The End of Annulment

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I. INTRODUCTION

What role does marriage play in producing a person’s identity? This question is at the core of Angela Onwuachi-Willig’s marvelous new book, According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family.1 Professor Onwuachi-Willig’s book tells the story of Rhinelander v. Rhinelander, a 1925 annulment case.2 Like many annulment cases of its day, Rhinelander revolved around fraud.3 The plaintiff, Leonard Kip Rhinelander, was a member of elite New York society; the defendant, Alice Beatrice Jones Rhinelander, was a working-class woman Leonard met by chance.4 At trial, Leonard claimed Alice had fraudulently induced him to marry her by falsely representing that she was white when in actuality she was “colored.”5 Alice’s lawyer won a victory at trial by having Alice admit that she was colored and arguing that Leonard should have known this—there could be no fraud if Alice had not fooled him.6 The evidence famously included Alice’s partial disrobing before the jury and judge in a private room to show that Leonard should have known based on her naked body that she was not a white woman.7

Although Alice “won” her case—and therefore was ultimately able to obtain a small divorce settlement from Leonard instead of having her marriage declared a nullity—Professor Onwuachi-Willig points out that

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2. Id. at 2–3.

3. Id. at 3.

4. Id. at 3, 27.

5. Id. at 3.

6. Id. at 63.

7. ONWUACHI-WILLIG, supra note 1, at 14.
Alice’s win may have actually been a loss.\textsuperscript{8} Alice appears to have been in love with her husband; the publicity of the trial and the confession that she was indeed “colored” were enough to undo their marriage by making it socially, if not legally, impossible.\textsuperscript{9} The Rhinelanders’ marriage may have been “real,” but in so finding, the jury also reinforced the notion that race was a purely biological construct with distinct physical markers, and may have felt that that Alice’s behavior—including engaging in premarital sex with Leonard and writing him steamy love letters—was consistent with racial stereotypes of black women as promiscuous and hypersexual.\textsuperscript{10} The lesson of *Rhinelander* is that race, even if socially constructed, can seem so indelible that it makes marriage impossible.

Why would this be so? What is it about marriage that links it so closely to identity? *According to Our Hearts* gives us some interesting clues. In considering the plight of contemporary mixed-race families, Professor Onwuachi-Willig frequently refers to the “placelessness” these families experience.\textsuperscript{11} Black-white couples are couples, but like all couples, they are made up of two distinct individuals. As a couple, they take on a new racial identity visible to the outside world.\textsuperscript{12} But as individuals they lose something; each member of the couple is now no longer associated primarily with his or her racial group or community.\textsuperscript{13} Identity has simultaneously been expanded and retracted, often contrary to the preferences of the couple.\textsuperscript{14} As Professor Onwuachi-Willig shows, this new identity can have sweeping social and legal consequences. A mixed-race couple may have difficulty finding a place where they can be “seen”—store clerks and restaurant servers will assume that they are not a couple, making comments with (perhaps unintentional) double meanings, such as “[a]re you together?”\textsuperscript{15} And mixed-race couples can find it difficult to find a neighborhood where they can live without social awkwardness or harassment, and are sometimes even turned away by landlords altogether.\textsuperscript{16} Even with legal protections in place, such as the Fair Housing Act, de facto segregation lives on, and this segregation can make being a mixed-race

\begin{itemize}
\item[8.] *Id.* at 89, 103.
\item[9.] *Id.* at 11, 102.
\item[10.] *Id.* at 110.
\item[11.] *Id.* at 156–98.
\item[12.] *Id.* at 152.
\item[13.] *Onwuachi-Willig*, *supra* note 1, at 162–63.
\item[14.] *Id.*
\item[15.] *Id.* at 176.
\item[16.] *Id.* at 187.
\end{itemize}
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couple uncomfortable, stressful, and challenging.\textsuperscript{17}

Professor Onwuachi-Willig's book is a fascinating exposition of contemporary racial politics viewed through the lens of mixed-race marriage. It also provides an unusual lens through which to view modern marriage, one that this essay explores further. When is a marriage not a marriage? One answer suggested by \textit{According to Our Hearts} is that a marriage is not a marriage when it transgresses the tacit societal consensus regarding what marriage is.\textsuperscript{18} Legally, a marriage is not a marriage if it can be annulled.\textsuperscript{19} However, this essay will show that what counts for annulment has changed over the years. Annulment law reflects changing societal attitudes about which relationships are so far beyond the bounds of the legally cognizable that they cannot be acknowledged.

This essay will evaluate how societal expectations for marriage have changed by exploring changes in annulment law. The Rhinelander case occurs at a pivotal point in this history: a time in which marriage was moving from an economic, community-oriented institution to a private, personal expression of identity.\textsuperscript{20} The central claim of this essay is that understanding annulment law can help us understand the function marriage currently serves in our culture. In a society with no-fault divorce, we might see the end of annulment: legislatures might abolish it, or judges might narrow its availability to make it functionally nonexistent. But that has not happened; people still seek annulments, just for different reasons than they used to.\textsuperscript{21} So if annulment has not come to an end, what is its "end" in that word's other sense—what is its purpose or aim? Understanding why annulment remains important, legally and culturally—and the goals of people who seek it—can help us to understand how marriage forges and alters people's identities.

II. WHAT IS ANNULMENT?

Courts grant divorces when a marriage is over. In the days of fault-based divorce, this was generally when one spouse had "breached" the marital contract by committing an act that was grounds for divorce—typically adultery, desertion, or extreme cruelty.\textsuperscript{22} In a fault-based divorce,

\begin{footnotesize}
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\item \textsuperscript{17} \textit{Id.} at 188.
\item \textsuperscript{18} See, e.g., \textit{id.} at 123.
\item \textsuperscript{19} \textsc{Douglas E. Abrams et al.}, \textsc{Contemporary Family Law} 463–64 (3d ed. 2012).
\item \textsuperscript{20} See infra notes 107–112 and accompanying text.
\item \textsuperscript{21} See infra Part III.
\item \textsuperscript{22} See \textsc{Leslie Joan Harris, Lee E. Teitelbaum & June Carbome}, \textsc{Family Law} 292–300 (4th ed. 2010) (describing fault-based divorce and common grounds for it).
\end{enumerate}
\end{footnotesize}
the innocent and injured spouse often received compensation, usually in the form of maintenance payments or property division.23 Today, as all states have some form of no-fault divorce available, property division and maintenance usually depend more on need and contribution than fault.24

In contrast, courts grant annulments only when they determine that no marriage legally existed.25 The grant of an annulment essentially signifies that there was something so un-marriage-like about the so-called marriage that the law cannot recognize it as valid.26 Unlike divorce, the remedy for a marriage that failed, annulment is the remedy for a marriage that simply was not.27

Traditionally, courts granted annulments only for very limited reasons, such as impotence, incapacity, nonage, or consanguinity.28 Broader annulment grounds would have allowed individuals to avoid the obligations of marriage. A husband, for example, could avoid dividing property or paying maintenance to his wife if he could show that the marriage never actually existed, and children of the marriage might be rendered illegitimate.29 These consequences have become less dire in recent years, because legislatures and courts have increasingly treated annulments and divorces as functional equivalents, and because courts are increasingly granting marriage-like remedies to cohabitants upon dissolution of their relationships.30 But when annulment doctrine was still developing, the difference between an annulment and a divorce could be substantial.31 Celebrities and others who can earn vast amounts of income in a short period of time still occasionally seek annulments—a ten-month marriage could

23. ABRAMS ET AL., supra note 19, at 515.

24. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 308, 9A U.L.A. 446 (1998) (creating “need” as a requirement for maintenance and eliminating “fault” from factors a court can weigh); see also HARRIS, TEITELBAUM & CARBONE, supra note 22, at 345 (noting that “the demise of the fault-based system did generate a conceptual crisis for spousal support and property division orders by eliminating or limiting the effect of a finding of fault on the division of economic resources”).

25. See ABRAMS ET AL., supra note 19, at 463–65 (distinguishing annulment from divorce and describing the grounds for the effects of annulment).

26. Id.

27. Id.


29. Id. at 125–39 (discussing the history of annulment’s effect on legitimacy and alimony and critiquing traditional rule).

30. Id. at 135, 139–41; see also ABRAMS ET AL., supra note 19, at 464–65 (noting that distinction between consequences of annulment and divorce has eroded).

result in an expensive divorce for a spouse who earns $1 million a month, while an annulment would be less costly.

An important feature of early annulment cases was the extent to which they focused on enforcing the public functions of marriage. Several grounds for annulment, such as incapacity, duress, or nonage, are based on a requirement of consent. The thought was that a person making a commitment as important and life-long as marriage had to be able to legally consent to assume its burdens and obligations. Other grounds, such as consanguinity (close blood ties, as in sibling marriage) or impotence, underscored marriage’s social and legal role as the approved site for sexual and procreative relationships. A person who could not engage in sex or procreation, or a couple for whom procreation could be disruptive to the social or genetic order, was prevented from marrying—or from having the marriage recognized if they did marry—because such a marriage disserved the public.

Very rarely did the subjective desires of a particular spouse matter in annulment law. However, one annulment ground did provide a potential avenue for these desires—the ground of fraud. After all, a lie that might fraudulently induce one person into marrying might not work on another. But even in cases of fraud, most courts allowed only very narrow categories of lies to undo a marriage; these types of lies closely tracked the other annulment grounds, focusing on lies about sex and procreation. As Professor Onwuachi-Willig notes in According to Our Hearts, courts have repeatedly held that “incontinence, temper, idleness, extravagance, coldness or fortune cannot serve as the basis for an annulment” and misrepresentations “about financial means or social position [do] not go to the essence of marriage.”

Here is an example: Imagine a man claimed before and during his marriage that he graduated from college with honors (not true), was a partner at a major accounting firm (but was really only a junior accountant), was a highly-decorated Korean War hero (he did not serve in conflict), was a

32. See CLARK, supra note 28, at 88–105.
33. Id.
35. Id.
36. See infra notes 41–44.
38. Id. (citing Marshall, 300 P. 816; Williams v. Williams, 32 Del. 39 (Del. Super. Ct. 1922)).
United States Air Force Officer and Pilot (but was only an enlisted man), and that he received the Congressional Medal of Honor (false). He also told his future wife that he never drank or did drugs (wrong), and that he was not violent (when he had been convicted of felonious atrocious assault for shooting his previous wife).\textsuperscript{39}

Under the fraud doctrine familiar from contract law, a person attempting to void a marriage contract with this person (i.e., the man’s unfortunate wife) would have to show: (1) that he made assertions not in accord with facts; here, that he was an honors graduate, partner at his firm, war hero, sober, and nonviolent; (2) that these facts were fraudulent or material; here, that he knew that his statements were false and that he intended to mislead her; (3) that she relied on the misstatements to her detriment; here, that she believed him, married him, and now is stuck being married to someone who is slowly draining her bank account, is unreliable and violent, and may take her property with him in a divorce; and (4) that her reliance was justified; here, that it was not foolish for her to believe him, or that she could not have easily investigated and refuted his claims on her own.\textsuperscript{40} Although a plaintiff’s ability to win on these facts based on pure contract principles might vary depending on the circumstances, one could imagine that some plaintiffs in these circumstances would have a winning case. Yet the law of annulment treats fraud very differently from run-of-the-mill contract law—so differently, in fact, that a plaintiff would almost never win on these facts.

In \textit{Summers v. Renz}, for example, the 2004 case from which these facts were taken, the court denied the wife an annulment.\textsuperscript{41} The “essentials of the marriage,” the court held, were fulfilled for ten years, until the wife discovered that her husband had shot his previous wife.\textsuperscript{42} Although the court did not devote any time to considering what the “essentials” of marriage might include, the essentials test is long-standing and well developed in many jurisdictions, including California, where \textit{Summers} arose.\textsuperscript{43} Put simply, the “essentials” of the marriage, for purposes of annulment law, are sexual activity and procreation.\textsuperscript{44}

Annulment doctrine, then, allowed a very narrow sliver of marriages to


\textsuperscript{40} See \textsc{E. Allan Farnsworth}, \textsc{Contracts} 237 (4th ed. 2004) (describing elements of misrepresentation that make a contract void).

\textsuperscript{41} \textit{Summers}, 2004 WL 2384845 at *13.

\textsuperscript{42} \textit{Id.} at *9 n.3.

\textsuperscript{43} \textit{Id.} at *1.

\textsuperscript{44} For an extensive treatment of the essentials test, see Kerry Abrams, \textit{Marriage Fraud}, 100 \textsc{Calif. L. Rev.} 1, 7–14 (2012) [hereinafter Abrams, \textit{Marriage Fraud}].
end based on "fraud" or other impediments. The doctrine provided an escape from particularly untenable situations in which sexual activity and procreation could not, or would not, occur within marriage.\textsuperscript{45} The essentials doctrine may have systematically favored men, as the annulment grounds prohibited by law included ones that women seem more likely to assert: misrepresentations about wealth, criminal records, or propensities towards violence or drug abuse.\textsuperscript{46}

Courts may have been particularly careful about creating end-runs around tough divorce rules for two reasons. The first was an intuition that courting couples make misrepresentations routinely.\textsuperscript{47} A particular problem with applying contract principles to marriages is the tendency of courting couples to exaggerate or "puff." As one judge put it:

If every misrepresentation made by the wooer or the wooed were to pave the way to a courthouse for a disappointed spouse suddenly made aware of unsuspected and deliberately concealed frailties of the other, society would indeed have reached a pretty pass. Shall the wife be entitled to nullify her solemnly accepted status if, forsooth, in the face of previous protestations to the contrary, her husband reveals himself as the possessor of a bewitching glass eye or a set of pearly false teeth, or shall to the husband be extended a similar privilege if his once-gorgeous blonde has mysteriously gone brunette? Of course not, for such fraud has not the slightest bearing on the objectives of matrimony. . . . "Fraudulent misrepresentations . . . as to birth, social position, fortune, good health, and temperament, cannot therefore vitiate the contract. \textit{Caveat emptor} is the harsh but necessary maxim of the law."\textsuperscript{48}

This analysis recognizes something important about marriage: although parties to contracts routinely "puff" to a certain extent in their negotiations with one another, we expect romantic partners to show themselves in their best light because they are trying to do something more difficult than just get a consumer to buy a product—they are trying to get someone else to fall in love. Dating couples make misrepresentations about themselves all the time: "I'm not a smoker" sometimes means "I smoke in the evenings"; "I've only had sex with two other people" sometimes means five; "I'm a real-estate developer" sometimes means I have a mortgage I can't pay; "I'm separated" means I've been thinking about leaving my spouse. People also commit sins

\textsuperscript{45} Id.

\textsuperscript{46} For an argument that legal regulation of intimate lies, including annulment law, privileges men, see Jill E. Hasday, Intimate Lies (unpublished manuscript) (draft on file with author).


\textsuperscript{48} Id. (citation omitted).
of omission, failing to mention that they have a sexually transmitted disease, or that their mother isn’t really Jewish, or that they have doubts about their sexual attraction to their potential marriage partner, or, for that matter, that they have doubts about their own sexual orientation. And it is also harder to pinpoint the moment that bargaining begins. Romantic relationships may not have a clear-cut beginning, and even if they do, they may not feel like an "arms-length" negotiation when they are going on.

Annulment for fraud, then, had to be a narrow doctrine or it threatened to envelop most pre-marital representations. A second, and perhaps more important reason for its scope, was that annulment for fraud doctrine developed during a time in which marriage was the only legally and socially sanctioned site for sex and procreation. To make this system work, people needed to get married and stay married. But they also needed assurance that marriage would involve the important social function they anticipated it would. Marriage was the primary means by which the law dealt with dependency, especially the dependency of women and children. Sex and procreation were criminalized outside of marriage. Allowing husbands or wives to escape their marital obligations might lead to an untenable number of impoverished women, but providing no escape hatch whatsoever from a non-sexual or non-procreative marriage would deprive individuals of the only legal means by which they could engage in sex or have children. Annulment was necessary, but it could not provide too easy an escape from marriage.

The limitation on divorce during the fault-based era meant that annulments played an important role in the law of legal separation. People who were not entitled to a divorce might nevertheless obtain an annulment. As Lawrence Friedman has shown, divorce was so difficult to get in New York that by the 1950s, the number of annulments outstripped divorces in ten New York counties, and rivaled the number of divorces in the rest of the state. And New York, a state with a much stricter divorce law than most,
developed a much more lenient annulment law. In New York, a person seeking an annulment based on fraud did not need to limit his or her claim to fraud that went to the "essentials" of marriage: any "material" misstatement or omission was fair game—and this was the law that applied to the Rhinelander case. This New York doctrinal aberration suggests that annulments functioned as a kind of safety valve when the local divorce law did not keep up with modern mores. Even in New York, however, misrepresentations as to income were not enough to obtain a fraud-based annulment; had Alice Rhinelander claimed to be wealthy, for example, Leonard Rhinelander would have had no case to bring.

Traditional annulment law, then, was generally narrow, allowing escape from marriage only in circumstances where marriage was untenable. These reasons were public-spirited; it was in the public interest, for example, to confine sex and reproduction into marriage, and individuals therefore needed to be given an opportunity to have a marriage that included these elements. Marriages entered into based on lies that preyed on the more idiosyncratic preferences of particular spouses would not qualify for annulment, even if it was clear that the spouse would never have married had he or she known the pertinent information.

III. EXPRESSIVE ANNULMENT

Sometime in the mid-twentieth-century, annulment law changed substantially. As Professor Onwuachi-Willig notes in According to Our Hearts, "[d]uring the era of restrictive, fault-based divorces, annulments served a very important purpose, as they provided the primary—and in some cases, the only—mechanism for people to dissolve their marriages." This

55. Id. at 69–70.
56. See Di Lorenzo v. Di Lorenzo, 67 N.E. 63 (N.Y. 1903) (granting husband an annulment where wife said she gave birth to his child but there was no child); Kober v. Kober, 211 N.E.2d 817 (N.Y. 1965) (allowing a pleading on an annulment where husband fraudulently concealed his membership in the Nazi Party during World War II to go forward); Sheridan v. Sheridan, 186 N.Y.S. 470 (Sup. Ct. 1921) (granting an annulment where husband only wanted wife for her money); Wells v. Talham, 194 N.W. 36, 39 (Wis. 1923) (noting that New York had a more lax annulment rule than other states, and speculating that this rule resulted from New York’s having only one ground for divorce).
58. See Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 104 N.E.2d 877 (N.Y. 1952); see also ONWUACHI-WILLIG, supra note 1, at 298 n.99 ("In this sense, had Leonard alleged that Alice had lied about her social position as opposed to her race—a factor that also was reported to be objectionable to his father, Philip Rhinelander, that claim likely would not have survived because such misrepresentations could have been determined to be outside of the ‘essence of marriage.’")
59. See supra notes 49–52.
60. ONWUACHI-WILLIG, supra note 1, at 149.
was especially true in New York, where adultery was the only available ground for divorce until 1967. The newly-reformed divorce laws of the 1970s dramatically expanded the available exit options for couples in unhappy marriages, “making the need for the remedy of annulment less necessary than it was during the time of the Rhinelander[s],” which in turn led to a decline in “collusive” divorces and a decline in the number of annulments sought. The increased availability of divorce made an especially dramatic difference in states with high annulment rates. Consider again the case of New York, which had an unusually high ratio of annulments to divorce. In 1950, for example, courts in the State of New York granted 6604 divorces and 4599 annulments, making annulment almost as significant a way to “end” a marriage as divorce. By 1969, when New York had expanded its grounds beyond just adultery, annulments made up only 10.3% of all cases, and by 1979, this figure had dropped to 1.7%—higher, but not drastically so, than the national average that year of 0.8%. Annulments also became less important to Catholics; many Catholics are now legally divorced, yet still meet the criteria for a papal annulment. The fact that a marriage ended in divorce and not annulment does not affect the Church’s jurisdiction over determining the religious meaning of the marriage.

One might think that with the advent of no-fault divorce, annulment would disappear entirely. Yet the annulment doctrine has lingered. In fact, some courts have actually begun to expand the “essentials” doctrine in ways that stretch it beyond recognition. Most of these expansions occur in cases that implicate individuals’ core personal identities, such as the desire to avoid being a parent, sexual orientation, or national citizenship. Courts’
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willingness to expand annulment law in this direction may indicate a new understanding of the purpose of marriage.

For example, in a New Jersey case, a husband promised his wife prior to marriage that he did not want to have children.69 Once married, however, he refused to have intercourse using contraceptives.70 Under the traditional “essentials” test, the wife’s claim for fraud would have gone nowhere. The husband’s misrepresentation did not prevent her from achieving the “essentials” of the marriage through having procreative sex; in fact, this is exactly what he wanted to engage in.71 If the public purpose of marriage was to provide a legally approved site for sex and reproduction, she was the one at fault, not he. But the court disagreed. “What is essential to the relationship of the parties in one marriage may be of considerably less significance in another,” it explained.72 To further explain its decision, the court turned the “essentials” test inside out:

It is axiomatic that . . . a party will be entitled to an annulment when the spouse refuses to have children. This court now finds that the converse is also true, i.e., given proper proof, a party will be entitled to an annulment when the spouse insists on having children, contrary to the express agreement of the parties prior to marriage that they would not have children.73

More recently, courts have granted annulments where one spouse fails to disclose that he or she is gay.74 One court, for example, explained that a wife’s desire for “unnatural intercourse” with her husband was “repugnant to and destructive of the basic purpose and terms of the marriage covenant.”75 When combined with evidence of her lesbian activity prior to the marriage, this evidence was sufficient to prove fraud.76

In one case, In re Marriage of Ramirez, the court justified the grant of an annulment by claiming that marital infidelity—traditionally a ground for fault-based divorce—now falls within the essentials test.77 There, the husband, Jorge, married Lilia even though he had begun a love affair with Lilia’s sister, Blanca, which he intended to continue even after marrying

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70. Id.
71. Id.
72. Id. at 329.
73. Id. at 328
75. Id. at 774.
76. Id.
77. In re Marriage of Ramirez, 81 Cal. Rptr. 3d 180 (Ct. App. 2008).
Lilia. The court acknowledged the traditional means and use of annulment. "Historically," the court claimed, "annulments based on fraud have only been granted in cases where the fraud relates in some way to the sexual, procreative or child-rearing aspects of marriage." True enough. But then, the court went much further: "Jorge's actions here, in marrying Lilia while continuing to carry on a sexual relationship with her sister Blanca, directly relates to a sexual aspect of marriage—sexual fidelity." Thus, infidelity, traditionally thought of as an aspect of "character" or "personality" and not something that prevents a married couple from engaging in sex, is now not only grounds for divorce but also annulment. Ramirez generated a heated dissent. The dissenting judge opined that the "majority holds that infidelity alone, disdainful as it may be, may serve as a basis for annulment on the ground of fraud . . . . Today's decision could have unintended repercussions in family law practice . . . ." If anyone who doubts his or her ability to remain faithful in marriage can now have the marriage annulled for fraud when the doubts prove true, annulment would indeed expand dramatically.

Some courts have also broadened the essentials test to encompass immigration fraud. "Green card marriages" would appear on their face to be little different from marriages where a person marries for money or social standing. Under the traditional "essentials of the marriage" test, courts should deny annulments in these cases, provided that the immigrant spouse was willing to have procreative sexual relations with the citizen spouse—and indeed, many have.

Often, however, appellate courts have granted or upheld annulments based on green card fraud. California has been in the vanguard of this trend, stretching its "essentials of the marriage" test to include most green card

78. Id. at 181–82.
79. Id. at 185.
80. Id.
81. Id. at 186 (Gaut, J., concurring in part and dissenting in part).
82. Id. at 186.
83. See infra notes 84–96.
cases. This pattern began with the 1974 case of Rabie v. Rabie, in which an American wife accused her Iranian husband of marrying her solely for a green card. The court’s broad holding, that an annulment was justified because the husband never intended to fulfill his marital duties, “especially the duties to remain faithful to [her] and remain married to her[,]” threatened to create an exception to swallow the rule: presumably many people marry with an intention or a suspicion that they may not remain faithful, but the traditional remedy for that has been a fault-based divorce for adultery, not an annulment for fraud. And even more people may marry thinking, in this age of no-fault divorce, that they may not remain married forever. This belief is not fraud, but an accurate understanding of what the law requires of them (or doesn’t). How can the intent to legally terminate a status make the status void?

The Rabie court justified its holding by citing to an earlier case, Security-First National Bank of Los Angeles v. Schaub, in which a thirty-four-year-old woman married a sixty-year-old man solely to gain access to his property. She entered into the marriage as part of a scheme with her lover, a Mr. Scott, and continued to flagrantly visit Scott throughout the marriage. In upholding the district court’s grant of an annulment, the appellate court emphasized that the case was “exceptional.” Mrs. Schaub, unlike other women who had engaged in premarital relations, had demonstrated “no repentance, no reformation, and no desire to seek the shelter of an honorable married life as a means of escape from the past.” Had the court not intervened, Mr. Schaub would be saddled with an immoral and unrepentant leech for the rest of his life.

Schaub’s holding appeared to be an extreme exception to the general rule, as courts largely ignored it and continued to apply the traditional “essentials of marriage” test. Not so with Rabie. Since the Rabie decision,

86. Id.
87. Id. at 596.
88. See Harris, Teitelbaum & Carbone, supra note 22, at 296 (discussing adultery fault ground).
90. Id. at 968.
91. Id. at 972.
92. Id. at 973.
California courts have annulled "green card" marriages in case after case, essentially carving out an exception to the usual test if immigration status, as opposed to social or economic status, is at issue.

In many of these immigration fraud cases, the "essentials" test need not be stretched very far to make out a case for annulment. Most commonly, the fraud is characterized as going to the essentials of the marriage because it involved a secret desire not to consummate the marriage. In one case, for example, a court granted an annulment where a Czech husband refused to have sex with his American wife and told her it was because she was obese. When she lost sixty-five pounds and he continued to demur, the wife became suspicious that he had married her only to obtain legal immigration status. In these cases, even applying the traditional essentials test, a court could conclude that the immigrant spouse never intended to engage in procreative sex with the citizen spouse. The motive of a green card might be further evidence of this, but it would not be the reason for the annulment.

In other cases, however, courts have held immigration fraud alone as sufficient to sustain an annulment. These cases stretch the essentials test almost beyond recognition and characterize remaining in the marriage (or getting a quick no-fault divorce, easily available in California) as unbearable. As one court put it, "where fraud is so grievous that it places the injured party in an intolerable relationship, it robs the marital contract of all validity." This holding is especially striking when compared to Summers v. Renz, the case discussed in Part I in which the husband neglected to mention he had been convicted for shooting his previous wife, and lied about his college education, career, war service, honors, and drug and alcohol use. Some relationships, apparently, are more "intolerable" than others.

Kurys v. Kurys, 209 A.2d 526, 528 (Conn. Super. Ct. 1965) (holding that "if an alien marries a citizen of this country for the only purpose of entering the United States, and without any intention of assuming the duties and responsibilities of the marriage, in a proper case an annulment may be decreed"); Seirafi-Pour v. Bagherinassab, 197 P.3d 1097, 1101 (Okla. Civ. App. 2008) (holding that circumstantial evidence indicated that the wife never intended to engage in marital sex with the husband; the husband claimed that the marriage was never consummated; the wife told co-workers she was single, complained about her new husband's age, appearance, and the way he walked, and left her husband only nine days after getting her green card; further, the husband hired a computer forensic recovery specialist that recovered logs of chats between wife and someone with the tag "Pentagon 666 2000"—presumably her Iranian boyfriend).

94. See infra note 96.

95. Janda, 984 So. 2d at 439.

96. Id. at 435, 439.

97. See infra notes 96, 98.


One inevitable consequence of abandoning the formality of the "essentials" test is that judges have to inject themselves into the mindset of the parties to the marriage, imagining what they would have wanted to know and how they would have felt just prior to marriage—and they may well be mistaken. In one case, for example, a court granted an annulment to a husband who met his wife over the internet.\(^\text{100}\) Shortly after the wedding, the wife demanded that the husband sponsor her for a green card, and the marriage broke down soon thereafter.\(^\text{101}\) The trial court found that the wife’s determination to get a green card on the very same day she got married to be persuasive evidence of her motivation to marry solely for a green card.\(^\text{102}\) "On the day you get married," the court opined, "rather than discuss making a home, finding a place to live, having children, starting a relationship, a green card is one of your first things you list on the day of your marriage."\(^\text{103}\) But why shouldn’t it be? If “making a home” is an important goal, a green card could very well be a prerequisite; there will be no joint home if one spouse is deported. In fact, in some cases, the need for a green card might dictate the date of a couple’s wedding.\(^\text{104}\) And do people really begin to discuss in detail “having children” or “starting a relationship” on their wedding day? Haven’t most people already discussed these things, or if they have not, do we really think they bring it up immediately after their marriage ceremony?

In all of these cases—those involving mistaken or misunderstood sexual orientation, a desire to be childless, the failure to be faithful, or an immigration-status motive—the traditional doctrine would have disallowed annulments for the same reason it forbade them in cases of social or economic fraud. Courts might suspect that in many of these cases, the allegedly defrauded spouse knew or at least suspected that the marriage might have problems, and decided to marry anyway. The “puffing” engaged in by the supposed liar may have been aspirational, hopeful, and even sincere. It is difficult enough for the members of a couple to know what they are thinking and feeling when they enter into a marriage; it is even more difficult for an outsider to discern those motives looking back, sometimes years later.


\(^{101}\) Id. at *1.

\(^{102}\) Id. at *3.

\(^{103}\) Id. (internal quotation marks omitted).

But something about these cases is so repugnant to judges that they are willing to find fraud even where the traditional doctrine appears to deny this form of relief. Judges are granting what we might call "expressive annulments"—repudiations of marriages deemed so far beyond the pale that a no-fault divorce cannot undo the dignitary harm suffered by the duped spouse. In the next Part, I speculate that the reason for this may be that marriage has taken on a new meaning, an identity-producing one, in which the recognition of a fraudulent marriage can harm someone's personal integrity.

IV. RELATIONAL IDENTITY

Annulment doctrine is not the only aspect of marriage that has changed in the past century. Historians and sociologists have shown that marriage itself has changed. 105 Marriage used to be an economic arrangement, and although husbands and wives might feel affection for each other, the marital relationship was not the be-all and end-all of a person's social identity. People lived in large extended families and sought emotional satisfaction and friendship from a variety of sources, not necessarily from their spouses. As William O'Neill put it, families were "large and loose, arouse[d] few expectations, and ma[d]e few demands." 106

The married couple as part of a larger economic household began to shift in the nineteenth century toward the cozy couples we know today. As Stephanie Coontz has shown, the Victorian Era, for all of its notorious prudishness, was actually an era of radical experimentation on the marriage front. 107 "The Victorians," she writes, "were the first people in history to try to make marriage the pivotal experience in people's lives and married love the principal focus of their emotions, obligations, and satisfactions." 108 Men and women began to expect more of their marriages, hoping to obtain emotional, intellectual, and even spiritual fulfillment in them. 109 However, Coontz also argues that the rigid gender roles of the Victorian Era were an impediment to this kind of satisfaction for many couples; when men and women inhabited such "separate sphere" in their everyday lives, it was

106. WILLIAM L. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA 6 (1967).
108. Id.
109. Id.
difficult for them to connect enough to satisfy each other’s every need.\textsuperscript{110}

But by the late twentieth century, these gender roles had been largely tossed aside. Sociologist Andrew Cherlin has identified the 1960s as the dawn of an age of “individualized marriage” and “expressive divorce.”\textsuperscript{111} By the 1960s, Cherlin argues, a new “cultural model of individualism” had arisen, one that held that “self-development and personal satisfaction are key rewards of an intimate partnership.”\textsuperscript{112} In this model of marriage, a partnership is expected to provide a person with “the opportunity to develop your sense of who you are and to express that sense through your relations with your partner. If it does not, then you should end it.”\textsuperscript{113} Thus, we see not only “expressive individualism” in marriage but “expressive divorce.”\textsuperscript{114} Cherlin explains that “if a person finds that he or she has changed since marriage in a direction different from the one his or her spouse has taken, then that person is justified in leaving the marriage in order to express this newer, fuller sense of self.”\textsuperscript{115}

All of these changes mean two important things for understanding marriage and the law of marriage. First, there is less of a public interest in an individual marriage. A wife is less likely to find herself destitute upon divorce (although this certainly does happen), and since sexual expression is available both in and out of marriage, there is nothing particularly troubling about a person remarrying and having sexual relations with someone new. Second, there is much more of an individual interest in marriage. Marriages are personal projects entered into together by autonomous individuals. These projects are important to crafting and staking out these individuals’ own identities, and it is important for these projects to accurately reflect the spouses’ current, chosen forms of self-expression. In other words, the historical changes in marriage in the past two centuries do not make marriage less a part of a person’s identity. If anything, marriage can be more identity-producing: marriage has become in some ways the ultimate self-expression.

The Rhinelanders’ case occurred in the midst of these dramatic changes. Thus, as Professor Onwuachi-Willig shows, \textit{Rhinelander} has elements of both visions of marriage. The interracial union of Alice and Leonard was a public problem, for it threatened to destabilize rigid ideas

\begin{thebibliography}{99}
\bibitem{110} \textit{Id.}
\bibitem{111} Ch\textit{erlin}, \textit{supra} note 105, at 31 (citing \textit{Barbara Dafoe Whitehead, The Divorce Culture} (1997)); \textit{id.} at 87–115.
\bibitem{112} \textit{Id.} at 30.
\bibitem{113} \textit{Id.}
\bibitem{114} \textit{Id.} at 29, 30.
\bibitem{115} \textit{Id.} at 31.
\end{thebibliography}
about race. Professor Onwuachi-Willig shows in detail in *According to Our Hearts* how the jury’s verdict—while on its face a win for Alice—actually reified an ideology of racial difference. If Leonard “knew, or at least should have known” that Alice was colored, it was because being “colored” was something obvious, something the jurors could see with their own eyes. But for the Rhinelander couple, marriage may also have been a self-expression of identity. Leonard may have been attempting to forge a new identity for himself, independent of a wealthy family. Alice may have been, consciously or not, attempting to stake her claim as a “white” person in a world where with whiteness came the possibility of wealth and respect.

This identity-producing aspect of marriage is a theme that threads its way through *According to Our Hearts*. Professor Onwuachi-Willig shows that marriage carries with it a social meaning not present with being a friend or a co-worker. As she puts it, “individuals in intimate, interracial [relationships] often experience daily disadvantages and microaggressions as well as blatant and subtle forms of actionable discrimination in their private lives as a result of their union.” Marriage, she argues, can alter a person’s identity in ways that have concrete social and legal consequences. To support her argument, she quotes Professor Ali Mazrui, who asserts that Barack Obama may have been legitimated in the eyes of black voters by his marriage to Michelle, who is “the descendent of slaves in the United States and a dark-skinned (not a light-skinned) woman who grew up on the South Side of Chicago.” Had he been married to a white woman, however, he very well might never have become president.

Another example offered by Onwuachi-Willig is Professor Heather Dalmage’s story of how marrying a black man altered her own racial identity, changing her from a “white” woman to a person with “no other racial identity . . . to claim.” Dalmage explained: “racial identities are formed in part through our experiences. . . . my experiences are vastly

116. ONWUACHI-WILLIG, supra note 1, at 121–22.
117. Id. at 121–24.
118. Id. at 113.
119. See id. at 199 (describing unique aspects of intimate relationships).
120. Id.
121. Id. at 217 (citing Imagine If Obama’s Wife Was White, Asks African-American Author, THAINDIAN NEWS (Nov. 23, 2008, 7:44 PM), http://www.thaindian.com/newsportal/uncategorized/imagine-if-obamas-wife-was-white-asks-african-american-author_100122795.html).
122. ONWUACHI-WILLIG, supra note 1, at 214.
123. Id. at 256 (quoting HEATHER M. DALMAGE, TRIPPING ON THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD 21 (2000)) (internal quotation marks omitted).
different from other white women."\textsuperscript{124} She cited experiences such as "being seated in the back of restaurants, being denied loans, being steered out of white neighborhoods when [they] search[ed] for housing, being pulled over for no reason, and facing hostility from racist whites [as] experiences most white people never contend with."\textsuperscript{125}

Despite the ways in which marriage can alter a person’s identity, Professor Onwuachi-Willig shows how the law often refuses to recognize the claims of individuals who are harmed, not by their own race, but by their involvement in an interracial relationship.\textsuperscript{126} Professor Onwuachi-Willig critiques this limit in the law, arguing that by framing legal claims in this way, the law "anticipates only temporary connections and effects from cross-racial, work interactions, rather than the long-term or lifelong connections and impacts that occur within families."\textsuperscript{127} It is not just that marriage creates a new partnership—just as incorporation creates a legal "person." Professor Onwuachi-Willig’s important insight is that the existence of this new partnership actually alters the identity of the individuals who are party to it. Her book is filled with examples of how marriage affects an individual’s identity in the context of interracial marriage.\textsuperscript{128} Through her analysis of court opinions, media reports, and numerous self-conducted interviews, Professor Onwuachi-Willig shows how participation in an interracial marriage changes the way others understand and perceive a person and, in turn, his or her own understanding of self. Professor Onwuachi-Willig draws on her own experiences as one half of an interracial couple, revealing how the discovery that she has a white husband changes other people’s perceptions of her own race: “my liberal politics and appearance initially identify me as one who is authentically black, but my choice in a life partner, which indicates my willingness to be placed in deliberate proximity to whiteness, somehow destabilizes my racial identity.”\textsuperscript{129}

If marriage is now inextricably intertwined with personal expression and identity, it should be no surprise that annulment doctrine, and attitudes about annulment, would reflect this trend. Many courts are stretching the "essentials of marriage" doctrine to include aspects of marriage that are idiosyncratic to the couple in question, aspects that never would have been

\textsuperscript{124} Id. (quoting DALMAGE, supra note 125, at 21) (internal quotation marks omitted).
\textsuperscript{125} Id. (quoting DALMAGE, supra note 125, at 21) (internal quotation marks omitted).
\textsuperscript{126} Id. at 257.
\textsuperscript{127} Id. at 258.
\textsuperscript{128} See ONWUACHI-WILLIG, supra note 1 passim (describing self-identity issues).
\textsuperscript{129} Id. at 230.
considered “essentials” one hundred years ago.\textsuperscript{130} Professor Onwuachi-Willig’s book shows that this trend is not only a judicial one. Toward the end of *According to Our Hearts*, she discusses a poll she conducted of twenty-seven undergraduate students at the University of Iowa.\textsuperscript{131} Eerily, their attitudes toward annulment closely track the judicial trend.

Professor Onwuachi-Willig explained to students the difference between annulment and divorce, and that fraud that “goes to the essence of marriage” justifies annulment.\textsuperscript{132} She then asked them to decide whether they thought annulment was justified in each of several hypotheticals.\textsuperscript{133} In each hypothetical, a couple had dated for a year before they married, but the individuals in the couple had never met each other’s families before they married. By at least the third month of the marriage, one of the individuals discovered a fact about his or her partner that caused him or her to file for an annulment.\textsuperscript{134} The only variable was the newly discovered fact.\textsuperscript{135}

The results of Professor Onwuachi-Willig’s poll are fascinating and consistent with the instincts of judges as shown in the annulment cases discussed previously.\textsuperscript{136} Of the twenty-seven students, only two thought that annulment was justified when a husband discovered that his “white-looking” wife kept the fact that she was half black a secret from him until after they got married.\textsuperscript{137} The second most unpopular grounds for annulment was laziness. Only five students thought an annulment was warranted due to a wife’s disappointment when her “once sixty-hour-per-week-working fiancée quit his job almost immediately after they got married to sit on the couch every day, drink beer, and watch sports.”\textsuperscript{138} The most common traditional annulment grounds, impotence and infertility, garnered fifteen and twelve votes for annulment, respectively.\textsuperscript{139} In fact, lying about wealth—which courts do not generally hold to be fraud that goes to the “essentials” of marriage—did just as well, getting fifteen student votes.\textsuperscript{140} The only two types of fraud that received a large majority of the votes were a wife’s lying

\begin{itemize}
\item \textsuperscript{130} See supra Part II.
\item \textsuperscript{131} ONWUACHI-WILLIG, supra note 1, at 235–40.
\item \textsuperscript{132} Id. at 235 (internal quotation marks omitted).
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id. at 235–36.
\item \textsuperscript{135} Id. at 236.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} ONWUACHI-WILLIG, supra note 1, at 238.
\item \textsuperscript{138} Id. at 236, 238.
\item \textsuperscript{139} Id. at 237.
\item \textsuperscript{140} Id.
\end{itemize}
about “being a male-to-female transsexual” (seventeen out of twenty-seven voted for annulment) and a “husband’s discovery that his wife is not an American citizen after she stopped having sex with him and hanging out with him upon marriage” (twenty-four out of twenty-seven voted for annulment).  

What is going on here? Why do students (and judges) find lies about citizenship, motives, and sexual orientation or gender identity to be more harmful to the integrity of marriage than lies about procreation, sexual ability, wealth, and laziness much more harmful than lies about race? One answer may be that citizenship, gender, and sexual identity have more to do with contemporary understandings of identity—and marital identity in particular—than many of these other characteristics. If marriage is a project of personal self-fulfillment and expression, then finding out that the person you married was never actually physically attracted to you (because of sexual orientation) or used to be a different gender could be remarkably destabilizing to one’s sense of self. If marriage is a joint project, in which goals and desires specific to the couple can be brought to fruition, it is not surprising that judges would find lying about the desire not to procreate to be just as important as lies about one’s ability or willingness to do so. And if marriage is central to a person’s core identity, finding out that your spouse married you only to obtain a different identity—like U.S. citizenship—might feel like the ultimate betrayal. 

Indeed, it is the annulment cases dealing with immigration and citizenship status that can be most fascinating, not only because they represent the largest number of cases showing a new ground for annulment, but also because of the visceral reaction judges and students alike seem to have to these cases. We may not consciously think of marriage as a form of citizenship, but we may well think of it as an identity-producing relationship, one that changes us in the ways that a change in nationality might. So finding oneself tied to a person who didn’t intend to forge a new identity through the marriage, but instead intended to use the marriage to get a particular legal identity, feels like a betrayal, almost an infidelity. 

Why would a lie about immigration status be worse than a lie about wealth? Remember how the California courts grant annulments for the first kind of lie but not the second, and that twenty-four of the twenty-seven students surveyed would grant an annulment for lying about citizenship but only fifteen would for a lie about wealth. It may be that the cases simply are not analogous. In the wealth cases, it is the supposedly-wealthy person

141. Id. at 236.
142. For extended arguments about how marriage does sometimes function as a form of citizenship, see Kerry Abrams, Citizen Spouse, 101 CALIF. L. REV. 407 (2013).
143. ONWUACHI-WILLIG, supra note 1, at 236–37.
who lies, and the "gold-digger" finds him or herself stuck with a poorer-than-expected spouse. But in the citizenship cases, it is not the person with the asset (citizenship) who is lying. There are no annulment cases, to my knowledge, brought by an immigrant based on a spouse's false claim of citizenship. Rather, it is the citizen spouse who was duped into thinking that the immigrant spouse really loved him, rather than his citizenship.

But there may also be another important distinction between wealth and citizenship. Wealth is something that can come and go; indeed, the popularity of "for richer or for poorer" in the marriage vows taken by couples speaks to the common cultural understanding that wealth can be transient and that marriages should outlast financial troubles, regardless if it is actually true. Immigration status is different. Once an immigrant has obtained lawful permanent resident status based on marriage, he or she can divorce the sponsoring spouse and apply for citizenship on his or her own.\textsuperscript{144} The marriage can be used in a purely instrumental fashion and discarded once the desired result has been obtained. It is harder to manipulate wealth in this fashion. Even if a person married someone solely for his or her money, he or she would have to stay married for years in order to acquire enough of an interest in marital property incurred during the marriage to make a divorce for money pay off. But a newly-married immigrant can divorce a sponsoring spouse after only two years of marriage, as soon as a green card has been obtained; indeed, absent evidence of marriage fraud, an immigrant can even divorce a citizen spouse during the two-year waiting period and still walk away with legal papers.\textsuperscript{145} This kind of fraud may be one of the purest examples of using a spouse for ulterior motives, a kind of identity theft through marriage. If marriage is anything today, it is a commitment to a joint project—whatever that project may be. For someone seeking an annulment today, the "end" or goal of annulment may be to reclaim his or her pre-marital identity.

V. CONCLUSION

Annulment cases such as \textit{Rhinelander}, as Professor Onwuachi-Willig explicates so beautifully in \textit{According to Our Hearts}, are like a palimpsest of marriage mores. Again and again, courts inscribe new notions of what marriage is into the body of annulment doctrine. At the same time, the old meanings linger on in phrases such as the "essentials of marriage," constraining the ways in which judges can talk about marriage. In some

\textsuperscript{144} Abrams, \textit{Marriage Fraud}, \textit{supra} note 44, at 38.

\textsuperscript{145} For more detailed discussions of conditional permanent residency, see Abrams, \textit{Immigration Law and the Regulation of Marriage}, \textit{supra} note 104, and Abrams, \textit{Marriage Fraud}, \textit{supra} note 44.
instances, as in the transsexual and green card annulment cases, the doctrine makes room for new understandings of marriage.

But in other circumstances, annulment doctrine may not track the social realities of what people expect from marriage. For instance, does Professor Onwuachi-Willig’s discovery that students no longer believe that lies about race should be the basis of annulment mean that race is no longer a salient part of marital identity? According to Our Hearts suggests that the answer is emphatically “no.” Professor Onwuachi-Willig argues that a legal change has occurred that makes race-based annulment impossible now. Courts are generally no longer willing to give weight to the “private biases” that may exist in the world; as the Supreme Court explained in a child custody case, the “Constitution cannot control such prejudices but neither can it tolerate them.”

The story of social change told in According to Our Hearts, however, is more complex. The students Professor Onwuachi-Willig polled emphatically rejected the idea that race was salient enough to marital identity to warrant an annulment; in fact, they largely thought the hypothetical husband who wanted the annulment was a racist. Their written comments included statements such as “if you love someone it shouldn’t matter what half of their gene code says,” “race should never be a reason to get a marriage annulled and the guy is ridiculous for thinking that is a good reason” and even “[t]his is a stupid question.” Yet Professor Onwuachi-Willig shows in great detail in According to Our Hearts that, for most Americans, race does factor into the decision to marry, and affects, sometimes unconsciously, whether someone falls in love with a particular person. Even as students and judges reject the legal salience of race, its social salience remains. There is no room any more for race in annulment law—nor should there be. But just as annulment law historically refused to recognize the importance of economics in marriage, it now also refuses to recognize the importance of race, and is thus an incomplete measure of what marriage means today. Perhaps annulment law represents the ideal to which we aspire—a colorblind society. According to Our Hearts helps us to see the disjunction between this aspiration and reality.

146. ONWUACHI-WILLIG, supra note 1, at 148–50.
147. Id. at 149 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).
148. Id. at 238.
149. Id. (citations omitted).
150. See also Elizabeth F. Emens, Intimate Discrimination: The State’s Role in the Accident of Sex and Love, 122 HARV. L. REV. 1307, 1311 (2009) (discussing how “law shapes whom we meet and how” and therefore determines what seem like “accidents of sex and love”); Russell K. Robinson, Structural Dimensions of Romantic Preferences, 76 FORDHAM L. REV. 2787, 2803 (2008) (arguing that “race structures our relationships, even when we think we have transcended it”).