
SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 17716

ELIZABETH KERRIGAN, ET AL.

v.

COMMISSIONER OF PUBLIC HEALTH, ET AL.

BRIEF OF AMICUS CURIAE
THE PROFESSORS OF HISTORY AND FAMILY LAW

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Statements of Interest

Amici Curiae are professors of history and family law, specializing in the history of marriage, families, and the law at universities throughout the United States. We have written leading books and articles analyzing the history of marriage and marriage law in the United States. This brief is submitted to assist the Court's deliberations by offering an analysis of the history of marriage law and practice based on our scholarship. Our names, institutional affiliations, and brief biographies are set forth below.

We adopt the Statement of the Case and Statement of Facts in the brief of the Plaintiff-Appellants.

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(Scribners, forthcoming). She is also the senior editor for the prizewinning anthology, Constitutionalism and American Culture: Writing the New Constitutional History (Univ. Kansas Press 2002).

STATEMENT OF ISSUE

1. Did the Superior Court properly conclude that it is permissible to exclude same-sex couples from marriage where the history of marriage demonstrates that marriage is a unique, culturally significant institution, with a rich history and fluid rules that have consistently been altered through legislative enactments and judicial decisions to extend the right to marry to minority groups?

Discussion begins on page 1.

PRELIMINARY STATEMENT

As a government-controlled institution from the colonial era to the present, marriage has evolved over time to reflect changes in society. Marriage has undergone significant changes that altered rules once believed to be definitional to the institution, including the eradication of legally-mandated gender roles, racial restrictions on the eligibility to marry, and marital fault as the sole basis for divorce. Contrary to fears that such changes would undermine marriage, this adaptability has been the very reason that marriage has endured as a valued and relevant institution. This history renders implausible the suggestion that marriage has a fixed structure that mandates the current exclusion of same-sex couples.

While having its exclusions, restrictions and inequalities eliminated, marriage has retained its essence as a voluntary union of two parties based on mutual consent. Since free choice precedes consent, the emphasis on consent reflects the importance the state gives to the freedom to choose one's marital partner. Moreover, because of its historical grounding in our culture and heritage, marriage remains a unique social and legal status that provides advantages and protections to married couples. No other institution has the same respect and prestige or provides the identical advantages and protections.

ARGUMENT

I. THE LEGAL DEFINITION OF MARRIAGE IN CONNECTICUT HAS NEVER BEEN STATIC; FEATURES OF MARRIAGE ONCE THOUGHT ESSENTIAL HAVE BEEN REVISITED AND REJECTED CONSISTENTLY OVER TIME.

Marriage in Connecticut has historically been a civil matter, controlled and authorized by state officials and distinct from religious rites performed within the confines of a religious community. See, e.g., Gould v. Gould, 78 Conn. 242, 258 (1905) (Hamersley, J., concurring) (marriage under the exclusive jurisdiction of the civil authorities after establishment of the jurisdiction of Connecticut in 1638). Legal developments since that time demonstrate that the legal boundaries and content of marriage in Connecticut have not been static and that the notion of a "traditional" marriage is historically meaningless.

Through a steady stream of decisions and statutory amendments, Connecticut's courts and legislature have continuously responded to changes in society and abandoned elements once thought of as definitional to marriage. Like any successful civil institution, marriage has been resilient, changing to reflect and embody evolving societal norms of individual liberty and equality. The most prominent changes occurred with respect to: (a) women's status within marriage; (b) no-fault divorce; and (c) the racial regulation of marriage.

A. The Abolition of Coverture Has Led to A Legal System in Which Spousal Rights and Responsibilities are Equal, Mutual and Gender-Neutral.

Since our country's founding, marriage laws have been transformed to reflect changing societal views about the status of women. Coverture and the legal subordination of women were once accepted as a natural and essential component of marriage, but these have given way to a legal construct of equality between the spouses. This legal development culminated in the passage of the ERA in 1974, unequivocally eliminating sex as a basis for distinctions in Connecticut law. See Conn. Constitution, Article First, § 20.

Until well into the 19th century, marriage laws, including in Connecticut, entailed the complete merger of a woman's legal identity into that of her husband. See Dibble v. Hutton, 1 Day 221, 235 (Conn. 1804) ("By the common law, the husband and wife are considered as one person in law, the existence of the wife being merged in that of the husband, or suspended during the coverture"). Under coverture, a wife could not own property, enter into contracts, execute legal documents, or be legally responsible in criminal or civil law. See Matthewson v. Matthewson, 79 Conn. 23, 26-28 (1906); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 11-12 (Harvard Univ. Press 2000) (describing women's lack of economic freedom because the wife's assets and earnings became her husband's and her husband, in exchange, was obligated to provide support).¹

¹ It was even permissible for a husband to engage in physical violence to "correct" his wife. See Matthewson, 79 Conn. at 27; Brown v. Brown, 88 Conn. 42, 43 (1914) ("by the common law the husband might restrain the wife of her liberty and might chastise her"); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale LJ. 2117, 2123-24 (1996).

This legal regime reflected society's view of the marital couple as a unit naturally headed by the husband and further reflected society's views regarding the proper roles of men and women. Michael Grossberg, Governing the Hearth: Law & the Family in Nineteenth-Century America 4-5 (Univ. of North Carolina Press 1985) (citation omitted) (the colonial family was a "little commonwealth"); Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 6-13 (Columbia Univ. Press 1994) (the wife and children were dependents in the husband's domain).

Until the late 19th Century, marriage without such legally-mandated subordination was unimaginable. See e.g., Fitch v. Brainard, 2 Day 163, *2 (1805) (preface, Smith and Edwards for the plaintiff) ("... if femes-covert are, by our statute, enabled to devise, they are equally capacitated, not only to alienate 'their lands and other estates,' but 'to give their vote, verdict, or sentence, in any matter or cause;' they may vote in free-man's-meeting, may be jurors, and may even be judges of the courts. The evident absurdity of such a conclusion is a clear proof, that it [a married woman's right to devise property by will] was not intended by the legislature").

The longstanding legal unity of husband and wife began to erode towards the end of the 19th Century. During the 1800s, with women increasingly making their own choices and earning wages, the notion that married women had no legal individuality apart from their husbands began to clash with the reality of the developing society. See George Chauncey, Why Marriage?: The History Shaping Today's Debate Over Gay Equality 67 (Basic Books 2004) ("However feasible in an agrarian economy, this marriage regime [of coverture] could not survive the growth of the wage economy and its ideology of free labor."); Richard H. Chused, Married Women's Property Law: 1800-1850, 71 Geo. L. J. 1359 (1983); Cott, Public Vows at 52-54. Advocates of maintaining coverture claimed that removing the husband from his role as the ultimate power within the home would "destroy domestic tranquility" and the "good order of society." Dibble, 1 Day at 225 (preface, Smith, for the plaintiff); Fitch, 2 Day at 172-76 (preface, Smith and Edwards for the plaintiff).

Despite these doomsday predictions, in 1845 the Connecticut legislature enacted the first in a series of statutes that changed the coverture regime. Jackson v. Hubbard, 36 Conn. 10, 15 (1869). Most significantly, in 1877 Connecticut enacted the “Married Women’s Property Act,” which provides that: “All property hereafter acquired by any married woman shall be held by her to her sole and separate use.” Public Act 1877, Ch. 114, now Conn. Gen. Stat. § 46b-36. The act was considered a “radical change in public policy” and indeed it was, ending a centuries-old system premised on a fundamental inequality. Matthewson, 79 Conn. at 33-36.

This Court also played a significant role in shaping gender equality within marriage through its interpretations of the Married Women’s Property Act and related statutes. See Id. at 287 (coverture was not only abolished by statute, but “has disappeared under the continuous pressure of judicial interpretation or indirect legislation”). By 1911, this Court recognized that the wife had a complete legal identity of her own, with rights of her own, and enforceable as her own. Marri v. Stamford St. R. Co., 84 Conn. 9, 21-22 (1911), overruled, Hopson v. St. Mary’s Hospital, 176 Conn. 485 (1979).

B. Divorce Laws Have Changed to Reflect Evolving Social Conditions.

The laws regulating divorce have also been transformed to reflect changing marital expectations and individual rights. Marriage was once viewed as “a life relation” that was “indissoluble at the will of the parties.” Gould, 78 Conn. at 259 (Hamersley, J., concurring). The state could dissolve marriages for causes that rendered “a continuance of the relation inconsistent with its essential purpose and against public policy” Id. To obtain a divorce one spouse had to demonstrate that the other spouse had broken the terms of a valid marriage, those terms having been set by the state. See Cornelia Hughes Dayton, Women Before the Bar: Gender, Law and Society in Connecticut 1639-1789 116 (Univ. of North Carolina Press 1995); See also Acts and Laws of the State of Connecticut, 1784 at page 41 (no divorce except for adultery, fraudulent contract, or willful desertion) and Connecticut Statutes 1808, Title XLIX (same).

Divorce grounds expanded gradually, as states recognized that people were breaking up their marriages for many reasons, and states wanted to set and order the terms of separation and the post-divorce support obligations. Norma Basch, "From the Bonds of Empire to the Bonds of Matrimony," in Devising Liberty: Preserving and Creating Freedom in the New American Republic, 217-41 (David Thomas Konig, ed.; Stanford Univ. Press 1995); Cott, Public Vows at 205-07. As divorce became more common during the 20th Century, some spouses whose marriages had simply broken down began colluding to make it look as if conditions had been met for a fault divorce. Katherine L. Caldwell, Not Ozzie and Harriet: Postwar Divorce and the American Liberal Welfare State, 23 *Law & Soc. Inquiry*, 1, 2 (1998); Cott, Public Vows at 195-96. In 1973, Connecticut passed P.A. 73-373, codified at Conn. Gen. Stat. § 46b-40(c), providing for the dissolution of a marriage without regard to the fault of either marital partner. The move to no-fault procedure was intended to make divorce law consistent with social reality and reflect society's view that spouses themselves should evaluate the performance of marital roles. Cott, Public Vows at 205-06; Mary Ann Glendon, Abortion and Divorce in Western Law: American Failures, European Challenges 66-67, 78 (Harvard Univ. Press 1987). This represented a vast change in the terms of every extant marriage as well as a radical alteration to the understanding of marriage as a lifelong obligation terminable only for state-defined cause.

C. Laws Involving Racial Restrictions in Marriage Have also Undergone Fundamental Change Since the Colonial Era.

The most notorious historical restrictions on the eligibility to marry were race-based. Abolitionists' arguments emphasized that slaves were barred from marriage and that this denial was a human tragedy and a cause of degradation of families. Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values 30-40, 171-81 (Lawrence Hill Books 1998); Cott, Public Vows at 56-66. After emancipation, slaves flocked to marry legally. They saw marriage as an expression of their civil rights; now being individuals in the eyes of the law, they could consent and therefore enter into a legal marriage. Peter W.

Bardaglio, Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South 132-33 (Univ. of North Carolina Press 1995).

After Emancipation, however, most states retained or enacted laws prohibiting marriage between a white person and a “negro” or “mulatto.” David H. Fowler, Northern Attitudes towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest, 1780-1930 (Taylor & Francis 1987); Cott, Public Vows at 99. Connecticut was one of the few states that did not enact anti-miscegenation laws. See Christopher Collier, The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights, 76 Conn. B.J. 1, 47 (2002). At the same time, at least some in Connecticut regarded such marriages as “revolting” and “an offence against public decorum.” Crandall v. State, 10 Conn. 339, 360 (1834) (preface, Judson and C.F. Cleaveland for the State).

Anti-miscegenation laws were considered an intrinsic part of marriage law and were justified as enacting what nature or God dictated and preventing “corruption” of the institution of marriage. See, e.g., Kinney v. Commonwealth, 30 Gratt. 858 (Va. 1878); State v. Gibson, 36 Ind. 389 (1871).² As late as 1955, the Supreme Court of Appeals of Virginia recognized that the state had a legitimate interest to “‘preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’” Loving v. Virginia, 388 U.S. 1, 7 (1967) (internal quotation omitted).

Over time, these laws were understood to be based on impermissible prejudices and antithetical to the concept of marriage as founded on consent and choice. California was the first state to find that race-based restrictions on marriage were unconstitutional, Perez v. Sharp, 32 Cal.2d 711, 714 (1948), and in 1967, the U.S. Supreme Court struck down all

² The trial judge in Loving stated: “Almighty God created the races ... and he placed them on separate continents. ... The fact that he separated the races shows that he did not intend the races to mix.” Loving v. Virginia, 338 U.S. 1, 3 (1967) (quoting trial court).

remaining laws banning interracial marriage. Loving, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men”); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the right to marry is a fundamental civil right). As in the case of laws regulating the duties of spouses in marriage, racial regulations that had predominated for centuries changed to reflect society’s evolving conceptions of equality.

II. THE CORE OF MARRIAGE HAS ALWAYS BEEN THE MUTUAL CONSENT OF THE TWO PARTIES FOR THE PURPOSE OF ENCOURAGING COMMITTED AND INTERDEPENDENT RELATIONSHIPS OVER TRANSIENT ONES.

Although marriage has changed dramatically over time, the mutual consent of two individuals has long been the core element for entering into a valid marriage in Connecticut. The concept of consent reflects the state’s respect for individual dignity and choice in the matter of selecting a marital partner. Marriage is a civil institution through which the state recognizes, supports and ennobles individuals’ choices to enter into long-term, committed, and intimate relationships.

Among the freedoms always enjoyed by Connecticut citizens of proper age has been the right to choose a marital partner. As Tapping Reeve wrote in 1816, the matrimonial contract should be as unrestrained as possible, because restraining marriage was “against sound policy, and detrimental to the interest of the commonwealth.” Tapping Reeve, The Law of Baron and Femme, 220 (William S. Hein & Co. 1981) (1816). Among an individual’s rights have always been the rights to pursue any vocation and “marry whomever they chose, including Indians and free blacks.” Collier, supra at 38. Loathsome as it may have been to some, even many, to choose a marital partner of a different race, Connecticut public policy allowed this choice.³

³ Other than the current same-sex prohibition, statutory provisions restricting access to marriage have not been extensive during Connecticut’s history. See Conn. Gen. Stat. §§ 46b-30 (age) and 21 (consanguinity); § 53a-190 (bigamy prohibition); Connecticut

This Court has repeatedly emphasized the importance of consent to the marital relation. State v. Nosik, 245 Conn. 196, 202, cert. denied, 525 U.S. 1020 (1998) (holding that no valid marriage was formed because the parties did not possess a good faith intention to enter into a valid legal marriage); Schibi v. Schibi, 136 Conn. 196, 198 (1949) (“The law is clear that mutual consent is essential to a valid marriage”) (citations omitted); Allen v. Allen, 73 Conn. 54, 55 (1900) (same). In fact, consent is such a central element to the marital relationship that a marriage ceremony performed with the consent of the parties can produce a valid marriage even when the parties fail to comply with other statutory requirements. Carabetta v. Carabetta, 182 Conn. 344, 351 (1980) (holding that the marriage was valid despite the lack of a marriage license).

The respect for an individual’s choice of marital partner has been increasingly reflected in Connecticut’s laws. This Court, in Gould v. Gould, 78 Conn. 242 (1905), found that the “right to contract marriage” is part of the right to “life, liberty, and the pursuit of happiness,” guaranteed by Article First, § 1 of the Connecticut Constitution. Justice Hamersley, in his concurrence, emphasized that the freedom to choose one’s marital partner is part of “the proper domain of individual right ... [an] individual right [that] has been and is regarded as protected by the Constitution from arbitrary invasion.” Id. at 251. The United States Supreme Court subsequently held that the right of the individual to choose a marital partner is fundamental. See, e.g., Loving, supra; Zablocki v. Redhail, 434 U.S. 374, 384, 386 (1978) (“the right to marry is of fundamental importance for all individuals”).

By bundling social rewards and obligations with freely chosen and consent-based relationships, the state formally recognizes and encourages long-term, committed and intimate relationships over transient ones. As a legal matter, marriage today is an equal partnership with each party having the same rights and responsibilities to each other and to

General Statutes of 1808, Title CV, ch. 1, § 3 (age), § 4 (consanguinity), and § 11 (bigamy prohibition).

society. Recognizing the equality and liberty rights of gay and lesbian individuals who choose to marry fits precisely within this paradigm and the aims of marriage.

III. CONNECTICUT'S MARRIAGE LAWS HAVE NOT PRIVILEGED BIOLOGICAL PROCREATION OVER INTIMACY THAT DOES NOT LEAD TO BIOLOGICAL PROCREATION.

In popular imagination and law, sexual intimacy is an element of marriage. Gould, 78 Conn. at 249-50 (acknowledging marriages may be voided when a person marries knowing he or she is incapable of sexual intimacy). A marriage, however, does not need to be consummated to be valid. Benton v. Benton, 1 Day 111, 116 (Conn. 1803) (finding that the marriage was valid where the parties to the marriage did not consummate the marriage relationship subsequent to the marriage ceremony); Hassan v. Hassan, 2001 WL 1329840, *5-6 (Conn. Super. Ct. Oct. 9, 2001) (Lifshitz, Magistrate) (“The lack of consummation surely is not sufficient grounds for the marriage to be declared void”).

Moreover, the capacity to procreate has never been an essential element of marriage. Hannibal v. Hannibal, 23 Conn. Supp. 201, 204 (Conn. Super. Ct. Feb. 9, 1962) (Ryan, J.) (denying annulment sought because the wife refused to bear children). No statute has ever treated procreation as essential to marrying or staying married. The state’s annulment and divorce statutes confirm that the capacity to procreate has never been required for marriage. See, e.g., Conn. Gen. Stat. § 46b-40 (no indication that failure to procreate biologically is cause for annulment or divorce).

IV. MARRIAGE IS A UNIQUE LEGAL, CULTURAL AND SOCIAL INSTITUTION THAT HAS NO SUBSTITUTE.

The Amici have spent many years researching the social history of the United States, including marriage, and its social and cultural meaning. It is our conclusion that there is nothing that provides the full advantages of marriage, but marriage itself. Legal marriage is, and has been for hundreds of years, a privileged status. The title of “marriage”

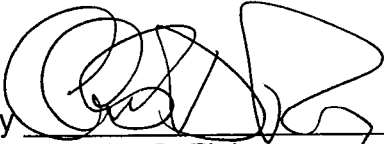
brings with it not only legal rights and obligations, but also a special status. Being married reflects not only personal choice, but also status in the community and society. Marriage is a definitive expression of love and commitment and is deeply ingrained in our society. It is omnipresent and reflected in and perpetuated through laws, custom, literature and folk tales. Marriage has an attribute of legitimacy that has been earned through many years of individual validation and institutionalization by governments and society. Civil unions, as a new mechanism for obtaining legal rights and responsibilities for one group of citizens, do not have the social, legal or cultural significance of marriage.

CONCLUSION

The historical limitation of marriage to a man and woman was rooted in a system that rigidly enforced gender roles in marriage. Not only has this notion been abandoned, but Connecticut has recognized that lesbian and gay people form committed, long-term relationships. See Conn. Gen. Stat. §§ 46b-38aa to 46b-38pp (civil union law); Conn. Gen. Stat. § 45a-727a (second parent adoption law). Today, same-sex couples are an identifiable group and are part of the fabric of society in Connecticut.⁴ Ending the ban on marriage for gays and lesbians would be in keeping with the state's respect for individual choices about a marital partner. It would also be consistent with and continue the marked historical trend wherein a legally stigmatized group finds recognition of marriage rights as intrinsic to their civil rights. The time to jettison the remaining vestiges of discrimination against same-sex couples, by allowing them to formalize their commitments through marriage, is now.

⁴ As of the 2000 census, there were approximately 7,386 same-sex households in Connecticut. "2000 Census Figures – Same-Sex Partner Households in Connecticut," OLR 2002-R-0200 (Feb. 6, 2002), <http://www.cga.ct.gov/2002/rpt/2002-R-0220.htm>. These numbers likely reflect underreporting.

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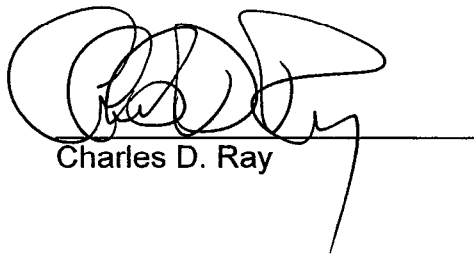
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