2011

Reflections on E-Marriage Papers

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2011 MICH. ST. L. REV. 35

INTRODUCTION

My task is to comment on the rich collection of papers inspired by the E-marriage proposal of Adam Candeub and Mae Kuykendall.[1] Theirs is a refreshingly novel suggestion, though one with some precedents (in social policy and practice, there is little under the Sun that is entirely new). In the course of commenting on the other papers in this symposium, I will have some reflections on the Candeub/Kuykendall proposal as well.

The papers in this conference are impressive both individually and in the range of topics covered and arguments and insights offered. If I make relatively few comments on some of the papers, it is not any reflection on the interest or importance of those pieces; it reflects, instead, the limits of my knowledge and experience. I have written more on some topics than on others. Also, in my comments, I will speak at a fairly abstract level about policies, rules, long-standing principles, strategic concerns, and the like. It is simply what I do; I am much more a theorist than a practitioner or a political strategist. However, I never forget, and I trust that no readers will ever forget, that all of these questions and issues ultimately come down to real people, their ability to express their commitments, and their ability to have their commitments recognized and acted upon by the government. And for this reason, I am especially grateful that the issue contains the testimonies of Mark Reed-Walkup and Dante Walkup, as well as Bryan Wildenthal, who offer the human faces and emotions behind our more abstract arguments.[2]

I. THE CANDEUB/KUYKENDALL PROPOSAL

Adam Candeub and Mae Kuykendall have proposed that states pass legislation allowing parties to marry electronically, without any requirement that the parties be physically present within the state; the presiding official would be in the state, but the prospective spouses could be many states

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1. Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735 (2011).

2. Mark Reed-Walkup, *Our Wedding Day: Bringing Law & Love Together to Texas*, 2011 MICH. ST. L. REV. 45; Bryan H. Wildenthal, *A Personal Perspective on Marriage, Time, Space, Uncertainty, and the Law*, 2011 MICH. ST. L. REV. 229.

away (and perhaps many states away from each other, as well), or even in another country.[3] One obvious advantage to this proposal—at least from the perspective of the prospective spouses—is that it would allow some couples to marry who would otherwise be barred from marrying based on their home states' laws. The obvious example that comes to mind involves same-sex couples, but this might also help first cousins who wanted to marry (where, like with same-sex couples, there are some states that allow such marriages, surrounded by a large number of states that do not[4]), and, potentially, even polygamous unions (though it seems unlikely that any states will authorize polygamous unions in the near, or even foreseeable, future).

The focal objective of the proposal is the ability of couples to marry where their home states' laws would otherwise forbid the union, but without requiring the couple to have to travel to a state with more receptive marriage laws. This is thus the difference from traditional proxy marriage (itself available in only four states[5]), where in most cases, at least one prospective spouse needs to be physically present (Montana appears to allow double-proxy marriages with neither party physically present, but requires that one of the prospective spouses be either a Montana resident or on active duty in the military[6]). Whether any other state, including the state(s) where the prospective spouses are domiciled, would recognize this "distance" or "electronic" marriage would be a separate question, as will be discussed further below.

It is normal for states to make marriage available to citizens from other states. Some states go out of their way to make themselves attractive destinations for marriages, e.g., by imposing minimal licensing requirements and waiting times between license application and marriage, as Nevada does, while other states simply have the advantage of allowing types of unions other states do not allow.[7]

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3. *See generally* Candeub & Kuykendall, *supra* note 1.

4. According to the National Conference of State Legislatures, first-cousin marriage is legal in 19 states and the District of Columbia, and legal under very limited circumstances in six other states. *See* STATE LAWS REGARDING MARRIAGES BETWEEN FIRST COUSINS, http://www.ncsl.org/default.aspx?tabid=4266 (last visited April 2, 2011).

5. Those states are: California, Colorado, Texas, and Montana. *See* MARRIAGE BY PROXY, *available at* http://www.marriagebyproxy.com/legality.html (last visited April 2, 2011).

6. MONT. CODE ANN. § 40-1-301 (2009).

7. As Thomas Little reports in his excellent narrative of the legal recognition of same-sex unions in Vermont, most civil unions granted there involve couples from other states. Thomas H. Little, *Bill Lippert and Civil Unions: A Policy Entrepreneur in the Right Place at the Right Time*, 2011 MICH. ST. L. REV. 237, 250 (citing *2002-146400.1, Report of the Vermont Civil Union Review Commission* 6, OFFICE OF THE LEGIS. COUNCIL (Vt. 2002), *available at* http://www.leg.state.vt.us/ba ker/Final%20CURC%20Report%20for% 202002.pdf).

As already noted, the Candeub/Kuykendall proposal goes a step beyond current law by allowing parties from other states to take advantage of the first state's marriage law without having to travel to, or be physically present in, the state. This proposal thus has connections not only to proxy marriage laws (as already noted) but also to the historical practice of Japanese picture marriages.[8] It also has some resonance to a proposal I made some years back to authorize choice of law provisions in marriage.[9]

My argument had been that choice of law in commercial transactions was common-place, widely-accepted, and generally considered a good thing, at least in the way it reflected party autonomy. Why not the same reflection of autonomy in marriage? On one hand, confining the marriage law chosen to a limited set (perhaps law valid in some American state) would create safeguards for vulnerable parties. On the other hand, states did not have significant arguments for confining the rules under which couples married, given that states currently allowed non-residents to marry under their law.[10]

Marriage (and divorce) are (and, in the United States, have always been) largely a matter of state regulation. Each state has its own set of rules about who can marry, what the consequences of marriage are, and when and how marriages can be dissolved. State regulation of the family is more significant when dealing with divorce judgments, child custody orders, child support awards, and adoptions, as these are state judgments and decrees that are enforceable in other jurisdictions (without consideration of the forum state's public policies) through the Full Faith and Credit clause of the United States Constitution, sometimes supplemented by federal legislation.[11] Marriage, however, is an area where each state's regulatory power is much less significant, in part because of the much more limited rules of inter-jurisdictional recognition.

Many people (including many lawyers and more than a few politicians) do not realize that it is not the Full Faith and Credit clause of the

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8. *See generally* Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141.

9. Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255 (2002).

10. *Id.* at 264-71. Another significant part of my proposal was that the marriage law chosen by the couple at the time of marriage would continue to govern them through divorce, unlike current practices, under which where one marries has little to no impact on the law under which the marriage and its dissolution is regulated. *Id.* at 256-62, 265-66.

11. *See* Williams v. North Carolina, 317 U.S. 287, 302 (1942) (divorce decrees subject to full faith and credit, subject only to 2nd court's right to investigate the decree-granting court's jurisdiction); 28 U.S.C.A. § 1738A (West 2006) (full faith and credit for child custody determinations); 28 U.S.C.A. § 1738B (West 2006) (full faith and credit for child support orders).

United States Constitution[12] that determines whether one state recognizes a marriage celebrated in a second state, nor is it the Defense of Marriage Act[13] (though its proponents claimed that DOMA both was needed and was effective in determining whether one state had to recognize another state's marriage).[14] Instead, inter-jurisdictional recognition of marriages is governed by conflict of laws principles. The basic principle regarding marriage is that a marriage that is valid where celebrated will be recognized, unless it is contrary to the strongly held public policy of the forum state.[15] Even beyond the limited rules for inter-jurisdictional recognition of marriage, the combination of conventional conflict of laws principles, subject matter jurisdiction rules for divorce,[16] and a highly mobile society means that states are significantly weakened in their efforts to enforce their policies.[17]

This is the legal context for considering the inter-jurisdictional effects of a possible E-marriage, should a state enact the Candeub/Kuykendall proposal. One threshold question for such an E-marriage, relevant to a conflict of laws analysis, is when a couple physically present in state X is e-married under state Y's E-marriage law by an official in state Y, which state is the state of the marriage's "celebration"? The intention of the proposal would almost certainly be to make state Y, the state in which the official presides over the marriage, the "state of celebration," rather than state X, the state in which the couple is physically present. However, one can imagine a state unsympathetic to E-marriage declaring otherwise: declaring that the state of celebration must be state X, where the spouses are physically present (and

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12. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

13. "No State . . . shall be required to give effect to any public act, record or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." 28 U.S.C.A. § 1738C (West 2006).

14. *See, e.g.*, Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353 (2005) (offering historical and doctrinal justifications for the irrelevance of the full faith and credit clause); *see also* Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337, 343-44 (2005) (noting doubts about the relevance of the full faith and credit clause to the inter-jurisdictional recognition of marriage); ANDREW KOPPELMAN, SAME SEX DIFFERENT STATES 118 (2006) ("[T]here is not a single judicial decision that holds that full faith and credit requires states to recognize marriages that violate their own public policies concerning who may marry." (footnote omitted)).

15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

16. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 71 (1971) (state has jurisdiction to dissolve marriage where either spouse is domiciled).

17. *See* Bix, *supra* note 9, at 256-62; *cf.* Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1 (2000) (raising questions about what state interests are and the coherence with which they are expressed).

are, in a more conventional sense, "celebrating"). This would then be an easy way for the forum state to declare the marriage invalid, for such a marriage will usually be contrary to the requirements of the state where the couple is physically located (this, after all, is the likely motivation for the couple to seek an E-marriage in the first place). Of course, a forum state hostile to the type of marriage involved (whether same-sex, first-cousin, uncle-niece, polygamous, etc.) would also have the option to refuse recognition of the marriage, not based on a controversial claim regarding the "state of celebration," but based on the more conventional assertion that the marriage in question is contrary to the forum state's strong public policy.[18]

As Gregory Mitchell points out,[19] from a practical perspective, the Candeub/Kuykendall proposal raises many questions. Why would a state want to adopt this proposal? Allowing couples to marry under the state's laws without being physically present does not bring a state any financial benefits (in contrast to the idea of pioneers in same-sex marriage receiving the tourist dollars of those who come to the state to marry under that law[20]), and in fact may lose the state some benefits.[21] It is not even seeking the more nebulous advantage that might come to lawyers of the state when a state's rules are frequently selected in choice-of-law provisions.[22]

A state's effort to export its ideas about marriage (perhaps including covenant marriage,[23] same-sex couples, the marriage of close relatives, or polygamy) would seem to be mostly symbolic; less charitably, one might even see it as just an effort to annoy other states with different views.[24] Of course, "annoying" other states on a matter of principle may be part of the

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18. *See supra* note 15, and accompanying text.

19. Gregory Mitchell, *Should it be Easier to Get Married?*, 2011 MICH. ST. L. REV. 217, 224-28.

20. *See* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 747, 771, 821 (1995) (describing the possible financial benefits to first adopters of same-sex marriage, particularly through "marriage tourism"); *see also* Jennifer Gerarda Brown, *E-marriage: "Dot Com" or "Dot Org?,"* 2011 MICH. ST. L. REV. 209, 211-13 [hereinafter, Brown, *"Dot Com"*] (summarizing the same point).

21. *See* Brown, *"Dot Com" supra* note 20, at 211-13 (noting that celebrations of E-marriages will be spending their funds in other states rather than the state that passes the E-marriage proposal).

22. *Cf.* Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1556 (2000) (discussing the pressures on lawmakers that may result from choice of law decisions).

23. Covenant marriage is a more binding form of marriage that married couples or couples about to marry currently have as an option in three states: Louisiana, Arizona, and Arkansas. *See, e.g.*, Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 605 (2005).

24. *Cf.* Sosna v. Iowa, 419 U.S. 393, 407-08 (1975) (one-year residency requirement for state divorce law justifiable based on state interest "in avoiding officious intermeddling in matters in which another State has a paramount interest").

point. It is a form of protest, almost a form of civil disobedience. In any event, making (say) a Massachusetts marriage available to same-sex couples who do *not* visit the state does not seem that different—as a matter of principle or for purposes of backlash (as opposed to a matter of tourist dollars)—than making a Massachusetts marriage available to such couples when they do drive or fly to the state for the ceremony.

An electronic marriage option does not change the basic facts on the ground: that states generally make the opportunity to marry available to people from other states (and other countries), that many people do travel to other states (and other countries) to marry, sometimes to circumvent marriage restrictions in their home state; and that such "migratory marriages" do then face potential "public policy" restrictions on where their marriages are recognized. For example, same-sex couples marrying—whether in Massachusetts, Canada, or elsewhere—face over forty states with public declarations (by mini-DOMAs or other legal sources) that same-sex marriages are contrary to their public policy.[25] Of course, one might also choose to marry electronically under another state's laws simply to show one's support for that state's policies (if one did not have the time or resources to show one's support by traveling there for the marriage, or was otherwise constrained by family and friends who could not make the trip).[26]

June Carbone reminds us of two crucial matters: (1) that much of the debate on marriage options turns on the symbolic or expressive side of the legal recognition of a couple (and of calling that legal recognition "marriage" rather than something else);[27] and (2) that, though some of the expressive work can be done at the municipality level, such efforts must keep in mind the danger of backlash at the state level.[28] As noted, a state might want to create electronic marriage to emphasize its strong beliefs about making certain kinds of marriage available, while similarly giving couples an inexpensive way to express their public commitment, even if that commitment is not recognized by their home state (or the federal government[29]).

We cannot discount the problem of backlash as being merely the rash actions of benighted people. As Joel Nichols reminds us, people's views on

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25. *See, e.g.*, KOPPELMAN, *supra* note 14, at 138 (listing states and sources).

26. *See* Brown, *"Dot-Com," supra* note 20, at 214.

27. *See also* Kristin Hass, *Peggy Pascoe's* What Comes Naturally: Miscegenation Law and the Making of Race in America *and the Use of Legal History to Police Social Boundaries*, 2011 MICH. ST. L. REV. 255, 258 ("[L]aws about marriage [are] mobilized to police the boundaries of not only marriage itself but [also] ideas about what constitutes full cultural citizenship and who should have access to it.").

28. June Carbone, *Marriage as a State of Mind: Federalism, Contract and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49, 59-82.

29. The Defense of Marriage Act created a definition of marriage for federal law purposes that excludes same-sex unions, even if they are recognized by the couple's home state. 1 U.S.C.A. § 7 (West 2005).

marriage are often tied both to their sincerely held religious beliefs and to traditions and social practices that go back centuries, if not millennia.[30] Nichols also reminds us that while Catholics, Jews, and Moslems can, to some degree, separate *civil* marriage and divorce from the official pronouncements on these matters within their own communities, Protestants have handed over authority over marriage to the state and, therefore, often work harder to try to keep civil marriage law consistent with their religious beliefs about marriage and family.[31] While it is likely that no marriage proposal will satisfy all policy and religious constituencies, all efforts should be made to take (and to appear to take) seriously both traditional and non-traditional views about marriage.

Allison Tait's narrative of Utah's polygamy prosecutions shows that states (even culturally conservative states) can invoke broad, flexible, and cultural definitions of marriage when it suits their purposes (here, the purpose being to prosecute a polygamist police officer who had gone through a religious marriage ceremony with an under-age woman).[32] Of course, this is the same state supreme court that did not find a civil union ceremony in another state sufficient reason to let a parent's (civil union) partner even have *standing to seek* visitation with the child the two women had raised together.[33] It is no surprise to modern readers that courts' reasoning can be result-driven, and the broad discretion often given (or claimed by) courts in family law cases may only increase that danger.

To some extent, as Anita Bernstein indicates (in the course of a fascinating discussion of "essentials" of marriage),[34] the underlying question in the marriage debates is the proper mixture of private and state roles in determining the legal contours of a marriage. As Bernstein properly points out, the issue is one of whether private agreements are *enforceable*,[35] and therefore, it is not precise to characterize this as a matter of individual liberty. On most matters, individuals (married or unmarried, same-sex or oppo-

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30. Joel A. Nichols, *Misunderstanding Marriage and Missing Religion*, 2011 MICH. ST. L. REV. 195, 197-99.

31. *See id.* at 201; *see also* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1793-97 (2005).

32. Allison Tait, *Polygamy, Publicity, and Locality: The Place of the Public in Marriage Practice*, 2011 MICH. ST. L. REV. 173, 174-182 (discussing State v. Holm, 2006 UT 31, 137 P.3d 726).

33. Jones v. Barlow, 154 P.3d 808, 815 (Utah 2007) (refusing civil union partner of mother standing to seek visitation with child, even though civil union had been entered before birth, partners had collectively decided to have the child, and partners raised the child together).

34. Anita Bernstein, *Toward More Parsimony and Transparency in "The Essentials of Marriage"*, 2011 MICH. ST. L. REV. 83. Bernstein discusses physical proximity as an "essential of marriage," *id.* at 122-25, though, as she also notes in the course of the analysis, it is more an "essential" of the marriage ceremony. *Id.*

35. *E.g.*, *id.* at 101.

site-sex) can enter private arrangements without fear that the state will prohibit their actions or make them subject to civil or criminal penalties. The issue on which Bernstein properly focuses is when and whether the state will offer its enforcement machinery to back up the private commitments. And as the state enforces many such arrangements, but withholds its enforcement machinery from others (or requires modification of the terms prior to enforcement), the proper focus is on equality (why offer enforcement to one type of agreement but not to another?) rather than liberty.[36] Bernstein's article also makes a persuasive entry in the debate about whether enforcement of agreements in family and sexual matters works for women's interests or against them.[37]

CONCLUSION

Adam Candeub and Mae Kuykendall have given us just the sort of novel reform proposal or thought experiment that helps us think clearly and critically about the role of government generally, and states specifically, in regulating marriage. The Candeub/Kuykendall electronic marriage proposal would, on one hand, give greater protection for party autonomy, in allowing prospective spouses the ability to choose the law under which they marry without having to travel to the state in question. At the same time, the proposal effectively (if perhaps unintentionally) points out the incoherence of state regulation of marriage, where there is neither residency/domiciliary restrictions on marriage nor mandatory inter-state recognition of marriages.

Some of the commentators in this symposium have raised reasonable questions regarding the benefits of the proposal either to adopting states or to couples who might marry under the law, as well as concerns about a potential "backlash." Other commentators have noted that with this proposal, as with so much else in the marriage debates, one's view may be motivated

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36. I discuss these issues in greater length in Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL L. 249 (2010). I am intentionally avoiding speaking of enforceability or non-enforceability in terms of government "intervention" or "non-intervention," as that would be a different, and more complex, inquiry. As Frances Olsen and others have pointed out, governments intervene in the establishment and maintenance of background rules even where they do not intervene in more direct ways. *See, e.g.*, Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 848-49 (1985).

37. *Compare* Bernstein, *supra* note 34 *and* Martha Albertson Fineman, *Contract, Marriage and Background Rules*, *in* ANALYZING LAW 183, 187-88 (Brian Bix ed., Oxford, 1998) (arguing that keeping unenforceable agreements in sexual and family areas where women have some market advantage works against women's interests), *with* Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 69 YALE J.L. & FEMINISM 229, 294-95 (1994), *and* MARTHA FIELD, SURROGATE MOTHERHOOD 76-78, 151-52 (1990) (arguing for the general unenforceability of surrogacy agreements, in part on gender justice grounds).

primarily by the symbolic or expressive aspects of marriage, rather than by more practical or doctrinal concerns.

Whatever the ultimate evaluation, it is clear that the Candeub/Kuykendall proposal warrants just the sort of serious consideration that it is receiving as a result of this symposium.