PARADIGMS OF MARITAL CHOICE

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Abstract

In 2012, the Washington State legislature legalized marriage between same-sex couples. The legislation, which survived a voter referendum in November of that year, provided registered same-sex domestic partners approximately a year-and-a-half to either marry or dissolve their partnerships. Any partnerships in which a member was not over the age of 62 and that were not dissolved by the summer of 2014 would automatically be converted to marriages.

This was not the first time that same-sex couples in alternate family statuses have found themselves married without having made a deliberate choice. Parties to civil unions in the states of Connecticut, Delaware, and New Hampshire similarly saw their unions converted to marriages without any action on their part. It is true that these parties, like the domestic partners in Washington, theoretically had the option to dissolve their unions, so they did not entirely lack agency regarding their nuptials. But the dissolution process in most of these states is not unlike a divorce: partners must negotiate or adjudicate property division, custody, and support. The choice to do anything but accede to automatic conversion to marriage would therefore be costly on a practical and emotional level, as perfectly happy couples would have to become legal adversaries in order to avoid marriage. It would be hard to characterize such a choice—opting out of marriage on pain of dissolution—as freely made.

The institution of marriage is in a historical moment of transition. In the coming months and years, many other jurisdictions will have to decide what the arrival of same-sex marriage, often the product of court decisions, will mean for the continued existence of their alternate statuses. These decisions will impact tens of thousands of registrants, and could result in significant numbers of coerced marriages.

The legalization of same-sex marriage will give rise to other vexing transition problems. Separate from the question of conversion, states must decide whether to extend marriage rights retroactively to the date the parties formalized an alternate status. Relatedly, some states, like Hawaii, have premised statuses on the unavailability of legal marriage. Reciprocal beneficiaries are two adults who are prohibited by law from marrying; what is the validity of a reciprocal beneficiary status between two people of the same sex now that same-sex marriage is legal? And people who would have married but for the opposite sex requirement may assert legal rights premised on the nature of their relationship before same-sex marriage was legalized in their states. People in a common law marriage state, for example, may argue that they would have satisfied the requirement that they hold themselves out as married except for the fact that marriage was legally unavailable to couples of the same sex.

Each of the transition problems above potentially involves conscription/ascription—the act of bringing someone within the status of marriage in spite of some sort of formal limitation or deficiency at an earlier time. And this conscription can be voluntary—in the sense that all involved, including the partners, State, and third parties agree that the couple should be deemed

married—or involuntary as the case may be. Choice, and what we mean when we invoke it, will be central to the resolution of these transition problems.

The value of formal, *ex ante* choice has become more prominent in the rhetoric of the marriage and the family. Court decisions talking about marriage have enshrined the choice to marry as one of the most important that a person will make. They have noted that the choice changes a person's relationship to society and even his own conception of himself. They have therefore characterized interference with that choice as a grievous injury.

But the transition problems that have accompanied the legalization of same-sex marriage reveal that the law may simultaneously create, facilitate, and even deny choice within the context of marriage. These transition problems therefore present a timely opportunity to consider the broader relationship between choice and marital status. Looking at these transition problems collectively reveals that choice has taken on a variety of meanings in different contexts, often in tension with each other. This Article brings together these paradigms of choice in the attempt to answer two questions: do these paradigms point in the direction of a unified theory of marital choice; and, if so, is that theory one we are willing to live with?