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A MARRIAGE SKEPTIC RESPONDS TO THE PRO-MARRIAGE PROPOSALS TO ABOLISH CIVIL MARRIAGE

Nancy J. Knauer∗

I was born either at the tail end of the Baby Boom or the very beginning of Generation X, depending on which marketing report you read.1 As my nether cohort followed in the wake of the Boomers, we grew accustomed to a world of “diminished expectations.”2 Since the beginning of my working life, I have been resigned to the fact that Social Security is a bankrupt institution and that I will have to rely on market solutions for my retirement.3 Perhaps this explains my disorienting sense of déjà vu when I read Professor Edward Zelinsky’s paper urging the abolition of civil marriage, Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage.4 Social security is one thing, but now marriage! Just when I was about to qualify for membership, it seems there’s a movement afoot to disband the club.

Indeed, Professor Daniel Crane anticipated my feelings of dislocation in the introduction to his article, A “Judeo-Christian” Argument for Privatizing Marriage.5 He notes that individuals in same-sex relationships might view the proposal to abolish civil marriage “as akin to closing down public swimming pools in order to avoid integration.”6 I generally avoid analogies between race and sexual

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3 See Nelson Mui, Here Come the Kids: Gen Y Invades the Workplace, N.Y. TIMES, Feb. 4, 2001, § 9, at 1 (noting “Gen X’ers came of age in an era of soaring national debt, predictions of Social Security apocalypse and a bleak job market in the recession of the early 90’s”).


6 Id. at 103, 103 n.7. Professor Crane cites the U.S. Supreme Court case Palmer v. Thompson, where the Court found that closing municipally owned swimming pools in anticipation of court-ordered integration was motivated by racial animus. Palmer v. Thompson
orientation because I believe they prove, at once, too little and too much. They can be insensitive to the legacy of racial slavery, deny the unique morality discourse that defines anti-gay activism, and ignore intersecting identities. However, to the extent one chooses, with these caveats, to use racial integration as an analogy, the case that comes to mind is not the shuttering of public recreational facilities, but the program of “massive resistance” that closed certain Southern public schools for years, as private, religious, and segregated academies flourished.

Despite my initial reaction of feeling “left behind,” I remain a

7 The identity-based nature of the current LGBT civil rights platform can lead to unexamined claims regarding the equivalence of minority experiences. As I have explained: The insistence on the equivalence of minority experiences ignores the inherent complexity of identity and the singularity of oppression. For example, the analogy between gay men and lesbians and African-Americans assumes not only a congruence of oppression, but also mutually exclusive boundaries between the two groups. Under such a model, the trials of a gay man (who is assumed to be white) are considered the same as those of an African-American man (who is assumed to be heterosexual). In the race to establish gay men and lesbians as a legitimate minority, such claims of equivalence can erase the gay African-American subject and the particularity of his experience. This can lead not only to the offensive assertion that anti-gay oppression is the same as the legacy of hundreds of years of racial slavery, but it can also obscure the uniqueness of sexual orientation as a defining group feature, namely the centrality of questions of morality.

8 The morality discourse surrounding homosexuality separates gay men and lesbians from other minority groups. Michael Warner explains that [t]here have always been moral prescriptions about how to be a woman or a worker or an Anglo-Saxon; but not whether to be one. MICHAEL WARNER, Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY at xviii (1993).


marriage skeptic—at least intellectually. (In real life, I am quite married—at least in Canada.) At a time when same-sex marriage has been catapulted to the top of the so-called “cultural” agenda, it is refreshing to encounter scholars eager to question the continued viability of civil marriage as a legal category. As a marriage skeptic, I do not share the unwavering pro-marriage commitment that unites the projects of both Professors Crane and Zelinsky. However, I do see numerous points of agreement that merit further discussion and investigation. For example, I agree with Professor Zelinsky that the vision of a world without civil marriage is an important metric to evaluate various policy proposals. In addition, I find quite compelling the notion that a private deregulated marriage regime would promote a more mindful partnership where expectations were express, responsibilities were clear, and the terms were tailor-made for the particular couple. Finally, I understand, albeit from a different perspective, Professor Crane’s caution regarding the threat that a majoritarian definition of marriage can pose to liberty interests.

Although I found Professor Crane’s discussion of the “Judeo-Christian” perspective on secular marriage quite illuminating, my comments primarily respond to Professor Zelinsky’s three-part argument in favor of the abolition of civil marriage. This choice of emphasis tracks my particular areas of expertise. Accordingly, I leave to others more qualified the task of providing commentary on Professor


12 In support of marriage, Professor Crane argues that state definition of marriage “not only profanes a holy institution but threatens the ultimate autonomy and authority of religious communities with respect to marriage.” Crane, supra note 5, at 102. Professor Zelinsky notes that he starts his analysis “from the premise that marriage is a desirable institution.” Zelinsky, supra note 4, at 103 n.9.

13 Recognizing the likelihood that the abolition of civil marriage is not imminent, Professor Zelinsky notes that “the vision of a world without civil marriage is a valuable yardstick with which to approach” issues involving marriage and family. Zelinsky, supra note 4, at 133. He likens such a view to using the conception of an ideal tax code as an “important metric for assessing current law and proposals to change it.” Id.

14 The notion of choice is central to the proposals set forth by both Professors Crane and Zelinsky. For example, Professor Crane emphasizes “the couple’s voluntary delegation of jurisdiction over their marriage to a specified religious institution.” Crane, supra note 5, at 132. Professor Zelinsky discusses the “democratization” of prenuptial agreements which will result in marriage contracts being “promulgated by religious and secular institutions sponsoring marriage . . . developed and promoted by bar associations, legal publishers, independent websites - anyone with an ideological or economic interest in servicing the deregulated marriage market.” Zelinsky, supra note 4, at 122.

15 Professor Crane suggests that a majoritarian decision to recognize same-sex marriage could lead to “state coercion of religious institutions to conform to progressive views of marriage[.]” Crane, supra note 5, at 136.
Crane’s theological justification for the privatization of marriage.16

Professor Zelinsky starts his argument in favor of the abolition of civil marriage with a bold statement of institutional choice: the state should cede its monopoly over marriage in favor of a deregulated market where marriage will be strengthened as a result of robust competition.17 He does not follow this assertion with a detailed comparative institutional analysis,18 but instead bolsters this strong market preference with two forceful pragmatic arguments: 1) deregulation would reflect cultural and legal reality because the rules governing civil marriage are increasingly applied to unmarried couples,19 and 2) deregulation would diffuse a particularly divisive political question with a neutral solution.20

As a marriage skeptic, I do not have any particular view on the desirability of deregulation—on whether the market is indeed the least imperfect alternative to foster and encourage marriage.21 Professor Zelinsky’s choice of the market seems correct, and arguably foregone, given that he locates the primary importance of marriage in its religious

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16 I will register my concern that the abdication of marriage to a private sphere invites the potential for abuse. Domestic violence advocates had to argue long and hard to secure state intervention into what were seen as private matters. Professor Zelinsky discusses the need to accommodate “couples who reject the egalitarian norms.” Zelinsky, supra note 4, at 156. He states that only a “deeply coercive and illiberal vision” of the state would compel a dissenting couple to assent to egalitarian terms. Id. However, it must be recognized that the notion of the consciously and consensually inegalitarian relationship runs the risk of creating a private haven for violence and oppression.

17 Zelinsky, supra note 4, at 103. Professor Zelinsky argues that “abolishing civil marriage would strengthen marriage by ending the government’s legal monopoly in defining that institution; this would encourage a productive competition among alternative versions of marriage.” Id.

18 Comparative institutional analysis refers to a mode of law and public policy analysis that attempts to compare the relative merits of alternative and existing institutional settings. See generally, NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 9 (2001) (asserting “law and rights are the product of tough institutional choices”). A primary concern is to avoid the trap of “single institutionalism” where an analyst details the deficiencies of one institution, but fails to interrogate the alternative and institutional settings with the same vigor. Id. at 24 (noting “the implicit assumption” of single institutionalism “is that a perfect or idealized institution is waiting in the wings[.]”). A related concern is the tendency to “hardwire” certain social goals with certain institutions, depending upon ideology. Id. at 174 (pointing to “Richard Epstein’s aversion to the rent-seeking, welfare state and Margaret’s Radin’s aversion to the callous, atomistic market”).

19 Zelinsky, supra note 4, at 103 (stating “rules the same as or similar to those governing married couples increasingly apply outside of marriage also[.]”).

20 Id. at 104 (stating “the classic way for a diverse polity to resolve contentious issues with minimum strife is to decentralize and privatize those issues[.]”).

21 Neil Komesar uses the term “imperfect alternatives” to describe the inevitable result of comparative institutional analysis. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 271 (1994). The result will always be imperfect because all institutions suffer under the basic constraints of volume and complexity and no single institutional choice will produce an optimal result. Id. Professor Zelinsky in no way sees the market as a perfect alternative, but describes it as “the imperfect (but preferable) option.” Zelinsky, supra note 4, at 104.
2006] MARRIAGE SKEPTIC RESPONDS 105

and cultural significance, rather than in its legal consequences. Although I could talk about the expressive value of state recognition or validation of a relationship, I would prefer not to quibble over this basic premise when the source of disagreement is clearly a question of perspective. Perhaps the significance of a marriage “license” – of state permission to marry your chosen partner – is one of those things that can only be seen from the outside.

In the spirit of furthering this discussion, rather than derailing it, I wish to offer some observations from the outside. Leaving aside the normative claims regarding the desirability of marriage and the superiority of the market, I intend to confine my comments to the pragmatic legs of Professor Zelinsky’s argument for abolition: marriage is no longer a significant legal category and the creation of a deregulated marriage market will provide a neutral resolution to a politically contentious issue. It may seem odd to focus on these points, given that neither is essential to his call for deregulation. However, I believe that both claims rest on an overly optimistic view of the current status of same-sex relationships; a view that misapprehends the extent of the disabilities imposed on same-sex couples and the nature of the objections against same-sex marriage. Left untested, I worry that the combined logic of these two claims risks trivializing the ongoing struggle for the legal recognition of same-sex relationships.

My goal is to add a dimension to the discussion that may help explain the urgency with which some advocate for equal marriage rights. In many ways, I offer the “half empty” view of the landscape

22 For example, Professor Zelinsky argues that the message of “commitment” and “family” conveyed by marriage “does not derive from the legal framework governing marriage but from the publicly-proclaimed, communally-supported affirmation of cultural and religious norms of mutual commitment.” Zelinsky, supra note 4, at 148.

23 Professor Zelinsky notes in his acknowledgment footnote that he has been married “civilly and religiously, for over thirty years.” Id. at 101 n.*. His perspective is therefore necessarily that of someone who has experienced the world, his relationship, and his choice of partner from within the institution of civil marriage. On the other hand, I navigate my life, my relationship, and my commitment to my partner without the benefit of civil recognition.

24 See Mary Anne Case, Marriage Licenses, 89 MICH. L. REV. 1758, 1759 (2005) (discussing various meanings of term “marriage licenses”).

25 As I understand it, Professor Zelinsky’s main argument is that deregulation and the resulting competition will strengthen marriage. He then supports this argument with what I refer to as “pragmatic legs.” These legs further his argument, but do not appear to be essential to it. A more direct engagement of his argument would challenge his normative assertions regarding the desirability of marriage or the choice of the market as the least imperfect institutional setting.

26 The reasoning that would lead to such trivializing is obvious and troubling. If marriage no longer holds legal significance, then the insistence on same-sex marriage rights is either naively misplaced or a raw attempt to score a symbolic victory in the culture war. To the contrary, as I discuss below, the movement for equal marriage rights is an effort to secure our families. This movement for basic security would not be necessary in a world, such as the one described by Professor Zelinsky, where “marriage, as a legal category, is becoming unnecessary.” Zelinsky, supra note 4, at 103.
described by Professor Zelinsky. For example, consider the current legal status of same-sex couples. Isolated instances where an unmarried partner has no legal recourse or is rendered invisible by the crushing lack of uniformity in relationship recognition loom very large in my world. To a disinterested commentator, however, these instances may appear as inevitable loose ends in an evolutionary project leading to ever greater protections.\(^{(27)}\) To me, however, they underscore the central fragility of same-sex relationships and the cost imposed on those who live outside marriage.

With respect to the notion that deregulation offers a neutral retreat on a divisive topic, Professor Zelinsky explains that “the classic way for a diverse polity to resolve contentious issues with minimum strife is to decentralize and privatize those issues.”\(^{(28)}\) This may be true, but I am left to question whether such a retreat is in fact neutral and why deregulation with equal access for same-sex couples would not offend the general prohibition against the recognition of same-sex relationships that is so ardently advanced by the traditional values movement.\(^{(29)}\)

On the first point, the abolition of civil marriage invites the possibility that existing inequities will be reproduced in the continuing legal interface required to enforce and monitor the newly privatized arrangements. Even though the law will no longer have occasion to “define, regulate or recognize marriage,”\(^{(30)}\) it will have to enforce, interpret, and void private marriage agreements, as well as provide a set of default rules to define and to govern couples who fail to marry or fail to contract.\(^{(31)}\) In each case, the law will be presented with the question of whether to recognize or to exclude same-sex couples.

When discussing his vision of a world without civil marriage, Professor Zelinsky asserts that it “will not look as different from the legal status quo as some might suspect,”\(^{(32)}\) and, indeed, that is exactly what I am worried about. While Professor Zelinsky recognizes the danger posed “if fights over the definition of marriage are simply

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\(^{(27)}\) Professor Zelinsky uses language that implies a progressive momentum to discuss the waning influence of marriage. For example, when discussing the irrelevance of marriage as a legal status, he employs terms such as “rapidly being applied,” “becoming unnecessary,” and “increasingly apply.” Id. at 103. The message is that if not now, then shortly, unmarried couples will be treated the same as married couples.

\(^{(28)}\) Id. at 104.

\(^{(29)}\) The traditional values movement can be traced to the formation of politically conservative evangelical organizations in the 1970s. GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY 33 147-52 (2004) (describing history of movement). Today it presents a broad platform for social change, with a particular emphasis on homosexuality. Id.

\(^{(30)}\) Zelinsky, supra note 4, at 103.

\(^{(31)}\) Professor Zelinsky notes “a deregulated marital regime would require default rules for those couples who fail to contract and for those couples whose contracts fail to address particular issues.” Id. at 121.

\(^{(32)}\) Id. at 125.
transformed into equivalent struggles to declare public policy as to marital and cohabitation contracts;”

33 his reassuring conviction that this will not be the case leaves me wanting to know more. Will an extended “culture war” over the meaning of marriage
dull the heteronormative impulse and militate against the erection of barriers of entry for same-sex couples? What supports Professor Zelinsky’s strong normative position that “the courts (and legislatures) in a world without civil marriage should not invalidate voluntary arrangements except upon very compelling grounds”

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Professor Zelinsky dismisses as improbable the likelihood that a de facto prohibition against same-sex marriage would arise following a presumably majoritarian consensus to end de jure marriage. Of course, this logic only holds where the abolition of the de jure institution does not occur under threat. Where the consensus to dismantle arises in response to a legal threat to change the character of an institution, the majoritarian decision to decamp for the market is made with the express intent to preserve existing inequities. It was exactly this motivation that created the segregation academies,

37 and it is exactly this motivation that must be guarded against on a road to privatizing marriage.

38 Assuming that a deregulated private marriage market provides equal access to same-sex couples, I suspect that the traditional values movement may question the neutral character of the deregulation, at least to the extent one reads “neutral” to mean not taking sides in a culture war.

39 Currently, one state recognizes same-sex marriage and

33 Id. at 124.

34 Id at 149.

35 Id. at 124 (emphasis added).

36 Professor Zelinsky reasons:

I suspect that that possibility is unlikely. If there is strong political support for de facto civil marriage, there is likely to be strong support for civil marriage de jure. I thus find improbable a scenario in which there is sufficient political support to abolish civil marriage in form but equally great political support to recreate civil marriage in substance through restrictive declarations of public policy and default rules. It is nevertheless a scenario to be guarded against.

Id. at 124.


38 Professor Zelinsky expressly recognizes that a de facto system could replicate marriage, but identifies the primary concern this raises as the reproduction of the “legal inflexibility of civil marriage.” Id. at 124. My primary concern is the prospect that existing inequities would be continued. Of course, this perspective requires one to see inequities in the first place.

only six other states extend some form of relationship recognition to same-sex couples. To the contrary, 44 states define marriage as the union between one man and one woman or have state constitutional amendments prohibiting same-sex marriage. Under Professor Zelinsky’s proposal for a deregulated marriage market, the traditional values movement might rightfully wonder how allowing same-sex couples to contract on the same basis as opposite-sex couples constitutes a neutral resolution. All things considered, it may seem more like an unqualified victory for same-sex couples.

The ease with which Professor Zelinsky envisions equal participation by same-sex couples in the private marriage marketplace is personally very gratifying, but I worry that it underestimates the scope and tenacity of the objections raised by the traditional values movement to same-sex relationships. True, as Judge Posner says, “marriage is the red flag before the bull,” but the ultimate objection is not limited to the marriage part. It extends to the recognition of same-sex relationships and the normalization of same-sex desire within the body politic.

This is why the most recent generation of state-wide defense of marriage acts and constitutional amendments prohibit not only marriage, but also any grant of the “incidents of marriage.” The additional language is considered necessary to prevent so-called “counterfeit marriages.”

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40 See infra notes 59-64 (discussing state recognition laws).
43 Chauncey notes that “‘defending marriage’ as the union of one man and one woman had special symbolic significance for the opponents of gay rights.” CHAUNCEY, supra note 29, at 145. The traditional values movement considers same-sex marriage “both the ultimate sign of gay equality and the final blow to their traditional ideal of marriage[.]” Id.
44 For example, the proposed Federal Marriage Amendment refers to the “legal incidents” of marriage. H.R.J. Res. 56, 108th Cong. (2003). The Oklahoma state constitution also refers to “legal incidents.” OKLA. CONST. art. II, § 35. The constitutions of Kentucky and Louisiana speak of “a legal status identical or substantially similar to that of marriage.” KY. CONST. § 233a; LA. CONST. art. XII, § 15. North Dakota and Utah both state in their constitution that “no other domestic union” may be given “the same or substantially equivalent legal effect” as marriage. N.D. CONST. art. XI, § 28; UTAH CONST. art. I, § 29. The marriage amendment to the Ohio Constitution adopted in 2004 specifically addresses attempts “to approximate the design, qualities, significance or effect of marriage.” OHIO. CONST. art. XV, § 11. These types of amendments differ from the standard type of constitutional definition that was adopted by Mississippi in 2004 and is more in line with the first generation of defense of marriage statutes that defined marriage, but did not go any further. MISS. CONST. annot. art. 14, § 263A. Section 263A of the Mississippi Constitution provides: “Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this State.” Id.
45 The traditional values movement routinely uses the term “counterfeit marriages” to refer to Civil Unions, registered domestic partnerships, and even the grant of employee benefits to same-sex partners. For example, when the Thomas Law Center, a conservative Christian legal
MARriage Skeptic Responds

is intended to forestall the legislative grant of parallel relationship recognition such as Civil Unions or Registered Domestic Partnerships, as well as to prevent public employers from providing domestic partner benefits. The Commonwealth of Virginia recently tried to embolden this view on a special order vanity license plate, and then took this commitment one step further. Its legislature passed the Affirmation of Marriage Act that purports to void all private relationship contracts between same-sex individuals.

The second leg of Professor Zelinsky’s argument asserts that the abolition of civil marriage is supported by experience and, as such, will not be particularly disruptive because marriage is increasingly irrelevant for purposes of resolving legal disputes. Unfortunately, this classic pragmatic argument to justify legal change greatly overstates the current status of the law. I agree with Professor Zelinsky that there is an increased willingness on the part of the courts and some legislators to


For example, the newly enacted marriage amendment to the Michigan state constitution provides: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” MICH. CONST. art. I, § 25. After its adoption, the Michigan Attorney General issued an opinion stating that all governmental entities had to stop offering domestic partner benefits. Rick Lyman, Gay Couples Files Suit After Michigan Denies Benefits, N.Y. TIMES, Apr. 4, 2005, at A16. The litigation is currently pending.

The Virginia House approved a bill that would have created a special “Traditional Marriage” license plate for committed motorists. Christina Bellantoni, House OK’s ‘Traditional Marriage’ Plates, WASH. TIMES, Feb 2, 2005, at B02, available at http://washingtontimes.com/metro/20050202-110419-1895r.htm. The bill passed by a vote of 62 to 35. Id. However, the bill’s sponsor withdrew it before it could be considered by the state Senate. Equality Virginia, Equality of Virginia Summary of 2005 Legislation, at http://equalityvirginia.org (last visited Nov. 10, 2005). (NOTE to Editor – check this citation).

VA. CODE ANN. § 20-45.3 (2005). Titled “The Affirmation of Marriage Act,” its language could void not only private domestic partnership benefits offered by private employers, but also private contractual arrangements between same-sex partners. The full text of the statute provides:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Id.

Zelinsky, supra note 4, at 105-13.
recognize same-sex partners. Despite the fact that same-sex partners have secured recognition in a wide number of areas, this recognition is based on various theories and remains largely a case-by-case enterprise. Accordingly, I cannot share Professor Zelinsky’s optimistic characterization of present legal and cultural reality when he writes “for better or for worse . . . marriage has ceased to carry legal significance because the same . . . rules . . . apply to unmarried couples.”

From my vantage point, the question of whether a same-sex partner is considered a spouse misses an important point of reference. A same-sex partner is a legal stranger who stands behind children, parents, siblings, grandparents, aunts and uncles and even cousins in terms of priority and legal standing. As such, the question is often not whether a same-sex partner will be treated equally as a spouse, but whether a same-sex partner will be recognized at all. Marriage provides a way to make your partner family, to include your partner’s name on a list which is otherwise determined solely in terms of biology and adoption.

Considerations of time and space do not allow me to discuss in any great detail my “half empty” view of the rights and disabilities of individuals in same-sex relationships. Suffice it to say that my work with surviving same-sex partners has led me to conclude that although private contract may be adequate to sort out the rights and responsibilities of the parties vis à vis each other, it often falls woefully short when asked to compel third parties to respect or recognize the relationship. Using the metric prescribed by Professor Zelinsky, in a

51 Id. at 106.
52 Nancy J. Knauer, The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy, 75 TEMP. L. REV. 31, 40-1 (2002). Beyond the handful of jurisdictions that extend some form of recognition to same-sex couples:

The vast majority of jurisdictions . . . still deny a surviving same-sex partner any of the property rights or decision-making authority which inure automatically to the benefit of a surviving spouse or next of kin, such as the right to take under the rules of intestate succession or standing to file a wrongful death action. In these jurisdictions, a same-sex couple must rely on a combination of testamentary documents, lifetime transfers, beneficiary designations, and other declarations to safeguard the interests of the surviving partner. Although courts will uphold an otherwise valid will which primarily benefits a same-sex partner, such a will remains subject to challenge by the relatives of the deceased partner and will most likely fail to address or remedy every eventuality.

Id. at 40.
53 Id. at 39-54 (describing treatment of surviving same-sex partners).
54 For example, the personal representative of a decedent’s estate, appointed either under a will or the rules of intestacy, has the authority to undertake a variety of tasks on behalf of the decedent and the estate. Id. at 47. As I noted in 2002, even where the partner is the personal representative, “there remains the possibility that a third party, such as a funeral director or a cemetery, will refuse to honor the directions of the surviving partner, particularly where they are contrary to the wishes of the next of kin.” Id. at 48. At the time, I was thinking of the case of Sherry Barone and her legal battle to compel a cemetery to accept her choice for the inscription on her partner’s headstone. See infra note 78. Bill Flanigan had not yet filed his lawsuit against the hospital whose emergency room staff had barred him from seeing his dying partner, Robert Daniel, despite the fact that he was Daniel’s health care proxy. See infra text accompanying
world where civil marriage is not recognized—indeed my current world—a surviving partner is a legal stranger.

For example, the experience of the surviving same-sex partners of the September 11 attacks illustrates how a surviving same-sex partner often must reconfigure her relationship with her partner to fit within various legal categories to secure the desired recognition, relief, or compensation. These legal categories ordinarily do not allow recovery in recognition of the nature of her relationship with her partner, but rather in spite of the nature of the relationship. In the absence of uniform relationship recognition, either in the form of same-sex marriage or a parallel status, such as Civil Unions or Registered Domestic Partnerships, a same-sex couple must rely on beneficiary designations, dependent classifications, and, at times, the goodwill of family members to secure rights for the survivor.

Even if a couple lives in Massachusetts where same-sex marriage has been judicially imposed or in one of the six states which currently provide some degree of comprehensive relationship recognition—California, Connecticut, Hawaii, Maine, New Jersey—

notes 79-81. Flanigan only gained entrance after Daniel’s mother gave her assent. Id. At the time, I wrote: “Experience shows that when faced with legally binding documents in the hand of a . . . same-sex partner, many third parties will still turn instinctively, and perhaps stubbornly, toward the traditional decision-makers who, in these types of situations are the next of kin.” Knauer, supra note 52, at 48-49.

55 For example, in the case of the surviving same-sex partners of the victims of the September 11 attacks, some partners received compensation because they could establish that they had been financially dependent upon the victim, thereby entitling them to recover from the state crime victims compensation funds. Id. at 76-88. In the case of the federal Victim Compensation Fund, a partner who was the executor of the victim’s will had standing to file a claim, but the ultimate recovery depended upon the generosity of the victim’s next of kin. Jane Gross, U.S. Fund for Tower Victims Will Aid Some Gay Partners, N.Y. TIMES, May 30, 2002, at A1 (explaining partner will recover on direction of next of kin where no dispute).

56 The federal compensation fund authorized relief to be paid to surviving same-sex partners on the direction of the victim’s next of kin and despite the federal Defense of Marriage Act. Id.

57 See supra text accompanying note 55.

58 In addition, the District of Columbia provides a domestic partner registry. D.C. CODE §§ 32-701 to 32-710 (2005). The legislation provides domestic partner benefits for the employees of the District of Columbia. Id. § 32-705. It also provides limited benefits, such as the right of visitation in District hospitals. Id. § 32-704. Congress blocked the implementation of the domestic partner provisions for nine years. Adam Clymer, House Approves D.C.’s Law on Rights of Domestic Partners, N.Y. TIMES, Sept. 26, 2001, at A12.

59 CAL. FAM. CODE §§ 297, 297.50, 298, 298.5 (West 2005) (establishing procedure for “Registered domestic partners”). [Effective January 1, 2005, “registered domestic partners” enjoy substantially all the rights and responsibilities enjoyed by spouses under California law. Assemb. B. 205, 1st Sess. (Cal. 2003-04). Prior law had extended to “registered domestic partners” a number of rights traditionally reserved for spouses, including inheritance rights, certain health care decision-making authority, and standing to sue for wrongful death. CAL. CIV. PROC. CODE § 377.60 (2004).] [NOTE TO AUTHOR regarding bracketed portion – perhaps you’d just like to write: See also supra text accompanying note 46]

Vermont—their status will not be respected on the federal level, nor will it likely be respected by disapproving sister states. Any recognition by an employer or municipality provides necessarily limited rights that do not transfer to other settings. In 2004, the American Psychological Association (APA) adopted a Resolution in favor of same-sex marriage. The APA Resolution supports equal marriage rights, noting the “minority stress” suffered by same-sex couples due to lack of legal recognition and the fact that a parallel or partial status such as a registered domestic partner is “rarely portable.”

This lack of uniform legal recognition for same-sex relationships guarantees that, notwithstanding a comprehensive estate plan, thorough beneficiary designations, and even state-wide relationship recognition, a surviving same-sex partner will be legally invisible in certain responsibilities applicable to married couples. Unlike Vermont, Connecticut was not pressured to do so through litigation. William Yardley, Connecticut Approves Civil Unions for Gays, N.Y. TIMES, Apr. 21, 2005, at B5.

HAW. REV. STAT. § 572C-1 (2004). Hawaii enacted legislation granting certain inheritance and other rights to “reciprocal beneficiaries.”

In 2004, Maine enacted legislation establishing a state-wide domestic partner registry and extending to same-sex couples certain health-care decision-making authority and inheritance rights equivalent to spouses. ME. REV. STAT. ANN. tit. 22, § 2710 (West 2005).

New Jersey’s newly enacted status of “domestic partnerships” extends certain medical decision-making authority to same-sex partners, as well as certain insurance and state tax benefits. N.J. STAT. ANN. §§ 26:8A-1 to 8A-12 (West 2005).

VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004). Vermont established same-sex civil unions. The parallel status extends the benefits and responsibilities equivalent to spouses to same-sex couples who enter into civil unions.


In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.


Obviously, municipal recognition of a partnership can only extend such rights as may be granted by the jurisdiction. The fact that Bill Flanagan and Robert Daniel were registered as domestic partners in San Francisco did not sway the staff of the University of Maryland Medical Center when Flanagan asserted his right to see his unconscious partner. See infra text accompanying notes 79-81.


context—a mere stranger. This invisibility places the burden on the surviving partner to claim standing or recognition as something other than a partner. It requires her to disaggregate her relationship and present a partial picture of her relationship and her life. Moreover, in some instances there are no alternative avenues for recovery, and the surviving partner is categorically excluded because she is not considered next of kin.\(^{69}\)

Absent uniform relationship recognition on the state and federal level, this potential for erasure is omnipresent. It is also important to note that a surviving same-sex partner experiences the loss of a partner against the backdrop of a persistent morality discourse that demonizes same-sex relationships and enshrines such sentiments in legislation and citizens’ initiatives designed to “protect” traditional marriage and deny the incidents of marriage to same-sex couples.\(^{70}\)

The efforts to ensure that a same-sex partner remains a legal stranger have intensified since \textit{Lawrence v. Texas}\(^{71}\) and the legalization of same-sex marriages in Massachusetts.\(^{72}\) A surviving same-sex partner is denied the basic “luxury of grieving”\(^{73}\) because she must navigate a complicated legal system offering pockets of partial recognition and, at times, she must resort to litigation. As a result of the highly contentious and polarized debate regarding the recognition of same-sex relationships, her very loss becomes contested and her mourning politicized.\(^{74}\)

For example, representatives of the traditional values movement accused the surviving same-sex partners of the victims of the September 11 attacks of exploiting a “national tragedy to promote their agenda.”\(^{75}\) They urged the relief organizations to ignore

\(^{69}\) A clear example of this would be the rules of intestacy in jurisdictions which do not recognize property rights of surviving same-sex partners. The only alternative is to try to sue under an equitable theory. \textit{See Vasquez v. Hawthorne,} 33 P.3d 735 (Wash. 2001) (expanding equitable principal to same-sex partners).


\(^{71}\) 539 U.S. 558 (2003)

\(^{72}\) \textit{Goodridge v. Dep’t of Pub. Health,} 798 N.E.2d 941, 948-49 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution and citing \textit{Lawrence} approvingly). The restraining force of heteronormativity had made expressly anti-gay laws largely unnecessary. \textit{See Knauer, supra note 7, at 50.}

\(^{73}\) When Tom Miller’s partner, Seamus O’Neal was killed in the September 11 attacks, Miller had to fight for recognition. \textit{Human Rights Campaign FamilyNet, Tom Miller Partner of Seamus O’Neal, available at} \textit{http://www.tampabaycoalition.com/files/TBC911SeamusONeil.htm} (last visited Nov. 10, 2005). Miller explained, “I did not have the luxury of grieving without having to defend myself and prove who I am and who we were.” \textit{Id.}


\(^{75}\) Thomas B. Edsall, \textit{Minister Says Gays Should Not Get Aid,} \textit{Wash. Post,} Oct. 5, 2001, at A22 (quoting Rev. Lou Sheldon, chairman of Traditional Values Coalition). This scorn extends to individual surviving same-sex partners attempting to secure recognition. For example, when Sharon Smith pursued a wrongful death action in California after the dog-mauling death of her
surviving same-sex partners and to award assistance “on the basis and priority of one man and one woman in a marital relationship.”

Indeed, many of the challenges confronting a surviving same-sex partner stem from what Professor Zelinsky refers to as “social convention,” such as the apparent authority of a personal representative to make funeral arrangements and to control the disposition of remains. On the very important question of hospital visitation rules, Professor Zelinsky notes that there is no inherent legal right of spousal visitation because the policies that limit visitors to immediate family members are determined internally by the hospital. This is true, but begs the question of whether any hospital would define “immediate family” in such a way as to exclude a spouse. As a practical matter, a spouse would only need a legal right to visit if the hospital failed to admit spouses. In our current legal and cultural reality, a spouse does not need a legal visitation right because a spouse is automatically considered family. This was not the case for Bill Flanigan when the emergency room staff at the University of Maryland Health Care System refused to allow him to see his dying partner, Robert Daniel, even though he was Daniel’s health care attorney-in-fact, and they had registered as domestic partners in San Francisco. The

partner, Diane Whipple, Smith and Whipple were characterized as gay activists. Christopher Heredia, Dog Mauling Victim’s Partner to Test Wrongful Death Law, S.F. CHRON., Feb. 19, 2001, at A13. See Westboro Baptist Church’s Perpetual Gospel Memorial to Diane Whipple, at http://www.godhatesfags.com/main/whipplememorial.html (last visited on Nov. 10, 2005) (describing Smith and Whipple in unfavorable terms). A “Memorial to Diane Whipple” can be found on the website of the anti-gay Westboro Baptist Church where a computer graphic shows Whipple’s face being licked by flames and a counter records the number of days she has been consigned to hell. Id.

Referring to a recently enacted New York statute that requires hospitals to allow visitation by domestic partners, Professor Zelinsky notes, “This formulation confirms that, ultimately, the medical institution sets its visitation policy—not that there is some inherent legal right of spousal visitation.” Zelinsky, supra note 4, at 145. See Al Baker, New Law Gives Gay Partners Visiting Rights in Hospitals, N.Y. TIMES, Oct. 2, 2004, at B2.

staff did not permit Flanigan to see his partner until Daniel’s mother arrived and authorized the visit, by which time Daniel was unconscious.\(^{81}\) Daniel never regained consciousness.\(^{82}\)

Before the advent of HIPAA,\(^{83}\) a doctor would automatically share health care information with a spouse or close family member, following what Professor Zelinsky describes as a “sensible social practice.”\(^{84}\) To the contrary, a same-sex partner can not rely on that presumption of standing. She is left to assert her legal right as a registered domestic partner,\(^{85}\) an attorney-in-fact,\(^{86}\) or a health care decision-making surrogate\(^{87}\) in order to secure the deference naturally afforded a spouse as a matter of social custom.

With respect to legal rights, Professor Zelinsky states that, “[i]n the final analysis, most people do not marry to acquire legal rights or obligations of which they are usually unaware and do not understand.”\(^{88}\) I would add that most opposite-sex couples who choose to marry have not contemplated a life together without civil marriage, and it is understandable that the relative privileges and security afforded by marriage seem natural and unremarkable. Instead, it is the policies that inadvertently penalize marriage, such as the much ballyhooed marriage penalty under the federal income tax, that attract attention.\(^{89}\)

Professor Zelinsky acknowledges the importance of marriage in the creation of family when he writes: “marriage itself conveys a

\(\text{bin/iowa/cases/record?record=174 (last visited Nov. 10, 2005).}\)

\(^{81}\) In addition, Bill Flanigan’s partner was receiving life-sustaining treatment contrary to his express wishes. \(\text{Id. at 11. Flanigan later sued the hospital for negligence and intentional infliction of emotional distress. Id. at 17 The jury found for the hospital. Lambda Legal, Flanigan v. Univ. of Md. Med. Sys. Corp., }\text{http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=174 (last visited Nov. 10, 2005).}\)

\(^{82}\) \(\text{Id.}\)


\(^{84}\) Professor Zelinsky notes that a physician will often share information with a spouse “even when such spouses lack the authority to receive such information under a health care directive or similar instrument” because the physician is following “sensible social practice.” Zelinsky, \text{supra} note 4, at 145.

\(^{85}\) For example, under New Jersey Law, registered domestic partners are entitled to make health care decisions for incapacitated partners. Janon Fisher, \text{Gays Sign Up for New Jersey Domestic Partner Status, N.Y. TIMES,} July 11, 2004, §1, at 33

\(^{86}\) As a health care attorney-in-fact, a same-sex partner is authorized to make health care decisions on behalf of her partner. Although such documents should be respected by third parties, the case of Bill Flanigan illustrates how difficult it can be to prove a non-traditional relationship through legal documents. \text{See supra} note 80. In such an emergency situation, the ability to litigate is cold comfort.

\(^{87}\) For example, the Pennsylvania Advance Health Care Directive authorizes the appointment of a decision-making surrogate where the declarant is in a terminal condition or in a state of permanent unconsciousness. 20 PA. CONS. STAT. § 5404 (2005).

\(^{88}\) Zelinsky, \text{supra} note 4, at 148.

message, a message of commitment, a message of family. However, that message does not derive from the legal framework governing marriage but from the publicly-proclaimed communally-supported affirmation of cultural and religious norms of mutual commitment."

No doubt, but from my perspective, it is still good to have options — legal options.

In conclusion, my primary interest in the legal category of marriage is instrumental. I am of a particular generation and political persuasion for which the institution of marriage was more likely the object of critique than a lifelong goal. However, my research and my experience have led me to believe that certain fundamental questions of human dignity and bodily integrity can not be remedied through private contract and, therefore, I cannot protect my chosen family in the absence of some form of uniform relationship status on both the state and federal level.\textsuperscript{91} Marriage, civil union, domestic partnership—at the end of the day, I want some way to designate my partner as “family” to give her legal standing and enable her to withstand the societal forces of that will render her invisible and our commitment illegitimate. Mindful of the limits of law to effect social change,\textsuperscript{92} I am prepared to settle for a legal right here or there, pending the wholesale revamping of “social convention” and “sensible social practice.”\textsuperscript{93}

I have no desire to either convert or vanquish those who oppose the recognition of same-sex relationships, but I do hope that those sympathetic to this cause will take the time to consider the reality of a world without the protections of civil marriage. It is only when couples who enjoy the protection of marriage comprehend the weight and the breadth of these protections that we can have an informed discussion about whether to abolish, expand, or narrow the institution of civil marriage. Both Professors Crane and Zelinsky have already made very important contributions to this project. I look forward to the world described by Professor Zelinsky where “the same or similar legal rules apply to married and unmarried couples alike.”\textsuperscript{94}

\textsuperscript{90} Zelinsky, supra note 4, at 148.
\textsuperscript{91} Knauer, supra note 52, at 40.
\textsuperscript{93} Zelinsky, supra note 4, at 145.
\textsuperscript{94} Id. at 112.