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CONFERENCE ON MARRIAGE, FAMILIES, AND DEMOCRACY

FOREWORD

*Jordan Leigh Santeramo**

In a time when the definition of marriage is being hotly contested, even as federal lawmakers propose a “federal marriage amendment” to build a definition of marriage into the U.S. Constitution, examining the role of democracy in how we perceive and define “marriage” and “family” is important. Governmental proposals to “promote marriage” through welfare policy would expand marriage’s reach, even as the proposed “federal marriage amendment” would limit who may participate in the fundamental social institution of marriage. Whether you view democracy through the eyes of a state court judge, the President of the United States, a foreign delegate, a law professor, or an average citizen, we are all human beings, and the gravity of these issues becomes obvious as we ask ourselves, in a democratic society, who decides what “family” means? What role, if any, should our government have in determining such a human issue? What are the justifications for government’s interest in marriage, and, more broadly, in families? What is the relationship between family self-governance and democratic self-government? Why does marriage remain at the center of so many contentious public debates? Has the case been made for making marriage the cornerstone of family policy?

On March 14-15, 2003, thirty-five prominent academic scholars from a range of disciplines gathered at Hofstra University School of Law, for a Conference on Marriage, Democracy, and Families, to ask themselves precisely these questions. One year later, as this symposium goes to press, these issues remain just as significant and just as contested. This Symposium illustrates this diversity of views. Some

* Editor-in-Chief, *Hofstra Law Review*; J.D. anticipated May 2004.

scholars contend that the definition of “family” should be determined more by individual citizens, and would shift the focus away from the institution of marriage (between a man and woman) to a broader protection of an array of “families,” accorded rights and obligations regardless of their sexual orientation. On the other side, other scholars look upon the marriage of a heterosexual couple as the bedrock of our society, an institution that must be preserved and elevated above other close relationships.

The Conference on Marriage, Families, and Democracy consisted of five panels, during which scholars explored the following questions:

I. HISTORICAL PERSPECTIVES ON MARRIAGE. This panel considers the history of government’s interest in marriage as an institution that sustains democratic self-government. It explores the idea that marriage helps constitute (or domesticate) adults as good citizens, as well as the gendered nature of this relationship. Perceived connections between marriage and civic virtue were historically important to governmental policies concerning freed slaves, immigrants, and child protection. Has viewing families as seedbeds of civic virtue, in which children develop the skills and capacities fundamental to self-government, justified regulation of the family or deference to family self-government? Of what import is the history of government’s interest in marriage to today’s efforts to fortify two-parent, marital families and to reduce the incidence of single-parent families? For the current issue of whether to recognize same-sex marriage?

II. FAMILIES IN LEGAL AND POLITICAL THEORY. This panel explores perspectives in legal and political theory about the relationship between marriage and democratic self-government. It also examines the place of families, as an institution of civil society, in our constitutional order. How might various legal and political theories about the family evaluate current governmental proposals to bolster marriage? What are the justifications for government’s interest in families and its regulation of them? May government justifiably prefer and promote marriage over other family forms? Should concerns for the human dependencies and vulnerabilities arising within intimate relationships lead to imposing obligations even on unmarried partners, as the recent ALI Domestic Partnership Principles propose? Should government try to shape marriages so they promote certain public values and public purposes?

III. CURRENT POLICY INITIATIVES TO PROMOTE MARRIAGE. This roundtable addresses a range of current policy initiatives to promote and sustain marriage, through, for example, welfare reform, and greater reliance on partnerships between federal and state governments and faith-based and community groups. Has the case for marriage and for government's role in promoting it been made? Are efforts to promote marriage sufficiently attentive to gender differences in expectations about and benefits from marriage, and to how gender inequality within marriage may contribute to women's discontent with marriage and willingness to become mothers outside of marriage? Should the discussion include the possibility of reconstituting marriage? Further, do proposals to promote marriage adequately consider economic and racial inequality and the impact of governmental measures upon different racial groups?

IV. LESSONS BEYOND U.S. BORDERS. This panel examines the question of marriage and democracy in a global context. How have other countries addressed the relationship between marriage and self-government? What role does promoting marriage play in supporting families? How do other countries address trends such as increases in divorce, cohabitation, nonmarital childbearing, and same-sex relationships? For example, some countries have extended benefits and obligations associated with marriage to nonmarital, opposite, and same-sex conjugal relationships. How do equality norms, international conventions, and human rights instruments apply to family life and the regulation of families?

V. INTIMATE AFFILIATION AND DEMOCRACY: BEYOND MARRIAGE? This roundtable addresses the question of whether the focus should be upon marriage and democratic self-government or upon the broader issue of the relationship between intimate affiliation and democracy. Is government right to focus on the marital relationship or should it focus on a broader range of forms of intimacy, such as the parent-child/caretaker-dependent bond, the bonds of extended family, and the bonds of friendship? What forms of intimate affiliation help to provide the caregiving vital to meet the needs of children and dependents? What forms help to foster the capacities for democratic and personal self-government? How do or might other institutions of civil society (e.g., religions) support the work of families? How might government support families, as well as these other institutions of civil society?¹

1. Brochure, Hofstra University School of Law, A Conference on Marriage, Families, and Democracy, at http://www.hofstra.edu/Academics/Law/law_marriage.cfm.

This published Symposium contains articles by thirteen conference participants, arranged in the order in which those views were presented at the conference. Their contributions have, in most instances, been updated to respond to changes that have taken place in this rapidly evolving area of law over the year since they were first presented.

The Issue opens with a piece by James Herbie DiFonzo, moderator of Panel I, "Historical Perspectives on Family." Professor DiFonzo posits the idea that the historical concept of marriage is evolving to the point where it is no longer an "institution" with a uniform definition. Rather, it may be representative of a variety of different social arrangements, each possessing "bundles" of rights and responsibilities.²

In an article based upon her keynote address delivered at the Conference, Professor Herma Hill Kay, Hofstra's 2003 Sidney and Walter Siben Distinguished Professorship Lecturer, urges us to view marriage as a "joint venture," enabling parties to design their own form of marriage.³ Her article revisits and reemphasizes observations she made thirty years ago in her book review essay, *Making Marriage and Divorce Safe for Women*,⁴ contending that the only way to strengthen marriage effectively is to provide couples with greater flexibility in formulating the terms of their own relationships.⁵

The next three articles come from Professors Brian Bix, Steven H. Hobbs, and Nancy L. Rosenblum, who appeared on the second panel, on "Families in Legal and Political Theory." Professor Bix accepts governmental regulation of marriage, but calls upon the government to emphasize the importance of social norms when shaping policy.⁶ Demonstrating that history has much to teach about the present and future of family law, Professor Hobbs, through an examination of a story of love on the Oregon Trail, offers lessons about the capacity of human beings to love and to formulate and reformulate their own intimate relationships, in whatever shape or form.⁷ Professor Rosenblum provides a more philosophical view of marriage, drawing on political theory to

2. James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 33 (2003).

3. Herma Hill Kay, "Making Marriage and Divorce Safe for Women" Revisited, 32 HOFSTRA L. REV. 71, 89 (2003).

4. Herma Hill Kay, *Making Marriage and Divorce Safe for Women*, 60 CAL. L. REV. 1683 (1972) (book review).

5. See Kay, *supra* note 3, at 61.

6. Brian H. Bix, *State Interest and Marriage—The Theoretical Perspective*, 32 HOFSTRA L. REV. 93 (2003).

7. Steven H. Hobbs, *Love on the Oregon Trail: What the Story of Maynard v. Hill Teaches Us About Marriage and Democratic Self-Governance*, 32 HOFSTRA L. REV. 111 (2003).

examine the role of the institution of marriage in our society and to question the moral desirability and political necessity of regulating families.⁸

The next four articles grew out of papers presented on Panel IV, “Lessons Beyond U.S. Borders,” and are by Professors Mary Jane Mossman, Nancy D. Polikoff, Linda Silberman (with co-author Karin Wolfe), and Nora V. Demleitner. These authors encourage those engaged in public debate in the United States to examine and reflect upon the developments of family law in other countries in order to gain a new perspective. Professors Mossman and Polikoff offer an overview of recent developments in Canadian family law. Professor Mossman focuses particularly upon Canada’s expanding recognition of “new families,”⁹ while Professor Polikoff examines Canada’s *Beyond Conjugal* report and urges those who advocate for an expansive definition of “family” in the United States to deemphasize marriage.¹⁰ Instead of securing the right for same-sex couples to marry, she contends that advocates should instead focus on securing equal rights for all types of family relationships, regardless of marital status.¹¹ Professor Silberman and Karin Wolfe and Professor Demleitner take these issues to a transnational level. Professor Silberman and Wolfe discuss the effects of globalization on the quantity of cross-border family law disputes, and how to deal with the competing policy interests of different countries in resolving these matters.¹² Similarly, Professor Demleitner examines the effect of increasing migration and “how immigration laws and international prescriptions have shaped the concept of marriage and family in the United States and other Western democracies.”¹³

Finally, Professors Don Browning, Judith Stacey, Lynn Wardle, and Linda McClain provide a variety of different perspectives on Panel V’s topic, “Intimate Affiliation and Democracy: Beyond Marriage?” Professors Browning and Wardle view marriage as an institution that should be protected and preserved. Professor Browning, a theologian,

8. Nancy L. Rosenblum, *Democratic Families: The “Logic of Congruence” and Political Identity*, 32 HOFSTRA L. REV. 145 (2003).

9. Mary Jane Mossman, *Conversations About Families in Canadian Courts and Legislatures: Are There “Lessons” for the United States?*, 32 HOFSTRA L. REV. 171, 172 (2003).

10. Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201 (2003).

11. *See id.*

12. Linda J. Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-sex Unions*, 32 HOFSTRA L. REV. 233 (2003).

13. Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273, 275-76 (2003).

gives a philosophical and theological cast to the discussion. He examines the mother-father relationship through a “critical familism” theory espousing an “equal regard” partnership between men and women.¹⁴ He holds that there is a proper place for religious reasoning in shaping family theory.¹⁵ It is his belief that “marriage and family matters are primarily works of culture to be addressed in civil society and only secondarily matters that can be promoted or remedied by government policy, the market, or the details of family law.”¹⁶ Professor Wardle examines the constitutional effects of extending marital rights to same-sex couples, stressing the historical link between traditional marriage and the generation of civic virtue.¹⁷ He finds that, while reexamining social norms is a necessary and positive thing, it should not always lead to reform, but can instead lead to a reestablishment of traditional thought.¹⁸ In response, Professors Stacey and McClain stress the importance of equality-based policies regarding marriage. Both authors argue for a broad definition of family. Professor Stacey urges a more pluralistic approach to family policy, and proposes the idea of registered kinship as an alternative to “sexual and marital family.”¹⁹ Expanding upon Professor Browning’s idea of “equal regard,” she argues for extending “equal regard to multiple genres of marriage and to the diverse, de facto forms of intimate affiliation that so many people . . . have forged in response to the postmodern condition.”²⁰ Professor McClain contends that marriage should not be abolished, but rather a principle of equality among families requires that marriage be extended to same-sex couples and that certain forms of benefits and obligations now linked exclusively to the institution of marriage be extended to other family-type relationships.²¹ Thus, society should move partly, but not wholly, “beyond marriage.” It is her view that the emphasis should be on “equality within and equality among families.”²²

14. Don S. Browning, *Critical Familism, Civil Society, and the Law*, 32 HOFSTRA L. REV. 313 (2003).

15. *See id.*

16. *See id.* at 329.

17. Lynn B. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 (2003).

18. *See id.*

19. Judith Stacey, *Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331, 347 (2003).

20. *See id.*

21. Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379 (2003).

22. *See id.* at 383.

Whatever one's perspectives on these issues, ultimately, in a democratic society, conferences such as this one should be appreciated for their role in spurring citizens to seriously consider, or reconsider, the meaning of "family" and "marriage," and to ask the question, who, if any one person or institution, should decide what definition controls.

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