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Symposium on Abolishing Civil Marriage: Introduction

Edward Stein

Benjamin N. Cardozo School of Law, estein2@yu.edu

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SYMPOSIUM ON ABOLISHING CIVIL MARRIAGE: AN INTRODUCTION

*Edward Stein**

The institution of marriage is venerable both because it has existed for a long time and because of the role it plays in our culture. In *Griswold v. Connecticut*, the Supreme Court, in the context of discussing “the notions of privacy surrounding . . . marriage”¹ as they related to a state law regulating contraception, said:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.²

The venerable institution of marriage has a distinctive Janus-faced character, both in the past and in the present: it is at once both public and private; it is contractual in nature and yet it creates a civic legal status that has implications for third parties. In 1927, the Supreme Court described marriage’s unusual character as follows:

[W]hilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the

* Professor of Law and Co-Director of the Program in Family Law, Policy and Bioethics, Benjamin N. Cardozo School of Law. B.A., Williams College; J.D., Yale Law School; Ph.D. (in Philosophy), M.I.T. The symposium that this essay introduces was organized by the Program in Family Law, Policy and Bioethics with the support of the Gloria and Stanley Plesent Lecture Fund and the *Cardozo Law Review*. Thanks to Alan Weiler for his support and to Josh Andrix for his research assistance.

¹ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

² *Id.*

parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.³

Marriage today retains this distinctive legal character and a cultural significance, but marriage as a social and legal institution has undergone substantial changes over the last one hundred years. These changes involve the extent of gender asymmetries in marriage, the ease of dissolving a marriage, the legality and social acceptance of interracial marriage, and the connections among sexual activity, marriage, and procreation. Specifically, over the past hundred or so years, gender roles in marriage have changed dramatically. Whereas married women at one time could not own property⁴ and inheritance laws once treated married men and married women differently,⁵ today legally created and enforced gender asymmetries in family law have been mostly eliminated.⁶ Additionally, over the years, it has become easier (and more common) to get divorced in the United States, as evidenced by the shift from a primarily fault-based divorce regime, in which one spouse had to show that he or she was wronged by the other spouse in order to get a divorce, to a no-fault divorce regime, in which fault is no longer an issue with respect to allowing the dissolution of a marriage.⁷ Also, most states in the United States, at some time, prohibited people of different races from marrying,⁸ while all states now allow interracial marriages.⁹ Despite dramatic changes regarding who may marry, the benefits and duties of marriage, the rules for dissolving marriage, and the social assumptions relating to marriage, this institution has survived

³ *Maynard v. Hill*, 125 U.S. 190, 210-11 (1927).

⁴ *See, e.g.*, MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* (1986).

⁵ *See, e.g.*, CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* (1987).

⁶ *See, e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that a state law that allowed a husband to unilaterally alienate community property of the marriage violated equal protection because it constituted sex discrimination); *Orr v. Orr*, 440 U.S. 268 (1979) (holding that a state law under which husbands but not wives may be required to pay alimony similarly violated equal protection). *But cf.* *Nguyen v. INS*, 533 U.S. 53 (2001) (holding that different requirements for citizenship based on whether citizen parent was the applicant's mother or father did not violate the equal protection clause).

⁷ *See, e.g.*, NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 79 (2000); J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH CENTURY AMERICA* (1997).

⁸ There are twelve exceptions. Specifically, Alaska, Connecticut, Hawaii, Minnesota, New Hampshire, New Jersey, New York, Vermont, Wisconsin, Kansas, New Mexico, and Washington never had laws restricting interracial marriage. The last three prohibited interracial marriages when they were territories, but repealed such laws when they became states. The District of Columbia also never prohibited interracial marriages. *See* PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE* 253-54 (2002).

⁹ *Loving v. Virginia*, 388 U.S. 1 (1967) (holding unconstitutional laws prohibiting interracial marriages).

and thereby proven to be remarkably adaptable and supple.¹⁰

In the last decade or so, there have been rumblings of another dramatic change for marriage. A legal and political battle has emerged around the recognition of relationships between persons of the same sex. Lesbians, gay men, bisexuals, and their allies have argued in courts and in legislatures that their relationships deserve legal recognition.¹¹ Opponents of access to marriage for same-sex couples have proposed state and federal laws and amendments to state and federal constitutions in order to block some or all recognition of same-sex relationships.¹²

Although there are some who have tried to take legal actions to resist this trend,¹³ lesbians, gay men, and bisexuals are building families not just by entering relationships, but, in increasing numbers, they are raising children. If the elimination of gender asymmetries in marriage and the move to no-fault divorce are two “revolutions” in family law in this country, the recognition of same-sex relationships and families may well be a third. On the cusp of this revolutionary moment in family law, it is not surprising for scholars to ask deep and foundational questions about marriage and the state’s role in relation to it.

The two main papers for this symposium are written by my colleagues Ed Zelinsky and Daniel Crane. Both of them argue for the abolition of civil marriage, decoupling the contractual and the civil aspects of marriage. Ed Zelinsky argues that deregulating marriage would be better for marriage because, doing so would create a marketplace for alternative marriage contracts created by non-state actors. Creating this marketplace for marriage contracts would have the virtue, Zelinsky argues, of strengthening marriage and marriages. He further argues that the abolition civil marriage would have few, if any,

¹⁰ See, e.g., Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 663 (2004).

¹¹ See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. 1995); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

¹² As of this writing, 39 states have either passed laws or amended their constitutions (or done both) to prohibit same-sex marriages, to deny recognition of same-sex marriages from other jurisdictions, and/or to deny recognition of other types of same-sex relationships. See, e.g., National Gay and Lesbian Task Force, *Anti-Gay Marriage Measures in the United States* (Nov. 15, 2005), available at <http://www.thetaskforce.org/downloads/marriagemap.pdf>; Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005). In 1996, the “Defense of Marriage Act,” which defines marriage as between one man and one woman and says no state shall be required to recognize a same-sex marriage from another jurisdiction, became federal law. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). Various federal constitutional amendments that would prohibit same-sex marriage have also been proposed. See, e.g., Stein, *supra* note 10, at 613 n.1 and accompanying text.

¹³ See, e.g., FLA. STAT. § 63.042(3) (2005) (prohibiting homosexuals from adopting). This law was upheld in *Lofton v. Secretary of the Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004).

substantive deleterious effects and that this legal change would not be as radical as it might seem. Dan Crane reaches the conclusion that we should abolish civil marriage from a religion-based argument. He argues that under the Judeo-Christian tradition, marriage is a spiritual relationship between two people that is best left alone by the state. He describes the benefits of allowing religious institutions and other non-state institutions to take care of marriage. Neither Zelinsky nor Crane would abolish the *social* institution of marriage and, on their views, most of the social practices around marriage would be unaltered by their proposals. Further, neither claims that their proposals eliminate the state's involvement with married persons. Although at one level neither paper is concerned with marriage equality for lesbian, gay men and bisexuals,¹⁴ both papers are written against the current social, political, and legal context in which equal access to marriage by same-sex couples is part of the "culture war."¹⁵

Is it appropriate that the debate about marriage equality for lesbians, gay men, and bisexuals provides an occasion for proposals to abolish civil marriage? Debates about interracial marriages did not produce similar reflections on whether to abolish civil marriage, although some early feminist scholars and others who critiqued gender asymmetries in marriage did argue for the abolition of marriage.¹⁶ Questioning civil marriage, the public policies that support it, the restrictions on it, and the benefits and obligations that flow from it is an important and appropriate project for legal scholars. The subject of this symposium, although perhaps spawned by questions about same-sex marriage, is orthogonal to those questions.

Zelinsky and Crane each bring a unique perspective to the question of whether civil marriage should be abolished in part because neither is a specialist in family law: Zelinsky's primary scholarly interest concerns tax,¹⁷ while Crane's primary scholarly interest is in antitrust law.¹⁸ Their different scholarly backgrounds and the associated disciplinary frameworks provide them with alternative lenses for examining civil marriage. Perhaps as a consequence of their alternative disciplinary perspectives, a theme that runs through all three commentaries, especially those by Charles Reid and Carol Sanger,¹⁹ is

¹⁴ That is, however, a central focus of Nancy Knauer's commentary on the papers of Crane and Zelinsky. See Nancy Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261 (2006).

¹⁵ *Lawrence v. Texas*, 539 U.S. 558, 602 (Scalia, J., dissenting).

¹⁶ See, e.g., SIMONE DEBEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans. & ed., 1953).

¹⁷ See, e.g., Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451 (2004).

¹⁸ See, e.g., Daniel A. Crane, *Multiproduct Discounting: A Myth of Nonprice Predation*, 72 U. CHI. L. REV. 27 (2005).

¹⁹ Charles Reid, *And the State Makes Three: Should the State Retain a Role in Recognizing Marriage?*, 27 CARDOZO L. REV. 1277 (2006); Carol Sanger, *A Case for Civil Marriage*, 27

that the new legal regimes that would evolve under their proposals would not adequately replace current family law, in which civil marriage plays a central role. All three commentators and I, as the convener of this symposium, however, agree that the two symposium papers are provocative and raise important questions, questions that are especially ripe given the current revolutionary moment in family law and questions that demand critical engagement.