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THE EMERGENCE OF MARRIAGE EQUALITY AND THE SAD DEMISE OF CIVIL UNIONS

Cyril Ghosh

ABSTRACT

In this chapter, I suggest that Connecticut's and other states' recent discontinuation of civil unions in the name of marriage "equality" marginalizes and demeans marriage – rejecting people who may nonetheless wish to codify their intimate partnerships – for purposes of legal "incidents," including rights and privileges, like hospital visitation rights, testimonial privilege, inheritance rights, etc. In doing so, I also call for a rejuvenation of the practice of granting civil union licenses in these states.

Keywords: Civil unions; constitutional law; marriage equality; queer theory; feminism; critical theory

I love it when gays argue with other gays about being gays.[1]

The trannies are not going to hang out at Banana Republic.[2]

Two recent marriage equality decisions issued by the US Supreme Court, *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015), have effectively inaugurated nationwide marriage equality. Long before these decisions were issued, however, various states – especially in the northeastern United States – had already moved in this direction. For example, in *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court

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granted same-sex couples marriage rights as early as 2003. When marriage equality had not yet become an available option, some states, such as Vermont and Connecticut, started granting civil union licenses to same-sex couples. In 2008, however, the Connecticut Supreme Court's decision in *Kerrigan v. Commissioner of Public Health* legalized same-sex marriage (SSM) in the state. This decision triggered a 2010 state statute that formally discontinued civil unions and inaugurated the practice of retroactively converting all existing civil unions into marriages (GLAD, 2010). Various other formerly civil union-granting states have taken similar steps.

By paternalistically making civil unions "redundant" as a result of marriage equality, these states have self-consciously moved away from an inclusive regime of family law toward a more exclusive one – all in the name of marriage "equality." But, to what extent is the current regime of marriage "equal" in the United States? In the remainder of this chapter, I argue that, although the marriage equality movement makes an important and laudable set of rights-demands, the discontinuation of civil unions in Connecticut and other states effectively discourages, rather than protects, attempts by individuals to create nontraditional families and circumscribes the range of permissible legal codifications for nontraditional relationships. In so doing, it delegitimizes rather than supports a range of nontraditional family formations and patently contradicts a historically *liberal* trajectory of expanding the range of rights associated with family formations. It also "normifies" (Goffman, quoted in Warner, 1999, p. 32) the heterosexual, married, monogamous,[3] romantic couple as the standard for all people, including LGB couples. This normification devalues queer and other marriage-rejecting individuals and couples.

Civil unions and marriage equality are, on this misguided view, mutually exclusive. Connecticut's discontinuation of civil unions is predicated on the assumption that civil unions are no longer relevant when marriage equality has been instituted. But the state has never sufficiently demonstrated this to be the case. In fact, the state refuses to even acknowledge that retroactively converting civil unions into marriages (by statutory fiat), and subsequently denying civil union licenses to all couples, might have the invidious effect of marginalizing and demeaning marriage-rejecting people (straights, queers, and others) who may nonetheless wish to codify – for purposes of legal "incidents" like hospital and jail visitation rights, inheritance, testimonial privilege, etc. – their existing intimate partnerships.

In what follows, I begin, in Part I, with a discussion of the legal landscape and the achievements of the marriage equality movement. In Part II, I illustrate how the achievement of marriage equality has led to a simultaneous discontinuation of civil unions in several states. In Part III, I offer a set of reasons why legal codifications of intimate partnerships remain important – even for those couples who do not wish to participate in the institution of marriage. In Part IV, I offer a set of *liberal* justifications for a reinstatement of civil unions in formerly civil union granting states. In Part V, I present some remarks on

the challenges that a demand for a universal right to civil unions, such as the one presented here, must inevitably confront. I conclude in Part VI with a note on why marriage equality and civil unions are not mutually exclusive and should not be regarded as such.

BACKGROUND

In the legal landscape, the marriage equality movement has moved with what might be called vertiginous speed. As recently as 1986, in *Bowers v. Hardwick*, the Supreme Court refused to strike down prohibitions on same-sex intimate conduct (sometimes called sodomy laws) in Georgia. Within 17 years of this ruling, however, the Court changed its mind on this issue as it declared in *Lawrence v. Texas* (2003) that *Bowers* had not been correctly decided (Kennedy, in *Lawrence v. Texas*, 2003, p. 578). *Lawrence* effectively outlawed sodomy laws across the 50 states. Ten years later, when the Supreme Court struck down Section 3 of the Defense of Marriage Act in *United States v. Windsor*, it elected to do so on June 26, 2013 – the 10th anniversary of its *Lawrence v. Texas* decision (Lambda Legal, 2013). This ruling inaugurated federal recognition of SSMs. In his majority opinion Justice Kennedy wrote, *inter alia*, that a key provision of the federal Defense of Marriage Act (DOMA, 1996) – namely, Section 3, which defined marriage as a union between a man and a woman – was "unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment" (Kennedy, in *United States v. Windsor*, 2013, p. 2).

It was also noteworthy that the Court issued this ruling just a few days before the scheduled New York pride parade (*Windsor* originated in the District Court for the Southern District of New York). The octogenarian New Yorker, Edie (Edith) Windsor, the plaintiff in *Windsor*, led the parade that year as tens of thousands of LGBT+ people and their allies celebrated the occasion with her. *Windsor* has been widely recognized as one of the Court's few progressive landmark decisions in recent years and LGBT+-rights advocates in the United States as well as elsewhere have been understandably jubilant about it.

The decision itself, however, was "narrow" and "minimalist" (Sunstein, 1999; also see Bybee & Ghosh, 2009) and remained silent on the question of state bans on SSM. Yet, in his dissenting opinion, Justice Scalia warned that the decision was "jaw-dropping … an assertion of judicial supremacy over the people's Representatives in Congress and the Executive …[this] image of the Court would have been unrecognizable to those who wrote and ratified our national charter" (Scalia, in *United States v. Windsor*, 2013, p. 2). In addition, he declared that the reasoning of the Court would lead to an invalidation of state bans on SSM (Ford, 2014).

This indeed happened. In 2015, the Court issued a decision in *Obergefell v. Hodges* (on the 12th anniversary of *Lawrence*) declaring that state bans on SSM were impermissible under the US Constitution. In the two intervening years between *Windsor* and *Obergefell*, there was a spate of rulings, mostly from federal courts, striking down state bans on SSM – apparently in keeping with the *Windsor* decision. By the time the Court issued its opinion in *Obergefell*, SSM had become legal in 37 states and Washington D.C. (Stewart, 2015) and more than 70% of Americans were estimated to be living in states that allowed SSM.[4]

During this period, the Court repeatedly declined to hear appeals against federal circuit court rulings. This was not surprising because most of these courts had, in one way or another, echoed the reasoning offered in Justice Kennedy's majority opinion in *Windsor*. In late 2014, however, a Sixth Circuit Court of Appeals panel upheld SSM bans in four states: Ohio, Michigan, Kentucky, and Tennessee. This created a "circuit split" and eventually led to a grant of *certiorari* from the Supreme Court. The Court was extremely likely to overturn the Sixth Circuit decision and it predictably did so. As a result, gay and lesbian individuals now have the right to marry across the 50 states and Washington, DC and their marriage rights are now recognized both at the federal and at the state levels.

The highest court in the country rarely overturns its preceding decisions. So, it is a testament to the marriage equality movement's legitimacy and effectiveness that a mere 30 years ago the court upheld Georgia's sodomy laws and today the Court no longer permits any state-sponsored bans on same-sex intimacy and disallows denial of marriage rights to same-sex couples at both the federal and state levels. But what is less well known about the marriage equality movement is the steady erosion of civil unions that has accompanied its advances. In the next section, I elaborate on some of these developments.

SHOULD MARRIAGE EQUALITY LEAD TO THE DISMANTLING OF CIVIL UNIONS?

As litigation around marriage equality percolated up through the federal court system in the early years of this century, many states, including several in the northeastern United States, started offering gay and lesbian couples the opportunity to enter into civil unions. This was a progressive step in the right direction because these unions codified the intimate relationships that existed between these partners and bestowed upon the couples all the same rights and benefits as marriage, at least at the state level. But these civil unions differed from marriages in two important ways. First, the partners could not call themselves a "married" couple. And second, the couple did not become entitled to

the federal rights associated with marriage because the federal government did not recognize civil unions.

As early as 2005, Connecticut started giving same-sex couples the right to enter into a civil union. But in 2008, the Connecticut Supreme Court, in *Kerrigan v. Commissioner of Public Health,* found the practice of granting of civil unions to same-sex couples, while simultaneously denying them marriage rights, to be in violation of the equal protection clause of the Connecticut Constitution. The Court also found, correctly, that:

> [R]etaining the designation of marriage exclusively for opposite sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise [namely] … that gay individuals and same-sex couples are in some respects 'second-class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples. (*Kerrigan v. Commissioner of Public Health*, 2007)

In part as an unintended consequence, however, with this ruling, not only did the court effectively institute SSM in the state, but it also paved the way for the demise of civil unions in Connecticut. The following year, the Connecticut state legislature passed a law to guarantee "equal protection under the state constitution for same-sex couples." According to this law, by October 1, 2010, all civil unions already entered into in Connecticut would be automatically converted into marriages (except in cases where the civil union was in dispute) (Connecticut Public Act 09-13). In addition, Connecticut would no longer issue licenses for civil unions.

Civil Unions in Vermont and New Hampshire have met with similar fates (Minter & Stoll, 2010). Since January 2010, when it first started allowing SSM to be performed in the state, New Hampshire phased out civil unions altogether. All existing civil unions would be converted into marriage. Vermont had allowed civil unions since 2000, the first state in the country to do so. But since 2009, when it became a marriage equality state, Vermont has stopped performing any new civil unions, although it continues to recognize civil unions entered into in the past. The story is even bleaker for advocates of opposite-sex civil unions. Today, heterosexual couples who want to enter a civil union may only do so in a handful of states like Illinois, Hawaii, and Colorado; Nevada has some domestic partnership laws but no civil unions (Culhane, 2013; NCSL, 2014).

This steady elimination of civil unions across these SSM-allowing states, carried out in the name of marriage equality, presents a set of major challenges for those queer-identified individuals and straight couples who reject the institution of marriage but nonetheless wish to codify their intimate partnerships – often in no small part because they would like to obtain access to the rights, entitlements, and benefits that result from the state's recognition of intimate partnerships.

In the remainder of this chapter, I present an argument for the reinstatement of civil unions in the states that have dismantled them. In doing so, I first illustrate, in the next section, some reasons why codification of intimate partnerships remains important, even for those who reject the institution of marriage.

WHY IS CODIFICATION OF INTIMATE RELATIONS IMPORTANT?

Codification of intimate relations can potentially take many different forms, including, primarily, marriage, but also civil unions, domestic partnership laws, intimate caregiving unions (ICGUs) (for more on ICGUs, see Metz, 2010), and so on. Proponents of marriage equality, of course, want the most straightforward form of codification of intimate relationships for all couples. For them, marriage equality enables the provision of equal rights as well as equal recognition. In thinking about the former, some have highlighted SSM's equal protection and due process claims. For example, advocates of SSM have sometimes compared bans on SSM to bans on interracial marriage (Bonauto, 2003; Chauncey, 2004; Eskridge, 2002; Goldberg-Hiller, 2002; Strasser, 2004). Others have claimed that SSM litigation should eschew "equal protection" arguments and proceed on the logic that SSM bans violate the Establishment Clause by impermissibly employing religious reasoning to govern the terms of a secular contract (Bedi, 2013). Yet others have suggested that denying marriage rights to same-sex couples constitutes a violation of the due process clause of the Fourteenth Amendment (Gerstmann, 2008).

In some ways, however, the recognition argument for marriage is stronger than the rights-based argument. It throws into sharp relief the idea that allowing civil unions for lesbian and gay couples does not constitute an adequate substitute for marriage equality. In this spirit, many have suggested that the marriage contract signifies more than just rights and that the marriage contract is a celebration of a couple's love and commitment toward one another and a symbol of the social and cultural recognition that come with such a formal declaration. Marriage, in this view, is rife with both political and social meaning (Wedgwood, 1999; also see Pinello, 2006; Hull, 2006). In *Virtually Normal*, Andrew Sullivan goes so far as to suggest that "marriage is not simply a private contract; it is a social and public recognition of a private commitment. As such, it is the highest public recognition of personal integrity. Denying it to homosexuals is the most public affront possible to their public equality" (Sullivan, 1996, p. 79). While Sullivan's rhetoric is a bit hyperbolic here, it remains the case that the symbolic character of marriage is central to its meaning. In an important respect, therefore, the marriage equality debate has been less about legal incidents (which civil unions would accommodate, for the most part) and more about the positive social connotations of being recognized as a married couple

and the demeaning social connotations of being disbarred from the institution of marriage.

But, as I demonstrate in the remainder of this section, it is this very recognition and symbolism, these very social connotations, not to mention marriage's somewhat chequered history, that some queer-identified and other individuals wish to reject (Ackelsberg & Plaskow, 2004; Brake, 2010, 2012; Ettelbrick, 1992 [1989]; Ettelbrick & Shapiro, 2004; Fineman, 2004; Franke, 2012; Josephson, 2005; Metz, 2010; also see, Yoshino, 2002, 2006). So, for example, a couple can legitimately wish to codify their intimate relationship without wishing to acquire marriage's "sacramental connotations" (Brake, 2012, p. 14). Similarly, couples may wish not to set their relationship up for failure in the face of marriage's "impossible expectations" (Brown, 2004, pp. 89–90). Yet other couples may just not yet be "ready" for marriage and/or wish to avoid the institution's "bad track record" (Baxter, 2014). Rejecting the institution of marriage is not the same thing as rejecting access to all the legal "incidents" that ought to accrue to intimate partners. The list of these legal incidents is inordinately long; some prominent ones include hospital and jail visitation rights, inheritance, communications and testimonial privilege, adoption, filing of joint tax returns, ownership of collective property, access to spousal/partner's health insurance, welfare, social security, and so on.

It is for this reason that both critics and supporters of SSM endorse nonmarital codifications of intimate partnerships. For example, Andrew March, a critic of marriage in its current form, thinks that the liberal state should get out of the business of marriage altogether, but he too recognizes that the state's conferring a civil union status remains important precisely because such a form of codification of intimate partnerships would bestow rights (March, 2011; also see Andrew March, 2010).[5] Thus, he goes on to recommend a "universal civil union status" for intimate couples of all kinds. Similarly, Martha Ackelsberg and Judith Plaskow raise the question: "Why not argue for the disestablishment of marriage as a legal form and the creation of a status of 'civil union' that will allow people to create their own forms, and have them recognized by the state?" (Ackelsberg & Plaskow, 2004).

In 1989, in a famous exchange on this subject, Paula Ettelbrick and Tom Stoddard offered their views in *Out/Look* about the "desirability of marriage." While Stoddard agreed that there is a "general absence of edifying examples of heterosexual marriage" (Stoddard, 1992 [1989], p. 14), he also claimed that the issue "is not the desirability of marriage, but rather the desirability of the *right* to marry" (Stoddard, 1992 [1989], p. 18). Ettelbrick, however, responded with less certainty about even the desirability of the *right* to marry because, she claimed, "marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships" (Ettelbrick, 1992 [1989], p. 21). However, Ettelbrick too ultimately agrees that state recognition of intimate relationships

remains important and should include "different kinds of families" (Ettelbrick & Shapiro, 2004, p. 476).

Mary Lyndon Shanley has used the term "contractualism" to describe the position of those who support some form of codification and are yet critical of marriage as an institution. These critics of marriage wish to abolish state-defined marriage and "replace it with individual contracts drawn up by each couple wishing to marry" (Shanley, 2004, p. 5). Shanley's own preference, however, is for a reformed institution of marriage that is premised on the "equal status" of the partners, in which men and women of any race, class, or sexual orientation can marry each other (Shanley, 2004, p. 6). But one powerful response to this line of argumentation is that Shanley's analysis excludes "nonmarital relationships" (Fineman, 2004, p. 46). For Martha Fineman, for example, the state should indeed be "involved in supporting and subsidizing some family relationships. But the target of state policies should be the caretaker-dependent tie, not that between sexual affiliates" (Fineman, 2004, p. 50).

Tamara Metz continues this line of thinking about caregiving and builds a powerful case for the "disestablishment" of the institution of marriage from the state. But she too supports, and in fact strongly calls for, a regime of codification for intimate relationships that would be called "intimate caregiving unions (ICGUs)" (Metz, 2010). This same idea of care also figures prominently in the work of Elizabeth Brake, who recommends a genuinely liberal regime of marriage that is "minimal" (Brake, 2010, 2012) – in the sense that the least possible restrictions apply to it. As Brake would have it, the state should not impose any restrictions on either the sex or the number of the contracting parties or the nature and purpose of their relationships, "except that they be *caring* relationships" (Brake, 2010, p. 305, my emphasis) and the parties decide which "rights and responsibilities to exchange with each" (Brake, 2010, p. 303). In other words, unlike Metz, Brake would retain marriage but have it look very different from the way it currently does.

These queer theorists and their affiliates do not constitute the only group that acknowledges the crucial role the state must inevitably play in supporting nonmarital care and intimacy. Thus, even Stephen Macedo, who is not at all supportive of queer critics' wish to "disestablish" the institution of marriage from the state, agrees that "the law should do more to recognize and support a variety of forms of nonmarital caring and caregiving relationships; not as substitutes for monogamous marriage but as supplements" (Macedo, 2015a, p. 9; also see, Macedo, 2015b). And finally, there are those, like Amitai Etzioni, who are opposed to marriage equality but also think there are good reasons for accepting a regime in which gays and lesbians are given the opportunity to form civil unions to codify their intimate relationships. Writing at a time well before marriage equality became the law of the land, Etzioni has suggested, "Civil Unions accord those involved in them *most* of what traditional marriages provide: the right to inherit, share health benefits, and so on. Indeed, ceremonies and public commitments can be made for civil unions too. And such unions

allow social conservatives to believe that that which is sacred to them has been respected" (Etzioni, 2004, p. 66).

To be sure, for Etzioni, civil unions should be relevant only for homosexuals. But, as Cass Sunstein has pointed out in his discussion of federalism's relationship to marriage laws in the United States: "The genius of the federal system lies in the fact that it allows law to adapt to diverse cultures of diverse states – and simultaneously provides extensive room for experimentation and learning. The point holds for experiments that go well beyond the domain of same-sex relations. For example, heterosexuals, no less than homosexuals, might be permitted to enter into civil unions as well as marriage; *many heterosexuals might in fact prefer that option*, and some states should provide it to them" (Sunstein, 2004, p. 43, my emphasis).

It is to this idea – that civil unions might be a *preferred* option for some couples, both homosexual and heterosexual – to which I now turn. In the next section, I offer a *liberal* set of reasons why states that have rescinded the practice of granting civil union licenses should reinstate these practices because couples might reasonably "choose" to have civil unions instead of marriage. And in a genuinely liberal society, they would be well within their rights to do so.

REASONS FOR REJUVENATING CIVIL UNIONS

Privileging the marriage contract over civil unions curtails the range of family and kinship ties that the state officially recognizes, and goes against a liberal regime's explicit commitments to broadening the range of human capabilities and freedoms rather than constricting them (on the capabilities approach, see Nussbaum, 2000). Ironically, Justice Antonin Scalia, who famously opposed marriage equality, makes a version of this argument in his dissenting opinion in *Obergefell v. Hodges*. It bears quoting him at some length here:

> The [majority opinion] is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. Of course the [Obergefell] opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, *one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say*.) (Scalia, in *Obergefell v. Hodges*, 2015, p. 8, emphasis mine)

Justice Scalia's insight, that marriage "constricts," is hardly original. As discussed above, as early as 1989, Paula Ettelbrick had raised the question: "Since when is marriage the path to liberation?" (Ettelbrick, 1992 [1989]). It has also long been pointed out that normals (mainstream gays and lesbians)

and their queer counterparts disagree radically on the importance of access to the institution of marriage (Warner, 1999). Normals want to be just like straight people – married, often monogamously,[6] and interested in building a traditional family with one intimate partner. In other words, they want to "normify" their conduct as well as others' via "in-group purification" (Goffman, quoted in Warner, 1999, p. 32). For these normals, access to marriage would make for "good gays – the kind who would not challenge the norms of straight culture, who would not flaunt their sexuality, and who would not insist on living differently from ordinary folk" (Warner, 1999, p. 113). These good gays are all the things that queers are not – docile, neoliberal, assimilationist, and even "homonationalist" (Puar, 2006; also see Yoshino, 2002, 2006; Franke, 2012; Weber, 2016; Ghosh, 2016).

In short, these good gays are normal, who want to "cover" while queers "signal" instead (Yoshino, 2002, 2006). To "cover" is to conform to a mild assimilationist demand to maintain a low profile as a homosexual; "all covering requires is that the individual modulate her conduct to make her difference easy for those around her to disattend her *known* stigmatized trait" (Yoshino, 2002, p. 837, emphasis in the original). To be sure, marriage can represent – depending on context – both signaling and covering (Yoshino, 2002, p. 848). But, in an age of gay wedding planners, gay honeymoons, and gay destination weddings,[7] it may be said that the view that marriage is an instance of covering has acquired quite a bit of legitimacy.

Many queers understandably reject this impulse to covering as well as the heteronormative and normalizing injunction to marry, and quite reasonably view traditional marriage as a historically sexist institution built upon asymmetrical relations of sexual power and as one that is often associated with religious endorsement. For these and other reasons, they recognize why marriage has long been the focus of "radical-feminist revulsion" (Ettelbrick, 1992 [1989], p. 20). As a result, and as a mark of resistance, queers have long affirmed the practice of forming relationships and families that do not fit the traditional marriage mold. They see this as *liberating*. As Katherine Franke explains it: "What's difficult to explain is that for some lesbians and gay men, having our relationships sanctioned and regulated by the state is hardly something to celebrate. It was [after all] only a few years ago that we were criminals in the eyes of the law simply because of whom we loved" (Franke, 2011). But the difficulty with having this position is that when individuals do, in fact, try to codify their nontraditional relationships into a status that is recognized by the state they have very few options to choose from. This results in a material deprivation of a long litany of rights, such as, for example, and as indicated above, those associated with adoption or hospital and jail visitation or inheritance or testimonial privilege, and so on.

States that disallow civil unions, in effect, demand that couples who wish to have access to legal incidents must sign a marriage contract. In doing so, these states lend their full weight to what they think is an ideal, normative, and

indeed *right* form of family and they thus incentivize marriage. Today, in the United States, only the marriage contract enables full access to all legal incidents that accrue from a codification of intimate partnerships. Spouses are the recipients of ~1,138 of these benefits and entitlements at the federal level (Arkin, 2013), in addition to rights and benefits that result from state statutes. It is for this reason that one might say that the state tacitly – but aggressively – encourages those who are in intimate relationships to codify their relationships through the marriage contract. Tax breaks for married people who file their taxes jointly constitute just one simple example of such incentives. There are many others.

This injunction to marry contravenes several guarantees the liberal state claims it is committed to – such as maintaining neutrality among competing conceptions of the good; eschewing "morals legislation" (something that Justice Scalia wished to protect);[8] and protecting individuals from any invasion of a "zone of privacy" they are entitled to.[9] In addition, this privileging of the marital relationship is also particularly ironic because, historically speaking, the contemporary western ideal of a secular and lasting marriage, based on romantic love, has always been more of an exception rather than a rule. At the turn of the century, about half of all American marriages were projected to end in divorce – at double the rates of the 1960s (Miller, 2014; O'Rourke, 2003). No matter how secular the marriage contract is construed to be – a couple can have a Justice of the Peace marry them in the middle of City Hall, for example – "sacramental connotations" (Brake, 2012, p. 14) pervade the institution. Equally, contrary to what occurs in reality, marriage is never presented in the public domain as purely "transactional," even though, as a practical matter, many marriages might be principally or entirely so. In fact, some people get married because they simply do not wish to be alone.[10] Even the federal government supports transactional marriages in some cases (see, e.g., Department of Justice, 1963).

There is also almost always a background assumption that the relationship involves love of some kind (usually romantic) and commitment of some kind and spouses are expected to not abandon their partner simply because the arrangement has become inconvenient for them (some marriage vows even insist that couples profess that they will remain partnered "in sickness and in health," etc.). It is injunctions such as these that have made no-fault divorce historically controversial and difficult to obtain in the United States.[11] In recent years, some states have in fact made it burdensome to obtain a divorce – as they have made divorce laws stricter than in the past.[12]

Monogamy, too, has always been an *implicit* assumption in both traditional marriage and SSM, although, as is well known, this is always already an unenforceable norm. In fact, there is no coherent argument to be made for monogamy[13] at all (Butler, 2008; Sandel, 2009, p. 257). As Michael Sandel has observed, "If government were truly neutral on the moral worth of all voluntary intimate relationships, then the state would have no grounds

for limiting marriage to two persons" (Sandel, 2009, p. 257). Even Stephen Macedo, who strongly supports monogamous marriage, recognizes that partners in committed relationships can and often do have "consensual sexual non-exclusivity" (2015b, p. 17). Yet, the state actually *prefers* and *wants* monogamy; and it *wants* marriage. This is so in part, and as indicated above, because the state is committed to the idea of monogamy as a "conception of the good." This, of course, goes against the very essence and core of liberal neutrality.

In this context, therefore, it should not be surprising that some individuals, both queer and nonqueer, wish to reject these kinds of normalizing injunctions of the marriage contract. After all, in the course of history, marriage has almost always tended to subjugate women, whose domestic, reproductive, sexual, and other forms of labor, including caregiving labor, are routinely extracted from them without due recognition or remuneration (Cott, 1998; Friedan, 1963; Josephson, 2005; Pateman, 1988). There is even some evidence that cohabiting women spend less time on domestic labor than married women (Josephson, 2005, p. 276).

Equally, marriage in the United States began as a conservative institution designed to assert paternalistic control, and indeed domesticate, white women's sexuality (under slavery, e.g., black women were left out of marriage's ambit) (Josephson, 2005, p. 275) and the political "dependence" of women was historically reinforced through elaborate "coverture" laws that were, and could only be, sustained through the institution of marriage (Miller, 2012). One further reason to not want to get married is, as Wendy Brown suggests, marriage's impossible expectations:

> [M]arriages and families are expected to hold every flower in the bouquet of personal happiness and fulfillment – great sex, great children, great freedom, great adventure, along with love, excitement, fidelity, stability, and harmony – and not only are these *impossible expectations*, but marriages are often crushed by their weight, by the overburdened and claustrophobic character of the form. (Brown, 2004, pp. 89–90, emphasis mine).

Given these radically impossible expectations of marriage, a person is well within her or his rights to have reservations about the institution of marriage. Civil unions, for these couples, might well represent a secular (and even somewhat transactional) alternative to marriage that allows them to codify their intimate relationships and to have access to various legal incidents and protections (from abandonment, for example). And, yes, individuals might even, for all the reasons cited above, and as Cass Sunstein describes it, have a reasonable "preference" for civil unions (Sunstein, 2004, p. 43).

One also does not have to be a feminist critic of marriage to reject marriage. Some couples are simply not ready for the "commitment" that is invariably involved in marriage. Still others may not wish to enter into a marriage contract because they believe the institution of marriage has traditionally had distinctly religious connotations that they might want to stay

away from. Finally, many couples who have been married before and then divorced may not be prepared to marry again even though they might want to obtain the rights associated with intimate partnerships. Empirical evidence on civil unions from France, the UK, Holland, and New Zealand also corroborate this idea of "preference" for civil unions, both among straight and among gay couples.

In the United Kingdom, there is a movement underway that demands civil unions for heterosexual couples. In 2014, Rebecca Steinfeld and Charles Kreidan, a heterosexual couple, reported in *The Guardian* that they have petitioned the equalities minister, Nicky Morgan, to open "civil partnerships to all, regardless of sexual orientation" (Kriedan & Steinfeld, 2014). According to this couple, "Being civil partners would give [them] greater legal rights and responsibilities without the social expectations, pressures and traditions surrounding marriage" (Keidan & Steinfeld, 2014). Similarly, Holly Baxter has reported in *The Guardian* that in Holland and New Zealand, where civil partnerships are open to heterosexual couples, "the uptake is about 10%" (Baxter, 2014). These civil partnerships are "modern unions created in a time where sex discrimination was illegal rather than actively encouraged" and they allow these couples – both heterosexual and homosexual – to "leave behind the bad track record of marriage" and yet make a legal commitment to one another (Baxter, 2014).

The *New York Times* reported in 2010 that in France for every three marriages there were two civil unions (called *pacte civil de solidarité* (PACS) in France) (Sayare & de la Baume, 2010). The overwhelming majority of these civil unions is among heterosexual couples. In fact, *Liberation* reported in 2012 that 94% of PACS were heterosexual (Wullus, 2012).[14] Between 1999 (when it was first introduced) and 2008, the number of civil unions in France snowballed from 6,000 to 140,000 (Cody, 2009).

But the story remains very different in the United States, where, despite all the LGBT+-rights advances we have seen in the recent past, and as described above, most of the 50 states do not, at the present time, allow civil unions, especially for heterosexual civil unions. The State of Connecticut's decision to retroactively convert existing civil unions into marriages is paternalistic and infantilizing. It "misrecognizes" (Fraser, 1995) and, in the process demeans, all those couples who entered into civil unions expecting to remain civilly united and to never be married. It also effectively erases any mark of political resistance these gay and lesbian couples may have deemed to be central to their public identities. And it does all this in the name of liberty and equality. The nonchalance, and speed, with which Connecticut and various other formerly civil union-granting states have carried out their project of rescinding the right to enter into a civil union in recent years is indicative, ultimately, of the dismissiveness with which these lawmakers regard any politics of queer, and queer-affiliated, resistance.

DOES A RIGHT TO A CIVIL UNION "COUNT"?

Recognizing some rights as more noteworthy than others is endemic to the liberal state's usual approach to rights mobilization. Sociolegal scholarship on rights-based mobilization suggests that within liberalism there is often contestation surrounding which rights "count" (McCann, 2014, p. 248) and which do not. Michael McCann (2014) and Jeffrey Dudas, Jonathan Goldberg-Hiller, and Michael McCann (2015) illustrate that rights claims are routinely contested over and which rights, in the end, matter more – and which kinds of rights-based mobilization ends up being successful – often depends on whether or not the rights-claim is seen, culturally, as legitimate. McCann (2014, p. 253), for example, suggests that "at every point in North American history, the standard of rights qualification also has been deployed [by dominant groups] as a normative force denying many people from even basic recognition and status as full citizens."

Exclusionary tendencies, in fact, permeate American citizenship. Rogers Smith's *Civic Ideals* (1997) carefully catalogues how exclusionary traditions predicated on ascriptive hierarchies of race, ethnicity, and gender have always coexisted with a liberal tradition in the United States. Equally, as Elizabeth F. Cohen has demonstrated, some US citizens are de facto "semi-citizens" because of the rights-exclusions they experience, often as a result of the confluence and competing pulls of administrative rationality and liberal and democratic norms (Cohen, 2009). Thus, for example, gays and lesbians, before they had federal as well as state marriage equality, were denied the right to marry at least in some jurisdictions, and children and felons are routinely excluded from voting rights.[15] Even in the domain of free speech rights, where a radically libertarian "Millean paradigm" is widely regarded to be the predominant discursive tradition, all sorts of exclusions are routinely admitted on the basis of "moral geographies" interwoven into constitutional interpretation (Passavant, 1996).

Simply put, rights are obtained and exercised in the United States within a larger discursive context of "deservingness" (Dudas et al., 2015, p. 372). Indeed, a "core assumption of liberal governance – free, rights-bearing subjects must be disciplined, rational, self-governing beings – has worked as legitimating ground for the practice of differential rights to enjoyment and mobilization" (Dudas et al., 2015, p. 373). It is not surprising, therefore, that the assimilated, normified, marriage-endorsing, LGB couple has been the beneficiary of a relatively speedy path to marriage equality. They fit the ideal of the "disciplined, rational, self-governing" being. In this sense, queers and other marriage-rejecting couples and individuals who seek to be civilly united even though they have access to marriage rights are liberalism's "pariahs" (Dudas et al., 2015, p. 374). For them, earning the right to acquire all the legal incidents that accrue from marriage while refusing to be legally married will always be accompanied by the burden of demonstrating the "deservingness" of their

rights claim. This chapter has proposed one set of arguments in this regard. But more remains to be said before a demand for universal civil union rights becomes widely acceptable.

ARE MARRIAGE EQUALITY AND A UNIVERSAL RIGHT TO CIVIL UNIONS MUTUALLY EXCLUSIVE?

If family law in the United States were an ecosystem, civil unions, especially civil unions for heterosexual couples, would be an endangered species. Only about three or four states allow heterosexual civil unions at the present time. A massive push for SSM both from within the LGBT+ community and from their allies has catapulted SSM on to the center-stage of contemporary civil rights struggles and the advances made in the marriage equality movement have been rapid and widespread. But they have come at a cost. The movement has rightly pointed out that the granting of civil union licenses for same-sex couples while segregating marriage licenses as the exclusive prerogative of heterosexual couples is patently discriminatory. As an unintended consequence, though, the marriage equality movement has inferiorized and devalued the practice of civil unions and contributed to their steady elimination. This practice should be rolled back. It discriminates against marriage-rejecting intimate partners and caregivers.

It is, of course, debatable whether or not the state should be in the business of regulating intimate relationships at all. Many have plausibly argued that it should not. In fact, endorsement of the state's involvement in marriage creates a situation of "selective legitimacy" for marital intimacies and "sanctifies some couples at the expense of others" (Warner, 1999, p. 82.) It is no wonder, then, that Richard Thaler and Cass Sunstein, Andrew March, Tamara Metz, and others have each in their own way called for the "disestablishment" of marriage from the state (March, 2010, 2011; Metz, 2010; Thaler & Sunstein, 2009).

As a practical matter, however, this kind of disestablishment of marriage is not likely to happen in the foreseeable future. In this context, then, there are good reasons to support the marriage equality movement (and I do) but not necessarily endorse the abandonment of civil unions for all couples. It does not have to be one or the other. Equal marriage rights and the right to have civil unions should not be understood as somehow contradictory. In a genuinely liberal society, we should recognize that we expand the range of human capacities of self-expression, intimacy, and yes, even love, if the state allows for a broader range of family formations rather than a narrower one.

One remaining word needs to be said here about the relationship of federalism and marriage reform in the United States. As Sunstein argues the case, to approve of the Supreme Judicial Court of Massachusetts's *Goodridge* decision upholding SSM,

> [It] is not necessary to be certain that as a matter of principle, same-sex unions should be permitted everywhere or anywhere. It is necessary only to say that ours is a federal system and that reasonable people have made reasonable claims on behalf of those unions. (Sunstein, 2004, p. 43)

This line of reasoning becomes especially pertinent in thinking about how northeastern states in the United States spearheaded the campaign for a nationwide debate on marriage equality, first, by allowing civil unions for gay couples, and then by legally instituting marriage equality. Same-sex couples married in these states demonstrated to the rest of the country that allowing SSM does not lead to a breakdown of society. Now, it is time for these states to revisit their attitudes toward civil unions. States like Connecticut, Vermont, and New Jersey ought to engage in a constructive dialogue with advocates of civil unions and re-evaluate their stance on the practice of rescinding them. It will be one of the great ironies of history if, in the name of liberty and equality, we permanently disallow intimate couples from *choosing* to either get married or get civilly united. Marriages and civil unions are not mutually exclusive and depicting them as such runs contrary to our deepest convictions about what a free society should look like. Marriage-endorsing LGBT+ people should express their solidarity with marriage-rejecting and/or queer-identified people in their quest for access to civil unions because the need for LGBT+ group solidarity remains pertinent. The struggles of lesbians, gays, bisexuals, transgender, and queer people have not ended with the establishment of marriage equality – they have only been partially addressed and a lot remains to be done.

NOTES

1. Doris (Lauren Weedman), in *Looking: The Movie* (2016; dir. Andrew Haigh).
2. Michael Warner, *The Trouble With Normal* (1999, p. 152).
3. The word "monogamous" has multiple meanings. I use it here and elsewhere to denote fidelity. I do not use it to denote singular marriage (as opposed to plural marriage). In the remainder of the chapter, wherever I mean the latter, I say so explicitly.
4. This data point is a low estimate because, after this report came out, Alabama became the 37th state to allow SSM.
5. To be sure, March recognizes that granting civil union rights to gays and lesbians while leaving the option to marry the exclusive prerogative of heterosexuals constitutes a "form of stigmatization."
6. I use the word to denote "fidelity" here.
7. See, for example, http://www.huffingtonpost.com/news/gay-wedding-planning/; http://www.cnn.com/2014/05/25/travel/gay-honeymoon-hotspots/; http://www.lonelyplanet.com/honeymoons-and-romance/best-of-honeymoons-and-romance/content/travel-tips-and-articles/top-10-gay-wedding-destinations; last accessed July 28, 2015.
8. See Antonin Scalia, *Lawrence v. Texas*, 2003, https://www.law.cornell.edu/supct/html/02-102.ZD.html.
9. See, for example, *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1971); *Roe v. Wade* (1973); *Planned Parenthood of Eastern Pennsylvania v. Casey* (1992); *Lawrence v. Texas* (2003); *United States v. Windsor* (2013); and *Obergefell v. Hodges* (2015).

10. In the recent past, at least two non-romantic couples have publicly proclaimed their decision to marry their friends to form a nonromantic partnership. See, for example, Ephi Stempler, "Platonic, until death do us part," *The New York Times*, January 21, 2016, available at http://www.nytimes.com/2016/01/24/fashion/platonic-gay-relationship-couple.html?_r=0; last accessed July 14, 2016. Also see Kim A. Calvert, "Commentary: why i might marry for friendship and money – not love," *Chicago Tribune*, June 10, 2016; available at http://www.chicagotribune.com/news/opinion/commentary/ct-marriage-money-financial-benefits-taxes-20160610-story.html?track=ct_social_keywee_acquisition-subscriber_facebook_fb-post&kwp_0=167828&kwp_4=687092&kwp_1=349841; last accessed July 14, 2016.
11. The State of New York, for example, didn't approve of no-fault divorce till 2010 (see Nicholas Confessore, "NY moves closer to no-fault divorce," *The New York Times*, June 15, 2010).
12. On the case of divorce laws in Arkansas, for example, see Tracy Harrington McCoy, "Breaking up is hard to do in Arkansas: Why divorce laws are getting stricter," *Newsweek*, May 17, 2015; available at http://www.newsweek.com/2015/05/29/breaking-hard-do-arkansas-why-divorce-laws-are-getting-stricter-332531.html.
13. Here, and in the rest of the paragraph, I use the word to denote both "singular marriage" (as opposed to "plural marriage") as well as fidelity.
14. I am indebted to Nicholas Ealy for a translation of this French newspaper article.
15. On felon disenfranchisement, also see Uggen and Manza (2002).

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