utually disinterested men might turn out to be uninterested men, men incapable of comprehending the meaning of

³³ See DANIELS, *supra* note 7, at 240-41; H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534, 543-44 (1973).

interest.”³⁴ The same as with liberty-balancing, the constraints of the original position may be over-inclusive. Application of the veil may remove necessary capacity alongside capacity for mischief.

References to Rawls, while perhaps not ubiquitous enough to be part of the vernacular, are nonetheless common. Beyond obvious interest in philosophy and social science, Rawls is well-represented in the legal lexicon. Unlike case and secondary citations which include tabulations of citing references, frequency of citations to Rawls depends on the nature of search performed. For example, a simple terms search for Rawls in proximity to both “theory” and “justice” yields over 12,000 results in the Fastcase database. A more limited search specific to citations of Rawls’ principal work yields sixty-one cases. The majority of these citations are merely string-cites. However, some references are more substantive. For example, at least one court cited Rawls in addressing contractual language which prevented future consideration of drafting history.³⁵ That court, with footnoted reference to relative knowledge of parties behind the veil of ignorance, colorfully noted the parallel to some parts of contract negotiation where the parties “do not know whose ox the provision will gore, so it is more likely that the arrangement is efficient.”³⁶ Similarly, another court noted that contractual requirements for arbitration might result in Rawlsian conceptions of justice if neither party knew which would be advantaged by such a requirement.³⁷ In one particularly poignant example, a state supreme court dissenting judge exercised the freedom that dissenting opinions afford to offer commentary that may not be appropriate for an opinion of the court.³⁸ After characterizing Rawls as carrying the traditional theory of social contract to a higher level of abstraction, Judge Donnelly went on to conclude that that the court’s opinion had failed the test and

³⁴ See DANIELS, *supra* note 7, at 295; Benjamin Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, 69 AM. POL. SCI. REV. 663, 664 (1975).

³⁵ Texas Pac. Land Corp. v. Horizon Kinetics LLC, 306 A.3d 530, 551 n.12 (Del. Ch. 2023), *aff’d* 314 A.3d 685 (2024).

³⁶ *Id.*

³⁷ Global Gold Mining, LLC v. Ayvazian, 983 F. Supp. 2d 381 (S.D.N.Y. 2013).

³⁸ Barnes v. Tools & Mach. Builders, Inc., 715 S.W.2d 518 (Mo. 1986) (Donnelly, J., dissenting).

adopted a rule for manufacturer liability that failed to adequately account for relative advantage in veiled decision-making.³⁹

Commentary here serves to improve understanding. Most criticism, some pointed, is remarkably respectful of Rawls' contributions. For the purposes of this article, such criticism is useful both to explain primary source material and to design the specific experiment intended.

C. *Designing Application of Rawls to Family Law*

In adapting a theoretical construction of justice as fairness to the specialized issues of family law, setting the specific parameters is useful. It is assumed that the original position does not predate the whole of society. It may be further assumed that the present focus is on maximizing just results specifically for the designated field. While matrimonial relations are often inter-disciplinary, the limited nature of this experiment would only address other areas of the law by extrapolation rather than directly. Furthermore, while this experiment will proceed through a sequential analysis, specific constitutional limitations will be ignored to instead proceed from principles, to legislation, and finally application. Furthermore, such an analysis would be an application of Rawls rather than inspired from his works.⁴⁰

Considering constructive criticism highlighted above in Section I(B), further modifications are appropriate. First, the original position, while still employing a veil of ignorance, will be less rigid. Decision-makers here will lack knowledge about their particular station and abilities. They will also be devoid of knowledge concerning their natural advantages, if any, from either birth or social status. As indicated above, the construct here involves formed society eliciting principles for a particular area of law with similar parameters rather than nation-building from whole cloth. To promote the desired ends, the decision-makers in this modified

³⁹ *Id.*

⁴⁰ At least one prior effort has considered Rawls in the context of marital contracts. Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998). While paying tribute to Rawls and noting that the veil of ignorance may be useful to conceive of a single marriage regime, the authors then transition to considerations of how individuals, freed from any ignorance of their status, may make decisions in full awareness of their circumstances. *Id.* at 464.

original position will be aware of the general nature of matrimony, although not fully aware of any existing or proposed legal structures related to marriage. Stated differently, the original position assumes marriage already exists but is not fully defined so that the decision-makers do not suffer from the psychological disadvantage that would naturally follow if they had no knowledge of marriage itself. Restating the goal, this modified experiment will proceed from an original position beyond the state of nature but without fully formed legal structures. The veil of ignorance, so conceived, will be less rigid than would be required in a faithful application of Rawls while in keeping with the major premises of the source material. Finally, decision-makers for these purposes will have information beyond the nature of abilities and will have a rudimentary understanding of social structures, marriage in particular, although not the governing law that their hypothetical status tasked them with creating from principles forward.

Finally, here, while the focus is broadly on family law, particular issues merit special attention. First, the original position here assumes marriage exists in the abstract but not as a fully formed institution. For that reason, the nature of marriage itself forms part of the discussion. Second, to properly understand principled creation of marital institutions the decision-makers must also reflect on the nature of dissolution. This concern is partially subsumed within the first point, and more specifically how to form and dissolve a marriage. However, specific to divorce, consideration of matrimonial issues necessarily requires addressing division of marital property. Third, while less frequent and therefore less pressing than other financial issues, spousal support remains a part of existing matrimonial law and is therefore within the purview of projections from the modified original position. Finally, custody and child-related issues often permeate divorces for spouses that have children. However, otherwise operative constraints do not apply in the same way to child-related issues. A preliminary consideration of the original position, and the purpose of the veil of ignorance, involved restricting knowledge to avoid self-interested decision-making. Those same considerations would not apply with equal force to child-related issues.⁴¹

⁴¹ While the self-interested behavior of parties to custodial litigation may be assumed, the purpose is simply to note deviation from the otherwise operative assumptions that limits application here.

II. Past and Present Matrimonial Law: A Survey of the Status Quo

A. *What Is Marriage?*

Principles of law necessarily demand attention to civil, rather than religious, institutions. Modern discussions of the nature of marriage often involve discussion of marriage as a status, as quasi-contractual, or as something else. However, regardless of how marriage may be characterized, it carries at least some religious connotations. As a matter of history, and in considering first principles, marriage as an institution predates matrimonial law. As Professor John Witte, Jr. notes in his description of marital evolution, that transition has its genesis as a sacramental model.⁴² Development of marital status followed through Protestant reformation, where it lost some of its previously attributed sacred character before acquiring features of covenant and finally liberalized blending with elements of contract.⁴³ Prior to modern developments, marriage as an institution slowly moved away from religion and towards civil law as equality gained a stronger foothold in both marriage and the law.

Modern considerations of marriage, and how even authoritative sources conceive of marriage, occupy strange linguistic and conceptual spaces that are often contradictory. Marriage maintains features of status, conferred and controlled by the state, which concomitantly implies that the institution is rather more than a private familial arrangement.⁴⁴ But that hardly answers the question. In the stably evolving law, which refuses to stand still, the ancient command of state-controlled status gave way to more modern conceptions of marriage as contracts. While any developments towards marriage as contract, and thus privately controlled, did not gain immediate sanction, they did find contemporaneous and unequivocal expression of an answer to the seeming divide. What is marriage? “It is contract,” at least according to Sir Henry

⁴² JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997).

⁴³ See *id.* at 9-11.

⁴⁴ JOEL PRENTISS BISHOP, MARRIAGE AND CONTRACT (1852). See also Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1 (2010).

Maine.⁴⁵ The U.S. Supreme Court weighed in to clarify with further shades of grey:

[W]ilst marriage is often termed by text writers and in decisions of courts as a civil contract . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change.⁴⁶

The lack of clarity matters here. For if marriage is status, then efforts to create principles that allow formation of the marital relationship must take place consistent with progression from principle to constitution in pursuit of justice. Conversely, if marriage is conceived of as a contract then constructing principles for marriage occurs earlier in the process of applying Rawls' analytical framework. As contract, marriage principles would compel those in the original position to consider circumstances that would maximize liberty and avoid resulting inequality to the benefit of all.⁴⁷

In the process of determining when to answer this question, and thus which analytical framework applies, perhaps the distinction and dispute remain avoidable. Even family law casebooks add to this uncertainty, weaving between status, contract, or unspecified amalgamation devoid of separate nomenclature.⁴⁸ More important than the continued waffling between options that appear to exist along an unspecified continuum, perhaps the solution lies in the insightful observation that the entire effort is a futile undertaking best replaced by tools from legal realists focused on effects.⁴⁹ Discarding classical legal thought would certainly shift the focus, but may also clarify the consequentialist focus seemingly compelled by a structured thought experiment designed to produce

⁴⁵ HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 169 (Legal Classics Library ed., (1982) (1861).

⁴⁶ *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888) (alterations as quoted in Rasmusen & Stake, *supra* note 40, at 454-55).

⁴⁷ See *supra* text at note 15.

⁴⁸ Halley, *supra* note 44, at 2. Professor Halley tracks five separate case law texts and draws the parallel structure in each. *Id.* at 2 n.1 (additional citations omitted). Note the timing here. In the years prior to the U.S. Supreme Court declaring that same-sex couples held a constitutionally protected right to enter marriages, attention focused not merely on the legal disputes but the status of marriage itself in this context. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁴⁹ Halley, *supra* note 44, at 46.

justice.⁵⁰ The suggestion is counterintuitive in consideration of Rawls' focus on pre-legal constructs. But perhaps the alignment of goals is instructive in a modified thought experiment directed at merely a single area of law with better-informed participants.

Furthermore, the general trend away from fault-based divorce may further confuse the inquiry.⁵¹ Marriage as contract would imply breach-based dissolution but would, in appropriate jurisdictions, also countenance efficient breach.⁵² As to impact on status characteristics, controlled statistical analysis of increased divorce rates between 1953 and 1987, when all states adopted some form of no-fault regime, certainly cements state authority over the means of terminating marital relationships.⁵³ With increased power to define the nature of the relationship, marriage acquires additional elements of status. The question of status remains one of the priorities according to Rawls while complications due to any grounds for divorce likely necessitate early consideration.

⁵⁰ See generally Karl Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281 (1932).

⁵¹ See STANFORD N. KATZ, *FAMILY LAW IN AMERICA* 2-3 (3d ed. 2021) (noting the trend away from the sole focus on fault and the shift towards substantive issues). See also Paul A. Nakonezny, Robert D. Shull, & Joseph Lee Rodgers, *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477 (1995).

⁵² The contractual question also has strange implications for potential remedies. For if marriage is a contract, should such a characterization invite attention to contractual remedies? Marital contracts, to the extent they are characterized as such, necessarily concern unique subject-matter that as a question of remedies invites attention to specific performance as one form of equitable relief. To the extent specific performance, as a matter of common law, requires that legal remedies are insufficient then marriage may be a paradigmatic example of how courts cannot use damages alone to heal damages from breached promises. But it strains credulity to imagine courts requiring parties to specifically perform their marital obligations by remaining married, at least under modern conceptions of domestic institutions. Whether courts may equitably enforce the substance of marital promises as part of dissolving marriages is a more difficult, and more worthy, topic. Specific performance of services is generally disfavored just as continued compelled marriage would be unconscionable. See, e.g., 81 C.J.S. *Specific Performance* § 96 (1955). But equitable remedies may afford courts the ability to consider crafting remedies that enforce the substance of prior promises if not requiring their exacting execution as originally intended.

⁵³ See Nakonezny et al., *supra* note 51, at 480.

At the same time, a few states have also created separate status for “covenant marriage.”⁵⁴ While the impact has been more limited, this partial shift towards choice in forms of marriage does suggest a system capable of accommodating, and enforcing, more individualized options.⁵⁵ Additional options, separate from marriages but sharing some common features, are also available in some foreign jurisdictions, further expanding the nature of relationships.⁵⁶ Perhaps most significantly, a majority of states have adopted one of two uniform acts concerning marital agreements.⁵⁷ Greater flexibility, and consistency in enforcement, affords parties to marriages the option to form agreements that alter and amend their marital obligations. Trends toward greater enforceability of marital and premarital agreements have also invited both criticism and state-specific variation, generally in favor of additional protections for the parties.⁵⁸

Consistent with criticism of marital agreements, if principled consideration of family court systems yields divorce structures more akin to contract, the threat of inequality may be heightened. First, greater power in negotiating agreements may heighten the inherent disadvantages of parties often possessed of asymmetric information.⁵⁹ To the extent marriage may even be comparable to any market, this asymmetry invites distortion that would exacerbate inequality. Furthermore, realist assumptions about law may

⁵⁴ See, e.g., ARIZ. REV. STAT. ANN. §§ 25-901–906 (2011); see also ARK. CODE § 9-11-807; LA. REV. STAT. § 9:9:273. These three states currently have similar regimes.

⁵⁵ See generally Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 12, 17 (2012).

⁵⁶ *Id.* at 34-37.

⁵⁷ See UNIF. PREMARITAL AGREEMENT ACT (UNIF. LAW COMM’N 1983); See also UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (UNIF. LAW COMM’N 2012). A total of twenty-eight states and the District of Columbia have adopted at least portions of one, or both, uniform acts. See *Enactment History – Premarital and Marital Agreements Act*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?communitykey=2e456584-938e-4008-ba0c-bb6a1a544400> (last visited Sept. 8, 2024).

⁵⁸ See Atwood, *supra* note 55, at 12, 14, 33.

⁵⁹ See generally William Samuelson, *Bargaining Under Asymmetric Information*, 52 ECONOMETRICA 4 (July 1984). If the asymmetry of parties in routine transaction, such as automobile purchases, is adversely affected by the gap between informed and uninformed participants, the danger to parties to marriages is axiomatic.

have a connection to bargaining theory such that relative power of parties may be indirectly derived from rules governing their disputes.⁶⁰

The dispute over marriage, while worthy of consideration, may be superfluous. Regardless of the legal structures superimposed upon the marital union, perhaps it remains truly *sui generis*. But in the context of considering marriage as part of evaluating how best to form a system of laws surrounding the institution, no conclusion is required as to the current status of marriage law.

B. *Current State of Marital Property Division*

The trend away from fault in marital dissolution refocused attention towards financial considerations of divorcing spouses.⁶¹ Common law property division, based solely on title, gradually yielded to considerations that allowed courts to equitably divide property in relationships recognized, *inter alia*, as economic partnerships.⁶² Nine states recognize community property, where title must yield to the presumption that spouses acquire a one-half interest in property acquired during the marriage regardless of title.⁶³ Absent recognized exceptions to general rules, four of nine community property states adhere to an even division of thus-acquired community property while the remaining five incorporate some principles of equitable distribution.⁶⁴ The now-prevailing method for property distribution revolves around “equitable distribution,” which incorporates factors the courts must weigh to reach fair divisions of the marital estate. While few states adopted, in toto, the Uniform Marriage and Divorce Act, various equitable distribution schemes are nonetheless inspired by a weighed factors approach alongside additional considerations that might exempt certain

⁶⁰ See Lewis Kornhauser & Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Cf. Halley, *supra* note 44, at 48 (criticizing this view of differential power for reinstating other elements of classical legal at the possible expense of gains made in differentiating competing institutions about the status of marriage).

⁶¹ KATZ, *supra* note 51, at 2-3, 128-29.

⁶² See *id.* at 129-31.

⁶³ See *id.* at 129.

⁶⁴ See *id.* at 129-30.

property from the court's purview or segregate special types of property for disparate treatment.⁶⁵

There are no perfect solutions to the conundrum. Equity is a big little word. Fairness, overall, may require consideration of other means to impact the financial circumstances of the parties.⁶⁶ The trend toward equitable distribution is consistent with rejection of common law systems where title controlled prior to, and exclusive of, equitable considerations. The status of marital property division schemes is the product of a long-trending process that rejected rigidity and sought greater flexibility in the service of shared, but elusive, goals.⁶⁷ The path towards change has been state-specific but trends are apparent.⁶⁸ Agreements concerning marital property, whether prenuptial, marital, or as settlement arrangements after filing litigation, may afford parties some degree of flexibility at various stages of marriage to control distribution of their property. There does not appear to be any resolution of the dispute between discretion versus rigidity. In adopting appropriate schemes, case studies, like case law, may add to understanding but not yield answers to every inquiry.⁶⁹

Turning back to equitable apportionment factors, the various regimes generally share twin and common goals. First, to provide guidance to the courts in reaching equitable distribution awards. Second, to afford flexibility in weighing individual circumstances.⁷⁰ As to the latter point, not all states value flexibility and some jurisdictions have adopted specific limitations on judicial discretion. More specifically, some jurisdictions require trial courts to

⁶⁵ See *id.* at 130-34.

⁶⁶ See *infra* Section II(c).

⁶⁷ See generally Max Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413, 426 (1975).

⁶⁸ See, e.g., Norman Perlberger, *Marital Property Distribution: Legal and Emotional Considerations*, 25 VILL. L. REV. 662, 672 (1980) (noting the development of then-new equitable distribution legislation and its impact on litigants in Pennsylvania).

⁶⁹ See, e.g., Marsha Garison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 76 (2011) (analyzing case studies in an evaluation of efforts to adopt best methods). In appropriate reference here, the author analogizes factors to sentencing guidelines which inform decision-makers while still requiring "messy" decisions which have dramatic impact on individual lives. *Id.* at 88.

⁷⁰ See KATZ, *supra* note 51, at 135.

enumerate specific findings justifying any equitable distribution award while others create a presumption in favor of equal division, at least in the case of long-term marriages.⁷¹ Taken as a whole, the dominant trend unmistakably leans towards creating a judicial guidance framework that empowers trial courts to reach equitable results based on, arguably, predictable factors for consideration. However, to the extent equal distribution is presumed, by statutory mandate or simply in practice, robust statutory schemes providing guidance may approach superfluity.⁷² Limitations on judicial discretion often yield greater predictability. But predictability can come at the expense of individualized consideration. It would be strange indeed to move from common law title theory, through a path of presumed marital property, towards more enlightened equitable distribution schemes, and then revert backwards to presumptions of equal distribution. In equitable division of marital property as in seeking better principles of justice, the tension is between flexibility afforded by additional liberties and the goals of protected equality.

C. *Equitable Considerations in Spousal Support*

Division of marital property is not the only financial consideration in marital dissolution. In states that still provide for alimony, or spousal support, courts may have additional discretion to adjust the financial circumstances of the parties by separate means. Alimony, like other aspects of matrimonial law, has an unfortunate history relative to outdated notions of gender roles. Wives, and only wives, could seek alimony as a substitute for former support during the marriage since they had been deprived of any property during the marriage.⁷³ Alimony law has evolved toward gender-neutrality, although the original purposes for post-divorce support have also necessarily evolved. Discretion in alimony awards may also be problematic, not only in the amount of the award but the extent of relief where lifetime awards remain

⁷¹ *Id.* Conversely, courts do not generally apply such presumptions in short-term marriages

⁷² Stated differently, if courts default as to equitable distribution as a presumed equal division of marital property, statutes providing factors for consideration by the court become far less meaningful.

⁷³ See KATZ, *supra* note 51, at 135.

possible.⁷⁴ Conceptually, alimony is more difficult than equitable distribution because continuing support necessarily creates an ongoing link between severed spouses whereas equitable distribution segregates formerly marital property.

Alimony reform is not a new topic. Identifying trends in alimony is more difficult than in division of marital property. Evolution of gender roles, alongside liberalized divorce with less emphasis on fault and greater attention to financial matters, created the necessity to evaluate both the continuing need for alimony and structural reform.⁷⁵ Lingering gender-specific issues also highlight ongoing problems with alimony, with continuing criticism of alimony systems from the perspective of either spouse.⁷⁶ To the extent marriage is characterized as a partnership, however, decisions made during the marriage are not capable of equitable remedies by division of property alone. Alimony may be analogous to reconciliation of partnership accounts whereby separating business partners divide their partnership property but with allowance for adjustment for capital contributions during partnership. Of course, even that analogy breaks down as business partners would rarely, if ever, be subject to ongoing maintenance awards akin to alimony following dissolution of business partnerships. Nevertheless, social changes in marriage may have eroded, but not eliminated, the need for alimony even while equitable systems for assessing and setting awards remain elusive.⁷⁷

⁷⁴ See *id.* at 137.

⁷⁵ See generally Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197. Evaluating the ongoing rationale for alimony, the question may become as much about the justification for any alimony scheme as a prerequisite to reform discussions, including but not limited to any remaining moral justification for alimony. See *id.* at 235.

⁷⁶ See Jennifer L. McCoy, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA ST. U.L. REV. 501 (2005). Here alimony suffers attack for its devastating impact on women while also meriting criticism for fostering involuntary servitude by payor spouses. See *id.* at 516, 521. Both may be true. But as the author concludes, the financial circumstances during marriage do not have a complete solution in division of marital property alone as the decisions during the marriage impact more than just property that exists at the time of dissolution.

⁷⁷ See Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL'Y 41, 51 (2011) (noting the shifting explanation for alimony awards).

Reform efforts have yielded both new alternatives and new problems. Courts in some jurisdictions have new tools to award rehabilitative alimony in appropriate cases, which affords the supported spouse necessary support while, theoretically, decreasing the need for such support over time.⁷⁸ Greater emphasis on delineated factors for determining, first, whether alimony is appropriate and, second, an appropriate award may reduce the uncertainty attendant to wide latitude in making awards. However, some forms of alimony awards, including those with conditional features, may invite spousal discord following divorce.⁷⁹ To the extent equitable distribution alone is insufficient to address the overall financial ramifications of marital dissolution, alimony remains a necessary additional tool for crafting equitable remedies to individualized circumstances.

D. *Child Custody Decisions*

As with the evolution from fault-based to no-fault divorce, the shifting landscape of family law has upended the focus of custody. Where fault was no longer the dominant, and sometimes only issue, in divorces, courts increasingly focused on financial aspects of divorce. Similarly, custody as an issue in marital litigation has become an increasing area of contention in family court litigation. Historically, custody was all but assumed. Even as courts shifted towards the “best interests of the child,” that change in focus predated abolition of the maternal preference typically referenced as the “tender years” doctrine or presumption.⁸⁰ The trend towards uniform law incorporated child-focused factors to guide custody decisions while some states required more detailed proposals focused on parent-specific factors.⁸¹ Modern custody decisions are predominantly child-focused while still incorporating pre-existing parenting practices and parental preferences into the analysis.⁸² Additionally, courts in many jurisdictions have more flexible options for awarding individualized parenting plans.⁸³

⁷⁸ See KATZ, *supra* note 51, at 139-40.

⁷⁹ See, e.g., *id.* at 140-41 (discussing cohabitation condition in alimony and resulting litigation over the ongoing award).

⁸⁰ See *id.* at 145-46.

⁸¹ See *id.*

⁸² See *id.* at 147-53.

⁸³ See *id.* at 154.

No other area of family court litigation shifts focus away from the litigants themselves to the extent necessitated by custody determinations. That shift alters the structural framework for conceptions of marriage, as even where parties enjoy greater flexibility in arranging their own conceptions of marital relations the court reserves authority over children.⁸⁴ Furthermore, child-focused inquiries that direct the court away from the parties also require the court to consider both what is best for the impacted children and what maximizes amelioration of harm.⁸⁵ Similarly, custody decisions are one of the most likely aspects of family court litigation to necessitate expert testimony.⁸⁶ Modern trends have developed additional considerations for custody cases while also shifting the emphasis from the parties.

For purpose of this inquiry, the centrality of best interests' analysis alters the analytical framework as hypothetical decision-makers must consider not merely how to arrange systems for marital relations but contemplate the potential impact on children.⁸⁷ This aspect of marital litigation fits unevenly within the remainder of the applied experiment but cannot be ignored given its potential importance to any system of marital dissolution.

III. Experiment Applied: Resulting Perspectives

Having reviewed the background of the inquiry and existing systems for applying that inquiry to particular issues, the analysis turns first to the parameters for application. Applying Rawlsian

⁸⁴ See UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10 (exempting, *inter alia*, issues related from children from enforceability in premarital or marital agreements.)

⁸⁵ JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN, & ANNA FREUD, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1996). Combining all three books from this child-focused trilogy, the authors detail the necessity of orienting decisions away from parents and towards the minor children.

⁸⁶ *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* (Robert M. Galatzer-Levy & Louis Kraus, eds. 1999) (detailing multiple aspects of expert inquiry to inform custody decisions, including child psychology, custodial evaluations, and special medical needs of children).

⁸⁷ This divide raises the question of which vision of public reason—Rawls' separation of moral arguments from political discourse or communitarian ideals of individuals linked to communities—provides a more secure foundation for marginalized and vulnerable groups. See ROBERT L. HAYMAN JR., NANCY LEVIT, RICHARD DELGADO, STANLEY FISH, & JEAN STEFANCIC, *JURISPRUDENCE: CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM* 23-24 (2021).

assumptions to a modified original position compels some changes. First, the modified original position here does not predate the whole of society. Second, the focus is on maximizing just results specifically for the designated field with a necessarily limited inquiry. This does not ignore relevant aspects from other areas of law or disciplines but does distinguish this experiment from the source material. Just as with the original theory, application here will skip constitutional limitations to instead proceed from principles, to legislation, and finally application.

Application of the modified original position involves further changes to Rawls' assumptions. It decreases the rigidity of the veil of ignorance. While decision-makers here will remain ignorant of their particular station and abilities, and devoid of knowledge concerning their natural advantages, if any, from either birth or social status, knowledge about the nature of matrimony is presumed. However, ignorance is required as to any existing or proposed legal structures related to marriage. In the original position, marriage exists but awaits full definition so that decision-makers do not suffer from the psychological disadvantage that would naturally follow if they had no knowledge of marriage itself. Finally, decision-makers for these purposes will have information beyond the nature of abilities and will have a rudimentary understanding of social structures, marriage in particular, although not the governing law that their hypothetical status tasked them with creating from principles forward.

In so doing, we proceed with understanding the nature of marriage itself forms part of the discussion. Second, to properly understand principled creation of marital institutions the decision-makers must also reflect on the nature of dissolution. The thought experiment requires, specifically, how to form and dissolve a marriage. This must address both marital property and alimony as a means of resolving the overall financial status of the parties. Finally, child issues necessarily impacted by divorce are relevant but less capable of direct application in the limited nature of the experiment.

A. *Guiding Principles*

From the modified original position, with its accompanying veil of ignorance, application proceeds first with consideration of principles from such status. In stating such principles, the decision-makers are necessarily referring to preconditions for marriage in

the application of announced principles. From this original position, the following principles emerge:

- (1) Each person has the same indefeasible claim to equal status within the marital relationship, compatible with any inequalities subject to the following conditions: first, they are the product of freely chosen options within the marital relationship, and second, inequality is justified by exercise of liberty within allowable constraints (consequential principle).
- (2) Each person is entitled to maximum liberty of choice consistent with obligations to their spouse and constraints necessitated by the marital relationship.

The emerging principles borrow from Rawls' original formulation but invert their structure. The priority principle, previously applied to maximize total liberty, now demands that the parties arrange their relationship such that they maximize their equality. Exception is allowed solely where the product of choice consistent with the marital relationship and liberty of action is compelled by the second principle. Protection for liberty, while retained, yields to equitable concerns. The resulting marital relationship does not extinguish liberty, and specifically protects liberty of action. However, allowable choices are naturally constrained by the nature of the marital relationship itself. Inequality is permissible, but only as a result of choice, which suggests the consequential principle allows deviation but further implying that libertine departure from equality will also impart consequences.

Proceeding towards sequential analysis, and applying these first principles, attention turns to legislative choices and the extent to which initial principles constrain legislative action. To protect equality pursuant to priority principles, legislative action would be restricted and would dictate the following legislative values consistent with first principles. First, establishing marital relationships must be **predictable**. Predictability serves both equality and liberty interests, but also nods towards the consequential principle within predictable options. Second, marital relationships must be **personal**. Consistent with allowable liberty, and the ability to arrange affairs with an equality-maximizing structure, structural forms emerging from the original position would be personal. In contrast to the original position of Rawls, the decision-makers retain sufficient knowledge to understand the general nature of matrimony. Strictly limiting marital forms, or options upon dissolution, would not necessarily follow from the modified structure.

Finally, and consistent with the personal nature of marital forms, principled application of the structural experiment would produce marital forms that are **flexible**. This malleability is not unlimited, constrained at least by commands of equality and necessity for predictability. Due to the priority principle, liberty which suggests flexibility must also find constraint by mandated equality. Effectively, equality will establish both a floor and a ceiling between which liberty will afford flexibility.

Proceeding sequentially, principles then yield legislative action subject to the following restrictions on freely democratic choice which is subject to established principles. This analysis contains three phases, in contrast to Rawls' four, but is essentially subject to the same checks as constitution-making in that phase. Legislative action would produce marital structure which may well invert normative forms. While existing structures allow parties to seek counsel to enter marital agreements, legislative dictates here require marital agreement. This result does not suggest fully flexible marriages or a range of options from which putative spouses merely identify their menu choices. Rather, marital contracts would be educational to the parties. This would not require a course of study. But to ensure equality, allow liberty, and maintain predictable forms, marriage cannot proceed in the absence of features currently associated with pre-marital agreements. Accordingly, the parties would (1) retain counsel, (2) make full financial disclosure, (3) ensure freedom of choice untainted by duress or coercion.⁸⁸ Structurally this may resemble existing practice for pre-marital agreements.⁸⁹ One important distinction arises.

⁸⁸ The application here retains flexibility consistent with options that may be available in various jurisdictions. Covenant marriages would not necessarily be excluded but would not be required. [That is the current state of the law in Arizona, Alabama, and Louisiana.] Individual states may allow greater flexibility.

⁸⁹ Specifically, enforceability of agreements under the uniform act requires, *inter alia*, voluntary consent, access to counsel (or adequate waiver), and full disclosure. See UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT, *supra* note 84 at § 9. Case references in the official Comment delineate examples of structural requirements applied. See, e.g. *Marriage of Bernard*, 204 P.3d 907, 910-13 (Wash.2009) ("finding agreement 'involuntary' when significantly revised version of premarital agreement was presented three days before wedding"); *Ware v. Ware*, 687 S.E.2d 382, 387-91 (W.Va. 2009) ("*access* to independent counsel required, and *presumption of validity* for premarital agreement available

The result here does not require agreement of the parties. Parties retaining both flexibility and predictability may freely choose to enter marriages subject only to the legislative constraints set forth below.

B. *Freedom of Contract – Constrained*

While parties pursuant to procedural protections would not be required to enter specific marital agreements, contractual freedom like existing structures for marital agreements is permissible. The essential framework for pre-marital guidelines satisfies the prerequisites for marital agreements should the parties elect to proceed. But options here must be limited. First, and in contrast to current uniform law, enforceable agreements must not exceed the bounds of conscionability either at the time of execution or at the time of marital dissolution.⁹⁰ Consistent with current uniform law, unconscionability is a question of law for courts.⁹¹ However, complete liberty must still yield to equality. The parties would not retain contractual capacity to prevent all property from becoming marital property. The parties would not retain absolute authority to waive alimony – subject perhaps only to conscionability of enforcement. The structure of marital agreements, if anything, would more closely resemble partnership agreements where the parties may define their roles and some procedures upon dissolution. However, the parties could not vary the essential nature of the partnership, the fiduciary nature of the marital relationship,

only where party challenging the agreement actually consulted with independent counsel” [emphasis in original Comment]); *Friezo v. Friezo*, 914 A.2d 533, 549, 550 (Conn.2007) (explaining after survey of disclosure requirements that “[The standard] requires each contracting party to provide the other with a general approximation of their income, assets and liabilities.”).

⁹⁰ See UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 9(f).

⁹¹ See *id.* at § 9, Comment (“This language broadly reflects the standard applied in a number of states.” (citing, e.g., Connecticut Code § 46b-36g(2) (whether premarital agreement was “unconscionable . . . when enforcement is sought”); N. J. STAT. § 37:2-38(b) (whether premarital agreements was “unconscionable at the time enforcement is sought”); N. D. CENT. CODE § 14-03.1-07 (“enforcement of a premarital agreement would be clearly unconscionable”); *Ansín v. Craven-Ansín*, 929 N.E.2d 955, 964 (Mass. 2010) (“the terms of the [marital] agreement are fair and reasonable . . . at the time of divorce”); *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011) (“the terms of the [marital] agreement are . . . not unconscionable at the time of dissolution”).

or allow dissolution to ignore that marriage – as a partnership – necessarily involves contributions, benefits, burdens, and rights from both.

Marital agreements here would be contrast to agreements that may otherwise emerge under existing law as a proposed solution to comprehensive legislative action on all areas of matrimonial law. Distinguished from prior efforts to allow marital agreements to fulfill the goals of personalizing the marital contract, the parties to marriages in this application would be constrained by limits imposed by the modified original position.⁹² Limitations on marital agreements are compelled by the nature of marital forms emerging from the modified original position and necessary veil of ignorance. Parties designing marital forms, without full knowledge of their status, would certainly want disclosure prior to marriage but are not entitled to pierce the veil of ignorance in setting out rules of construction. Principles must proceed to specific applications. Faithful to the intention of designing structures constrained to protect liberty but maximize equality, marriage would necessarily change in structural form.

C. *Equitable Considerations in Absence of Agreement*

Where parties are not compelled to agree, default statutory provisions must follow the sequential application of emerging structures here. Thus, each area of existing law requires brief attention.

1. *Division of Marital Property*

Default rules for property here follow structurally sound existing principles, but with an important addendum. Under existing practice, most jurisdictions apply some version of equitable distribution with statutory guidelines for making awards.⁹³ From behind

⁹² See Rasmusen & Stake, *supra* note 40, at 464. (“The veil of ignorance can and should be lifted by asking thousands of individual decisionmakers, with full awareness of their position, to choose rules to fit their own goals and aspirations.”) While not a criticism of this earlier work, it remains a proposal inspired by Rawls rather than an application of Rawlsian principles. While freely chosen marital agreements may avoid some current problems, greater freedom to contract – without the constraints of the veil of ignorance – merely substitutes new inequities for current structural problems.

⁹³ KATZ, *supra* note 51, at 135.

the veil, parties seeking predictability would require specified factors to aid in division. But just as existing practice often collapses into default equal divisions, even equality maximizing principles here do not require that result. Rather, courts would not be constrained by a presumption of equal division but would be required to delineate the basis for decision. While not completely consistent with predictability, no system – however conceived – is completely predictable. Requirements for decision here protect predictability by allowing appellate review. Furthermore, the liberty interests that are also implicated allow parties to arrange unequal contributions that may deserve consideration in equitable distribution.

2. *Alimony*

Similar to equitable distribution, alimony provisions resulting from application of the veil do not produce wholly new systems. However, modifications would emerge. Similar to existing practice in at least some jurisdictions, decision-makers behind the veil would want factors for inclusion in any alimony decision.⁹⁴ However, alimony may be constrained by agreement subject to conscionability. Second, application of alimony would follow a sequential analysis. First, the court must determine that an award – any award – is justified based on statutory guidelines. This prerequisite aids in predictability. Next, only after preliminary decisions could the court apply factors to produce an alimony award. Finally, and in departure from existing practice, courts would be required to assess alimony in concert with equitable distribution.⁹⁵ To the extent alimony is a tool to equitably sever the marital relationship where other options are insufficient, courts applying structural analysis produced from behind the veil would necessarily be compelled to find that alimony alone is sufficient to reach equitable results.

⁹⁴ See KATZ, *supra* note 51, at 136.

⁹⁵ See UNIF. MARRIAGE AND DIVORCE ACT § 307-308 (suggesting in one alternative proposal for division of property that courts consider whether apportionment is “in lieu of or in addition to maintenance” while not specifically requiring consideration of marital property division as a prerequisite for alimony); *see also* KATZ, *supra* note 46, at 136 (explaining that only eight states have adopted the Uniform Marriage and Divorce Act but pointing to uniform law as a basis for other statutory schemes with enumerated factors for division of property).

3. *Custody*

In limited application, custody would also follow at least some existing practice. The best interests of the child would remain the guidepost here. But important qualification remains as the structural forms produced from the modified original position do not necessarily compel decision-makers to incorporate best interests as part of this analysis. Parties that are aware of marriage, and aware of children, but ignorant of their role may well choose to prioritize children. But that prioritizing would not be from self-interest, which would not apply. Instead, emerging best interest analysis from behind the veil would produce a structure of factors which each focus specifically on the child. Parenting plans and detailed parental analysis would not only receive little attention, but decision-making behind the veil also suggests that parties would not want the burden associated with self-evaluation. Subject to minimum guarantees, such as protecting the parent child relationship for both parents, the emerging custody structure would remain flexible but be more purely child focused.

IV. Conclusion

Blind entry to marriage, from a legal and factual perspective, can produce unforeseen results. Semi-blind decisions from behind a veil of ignorance would hardly produce perfect results. But in designing a system, however conceived, to allow human actors to enter fundamental but challenging relationships, better is good enough.⁹⁶ Designing marital forms without regard to full knowledge that might be possible by contracting parties under existing structures would undoubtedly produce hedging by those seeking to protect minimum guarantees. The primary conclusion that emerges here is that both liberty and equality would remain paramount, consistent with Rawls; however, inversion of those first principles and application to existing practices may well be

⁹⁶ Thus echoing Voltaire's reminder to "not let the best be the enemy of the good" M. DE VOLTAIRE, *LA BEGUEULE*, CONTE MORAL [THE PRISY: A MORAL TALE] A3 (1772).

more consistent with the fundamental nature of marital relationships and the impulse to protect the interests of children. This theoretical construct, as an applied thought experiment, may assist legislators in pursuit of the great desideratum of more equitable matrimonial laws.