

# Washington University Journal of Law & Policy

## Following Marriage

### Introduction

Susan Frelich Appleton\*

This symposium, “Following Marriage,” originated almost three years before appearing in print. Its roots trace back to lively discussions in my family law course in 2004, an early opportunity to consider the then relatively new decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*,<sup>1</sup> which held unconstitutional the exclusion of same-sex couples from civil marriage and its benefits. This pathbreaking case, allowing students both to see clearly the pervasive salience of gender in the law’s conceptualization of family and also to imagine marriage (or some successor to marriage) liberated from its gendered foundations, offered a lens through which to examine and re-examine almost all the topics covered throughout the course. One student, Heather Buehe, found these classroom conversations particularly exciting, and—as a staff member and later the managing editor of the *Washington University Journal of Law & Policy* (2004–2005)—she persuaded the other editors and me that much more remained to say.

Heather Buehe’s enthusiasm and vision initiated this project, which materialized only after valuable assistance from my colleague

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\* Lemma Barkeloo & Phoebe Couzins Professor of Law, Washington University.

1. 798 N.E.2d 941 (Mass. 2003); *see also* Opinion of the Justices to the Senate, 802 N.E.2d 505 (Mass. 2004).

Professor Laura A. Rosenbury, who helped invite contributors; a “test drive” by some of the participating authors who presented initial thoughts as part of the “Following Marriage” panel at the 2006 Annual Meeting of the Law & Society Association in Baltimore, Maryland; and the organizational and editorial efforts of the *Journal* staff over the years since the symposium’s inception, in particular Managing Editors Katherine Lieb (2005–2006) and Tracey Ohm (2006–2007) as well as Editor-in-Chief Gannon E. Johnson (2006–2007). All deserve substantial thanks.

Originally only a working title, “Following Marriage” proved attractive because of its openness. In the spirit of the classroom conversations that sparked this project, we wanted no limit on the different paths that the authors might take from their shared point of departure, marriage. We imagined as possible topics consideration of events that might take place after a given marriage (such as divorce or death), developments that have emerged beyond marriage (such as civil unions or domestic partnerships), conceptual changes that might follow as traditional marriage undergoes contemporary transformations (such as the deconstruction of gender or of sexual orientation, the decentering of sex, and resistance to marriage and the privilege that it entails), or an argument that makes the case for adhering to the traditional approach to marriage—to list just a few of the possibilities we first contemplated.

As the ensuing pages show, the symposium contributors took full advantage of the openness provided by our “prompt.” They have written a diverse collection of essays that show creativity, thoughtfulness, and a talent for challenging prevailing assumptions and norms. Despite the varied topics and analyses, each infuses “Following Marriage” with content that reveals why scholars and students alike find family law such a rich and provocative field, as briefly summarized below.

Under one of family law’s central norms, children follow marriage.<sup>2</sup> Yet what, *in fact*, follows for children from their parents’ decision whether to enter this state-favored relationship? Professor

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2. Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007).

Vivian Hamilton's *Family Structure, Children, and Law*<sup>3</sup> exposes the difficulty of disentangling the oft-proclaimed benefits of marriage for children from other influential variables, such as parents' education, race, ethnicity, and economic status. Further, to the extent that government provides special benefits for marital families (to accomplish the goal of channeling adults' behaviors and relationships<sup>4</sup>), then modern equality principles require a skeptical examination of such state action. Given the scant data we have about whether such state-conferred benefits actually encourage marriage,<sup>5</sup> Hamilton concludes that punishing non-marital children for the personal choices of their parents fails to withstand constitutional scrutiny.

Professor Julie Nice, grappling with some of the same empirical uncertainties that inform Hamilton's analysis, offers a different critique. *Promoting Marriage Experimentation: A Class Act?*<sup>6</sup> confronts the federal government's current marriage-promotion policies—official efforts to induce poor Americans to marry. Yet the available data suggest that such public relations campaigns will not address the primary obstacle that poor women cite as the reason for not following marriage: their inability to afford this “luxury.”<sup>7</sup> As Nice cogently asks, why do marriage advocates not direct funds to poor families, instead of subsidizing class-based social experimentation?<sup>8</sup>

Also using empirical evidence as a starting point, Professor Laura Kessler challenges the numerical limits of prevailing parentage laws. Data show that in a wide range of situations children share emotional and financial ties with more than two adults, a phenomenon that Kessler calls “*Community Parenting*.”<sup>9</sup> Yet, political discourse makes

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3. Vivian Hamilton, *Family Structure, Children, and Law*, 24 WASH. U. J.L. & POL'Y 9 (2007).

4. Carl Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); see also Hamilton, *supra* note 3, at 23 (quoting Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1790 (1995)).

5. Hamilton, *supra* note 3, at 28.

6. Julie Nice, *Promoting Marriage Experimentation: A Class Act?*, 24 WASH. U. J.L. & POL'Y 31 (2007).

7. *Id.* at 37.

8. *Id.* at 37–38.

9. Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007).

invisible such affiliations, and case law—even while recognizing functional parent-child relationships—continues to exhibit hostility to any analysis that would accord any child more than two parents.<sup>10</sup>

For Kessler, however, community parenting holds great promise for addressing feminist critiques of family law by helping us imagine a new family law that could follow (in the sense of “come after”) the current marriage-centric and deeply gendered regime. For example, collaborative childrearing practices discernible among some gays and lesbians<sup>11</sup> illustrate how “disconnecting family formation and reproduction from heterosexual relations . . . reveal[s] heterosexuality and biology to be mere symbols of a privileged relationship.”<sup>12</sup> Thus, Kessler contends that theorizing parenting as a collective project can help “deconstruct traditional gender and sexuality norms.”<sup>13</sup>

Like Kessler’s piece, Professor Anita Bernstein’s *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*<sup>14</sup> invokes existing departures from today’s apparent preoccupation with marriage to identify an agenda for ongoing reform. Both essays reflect congruous visions of a post-marriage regime, although Kessler explicitly aims to destabilize the gender system while Bernstein seeks to rid family law of its focus on sexual intimacy. Bernstein lauds both the creation of “reciprocal beneficiaries” by Hawaii and the report of the Law Commission of Canada entitled *Beyond Conjuality* because each of these schemes removes sexual affiliation as the criterion for the state’s recognition of an adult relationship. Despite the harsh and thus far successful backlash to the advent of same-sex marriage, Bernstein pins her hopes not on a counter-backlash, but on an informal corrective course, built from experiences, performances, and the diffusion of such practices. Little by little, she predicts, this on-the-ground approach will do more than simply subvert the backlash; by blurring the distinction between the married and the not married,<sup>15</sup>

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10. *But see* Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007).

11. *See generally, e.g.*, DIANE EHRENSAFT, MOMMIES, DADDIES, DONORS, SURROGATES: ANSWERING TOUGH QUESTIONS AND BUILDING STRONG FAMILIES (2005).

12. Kessler, *supra* note 9, at 73.

13. *Id.* at 50.

14. Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J.L. & POL’Y 79 (2007).

15. *See id.* at 109 (discussing common law marriage).

it also has the transformative potential to undo the current meaning of marriage by “[shaking] the notion that matrimony should determine what individuals receive from their conjugal partners, third parties, and the state.”<sup>16</sup>

In *From Functional Family to Spinster Sisters: Australia’s Distinctive Path to Relationship Recognition*,<sup>17</sup> Professors Reg Graycar and Jenni Millbank, contributing from their posts in Sydney, bring a transnational perspective to the symposium. In tracing the evolution of legal recognition of personal relationships in Australia, Graycar and Millbank highlight at least three important issues: the extent to which relationship recognition should follow marriage as a model or benchmark,<sup>18</sup> the contrast between opt-in schemes versus recognition by presumption or ascription,<sup>19</sup> and the appeal to progressive and conservative agendas alike of the move to recognize non-conjugal relationships.<sup>20</sup> All of these issues merit consideration by family law reformers in this country and elsewhere.

Professor Marc Spindelman’s essay, *State v. Carswell: The Whipsaws of Backlash*,<sup>21</sup> gives meaning to “Following Marriage” in two ways. First, he reminds us of the violence that too often follows in the wake of marriage and other intimate relationships. Second, and more particularly, he exposes the deep flaws inherent in the restrictive constitutional amendments adopted in many states following Massachusetts’s inclusion of same-sex couples in its civil marriage laws (those same restrictive measures that Bernstein hopes to subvert).

Using a case pending before the Ohio Supreme Court to illustrate, Spindelman asks whether backlash amendments that limit marriage to unions between one male and one female, while prohibiting any marriage-like status from attaching to non-marital relationships, will

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16. *Id.* at 120.

17. Reg Graycar & Jenni Millbank, *From Functional Family to Spinster Sisters: Australia’s Distinctive Path to Relationship Recognition*, 24 WASH. U. J.L. & POL’Y 121 (2007).

18. *See id.* at 144–47.

19. *See, e.g., id.* at 127.

20. *See id.* at 150.

21. Marc Spindelman, *State v. Carswell: The Whipsaws of Backlash*, 24 WASH. U. J.L. & POL’Y 165 (2007).

be interpreted to disallow the application of domestic violence laws to unmarried couples. If courts in domestic violence cases read the amendments to have exceptions in the interest of health and well-being, then additional exceptions for, say, public universities' health benefits for employees' domestic partners (similar to those provided for employees' spouses) should logically follow, Spindelman contends.<sup>22</sup> On the other hand, if the constitutional amendments leave no room for exceptions, even for domestic violence protections, then the discrimination against unmarried individuals, in the name of traditional morality, conflicts with federal constitutional equality principles articulated by the United States Supreme Court, he asserts. What's a "marriage-defender"<sup>23</sup> to do? Spindelman finds reason for optimism in this dilemma, which threatens to unravel the entire backlash effort.

Together, all of these essays might suggest that "Not Marriage"<sup>24</sup> in one form or another raises so many intriguing issues that conventional male-female marriage merits no discussion today. Robyn Rimmer and I attempt to rise to this challenge, tackling a question that becomes particularly salient after marriage, even as traditionally defined (although similar questions can arise with respect to other intimate and familial relationships as well): What perceptions and inferences does contemporary marriage generate about conflicts of interest for spouses with intersecting careers? In *Power Couples: Lawmakers, Lobbyists, and the State of Their Unions*,<sup>25</sup> we ask this question in the context of a notable phenomenon in the nation's capital that has just begun to receive official attention—marriages in which one spouse serves as a member of Congress and the other works as a lobbyist. This case study reveals how ethical constraints centered on avoiding

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22. *Id.* at 177–78.

23. The term in quotation marks is mine, not Spindelman's. It comes from backlash laws and constitutional amendments enacted in "defense of marriage" from feared encroachments by same-sex couples and others outside the traditional marital norm. *See, e.g.*, 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000) (codifying federal "Defense of Marriage Act," which sparked the enactment of many state laws and constitutional amendments); *see also* Spindelman, *supra* note 21, at 166 n.5 (listing state enactments).

24. I borrow this phrase from Graycar & Millbank, *supra* note 17, at 145.

25. Susan Frelich Appleton & Robyn M. Rimmer, *Power Couples: Lawmakers, Lobbyists, and the State of Their Unions*, 24 WASH. U. J.L. & POL'Y 207 (2007).

*appearances* of impropriety run aground when confronting two antagonistic principles of modern family law: the conceptualization of marriage as a (financial) partnership and the recognition of spouses, especially in the public sphere, as fully independent individuals.

The problem posed by such “power couples,” saturated as it is with gender politics, permits no easy solution, despite Congress’s belated and hurried efforts to enact rules disavowing a “culture of corruption” at the start of the 110th Congress.<sup>26</sup> We conclude that only a mechanism capable of undertaking case-by-case review and nuanced analysis is up to the task of ensuring respect for the many competing values at stake, such as government integrity, gender equality, individual autonomy, family privacy, and the touted place of marriage in family law.<sup>27</sup>

Despite the diversity of these essays, many possible meanings of “Following Marriage” remain unexamined in this symposium. We hope that this volume, then, with its fragments of what could easily be a much larger conversation, will invite continued exploration.

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26. *Id.* at 224.

27. *Id.* at 258.