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THE CONVERSATIONS ABOUT THE INTERSECTING INSTITUTIONS OF MARRIAGE

Gilbert A. Holmes†

At the 1998 Association of American Law Schools ("AALS") Annual Meeting, the sections on Family and Juvenile Law, Gay and Lesbian Issues, Minority Groups, and Women in Legal Education jointly sponsored a program entitled, *The Intersecting Institutions of Marriage: Conflicts and Consequences.* The goal of the program was to identify and explore the various ways in which the intersections of marriage as a legal, religious, social, and economic institution created and possibly determined important legal and social issues. The program included legal scholars who provided interesting, thoughtful and provocative reflections on the institution of marriage and on the reverberations flowing from the intersecting issues.

By way of introduction to the symposium papers and comments, presented in this edition of the Texas Wesleyan Law Review, this essay will highlight the issues raised by the panelists. This essay is not a substitute for the eloquent and stimulating comments of the panelists, nor is it an in-depth discussion of the legal issues raised during the program. Rather, it is a summary of the presentations and discussions, and an attempt to highlight the cogent points offered by the panelists and the audience at this provocative and enlightening AALS program. In addition to this essay, we are fortunate to have an essay from Professor Steven Hobbs that was a significant contribution to the program. I wish to thank the 1997 officers of the co-sponsoring sections for their support of the program: Naomi Cahn (Chair) and June Carbone (Secretary/Treasurer), Family and Juvenile Law; Frank X. Valdes (Chair), Gay and Lesbian Issues; Dorothy A. Brown (Chair), Minority Groups; and Judith Maute (Chair), Women in Legal Education. I also want to thank the program committee, consisting of Barbara Babb, Tonya Brito, and Jane Murphy, for their assistance in all aspects of planning and staging the program.

In the past five years, there has been a renewed interest in, and examination of, the institution of marriage.[1] In the human experience, marriage occupies an important role. It has often been de-

† Professor of Law, Texas Wesleyan University Law School; B.A., Bucknell University; J.D., New York University. I wish to thank all of the participants in the 1998 AALS Program, jointly sponsored by the Sections on Family and Juvenile Law, Gay and Lesbian Issues, Minority Groups and Women in Legal Education. I also want to thank Karen Johnson, Thelma Manning and Teresa Smith for their research assistance.

1. The 1997 AALS program was one of several legal conferences and symposiums focused on, or significantly related to, the institution of marriage.

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scribed as the foundational unit of society[2] and the basis of the preferred family unit.[3] However, prior to 1993 there had been little scholarly examination of marriage by legal scholars even though other disciplines had continually reviewed the importance of, and changes in, marriage. Despite the significant legal dimensions of marriage, the subject has remained largely unexamined by legal academicians.[4] The 1993 Hawaii Supreme Court decision in *Baehr v. Lewin*[5] created a modern day interest in marriage as a legal institution. The decision was an outgrowth of United States Supreme Court jurisprudence on the constitutional aspect of marriage.[6] Judicial interest and concern about the institution of marriage has resulted in legislative action to curtail perceived threats to the institution,[7] new debates about the im-

2. *See* Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce and Family Life*, 1994 UTAH L. REV. 587, 592 (discussing the evolution of marriage and the variations of familial structures over 500 years).

3. In Stevens v. United States, 146 F.2d 120 (10th Cir. 1944), the Court of Appeals for the Tenth Circuit expressed the importance of marriage to society. Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between the parties subject to their will and pleasure in respect of effects, continuance or dissolution. It is a domestic relation having to do with the morals and civilization of a people. It is an essential organization in every well-organized society. *See id.* at 123.

4. A review of the casebooks used by law professors reveals that the marriage sections are the smallest, and, for example, that the cases involving issues of who may marry, generally occurred before 1985.

5. 852 P.2d 44 (Haw. 1993) as clarified on reconsideration (May 27, 1993).

6. This jurisprudence began with the recognition of a liberty interest in familial relationships in Meyers v. Nebraska, 262 U.S. 390 (1923), and developed through a series of cases that struck down restrictions on who can marry. *See, e.g.*, Turner v. Safely, 482 U.S. 78 (1987) (declaring unconstitutional a regulation prohibiting prisoners from marrying without the approval of the warden); Zablocki v. Redhail, 434 U.S. 374 (1972) (declaring unconstitutional a statute requiring a person to have no arrears in child support before receiving a marriage license); Loving v. Virginia, 388 U.S. 1 (1967) (declaring unconstitutional racial restrictions on who can marry).

7. *See, e.g.*, Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996) codified as 28 U.S.C. § 1738C (1997), as amended 1 U.S.C. § 7 (1997) (prohibiting any jurisdiction from being required to recognize a same-sex marriage recognized in another jurisdiction, and limiting marriage for the purpose of receiving federal benefits to opposite-sex couples); Louisiana Covenant Marriage Act, LA. REV. STAT. ANN. § 9:272, 307 (West 1997) (establishing a category of marriage in which the parties must receive pre-marital counseling, must engage in marriage counseling prior to divorce, and cannot use the no-fault divorce regime to dissolve their marriage).

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portance of marriage as a social institution,[8] and greater recognition of the economic aspects of marriage.[9]

For centuries, marriage has been regarded as an important religious institution.[10] In Western society, marriage was primarily a religious institution with significant social and legal aspects.[11] In their discussion of the intersection of marriage as a legal and religious institution, Professors William Eskridge[12] and Lynn Wardle[13] conceded the religious aspect of marriage. However, they disagreed regarding the impact of religion on the legal institution of marriage.

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8. *See, e.g.*, WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT, 51-85 (1996); Paula Ettlebrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107 (1996) (arguing that gays and lesbians should not seek the right to marry because marriage is a marginalizing institution); Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriages Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1996); Tom Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997) (arguing that marriage would be good for gays and lesbians and that same-sex marriages would be good for the institution of marriage). This debate about the viability of marriage as a social institution is not new. Rather, it is the continuation of the feminist critique of marriage dating back to the early Twentieth Century. *See, e.g.*, Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor*, 103 YALE L.J. 1073 (1994). *See also* the discussion of the presentation of Professor Ann Shalleck *infra* notes 24 to 29.

9. *See, e.g.*, Wendt v. Wendt, No. FA 9601495625, 1997 WL 752374 (Conn. Super. Ct. Dec. 3, 1997). The defendant-husband sought to seal the file and close the hearing in the divorce proceeding because of his position as president and chief executive officer of General Electric Capital Services, Inc. The defendant argued that his testimony might affect the market value of General Electric shares. In an unprecedented ruling, the court held that because the information concerning the defendant as an insider might affect another's decision to trade or invest in the market, the motion to seal the file and close the hearing was granted.

10. *See, e.g.*, Genesis 28:1; Leviticus 7:13-14 (prescribing under Jewish Law who a man can marry); Hebrews 13:4 (declaring marriage in the Christian doctrine as being held in a place of honor by all); Qur'an 2:22 (prescribing for Muslims who may marry); Qur'an 4:23 (declaring who may not marry); Qur'an 24:33 (directing chastity until marriage).

11. Marriage has always had significant legal, social and economic aspects. For example, children of a marriage have been considered "legitimate" and children outside the marriage have not. Thus, the marriage of the parents determined the children's legal (heirs), social (acceptable and recognized) and economic (inheritance) status. The protection and promotion of the traditional family has guided the Supreme Court in reviewing laws dealing with illegitimacy. *See, e.g.*, Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 167-68 n.3 (1972) (acknowledging the inferior status of illegitimate children in recovering their parents' worker's compensation benefits because of the importance of the state's interest in promoting the traditional family). *See also* Labine v. Vincent, 401 U.S. 532, 533, 539-40 (1971) (upholding a Louisiana intestate succession scheme which prevented illegitimate children from sharing equally with legitimate children in their parents' estate).

12. Professor William Eskridge, Jr. teaches at the Georgetown University School of Law. He has written numerous articles on gay and lesbian issues, including same-sex marriages.

13. Professor Lynn Wardle teaches at the Brigham Young University Law School. He has written several articles on family law issues.

Professor Eskridge argued that several constitutional doctrines are violated when the religious aspect of marriage dictates the legal policy of who has access to the marital institution. He suggested that First Amendment restrictions against the establishment of religion[14] prohibit the use of religious beliefs as a justification for prohibiting same-sex marriages.[15] Professor Eskridge further suggested that the fundamental liberty interest in marrying, as identified by the Supreme Court[16] and protected under the Fifth and Fourteenth Amendments,[17] requires that any religious aspect of marriage yield to the legal aspect of marriage.

Professor Wardle, on the other hand, suggested that religious views and values provided important perceptions to the functioning of society and thus were a significant, though not exclusive, part of the analysis of marriage. Professor Wardle argued that religion helps answer age-long questions of the human experience and provides the foundation for a virtuous society. He suggested that our constitutional form of government has as its starting point the existence of a virtuous society. Building on the significant role that religion and religious views play in society, Professor Wardle then argued that heterosexual marriage has a preferred place because of the unique contributions it makes to a society built on the concept of marriage and family. As examples of the areas in which heterosexual marriage makes these unique contributions, he listed public welfare concerning safe sex, procreation, child rearing, stability, strength and security of family unions, and the integrity of the basic unit of society.[18]

Interestingly, Professor Eskridge and Professor Wardle agreed on the importance of marriage as a social institution, and neither was interested in creating a substitute for marriage. They both acknowledged that the law should allow other mechanisms for establishing familial relationships, for example, domestic partnership relationships.[19] Their disagreement, however, was regarding who should take

14. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion . . . ." *Id.*

15. *See generally* VERN L. BULLOUGH, HOMOSEXUALITY: A HISTORY 17 (1979) ("Historically the most important force in setting Western attitudes toward homosexuality has been religion, and in both Judaism and Christianity homosexuality has been regarded as a sin.").

16. *See* Maynard v. Hill, 125 U.S. 190, 205-11 (1888) (explaining that marriage was "the most important relation in life," and that it was "the foundation of family and society, without which there would be neither civilization nor progress.").

17. U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property without due process of law . . . ." *Id.* U.S. CONST. amend. XIV. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* For further discussion, see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1424-25 (1993).

18. For further discussion see Lynn D. Wardle, *A Critical Analysis Of Constitutional Claims For Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 38-40.

19. Domestic partnerships are relationships that the state recognizes and accords certain rights, duties and responsibilities. Until recently, legislation permitting parties

advantage of such mechanisms. Professor Wardle argued that traditional marriage should be limited to heterosexual couples. The domestic partnership option, he argued, should be limited to heterosexual couples who do not choose marriage, heterosexual couples who cannot marry but want to enter legally binding relationships, and same-sex couples. On the other hand, Professor Eskridge suggested making marriage available to both heterosexual and same-sex couples, and offering the domestic partnership alternative to any heterosexual or same-sex couple who did not want to marry or who could not marry because of incest laws.[20]

Similar to the religious aspect of marriage, the social institution of marriage has a history as long as the human experience.[21] Indeed, the importance of marriage as a social institution predates its importance as a legal institution.[22] Marriage has been long regarded as the foundational social unit and continues to be a means of moving up and down the "social ladder."[23]

In discussing the intersection of marriage as a legal and social institution, Professors Ann Shalleck[24] and Joseph Thomson[25] both ques-

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to enter into enforceable domestic partnership agreements, recognizing domestic partnerships, and imposing requirements such as registration and eligibility, was limited to municipalities. As a result of the initial decision in Baehr v. Lewin, 852 P.2d 44 n.2 (Haw. 1993), the state of Hawaii has enacted the first statewide domestic partnership legislation. *See* HAW. REV. STAT. ANN. § 572C (Michie 1997). Hawaii's new law creates the status of reciprocal beneficiaries, similar to domestic partners, and extends benefits afforded married couples to those who cannot legally marry, such as a widow and her son, and lesbian and gay couples. *See generally* Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1187 (1992) (discussing how domestic partnership laws can compensate for defects in domestic relations laws that fail to recognize nontraditional relationships).

20. *See, e.g.*, N.Y. PENAL LAW § 255.25 (McKinney 1989) (making marriage between particular relatives a felony); TEX. PENAL CODE ANN. § 25.02 (Vernon 1994) (making sexual intercourse between certain relatives a felony); CAL. PENAL CODE § 285 (West 1988) (making marriage between individuals within degrees of consanguinity incestuous and punishable by imprisonment).

21. *See* Thornton, *supra* note 2, at 558 (a review of information from societies around the world found that marriage, family ties, and kinship relationships were central social structures in all of the populations encountered).

22. *See id.*

23. The courts have recognized marriage as an important social institution in several cases. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (describing the right to marry as "older than the Bill of Rights"); Skinner v. Oklahoma, 316 U.S. 535, 536-37, 541 (1942) (holding unconstitutional a state statute that provided for mandatory sterilization of certain felons on grounds that marriage and procreation are necessary for human survival); Maynard v. Hill, 125 U.S. 190, 205 (1888) (positing that marriage is "the most important relation in life.").

24. Professor Ann Shalleck teaches at the American University Washington College of Law. She has written in the area of clinical education.

25. Professor Thomson is the Dean of the Law Faculty at the University of Glasgow, Glasgow, Scotland.

tioned the priority the legal system places on marriage.[26] Professor Shalleck expressed concern about how modern critiques of marriage primarily focus on how marriage has failed as demonstrated by a preoccupation with those who do not fit into marriage, those who have children outside of marriage, and those who get out of marriage. Professor Shalleck reminded participants of the wealth of critical analysis emanating from the feminist critique of marriage as a social institution. She traced two phases of that critique, the first of which began with writers at the turn of the Twentieth Century. Those writers questioned inequalities in marriage relationships, the limitation that marriage placed on women's participation in the economic, political and social arenas, and the consequences flowing from having marriage serve as the central ordering concept for society and intimate relationships. The second phase, led primarily by the writings of Simone de Beauvoir,[27] occurred in the late 1960s and early 1970s. De Beauvoir's writing criticized the inequalities created by living gendered lives within marriages, and suggested a radical reconstruction of intimate relationships was necessary since marriage was critical to the social structure of women's experiences. According to Ms. De Beauvoir, the combination of the inequities within marriage and the importance of marriage to women made liberalizing marriage impossible.[28] Professor Shalleck questioned what has happened to that critique.[29] In a time when marriages and divorces are increasing, Professor Shalleck suggested that legal scholars revisit the feminist critique of marriage and examine how, if at all, we can alter the current social patterns of marriage.

Professor Thomson posited an even more challenging question. Do we need marriage at all? He traced the historical justification for marriage to three concerns: the making of political alliances, the transfer of wealth, and the need to have legal sexual relations. Professor Thomson suggested that changes in social mores and political life have all but eliminated the need for the legal state of marriage. Additionally, he noted that under Scottish law married persons are treated as if

26. Professor Shalleck suggested that her role on the panel was to demonstrate that Professor Wardle and Professor Eskridge were actually more in agreement than disagreement.

27. SIMONE DE BEAUVOIR, THE SECOND SEX 72 (H.M. Parshley trans. & ed. 1989) (1949).

28. *Id.* at 425-483.

29. According to Professor Shalleck most of that critique existed in scholarship regarding gay and lesbian issues. *See, e.g.,* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 585 (1997) (discussing the debate about marriage in the gay and lesbian community). She also acknowledged that a few other scholars have built on that critique. *See generally* MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

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they are unmarried.[30] Therefore, according to Professor Thomson, marriage was only important for what a person obtained by being married, which was limited to what a person could obtain at the end of the marriage. These end-of-marriage benefits were primarily default property distribution rules at the termination of the marriage by divorce[31] or death of a spouse.[32] Professor Thomson argued that since property distribution issues are the legal consequences of marriage, the legal system need only devise a default position for the rights and obligations of the "marital" relationship, and ascribe those same default requirements to individuals who have entered into a physical, emotional or financial interdependent relationship.[33] By developing such a system, Professor Thomson asserted that we can eliminate the social trappings, socially defined roles, and social contradictions of the legal institution of marriage. Professor Thomson's approach clearly was bold and may have been somewhat disturbing to some. However, the analytical basis for his position deserves consideration.

The economic aspects of marriage have long drawn the attention of attorneys, judges and legal academicians. The transition of legal doctrine, from husbands having all the property rights in marriage,[34] to marriage as an economic partnership,[35] has resulted primarily from

30. For a discussion of the law treating married persons as individuals rather than as part of a merged entity, see Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443, 1458-59 (1992).

31. *See, e.g.*, N.Y. Dom. Rel. Law § 236 (McKinney 1986) (establishing the distribution of marital property on divorce); Tex. Fam. Code Ann. § 3.001-3.002 (Vernon 1997) (setting forth the rules related to community property, including definition, management and distribution).

32. *See, e.g.*, Cal. Fam. Code § 802 (West 1994) (establishing a presumption that property acquired during a marriage is not community property if legal or equitable title is held by a person at the time of the person's death and the marriage during which the property was acquired dissolved more than four years before the person's death).

33. *See* Braschi v. Stahl Ass'n, 453 N.E.2d 49 (N.Y. 1989) (using the concept of physical, emotional, and financial interdependence to define a "family" under the New York City Rent Control Law).

34. *See* C.M.A. McCauliff, *The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations, and the Interests of Women*, 66 Tul. L. Rev. 919, 923 (1992) (explaining that land was given to a husband from the wife's family, usually from her father or someone acting on his behalf, as a gift on the occasion of marriage and the property rights were transferred to the husband).

35. *See* Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 Tex. L. Rev. 689, 697 (1990) ("Recognizing the economic risk that divorce poses to women and to mothers, states adopted the partnership model specifically to increase the distribution of property to women upon divorce and thus to offset the economic losses caused by divorce."). In Wendt v. Wendt, No. FA 9601495625, 1997 WL 758374, *1 (Conn. Super. Ct. Dec. 3, 1997), the plaintiff argued that her thirty-one year commitment to the marriage entitled her to an equal rather than an equitable division of the marital estate because marriage is a partnership. The partnership model has its origins in the community property concept. *See* Boggs v. Boggs, 520 U.S. 833, 117 S.Ct. 1754 (1997) (declaring ERISA preempts even the long-standing partnership aspect of community property regimes); De La Rama v. De La

debates and reforms in divorce related issues.[36] Moreover, courts have regularly invoked the doctrine of family privacy to avoid addressing the question of marriage as an economic institution.[37] In their presentations, Professor Steven Hobbs[38] and Professor Carol Sanger[39] examined the confluence of marital and economic issues. Professor Hobbs, whose essay appears in this volume,[40] suggested employing a systems analysis of family to reveal the overlaying relationships that bring marriage and economic issues to the surface. He used a hypothetical involving a married woman whose husband and business partner was having an affair with his administrative assistant to demonstrate how a lawyer advising the wife should examine the relationship and economic issues beyond mere support and distribution concerns. He offered this as an example of how using a systems approach would facilitate providing appropriate legal and financial counseling to a client, because it represents a new critique of marriage as a legal and economic institution. Thus, in a marriage where there is a family business, the economic issues can affect several categories of individuals, e.g., employees, creditors of the business, children's interests in the future of the business, and the husband and wife as business partners.[41]

Responding to that theme, Professor Sanger challenged the uncritical acceptance of the business partnership as the economic model for a marriage. She suggested an analogy could be drawn between marriage and business entities, and supported her thesis with three foundational points. First, society, historically and currently, views marriage in business terms. Professor Sanger maintained that while not necessarily viewing marriage as a business, society has certainly viewed marriage as a business proposition, i.e., a "deal."[42] Second,

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Rama, 291 U.S. 303 (1905) (referring to marriage under the Spanish community property regime as the "conjugal partnership.").

36. *See* Smith, *supra* note 35 at 694-98 (describing the development of the concept of marriage as an economic partnership as the product of divorce reform, including the proliferation of "no-fault" divorce statutes).

37. *See* McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) ("[T]he living standards of a family are a matter of concern to the household, and not for the courts to determine.").

38. Professor Steven Hobbs is the Thomas Belvin Professor of Law at the Alabama University Law School. He has written in the area of family law, corporations and professional responsibility.

39. Professor Carol Sanger teaches at the Columbia University Law School. Her scholarship includes articles in the area of feminism and family law.

40. *See* Steven H. Hobbs, *Family Businesses and the Business of Families: A Consideration of the Role of the Lawyer*, 4 TEX. WESLEYAN L. REV. 153 (1998).

41. *See id.* at 167-69. *See also* Smith, *supra* note 35, at 696 (realizing that there are more marriages today with both spouses working and money being pooled, which creates an expectation and reality of shared assets).

42. Professor Sanger used two examples to illustrate this point. First, she described the large money judgments in breach of promise to marry cases as an example of the historical view of the "deal" aspect of marriage. Second, she referenced the economic status of spinsters in the late 19th and early 20th centuries, because those

the state treats marriages similar to the way it treats businesses. The state requires a license for each;[43] it sets default rules for operation and termination;[44] it permits parties to fashion their own rules for the operation and termination of the relationship;[45] it encourages both through beneficial rules;[46] and it looks to both to perform important social functions.[47] Third, a marriage and a business have a similar primary function to make a profit.[48] Therefore, since marriage has traditionally been, at the minimum, a business prospect and is currently viewed as a business arrangement, Professor Sanger suggested that we should examine what business form might be best suited for analyzing the relationship of spouses, and perhaps their children.[49]

In Professor Sanger's view, the perception of marriage as a partnership might not be the only way to examine marriage as an economic

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individuals either had independent economic means or were supported by their fathers or families. Thus, they did not need the economic improvement that the marriage deal represented. For further discussion, *see* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN THE NINETEENTH CENTURY (1985).

43. *See, e.g.,* N.Y. BUS. LAW § 40 (McKinney 1996) (requiring the licensing of collateral loan brokers); N.Y. BUS. LAW § 173 (McKinney 1996) (requiring the licensing of employment agencies); N.Y. INS. LAW § 1102 (McKinney 1996) (requiring the licensing of insurance businesses); N.Y. DOM. REL. LAW § 13 (McKinney 1996) (requiring a license for all persons seeking to be married); TEX. BUS. CORP. ACT ANN. art. 2.01 (Vernon 1997) (requiring the licensing of all corporations for profit); TEX. FAM. CODE ANN. § 2.001 (Vernon 1997) (requiring a license for a ceremonial marriage).

44. *See, e.g.,* TEX. REV. CIV. STAT. ANN. art. 6132b, § 32 (Vernon 1997) (Texas Uniform Partnership Act provision regarding termination and winding up of a partnership); TEX. FAM. CODE ANN. § 3.9601 (Vernon 1995) (setting forth rules on determining and fixing the amount of maintenance on a divorce).

45. *See* Uniform Premarital Agreement Act 1983 § 3 (delineating the possible content of premarital agreements including the parties' rights and obligations regarding property).

46. *See* Lynne Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships Be Granted the Same Status As Marriage?*, 22 J. CONTEMP. L. 51, 69-72 (1996) (discussing the legal benefits that encourage marriage); Reginald L. Thomas and Paul F. Roye, *Regulation Of Business Development Companies Under The Investment Company Act*, 55 S. CAL. L. REV. 895, 912-14 (1982) (discussing how the Investment Company Act encourages business development).

47. Both serve to support members of the society. Businesses do this through employment and providing benefits. Marriages do this through financial and emotional support of family members. *See* Peter Dobkin Hall, *Business Giving and Social Investment In the United States, 1790-1995*, 41 N.Y.L. SCH. L. REV. 789, 813-15 (1997) (describing the similar benefits to society provided by businesses and families during the depression).

48. The definition of a partnership is "the association of two or more persons to carry on as co-owners a business for profit." Uniform Partnership Act § 202, 6 U.L.A. 1 (1994). One definition of a corporation is "any company . . . organized to carry on business for its own profit or that of its members and has shares of capital stock." 15 U.S.C.A. § 44 (1997). One way of looking at a successful marriage is to see if the parties are better off financially after the venture than they were before it.

49. In response to a question, Professor William Eskridge suggested, as part of an analysis or consequence of marriage as an economic institution, that we view children as wholly owned subsidiaries who are spun off at age 18.

entity. She suggested that the wife in the *Wendt* case argued for a partnership model with her and her husband as equal partners,[50] while the husband seemed to argue for a corporation model, with the wife as a minority shareholder or even an employee.[51] Professor Sanger suggested that it might be better to view marriage as a closely held corporation where termination requires a valuation and buy-out process. Furthermore, Professor Sanger employed the common business concept of making an investment in the enterprise to raise serious questions and issues.[52] What return on investment should parties expect from the marriage-business entity, and how should we factor that into the dissolution process? Professor Sanger noted that the concepts of community property and equitable distribution have their foundation in an economic model of marriage. The economic model begins the process of viewing parties as having an investment in a marriage.[53] But Professor Sanger suggested that viewing marriages as business entities other than partnerships can appropriately extend that analysis.[54]

Clearly this program opened some new and renewed discussion of some well-established analysis of the institution of marriage. Hopefully, this essay has provided a flavor of the stimulating and thoughtful discussions that occurred at the AALS program. The program and the essay presented within this volume represent a revived concern and focus to the old and venerable institution of marriage. These new ways of looking at marriage, some of which are extensions of prior critical analysis, can and will generate significant legal and policy discussions, which may serve to strengthen and invigorate the institution itself.

50. *See* Wendt v. Wendt, No. FA 9601495625, 1997 WL 752374 *2 (Conn. Super. Ct. Dec. 3, 1997) ("The plaintiff [claims] 'Marriage is a partnership, and I should be entitled to 50%. I gave thirty-one years of my life. I loved the defendant. I worked hard and I was loyal.'").

51. *See* Lynn Touhy, *Not Just Millions, She Wants Half*, THE HARTFORD COURIER, Oct. 21, 1997 (quoting Gary Wendt as saying, "I worked hard. She didn't.").

52. The concept of making an investment is not new, and it is not necessarily treated as a legal concept. One of the songs from the movie *Waiting to Exhale* expressed it quite pointedly:

> I was a lover and your secretary working every day of the week; Was at the job when no one else was there helping you get on your feet. Eleven years of sacrifice and you can leave at the drop of a dime; Swallowed my fears, stood by your side, I shoulda left your ass a thousand times!

Mary J. Blige, *Not Gon' Cry* (Twentieth Century Fox Film Corp., 1995).

53. *See* Smith, *supra* note 35, at 696 (identifying community property states as the source of the partnership model for marriage).

54. In community property states, this analysis might not significantly change the law on the identification and distribution of marital assets. However, it could significantly change the approach in equitable distribution states, which are the vast majority of the jurisdictions.