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## CHAPTER 2

# MARRYING

Marriage is a highly complex institution. It is, among other things, an often-shifting and conflicting mosaic of different religious, moral, philosophical, ethical, cultural, social, political, legal, aesthetic, as well as highly and deeply personal perspectives and beliefs. Recognizing this, what does it mean to say that “marriage” should be recognized by the state under law—and regulated? “Marriage” defined how, and in relation to exactly what view or views? Marriage defined from or toward what larger ends?

Recalling some of the approaches to thinking about family law that you encountered in the last chapter, where—as an initial matter—do you locate yourself and your views on marriage?

What do you take marriage and its purposes to be? Is marriage simply a good? Is it a good for society or the individual? Both? A good defined in secular or religious terms? Is it not also a very real form of management and regulation? Social control and inequality? What do you make of the fact that, in the U.S., “[a]ntebellum social rules and laws considered enslaved people morally and legally unfit to marry,” and “incapacitated [them] from entering into civil contracts, of which marriage was one”?<sup>1</sup> What do you make of the notion, expressed from different points of view, that marriage operates as a discriminatory institution that should be de-regulated and de-recognized, or even eliminated altogether as a legal and a social form? Even if you happen to find ideas along these lines persuasive, might you be inclined to the view that while the state should generally stay out of the interpersonal intimacy business, some intimacies still need to be regulated, as, for example, by criminal or civil, including contract, law?

Are there proper limits to the ways the state governs marriage? Where do they come from? How should the incommensurability of various perspectives on and beliefs about marriage be handled under law? Do the incommensurabilities highlight the importance of process-based criteria for deciding what state regulation of marriage should look like?

As you think about these questions, you might consider not only the ideas and intentions behind various legal rules relating to marriage but also their effects. Sometimes, the effects of marriage rules will be or seem obvious. Think here about *de jure* race-based restrictions on marriage, which reflected and furthered the ideology and social practices of white supremacy. In other instances, however, marriage regulations’ effects may be less readily apparent. Think here about how marriage regulations may reflect and reinforce social ideologies and practices of intimacy that condition the lives individuals realistically imagine themselves wanting to lead. Try imagining how the traditional exclusion of same-sex couples from marriage governed the public and private lives that non-heterosexuals actually led—both inside and outside of marriage. Or consider how the recent, full inclusion of same-

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<sup>1</sup> Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J. L. & HUMANITIES 251, 252(1999); see also generally KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015); R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 54, 57–62, 64–65 (2015) (excerpted in Chapter 1).

sex couples within marriage under law might reconfigure the life choices that individuals of various sexual and gender identities experience within and outside of it.

Appreciating the complex ways that marriage rules effectively govern behaviors and relationships as well as how people experience themselves, their subjectivities, and their wellbeing, how might you structure marriage's rules so that they are as tightly calibrated as possible to the effectuation of only the purposes you think marriage regulations should seek to achieve? Are unwanted costs inevitable? If so, how should they be handled? How are those policy trade-offs legally constrained when marriage is affirmed and regulated as a matter of constitutional right? Could protecting marriage as a fundamental constitutional right itself have negative effects, hence costs?

To help concretize and sharpen your thinking on at least some of these questions, and as a more in-depth and substantive step toward the cases and materials that follow, consider these very different views on marriage—one highly traditionalist, one highly critical of it—and what they might be taken to suggest about how marriage should be legally recognized and regulated, if it should be recognized and regulated at all. As you read these materials, you might consider how the perspectives being offered map on to the approaches to family law rules discussed in Chapter 1.

## A. SOME INITIAL PERSPECTIVES ON MARRIAGE

### Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*

34 HARV. J.L. & PUB. POL'Y 245, 245–59 (2011).

What is marriage?

Consider two competing views:

*Conjugal View:* Marriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—acts that constitute the behavioral part of the process of reproduction, thus uniting them as a reproductive unit. Marriage is valuable in itself, but its inherent orientation to the bearing and rearing of children contributes to its distinctive structure, including norms of monogamy and fidelity. This link to the welfare of children also helps explain why marriage is important to the common good and why the state should recognize and regulate it.

*Revisionist View:* Marriage is the union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life. It is essentially a union of hearts and minds, enhanced by whatever forms of sexual intimacy both partners find agreeable. The state should recognize and regulate marriage because it has an interest in stable romantic partnerships and in the concrete needs of spouses and any children they may choose to rear.

It has sometimes been suggested that the conjugal understanding of marriage is based only on religious beliefs. This is false. Although the world's major religious traditions have historically understood marriage as a union

of man and woman that is by nature apt for procreation and childrearing, this suggests merely that no one religion invented marriage. Instead, the demands of our common human nature have shaped (however imperfectly) all of our religious traditions to recognize this natural institution. As such, marriage is the type of social practice whose basic contours can be discerned by our common human reason, whatever our religious background. . . .

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## I.

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### **B. Real Marriage Is—And Is Only—The Union of Husband and Wife**

As many people acknowledge, marriage involves: first, a comprehensive union of spouses; second, a special link to children; and third, norms of permanence, monogamy, and exclusivity. All three elements point to the conjugal understanding of marriage.

#### **1. Comprehensive Union**

Marriage is distinguished from every other form of friendship inasmuch as it is comprehensive. It involves a sharing of lives and resources, and a union of minds and wills—hence, among other things, the requirement of consent for forming a marriage. But on the conjugal view, it also includes organic bodily union. This is because the body is a real part of the person, not just his costume, vehicle, or property. Human beings are not properly understood as nonbodily persons—minds, ghosts, consciousnesses—that inhabit and use nonpersonal bodies. . . .

Likewise, because our bodies are truly aspects of us as persons, any union of two people that did not involve organic bodily union would not be comprehensive—it would leave out an important part of each person's being. Because persons are body-mind composites, a bodily union extends the relationship of two friends along an entirely new dimension of their being as persons. If two people want to unite in the comprehensive way proper to marriage, they must (among other things) unite organically—that is, in the bodily dimension of their being.

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Our organs—our heart and stomach, for example—are parts of one body because they are coordinated, along with other parts, for a common biological purpose of the whole: our biological life. It follows that for two individuals to unite organically, and thus bodily, their bodies must be coordinated for some biological purpose of the whole.

That sort of union is impossible in relation to functions such as digestion and circulation, for which the human individual is by nature sufficient. But individual adults are naturally incomplete with respect to one biological function: sexual reproduction. In coitus, but not in other forms of sexual contact, a man and a woman's bodies coordinate by way of their sexual organs for the common biological purpose of reproduction. They perform the first step of the complex reproductive process. Thus, their bodies become, in a strong sense, one—they are biologically united, and do not merely rub together—in coitus (and only in coitus), similarly to the way in which one's heart, lungs, and other organs form a unity: by coordinating for the biological good of the whole. In this case, the whole is made up of the man and woman as a couple, and the biological good of that whole is their reproduction.

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By extension, bodily union involves mutual coordination toward a bodily good—which is realized only through coitus. And this union occurs even when conception, the bodily good toward which sexual intercourse as a biological function is oriented, does not occur. In other words, organic bodily unity is achieved when a man and woman coordinate to perform an act of the kind that causes conception. This act is traditionally called the act of generation or the generative act; if (and only if) it is a free and loving expression of the spouses' permanent and exclusive commitment, then it is also a marital act.

Because interpersonal unions are valuable in themselves, and not merely as means to other ends, a husband and wife's loving bodily union in coitus and the special kind of relationship to which it is integral are valuable whether or not conception results and even when conception is not sought. But two men or two women cannot achieve organic bodily union since there is no bodily good or function toward which their bodies can coordinate, reproduction being the only candidate. This is a clear sense in which their union cannot be marital, if marital means comprehensive and comprehensive means, among other things, bodily.

## 2. *Special Link to Children*

Most people accept that marriage is also deeply—indeed, in an important sense, uniquely—oriented to having and rearing children. That is, it is the kind of relationship that by its nature is oriented to, and enriched by, the bearing and rearing of children. . . .

It is clear that merely committing to rear children together, or even actually doing so, is not enough to make a relationship a marriage—to make it the kind of relationship that is by its nature oriented to bearing and rearing children. . . . It is also clear that having children is not necessary to being married; newlyweds do not become spouses only when their first child comes along. Anglo-American legal tradition has for centuries regarded coitus, and not the conception or birth of a child, as the event that consummates a marriage. Furthermore, this tradition has never denied that childless marriages were true marriages.

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If there is some conceptual connection between children and marriage, therefore, we can expect a correlative connection between children and the way that marriages are sealed. That connection is obvious if the conjugal view of marriage is correct. Marriage is a comprehensive union of two sexually complementary persons who seal (consummate or complete) their relationship by the generative act—by the kind of activity that is by its nature fulfilled by the conception of a child. So marriage itself is oriented to and fulfilled by the bearing, rearing, and education of children. The procreative-type *act* distinctively seals or completes a procreative-type *union*.

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Just so, marriage has its characteristic structure largely because of its orientation to procreation; it involves developing and sharing one's body and whole self in the way best suited for honorable parenthood—among other things, permanently and exclusively. But such development and sharing,

including the bodily union of the generative act, are possible and inherently valuable for spouses even when they do not conceive children.

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### 3. *Marital Norms*

Finally, unions that are consummated by the generative act, and that are thus oriented to having and rearing children, can make better sense of the other norms that shape marriage as we have known it.

For if bodily union is essential to marriage, we can understand why marriage is incomplete and can be dissolved if not consummated, and why it should be, like the union of organs into one healthy whole, total and lasting for the life of the parts (“till death do us part”). That is, the comprehensiveness of the union across the dimensions of each spouse’s being calls for a temporal comprehensiveness, too: through time (hence permanence) and at each time (hence exclusivity). This is clear also from the fact that the sort of bodily union integral to marriage grounds its special, essential link to procreation, in light of which it is unsurprising that the norms of marriage should create conditions suitable for children: stable and harmonious conditions that sociology and common sense agree are undermined by divorce—which deprives children of an intact biological family—and by infidelity, which betrays and divides one’s attention and responsibility to spouse and children, often with children from other couplings.

Thus, the inherent orientation of conjugal union to children deepens and extends whatever reasons spouses may have to stay together for life and to remain faithful: in relationships that lack this orientation, it is hard to see why permanence and exclusivity should be, not only desirable whenever not very costly (as stability is in *any* good human bond), but inherently normative for anyone in the relevant kind of relationship.

## **Laurie Essig & Lynn Owens, *What if Marriage Is Bad for Us?***

CHRON. REV., at B4–B5 (2009).

...

Marriage as we imagine it today developed during the late 1800s, when it became “for love” and “companionate.” Until that point, one married for material and social reasons, not romance. Women required marriage for survival; men did not. That left men free to behave as they wished: Prostitutes and buggery were part of many a married man’s sexual repertoire. But then the Victorians (with their sexual prudishness) and first-wave feminists (with their sense that what’s good for the goose is good for the gander) insisted that antiprostitution and antisodomy laws be enacted, and that married men confine their sexual impulses to the conjugal bed. The result was enforced lifelong sexual monogamy for both parties, at least in theory.

That might have seemed reasonable in 1900, when the average marriage lasted about 11 years, a consequence of high death rates. But these days, when a marriage can drag on for half a century, it can be a lot of work. Laura Kipnis calls marriage a “domestic gulag,” a forced-labor camp where

the inmates have to spend all their time outside of work working on their marriage.

And if the dyadic couple locked in lifelong monogamy was a radical new form, so was the family structure it spawned. The nuclear family is primarily a mutant product of the nuclear age. Before World War II, most Americans lived among extended family. The definition of family was not the couple and their offspring, but brothers, sisters, aunts, uncles, and grandparents as well. With the creation of suburbs for the middle classes, large numbers of white Americans began participating in the radical family formation of two married parents plus children in a detached house separated from extended family.

Although the nuclear family is idealized as “natural” and “normal” by our culture (*Leave It to Beaver*) and our government (“family values”), it has always been both a shockingly new way of living and a minority lifestyle. Even at its height, in the early 1970s, only about 40 percent of American families lived that way. Today that number is about 23 percent, including stepfamilies. The nuclear family is not only revolutionary; it is a revolution that has failed for most of us.

. . . According to the Centers for Disease Control and Prevention, married people have better health than those who are not married. A closer look at the data, however, reveals that married and never-married Americans are similar; it’s the divorced who seem to suffer. The lesson might be to never divorce, but an even more obvious lesson to be drawn from the research might be to never marry.

Naomi Gerstel and Natalia Sarkisian’s research shows that married couples are more isolated than their single counterparts. That is not a function just of their having children. Even empty-nesters and couples without children tend to have weak friendship networks. Marriage results in fewer rather than more social ties because it promises complete fulfillment through the claims of romance. We are instructed by movies, pop songs, state policy, and sociology to get married because “love is all you need.” But actually we humans need more. We need both a sense of connection to larger networks—to community, to place—and a sense of purpose that is beyond our primary sexual relationships.

For those reasons, marriage has been self-destructing as a social form. The marriage rate in the United States is at an all-time low. In 1960[,] about two-thirds of adult Americans were married. Today only slightly more than half of Americans live in wedded bliss. Actually, even the bliss is declining, with fewer married Americans describing their unions as “very happy.”

Maybe it’s the decline in happiness that has caused an increasing number of Americans to say “I don’t,” despite Hollywood’s presenting us with happy ending after happy ending and a government bent on distributing civil rights on the basis of marital status. Apparently no amount of propaganda or coercion can force humans to participate in a family form so out of sync with what we actually need.

With all that marriage supporters promise—wealth, health, stability, happiness, sustainability—our country finds itself confronted with a paradox: Those who would appear to gain the most from marriage are the same ones who prove most resistant to its charms. Study after study has found that it is the poor in the United States who are least likely to wed. The people who get married are the same ones who already benefit most from all

our social institutions: the “haves.” They benefit even more when they convince everyone that the benefits are evenly distributed.

Too often we are presented with the false choice between a lifelong, loving marriage and a lonely, unmarried life. But those are far from the only options. We should consider the way people actually live: serial monogamy, polyamory, even polygamy.

Instead of “blaming the victims” for failing to adopt the formative lifestyles of the white and middle class, we should consider that those avoiding marriage might know exactly what they are doing. Marriage is not necessarily good for all of us, and it might even be bad for most of us. When there is broad, seemingly unanimous support for an institution, and when the institution is propped up by such disparate ideas as love, civil rights, and wealth creation, we should wonder why so many different players seem to agree so strongly. Perhaps it’s because they are supporting not just marriage but also the status quo.

We can dress up marriage in as many beautiful white wedding gowns as we like, but the fundamental fact remains: Marriage is a structure of rights and privileges for those who least need them and a culture of prestige for those who already have the highest levels of racial, economic, and educational capital.

So when you hear activists and advocates—gay, Christian, and otherwise—pushing to increase not only marriage rights but also marriage rates, remember these grouchy words of Marx: “Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly, and applying the wrong remedies.” Marriage is trouble. Americans haven’t failed at marriage. Marriage has failed us.

## NOTE

Do you agree with the Girgis-George-Anderson point of view? Are you inclined to accept their sense that the “conjugal view” of marriage they describe and endorse is not “based only on religious beliefs,” but also on what they characterize as “our common human reason, whatever our religious background”? Are you more drawn to the substance of what they describe as the “revisionist view” of marriage, despite the negative inflections of that label? If so, how might you prefer to characterize it? What do you make of the Essig-Owens perspective? Do you agree with it? Where in this larger mix of positions do you find yourself wanting to stand? Do you find yourself wishing for some altogether different ground?

## B. RESTRICTIONS ON WHO MAY MARRY

### 1. CONSTITUTIONALITY OF MARRIAGE RESTRICTIONS

#### **Loving v. Virginia**

Supreme Court of the United States, 1967.  
388 U.S. 1, 87 S. Ct. 1817, 18 L.Ed.2d 1010.

■ CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to

prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. . . .

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. . . . On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. . . .

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after modifying the sentence, affirmed the convictions. The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U.S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20–58 of the Virginia Code:

*“Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20–59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.”

Section 20–59, which defines the penalty for miscegenation, provides:

*“Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”

Other central provisions in the Virginia statutory scheme are § 20–57, which automatically voids all marriages between “a white person and a



colored person” without any judicial proceeding, and §§ 20–54 and 1–14 which, respectively, define “white persons” and “colored persons and Indians” for purposes of the statutory prohibitions.<sup>4</sup> The Lovings have never disputed in the course of this litigation that Mrs. Loving is a “colored person” or that Mr. Loving is a “white person” within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.<sup>5</sup> Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. . . . The central features of . . . current Virginia law[ ] are the absolute prohibition of a “white person” marrying other than another “white person,” a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants’ statements as to their race are correct, certificates of “racial composition” to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 87 S.E.2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State’s legitimate purposes were “to preserve the racial integrity of its citizens,” and to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride,” obviously an endorsement of the doctrine of

<sup>4</sup> Section 20–54 of the Virginia Code provides:

*“Intermarriage prohibited; meaning of term ‘white persons.’—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this Chapter, the term ‘white person’ shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.”* VA. CODE ANN. § 20–54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth “of the blood of the American Indian” is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by “the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas. . . .” Plecker, *The New Family and Race Improvement*, 17 VA. HEALTH BULL., Extra No. 12, at 25–26 (New Family Series No. 5, 1925), cited in Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1202, n. 93 (1966). . . .

<sup>5</sup> After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, ALA. CONST., art. 4, § 102, ALA. CODE, Tit. 14, § 360 (1958); Arkansas, ARK. STAT. ANN. § 55–104 (1947); Delaware, DEL. CODE ANN., Tit. 13, § 101 (1953); Florida, FLA. CONST., art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, GA. CODE ANN. § 53–106 (1961); Kentucky, KY. REV. STAT. ANN. § 402.020 (Supp. 1966); Louisiana, LA. REV. STAT. § 14:79 (1950); Mississippi, MISS. CONST., art. 14, § 263, MISS. CODE ANN. § 459 (1956); Missouri, MO. REV. STAT. § 451.020 (Supp. 1966); North Carolina, N.C. CONST., art. XIV, § 8, N. C. Gen. Stat. § 14–181 (1953); Oklahoma, OKLA. STAT., Tit. 43, § 12 (Supp. 1965); South Carolina, S.C. CONST., art. 3, § 33, S.C. CODE ANN. § 20–7 (1962); Tennessee, TENN. CONST., art. 11, § 14, Tenn. Code Ann. § 36–402 (1955); TEXAS, Tex. Pen. Code, art. 492 (1952); West Virginia, W. VA. CODE ANN. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

White Supremacy. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, 125 U.S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. . . . Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination. . . .

. . .

The State finds support for its "equal application" theory in the decision of the Court in *Pace v. Alabama*, 106 U.S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin v. Florida*, [379 U.S. 184, 188 (1964)]. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. . . .

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed.

## NOTES

1. As the Supreme Court's opinion in *Loving v. Virginia* makes clear, Virginia defended its miscegenation ban partly on the ground that it had a rational basis for treating "interracial marriages differently from other marriages." 388 U.S. 1, 8 (1967). According to the Court, "the State argue[d] [that] the scientific evidence [on the effects of miscegenation] is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages." *Id.* Illuminating the point is the following exchange from the oral arguments before the Supreme Court, in which R.D. Mc Ilwaine III, Assistant Attorney General of the Commonwealth of Virginia, made the following arguments on Virginia's behalf:

MR. MC ILWAINE: . . . Turning, then, to our . . . argument, which we say can only be reached if the legislative history of the Fourteenth Amendment is ignored, and the Fourteenth Amendment is deemed to

reach the state power to enact laws relating to the marriage relationship, we say that the prevention of interracial marriage is a legitimate exercise of state power, that there is a rational classification, certainly so far as the Virginia population is concerned, for preventing marriages between white and colored people, who make up almost the entirety of the State's population; and that this is supported by the prevailing climate of scientific opinion. We take the position that while there is evidence on both sides of this question, when such a situation exists it is for the legislature to draw its conclusions, and that these conclusions are entitled to weight; and, that unless it can be clearly said that there is no debatable question, that a statute of this type cannot be declared unconstitutional.

We start with the proposition, on this connection, that it is the family which constitutes the structural element of society; and that marriage is the legal basis upon which families are formed. Consequently, this Court has held, in numerous decisions over the years, that society is structured on the institution of marriage; that it has more to do with the welfare and civilizations of a people than any other institution; and that out of the fruits of marriage spring relationships and responsibilities with which the state is necessarily required to deal. Text writers and judicial writers agree that the state has a natural, direct, and vital interest in maximizing the number of successful marriages which lead to stable homes and families, and in minimizing those which do not.

It is clear, from the most recent available evidence on the psychosociological aspect of this question that intermarried families are subjected to much greater pressures and problems than are those of the intramarried, and that the State's prohibition of racial intermarriage, for this reason, stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the prescription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally competent.

THE COURT: There are people who have the same feeling about interreligious marriages. But because that may be true, would you think that the State could prohibit people from having interreligious marriages?

MR. MC ILWAINE: I think that the evidence in support of the prohibition of interracial marriages is stronger than that for the prohibition of interreligious marriages; but I think that—

THE COURT: How can you say that? . . . Because you believe that?

MR. MC ILWAINE: No, sir. We say it principally on the basis of . . . a book by Dr. Albert I. Gordon, . . . which is characterized as the definitive book on inter-marriage, and as the most careful, up-to-date, methodologically sound study of intermarriage in North America that exists. It is entitled *Intermarriage: Interfaith, Interracial, Interethnic* [(1964)].

Now, our proposition on the psycho-sociological aspects of the question is bottomed almost exclusively on this particular volume. This is the work of a Jewish rabbi who also has an M.A. in sociology and a Ph.D. in social anthropology. It is a statistical study of over 5,000 marriages which was made by the computers of the Harvard Laboratory of Social Relations and the MIT Computation Center. This book has given statistical form and basis to the proposition that, from

a psycho-sociological point of view, interracial marriages are detrimental to the individual, to the family, and to the society.

I do not say that the author of the book would advocate the prohibition of such marriages by law, but we do say that he personally clearly expresses his view as a social scientist that interracial marriages are definitely undesirable; that they hold no promise for a bright and happy future for mankind; and that interracial marriages bequeath to the progeny of those marriages more psychological problems than parents have a right to bequeath to them.

. . . [T]his book has been widely accepted, and it was published in 1964 as being the definitive book on intermarriage in North America that exists.

THE COURT: Is he an Orthodox, or an Unorthodox Rabbi?

MR. MC ILWAINE: I have not been able to ascertain that, Your Honor, from any of the material that I've gotten here. He is the Rabbi of the Temple Emmanuel in Newton Center, Massachusetts. I do not understand that, certainly, the religious view of the Orthodox or the Conservative or the Reformed Jewish faiths disagree necessarily on this particular proposition. . . .

I am more interested, of course, in his credentials as a scientist, for this purpose, . . . than . . . in his religious affiliations. . . . [S]ome of the statements which are made in [Gordon's study] are based upon the demonstrably, statistically demonstrably greater, ratio of divorce/annulment in intermarried couples than in intramarried couples. Dr. Gordon has stated it, as his opinion, that "It is my conviction that intermarriage is definitely inadvisable; that they are wrong because they are most frequently, if not solely, entered into under present-day circumstances by people who have a rebellious attitude towards society, self-hatred, neurotic tendencies, immaturity, and other detrimental psychological factors."

THE COURT: You don't know what is cause, and what is effect. Presuming the validity of these statistics, I suppose it could be argued that one reason that marriages of this kind are sometimes unsuccessful is the existence of the kind of laws that are at issue here, and the attitudes that those laws reflect. Isn't that correct?

MR. MC ILWAINE: I think it is more the matter of the attitudes that, perhaps, the laws reflect. I don't find anywhere in this that the existence of the law does it. It is the attitude which society has toward interracial marriages, which in detailing his opposition, he says, "causes a child to have almost insuperable difficulties in identification," and that the problems which the child of an interracial marriage faces are those to which no child can come through without damages to himself.

Now, if the state has an interest in marriage, if it has an interest in maximizing the number of stable marriages, and in protecting the progeny of interracial marriages from these problems, then clearly there is scientific evidence available that this is so. It is not infrequent that the children of intermarried parents are referred to not merely as the children of intermarried parents, but as the victims of intermarried parents, and as the martyrs of their intermarried parents. These are direct quotes from the volume. . . .

THE UNITED STATES: CONSTITUTIONAL LAW 959, 986–89 (Philip B. Kurland & Gerhard Casper eds., 1975); *see also* Brief and Appendix on Behalf of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 789, 831–43 (Philip B. Kurland & Gerhard Casper eds., 1975); *id.* at 834 (“If this Court (erroneously, we contend) should undertake such an inquiry [into the wisdom of Virginia’s “statutory policy”] it would quickly find itself in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point[s] of view.”). What do you make of these perspectives?

2. Consider Derrick Bell, *The 1984 Term: Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 62 (1985):

... I will bet few law students know, and even fewer legal scholars remember, that only a few months after *Brown*, the Court refused to review the conviction under an Alabama antimiscegenation law of a black man who married a white woman.<sup>158</sup> Many of us do remember, of course, and remember too the procedural contortions that the Court used one year after *Brown* to avoid deciding another challenge to a state law barring interracial marriages.<sup>159</sup>

It is widely understood that the Supreme Court engaged in “the procedural contortions” Professor Bell refers to in a case called *Naim v. Naim*, 87 S.E.2d 749, *remanded*, 350 U.S. 891 (Va. 1955), *aff’d* 90 S.E.2d 849 (Va. 1956), *appeal dismissed*, 350 U.S. 985 (1956), and that it did so as a result of the Court’s conviction that declaring interracial marriage bans unconstitutional so soon on the heels of its landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), would imperil the effectuation of the Court’s equality mandate in that case outlawing racially segregated public schooling. *See* Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 446–51 (2001) (discussing *Naim* and tracking additional resources about the decision). Why might regional and white supremacist views about interracial *marriage* have served as an obstacle to the implementation of the Court’s ruling in *Brown* on *public education*? What might this suggest about the primacy of marriage as a racial privilege project within the historical American scheme of values?

3. What, exactly, does *Loving v. Virginia* protect as a matter of constitutional right? Is it only “the freedom to marry”? Is it freedom from marriage understood as a device of and for racial domination? If so, what might that ruling entail? What do you make of the Court’s observation that “[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State?” Does *Loving* thus guarantee a private right to discriminate in the choice of one’s intimate partners? For relevant discussion, see Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009).

4. Formally, *Loving* eliminated legal barriers to interracial marriage—barriers that, it should be noted, historically impacted different sorts of

<sup>158</sup> *See* Jackson v. [Alabama], 72 So. 2d 114 (Ala.Ct.App.) *cert. denied*, 348 U.S. 888 (1954).

<sup>159</sup> In *Naim v. Naim*, 87 S.E.2d 749, *remanded*, 350 U.S. 891 (Va. 1955), *aff’d* 90 S.E.2d 849 (Va. 1956), *appeal dismissed*, 350 U.S. 985 (1956), the Supreme Court remanded the case after oral argument for development of the record regarding the parties’ domicile. After the state court refused to comply with the mandate, claiming that no state procedure existed for reopening the case, the Supreme Court dismissed the appeal, finding that the state court ruling left the case devoid of a substantial federal question. Professor Wechsler remarked that this dismissal was “wholly without basis in law.” [Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).]

interracial and interethnic relationships differently. *See, e.g.*, *Perez v. Sharp*, 198 P.2d 17 (1948); R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 840–41 (2008) (noting that the racialized make-up of the couple in *Perez* under California law, which long treated “Mexican Americans . . . as white for purposes of marriage.”). This important legal achievement has not, however, meant the end of social barriers to interracial intimacies. *See, e.g.*, GRETCHEN LIVINGSTON, ANNA BROWN, PEW RES. CTR., INTERMARRIAGE IN THE U.S. 50 YEARS AFTER *LOVING V. VIRGINIA* 24, 26–27 (May 18, 2017), <http://www.pewsocialtrends.org/2017/05/18/intermarriage-in-the-u-s-50-years-after-loving-v-virginia/> (“[R]oughly four-in-ten adults (39%) now say that more people of different races marrying each other is good for society, up from 24% in 2010. . . . U.S. adults saying they would be opposed to a close relative marrying someone of a different race or ethnicity has fallen since 2000 . . . . In 2000, 31% of Americans said they would oppose an intermarriage in their family . . . and now one-in-ten say they would oppose a close relative marrying someone of a different race or ethnicity.”).

How might you begin to come to terms with—and to explain—some of the existing data on interracial and interethnic relationships? As one recent trend report indicated: “In 2015, 17% of all U.S. newlyweds had a spouse of a different race or ethnicity, marking more than a fivefold increase since 1967, when 3% of newlyweds were intermarried . . .” *Id.* at 5. These rates may seem low if viewed in light of one study that suggested that “under random matching[,] 44% of all marriages would be interracial[.]” Raymond Fisman, et al., *Racial Preferences in Dating*, 75 REV. OF ECON. STUDIES 117, 117 (2008). What aside from racial and ethnic preferences in choices of intimate partners and spouses might explain these trends? *See, e.g., id.* (“Prior evidence across a range of disciplines reveals extensive racial segregation in the U.S., both geographic and social[.] Interracial matches may be rare simply because members of different races interact relatively infrequently. Rates of interracial marriage thus capture both preferences and socio-geographic segregation.” (citations omitted)). There are also higher rates of interracial and interethnic intimacy for cross-sex couples outside of marriage. The same has held true for rates of interracial and interethnic relational intimacies among same-sex couples. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 18 tbl. 7 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> (containing comprehensive national, regional, and state breakdowns). *See also* GARY J. GATES, WILLIAMS INST., SAME-SEX COUPLES IN CENSUS 2010: RACE AND ETHNICITY (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-CouplesRaceEthnicity-April-2012.pdf> (“More than one in five same-sex couples (20.6%) are interracial or interethnic compared to 18.3% of different-sex unmarried couples and just 9.5% of different-sex [ ]married couples.”). What might explain these differences? For some ideas that move in these directions in relation to the racial preferences of gay men in particular, and “how gay and bisexual men of color contest and navigate sexual racism with their sexual partners or potential partners,” see Russell K. Robinson & David M. Frost, *LGBT Equality and Sexual Racism*, 86 FORDHAM L. REV. 2739, 2742–53 (2018).

5. Mildred Loving was interviewed in 1992. A widow, with three grown children, her church had presented her with a plaque and compared her to Rosa Parks. “I don’t feel like that. Not at all. What happened, we really didn’t intend for it to happen. What we wanted, we wanted to come home.” She was 17 when she married Richard, who was 24. She did not know the marriage was illegal. Their ordeal began at 2 a.m. one day in July, 1958, when a Caroline County, Va., sheriff roused the Lovings from sleep and took them to the Bowling Green jail. After they moved to the District, Mildred wrote for help to then-U.S. Attorney General Robert F. Kennedy. Bernard Cohen, an ACLU lawyer, took on their case.

Reflecting on the case, Cohen observed that it was full of ironies: ironic in the also tragic sense “that her husband was killed in an auto accident . . . a few years after they finally got peace,” and also in that the justice of the Virginia Supreme Court “who wrote the decision upholding the constitutionality of the law [became the chief justice of the court.]” Lynne Duke, *Intermarriage Broken Up By Death*, WASH. POST, June 12, 1992, at A3.

6. Challenging the “conventional wisdom” that “*Loving* was hugely transformative,” Professor Melissa Murray points to other developments in law indicating that “[i]n the years preceding and following *Loving*, white women routinely lost custody of their white children when they remarried or began dating black men.” Melissa Murray, *Loving’s Legacy, Decriminalization and the Regulation of Sex and Sexuality*, 86 FORDHAM L. REV. 2671, 2671 (2018). As Murray explains: “Courts worried that, by virtue of their intimate connection with a person of color, white children would lose the privileges of whiteness—that they would become irredeemably imbued with the other race.” *Id.* at 2693. At the same time, “[i]n jurisdictions where interracial unions had been lawful, even before *Loving*, post-*Loving* courts continued to divest white mothers of custody by relying on a range of considerations, . . . root[ing] their decisions in race-neutral rationales—the mother’s promiscuity, her willingness to prioritize her relationship above her children, [and] her general unfitness for custody. . . . Likewise, in those jurisdictions where criminal barriers had only recently been removed by virtue of *Loving*, the effort to regulate and censure interracial relationships did not end with *Loving*.” *Id.* at 2694. The lesson as Murray describes it is that, “[d]espite the turn toward decriminalization and subsequent legalization” evident in *Loving*, “the impulse to punish and stigmatize certain conduct [did] not dissipate entirely[.]” but was, rather, “rerouted into other legal avenues where disapprobation of the challenged conduct may continue to be expressed and felt.” *Id.* at 2673–74. After *Loving*, the “law continued to play a direct role in expressing antipathy for interracial unions.” *Id.* at 2695. Can you think of other examples of this “regulatory displacement” phenomenon? *Id.* at 2674.

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Focusing on marriage and its regulation by law, *Loving v. Virginia* was the first case in which the U.S. Supreme Court struck down as unconstitutional a state restriction on marrying. In its wake, courts have overturned numerous other restrictions on marriage. The remaining cases in this section trace high points in the development of the Supreme Court’s constitutional “right to marry” doctrine.

### Zablocki v. Redhail

Supreme Court of the United States, 1978.

434 U.S. 374, 98 S. Ct. 673, 54 L.Ed.2d 618.

■ JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of a Wisconsin statute, Wis. Stat. §§ 245.10(1), (4), (5) (1973), which provides that members of a certain class of Wisconsin residents may not marry, within the State or elsewhere, without first obtaining a court order granting permission to marry. The class is defined by the statute to include any “Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment.” The statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children



covered by the support order “are not then and are not likely thereafter to become public charges.” No marriage license may lawfully be issued in Wisconsin to a person covered by the statute, except upon court order; any marriage entered into without compliance with § 245.10 is declared void, and persons acquiring marriage licenses in violation of the section are subject to criminal penalties.

After being denied a marriage license because of his failure to comply with § 245.10, appellee brought this class action . . . challenging the statute as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and seeking declaratory and injunctive relief. The United States District Court for the Eastern District of Wisconsin held the statute unconstitutional under the Equal Protection Clause and enjoined its enforcement. 418 F.Supp. 1061 (1976). We . . . now affirm.

## I

Appellee Redhail is a Wisconsin resident who, under the terms of § 245.10, is unable to enter into a lawful marriage in Wisconsin or elsewhere so long as he maintains his Wisconsin residency. . . . In January 1972, when appellee was a minor and a high school student, a paternity action was instituted against him in Milwaukee County Court, alleging that he was the father of a baby girl born out of wedlock on July 5, 1971. After he appeared and admitted that he was the child’s father, the court entered an order on May 12, 1972, adjudging appellee the father and ordering him to pay \$109 per month as support for the child until she reached 18 years of age. From May 1972 until August 1974, appellee was unemployed and indigent, and consequently was unable to make any support payments.

On September 27, 1974, appellee filed an application for a marriage license with appellant Zablocki, the County Clerk of Milwaukee County, and a few days later the application was denied on the sole ground that appellee had not obtained a court order granting him permission to marry, as required by § 245.10. Although appellee did not petition a state court thereafter, it is stipulated that he would not have been able to satisfy either of the statutory prerequisites for an order granting permission to marry. First, he had not satisfied his support obligations to his illegitimate child, and as of December 1974 there was an arrearage in excess of \$3,700. Second, the child had been a public charge since her birth, receiving benefits under the Aid to Families with Dependent Children program. It is stipulated that the child’s benefit payments were such that she would have been a public charge even if appellee had been current in his support payments.

On December 24, 1974, appellee filed his complaint in the District Court, on behalf of himself and the class of all Wisconsin residents who had been refused a marriage license pursuant to § 245.10(1) by one of the county clerks in Wisconsin. . . . The complaint alleged, among other things, that appellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time. . . .

. . .

. . . We agree with the District Court that the statute violates the Equal Protection Clause.

## II

...

The leading decision of this Court on the right to marry is *Loving v. Virginia*, 388 U.S. 1 (1967). . . .

Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as “the most important relation in life,” and as “the foundation of the family and of society, without which there would be neither civilization nor progress,” *id.* at 211. . . .

More recent decisions have established that the right to marry is part of the fundamental “right of privacy” implicit in the Fourteenth Amendment’s Due Process Clause. *Griswold v. Connecticut*, 381 U.S. 479 (1965). . . .

...

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see *Roe v. Wade*, [410 U.S. 113 (1973),] or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings, see *Trimble v. Gordon*, 430 U.S. 762, 768–770, and n. 13 (1977), *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175–176 (1972). Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee’s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. See *Califano v. Jobst*, [434 U.S. 47, 48 (1977)]. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.

Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are both void and punishable as criminal offenses. Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute’s requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute’s requirements suffer a

serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.<sup>12</sup>

### III

When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. . . . Appellant asserts that two interests are served by the challenged statute: the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected. We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.

There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby persons with support obligations to children from prior marriages could be counseled before they entered into new marital relationships and incurred further support obligations. Court permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed. The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court, and thus it can hardly be justified as a means for ensuring counseling of the persons within its coverage. Even assuming that counseling does take place—a fact as to which there is no evidence in the record—this interest obviously cannot support the withholding of court permission to marry once counseling is completed.

With regard to safeguarding the welfare of the out-of-custody children, appellant's brief does not make clear the connection between the State's interest and the statute's requirements. At argument, appellant's counsel suggested that, since permission to marry cannot be granted unless the applicant shows that he has satisfied his court-determined support obligations to the prior children and that those children will not become public charges, the statute provides incentive for the applicant to make support payments to his children. This "collection device" rationale cannot justify the statute's broad infringement on the right to marry.

First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the

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<sup>12</sup> The directness and substantiality of the interference with the freedom to marry distinguish the instant case from *Califano v. Jobst*, [434 U.S. 47 (1977)]. In *Jobst*, we upheld sections of the Social Security Act providing, *inter alia*, for termination of a dependent child's benefits upon marriage to an individual not entitled to benefits under the Act. As the opinion for the Court expressly noted, the rule terminating benefits upon marriage was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage." [*Id.* at 54]. The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made "practically impossible," any marriages. Indeed, the provisions had not deterred the individual who challenged the statute from getting married, even though he and his wife were both disabled. See [*id.* at 48]. See also [*id.* at 57 n. 17] (because of availability of other federal benefits, total payments to the Jobsts after marriage were only \$20 per month less than they would have been had Mr. Jobst's child benefits not been terminated).

applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry. Under Wisconsin law, whether the children are from a prior marriage or were born out of wedlock, court-determined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties. And, if the State believes that parents of children out of their custody should be responsible for ensuring that those children do not become public charges, this interest can be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders.

There is also some suggestion that § 245.10 protects the ability of marriage applicants to meet support obligations to prior children by preventing the applicants from incurring new support obligations. But the challenged provisions of § 245.10 are grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations. And, although it is true that the applicant will incur support obligations to any children born during the contemplated marriage, preventing the marriage may only result in the children being born out of wedlock, as in fact occurred in appellee's case. Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is simply more illegitimate children.

The statutory classification created by §§ 245.10(1), (4), (5) thus cannot be justified by the interests advanced in support of it. The judgment of the District Court is, accordingly,

*Affirmed.*

■ JUSTICE STEWART, concurring in the judgment.

I cannot join the opinion of the Court. . . .

. . . I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.

I

I do not agree with the Court that there is a "right to marry" in the constitutional sense. That right, or more accurately that privilege, is under our federal system peculiarly one to be defined and limited by state law. *Sosna v. Iowa*, 419 U.S. 393 [(1975)]. A State may not only "significantly interfere with decisions to enter into marital relationship," but may in many circumstances absolutely prohibit it. Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife. But, just as surely, in regulating the intimate

human relationship of marriage, there is a limit beyond which a State may not constitutionally go.

The Constitution does not specifically mention freedom to marry, but it is settled that the “liberty” protected by the Due Process Clause of the Fourteenth Amendment embraces more than those freedoms expressly enumerated in the Bill of Rights. And the decisions of this Court have made clear that freedom of personal choice in matters of marriage and family life is one of the liberties so protected.

It is evident that the Wisconsin law now before us directly abridges that freedom. . . .

The Wisconsin law makes permission to marry turn on the payment of money in support of one’s children by a previous marriage or liaison. Those who cannot show both that they have kept up with their support obligations and that their children are not and will not become wards of the State are altogether prohibited from marrying.

. . .

Looked at in one way, the law may be seen as simply a collection device additional to those used by Wisconsin and other States for enforcing parental support obligations. But since it operates by denying permission to marry, it also clearly reflects a legislative judgment that a person should not be permitted to incur new family financial obligations until he has fulfilled those he already has. Insofar as this judgment is paternalistic rather than punitive, it manifests a concern for the economic well-being of a prospective marital household. These interests are legitimate concerns of the State. But it does not follow that they justify the absolute deprivation of the benefits of a legal marriage.

On several occasions this Court has held that a person’s inability to pay money demanded by the State does not justify the total deprivation of a constitutionally protected liberty. . . .

The principle of those cases applies here as well. The Wisconsin law makes no allowance for the truly indigent. The State flatly denies a marriage license to anyone who cannot afford to fulfill his support obligations and keep his children from becoming wards of the State. We may assume that the State has legitimate interests in collecting delinquent support payments and in reducing its welfare load. We may also assume that, as applied to those who can afford to meet the statute’s financial requirements but choose not to do so, the law advances the State’s objectives in ways superior to other means available to the State. The fact remains that some people simply cannot afford to meet the statute’s financial requirements. To deny these people permission to marry penalizes them for failing to do that which they cannot do. Insofar as it applies to indigents, the state law is an irrational means of achieving these objectives of the State.

As directed against either the indigent or the delinquent parent, the law is substantially more rational if viewed as a means of assuring the financial viability of future marriages. In this context, it reflects a plausible judgment that those who have not fulfilled their financial obligations and have not kept their children off the welfare rolls in the past are likely to encounter similar difficulties in the future. But the State’s legitimate concern with the financial soundness of prospective marriages must stop short of telling people they may not marry because they are too poor or because they might persist in their financial irresponsibility. The invasion of constitutionally protected

liberty and the chance of erroneous prediction are simply too great. A legislative judgment so alien to our traditions and so offensive to our shared notions of fairness offends the Due Process Clause of the Fourteenth Amendment.

. . .

■ JUSTICE POWELL, concurring in the judgment.

I concur in the judgment of the Court that Wisconsin's restrictions on the exclusive means of creating the marital bond, erected by Wis. Stat. §§ 245.10(1), (4), and (5) (1973), cannot meet applicable constitutional standards. I write separately because the majority's rationale sweeps too broadly in an area which traditionally has been subject to pervasive state regulation. The Court apparently would subject all state regulation which "directly and substantially" interferes with the decision to marry in a traditional family setting to "critical examination" or "compelling state interest" analysis. Presumably, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." The Court does not present, however, any principled means for distinguishing between the two types of regulations. Since state regulation in this area typically takes the form of a prerequisite or barrier to marriage or divorce, the degree of "direct" interference with the decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.

I

On several occasions, the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society. . . .

Thus, it is fair to say that there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government. But the Court has yet to hold that all regulation touching upon marriage implicates a "fundamental right" triggering the most exacting judicial scrutiny.<sup>1</sup>

The principal authority cited by the majority is *Loving v. Virginia*, 388 U.S. 1 (1967). . . . [But] *Loving* involved a denial of a "fundamental freedom" on a wholly unsupportable basis—the use of classifications "directly subversive of the principle of equality at the heart of the Fourteenth Amendment. . . ." It does not speak to the level of judicial scrutiny of, or governmental justification for, "supportable" restrictions on the "fundamental freedom" of individuals to marry or divorce.

In my view, analysis must start from the recognition of domestic relations as "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The marriage relation traditionally has been subject to regulation, initially by the ecclesiastical authorities, and later by the secular state. As early as *Pennoyer v. Neff*, 95 U.S. 714, 734–735 (1878), this Court noted that a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which

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<sup>1</sup> Although the cases cited in the text indicate that there is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude, they do not necessarily suggest that the same barrier of justification blocks regulation of the conditions of entry into or the dissolution of the marital bond. See generally Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1429–1432 (1974).

it may be dissolved.” The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people. . . . State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. Likewise, a showing of fault on the part of one of the partners traditionally has been a prerequisite to the dissolution of an unsuccessful union. A “compelling state purpose” inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.

## II

State power over domestic relations is not without constitutional limits. The Due Process Clause requires a showing of justification “when the government intrudes on choices concerning family living arrangements” in a manner which is contrary to deeply rooted traditions. *Moore v. East Cleveland*, 431 U.S. 494, 499, 503–504 (1977) (plurality opinion). Due process constraints also limit the extent to which the State may monopolize the process of ordering certain human relationships while excluding the truly indigent from that process. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Furthermore, under the Equal Protection Clause the means chosen by the State in this case must bear “‘a fair and substantial relation’” to the object of the legislation. *Reed v. Reed*, 404 U.S. 71, 76 (1971), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The Wisconsin measure in this case does not pass muster under either due process or equal protection standards. Appellant identifies three objectives which are supposedly furthered by the statute in question: (i) a counseling function; (ii) an incentive to satisfy outstanding support obligations; and (iii) a deterrent against incurring further obligations. The opinion of the Court amply demonstrates that the asserted counseling objective bears no relation to this statute. . . .

The so-called “collection device” rationale presents a somewhat more difficult question. I do not agree with the suggestion in the Court’s opinion that a State may never condition the right to marry on satisfaction of existing support obligations simply because the State has alternative methods of compelling such payments. To the extent this restriction applies to persons who are able to make the required support payments but simply wish to shirk their moral and legal obligation, the Constitution interposes no bar to this additional collection mechanism. The vice inheres, not in the collection concept, but in the failure to make provision for those without the means to comply with child-support obligations. I draw support from Mr. Justice Harlan’s opinion in *Boddie v. Connecticut*[, 401 U.S. 371 (1971)]. In that case, the Court struck down filing fees for divorce actions as applied to those wholly unable to pay, holding “that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.” 401 U.S., at 383. The monopolization present in this case is total, for Wisconsin will not recognize foreign marriages that fail to conform to the requirements of § 245.10.

The third justification, only obliquely advanced by appellant, is that the statute preserves the ability of marriage applicants to support their prior issue by preventing them from incurring new obligations. The challenged provisions of § 245.10 are so grossly underinclusive with respect to this

objective, given the many ways that additional financial obligations may be incurred by the applicant quite apart from a contemplated marriage, that the classification “does not bear a fair and substantial relation to the object of the legislation.” *Craig v. Boren*, [429 U.S. 190, 211 (1976)] (Powell, J., concurring).

The marriage applicant is required by the Wisconsin statute not only to submit proof of compliance with his support obligation, but also to demonstrate—in some unspecified way—that his children “are not then and are not likely thereafter to become public charges.” This statute does more than simply “fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.” *Griffin v. Illinois*, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting). It tells the truly indigent, whether they have met their support obligations or not, that they may not marry so long as their children are public charges or there is a danger that their children might go on public assistance in the future. Apparently, no other jurisdiction has embraced this approach as a method of reducing the number of children on public assistance. Because the State has not established a justification for this unprecedented foreclosure of marriage to many of its citizens solely because of their indigency, I concur in the judgment of the Court.

■ JUSTICE STEVENS, concurring in the judgment.

...

When a State allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently. Classification based on marital status has been an accepted characteristic of tax legislation, Selective Service rules, and Social Security regulations. As cases like *Jobst* demonstrate, such laws may “significantly interfere with decisions to enter into the marital relationship.” That kind of interference, however, is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences between married persons as a class and unmarried persons as a class.<sup>1</sup>

A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship.<sup>2</sup> The individual’s interest in making the marriage decision independently is sufficiently important to merit special constitutional protection. It is not, however, an interest which is constitutionally immune from evenhanded regulation. Thus, laws prohibiting marriage to a child, a close relative, or a person afflicted with venereal disease, are unchallenged even though they “interfere directly and substantially with the right to marry.” This Wisconsin statute has a different character.

Under this statute, a person’s economic status may determine his eligibility to enter into a lawful marriage. A noncustodial parent whose

<sup>1</sup> In *Jobst*, we pointed out that “it was rational for Congress to assume that marital status is a relevant test of probable dependency. . . .” We had explained:

“Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.” [434 U.S. at 53.]

<sup>2</sup> *Jobst* is in the former category; *Loving v. Virginia*, 388 U.S. 1, is in the latter.



children are “public charges” may not marry even if he has met his court-ordered obligations. Thus, within the class of parents who have fulfilled their court-ordered obligations, the rich may marry and the poor may not. This type of statutory discrimination is, I believe, totally unprecedented,<sup>4</sup> as well as inconsistent with our tradition of administering justice equally to the rich and to the poor.

The statute appears to reflect a legislative judgment that persons who have demonstrated an inability to support their offspring should not be permitted to marry and thereafter to bring additional children into the world.<sup>6</sup> Even putting to one side the growing number of childless marriages and the burgeoning number of children born out of wedlock, that sort of reasoning cannot justify this deliberate discrimination against the poor.

The statute prevents impoverished parents from marrying even though their intended spouses are economically independent. Presumably, the Wisconsin Legislature assumed (a) that only fathers would be affected by the legislation, and (b) that they would never marry employed women. The first assumption ignores the fact that fathers are sometimes awarded custody,<sup>7</sup> and the second ignores the composition of today’s work force. To the extent that the statute denies a hard-pressed parent any opportunity to prove that an intended marriage will ease rather than aggravate his financial straits, it not only rests on unreliable premises, but also defeats its own objectives.

These questionable assumptions also explain why this statutory blunderbuss is wide of the target in another respect. The prohibition on marriage applies to the noncustodial parent but allows the parent who has custody to marry without the State’s leave. Yet the danger that new children will further strain an inadequate budget is equally great for custodial and noncustodial parents, unless one assumes (a) that only mothers will ever have custody and (b) that they will never marry unemployed men.

Characteristically, this law fails to regulate the marriages of those parents who are least likely to be able to afford another family, for it applies only to parents under a court order to support their children. § 245.10(1) (1973). The very poorest parents are unlikely to be the objects of support orders. If the State meant to prevent the marriage of those who have demonstrated their inability to provide for children, it overlooked the most obvious targets of legislative concern.

In sum, the public-charge provision is either futile or perverse insofar as it applies to childless couples, couples who will have illegitimate children if they are forbidden to marry, couples whose economic status will be improved by marriage, and couples who are so poor that the marriage will

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<sup>4</sup> The economic aspects of a prospective marriage are unquestionably relevant to almost every individual’s marriage decision. But I know of no other state statute that denies the individual marriage partners the right to assess the financial consequences of their decision independently. I seriously question whether any limitation on the right to marry may be predicated on economic status, but that question need not be answered in this case.

<sup>6</sup> The “public charge” provision, which falls on parents who have faithfully met their obligations, but who are unable to pay enough to remove their children from the welfare rolls, obviously cannot be justified by a state interest in assuring the payment of child support. And, of course, it would be absurd for the State to contend that an interest in providing paternalistic counseling supports a total ban on marriage.

<sup>7</sup> The Wisconsin Legislature has itself provided:

“In determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent.” Wis.Stat. § 247.24(3) (1977).

have no impact on the welfare status of their children in any event. Even assuming that the right to marry may sometimes be denied on economic grounds, this clumsy and deliberate legislative discrimination between the rich and the poor is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment.<sup>10</sup>

■ JUSTICE REHNQUIST, dissenting.

I substantially agree with my Brother Powell's reasons for rejecting the Court's conclusion that marriage is the sort of "fundamental right" which must invariably trigger the strictest judicial scrutiny. I disagree with his imposition of an "intermediate" standard of review, which leads him to conclude that the statute, though generally valid as an "additional collection mechanism" offends the Constitution by its "failure to make provision for those without the means to comply with child-support obligations." For similar reasons, I disagree with my Brother Stewart's conclusion that the statute is invalid for its failure to exempt those persons who "simply cannot afford to meet the statute's financial requirements." I would view this legislative judgment in the light of the traditional presumption of validity. I think that under the Equal Protection Clause the statute need pass only the "rational basis test," and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective. The statute so viewed is a permissible exercise of the State's power to regulate family life and to assure the support of minor children, despite its possible imprecision in the extreme cases envisioned in the concurring opinions.

...

... Because of the limited amount of funds available for the support of needy children, the State has an exceptionally strong interest in securing as much support as their parents are able to pay. Nor does the extent of the burden imposed by this statute so differentiate it from that considered in *Jobst* as to warrant a different result. In the case of some applicants, this statute makes the proposed marriage legally impossible for financial reasons; in a similar number of extreme cases, the Social Security Act makes the proposed marriage practically impossible for the same reasons. I cannot conclude that such a difference justifies the application of a heightened standard of review to the statute in question here. In short, I conclude that the statute, despite its imperfections, is sufficiently rational to satisfy the demands of the Fourteenth Amendment.

## NOTES

1. What is the constitutional status of marriage regulations after *Zablocki v. Redhail*? Justice Marshall's opinion holds that laws which "directly and substantially [interfere] with the right to marry" are unconstitutional. Should this holding be taken literally? Without implying that there is any relationship between the different types of marriages, as discussed in the next section below, states have traditionally restricted access to marry based on pre-existing family relationships, on age, and on numerosity. Don't all those restrictions on marriage

<sup>10</sup> Neither the fact that the appellee's interest is constitutionally protected, nor the fact that the classification is based on economic status is sufficient to justify a "level of scrutiny" so strict that a holding of unconstitutionality is virtually foreordained. On the other hand, the presence of these factors precludes a holding that a rational expectation of occasional and random benefit is sufficient to demonstrate compliance with the constitutional command to govern impartially. See *Craig v. Boren*, 429 U.S. 190, 211 (STEVENS, J., concurring).

“directly and substantially” interfere with the marriage decisions of couples subject to these rules? Does *Zablocki* thus indicate that such laws are unconstitutional? Or should that conclusion be avoided even after *Zablocki*? If so, what textual support in the opinion is there for such a possibility?

Justice Stevens’s concurring opinion in *Zablocki* maintains that there is a difference between classifications based on marital status and classifications that determine who may lawfully marry. Is this difference simply a reflection of the fact that restrictions on married couples are by definition “indirect” restrictions, and thus constitutional? See *Mapes v. United States*, 217 Ct.Cl. 115, 576 F.2d 896 (1978), *cert. denied*, 439 U.S. 1046 (1978) (upholding different income tax rates for married and single taxpayers resulting in a “marriage penalty”); *Druker v. Commissioner*, 697 F.2d 46 (2d Cir. 1982) (accord). The same constitutional rationale has been used to support marriage subsidies. See also *Peden v. State Dep’t of Revenue*, 930 P.2d 1 (Kan. 1996) (upholding a tax schedule with individual rates higher than the highest possible rate for a married couple filing jointly). Do you think the *Zablocki* Court meant to cast marriage subsidies into doubt? Does the text of Justice Marshall’s opinion do so anyway?

2. *Zablocki* is an important building-block in the Supreme Court’s substantive due process, “right to marry” canon, though, technically the Court’s opinion announced Wisconsin’s law was unconstitutional on equal protection grounds. *Zablocki v. Redhail*, 434 U.S. 374, 382 (1977) (“the statute violates the Equal Protection Clause.”). For related discussion, see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 703–04, 826–28 (5th ed., 2015); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1017–20 (8th ed., 2000). That doctrinal detail aside, the majority opinion in *Zablocki* and the various opinions siding with it make clear that *Zablocki* offers constitutional protections for the right to marry as it intersects with socio-economic status, and with indigency, in particular. In this sense, *Zablocki* may loosely be thought to track the two doctrinal elements of *Loving*: its due process, individual right-to-marry aspect, and its race-based, equal protection, right-to-marry analysis. Seen in this light, does *Zablocki* reflect a broad-based constitutional value that marriage should treat all individuals alike in the sense of being fully open to all regardless of their socio-economic status? If so, does marriage as it now exists adequately conform to that value? Is marriage, despite *Zablocki*, a class-defined institution? See, e.g., June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185 (2013) (discussing class-inflected aspects of marriage); see also, e.g., Kevin Carey, *The Ivy League Students Least Likely to Get Married*, N.Y. TIMES (Mar 29, 2018), <https://www.nytimes.com/interactive/2018/03/29/upshot/college-marriage-class-differences.html> (noting that, “[a]t Princeton, and in the American higher education system as a whole, there remains a strong correlation between marriage and economic class”). What might explain this feature of marriage? Is there anything the law can, or in your view, should, do about it?

3. Roger Red Hail—whose “last name is misspelled as Redhail in the *Zablocki v. Redhail* judicial opinion”—is Oneida, a fact about him that “[o]ne doesn’t learn . . . from reading any of the case briefs or opinions in *Zablocki v. Red Hail*.” Tonya L. Brito, R. Kirk Anderson, & Monica Wedgewood, *Chronicle of a Debt Foretold*, in THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES 232–33, 254 n.1 (Ezra Rosser & Marie Failing, eds., 2016). Although Red Hail “did not [at the time of his case] have a strong identity as Oneida or as Indian[,]” something that has since changed, it has been argued that his Native American ancestry and his dual citizenship “as both a citizen of Oneida and of the United States,” are, nevertheless, important for a fully contextualized understanding of the case that carries his misspelled name. See *id.* at 237, 253 (“The Red Hail family now has a strong sense of pride in being Indian.”), 233. According to Tonya Brito, R. Kirk

Anderson, and Monica Wedgewood, Red Hail’s case should not merely be understood as the constitutional family law milestone that it is, but also—significantly—as a decision that opens onto the history of Native Americans and their socioeconomic status both in the United States generally and in Wisconsin and in Milwaukee more particularly. Among the other points they make, Brito, Anderson, and Wedgewood note that the child support order in Red Hail’s case was high. His economic opportunities, by contrast, given his own background in circumstances of poverty where he grew up and given background disparities in economic opportunity defined by his first peoples’ ancestry, were low. *Id.* at 237–40. How do you understand these arguments to relate to the class-based concerns that repeatedly arise in the *Zablocki* opinions? Do they render recourse to his Native American ancestry doctrinally superfluous? How, if you were inclined to, would you explain its doctrinal relevance?

4. As a Post-Script to *Zablocki*, consider that, as of 2016, “Red Hail is still paying on the child support debt that brought about his 1978 Supreme Court decision. The exorbitant \$109 per month child support order that was entered in 1972 and prevented him from marrying in Wisconsin in 1974 is still pending *40 years later*.” Brito, Anderson, & Wedgewood, *supra*, note 3, at 252. Red Hail’s “total support debt now exceeds \$63,000[.]” *Id.* The state garnishes \$50 from his paycheck monthly. *Id.* At that clip, not forgetting the interest “that accumulates on the debt annually” (“currently at 6 percent but previously as high as 18 percent”), he “will never satisfy the staggering accumulated child support arrearages.” *Id.*

Red Hail’s child support arrearage and this debt have continued to influence his exercise of the constitutional right to marry secured in part in his name. “[T]he debt prevents Roger and his fianc[ée] Colleen from marrying.” *Id.* “[T]ogether for nearly twenty years and liv[ing] . . . in Colleen’s home, they have been putting off marriage out of fear that the state’s pursuit of Red Hail’s child support arrears will impair Colleen’s financial security.” *Id.* “[T]hey have heard stories that the state has put liens on the homes of women who marry men with child support debt, and they fear that if they marry, the same thing will happen to Colleen.” *Id.* Do legal rules that impact how spouses share one another’s financial obligations raise any constitutional, right-to-marry concerns? Should they?

## Turner v. Safley

Supreme Court of the United States, 1987.  
482 U.S. 78, 107 S. Ct. 2254, 96 L.Ed.2d 64.

■ JUSTICE O’CONNOR delivered the opinion of the Court.

This case requires us to determine the constitutionality of regulations promulgated by the Missouri Division of Corrections relating to inmate marriages. . . .

. . .

The challenged marriage regulation, which was promulgated while this litigation was pending, permits an inmate to marry only with the permission of the superintendent of the prison, and provides that such approval should be given only “when there are compelling reasons to do so.” The term “compelling” is not defined, but prison officials testified at trial that generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason. Prior to the promulgation of this rule, the applicable regulation did not obligate Missouri Division of Corrections officials to assist an inmate who wanted to get married, but it also did not

specifically authorize the superintendent of an institution to prohibit inmates from getting married.

...

In support of the marriage regulation, petitioners first suggest that the rule does not deprive prisoners of a constitutionally protected right. They concede that the decision to marry is a fundamental right under *Zablocki v. Redhail* and *Loving v. Virginia*, but they imply that a different rule should obtain “in . . . a prison forum.” Petitioners then argue that even if the regulation burdens inmates’ constitutional rights, the restriction should be tested under a reasonableness standard. They urge that the restriction is reasonably related to legitimate security and rehabilitation concerns.

We disagree with petitioners that *Zablocki* does not apply to prison inmates. It is settled that a prison inmate “retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.” The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context. Our decision in *Butler v. Wilson*, 415 U.S. 953 (1974), summarily affirming *Johnson v. Rockefeller*, 365 F.Supp. 377 (S.D.N.Y.1973), is not to the contrary. That case involved a prohibition on marriage only for inmates sentenced to life imprisonment; and, importantly, denial of the right was part of the punishment for crime.

...

Petitioners have identified both security and rehabilitation concerns in support of the marriage prohibition. The security concern emphasized by petitioners is that “love triangles” might lead to violent confrontations between inmates. With respect to rehabilitation, prison officials testified that female prisoners often were subject to abuse at home or were overly dependent on male figures, and that this dependence or abuse was connected to the crimes they had committed. The superintendent at Renz, petitioner William Turner, testified that in his view, these women prisoners needed to concentrate on developing skills of self-reliance, and that the prohibition on marriage furthered this rehabilitative goal. Petitioners emphasize that the

prohibition on marriage should be understood in light of Superintendent Turner's experience with several ill-advised marriage requests from female inmates.

We conclude that on this record, the Missouri prison regulation, as written, is not reasonably related to these penological interests. No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent. The Missouri regulation, however, represents an exaggerated response to such security objectives. There are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives. See, e.g., 28 CFR § 551.10 (1986) (marriage by inmates in federal prison generally permitted, but not if warden finds that it presents a threat to security or order of institution, or to public safety). We are aware of no place in the record where prison officials testified that such ready alternatives would not fully satisfy their security concerns. Moreover, with respect to the security concern emphasized in petitioners' brief—the creation of “love triangles”—petitioners have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements. Common sense likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles: surely in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as with one. Finally, this is not an instance where the “ripple effect” on the security of fellow inmates and prison staff justifies a broad restriction on inmates' rights—indeed, where the inmate wishes to marry a civilian, the decision to marry (apart from the logistics of the wedding ceremony) is a completely private one.

Nor, on this record, is the marriage restriction reasonably related to the articulated rehabilitation goal. First, in requiring refusal of permission absent a finding of a compelling reason to allow the marriage, the rule sweeps much more broadly than can be explained by petitioners' penological objectives. Missouri prison officials testified that generally they had experienced no problem with the marriage of male inmates, and the District Court found that such marriages had routinely been allowed as a matter of practice at Missouri correctional institutions prior to adoption of the rule. The proffered justification thus does not explain the adoption of a rule banning marriages by these inmates. Nor does it account for the prohibition on inmate marriages to civilians. Missouri prison officials testified that generally they had no objection to inmate-civilian marriages, and Superintendent Turner testified that he usually did not object to the marriage of either male or female prisoners to civilians. The rehabilitation concern appears from the record to have been centered almost exclusively on female inmates marrying other inmates or ex-felons; it does not account for the ban on inmate-civilian marriages.

Moreover, although not necessary to the disposition of this case, we note that on this record the rehabilitative objective asserted to support the regulation itself is suspect. Of the several female inmates whose marriage requests were discussed by prison officials at trial, only one was refused on the basis of fostering excessive dependency. The District Court found that the Missouri prison system operated on the basis of excessive paternalism in that the proposed marriages of *all* female inmates were scrutinized carefully even before adoption of the current regulation—only one was approved at

Renz in the period from 1979–1983—whereas the marriages of male inmates during the same period were routinely approved. That kind of lopsided rehabilitation concern cannot provide a justification for the broad Missouri marriage rule.

It is undisputed that Missouri prison officials may regulate the time and circumstances under which the marriage ceremony itself takes place. On this record, however, the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives. We conclude, therefore, that the Missouri marriage regulation is facially invalid.

## NOTES

1. Does *Turner* stand for the broad proposition that prisoners have a constitutionally protected right to marry? See, e.g., *Akers v. McGinnis*, 352 F.3d 1030 (6th Cir. 2003); *Ford v. Fischer*, 2012 WL 4754560 (N.D. N.Y. 2012), *report and recommendation adopted without opinion*, 2011 WL 846860 (N.D.N.Y. 2011); *Starr v. Cattell*, 2006 WL 2787278 (D.N.H. 2006) (unpublished); *Langone v. Coughlin*, 712 F.Supp. 1061 (N.D.N.Y. 1989). How far should this right go? Should it include the “concomitants to marriage” like physical intimacy and sexual intercourse? See, e.g., *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2001) (quoting *Goodwin v. Turner*, 702 F.Supp 1452, 1454 (W.D. Mo. 1988)) (“[M]any aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement.’ . . . Incarceration is simply inconsistent with the vast majority of concomitants to marriage, privacy, and personal intimacy.”).

2. How much is *Turner* a “right to marry” decision and how much is it animated by sex inequality concerns? Cf. *Keeney v. Heath*, 57 F.3d 579, 582 (7th Cir. 1995) (opinion by Posner, J.) (noting that “[s]ince the ratio of male prisoners to female guards is vastly higher than the ratio of female prisoners to male guards, there is no doubt that an anti-fraternization policy of the sort enforced [here] . . . will impair the marital prospects of women far more than those of men[.]” though, “by relieving pressures to which women guards would otherwise be subjected, [they may] make women guards as a whole better off.”). In this respect, does *Turner*—like *Loving* and *Zablocki* before it—reflect intersecting concerns with the individual right to marry and group-based, here, specifically, sex-based, equality concerns?

3. Formally, *Turner* itself does not turn on or mention racial considerations in the course of its right-to-marry ruling, unless one counts the way the opinion builds on *Loving v. Virginia*, which obviously does involve race. Does this mean that *Turner* has nothing to do with race? Do existing practices of mass incarceration—in particular, the way the criminal justice system disproportionately incarcerates racial and ethnic minorities at unusually high rates—suggest otherwise in ways that might be socially or even legally countenanced? See *Jones v. Perry*, *infra*, at p. 144. For a now-standard source on mass incarceration, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

One set of questions here might involve whether *Turner* is related to, and in any way contributes to, the racial composition of marriage and family life outside the prison setting. Does *Turner* function to legitimize how the criminal justice system, including what has been called the prison industrial complex, manages black and brown families and family life? See, e.g., John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RES. CTR. (Jan. 12, 2018), <http://www.pewresearch.org/fact-tank/2018/01/12/shrinking->

[gap-between-number-of-blacks-and-whites-in-prison/](#) (“In 2016, blacks represented 12% of the U.S. adult population but 33% of the sentenced prison population. Whites accounted for 64% of adults but 30% of prisoners. And while Hispanics represented 16% of the adult population, they accounted for 23% of inmates.”). Does *Turner* give these forms of institutional regulation a “kinder” or “gentler,” hence a respectable, face by making it clear that incarcerated persons retain some set of individual rights?

Another set of questions might involve how *Turner* concretely impacts the lives of incarcerated persons themselves. *Turner* is widely figured as an advance for incarcerated persons and their rights. But is it simply that? In answering, one perspective to consider ventures that, in general terms, *Turner* has “given legitimacy to a thin, underenforced federal Constitution for prisoners” and that the “Turnerization” of the rights of incarcerated persons “represents a normative strain in the bureaucratic state, with the *Turner* test advancing the management of prisoners as a permanent underclass and thereby inflicting great damage to the grundnorm—or basic norm—of prisoners’ rights.” James E. Robertson, *The Rehnquist Court and the “Turnerization” of Prisoners’ Rights*, 10 N.Y. CITY L. REV. 97, 98 (2006). Ask yourself how much your own assessment of *Turner* turns on your understanding of it as a right-to-marry decision and nothing more. Even if you believe *Turner* reaches the right constitutional result for the right sorts of reasons, might the ruling, in setting what you consider a sound family law policy rule, nevertheless be capable of making social and legal conditions and life inside and outside of prison worse? If *Turner* has, indeed, entrenched “the management of prisoners as a permanent underclass[,]” thereby “inflicting great damage to the grundnorm . . . of prisoners’ rights,” how might this complicate or alter your assessment of the decision? If the claim is true, should the case have been decided any differently? Should the Court have ruled in favor of the anti-marriage regulations *Turner* involved? Or, if the claim is true, does it instead suggest the need for deeper and broader prison reform in order to ensure that incarcerated persons have a robust set of legally protected rights in relation to marriage and family life and also more generally? Something else? For some sources that may sharpen and deepen your answers to these questions, while paving the way to others, see Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS OF THE AM. ACADEMY 221 (2009), as well as Sara Wakefield, Hedwig Lee, & Christopher Wildeman, *Tough on Crime, Tough on Families? Criminal Justice and Family Life in America*, 665 ANNALS OF THE AM. ACADEMY 8 (2016), and Robert Apel, *The Effects of Jail and Prison Confinement on Cohabitation and Marriage*; 665 ANNALS OF THE AM. ACADEMY 103 (2016). Cf. *Prison Marriage and Divorce*, in 6 JAILHOUSE LAWYER’S MANUAL 583 (2005).

### Obergefell v. Hodges\*

Supreme Court of the United States, 2015.  
576 U.S. \_\_\_, 135 S. Ct. 2584, 192 L.Ed.2d 609.

■ JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages

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\* [Eds.: Together with No. 14–562, *Tanco et al. v. Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al. v. Snyder, Governor of Michigan, et al.*, and No. 14–574, also on *certiorari* to the same court. For a description of the plaintiffs involved in these cases, see Chapter 1, p. 13.]



deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

## I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

...

... This Court granted review, limited to two questions. The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

## II

...

### A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons[.] . . . Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution [defined as “a union between two persons of the opposite sex”] has existed for millennia and across civilizations. . . .

...

### B

The ancient origins of marriage confirm its centrality, but . . . [t]hat institution—even as confined to opposite-sex relations—has evolved over time.

For example, . . . [u]nder the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. . . .

. . .

In the late 20th century, . . . same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

. . .

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage.

### III

. . . 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. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486 (1965).

The identification and protection of fundamental rights . . . “has not been reduced to any formula.” *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence, supra*, at 572. . . .

. . .

. . . [T]he Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.

. . . [T]his Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810 [(1972)], a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right

based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, e.g., *Lawrence v. Texas*, 539 U.S. [558], 574 [(2003)]; *Turner, supra*, at 95; *Zablocki, supra*, at 384; *Loving, supra*, at 12; *Griswold, supra*, at 486. And 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. See, e.g., *Eisenstadt, supra*, at 453–454; *Poe, supra*, at 542–553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. . . . Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. . . .

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, . . . “. . . the decision whether and whom to marry is among life’s momentous acts of self-definition.” *Goodridge v. Department of Public Health*, 798 N.E.2d [941], 955 [(Mass. 2003)].

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.

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. . . . The right to marry thus dignifies couples who “wish to define themselves by their commitment to each other.” [*U.S. v.*] *Windsor*, [570 U.S. 744, 763 (2013)]. 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.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. . . . [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. . . .

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. [390], 399 [(1923)]. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” *Zablocki*, 434 U.S., at 384 (quoting *Meyer, supra*, at 399). Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and

legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, [570 U.S. at 772.] Marriage also affords the permanency and stability important to children's best interests.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. . . . In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. . . . In *Maynard v. Hill*, 125 U.S. 190, 211 (1888), the Court . . . explain[ed] that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "a great public institution, giving character to our whole civil polity." *Id.*, at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. . . .

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. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. . . . Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same-[sex] and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. 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.

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.

...

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. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. . . . 388 U.S., at 12. With this link to equal protection[,] the Court proceeded to hold the prohibition offended central precepts of liberty[.] . . . *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the

Court's holding that the law burdened a right "of fundamental importance." 434 U.S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

...

Other cases confirm this relation between liberty and equality. . . .

...

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, e.g., *Zablocki*, *supra*, at 383–388.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

#### IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. . . .

...

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. [*Schuetz v. BAMN*, 572 U.S. 291, 313 (2014)] (slip op., at 17). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

...

. . . Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

...

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This

may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view[.] . . . [I]t is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. . . . [T]hese cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, . . . religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

...

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

\* \* \*

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

*It is so ordered.*

■ CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

...

## I

...

## A

As the majority acknowledges, marriage “has existed for millennia and across civilizations.” For all those millennia, across all those civilizations, “marriage” referred to only one relationship: the union of a man and a woman. . . .

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage . . . arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. QUALE, *A HISTORY OF MARRIAGE SYSTEMS* 2 (1988).

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together[.] . . . Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. . . .

This singular understanding of marriage has prevailed in the United States throughout our history. . . .

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with “[t]he whole subject of the domestic relations of husband and wife.” [*United States v. Windsor*, 570 U.S., at 767 [(2013)] (quoting *In re Burrus*, 136 U.S. 586, 593–594 (1890))]. There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. . . .

...

This Court’s precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. . . .

...

[And even the changes to marriage over time noted by the majority] . . . did not . . . work any transformation in the core structure of marriage as the union between a man and a woman. . . .

...

## II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. . . .

The majority purports to identify four “principles and traditions” in this Court’s due process precedents that support a fundamental right for same-sex couples to marry. . . .

...



## B

...

## 1

...

When the majority turns to the law, it relies primarily on precedents discussing the fundamental “right to marry.” *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki [v. Redhail]*, 434 U.S. [374,] 383 [(1978)]; see *Loving [v. Virginia]*, 388 U.S. [1,] 12 [(1967)]. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. . . .

. . . [T]he “right to marry” cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

## 2

The majority suggests that “there are other, more instructive precedents” informing the right to marry. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental “right of privacy.” *Griswold [v. Connecticut]*, 381 U.S. [479,] 486 [(1965)]. . . .

The Court also invoked the right to privacy in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws . . . invaded privacy by inviting “unwarranted government intrusions” that “touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home.” *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. . . . [T]he marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is “condemned to live in loneliness” by the laws challenged in these cases—no one. At the same time, the laws in no way interfere with the “right to be let alone.”

...

. . . [T]he privacy cases provide no support for the majority’s position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35–37 (1973). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

## 3

...

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner v. New York*, 198 U.S. 45 [(1905)]. The majority opens its opinion by announcing petitioners' right to "define and express their identity." The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner*, 198 U.S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted [by the Court] in *Lochner*.

...

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. . . . [T]he majority . . . offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. . . .

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. . . .

## 4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." . . .

. . . [T]his assertion of the “harm principle” sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of “due process.” There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. . . . [T]he Fourteenth Amendment . . . certainly does not enact any one concept of marriage.

The majority’s understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country’s entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the “nature of injustice is that we may not always see it in our own times.” As petitioners put it, “times can blind.” But to blind yourself to history is both prideful and unwise. . . .

### III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. . . . The central point [of the majority’s discussion of this claim] seems to be that there is a “synergy between” the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. . . .

The majority . . . assert[s] . . . that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ “legitimate state interest” in “preserving the traditional institution of marriage.” *Lawrence*, 539 U.S., at 585 (O’Connor, J., concurring in judgment).

. . . The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits [associated with marriage]. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

### IV

The legitimacy of this Court ultimately rests “upon the respect accorded to its judgments.” *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). That respect flows from the perception—

and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. . . . In the majority’s telling, it is the courts, not the people, who are responsible for making “new dimensions of freedom . . . apparent to new generations,” for providing “formal discourse” on social issues, and for ensuring “neutral discussions, without scornful or disparaging commentary.”

...

. . . There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. . . . Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. . . .

...

Perhaps the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that “the necessary consequence” of laws codifying the traditional definition of marriage is to “demea[n] or stigmatiz[e]” same-sex couples. The majority reiterates such characterizations over and over. . . . These apparent assaults on the character of fairminded people will have an effect, in society and in court. . . . It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s “better informed understanding” as bigoted.

...

\* \* \*

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

■ JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

...

I

...

. . . These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. . . . When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. . . . We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

...

■ JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

...

#### IV

. . . [T]he majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. . . . Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

\* \* \*

. . . I respectfully dissent.

■ JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

...

#### III

...

[Today's decision] . . . will be used to vilify Americans who are unwilling to assent to the new orthodoxy [the majority announces]. In the course of its

opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

. . . [T]he majority attempts . . . to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

. . . By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

. . .

Most Americans—understandably—will cheer or lament today’s decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority’s claim of power portends.

## NOTES

1. The *Obergefell* majority opinion expressly underscores that its ruling rests on both Fourteenth Amendment Due Process and Equal Protection grounds. While it is clear enough that the Court’s Due Process “right to marry” ruling spells the end to traditional bans on same-sex marriage, what function, exactly, does the Court’s Equal Protection holding serve? Does it simply reinforce the strength of the Court’s substantive due process ruling? See *Obergefell v. Hodges*, 135 S. Ct. at 2631 n.1 (Thomas, J., dissenting) (“. . . the majority clearly uses equal protection to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.”). Or does it also operate to guarantee lesbians, gay men, and same-sex couples equal protection and treatment under law in the context of marriage, family law, and perhaps more generally? An important answer is suggested by the Supreme Court’s post-*Obergefell* decision in *Pavan v. Smith*, 582 U.S. \_\_\_, 137 S. Ct. 2075 (2017) (see *infra*, p. 709). See also, e.g., *Campaign for S. Equal. v. Miss. Dep’t Hum. Servs.*, 175 F.Supp.3d 691 (S.D. Miss. 2016) (see *infra*, p. 534).

2. Chief Justice Roberts ends his *Obergefell* dissent by recognizing that “many Americans”—not all—will welcome the majority opinion with a spirit of celebration. However, he then goes on to cap off that recognition with an important qualification:

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

*Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting). What does the dissent mean when it says “the Constitution . . . had nothing to do with it”? Do cases decided by the Supreme Court after *Obergefell* indicate that the Chief Justice has now come to accept it as settled law? See, e.g., *Masterpiece*

*Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.*, 584 U.S. \_\_\_, 138 S. Ct. 1719 (2018); *Pavan v. Smith*, 582 U.S. \_\_\_, 137 S. Ct. 2075 (2017); *Sessions v. Morales-Santana*, 582 U.S. \_\_\_, 137 S. Ct. 1678, 1690 (2017). *But see Pidgeon v. Turner*, 538 S.W.3d 73, 75, 89 (Tex. 2017) (“declin[ing] to instruct the trial court how to construe *Obergefell* on remand” in a case involving employee benefits of city employees “who were married in other jurisdictions to City employees of the same sex”), *cert. denied* 138 S. Ct. 505 (Dec. 4, 2017). Might other Justices who dissented in *Obergefell* now likewise view the case as settled law? See Marc Spindelman, *Masterpiece Cakeshop’s Homiletics*, unpublished manuscript (June 12, 2019) (on file with author) (noting the ways in which Justice Kennedy’s majority opinion in *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n.*, 584 U.S. \_\_\_, 138 S. Ct. 1719 (2018), reaffirms *Obergefell* and the lesbian and gay rights jurisprudence it builds on). Is there now any serious reason to doubt *Obergefell’s* authority as a binding rule of constitutional law?

3. In different ways, the *Obergefell* dissents indicate that they are unpersuaded that the majority opinion does not threaten the religious freedoms guaranteed by the First Amendment, except perhaps the freedom to enter into plural marriages, which, as Chief Justice Roberts’s opinion speculates, may have been given a boost by the principles of the Court’s ruling.

How, if at all, do these concerns persist in light of the Supreme Court’s decision in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n.*, 584 U.S. \_\_\_, 138 S. Ct. 1719 (2018)? In that case, the Court held, 7–2, per Justice Anthony M. Kennedy, that Mr. Jack Phillips was discriminated against in state civil rights proceedings brought against him for his refusal to sell a custom-made wedding celebration cake to a same-sex couple. According to the Court’s decision, Phillips was the victim of state-based anti-religious discrimination in violation of the First Amendment’s Free Exercise Clause. How reassuring to people of faith concerned about their rights to the free exercise of their religion after *Obergefell* is the following passage from Justice Kennedy’s *Masterpiece Cakeshop* opinion, offered along the way to its holding for Jack Phillips?

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S.Ct. 2584 (2015), “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” *Id.*, at \_\_\_, 135 S.Ct., at 2607. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 5 (1968) (*per curiam*); see also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995).

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an

exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, § 31 (2012). At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor*, 570 U.S. 744 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. See *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Mar. 24, 2015); *Jack v. Le Bakery Sensual, Inc.*, Charge No.



P20140070X (Mar. 24, 2015); *Jack v. Azucar Bakery*, Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

...

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. \_\_\_, 138 S. Ct. 1719, 1727–29 (2018).

4. Like the United States, a number of countries around the world also recognize same-sex marriage. They include: Argentina, Australia, Belgium, Brazil, Canada, Columbia, Denmark, England, Finland, France, Germany, Greenland, Iceland, Ireland, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Portugal, Scotland, South Africa, Spain, Sweden, Uruguay, and Wales. *Gay Marriage Around the World*, PEW RES. CTR (Aug. 8, 2017), <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/>. Same-sex marriage may also be solemnized in some states in Mexico, though a marriage that is legally performed in one state can be validated and so be recognized in others. See Aengus Carroll, Lucas Ramón Mendos, & The Int’l Lesbian, Gay, Bisexual, Trans and Intersex Ass’n, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* 68 (12th ed. 2017), <https://www.ilga.org/state-sponsored-homophobia-report>; see also Randal C. Archibold & Paulina Villegas, *With Little Fanfare, Mexican Supreme Court Legalizes Same-Sex Marriage*, N.Y. Times (June 14, 2015), <https://www.nytimes.com/2015/06/15/world/americas/with-little-fanfare-mexican-supreme-court-effectively-legalizes-same-sex-marriage.html>. Additionally, a number of countries that do not recognize same-sex marriage do recognize civil unions or registered domestic partnerships. A detailed analysis of “partnership laws” is in Carroll, Mendos, & The Int’l Lesbian, Gay, Bisexual, Trans and Intersex Ass’n, *supra*, at 70–72.

5. By its terms and implications, *Obergefell* formally opens marriage to any two persons otherwise entitled to marry regardless of standard sexual orientation identifications, including as lesbian, gay, and bisexual and/or pansexual. It also appears to open marriage, both cross-sexed and same-sexed, to all regardless of their sex, gender, gender identity, or mode of gender expression. As one commentator has succinctly summed it up, *Obergefell* “removed the question of whether someone is ‘biologically’ a man or a woman” from the constitutional analysis of the right to marry. Kylar W. Broadus, *The Legal Status of Transgender Relationships*, 34 GPSOLO 1, at 23, 24 (2017). This doesn’t mean, however, that all issues relating to trans marriage, much less trans equality, have been fully resolved. As this same commentator has gone on to observe:

Still unresolved is how . . . marriages of . . . genderqueer or gender nonconforming [persons] fit into the post-*Obergefell* framework. Many people . . . identify this way and don't necessarily identify as male or female.

Child custody issues are handled differently in transgender cases[.] . . . Most transgender people are still considered by courts not to be fit or stable parents[.] . . . This . . . needs to be addressed, and . . . was not resolved by *Obergefell*. . . .

Identity documents are still important for transgender people[.] . . . This issue wasn't resolved by *Obergefell*. . . .

...

*Obergefell* . . . resolv[ed] some major marriage issues for transgender people. . . . Nevertheless, the decision leaves child custody issues (tied to marriage) unresolved . . . , along with many other obstacles that transgender people must overcome to become fully engaged citizens in society.

*Id.* at 24–25. How surprising is all this in light of the history of interracial marriage in the aftermath of *Loving v. Virginia* discussed above? Is this another instance, see *supra* p. 76, of what Professor Melissa Murray calls “regulatory displacement”? Melissa Murray, *Loving’s Legacy, Decriminalization and the Regulation of Sex and Sexuality*, 86 *FORDHAM L. REV.* 2671, 2674 (2018). Can the decision by President Donald J. Trump to reinstall the ban on trans military service be understood that way? Memorandum on Military Service by Transgender Individuals, 83 *Fed. Reg.* 13,367 (Mar. 23, 2018). See also Helene Cooper & Thomas Gibbons-Neff, *Trump Approves New Limits on Transgender Troops in the Military*, *N.Y. TIMES* (Mar. 24, 2018), <https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html>. Can legislation and litigation surrounding bathroom access properly be described in those terms? See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F.Supp.3d 730, 750 (E.D. Va. 2018). Might that characterization be useful not simply for analytic purposes of understanding the relationships between and among these developments, but also for purposes of litigation and law reform? For additional discussion, see Mary Anne Case, “*Why Not Abolish the Laws of Urinary Segregation?*,” in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211–228 (Molotch & Norén, eds. 2010); Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 *OHIO ST. L.J.* 145 (2017); Jack B. Harrison, “*To Sit or Stand*: *Transgender Persons, Gendered Restrooms, and the Law*,” 40 *U. HAW. L. REV.* 49 (2017).

## 2. TRADITIONAL RESTRICTIONS

The U.S. Supreme Court’s right to marry doctrine has eliminated two of the traditional restrictions on the right to marry: bans on interracial marriage and bans on same-sex marriage. A number of other traditional restrictions on marriage remain. Whether for purposes of constitutional analysis or otherwise, what vision of marriage, if any, can account for the shape of the traditional restrictions on marriage that persist, either on their own terms or taken together? Do these restrictions, or some of them, bear any resemblance to those the Supreme Court has already struck down as unconstitutional? Is there anything problematic in your view about comparing bans on interracial or same-sex marriage to the sorts of limits on entry to marriage that are still on the law books?

## a. INCEST

**State v. Sharon H.**

Superior Court of Delaware, New Castle County, 1981.

429 A.2d 1321.

## ■ STIFTEL, PRESIDENT JUDGE.

. . . Defendants, half-brother and half-sister, were charged with (1) engaging in a prohibited marriage in violation of 13 Del.C. § 102, and (2) perjury in the third degree in violation of 11 Del.C. § 1221, in that they swore falsely and contrary to the requirements of 13 Del.C. § 127.

The parties agree to the following facts:

Sharon and Dennis H., appellees, are half-brother and half-sister by blood, born of the same mother, but of different fathers. Sharon, when approximately ten days old, was adopted by the W. family, by whom she was raised. Dennis became a ward of the State, and was raised in or by various State programs. After reaching maturity, Sharon discovered that she had a half-brother, Dennis. After locating him in the Smyrna Correctional institution, Sharon assisted Dennis in obtaining parole. They were married on July 11, 1979.

On October 31, 1979, appellees were arrested and jailed for violations of 13 Del.C. § 102 and 11 Del.C. § 1221.

In Municipal Court, appellees . . . argued that even if they were half-brother and half-sister by blood, the provision of 13 Del.C. § 102 prohibiting marriages between brothers and sisters was inapplicable to the appellees' situation because under 13 Del.C. § 919, Sharon's adoption eliminated any tie between Sharon and Dennis as a matter of law. Appellees had also argued that the provisions of Chapter 9 of Title 13 prohibiting examination of the adoption records prohibited any inquiry into the matter of Sharon's adoption, which would be necessary for the State to prove its allegations.

The Municipal Court dismissed the information charging Sharon and Dennis with a violation of 13 Del.C. § 102, stating:

[T]he Court concludes that the clear and unequivocal language used throughout Chapter 9 of Title 13 of the Code dictates that the State cannot examine into relationships which as a matter of public policy and law are put at rest with adoption.

Since the perjury count was based on the denial under oath that Sharon and Dennis were related by blood, the Court held that inquiry would require the same type of prohibited inquiry, and so dismissed all charges.

The State appeals[.] . . .

[Appellees sought dismissal of the appeal on various procedural grounds, which the court rejected.]

Title 13 of the Delaware Code, § 101(a)(1) provides:

§ 101. *Void and Voidable Marriages*

(a) A marriage is prohibited and void between:

(1) A person and his or her ancestor, descendant, brother, sister, uncle, aunt, niece, nephew or first cousin . . .

Title 13 of the Delaware Code, § 102 provides:

§ 102. *Entering into a prohibited marriage; penalty*

The guilty party or parties to a marriage prohibited by § 101 of this title shall be fined \$100, and in default of the payment of the fine shall be imprisoned not more than 30 days.

Title 13 of the Delaware Code, § 919 provides:

§ 919. *General effect of adoption.*

(a) Upon the issuance of the decree of adoption, the adopted child shall be considered the child of the adopting parent or parents, entitled to the same rights and privileges and subject to the same duties and obligations as if he had been born in wedlock to the adopting parent or parents.

(b) Upon the issuance of the decree of adoption, the adopted child shall no longer be considered the child of his natural parent or parents and shall no longer be entitled to any of the rights or privileges or subject to any of the duties or obligations of a child with respect to the natural parent or parents; but, when a child is adopted by a stepparent his relationship to his natural parent who is married to the stepparent shall in no way be altered by reason of the adoption.

[Defendants] contend that 13 Del.C. § 919 must be read to end *all* relationships between the adopted child and its natural parents and kin, including the blood ties that the State asserts are the basis for the provision of 13 Del.C. § 101(a)(1). The State opposes such an interpretation[,] . . . contending that the Legislature did not intend such a result when it enacted 13 Del.C. § 919. The defendants seek to support their interpretation . . . with various cases holding . . . that, by adoption, a child is given the status of a natural child as to his or her adopted parents, and any legal relationship to the child's natural parents is ended. However, these cases deal exclusively with either the question of the child's right to inherit from the adopted parents, or the question of the effect of the adoption on the rights and duties of the natural parents as to the adopted child. The cases do not . . . address the issue presently before the Court, and so are irrelevant[,] . . . The cases cited by the State are similarly inappropriate, since they deal solely with the issue of whether a man may marry his *adopted* sister. It is clear that this issue may be resolved solely by an interpretation of the relevant statutes.

Section 101(a)(1) of Title 13 is what is commonly termed a consanguinity statute. . . . In general, a consanguinity statute prohibits marriages between blood relatives in the lineal, or ascending and descending lines. The historical basis for these statutes is rooted in English Canonical Law, which enforced what is considered to be a Biblical prohibition on incestuous relationships.

Another reason . . . for . . . incest and consanguinity statutes is a generally accepted theory that genetic inbreeding by close blood relatives tends to increase the chances that offspring . . . will inherit certain unfavorable physical characteristics. Even if this theory is accepted, it is unlikely that it was the original basis for consanguinity statutes, given the relative newness of the theory and the ancient history of these statutes;

however, it is possible that this theory served as an additional basis for the revision and reenactment of the various statutes.

In any case, . . . consanguinity statutes were designed to prohibit marriages between blood relatives. The Delaware consanguinity statute is no exception. . . .

The present version of Delaware's consanguinity statute, 13 Del.C. § 101(a)(1), expressly prohibits marriages between brother and sister. Although the Delaware Courts have never addressed the issue, other courts which have applied similar statutes have concluded that the policy behind the prohibition of marriages or sexual relations between blood relatives requires the Court to include relatives of half-blood in the prohibition. See *State v. Skinner*, 43 A.2d 76 [(Conn. 1945)]; *State v. Lamb*, 227 N.W. 830 [(Iowa 1929)]; *State v. Smith*, 85 S.E. 958 [(S.C. 1915)]. Given the obvious intent of 13 Del.C. § 101(a)(1) to prohibit marriages between blood relatives, it is clear that a reasonable interpretation of 13 Del.C. § 101(a)(1) would prohibit the marriage between the appellees.

However, appellees contend that 13 Del.C. § 101(a)(1) is a penal statute, insofar as it is applied through 13 Del.C. § 102 to criminally punish anyone who enters into a prohibited marriage. As a penal statute, it must be strictly construed in favor of the appellees. Thus, appellees argue, since 13 Del.C. § 101(a)(1) does not expressly prohibit marriages between a half-brother and half-sister, this Court must construe the statute so as to exclude a marriage between half-brother and half-sister from the reach of 13 Del.C. § 101(a)(1). I disagree.

In general, . . . strict construction requires that . . . any ambiguity [in a penal statute] must be resolved in favor of the defendant . . . to insure that no individual is convicted unless a fair warning has been given to the public in understandable language what activities the statute prohibits. However, the doctrine of strict construction is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the Legislature. . . . If a statute can have two meanings, the principle of strict construction does not require the Court to accept automatically the meaning most favorable to the defendant; the Court's general objective is still to determine the general intent of the Legislature. Thus, strict construction does not require the Court to adopt an unreasonable construction, or one which results in an injustice which the Legislature should not be presumed to have intended.

Looking to the language of 13 Del.C. § 101(a)(1), I do not see that there is any reasonable ambiguity as to whether the marriage of the appellees was prohibited by that statute. The statute clearly prohibits marriages between brother and sister, as well as other blood relatives. No exception is made for relatives of the half-blood or blood relatives adopted by other families. To engraft such exceptions on the plain language of 13 Del.C. § 101(a)(1), because it does not expressly include such relations, requires an unreasonable interpretation of the statute which the doctrine of strict construction does not mandate. . . . [S]trict construction does not shield the appellees from 13 Del.C. §§ 101(a)(1) and 102.

Having concluded that 13 Del.C. § 101(a)(1) would normally prohibit marriage between the appellees, the question becomes whether the effect of 13 Del.C. § 919 is to destroy all ties between an adopted child and the child's

natural relatives, including the ties of blood. As quoted earlier, 13 Del.C. § 919(b) states:

(b) Upon the issuance of the decree of adoption, the adopted child shall no longer be considered the child of his natural parent or parents, and shall no longer be entitled to any of the rights or privileges or subject to any of the duties or obligations of a child with respect to the natural parent or parents. . . .

Appellees contend that . . . 13 Del.C. § 919 ends all relationships between an adopted child and its natural relatives, including blood relationships, and so the blood relationship prohibited by 13 Del.C. § 101(a)(1). . . . [T]he General Assembly did not intend that 13 Del.C. § 919 have such an effect.

Appellees would have this Court interpret the words “duties and obligations” to include compliance with criminal provisions such as 13 Del.C. § 101(a)(1), so that the language of 13 Del.C. § 919(b) stating that an adopted child “shall no longer be . . . subject to any of the duties or obligations of a child with respect to his natural parent or parents . . .” would legally eliminate the blood tie between an adopted child and its natural relative, barring prosecution under 13 Del.C. § 102 if these two later marry. However, such a literal interpretation of 13 Del.C. § 919 is clearly inconsistent with the obvious intent of the statute to eliminate such duties as the right to custody in the natural parents, and the reciprocal duties or obligations of the child and the natural parents to support one another. . . . To interpret 13 Del.C. § 919 as the appellees argue would require that I in effect amend 13 Del.C. § 101(a)(1) by implication. Such an interpretation would violate the general rules of statutory construction which require that a statutory ambiguity be interpreted in accordance with pre-existing law, unless there is an “irreconcilable inconsistency” between the statutes; and that amendment of existing law by implication is disfavored.

If 13 Del.C. § 919(b) is read to be limited to eliminating only the legal ties between the adopted child and its natural parents, there is no irreconcilable inconsistency between the two statutes, and 13 Del.C. § 101(a)(1) should not be considered to be impliedly amended by 13 Del.C. § 919. Thus, 13 Del.C. § 919 does not bar the application of 13 Del.C. §§ 101(a)(1) and 102 to the facts of the present case.

Appellees’ last argument in support of the decision below contends that the strong public policy of maintaining the secrecy of adoption records as evidenced by 13 Del.C. §§ 923 and 924 bars *any* inquiry into the facts of the adoption, even where the information sought is not to be obtained from the adoption records. . . .

. . .

There is no indication that the provisions of 13 Del.C. §§ 923 and 924 were intended to eliminate any inquiry into the facts surrounding an adoption, *including* inquiry *outside* the adoption records. . . . [Thus,] 13 Del.C. §§ 923 and 924 do not prohibit the State from presenting its case against the appellees in the manner in which it intends to proceed.

For the reasons stated, . . . the Municipal Court erred in dismissing the informations charging Sharon and Dennis H. with violations of 13 Del.C. § 102 and 11 Del.C. § 1221. The decision of the Municipal Court is reversed and the case is remanded . . . for action that is consistent with this decision.

IT IS SO ORDERED.

### **Back v. Back**

Supreme Court of Iowa, 1910.  
125 N.W. 1009.

■ MCCLAIN, J.

. . . In 1890[,] William Back, the decedent, married a widow, one Mrs. Dirke, who then had living a daughter by her former husband, which child is the plaintiff in this case. In 1900[,] the wife obtained a divorce from said William Back, and four years later he married the plaintiff. No children were born to William Back by his first marriage, but as a result of his marriage to plaintiff four children were born, all of whom survive him. About two years after the second marriage, the divorced wife, mother of the plaintiff, died, and thereafter plaintiff and the decedent continued to live together as husband and wife until his death in 1906. The resistance of defendant to plaintiff's application as widow to have . . . property set apart to her was on the ground that the marriage was incestuous and void under the provisions of Code, § 4936, which within the definition of "incest" includes marriage between a man and his wife's daughter, and prohibits such marriage. The trial court ruled . . . that the marriage to plaintiff was void in its inception and continued to be void after the death of plaintiff's mother and until the death of decedent, and that, therefore, plaintiff is not the widow of decedent. . . .

. . .

. . . [W]hether the marriage of plaintiff to decedent was within any of the prohibitions of Code, § 4936 . . . depends upon the construction of the words "wife's daughter" in that section. . . . If the statute purported to be a definition only of degrees of relation within which marriage is prohibited, it might perhaps be argued with some plausibility that, as a man could not marry his wife's daughter while his wife was living and undivorced without committing bigamy, the object of including wife's daughter among those to whom a marriage is declared invalid was to prohibit such marriage after the death or divorce of the mother of such daughter; but, as the primary purpose of the statute apparent on its face is to punish carnal knowledge as between persons having the specified relationships as well as to punish marriage between them, it is quite evident that the enumeration of relationships is simply a method of stating more definitely what are the degrees of consanguinity or affinity rendering marriage or carnal knowledge between persons of the relationships named criminal. . . .

We reach the conclusion, therefore, that the relationship of affinity between the decedent and plaintiff which existed during the continuance of the marriage relation between decedent and plaintiff's mother terminated when the latter procured a divorce from decedent, and after that time plaintiff was not the daughter of decedent's wife, and the marriage between them was valid.

. . .

**Claude Levi-Strauss, *The Family,*  
in MAN, CULTURE AND SOCIETY**

261, 276–78 (Shapiro ed., 1956).

. . . The universal prohibition of incest specifies, as a general rule, that people considered as parents and children, or brother and sister, even if only by name, cannot have sexual relations and even less marry each other. . . .

The space at our disposal is too short to demonstrate that . . . there is no natural ground for the custom. Geneticists have shown that while consanguineous marriages are likely to bring ill effects in a society which has consistently avoided them in the past, the danger would be much smaller if the prohibition had never existed, since this would have given ample opportunity for the harmful hereditary characters to become apparent and be automatically eliminated through selection: as a matter of fact this is the way breeders improve the quality of their subjects. Therefore, the dangers of consanguineous marriages are the outcome of the incest prohibition rather than actually explaining it. Furthermore, since very many primitive peoples do not share our belief in biological harm resulting from consanguineous marriages, but have entirely different theories, the reason should be sought elsewhere, in a way more consistent with the opinions generally held by mankind as a whole.

The true explanation should be looked for in a completely opposite direction, and what has been said concerning the sexual division of labor may help us to grasp it. This has been explained as a device to make the sexes mutually dependent on social and economic grounds, thus establishing clearly that marriage is better than celibacy. Now, exactly in the same way that the principle of sexual division of labor establishes a mutual dependency between the sexes, compelling them thereby to perpetuate themselves and to found a family, the prohibition of incest establishes a mutual dependency between families, compelling them, in order to perpetuate themselves, to give rise to new families. . . .

We now understand why it is so wrong to try to explain the family on the purely natural grounds of procreation, motherly instinct, and psychological feelings between man and woman and between father and children. None of these would be sufficient to give rise to a family, and for a reason simple enough: for the whole of mankind, the absolute requirement for the creation of a family is the previous existence of two other families, one ready to provide a man, the other one a woman, who will through their marriage start a third one, and so on indefinitely. To put it in other words: what makes man really different from the animal is that, in mankind, a family could not exist if there were no society: i.e. a plurality of families ready to acknowledge that there are other links than consanguineous ones, and that the natural process of filiation can only be carried on through the social process of affinity.

How this interdependency of families has become recognized is another problem which we are in no position to solve because there is no reason to believe that man, since he emerged from his animal state, has not enjoyed a basic form of social organization, which, as regards the fundamental principles, could not be essentially different from our own. Indeed, it will never be sufficiently emphasized that, if social organization had a beginning, this could only have consisted in the incest prohibition since, as we have just shown, the incest prohibition is, in fact, a kind of remodeling of the biological



conditions of mating and procreation (which know no rule, as can be seen from observing animal life) compelling them to become perpetuated only in an artificial framework of taboos and obligations. It is there, and only there, that we find a passage from nature to culture, from animal to human life, and that we are in a position to understand the very essence of their articulation.

. . . [T]he ultimate explanation is probably that mankind has understood very early that, in order to free itself from a wild struggle for existence, it was confronted with the very simple choice of “either marrying-out or being killed-out.” The alternative was between biological families living in juxtaposition and endeavoring to remain closed, self-perpetuating units, over-ridden by their fears, hatreds, and ignorances, and the systematic establishment, through the incest prohibition, of links of intermarriage between them, thus succeeding to build, out of the artificial bonds of affinity, a true human society, despite, and even in contradiction with, the isolating influence of consanguinity. . . .

**Margaret Mead, *Anomalies in American Post-Divorce Relationships*, in *DIVORCE AND AFTER***

115–20 (Bohannon ed., 1970).

Our present frequency of divorce has coincided with the development of a new set of attitudes and beliefs about incest. Incest taboos are among the essential mechanisms of human society, permitting the development of children within a setting where identification and affection can be separated from sexual exploitation, and a set of categories of permitted and forbidden sex can be established. Once these are established by the usually implicit but heavily charged learning of early childhood, the boy or girl is prepared to establish close relationships with others, of both a sexual and an asexual but affectional nature. The permissible sex partner, who may be one of a narrowly defined group of cousins, or any appropriately aged member of another village, or any age mate in the village who is not a relative, is sharply identified. The forbidden sex partners, a category which includes parents, aunts and uncles, brothers and sisters, nephews and nieces, and sometimes a wider group of all cousins, or all members of the clan or the community, are equally sharply distinguished. Close ties may be formed with forbidden sex partners without the intrusion of inappropriate sexuality; trust and affection, dependence and succorance, can exist independently of a sexual tie. Grown to manhood and womanhood, individuals are thus equipped to mate, and to continue strong, affectional ties with others than their own mates.

Where such incest categories are not developed, there are certain kinds of social consequences. Groups that can only absorb a non-member by establishing a sexual tie to a member, like the Kaingang of South America, have a limited capacity to form wider alliances. In parts of Eastern Europe, where the father-in-law may pre-empt the daughter-in-law in his son’s absence, for example, on military service, certain inevitable suspicions and antagonisms exist between fathers and sons. The complications that may result from a mother-in-law’s attraction to a young son-in-law—complications that were ruled out in the case of a juvenile own son, no matter how loved—are so ubiquitous, that mother-in-law taboos placing limitations on any social relationships between son-in-law and mother-in-law are the

commonest and most stringent avoidance taboos in the world. The complementary taboo, between brother and sister, is also found in many parts of the world. . . .

If the incest taboos are seen to make an essential contribution to the rearing of children within a situation where their own immature emotions are respected, and where they are at the same time prepared for both sexual and non-sexual relationships as adults, it is then obvious that the taboo must be extended to include all members of the household. No matter what the size of the household, sex relations must be rigorously limited to the sets of marital couples—parents, grandparents, married aunts and uncles—who live within its confines. When these rigorous limitations are maintained, the children of both sexes can wander freely, sitting on laps, pulling beards, and nestling their heads against comforting breasts—neither tempting nor being tempted beyond their years. . . .

In England, until fairly recent times, the dangerous possibilities of attraction to the wife's sister, were considered so great that there was a compensatory legal rule which specifically forbade marriage with a deceased wife's sister. This device was designed to at least interrupt daydreaming and acting out during the wife's lifetime, since membership in the same household was possible after her death. In non-monogamous societies, marriage with the wife's sister is a common and often congenial type of marriage, especially in the cases where a sister may be given to complete a household into which her childless older sister is married.

Traditionally, within the Christian usages of the past, forbidden degrees of marriage have dealt more or less successfully with the problem of protecting those who live together in a single household. Stepbrotherhood and stepsisterhood are included within the impediments to marriage in the Roman Catholic Church.

However, imperceptibly and almost unremarked, the sanctions which protect members of a common household, regardless of their blood relationships, have been eroded in the United States. About all that remains today is the prohibition of sex in consanguineous relationships—a prohibition supported by the popular belief that the offspring of close relatives are defective. Stated baldly, people believe the reason that sex relationships between any close kin, father-daughter, mother-son, brother-sister, sometimes first cousins, uncle-niece and aunt-nephew, are forbidden, is simply that such unions would result in an inferior offspring—feeble-minded, deformed, handicapped in some way. This belief is a sufficient protection against incest so long as the two-generation nuclear family is the rule of residence, and the original marriage remains intact. In such households, neither aunts nor uncles are welcome as residents, cousins are members of other households, and even boarders and domestic servants are now regarded as undesirable. The small family, united by blood ties, can thus safely indulge in intimacy and warmth between biologically related parents and children. It can be pointed out that this sanction is based on a misunderstanding of the biological principles which govern the inheritance of specific genes which are more likely to appear in closely consanguineous matings. But a more serious limitation of this sanction is that it does not provide for a household which includes a stepparent, a stepchild, stepsiblings, or adopted children.

We rear both men and women to associate certain kinds of familiarity, in dress, bathing, and relaxation, with carefully defined incest taboos in

which the biological family and the single household are treated as identical. We provide little protection when individuals are asked to live in close contact within a single, closed household, with members of the opposite sex to whom they have no consanguineous relationships. This leads to enormous abuses—girls are seduced by stepbrothers and stepfathers, men are seduced by precocious stepdaughters. It also leads to a kind of corruption of the possibilities of trust and affection, confusing the children's abilities to distinguish between mates and friends, whether of the same age, or among those of another generation. If the girl is below the age of consent, seduction which takes place between a stepfather and a stepdaughter, however initiated, is treated as a sex offense against a minor rather than as incest. Moreover, there is increasing evidence of the connivance of a consanguineous member of the family in such intrigues. The consenting minor may or may not be damaged psychologically, as she would be certain to be in a relationship with her own father or brother, which is experienced as incest. In fact, there is some evidence that where the biological mother connives in a sexual relationship between a father and daughter, the daughter has not been damaged psychologically. This finding may be interpreted as a sign that there is no natural or instinctive aversion to incest. But it may also be seen as a final weakening of incest taboos in our society, as the rationale has shifted from taboos governing the relationships of persons of opposite sex and different generations in close domestic contact, to a mere precaution against defective offspring, when offspring are not in any event the purpose of such liaisons.

As the number of divorces increases, there are more and more households in which minor children live with stepparents and stepsiblings, but where the inevitable domestic familiarity and intimacy are not counterbalanced by protective, deeply felt taboos. At the very least, this situation produces confusion in the minds of growing children; the stepfather, who is seen daily but is not a taboo object, is contrasted with the biological father, who is seen occasionally and so is endowed with a deeper aura of romance. The multiplication of such situations may be expected to magnify the difficulties young people experience in forming permanent-mating relationships, as well as in forming viable relationships with older people. They may also be expected to magnify the hazards of instructor-student intrigues, of patient-doctor complications, and of employer-employee exploitation. It may even be that the emergence of the very peculiar form of sex behavior in which couples unknown to each other, arrange to meet secretly and exchange sex partners may be an expression of the kind of object confusion that has grown up in our present much-divorced, much remarried society—a society in which, however, the ideal of the biologically related, two-generation, exclusive nuclear family is still preserved.

## NOTES

1. All states and the District of Columbia prohibit marriages between parent and child, brother and sister, and aunt and nephew, or uncle and niece. As of 2018, twenty states and the District of Columbia broadly permit the solemnization of marriages between first cousins, while several others allow it under limited circumstances.<sup>2</sup> Additionally, most courts have reached the same

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<sup>2</sup> Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Maryland, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and Virginia. In addition, Illinois does if both

conclusion as the court in *Back* that, in the absence of a contrary statutory provision, all affinity relationships cease upon termination of the marriages that produced them. As the opinion indicates, however, a few courts have exempted situations involving children of the original marriage.

2. In light of the justifications for incest prohibitions advanced by Levi-Strauss and Mead, should statutory bans on incestuous marriages apply to marriages between a parent and an adopted child? Robert Keefe, Note, *Sweet Child O'Mine: Adult Adoption and Same-Sex Marriage in the Post-Obergefell Era*, 69 FLA. L. REV. 1477, 1495–96 (2017) (noting that “[b]y explicit statutory reference, at least twenty-three states and territories include the adoptive parent-child relationship within the definition of incest,” and listing the jurisdictions). What about an adult parent and an adult child who never cohabited or knew each other as the child was growing up, because, say, the child was abandoned, given up for adoption, or born of a “sperm donation scenario”? See Tracy Moore, *This Interview With a Woman Dating Her Father Will Haunt You Forever*, JEZEBEL (Jan. 15, 2015), <https://jezebel.com/this-interview-with-a-woman-dating-her-father-will-haun-1679768194> (discussing examples). What, in light of the justifications for incest prohibitions offered by Levi-Strauss and Mead, should be made of the case of an adult who previously adopted his/her/their adult partner as a legal child? Should they ever be allowed to marry? See Keefe, *supra*, at 1480, 1491–1500 (discussing details of “the current dilemma faced by same-sex couples [in which one partner adopted the other] . . . in the decades before the *Obergefell* decision, now that same-sex marriage is legal nationwide,” and suggesting possible solutions).

Compare Section 207 of the Uniform Marriage & Divorce Act:

§ 207. [Prohibited Marriages]

(a) The following marriages are prohibited:

. . .

(2) a marriage between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or the whole blood, or by adoption;

(3) a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs of aboriginal cultures.

UNIFORM MARRIAGE & DIVORCE ACT § 207 PROHIBITED MARRIAGES (1973).

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parties are over 50 or if either party is sterile, Indiana allows them if both parties are over 65, Maine does after a certificate of genetic counseling has been obtained, Utah does if either both parties are 65 or older or both are 55 or older and either party is sterile, and Wisconsin permits such marriages if the woman is over 55 or if either party is sterile. Finally, Oklahoma will recognize a first cousin marriage performed in a state where legal, and Minnesota will allow it if such a marriage was “permitted by the established customs of aboriginal cultures.”

## b. AGE

**In re J.M.N.**

Tennessee Court of Appeals, 2008.  
[2008 WL 2415490](#).

## ■ KIRBY, J.

...

Plaintiff/Appellee Jerry Clyde Nix (“Father”) and Defendant/Appellant Amy Nix Cantrell (“Mother”), both Mississippi residents, were married and had a daughter, Jacy Marie Nix (“Jacy”), born August 27, 1991. Mother and Father were divorced by final decree entered on August 22, 1995, in the Chancery Court of Warren County, Mississippi. In the decree, Mother was designated the primary residential parent for Jacy.

Father later filed a petition for modification of the decree, seeking to be designated primary residential parent, based in part on Mother’s mental illness. On August 26, 1999, the Mississippi chancery court entered an order granting Father’s petition and appointing him as Jacy’s primary residential parent. Mother was given the same visitation that had been awarded to Father in the original divorce decree.

At all pertinent times thereafter, Father has lived with Jacy . . . in Winona, Montgomery County, Mississippi. Mother lived about three hours away from Father . . . in Corinth, Alcorn County, Mississippi. Over the years, for Jacy’s visitation, the parties met at a point in between their homes for the exchange.

On Friday, July 27, 2006, when Jacy was fourteen (14) years old, Father took Jacy for her regular visitation with Mother. Father was led to believe that Jacy would be going with Mother to vacation in Florida for the week. Instead, without notifying Father, Mother took Jacy across the Tennessee/Mississippi state line to the Juvenile Court in Selmer, McNairy County, Tennessee, to enable Jacy to marry her eighteen-year-old boyfriend, Kevin Brady Henry (“Henry”). When Mother, Jacy, and Henry arrived at the McNairy County Justice Center, Jacy and Henry sought to file an application for a marriage license. Because the legal age for marriage without parental consent in Tennessee is eighteen, and Jacy was only fourteen, Mother filled out a preprinted consent affidavit, acknowledging that she is Jacy’s mother, that Jacy’s birth date is August 27, 1991, and that she consented to and joined in the application for marriage between Jacy and Henry.

Thereafter, Wayne Bolton (“Bolton”), a youth services officer of the McNairy County Juvenile Court, met briefly with Jacy and Henry to ensure that they intended to be married. He then presented Mother’s affidavit to Juvenile Court Judge Bob Gray. Along with Mother’s affidavit, Bolton presented Judge Gray with a preprinted order finding that the marriage would be in Jacy’s best interest, and that good cause was shown for the marriage. In addition, the pre-printed order suspended the three-day waiting period for the issuance of a marriage license, waived the age restriction to marriage, and authorized the County Court Clerk to issue a marriage license to Jacy and Henry. *See* T.C.A. § 36–3–107 (2005). Judge Gray signed the order proffered by the youth services officer. Mother, Jacy, and Henry did not appear before Judge Gray.

After obtaining Judge Gray's order, Mother, Jacy, and Henry went to the McNairy County Courthouse to apply with the County Court Clerk for a marriage license and to have the marriage ceremony performed. When Jacy and Henry applied for the license, a deputy clerk asked them for a copy of Jacy's birth certificate or some other record identifying her legal parents and her date of birth. Mother had no such records for Jacy with her. Instead, she showed the clerk the front page of a proposed Mississippi chancery court order drafted by her attorney, which indicated that she had primary custody of Jacy. This order had never been signed by a court; it had merely been proposed by Mother's attorney in the prior Mississippi chancery court proceedings between Mother and Father. In any event, the county clerk's office accepted the unsigned order in lieu of other forms of identification and issued the marriage license. Thereafter, Jacy and Henry were married by the County Court Clerk.

A few days later, Mother called Father and informed him that Jacy and Henry had married. She told him that, as a result of the marriage, Jacy was emancipated and that he no longer had custody of her under the Mississippi chancery court order.

On August 22, 2006, Father filed a motion in the McNairy County Juvenile Court asking the Juvenile Court to set aside Judge Gray's July 27, 2006 order authorizing the County Court Clerk to issue a marriage license to Jacy. As the basis for his motion, Father asserted fraud on the court by Mother. Father later modified his position, claiming that the prior order could be set aside based on "good cause being shown," regardless of any fraud.

Father's motion was filed as an adversarial proceeding under the same docket number as Judge Gray's Juvenile Court order, No. 8793, naming Mother as the respondent. Mother filed a response, claiming that no fraud had been committed on the court and that Father's motion to set aside should be denied.

Also on August 22, 2006, Father, on behalf of Jacy, filed a petition in the McNairy County General Sessions Court for annulment of the marriage. . . . In this petition . . . Father named Henry as the defendant. On October 5, 2006, represented by the same attorney who represented Mother, Jacy filed an intervening petition in the McNairy County General Sessions action, asserting that she was legally married to Henry, that she was emancipated based on her marriage, and that she did not authorize Father to file the petition for annulment on her behalf. Jacy denied that fraud was committed in obtaining Judge Gray's Juvenile Court order, and she requested that Father's annulment petition be dismissed. On the same day, Henry filed an answer to Father's petition for annulment, claiming that he and Jacy were legally married and asking the General Sessions Court to dismiss Father's petition.

By this time, Judge Van McMahan ("Judge McMahan") had become both the Juvenile Court judge and the General Sessions judge for McNairy County. On October 9, 2006, Judge McMahan conducted a hearing on Father's Juvenile Court motion to set aside Judge Gray's order, as well as Father's General Sessions petition for annulment. Both matters were consolidated for purposes of the hearing "for the sake of judicial economy and based on the fact that the two separately filed cases arise from the same set of facts. . . ."

Father, Mother, Henry, and Jacy all testified at the hearing. Father testified that, prior to Jacy's marriage, he and Jacy lived together at his home . . . in Winona, Mississippi. He said that, ever since he was designated as Jacy's primary residential parent in 1999, he and Mother had been having trouble. On several occasions, Father stated, Mother refused to return Jacy to him after her regular visitation, requiring Father to go retrieve Jacy.

Father testified that on Friday, July 27, 2006, he took Jacy to visit Mother for an extended time because he understood that they planned to go on a vacation to Florida. Father had never met Henry, or even heard of him, prior to learning of the events of July 27, 2006. He did not find out that Jacy and Henry were married until a few days after the ceremony when Mother called and told him that Jacy was emancipated based on her marriage. Father viewed Mother's facilitation of Jacy's marriage as another one of Mother's "stunts" to get custody of Jacy. He said that he filed his petition for annulment because he did not believe that it was in Jacy's best interest to be married at only fourteen years old.

Mother also testified at the hearing. She admitted that she had a history of mental illness and said that she suffered from depression. Mother also admitted that she had tried to take Jacy from Father's custody on a prior occasion.

Mother said that, since late May 2006 when Jacy's school year ended, Jacy had lived with her in Alcorn County, Mississippi. Mother asserted that, during the time period between May 2006 and July 27, 2006, Jacy spent a total of about seven nights with Father.

Mother testified that, in July 2006, Jacy told Mother that she suspected that she was pregnant, and asked Mother's permission to marry the prospective father. Mother claimed that Jacy took a pregnancy test, with inconclusive results. She did not take Jacy to see a physician for a pregnancy test and, as it turned out, Jacy was not pregnant. Nevertheless, Mother explained, she consented to Jacy's marriage to Henry because she felt that marriage was in Jacy's best interest in light of the possibility that she was pregnant. Mother said that she did not discuss the decision with Father because she and Father "had a very hostile relationship." Although both Jacy and Henry lived in Mississippi, Mother took them to Tennessee to be married to avoid the waiting period associated with the blood test that was required in Mississippi. Mother said that Jacy and Henry planned for the trip to Florida to be their honeymoon.

Mother then described the events that took place. According to Mother, about a week prior to July 27, 2006, she called the Juvenile Court Clerk's office and asked whether a noncustodial parent could give consent for a minor to be married. She claimed that one of the Juvenile Court clerks, Jean Smith ("Smith"), assured her that either parent could give consent regardless of who had primary custody. On July 27, 2006, when she, Jacy, and Henry arrived at the McNairy County Juvenile Court, Mother claimed that no one asked her whether she was Jacy's custodial parent. Mother filled out all of the paperwork presented to her by Smith. After that, they were sent to youth services officer Bolton. In Bolton's office, he talked with Jacy and Henry about their decision to marry. Bolton then left the room and returned with an order signed by Judge Gray giving them permission to marry. Mother, Jacy, and Henry did not personally appear before Judge Gray. Mother denied showing anyone in the Juvenile Court office the proposed Mississippi

chancery court order indicating that she had custody, and she asserted that she was not asked for such documentation by Juvenile Court personnel.

Once they obtained Judge Gray's order from Juvenile Court, Mother took Jacy and Henry to the McNairy County Clerk's office to obtain a marriage license and get married. In order to obtain a marriage license, Henry presented to the County Clerk's office his birth certificate and driver's license. Jacy was required to present a birth certificate or "something showing who her legal parents were and her date of birth." To fulfill this requirement, Mother gave the County Clerk's office the first page of her unsigned Mississippi proposed order, which recited Jacy's birth date and indicated that Mother was the primary custodian. Mother explained that she presented the first page of this order because it was all she had with her to show the identity of Jacy's parents. Once the marriage license was procured, the wedding ceremony took place there in the County Clerk's office.

A few days later, Mother called Father to tell him about Jacy's marriage. Mother testified that, at the time of the hearing, Jacy and Henry were living with her, and that Henry was not working.

Henry testified as well. He stated that he was not involved in the discussions with the clerks or with Judge Gray, but spoke only with Bolton, the Juvenile Court youth services officer, who interviewed the couple about their decision to marry. Henry testified that he told Bolton that he wanted to marry Jacy because he loved her and because marriage was what they believed was right. Henry refused to answer questions about whether he told Mother that Jacy was pregnant. At the time of the hearing, he said, he and Jacy were living with Mother. He planned to go into the National Guard. Henry testified that he did not wish to be divorced, and that divorce violated his religious beliefs.

Jacy also testified at the hearing. Prior to the marriage, she said, she lived primarily with Father and visited Mother. She acknowledged that there were substantial periods of time in which she did not visit Mother. Between May 24 and July 27, 2006, Jacy said, she stayed with Mother quite a bit. She corroborated Father's testimony that he took her to Mother's home on July 27, 2006, based on his understanding that she and Mother were going to go on vacation in Florida. Jacy said that it was her and Henry's idea to go to McNairy County to get married. A week before the three of them went to McNairy County, Jacy and Henry told Mother that they suspected that Jacy was pregnant. They told Mother that they loved each other and wanted to get married. Contrary to Mother's testimony, Jacy said that she did not take a pregnancy test. Jacy denied involvement in any misrepresentations to the Juvenile Court clerks, the Juvenile Court judge, or the County Court clerks in relation to this matter. She maintained that she wanted to remain married to Henry, and that she did not authorize Father to file the petition for annulment in General Sessions Court.

Over the objection of Mother's attorney, Judge Gray testified at the hearing. He said that he had no specific recollection of the matter involving Jacy and Henry, but that it was not uncommon for him to get requests for waiver of the age restriction for marriage. Judge Gray explained that it had been the Juvenile Court's "policy that a person . . . that's requesting the child to be married to make this affidavit that you have here and have some supporting documentation that that person had custody of that child if mother and father both didn't sign the affidavit." Judge Gray said that "if both parents did not come in to show proof that they were parents of this



child, then the policy was that the one parent would be required . . . to provide proof that person had physical and legal custody of that child.” He maintained that, without such documentation, he would not have signed the order permitting the marriage. Typically, he stated, he would not see the person making the affidavit because having the affidavit signed is “an administrative function done by one of the youth services officers.” Judge Gray said that, in most cases, the youth services officer was the person who presented the petition to the court, and the judge signed the order.

At the conclusion of the hearing, Judge McMahan orally granted Father’s motion to set aside the July 27, 2006 order. Judge McMahan determined from the evidence that it was inappropriate for Mother to make the decision to allow Jacy to get married at age fourteen without notifying Father:

I think it’s significant in this case that we’re dealing with, at the time a 14-year-old. I think it’s clear that the father, the person that has custody, I think both parents should have a say in that decision. That’s a huge decision for parents to make in the lives of their children. And for one parent to go and make it without notifying the other parent, that’s just not right. You shouldn’t do that.

I don’t think the statute—I think based upon Judge Gray’s testimony, the policy procedure of the Court in Juvenile Court has been that if both parents aren’t there, then one parent’s got to present evidence that they have custody. So . . . I don’t think Judge Gray at that point would have granted this Motion had it not been—if he did not believe that Mrs. Cantrell had custody. Now, I believe the Court has basis to set this aside regardless of whether there’s any fraud or not.

. . . And the Court considers the best interest of the child as one of the grounds for overturning this motion.

I think it’s in the best interest of this child that she not be married at age 14. At least not without the consent of both parents. So the Court finds that the Motion to Set Aside should be granted[.] . . .

After setting aside the July 27, 2006 order, Judge McMahan stated that doing so had the effect of rendering Jacy’s marriage void and the petition for annulment moot.

On November 21, 2006, Judge McMahan entered a written order consistent with his oral ruling. . . . Judge McMahan’s written order granted Father’s . . . motion to set aside the July 27, 2006 Juvenile Court order and went on to state that “Jacy Marie Nix is not of legal age to be married in Tennessee, and . . . her marriage to Kevin Brady Henry is now void.” Mother now appeals[.] . . .

On appeal, Mother contends that the trial court erred[,] . . . asserting that there was no evidence that she committed a fraud upon the court in obtaining the order. Mother claims that she had received assurances from Smith and Bolton that consent of the minor’s custodial parent was not necessary, and she maintains that she did not hold herself out to the Juvenile Court to be Jacy’s custodial parent. She notes that Bolton presented the affidavit and the preprinted order to Judge Gray, and that neither she, nor Jacy, nor Henry personally appeared before Judge Gray. Mother acknowledges that she showed the first page of the proposed Mississippi chancery court custody order to the county clerk’s office, but maintains that

she did so only for identification purposes, and asserts that she did not show the proposed order to either Smith or Bolton. Mother also argues that the trial court committed reversible error in permitting Judge Gray to testify in the proceeding below, asserting that his testimony was adduced in order to directly attack an order entered by him in the same proceeding and, as such, was improper pursuant to Tennessee Rule of Evidence 605.

...

... When ... the trial court held a hearing[,] ... [it] was presented with evidence that Father was Jacy's primary residential parent, that Mother did not have decision-making authority regarding Jacy, that Father was not notified of Mother's actions, and that Mother had a history of mental illness and of attempts to usurp Father's authority in decision-making matters involving Jacy. The evidence of these facts was not before Judge Gray when he signed the July 27, 2006 order. From this, Judge McMahan determined that setting aside the order giving Jacy permission to marry was warranted. The evidence adduced at the hearing before Judge McMahan is ample justification for granting relief from the order. Even if the admission of Judge Gray's testimony was erroneous, it is harmless error in light of the undisputed facts of this case. Therefore, we conclude that the Juvenile Court did not abuse its discretion in setting aside the July 27, 2006 order giving Jacy permission to marry.

As noted above, Judge McMahan ... [declared] that the marriage between Jacy and Henry "is now void." Thus, we feel compelled to address the correctness of this comment.

The Juvenile Court's July 27, 2006 order legally removed the age restriction of marriage for Jacy and permitted her to legally obtain a marriage license. Setting aside this order vacated the court's waiver of the age restriction. Jacy was then relegated to the status of a minor who was not entitled to be married legally in Tennessee. This does not, however, change the fact that Jacy in fact obtained a marriage license and married Henry at the County Clerk's office.

In Tennessee, a marriage between and minor and an adult is voidable, not void. *Coulter v. Hendricks*, 918 S.W.2d 424, 426 (Tenn. Ct. App. 1995) (listing marriage of person who is under the age of consent as a voidable marriage). "A voidable marriage differs from a void marriage in that the former is treated as valid and binding until its nullity is ascertained and declared by a competent court." 18 TENN. JUR. *Marriage* § 4 (2005) (footnote omitted; citing *Brewer v. Miller*, 673 S.W.2d 530 (Tenn.Ct.App.1984)). If either party is under the age of consent at the time of the marriage, "the marriage is inchoate and voidable. Thus, a ceremonial marriage where a party is under [the age of consent] is valid until set aside." *Id.* (footnote omitted; citing *Warwick v. Cooper*, 37 Tenn. (5 Sneed) 659 (1858)). Indeed, the marriage of underage parties may be ratified or disaffirmed by them upon attaining the age of consent if the marriage is not annulled before that time. *See id.* "If the marriage is ratified, it is not necessary that it be again solemnized; a continuance of the relation after attaining the age of consent is a ratification of the voidable marriage." *Id.* Thus, until the marriage between Jacy and Henry is annulled or otherwise rendered void by a court of competent jurisdiction before Jacy reaches the age of consent, it remains valid, and Henry and Jacy remain husband and wife.

The decision of the Juvenile Court is affirmed. . . .

## NOTES

1. According to the lawyer for the father in the case: “On September 18, 2009[,] I presented to the trial Court an Order of Annulment which the Court granted. The Order set out that the Court of Appeals had made the finding [it did] . . . and that the Court needed to make an additional specific finding that the marriage should be and is annulled. The order was presented on Notice[,] but no one from the opposing sides showed up.” E-mail from Ken Seaton to M. Spindelman, Professor of Law, Ohio State Univ. Moritz College of Law (Sept. 22, 2011, 10:04 PDT) (on file with author).

2. At common law, children were considered capable of consenting to marriage at age seven, although the marriage was voidable by the underage party until he or she reached the “age of discretion,” the presumptive age at which the marriage could be consummated, which was twelve for girls and fourteen for boys.

As of 2018, Mississippi and Nebraska are the only states that do not set 18 as the minimum age for marriage without parental consent. Certain other statutory considerations aside, Mississippi requires parental permission only if the male is under 17 or the female is under 15, whereas Nebraska requires parental permission if either party is under 17 years of age. MISS. CODE ANN. §§ 93–1–5, 1–3–27; NEB. REV. STAT. § 42–102, 42–105.

Most states permit 16- or 17-year-olds to marry with parental consent. This now includes New Hampshire, which previously allowed girls to marry with parental consent at 13 and boys at 14, N.H. REV. STAT. §§ 457:4, 457:5, 457:6, but which raised the marriage age to 16 for both females and males as of January, 2019. Many states also allow judges to override either parental consent or refusal to consent below the age of majority. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/208 (court can order issuance of marriage license to minor despite a lack of parental consent “if the court finds that the underaged party is capable of assuming the responsibilities of marriage and the marriage will serve his best interest.”). In addition, statutory minimums may yield when certain exceptional circumstances exist, pregnancy being the most common. *See, e.g.*, ARK. CODE ANN. § 9–11–103.

3. Underage or child marriages are not at all uncommon. According to one recent analysis, “[m]ore than 207,000 people under 18 were married in the U.S. between 2000 and 2014[.] . . . While most minors were 16 or 17, some were as young as 12.” Anjali Tsui, *Delaware Becomes First State to Ban Child Marriage*, Frontline, PBS.ORG (MAY 9, 2018), <https://www.pbs.org/wgbh/frontline/article/delaware-becomes-first-state-to-ban-child-marriage/>.

The legal rules allowing these marriages are increasingly being questioned across the country. Legal developments in Delaware are of especial note. *See* 13 Del.C. § 123(a). “In Delaware, some 200 minors were married between 2000 and 2011, according to state health data. The majority—90 percent—were girls.” *Id.* In June, 2018, Delaware changed its marriage age to 18, making it “now the [first] . . . state where minors are unequivocally prevented from marrying before their 18th birthday.” *Id.* “Since 2016, more than 20 states have introduced legislation to raise the minimum marriage age.” *Id.* Is an exceptionless rule like Delaware’s, limiting marriages to only those over 18 years of age, a good idea? What are its strongest justifications? Preventing the legal legitimation of child sexual abuse? *See* Nicholas Kristof, *An American 13-Year-Old, Pregnant and Married to Her Rapist*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/opinion/sunday/child-marriage-delaware.html>. Are the justifications that may be advanced in defense of an exceptionless rule like Delaware’s an adequate legal warrant should the measure be subjected to constitutional challenge? What if the purpose of a marriage involving a minor is in whole or in part to ensure that a pregnant minor does not have a child out of wedlock? What

if the marriage is consistent with both the minor's wishes and with the minor's parents' judgment? With religious and/or cultural practices of the group or community in which the minor lives? See Sarah Mueller, *Delaware Expected to Be the First State to Ban Child Marriage Outright*, NPR (May 3, 2018, 8:35PM), <https://www.npr.org/2018/05/03/608351312/delaware-expected-to-be-the-first-state-to-ban-child-marriage-outright>. Also in 2018, New Jersey became the second state to prohibit all marriages for minors who are under the age of 18. N.J. STAT. ANN. § 37:1–30(c) (West, 2018).

4. Prohibitions on marriages involving one or more parties who are minors are scarcely the only means of enforcing a general policy against them. Child neglect proceedings provide another way of doing so. See *People v. Benu*, 385 N.Y.S.2d 222 (1976) (father convicted of endangering the welfare of his 13-year-old daughter by arranging her marriage); *In Interest of Flynn*, 318 N.E.2d 105 (1974) (couple found unfit parents after they “sold” their 12-year-old daughter into marriage with a relative stranger for \$28,000). See also Loretta M. Kopelman, *The Forced Marriage of Minors*, 44 J. OF L. MED. & ETHICS 173, 179 (2016) (arguing that “[t]he forced marriage of minors is child abuse and consequently [individuals and organizations that “have duties to prevent or stop child abuse”] . . . also have duties to prevent or stop the forced marriages of minors. These obligations arise from more general duties to safeguard their rights and wellbeing.”).

5. Is the divorce rate for teenage marriages relevant to either a policy debate about the legality of underage marriage or to an assessment of rules against it as a constitutional matter? Is it significant that divorce rates for teenage marriages are higher than for other marriages, and that they have been for some time? Between 2006 and 2010, the reported probability of divorce within the first five years for women married under the age of 20 was 30 percent, while for women married between 20 and 24 years of age it was 19 percent. The reported probability for divorce for all women aged 15–44 within the first five years of marriage was 20 percent. See Casey E. Copen, et al., *First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth*, 49 NAT'L HEALTH STAT. REP. 1, 16 (2012).

To combat the high divorce rate of youth-involved marriages, some states have rules involving requirements for some premarital counseling. See CAL. FAM. CODE § 304 (authorizing courts to order premarital counseling for all couples in which one of the parties is a minor); MONT. CODE ANN. § 40–1–213 (required marriage counseling); OHIO REV. CODE ANN. § 3101.05 (same); UTAH CODE ANN. § 30–1–9(3)(b) (requirement of statement of marriage counseling “satisfactory to the court”); UTAH CODE ANN § 30–1–30 to 39 (authorizing county commissioners to require counseling for couples in which one partner is either under 19 or divorced). Should such barriers to “easy” marriage be encouraged? Are they constitutional? Does your answer depend on who is doing the counseling or how much of it is required?

6. The domestic U.S. legal rules on underage marriage may be situated in an international context. See, e.g., Minzee Kim et al., *When Do Laws Matter? National Minimum-Age-of-Marriage Laws, Child Rights, and Adolescent Fertility, 1989–2007*, 47 L. & SOC'Y REV. 589, 590–92 (2013) (citations and footnote omitted). Speaking generally, should domestic U.S. rules on underage marriage generally be harmonized with declared international norms? If so, under what sorts of circumstances? How might such arguments play in state legislative debates?

## c. POLYGAMY

**Collier v. Fox**

U.S. District Court, D. Montana, Billings Division, 2018.  
[2018 WL 1247411](#).

■ TIMOTHY J. CAVAN, U.S. MAGISTRATE JUDGE.

**FINDINGS AND RECOMMENDATIONS . . .**

Plaintiffs Christine Collier, Vicki Collier, and Nathan Collier (the “Colliers”) bring this action against Tim Fox, in his official capacity as Attorney General of Montana; Steve Bullock, in his official capacity as Governor of Montana; Scott Twito, in his official capacity as Yellowstone County Attorney, and Terry Halpin, in her official capacity as Clerk of the Yellowstone County District Court.<sup>1</sup> As outlined below, the Colliers allege several claims against the Defendants under the First and Fourteenth Amendments to the United States Constitution.

...

**I. Pertinent Facts**

The parties generally agree upon the following pertinent facts. Nathan and Vicki were legally married in Dillon, South Carolina, on April 26, 2000. . . . Nathan also is in a committed romantic relationship with Christine, and they desire to legally marry. Vicki and Christine are aware of Nathan’s relationship with one another, and each consents to be married to Nathan simultaneously. The Colliers have “committed to raise, support, nurture, and care for one another’s children, including [Christine’s] children from a prior marriage.” The Colliers have parented their eight children jointly for several years. There is no evidence to suggest that either of Nathan’s romantic relationships—with Vicki or with Christine—involves dishonesty, coercion, fraud, abuse, or violence.

On June 30, 2015, Nathan and Christine went to the Yellowstone County Clerk of District Court Marriage License Division to apply for a marriage license; the application was denied. The Yellowstone County Attorney’s office subsequently sent a letter (the “Denial Letter” or “Letter”) to the Colliers on July 14, 2015, formally denying the request for a marriage license. The Denial Letter informed the Colliers that their request for a marriage license could not be granted because granting the license would place the Colliers in violation of Montana law, citing Mont. Code Ann. §§ 45–5–611 and 612. Those statutes respectively criminalize entering into multiple marriages, and marrying a person knowing that the person is married to another. Though the Denial Letter identifies Mont. Code Ann. §§ 45–5–611 and 612 as statutes that criminalize bigamy, the Denial Letter does not threaten prosecution of the Colliers.

The Colliers responded by bringing this action, challenging the validity of what they characterize as Montana’s anti-polygamy statutes.

...

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<sup>1</sup> The Court will use the shorthand “State Defendants” when referring to defendants Fox and Bullock, “County Defendants” when referring to defendants Twito and Halpin, and “Defendants” when referring to all defendants collectively.

## II. Parties' Arguments

...

### B. The Parties' Motions

The Colliers have filed a motion for summary judgment, generally arguing that Montana's criminal and civil anti-polygamy statutes are unconstitutional and violate their First and Fourteenth Amendments rights.

...

The State Defendants have also filed a Motion for Summary Judgment, arguing, *inter alia*, that the Colliers lack standing to challenge the anti-polygamy laws at issue. . . . The County Defendants have joined in the State Defendants' motion.

## III. Legal Standard

...

"Where the parties file cross-motions for summary judgment, the court must consider each party's evidence, regardless under which motion the evidence is offered." *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011). "It is well-settled in this circuit and others that the filing of cross-motions for summary judgment, both parties asserting that there are no uncontested issues of material fact, does not vitiate the court's responsibility to determine whether disputed issues of material fact are present. A summary judgment cannot be granted if a genuine issue as to any material fact exists." *U.S. v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978).

## IV. Analysis

### A. Standing

...

The case or controversy requirement of Article III of the United States Constitution limits federal court's subject matter jurisdiction by requiring that plaintiffs have standing and that claims be ripe for adjudication. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–1122 (9th Cir. 2010). . . . "Standing is a jurisdictional requirement, and a party invoking federal jurisdiction has the burden of establishing it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Further, standing is claim- and relief-specific, such that a plaintiff must establish Article III standing for each of her claims and for each form of relief sought." *In re Carrier IQ, Inc.*, 78 F.Supp.3d 1051, 1064–1065 (N.D. Cal. 2015) (quotations omitted) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

To establish standing, the Plaintiff must show three elements. First, the plaintiff must have "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not 'conjectural' or 'hypothetical'[" *Lujan*, 504 U.S. at 560 (internal citations omitted). Second, the plaintiffs must establish "a causal connection between the injury and the conduct complained of" by proving that their injury is fairly traceable to the challenged conduct of the defendant and not the result of an independent action of a third party not before the court. *Id.* Third, the plaintiffs must show that their injury will likely be redressed by a favorable decision. *Id.* at 561.

...

Before addressing the standing issue with respect to Nathan and Christine, the Court will dispense with the claims brought on behalf of Vicki. The Colliers do not identify any manner in which Vicki has suffered or could suffer an injury in fact based on any of Montana’s anti-polygamy laws. She and Nathan are legally married and have been married at all times material to this case. There is no evidence to suggest that Vicki is attempting to marry another person while she is married (Mont. Code Ann. § 45–5–611), or attempting to marry another person while knowing that person to be committing bigamy (Mont. Code Ann. § 45–5–612). Similarly, Vicki has not applied for and been denied any additional marriage license, or undertaken any other action that may implicate an anti-polygamy provision in any Montana civil statute.

The Colliers attempt to satisfy Vicki’s standing requirement by generally alleging that her “economic and familial interests” have been affected by Montana’s refusal to allow Nathan and Christine to marry. But the Colliers do not establish—or make any attempt to establish—that these ill-defined, nebulous “economic and familial interests” constitute legally protected interests, as required to find standing.

... Therefore, the Court finds that Vicki does not have standing, and recommends that summary judgment be granted in favor of Defendants as to all of Vicki’s claims.

The Court will now consider whether Nathan and Christine have standing, first with respect to the criminal bigamy laws and then with respect to any germane civil laws.

### 1. Montana’s Criminal Anti-Polygamy Statutes

The bulk of the Colliers’ claims are directed at Montana’s criminal anti-bigamy statutes, Mont. Code Ann. §§ 45–5–611 and 612, and the Colliers’ alleged fear of criminal prosecution under those statutes. As noted above, § 611 criminalizes marrying while still being married to another, providing in relevant part: “[a] person commits the offense of bigamy if, while married, the person knowingly contracts or purports to contract to another marriage. . . .” Section 612 criminalizes marrying a bigamist, and states in part: “[a] person commits the offense of marrying a bigamist if the person contracts or purports to contract a marriage with another knowing that the other is committing bigamy. . . .”

It is undisputed that the Colliers have never faced prosecution for violation of either statute. Accordingly, the Colliers are raising a “pre-enforcement challenge” to these statutes. In asserting pre-enforcement challenges to a statute, plaintiffs may meet constitutional standing requirements by demonstrating “a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.” *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). But when plaintiffs “do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, they do not allege a dispute susceptible to resolution by a federal court.” *Id.* at 298–299 (internal quotation omitted). Thus, despite the relaxed standing analysis for pre-enforcement challenges, “plaintiffs must still show an actual or imminent injury to a legally protected interest.” *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010). Neither the mere existence of a statute nor a generalized threat of prosecution is sufficient to satisfy plaintiffs’ obligation.

*Thomas v. Anchorage Equal Rights Commission.*, 220 F.3d 1134, 1139 (9th Cir. 2000).

The Court considers three factors in determining the genuineness of a claimed threat of prosecution: (a) whether the plaintiffs have articulated a concrete plan to violate the law in question; (b) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (c) the history of past prosecution or enforcement under the challenged statute. *Humanitarian L. Project v. U.S. Treas. Dept.*, 578 F.3d 1133, 1142 (9th Cir. 2009).

**a. Concrete Plan to Violate**

There is no dispute that Nathan and Christine are at least attempting to violate Mont. Code Ann. §§ 45–5–611 and 612. They claim to have entered into a marital contract, and evidence suggests that they generally refer to each other as husband and wife. They have also sought, albeit unsuccessfully, a state marriage license. It is less clear, however, whether Nathan and Christine have articulated anything that could be considered a “concrete plan to violate” Mont. Code Ann. §§ 45–5–611 or 612.

...

Nevertheless, . . . the Court will assume without deciding that Nathan and Christine can satisfy the first factor in determining the genuineness of a claimed threat of prosecution.

**b. Threat of Prosecution**

Though the Colliers generally allege that they “fear that the State will imminently enforce anti-polygamy criminal statutes” against them, they do not allege that they have ever been prosecuted under Montana’s criminal bigamy statutes, nor do they identify any specific threat of prosecution. The closest the Colliers come to identifying an actual threat of prosecution is their allegation that “Defendants enforced State anti-polygamy criminal statutes by using them to justify the State’s denial of a State-issued marriage license to Christine and Nathan Collier.” The Colliers are referring here to the Denial Letter, which specifically states that the Clerk’s Office was correct to deny the license because “while both of you are lawfully married to each other, you seek to engage in yet another state licensed marriage. That act, by either or both of you, would be considered bigamy in Montana.” This statement does not threaten prosecution. Instead, the Letter indicates a second marriage license could not be issued because, that would constitute a second state-sanctioned marriage, which would violate Montana’s bigamy statutes.

... The Colliers offer no other concrete examples or assertions of a specific threat or intent of Defendants to prosecute them under Montana’s bigamy statutes. In fact, the entity charged with enforcement of the bigamy laws—the State of Montana—has taken the position that the Colliers are not in violation of the laws. Accordingly, this factor weighs strongly against finding a genuine threat of prosecution.

**c. History of Enforcement**

The Colliers also are unable to present a history of enforcement. Despite their avowed “fear” of prosecution, the Colliers have not identified a single instance of bigamy prosecution in Montana. This lack of past prosecution under these statutes weighs heavily against finding the Colliers face a genuine threat of prosecution. The mere existence of the challenged statutes



is simply not enough to demonstrate the constitutionally required standing necessary to challenge these statutes. *See Thomas*, 220 F.3d at 1139.

#### **d. Conclusion**

Even after giving the Colliers the benefit of the substantial doubt that they have formulated a concrete plan to violate Mont. Code Ann. §§ 45–5–611 or 612, the Court finds that the Colliers have failed to demonstrate injury in fact because they have not shown a threat of prosecution or a history of enforcement, and therefore they do not have standing to challenge those criminal statutes. Accordingly, the Court recommends that summary judgment be granted in favor of Defendants with respect to the Colliers’ challenge to Mont. Code Ann. §§ 45–5–611 and-612.

### **2. Montana’s Civil Marriage Laws**

Although the Colliers repeatedly reference and challenge the criminal bigamy laws . . . , they do not explicitly reference any Montana civil statutes. Defendants, therefore, maintain that the Colliers’ challenge does not reach Montana’s civil marriage laws.

But in their Second Amended Complaint, the Colliers do generally allege that they seek “declaratory and injunctive relief against enforcement of Montana State’s laws banning . . . polygamy, and against Montana State unequal treatment of, and discrimination against, polygamous families.” They also request an order requiring Defendants to “issue a State-issued marriage license to Christine and Nathan Collier”; and they further specify in their summary judgment motion that the Defendants have deprived them of their rights by “denying them equal access to the benefits and responsibilities of government-granted licensure,” citing Mont. Code Ann. § 40–1–401(1)(a). That section is a civil marriage statute which defines “prohibited marriages” to include “a marriage entered into prior to the dissolution of an earlier marriage of one of the parties. . . .” Therefore, the Court finds that the Colliers have sufficiently raised a challenge to at least that civil marriage statute.

The standing analysis differs with respect to that claim, since the Colliers are not asserting a pre-enforcement challenge. The undisputed facts demonstrate that Nathan and Christine applied for a Montana marriage license with the Yellowstone County Clerk of District Court Marriage License Division and were denied due to Nathan’s existing marriage to Vicki. That action is sufficient to confer standing upon them to challenge Montana’s civil statute prohibiting plural marriage. It constitutes an alleged invasion of a legally protected interest (the right to marry) which is (a) concrete and particularized and (b) actual or imminent; (2) the injury would be fairly traceable Defendants’ refusal to grant the marriage license; and (3) a favorable decision from the Court could resolve their injury by ordering Defendants to provide a marriage license.

Accordingly, the Court finds that the denial of Nathan’s and Christine’s marriage license application provides Nathan and Christine with standing to challenge Mont. Code Ann. § 40–1–401(1)(a).

### **B. Ripeness**

Defendants also argue, however, that the Colliers’ claims are not ripe. “The [ ] doctrine of ripeness is a means by which federal courts may dispose of matters that are premature for review because the plaintiff’s purported injury is too speculative and may never occur.” *Chandler v. State Farm Mut.*

*Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010.) Defendants limit their ripeness discussion to the Colliers' challenge to the criminal bigamy statutes, and they are correct that the Colliers' claims that they have been injured by those statutes is not ripe. However, the Colliers' challenge to Mont. Code Ann. § 40-1-401(1)(a) is ripe because Nathan and Christine already have applied for and been denied a Montana civil marriage license.

### C. Constitutional Claims

The question of whether state statutes prohibiting polygamy violate the United States Constitution was answered over a century ago in *Reynolds v. U.S.*, 98 U.S. 145 (1878). *Reynolds* included a constitutional challenge to a federal statute which prohibited bigamy in a territory or other place within the exclusive jurisdiction of the United States. The Supreme Court upheld the validity of that statute, finding "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." 98 U.S. 145, 166 (1879). The Court further found that the statute was "constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control." *Id.*

Although *Reynolds* is almost 140 years old, it is not antiquated and is still valid, binding authority. Several recent decisions have relied upon *Reynolds* to uphold the constitutionality of anti-polygamy statutes.

The Colliers point out Chief Justice Roberts' recent dissent in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in which the Court held that same-sex couples have a constitutionally protected right to marry. In his dissent, the Chief Justice commented that "[i]t is striking how much the majority's reasoning [in support of a fundamental right to same-sex marriage] would apply with equal force to the claim of a fundamental right to plural marriage." *Id.* at 2621 (Roberts, C.J. dissenting). Chief Justice Roberts also added, however, that he did "not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis." *Id.*

Regardless, [Chief] Justice Roberts' dissent is not binding precedent, and it certainly cannot be said to have overruled *Reynolds*. Mindful of this Court's place in the federal judicial hierarchy, it is bound to follow *Reynolds* unless and until the Supreme Court decides to revisit the issue. Supreme Court "decisions remain binding precedent until [that Court sees] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. U.S.*, 524 U.S. 236, 252-253 (1998).

To the extent that the Colliers allege Montana's anti-polygamy laws have infringed upon rights other than their claimed fundamental right to plural marriage—such as, *inter alia*, the rights to cohabit, intermingle finances, raise children together, etc. (see Doc. 80 at 13)—the Court does not find these challenges to be persuasive. First, the Colliers have not presented any evidence that Defendants have prevented them from exercising any of these alleged fundamental rights; on the contrary, the evidence suggests that the Colliers already are engaging in all of the conduct they discuss, with the sole exception being their desire to legally marry. Given Defendants' position that the Colliers are not violating any laws in spite of the fact that they otherwise live together as a family, with all that entails, the Court is not persuaded that Montana's anti-polygamy laws infringe upon any

fundamental right incidental to marriage. Rather, Mont. Code Ann. § 40–1–401(1)(a) prohibits Nathan and Christine from procuring a legal marriage license because Nathan is already married to Vicki. Until the Supreme Court overrules *Reynolds*, that prohibition, in and of itself, is not unconstitutional.

For the foregoing reasons, the Court recommends that summary judgment be granted in favor of Defendants with respect to the Colliers’ constitutional challenge to Mont. Code Ann. § 40–1–401(1)(a).

#### D. 42 U.S.C. § 1983

Finally, the Colliers seek relief under 42 U.S.C. § 1983, which provides a civil right of action to redress the deprivation of rights under color of state law. . . . As discussed . . . above, there is no constitutional right to multiple marriages, and the Colliers therefore cannot raise a prima facie claim under § 1983 for any deprivation thereof. Since the Colliers have not established that they have been deprived of any other constitutional rights, their § 1983 claim must fail.

Accordingly, the Court recommends that summary judgment be granted in favor of Defendants with respect to the Colliers’ claim under 42 U.S.C. § 1983.

...

#### V. Conclusion

Based on the foregoing, **IT IS RECOMMENDED** that:

- (1) Defendants’ Motion for Summary Judgment—Fed. R. Civ. P. 56 (Doc. 67) be **GRANTED**;
- (2) the Colliers’ Motion for Summary Judgment (Doc. 75) be **DENIED**[.]

...

#### NOTES

1. On March 9, 2018, U.S. District Judge Susan P. Watters adopted in full the findings and recommendations made by U.S. Magistrate Judge Cavan. *Collier v. Fox*, CV 15–83–BLG–SPW, 2018 WL 1247388 (D. Mont. Mar. 9, 2018).

2. Are you persuaded by Magistrate Judge Cavan’s discussion of *Obergefell v. Hodges*? Do you agree with the sense in his opinion that *Obergefell* has not undermined *Reynolds v. United States*? If the constitutionality of bans on plural marriage turned singularly on *Obergefell*, what result should have obtained in *Collier v. Fox*? Should it have been decided as it was—or differently? The argument that Chief Justice Roberts carefully makes in *Obergefell* dissent is clearly relevant to the discussion as a reflection on the meaning and implication of the *Obergefell* majority opinion, and not only as authority in its own right. Without “equat[ing] marriage between same-sex couples with plural marriages in all respect,” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting), Chief Justice Roberts’s dissent observes that “[i]t is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.” *Id.* at 2621. The dissent continues:

If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise “suffer the stigma of knowing their families are somehow lesser,” why wouldn’t the same reasoning

apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

*Id.* at 2621–22. Do you agree or disagree? Why? For further discussion, see Jack B. Harrison, *On Marriage and Polygamy*, 42 OHIO N.U. L. REV. 89 (2015); John O. Hayward, *Plural Marriage: When One Spouse is Not Enough*, U. PA. J. CON. L. ONLINE (2017); Renuka Santhanagopalan, *Ménage à What? The Fundamental Right to Plural Marriage*, 24 WM. & MARY J. WOMEN & L. 415 (2018). Suppose that polygamy has been decriminalized. How would you handle issues that arise in polygamous relationships respecting children? Is it obvious that it would only be biological parents who should be entitled to assert their rights? An important set of thoughts on “marital multiplicity” as it relates to children is found in Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2025–31 (2010).

3. Magistrate Judge Cavan’s opinion found that the plaintiffs in the case faced no “threat of prosecution” and had established no “history of enforcement” of the state’s criminal bigamy laws. The opinion thus effectively suggested that, in Montana anyway, the criminal bar on bigamy had fallen into a state of desuetude, even if the civil prohibitions against plural marriages remained actively enforced. A separate, but related issue, is how vibrant social norms disapproving of plural marriages are—whether in Montana or elsewhere. Are laws against polygamy still backed by the force of broad-based social disapproval of the practice? Consider the following cases:

- In May, 2001, Tom Green became the first defendant charged with bigamy in Utah in almost fifty years. He was convicted of four counts of bigamy and one count of criminal nonsupport. Green lived with five wives and twenty-five children, and publicized his arrangement in the media, stating that he chose to obey God rather than the law. Kevin Cantera & Michael Vigh, *Green Guilty on All Counts; Jury Takes Less Than Three Hours to Reach Verdict*, SALT LAKE TRIB., May 19, 2001, at A1. Green appealed his conviction but lost. The Supreme Court declined to take up his claim that his religious freedom was being denied. In 2002, Green was charged with the additional count of rape for impregnating one of his wives at the age of 13, convicted, and sentenced to from five years to life imprisonment (the minimum possible sentence). See Michael Janofsky, *Mormon Leader Is Survived by 33 Sons and a Void*, N.Y. TIMES, Sep. 15, 2002, at 22.
- In 2007, Warren Jeffs was convicted by a jury as an accomplice to the rape of a fourteen-year-old girl. He was sentenced to two consecutive sentences of five years to life imprisonment. Citing deficiencies in the trial court’s jury instructions, the Utah Supreme Court reversed and remanded for a new trial. *State v. Jeffs*, 243 P.3d 1250, 1254 (Utah 2010). See also Dan Frosch, *Polygamist’s Rape Convictions Are Overturned in Utah*, N.Y. TIMES, July 28, 2010, at A11. In August 2011, in a different proceeding, Jeffs was convicted “for sexually assaulting an underage follower he took as a bride in what his church deemed a ‘spiritual marriage.’” *Texas: Polygamist Leader Gets Life Sentence*, N.Y. TIMES, Aug. 10, 2011, at A15. The jury also convicted Jeffs of a separate count of sexual assault of a different fifteen-year-old girl and sentenced him to twenty years imprisonment in addition to his life sentence. *Id.*

- In proceedings challenged in *In re Steed*, Texas officials removed “a number of children . . . from their homes on an emergency basis from the Yearning for Zion Ranch outside of Eldorado, Texas.” *In re Steed*, 2008 WL 2132014, at \*1 (Tex. Ct. App. 2008). “The ranch is associated with the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS), and a number of families live there.” *Id.* Texas officials justified their unusual actions partly on the grounds that “the ‘pervasive belief system’ of the FLDS” involves “groom[ing]” “the male children . . . to be perpetrators of sexual abuse,” while “the girls are raised to be victims of sexual abuse.” *Id.* at \*2. The officials also justified their actions in part on the grounds of “a pattern of girls reporting that ‘there was no age too young for girls to be married’”; that “[t]wenty females living at the ranch had become pregnant between the ages of thirteen and seventeen[.]” *Id.* at \*1. While the removal of the children from the Yearning for Zion Ranch was ultimately found by the Texas courts to be an act of legal overreaching, *In re Steed* involved the regulation of a polygamist community.

What might these cases be taken to indicate about not simply legal action against, but also about social disapproval of, polygamy? Are there counter-examples you can think of? What about the plural relationships you encountered in Chapter 1? Recalling those accounts, can you confidently say that social norms disapproving of polygamy remain broad and run deep? What additional indications may safely be gleaned from small-screen programs like *Big Love* or *Sister Wives*? Have social norms disapproving of polygamy narrowed so as in certain ways to overlap with disapproval of underage marriage and sexuality? How might these questions be relevant to an assessment of how the law should treat polygamy? To an assessment of laws against the practice as a constitutional matter?

4. What do you understand the strongest reasons for banning polygamy to be? Protecting traditional marriage? Protecting marriage as now defined in light of *Obergefell*? Safeguarding the general health, safety, and morals of the public? Protecting, more specifically, women? Children? Both? Something else? How might you differentiate polygamy, whether in the form of polygyny (more than one wife) or polyandry (more than one husband), from “sequential polygamy” (having more than one spouse during a lifetime), which, of course, has been and is common among American women and men?

#### d. OTHER RESTRICTIONS ON MARRYING (OR NOT MARRYING)

Mental incapacity remains a widely accepted restriction on who may marry. As of 2018, forty-eight states and the District of Columbia restrict marriage by people with cognitive disabilities under different circumstances, although cruder terms have not been entirely abandoned.<sup>3</sup> In twelve states, such marriages are prohibited.<sup>4</sup> In twenty-seven states and the District of Columbia, they are voidable if a court finds that one of the parties was either a person living with a developmental disability or lacked mental capacity to contract to marry.<sup>5</sup> Eight states require consent of the parties, while

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<sup>3</sup> Lindsey Dennis, et al., *Marriage and Divorce*, 19 GEO. J. GENDER & L. 397, 424–41 app A (2018); see also, e.g., TENN. CODE ANN. § 36–3–109 (2011) (no marriage shall be granted to “drunk, insane, or an imbecile”).

<sup>4</sup> See Dennis, *supra* note 3, at 424–41 app.A.

<sup>5</sup> *Id.*

Minnesota requires the consent of the state.<sup>6</sup> The legal standards for defining such disabilities, legal processes for voiding marriages, and the standing of particular individuals to seek to void a marriage (the person with intellectual disabilities, their guardian, or their spouse usually) vary by state.<sup>7</sup> Could similar restrictions be placed on individuals with serious physical disabilities? Those with genetic disorders? With drug or alcohol dependency issues?

## NOTES

1. Is it surprising to you that not all states have restrictions involving mental capacity limitations in relation to the decision about whether and whom to marry? If marriage is understood to be a civil contract, how might you explain the lack of capacity restrictions in jurisdictions without them?
2. Lord Devlin, an English judge, observed that although it makes little sense to force partners who believe their marriage is over to stay together, it might be wise to limit the right to marry a second (or third) time. Specifically, he suggested that when a marriage has failed, society should “claim the right to demand proofs of sincerity before it licenses another.” PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 79 (1965). Do you agree? Would such a restriction be constitutional?
3. Private restraints on marriage in wills or contracts have been held to be illegal in some states, *see, e.g.*, CAL. CIV. CODE § 1669 (“Every contract in restraint of the marriage of any person, other than a minor, is void”), and, at least in theory, are disfavored by courts as being against public policy. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 29, cmt *j* (AM. LAW INST. 2003) (“*j.* Family relationships. A trust or a condition or other provision in the terms of a trust is ordinarily . . . invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship. . . . In addition, a trust provision is ordinarily invalid if it tends seriously to interfere with or inhibit the exercise of a beneficiary’s freedom to obtain a divorce . . . or the exercise of the freedom to marry . . . by limiting the beneficiary’s selection of a spouse.”). Partial restraints are generally permitted so long as they are not “unreasonable.” *See, e.g.*, 52 AM. JUR. 2D MARRIAGE § 117 (2018) (“Restraints on first marriage—Partial restraints. Partial restraints on marriage—that is, restraints designed not to bar marriage completely, but to narrow the range of marriage possibilities by imposing certain conditions for marriage beyond the basic requirements of the law—are valid unless unreasonable.”); *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955) (upholding will provision requiring children to marry a person of the “Hebrew faith”); *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825 (Ohio Com. Pl. 1974) (accord); *but see In re Estate of Feinberg*, 891 N.E.2d 549, 552 (Ill. App. Ct. 2008) (striking such a provision down as violative of public policy because it “seriously interferes with and limits the right of individuals to marry a person of their own choosing”), *rev’d on other grounds*, 919 N.E.2d 888, 909 (Ill. 2009). *See also* Jeremy Macklin, *The Puzzling Case of Max Feinberg: An Analysis of Conditions in Partial Restraint of Marriage*, 43 J. MARSHALL L. REV. 265 (2009).
4. This Chapter has focused primarily on state restrictions on who may marry. It is only fair to note that state laws also sometimes pressure unwilling parties

<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g.*, Brooke Pietrzak, *Marriage Laws and People With Mental Retardation: A Continuing History of Second Class Treatment*, 17 DEV. MENTAL HEALTH L. 1 (1997); Jonathan Matloff, *Idiocy, Lunacy, and Matrimony: Exploring Constitutional Challenges to State Restrictions on Marriage of Persons with Mental Disabilities*, 17 AM. U. J. GENDER SOC. POL’Y & L. 497 (2009).

to marry. It is clear that private citizens cannot force a marriage. Shotgun weddings—in the old image, a weddings that take place at the point of a father’s shotgun—have long been held voidable for want of consent. *See, e.g.*, *Burney v. State*, 13 S.W.2d 375 (Tex. Crim. App. 1929). *See generally* Walter Wadlington, *Shotgun Marriage by Operation of Law*, 1 GA. L. REV. 183 (1967). But by making marriage a defense to prosecutions for fornication, *see, e.g.*, IDAHO CODE ANN. § 18–6603; MASS. GEN. LAWS ch. 272 § 18; MINN. STAT. § 609.34; S.C. CODE ANN. § 16–15–60; UTAH CODE ANN. § 76–6–104. or rape, *see, e.g.*, Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens By Their Statutory Rapists*, 61 ALB. L. REV. 237 (1997); Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Law and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 84 UMKC L. REV. 343, 345, 381–86 (2017) (arguing for the removal of “statutory allowances for underage marriage and the spousal defense to statutory rape”), state policy has at times accomplished what a shotgun could not. As Professor Wadlington has observed, such decisions are conceptually at odds with a growing recognition in divorce proceedings that a marriage ended in fact should be terminable at law. Wadlington, *supra*, at 204.

Even recognizing shotgun weddings are generally a thing of the past, the problem of forced marriage is not strictly historical. As recently as 2014, the American Bar Association House of Delegates found good reason to adopt a formal Resolution that took the position that forced marriage is “a fundamental human rights violation and a form of family violence and of violence against women.” AMERICAN BAR ASS’N COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, RESOLUTION AND REPORT 112B 1 (May 6, 2014). The Resolution urged “federal, state, territorial, local and tribal governments to amend existing laws, to prevent forced marriages in the United States or involving U.S. citizens or residents and to protect and support individuals threatened by forced marriage[.]” *Id.* Recognizing this is not only a governmental problem, the Resolution further provided that “the American Bar Association urges governments to collaborate with legal, social services and advocacy organizations with expertise in forced marriage to develop victim-centered legal remedies, and to promote training for judges, prosecutors, law enforcement, child protection authorities, victim-witness advocates, and attorneys.” *Id.* at 11.

A Report submitted by Angela Vigil, Chair of the ABA Commission on Domestic & Sexual Violence, that accompanies the Resolution, notes the “significant” scope of the forced-marriage problem in the United States. According to the Report, “[t]housands of individuals across the United States may be threatened by forced marriage every year.” *Id.* at 3. As key authority for this claim, the Report relies on a 2011 national survey by “the Tahirih Justice Center, a national legal services and advocacy organization serving immigrant women survivors of violence.” *Id.* The Tahirih Survey is quoted by the Report as indicating that “[o]ver 500 respondents . . . from 47 states reported encountering as many as 3,000 cases of known or suspected forced marriage in the prior two years.” *Id.* The Report underscored as a “striking finding of the Tahirih Survey” “the incredibly diverse impact of forced marriage.” *Id.* Respondents reported cases among families from at least 56 countries of origin (including India, Pakistan, Bangladesh Yemen, the Philippines, Afghanistan, Somalia, and Mexico) and among families from varied religious backgrounds (including Muslim, Christian, Hindu, Sikh, Buddhist, Jewish and others).” *Id.* Additionally, “[t]he Tahirih Survey also confirmed that forced marriages affects both genders and all ages.” *Id.* at 4.

The problem of forced marriage being what it is, the Report, like the Resolution, took the position that “[s]tate-level responses to forced marriage are limited, and while existing laws can be tools to prevent forced marriages to

protect victims in some cases, they are not widely used or may offer inadequate protections.” *Id.* at 11. As examples, the Report contends that age-of-consent laws, while useful and perhaps a tool to combat the problem, may also “conceal situations in which the underage parties themselves do not consent.” *Id.* at 5. Likewise, “[s]tate laws and processes regarding terminating or annulling/voiding a marriage also may not appreciate the particular circumstances of forced marriage victims.” *Id.* Among the recommendations that the Report seems to suggest as areas for law reform are criminal and civil rules designed around the needs and experiences of what the Report sees as victims of forced marriage. Criminal rules could come in the form of laws specifically criminalizing forced marriage. The Report also contemplates the expansion of state domestic violence rules particularly in the civil protection order context, so as to “encompass the dynamics of forced marriage,” *id.* at 6, including harms of it that may not be imminent or that may be “hard for victims to show, especially if they are being kept deliberately in the dark as to their family’s future plans.” *Id.* at 6. The Report also contemplates federal law reform efforts “particularly in cases in which women and girls have been taken out of the United State to force them into marriage abroad.” *Id.* at 7. For some additional discussion of the 2014 Resolution and Report, and of the problem of and responses to forced marriages involving children, see Loretta M. Kopelman, *The Forced Marriage of Minors, A Neglected Form of Child Abuse*, 44 J.L., MED. & ETHICS 173 (2016).

5. Breach of promise actions once forced people into unwanted matrimony, but today they are no longer much of a threat.

The earliest breach of promise to marry suits were based on tort principles. The plaintiff sued to recover money paid in reliance on the (false) promise of marriage. Thus, in 1452 in England, Margaret and Alice Gardyner sued John Keche to recover the 22 marks they paid him to marry Alice. Sometime between 1504 and 1515, John James, a rebuffed law student, sought to recover in a slightly more ambitious suit not only the tokens of affection he had bestowed on Elizabeth Morgan, but also the expenses he had incurred in going to visit her. *Some Early Breach of Promise Cases*, 3 THE GREEN BAG 3, 5 (1891).

By the seventeenth century, the suits began to resemble contract actions, with breach of promise the injury, and only the tort measure of damages retained to indicate the earlier history. See *Stretch v. Parker*, Mich. 12 Car. Rot. 21 (1639); *Holcroft v. Dickenson*, Cart. 233, 124 Eng. Rep. 933 (C.P. 1672). Professor Homer Clark has suggested that this change arose because marriage in seventeenth-century England was largely a property transaction, entered into for material reasons as much as for sentimental ones. Breach of promise to marry thus was recognized as a legal injury at roughly the same time as breach of commercial contracts. HOMER CLARK, DOMESTIC RELATIONS § 1.1 (1968).

The American colonies permitted recovery for breach of promise to marry as early as 1633, when a colonial court fined Joyce Bradwicke 20 shillings for not performing her promise to marry Alex Becke. RECORD OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASS. BAY 1630–1692, at 32 (John Noble ed., 1904). In 1661, John Sutton won 15 pounds plus costs when Mary Russell became engaged to another, and Richard Silvester collected 20 pounds for his daughter when John Palmer failed to marry her as promised. VII PLYMOUTH COLONY COURT RECORDS, 1636–92, JUDICIAL ACTS 101 (Nathaniel Shurtleff ed., 1857).



By 2018, twenty-eight states and the District of Columbia had abolished the action of breach of promise to marry,<sup>8</sup> while several others had limited its use.<sup>9</sup> More significantly, in the twenty-two jurisdictions where such actions are still possible, only a handful have been reported in the last thirty-or-forty-odd years. *See, e.g.*, *Yang v. Lee*, 163 F.Supp.2d 554 (D.Md.2001); *Finch v. Dasgupta*, 555 S.E.2d 22 (Ga. Ct. App. 2001); *Phillips v. Blankenship*, 554 S.E.2d 231 (Ga. Ct. App. 2001); *Schwalb v. Wood*, 680 N.E.2d 773 (Ill. App. Ct. 1997); *Wagener v. Papie*, 609 N.E.2d 951 (Ill. App. Ct. 1993); *Sanders v. Gore*, 676 So.2d 866 (La. Ct. App. 1996); *Menhusen v. Dake*, 334 N.W.2d 435 (Neb. 1983). For some general discussion, see Kelsey M. May, Comment, *Bachelors Beware: The Current Validity and Future Feasibility of a Cause of Action for Breach of Promise to Marry*, 45 TULSA L. REV. 331 (2009).

Breach of promise actions, in short, are almost extinct. Actions for damage to reputation or lost prospects are rarely successful, moreover, probably as a result of both the improving opportunities for rejected women, and the increase in divorce (and remarriage). With divorce such a likely outcome, breach of promise is generally viewed as a minor injury. *See generally* Jeffrey D. Kobar, Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770 (1985).

What remain are suits to recover gifts or money given in contemplation of the marriage. Plaintiffs have recovered on a number of legal theories ranging from conditional gift, *see, e.g.*, *Glass v. Wiltz*, 551 So. 2d 32 (La. App. 1989); *Lindh v. Surman*, 702 A.2d 560 (Pa. Super. 1997), and fraud, *see, e.g.*, *Pine v. Price*, 2002 WL 31168905, to unjust enrichment. *See, e.g.*, *Dixon v. Smith*, 695 N.E.2d 284 (3d 1997). A few states even regulate the return of engagement gifts by statute. *See, e.g.*, Cal. Civ. Code § 1590; N.Y. CLS CIV. RTS. L. § 80–b.

## C. RESTRICTIONS ON THE PROCEDURE FOR MARRYING

### Rappaport v. Katz

United States District Court, Southern District of New York, 1974.

380 F.Supp. 808.

#### ■ POLLACK, DISTRICT JUDGE.

This is an attempted federal suit against the City Clerk of the City of New York, cast in the mold of a suit for violation of Civil Rights, 42 U.S.C. § 1983[,] seeking an injunction and damages. Both sides have moved for summary judgment. . . .

The plaintiffs are two couples, one having been married by the defendant City Clerk on November 2, 1973 and one who has been planning marriage and is looking forward to a ceremony to be performed by the City Clerk. They complain that they were subjected (or are to be subjected) to dress guidelines promulgated by the City Clerk to be observed for wedding ceremonies at City Hall, including the exchange of a ring or rings. These

<sup>8</sup> Alabama, Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Indiana, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

<sup>9</sup> *See, e.g.*, MD. FAMILY LAW CODE ANN. § 3–102 (limiting use of breach of promise to marry actions to pregnant women who have corroboration for their claim); MISS. CODE ANN. § 15–3–1 (promise must be in writing); *Menhusen v. Dake*, 334 N.W.2d 435, 437 (Neb. 1983) (extinguishing ability to bring claim if parties cohabitate prior to fulfillment of promise).

guidelines are said to deprive them of due process of law in violation of their constitutional rights. . . .

The questioned guidelines are customarily handed to persons when they receive their marriage licenses if they request the City Clerk or his deputy to officiate at the wedding. Among other things the guidelines say that:

(9) Every couple should be properly attired, the bride must wear a dress or skirt and blouse—no slacks—and the groom must wear a coat and tie.

(10) One or two rings must be exchanged.

An office policy accepts in lieu of a tie, a turtleneck shirt or other shirts or jackets that do not require a tie. The ring requirement may be satisfied by the exchange of any other tangible item; the plaintiffs are not pressing any claim herein in regard to this requirement or its substitutes.

Plaintiff Rappaport wished to wear pants to her wedding but was told to present herself in a skirt. She did, but was unhappy that she did not wear her green velvet pants suit for her wedding. Plaintiff Dibbell states that she wishes to wear pants to her wedding, and she and her intended spouse say they do not wish to exchange either one or two rings as part of their wedding ceremony. The couple to be married are a free lance journalist and a music critic. The bride-to-be says: "I find dressing in pants . . . protects me from much of the sex-role stereotyping to which women continue to be subjected both professionally and socially." The groom-to-be says: "Because marriage has traditionally been an unequal yoke, it is essential to me that my marriage ceremony emphasize the equality of the partnership. For this reason, our dress at this ceremony must be virtually identical." The plaintiffs charge that defendant's guidelines put them to the choice between their statutory right to be married by the City Clerk and their fundamental right to marry free of unwarranted governmental intrusion on their privacy and with free expression.

. . .

The ruling herein, dismissing this suit, is not based upon or any reflection upon the merit of this complaint or the alleged justification for such guidelines and their relation to the statutory command to the Clerk—those have not been considered. While federal courts have accepted the case of a policeman's beard because "choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation," *Dwen v. Barry*, 483 F.2d 1126, 1130 (2d Cir. 1973), it does not seem to this Court that the institutional cases, the school and police cases, reach to the extent of federal cognizance of marriage decorum in City halls.

The threshold question here presented and decided is not the merit of the clothes guideline, but whether the federal courts should supervise marriage forms and procedures in City Clerk's offices. A line for acceptable issues must be drawn somewhere. The defendant's is a locally prescribed and directed function in an area fundamentally of state concern. Plaintiffs concede that some decorum is appropriate but draw the line at skirts, an accoutrement of diminishing use for many. *Non constat*, the forms and the degree of decorum at weddings in the City Clerk's office do not sufficiently justify provoking a federal-state conflict. Federal judges have too much to do to become involved in this type of dispute which is best and most

appropriately resolved by the State of New York and the New York City Council to whom the defendant is responsible. This is a class of case where, certainly, “the state tribunals will afford full justice, subject, of course, to Supreme Court review.” H.J. Friendly, *Federal Jurisdiction: A General View* (1973) p. 95.

Complaint dismissed.

## NOTES

1. “The *Rappaport* case was appealed to the Second Circuit, but before the appeal was perfected, Herman Katz was indicted for padding the payroll. (The indictment was dismissed last week because the statute of limitations had run). The new City Clerk was more reasonable and the case was settled by stipulation. The new regulations suggest, but specifically do not require, any particular form of dress for marrying couples, and the exchange of rings requirement has been dropped.” Letter from Eve Cary, attorney for the plaintiffs (Feb. 24, 1976).

2. How important are the legal preliminaries to the celebration of a marriage? Back in 1976, Professor Mary Ann Glendon wrote an important article on the subject suggesting not very. Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976). Her review of the situation led her to conclude that “it is not too much of an exaggeration to say that the present legal regulation of marriage in the United States is already just a matter of licensing and registration.” *Id.* at 681. For some perspective on the extent to which that observation still holds, consider *Chaney v. Netterstrom*, 229 Cal.Rptr.3d 860 (Ct. App. 2018) (finding that the failure to return a signed, confidential marriage license to county after solemnization ceremony did not invalidate marriage); *In re Cantarella*, 119 Cal.Rptr.3d 829, 833 (Cal. Ct. App. 2011) (declaring the failure of a couple to register their marriage after their 1991 wedding insufficient to find the marriage voidable or void, and contrasting the importance of licensing and solemnization with the relative insignificance of registering a marriage, which, the court said, does “little to ensure the parties . . . validly consented to marriage, but rather serve[s] a record keeping function,” hence is insufficient to negate the solemnized union); see also *In re Farraj*, 900 N.Y.S.2d 340 (N.Y. App. Div. 2010) (holding that because the parties had capacity to marry, celebrated a religious marriage, and were domiciled throughout their marriage in New York, their marriage was valid under New York law despite the failure ever to obtain a marriage license in New Jersey, where the couple held their Islamic wedding ceremony). *But see Cohen v. Shushan*, 212 So.3d 1113, 1123 (Fla. Dist. Ct. App. 2017) (finding, in a collateral proceeding under Florida law, that the marriage at issue in the case was not valid under Israeli law because it “was not entered into through any recognized religious authority”); *Betemariam v. Said*, 48 So. 3d 121 (Fla. Dist. Ct. App. 2010) (affirming a Florida trial court decision holding a man and woman were never legally married, hence that the woman’s divorce petition should be denied, because they never obtained a valid marriage license or filed a marriage certificate with any clerk of court in Virginia, where their Islamic wedding ceremony was celebrated); *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. Ct. App. 2011) (declaring no valid legal marriage where the parties “knowingly and intentionally evaded and disregarded statutory mandates for establishing a legally valid civil marriage, particularly including their duty to . . . obtain a license to be civilly married within Kentucky” before the religious ceremony marrying them occurred); *Hasna J. v. David N.*, 39 N.Y.S.3d 701 (Sup. Ct. 2016) (declaring there was no valid marriage because parties had no “justified expectation” of a valid one). In your opinion, how important should the legal preliminaries to the celebration of a marriage be? Why?

3. Contrary to popular belief, the captain of a ship has no authority to marry a couple. Marriages performed on the high seas have been recognized, but only if the law of the state governing the marriage recognizes common law marriages. The real issue, therefore, is what state law governs. Courts have looked to the domicile of either the ship owner, *Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460 (1929), or the parties, *Norman v. Norman*, 121 Cal. 620, 54 P. 143 (1898). Probably the best explanation of these seemingly disparate rulings is that the courts tend to bend over backwards to sustain such marriages if possible. Comment, *Law Governing Marriages on the High Seas*, 22 CAL. L. REV. 661 (1934). The exception to this pattern involves situations in which a couple attempts to circumvent the law of their domicile by marrying on the high seas, as was the case in *Norman*.

### Jones v. Perry

U.S. District Court, E.D. Kentucky, October 18, 2016.  
[215 F.Supp.3d 563.](#)

■ GREGORY F. VAN TATENHOVE, U.S. DISTRICT JUDGE.

#### OPINION & ORDER

Bradley Jones and Kathryn Brooke Sauer simply want to get married. Defendant Sue Carole Perry, the Shelby County Clerk, refuses to issue them a marriage license. She insists that Kentucky law prohibits her from doing so unless both Jones and Sauer physically appear at the clerk's office to apply for a license. Sauer happens to be a prisoner at the Kentucky Correctional Institution for Women, so she cannot travel to the clerk's office for this purpose.

Although Perry believes that Kentucky law compels her to prevent Jones and Sauer from exercising their fundamental right to marry, the relevant statutes tell a different story. In fact, these statutes make no mention of Perry's in-person requirement, nor do they otherwise discuss the significance of a marriage applicant's presence at the clerk's office. The blanket in-person requirement is a contrivance of Perry and other government officials of this Commonwealth. It is also unconstitutional. For that reason, the Court will now permanently enjoin Perry from enforcing this requirement against Jones in the future.

#### I

Jones and Sauer were only teenagers when they first met at Westport Middle School in 1994. They dated for about a month, after which Sauer moved away from Louisville with her family. Jones never forgot about her. He spent a lot of time "in and out of juvenile institutions and prison for a variety of non-violent charges" over the next ten years, and he and Sauer lost touch. When he finally exited the prison system, Jones began looking for her. . . . Years passed without any luck. Then, in 2014, he ran into an old middle school classmate who was still friends with Sauer. She told him that Sauer had experienced her own share of legal trouble over the years, and that she was currently serving a long-term prison sentence.

Given his history, Jones "understood how much it means to an incarcerated person to talk to people on the outside." He and Sauer began exchanging letters and talking on the phone. What started "as a rekindled friendship eventually led to a rekindled romantic relationship." Jones then obtained approval to visit her at the Kentucky Correctional Institution for

Women (“KCIW”). At their first in-person encounter since middle school, he proposed marriage. She said yes. He has continued to visit her “twice a week nearly every week since then.”

Sauer is not eligible for parole until June of 2026. Because of his religious beliefs, Jones does not believe he can “or should wait until then to solidify their bond before God and the Commonwealth of Kentucky.” But state officials have consistently thwarted the couple’s attempts to marry. Jones reports that he has contacted “numerous county clerks” throughout the Commonwealth and “not one [will] agree to grant [the couple] a marriage license.”

One of these clerks is Defendant Sue Carole Perry. She is the clerk of Shelby County, Kentucky, where KCIW is located. When Jones sought a marriage license from Perry in July 2016, she told him that “her office interprets Kentucky law as saying both parties must be present to issue a marriage license.” Jones informed her that his fiancée could not appear at the clerk’s office because she was in prison, “but [Perry] still refused to issue a license.” Prison officials at KCIW also offered no help; in a letter sent to Jones that same month, Warden Janet Conover informed him that she had “no objection to the marriage,” but that “both parties must be present [at the clerk’s office] to obtain a license and [the prison does] not transport inmates for this reason.”

Jones later asked Perry to identify what “Kentucky law” prevented her from issuing the couple a license. Rather than cite a Kentucky statute, Perry supplied a memo that she received from the Kentucky Department for Libraries & Archives (“KDLA”) in 2008. This memo noted that marriage license applications have “signature places for both the bride and groom.” And because KRS § 402.110 states that clerks must “see to it that every blank space required to be filled by the applicant is so filled before delivering” a marriage license, the KDLA determined that “the county clerk in each county must have both parties sign the application and both must be present at that time.” The department also claimed to have reached this conclusion “after consulting with” Kentucky’s Attorney General.

In 2009, however, the Office of the Attorney General (“OAG”) expressed a very different opinion. The OAG issued a letter in response to a question from the Education and Workforce Development Cabinet (which houses the KDLA) about “the inability of incarcerated persons to obtain a marriage license because they cannot present themselves to the county clerk.” The office declined to issue a formal opinion “because litigation [was] being contemplated,” but did note that the in-person requirement likely interfered with a prisoner’s fundamental right to marry. The OAG affirmed that “public officials cannot sit on their hands and frustrate an incarcerated person’s right to marry,” and advised the state to adopt “procedures . . . to assist incarcerated persons in exercising” that right.

Seven years after the OAG warned public officials not “to sit on their hands and frustrate an incarcerated person’s right to marry,” Jones walked into the Shelby County Clerk’s Office. Perry refused to issue him a marriage license. He then filed a Motion for Preliminary Injunction in this Court, arguing that Perry’s in-person requirement violates his “fundamental right to marry . . . which is guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.”

## II

## A

## i

Before reaching the substance of Jones’s request, the Court must first decide whether to treat his motion as one for a preliminary or permanent injunction. Ordinarily, courts should not convert a motion for a preliminary injunction into one for a permanent injunction without first holding an evidentiary hearing. *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995). But no hearing is required when the dispute concerns a “purely legal question” and there are “no triable issues of fact.” *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983).

...

. . . In the absence of any legitimate dispute, the Court will treat Jones’s motion as one for a permanent injunction.

## ii

To obtain a permanent injunction, a plaintiff “must first establish that [he has] suffered a constitutional violation.” *Women’s Med. Profl Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006). And even if the Court finds that a violation occurred, the plaintiff must also “demonstrate: (1) that [he] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

## B

## i

The constitutional right at issue here is plain. The right to marry “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men” and women. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). This freedom “is one of the most basic civil rights of every [human being], fundamental to our very existence and survival.” *Id.* (internal quotations and citation omitted). Through this commitment our collective rights deepen, and “two persons together . . . find other freedoms, such as expression, intimacy, and spirituality.” *Obergefell v. Hodges*, [576] U.S. \_\_\_, 135 S. Ct. 2584, 2599 (2015). Many, like Jones, consider “the commitment of marriage [to] be an exercise of religious faith as well as an expression of personal dedication.” *Turner v. Safley*, 482 U.S. 78, 95–96 (1987).

For all these reasons, courts will apply strict scrutiny to any law or policy that places a “direct and substantial burden” on the right to marry. *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001). This means the rule “cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). A state policy places a “direct and substantial burden” on this right when “a large portion of those affected by the rule are absolutely or largely prevented from marrying, or whe[n] those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses.” *Vaughn*, 269 F.3d at 710. But if the policy does not “directly and

substantially interfere with the fundamental right to marry,” courts will only subject the rule to rational basis review. *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1135 (6th Cir. 1995). This forgiving test requires the Court to find only that the policy is “rationally related to legitimate government interests.” *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010).

ii

Perry, of course, argues that the Court should apply rational basis review to the in-person requirement. She cites *Toms v. Taft*, 338 F.3d 519, 525 (6th Cir. 2003), for the proposition that “a prisoner’s right to marry may be restricted where the restriction is reasonably related to a legitimate penological interest.” *Toms v. Taft*, 338 F.3d 519, 525 (6th Cir. 2003) (citing *Turner*, 482 U.S. at 96–97). . . . But *Toms* does not apply to this case. . . . Perry does not manage a prison. She cannot lean on any penological interests to rescue this policy.

...

At oral argument, Perry . . . announced that she “would like to . . . plant the question [in the Court’s mind] as to why the county clerk is the one [being sued] if the warden is also responsible for interpreting the statute.” The KCIW Warden is not a defendant in this suit. Whether the prison’s refusal to transport Sauer is “reasonably related to a legitimate penological interest” is not at issue in this case. But the Court does note that the Warden’s policy—which need only satisfy rational basis review—is more likely constitutional than Perry’s, which deserves strict scrutiny. For the purposes of this order, it is enough to say that the KCIW Warden expressly stated she will “not transport inmates” to the clerk’s office to obtain a marriage license. That fact, coupled with Perry’s refusal to issue a license, absolutely prevents Jones from marrying Sauer.

Perry’s next argument is that her policy does not impose a “direct and substantial burden” because Jones and Sauer remain free “to marry anybody they want[,] just not each other.” In support, she cites a case of this Circuit, *Vaughn*, 269 F.3d 703. In *Vaughn*, the plaintiffs—a married couple who previously worked together in state government—challenged a state employer’s policy “requir[ing] the resignation of one spouse in the event two employees marry.” *Id.* at 706. The court found that this policy did not place a “direct and substantial burden” on the couple because “it did not bar [them] from getting married, nor did it prevent them [from] marrying a large portion of population,” but “only made it economically burdensome to marry a small number of those eligible individuals, their fellow employees at [the office where they worked].” *Id.* at 712. The court added that “[o]nce [the couple] decided to marry *one another*, [the] policy became onerous for them, but *ex ante*, it did not greatly restrict their freedom to marry or whom to marry.” *Id.* (emphasis in original).

The holding in *Vaughn* does not control this case for at least three reasons. First, the relevant facts in *Vaughn* are facially distinguishable from those at issue here. The *Vaughn* court’s decision rested on an obvious fact that is not present in this case: the disputed policy “did not bar [the couple] from getting married,” but “only made it economically burdensome” to do so. *Id.* The plaintiffs in *Vaughn* were already married by the time they filed suit. *Id.* at 708. . . . The [*Vaughn*] court’s rather dismissive treatment of this *ex post* burden need not extend to the policy in dispute here, which absolutely prohibits Jones from marrying Sauer.

Second, to the extent that *Vaughn* counsels against applying strict scrutiny in all cases where a policy “only” burdens the applicants’ right to marry “one another,” this aspect of the court’s holding is no longer good law. That is especially true where, as here, the petitioner mounts an as-applied challenge to a policy that absolutely erases his right to marry the individual of his choice. Fourteen years after *Vaughn*, the Supreme Court announced that “the decision whether *and whom* to marry is among life’s momentous acts of self-definition.” *Obergefell*, 135 S. Ct. at 2599 (emphasis added) (internal quotations and citation omitted). The Court cannot recognize this principle without also honoring Jones’s constitutional right to marry *this woman*, the woman he freely chose. Loved ones are not fungible commodities.

Third, *Vaughn*’s holding also rested on the fact that the employer’s policy “did [not] prevent [the couple from] marrying a large portion of population,” but “only made it economically burdensome to marry a small number of those eligible individuals, their fellow employees at [the office where they worked].” *Id.* at 712. Here, by contrast, the in-person requirement absolutely prevents Jones from marrying any person who (1) happens to be in prison and (2) cannot travel to the clerk’s office.<sup>5</sup> If we lived in any other country in the world, Perry might plausibly argue that prisoners do not constitute a sizeable portion of the population. But the United States has the largest prison population on earth.<sup>6</sup> And Kentucky is one reason why.

A recent study found that “[i]f each U.S. state were its own country, Kentucky would have the seventh-highest incarceration rate in the world.”<sup>7</sup> Our state jails and prisons currently house over 23,000 people.<sup>8</sup> Our federal facilities have roughly 7,000 prisoners.<sup>9</sup> And the problem is especially bad in Shelby County. As of September 2016, the Shelby County Correctional Center housed 351 inmates.<sup>10</sup> KCIW, located in Shelby County, had 683 prisoners.<sup>11</sup> According to the last census, only around 42,000 people live in Shelby County.<sup>12</sup> That means the prison population of KCIW alone amounts to 1–2 percent of the county’s total population. By comparison, the federal government reported in 2014 that “1.6 percent of adults [in the United States] self-identify as gay or lesbian.”<sup>13</sup> At the very least, then, the in-person

<sup>5</sup> In truth, the policy prohibits Jones from marrying anyone who cannot travel to the clerk’s office, incarcerated or otherwise. That would also include, for example, an invalid or a diagnosed agoraphobic.

<sup>6</sup> *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All&=Apply](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All&=Apply) (last visited Sept. 28, 2016).

<sup>7</sup> *Kentucky’s Incarceration Rate Ranks 7th in the World*, WFPL NEWS (Nov. 12, 2015), <http://wfpl.org/if-it-were-a-country-kentuckys-prison-rate-would-rank-7th-in-the-world/>.

<sup>8</sup> *Inmate Profiles*, KENTUCKY DEPARTMENT OF CORRECTIONS (Sept. 15, 2016), [<https://corrections.ky.gov/About/researchandstats/Documents/Monthly%20Report/2016/Inmate%20Profile%2009-2016.pdf>].

<sup>9</sup> *Generate Inmate Population Reports*, FEDERAL BUREAU OF PRISONS, [[https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp)] (click “Generate Reports,” select “Kentucky,” and click “Generate Report”).

<sup>10</sup> *Inmates*, SHELBY COUNTY DETENTION CENTER, [http://www.shelbycountydetection.com/SCDC\\_inmatelist.html](http://www.shelbycountydetection.com/SCDC_inmatelist.html) (last visited Sept. 28, 2016).

<sup>11</sup> *About KCIW*, KENTUCKY DEPARTMENT OF CORRECTIONS, [<https://corrections.ky.gov/Facilities/AI/KCIW/Pages/default.aspx>].

<sup>12</sup> *Quick Facts: Shelby County*, UNITED STATES CENSUS BUREAU, [<https://www.census.gov/quickfacts/fact/table/shelbycountykentucky,US/PST045218>].

<sup>13</sup> *Health survey gives government its first large-scale data on gay, bisexual population*, THE WASHINGTON POST (July 15, 2014), <https://www.washingtonpost.com/national/health->



requirement prohibits Jones from marrying a significant percentage of Shelby County residents.

These facts support one conclusion: the in-person requirement absolutely prevents Jones from marrying Sauer, and absolutely prevents him from marrying a large portion of the population. The policy thus imposes a “direct and substantial burden” on Jones’s fundamental right to marry, and it “cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki*, 434 U.S. at 388.

### iii

Perry’s rationale for imposing the in-person requirement collapses under strict scrutiny. She first argues that her policy serves the “important state interest” of ensuring that both applicants are legally eligible to marry. The Court will accept that verifying the eligibility of marriage applicants is a “sufficiently important state interest.” *Zablocki*, 434 U.S. at 388. But the in-person requirement is not “closely tailored to effectuate only” that interest. *Id.*

At oral argument, the Court repeatedly asked Perry’s counsel to explain how the in-person requirement actually promotes the state’s interest in verifying the eligibility of marriage applicants. Counsel never fully answered this question. Without much guidance from Perry, the Court will summarize a few reasons why her policy might plausibly advance this interest. First, the in-person requirement could encourage applicants to provide thorough and honest answers to the clerk’s questions about their eligibility. Some find it easier to lie on paper than in face-to-face communication. Second, observing an applicant’s demeanor in person might make it easier to evaluate the applicant’s credibility. The subtleties of a facial expression are lost in a documentary exchange. Third, an applicant might have some disqualifying characteristics that are readily observable in person. A pregnant minor, for example, would have difficulty obtaining a license at the clerk’s office.

Even though Perry’s chosen policy may serve the interest at stake, many alternative methods could just as easily effectuate that interest. Most evidently, Perry or one of her deputies could drive up the road to KCIW and watch Sauer sign the marriage license. That would take about twenty-five minutes. Or she could do what the clerk did in *Toms* and arrange to “deputize an employee of the ‘central office’ of the [prison] (specifically, an Assistant Attorney General) as a clerk to issue the marriage license” to Sauer at the prison itself. *Toms*, 338 F.3d at 522–23. Both of these alternatives would allow the state to preserve the benefits of observing an applicant in person.

Another alternative appears in *Amos v. Higgins*, 996 F.Supp.2d 810 (W.D. Mo. 2014). In *Amos*, the court confronted a Missouri statute that “required each applicant for a marriage [to] sign the application ‘in the presence of the recorder of deeds or their deputy.’” *Id.* at 811. The court held that this requirement was unconstitutional as applied to both prisoners and their fiancées[.] . . . As an alternative procedure, the court ordered the clerk to permit each prisoner to (1) submit “all fees and other documents required for the issuance of a marriage license under the laws of the [state],” and (2) submit an “affidavit or sworn statement,” verified by both “the warden or the warden’s designee and . . . a notary public,” that identified the “names of both

applicants” and stated that “the applicant [was] unable to appear in the presence of the recorder of deeds due to [her] incarceration.” *Id.* at 814–15.

Admittedly, the *Amos* procedure addressed the clerk’s concern about verifying the *identity* of marriage applicants. Perry’s expressed concern is about the *eligibility* of applicants. In Kentucky, however, prison wardens are already required to verify the eligibility of prisoners before they obtain a marriage license. Kentucky’s official corrections policy requires a warden to approve a marriage application in advance. This approval process directs the warden to ensure that there are no “legal restriction[s]” to the marriage and that the “inmate making the request is not . . . incompetent.” This additional step, coupled with the procedure established in *Amos*, would likely resolve any questions about the prisoner’s eligibility.

The Court adds that here, unlike in *Amos*, no state law actually obligates Perry to enforce the in-person requirement. . . . [T]he provision relied upon by the KDLA, KRS § 402.110, provides only that “[t]he clerk shall see to it that every blank space required to be filled by the applicants is so filled before delivering it to the licensee.” Perry could comply with these requirements by adopting any one of the procedures outlined above.<sup>17</sup>

#### iv

Because Perry’s policy is unconstitutional as applied to Jones, the remaining elements of the permanent injunction standard can be resolved easily. The “irreparable harm” to Jones flows naturally from Perry’s constitutional violation. *See Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002). The Court cannot remedy this harm through monetary damages alone; no amount of compensation will substitute for the exercise of “one of the vital personal rights essential to the orderly pursuit of happiness by free men” and women.  *Loving*, 388 U.S. at 12.

The balance of the harms also tips in Jones’s favor. As explained above, Perry can satisfy her statutory duties through a range of readily available alternatives to the in-person requirement. The harm she might suffer from, for example, driving to KCIW—or perhaps asking one of her deputies to make the short trip—is minimal. And most importantly, the public has a powerful interest in vindicating “one of the most basic civil rights of every [human being], fundamental to our very existence and survival.” *Id.*

### III

When state officials disrupt the free exercise of fundamental rights, courts will scrutinize their conduct with unusual precision and care. Perry’s in-person requirement cannot survive that scrutiny. The Court does recognize, however, that Perry is best situated to choose from among the available alternatives to her current policy. *See Howe v. City of Akron*, 801 F.3d 718, 754 (6th Cir. 2015). Accordingly, the Court **HEREBY ORDERS** as follows:

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<sup>17</sup> Perry also briefly argued that “to open the door for these individual exceptions without any formal protocol is simply opening up Pandora’s Box, and [she] shouldn’t be forced to do that.” The Court is not asking Perry to make a special exception for Jones. The Court is ordering Perry to comply with the Constitution. If Perry enforced the in-person requirement against another individual who absolutely could not appear at the clerk’s office—for example, someone who was terminally ill and could not safely leave her home—that would also likely be unconstitutional. Needless to say, the likelihood that Perry’s policy may be unconstitutional in other circumstances does not preclude the Court from also finding it unconstitutional here.

- (1) Jones's motion for injunctive relief is **GRANTED**;
- (2) Defendant Sue Carole Perry is **PERMANENTLY ENJOINED** from requiring Sauer to appear at the Shelby County Clerk's Office prior to issuing Jones a marriage license; and
- (3) Perry shall have up to and including **Friday, November 4, 2016**, to adopt and perform a procedure that will permit Jones and Sauer to obtain a marriage license without physically appearing at the Shelby County Clerk's Office.

## NOTES

1. According to Aaron J. Bentley, who helped represent Bradley Jones in *Jones v. Perry*:

After the Court's decision, the Shelby County Clerk agreed to accept a notarized form signed by the incarcerated person to fulfill the requirements to obtain a marriage license. Brad and Brooke received a license, and married on November 10, 2016. The ceremony was a deserved ending to Brad's long, determined fight to marry his childhood sweetheart. After contacting nearly every Kentucky county clerk, unsuccessfully trying to hire several lawyers, researching laws of other states and countries regarding proxy marriages, and even turning down an early settlement offer that included a marriage license but no prospective change in policy, Brad secured a federal court judgment vindicating his constitutional right to marry.

Since Brad's case, some Kentucky clerks have adopted procedures to permit incarcerated Kentuckians to marry; however, the large majority have not. . . .

Email from Aaron J. Bentley, Craig Henry (June 28, 2017, at 13:50 EST).

2. Speaking generally, *Jones* illuminates how procedural limitations on the right to marry can, at times, veer onto substantive terrain, limiting the right to marry and so violating the constitutional protections accorded to it. But the *Jones* court decision does not rule that the in-person marriage license requirement at issue in the case is always unconstitutional. Its judgment is highly contextualized. It declares this licensure requirement in this case to be a "direct and substantial" limitation on Jones's right to marry. What are the factors that lead the court to this conclusion? What do you make of the court's view that statistics on incarceration rates are relevant to the constitutional ruling it issues? What, precisely, is the court saying on this score, and do you agree or disagree, and why?

3. *Jones* formally addresses how the in-person marriage license requirement challenged in the case violates Bradley Jones's constitutional right to marry. Along the way, the court's opinion suggests, without deciding, that Warden Janet Conover's decision not to transport Kathryn Brooke Sauer to the Shelby County Clerk's office in order to satisfy the Clerk's in-person licensure requirement might not have constituted a violation of Sauer's constitutional marriage rights, even though that decision practically blocked Sauer from satisfying the in-person licensure requirement, hence kept her, at least initially, from marrying Jones. Is the idea that thus emerges from the case that Jones's constitutional right to marry entitles him to marry Sauer but that Sauer's constitutional right to marry on its own may not entitle her to marry him? Is Sauer's right to marry Jones in this case, then, a function of his, and not her own, constitutional rights? Would that raise any legal concerns of its own?

4. According to at least one newspaper report, the in-person marriage license requirement at issue in *Jones* traces to a desire “to ensure the bride and groom are 18 and of different sexes, as required by law, and to avoid other marriage fraud.” Andrew Wolfson, *Kentucky Inmate Fights Marriage License’s Revocation*, COURIER-J., Nov. 7, 2012, at A1, A6 (referring to comments by “Jerry Carlton, director of local government records,” given in an interview). May States generally have in-person marriage license requirements in order to ensure that the parties to a marriage satisfy substantive marriage law rules, like those involving age restrictions on marriage?

## D. STATE OF MIND RESTRICTIONS

### Lester v. Lester

Domestic Relations Court of New York, 1949.  
[195 Misc. 1034, 87 N.Y.S.2d 517.](#)

■ PANKEN, JUSTICE.

...

A marriage procured in consequence of coercion or fraud will be regarded ab initio as if the marriage had not been entered into at all. Marriages procured by coercion or in consequence of fraud may in a court having jurisdiction be annulled. An annulment of a marriage is a determination that the conventional relationship of man and wife had not been established despite and in face of a marriage ceremony.

Marriage presumably is a relationship into which two individuals enter upon freely and voluntarily. Environmental influences, and that means education, conventions at a given time and in a given place, and economic status of the parties sometimes control the character of the freedom and the voluntary attitudes of the parties entering into the marriage relationship. To that extent the freedom exercised in a marriage contract is limited.

...

The state and the community are interested in and concerned with the institution which marriage creates. Man enters a marital relationship to perpetuate the species. The family is the result of marital relationship. It is the institution which determines in a large measure the environmental influences, cultural backgrounds, and even economic status of its members. It is the foundation upon which society rests and is the basis for the family and all of its benefits.

The character of the culture and civilization, the morals, conventions, law and relationship in the life of a community are what man develops. The community, man, has a vital interest in the marriage institution, for the present generation is father to the succeeding one, and that generation will be the determinant as to the advance of civilization, morals, law and relationships of the future. The character of the succeeding generation is influenced by the permanence and decency of the family institution. Public policy enlists and commands the need of regulation of marriage and the course that the family institution is to pursue. Though marriage is a free institution to be entered into freely and voluntarily because of the community’s interest in that institution, the state has a right to regulate and insist upon decency and morals in its maintenance.

Agreements entered into ante-nuptially between parties which do violence to the accepted conventions and laws of the state and the community are unenforceable as a matter of public policy.

The petitioner and the respondent were married according to law. The respondent claims that no valid marriage was entered into; that it was never intended to be a real marriage. He introduced in evidence two documents bearing upon his claim. One exhibited in part reads, "Know all men by these presents that whereas C.L. can no longer bear to continue her relationship with N.C.L. in the same way as in the past, but at the same time is not willing to give him up; and whereas she is desirous of reestablishing herself in the good graces of her relatives and friends; and whereas, considering all things, this cannot be done unless said relatives and friends are given the impression that N.C.L. has married her; and whereas, for personal reasons, she can no longer continue staying with her sister, B.G., but must seek a place of her own; for these and other reasons important only to herself, . . ." and then the document proceeds to set forth that that was the reason and purpose for the marriage between the parties. Another portion of the same document reads, "N.C.L. hereby states, and C.L. hereby admits, that the pretended and spurious marriage contract and ceremonies, and simulated marriage relationship, is taking place against N.C.L.'s wishes, and only because of serious and dire threats of all types made against him and against herself by C.L.; and because of the understanding that the relationship being thus established is only for the benefit of C.L., and hence is not to be interpreted under any conditions as an actual marriage; and that the said relationship involves no obligations of any kind whatsoever, now or at any time in the future, on the part of N.C.L. . . ." Upon those grounds the respondent bases his claim that the marriage is not valid and the obligations which naturally flow from a marriage relationship in favor of the petitioner do not exist. He accepted the benefits of that relationship. He cannot blow hot and cold.

The other exhibit in part reads that both the petitioner and the respondent "do hereby declare that the marriage ceremony we went through at Elkton, Maryland, is in pursuance of our agreement and contract of August 27, 1938," (the date of the other exhibit) "and we therefore consider the marriage ceremony and contract performed between us at Elkton, Maryland, null and void in all its parts and implications whatsoever, ab initio."

. . .

Has the marriage contract entered into between the parties before me been the result of coercion, threat, force, fraud or other taint? . . .

. . .

The testimony as well as the documentary evidence submitted herein negatives the assertion that this marriage was entered upon as the result of threat or coercion.

Private individuals may not by agreement set aside the law of the land. They may not declare that which is valid in law null and void. . . . Persons may not enter upon a marital relationship in conformity with the law and then dissolve that marriage in violation of law. As a matter of public policy the regulation of divorce is as important as is that of marriage. The parties hereto did sign a paper which is in evidence that they both declared their marriage to be "null and void" in all its parts and implications whatsoever

“ab initio”. What they have signed and sealed after they have entered into a marriage relationship is not enforceable as a matter of law when the purport of that agreement runs counter to the established law and to the morals and mores and conventions of the society in which they live.

The respondent’s claim of coercion or threat seems to be unfounded in the light of his relationship for about ten years with the petitioner subsequent to the agreements upon which he rests his claim to invalidity of the marital relationship.

...

In the course of the hearing before me it was testified by the respondent repeatedly that he had been under duress during the entire period of their marital relationship. He testified, for instance, that he had had intimate relations with her, sexually, under duress. In other words he was coerced by her to have sexual relations with her. His explanation when asked what the duress was which she exercised, was “The constant fear of committing suicide and leaving me, blackening my name at the College and blackening my name so that I would lose my employment.” The respondent before me is a teacher in some college and oddly he teaches the law of family relations. Evidently he thought himself familiar with the law when he caused the petitioner to sign the two documents above referred to. It is quite odd. He prepared the documents in anticipation of a claim by him that the marriage was entered into by him because of coercion and threat.

I find as a matter of fact and as a matter of law for all purposes that the petitioner has established by fair preponderance the allegations in her petition [for support]. She is the wife of the respondent and continues to be such until the marriage is annulled by a court of competent jurisdiction, if at all. In this case the respondent claims that there has been no marriage and the only method in which he might be relieved of his obligation as the petitioner’s husband is by an annulment of the marriage. It is very questionable indeed whether he could possibly prevail. Indeed, I think he could not.

...

## NOTE

Duress and other causes of action to void a marriage on the ground that the partners lacked either the capacity or the intent to contract are rarely relied on now that it has become easier to obtain a divorce in most jurisdictions.

“Insanity” had been the most widely recognized basis for holding that one of the partners did not have the capacity to consent to marriage. Many states specifically provide that insanity is a ground for divorce or annulment, although a few have made it a defense to such actions. The statutes use a variety of undefined terms such as “idiocy” and “lunacy,” which are applied to both people with intellectual disabilities and people with mental illness. Courts in some jurisdictions construe such statutes quite strictly, however, in keeping with a general resistance to marriage dissolution. *See, e.g., Larson v. Larson*, 192 N.E.2d 594 (Ill. Ct. App. 1963) (annulment based on wife’s mental condition denied despite proof that she had a history of mental illness). Others have broadly construed such statutes in the pursuit of notions of equity. *See, e.g., In re Acker*, 48 Pa. D. & C. 4th 489 (2000) (voiding the marriage of an elderly man with an unstable mental condition despite the fact that no party had sought an annulment). Is “insanity” a problematic legal concept in this context? Does its

use and deployment in this setting, along with related terms like “idiotcy” and “lunacy,” risk harming individuals with intellectual disabilities and those experiencing mental illness? How, if at all, would you modernize these consent rules? How deep might reforms here run?

### **Johnston v. Johnston**

Court of Appeal, Fourth District, 1993.  
18 Cal.App.4th 499, 22 Cal.Rptr.2d 253.

■ SONENSHINE, ASSOCIATE JUSTICE.

Donald R. Johnston appeals a judgment annulling his marriage to Brenda Johnston.

After a 20-month marriage, Brenda sought to have her marriage to Donald annulled. Donald agreed the marriage should be terminated but requested a judgment of dissolution be entered.

At the trial, Brenda testified she was unaware of Donald’s severe drinking problem until after the marriage and she was upset to discover this and disappointed in his refusal to seek help. She knew before the nuptials that he was unemployed, but did not realize he would refuse to work thereafter. She stated their sex life after marriage was unsatisfactory and that he was dirty and unattractive. In short, he turned from a prince into a frog.

Donald testified to the contrary, but to no avail. The trial court believed Brenda. “There is a conflict in the testimony as to what happened in this marriage. But the court tends to believe [Brenda] has told the truth when she’s described the events of the marriage and what occurred before.”

The court found Brenda’s consent had been fraudulently obtained and annulled the marriage. Donald appeals.

Donald complains the evidence is insufficient to support a finding of fraud. He is correct.

Civil Code section 4425, subdivision (d) delineates the grounds for a voidable marriage: “A marriage is voidable and may be adjudged a nullity if . . . (d) The consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife.” There was no fraud.

Civil Code section 1710 defines deceit as “either: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, 4. A promise, made without any intention of performing it.”

Brenda testified Donald told her “he wanted to get a job and with my help in his life, maybe I could help him get himself back together and get his feet on the ground and go out and get a job. And he wanted to get married to me, to have a nice life with me.” She also explained that prior to the marriage she saw him regularly and “he was just very polite. Very nice. Very respectful to me. Clean-shaven. Bathed. Just very nice.” But after they were wed he “never treated me with respect after the marriage, that is correct. And on many occasions[,] unshaven.”

Even if Brenda's testimony was believed by the trial court, she presented insufficient grounds for an annulment.<sup>2</sup> The concealment of "incontinence, temper, idleness, extravagance, coldness or fortune inadequate to representations" cannot be the basis for an annulment. *Marshall v. Marshall* 300 P. 816 (Cal. 1931). If a shoe salesman's false representation that he owned his own shoe store fell short of "fraud sufficient to annul a marriage" in *Mayer v. Mayer*, 279 P. 783 (Cal. 1929), or a future husband's statement that he was a "man of means" (when he was really "impecunious") was not enough in *Marshall v. Marshall, supra*, 300 P. at 817, how much less so are the grounds here, where the husband turned out to be, in the eyes of his wife, a lazy, unshaven disappointment with a drinking problem.<sup>3</sup> In California, fraud must go to the *very essence* of the marital relation before it is sufficient for an annulment. Thus, the trial court erred in granting the annulment.

Brenda testified that during the marriage she executed an interspousal deed, transferring title to real property she owned prior to the marriage to her name and Donald's. The trial judge, after finding the marriage void, declared the deed null and void based upon the failure of consideration. In other words, she deeded the property to Donald because they were married. If the marriage is void, then so is the deed. Because we find the court erred in declaring the marriage void, we must also conclude this portion of the judgment must be reversed.

Donald appealed only the judgment of nullity and the disposition of the real property. Brenda did not file a protective cross-appeal, although the judgment includes several other orders.<sup>4</sup> Moreover, we note the parties stipulated the value of the real property as of June 1992 was \$139,000, the purchase price in January 1988 was \$101,200 and Brenda's down payment was \$19,400; the loan balance at the date of marriage was \$82,459 and at the date of separation it was \$81,392.56. The parties also stipulated "the negative on the property from October 1989 through June 1992 was \$2,384."

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<sup>2</sup> We therefore need not discuss whether Donald knew they were false when he made them or whether Brenda relied upon them in marrying him.

<sup>3</sup> In *Mayer*, the Supreme Court reversed an annulment where the marriage had not even been consummated and the parties had never lived together as husband or wife. By contrast, here the court recognized the parties consummated their marriage but found Brenda's disappointment with the quantity and quality of the relationship as further grounds for the annulment. "Well, first of all, the court finds that especially in second marriages or in later in life marriages as opposed to early marriages, the parties are entitled to certain expectations. And foremost among them is a loving relationship, a loving, nurturing relationship. And that absent some very powerful financial considerations, which may be part of a lot of cases but are not a part of this case, is the basic reason for wanting to be married. In addition to that, any reasonably normal person, normal mature person, is entitled to be able to seek and have sexual satisfaction. And in the days where AIDS is a life threatening reality, people are certainly entitled to be able to look within a marriage for that satisfaction, both for fidelity and that type of satisfaction, because it's just too dangerous not to. Those things morally, theoretically have always been a consideration, but especially for the last 40 or 50 years, at least, that's not been a major item. I think it's a new ball game today, and I think that that's entirely within the expectations of a person in getting married."

<sup>4</sup> The court found the money that was in the bank and the tax refund to be Brenda's separate property. "The court also [found] that [Donald] paid \$9,000 for the boat and that whether or not [Brenda's] name was on the title at one time, that the boat, . . ., [was Donald's] separate property. As to the check, as to the funds for the sale of the previous boat, the court [found] that there was a fair distribution at the time; that each party got what they put into it and is not going to rule further on that."



Neither the reversal of the portion of the judgment regarding the real property nor the reversal of the judgment of nullity requires a reversal of the stipulation or other orders. Upon remand, the stipulation and the court's other orders shall remain.

The granting of a nullity of the marriage is reversed and a judgment of dissolution shall be entered. The parties' respective property rights in the real property shall be determined based on their previous stipulations. In all other respects, the judgment is affirmed. Donald shall receive his costs on appeal.

## NOTES

1. As *Johnston v. Johnston* suggests, most courts have required a stronger showing of fraud to void a marriage contract than to void other contracts. What policy, if any, is served by this tradition?

2. A number of years ago, Professor Max Rheinstein noted that:

the tendency [of American courts] has been . . . to limit essentiality to those facts which relate to the sex aspects of the marriage, such as affliction with venereal disease, false representation by the woman that she is pregnant by her partner, concealed intent not to consummate the marriage or not to have intercourse likely to produce progeny, also concealed intent not to go through with a promise to follow the secular conclusion of the marriage with a religious ceremony considered by the other party essential to relieve intercourse from the stigma of sin. Annulments have rarely been granted for fraudulent misrepresentations of character, past life, or social standing and hardly ever for misrepresentations on matters of property or income.

MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND LAW 95 (1972). There is case law to support this analysis. See, e.g., *Adler v. Adler*, 805 So.2d 952 (Fla. App. 2001) (lying about past marriages was not grounds for annulment); *Stepp v. Stepp*, 2004-Ohio-1617 (Ohio Ct. App.) (disallowing annulment based on fraudulent portrayal of assets). Even fraud concerning sexual aspects of marriage will not make the marriage voidable once the marriage has been consummated. See, e.g., *In re Marriage of Igene*, 35 N.E.3d 1125, 1129 (Ill. Ct. App. 2015) (holding that it was not fraud going to the essentials of the marriage contract for husband to conceal previous marriages); *Blair v. Blair*, 147 S.W.3d 882 (Mo. App. 2004) (lying about paternity of children born during marriage did not support a claim for annulment). For an unusual case of annulment based on a wife's legally determined "incurable impotence," see *Manbeck v. Manbeck*, 489 A.2d 748, 751 (Pa. 1985) (declaring that "incurable impotence can be inferred from the facts and circumstances," and then holding such conditions met where "despite [a] husband's repeated attempts, no intercourse had taken place throughout the twenty-four (24) year marriage"); see also *id.* at 751 n.7 (quoting from the lower court's findings of facts on the history of the case). The primary—although not the only—exceptions to Rheinstein's observations are incest and bigamy, which render marriages void, not simply voidable, in most jurisdictions.

## In re the Marriage of Farr

Colorado Court of Appeals, 2010.

228 P.3d 267.

■ GRAHAM, J.

Larry Allen Farr (husband) appeals from the judgment declaring his marriage to Joy Lynn Farr (wife) invalid[.] . . . We affirm.

I. Background

The parties' thirty-year marriage ended in dissolution in 1999. They remarried in 2004, and in 2007, husband filed for dissolution. Wife cross-petitioned to declare the second marriage invalid pursuant to section 14–10–111(1)(d), C.R.S.2009, asserting that she agreed to marry him based upon his representation that he had a terminal illness. A hearing was held, after which the trial court dismissed the petition for dissolution and declared the marriage invalid. Permanent orders regarding property, maintenance, and attorney fees were then entered pursuant to stipulation. Thereafter, husband appealed the order invalidating the marriage, and wife moved to dismiss his appeal as untimely.

...

III. Declaration of Invalidity

Husband contends that the trial court applied the wrong standard of proof in invalidating the parties' marriage and, further, that the court abused its discretion in finding that his representation concerning his illness was fraudulent and in neglecting to determine whether that representation went to the essence of the marriage. We disagree.

A. Standard of Proof

Whether the trial court applied the proper standard of proof is a question of law that we review de novo. See *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 72 (Colo. 2009).

For all civil actions accruing after July 1, 1972, the burden of proof shall be by a preponderance of the evidence, notwithstanding any contrary provision of law. § 13–25–127(1), (4), C.R.S.2009; *Gerner v. Sullivan*, 768 P.2d 701, 702–03 (Colo. 1989). The statute applies despite the existence of prior settled case law establishing a higher burden of proof. *Gerner*, 768 P.2d at 705. Pursuant to the statute, the preponderance of the evidence standard applies when a party seeks to avoid a transaction on equitable grounds alleging fraud, undue influence, or mistake. See *Page v. Clark*, 592 P.2d 792, 801 (Colo. 1979).

...

... Thus, ... the trial court did not err in applying a preponderance of the evidence standard when determining wife's petition.

B. Findings in Support of Invalidity

We review for abuse of discretion the trial court's decision to invalidate a marriage. See *[In re Marriage of] Blietz*, 538 P.2d [114,] 116 [(Colo. App. 1975)].

As relevant here, a court shall enter a decree declaring a marriage invalid if one party entered into the marriage in reliance on a fraudulent act or representation of the other party when the act or representation goes to the essence of the marriage. See § 14–10–111(1)(d).

Here, the trial court recited these statutory requirements and made the following findings: (1) that wife's testimony was more credible than husband's; (2) that wife believed husband's representation that his death was imminent; (3) that wife did not want husband to die alone; (4) that wife relied on husband's representation that he was suffering from myelodysplastic syndrome in deciding to remarry him; and (5) that such representation was fraudulent.

Because these findings are supported by the record, we reject husband's contention that the court abused its discretion in invalidating the parties' marriage. Wife testified that in 2003, before the parties remarried, husband told her that he had a serious illness and that he would die within a few years. Although the medical records husband brought to his meeting with her indicated that his disease had not progressed to a terminal form, wife testified that she was not familiar with the disease and believed what husband told her about his prognosis. She further testified, as did other witnesses, that she agreed to remarry because husband was dying and she did not want him to die alone.

Wife and the parties' son testified that after the parties remarried, husband did not appear to be ill and that they came to believe he had misled them into believing that he would die soon. Wife further testified that she reviewed husband's recent medical records and that they indicated to her that he was not ill. She also submitted a 2005 insurance application form, which was signed by husband and which indicated that he had no medical problems.

We recognize that there was contrary evidence presented regarding these issues. The evidence as to the nature and progression of husband's disease was particularly conflicting, and no expert testimony was presented. Nonetheless, it is the province of the trial court to determine the credibility of the witnesses and to resolve conflicting evidence. If the trial court's factual findings have support in the record, an appellate court may not substitute its own findings for those of the trial court. Thus, although the evidence sharply conflicted here and the court could have found, as husband suggests, that he made only an innocent misrepresentation, we may not disturb the court's findings because there is some evidence in the record to support them.

We reject husband's contention that the trial court bypassed the statutory requirement that his misrepresentation go to the essence of the marriage. Our review of the court's findings indicates that it first recognized that it had to find this element, and then found that wife relied on husband's representation in deciding to remarry and that husband made a sufficient fraudulent representation for the court to invalidate the marriage. We conclude that these findings, taken together, are adequate to imply that the court found that the misrepresentation went to the essence of the marriage, and we discern no basis for remand.

We also reject husband's contention that a misrepresentation about a spouse's prognosis and life expectancy cannot go to the essence of the marriage. Husband cites no case law specifically supporting this contention. Additionally, there was ample evidence that wife decided to remarry him *only* because she believed his death was imminent. Thus, the record supports the finding that, at least as to these parties, the misrepresentation did go to the essence of their remarriage.

The judgment is affirmed.

### NOTE

When it comes to those misrepresentations that are to be deemed legally sufficient to annul a marriage, what should the approach to the standard be? Should courts look to an objective standard of materiality with a subjective component? A wholly subjective standard? How would you classify the approaches taken in *Johnston v. Johnston* and *In re the Marriage of Farr*? Is one objective and the other subjective? Or do they both practically recognize an objective threshold of the sorts of misrepresentations that will serve as a basis for annulling a marriage?

## E. COMMON LAW MARRIAGE

### Hargrave v. Duval-Couetil (In re Estate of Duval)

Supreme Court of South Dakota, 2010.

777 N.W.2d 380.

#### ■ MEIERHENRY, JUSTICE.

Nathalie Duval-Couetil and Orielle Duval-Georgiades (Daughters) appeal the circuit court's judgment that Karen Hargrave (Hargrave) was the common-law wife of their father, Paul A. Duval (Duval). Daughters contend the circuit court erred when it held that Duval and Hargrave entered into a common-law marriage under the laws of Mexico and Oklahoma. We agree and reverse the circuit court.

#### FACTS AND BACKGROUND

Duval and Hargrave began living together in Massachusetts in 1994. In 1995, Duval acquired a home in Custer, South Dakota. Hargrave moved from Massachusetts to Duval's home in South Dakota in 1996. In 1997, Duval and Hargrave began a yearly routine of spending the summer months in Custer and the winter months in Mexico. In 1998, Duval and Hargrave bought a home together in Nuevo Leon, Mexico, as husband and wife.

In 2005, Duval was assaulted while in Mexico and placed in an intensive care unit for his injuries. Hargrave lived with Duval at the hospital while he was being treated. She later took Duval to Oklahoma for rehabilitation at a hospital in the Tulsa area and eventually to Rochester, Minnesota, for medical treatment at Mayo Clinic. Duval and Hargrave subsequently returned to Oklahoma for a period of time; and then, resumed their annual routine of spending winters in Mexico and summers in Custer. Duval was killed as a result of a rock climbing accident on June 24, 2008, in Custer County, South Dakota.

Duval and Hargrave never formally married. Hargrave testified that she and Duval had discussed a formal wedding ceremony, but mutually decided against it. She said they did not think they needed to marry because they held themselves out as husband and wife and felt like they were married. The circuit court specifically found that over the course of Duval and Hargrave's relationship, Duval referred to Hargrave as his wife on an income tax return form, designated her as the beneficiary on his VA health benefits application, and executed a general power of attorney in her favor.

The circuit court ultimately concluded that Hargrave had established that she and Duval met the requirements for a common-law marriage under the laws of both Mexico and Oklahoma. As such, Hargrave was treated as Duval's surviving spouse for inheritance purposes in South Dakota. Daughters appeal. Daughters' main issue on appeal is whether the circuit court erroneously recognized Hargrave as Duval's surviving spouse entitling her to inherit from his estate. They claim (1) that the South Dakota domicile of Duval and Hargrave precluded them from entering into a common-law marriage in either Mexico or Oklahoma, (2) that South Dakota law does not recognize a Mexican concubinage as a marriage, and (3) that Hargrave and Duval had not entered into a common-law marriage under Oklahoma law.

#### ANALYSIS

The relevant facts are not in dispute. Because the issues involve questions of law, our review is *de novo*. *Sanford v. Sanford*, 694 N.W.2d 283, 287 (S.D. 2005). The first issue centers on whether South Dakota will give effect to a common-law marriage established by South Dakota domiciliaries while living in a jurisdiction that recognizes common-law marriage.

##### *Common-Law Marriage*

Common-law marriages were statutorily abrogated in South Dakota in 1959 by an amendment to SDCL 25–1–29. Notwithstanding, Hargrave contends that South Dakota continues to recognize valid common-law marriages entered into in other jurisdictions. Hargrave relies on SDCL 19–8–1, which provides that “[e]very court of this state shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.” *Id.* In addition to taking judicial notice of the common-law of other states, the South Dakota Legislature specifically addressed the validity of marriages entered into in other jurisdictions in SDCL 25–1–38. This statute provides that “[a]ny marriage contracted outside the jurisdiction of this state . . . which is valid by the laws of the jurisdiction in which such marriage was contracted, is valid in this state.” *Id.* In view of these statutes, we conclude that a common-law marriage validly entered into in another jurisdiction will be recognized in South Dakota.\*

Daughters argue that the domicile of the couple controls their ability to enter into a common-law marriage. Daughters urge this Court to adopt a rule requiring parties to a common-law marriage to be domiciled in the state in which the marriage occurred. Thus, a couple domiciled in South Dakota could not be considered married merely by traveling to another state that recognizes common-law marriage and meeting that state's common-law marriage requirements. Daughters further allege that at all relevant times, Duval and Hargrave were domiciled in South Dakota, thereby precluding them from entering into a common-law marriage in either Mexico or Oklahoma. Daughters cite *Garcia v. Garcia* as authority for the domicile requirement. 127 N.W. 586 (S.D. 1910). In *Garcia*, we said that a marriage “valid in the state where it was contracted, is to be regarded as valid in [South Dakota].” *Id.* at 589. We do not interpret *Garcia* as requiring domicile in the state in which the marriage occurred.

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\* Notably, “a common law marriage contracted in a state of the United States that recognizes common law marriages is just as valid as a ceremonial marriage . . . [and] is not a second-class sort of marriage[.]” *Rosales v. Battle*, 7 Cal.Rptr.3d 13, 17, 113 Cal.App.4th 1178, 1184 (2003) (citations and quotations omitted).

This is consistent with other jurisdictions that do not require parties to establish domicile in the state where the common-law marriage occurred. Minnesota courts have recognized common-law marriages entered into in other jurisdictions. In *Pesina v. Anderson*, the court held it would “recognize a common-law marriage if the couple takes up residence (but not necessarily domicile) in another state that allows common-law marriages.” 1995 WL 387752 \*2 (Minn. Ct. App. 1995) (quoting *Laikola v. Engineered Concrete*, 277 N.W.2d 653, 658 (Minn. 1979)) (citations omitted). Similarly, in *Vandever v. Indus. Comm’n of Ariz.*, the court stated that it “disagree[d] with the legal reasoning of cases which hold that the policy of the domicile disfavoring common-law marriages should govern unless the couple has subsequently established residence in a state recognizing such marriages.” 714 P.2d 866, 870 (Ariz. 1985). The *Vandever* court went on to state, “[t]hese cases effectively read a requirement of residency into the law of all common-law marriage[ ] states which may or may not exist.” *Id.* See *Grant v. Superior Court* in and for County of Pima, 555 P.2d 895, 897 (Ariz. Ct. App. 1976) (“Although Arizona does not authorize common law marriage, it will accord to such a marriage entered into in another state the same legal significances as if the marriage were effectively contracted in Arizona.”). Mississippi has also recognized that “[t]he [domicile requirement] argument ignores the basic right of all persons to choose their place of marriage. As long as they follow the requirements of the law of the state of celebration, the marriage is valid in most jurisdictions.” *George v. George*, 389 So.2d 1389, 1390 (Miss. 1980). Likewise, Maryland “has continuously held that a common-law marriage, valid where contracted, is recognized in [Maryland].” *Goldin v. Goldin*, 426 A.2d 410, 412 (Md. Ct. Spec. App. 1981).

In addition to *Garcia*, the plain meaning of SDCL 25–1–38 does not require domicile in the foreign jurisdiction in order for the marriage to be considered valid in South Dakota. Consequently, we hold that South Dakota does not require domicile in the foreign jurisdiction before recognizing that jurisdiction’s common-law marriage scheme. All that is necessary for a marriage from another jurisdiction to be recognized in South Dakota is for the marriage to be valid under the law of that jurisdiction. See SDCL 25–1–38. Thus, the question in this case is whether Duval and Hargrave would be considered validly married under the laws of either Nuevo Leon, Mexico, or Oklahoma.

#### *Concubinage in Mexico*

...

We are persuaded by the reasoning of *Nevarez [v. Bailon]*, 287 S.W.2d 521, 523 (Tex. Civ. App. 1956), and *Rosales [v. Battle]*, 7 Cal.Rptr.3d 13, 113 Cal.App.4th 1178 (2003), and . . . conclude that a Mexican concubinage is not the legal equivalent of a common-law marriage in the United States. Consequently, the circuit court erred in concluding the concubinage between Duval and Hargrave, if one existed, had the same legal effect as a common-law marriage. Therefore, we reverse on this issue.

#### *Common-Law Marriage in Oklahoma*

The circuit court concluded that Duval and Hargrave entered into a valid common-law marriage while they lived in Oklahoma. The Oklahoma Court of Civil Appeals recently reaffirmed its recognition of common-law marriages and its requirements. The court stated:

[T]his Court recognizes in accordance with established Oklahoma case law that, absent a marital impediment suffered by one of the parties to the common-law marriage, a common-law marriage occurs upon the happening of three events: a declaration by the parties of an intent to marry, cohabitation, and a holding out of themselves to the community of being husband and wife.

*Brooks v. Sanders*, 190 P.3d 357, 362 (Okla. Civ. App. 2008). In *Brooks*, the court referenced an earlier Oklahoma case that explained the requirements of Oklahoma's common-law marriage as follows:

“To constitute a valid “common-law marriage,” it is necessary that there should be an actual and mutual agreement to enter into a matrimonial relation, permanent and exclusive of all others, between parties capable in law of making such contract, consummated by their cohabitation as man and wife, or their mutual assumption openly of marital duties and obligations. A mere promise of future marriage, followed by illicit relations, is not, in itself, sufficient to constitute such marriage.’”

*Id.* at 358 n. 2 (quoting *D.P. Greenwood Trucking Co. v. State Indus. Comm'n*, 1954 OK 165, 271 P.2d 339, 342 (quoting *Cavanaugh v. Cavanaugh*, 275 P. 315 (Okla. 1929))). Based on the language of these two cases, it appears that Oklahoma requires (1) a mutual agreement or declaration of intent to marry, (2) consummation by cohabitation, and (3) publicly holding themselves out as husband and wife. Oklahoma law requires the party alleging a common-law marriage satisfy these elements by clear and convincing evidence. *Standefer v. Standefer*, 26 P.3d 104, 107 (Okla. 2001) (citing *Maxfield v. Maxfield*, 258 P.2d 915, 921 (Okla. 1953)).

Thus, the first requirement Hargrave had to satisfy by clear and convincing evidence was that she and Duval had mutually agreed and/or declared their intent to marry while in Oklahoma. *Brooks*, 190 P.3d at 362. “Some evidence of consent to enter into a common-law marriage are cohabitation, actions consistent with the relationship of spouses, recognition by the community of the marital relationship, and declarations of the parties.” *Standefer*, 26 P.3d at 107 (citing *Reaves v. Reaves*, 82 P. 490 (Okla. 1905)). The circuit court made no finding on mutual agreement or declaration of intent to marry, yet concluded that Duval and Hargrave entered into a common-law marriage. We have said a circuit court “is not required to ‘enter a finding of fact on every fact represented, but only those findings of fact essential to support its conclusions.’” *In re S.K.*, 587 N.W.2d 740, 742 (S.D. 1999) (quoting *Hanks v. Hanks*, 334 N.W.2d 856, 858–59 (S.D. 1983)). A finding on whether the couple mutually agreed or declared their intent to marry while in Oklahoma was essential to support the circuit court's conclusion that they entered into a common-law marriage. A review of the testimony may explain why the circuit court was unable to enter a finding of a mutual agreement or declaration of intent to enter into a marital relationship.

Hargrave testified that she and Duval entered into an “implicit agreement” to be married while they were in Oklahoma. She also testified that “nobody said, okay, so we should agree to be married and write it down and put the date on it.” When asked on cross-examination if there was ever a point when she and Duval made an agreement to be married, Hargrave stated in the negative, and said the couple just decided “well, I guess we are [married].”

The Oklahoma Supreme Court addressed this issue under a similar situation and recognized the importance of establishing a clear intent to marry. *Standefor*, 26 P.3d at 107–08. In *Standefor*, the court stated the “evidence [wa]s clear and convincing that both parties assented to a marriage on Thanksgiving Day of 1988.” Both the husband and wife in *Standefor* agreed that they were common-law spouses as a result of their mutual assent to marry on that day. Significantly, the couple was able to identify an instance where they mutually assented to a marriage. This fact stands in contrast to the present case where Hargrave’s testimony established that no specific time existed when the couple mutually agreed or declared their intent to be married. To meet Oklahoma’s requirements, their mutual agreement or declaration to marry would have to be more than an implicit agreement. This consent requirement is consistent with SDCL 25–1–38, which sets forth the requirement that a marriage must be “contracted” in the other jurisdiction before South Dakota will recognize the marriage as valid. SDCL 25–1–38 provides “[a]ny marriage *contracted* outside the jurisdiction of this state . . . which is valid by the laws of the jurisdiction in which such marriage was *contracted*, is valid in this state.” *Id.* (emphasis added). Failing to establish that mutual assent or a declaration to marry took place, Hargrave could not meet the first requirement for entering into a common-law marriage in Oklahoma as outlined by *Brooks*. 190 P.3d at 362.

The absence of a finding of fact on this issue, coupled with Hargrave’s testimony, leads to a conclusion that as a matter of law Hargrave could not prove by clear and convincing evidence that the couple entered into a valid common-law marriage while in Oklahoma. Thus, no legal basis existed to support the circuit court’s conclusion that the parties entered into a common-law marriage in Oklahoma.

...

We reverse and remand to the circuit court for proceedings consistent with this opinion.

### Coon v. Tuerk

Superior Court for the District of Columbia, 2014.\*  
No. 2012 DRB 002984.

■ PETER A. KRAUTHAMER, ASSOCIATE JUDGE.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING COMMON LAW MARRIAGE

...

[O]n August 29, 2013, the Court issued its Order Denying in Full Defendant’s Motion to Dismiss Plaintiff’s Amended Complaint, in Part, for Failure to State a Claim Upon Which Relief Can be Granted and Lack of Subject Matter Jurisdiction. By that ruling, the Court found that the parties were bound by a common law marriage beginning March 3, 2010, the date the Religious Freedom and Civil Marriage Equality Amendment Act [of 2009, D.C. Code § 46–401(a),] became law in the District of Columbia. The Court now issues its Findings of Fact and Conclusions of Law explaining its decision on the common law marriage issue.

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\* [Eds.: This is an unreported decision.]



## I. FINDINGS OF FACT

The parties appeared before the Court on July 31, 2013 for an Evidentiary Hearing concerning the existence of a common law marriage. Both parties appeared with counsel and presented testimony and evidence in support of their positions. The Court now makes the following Findings of Fact.

1. The parties met in a pet store in 1994 and they started dating shortly thereafter. The parties were involved in a romantic relationship for approximately 18 years. The parties ultimately ceased cohabitating in March of 2012, when Defendant forced Plaintiff to vacate the home . . . [in Northwest] Washington, DC. . . .

2. Plaintiff purchased Tiffany & Co. rings and, while the parties were in bed together on Valentine's Day in 1998, asked Defendant to marry him. Defendant said that he was not ready and he would let Plaintiff know when he was ready to be married.

3. Defendant asked Plaintiff to go out to lunch with him in May of 1999 and walked together with him to DuPont Circle, where Defendant took Plaintiff to a seat. Defendant pulled out the rings from a blue box and asked Plaintiff to marry him. Defendant said he was ready, both parties were crying, and their emotional intensity was high. Plaintiff testified that he clearly remembered the words exchanged this day, although Defendant testified that he did not remember the specific words he used. Plaintiff testified that he said words to the effect of yes, I will be your husband for the rest of our lives, and Defendant said the same. The parties then put the rings on.

4. In response to Defendant's request to marry, Plaintiff said yes. Plaintiff also said at that moment that they were now married. The parties put on the rings and wore them regularly during the remainder of their cohabitation.

5. Defendant testified that neither he nor Plaintiff agreed to be married upon exchanging rings in May of 1999. Defendant testified that he was always opposed to any marriage and had specific reasons why he thought it unwise to marry Plaintiff in particular. Those reasons included Plaintiff's financial instability, his desire to avoid being associated with Plaintiff's poor financial reputation among friends and colleagues, Plaintiff's recreational drug and alcohol use, and Plaintiff's prior thefts from business associates. Defendant testified that he often told Plaintiff that he did not want to marry.

6. The parties cohabitated both prior and subsequent to the May 1999 event, with the exception of a period of several months immediately prior to that date when the parties were separated due to a dispute over a home renovation, and other brief periods of separation during strains in their relationship. Defendant testified that because he had signed a one-year lease, the parties did not immediately live together after the May 1999 event, but rather they moved back together when Defendant's lease expired.

7. Plaintiff and Defendant went to the home of Plaintiff's mother . . . with their rings in the mid- to late-90s, and [she] . . . testified that from that point forward, they always wore the rings. Defendant told [Plaintiff's mother] . . . that he bought the rings and they were markers of the parties' marriage. [Plaintiff's mother] . . . testified that the parties were cohabitating at this time.

8. On November 12, 2002, a book entitled “Joined at the Heart: The Transformation of the American Family,” by Al and Tipper Gore, was published by Henry Holt and Co. In this book, the authors documented and interviewed people they saw as representative of the changing face of the American family.

9. One of the families profiled in that book was referred to as the “Logans” and was comprised of [the plaintiff, the defendant, and their adopted children].

10. In addition to quotes from Plaintiff and Defendant and information about their family and adopted children, the book states the following at page 68: “The way they see it, theirs is a hometown story, really. They each married the guy around the corner. They point out that the really unusual thing is that both sets of their parents are still together!”

11. The parties met with the Gores during production of the book. Plaintiff and Defendant together read the passage about them in the book, and Defendant did not object to the book’s characterization of them as married. No testimony was presented about Defendant ever attempting to correct this portrayal.

12. Plaintiff introduced a series of photographs that show the parties together, separately, and with their children while wearing rings on their left-hand wedding ring finger. Plaintiff also introduced photographs of the parties taken on or about Christmas of 2010, Christmas of 2011, July 4th of 2011, and a family reunion the summer of 2011, all of which show the parties wearing the rings in this fashion.

13. Defendant handwrote a letter to Plaintiff sometime in 2010 or prior concerning the process of the parties putting together a “post nup,” which it appears Defendant meant to be an agreement of distribution of assets and debt should their relationship end.

14. Plaintiff and Defendant signed a typewritten document dated August 24, 2010, which explains division of rights, profits, and privileges pertaining to the parties’ real property in the event their relationship ends.

15. Defendant was diagnosed with esophageal cancer in June of 2011, and began chemotherapy in August of 2011. Defendant underwent major treatment for this cancer on October 17, 2011, and Plaintiff was present with him for a total of three surgeries. Plaintiff was present and cared for Defendant for at least a week in the hospital and presented himself there as Defendant’s husband. Plaintiff stayed with Defendant for at least two weeks after his release from the hospital, and cared for him while he recovered.

16. In the beginning of December, 2011, about two months after surgery, Defendant resumed chemotherapy treatment. Plaintiff assisted and cared for Defendant and their children during this treatment. Defendant’s chemotherapy stopped in February of 2012, and he would spend time at the parties’ farm in West Virginia to rest.

17. The parties never registered as domestic partners, obtained a marriage license, or had a formal marriage ceremony.

18. Upon transferring Plaintiff’s interest as a joint tenant in the Foxhall Road Property to Defendant, Defendant paid \$15,407.44 in transfer taxes on Plaintiff’s behalf with full knowledge that no transfer taxes would be due were the parties formally married.

19. The parties never filed joint federal or state income tax returns. Plaintiff filed as head of household on his federal income tax returns.

## II. ANALYSIS AND CONCLUSIONS OF LAW

### A. Applicable Law

The District of Columbia has long recognized common law marriage. See *Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993). “The elements of a common law marriage in this jurisdiction are cohabitation as husband and wife, following an express mutual agreement, which must be in words of the present tense.” *Mesa v. United States*, 875 A.2d 79, 83 (D.C. 2005) (quoting *Coates*, 622 A.2d at 27). “When one of the parties to the alleged marriage asserts its existence but either denies or fails to say there was mutual consent or agreement, then mere cohabitation, even though followed by reputation, will not justify an inference of mutual consent or agreement to be married.” *Coates*, 622 A.2d at 27 (quoting *U.S. Fidelity & Guaranty Co. v. Britton*, 269 F.2d 249, 252 (D.C. Cir. 1959). While there is no set formula for the agreement, “the exchange of words must ‘inescapably and unambiguously imply that an agreement was being entered into to become man and wife as of the time of the mutual consent.’” *Id.* (quoting *Nat’l Union Fire Ins. Co. v. Britton*, 187 F. Supp. 359, 364 (D.D.C. 1960), *aff’d*, 289 F.2d 454, *cert. denied*, 368 U.S. 832 (1961)).

Despite the District’s recognition of common law marriage, the Court should closely scrutinize claims of such “[s]ince ceremonial marriage is readily available and provides unequivocal proof that the parties are husband and wife.” *Bansda v. Wheeler*, 955 A.2d 189, 198 (D.C. 2010) (quoting *Coates*, 622 A.2d at 27). The proponent must prove by a preponderance of the evidence that there was a valid common law marriage. *Id.* (citing *East v. East*, 536 A.2d 1103, 1106 (D.C. 1988)).

If parties “agree to be husband and wife in ignorance o[f] an impediment to lawful matrimony, then the removal of that impediment results in a common-law marriage between the parties if they have continued to cohabit and live together as husband and wife” after its removal. *Matthews v. Britton*, 303 F.2d 408, 409 (D.C. Cir. 1962) (internal citations omitted); see also *Taylor v. Taylor*, 233 A.2d 43, 44 (D.C. 1967) (“It is settled that if parties agree to be husband and wife in ignorance of, or with knowledge of, an impediment to lawful matrimony, the removal of that impediment results in a common law marriage between the parties if they continue to cohabit and live together as husband and wife.”). “[I]n *Thomas v. Murphy*, 71 App.D.C. 69, 107 F.2d 268 (1962), this Court held the same result obtains even if the parties have knowledge of the impediment at the time that they agree to be married. It is not to be expected that the parties once having agreed to be married will deem it necessary to agree to do so again when an earlier marriage is terminated or some other bar to union is eliminated.” *Matthews*, 303 F.2d at 409 (holding that “[w]e are of the view that *Thomas v. Murphy* still constitutes the law of the District of Columbia”).

By its Order docketed January 7, 2013, the Court found as a matter of law that the parties in this matter could not have been common law married prior to March 3, 2010, the date on which the legal impediment to the same was removed, and left open the factual question of whether the parties became common law married on or after March 3, 2010.

### A. Discussion

In this jurisdiction, if Plaintiff and Defendant cohabitated as spouses following an express mutual agreement in words of the present tense, then they became married pursuant to the common law. In its analysis, the Court focuses particularly on that day in May of 1999, when Defendant exchanged rings with Plaintiff in DuPont Circle. The wrinkle, however, is that same-sex marriage was not legally recognized in this jurisdiction in May of 1999 and therefore common law marriage between them then was a legal impossibility. Under the law of this jurisdiction, however, it matters not whether the parties were aware of this legal barrier in 1999, and removal of this legal impediment on March 3, 2010 resulted in a common law marriage on that date, provided the parties continued to cohabit and live together as spouses. This Court previously held that should it find that the parties' met the elements of common law marriage, a common law marriage may only be said to have existed from March 3, 2010.

As an initial matter, there was no specific testimony about whether either party knew of the legal impediment to same-sex marriage in May of 1999. There was, however, testimony from Plaintiff that the parties used marital language on that day, and from Defendant that he did not remember the exact language exchanged along with the rings. Whether the parties knew of the legal impossibility to same-sex marriage on that date, however, is inconsequential under *Taylor*, 233 A.2d at 44[,] and *Thomas*, 107 F.2d 268, and the parties became common law married on the date the legal impediment was removed, provided they continued to cohabit and live together as spouses.

As mentioned, the parties presented conflicting testimony about the exact words they exchanged along with the rings in DuPont Circle on that day in May of 1999. Previously, when Plaintiff purchased rings and attempted to exchange them with Defendant on Valentine's Day of 1998, Defendant declined and said he would let Plaintiff know when he was ready to marry.

Plaintiff testified that on that day in May of 1999, Defendant asked him to go to lunch and then asked him to take a seat in DuPont Circle. He further testified that Defendant pulled two Tiffany rings from a blue box, said he was ready, and asked Plaintiff to marry him. Plaintiff testified that he clearly remembered the words exchanged that day, while Defendant testified he did not remember. Plaintiff testified the event was emotional for both parties, that he responded affirmatively to Defendant's proposal and said I will be your husband for the rest of our lives, and that Defendant said the same. The parties then put on the rings. Defendant testified that neither he nor Plaintiff agreed to be married that day.

The Court, therefore, is presented with conflicting testimony about the words exchanged and the events that transpired that day in May of 1999. Plaintiff presented stronger recollections of what was said by each party on that emotional day. Defendant testified that he did not recall the exact words exchanged, but regardless, was somehow certain that neither party agreed to be married. Based upon the totality of the record and the parties' demeanor as witnesses, the Court credits Plaintiff's testimony about that day over Defendant's. The testimony of . . . Plaintiff's mother[ ] corroborates this. [She] . . . testified that the parties went to her home in the late 1990s, each wearing a ring, and Defendant told her he bought the rings as markers of the parties' marriage. The Court, therefore, finds that the parties each made

an express mutual agreement in words of the present tense to be married on that day in May of 1999.

Defendant testified that he is opposed to the institution of marriage and never would have married Plaintiff. Defendant testified as to specific reasons why he did not think it was wise to marry Plaintiff—e.g. he was financially insecure, recreationally used drugs and alcohol, had a poor reputation with their friends, and had stolen from business contacts. Defendant also paid \$15,407.44 in transfer taxes on the . . . Property [in Northwest, D.C.] on Plaintiff's behalf in 2010 rather than first seek a formal marriage even though he knew doing so would prevent such taxes, suggesting that at that time, at least, he was opposed to formal marriage. There was no specific testimony, however, about when Defendant formed these beliefs about marriage, or, more telling, any specific testimony that Defendant held them in May of 1999, only some five years after the parties met and relatively early in a relationship that lasted until March of 2012. The Court concludes that Defendant may well have certain strong views of the institution of marriage, and may have discovered certain habits or characteristics of Plaintiff that lead him to find Plaintiff unsuitable for marriage as the parties' 18-year relationship progressed and which likely informed those views, but finds the existence of the elements of common law marriage on that day in May 1999 when the Defendant presented Plaintiff with the Tiffany rings. Again, the Court credits Plaintiff's testimony about the words the parties exchanged and their intent that day and it is this specific point in time on which the Court focuses its common law marriage inquiry, which is temporally sufficient under the controlling law.

Although minimal, there was some evidence and testimony presented about the parties being publicly referred to as married. The book written by Al and Tipper Gore referred to the parties as married. [Plaintiff's mother] . . . testified the parties presented themselves as married while wearing the rings at her house. Plaintiff testified he referred to Defendant as his husband at the hospital while caring for Defendant during his cancer treatment. There was no evidence or testimony, however, regarding any attempts by Defendant to correct or contradict any references to the parties as spouses, or to clarify that they were not. While not directly relevant to what occurred that day in May of 1999, such evidence does inform the Court's reconciliation of the parties' conflicting testimony about the ring exchange on that day, about their intent at that time, and about their cohabitation. In other words, if Defendant always [w]as adamantly against marriage as he testified, one would expect he would have presented testimony or evidence about his attempts to ensure that family, friends, or the general public knew that the parties were not married.

There was also conflicting testimony about cohabitation. Plaintiff testified that the parties were cohabitating before and after the exchange of rings, with the exception of a period of time prior to the exchange when the parties lived separately due to a dispute over home renovation. [Plaintiff's mother] . . . also testified the parties were cohabitating when they visited her at her home in the late 1990s wearing the rings and presented themselves as married. Defendant testified that because he had signed a one-year lease, the parties did not live together immediately after the exchange of rings in May 1999, but rather began cohabiting once this lease expired. Based upon the totality of the record and the parties' demeanor as witnesses, the Court finds the parties cohabitated as spouses prior to May of 1999, most

importantly cohabitated on that day, and cohabitated after, and any time spent apart was insufficient to undermine their spousal cohabitation upon exchanging rings. The record further shows that the parties continued to cohabit, with brief periods of separation incidental to relationship issues, until March of 2012. The Court, therefore, finds that the parties cohabitated following their exchange of rings and express mutual agreement to be married.

Accordingly, the Court finds that the elements of a common law marriage between the parties existed upon their exchange of rings in May of 1999, although same-sex marriage was then legal impossibility. This impossibility was removed on May 3, 2010, when the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Code § 46–401(a), became effective. Since the parties continued to cohabit and live together as spouses, they became common-law married on March 3, 2010, upon the removal of the legal impediment to their marriage.

### III. CONCLUSION

The Court issues the foregoing Findings of Fact and Conclusions of Law in support of its August 29, 2013 ruling on the parties' common law marriage. Accordingly, it is by the Court this 23rd day of January, 2014,

**SO ORDERED.**

### NOTE

At the beginning of the twentieth century, two-thirds of the states recognized common law marriages. Today ten states and the District of Columbia do.<sup>10</sup> This legal change in many respects reflects demographic changes. A practice that was almost a necessity when the population was scarce and scattered, and ministers or justices of the peace few and far between, became increasingly unacceptable as society grew and became more complex. Moral objections also grew. Otto E. Koegel, for example, argued that common law marriages “invite impulsive, impure and secret unions.” OTTO E. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 167 (1922). A growing concern with eugenics was a third factor in tightening the procedure for contracting a legal marriage. Blood tests and prohibitions on the marriage of mentally ill individuals also embodied this concern. For additional perspective, see Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1998).

Recently, however, the trend toward abolishing common law marriage has abated somewhat. For one thing, it has been recognized that those jurisdictions that do not recognize common law marriage often have to resort to other devices to achieve the practically same end.<sup>11</sup> Most jurisdictions, for example, have

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<sup>10</sup> The states are: Colorado, Iowa, Kansas, Kentucky, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, and Texas. A number of other states, including Alabama, Florida, Georgia, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Nevada, New Jersey, Ohio, Pennsylvania, South Dakota, and Wisconsin, have grandfather clauses recognizing common law marriages solemnized prior to certain years. New Hampshire recognizes common law marriages solely for purposes of probate (at the death of one spouse). Utah allows common law marriage of a sort, but has extra requirements beyond the traditional standard and adds a requirement for a court determination to validate the marriage. See Lindsey Dennis, et al., *Marriage and Divorce*, 19 Geo. J. Gender & L. 397, 424–41 app.A (2018).

<sup>11</sup> It is consequently very difficult to tally exactly how many states recognize some form of common law marriage, particularly if a functional definition is used. Tennessee, for example, has formally abolished common law marriage, but reached almost the same result by presumption. See *Emmit v. Emmit*, 174 S.W.3d 248 (Tenn.App. 2005); Richard T. Doughtie,

adopted a presumption in favor of the validity of a second marriage when one spouse was previously married (the burden of proving that the first marriage was still in existence lies with the party attacking the legitimacy of the second marriage). *See generally* 52 AM. JUR. 2D Marriage § 100 (2018). For interesting historical perspective, see Margadette Moffatt, *Domestic Relations: The Presumption of the Validity of the Second Marriage*, 33 MARQ. L. REV. 65 (1949).

There are three different situations to consider: (1) instances in which both parties believed in good faith they were formally married, but in fact they were not (say, because the person who officiated had no authority to marry them or there was a technical flaw in the license); (2) instances in which one party believed in good faith that he or she was formally married (e.g., one spouse lied and concealed the fact that he or she was still married to someone else); and (3) instances in which both knew they were not formally married, but believed they were nonetheless legally wed. Legal recognition of the marriage or other appropriate relief seems clearly justified for both spouses in instance one, and for the “innocent” spouse in example two. Any decision to abolish common law marriage in a jurisdiction should therefore at least consider adopting other forms of protection for innocent parties in instances one and two. California, for example, has adopted the putative spouse doctrine in its Family Code:

§ 2251. Status of putative spouse; division of quasi-marital property

(a) If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall:

- (1) Declare the party or parties to have the status of a putative spouse.
- (2) If the division of property is in issue, divide . . . that property acquired during the union. . . . This property is known as “quasi-marital property.”

§ 2254. Support of putative spouse

The court may, during the pendency of a proceeding for nullity of marriage or upon judgment of nullity of marriage, order a party to pay for the support of the other party in the same manner as if the marriage had not been void or voidable if the party for whose benefit the order is made is found to be a putative spouse.

It is important to note, however, that a putative marriage is not a marriage. For example, there is no need to seek an annulment or divorce to terminate a putative marriage. *See generally* Christopher Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1 (1985); Raymond O’Brien, *Domestic Partnerships Recognition & Responsibility*, 32 SAN DIEGO L. REV. 163 (1995); Jennifer Robbennolt & Monica Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999).

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Note, *Use of Presumptions in Proving the Existence of Marriage Relationships in Tennessee*, 5 MEM. ST. U. L. REV. 409 (1975).