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Carol Sanger

Columbia Law School, csanger@law.columbia.edu

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A CASE FOR CIVIL MARRIAGE

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BY:

PROFESSOR CAROL SANGER
COLUMBIA LAW SCHOOL

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A CASE FOR CIVIL MARRIAGE

*Carol Sanger**

In Leonard Bernstein's 1953 musical comedy *Wonderful Town*, there is a terrific song called *One Hundred Easy Ways to Lose a Man*.¹ The heroine, Ruth Sherwood, catalogues all the mistakes a girl can make in trying to get a man. She might, for example, know more than he does about baseball or cars, or in the refrain I have in mind, she might know more than he does about grammar. Worse yet, she might let him know she knows more than he does about baseball, cars, or grammar. As Ruth laments, "Just show him where his grammar errs/And mark your towels 'Hers' and 'Hers.'"²

This was once simply a funny line. But since 1953, and especially since 2003 which brought the *Goodridge v. Department of Public Health*³ and *Lawrence v. Texas*⁴ cases, the line has become much more. It is for some a charming aspiration—all couples can register for monogrammed towels! For others, the possibility of same-sex marriage is a grim prediction of the legalization of moral decay.

And in response, there has been a frenzy of legislative activity aimed at nailing down the legal definition of marriage to make sure that there will be no more nonsense about same-sex monograms or same-sex marriage applications. In an effort to slow down the frenzy, and to encourage those within the academy to think harder about the on-going problem of what to do about marriage, Professor Edward Stein has posed a straightforward question: Should civil marriage simply be abolished? In this mini-symposium, Professors Edward Zelinsky and Daniel Crane have provided two answers to his question: yes and yes.

Let me explain the double positive. Both authors agree that marriage should not, in Professor's Zelinsky's words, be "recognized, defined, or regulated by the state."⁵ Both are content to use *contract* to

* Barbara Aronstein Black Professor of Law, Columbia Law School. I am grateful to Kari Hong for her insightful comments.

¹ LEONARD BERNSTEIN & ROSALIND RUSSELL, ONE HUNDRED EASY WAYS TO LOSE A MAN (1953), available at <http://www.leonardbernstein.com/studio/element2.asp?id=373> (last visited Dec. 22, 2005) (lyrics).

² *Id.*

³ 798 N.E.2d 941 (Mass. 2003).

⁴ 539 U.S. 558 (2003).

⁵ Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1164 (2006).

create enforceable marriage-like obligations.⁶ Yet their reasons for abolition differ in ways that distinguish their yeses. Both agree that civil marriage should be abolished, but as we see from their paper titles, Professor Zelinsky wants to *deregulate* marriage⁷ and Professor Crane wants to *privatize* it.⁸ So while I am not going to turn into Ruth Sherwood and start correcting anyone's grammar (everyone's grammar was fine), I do want to look a bit harder at this comparative verb usage because the substitute regimes for the relationship formerly known as marriage are imagined differently under Zelinsky's deregulation than under Crane's privatization. Deregulation will result in a market for marriage that will produce a multiplicity of contractual regimes from which couples may satisfy their most intimate consumer preferences. Professor Crane acknowledges a similar regime of choice but focuses on the historical case for one in particular, religious marriage.

Although I am a Contract Law enthusiast, both arguments began to make me nervous about abolishing civil marriage. I therefore want to explain why, after reading these intriguing papers, I have become an anti-abolitionist, or at least a contract skeptic. I organize my remarks around two propositions. The first is that Professor Zelinsky has more faith in the ability of contract law to organize intimate relationships than I do. I will use his paper to talk about a few general problems of contracting for marriage. Proposition number two is that Professor Crane has too little faith in law and I have too little faith in religion to justify returning marriage to an exclusively religious domain, however valid the historical support may be. I will use Professor Crane's paper to discuss the particular perils, of privatizing to religion, for women and same-sex couples.

I. DEREGULATING MARRIAGE

Zelinsky offers several practical reasons why the state should get out of the marriage business. He explains that marriage is no longer necessary for issues of parentage, custody, or adoption; it is not necessary for significant areas of wealth transmission, such as pensions or inheritance.⁹ Moreover, the benefits that are often associated with marriage—medical decision-making, evidentiary privilege, hospital

⁶ The idea was proposed forcefully by Martha Fineman a decade ago. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 226-29 (1995).

⁷ See Zelinsky, *supra* note 5.

⁸ See Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221 (2006).

⁹ See Zelinsky, *supra* note 5, at 1166-73.

visitation—are not as robust as most people think.¹⁰ In short, Zelinsky argues that, if civil marriage is abolished, the world will not look so very different than it does now. It will certainly not look *worse* and, from a marital perspective, it may well look much better. Active competition among firms will strengthen the institution. People will feel more committed to domestic arrangements that they have affirmatively chosen. The polity itself will be better off because there will be less squabbling over the meaning of marriage. We can each be “married” in our own way.

As a Contracts professor, I am honored that my subject has been chosen for this important assignment. At the same time, I am wary about just how well it is going to perform. As a way of taking seriously Zelinsky’s proposal for contract marriage, I want to explore several doctrinal concerns. I begin with behavior that precedes the contract but upon which its validity may rest: disclosure. At present, only non-disclosures or misrepresentations that go to the heart of the marital relation justify annulment, or what we will now call rescission. This list is small and includes such things as undisclosed impotency or venereal disease.¹¹ In most cases, however, marital partners are more or less warranted “as is,” to use the commercial term and “puffing” is given a wide berth.¹²

Under the new regime, full disclosure is *required*; each partner has an affirmative duty to provide all relevant information to the other. (Readers might pause to consider which of their beloved’s behavioral quirks they now realize had not been fully disclosed might have made a difference in their own decision to marry; I suspect the list is varied and interesting.) Full disclosure changes the nature of the transaction that we used to call courtship. And just what would full disclosure entail? Slovenly tendencies? Insights about one’s constancy? Under the contractual model, disclosures would no longer go to the essence of marriage—marriage has been abolished—but to the heart or essence of each particular transaction. If one party is aware of a genetic predisposition to breast cancer or to Alzheimer’s disease, must this fact be revealed? Certainly, the early death or impending incapacity of one’s partner and the implications for physical, emotional, and financial dependence and support is something a contracting partner might want

¹⁰ See *id.* at 1201-05.

¹¹ HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 98-102 (2d ed. 1988).

¹² Under the Uniform Commercial Code, “when the buyer before entering into the contract has examined the goods . . . as fully as he desired or has refused to examine the goods there is no implied warranty with regards to defects which an examination ought in the circumstances have revealed to him.” U.C.C. § 2-316(3)(b) (1998). For application of the rule in the context of marriage, see *Johnston v. Johnston*, 22 Cal. Rptr. 2d 253, 254 (Ct. App. 1993) (annulment denied to wife whose messy, unemployed husband had “turned from a prince into a frog”).

to know about ahead of time. Some couples may still choose to exchange “in sickness and in health” promises but others, perhaps on advice of prudent counsel, would not.

There is also the familiar rule that contracting parties are bound by their agreements whether they have read them or not. Prenuptial agreements, which will have to be called something else since there are no longer any nuptials, present an interesting category for application of the rule. Especially with regard to first marriages, these agreements are often difficult for the happy couple to discuss, to negotiate, to scrutinize, and to sign. It seems churlish to dicker over terms with one’s betrothed. Nevertheless, in a somewhat spiteful 1993 case, *Simeone v. Simeone*,¹³ the Pennsylvania Supreme Court upheld the terms of a prenuptial agreement presented and signed on the eve of the wedding, as many are.¹⁴ The wife, an unemployed nurse who had married a surgeon, claimed that she hadn’t understood the meaning of *alimony pendens lite*. The court rejected the argument wholesale, explaining that society has “advanced . . . to the point where there is . . . [no] viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements.”¹⁵ Moreover, the court held that it would no longer specially scrutinize prenuptial agreements for fairness: “pre-nuptial agreements are contracts, and as such, should be evaluated under the same criteria as are applicable to other types of contracts.” To interfere on the grounds of unfairness “would constitute a paternalistic and unwarranted interference with the parties’ freedom to enter contracts.”

Not all states, however, have the same confidence in the ability of intimates to protect themselves adequately through bargain. California legislation now provides that prenuptial provisions regarding spousal support are unenforceable unless “the party against whom enforcement is sought was represented by independent counsel.”¹⁶

There is also the matter of default rules. I agree with Professor Zelinsky that many couples, even those who are represented by lawyers, will contract incompletely and then turn to gap fillers provided by the state.¹⁷ It is interesting to think for a moment about *why* parties to a marriage contract may be especially unlikely to provide for the range of

¹³ 581 A.2d 162 (Pa. 1990).

¹⁴ *Id.* The court also held that there was no duress: the timing may not have been ideal but the bride could have walked away from the deal. From a straight contractual point of view, the court probably got this right. As a matter of social interaction and reputation, canceling a wedding when the guests have already arrived may be another matter. See Ariel Hart, *Bride-to-be Admits Fleeing and Making Up Kidnap Story*, N.Y. TIMES, May 1, 2005, at 1; see also Sharon Jayson, *Real Runaway Brides are Rare But Inclination Isn’t*, USA TODAY, May 3, 2005, at 9D.

¹⁵ *Simeone*, 581 A.2d at 165.

¹⁶ CAL. FAM. CODE § 1612 (c) (2004).

¹⁷ See Zelinsky, *supra* note 5, at 1165, 1182-83.

likely disputes. As Lynn Baker and Robert Emery discovered in their study of newlyweds, there is an enormous optimism about marriage by those standing on its cusp.¹⁸ Although the study's subjects were well aware of the general dismal statistics on divorce, not *one* of them thought that their *own* marriage would bust up. In addition to the optimism bias, all the standard reasons that contracting parties leave things out apply: fear of introducing the deal breaker and a reluctance of parties in on-going relationships to spell out every expectation, demand, or obligation.¹⁹ For all these reasons, there is likely to be substantial recourse to gap fillers.

I wonder, however, whether the default rules will begin to operate as a shadow regime, establishing baselines for marital obligation and support so that the law of marriage contract will over time not differ much from the law of civil marriage. If, as Professor Zelinsky acknowledges, marriage contracts are a unique kind of contract and therefore "require . . . unique rules," I would prefer to have the rules straight up rather than through indirect resort to contract.²⁰

My greater concern, however, is not about the terms parties leave out but about the enforcement of terms they explicitly include. What is a court to do with provisions that limit the number of children to the marriage or that forbid the use of contraception by either spouse? What about a contract that provides only fault-based grounds for dissolution or no grounds for divorce at all? The immediate answer is that the complaining parties consented to the agreement and are stuck with their bargain. But how will courts handle breach in cases where the wife has used a diaphragm or the husband has had an affair in violation of contract terms? Should judges enforce liquidated damage clauses that deny the breaching spouse property? Can a plaintiff sue for specific performance so that the defendant spouse might be enjoined from marrying again, just as defecting sports players cannot sign with other teams?

There is also a deeper question about the contract-based marital regime. Professor Zelinsky envisions an array of standard form contracts from which couples may choose.²¹ I am sure this will be so should his proposal prevail; we are energetic capitalists and just as umbrellas appear for sale on every Manhattan corner within two minutes of a thundershower, marriage entrepreneurs will be out there

¹⁸ Lynn Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993).

¹⁹ For the argument that contractual promising is inadequate when applied to family relationships, see MARGARET F. BRINIG, FROM CONTRACT TO COVENANT 3 (2000) (explaining that contract law "does not have the right concepts or languages to treat love, trust, faithfulness, and sympathy, which more than any other terms describe the essentials of family").

²⁰ Zelinsky, *supra* note 5, at 1198.

²¹ See *id.* at 1173-77, 1182-83.

faster than you can say “Party of the First Part.” There will be contract options to cater to every relationship taste and preference. But how customized can a marriage contract be before it falls outside the marital regime all together? Is there a list of topics or terms that must be included before the arrangement is *not* marriage but something else, something perhaps closer to an employment contract or a property transfer or a friendship pact? Must the contracting parties reside together or be economically interdependent? Must there be provision for mutual support? Other regulatory schemes that recognize alternative forms of intimate relationships assume and require a baseline of connection between the parties. The province of Alberta, for example, provides for “adult interdependent partnerships” or “AIPS” to couples who are “emotionally committed to one another” and who “function as an economic and domestic unit.”²² The French Pacte Civil de Solidarité (the Civil Solidarity Pact or PACS) require parties to promise to provide “mutual and material support” to one another.²³ Private ordering requires nothing of the kind. Professor Zelinsky wants to retain the ceremonial aspects of marriage²⁴ but I am no longer quite sure what the ceremony is for or what it will be celebrating.

It may be that this question—what have we got here?—is no longer the state’s business. If states get out of the marriage business, they would seem to have little room to object to whatever arrangements substitute in. That, I think, is part of Professor Zelinsky’s goal. Marriage law has produced virulent debate over the meaning of the institution. If marriage is deregulated, gay and lesbian couples can marry just like any other persons with contractual capacity. Getting rid of civil marriage takes a contentious issue off the political table: there is no more state interest in private domestic arrangements other than policing the contracts by which the relationships are established.

Putting aside the question of just who is going to fall for this as a political solution to disagreement over same-sex relationships, I am not sure that participants themselves want the state to step aside. Civil marriage, as hokey and historically unjust as it has been, may still serve an important function even in its current disuse. It offers a system of sanctioned commitment from which more inventive arrangements may veer but to which they seem to return for certain basics, such things as shared resources, support obligations, and a system for dividing children and property upon dissolution.

²² Adult Interdependent Relationships Act, 2002 S.A., ch. A-4.5 (Can.), available at http://www.qp.gov.ab.ca/documents/Acts/A04P5.cfm?frm_isbn=0779714903.

²³ Law No. 99-944 of Nov. 15, 1999, J.O., Nov. 16, 1999, p.16959. See generally Daniel Borrillo, *The Pacte Civil de Solidarité in France: Midway Between Marriage and Cohabitation*, in *THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 475 (Robert Wintemute & Mads Andenaes eds., 2001).

²⁴ See Zelinsky, *supra* note 5, at 1197.

Moreover, only civil marriage offers the means for parties to present themselves publicly as partners to the full extent permitted by law. Civil marriage bestows status and respect precisely because it is created by law.²⁵ I offer a contractual analogy. As first year law students all learn, before the development of consideration, parties could make enforceable promises by promising under seal. Now we are more advanced; we use the bargain principle to create enforceability and scoff at the seal as a silly formalism—the hot wax and all. But the seal was not “just” a formalism. It was a mechanism that signaled a person’s intent to be bound and to submit to sanctions if the promise was broken.

Civil marriage may operate in somewhat the same way: it is a convention that signals an acceptance of certain obligations. It does so publicly (often ceremonially) and as a matter of law. I therefore disagree that marriage doesn’t matter because fewer people use it and some suffer no financial detriment in consequence. Yes, those who knew what they are doing can still inherit; claim support; get the pension. But they cannot do so with respect to their *husband* or *wife*. Contract law may work functionally (though I have expressed some doubts) but it cannot replace benefit of status: the respect of participating in civil marriage like everybody else.

I fear that the preference for deregulation reflects something of an insider’s perspective. Marriage may seem like very little when it can be declined, but it is much more significant when it is withheld. Indeed, Professor Zelinsky has made a “blue state” case for deregulation. We are too sophisticated for civil marriage; we don’t really need it; we know about the market. But I see market behavior somewhat differently than Zelinsky. Private firms would, I suspect, be unlikely to offer any partnership benefits in the absence of civil marriage. For example, in 2005, the Montana Supreme Court held that if unmarried heterosexual couples could purchase health insurance from a state employer, unmarried same-sex couples must be offered the same benefit.²⁶ Montana Blue Cross Blue Shield thereupon dropped *all* unmarried couples from coverage.²⁷

²⁵ Indeed, status has been defined as “a special condition of a continuous and institutional nature . . . conferred by law . . . whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents thereof are a matter of sufficient social concern.” Marjoria Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 303 n.373 (1982) (quoting Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941 (1971)) (emphasis added).

²⁶ Snetsinger v. Mont. Univ. Sys., 104 P.3d 445 (Mont. 2005).

²⁷ Donci Bardash, *BC/BS Decision on Non-married Partners Was Unfortunate*, HELENA INDEP. REC., Sept. 21, 2005, available at <http://www.helenair.com/articles/2005/09/22/opinions/hjjejahihhfei.txt>.

II. PRIVATIZING MARRIAGE

Professor Crane has presented a theological case for the privatization of marriage. He argues that Christianity and Judaism are making a big mistake by joining current political efforts to define marriage, for in so doing they are “implicitly acknowledging and confirming the state’s right to dictate the definition and contours of marriage.”²⁸ The strategy may produce an immediate short-term benefit—securing marriage as the union of one man and one woman as a matter of law—but the gain is off-set by the more profound and encompassing loss of religious authority over marriage to the state. In short, Professor Crane supports abolition so that marriage can return to its religious origins and flourish anew. It is then a very distinct form of privatization that animates his argument.

Like Professor Zelinsky, Professor Crane falls back on contract. Married couples agree to something like a choice-of-law clause. Each religious tradition can offer and can “realize its own vision with respect to . . . marital obligation, divorce, and remarriage,” limited only by respect for “the minimal norms of a liberal democratic society.”²⁹ When disputes arise, the parties turn, for arbitrated resolution, to “tribunals specialized in the religious traditions of the relevant family.”³⁰ I accept the accuracy of Professor Crane’s carefully qualified historical argument; I simply do not find it a persuasive reason to privatize civil marriage. I argue first that marriage is *already* privatized within the Judeo-Christian tradition and second, that there are particular problems with privatizing religious marriage in a liberal democratic state.

Professor Crane regards religious and secular laws as *competing* sources of marital regulation. This is true to some extent: civil law permits divorce and remarriage; Catholicism does not; Massachusetts permits same-sex marriage; Methodists do not.³¹ But while there is some tension between the two regimes, coexistence works well much of the time. Couples marry at law *and* in church. Indeed, the state is fairly cooperative in this regard and delegates to clergy the authority to formalize the marriage ceremonially: “By the power invested in me by the state, I now pronounce you . . . ,” and so on.

Shared authority over marriage acknowledges that marriage has

²⁸ Crane, *supra* note 8, at 1222.

²⁹ *Id.* at 1252.

³⁰ Crane explains that arbitral judgments would be set aside only if they suffered from the sorts of deficiencies recognized generally under the Federal Arbitration Act, such as fraud. *Id.* at 1251 n.151.

³¹ Neela Banerjee, *Top Methodist Court Backs Conservatives on Gay Issues*, N.Y. TIMES, Nov. 1, 2005, at A14.

several purposes—spiritual, economic, symbolic—and that different institutions may have superior competence to deal with one or another of them. I suggest that most married folk—including people of faith and including C.S. Lewis—like it this way. As Crane explains, Lewis married a divorced American, Joy Davidman, in a civil ceremony solely to help her secure legal residency in England.³² He did not consider himself *really* married to her until they participated in an ecclesiastical ceremony some time later: “For Lewis, civil marriage was unimportant and ecclesiastical marriage everything.”³³

But I think this is not quite the case. Lewis may not have considered himself married before *God* until Ceremony Number Two, but he was quite willing to have the *law* consider him married to Joy Davidson after Ceremony Number One. That was the very point of the first ceremony: to be married in the eyes of the law. Many people hold their religious marriage most dear, yet I suspect that few would decline the benefits and the status that a marriage *license* secures. In one sense then, marriage is *already* privatized. Couples within the Judeo-Christian tradition can already choose religious marriage and have it mean “everything.” They may exchange and they may keep the vows made before God; the state permits but does not compel either marriage or divorce.

I remind us about the present state of co-existence to highlight Professor Crane’s preference that between church and state, it is the state that should give way. He assures us that nothing too bad can happen under this form of privatization because the religious regime cannot fall below the “minimal norms of liberal democratic society.”³⁴ That sounds good and upon first reading the phrase, all my liberal, feminist, upper west side fears were allayed. *Let* the churches take back marriage; the minimum norms of a liberal democratic society will protect anything I might be worried about. But the matter is not quite so simple.

To begin, what *are* the minimum norms of a liberal democratic society? The phrase is not a determinate one and has no technical meaning. Because we are all law-trained, we can probably fill in a likely set of minimum norms without much trouble. I suspect our list would include concerns about equality, participation, the rule of law, and perhaps respect for autonomy.

But these are exactly the areas where religion lets us down. In few religions do women and men participate equally with one another, whether as celebrants, members, and certainly as founders. As political theorist Susan Okin has stressed, Christianity, Judaism, and Islam,

³² See Crane, *supra* note 8, at 1242.

³³ *Id.*

³⁴ *Id.* at 1252.

certainly in their more orthodox forms, are organized around the authority of husbands and the subservience of women.³⁵ Husbands control such things as the punishment of children and wives, the availability of divorce, and the distribution of property.³⁶ This is not a *feminist* claim; it is a descriptive statement. I am sure that most of us can uncontroversially come up with examples from within our own traditions.

Participatory norms are also challenged by religious marriage. Not all religions permit marriage outside the faith so that marriage to one's chosen partner may not be permitted at all. To demonstrate the value of civil law in such circumstances, political theorist Jeremy Waldron directs us to Romeo and Juliet, that most unhappily married couple. Prevented from marrying by the "traditions of the relevant family," the star-crossed lovers had to leave their respective communities and decamp to Verona. Waldron uses the case to illustrate the importance of an external "structure of rights that people can count on for organizing their lives, a structure which stands somewhat apart from communal or affective attachments and which can be relied on to survive as a basis for action no matter what happens to those attachments."³⁷ Civil marriage performs exactly this function: it provides a "basis on which individuals . . . can reconstitute their relations and take new initiatives in social life without having to count on the affective support of the communities to which they have hitherto belonged."³⁸

Just as some religious traditions restrict entrance to marriage, not all faiths permit exit from the institution. Restrictions on divorce implicate issues of autonomy and of equal participation, particularly for women. As Okin has explained, women's vulnerability within a marriage is intensified by their inability to leave it.³⁹ The distribution of power at home impacts significantly on participation and influence in the public realm: "the more a culture requires or expects of women in the domestic sphere, the less opportunity they have of achieving equality with men in either sphere."⁴⁰

³⁵ SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 7-13 (Joshua Cohen et al. eds., 1999).

³⁶ Putting aside the substance of the rules, I am also not so sure that religious tribunals operate with complete respect for the rule of law, or perhaps I am too influenced by Sheila Rauch Kennedy's book, *Shattered Faith: A Woman's Struggle to Stop the Catholic Church from Annuling Her Marriage*. See SHEILA RAUCH KENNEDY, SHATTERED FAITH: A WOMAN'S STRUGGLE TO STOP THE CATHOLIC CHURCH FROM ANNULING HER MARRIAGE (1997).

³⁷ Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 634 (1988).

³⁸ *Id.*

³⁹ SUSAN MOLLER OKIN, VULNERABILITY BY MARRIAGE IN JUSTICE, GENDER AND THE FAMILY (1989).

⁴⁰ OKIN, *supra* note 35, at 13.

Consider one form of the restraint, the *get*. This is the formal document husbands must give to wives in order for divorce and remarriage under Jewish law. As Ayelet Shachar notes, this practice vests the ultimate power to decide whether or not to dissolve a marriage in the husband alone. When the rule is sanctioned by state-authorized rabbinical courts, as in Israel, the consequence is something close to a “*carte blanche* license to subordinate certain members of the group.”⁴¹

What then does a liberal democracy have to say about the *get*? Church elders in a polygamous settlement in Colorado City, Arizona, order a wife to leave her husband and become the plural wife of someone else.⁴² She agrees because her faith compels her to though she would prefer to stay married to her chosen husband. What does a liberal democracy have to say about this notion of consent? The Kennedy family aside, Catholicism does not permit the remarriage of divorced persons; what does a liberal democracy say about that? Islamic law permits the stoning of adulterous wives. Surely a liberal democracy has something to say about ceding authority over family matters to Sharia law, as the government of Ontario did in stepping back from that particular brink in September, 2005.⁴³

Without using the vocabulary of multi-culturalism, Professor Crane’s privatization endorses a multi-cultural regime for marriage. Each couple (or each plurality in the case of polygamous religions) chooses and then is bound by the religious traditions to which they feel most closely tied. From the perspective of cultural accommodation, this is good. The authority of the group is recognized; its autonomy strengthened. But such accommodation is also likely to work against less powerful members within the group, those who Les Green has called minorities within minorities.⁴⁴ As Green observes, “without respect for internal minorities, a liberal society risks becoming a mosaic of tyrannies.”⁴⁵ This may be particularly true in the area of family law where as Shachar has noted, “the violation of rights are systemic rather than accidental.”⁴⁶

Extending religious control over marriage through religious privatization also works hand in hand with the trend toward economic privatization. While the phrase might once have referred simply to the

⁴¹ Ayelet Shachar, *Group Identity and Women’s Rights in Family Law: The Perils of Multicultural Accommodation*, 6 J. POL. PHIL. 285, 291 (1998).

⁴² See Timothy Egan, *Polygamous Community Defies State Crackdown*, N.Y. TIMES, Oct. 25, 2005, at A1.

⁴³ Colin Freeze & Karen Howlett, *McGuinty Government Rules Out Use of Sharia Law*, GLOBE AND MAIL, Sept. 12, 2005, available at <http://www.theglobeandmail.com/servlet/story/RTGAM.20050912.wxsharia12/BNStory/National/>.

⁴⁴ See Leslie Green, *Internal Minorities and Their Rights*, in THE RIGHTS OF MINORITY CULTURES 256 (1995). I thank Jeremy Waldron for this reference.

⁴⁵ *Id.* at 270.

⁴⁶ Shachar, *supra* note 41, at 289.

notion that the market is the best mechanism for resource allocation, privatization now encompasses a broader restructuring of the relation between the polity and state. It frequently stands for the proposition that responsibility for individual welfare is less a matter of public obligation than a private concern.⁴⁷ But reassigning responsibility to the private sphere almost always increases the burden on women, the traditional care-takers, and this in turn heightens their vulnerability in all spheres of life.

For all these reasons, it is therefore not enough simply to invoke minimum norms to satisfy concerns about unjust practices in religious marriage. Religions are markedly undemocratic, concerned not with rights or equality or principles of non-discrimination but with the demands of faith. Moreover, I suspect few religions would accept the importation of democratic norms, minimal or not, as a condition of governance. It means nothing to cede authority to religious tradition if the religion must first sign on to an incompatible set of civic values and practices.

One final point. Professor Crane suggests that civil marriage and the behaviors it tolerates have had a dispiriting trickle-down effect on religious marriage.⁴⁸ I am less concerned that secular values are infiltrating religious institutions than that the influence is working in exactly the opposite direction. We now live in an era that many politicians, some clergy, and all Fox news commentators call the "Culture of Life."⁴⁹ This is a belief system organized around the proposition that life starts at conception and ends at Teri Schiavo (with something of a detour around the death penalty). The Culture of Life may sound secular enough but it is in fact saturated with meaning and beliefs from within the Christian tradition.⁵⁰ The Culture of Life has become a significant piece of American political rhetoric. More importantly, however, as the special Culture of Life section on the White House Website makes very clear, its core values have been aggressively incorporated into laws and policies ranging from restrictions on stem cell research to the Born Alive Infants Protection Act.⁵¹ At a moment in which our political institutions are becoming

⁴⁷ See Judy Fudge & Brenda Cossman, *Introduction to PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM* 3-37 (2002).

⁴⁸ See Crane, *supra* note 8, at 1253-54.

⁴⁹ See Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. (forthcoming 2006) (analyzing how the Culture of Life language has moved in the last few years its religious origins in Roman Catholicism to the Republican National Platform).

⁵⁰ See Mary Leonard, *Bush Woos Catholics on Abortion, Nominee Echoes Pope's 'Culture of Life' Phrase*, BOSTON GLOBE, Oct. 9, 2000, at A1; Elisabeth Bumiller, *Turnout Effort and Kerry, Too, Were G.O.P.'s Keys to Victory*, N.Y. TIMES, Nov. 4, 2004, at A1 (noting that President Bush used phrases like "culture of life" and "armies of compassion" to motivate "evangelical voters").

⁵¹ See WhiteHouse.gov, Record of Achievement, <http://www.whitehouse.gov/infocus/achievement/index.html> (last visited Dec. 22, 2005).

increasingly and unabashedly religious in tone and in content, I am specially loathe to return marriage to the churches, however authentic religious governance may once have been.

CONCLUSION

I recognize that civil marriage has been and remains problematic as the authoritative structure for family and relationships. This is true not only as a matter of law and policy but, as most married folk acknowledge now and then, as a matter of daily interaction. As Phyllis Rose has observed, it is “[b]ad enough to choose once in a lifetime whom to live with; to go on choosing, to reaffirm one’s choice day after day, as one must when it is culturally possible to divorce, is really asking a lot of people.”⁵²

However, I think it is worth letting *all* committed couples ask this of one another: to commit to the full extent that is possible at law. And it is marriage law—not contract law—that ought to do the heavy lifting here, not as a functional matter—we can probably kick contract law into sufficient shape to do the job if necessary—but as a matter of the legitimacy of state authority over marriage. Just as the state has interests in marriage, citizens have an interest in the state articulating and defending its interests, as it was eventually unable to do with miscegenation, prohibitions on contraception, or as an absolute requirement for parenting.⁵³ The nature of the state’s interest in marriage is often contested, as it should be. As historian Nancy Cott has pointed out, “[t]he public benefit of governmental involvement in marriage no longer goes without saying.”⁵⁴ But the explication of the state’s interest is less likely to be produced by adjusting the definition of consideration or narrowing the application of injunctive relief.

I recognize and lament the fact that gay couples in the lower forty-nine states are not permitted to marry now. But they and their allies can at least appeal to democratic processes rather than to the Restatement Second or, more problematically, to the Vatican. Contestation over the legal regulation of intimate relations may be just the kind of issue we should leave on the table for its slow resolution, resorting neither to contract nor religion, especially when both are already available to those who prefer to leave the state out.

⁵² PHYLLIS ROSE, *PARALLEL LIVES: FIVE VICTORIAN MARRIAGES* 18 (1983).

⁵³ *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁵⁴ Nancy Cott, *The Public Stake*, in *JUST MARRIAGE* 33, 36 (2004).