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Regulating Nonmarriage

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REGULATING NONMARRIAGE

CLOSING THOUGHTS BY ALBERTINA ANTOGNINI



Two years have elapsed since the Supreme Court recognized the constitutional right to marry in the landmark case of *Obergefell v. Hodges*. Much ink has been spilled in the opinion's aftermath by scholars who have in turn lauded it for its promotion of dignity and equality, criticized it for having a conservative vision of what marriage entails, or pored over its reasoning to better understand the future it has ushered in. Underlying the opinion, and the recent scholarly debate it has generated, is the centrality of marriage – to the individual, to society, to the law. Justice Kennedy, writing for the Court, appealed to the durability of marriage as an institution: “Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together.” Marriage, moreover, “embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.” The Constitution, a majority of the Court concluded, could not be interpreted to deny same-sex couples the fundamental right to marry.

While *Obergefell* is notable for its rhetoric surrounding marriage, the opinion is equally notable for what it left unsaid: absent from *Obergefell* is any discussion of divorce, which by some accounts affects about half of all married couples, or any mention of the increasing number of individuals who are foregoing marriage, which is at an all-time high. In fact, marriage rates have been steadily declining for decades: one in four young adults today may never marry. And, marriage is becoming something of an elite status – those who marry, and remain married, generally have higher levels of income and education than those who do not marry or those who marry and then divorce. Although the repercussions of *Obergefell* are yet to be fully understood, in many ways the principal challenge for family law going forward is not how to address individuals who marry, which now includes

homosexual and heterosexual couples, but rather how to address those individuals who do not marry, either by choice or happenstance.

Family law remains staunchly focused on marriage and is thus ill-equipped to address nonmarital couples. State family law statutes do not generally regulate unmarried couples directly; these couples have occasion to interact with the law mainly in instances of rupture, when the relationship ends. Unmarried couples tend to either seek out the court's help in distributing property at the conclusion of their relationship or in deciding the custody of any children born to the relationship. The former situation – how courts distribute property after a couple separates – is particularly instructive. In these cases, courts have occasion to assess the nature of the nonmarital relationship and quite literally assign a value to the contributions made by each party.

The majority of couples who go to court to request a property distribution are heterosexual, even though they have long had the right to marry. The typical plaintiff – the individual seeking property – is a woman. The typical defendant – who is arguing against these claims of property – is a man. In evaluating the nonmarital cases, marriage remains central to the court's analysis: courts either look to marriage as a requirement for what a nonmarital relationship should be before deciding to distribute property, or as a status from which to differentiate the nonmarital relationship in deciding to award property.

Despite the variation in how courts approach nonmarital relationships, they reach strikingly consistent results: the individual seeking property, who is nearly always a woman, receives little outside of marriage. Those cases that require a nonmarital relationship to look just like a marriage before awarding property rely on marriage so closely that they have the

effect of denying recovery in most situations – based, paradoxically, on the fact that there was no legal tie of marriage. Those cases that require a nonmarital relationship to look nothing like a marriage in order to award property end up giving little to a woman who was in a marital-like relationship: if a relationship looks anything like a marriage, or the services provided by the woman approximate those a wife gives her husband, then courts deny property distribution. These two sets of cases converge, therefore, on a uniform result: outside of marriage, courts value the services a woman provides at a discount, or as entirely gratuitous. Courts thus reinforce the notion that a woman's labor within the home is either less valuable, or free.

In the process of evaluating nonmarriage by analogy or distinction to marriage, these cases impose a specific, and rather archaic, definition of marriage. Because the plaintiff seeking property is ordinarily a woman, these cases revolve around what a wife's duties are, or ought to be: the wife should provide homemaking services such as cooking, cleaning, and childcare. Some courts also require her to provide advice, time, and energy to her husband's business ventures. When these wifely services take place outside of marriage they are worth less, if not totally worthless.

A deeper understanding of how courts address nonmarital relationships provides a first step in identifying the legal regime's current limitations given the changing demographics of the American family. It remains to be seen how the law will adapt once same-sex couples, who can now marry, go to court in greater numbers to request a property distribution at the conclusion of a relationship that was not marital. While this thicker description of how courts regulate nonmarital relationships does not answer the question of how the law *should* regulate nonmarital relationships, it shows that marriage is not necessarily the only answer.