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Civil Rites: The Gay Marriage Controversy in Historical Perspective

by

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Family law, throughout American history, has developed amidst controversy. Though the work of many family lawyers today is routine – uncontested divorces and formulaic claims for child support are the “bread and butter for thousands of lawyers” (Friedman, 2004: 12) – family law, writ large, has been the locus of hard-fought battles over morality, privacy, state control over private life, civil rights, and federalism.

The most trenchant battle in family law today is over the ability of same-sex couples to marry. This essay will consider the modern same-sex marriage controversy through the lens of history. Though there is a growing historiography of family law, Lawrence Friedman, as researcher, shrewd observer, and storyteller, is one of the original and best contributors to our collective understanding of family law history. His work provides both overarching themes and ground-level observations that are useful for reflecting on the ongoing controversy about same-sex marriage.

The Modern Problem

The legalization of same-sex marriage by first one state, and then four more, — and the express condemnation of it by more than forty others—has reintroduced the age-old problem of non-uniform marriage laws and interaction among states with different laws regulating family creation and dissolution. Massachusetts began the same-sex marriage revolution with the landmark ruling of its highest court in *Goodridge v. Department of Public Health* in 2003. The state’s highest court held that a ban on same-sex marriages “works a deep and scarring hardship on a very real segment of the community for no rational reason” and violates the state constitution’s guarantees of both equality and due process.

After a rash of recent rulings and enactments, same-sex couples can now also marry in Connecticut, Iowa, Vermont, New Hampshire, and the District of Columbia as well as in a growing handful of foreign countries, so far including Netherlands, Belgium, Canada, Spain, South Africa, Norway and Sweden. While the granting of full marriage rights for same-sex couples *anywhere* was a striking development, the anti-same-sex marriage developments in other jurisdictions are even more remarkable.

In anticipation that Hawaii might (though it never did) legalize same-sex marriage in the 1990s, Congress enacted the Defense of Marriage Act to absolve states of any potential obligation under full faith and credit principles to recognize same-sex marriages from sister states. A significant majority of states responded to their absolution with historically unprecedented statutory and constitutional reforms that both ban the

celebration of same-sex marriage within each state's borders and preclude the state's courts from recognizing same-sex marriages validly celebrated elsewhere. Efforts to amend the federal constitution to bar same-sex marriage nationwide were also undertaken, albeit unsuccessfully.

Even the state of Massachusetts, the first (and, for four years, the only) state to legalize same-sex marriage, took steps to restrict the right by refusing to issue licenses to non-resident couples. (This tactic was not entirely surprising since the legalization of same-sex marriages came by virtue of a judicial decision rather than as a result of political will.) The state temporarily closed its doors to non-resident same-sex couples seeking to marry because, as then-governor Mitt Romney warned, "Massachusetts should not become the Las Vegas of same-sex marriage."

This story -- a challenge to traditional marriage, a divisive moral debate, and the emergence of strong oppositional forces that are stuck, at least temporarily but perhaps indefinitely, in a kind of stalemate -- is not an original one. American states have never been of one mind about the appropriate level of state control over domestic relations, and the federal government has, for the most part, steered clear. Though most conflicts involving state regulation of marriage and divorce had been resolved by the middle of the twentieth century, the battles were long, hard fought, and left an indelible imprint on family law history.

Take, for example, historical disagreements among states about prohibitions on marriage. While all states banned marriages that were polygamous, closely incestuous, or involved an "imbecile" or "lunatic," states differed in the imposition of other restrictions. States disagreed about interracial marriage, marriage between first cousins or between individuals related by affinity, the minimum age for marriage with and without parental consent, and marriage by those with a communicable or hereditary disease such as tuberculosis or epilepsy. Despite the broad agreement about some restrictions, disagreements about others led to moralistic fights, jurisdictional wars, the erection of statutory blocks to interstate recognition, and lobbying for federal control over marriage law.

The battle within and among states over accessible divorce was even starker and more hard-fought. Though the story is by now familiar, the path by which we traveled from a country without judicial divorce in the eighteenth century to a country with almost universal divorce-on-demand in the twenty-first was by no means peaceful. It was marked, instead, by the ebb-and-flow of legal reform and retrenchment, depending on the momentary sway of the moral tides, strident wars among states for control over their own residents' marital status, and a "seedy underbelly" of abandonment, perjury, and corruption that developed as the law failed to respond quickly enough to the rising social demand for divorce.

In these historical battles over marriage and divorce, there are lessons to be learned: that a moral stalemate often produces a nonsensical patchwork of laws, that a profound gap between formal law and its working reality often arises in the wake of such

compromises, and that the competitive market for the law of domestic relations in the federalist system can wreak real havoc on laws and lives. And, above all else, social forces, eventually, “shape the legal order.” (Friedman, 2004: 11)

The Moral Stalemate

States, and factions within states, had longstanding disagreements about the accessibility of divorce. Colonial America, following England’s “divorceless” tradition (which lasted until 1857), did not permit judicial divorce. Though states began to enact laws to provide for judicial divorce after the Revolutionary war, the trajectory from those strict, early laws to the no-fault, divorce-on-demand laws of today was neither smooth nor continuously arced in one direction. The early laws reflected a general consensus that divorce was a remedy for an innocent spouse who had been wronged by a partner who breached the legally established obligations of marriage. What made these early laws strict was the narrowness of permissible grounds for divorce (adultery and abandonment, for example), the requirement that the plaintiff be innocent, and, to avoid trespass by more lenient laws elsewhere, lengthy residency requirements.

Toward the middle of the nineteenth century, several states experimented with broader, general grounds for divorce. Rhode Island, for example, permitted divorce for “gross misbehavior and wickedness in either of the parties, repugnant to and in violation of the marriage covenant.” (Blake, 1977: 50) But laws like this fell between the 1870s and the 1890s under pressure from the anti-divorce moralists who warned of the dire consequences to society from more accessible divorce. (May, 1980: 4) Connecticut’s first divorce law permitted dissolution on grounds of “misconduct,” but it, too, eventually reverted to narrower, more traditional grounds like adultery and abandonment.

Easy divorce was hauled out by the “prophets of doom” to signal the moral decay of society; strict laws were proffered as the key to preserving the institution of marriage. For many religious and more moderate moralists, divorce was “at best a necessary evil.” (Friedman, 2004: 33) Lenient laws were defended and pushed for by feminists and free lovers, but also by pragmatists like Joel Prentiss Bishop, author of the first treatise on marriage and divorce, who thought divorce law should be “adapted to the general needs of society.” (Bishop, 1851: 22) Social demand and moral ideology thus warred, and the resulting laws, at any particular time, were a reflection of their relative strengths. As Friedman has noted: “Small or large shifts in moral climate, or in the strength of contending groups, are reflected in the living law, which is a thermometer measuring the current moral climate of society.” (Friedman, 1984: 16)

The nineteenth-century was a time of “national panic” that produced a set of divorce laws that Friedman describes as “an egregious example of a branch of law tortured by contradictions in public opinion, trapped between contending forces of perhaps roughly equal size; trapped, too, in a federal system with freedom of movement back and forth, and beyond the power and grasp of any single state.” (Friedman, 2005: 381) By the close of the nineteenth-century, the moralists had more or less won. Most states only permitted divorce for traditional, well-defined grounds such as adultery,

abandonment, and imprisonment for a felony. Some also permitted divorce based on cruelty, though many judges clung to an interpretation that required proof of physical abuse. (Griswold, 1982) South Carolina continued to ban divorce altogether, and New York permitted it only on grounds of adultery. (Grossman, 2001: 90-92) Yet, the social demand for divorce was higher than it had ever been, reflecting both the increasing expectations associated with companionate marriage and the needs of the newly propertied middle class for legal papers to reflect broken marriages. (Friedman, 2005: 378-89; Griswold, 1982) Demand for divorce is, after all, “a demand for legal status; nobody needs a formal divorce or a court order to skip out of a marriage, to pack one’s bags and move out, or to move in with somebody else.” (Friedman, 2004: 32)

The moral stalemate over the formal law coupled with rising demand to create “a classic case of a dual system” in which the law on the books was entirely unreflective of its subterranean life. But the formal law was stuck; “[t]here was no way to reform the law, or to move it in either direction.” (Friedman, 2004: 38)

The concept of a “moral stalemate,” which so aptly characterizes divorce law in the second half of the nineteenth and first half of the twentieth centuries, holds some force in the modern same-sex marriage controversy as we begin to see some evidence of an emerging compromise between moralists on the one hand and pragmatists and advocates on the other. When the Vermont Supreme Court concluded that the existing ban violated the state constitution’s guarantee of “common benefits” to all citizens, it gave the legislature the choice between opening civil marriage to same-sex couples or fashioning a legal equivalent. *Baker v. State*, 1998. The legislature chose the latter option, and created a new status called a “civil union.” Several years later, and without the pressure of a court ultimatum, Connecticut also adopted a civil union law, as did, eventually, New Jersey and New Hampshire. (England has recently adopted a “civil partnership” law that significantly resembles the American civil union.) The “civil union” is a non-marriage marriage that preserves, at least symbolically, the tradition of heterosexual marriage, while permitting its rights and obligations to be shared by those who could not, historically, lay claim to the tradition.

These alternative status laws, like the strict nineteenth-century divorce laws, represent a triumph of symbolism over functional meaning. But the symbolism comes at a price – reflected in a second theme developed in Lawrence Friedman’s work and discussed below – the dual system. A civil union is a marriage, except in name. But we know, through the work of Friedman and others in family law, that such symbols are not easily discarded. And the symbol of traditional marriage remains steadfast, while its hold on human behavior has steadily declined.

Politically, the “civil union” status has become a marriage alternative that is acceptable even, surprisingly, to many conservatives. (It has also proven a gateway to full marriage rights, since both Connecticut and New Hampshire moved there from civil unions.) Pragmatically, within a single state, civil unions are easy to administer since they replicate marriage, legally, in all but name. But, as with divorce, the same-sex marriage stalemate has produced some pretty unworkable results, inconsistencies within

individual states and problems of portability across state lines. California, for example, adopted both an expansive domestic partnership law (at the hands of the legislature) and an anti-same-sex marriage law (by voter initiative). With the benefit of the state supreme court's view about how these two laws might co-exist (*Knight v. Schwarzenegger* (2005) and *Koebke v. BHCC* (2005)), registered same-sex partners in California are rightfully considered "spouses," but their union is not a "marriage." Then, in the midst of this chaos, the state legislature twice passed a bill to permit same-sex marriage, only to be rebuked by the state's governor, Arnold Schwarzenegger, who vetoed the bills because the legality of same-sex unions is a "matter for the courts". (This statement is particularly ironic for a Republican governor, since the main voiced objection to same-sex marriage in Massachusetts has been that it was undemocratically foisted on the people by the courts.) The state's highest court then weighed in – ruling the state's ban on same-sex marriage unconstitutional, giving same-sex couples the right to marry. (*In re Marriage Cases*, 2008) More than fourteen thousand couples made it to the altar before voters amended the constitution by referendum to once again prohibit same-sex marriage and to return to a domestic partnership regime. (Proposition 8 § 2, 2008) The referendum was upheld by the state's highest court, though the already-solemnized marriages were grandfathered in. (*Strauss v. Horton*, 2009) That same referendum is now the subject of a contentious lawsuit in federal court. Same-sex couples in California thus again live in a legally ambiguous landscape.

Though the moral stalemate has resulted in some compromises and led to the emergence of alternative status laws in some jurisdictions, the scale is still weighted heavily against same-sex marriage. In the vast majority of states, proponents of same-sex marriage have not mustered enough force to demand even a compromise position. In Maine, the legislature passed a law legalizing same-sex marriage, only to have the law wiped off the books by a "People's Veto" in an election six months later in November, 2009. Forty-one states have enacted either a statute or constitutional amendment (or both) banning same-sex marriage, and most of those also refuse to recognize a same-sex marriage validly celebrated elsewhere (whether from a sister state or one of the several foreign countries that have legalized the practice in recent years). The only states without such provisions are the five states that expressly permit same-sex marriage and New Jersey, New Mexico, New York, and Rhode Island. (Grossman and Stein, 2009)

At the federal level, opponents have prevailed strongly enough that no real compromise can be detected. With enactment of the Defense of Marriage Act in 1996, marriage became defined, for all federal purposes, as a union between a man and a woman. Thus, a same-sex marriage validly celebrated in an American state does not qualify for important federal rights like social security survivor benefits, immigration rights, or joint tax status.

Yet, even in staunchly anti-same-sex-marriage states, there is still the potential for compromise. Efforts to enact a federal constitutional ban on same-sex marriage were stalemated in part by a dispute among same-sex marriage opponents about whether to leave room for, or perhaps even endorse, a marriage alternative like civil unions. (And without George W. Bush in the White House to champion these efforts, they have

effectively died.) And efforts to amend the Massachusetts constitution, to override the judicial authorization of same-sex marriage, also failed because the leading opponents refused to leave room for something like civil unions.

Moreover, to the extent social forces really drive the legal order, the dramatically increased social acceptance of same-sex relationships would suggest compromise, or even full acceptance, will be an inevitable byproduct of the passage of time. One need only look at the portrayal of same-sex relationships in television and movies, the results of polls showing fairly significant acceptance of such relationships (particularly if you take the word “marriage” out of the question), and the marked inverse relationship between disapproval of homosexuality and voter age to see the potential effect of this social force on the near-term horizon. But, of course, the interrelationship between changing public opinion and the legal order is complex, and while the growing support is reinforced by greater constitutional protection for intimate relationships, including same-sex ones (*Lawrence v. Texas*, 2003), it is dampened by more deeply entrenched negative views and greater polarization of public opinion. The decision by the most recently anointed Pope to drum out and banish homosexual priests, for example, could have the effect of reminding Catholics that they are supposed to actively oppose homosexual relationships.

In family-law-battle years, it’s still early. The moral pendulum will no doubt continue to swing on same-sex marriage for many years before coming to a rest. In the meantime, the stalemate means living with an inconsistent and sometimes irrational legal order.

The Dual System

A second recurring theme in family law history is the concept of a dual system, what Friedman has described as the “two faces of law.” (Friedman, 1984) These two faces – the moralistic surface and the “working realities” – have been present in many contexts over the course of American legal history. Prostitution, for example, was almost universally criminalized, yet hardly ever prosecuted. Through this unstated compromise, the “moralists wanted, and got, symbolic affirmation of their standards, and this was valuable to them.” (Friedman, 1984: 24)

Historically, divorce provides the best example of a true “dual system.” The official rules at the end of the nineteenth century made divorce accessible, but not “routine or automatic.” (Friedman, 2005: 145, 377-81) As mentioned above, the law imposed substantive and procedural roadblocks to easy, consensual divorce. Yet, the divorce rate rose steadily throughout that period, and spouses from all walks of life managed to get their judicially approved walking papers. And the demand for divorce clearly rose even beyond the increases reflected in the actual divorce rate. Scholars have found that as expectations for marriage gradually increased during the Victorian era, spouses were more likely to experience disappointment with their unions. (Griswold, 1982; May, 1980) Great equality for women and increasing pressure on the family to carry out society’s missions were among the forces driving higher expectations for

marriage and a more pressing need for an escape valve. (Degler, 1980: 168; O'Neill, 1967; Grossman & McClain, 2006)

Divorce is the obvious remedy for increasing marital dissatisfaction, but the formal law, and the moral stalemate it resulted from, refused to budge. The dual system thus emerged with two main escape valves that allowed the moralistic laws to survive amid increasing demand for divorce and greater marital unhappiness: collusive divorce – husbands' and wives' conspiring to obtain a decree of dissolution to which neither was entitled -- and simple abandonment. No scholar has been more insistent about the prevalence of collusion in divorce practice than Lawrence Friedman, and the evidence he cites is convincing. Although most state divorce laws expressly prohibited collusion – and required judges to deny a petition for divorce if they suspected it – it was obviously common. From the “unknown blonde” who confessed to participating in mock adultery for more than one hundred divorces, to the boilerplate and often obviously perjured testimony in divorce trials around the country, to the overwhelming percentage of female plaintiffs (who had more to lose in terms of custody, spousal support, and reputation in the community, by being found “at fault” for a marriage’s breakup), couples routinely made a mockery of the moralistic laws designed to constrain exit from marriage. (Friedman, 2005: 380-81) Indeed, it was primarily a clamoring for a more “honest” system of divorce, rather than a shift in underlying morals, that led to the widespread adoption of no-fault laws in the 1970s. (Jacob, 1988: 66-69)

For unhappy couples who could not manage to obtain a divorce, collusive or otherwise, the solution was to simply act as if they were no longer married. As Friedman describes England in its pre-1857 divorceless era, the “most common ‘solutions’ when a marriage broke down were adultery and desertion.” (Friedman, 2005: 142) Strict American laws encouraged those pragmatic remedies as well, and American mobility and westward expansion facilitated them. A prototypical bigamist, in Friedman’s words, might be a “man who found his marriage unsatisfying or stifling; he decamped, without the bother of a divorce, and started over again, usually in some other city.” (Friedman, 1991: 642). Consensual separation, often without court approval, was another remedy for unhappiness. “When unhappy nineteenth-century couples lacked the legal grounds or the financial means or the moral or religious support to seek a divorce, many separated.” (Hartog, 2000: 29)

The demand for divorce, coupled with dismay over the integrity of the broken system, was sufficient to finally overcome the opposition to accessible divorce. There has always been pressure for the law to accord formal recognition to the social reality of failed marriages, but, as Friedman reminds us, “[s]ocial change leads to legal change; but never automatically.” (Friedman, 2002: 589) The dual system ultimately came to an end in the second half of the twentieth century, when the law finally conceded its strict stance.

Has the moral stalemate in the same-sex marriage context produced the same sort of dual system history has taught us to expect? Yes and no. One historically typical reaction to non-universal marriage prohibitions is evasive marriage. Yet, with respect to

same-sex marriage, that avenue was initially foreclosed by a reverse marriage evasion law in Massachusetts, which forbids clerks from issuing marriage licenses to same-sex couples from out of state unless their home states would permit them to marry. Notwithstanding a few wedding announcements in the *New York Times* that suggest imperfect enforcement of the law, Massachusetts enforced its law excluding non-resident couples from the right of same-sex marriage until it was repealed in 2007.

There are opportunities now, though, for same-sex couples to evade their own states' prohibitions by marrying in another state or country that permits it. The problem, however, is in gaining recognition by their home states that make such a marriage legally meaningful. So-called "Metro-North" marriages have made headlines, as New Yorkers travel to neighboring Connecticut to marry, precisely because New York, unlike most other states, seems inclined to grant full recognition to same-sex marriages validly celebrated elsewhere. (Foderaro, 2009) Even without full recognition, however, anecdotal evidence reveals small-ticket ways around the anti-same-sex marriage regime, like subversively filing joint federal tax returns (which do not, it turns out, ask the gender of the filer or filer's spouse) notwithstanding the federal law's refusal to recognize same-sex unions. But, again, this does not amount to a "dual system" as history might understand it.

Evidence of the dual system, to the extent it exists, lies in two places: census data that reflects same-sex couples replicating spousal lives and the patchwork of laws and judicial decisions that permit them to form, maintain, and dissolve families in ways that often significantly resemble marriage. One way of looking at marriage is by its "incidents": cohabitation, procreation, child-rearing, and the like. When the 2000 census was conducted, same-sex couples could not legally marry anywhere in the United States. Yet, data show gays and lesbians are partaking of the incidents of marriage in large numbers. Nearly 600,000 American households are anchored by a same-sex couple, comprising more than 10 percent of all unmarried partner households. Same-sex couples are present in 99 percent of all U.S. counties, and nearly a quarter of them are raising children. (U.S. Census, 2000)

Laws other than those governing marriage often permit same-sex couples to formalize these incidents; they can thus establish significant legal ties to one another that in some cases mimic those between married couples. The national landscape reveals a sliding scale of rights for same-sex couples. In addition to the five states (plus the District of Columbia) providing full marriage rights, New Jersey offers civil unions, which gives couples access to all marital rights and responsibilities. California, Oregon, Washington, and Nevada offer a robust domestic partnership status that grants most of the rights of marriage. Further down the scale, Colorado, Hawaii, and Maryland offer a more limited type of domestic partnership, and a handful of states provide limited benefits to same-sex partners of state employees. In addition to rights at the state level, many localities also grant same-sex couples the ability to register as domestic partners, entitling them to some, usually very limited, benefits. The willingness of state legislatures to express support for "all families" while simultaneously affirming

traditional marriage through anti-same-sex marriage initiatives, reinforces this dual system. (McClain, 2008)

Court decisions in many jurisdictions have upheld different marriage-like incidents for same-sex partners, even as the voters or legislators within the same jurisdiction have formally condemned same-sex marriage. These decisions, which are often motivated by the injustice that would result from excluding committed same-sex couples from legal protections that married heterosexuals take for granted, contribute to a real and identifiable dual system of laws.

The ability of gays and lesbians to reproduce – a prime “incident” of traditional marriage -- has become much easier due to advances in reproductive technology. Alternative reproductive technologies like artificial insemination and in vitro fertilization have facilitated biological parenthood for lesbian women, and surrogacy is increasingly used by gay men as a gateway to biological fatherhood. But the ability of same-sex couples to raise children together, with legal protections as parents, has become easier as well.

Despite the widespread prohibitions of same-sex marriage, same-sex parenting has eked out legal protections in many states. One core issue is whether lesbians and gays possess the ability to legally adopt children – either as individuals, or as part of a same-sex couple. At one end of the legal spectrum is a state like New York, which permits both so-called “second parent” adoptions (where an individual adopts the legal or biological children of a same-sex partner) and joint adoptions by same-sex couples. Along the middle of the spectrum lie states that permit second-parent adoptions, but not joint adoptions, or vice-versa. There also appear to be states in which same-sex couples are permitted, in practice, to adopt despite the lack of a statute or judicial ruling on the subject. In addition, a few states apply the traditional rules of “legal” parentage to same-sex couples – potentially deeming a person the legal parent of a child based on her relationship to the child’s other parent or her functional parentage, regardless of whether an adoption has occurred. (*K.M. v. E.G.*, 2005)

There are states that prohibit gay and lesbian couples from adopting. Florida bans all homosexuals from becoming adoptive parents (*Lofton v. Sec’y Dep’t Children & Family Servs.*, 2004); Mississippi and Utah bar same-sex couples from adopting children; and Arkansas prohibits adoptions by unmarried couples. (Grossman, 2009) The marked trend, however, is towards permitting same-sex couples and gay and lesbian individuals to adopt on the same terms as other couples and individuals. This trend is not entirely surprising, given the significant number of studies suggesting that children with gay parents fare as well in all relevant respects as children raised by heterosexuals.

There are some outlier states, which are openly hostile to gay parenting. Florida prohibits all homosexuals from adopting, a law resulting from a vocal anti-gay campaign by celebrity Anita Bryant, which sought, among other things, to “Save Our Children” from gay parents. Mississippi and Utah bar same-sex couples from jointly adopting

children, and Arkansas voters recently passed a referendum to prevent all unmarried couples from adopting.

Other incidents of marriage can sometimes be replicated through contractual and other private mechanisms. Couples in many states have successfully used parenting agreements to regulate the co-parenting relationship between biological and non-biological lesbian mothers. There are lawyers in many jurisdictions who devote their entire practice to assisting same-sex couples in creating partnerships and co-parenting arrangements that are enforceable within the existing legal framework. Same-sex couples can enter into reciprocal wills and durable powers of attorney that mimic the health-care decision-making and inheritance rights of spouses. Outside of a handful of states like Virginia that expressly negate the legal force of contracts between same-sex couples that purport to replicate marriage-like rights, same-sex couples can enter into binding agreements to obligate themselves financially to one another. Regardless of a state's law, same-sex couples can partake in commitment ceremonies in which they publicly vow love and fidelity toward one another, celebrations that are often indistinguishable (in content, appearance, *and* cost) from heterosexual weddings. And, since the Supreme Court's 2003 decision in *Lawrence v. Texas*, which invalidated Texas' same-sex sodomy ban as unconstitutional, they can freely engage in intimate sexual conduct without fear of government interference.

The emerging dual system for same-sex marriage is not yet a complete replication of the past. At least some same-sex couples have contracted evasive same-sex marriages in Massachusetts or elsewhere that have only symbolic effect at home. Couples thus act "married" in the same way unhappy couples sometimes pretended to be "divorced." But marriage, it turns out, is harder to fake than divorce, since the piece of paper itself is what entitles the bearer to commonly availed benefits of the status like dependent health insurance coverage, hospital visitation rights, joint tax filing status, and the spousal elective share. One can pretend to be divorced, after all, by simply moving out and moving on. One can even remarry – though not legally – without first obtaining a divorce by simply checking "single" on the marriage license application form. Although the chances of eventually being caught in this day and age are high, bigamous remarriages are undoubtedly still celebrated.

But in both cases we see real limits on the law's ability to shape culture and human behavior. Refusing to allow unhappily married couples to divorce did not make them happily married, and refusing to permit same-sex couples to marry does not lead them to either marry someone of the opposite sex or remain single. History teaches, though, that a longstanding social practice often forces the law to take account of it. With cohabitation, for example, courts have had to "face the fact that living in sin is now a recognized legal category." (Friedman, 2005: 581) In so many cases, it is not only financial or economic needs that drive the push for recognition, but moral ones as well. Existing realities tend to gain acceptance over time, and the deprivation of formal recognition itself becomes an unacceptable slight. Language in those judicial decisions that have struck down bans on same-sex marriage have emphasized the stigmatic effect

of exclusionary marriage laws. (*Goodridge v. Dep't of Public Health*, 2003; *Kerrigan v. Commissioner of Public Health* 2008)

The Battle Among States: The Price of Mobility and Federalism

Though the moral stalemate over divorce fed an unsatisfactory dual system within almost every state, the history of marriage and divorce is actually far more complicated than that. The formal law not only differed from the social reality, but also differed, sometimes profoundly, from state to state. Because American states did not (and do not) exist in isolation, differences in the laws of marriage and divorce engendered legal conflicts when couples married or divorced in one state and sought recognition in another. For marriage, the practice of intentionally crossing state lines to marry became known as “evasive marriage” and was banned by statute in a small number of states and made ineffectual in a few others through judicial application of a common-law anti-evasion principle. But not all evasive marriages were ignored, and when couples simply married one place, and later migrated elsewhere, the traditional approach in most states was staunchly weighted in favor of recognition. Under common law principles of comity, recognition was often, but not always, granted to disfavored marriages validly celebrated elsewhere.

States thus warred with each other about the restrictive laws, fearing that laxer standard would always trump stricter ones particularly as American mobility increased. Several uniform marriage laws were put forth near the beginning of the twentieth century, though none were widely adopted by states. Some attempts were made to federalize marriage law, either generally through a grant of jurisdiction to Congress or specifically by constitutionalizing bans on, say, polygamy and interracial marriage. (Stein, 2004) None of these efforts were successful, however, and states, eventually, learned to co-exist and show each other tolerance despite significant differences in marriage laws. (Grossman, 2005)

The states' wars over divorce laws were always more tumultuous and drawn out than those over marriage. From the early eighteenth-century advent of judicial divorce through the widespread adoption of no-fault divorce laws in the 1970s, states clashed over the accessibility of divorce. Some of the differences were regional. The South was always more hostile to divorce than other areas of the country, but so-called “divorce mills” sometimes popped up in surprising places. These mills were, for the most part, intentionally created, and, because of their appeal to out-of-staters, “pitted state against state.” (Friedman, 2005: 436) States competed for divorce business by shortening residency requirements (which were otherwise typically at least one year) and adding broader or more flexible grounds for divorce.

Indiana, for example, lured divorce-seekers with the combination of an “omnibus” ground for divorce and a requirement only that the plaintiff be a state resident at the time the petition for divorce was filed. (Blake, 1977: 119) It closed the door in 1873, only to be replaced in popularity by first Utah, then North and South Dakota, and then Nevada, which retained its divorce-haven status for many decades. Nevada's unusually short

residency requirement – six weeks – enabled nightclub singer Eddie Fisher to use a 44-night gig at *The Tropicana* to stage his divorce from Debbie Reynolds and virtually simultaneous remarriage to Elizabeth Taylor. (Blake, 1962: 1-4)

The lack of uniform divorce laws and the ability of an opportunistic state like Nevada to facilitate migratory divorce were a source of significant conflict among states. Efforts to promote uniform divorce laws were more pronounced than in the marriage context, though they were equally unsuccessful. The National Divorce Reform League did bring about the repeal of broad grounds of divorce in some individual states, but never in securing true uniformity. Congress appropriated money for a national study of marriage and divorce, in large part to determine the migratory divorce rate and fuel efforts to combat it. But the strictness of laws, it turned out, had very little to do with the divorce rate in any particular state or nationally. Only drastic changes in law affected the divorce rate, and, even then, the improvements were generally short-term.

Both collusion and the possibility of migratory divorce left states impotent in the battle to control marital exit, and the longstanding relegation of control over domestic relations to the states made a federal mandate unpalatable. States were generally unwilling to conform their laws voluntarily on controversial issues, including divorce. (Friedman, 2005: 305) Thus, in addition to collusion and perjury, the federal system itself provided a “prominent door” around strict divorce laws. (Friedman, 2004: 36) A natural outgrowth of this situation was an effort in many states to refuse recognition to obviously migratory divorces. Uniform laws for the first three decades of the twentieth century endorsed this approach by laying out rules of jurisdiction, residency, and full faith and credit designed to maximize the ability of each state to enforce its own standards against its own domiciliaries. (Grossman, 2004) The Supreme Court had given the green light for many of the refusals of recognition in a 1906 case, *Haddock v. Haddock*, in which it held that states could ignore out-of-state decrees if only one party was domiciled in the granting state and the other did not receive personal service or make an appearance. This enabled a fragile compromise, whereby states had the ability to draw the line at so-called “quickie” divorces, while generally giving effect to each other’s decrees.

The unstated compromise among states was undone by the Supreme Court in 1942, when it reversed itself in interpreting the recognition requirements under the Full Faith and Credit Clause. In *Williams v. North Carolina*, the Court held that states must give effect to out-of-state divorce decrees as long as the granting state properly exercised jurisdiction under its own rules. Although the force of that ruling was diminished by two later decisions,¹ it nonetheless put a stop to most state efforts to refuse recognition to out-of-state divorces. By judicial force, states thus learned to coexist amidst a non-uniform

¹ In a second review of the same case, the Supreme Court ruled that North Carolina could make its own determination on collateral review as to whether Nevada’s jurisdictional requirements had been met. See *Williams v. North Carolina*, 325 U.S. 226, 239 (1945) (*Williams II*). Then, in *Estin v. Estin*, 334 U.S. 541 (1948), the Court held that while a New York court had to honor a Nevada divorce with respect to determining the marital status of the parties, it did not have to relieve the plaintiff-husband from the incidental obligations of separation previously adjudicated by a New York court. Though neither of these cases overruled the core holding of *Williams I*, both undermined its practical effect.

set of divorce laws and despite stark disagreements about the moral implications of easy divorce. This, the Supreme Court observed, was simply “part of the price of our federal system.” (*Williams v. North Carolina*, 1942)

Same-sex marriage is once again putting our federalism and commitment to state control over domestic relations to the test. What had been a period of relative calm in the state marriage wars was upended by the decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*. The non-uniformity created by *Goodridge* is a significant one, particularly given the prominence of gay rights and same-sex marriage in the national debate.

Massachusetts’ legalization of same-sex marriage, and the decade-earlier anticipation that Hawaii would permit it, triggered many responses. Though our long history of state conflicts over marriage and divorce was largely ignored, it has in many, mostly unfortunate ways been replicated. Congress sought to assert national control over marriage law through constitutional amendment, much as it had done in the first half of the twentieth century to combat, at various times, polygamy, interracial marriage, and the quickie divorce. Though separated by generations, these efforts have all failed.

At the state level, the modern response to same-sex marriage has been both a replication and an extension of our historical experience. While states have long taken steps to shore up their virtual borders against the transgressions of states with more lenient marriage and divorce laws, the lengths to which states have gone to protect against same-sex marriage are unprecedented. (Massachusetts even tried to prevent its own marriages from having extraterritorial effect – not something we have seen before— by strictly enforcing until its recent repeal its reverse marriage evasion law.)

States historically retained the right to refuse recognition to a marriage under the common law rules of marriage recognition, but, ultimately, the decision whether to exercise that discretion fell mostly to courts. On a case-by-case basis, courts thus determined whether to grant full, or perhaps just single-purpose, recognition to an out-of-state marriage that the forum state would not itself have permitted. While the outcomes turned on a number of variables, courts categorically refused recognition only to polygamous or closely incestuous marriages. Even there, courts sometimes recognized particular incidents of those marriages, especially if the parties would not have the opportunity to cohabit within the states’ borders. A court might, for example, recognize the validity of a marriage – effectively ended by the death of one party -- for inheritance purposes. Courts routinely granted recognition to marriages that would have been prohibited because of age, race, and relationships of affinity, unless the marriages were obviously evasive. The rules of recognition were driven by principles of comity – the idea of courtesy among political entities – and concerns about the havoc that would be wreaked by non-portable marital statuses. (Grossman, 2005)

The modern landscape looks quite different from the historical one. Outside of a handful of states that have not taken any action to stop same-sex marriage at the border, the decision whether to recognize a same-sex marriage from elsewhere has been removed

from courts. Instead, states have enacted sweeping statutes or constitutional amendments to prevent both the celebration and recognition of same-sex marriages. These laws, patterned after the federal Defense of Marriage Act, admit of no exceptions and do not, in many cases, permit even incidental recognition of same-sex marriage. A handful of state laws go even further. They prevent courts or the state's legislature from granting any formal recognition to same-sex unions, whether it is a marriage, a domestic partnership, a civil union, or some as-of-yet-undefined intermediate status. Unprecedented in scope, these laws threaten to undermine the orderly creation and dissolution of intimate unions, something states have worked toward over the centuries.

In the states that have not erected such obstacles, the historical patterns of recognition may emerge. Courts have shown themselves hesitant but not totally unwilling to recognize same-sex marriages or civil unions even though their own laws do not permit them to be celebrated. A handful of courts have granted civil union partners a "divorce" without necessarily recognizing the underlying union. At least one court has recognized a civil union partner as a "spouse" for purposes of filing a wrongful death action. And, as discussed above, the California Supreme Court has granted a domestic partner protection against "marital status" discrimination. More directly, New York has upheld recognition of same-sex marriages in a variety of cases and governmental orders. (*Godfrey v. Spano*, 2009).

The conflicts among states with respect to same-sex marriage are relatively young, since such unions have only been legally celebrated in the United States for less than five years. They will multiply, though, with the recent addition of four states that authorize same-sex marriage, and the potential for a few others to do so in the near future. Whether same-sex marriage survives in only the current five, or is extended to a small block of states, the union as a whole will have to learn to co-exist.

As more same-sex marriages occur, and more state-to-state conflicts arise, the harshness of the modern anti-same-sex marriage landscape may reveal itself more starkly. The unintended consequences of a non-recognition regime – legalized polygamy when states lines are crossed, uncertainty about marital status, risks to children whose parents' obligations to them might be unenforceable outside of the state of creation, and public dependencies created by the displacement of private, reciprocal obligations of care – may prove sufficient to cause a retrenchment.

Conclusion

Of what predictive value are the parallels between the history of marriage and divorce and the modern controversy over same-sex marriage? When considering what a legal historian of the twenty-first century might write in 2100, Friedman himself cautioned: "There is no crystal ball." (Friedman, 2002: 603). Yet, the lessons of history – about the unsustainable legal structures produced in times of panic, the influence of social and economic pressures on law's development, and the importance of the "separate histories of the law of the fifty states" – still offer us wise counsel. Had modern states paid more attention to them, particularly to the reasons why states historically managed to

peaceably co-exist despite stark disagreements about morality, eugenics, and state control over marriage, reproduction, and divorce, our modern landscape might be less troubled.

The vast changes to the law of marriage and, even more so, to the law of divorce between the nineteenth and twenty-first centuries notwithstanding, marriage remains a robust institution and a central part of our society. Many insisted that the rising demand for divorce in the nineteenth century was a symptom of society's decline, and, yet, marital exit also paved the way for remarriage. (Hartog, 2000; Grossman, 2005) A shift in underlying morals viewed divorce as better than adultery, and a happy remarriage as at least arguably better than a miserable first marriage. Indeed, the very challenges to marriage themselves are a testament, in some ways, to its strength as an institution; divorce was "a sign that people valued marriage highly." (Friedman, 2004: 39)

As Friedman closes the third edition of his famous compendium, *A History of American Law*:

Marriage and family have changed enormously; but they have also survived, and will continue to survive. They are simply in the process of changing their definitions. Some sort of essential core of marriage remains—and remains vital. This core is commitment. Even the idea of gay marriage, which so horrifies traditional people, is a kind of homage to commitment, to stability, monogamy, and to a kind of old-fashioned nuclear family. Traditional marriage has lost its monopoly of legitimacy. But one of its key ideas: long-lasting, unselfish love, is very much still alive. (Friedman, 2005: 582)

Lessons to live and legislate by.

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