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The Right to Unmarry: A Proposal

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THE RIGHT TO UNMARRY: A PROPOSAL

BRIAN L. FRYE* & MAYBELL ROMERO**

ABSTRACT

When I say I'm in love, you better believe I'm in love, L-U-V.[1]

[April 2, 2020] BLF: This is a marriage proposal in the form of a law review article. In this Article, I observe that Maybell Romero and I are in love. I want to marry her, and I believe she wants to marry me. At least I'll find out pretty soon. But we cannot marry each other right now, because we are both currently married to other people.

Maybell and I want to end our existing marriages, and our respective spouses have even agreed to divorce. But the government will not allow us to marry each other until it decides to terminate our current marriages.

Maybell is unaware of this prologue to our Article, describing our personal circumstances, but I'm sure she'll see it soon. Wish me luck.

[August 4, 2020] MR: As many of you who follow both Brian and me on Twitter or know us through other channels may already know, I, very happily, accepted Brian's proposal, above. While none of the circumstances he described have changed at all, we're both still waiting and hoping that hearings will finally be set and decrees finalized and entered after we have both spent months having to negotiate settlement offers with soon to be ex-spouses that, this Article argues, would more appropriately be handled after a grant of divorce.

Today I called the clerk of the court in Cook County in an effort to speed up the finalization of my divorce. I was told that I would need to ask for a remote hearing date, given the impact of the pandemic, even though my soon-to-be ex-husband and I have reached an agreement. Why? "Because that's how we stay in business, I guess," said the clerk.

[October 24, 2020] MR: Within about 24 hours of Brian's divorce finally getting finalized, we got married on October 10, 2020 at 4:00 PM at the Gene Snyder Federal Courthouse in downtown Louisville, Kentucky. My divorce was finalized on October 6, 2020. The process was so slow in Cook County that my now ex-husband filed a separate divorce action in a different state with a more streamlined process. Our remarriage saga has finally come to a much-delayed but very happy end.

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** Associate Professor of Law, Northern Illinois University College of Law. Both authors would like to thank Albertina Antognini and Lawprofblawg (of Twitter infamy) for their inciteful comments and feedback. The authors would also like to thank the many law professors, lawyers, and other friends who provided feedback and stories but prefer to remain anonymous.

[1] NATION OF ULYSSES, *Today I Met the Girl I'm Going to Marry*, *on* 13-POINT PROGRAM TO DESTROY AMERICA (Inner Ear Studios 1991).

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I. INTRODUCTION

The Constitution protects the fundamental right to marry the person of your choice, so long as the choice is mutual.[2] Any two people can agree to marry each other, and the government cannot stop them.

But the government can and does regulate the dissolution of marriages. While people can divorce, they need the government's permission. A marriage isn't over until the government says it is. And a person cannot remarry until their divorce is final. In other words, the government cannot prevent people from marrying each other, but it can and does force them to remain married.

We believe that people should be able to end a marriage and start a new one whenever they want. Indeed, we believe it is their constitutional right. If due process protects the right to marry based on autonomy and dignity, then it must also protect the right to unmarry on the same grounds. If it offends autonomy and dignity to prohibit a marriage, it offends autonomy and dignity to preserve a marriage, against the will of the married.

The state can legitimately regulate the allocation of property when a marriage is dissolved, just like it regulates the dissolution of any other partnership. But it cannot legitimately force people to remain married against their will or prevent them from remarrying. As always, love will out.

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[2] *See* Parts II.C and II.D, *infra*.

II. THE RIGHT TO MARRY

Marriage is a fundamental right.[3] Indeed, it may be the most fundamental right, the right to form a bond with another person that the state cannot rend asunder.

The institution of marriage has existed since time immemorial. It has been a part of every human society, albeit in many different forms. Marriage creates familial bonds and maintains those bonds across generations. It is the primal contract, the basis for all other agreements and institutions.

But marriage isn't just private law. It's also public policy. When people marry, they assume a congeries of obligations. Some are obligations to each other, but others are obligations to the state. People not only agree to have and to hold, but also agree to different tax and agency laws.

The right to marry is large and contains multitudes.[4] Of course, it is the right to bind yourself to another person. But it is also the right to compel the state to recognize, solemnize, and respect that decision. In other words, the right to marry is the right to expect the state to not only tolerate, but also honor your family relationships.

Marriage is how societies regulate interpersonal relationships. But it is also how governments regulate society. Marriage defines normality. It is the standard against which all other relationships are judged. Societies promote and expect marriage. And governments use marriage to police social groups. When a group accepts conventional marriage norms, assimilation is nigh. If it cannot, ostracism is inevitable.[5]

A. A Potted History of Marriage

Historically, marriage usually meant the legal union of a man and a woman.[6] But of course, typicality is not the measure of all things. Different people at different times in different societies have recognized different kinds of marriages. For better or worse, many societies have permitted or encouraged polygamous marriage.[7] Indeed, some still do, albeit sometimes in the face of official disapproval. Other societies have sanctioned other forms of non-monogamous marriage. And some societies have even recognized various forms of same-sex marriage, an attitude that is happily becoming the norm.

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[3] Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

[4] *See* WALT WHITMAN, *Song of Myself*, *in* LEAVES OF GRASS 33, 113 ("Death-bed" ed., Modern Library, 2001).

Do I contradict myself?

Very well then I contradict myself,

(I am large, I contain multitudes.)

Id.

[5] *See, e.g.*, Gretchen Craft Rubin & Jamie G. Heller, *Restatement of Love*, 104 YALE L.J. 707, 707 (1994) ("Custom has long been the authority in matters of love.").

[6] *Obergefell*, 576 U.S. at 656–57.

[7] Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, NEWSWEEK (July 28, 2009, 8:00 PM), https://www.newsweek.com/polyamory-next-sexual-revolution-82053.

Given the centrality of marriage to social regulation, it should come as no surprise that the state has always policed its contours. At various times, in various ways, the state has regulated who may marry, whom they may marry, when they may marry, and how they may marry. But the state has largely delegated the actual regulation of marriage and establishment of marital cultural norms to families and organizations, including the right to determine when people must marry each other, and when they may not. Historically, parents determined who their children would marry, with considerable input from their friends, and perhaps occasionally from their children.[8] The liberalization of marriage is a relatively novel phenomenon, which still provokes considerable opposition.

Obviously, the regulation of marriage expresses the mores of the society it regulates. The kinds of marriages a state endorses and prohibits reflect the values of its dominant social groups. Conservative societies adopt conservative marriage regulations, and liberal societies adopt liberal marriage regulations. As always, we have met the state, and it is us.

B. *The History of Marriage in the United States*

The United States has always regulated marriage. Or, more honestly, it has always allowed the states to regulate marriage. The law of marriage is overwhelmingly state law. State law determines who can marry, when they can marry, and how they can marry, subject to constitutional limitations. Unsurprisingly, different states have regulated marriage differently, some more liberally than others.

Historically, the United States has allowed states to deny disfavored people the right to marry. Before emancipation and the abolition of slavery, many states denied enslaved people the right to marry. And even if enslaved people could marry, their owners were not bound to respect their marriage. But many states also restricted the right of free African-Americans to marry the person of their choice.

C. *Interracial Marriage*

Many cultures and countries have either prohibited or discouraged interracial marriage.[9] Sadly, the United States is no exception. In the early American republic, official prohibition of interracial marriage was common, if not universal.[10] And it was buttressed by severe social sanctions, which deepened as American society became increasingly racialized.[11]

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[8] *Obergefell*, 576 U.S. at 659.

[9] The most infamous example might be the "racial hygiene" theory of Nazi Germany, which shared similar influences to eugenics movements in the United States and Western Europe. U.S. Holocaust Mem'l Museum, *Eugenics*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/eugenics (last edited Oct. 23, 2020). In South Africa, legislation outlawing interracial marriage and sex were central to apartheid. Cardell K. Jacobson et al., *Inter-Racial Marriage in South Africa*, 35 J. COMPAR. FAM. STUD. 444, 445 (2004).

[10] Jessica Viñas-Nelson, *Interracial Marriage in "Post-Racial" America*, ORIGINS (Sept. 2017), http://origins.osu.edu/article/interracial-marriage-post-racial-america/page/0/0.

[11] *Id.*

Even after Reconstruction, many states continued to prohibit interracial marriage. In *Pace v. Alabama*, the Supreme Court unanimously held that a state anti-miscegenation law prohibiting interracial sexual conduct did not violate the Equal Protection Clause because it punished both parties, implying that state laws prohibiting interracial marriage were also constitutional.[12] And in *Plessy v. Ferguson*, an 8-1 majority explicitly observed that state laws prohibiting interracial marriage were constitutional.[13]

Until distressingly recently, many states maintained anti-miscegenation laws.[14] At one point or another, 41 states have had some form of anti-miscegenation law on the books.[15] Embarrassingly, the United States not only allowed states to prohibit interracial marriage, but also encouraged social disapproval.

Finally, in *Loving v. Virginia*, the Supreme Court unanimously held that a state law prohibiting interracial marriage violated the Equal Protection Clause, overturning 16 still existing anti-miscegenation laws mainly found throughout the South.[16] As the Court observed, "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[17]

Sadly, some government officials still harbor anti-miscegenation sentiments. For example, in 2009, a (white) Louisiana justice of the peace, Keith Bardwell, refused to marry a couple because one of them was white and the other was black.[18] But national attention and outrage eventually led to Bardwell's resignation.[19]

D. *Gay Marriage*

Regrettably, most western cultures have considered homosexuality both immoral and pathological. Homosexual conduct was often illegal, and brutally punished by the

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12 Pace v. Alabama, 106 U.S. 583, 585 (1883).

13 Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

14 The term "miscegenation," which means "racial mixing" via sexual relations, marriage, or procreation, was coined by NEW YORK WORLD reporters David Goodman Croly and George Wakeman in an 1863 pamphlet intended to discredit abolitionism. *See* DAVID GOODMAN CROLY & GEORGE WAKEMAN, MISCEGENATION: THE THEORY OF THE BLENDING OF THE RACES, APPLIED TO THE AMERICAN WHITE MAN AND NEGRO (1863); *see also* Sidney Kaplan, *The Miscegenation Issue in the Election of 1864*, 34 J. NEGRO HIST. 274, 284–86 (1949); GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND 172 (1987).

15 DEBRA THOMPSON, NATION AND MISCEGENATION: COMPARING ANTI-MISCEGENATION REGULATIONS IN NORTH AMERICA 2 (2008).

16 Loving v. Virginia, 388 U.S. 1, 2 (1967).

17 *Id.* at 12.

18 Shawn Nottingham, *Louisiana Justice Who Refused Interracial Marriage Resigns*, CNN (Nov. 3, 2009, 10:47 PM), https://www.cnn.com/2009/US/11/03/louisiana.interracial.marriage/index.html.

19 *Id.*

state and society alike. With encouragement from both the medical and psychiatric establishment, homosexual desire was treated as a mental disorder, a sickness to be "cured," rather than a love to be celebrated.[20]

The United States was no exception. Gay sex was either explicitly or implicitly prohibited in every state, although the laws were often enforced only reluctantly or primarily in the breach. And gay marriage was unthinkable, except perhaps as parody. But gay people refused to accept official discrimination and social condemnation of their love.

1. *Bowers v. Hardwick* & the Prohibition of Homosexuality

In 1982, an Atlanta police officer arrested Michael Hardwick and another man for engaging in consensual oral sex, under a Georgia statute prohibiting sodomy.[21] The district attorney declined to prosecute, but Hardwick was incensed.[22] He filed a declaratory judgment action against Georgia Attorney General Michael Bowers in federal court, arguing that the Georgia law was unconstitutional.[23] The district court dismissed the action, but the Eleventh Circuit reversed, holding that the Georgia law violated the right to privacy.[24] The Supreme Court granted certiorari and reversed 5-4 in *Bowers v. Hardwick*.

Justice White's brief majority opinion asked whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy," and concluded that it does not. White summarily rejected Hardwick's argument that the right to privacy protects gay sex, holding that the Constitution does not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy" and that "morality" provides a "rational basis" to prohibit "homosexual sodomy."[25]

White's opinion is strikingly dismissive, describing Hardwick's arguments as "at best, facetious."[26] By contrast, the dissenting justices argued that the right to privacy protects gay sex, just like any other kind of consensual sex, and that the government cannot constitutionally punish gay sex, because it does not punish straight sex.[27]

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[20] Timothy W. Reinig, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 874 (1990).

[21] *See* Bowers v. Hardwick, 478 U.S. 186, 187–88 (1986); *see also* GA. CODE ANN. § 16-6-2 (1984).

[22] *Bowers*, 478 U.S. at 188. #

[23] *Id.* &

[24] *Id.* at 188–89. #

[25] *Id.* at 192, 196. #

[26] *Id.* at 194. #

[27] *Id.* at 218 (Blackmun, J., dissenting). #

2. *Lawrence v. Texas* & the Right to Gay Sex

In 1998, Texas police arrested John Geddes Lawrence Jr. and Tyron Garner for violating a Texas law that prohibited gay sex.[28] Lawrence and Garner filed a motion to dismiss, which the trial court denied.[29] The appellate court initially reversed, holding the law unconstitutional under the Texas Equal Rights Amendment, but then reversed itself en banc, and the Texas Court of Criminal Appeals declined review.[30] The Supreme Court granted certiorari and reversed 6-3 in *Lawrence v. Texas*.[31]

Justice Kennedy's majority opinion reversed *Bowers*, holding that the constitutional right to privacy and autonomy protects gay sex.[32] Among other things, Kennedy observed that the government historically avoided regulating private and consensual sexual conduct, and that the right to privacy protects consensual sex, including gay sex.[33] Justice O'Connor concurred, on equal protection grounds.[34] Justice Scalia dissented, arguing that the government can constitutionally prohibit sexual conduct on the basis of morality.[35] And Justice Thomas also dissented, arguing that the Constitution does not create a "general right of privacy."[36]

3. *United States v. Windsor* & the Definition of Marriage

In 2007, Edith Windsor and Thea Spyer married in Canada.[37] When Spyer died in 2009, she left her estate to Windsor, who claimed the estate tax exemption for surviving spouses.[38] While the state of New York recognized the validity of their marriage, the definition of "spouse" in the Defense of Marriage Act ("DOMA") excluded same-sex marriages.[39] Windsor filed an action challenging DOMA's

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[28] Lawrence v. Texas, 539 U.S. 558, 562–63 (2003); *see also* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012).

[29] *Lawrence*, 539 U.S. at 563.

[30] Petition for Writ of Certiorari at 7–8, *Lawrence* 539 U.S. 558 (No. 02-102), 2002 WL 32101039, at *7–8.

[31] *Lawrence*, 539 U.S. at 579.

[32] *Id.* at 574, 578.

[33] *Id.* at 571–72.

[34] *Id.* at 579 (O'Connor, J., concurring).

[35] *Id.* at 599 (Scalia, J., dissenting).

[36] *Id.* at 605–06 (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting)).

[37] United States v. Windsor, 570 U.S. 744, 749–50 (2013).

[38] *Id.* at 750.

[39] *Id.* at 753; *see also* Defense of Marriage Act (DOMA) § 3, 1 U.S.C. § 7 ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a

constitutionality.[40] The district court and court of appeals both held DOMA unconstitutional.[41] The Supreme Court granted certiorari and affirmed 5-4 in *United States v. Windsor*.[42]

Justice Kennedy's majority opinion held DOMA's definition of "spouse" was unconstitutional because it violated the Due Process and Equal Protection Clauses of the Constitution, by making some state-sanctioned marriages unequal to others.[43] Specifically, DOMA required the United States to grant certain benefits to opposite-sex married couples, but deny them to same-sex married couples. The majority held this violated the Fifth Amendment, because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[44]

In dissent, Justice Scalia argued that invalidating DOMA exceeded the Court's authority, and observed that *Windsor* implied a constitutional right to same-sex marriage.[45] "By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition."[46] In that respect, anyway, he was right.

4. *Obergefell v. Hodges* & the Right to Marry

Between 2012 and 2014, six gay couples from Michigan, Ohio, Kentucky, and Tennessee filed federal actions challenging the constitutionality of state laws denying them marriage licenses or refusing to recognize their marriages. While many circuits had previously held that the laws were unconstitutional, the Sixth Circuit disagreed.[47] The Supreme Court granted certiorari, in order to resolve the circuit split, and held in *Obergefell v. Hodges* that the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment includes same-sex marriages.[48]

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legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."), *invalidated by Windsor*, 570 U.S. at 775.

[40] *Windsor*, 570 U.S. at 751.

[41] *Id.* at 751–52.

[42] *Id.* at 752.

[43] *Id.* at 772, 774.

[44] *Id.* at 775.

[45] *Id.* at 798–800 (Scalia, J., dissenting).

[46] *Id.* at 800.

[47] DeBoer v. Snyder, 772 F.3d 388, 395 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015). The Sixth Circuit's decision relied in part on a one-line denial of certiorari in a case where a state refused to issue a marriage license to a same-sex couple. *Id.* at 399–402 (citing Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972)).

[48] *Obergefell*, 576 U.S. at 675–76.

Justice Kennedy's majority opinion observed that the "fundamental liberties" protected by the Due Process Clause of the Fourteenth Amendment "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[49] Among those fundamental liberties is the right to marry.[50] "Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause."[51] Kennedy observed that "in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected."[52] And he concluded, "[t]his analysis compels the conclusion that same-sex couples may exercise the right to marry."[53]

The Court relied on four "principles and traditions" to explain why the right to marry is a fundamental right that "must apply with equal force to same-sex couples": 1) individual autonomy; 2) intimate association; 3) the promotion of familial relationships; and 4) social order.[54]

First, it observed that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[55] The right to privacy protects individual autonomy. If it protects any decisions about family life, then it must also protect decisions about who to marry, because that decision is so fundamental to autonomy:

> The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.[56]

In other words, "[c]hoices about marriage shape an individual's destiny."[57] The freedom to choose who to marry enables people to realize themselves together, in ways they could not realize themselves alone.

Second, the Court observed that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[58] The privacy right to intimate association, is really the right to love the

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49 *Id.* at 663.

50 *Id.* at 664.

51 *Id.* at 664–65.

52 *Id.* at 665.

53 *Id.*

54 *Id.* at 665–70.

55 *Id.* at 665.

56 *Id.* at 666 (citations omitted) (first citing United States v. Windsor, 570 U.S. 644, 769–74 (2013); and then citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

57 *Id.*

58 *Id.*

person of your choice. Marriage is how people proclaim their mutual love and commitment to each other:

> Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.[59]

Accordingly, when people proclaim their love and commitment, they are entitled to official respect and recognition. They are entitled to marriage:

> [W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.[60]

Third, the Court observed that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[61] Same-sex families are also families, and entitled to the same protections as any other families.

And fourth, it observed that "marriage is a keystone of our social order."[62] In other words, marriage reflects not only a promise between two people to love and support each other, but also a promise from the state to recognize their love and commitment:

> For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.[63]

Official recognition matters, because it reflects respect and legitimacy. The government's recognition of a marriage legitimizes the marriage, and respects the love that supports the marriage. By contrast, the government's refusal to recognize a marriage proclaims its illegitimacy and signals disrespect:

> As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.[64]

Ultimately, the Court held that the right to marry must include a right to same-sex marriage. While marriage historically meant only opposite-sex marriage, nothing

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[59] *Id.* at 667.

[60] *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

[61] *Id.*

[62] *Id.* at 669.

[63] *Id.*

[64] *Id.* at 670.

about the right to marry limits it to opposite-sex couples, and that limitation imposes a constitutional harm:

> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[65]

Of course, governments and societies long discriminated against gay people, in a congeries of vicious and indefensible ways. That tradition of discrimination is no justification for denying them the right to marry. In other words, when tradition conflicts with principles, follow the principles. Same-sex marriage promotes the same constitutional values as opposite-sex marriage. Accordingly, the right to marry must also protect a right to same-sex marriage, irrespective of tradition:

> The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.[66]

Undeniably, *Obergefell* epitomized an epochal shift in the concept of due process, rooted in the protection of individuals from the arbitrary prejudices of the majority. Its implications are profound, and yet to be fully measured. But its impact on family law is most immediate.

Under *Obergefell*, the right to marry is not bound by tradition, and must reflect individual autonomy and mutual respect. But what about divorce? When can the bond of marriage be broken asunder?

If due process requires the government to recognize marriages, then it surely requires the government to recognize the dissolution of marriages as well. If it offends autonomy and dignity to prohibit marriage, then it surely offends autonomy and dignity to require marriage. The right to marry necessarily implies a right to unmarry.

III. THE LAW OF DIVORCE

Of course, just as the state regulates marriage, it also regulates divorce. The medieval Catholic church, then as now, simply prohibited divorce.[67] Marriage was a sacrament ended only by death. Unsurprisingly, commoners probably found ways of bending the rules. But the nobility, with their greater visibility and influence, could not. Indeed, the practical need for divorce fractured the Church. Henry VIII of England broke from Rome and formed the Anglican church, at least in part in order to justify

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[65] *Id.* at 670–71.

[66] *Id.* at 671–72.

[67] *See* CATECHISM OF THE CATHOLIC CHURCH para. 2382–86 (2d ed. 1997). *But see* Harold J. Berman, *Soviet Family Law in the Light of Russian History and Marxist Theory*, 56 YALE L.J. 26, 28 (1946) (explaining that the Eastern Orthodox Church has allowed for divorce in limited circumstances).

the annulment of his marriage to Catherine of Aragon that he could never secure from the Church.[68]

In colonial America, the right to divorce was limited, as it also was in the early American republic. Both medieval and American family law share two main influences—secular and religious law.[69] These influences operated in modern American family law in the opposite order as medieval family law: "American law began with religious influences but these later gave way to more secular legal concerns."[70]

During the progressive era, the right to divorce became more widely available but still required an allegation of fault. Grounds for divorce were limited to situations in which a party alleged grounds such as adultery, abandonment, impotence, and consanguinity.[71] Fault divorce requires the divorcing party to justify the decision to divorce. In other words, the preservation of the marriage is the legal norm, which can only be broken for sufficient reason. Having to allege such grounds, a list of which each state adopted for itself for purposes of granting divorces, made divorces much more difficult to obtain. This hurdle would force couples who, perhaps, wanted to divorce but did not have sufficient grounds to do so to lie to the court regarding the justification for the divorce.[72]

A. *No-Fault Divorce*

Eventually, states began to adopt a no-fault standard, which, thankfully, is the norm today. Under a no-fault divorce standard, either party to a marriage can request a divorce, without providing a reason.

Conservative pundit Maggie Gallagher has critiqued the current state of American divorce, stating that it embodies a "nagging paradox: Americans express a high regard for marriage and a great willingness to end marriages."[73] Surprisingly, many scholars

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[68] Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, 26 YALE J.L. & FEMINISM 29, 54 (2014).

[69] Maria Funk Miles, Note, *The Value of a Woman: A Comparison of the Law and the Traditions of Divorce in Medieval Europe and Modern America*, 15 UCLA WOMEN'S L.J. 139, 140 (2006).

[70] *Id.*

[71] *Id.* at 162.

[72] Examples of this conundrum have even been memorialized in songs such as Buck Owens's *Mental Cruelty*:

> Mental cruelty, that's what I heard her say
> Mental cruelty to the judge that day
> I sat there in silence so she could be free
> And listened to her lying words—mental cruelty.

BUCK OWENS, *Mental Cruelty*, *on* LOOSE TALK (Capitol Records 1961).

[73] MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE 219 (1996).

seem to share her sentiment, expressing concern that divorce, especially no-fault divorce, undermines the purpose of marriage.[74] Some have argued that, by undermining the idea of marriage as life-long commitment, no-fault divorce has weakened marriage as an institution.[75]

Today, all fifty states have some provision allowing for no-fault divorce, though only seventeen of those are true no-fault states, meaning that one can only file for divorce on no-fault grounds alone. The remainder of the states still allow petitioners to allege fault if they wish to do so, offering greater opportunities for the right to unmarry to be burdened.

B. "Quickie" Divorces and Waiting Periods

Some states, particularly Nevada, have historically been known to offer "quickie" divorces. All states, however, including Nevada, provide for a "cooling off" period before the entry of a decree of divorce, though many of these may be waived after going through an additional step of certifying to the court that imposing the waiting period would be of no use. These statutory waiting periods are meant to "encourage the amicable settlement of" issues, perhaps even averting divorce itself.[76]

Perhaps even more offensive to individual autonomy are state limitations on remarriage after divorce. Wisconsin currently requires those who have divorced to wait six months before remarriage,[77] while Alabama requires sixty days,[78] with Kansas,[79] Nebraska,[80] and Texas[81] at thirty days. Such waiting periods, even if well-intended, place a substantial burden on the right to unmarry in a paternalistic and infantilizing fashion.

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[74] *See* Allen M. Parkman, *Mutual Consent Divorce*, *in* THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 57, 63 (Antony W. Dnes & Robert Rowthorn eds., 2002); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809–11 (1985); Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 522 (1994).

[75] Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 932–34 (2005) (citing Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1954 (2000)).

[76] Michael Oths, *Divorce on the Road: "Going to Gooding,"* ADVOCATE, June 2000, at 11; 24 AM. JUR. 2D *Divorce and Separation* § 278 (2020).

[77] A Wisconsin State Assembly bill, if ratified, would eliminate the six-month, or any, waiting period altogether. Assemb. B. 439, 2019 Leg., Reg. Sess. (Wis. 2019).

[78] ALA. CODE § 30-2-10 (2020).

[79] KAN. STAT. ANN § 23-2708 (2014).

[80] NEB. REV. STAT. § 42-372.01 (2020).

[81] TEX. FAM. CODE ANN. § 6.801 (West 1997).

IV. THE RIGHT TO UNMARRY

If marriage is a fundamental right, then unmarriage must also be a fundamental right. After all, the Supreme Court held in *Obergefell* that marriage is a fundamental right because it expresses individual autonomy and honors the mutual desire of two people to be joined in perpetual union.[82] The fundamental right to marry recognizes that the Constitution prohibits the government from telling people who they have a right to love, and requires the government to make the economic and social benefits of marriage available to everyone who wants to exercise them. Under the Constitution, love will out.

But if individual autonomy and love create a fundamental right to form a marriage, surely they also create a fundamental right to end a marriage. If it is demeaning for the government to deny your autonomy to form a marriage, surely it is also demeaning to deny your autonomy to dissolve a marriage. And if it is demeaning for the government not to honor your love, surely it is also demeaning not to honor your lack of love.

In *Loving* and *Obergefell*, the Supreme Court held that the government cannot burden the fundamental right to marry by preventing people from marrying the person of their choice.[83] But if the government cannot prevent you from marrying, then it cannot prevent you from unmarrying. The logic of the right to marry necessarily implies the right to unmarry. And if the government cannot burden the right to marry, it cannot burden the right to unmarry either.

And yet, it does. The government promotes marriage by making it fast and easy, at least if it's your first marriage. In states like Nevada, you can even get married on the spot.[84] By contrast, divorce is slow and burdensome. It can take many months and inevitably requires many filings. Unlike marriage, which is essentially a ministerial act, divorce typically requires legal representation, multiple filings, court appearances, and considerable expense. You can get married on a lark, but getting divorced is always a bear.

But it gets worse. Divorce law doesn't just make it costly and burdensome to exercise the right to unmarry. It actually prevents people from exercising the right to unmarry without the government's permission. When you file a marriage certificate, you are married. But when you file a divorce petition, you aren't divorced. On the contrary, you have to wait for the government to approve your divorce, and it can take its sweet time. It will often do this based on the most seemingly trivial of reasons; perhaps a disagreement over some small aspect of property distribution or payment of health insurance premiums. In this sense, a court will hold a party, effectively, at ransom for the benefit of another: Your freedom to enter into a bond with another once you satisfy the demands of someone who will use the force of the state to hold you captive otherwise.

This is a practical problem, because marriage can be hazardous and unpleasant. Many people are trapped in abusive marriages and need out, as soon as possible. In those cases, the bureaucratic requirements of the divorce process may well facilitate

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82 Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015).

83 *Id.* at 675–76; Loving v. Virginia, 388 U.S. 1, 12 (1967).

84 NEV. REV. STAT. § 122.0615 (2019).

such abuse. And many others are just unhappy. Why should the government force people to stay married when they want to be divorced? Sure, it is only temporary, but it is still a harm.

But it is also a theoretical problem. The right to unmarry implies that the government cannot impose unjustified burdens on divorce. If someone wants to exercise their right to unmarry, the government should give them a divorce as soon as possible. There is no legitimate reason to force people to stay married, when they want to be divorced.

Sadly, the government not only burdens, but also discourages divorce. It is hard to get a divorce. The legal process is daunting. People are scared to ask for a divorce. They are scared to ask for an attorney. And they are scared of the courts. Many people who want and need a divorce just give up.

Even if you file for divorce, you have to wait. And then you have to wait some more. It doesn't matter why you want a divorce. It doesn't matter how you feel about being married. The only thing that matters is the court's docket. You will get a divorce when it is convenient to the court.

That is absurd. A marriage is just a contract, and contracts are made to be broken. If it is easy to form a marriage contract, it should be easy to break a marriage contract.

True, marriage is a social good. As the Court recognized in *Obergefell*, we encourage people to marry, because we believe marriage benefits society.[85] But social benefits cannot trump individual rights. Due process protects individuals, irrespective of the greater good. If due process protects a right to unmarry, the social value of marriage cannot affect the ability to exercise that right.

Of course, divorce has gotten easier over time, and some jurisdictions make divorce easier than others. No-fault divorce and "quickie divorces" have reduced the burden on the right to unmarry. Anyone who wants a divorce can get one. Eventually.

But constitutional rights cannot be vindicated by half-measures. Especially when the burdens fall unequally on the disadvantaged. Those with the resources to hire counsel and travel to a convenient jurisdiction can obtain an expeditious divorce. But few people find themselves in those happy circumstances. It is cold comfort to know that others enjoy a right you possess, but cannot exercise.

Due process demands that rights be available to all. If due process protects the right to unmarry–as it must–it must also protect the right to unmarry for all who wish to exercise it. And a right burdened is a right denied.

Accordingly, state laws burdening divorce are presumptively unconstitutional. Under the right to unmarry, the government must treat marriage and divorce the same. A marriage exists as soon as it is licensed and solemnized. Likewise, a divorce must exist as soon as it is filed and notarized. If saying, "I do," is enough to consummate a marriage, saying, "I don't," must be enough to dissolve it.

However, the right to unmarry would have little effect on most of divorce law. After all, divorce disputes are not about marital status, but about the distribution of property, the custody of children, and other contentious issues. None of these are implicated by the right to unmarry. Courts can and must resolve these difficult questions over a period of time, in consultation with the parties. But there is no reason or need for the marriage itself to persist, in order to address them.

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[85] *Obergefell*, 576 U.S. at 669.

In this respect, one might draw an analogy to the law of nonmarriage.[86] When a person ends a non-marital relationship, there is no need for a divorce proceeding, because no marriage ever existed. And yet, all of the same property and custody disputes can be litigated and resolved.

Perhaps the law of marriage should take a page from the law of nonmarriage and recognize that love is none of the government's business. What people made, people can unmake. The government can say you are married, but it cannot make it so. People will love who they choose, and won't worry about the government.

V. CONCLUSION

As Oscar Wilde observed, "Marriage is the triumph of imagination over intelligence. Second marriage is the triumph of hope over experience."[87] Presumably subsequent marriages continue to reflect hope, and perhaps a touch of imagination as well.

If the right to marry reflects a right to expect the government to respect your choices, the right to unmarry reflects a right to expect the government to respect your mistakes. There is nothing wrong with making mistakes.

"Quid, si falleris? Si enim fallor, sum. Nam qui non est, utique nec falli potest; ac per hoc sum, si fallor. Quia ergo sum si fallor, quo modo esse me fallor, quando certum est me esse, si fallor?"[88]

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[86] *See generally*, Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017).

[87] Danielle Teller & Astro Teller, *Second Weddings, The Triumph of Hope over Experience!*, HAPPILY DIVORCED & AFTER (July 1, 2014), https://happilydivorcedandafter.com/2014/07/01/second-weddings-the-triumph-of-hope-over-experience/.

[88] SAINT AUGUSTINE, THE CITY OF GOD bk. XI, ch. 26, at 76 (P.G. Walsh ed. & trans., 2016) (c. 426 C.E.). This passage has been translated as:

> 'What if you are mistaken?' - well, if I am mistaken, I am. For, if one does not exist, he can by no means be mistaken. Therefore, I am, if I am mistaken. Because, therefore, I am, if I am mistaken, how can I be mistaken that I am, since it is certain that I am, if I am mistaken?

SAINT AUGUSTINE, THE CITY OF GOD bk. XI (c. 426 C.E.), *reprinted in* 14 THE FATHERS OF THE CHURCH 187, 228–29 (Gerald G. Walsh & Grace Monahan trans., 2008) (emphasis removed).