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Transitional Equality

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TRANSITIONAL EQUALITY

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ABSTRACT

Legal discussions of inequality often focus on the virtues of one legal status or regulatory structure over another, but a guarantee of the right to a particular legal status does not ensure a lived experience of equality in that status. In moments of legal change, when a person or class of persons obtain a new status or gain rights that had previously been denied to them, the path from one legal status to another becomes critically important and may itself be impacted by race, gender, age, and other factors. The process of transitioning to a new status can be complex and burdensome in unexpected ways, and lack of attention to that process can impair persons' inhabitation of their newly acquired legal rights.

This article examines the underexplored issue of inequality in the process of shifting legal relational status and posits a new framework of "Transitional Equality" to address vulnerabilities that may arise during the process of transition itself. Focusing on the constitutional law of intimacy, this article discusses the specific case study of tens of thousands of same-sex couples who have transitioned from the legal status of unmarried to married after the Supreme Court's 2015 decision on marriage equality in Obergefell v. Hodges. Same-sex couples face substantially different process burdens than different-sex couples when moving from from unmarried to married, and for some cou-

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ples the burdens may be exacerbated by racism, poverty, and other structural obstacles. Achieving the promise of equality requires attention to such factors and their impact on the lived experience of becoming married.

Transitional Equality is a framework for identifying obstacles to full enjoyment of new legal rights and building resilience in the process of moving from one legal relational status to another. This article situates this new framework in reference to critical legal theory, constitutional doctrine, legal policy, and areas for future policy innovation and sociolegal research.

We are in the midst of a robust public discussion of various forms of inequality, including in regard to gender and sexuality, economic opportunity, health, criminal justice, immigration, education, and other areas. Transitional Equality provides a framework for identifying obstacles and solutions on the path to achieving equal rights that have been promised under law.

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INTRODUCTION

Law and legal scholarship struggle frequently over the comparative virtues of one regulatory regime or category over another.[1] Scant attention is paid to the process of transitioning from one legal status category to another, its social, psychological, and legal dimensions, attendant challenges, and opportunities for fostering resilience.[2] During times of social movement and rollback across a variety of domains, including within the financial, technological, and health care sectors, resilience through legal status transition for individuals, families, and communities is an important but woefully under-examined area.[3]

This article takes up this issue in the context of the constitutional law of family to advance the concept of transitional equality.[4] I argue that a robust account of equality and justice for families must attend to the sociolegal process of claiming rights through legal status transitions. This transition may go less noticed in situations representing movements into favored legal status categories, given the social progress such access promises. I highlight some ways in which the day-to-day experience of legal status transitions demands a multidimensional concept of legal process. I also argue for a multidisciplinary conception of resilience as a basis for achieving transitional equality.

In a recent essay, I embarked on a consideration of the Supreme Court's historical decision in *Obergefell v. Hodges*[5] and the ensuing nationwide marriage equality giving rise to what I termed "relational migration," the process of transitioning from one relationship status to another.[6] Since the *Obergefell* decision, over 157,000 same-sex couples have married in the United

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1. *See generally* Suzanne A. Kim, *Relational Migration*, 77 OHIO ST. L.J. 981 (2016).

2. *Id.* at 1007–08.

3. I thank the Vulnerability and the Human Condition Initiative for fostering important dialogue on issues of legal transition.

4. There is much to explore in sociolegal aspects of inequality in status shifts, including in emerging or ever-evolving areas like cryptocurrency, artificial intelligence, cannabis, and health care.

5. 576 U.S. __, __, 135 S. Ct. 2584, 2604 (2015) (holding in part that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty").

6. Kim, *supra* note 1, at 981–82.

States.[7] Many of these couples were in long-standing relationships, often for decades, prior to marrying.[8] The availability of marriage importantly offers greater legal protections to families than those available in a pre-*Obergefell* world.[9] In this prior work, I have focused on a different question than the fortunately decided issue of constitutional access to legal marriage. I have previously introduced my argument that a robust account of equality and justice for families must capture the sociolegal process of claiming rights through legal status transitions.[10] This transition may go less noticed in situations representing movements into favored legal status categories, given the social progress such access promises.[11] I have begun to highlight some ways in which relational migration gives rise to important transitional status

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7. *Id.* (citing Adam P. Romero, *1.1 Million LGBT Adults Are Married to Someone of the Same Sex at the Two-Year Anniversary of* Obergefell v. Hodges, WILLIAMS INST. (June 23, 2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Obergefell-2-Year-Marriages.pdf [https://perma.cc/5YEP-MSSJ]).

8. Kim, *supra* note 1, at 981 (citing Ellen D.B. Riggle et al., *Impact of Civil Marriage Recognition for Long-Term Same-Sex Couples*, 14 SEXUALITY RES. & SOC. POL'Y 223, 223 (2017)) ("Survey findings suggest that many of the couples who marry immediately after a state changes its law are on average older and have been in their relationship for many years, compared to different-sex couples who marry. For example, the average age of same-sex couple members who married shortly after marriage became legal in France, Massachusetts, Illinois, and several provinces in Canada was approximately 10 years older than different-sex couple members marrying in the same period of time."); Esther D. Rothblum et al., *Comparison of Same-Sex Couples Who Were Married in Massachusetts, Had Domestic Partnerships in California, or Had Civil Unions in Vermont*, 29 J. FAM. ISSUES 48, 62 tbl.2 (2008) (finding same-sex couples had been living together an average of eleven years prior to their marriage during the first year that same-sex marriages were available in Massachusetts). According to Gallup poll results issued nearly one year after the *Obergefell* decision, "roughly half of all cohabiting same-sex couples are married, up from 38% a year ago." Jeffrey M. Jones, *Same-Sex Marriages Up One Year After Supreme Court Verdict,* GALLUP (June 22, 2016), http://www.gallup.com/poll/193055/sex-marriages-one-year-supreme-court-verdict.aspx?version=print [https://perma.cc/6FR8-FFT9]. As discussed previously, "[i]t is likely that at least some of these married couples were in cohabiting relationships prior to marriage." Kim, *supra* note 1, at 982 (citing William Wan, *Gay Marriages Way Up a Year After U.S. Supreme Court Legalization*, WASH. POST (June 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/06/22/gay-marriages-way-up-a-year-after-u-s-supreme-court-legalization [https://perma.cc/5D6N-JCA9] ("[M]any same-sex couples 'who were already living together got married in the past year,' even though others 'stopped living together or considering themselves to be domestics partners.'")).

9. Kim, *supra* note 1, at 987–88.

10. *Id.* at 1001.

11. We see similar dynamics evident in other contexts in which legal change is understood categorically as a form of social progress. *Id.* at 990 (citing KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 184–96 (2006)); *see* RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 61–75, 184–96 (2001); *see also, e.g.*, Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1428–29 (2006).

questions best viewed through a multidimensional lens of legal process.

In this article, I situate relational transition and its process in a broader context of transitional equality, engaging insights from sociolegalism, social-psychology's procedural justice, and vulnerability theory as pathways toward building more robust equality for families. I continue to challenge a vision "of legal frameworks as existing statically alongside one another" to "bring[] the transition process front and center."[12] This focus conceptualizes transition more broadly than traditionally conceived, including alongside technical legal process, systemic, social, and psychological aspects of relational migration.[13] This expanded view of the transitional process has sought to "uncover fluid engagements between form and social practice within legal relational categories, including marriage."[14] I have argued that this "non-binaristic conception of legal categories further exposes ways in which formal access to rights is not self-effectuating" and can "reveal the complex and multi-dimensional aspects of status change."[15]

The present article further examines the interplay between select legal questions and extralegal impacts, giving rise to unique challenges in the transition into the marital regime for same-sex couples. While formally "equal," people transitioning into marriage—especially when considering age and gender—encounter unique process burdens occasioned by these distinct legal challenges and broader contexts of legal and social uncertainty. Additionally, race and socioeconomic status are likely to play important roles in experiences of transition into marriage. Those who marry, among different-sex couples, are more commonly socioeconomically privileged. Accordingly, these couples' experiences are less instructive for understanding how class and race may affect relational transition for same-sex couples. The demographic profile of same-sex married couples is a work in progress;[16] as as-

12. Kim, *supra* note 1, at 983.

13. *Id.*

14. *Id.*

15. *Id.*

16. It is likely that this picture will take a number of years to develop, due to widening data gaps, especially those concerning gender and sexual minorities in the United States. In March of 2018, the Department of Health and Human Services eliminated questions about LGBT people from the following two surveys: *The National Survey of Older Americans Act Participants* and the *Centers for Independent Living Annual Program Performance Report*. Praveen Hernandez, Opinion, *The Census Won't Collect L.G.B.T. Data.*

pects of this view become clearer, however, legal and social science scholars will do well to attend to this picture to address the process of relational transition for same-sex couples—and all families—including aging couples and those with children.[17]

This article pursues two broad goals. The first is "substantive" in nature—to highlight the connection between relational status transition and equality. In doing so, this article connects to varied scholarship in equality law in domestic and international contexts.[18] The second is methodological. I seek, through an intentional embrace of various disciplinary standpoints, to uncover the richness of lived experiences of movements across legal status categories, focused on the intimate sphere. In so doing, I set forth transitional equality as crucial for social equality, which is necessarily a dynamic and multilayered enterprise. Focusing on transitional equality provides an important opportunity to consider the role of advocates, legal education, and systemic reform in bolstering social equality and resilience.

In identifying transitional equality, this article seeks to bring into dialogue and enrich insights from three literatures, sociolegalism, social psychological discourse on procedural justice, and legal theory on vulnerability. Sociolegalism guides us toward a view of law as nested within society and provides a rich opportunity to address distributive equality and gaps between law on

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That's a Problem, N.Y. TIMES (May 10, 2017), https://www.nytimes.com/2017/05/10/opinion/the-census-wont-collect-lgbt-data-thats-a-problem.html [https://perma.cc/9T7P-NUUF] (noting that without data on sexuality and gender identity, "we don't know the size of the LGBT population or how that population is geographically distributed"); Mary Emily O'Hara, *L.G.B.T. Americans Won't Be Counted in 2020 U.S. Census After All*, NBC NEWS (Mar. 29, 2017, 1:27 PM EDT), https://www.nbcnews.com/feature/nbc-out/lgbtq-americans-won-t-be-counted-2020-u-s-census-n739911 [https://perma.cc/JMV7-B3H4] (noting that the exclusion of LGBT Americans from census data "makes it challenging for federal agencies and researchers to accurately track the size, demographics and needs of the community"). Notably, the 2020 United States Census will include a question about whether a respondent is in a same-sex or an opposite-sex relationship, but this question is not a sufficient substitute for independent questions regarding sexual orientation and gender identity. *See* U.S. DEP'T OF COMMERCE, QUESTIONS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY 65 (2018), https://assets.documentcloud.org/documents/4426784/Planned-Questions-2020-Acs.pdf [https://perma.cc/YHG4-6PPH].

17. We might infer greater racial and ethnic diversity amongst same-sex married couples than among different-sex marriage couples, as same-sex couples are more likely to be interracial or interethnic than different-sex couples. Gary J. Gates, *Same-Sex Couples in Census 2010: Race and Ethnicity*, WILLIAMS INST., https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-CouplesRaceEthnicity-April-2012.pdf [https://perma.cc/6RJ6-KDXP] (last visited Apr. 1, 2019).

18. *See infra* Part VI.B.

the books and law as lived. Procedural justice helps to illuminate the various social and legal burdens that can characterize—and remain hidden—in claims toward greater substantive rights.[19] Vulnerability theory generates ideas for fostering greater social resilience, by which I mean the capacity to respond to change.[20] Connecting these theoretical frameworks uncovers possibilities for how to address vulnerabilities that emerge in status change and engage social and state institutions in building resilience, which I argue is a goal of transitional equality.

As I elaborate upon in this article, a focus on transitional equality sheds light on the ways in which movement into legal status categories, even those involving privileged treatment, is itself a dynamic enterprise. Although dominant understandings of marriage access might suggest immediate family equality, the boundaries and benefits of marriage are not self-actualizing, especially for couples whose relationships have existed in frameworks of incremental or patchwork recognition. Indeed, crossing the legal border from nonmarital to marital relationships for many same-sex couples involves negotiating the very boundaries of the legal category that migrants seek to inhabit. In other words, as couples move into the institutional house of marriage, they must often determine where the walls of that house are located. A focus on transition reveals a range of process encounters, including those pertaining to legal consciousness, access to justice, uncertainty, and impact on the self and family.[21]

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19. *See* Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS 126, 127–28 (J. Roland Pennock & John W. Chapman eds., Plenum Press 1988) (1977); *see also* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 170–72 (1988).

20. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8–10 (2008) [hereinafter Fineman, *Vulnerable Subject*] (engaging vulnerability theory to promote resilience through the law and other social mechanisms, and arguing that vulnerability theory has the potential to "describ[e] a universal, inevitable, enduring aspect of the human condition"); *see also* Kim, *supra* note 1, at 984 & n.10 ("Vulnerability initially should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise."). *See generally* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH (2004) [hereinafter FINEMAN, AUTONOMY] (laying the conceptual foundation later termed the theory of vulnerability).

21. I also intend to connect this inquiry more broadly to considerations of how we understand other kinds of legal migrations, particularly those involving movement toward greater formal equality. These types of legal migration may be viewed as a form of "agentic legal migration," insofar as they bring with them improved formal legal status.

In this ongoing conversation about families and legal status transition, I aim to speak to diverse legal scholars, social scientists, judges, practitioners, policymakers, and those working at the intersections of these groups, with a continuing goal of identifying areas of future inquiry, research, policy innovation, and theoretical expansion within and across law, social science, and policy.[22]

This article proceeds in six parts. First, I assert the importance of the sociolegal dimension of equality. Second, I explore the concept of relational status transition. Third, I set forth three theoretical frames for this discussion: sociolegalism, procedural justice, and vulnerability theory. Fourth, I discuss distinct doctrinal issues arising through the passage from nonmarried to married statuses, that center on the need to confirm the very boundaries of marriage evoked by legal status transition. Fifth, I explore the variety of process encounters connected to these doctrinal questions that inform the experience of relational status transition. Sixth, I offer proposals aimed at bolstering social resilience, taking sociolegal process into account, in order to achieve transitional equality for families. I situate these ideas in reference to critical legal theory, constitutional doctrine, policy and infrastructural innovation, and future directions for sociolegal research. I aim to illuminate in this part, and more generally, how critical legal theory in the context of sociolegalism, procedural justice, and vulnerability can inform and be informed by transitional equality.

I. EVERYDAY EQUALITY

We are in the midst of a vigorous, and long overdue, public conversation about social inequality. Scholarship and public discourse on equality in a variety of disciplines, including law, economics, sociology, psychology, and public health focus on patterns of economic,[23] racial,[24] environmental,[25] and gender inequality.[26]

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22. Kim, *supra* note 1, at 1008–09.

23. *See, e.g.*, THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

24. *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

25. *See, e.g.*, Lindsey J. Butler et al., *The Flint, Michigan, Water Crisis: A Case Study in Regulatory Failure and Environmental Justice*, 9 ENVTL. JUST. 93 (2016).

26. *See, e.g.*, UN WOMEN, TURNING PROMISES INTO ACTION: GENDER EQUALITY IN THE

Inequality presents itself through far-reaching disparities in contexts of income,[27] social mobility,[28] criminal justice,[29] educational access,[30] organizational leadership,[31] and health.[32] Inequalities, of course, manifest on a global level—between and within nations as well.[33]

Legal and social scientific scholarship on inequality, while not necessarily explicitly styled as such, frequently orient toward equality or inequality in outcomes. The study of inequality is comparative, in relation to such social outcomes or endpoints. Law, for instance, takes up as central the attainment of formal access to rights.[34] This framing is understandable, as in many ways, this serves as a foundation for claiming rights.[35] This arti-

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2030 AGENDA FOR SUSTAINABLE DEVELOPMENT (2018), http://www.unwomen.org/en/digital-library/publications/2018/2/gender-equality-in-the-2030-agenda-for-sustainable-development-2018 [https://perma.cc/69P7-BRLJ].

27. *See, e.g.*, PIKETTY, *supra* note 23, at 23–24; *FAQs About the Wage Gap*, NAT'L WOMEN'S L. CTR., https://nwlc.org/wp-content/uploads/2016/09/FAQ-About-the-Wage-Gap-2016-5.pdf [https://perma.cc/FYU5-PE2A] (last visited Apr. 1, 2019).

28. *See, e.g.*, PIKETTY, *supra* note 23, at 239–40.

29. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

30. *See e.g.*, Richard Rothstein & Mark Santow, A Different Kind of Choice: Educational Inequality and the Continuing Significance of Racial Segregation (Aug. 21, 2012) (working paper, Economic Policy Institute), https://files.eric.ed.gov/fulltext/ED537326.pdf [https://perma.cc/55KB-BUDT].

31. *See, e.g.*, AAUW, BARRIERS AND BIAS: THE STATUS OF WOMEN IN LEADERSHIP (2016), https://www.aauw.org/research/barriers-and-bias/ [https://perma.cc/6ZAR-HTCZ].

32. *See, e.g.*, DONALD A. BARR, HEALTH DISPARITIES IN THE UNITED STATES: SOCIAL CLASS, RACE, ETHNICITY, AND HEALTH (2d ed. 2014); U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2015: WITH SPECIAL FEATURE ON RACIAL AND ETHNIC HEALTH DISPARITIES 20 (2016); Myra J. Tucker et al., *The Black-White Disparity in Pregnancy-Related Mortality from 5 Conditions: Differences in Prevalence and Case-Fatality Rates*, 97 AM. J. PUB. HEALTH 247 (2007); Nina Martin & Renee Montagne, *Black Mothers Keep Dying After Giving Birth. Shalon Irving's Story Explains Why*, NPR (Dec. 7, 2017, 7:51 PM ET), https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving -birth-shalon-irvings-story-explains-why [https://perma.cc/2YVQ-9HJ2].

33. *See, e.g.*, BRANKO MILANOVIC, WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY 44 (2005).

34. Within law, a focus on equality examines modes in which constitutional equality doctrine is conceptualized and carried out. This includes examination of equal protection doctrine's origins, construction, modes, promise, and failures.

35. I do not take up here the long-standing and important doctrinal debates within antidiscrimination scholarship about the value of equality frameworks as compared to others for achieving justice. Catharine MacKinnon, Charles Lawrence, Mari Matsuda, and others have asserted antisubordination as a more promising alternative to traditional liberalism's framing based on equality. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32–45 (1987); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 320–21 (1987); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1330–33 (1991). This

cle seeks to carve out a distinct space for sociolegal consideration of equality and to lay a foundation for examining transition in relation to that sociolegal consideration.

What does a sociolegal sphere entail? I use the term "sociolegal" to be loosely interchangeable, or at least encompassing of the "law and society movement."[36] As described by Lawrence Friedman,

> The law and society movement is the scholarly enterprise that explains or describes legal phenomena in social terms. To put it another way, it is the scholarly enterprise that examines the relationship between two types of social phenomena: those conventionally classified as 'legal' and those that are classified as nonlegal.[37]

And while the enterprise contains diversity in method and approach, scholars in law and society share "a general commitment to approach law with a vision and with methods that come from outside the discipline itself; and they share a commitment to explain legal phenomena (though not necessarily all legal phenomena) in terms of their social setting."[38]

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critique focuses on the limitations of an equality framework—requiring, like equal protection doctrine does, that those seeking equal treatment establish similarity or sameness to dominant standards. *See* MACKINNON, *supra*, at 32–45. For instance, as MacKinnon argues, the requirement for sameness sets women and minorities up to meet standards constructed not to be met. *Id.* As I have written elsewhere:

> Furthermore, at worst, women and racial minorities face a doctrinal trap in which they are never meant to gain equality, since women and racial minorities are socially defined as "different." Equality claims ultimately collapse inward, as they are founded on a disingenuous structure that treats sameness and difference as exact opposites, when, in actuality, they bear a hierarchical relationship to one another, with "difference" masking the subordination of women and racial minorities. Therefore, the "difference" that these rights seekers must overcome is actually the subordinated positions they hold in gender and racial hierarchies, respectively.

Suzanne A. Kim, Comment, *"Yellow" Skin, "White" Masks: Asian American "Impersonations" of Whiteness and the Feminist Critique of Liberal Equality*, 8 ASIAN L.J. 89, 90 (2001) (writing about MacKinnon's critique of liberal equality in the context of historical citizenship claims by Asians in the United States).

36. This comports with common usage within sociolegal literature. *See, e.g.*, Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 323 n.1 (2005). According to Silbey, "Although the latter term was originally used more in Europe, it has become conventional in the United States as well." *Id*; *see also* Sandra R. Levitsky et al., *"Legality with a Vengeance": Reclaiming Distribution for Sociolegal Studies*, 52 LAW & SOC'Y REV. 709, 709 (2018).

37. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 763–64 (1986).

38. *Id.* In a nod to the capaciousness, even unwieldiness, of the law and society umbrella, Friedman has written:

> "Law and society movement" is a rather awkward term. But there is no other

Sociolegal scholarship's emphasis on the social lends itself well to considering the everyday aspect of law. This body of work's conceptual starting point of "law in action" sheds light on the recursive relationship between law and legality on the one hand and lived experience on the other. Patricia Ewick's and Susan Silbey's foundational *The Common Place of Law* illuminates the complicated and varied ways in which people engage, resist, and defer to the law.[39] Sociolegal studies are predicated on an assumption that the legal and the social inform one another to varying degrees, that, indeed, these domains take turns shaping one another.[40]

Law and society de-exceptionalizes law as a discipline.[41] This framework conceptualizes law as a mode nested within society, as

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> obvious collective label to describe the efforts of sociologists of law, anthropologists of law, political scientists who study judicial behavior, historians who explore the role of nineteenth century lawyers, psychologists who ask why juries behave as they do, and so on.

Id. An account of the intellectual history of the law and society movement lies beyond the scope of this article. Generally speaking, the law and society movement is commonly observed as having begun in the 1960s, with the Law and Society Association founded in 1964 and the *Law and Society Review* founded in 1966. Lawrence M. Friedman, *Coming of Age: Law and Society Enters an Exclusive Club*, 1 ANN. REV. L. & SOC. SCI. 1, 15 (2005). Lawrence Friedman has located the theoretical origins of the "social study of law," on which law and society is based, within the nineteenth century,

> with figures like Sir Henry Maine, who published Ancient Law in 1861, and Max Weber, who was one of the founding parents. The movement depends on two rather modern ideas. The first is that legal systems are essentially man-made objects—social creations, in other words. The second, which is closely related, is the idea of cultural relativity. Law varies in time and space, according to the conditions of the culture in which it is embedded.

Friedman, *supra* note 37, at 764. Relevant to contemporary studies of inequality focused on antisubordination,

> [s]ociolegal studies employ a variety of qualitative and quantitative techniques for cataloging and exploring the law in everyday life, but the use of first person narratives is often an integral part of these projects. The centrality of these narratives in sociolegal studies methodology provides CRT/CRF scholars with an opportunity to learn from the work of other disciplines and a potential basis to reply to critiques that have been skeptical of the ways outsider scholars use narrative. I suggest that beyond exploring methodological synergies, CRT/CRF scholars should look more generally to interdisciplinary approaches and scholarship to support their methods and advance antisubordination theories.

Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 948–49 (2006).

39. PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE, at xi (1998).

40. *See id.* at 15–17.

41. *See id.* at 18–19.

others are.[42] This insight from sociolegal scholarship, reaching back far beyond American legal realism,[43] paves the way for understanding law itself as subject to social forces, as any other mode of organizing society and regulating people.[44] According to Susan Silbey, sociolegal scholarship's focus "has been decentering, concerned not with what the law is but with what the law does,"[45] and pursues the broad claim that "[l]egal institutions cannot be understood without seeing the entire social environment."[46] This foundation enables us to view legal intervention as one pathway, alongside others, for shaping and being shaped by the world. It opens analytical space for understanding the relationships between legal and nonlegal social dynamics. These insights are particularly important for addressing enduring social challenges and problems, such as inequality in its many guises.

In many ways, the study of inequality is baked into sociolegal research. The dichotomy around which sociolegal scholarship revolves—the gap between law "on the books" and law "in action"[47]—proceeds from a core concern about inequality. We may also think of this as the gap between formal law and law as lived or between formal and substantive equality.[48] Building on these

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42. *See id.* at 16.

43. *See* Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 170 (1987) ("Law and society research has roots far deeper and older than the American realists, origins that lie within the modern conception of law itself.").

44. *Id.* at 165, 173. The intellectual history of law and society and sociolegal scholarship, as it relates to legal realism, lies beyond the scope of this article.

45. Silbey & Sarat, *supra* note 43, at 165.

46. *Id.* Brian Tamanaha's discussion of the sociolegal vision presented by Marc Galanter's far-ranging work applies broadly to sociolegalism. Brian Z. Tamanaha, *A Holistic Vision of the Socio-Legal Terrain*, LAW & CONTEMP. PROBS. 71, 89–91 (2008) ("Above all else, Galanter has a thoroughly social view of law: law is a social product—a complex of activities of real people with socially shared and produced, but individually carried out, legal and nonlegal ideas, beliefs, motivations, and purposes. Law is inseparable from and embedded in—an integrated aspect of—social life. Galanter applies this sociological lens to legal actors as well as to nonlegal actors. He looks at how and what people inside and outside the official legal system think about law, and he examines their activities in connection with law." (discussing Marc Galanter, *The Modernization of Law*, *in* MODERNIZATION 153 (Myron Weiner ed., 1966); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 1–2 (1981); Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 MOD. L. REV. 1, 1–2 (1992)).

47. Silbey & Sarat, *supra* note 43, at 170–71.

48. YOSHINO, *supra* note 11, at 184–96 (2006) (addressing the social and legal imperative to "cover" to assimilate to dominant norms, notwithstanding advances in civil rights law); *see, e.g.*, MORAN, *supra* note 11, at 61–75, 184–96 (2001) (examining the persistence of racial segregation in intimacy); *see also, e.g.*, Maldonado, *supra* note 11, at 1427–29 (2006) (discussing cognitive bias of whites, despite antidiscrimination law advances). We

critically important investigations, a sociolegal consideration of equality could reach even farther.

A. *Minding the Gap*

First, we might explore this gap itself for its social significance. For instance, as Silbey and Ewick ask, what is the relationship between law's perceived legitimacy and its known inequality? Why do people still embrace the law, even knowing that the "haves" usually come out ahead of the "have-nots?"[49] Silbey and Ewick examine the ideological significance of the contradictions within law and legality as a mechanism of its durable hegemony.[50] "Thus, it is precisely because law is both god and gimmick, sacred and profane, objective, disinterested, and a terrain of legitimate partiality that it persists and endures," Ewick and Silbey observe.[51] "It is precisely because people believe that there is equality under law but also understand that sometimes the 'haves' come out ahead that legality is sustained as a powerful structure of social action."[52] This question has particular reso-

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may also bring this scholarship more tightly into consideration alongside constitutional inquiry.

49. Ewick and Silbey pose this question, in relation to Marc Galanter's work, which demonstrated that repeat players benefitted more in the legal system. Patricia Ewick & Susan S. Silbey, *Common Knowledge and Ideological Critique: The Significance of Knowing That the "Haves" Come Out Ahead*, 33 LAW & SOC'Y REV. 1025, 1036 (1999) ("This finding—commonly expressed alternative and opposing stories of law—brings us back to the question we posed at the beginning of this paper: What is the ideological significance of knowing that the 'haves' come out ahead? Is legality rendered imperfect, flawed, and vulnerable because it is understood to be a game as well as transcendent, a realm of power as well as a realm of disinterested decisionmaking? Does an awareness of the structural contradictions of law—knowing, despite formal assurances of equality before the law, that the 'haves' really do come out ahead—lead to critique and disillusionment?" (citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974))).

50. In answering these questions, we suggest precisely the opposite, arguing that the multiple and contradictory meanings of legality protect it from—rather than expose it to—radical critique. For too many years, sociolegal scholars have interpreted the gap between the law on the books and the law in action as a problem, an imperfection in the fabric of legality, something to be repaired. Rather than a flaw, or something to be explained away, we need to think about how the apparent oppositions and contradictions—the so-called gap—might actually operate ideologically to define and sustain legality as a durable and powerful social institution.

Ewick & Silbey, *supra* note 49, at 1036.

51. *Id.* at 1040.

52. *Id.*

nance today, as powerful critiques enswathe our current sociolegal institutions, alongside appeals to their authority.[53]

Ewick and Silbey suggest moving past the conventional framing of law and society scholarship around this gap between law on the books and law in action. They observe, "In an important sense, then, we have moved beyond conventional distinctions between ideals and practices, law on the books and law in action. These distinctions enforce false dichotomies. Legality is composed of multiple images and stories, each emplotting a particular relationship between ideals and practices, revealing their mutual interdependence."[54]

I suggest that, rather than abandoning this framing, we continue to push the sociolegal enterprise to pursue this gap for additional dynamics contained within. Even assuming Ewick and Silbey are right, that the contradictions in law contribute to its social durability, *how* does this happen?[55] A deeper inquiry into sociolegal aspects of everyday equality, focusing on transition, can shed some light.[56]

B. *Distribution*

A sociolegal account of everyday equality might also address the distributive function of law more squarely. Sandra R. Levitsky, Rachel Kahn Best, and Jessica Garrick have observed sociolegal scholarship's consistent push to broaden understandings of what counts as "law."[57] Within this context, they critique the predominant focus within sociolegal scholarship on the state's regulation of behavior, at the exclusion of examining "laws in which

53. *See e.g.*, NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 8–11 (2019).

54. Ewick & Silbey, *supra* note 49, at 1040 ("Because legality has this internal complexity—among and within the schema—it effectively universalizes legality. Any particular experience or account can fit within the diversity of the whole. Rather than simply an idealized set of ambitions and hopes, a fragile bulwark in the face of human variation, agency, and interest, legality is observed as both the ideal (and indeed several different ideals) as well as a space of powerful action. The persistently perceived gap is a space, not a vacuum; it is, in short, one source of the law's hegemonic power.").

55. I would also suggest further exploration about what we should do with this observation, what its normative implications are—from a day to day perspective. But I leave that conversation for another day.

56. *See infra* Part VI.A.

57. Levitsky et al., *supra* note 36, at 710.

the state distributes resources, goods, and services."[58] This focus on regulation as compared to distribution, they argue, diminishes the opportunity to illuminate law's implications for economic inequality.[59]

A focus on transition can itself be a distributive one. The latter inquiry leans heavily on the equality-based foundation of sociolegal scholarship. It accounts for the ways in which law and legal institutions as systems reflect and reinforce inequality. The role of law and legal institutions in the production of inequality should include consideration not just of how people experience the legal system and rights contained therein, as a flat construct, but the many dimensions of how individuals, families, and communities navigate legal systems, migrating across legal status categories as they claim rights. As I discuss in the next part, marital transition provides an explicit frame for the multiple dimensions of moving through the legal system toward claiming rights. This passage for families in the context of marital transition, for instance, is shaped by distributive inequality in a variety of forms, as I discuss in this article.

Marriage's sociolegal constitution and influence—consisting of robust formal law and a rich tapestry of social norms—provides a particularly useful opportunity to consider regulatory and distributive functions of the law and their interplay. Both within marriage and surrounding it, we see the ways in which marriage, by law and norm, regulates and distributes within its boundaries and across families. The transition into this status permits a closer perspective on these regulatory and distributive dynamics, shedding light on marriage status itself and on the experience of transition across legal status categories.[60]

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58. *Id.* at 709–10 ("The law and society community has argued for decades for an expansive understanding of what counts as 'law.' But a content analysis of articles published in the Law & Society Review from its 1966 founding to the present finds that since the 1970s, the law and society community has focused its attention on laws in which the state regulates behavior, and largely ignored laws in which the state distributes resources, goods, and services.").

59. *Id.* at 710 ("We find that sociolegal scholarship has always used 'law on the books' as a starting point for analyses (often to identify departures in 'law in action') without ever offering a programmatic vision for how law might ameliorate economic inequality. As a result, when social welfare laws on the books began disappearing, sociolegal scholarship drifted away from studying law's role in creating, sustaining, and reinforcing economic inequality.").

60. *See infra* Part III.

II. IDENTIFYING TRANSITION

Movements across relationship status categories are not new.[61] Indeed, different-sex couples have moved across the marital boundary routinely. And "[w]hile extensive literatures have developed regarding the social experiences of intimacy outside of and inside of marriage,"[62] there has been very little study of the transition across the marital boundary by any couples—same-sex or different-sex.[63] With nationwide marriage equality a relatively recent phenomenon, researchers have had "little contemporary opportunity to consider this kind of status migration for same-sex couples."[64] Moreover, researchers have lacked opportunities to examine the impacts of marriage on families over time, in the context of same-sex marriage.[65]

Studying the impacts of marriage, and transitional legal experiences, is deeply important for understanding how law works on the ground. This helps to enrich our understanding of how equality and inequality work, apart from formal aspiration. Constitutional legal analysis, painted in broad analytical strokes, is ill-suited to capturing ongoing gaps between social and formal equality. "While legal scholars have commented on gaps between formal and substantive equality and flaws in realizing the promise

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61. Kim, *supra* note 1, at 983.

62. *Id.* (citing PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES (1983); ARLIE RUSSELL HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT (2003); Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561 (2005)).

63. *Id.* at 982–83.

64. *Id.* at 983 (citing KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 23–116 (2015)) (comparing the same-sex marriage movement with marriage experiences of newly emancipated African Americans in the nineteenth century); *see also* Esther D. Rothblum et al., *Narratives of Same-Sex Couples Who Had Civil Unions in Vermont: The Impact of Legalizing Relationships on Couples and on Social Policy*, 8 SEXUALITY RES. & SOC. POL'Y 183, 183–84 (2011) (studying same-sex couples in Vermont who obtained civil unions during the first year Vermont had enacted civil union legislation to legalize same-sex relationships).

65. Kim, *supra* note 1, at 991–92. ("Since the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* held, in 2003, that same-sex couples are constitutionally entitled to marriage access, a body of literature has emerged concerning the impacts of marriage on U.S. couples. This research has generally been conducted on an individual-state basis, based on the piecemeal progression of marriage rights in this country. Only now is qualitative research being conducted in the context of nationwide marriage equality, however, and none of the research is yet longitudinal, which would help capture the impact of marriage over the course of relationships. Research in this developing area, however, highlights important experiences of same-sex couples in transitions into marriage and in this transitional moment in history." (footnotes omitted)).

of important legal change, a focus on relational migration, embodied in an expanded view of process, permits a closer view of the various challenges and potential resiliencies that can occur during status transition."[66] This focus is especially important when equality may be assumed due to substantial formal legal progress.[67]

The focus on transition across the marital border is important and intentional. "One of the most stark delineations in the law of intimacy is the divide between marital and nonmarital units."[68] As previously described, "[t]his divide—and the accompanying privileging of marriage—has been the subject of important and sustained critique by scholars, based on the marginalizing effect that this legal framework has on nonmarital families and on individuals."[69] A focus on relational transition can help reveal the

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66. *Id.* at 984.

> To situate this analysis further, I note that discussions abound in antidiscrimination law and legal scholarship on gaps between social and formal equality in a variety of domains. This understanding is critical to drawing attention to the gaps that exist between law on the books and law on the ground. Alongside this perspective, however, we must examine the movement across legal status borders. Even with legal reform aimed at better unifying formal and substantive equality in various domains, transitions between legal categories will always exist, introducing unique experiences for those involved.

Id. at 990–91 (footnote omitted). Study resilience involves examining and addressing differences in social assets that people have to respond to vulnerability that is universal to the human condition. Fineman, *Vulnerable Subject*, *supra* note 20, at 8–10 (explaining that vulnerability theory has the potential to "describ[e] a universal, inevitable, enduring aspect of the human condition").

67. Kim, *supra* note 1, at 984.

68. *Id.* at 985.

69. *Id.* (citing FRANKE, *supra* note 64, at 11; NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE (2008) [hereinafter POLIKOFF, BEYOND MARRIAGE]; Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 14–17; Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 173–75 (2000) [hereinafter Polikoff, *Why Read Fineman*]; Laura A. Rosenbury, *Marital Status and Privilege*, 16 J. GENDER RACE & JUST. 769, 770–79 (2013)); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016). I have previously deployed the metaphor of migration to set the stage for understanding the range of dynamic change that can arise from relational status transition, much in ways that physical movement ushers in a range of legal and social impacts. Kim, *supra* note 1, at 983 ("The migration metaphor resonates with the various movements we see in our contemporary world, with people and institutions routinely moving from one place to another. The literature of immigration and migration marks the distinctness of immigration and migration experiences." (citing CARLOS BULOSAN, AMERICA IS IN THE HEART (1943); GROWING UP ETHNIC IN AMERICA (Maria Mazziotti Gillan & Jennifer Gillan eds., 1999); JESSICA HAGEDORN, THE GANGSTER OF LOVE (1996); JHUMPA LAHIRI, INTERPRETER OF MALADIES (1999); CHANG-RAE LEE, A GESTURE LIFE (1999))). This metaphor of physical movement helps to connote the social and legal contours of formal legal

"social and structural forces that impel movements into and experiences of marriage, especially those who marry later in a relationship."[70]

III. TRANSITION IN THEORY

A. *Sociolegalism*

As discussed previously, sociolegalism provides a useful framework to explore equality and inequality. But how can sociolegalism also enable us to theorize about transition? By focusing on the connection between law and other social forces, it serves as rich terrain on which to explore the concept of law as interpreted, lived, and shaped by daily life. Rather unsatisfyingly, as Austin Sarat aptly notes, the sociolegal conversation on law and change, however, frequently focuses rather statically on the gap between law and social change or law's ability to produce social change.[71] Little has been written in law and society about the process of legal status change as a topic in itself. Austin Sarat's brief essay in his edited volume *Transitions: Legal Change, Legal Meanings* raises some interesting introductory questions. Conventionally, as he describes, law is often conceived of as an "island of stability."[72] Its "regular procedures . . . , its remove, its distant impartiality, provide reassurance that change can be managed, that order can be preserved, that transition will not disintegrate into

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status categories. I do not address the diverse and far-reaching sociolegal impacts of physical migration of families, which falls beyond the scope of this article.

70. Kim, *supra* note 1, at 983. As I have previously set forth:

> I do not enter the debate on whether the state should favor marriage as a form of intimate organization. Regardless of whether marriage should exist as a state-mediated institution, and whether this institution should occupy a privileged status in the legal landscape, it is not a stretch to acknowledge that, as a descriptive matter, marriage does exist as a state-mediated institution and that marriage does occupy a privileged status in the legal landscape (for better or for worse). Even under marriage-neutral or marriage-skeptical outlooks, couples who do decide to get married should not be impeded in their ability to secure this right based on under-examined aspects of the relational migration experience.

Id. at 992–93 (footnotes omitted).

71. Austin Sarat, *What Transitions Mean to and for Law: An Introduction*, *in* TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS 1, 1 (Austin Sarat ed., 2012).

72. *Id.*

chaos."[73] As Gretchen Craft observes, the effort to contain this "chaos," occupies "much human effort in . . . law."[74]

But what if we lean into that state of so-called chaos? What if we look closely at the feared process of transition itself and explore that space as a subject unto itself? One possibility might be to shine light onto "law itself . . . as an instrument of change, fostering transitions from one form of behavior to another, inside and outside of formal institutions."[75] It can also show the ways in which change disrupts law, exposing its limits and challenging its conventions.[76]

"[T]he most storied of all transitions in political and legal theory"[77]—that of "the state of nature to organized society," of Hobbes, Locke, and Rousseau fame[78]—both underscores the fundamental aspect of the study of transition but also its conventional limits. Without attempting to take up even a fraction of this topic, this article, by focusing on transition, bears some implications for the notion of organized society and of a seemingly immutable law's role within it.

Instead of merely focusing on the ways social change and law are consonant, or whether "law is a valuable instrument of social change,"[79] Sarat points to a gap in scholarly literature—concerning "what moments of legal change mean for law itself or how legal institutions bring about and respond to times of transition in legal arrangements."[80] Some types of transitions include the movement from one administration to another within ongoing political and legal order,[81] transitions from illiberal to liberal regimes and legal transitions,[82] transitions from national to supranational political orders,[83] and the role of law in responding to

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73. *Id.*; *see also* Stanley Fish, *Law Wishes to Have a Formal Existence*, *in* THE FATE OF LAW (Austin Sarat & Thomas R. Kearns eds., 1991).

74. Gretchen A. Craft, Note, *The Persistence of Dread in Law and Literature*, 102 YALE L.J. 521, 521–22 (1992).

75. Sarat, *supra* note 71, at 1.

76. *Id.*

77. *Id.* at 2.

78. *Id.*

79. *Id.* at 1.

80. *Id.*

81. *Id.* at 5.

82. *Id.*

83. *Id.*

dramatic abuses of power and crimes committed under prior regimes.[84]

Interestingly, the Sarat-edited volume was published at a time widely perceived as one of profound social advancement—in the midst of President Barack Obama's presidency. Some of the questions the book takes up, like the legitimacy of midnight regulations issued just prior to one presidential administration leaving and another coming into office,[85] bear particular significance in light of the progress narrative that characterized that time in recent history.[86] Sarat suggests a range of questions posed by the relationship between law and transition. They include: "[W]hat challenges do different transitions pose for law? When and why do moments of transition encourage and nurture legal ingenuity and resourcefulness? When and why do [transitions] precipitate crises and breakdown in legal authority?"[87] What is law's capacity to provide stability in turbulent times?[88]

These are important questions, but they perpetuate a dichotomy of law and change as opposed to one another. Rather than treating change, or transition, as exogenous to law and legality, I suggest pushing on the idea of transition even more fully to explore the meaning of transition and to theorize that space. I assert the need to consider how transition can and should change legal institutions. A focus on transition in the context of family status movements can also highlight the impacts of change on in-

84. *Id.* In *Transitional Justice*, Ruti Teitel takes up "diverse forms of reparatory justice," compared to formal legal institutions, in the context of transitional justice. RUTI G. TEITEL, TRANSITIONAL JUSTICE 119 (2000). I do not explore the area of transitional justice, or Ruti Teitel's work further here, but both by topic (transition) and also by disciplinary design (invoking formal legal and additional disciplinary means), transitional justice bears significant implications for the idea of the process of relational migration.

85. *See, e.g.*, Jack Beermann, *Midnight Deregulation*, *in* TRANSITIONS, *supra* note 71, at 17–18.

86. The legal, political, and policy rollbacks that have occurred during the Trump administration across a wide range of legal and policy areas, including health care, environmental reform, LGBTQ rights, reproductive justice, and immigration challenge conventional narratives of progress, such as Francis Fukuyama's later disavowed *The End of History*. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (Free Press 2006) (1992); *see also* Matthew Philips, *Fukuyama: The End of the End of History*, NEWSWEEK (Sept. 19, 2008, 8:00 PM), https://www.newsweek.com/fukuyama-end-end-history-88537 [https://perma.cc/RB7Z-PTV2].

87. Sarat, *supra* note 71, at 6–7.

88. This inquiry explores law's ability to manage transition and legal institutions as adaptive, providing ways to channel conflict and express normative dissent in moments of social and political change. *See id.* at 13.

dividuals, families, and communities, and how those changes shape sociolegal institutions.

B. *Procedural Justice*

Located within sociolegal scholarship, the literature of procedural justice provides another generative source for theorizing relational status transition. The work of scholars like Tom Tyler, Tracy Meares, and Rebecca Hollander-Blumoff, rooted in social psychology, explores the role of "process" in experiences of legal outcomes.[89] The research in procedural justice focuses on how subjective perceptions of fairness of dispute resolution systems shape individuals' trust in, cooperation with,[90] and overall view of the legitimacy of substantive outcomes.[91]

Procedural justice scholarship has often been thought to apply to adversary contexts in the civil and criminal justice systems and other types of dispute resolution.[92] While procedural justice work tended, originally, to focus principally on litigants' experiences with the justice system, recent innovations in research have explored other participants' experiences in the legal system—judges, lawyers, staff, and other actors.[93] It has also considered perceptions of fairness in other dispute resolution settings, as in negotiation. Procedural justice has extended to a variety of other community and relational contexts, such as policing, family dispute resolution, work supervision, and health care administration.[94] Perceptions of procedural fairness are shaped by a variety of factors, including the structure of dispute resolution and the nature of social interaction. For instance, the identity of decision makers, litigants' or community members' treatment by systemic

89. *See, e.g.*, Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 152 (2011); Tracey L. Meares et al., *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 300 (2015).

90. *See* Hollander-Blumoff, *supra* note 89, at 152–53.

91. *Id.* at 136–37. Alongside social scientists, legal scholars address "process fairness," focusing on this question through normative or doctrinal lenses. Hollander-Blumoff describes differences between social psychology's focus on procedural justice and legal analysis of process fairness. *Id.* at 142–46. I focus here on social scientific concepts of procedural justice.

92. *Id.* at 142–46.

93. *Id.* at 146–48.

94. *Id.* at 133–34.

actors, notice, and opportunities for participation are often viewed as key.[95]

Through its underlying commitments and its methodological tone, procedural justice literature draws out the sociolegal dimensions of legal process inherent in a study of status transition. First, procedural justice highlights the significance of process, separate and apart from "substantive" legal rules, as a mode of social justice. Procedural justice also broadens the conception of what counts as process itself. Methodologically, social scientific explorations within procedural justice deepen consideration of process by moving beyond questions of procedural due process doctrine or assessments of normative fairness of particular procedural rules.[96] It takes into account the host of factors that inform experiences of law, and its procedure, including its people, its places, its language, its demeanor, and its interactions with other social contexts. Procedural justice, as does sociolegal work in general, assertively situates law and its institutions in broader contexts of social institutions and actors.

This expanded conception of process meshes with a consideration of relational status transition. Relational status movements involve a variety of important dimensions, socially, psychologically, and legally.[97] This analysis draws from procedural justice's framing of process as dynamic, multidimensional, contextual, and constructed. Procedural justice emphasizes the importance of subjective and day-to-day experiences with the law, informed by interlocking social influences.

C. *Vulnerability Theory*

Vulnerability theory, and its focus on supporting resilience,[98] provides useful insights for examining relational transition and

95. *See* Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 121 (2000).

96. *See* Hollander-Blumoff, *supra* note 89, at 132–33 .

97. Kim, *supra* note 1, at 1003–08; *see* Michelman, *supra* note 19, at 127–28; *see also* LIND & TYLER, *supra* note 19, at 170–72.

98. *See* Kim, *supra* note 1, at 989 (citing Fineman, *Vulnerable Subject*, *supra* note 20, at 13) ("The state facilitated institutions that have grown up around vulnerability are interlocking and overlapping, creating the possibility of layered opportunities and support for individuals, but also containing gaps and potential pitfalls. These institutions collectively form systems that play an important role in lessening, ameliorating, and compensating for vulnerability.").

its process.[99] As articulated by Martha Fineman, the theory proceeds from an assumption that vulnerability—or susceptibility to change, as rooted in but not limited to, our physical embodiment—universally characterizes the human experience, including for historically marginalized communities.[100] In rebutting the liberal ideal of the autonomous subject in law and society, vulnerability theory creates an imperative for the state and institutions to bolster resilience, or social capacity to confront change.[101]

This analysis of the process of relational migration finds purchase in vulnerability theory's fundamental assumption that susceptibility to change characterizes the human condition. While vulnerability theory proceeds initially from biological (or environmental) vulnerability endured by all over the life course, it is not limited—even on its own terms—to this context. The social movement that typifies relational transition also exposes vulnerability and provides opportunities for fostering resilience. Vulnerability theory offers key opportunities for thinking through the process of relational transition. First, its conception is robustly multidisciplinary, which befits it for examining the various dimensions of relational migration.[102] Second, its rebuttal of an autonomous, and fully agentic, liberal subject clears the pathway for

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99. *Id.* at 988–90. As I have argued, a wider view of process encourages deeper thinking about fostering resilience in migrating individuals and their relationships, through strengthening various forms of social connection and organization. This greater resilience, in turn, can safeguard substantive rights more fully. This focus on relational migration is not intended to suggest that the existence of gaps between formal and social equality should influence our view of the importance of the pursuit of formal equality in the marriage context or in any others. *Id.* at 984 n.11.

100. *See* FINEMAN, AUTONOMY, *supra* note 20, at 288.

101. *See also* Fineman, *Vulnerable Subject*, *supra* note 20, at 9–10. I have argued:

> In theorizing the under-studied process of relational migration, this analysis also engages vulnerability theory, and more specifically, its focus on supporting resilience. Vulnerability theory paves the way for more supportive ways to address the vulnerabilities that touch everyone's lives. This theory's attention to the condition of universal vulnerability, including for historically marginalized communities, and its attendant focus on encouraging greater social strength or capacity in the face of that vulnerability, provides a particularly generative framework for identifying opportunities for increasing resilience in relational migration.

Kim, *supra* note 1, at 989 (citing Fineman, *Vulnerable Subject*, *supra* note 20, at 8–10, 20–21) (discussing universal vulnerability as related to marginalized communities); *see also* Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & C.R. L. REV. 307, 309–10 (2014).

102. Kim, *supra* note 1, at 989 ("[T]his intentionally multidisciplinary problem-solving approach is particularly well-suited to examining the many layers of relational migration."); *see* Fineman, *Vulnerable Subject*, *supra* note 20, at 9–10.

identifying systemic challenges faced by individuals, families, and communities, even those moving into domains of favored legal status. It also enables us to consider the conditions that impel parties to seek legal status change, even that sought "voluntarily," and the stakes from a resilience standpoint from these passages.

IV. TRANSITION IN ACTION

Access to marriage and the equal citizenship it represents is not self-actualizing. As with many other legal transitions, couples must pursue a process to obtain a legally favored relationship status. But same-sex couples transitioning into the marital regime encounter unique legal challenges in the effort to reap fully the benefits sought through marriage equality. This challenge revolves around the need to confirm the boundaries of the very legal category into which couples seek to transition so that existing claims and obligations correspond with a new legal status position. The need to address boundary confusion undoubtedly affects a range of legal transition processes (like for longer-term or older different-sex couples moving into marriage). Long-standing same-sex couples may face this more acutely, however, given the broader context of legal indeterminacy that has surrounded same-sex intimate relationships—as well as nonmarital relationships in general. This broader context has included incremental or patchwork recognition, varying from jurisdiction to jurisdiction. I briefly highlight some key areas of boundary confirmation work distinct to marital transition by same-sex couples.

A. *Marital Beginnings*

As in the law of intimacy in general, the nature of marriage is often most saliently defined at or upon anticipation of its end—by divorce or death. This is no less true for same-sex couples embarking on the legal transition into marriage. Same-sex couples in long-standing relationships, however, are more likely to encounter marital boundary confusion, due to difficulties in determining when the marriage "began." Because many couples, especially female ones,[103] may have pursued various forms of legal or

103. Female couples are more likely to seek legal recognition of relationship status than male couples. Brad van Eeden-Moorefield et al., *Same-Sex Relationships and Disso-*

social recognition in a landscape of patchwork or incremental recognition, preparation for marital dissolution may pose distinct challenges when determining the relevant marital time period for purposes of property distribution, spousal support, or retirement and death benefits. These considerations may be even more complicated when one takes into account life course.[104]

Even assuming that *Obergefell* is retroactively applied to nationally recognize marriages that were valid at the place of celebration, questions may arise as to whether the marital boundary should encompass time since a domestic partnership or civil union was formed.[105] Indeed, this type of question has even arisen in the context of partners who did not enter into a domestic partnership or civil union, but who have still been judicially interpreted as having functioned as if married.[106] Indeed, marital couples may even need to think through the extent to which the otherwise rarely invoked doctrine of common law marriage may be used to address time outside of formal marriage for purposes of financial distributions and benefits.

These questions involved in boundary confirmation arise particularly acutely for couples who have migrated from nonmarital to marital relational forms in a broader context of patchwork or incremental recognition.

B. *Marriage Equality and Marriage Validity*

While every marriage must meet a standard of legal validity, same-sex marriage migrants are more likely to face challenges in

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lution: The Connection Between Heteronormativity and Homonormativity, 60 FAM. RELATIONS 562, 564 (2011). *See generally* KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW (2006).

104. Scholarly examinations of life course are particularly important in finding helpful social, legal, and policy interventions. *See, e.g.*, Corinne Reczek et al., *Commitment Without Marriage: Union Formation Among Long-Term Same-Sex Couples*, 30 J. FAM. ISSUES 738, 738–39 (2009) ("Using a life course perspective . . . the authors examine how couples conceptualize and form committed relationships despite being denied the right to marry.").

105. Deborah H. Wald, *Practicing LGBT Family Law in a Post-*Obergefell *World*, FAM. ADVOC., Spring 2016, at 19. Allison Anna Tait has discussed enlarging the marital pie by marking the time of marriage's beginning using indicators of legal intent of partnership, like domestic partnerships or civil unions. Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1306 (2015).

106. FRANKE, *supra* note 64, at 213. For now, I do not address the underlying question of whether this type of marital ascription is desirable. I only highlight this as the kind of boundary work that couples must do.

this regard, due to having sought multiple forms of legal recognition prior to being able to obtain a nationally recognized legal marriage. These include domestic partnerships, civil unions, or marriages that were valid in the place of celebration but not in the place of the couple's domicile.

A key example of marriage equality's interaction with marital validity is in the context of relationships that remain legally valid at the time a new marriage is formed. Consider this example. Party A was previously in a marriage pre-*Obergefell* to Party X that was valid in the State Y where the marriage ceremony was performed, but not in State Z where the couple lived. Because recognition of same-sex marriage is barred by public policy in state Z, Party A and Party X cannot obtain a divorce, nor can they divorce in State Y, because of the typical durational residency requirement necessary for divorce jurisdiction in that state.[107] Because of this barrier, Party A never divorces. Party A then meets and marries Party B post-*Obergefell*. Based on retroactivity principles, the marriage to Party X is likely still valid, and Party A has entered into a legally invalid, bigamous marriage with Party B. While there are likely curative measures that Party A can pursue to confirm the boundaries of her current marriage and extinguish claims arising from her prior marriage, she must engage in a process to pursue these options.[108]

Boundary confusion may similarly influence Party A's marriage with Party B, even if Party A's prior relationship with Party X is a domestic partnership or civil union. This may happen if Party A is unable to dissolve her prior domestic partnership or civil union, which many states may still recognize even after marriage equality.[109]

C. *Contract's End and Marriage's Beginning*

Outside of a marital context, same-sex couples have commonly sought legal protection through contract in the effort to define the scope of benefits and obligations between intimate partners.[110]

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107. Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1, 1–2 (2012); Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1670 (2011).

108. Wald, *supra* note 105, at 22.

109. *Id.* at 20.

110. MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL & INFORMAL CONTRACTS

Alongside this, United States jurisdictions have increasingly recognized contracts between premarital and marital partners. The relationship between contract and marriage plays an important role in marital boundary confirmation.

As I discuss elsewhere, legal status expectations of marriage may not be entirely well-suited to all couples—regardless of the sex/gender of the marital partners.[111] A key example is in the context of financial affairs. Further empirical research is needed concerning the roles of race and gender in financial arrangements of couples. The norm of financial partnership that undergirds the equitable distribution regime in property distribution at divorce may not correspond with the arrangements of all couples—different- or same-sex, especially when one takes into account race and gender. For instance, some research suggests that the financial arrangements of different-sex African American married couples and same-sex African American female couples displays greater independence than different-sex, particularly white, couples.[112]

And while premarital and marital agreements concerning financial affairs fall within the realm of the enforceable, so long as they do not pertain to child support, couples who have been in long-standing relationships may also seek to instantiate their long-standing agreements regarding conduct in their relationships.[113] To the extent that contracts pertain to conduct, couples

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SHAPE ALL KINDS OF FAMILIES 111–52 (2015); Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 101, 116–41 (2016); Martha M. Ertman, *Marital Contracting in a Post-*Windsor *World*, 42 FLA. ST. U. L. REV. 479, 506 (2014).

111. SUZANNE A. KIM, MARRIAGE EQUALITIES (forthcoming 2020) (on file with author).

112. *Id.* (discussing Mignon R. Moore, *Independent Women: Equality in African-American Lesbian Relationships*, *in* FAMILIES AS THEY REALLY ARE 214, 214 (Barbara J. Risman ed., 2010)). Indeed, this dynamic may also be pronounced in different-sex American couples. Catherine T. Kenney, *The Power of the Purse: Allocative Systems and Inequality in Couple Households*, 20 GENDER & SOC'Y 354, 376–77 (2006). Of course, it is unclear whether norms of financial independence will persist if more same-sex couples marry and experience the legal and financial protections that marital recognition brings. Deborah A. Widiss, *Legal Recognition of Same-Sex Relationships: New Possibilities for Research on the Role of Marriage Law in Household Labor Allocation*, 8 J. FAM. THEORY & REV. 10, 25 (2016).

113. For example, Edward Stein has discussed the disparate impact of adultery laws on couples engaging in consensual nonmonogamy. Stein has argued that this disproportionality is likely to include male, same-sex couples. Edward Stein, Same-Sex Couples, the Future of Marriage, and Consensual Non-Monogamy, Presentation at Association of American Law Schools, Section on Family and Juvenile Law Panel on the Future of Marriage (Jan. 4, 2015).

are likely to encounter difficulty regarding enforceability.[114] In the transition from nonmarital to marital status, these questions are likely ones that involve substantial engagement with the legal system.

D. *Marital Parenting*

Relationally transitioning couples must also confirm the boundary between parentage and marital status. While marriage creates a stronger legal status for same-sex couples, it does not secure parentage rights by itself. This is because marital and parentage statuses are not legally commensurate, at least when applied to a broader range of families.

Couples moving into marriage encounter a legal landscape favoring different-sex and biologically connected parents.[115] Even for couples who become parents in the context of marriage, as opposed to moving into marriage after becoming parents, parentage law unequally recognizes parental status. Take, for example, the marital presumption, pursuant to which, historically, a man married to a woman giving birth to a child, is presumed to be the father of that child.[116] Marriage equality has assisted in forging parentage status, but this assistance is incomplete at best. First, even if the wording of state law marital presumptions is altered to apply to a "spouse" instead of just to a "husband," this revision does nothing to assist fathers in same-sex couples.[117] And even as applied to same-sex mothers, some states' resistance to the equal application of marital presumptions has been significant.[118] This poses significant process burdens, to be discussed in the next

114. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT §10 cmt. (UNIF. LAW COMM'N 2012).

115. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017).

116. *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 228 (2006); Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 594 (2018).

117. Nancy D. Polikoff, *Marriage as Blindspot: What Children with LGBT Parents Need Now*, *in* AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 127 (Carlos A. Ball ed., 2016); NeJaime, *supra* note 115, at 2312, 2339. NeJaime describes the legal biases in parentage law faced by parents using assisted reproductive technology. *Id.* at 2265–66.

118. Polikoff, *supra* note 117, at 130.

part, even for couples who live in states recognizing marital presumptions for female same-sex couples.[119]

Moreover, for couples moving into marriage while still planning to expand their families or who have become parents before marriage, marital transition raises important status dynamics. For instance, parents may mistakenly believe that getting married cures legal uncertainty over parentage of children prior to the marriage.[120] This would be understandable, given the characterization of marriage equality as fundamental to securing parent-child relationships.[121] Whether this arises due to socio-political[122] or to doctrinal framing in constitutional discourse,[123] the legal consciousness challenges[124] here are significant and expose risks for parents crossing status borders. The marital presumption fails to assist these parents, as the presumption is doctrinally inapt in the absence of a contemporaneously birthing mother and marital spouse. Similarly, for couples raising children of prior (heterosexual) relationships, which characterizes a large number of families of color,[125] marriage would have no effect on securing greater parentage status for spouses—either female or male.[126]

The latest revisions to the Uniform Parentage Act ("UPA") make significant progress toward addressing inequities in parentage law based on the application of biological and gender distinctions.[127] These changes reflect a deliberate focus on "recognizing and protecting functional parent-child relationships."[128] They include the elimination of gender distinctions in the "holding-out provision," introduction of "de facto parent" status as a means of establishing parentage, expansion of the classes of people eligible to establish parent status through state "voluntary acknowledgment processes (VAP)" to include those beyond genetic fathers, and provision of greater guidance to courts on how to determine

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119. NeJaime, *supra* note 115, at 2295.

120. Polikoff, *supra* note 117, at 130.

121. *Id.* at 131–32.

122. *See* Joslin, *supra* note 116, at 611–12.

123. Obergefell v. Hodges, 576 U.S. __, __, 135 S. Ct. 2584, 2590 (2015).

124. Joslin, *supra* note 116, at 611.

125. Polikoff, *supra* note 117, at 128.

126. *Id.* at 139.

127. Joslin, *supra* note 116, at 602. Doug NeJaime has comprehensively surveyed the legal treatment of parents in connection to various forms of ART, revealing the law's prioritization of biological and different-sex parents. NeJaime, *supra* note 115, at 2288–90.

128. Joslin, *supra* note 116, at 599.

parentage in the face of competing claims by focusing on factors rooted in "social bonds."[129] The UPA reforms also aim to eliminate gender distinctions through using gender-neutral terminology, making the means of establishing parentage gender-neutral, and updating the marital presumption, including broadening its application to beyond husbands of women.[130]

These UPA reforms, if adopted by states, would mark substantial progress toward correcting in state law systems gender- and sexuality-based inequities in parentage law, including for those in the marital context.[131] Although the UPA has been highly influential, with about half of states having adopted versions of it in the past,[132] legal indeterminacy is still likely to inform the legal status transition process for many families in the near- and long-term. Moreover, the UPA's continued focus on genetics and gestation is likely to favor certain forms of parentage over others—disparately affecting those families and individuals forming families apart from biological connection.[133]

Even in contexts of marriage, biology and gender-based distinctions continue to inform the security of parentage status, requiring high levels of procedural engagement. Reaching this point of engagement to pursue status adjustments like costly and burdensome second-parent adoptions demands heightened legal awareness and considerable social and financial resources. The equality-promising status of marriage in the legal and political landscape can obscure continued needs for boundary confirmation work for parents crossing the marital border.[134] Attention to the process of relational transition helps identify the range of factors that can bolster parents crossing the marital border.

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129. *Id.* at 601–05.

130. *Id.* at 606–08.

131. *Id.* at 595 (discussing Pavan v. Smith, 582 U.S. __, 137 S. Ct. 2075 (2017); Sessions v. Morales-Santana, 582 U.S. __, 137 S. Ct. 1678 (2017); Obergefell v. Hodges, 576 U.S. __,135 S. Ct. 2584 (2015)).

132. "The UPA has been quite influential, shaping parentage law in over half the states in this country since it was originally promulgated in 1973." Courtney Joslin & Jamie Pedersen, *Updated National Uniform Parentage Act (UPA 2017) Approved*, ASRM NEWS (Nov. 12, 2017) [https://perma.cc/XKA5-DHYQ].

133. Joslin describes the continued focus on gender and biology. Joslin, *supra* note 116, at 609 ("Except in cases involving surrogacy, the woman who gave birth to a child is automatically considered a parent."); *see also id.* at 608–10 (drawing distinction between gestational and genetic surrogacy).

134. Polikoff, *supra* note 69, at 28–29.

E. *The Meaning of Marriage Equality*

Boundary confusion also takes form through ongoing contests over the very meaning of marriage equality itself. Continued resistance to equal marriage rights raises process-based questions separate and apart from the substantive legal arguments asserted and disputed. *Obergefell* was decisive in its articulation that the constitution requires equality in access to marriage. Despite *Obergefell*'s clarity, the scope of marriage equality continues to be challenged in states. In contexts of parentage, public accommodations, and employment, opponents of marriage equality have continued to resist it in cases that have been considered by the United States Supreme Court, advancing bizarrely cramped conceptions of marriage equality.[135]

Supreme Court cases following *Obergefell*, from *Pavan v. Smith*, to *Pidgeon v. Turner*, to *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, tell a story of resistance to the scope of marriage equality at the state and municipal level. In *Pavan*, a married female same-sex couple challenged the Arkansas Department of Health's refusal to list both women as parents on state-issued birth certificates, pursuant to the state's statute governing birth certificates.[136] This refusal occurred in contrast with the state's presumptive listing of a husband of a birth mother on the birth certificate, even if that husband is not genetically tied to the child, such as when a child is conceived through artificial in-

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135. In a separate work, I analyze the different paths taken post-*Loving v. Virginia*, 388 U.S. 1 (1967), and post-*Obergefell* and the import of these different paths for interracial marriage and same-sex marriage comparatively in United States law. Suzanne A. Kim, *Loving* After Marriage Equality (unpublished manuscript) (on file with author). As described there, after *Loving*, state court litigation involving the scope of its holding was sparse. This did not mean that interracial marriage was celebrated socially or legally. Indeed, scholars write about the persistence of intimate segregation and the causes, including legal ones, for this. Despite this continued resistance to interracial intimacy, *Loving*'s import was accepted in the context of adoption, trusts and estates, and family law. In contrast, the current legal moment has given rise to repeated and far-reaching judicial, governmental, and legislative efforts to constrain *Obergefell*'s reach, reading the case in exceedingly narrow terms or attempting merely to ignore it. This occurs also alongside increased social acceptance of same-sex marriage across a variety of demographic groups in the United States.

136. Pavan v. Smith, 582 U.S. __, __, 137 S. Ct. 2075, 2077 (2017). ARK. CODE ANN. § 20-18-401(e) (2014) specifies, "For the purposes of birth registration the mother is deemed to be the woman who gives birth to the child." ARK. CODE ANN. § 20–18–401(f)(1) specifies "If the mother was married at the time of either conception or birth . . . the name of [her] husband shall be entered on the certificate as the father of the child."

semination using a sperm donor.[137] The state had argued, and the Arkansas Supreme Court had agreed, that the holding in *Obergefell* that same-sex couples are entitled to the "constellation of benefits that the States have linked to marriage"[138] did not include being listed on a child's birth certificate.[139] In its per curiam decision, the United States Supreme Court strongly disagreed, determining that it was clear that the state law used birth certificates to mark more than biological connection, but to "give married parents a form of legal recognition that is not available to unmarried parents."[140] The Court continued, "[h]aving made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition."[141]

In the context of employment, the provision of same-sex spousal benefits continues to be contested. In *Pidgeon v. Turner*,[142] taxpayers sought to challenge the City of Houston's decision to provide benefits, based on *Obergefell*, to the same-sex spouses of city employees, as it did for employees with different-sex spouses. The Texas Supreme Court vacated a trial court injunction that would have barred the benefits provision, but also remanded the case back to the trial court to determine whether *Obergefell* requires that "states must provide the same publicly funded benefits to all married persons."[143] The United States Supreme Court recently denied the petition for review, leaving the case to work its way back through the state court.[144]

Resistance to marriage equality continues in the public accommodations setting through *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[145] The case addresses a bakery's claim that its free exercise of religion and free speech rights are being violated by the Colorado Civil Rights Commission's decision that

137. *Pavan*, 582 U.S. at __, 137 S. Ct. at 2078 ("Echoing the court below, the State defends its birth-certificate law on the ground that being named on a child's birth certificate is not a benefit that attends marriage.").

138. Obergefell v. Hodges, 576 U.S. __, __, 135 S. Ct. 2584, 2601 (2015).

139. Smith v. Pavan, 505 S.W.3d 169, 176–77 (Ark. 2016).

140. *Pavan*, 582 U.S. at __,137 S. Ct. at 2078–79.

141. *Id.* at __, 137 S. Ct. at 2079.

142. 538 S.W.3d 73 (Tex. 2017), *cert. denied*, 583 U.S. __, 138 S. Ct. 505 (2017) (mem.).

143. *Id.* at 87.

144. *Turner*, 583 U.S. __, 138 S. Ct. 505 (mem.).

145. 584 U.S. __, 138 S. Ct. 1719 (2018).

the state's antidiscrimination law barred the bakery from refusing to provide service for a same-sex couple's wedding.[146]

Access to marriage remains disputed through state legislation, like the sweeping Mississippi House Bill 1523,[147] the constitutionality of which the Supreme Court declined to review.[148] The statute allows government officials, private businesses, and some medical and social service providers to withhold assistance or service based on beliefs that: (1) "[m]arriage is or should be recognized as the union of one man and one woman"; (2) "[s]exual relations are properly reserved to such a marriage"; and (3) "[m]ale (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."[149] These provisions directly impact married same-sex couples, transgender individuals, and those having sexual relations outside of marriage.

V. PROCESS OF TRANSITION

In the previous section, I briefly highlighted some distinct legal questions that arise for same-sex couples transitioning into marriage. I touch upon these, not to resolve these questions normatively or even to analyze them extensively, but merely to suggest the range of legal challenges that face those relationally transitioning in a marriage equality world. Even under conditions of judicial certainty, this boundary confirmation work is likely to affect same-sex couples uniquely, especially those in longer-term relationships moving into marriage. The stakes are especially high for marital transition, given that these questions involve financial affairs, benefits, and children. These questions help define the scope of marriage and rights of a growing group of relationally transitioning families.

A range of demographic factors likely influence same-sex couples' experiences of process in relational transition. Different-sex couples in the United States may not necessarily serve as the most useful guide for understanding how factors like class and

146. *Id.* at __, 138 S. Ct. at 1723.

147. H.R. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

148. Barber v. Bryant, 860 F.3d 345, 345–46 (5th Cir. 2017), *cert. denied*, 583 U.S. __, 138 S. Ct. 652 (2018).

149. H.R. 1523 § 2, 2016 Leg., Reg. Sess. (Miss. 2016).

race may affect the process of relational migration for same-sex couples. For example, while marriage among different-sex couples in the United States has been observed to be the province of whiter, wealthier, more educated people,[150] it is not clear yet what demographic patterns characterize same-sex marriage migrants.[151] Social scientists have already highlighted the importance of examining the significance of race, socioeconomic level, and age on social experiences of marriage.[152]

Gender and age will likely play a role in relational transition experiences, insofar as female same-sex couples are more likely than male same-sex couples to seek legal or social relational recognition, including marriage.[153] Moreover, in the United States, women's lifespans are longer than men's,[154] thus highlighting a potential gender-and-age-related difference in the impacts of relational transition. Lastly, given the gender wage gap in the United States, economic impacts of relational migration are likely to affect female couples differently than male couples.[155]

The existence of these significant legal questions gives rise to a host of process considerations in this context of relational migration. These include legal consciousness, access to justice, uncertainty, and impacts on identity.

A. *Legal Consciousness*

Lack of information imposes a process burden on anyone moving into a new legal status, but may raise particular issues in the

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150. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19 (2014).

151. We do know that same-sex couples are more likely to be interracial or interethnic than different-sex couples. *See* Gates, *supra* note 17.

152. Sharon S. Rostosky et al., *Same-Sex Couples' Decisions and Experiences of Marriage in the Context of Minority Stress: Interviews from a Population-Based Longitudinal Study*, 63 J. HOMOSEXUALITY 1019, 1035–37 (2016).

153. van Eeden-Moorefield et al., *supra* note 103, at 564.

154. FED. INTERAGENCY FORUM ON AGING RELATED STATISTICS, OLDER AMERICANS 2016: KEY INDICATORS OF WELL-BEING 26 (2016), https://agingstats.gov/docs/LatestReport/OA2016.pdf [https://perma.cc/V57V-VRFL].

155. *FAQs About the Wage Gap*, NAT'L WOMEN'S L. CTR. (Sept. 2016), https://nwlc.org/wp-content/uploads/2016/09/FAQ-About-the-Wage-Gap-2016-5.pdf [https://perma.cc/F3U7-6SMH]. I defer for another discussion about the impact of cisgender versus transgender identity on process burden, given the correlation between transgender identity and poverty. M.V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, WILLIAMS INST. 2 (June 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf [https://perma.cc/MA73-9BVP].

relational context. While marriage equality importantly marks equal citizenship, marriage also brings with it a host of legal expectations and obligations. Marriage's commonplace status may ironically overshadow the depth of its connection to a variety of legal and regulatory systems. As Lynn Baker and Robert Emery found in their early, but still influential, research on everyday knowledge about marriage and divorce, people's knowledge about the legal terms of marriage and divorce tends to be patchy and incorrect.[156]

Marital transition poses some important challenges in evaluating—and opportunities for future sociolegal research on—legal consciousness.[157] While legal awareness about the technical details of the status of marriage may be low on the whole, this lack of knowledge may be interpreted as a privilege of heteronormativity. Because of the prominent place of the marriage equality movement on the modern civil rights agenda, the rights associated with marriage have enjoyed significant attention, especially in LGBTQ and ally communities. Researchers would do well to revisit Baker's and Emery's work in the context of transition into marriage by same-sex couples. We do not yet know the broader demographic patterns of movements into marriage for same-sex couples post-*Obergefell*, but differences in race, education, economic status, and other socioeconomic status factors may inform legal consciousness in relational transition.

While increasing some levels of legal awareness, the role of marriage in civil rights discourse may also obscure the transitional complexities it poses for important aspects of everyday life. Engaging the legal system to resolve specific boundary confirmation questions requires the knowledge that these legal issues ex-

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156. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (determining, in part, that people held largely incorrect perceptions of the legal terms of the marriage contract as embodied in divorce statutes and idealistic expectations about the successes of their own relationships). This marriage exceptionalism relates to the family law exceptionalism identified by family law scholar Jill Hasday. Per Hasday, the legal treatment of interpersonal interactions is often, wrongly, set apart and placed in a separate category pertaining to family, while existing legal doctrine may easily resolve legal disputes. JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 15–16 (2014). For a discussion of exceptionalism in divorce, see Noa Ben-Asher, *In the Shadow of a Myth: Bargaining for Same-Sex Divorce*, 78 OHIO ST. L.J. 1345 (2017).

157. *See, e.g.*, JASON PIERCESON, SAME-SEX MARRIAGE IN THE UNITED STATES 38 (2013) ("Socio-legal scholars define legal consciousness as a form of legal awareness and activity by average citizens, as opposed to traditional legal actors.").

ist to be addressed.[158] Failure to resolve these legal questions can substantially affect the health and security of families, socially and financially. As discussed in the previous section, the effects of a lack of awareness about the financial and legal implications of transition into marriage can be even more significant for families whose lives might be more likely to depart from social norms against which law is structured. To guard against unwanted legal outcomes, couples in the process of relational transition face the particular cost of self-education. They are helped by important efforts of advocacy groups to engage in public education.[159] Even with marriage equality, however, couples face a continuing process burden, first in self-education to instantiate family connection with alternative mechanisms to marriage, and now within marriage.

B. *Access to Justice*

Access to information, discussed previously, is closely tied with access to justice. The process of determining the boundaries of marriage for relationally transitioning couples requires legal engagement. Lower- and middle-income relationally transitioning couples share in bearing the cost of the well-documented civil justice gap in this country, which affects individuals and families across a range of regulatory domains.[160]

Access to justice research demonstrates that the civil justice gap is especially pronounced for family law matters. For instance, family law cases comprised the largest percentage of all types of civil legal assistance provided by Legal Services Corporation grantees in 2016.[161] Moreover, communities of color, immigrants, women, the elderly, and LGBTQ people are among those more

158. On a related note, Lily Kahng discusses hidden costs associated with marital tax filing that are little discussed. Lily Kahng, *The Not-So-Merry Wives of* Windsor*: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325 (2016). For consideration of role of gender in tax generally, see FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Bridget J. Crawford & Anthony C. Infanti eds., 2018).

159. Tait, *supra* note 105.

160. *See generally* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/A32V-JBMG].

161. *Id.* at 39 fig.8.

likely to require income-based legal assistance in the United States.[162]

The prominent role that marriage has played in efforts to secure equal rights poses a risk of overlooking the need for ongoing legal assistance in relational transition. Given the complexity of the range of legal questions raised, the availability of affordable legal support poses a significant process challenge for middle- and lower-income families.

C. *Costs of Uncertainty*

Transition into marriage is the process burden of legal uncertainty occasioned by continued discrimination, and generalized fear that marriage rights will be reversed due to backlash and ongoing changes in political climate.[163] The feeling of temporariness of legal rights pervades many couples' decisions to marry and ongoing experiences of marriage.[164] Prevailing responses to ongoing resistance to marriage equality have focused on bringing other aspects of formal legal status substantively in line with governing precedent, such as *Obergefell*. A focus on the process of relational transition, however, also brings into closer view the impacts of uncertainty itself.

Even post-*Obergefell*, some legal practitioners advise married couples to carry around documents proving their marital relationship, in case their spousal rights are questioned, for example, in a hospital setting.[165] Such advice underscores the vulnerability of legal rights to substantive override. Indeed, as we know, the path toward and since marriage equality has shown continued resistance, highlighting the frequent gap between formal and substantive equality. Some couples' perception of marriage equality as provisional resonates with the experience of immigrants or some American ethnic groups who voice feeling like "perpetual outsiders,"[166] even while legally included in the body politic.

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162. Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016, 9:03 AM), https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/ [https://perma.cc/BFB8-8ZXX].

163. Kim, *supra* note 1, at 982–84, 1005.

164. *Id.* at 1005.

165. Wald, *supra* note 105, at 20.

166. *See* Michael Luo, *An Open Letter to the Woman Who Told My Family to Go Back to China*, N.Y. TIMES (Oct. 9, 2016), http://www.nytimes.com/2016/10/10/nyregion/to-the-

A focus on uncertainty as a sociolegal phenomenon rebuts the narrative of rights as fixed and binary. It enables wide-ranging and detailed consideration of uncertainty's impacts across a range of domains. These can include relational, individual, and community effects in psychological, legal, political, and other social spheres. For instance, we might ask how uncertainty affects one's relationship, one's choices regarding family formation or economic arrangement, one's psychological feelings of security, and one's experiences of inclusion. We might consider how uncertainty is mediated by race, gender, education, and economic status.

One entry point into this conversation about uncertainty is through the robust social scientific literature on minority stress, which focuses on the negative psycho-social and health impacts of stigmatization of a broad range of groups.[167] A recent intervention in this regard arose in the *Masterpiece Cakeshop* case.[168] Pursuant to this argument, permitting exemptions to antidiscrimination law that otherwise protect sexual minorities dangerously exacerbates minority stigma.[169] A stronger interdisciplinary conceptualization of uncertainty would look more closely at the legal and psycho-social impacts of ongoing uncertainty itself, even or especially in connection with established legal status claims.

Focusing on the process burden of uncertainty enables deeper examination of ways toward more responsive approaches to social resilience and relational health,[170] in the gaps between substantive and formal equality.

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woman-who-told-my-family-to-go-back-to-china.html [https://perma.cc/2XHG-M89F] (describing the experiences of Asian Americans as being treated as perpetual foreigners in the United States).

167. *See, e.g.*, Ilan H. Meyer & David M. Frost, *Minority Stress and the Health of Sexual Minorities*, *in* HANDBOOK OF PSYCHOLOGY AND SEXUAL ORIENTATION (Charlotte J. Patterson & Anthony R. D'Augelli eds., 2013); Ilan H. Meyer, *Prejudice, Social Stress and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 674–75 (2003); Rostosky, *supra* note 152, at 1021–22; Brandon L. Velez et al., *Minority Stress and Racial or Ethnic Minority Status: A Test of the Greater Risk Perspective*, 4 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 257, 258 (2017).

168. Brief of Amici Curiae Ilan H. Meyer, PhD & Other Social Scientists & Legal Scholars Who Study the LGB Population in Support of Respondents at 9, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. ___, 138 S. Ct. 1719 (2018) (No. 16-111).

169. *Id.* at 3.

170. *See* Holning Lau, *Beyond Our Hearts: The Ecology of Couple Relationships*, 4 CALIF. L. REV. CIR. 155, 157–59 (2013) (discussing research on impact of environment surrounding a relationship on its health).

D. *Social Norms*

Families transitioning into marriage may encounter impacts from dominant social norms and enduring prejudice. These could arise in the context of relational impacts. As I discuss in *Relational Migration*,[171] families transitioning into marriage may encounter impacts on self, on their relationship, and with broader communities. While some are expected, like greater feelings of inclusion, other impacts are more surprising, such as unanticipated tensions that may arise with families of origin.[172] As Lee Badgett has shown, even increased feelings of inclusion may vary based on other factors—like race, gender, and strength of relationship with one's family of origin.[173]

As alluded to above, people transitioning into marriage also encounter social norms that govern marriage's legal structure. While not necessarily evident immediately upon marriage, the law that undergirds property distribution in most states—equitable distribution—proceeds from an assumption that property is shared, and intended to be shared, by marital partners. What if couples who have always kept their property separate and intend to remain doing so even after they marry? If they do not take legal action to switch away from this default, their earnings during marriage are treated as marital property, subject to distribution. Noted above, some research suggests that the defaults upon which property distribution rules are not necessarily well-founded across a range of couples.[174] Financial arrangements may vary based on race, with Catherine T. Kenney's work suggesting more independent financial arrangement among African American different-sex couples than among white different-sex

171. Kim, *supra* note 1, at 985.

172. *See* Abigail Ocobock, *The Power and Limits of Marriage: Married Gay Men's Family Relationships*, 75 J. MARRIAGE & FAM. 191, 195, 198 (2013) (finding in interviews during 2010 and 2011 with gay married men in Iowa, that while two-thirds of men perceived that "getting legally married had a positive impact on their relationships with families of origin," half of the men interviewed (the same men who reported positive outcomes) also reported "some kind of negative experience with families of origin surrounding their marriages" including "re-experiencing rejection from already unsupportive family members" or "new experiences of rejection from family members who had previously seemed supportive").

173. *See* M.V. Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, 67 J. SOC. ISSUES 316, 331–32 (2011) (exploring experiences of same-sex married couples in the Netherlands and Massachusetts).

174. *See supra* note 111 and accompanying text.

couples.[175] Mignon Moore's work has also suggested more financial independence among African American lesbian couples than among white couples.[176]

Social norms and legal defaults may also be mismatched more generally for same-sex couples. Some United States data suggest that at least male same-sex couples may be more likely to follow norms of equal contribution to various household expenses, compared to different-sex couples.[177] United Kingdom research indicates that same-sex couples may pursue more diverse financial arrangements than different-sex couples,[178] including less "merging" of finances, but instead partially pooling money or managing money independently.[179]

Such encounters with social norms driving legal defaults, if they are even known,[180] to the extent they do not correspond with lived experience and intention, require time, attention, and resources. These are part of the processes of marital transition that may go underappreciated. If such process encounters are not attended, financial repercussions can be serious for couples later.

VI. BUILDING TRANSITIONAL EQUALITY

What does a focus on transitional equality mean for law and policy? What do we gain from this perspective? Again, this focus on transitional equality aims to examine the process of transition across legal status categories and the opportunities for fostering greater resilience. The process of relational status transition, as discussed in this context, is but one example. It is particularly useful, however, for revealing the many dimensions of any legal

175. Catherine T. Kenney, *The Power of the Purse: Allocative Systems and Inequality in Couple Households*, 20 GENDER & SOC'Y 354, 375–76 (2006).

176. Mignon R. Moore, *Independent Women: Equality in African-American Lesbian Relationships*, *in* FAMILIES AS THEY REALLY ARE 214, 216–17 (Barbara J. Risman ed., 2010).

177. Gabrielle Gotta et al., *Heterosexual, Lesbian, and Gay Male Relationships: A Comparison of Couples in 1975 and 2000*, 50 FAM. PROCESS 353, 364–65 & tbl.4 (2011).

178. M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 147 (2001); Maree Burns et al., *Financial Affairs? Money Management in Same-Sex Relationships*, 37 J. SOCIO-ECONOMICS 481, 487 (2008).

179. Carole Burgoyne et al., *Money Management and Views of Civil Partnership in Same-Sex Couples: Results from a UK Survey of Non-Heterosexuals*, 59 SOC. REV. 685, 703 (2011); Burns et al., *supra* note 178, at 497.

180. For a discussion about legal awareness, see *supra* Part V.A.

status transition, at the levels of formal law, social norms and dynamics, and lived experience.

Who bears and should bear the costs of relational status transition? Partially due to the promise that access to formal equality represents, the range of process aspects of these status transitions may be underappreciated in broader discourse. Certainly, identifying the costs of process (or their accompanying impacts on substantive equality), is never meant to defeat claims for formal equality.[181] But examining experiences in traversing the marital border provides an important opportunity to consider how we might bolster individuals and families through important status change by engaging the state and social institutions. Hidden process costs of relational transition may undermine the equality couples seek, by giving rise to unwanted legal and financial obligations due to boundary indeterminacy.

Sociolegalism provides a broad framework in which to consider paths toward the pursuit of everyday equality in transitional contexts. Concepts of procedural justice facilitate an evaluation of how process may bolster or undermine experiences of formal equality. Vulnerability theory highlights differential access to social assets, including through legal regimes that may buffer individuals, relationships, and communities.[182]

In the previous parts, I identify some distinct legal challenges that those transitioning into marriage face and the process challenges associated with addressing those questions. Efforts to bolster resilience and foster a more fulsome vision of rights for relationally transitioning families should address the range of process burdens identified. I will explore proposals more fully in this section, from theoretical, doctrinal, policy, and research perspectives.

A. *Theory*

How do we build resilience to create transitional equality within a framework of everyday equality? Sociolegalism, procedural

181. *See* Kim, *supra* note 1, at 991.

182. Fineman, *Vulnerable Subject*, *supra* note 20, at 8–10 ; FINEMAN, AUTONOMY, *supra* note 20, at 8–10. "This theory's attention to the condition of universal vulnerability, including for historically marginalized communities, and its attendant focus on encouraging greater social strength or capacity in the face of that vulnerability, provides a particularly generative framework for identifying opportunities for increasing resilience in relational migration." Kim, *supra* note 1, at 989.

justice, and vulnerability theory each provide conceptual tools for doing so independently, and as related to one another. The analysis of transitional equality also provides opportunities for theoretical expansion in each of these domains.

Sociolegalism's view of law and social context as mutually constitutive provides a foundation for theorizing the everyday aspect of equality.[183] The quotidian nature of equality, or lack thereof, finds purchase in the sociolegal concept of law on the books and law as lived. Within this, transitional equality expands our understanding of equality as rooted in legal transition processes of families. This latter consideration allows us to pursue the transitional dynamics that are present through formal status change processes, highlighting questions of distributive justice contained therein.[184]

Picking up on the thread of a socially implicated, and decentered law, procedural justice permits closer inquiry into the social and psychological impacts of legal systems through a holistic perspective.[185] Transitional equality finds a home in procedural justice's more capacious understanding of what counts as process and also in its centering of individual experience.[186] While individual perceptions of and encounters with legal systems serve as departure points for analysis, transitional equality can push for developing more responsive, overarching system design that will ensure enduring, and equitable, social change.[187]

Vulnerability theory provides a basis for envisioning systemic responses to address change that occurs connected to universal, human vulnerability.[188] Transitional equality conceives of that inevitable change in social, rather than bodily, terms.[189] This framing enables us to consider what social forces inform and impel relational change and how that change is understood and experienced. Resilience, as articulated through vulnerability theory, strengthens the experience of change, which as I argue, includes relational status change.[190] The social capacity of resilience, built

183. *See supra* Part III.A.
184. *See supra* Part I.B.
185. *See supra* Part III.B.
186. *See supra* Part III.B.
187. *See supra* Part IV.
188. *See supra* Part III.C.
189. *See supra* Part III.C.
190. *See supra* Part III.C.

through more responsive social institutions, inures to the benefit of individuals, communities, and society at large.

These theoretical frameworks help to draw out relational status transition as a subject of inquiry unto itself. The dynamic relationship between doctrinal and process questions that arise in marital transition provide a rich opportunity to push the concepts grounding sociolegalism, procedural justice, and vulnerability theory even farther.

B. *Doctrine*

What does it mean to reinforce transitional equality in the law? Legal doctrine provides some building blocks for better recognition and support of equality in transition. Specifically, bolstering access to justice provides an important mechanism for building transitional equality, premised on resilience. Procedural due process, equal protection, and substantive due process doctrine provide some opportunity to support access to justice in the relationship status transition context.

1. Procedural Due Process

Procedural due process doctrine provides an opportunity to build transitional equality. Cases on access to courts and civil legal assistance provide useful tools developing systemic resilience for relational status transition.

a. Access to Courts

Boddie v. Connecticut, addressing access to courts, vindicates an interest in transitional equality through its focus on protecting the opportunity to be heard to adjust relational status (i.e., marital status). Plaintiff welfare recipients challenged state procedures as applied for commencement of litigation, including requirements for payment of court fees and costs for service of process, that restricted access to courts in efforts to bring a divorce action. The average cost for litigation for bringing a divorce action was $60.[191] According to the plaintiffs, the court fees re-

191. Boddie v. Connecticut, 401 U.S. 371, 372 (1971).

stricted their access to divorce and violated procedural due process rights.

Plaintiffs analogized their position to that of defendants facing exclusion from the only forum in which they can settle their disputes. While plaintiffs in divorce actions voluntarily instituted legal action, unlike defendants who have no control over what plaintiffs do, the Court blurred the distinction between the voluntariness and non-voluntariness of the litigant plaintiffs' orientation toward the court. While the plaintiffs undertook action to obtain divorces, being in court was not truly voluntary because persons who want divorce have no option but to bring legal action for divorce.[192]

Boddie is instructive from a transitional equality perspective, however, even in instances when people are not seeking divorce. The monopoly that courts have over relational transition from married to unmarried extends to other relational transitions as well, such as from unmarried to married. The long shadow that judicial regulation casts over all relationship statuses means that any adjustment necessarily involves legal entanglement—whether at the relationship's beginning or end.[193] Transitional equality suggests, then, a need for equal access to judicial remedies to make relational adjustments.

b. Civil Legal Assistance

The legal questions that arise connected to marital status transition are ones that require legal expertise. Constitutional law's approach to civil legal assistance in the family context contains inherent contradictions. It both recognizes the importance of procedural protection in civil contexts (and even in the law of family)

192. While other parties, like those in a contract dispute, would have the option for private settlement of claims, those seeking divorce must pursue a legal proceeding. As a person seeking a divorce must "invok[e] State's judicial machinery" to get a divorce, the state has a monopoly over the ability to adjust one's legal status this way. *Id.* at 376. While the Court does not conclude that there is a fundamental right to divorce, it does say that obtaining a divorce is important because marriage is deemed central to private life. *Id.* at 371 ("[M]arriage involves interests of basic importance in our society.").

193. The Court tells us that "due process requires . . . that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given meaningful opportunity to be heard." *Id.* at 377.

but denies the need for this protection to come in the form of legal assistance.

The "civil *Gideon*" movement seeks to address needs for legal assistance in important civil contexts,[194] building on the foundational *Gideon v. Wainright*, guaranteeing a right to appointed counsel for indigent defendants in criminal cases as a Fourteenth Amendment procedural due process matter.[195] While there has been increasingly vigorous emphasis within legal, research, and policy communities on the importance of civil legal assistance, guarantees of such are substantially constrained by doctrine, specifically the Supreme Court's holding in *Lassiter v. Department of Social Services of Durham County*.[196]

In the case, petitioner Abby Lassiter lost custody of her son William when he was adjudicated neglected and put in the county's custody. She was subsequently convicted of second-degree murder (unrelated to her son William). The county Department of Social Services petitioned to terminate Lassiter's parental rights.[197] At the point that the Department of Social Services sought to terminate her parental rights, Lassiter had already lost physical custody but was still William's parent. Significantly, Lassiter was not represented during the parental termination hearing. And, not surprisingly, the state trial court terminated her parental rights.[198]

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194. Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106, 2108 (2013) ("The term 'civil *Gideon*' now commonly serves as a shorthand for the idea that the right to appointed counsel for indigent criminal defendants recognized in *Gideon* should be extended to civil cases involving interests of a sufficient magnitude."); *see also* Debra Gardner, *Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 167, 168 (2006); Steven D. Schwinn, *The Right to Counsel on Appeal: Civil Douglas*, 15 TEMP. POL. & C.R.L. REV. 603, 603 n.2 (2006).

195. 372 U.S. 335, 343–44 (1963).

196. 452 U.S. 18, 26–27 (1981).

197. These grounds included that she had not had contact with the child since December 1975, she willfully left William in foster care for more than two years without progressing toward reuniting with him and failed to show positive response to the county's efforts to strengthen her relationship with the child or to make and follow through with plans for William's future. *Id.* at 20–21.

198. *Id.* at 23–24. After the state trial court terminated her parental rights, Lassiter appealed to the intermediate state appellate court, which affirmed the termination. Lassiter appealed to the North Carolina Supreme Court, which denied her application for discretionary review. The United States Supreme Court granted certiorari to consider her Fourteenth Amendment Due Process claim. *Id.* at 24. Lassiter was able to manage these appeals through a legal aid attorney she eventually obtained. *Id.* at 19.

In analyzing Lassiter's procedural due process claim, the Court applies a presumption that indigent litigants have a right to counsel only when faced with potential loss of physical liberty.[199] Against this presumption, the Court weighs the three procedural due process analysis factors of *Mathews v. Eldridge*—risk of error and government interest with the private interest at stake.[200] While the Court assesses the private interest in threatened loss of parental rights as great, it views it as less significant than a threatened loss of physical liberty. The Court weighs the state's interest in welfare of the child and in saving fiscal resources,[201] noting potential alignment between the state and the parent based on appointed counsel being able to assist in obtaining an accurate decision for the child's welfare. Lastly, the Court weighed the risk of error as high, especially due to lack of education and the general distressing nature of the legal issue at stake.

With this analysis recognizing the great interests at stake, alignment between the parent and the state, and the high risk of error, the Court seemed poised to embrace a constitutional right to a lawyer in at least this civil context. So why the bait and switch to deny a procedural right to counsel?

The Court portrayed the procedural due process analysis as a "case by case determination" left in the first instance to the trial court. The Court concluded that the *Mathews* factors could not be distributed the same way in all cases, requiring more fact-specific inquiry. Oddly enough, however, rather than send the case back to the trial court to determine whether Lassiter was entitled to assistance of counsel, the Court undertook the trial court's work itself, determining that Lassiter was not entitled to an attor-

199. *Id.* at 26–27.

200. 424 U.S. 319, 335 (1976).

201. The Court noted that fiscal interests cannot determine the scope of procedural due process rights or access to constitutional rights. *Lassiter*, 452 U.S. at 27–28.

ney.[202] The case was widely decried as a debilitating setback for progress toward civil justice protection.[203]

How can transitional equality shift the frame around *Lassiter*? While the *Mathews* factors applied in *Lassiter* have themselves been the subject of sustained criticism, even assuming they are appropriately applied, a lens of transitional equality helps us understand various interests and dynamics at stake more broadly. The Court defined Lassiter's interest as one of loss of parental rights, engaging in a dichotomous weighing of the significance of loss of physical liberty as compared to loss of parental rights.

If Lassiter's status as a parent is to have meaning, however, this means the ability to keep that status secure as well. Lost in a narrow focus on how important parental rights are compared to physical liberty rights, the case reveals Lassiter's independent interest in equality in passage across the legal status boundary from parent to nonparent. Taken seriously, parties facing such kinds of status changes (in this case, a parental status change) deserve a means to buffer the various costs and dangers faced through this process. Parental or other legal status rights matter not just because of what they mean in an absolute, or isolated, sense but because of what they mean in connection to surrounding dynamic forces that shape, define, and inform them.

Within a framework of transitional equality, which demarcates multidimensional space around and through rights, the ability to secure rights in the first instance and to maintain them going forward matters. Lassiter's right as a parent includes the transitional rights associated with this relational status, including in

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202. The Court does its own analysis of *Mathews* factors in this particular case of Lassiter. The keys to the Court's analysis were risk of error and parental interest. The Court concluded that there was a low risk of error with no especially troublesome points of law and determining that counsel would not have made a difference, given the weight of evidence that Lassiter had "few sparks of such an interest" in rekindling her relationship with her son. *Id.* at 32–33. *Moreover*, the Court concluded that Lassiter's interest at stake was low, with her "plain demonstration that she [was] not interested in attending a hearing." *Id.* at 33.

203. *See e.g.* Brooke D. Coleman, Lassiter v. Department of Social Services*: Why Is It Such a Lousy Case,* 12 NEV. L.J. 591 (2012); Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing* Lassiter v. Department of Social Services, 59 CATH. U. L. REV. 1057 (2010). I do not enter here the robust scholarly conversation about whether *Mathews* was rightly decided or whether the factors enunciated there were appropriate. *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge, 44 U. CHI. L. REV. 28 (1976).

the face of relationship status transitions, whether voluntary or coerced. A case-by-case approach—apart from the way it is applied—overlooks interests in transitional equality. It should not matter from a transitional equality point of view whether the legal issues in the case were difficult or easy, whether Lassiter had demonstrated many or "few sparks of interest in rekindling interest in her son,"[204] or whether she attended the termination hearing or not.[205]

Even in the context of the case-by-case analysis, the reason to which the Court points for its conclusion that Lassiter possesses a diminished private right—that she did not attend the termination hearing[206]—highlights the very reason why she was entitled to an attorney. Even in her incarcerated state, legal assistance could have made a difference to Lassiter in facing the potential relationship status transition by enabling her to attend the very hearing she was faulted for not attending. Transitional equality further pierces the fiction upon which *Lassiter* is based—that her private interests and her risk of error were diminished because of actions Lassiter failed to take of her own individual, autonomous volition. While the confusion and distress that any parent would likely face when confronting the prospect of termination is, of course, serious, the framing of her interests solely in reference to its severity as compared to physical liberty devalues the ways in which Lassiter, and others facing relational status transition, are not merely individual actors but persons whose lives reveal and are informed by a variety of social forces and coercions. An emphasis on transitional equality brings to bear all the ways legal assistance matters and the ways in which she and others can be impaired in their relationship status transitions—whether due to

204. *Lassiter*, 452 U.S. at 32.

205. The Court's assessment of Lassiter's private interest as diminished by her failure to attend the parental termination hearing overlooks the fact that Lassiter was incarcerated at the time and did not know about the proceeding. *Id.* at 20–21. Justice Blackmun, in dissent, objected to the idea of a case-by-case approach. *Id.* at 57 (Blackmun, J., dissenting) ("[T]he issue . . . is not petitioner's character; it is whether she was given a meaningful opportunity to be heard when the state moved to terminate absolutely her parental rights."). This also departs from the effectively substantively-neutral approach to procedural due process as articulated in *Goldberg v. Kelly*, whereby the strength of claims at issue does not dictate the scope of procedural due process rights. 397 U.S. 254, 262–63 (1970).

206. *Lassiter*, 452 U.S. at 33.

the nature of the relationship at stake, level of education, legal issues contained therein,[207] or other social conditions.

2. Equal Protection and Substantive Due Process Dialectic

Constitutional cases that operate at the intersection of substantive due process and equal protection highlight the importance of equal access to rights. Cases like *Obergefell v. Hodges* occupy this middle ground—what Kerry Abrams and Brandon Garrett called "intersectional rights" cases—and provide a foundation for considering transitional equality more squarely.[208] Abrams and Garrett apply Kimberlé Crenshaw's concept of intersectionality to this domain of constitutional cases.[209]

Abrams and Garrett describe these intersectional rights cases as those that "involve multiple constitutional claims that gain meaning when heard together and amplify the cognizable harm."[210] These cases can arise across a range of contexts, as described by Abrams and Garrett; the Court's constitutional cases in the context of intimacy regulation, extending from *Griswold v. Connecticut*[211] to *Eisenstadt v. Baird*[212] to *United States v. Windsor*,[213] they observe, have been especially criticized for failing to explain the relationship between substantive due process and equal protection, when the Court relies on both to find a constitutional violation.[214] Abrams and Garrett similarly critique *Oberge-*

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207. The ex ante approach the Court takes to evaluating the risk of error runs entirely counter to what we know, from a social scientific standpoint, to the ways in which people understand the law, including in the intimate rights context. A society-based understanding of the legal system, focused on law as lived day-to-day, in everyday people's lives means that assumptions that legal actors make about law cannot be facilely applied to "lay" people, especially when one takes into account level of education and other social-economic status factors.

208. Abrams and Garrett theorize "cumulative constitutional rights" cases, whereby "[p]laintiffs litigate multiple constitutional violations, or multiple harms, and judges use multiple constitutional provisions to inform interpretation." Kerry Abrams & Brandon Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1309–10 (2017) (dividing cases into three categories—aggregate harm, hybrid rights, and intersectional rights).

209. *Id.* at 1330; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989).

210. *See* Abrams & Garrett, *supra* note 208, at 1330.

211. 381 U.S. 479 (1965).

212. 405 U.S. 438 (1972).

213. 570 U.S. 744 (2013).

214. Abrams & Garrett, *supra* note 208, at 1312 ("In particular, scholars have criticized much of the Court's constitutional family jurisprudence—from the contraception cases

fell v. Hodges for neglecting to specify the link between substantive due process and equal protection[215] in its determination that barring same-sex couples from marriage was unconstitutional.

In *Obergefell*, the Court marked a relationship between the two—

> [t]he Due Process Clause and the Equal Protection Clause are connected in a profound way . . . . In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[216]

Abrams and Garrett argue that cases like *Obergefell* show different constitutional rights, like due process and equal protection, as "mutually reinforcing and amplifying."[217] The withholding of the marriage right shows inequality, and the inequality shows the significance of what is being withheld. Further, "[t]he key to *Obergefell* and the other marriage cases is the bundling of multiple substantial government benefits into a legal status of cultural heft called 'marriage,' and then denying some but not all people from accessing that status," they observed.[218] "The Court implied that the discrimination claim and the fundamental rights claim, standing alone, were not as strong."[219]

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such as *Griswold v. Connecticut* and *Eisenstadt v. Baird* to the more recent LGBT rights cases such as *Lawrence* and *United States v. Windsor*—for failing to specify with adequate precision the constitutional right at stake." (citing Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988))).

215. *Id.*

216. 576 U.S. __, __,135 S. Ct. 2584, 2602–03 (2015).

217. Abrams & Garrett, *supra* note 208, at 1315. "Traditionally, substantive due process has protected a limited menu of 'fundamental rights' from government intrusion, while equal protection has protected individuals against discrimination by the government. But in some cases, these rights have merged." *Id.* at 1331–32.

218. The opinion then spends a substantial amount of space working through previous cases in which equal protection and substantive due process have converged. *Loving v. Virginia*, the case in which the Court invalidated a ban on interracial marriage, for example, rested on both equal protection and substantive due process principles. The *Obergefell* opinion acknowledges *Loving*'s conceptual merging of the two clauses; *Loving* held that "[t]o deny this fundamental freedom [of marriage] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." "The reasons why marriage is a fundamental right," *Obergefell* explains, "became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions." Abrams & Garrett, *supra* note 208, at 1333–34 (alterations in original) (footnotes omitted).

219. *Id.* at 1335.

A concept of transitional equality helps to bolster the concept of intersectional rights, which they draw from Pamela Karlan's notion of "stereotypic harm"[220] and Kenneth Karst's approval of the Court's "integration of appeals to equality and liberty" as reflecting the Fourteenth Amendment's core concern with equality of citizenship.[221] While a full discussion of the underlying commitments of substantive due process and equal protection lies beyond the scope of this article, I suggest here that the intersection of rights in the "fundamental due process" context, largely conceived of as occupying the space between substantive due process and equal protection, could also contain a procedural dimension.

The "synergistic"[222] relationship between substantive due process and equal protection, arguably, flows from a process-based concept of equal or full access. The ability to gain equal access to something valuable, whether or not it is denoted as a "fundamental right," but even or especially when it is deemed "fundamental," provides a way to think about the relationship between due process and equal protection. Equal access to a legal status raises independent and important concerns about fundamental fairness, which can help advance transitional equality.

Inequality of access also makes itself visible through regulation of access to the scope of rights already deemed fundamental. For instance, like *Lassiter*, the case of *M.L.B. v. S.L.J.* arises in the context of a threatened forced shift in relational status, parental termination.[223] The case strikes down, on due process and equal protection grounds, a statute "requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights."[224] While due process does not guarantee a right to appeal, Justice Ginsburg places the barrier to judicial access in the context of the importance of the threat to parental relationships.[225] Karlan observes, "Equal access was required because the right being adju-

220. Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474, 480 (2002).

221. Kenneth L. Karst, *Those Appealing Indigents: Justice Ginsburg and the Claims of Equal Citizenship*, 70 OHIO ST. L.J. 927, 938 (2009).

222. Karlan, *supra* note 220, at 474.

223. M.L.B. v. S.L.J., 519 U.S. 102, 119–24 (1996).

224. *Id.*

225. *Id.* at 102 ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."(citations omitted)).

dicated in the underlying proceeding was a fundamental one."[226] If the legal status of parenthood means anything, it includes the ability to protect this right equally against forced transition out of this status.

A transitional equality lens helps to bring into sharper focus the procedural stakes around rights, especially when located at the intersection of equal protection and due process. For instance, in *Kerry v. Din*, the Court denied a petitioner's claim that she had a constitutional right to reside in the United States with her husband, who was denied a visa, and that her liberty interest in marriage entitled her to a procedural review of the denial.[227] A transitional equality lens could have brought out even more saliently what Abrams and Garrett describe as the *Din* claim's

> nuanced understanding that procedural interests can affect substantive liberty interests. Din claimed not that she was entitled to family reunification because of her liberty interest in her marriage, but rather that her liberty interest in her marriage, coupled with her rights as a U.S. citizen, entitled her to sufficient due process to understand the reasons why her husband was being excluded from the United States.[228]

C. *Policy and Infrastructure*

The ability to address the legal and associated process burdens encountered by those in relational transition, like those post-*Obergefell*, requires innovation in access to justice policy and infrastructure. Creative problem solving in the justice gap space would inure to the benefit of the "[o]ver 100 million people in the United States . . . living with civil justice problems."[229] As discussed above, the civil justice gap is especially pronounced for family law matters.[230] Moreover, communities of color, immigrants, women, the elderly, and LGBTQ people are among those more likely to require income-based legal assistance in the United States. This broader picture of the civil justice gap suggests over-

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226. Karlan, *supra* note 220, at 482–83.

227. 576 U.S. __, __, 135 S. Ct. 2128, 2136 (2015) (plurality opinion).

228. Abrams & Garrett, *supra* note 208, at 1343.

229. AM. BAR FOUND., CIVIL JUSTICE PROBLEMS ARE COMMON, WIDESPREAD, AND RARELY TAKEN TO A LAWYER (2016), http://www.americanbarfoundation.org/uploads/cms/documents/abf_research_brief_access_to_justice_v3.pdf [https://perma.cc/9PVB-W4CS].

230. For instance, family law cases comprised the largest percentage of all types of civil legal assistance provided by Legal Services Corporation grantees in 2016.

lap between those facing justice problems and same-sex couples in relational transition into marriage.

Considering the various dimensions of relational status transition, in an intentionally sociolegal fashion, assists us in the effort to support transitional equality. This multidimensional focus enables us to strike a reasonable balance between responding to the needs of individuals, families, and communities on one hand and deterring excessive regulation on the other. This goal requires multi-pronged solutions that carefully attend to infrastructural gaps that build capacity and avoid coercion. I discuss some areas deserving further policy attention in the context of transitional equality, which will bolster resilience in relational transition.

As previously discussed, family-related needs make up the bulk of civil legal assistance needs.[231] Moreover, as Elizabeth MacDowell has observed, the issues of family are ubiquitous and run a wide gamut through people's lives, thus providing a revealing window into the role of access to justice in everyday life.[232] This topical focus and the higher rates of civil justice contact by disadvantaged populations[233] makes for an important opportunity to bolster transitional equality.

The access to justice conversation in the United States largely centers on two areas—funding and, relatedly, access to legal counsel. Efforts to boost pro bono service and the "civil *Gideon*" movement are based on the view of legal representation as a main measure of access to justice. But increasing access to lawyers may not be enough, or the only solution. Rebecca Aviel criticizes the focus on access to lawyers as it applies in the child custody context in family law.[234] She argues against relying solely in family law on the adversarial, lawyer-centered model of addressing access to justice problems, viewed as critical in criminal law, observing that "[m]ost litigants want proceedings that are short-

231. *See supra* Part V.B.

232. Elizabeth L. MacDowell, *Vulnerability, Access to Justice, and the Fragmented State*, 23 MICH. J. RACE & L. 51, 52–53, 56–59 (2018).

233. Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, AM. BAR FOUND. 1, 3, 5, http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf [https://perma.cc/C7B8-4JW5] (last visited Apr. 1, 2019).

234. Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106, 2109–10 (2013).

er, simpler, cheaper, more personal, more collaborative, and less adversarial. These are procedural values that are—and should probably remain—foreign to criminal proceedings."[235] Aviel's argument may be viewed as a means of bolstering resilience through relational transition.

Moreover, the sociolegal research of recent MacArthur "genius" award recipient Rebecca Sandefur highlights the mismatch between the intense focus on funding and on provision of lawyers and the justice needs of people. Simply funding more lawyers does not account for the way that people view their legal needs, if they even view them as legal. As Sandefur has determined, when Americans are asked about their experiences with problems that are justiciable, "they often do not think of their justice problems in legal terms."[236] They "express a wish for assistance with these problems, but it is not usually legal assistance that they wish for."[237]

The case of "Mary," a woman Sandefur interviewed, who faced foreclosure proceedings on her home, is telling. Mary had quit her job in order to manage her son's recently diagnosed developmental disorder, and had stopped making her mortgage payments. She soon became overwhelmed by the foreclosure proceedings.

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235. *Id.* at 2109. Aviel continues:

> [W]e should hesitate before throwing full support behind a civil *Gideon* initiative for family law, regardless of how wholeheartedly we embrace the proposition that parental rights are as important as physical liberty. Civil *Gideon* discourse trades on the gravitas of constitutional criminal procedure but isn't sufficiently tailored to the unique qualities of family law. These unique qualities challenge us to design custody dispute resolution systems that honor the constitutionally significant interests at stake while recognizing the truly unique posture in which separating parents litigate, which is different from both the criminal context that gave rise to Gideon and the administrative law context from which the Court's civil due process precedents emerged. To pursue civil Gideon as a stand-alone reform falls short of this challenge. It accepts the primacy of a lawyer-centric adversary system as the preferred means for resolving family law disputes in the face of growing evidence that this framework does more harm than good for most domestic-relations litigants. Civil *Gideon* responds in an admirable and important way to the unfairness of litigating without a lawyer in a system where lawyers are indisputably necessary. But it doesn't challenge the necessity of lawyers or envision a world in which parents can resolve their disputes more quickly and more collaboratively than in lawyer-centered systems.

Id. at 2109–10.

236. Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, *in* MIDDLE-INCOME ACCESS TO JUSTICE 222, 233 (Michael Trebilcock et al. eds., 2012).

237. AM. BAR FOUND., *supra* note 229 (citing Sandefur, *supra* note 236).

Mary told Professor Sandefur that the person who gave her the most helpful advice she had received throughout the entire ordeal was the process server who served her eviction papers. The process server had simply assured Mary that she had rights, and urged her not to let the bank intimidate her.[238]

This encounter "illustrates the disconnection from access to basic legal assistance that many Americans experience every day, and shines a light on the value of fundamental and sound advice given at the moment when it is most needed."[239] As Sandefur notes, it also "give[s] researchers important insights into the areas where legal assistance programs can intervene, and how we can design programs that can assist people at the moment when they need it most."[240]

Understanding the everyday contexts in which people encounter technically legal problems is crucial for building transitional equality. As Sandefur has found, despite the assumption that funding more lawyers should be the focus of access to justice reform, many people may never even reach the point of seeking to secure a lawyer. As she has found, despite the technical legal need that may exist, "people [are] least likely to consult attorneys about problems [involving] personal finances, . . . housing, . . . health care, . . . employment, . . . and community needs."[241] And solutions geared toward increasing access to justice must account for the broader social context that informs people's orientation toward problems. For instance, "In a study of poor and moderate-income Americans' experiences with civil justice problems involving money and housing, poor households were twice as likely to do nothing about such problems as were moderate-income households."[242] This inaction does not mean that legal problems should not be addressed; the reasons for the gap between action and in-

238. *Id.*

239. *Id.*

240. *Id.*

241. REBECCA L. SANDEFUR, AM. BAR FOUND. & UNIV. OF ILL. AT URBANA-CHAMPAIGN, CIVIL LEGAL NEEDS AND PUBLIC LEGAL UNDERSTANDING 1 (citing Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010)), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf [https://perma.cc/WSF6-SVQW] (last visited Apr. 1, 2019).

242. *Id.*

action must be understood and addressed to create sustained and effective access to justice solutions.[243]

Increasing transitional equality, including for those in relational transition, requires attending to the broader infrastructural landscape of civil legal assistance. Mapping this infrastructure is an important first step. The civil legal infrastructural landscape in the U.S. is one of numerous, small-scale public-private partnerships.[244] Not surprisingly, "Geography is destiny: the services available to people from eligible populations are determined by where they happen to live, not by what their civil justice problems [are]."[245] In this context, in order to create true resilience across legal status categories, especially and including relational statuses, but also connected to people's other legal problems, we must address these infrastructural gaps.[246]

In considering system design and more holistic approaches to building transitional equality, we must also consider what we mean by effective legal assistance and how our legal institutions can ambitiously and sensitively address pervasive need. A more robust effort at building transitional resilience, however, must attend to the limitations of increased funding or legal assistance provision as main goals of access to justice efforts. We must also expand what we mean by providing legal assistance. How do we shift people's orientation toward lawyers and the legal system? How can we build legal literacy? Without being tethered to legal institutions qua legal institutions, how can we address transitional equality needs as they arise—in ordinary people's lives? Innovations in technology, given its embeddedness in everday life, could assist in bolstering relational transition resilience.[247]

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243. Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, *in* TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 112–13, 127–28 (Pascoe Pleasence et al. eds., 2007).

244. AM. BAR FOUND., *supra* note 229.

245. REBECCA L. SANDEFUR & AARON C. SMYTH, AM. BAR FOUND., ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT, at v (2011), http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf [https://perma.cc/DHS9-K8R5]).

246. While fragmentation poses a serious challenge, we must, however, address the downsides of attempts to reduce this, namely coercive and systemic overregulation, especially of the poor, that can result in efforts to address legal problems in a more cohesive manner. Elizabeth L. MacDowell, *Vulnerability, Access to Justice, and the Fragmented State*, 23 MICH. J. RACE & L. 51, 53–54 (2017).

247. A broader conversation about the intersection of technology, access to justice, and

Relational status transition serves as an important launchpad for considering how to build transitional equality through access to justice. The confluence of lack of knowledge about marriage and the deeply legally embedded nature of marriage and its impacts regarding money and parenthood render even more salient the disproportionate representation of family law in the justice gap crisis. Moreover, the impacts of the civil justice gap on women, older people, and LGBTQ communities highlight the unique challenges of relational transition even in a context of marriage equality. This is even more pronounced for married couples of color.

Policy innovation in the access to justice space must take into account the heterogeneity of legal need comprising the justice gap, including in the family law arena. Relational transition in this marriage context provides the opportunity to think through how we might meet people's everyday encounters with legal problems in an effort to bolster resilience in legal status transition.

D. *Future Directions in Research*

I have highlighted above a range of possibilities for future inquiry and impact to advance transitional equality in critical legal theory, constitutional law, and policy and infrastructure. I discuss here some select future directions for research at the intersection of law and social science. Further research in the sociolegal domain can be useful for enabling researchers, policymakers, and legal and social service providers to better understand how to bolster resilience across relational status transition. This is especially important in times of uncertainty. While many same-sex couples married during a time when movement on LGBTQ rights appeared to be headed toward progress, fears about backlash and rollback have pervaded the socio-political climate in recent years. What opportunities does this present for researchers at the intersection of law and social sciences?

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transitional equality falls outside of the scope of this article. RJ Vogt, *Legal Tech Abounds, but Not the Kind People Need Most,* LAW360 (Feb. 3, 2019), https://www.law360.com/articles/1123860/legal-tech-abounds-but-not-the-kind-people-need-most [https://perma.cc/Y66E-PRND]; Rebecca L. Sandefur, *Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies*, AM. BAR FOUND. 1, 9 (2019), http://www.americanbarfoundation.org/uploads/cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf [https://perma.cc/Y6UZ-KJ3C].

1. Uncertainty

This provides an important chance to further explore at least two areas at the intersection of law and social science. First, we can explore the impacts and mechanisms of uncertainty. As described above, those relationally transitioning bear the process burden of legal uncertainty occasioned by continued discrimination, and generalized fear that marriage rights will be reversed due to backlash and ongoing changes in political climate.[248] The feeling of temporariness of legal rights pervades many couples' decisions to marry and ongoing experiences of marriage.[249] Prevailing responses to ongoing resistance to marriage equality have focused on bringing other aspects of formal legal status substantively in line with governing precedent, such as *Obergefell*.[250] As I have argued, focusing on relational status transition as a process in itself, however, also brings into closer view the impacts of uncertainty.[251]

A research agenda focused on uncertainty as a sociolegal phenomenon would dive into its impacts across the range of lived experience, including relational, individual, and community effects in psychological, legal, political, and other social spheres.[252] For instance, as discussed above, we might ask how uncertainty affects one's relationship, one's choices regarding family formation or economic arrangement, psychological feelings of security, and experiences of inclusion. Researchers should also explore the role of race, gender, education, and economic status on experiences and impacts of uncertainty. Especially in today's political context, there is much research to be done on uncertainty as it also relates to fears about backlash and rollback across other domains of social life.

One entry point into this conversation about uncertainty is through the robust social scientific literature on minority stress, including that of Ilan Meyer, which focuses on the negative psycho-social and health impacts of stigmatization of a broad range of groups, including LGBTQ communities.[253] One recent interven-

248. *See supra* Part V.C.
249. *See supra* Part V.C.
250. *See supra* Part V.C.
251. *See supra* Part V.C.
252. *See supra* Part V.C.
253. *See* sources cited *supra* note 167.

tion in this regard arose in the *Masterpiece Cakeshop* case.[254] Pursuant to this argument, permitting exemptions to anti-discrimination law that otherwise protect sexual minorities dangerously exacerbates minority stigma.[255] A stronger interdisciplinary conceptualization of uncertainty would look more closely at the legal and psycho-social impacts of ongoing uncertainty itself, even or especially in connection with established legal status claims. This focus would enable us to build more responsive approaches toward social resilience and relational health,[256] including in the gaps between substantive and formal equality.

2. Legal Literacy and Access to Justice

As discussed above, lack of information imposes a process burden on anyone relationally transitioning, but may raise particular issues for those whose families might depart from social assumptions informing dominant legal structures.[257] As discussed above, marriage's seemingly pervasive and privileged character might actually reduce the understanding of its dynamics, rather than enhance it.[258] The influential work of Lynn Baker and Robert Emery, published now over twenty-five years ago, provides an important foundation for further study of legal literacy about marriage and divorce, which they found, is remarkably low in general.[259]

There is much to explore still in this domain. Here are just a few questions. How does legal literacy in this domain compare now across the population? How does it compare in different cohorts in society?[260] How does the social context surrounding large-scale movements into marriage affect understanding of this socio-legal institution?[261] What are the gaps in this knowledge? How do

254. Brief of Amici Curiae, *supra* note 168, at 3–6, 20.

255. *Id.* at 3–6, 20–25.

256. *See supra* note 170 and accompanying test.

257. *See supra* Part V.A. ("Marriage's commonplace status may ironically overshadow the depth of its connection to a variety of legal and regulatory systems.")

258. I leave for a separate discussion my argument that a similar sociolegal dynamic exists in the context of gender discrimination.

259. *See supra* note 156 and accompanying text.

260. As discussed above, we do not yet know the broader demographic patterns of movements into marriage for same-sex couples post-*Obergefell*, but differences in race, education, economic status, and other socioeconomic status factors may inform legal consciousness in relational transition. *See supra* Part II.

261. As discussed, "[w]hile increasing some levels of legal awareness, the role of mar-

people remedy these gaps, if at all? How do age, gender, race, education, and economic status affect understanding? How can further study inform legal and policy change and various forms of legal and social service practice to bolster resilience for relational transition? What impacts will be felt more widely on relational status resilience from such further study?

Moreover, legal literacy is closely tied to access to justice. As Sandefur has documented, many people may not even view their justice needs as legal problems. Accordingly, funding more laywers may not solve the justice gap as it affects relational transition, as as discussed in this article, or in other contexts. This may be even more pronounced in contexts where a positive right is perceived to have been achieved, like marriage. Further areas of research inquiry can follow Sandefur's work, which would identify legal consciousness among those who have achieved positive rights. How does this affect one's view of whether one has legal problems? How does membership within a historically marginalized community affect own's perceptions of these justice needs?

Questions like these comprise merely the tip of the research iceberg.

CONCLUSION

Today's robust and important conversations about equality and social change fail to address the deep connections between these two spheres. Moreover, law and legal scholarship single-mindedly focus on the comparative virtues of one regulatory regime or category over another, ignoring the process of transitioning from one legal status category to another, its social, psychological, and legal dimensions, attendant challenges, and opportunities for fostering resilience. During times marked by inequality and rapid social change, resilience through legal transition demands attention.

Relational status transition highlights the rich opportunity that such movements pose for building even more sustained and dynamic equality. Focusing on family and relationships enables us to see even more clearly the social dimension of status change

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riage in civil rights discourse may also obscure the transitional complexities it poses for important aspects of everyday life." *Supra* Part V.A.

and the interwoven nature between formal law and substantive experience. Transitional equality helps us think through how we might create and support more responsive social structures to bolster resilience for families in legal passage. Critical legal theory, constitutional doctrine, policy and infrastructural thinking, and mapping future inquiry in sociolegal research provide avenues for this work and inform future innovation. At bottom, the goal is to support families holistically, in daily interaction, and systemically. I have highlighted here some ways in which the day-to-day experience of legal status transitions demands a multidimensional concept of legal process. I also argue for a multidisciplinary conception of resilience as a basis for achieving transitional equality. These insights can also help to enrich conversation about a range of other status transitions in the context of today's much-needed discourse about social inequality concerning race, gender, class, immigration, incarceration, and other areas. Attending to the process of status transition helps us achieve a more robust equality and justice for individuals and families, helping to make law's promise more real.