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The Promise of Equality: The Evolution of the Family in California

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Professor Brigitte Bodenheimer left a rich legacy at UC Davis and each year the Bodenheimer Lecture celebrates her pioneering work in family law. This Essay explores how the evolution of the family has affected the promise of equality.

Long ago our founders declared: "We hold these truths to be self-evident, that all men are created equal . . . ."[1] Great words. But our view of what truths are self-evident changes over time. When the founders drafted the Declaration of Independence in 1776, it was not self-evident that women were equal to men, or that people of color were even fully human, much less equal. The Constitution required amendments to change these invidious inequalities: amendments to eradicate slavery and to give women the right to vote. But what we consider to be self-evident has changed over time, and the law has

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[1] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

changed in response. Indeed, changes in how we, as a state and as a nation, view the nature of a family have prompted important changes in family law, much of that change coming from the courts. A mere sixty-two years ago it was not self-evident that a white woman could marry an African-American man.

In 1948, California Civil Code section 69 prohibited a white person from marrying a "Negro, mulatto, Mongolian or member of the Malay race."[2] When the Los Angeles County Clerk denied Andrea Perez, a Caucasian woman, and Sylvester Davis, an African-American man, a marriage license, they claimed the law violated their right to religious freedom because they were Roman Catholic and their church did not prohibit interracial marriage. A closely divided California Supreme Court, led by the great Justice Roger Traynor, struck down the law, holding that it violated the Equal Protection Clause of the United States Constitution by "impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."[3] The decision in *Perez v. Sharp* recognized that discrimination could not be justified by the fact that it had "been sanctioned by the state for many years."[4]

But even after the decision in *Perez v. Sharp*, it was not self-evident to many that banning interracial marriage was wrong. In 1958, Mildred Jeter, an African-American woman, married Richard Loving, a Caucasian man, in the District of Columbia. The couple then moved to Virginia, where they were convicted of violating Virginia's ban on interracial marriage. The trial judge upheld this blatant discrimination using logic that sounds shocking now; he reasoned:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[5]

He sentenced the Lovings to one year in jail, but suspended the sentence for twenty-five years on the condition that they leave Virginia and not return for twenty-five years; in other words, he banished them from the state of Virginia.

Now, my guess is that the Lovings probably were not heartbroken to leave Virginia and move back to the District of Columbia, but several

[2] Perez v. Sharp, 198 P.2d 17, 18 (Cal. 1948).

[3] *Id.* at 29.

[4] *Id.* at 27.

[5] Loving v. Virginia, 388 U.S. 1, 3 (1967).

years later they challenged their conviction. The Virginia Supreme Court of Appeals ruled against the Lovings and upheld the antimiscegination statute.[6] In 1967, the United States Supreme Court took the case. The Court struck down the law in *Loving v. Virginia*, nearly 20 years after the California Supreme Court had banned antimiscegination statutes in *Perez v. Sharp*. [7]

The majority opinion in *Loving*, authored by Chief Justice Earl Warren, declared: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[8] The freedom to marry, the court continued, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[9] (Perhaps he should have said, "by all people.")

The high court also noted that in 1967, sixteen states still prohibited interracial marriage.[10] Slowly but surely, however, the nation's view of what is self-evident has changed. And today, our President, born in 1961, is the product of an interracial marriage.

Our ideas about the nature of the family have been changed by advances in technology that were unimaginable only a few decades ago. For a long time, identifying the parents of a child focused on determining the identity of the father, because the identity of the mother was seldom in doubt; the mother was the woman who had given birth to the child. That changed with the advent of in vitro fertilization, which permitted the use of surrogate mothers. Some interesting questions emerged. For example, if a woman supplied an egg, which was fertilized in vitro using her husband's semen and then implanted in the womb of a surrogate mother, who was the real mother? New technology complicated the question of what it meant to be a mother.

The California Supreme Court confronted the question of surrogate mothers in *Johnson v. Calvert*, decided in 1993, only seventeen years ago.[11] After being forced to undergo a hysterectomy, Crispina Calvert continued to produce eggs but was unable to bear a child.[12] A coworker, Anna Johnson, offered to act as a surrogate. Doctors impregnated Ms. Johnson with one of Ms. Calvert's eggs that they had

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[6] *Id.*

[7] *Id.* at 12; *Perez*, 198 P.2d at 29.

[8] *Loving*, 388 U.S. at 12.

[9] *Id.*

[10] *Id.* at 6.

[11] Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

[12] *Id.*

fertilized using Ms. Calvert's husband Mark's semen. During the pregnancy, the relationship between Ms. Johnson and the Calverts deteriorated into litigation, and Ms. Johnson eventually refused to give up the child. The court was faced with a quandary. It was clear that Mark Calvert was the father, but who was the mother — Crispina Calvert or Anna Johnson? The law provided that Ms. Johnson could be considered the mother because she gave birth to the child, but also provided that Ms. Calvert could be the mother because she was the genetic parent.[13] What's a court to do?

The ACLU, appearing as amicus curiae, suggested that the child could have two mothers: the modern equivalent of Solomon's fabled solution of splitting the baby.[14] The court rejected that idea and held instead that "for any child California law recognizes only one natural mother."[15] To figure out which woman was that one natural mother, the court looked to their intentions and picked Crispina Calvert because she had "intended to bring about the birth of a child that she intended to raise as her own."[16]

A dozen years later, I had to confront whether it was indeed self-evident that a child could have only one mother when I received three cases that each involved parental rights to a child born to a woman in a committed lesbian relationship. When two women decide to raise a child and one of them gives birth, there is no question that the woman who bore the child is the mother. It was not clear, however, whether the birth mother's lesbian partner had any legal relationship to the child. In all three cases, the Court of Appeal had ruled that the birth mother's partner was a legal stranger to the child because a child could have only one mother.[17] In fact, that was not true.

Just two years earlier, the California Supreme Court had recognized that a child could, in fact, have two mothers — by adoption. In *Sharon S. v. Superior Court*, we considered the validity of a practice that had become common in the lesbian community: second-parent adoption.[18] Specifically, if one woman gave birth to the child and her partner adopted the child, both women would be parents. The governing statutes did not expressly permit such a procedure. Rather, the statutes contemplated that adoption involved transferring parental

[13] *Id.*

[14] *Id.* at 781 n.8.

[15] *Id.* at 781.

[16] *Id.* at 782.

[17] Elisa B. v. Superior Court, 117 P.3d 660, 665 (Cal. 2005); K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690, 692 (Cal. 2005).

[18] Sharon S. v. Superior Court, 73 P.3d 554, 570-71 (Cal. 2003).

rights and obligations from the birth parents to the adoptive parents.[19] Nevertheless, in 1925, the California Supreme Court had recognized the validity of step-parent adoptions.[20]

In *Marshall v. Marshall*, we held that the second husband of a widow could adopt the children from her first marriage.[21] Permitting the new husband to adopt the children did not affect the mother's parental rights.[22] So, could the lesbian partner of a birth mother adopt the child? In *Sharon S.* we said yes, and held that nothing required the adopting parent and the birth parent to be married. We referred to "[u]nmarried couples who had brought a child into the world with the expectation that they will raise it together . . . ."[23] We thus permitted the lesbian partner of a birth mother to adopt the child, and permitted a child to have two mothers. This decision had broad implications because over 20,000 second-parent adoptions were at stake.[24]

That was the state of the law when the court accepted those three cases involving questions about whether both partners in a committed lesbian relationship had parental rights and obligations to a child born into that partnership. In the first case, *Elisa B. v. Superior Court*, Elisa and Emily decided they each wanted to bear children and raise those children together. Because Elisa earned more money, they decided that she would be the primary breadwinner and Emily would be the stay-at-home mom. They went to a sperm bank and selected the same donor, so their children would be "biological brothers and sisters."[25] They both became pregnant, Emily with twins, and gave birth a few months apart. They jointly selected each child's name and gave them the same surname, which they formed by joining the two women's surnames with a hyphen.

Within two years, the couple had separated. Emily had not been working and Elisa had been supporting the household financially. Elisa continued to do so for a while after the break-up, but eventually stopped supporting Emily and the twins. Emily sought aid from the county, and the county filed a complaint against Elisa to establish that she was a parent of the twins and force her to pay child support. This procedural posture made the case an interesting vehicle for examining

[19] *Id.* at 563.

[20] Marshall v. Marshall, 239 P. 36, 38 (Cal. 1925).

[21] *Id.*

[22] *Id.*

[23] *Sharon S.*, 73 P.3d at 568.

[24] *Id.* at 571, 568 (citing sources that suggest California courts have approved between 10,000 and 20,000 second-parent adoptions).

[25] Elisa B. v. Superior Court, 117 P.3d 660, 663 (Cal. 2005).

whether parental rights existed, because it highlighted that along with parental rights come obligations. In this case, the county was contending that Elisa was a parent to the twins, even though Emily had given birth to them. Elisa was resisting — denying she was a parent to the twins.[26]

We held unanimously that Elisa was the second parent of the twins and was obligated to provide child support because she had "actively assisted Emily in becoming pregnant, with the understanding that they would raise the resulting children together."[27] Elisa, we reasoned, had held herself out as a parent to the twins in several important ways. She attended medical appointments with Emily during pregnancy, served as Emily's coach during labor, and even cut the twins' umbilical cords. And once the twins were born, Elisa helped select their names, breast fed them, claimed them as dependants on her tax returns, and obtained a life-insurance policy in Emily's name so that if anything happened to Elisa all three children would be cared for.

But what about our holding in the surrogate-parent case, *Johnson v. Calvert*, that a child could have only one mother?[28] We explained that it was undisputed in that case that the husband who had supplied the semen was the child's father, so the issue was whether his wife, who supplied the ovum, or the surrogate, who gave birth, was the child's mother. Thus, in *Johnson*, three people claimed to be the child's parents. What we rejected in *Johnson* was the suggestion that a child could have a father and two mothers; we did not consider whether a child could have two parents, both of whom were women, or both of whom were men. We resolved that issue in Elisa's case, declaring: "We perceive no reason why both parents of a child cannot be women."[29] We pointed out that this result was possible under the "second parent" adoption we approved in *Sharon S.* and also was possible in a registered domestic partnership.[30]

I next dealt with legal issues of parentage in *K.M. v. E.G.*, in which we had to decide whether a woman who provided ova to her lesbian partner so that the partner could have children through in vitro fertilization is a parent of those children.[31] Like the couple in *Elisa B.*, K.M. and E.G. were in a committed lesbian relationship. K.M. provided her ova to E.G., who gave birth to twins. Shortly thereafter, a

[26] *Id.* at 662-64.

[27] *Id.* at 669.

[28] Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993).

[29] *Elisa B.*, 117 P.3d at 666.

[30] *Id.*

[31] K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005).

dispute over the custody of the twins erupted. E.G. claimed that K.M. had simply donated her ova, and that both women understood that E.G. would raise the children alone. Meanwhile, K.M. claimed that the joint intention, from the beginning, was that the couple would raise the children together. We held in favor of K.M., and affirmed the parental rights and obligations of both women. The court explained: "both the woman who provides her ova and her partner who bears the children are the children's parents."[32]

The third case in this trilogy was *Kristine H. v. Lisa R.*, in which we denied Kristine H.'s attempt to void a stipulated judgment that she entered into, while pregnant, with her then-partner Lisa R.[33] The judgment provided the couple with joint parentage of the then-unborn child. By a unanimous vote, the court upheld the judgment and thus affirmed, yet again, the notion that two woman can be the parents of the same child.[34]

Today, the debate about whether the law should permit same-sex marriage is raising more questions about what constitutes a family. Our decisions permitting second-parent adoption and recognizing the parental rights and obligations of lesbian couples set the stage for the California Supreme Court to decide whether it was unlawful to limit marriage to heterosexual couples. In *In re Marriage Cases*, we recognized at the outset that same-sex couples enjoyed virtually all of the substantive legal rights enjoyed by heterosexual couples, with one significant exception: their "officially recognized family relationship" was called a domestic partnership, rather than a marriage.[35] Thus, we held that not permitting same-sex couples to marry denies them equal protection of the law.

Several factors led us to this conclusion. First, denying same-sex couples the right to marry "clearly is not *necessary* in order to afford full protection to all of the rights and benefits . . . enjoyed by married opposite-sex couples."[36] Second, such a denial "impose[s] appreciable harm on same-sex couples and their children" because it robs them of the "dignity" and "stature . . . equal to that of opposite-sex couples."[37] Finally, we noted that denying same-sex couples this right perpetuates the "premise . . . that gay individuals and same-sex couples are . . .

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[32] *Id.*

[33] Kristine H. v. Lisa R., 117 P.3d 690, 692 (Cal. 2005).

[34] *Id.* at 696.

[35] *In re* Marriage Cases, 183 P.3d 384, 444-45 (Cal. 2008).

[36] *Id.* at 401.

[37] *Id.*

'second-class citizens' who may, under the law, be treated . . . less favorably than . . . opposite-sex couples."[38]

The holding in *In re Marriage Cases* that same-sex couples must be permitted to marry was short lived. Only 170 days later, on November 4, 2008, the electorate passed Proposition 8, an initiative measure that altered the California Constitution (note I say "altered," rather than "amended" or "revised") to provide that: "Only marriage between a man and a woman is valid or recognized in California."[39]

That same day, the electorate also passed an initiative regulating the confinement of chicken in coops. As Chief Justice George noted, "Chickens gained valuable rights in California the same day that gay men and women lost them."[40]

The California Supreme Court upheld the validity of Proposition 8 despite a very persuasive concurring and dissenting opinion, which I wrote.[41] Well, at least I thought it was persuasive. Unfortunately, none of my colleagues agreed. But the central issue in the Proposition 8 decision was not same-sex marriage (and the conclusion that gays and lesbians constituted a suspect class was not contravened by Proposition 8); the issue was the limit of the electorate's ability to amend the California Constitution using the initiative process.[42]

In my view, Proposition 8 was a "change to one of the core values upon which our state Constitution is founded."[43] As I wrote in my dissent:

> even a narrow and limited exception to the promise of full equality strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment . . . . Promising equal treatment to some is fundamentally different from promising equal treatment to all. Promising treatment that is almost equal is fundamentally different from ensuring truly equal treatment. Granting a disfavored minority only some of the rights enjoyed by the majority is fundamentally different from recognizing, as a constitutional imperative, that they must be granted all of those rights. Granting same-sex couples all of the rights enjoyed by opposite-sex couples, except the right to

[38] *Id.* at 402.

[39] Strauss v. Horton, 207 P.3d 48, 68 (Cal. 2009).

[40] Ronald M. George, Chief Justice, Cal. Supreme Court, Speech to American Academy of Arts and Sciences (Oct. 10, 2009).

[41] *Strauss*, 207 P.3d at 114; *Id.* at 123 (Moreno, J., concurring and dissenting).

[42] *Id.* at 128-29.

[43] *Id.* at 129.

> call their " 'officially recognized, and protected family relationship' " a marriage, still denies them equal treatment.[44]

I relied on the fact that the equal protection clause of the California Constitution "is intended to operate independently of and in some cases more broadly than its federal counterpart."[45] Upholding Proposition 8, as the majority did, because nothing in the Federal Constitution forbade such discrimination "essentially strip[ped] the state Constitution of its independent vitality in protecting the fundamental rights of suspect classes."[46] To me, Proposition 8 was thus a revision of — not an amendment to — the California Constitution. Such a fundamental change in the meaning of equal protection, to the promise of equality, can be accomplished only by either a constitutional convention or a measure passed by a two-thirds vote of both houses of the Legislature and approved by the voters.[47]

Each one of my colleagues, however, found Proposition 8 to be only an amendment to the constitution that could be placed on the ballot by the signatures of eight percent of the persons who voted in the previous gubernatorial election and passed into law by a simple majority of the voters. Because Proposition 8 satisfied those procedural requirements, the court upheld the law.[48] Thus, sixty years after *Perez v. Sharp* broadened the definition of the family to include marriage between people of different races, Proposition 8 narrowed that definition to exclude marriage between people of the same sex.[49]

Let me address the initiative process. The progressives who thought up the initiative process at the beginning of the twentieth century believed that they were onto something that would advance the cause of popular democracy. What could be more democratic than allowing the voters to bypass political logjams and special interests in the Legislature and pass laws by a simple majority vote of the people? But the progressives who put the initiative in our state constitution forgot about the one law that we all live by — the law of unintended consequences. They did not foresee a time when special interests would hijack the very process that was supposed to be a counterweight to their influence, allowing those powerful interests to enact their narrow agendas by misleading the voters about what they

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[44] *Id.* at 131 (citation omitted).

[45] *Id.* at 139.

[46] *Id.*

[47] *Id.* at 131-32.

[48] *Id.* at 122.

[49] *Id.*

were being asked to approve. The abuse of the initiative process by powerful special and political interests has been going on in California for decades, and for many people the passage of Proposition 8 was a culmination of that process.

But neither the passage of Proposition 8 nor our court's decision upholding that initiative measure has put an end to the debate over same-sex marriage, just as it took a number of years, and perhaps decades, to reduce the debate and controversy over interracial marriage. A challenge to Proposition 8 based on the Federal Constitution is now pending in federal court,[50] and the newspapers report efforts to pass a new initiative permitting same-sex marriage. The debate will continue, the nature of the family will continue to evolve, and the law will change in response: from the people, and from the courts, and perhaps at some point, from the U.S. Supreme Court. An important aspect of law is predictability, as reflected in the doctrine of stare decisis. Thus, change does not come quickly, but it does come, step by step, measure by measure, and it does not come easily as we have seen. What California and the nation will hold to be self-evident twenty years from today, only time will tell.

[50] *See generally* Perry v. Schwarzenegger, 704 F. Supp. 2d 291 (N.D. Cal. Aug. 4, 2010) (holding that Proposition 8 violated Equal Protection and Due Process Clauses of Fourteenth Amendment).