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MARRIAGE AS? A REPLY TO *MARRIAGE AS PUNISHMENT*

Brenda Cossman[*]

Response to: Melissa Murray, Marriage as Punishment, 112 Colum. L. Rev. 1 (2012)

In *Marriage as Punishment*, Professor Melissa Murray reads marriage against its more mainstream grain[1]: Rather than classifying marriage as a public and/or private good, Murray uses the history of the law of seduction to reveal a darker side of marriage. Through a careful reading of this history, she illustrates some of the ways in which marriage intersected with criminal law, and as her title suggests, served as a form of punishment. It is a fascinating study of one of the many ways that law channeled sex into marriage—through the specificity of nineteenth-century seduction laws—producing marriage as the only site of approved sexual activity.

Professor Murray then shifts her analysis to more contemporary legal discourses of marriage, which she approaches through the lens of marriage-as-punishment. She begins by revisiting familiar jurisprudential terrain: *Skinner*,[2] *Zablocki*,[3] and *Turner*.[4] But in each, she finds a darker side of marriage, a subtext of marriage as a form of disciplinary governance, particularly in relation to appropriate sexual norms and behavior. Murray then alights on *Lawrence*[5] and the ensuing debates around same-sex marriage, arguing again that marriage may not—or may not only—be the public and private good that it is cracked up to be, but rather a site of sexual discipline and governance shaping good sexual citizenship.[6]

Marriage as Punishment is yet another illustration of the intersections of

* Professor, University of Toronto Faculty of Law.

1. Melissa Murray, Marriage as Punishment, 112 Colum. L. Rev. 1 (2012) [hereinafter, Murray, Marriage as Punishment].

2. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

3. Zablocki v. Redhail, 434 U.S. 374 (1978).

4. Turner v. Safley, 482 U.S. 78 (1987).

5. Lawrence v. Texas, 539 U.S. 558 (2003).

6. Murray, Marriage as Punishment, supra note 1, at 56–57.

criminal and family law, a theme central to Professor Murray's scholarship.[7] The piece demonstrates and deconstructs the artificial dichotomies created by law's disciplinary boundaries: public/private, criminal/family, and status/contract. Professor Murray instead reveals the ways in which different forms of regulation have shaped the intimate sphere and the contours of appropriate sexual citizenship. *Marriage as Punishment* is consistent with an emerging body of scholarship seeking to strike at the heart of family law's claim to exceptionalism and reveal the multiple and overlapping forms of regulation that constitute marriage, family, and the intimate sphere.[8]

In this Response, I explore the ways in which Murray has framed marriage as punishment, but also as discipline, as governance, and as state sexual regulation. I first contrast the governance and disciplinary role of marriage against Murray's marriage-as-punishment lens and then critically engage with Murray's take on marriage-as-comprehensive-sexual-regulation.

I. MARRIAGE AS GOVERNANCE?

While the marriage-as-punishment lens is compelling in the history of seduction, its connection to more contemporary legal developments is less than seamless. The analysis of contemporary legal discourses on marriage—*Skinner*, *Zalbocki*, *Turner*, and the same-sex marriage debates following on the heels of *Lawrence*—is less about marriage-as-punishment and more about marriage-as-governance. Indeed, I would suggest that it is in fact the idea of marriage-as-governance that better unites the first and second parts of Professor Murray's Article, although it admittedly would have provided a less catchy title. At the same time, I suggest some potential directions for using "marriage-as-punishment" in analyzing at least some contemporary legal discourses on marriage.

A. *Marriage as Discipline?*

Consistent with this notion of marriage-as-governance, there are ways in which the Article comes perilously close to conflating punishment with discipline. Professor Murray locates the law of seduction and the idea of marriage-as-punishment in the context of a shifting understanding of punishment in the nineteenth century. Drawing heavily on the work of Foucault, she sketches the emerging understanding of punishment as the inculcation of self-discipline.[9] It is perhaps here that the subtle slippage occurs.

Murray writes, "the penitentiary was not the *only* means of cultivating

7. See, e.g., Melissa Murray, Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life, 94 Iowa L. Rev. 1253 (2009) (arguing awareness of intersection of criminal and family law is necessary to "make informed choices about how we organize intimate life").

8. See, e.g., Janet Halley & Kerry Rittich, Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism, 58 Am. J. Comp. L. 753 (2010).

9. Murray, Marriage as Punishment, supra note 1, at 51–53.

discipline. Indeed, it was expressly understood as a last-resort alternative to the institution seen as the principal source of discipline and order—*the family*."[10] This is true enough; however, the discipline occurring within the family was not punishment but governance through discipline. While punishment was coming to look more like discipline, the converse was not necessarily the case: The discipline occurring in the family was not coming to look more like punishment. Professor Murray does not say that it was, and in fact, explicitly recognizes the distinction, arguing that she is not "conflat[ing] discipline with punishment; they are obviously distinct."[11] In the sections that follow on the contemporary regulation of marriage, she persuasively illustrates the role of marriage in the internalization of discipline.

Yet, there is a disjuncture here between marriage-as-punishment in the law of seduction and marriage-as-discipline in the contemporary moment. I would argue that one of the most compelling aspects of her Article is precisely the way she illustrates the actual convergence and mutually constituting roles of criminal law and marriage, where marriage was actually a substitution for criminal incarceration. Marriage really was operating as a form of punishment within a shifting understanding of punishment-as-discipline. But, in the shift to the contemporary discourses of marriage, the lens of punishment is less effective.

In contemporary legal regulation, marriage is much more explicitly about discipline—specifically about the technologies of self-regulation—rather than about state punishment. Indeed, Professor Murray largely shifts her own analytic language to that of discipline, and the cases she examines are not illustrations of marriage-as-punishment, but rather, of marriage as a site of discipline. She admits as much, writing that "while marriage is not considered punishment today, it continues to be a *disciplining* institution of critical importance to the state's project of constructing a disciplined citizenry."[12]

This brings me back to my point that the flow between the past and present in the Article is not as seamless as it might have been had Professor Murray focused more on marriage-as-governance and less on marriage-as-punishment as the overarching analytic theme, thereby uniting past and present. It would similarly advance Professor Murray's objective of revealing the darker side of marriage, without gesturing toward a stretching of the meaning of punishment in the contemporary regulatory moment.

B. *Discipline as Punishment?*

Nonetheless, Professor Murray's close reading of seduction sets the stage for rendering visible the many ways in which marriage operates as a form of disciplinary governance. Her analysis implicates the same-sex marriage cases and the paradoxical discourse of responsible procreation.[13] Indeed, this might

10. Id. at 28–29.

11. Id. at 40.

12. Id.

13. Id. at 45.

be a case study in which discipline actually does begin to flow back to a more punitive model. In the writings of some social conservatives—as picked up by some courts[14]—marriage is defended as necessary for responsible procreation because it is the mechanism for making men stay at home and care for children.[15] While it is not as explicit as the seduction laws—where marriage was literally an alternative for incarceration—this is a way in which marriage operates as punishment for sex outside of marriage.

Another area of disciplinary regulation through marriage that comes perhaps a bit closer to the coercive history of marriage-as-punishment is arguably found in contemporary welfare regimes. Welfare law—since the Clinton-era Personal Responsibility and Work Opportunity Act[16]—has placed a renewed emphasis on the redemptive nature of marriage.[17] With the healthy marriage initiatives of the early 2000s, marriage was promoted as a way out of poverty and welfare dependency.[18] While the official emphasis of these

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14. The high water mark of this reasoning is seen in the oft-quoted passage from Judge Cordy's dissenting opinion in *Goodridge v. Dep't of Pub. Health*:

> Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child . . . . The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative . . . would be chaotic.

798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting). Other courts have adopted this responsible procreation argument. See, e.g., Morrison v. Sandler, 821 N.E.2d 15, 24–25 (Ind. Ct. App. 2005) (noting that marriage "encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly"). On the responsible procreation argument, see generally Julie A. Nice, The Descent of Responsible Procreation: A Genealogy of an Ideology, 45 Loy. L.A. L. Rev. 781 (2012).

15. See Anna Gavanas, Fatherhood Politics in the United States: Masculinity, Sexuality, Race, and Marriage 49–56 (2004) (stating "pro-marriage belief" that man needs marriage "to control his masculinity and use it to benefit society"); Anna Gavanas, The Fatherhood Responsibility Movement: The Centrality of Marriage, Work and Male Sexuality in Reconstructions of Masculinity and Fatherhood, *in* Making Men into Fathers: Men, Masculinities and the Social Politics of Fatherhood 213, 237–39 (Barbara Hobson ed., 2002) (discussing way in which United States-based pro-marriage "Fatherhood Responsibility Movement" is "centered around the problem of managing male heterosexuality" (internal quotation marks omitted)). Gavanas quotes from a range of leading social conservatives in "The Fatherhood Responsibility Movement," such as David Popenoe, Wade Horn, and David Blankenhorn on the importance of marriage to civilize and control men's sexuality and bind men to their children. For examples of these arguments, see generally David Blackenhorn, Fatherless America: Confronting Our Most Urgent Social Problem (1995) (discussing various archetypes of fathers and loss of father ideal); David Popenoe, Life Without Father (1996) (describing effects of fatherless household on family and on American society).

16. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (codified in scattered titles of the U.S.C.).

17. Brenda Cossman, Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging 126 (2007).

18. See, e.g., Brenda Cossman, Contesting Conservatisms, Family Feuds and the Privatization of Dependency, 13 Am. U. J. Gender Soc. Pol'y & L. 415, 420–21 (2005) (discussing federal promotion of marriage as solution to welfare dependency and cause of partial privatization of United States family law); Kaaryn Gustafson, Breaking Vows: Marriage

programs is on voluntary participation, the coercive nature of welfare regimes hovers. In some states, marriage promotion programs incentivize marriage by either threatening to withhold welfare benefits from those who are not married and/or providing more benefits for those who do marry.[19] While marriage here is clearly disciplinary in nature, seeking to remake welfare recipients and their inappropriate sexual conduct in the image of marital sexual citizenship, there is perhaps also fodder for a marriage-as-punishment lens. Marriage might here be seen as a substitute for more punitive consequences of welfare regimes. As a result, these coercive marriage promotion programs might even be viewed through the lens of marriage-as-punishment, where marriage becomes in essence a "punishment" for poverty.

A third area where the marriage-as-punishment lens might still cast a shadow over the present is in relation to divorce and collusion. Fault-based divorce regimes always have a retributive justice dimension: The relief of marriage termination is awarded to the innocent party against the guilty party. Accordingly, divorce could be refused if the parties engage in collusion, that is, agree to commit or appear to have committed the act that qualifies for the fault-based divorce.[20] The penalty for collusion is to deny the divorce; the couple is guilty of trying to undermine the administration of justice, and accordingly, their punishment is that they must stay married.[21] Admittedly, these fault-based divorce regimes have their genesis in the nineteenth century,

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Promotion, the New Patriarchy and the Retreat from Egalitarianism, 5 Stan. J. C.R. & C.L. 269, 292–94 (2009) (discussing, in part, federal marriage promotion programs' inability to address fundamental problem of poverty adequately); Phoebe G. Silag, Note, To Have, To Hold, To Receive Public Assistance: TANF Marriage-Promotion Policies, 7 J. Gender Race & Just. 413, 414 (2003) (explaining "what marriage-promotion, as a goal of welfare policy, means for those eligible for public assistance").

19. On the coercive nature of these Healthy Marriage Initiatives under Temporary Assistance for Needy Families (TANF), see Teresa Kominos, Note, What Do Marriage and Welfare Reform Really Have in Common? A Look into TANF Marriage Promotion Programs, 21 St. John's J. Legal Comment. 915, 942 (2007) ("Marriage promotion programs attempt to coerce TANF recipients to make 'better' decisions in their personal relationships by threatening financial consequences . . . ."); Aly Parker, Note, Can't Buy Me Love: Funding Marriage Promotion Versus Listening to Real Needs in Breaking the Cycle of Poverty, 18 S. Cal. Rev. L. & Soc. Just. 493, 507 (2009) ("Offering a family an additional third of the base monthly stipend is a form of government coercion to marry.").

20. By 1936, twenty-eight states recognized collusion statutorily; elsewhere collusion was a common-law defense, see Note, Collusive and Consensual Divorce and the New York Anomaly, 36 Colum. L. Rev. 7, 1121, 1121–33 n.12 (1936). Collusion remains on the books in a number of states, including Georgia (Ga. Code Ann., § 19-5-4(a)(1) (2010)), Hawaii (Haw. Rev. Stat. Ann. § 580-7 (LexisNexis 2010)), Idaho (Idaho Code Ann. § 32-611 (2006)), Mississippi (Miss. Code Ann. § 93-5-1 (2011)), and South Dakota (S.D. Codified Laws § 25-4-19 (2004)). In contrast, the law of collusion has been abolished statutorily in some states, including Florida (Fla. Stat. Ann. § 61.044 (West 2006)), Kentucky (Ky. Rev. Stat. Ann. § 403.150(5) (LexisNexis 2010)), Missouri (Mo. Ann. Stat. § 452.310(6) (West 2003)), Montana (Mont. Code Ann. § 40-4-105(4) (2011)), New Jersey (N.J. Stat. Ann. 2A:34-7 (West 2010)), Pennsylvania (23 Pa. Cons. Stat. Ann. § 3307 (West 2010)), and West Virginia (W. Va. Code Ann., § 48-5-301 (LexisNexis 2009)).

21. See, e.g., Ga. Code Ann., § 19-5-4 ("(a) No divorce shall be granted under the following circumstances: (1) The adultery, desertion, cruel treatment, or intoxication complained of was occasioned by the collusion of the parties, with the intention of causing a divorce.").

and most contemporary legal regimes now include no-fault options as well.[22] However, collusion remains alive and may continue to operate in contemporary contexts like immigration marriages and marriage fraud.[23] Accordingly, punishment may then continue to have some analytic traction in at least some areas of marriage regulation.

II. MARRIAGE AS COMPREHENSIVE SEXUAL REGULATION?

My second critical engagement relates to Professor Murray's claim of "the totality of state regulation of sex and sexuality."[24] While I am fully sympathetic to Murray's project of demonstrating law's role in disciplining and regulating sex in marriage, I worry somewhat about both the claim to totality and Professor Murray's subsequent appeal to the law. In the context of the nineteenth century, she writes that there was "little space for sex outside the rubrics of marriage and crime, and no refuge from state regulation of sex."[25] It is perhaps because of Murray's claim to "totality" and "no refuge" that I cannot help but interject a little bit more Foucault.[26] Eve Sedgwick once explained that most attempts to deploy Foucault's repression hypothesis have gotten it exactly wrong.[27] There is, I think, a tendency to overemphasize the role of law in the repression of sex and sexuality, to see no space outside of law for sex, to underplay the possibility of resistance, and the proliferation of sexual discourses—which was Foucault's point.[28] Professor Murray may be

22. On divorce reform, see Doris J. Freed & Henry H. Foster, Jr., Divorce in the Fifty States: An Outline, 11 Fam. L.Q. 297, 298 (1977) ("The current situation regarding no-fault grounds for divorce is that only Illinois, Pennsylvania and South Dakota have fault grounds only."); Allen M. Parkman, Reforming Divorce Reform, 41 Santa Clara L. Rev. 379, 379 (2001) (noting in regards to dawn of no-fault divorce that "[a]fter World War II, frustrations with . . . fault grounds led to a reform movement that eventually changed the grounds for divorce in all the states"). For a review of the limitations on no-fault divorce in the context of New York's Divorce Reform Act of 2010, see Lauren Guidice, New York and Divorce: Finding Fault in a No Fault System, 19 J.L. & Pol'y 787, 800–11 (2011) (arguing "[t]he inconsistent, unpredictable nature of [New York divorce cases] clearly illustrates the necessity of a unilateral and 'faultless' ground for divorce").

23. See, e.g., The Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, §216(b)(1)(A)(i), 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.) (permitting Attorney General to "terminate the permanent resident status of an alien" when marriage "was entered into for the purpose of procuring an alien's entry as an immigrant"), and subsequent amendment, The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5079 (codified as amended in scattered sections of 8 U.S.C.) (explaining "alien" can avoid deportation for marriage fraud if "the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws").

24. Murray, Marriage as Punishment, supra note 1, at 6.

25. Id. at 6–7.

26. See in particular 1 Michel Foucault, A History of Sexuality: An Introduction (Robert Hurley trans., 1978) and 3 Michel Foucault, The History of Sexuality: The Care of the Self (Robert Hurley trans., 1978) for relevant background on Foucault's reasoning.

27. Eve Kosofsky Sedgwick, Touching Feeling: Affect, Pedagogy, Performativity 9–13 (2003) (arguing that modern academics have largely misapplied Foucault's repression hypothesis).

28. See, e.g., Eve Kosofsky Sedgwick, Melanie Klein and the Difference Affect Makes, *in*

slightly and unnecessarily overstating the case of the totality (which admittedly should not be conflated with the totalizing) of legal regulation and the absence of an "outside." Channeling sex into marriage, through discipline and punishment, is itself part of the proliferation of the sexual discourse of the nineteenth century, as is the disciplinary governance of sexuality in marriage in the early twenty-first century.

Conversely, I also wonder about Professor Murray's argument for the role of law in promoting the interstitial space of sexual liberty in the present. Professor Murray joins in the chorus of those feminist and queer scholars who are critical of marriage and the disciplinary nature of same-sex marriage in particular.[29] Normatively, she is arguing for an expansion of this interstitial space, where sexual liberty can be untethered from marriage.[30] It is a normative vision with which I whole-heartedly agree. Yet, there is an odd moment in this argument, in which Professor Murray appears to argue for more rather than less law, admittedly in a different guise: "What is needed is for law to step into the space between marriage and crime created by *Lawrence* and reclaim it as a refuge from the disciplinary domains of the state."[31] There is an unusual distinction drawn here between the law and the state, as the disciplinary domains of the state undoubtedly include law. Perhaps, here, "the state" really means legislative regulation and the role of law is one of restricting the ability of governments to regulate these intimate spheres. Pushing back on the legitimate area of government regulation—particularly criminal regulation through rights to sexual liberty—is a worthy political and normative project.

However, this space between marriage and crime is hardly unregulated, nor is it a refuge from disciplinary domains. Professor Murray is aware of this dilemma, recognizing that there is "no outside of law" and no space in which there is "[a] complete absence of law."[32] Rather, she argues for the prospect of "*less thick* legal regulation,"[33] not the avoidance of regulation when regulation exists. Murray even makes a stronger claim: Law in this attenuated form might be able to mute emerging norms of cultural self-discipline.[34] It is an intriguing claim. But, I remain a bit more Foucauldian in my suspicion of law's ability to deliver spaces of sexual freedom; I am inclined instead to think of such spaces as accidental spin-offs of the very discourses seeking to discipline sexuality.

After Sex? On Writing Since Queer Theory 283 (Janet Halley & Andrew Parker eds., 2011). Halley and Parker succinctly describe Sedgwick's critique: "Sedgwick argues that Foucault himself failed to elaborate any of his utopian hunches, and that queer theory—which she sees as almost completely dedicated to reproducing this failure—entrenches and solidifies (better said, perhaps, *symptomatizes*) the repressive hypothesis in every purported denunciation of it." After Sex? On Writing Since Queer Theory 10 (Janet Halley & Andrew Parker eds., 2011).

29. See for example Katherine M. Franke, The Politics of Same-Sex Marriage Politics, 15 Colum. J. Gender & L. 236, 240 (2006) (arguing recognition of same-sex partnerships has precipitated "a radical substitution or transformation of the nature of homosexual desire").

30. Murray, Marriage as Punishment, supra note 1, at 63.

31. Id. at 62.

32. Id. at 62–63 (internal quotation marks omitted).

33. Id. at 63.

34. Id.

III. CONCLUSION

My criticisms aside, *Marriage as Punishment* is a powerful piece, marking ways in which marriage has and continues to operate as a form of disciplinary governance. Professor Murray's work sits at the cutting edge of a new generation of "family law" scholarship.[35] Like the critical scholarship of an earlier generation, Murray sees law as constitutive of the subjects it seeks to regulate; but moving beyond those earlier critical moves, Murray also sees these subjects as self-regulating through the discourses of law. The piece refuses the traditional disciplinary categories of legal scholarship. It reads closely and carefully against the grain to produce a richly textured analysis of the multiple layers of law's regulation. Marriage law, it turns out, is both more and less criminal, both more and less coercive, than it might appear at first or even second glance.

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35. See, e.g., Kerry Abrams, Immigration Law and the Regulation of Marriage, 91 Minn. L. Rev. 1625, 1632 (2007) (discussing impact of immigration law on marriage); Kerry Abrams, Marriage Fraud, 100 Calif. L. Rev. 1, 4 (2012) (focusing on marriage fraud and what marriage does not constitute); Elizabeth F. Emens, Intimate Discrimination: The State's Role in the Accidents of Sex and Love, 122 Harv. L. Rev. 1307, 1307 (2009) (examining discrimination in intimate domain); Elizabeth F. Emens, Regulatory Fictions: On Marriage and Countermarriage, 99 Calif. L. Rev. 235, 235 (2011) (discussing alternatives to traditional marriage regimes, including "countermarriages"); Laura A. Rosenbury, Friends with Benefits?, 106 Mich. L. Rev. 189, 189 (2007) (reviewing family law's emphasis on marriage-like relationships and its effect on gender equality); Laura A. Rosenbury & Jennifer E. Rothman, Sex in and out of Intimacy, 59 Emory L.J. 809, 811 (2010) (challenging assumptions of state-protected sexual conduct and proposing theory for extending legal protection to wider range of consensual sexual activities).