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New Directions for Family Law in the United States

From Contract Cohabitation to Registered Partnerships and Beyond

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*Abstract***

This article provides a survey of one major development in family law in the United States that has occurred during the most recent past. This development is the change that has occurred in marriage-like relationships. The article begins with a discussion of contract cohabitation and the extent to which it reflected a change from traditional views of formal or informal marriage as the only legally acceptable model for adults who desired to live together. It shows how contract cohabitation laid the groundwork for the establishment of domestic partnership laws. These laws were first adopted by municipalities and then by states to cover same-sex relationships and then served as a predicate for civil union legislation. That legislation in turn provided a legal model for recognizing same-sex relationships short of marriage. The article provides an analysis and critique of provisions (which are reproduced) dealing with domestic partnerships of the Principles of the Law of Family Dissolution proposed by the American Law Institute in 2000.

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1. Introduction

In my thinking about family law, I have organized the issues in the field by considering three processes: the process of establishing, of maintaining and of terminating or reorganizing domestic relationships¹. For example, laws dealing with forming marriage and marriage-like relationships would fall under the heading of establishing relationships, laws dealing with on-going relationships fall under the heading of maintaining those relationships and terminating a marriage or marriage-like relationship would fall under the last category. In this presentation I shall be discussing those developments in establishing adult marriage-like relationships that began in the 1970s and were carried forward to the beginning of the new century. For the most part, the changes that took place were begun by state courts and the creativity of lawyers and were followed by the actions of state legislatures. These developments changed the direction of family law in the United States.

In conducting research in FAMILY LAW IN AMERICA, I was struck by the fact that it was not until about two or three decades following World War II that laws regulating family life took a different direction. I am not quite sure why, but I am inclined to think that both state courts and state legislatures began to take a more realistic view of societal changes having been convinced by legal arguments and social science data that change was necessary and they reflected those changes in ground-breaking decisions and new legislation.

2. Contract cohabitation

In 1976, the California Supreme Court decided the case of *Marvin v. Marvin*², which I consider one of the most important family law decisions handed down by a state supreme court in the decade of the 1970s. Basically, that case recognized a social reality. The facts in *Marvin* involve Lee Marvin, the Hollywood actor and his companion, Michelle, who lived together as a couple, having begun that relationship while Lee was married to another woman. Early in the relationship, Lee divorced his wife and continued living with Michelle who changed her name legally to Michelle Marvin. Lee and Michelle lived together for six years, never having gone through a formal marriage ceremony. Had California recognized common law marriage, an informal marriage requiring the living together of a couple and their holding themselves out to the community that they were married, it is possible that Lee and Michelle could have held the status of husband and wife under a common law marriage. However, California had abolished that status in 1895, a fact the California Supreme Court makes in a footnote and states that it does not wish to resurrect common law marriage by its decision.

¹ I have explained these processes in my book, FAMILY LAW IN AMERICA 9 (2003).

² 557 P.2d 106 (Cal. 1976).

Under traditional family law, which did not recognize any form of friendship as having legal consequences, there would be no legal remedy available to a person in Michelle Marvin's position. It was probably a long shot for her lawyer to seek redress in the California courts. Yet that is what he did. Michelle Marvin's lawyer sued to determine Michelle's contractual and property rights by way of declaratory relief. In her complaint, Michelle alleged that she and Lee had had an oral agreement in which they promised to hold themselves out as married and to share in his economic wealth. Specifically, Michelle sought to have the court impose a constructive trust on half of the couple's property that was acquired during their years of cohabitation. The trial court denied Michelle's request, and she appealed the decision to the Supreme Court of California. That court reversed the trial court's decision, and held that Michelle did have a cause of action for breach of an express contract of cohabitation. It remanded the case to the trial court in order for her to present facts sufficient to prove a cause of action in contract. Footnotes 25 and 26 in the case are extremely important. Footnote 25 reads: "Our opinion does not preclude the evolution of additional remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise"³. Footnote 26 reads: "We do not pass upon the question whether, in the absence of an express or implied contractual obligation, a party to a nonmarital relationship is entitled to support payments from the other party after the relationship terminates"⁴.

Footnote 25 gave Michelle the opportunity to seek equitable remedies in addition to contractual ones, when she sought relief in the Superior Court of California to which the case had been remanded. That court, not having been convinced of the existence of any kind of agreement between the couple, gave Michelle the amount of money she would need to educate herself so that she could be employable⁵. Lee Marvin appealed that decision to the California Court of Appeals, which reversed the Superior Court's decision, basing its holding on the court's belief that the monetary award was not based on any recognizable doctrine other than finding an equitable resolution of the conflict⁶. Thus, after years of litigation, Michelle Marvin received no compensation.

Even though the plaintiff lost, the doctrine that was established has had an enormous impact on the law. The decision by the Supreme Court of California is important for recognizing that there can be legal consequences to two adults living together in a non-marital relationship. In particular, the court specifically allows non-marital couples who live together the power to arrange their lives using contract principles. In addition, the court also permits the judicial application of equitable remedies if facts permit it.

³ *Id.* at 123.

⁴ *Id.*

⁵ Today, such an award in a divorce case would be considered "rehabilitative alimony."

⁶ 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

In *Marvin* the Supreme Court of California recognized the rights of non-marital couples to sue each other for compensation if the facts support either contract or some equitable doctrine. But, a major question is the extent to which giving non-marital couples such rights makes contract cohabitation the functional equivalent of marriage? It must be remembered that the status of marriage in the United States provides the married couple with many rights by operation of law. By that I mean that the state imposes upon married couples certain responsibilities, like financial support, as well as providing them with certain rights and protections, like state inheritance laws and benefits under federal laws, like social security and pensions. For example, some state inheritance laws provide that a widow or widower receives the total estate if the decedent dies intestate (without leaving a will) and without leaving any children. Some states provide that a widow or widower receives half of the decedent's estate if the decedent dies intestate and with surviving children. Further, state wrongful death statutes (providing a civil cause of action to a surviving spouse against a person who caused the death of the spouse) are ordinarily restricted to married persons. Also, wives and husbands are considered next of kin, when that status is important and carries authority, like signing medical and hospital documents.

Footnote 26 stated that the court was not deciding whether upon termination of any cohabitation agreement, which made no provision for support, there would be a state imposed obligation. In other words, the court was in effect saying that it was not deciding whether the model for divorce would apply to contract cohabitation. At least three states have applied marital property concepts to the distribution of property upon the termination of a cohabitation agreement⁷. Although Massachusetts was willing to enforce an express contract cohabitation, it was unwilling to apply principles of Massachusetts divorce law on the assignment of property to cohabitants. In *Wilcox v. Trautz*⁸, Justice Greany wrote:

Social mores regarding cohabitation between unmarried parties have changed dramatically in recent years and living arrangements that were once criticized are now relatively common and accepted. With the prevalence of nonmarital relationships today, a considerable number of persons live together without benefit of the rules of law that govern property, financial, and other matters in a marital relationship (...). Thus, we do well to recognize the benefits to be gained by encouraging unmarried cohabitants to enter into written agreements respecting these matters, as the consequences for each partner may be considerable on termination of the relationship or, in particular in the event of the death of one of the partners (...). *This may be especially important in a jurisdiction like Massachusetts where we do not recognize common law marriage, do not extend to unmarried couples the rights possessed by married couples who divorce, and reject equitable remedies that might have the effect of dividing property between unmarried parties*⁹ (emphasis added).

⁷ See *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995); *Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984); *Shuraleff v. Donnelly*, 817 P.2d 764 (Or. Ct. App. 1991); *Wilbur v. DeLapp*, 850 P.2d 1151 (Or. Ct. App. 1993); *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986).

⁸ 693 N.E.2d 141 (Mass. 1998).

⁹ *Id.* at 144-45.

There is no question that marriage in the United States is the preferred legal status for adults. Throughout family law, there is evidence of this through the application of rebuttable legal presumptions. For example, there is the rebuttable legal presumption that an adult male and an adult female living together are presumed to be married. There is a presumption that a marriage is legal. Further there is a presumption that in a case of a series of marriages that the most recent marriage is legal. Children born of a marriage are presumed the legitimate children of that marriage. These presumptions, in addition to being a convenient procedural device should there be litigation, are a reflection of both popular beliefs and of social values having to do with a preference for persons acting morally and legally¹⁰.

The decision in the *Marvin* case had a ripple effect. Following that case, similar cases were brought before other state courts, and for the most part, state courts sanctioned contract cohabitation as an alternative model for couples to utilize if they did not wish to marry¹¹. But it is important to emphasize that contract cohabitation was a private arrangement totally dependent on the couple's contract or conduct. If neither an express nor implied contract could be proven, there was no default to a legal model, like marriage. And, because of that contract cohabitation relationship can be vulnerable, leaving individuals unprotected, the actual outcome for Michelle Marvin in the *Marvin* case.

3. *The ALI principles on domestic partnerships*

The decision in *Marvin*, although at first heralded as a major step in the direction of protecting non-married cohabitants, especially women, has been criticized, especially for its emphasis on the conventional principles of contract as a model. Professor Ira Ellman has been one of the critics who has written about the deficiencies in using the bargained-for exchange model of contracts, particularly because he feels that non-married couples do not think in terms of contract when they begin their intimate relationship and do not, as a general rule, enter into express contracts¹². Further, he believes that the fundamental principles upon which the common law of contracts rest, namely

¹⁰ See KATZ, *supra* note 1, at 27.

¹¹ See, e. g., *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990); *Glasco v. Glasco*, 410 N.E.2d 1325 (Ind. Ct. App. 1980); *Watts v. Watts*, 405 N.W. 2d 303 (Wis. 1987). Minnesota and Texas require cohabitation agreements to be in writing. See Minn. Stat. § 513.076 (2002) and Tex. Bus. & Com. Code Ann. § 26.01(b)(3) (2002). New York will enforce an express contract, but not an implied one. See *Morone v. Morone*, 413 N.E.2d 1154 (N. Y. 1980). In that case the New York Court of Appeals stated, "Absent an express agreement, there is no frame of reference against which to compare the testimony presented and the character of the evidence that can be presented becomes more evanescent. There is, therefore, substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid." *Id.* at 1157.

¹² See Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365 (2001). The entire issue of Number 5, October 2001, of the Notre Dame Law Review is devoted to articles on *Marvin v. Marvin*.

fulfilling parties' expectations by ordering their relationship through a bargained- for exchange, is inappropriate for cohabitation; "The successful intimate relationship is reciprocal, but not contractual"¹³, he wrote. It is that theory, basically rejecting contract and adopting a status-based approach that forms the basis for the American Law Institute's (ALI) codification of the rules regulating cohabitation arrangements in its Principles of the Law of Family Dissolution¹⁴ of which Professor Ellman was the Reporter. Section 6.03 reads as follows:

§ 6.03 Determination That Persons Are Domestic Partners

- (1) For the purpose of defining relationships to which this Chapter applies, domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.
- (2) Persons are domestic partners when they have maintained a common household, as defined in Paragraph (4), with their common child, as defined in Paragraph (5), for a continuous period that equals or exceeds a duration, called the cohabitation parenting period, set in a rule of statewide application.
- (3) Persons not related by blood or adoption are presumed to be domestic partners when they have maintained a common household, as defined in Paragraph (4), for a continuous period that equals or exceeds a duration, called the cohabitation period, set in a rule of statewide application. The presumption is rebuttable by evidence that the parties did not share life together as a couple, as defined by Paragraph (7).
- (4) Persons maintain a common household when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household.
- (5) Persons have a common child when each is either the child's legal parent or parent by estoppel, as defined by § 2.03.
- (6) When the requirements of Paragraph (2) or (3) are not satisfied, a person asserting a claim under this Chapter bears the burden of proving that for a significant period of time the parties shared a primary residence and a life together as a couple, as defined in Paragraph (7). Whether a period of time is significant is determined in light of all the Paragraph (7) circumstances of the parties' relationship and, particularly, the extent to which those circumstances wrought change in the life of one or both parties.
- (7) Whether persons share a life together as a couple is determined by reference to all the circumstances, including:
 - (a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;
 - (b) the extent to which the parties intermingled their finances;
 - (c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;
 - (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
 - (e) the extent to which the relationship wrought change in the life of either or both parties;

¹³ *Id.* at 1375.

¹⁴ The American Law Institute adopted and promulgated the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS on May 16, 2000. They were published in book form with 1187 pages by Matthew Bender & Co., Inc. in 2002. The Comments to each section contain an extraordinary amount of research, which includes social science data, case law and statutes.

- (f) the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee benefit plan;
- (g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;
- (h) the emotional or physical intimacy of the parties' relationship;
- (i) the parties' community reputation as a couple;
- (j) the parties' participation in a commitment ceremony or registration as a domestic partnership;
- (k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;
- (l) the parties' procreation of, adoption of, or joint assumption of parental functions toward a child;
- (m) the parties' maintenance of a common household, as defined by Paragraph (4).

The Comment to Section 6 explains the text:

b. This section's relationship to existing law. In the United States, courts generally rely upon contract law when they conclude that cohabiting parties may acquire financial obligations to one another that survive their relationship. The great majority of jurisdictions recognize express contracts, and only a handful of them require that the contract be written rather than oral. Jurisdictions split on whether to recognize implied contracts. Those that do recognize implied contracts differ in their inclination to infer contractual undertakings from any given set of facts. Some courts reach much further than others. In doing so, they appear to vindicate an equitable rather than a contractual principle. That is, having concluded that a particular set of facts demands a remedy, they may stretch ordinary contract principles to fit the remedy within a contractual rubric. This result is not surprising. Parties may share their lives for many years without having any clear agreement, express or implied, that sets out the financial consequences of terminating their relationship. To find such an agreement may therefore require filling many gaps with terms that flow more from the court's sense of fairness than from any mutual intentions inferable from the parties' conduct.

This section approaches the matter in a more straightforward manner. It identifies the circumstances that would typically lead such a court to find a contract, and defines those circumstances as giving rise to a domestic partnership. Remedies then follow unless the parties have made an enforceable contract to the contrary. In formulating a rubric combining expansive notions of contract with equitable remedies, one court observed that it is appropriate in these cases to presume "that the parties intend to deal fairly with each other." This suggests that, as in marriage, in the ordinary case the law should provide remedies at the dissolution of a domestic relationship that will ensure an equitable allocation of accumulated property and of the financial losses arising from the termination of the relationship. The result, in comparison with a narrow contractual approach, is a system that places the burden of showing a contract on the party wishing to avoid such fairness-based remedies, rather than imposing it on the party seeking to claim them.

This section thus does not require, as a predicate to finding the existence of a domestic partnership, that the parties had an implied or express agreement, or even that the facts meet the standard requirements of a quantum meruit claim. It instead relies, as do the marriage laws, on a status classification: property claims and support obligations presumptively arise between persons who qualify as domestic partners, as they do between legal spouses, without inquiry into each couple's particular arrangement, except as the presumption is itself overcome by contract. This approach reflects a judgment that it is usually just to apply to both groups the property and support rules applicable to divorcing spouses, that individualized inquiries are usually impractical or unduly burdensome, and that it therefore makes more sense to require parties to contract out of

these property and support rules than to contract into them. This approach, of course, demands careful attention to the factors required to establish a couple's status as domestic partners. Although not always articulated in this way, several American jurisdictions follow a status approach similar to that adopted in this section, as do several Canadian provinces, Australian states, and some European countries. Finally, some American states that follow a contractual approach reach the same or similar.

§ 6.04 Domestic-Partnership Property Defined

- (1) Except as provided in Paragraph (3) of this section, property is domestic-partnership property if it would be marital property under Chapter 4, had the domestic partners been married to one another during the domestic-partnership period.
- (2) The domestic-partnership period (a) starts when the domestic partners began sharing a primary residence, unless either partner shows that the parties did not begin sharing life together as a couple until a later date, in which case the domestic-partnership period starts on that later date, and (b) ends when the parties ceased sharing a primary residence. For the purpose of this Paragraph, parties who are the biological parents of a common child began sharing life together as a couple no later than the date on which their common child was conceived.
- (3) Property that would be re-characterized as marital property under §4.12 if the parties had been married, is not domestic partnership property.

§ 6.05 Allocation of Domestic-Partnership Property

Domestic-partnership property should be divided according to the principles set forth for the division of marital property in section 4.09 and § 4.10.[These sections follow.]

§ 4.09 Division of Marital Property Generally

- (1) Except as provided in Paragraph (2) of this section, marital property and marital debts are divided at dissolution so that the spouses receive net shares equal in value, although not necessarily identical in kind.
- (2) The spouses are allocated net shares of the marital property or debts that are unequal in value if, and only if, one or more of the following is true:
 - (a) Pursuant to section 5.10, section 5.11, or section 5.14, the court compensates a spouse for a loss recognized in Chapter 5, in whole or in part, with an enhanced share of the marital property.
 - (b) Pursuant to section 4.10, the court allows one spouse an enhanced share of the marital property because the other spouse previously made an improper disposition of some portion of it.
 - (c) Marital debts exceed marital assets, and it is just and equitable to assign the excess debt unequally, because of a significant disparity in the spouses' financial capacity, their participation in the decision to incur the debt, or their consumption of the goods or services that the debt was incurred to acquire.
 - d) Debt has been incurred to finance a spouse's education, in which case it is treated as the separate obligation of the spouse whose education it financed.
- (3) When a "deferred-sale-of-family-residence order" is made under section 3.11, any resulting enhancement in the residential parent's property share is additional child support, whether or not it is recognized as such in the formal child-support award, and therefore no adjustment is required under this section to offset it.

§4.10 Financial Misconduct as Grounds for Unequal Division of Marital Property

- (1) If one spouse, without the other spouse's consent, has made gifts of marital property to third parties that are substantial relative to the total value of the marital property at the time of the gift, the court should augment the other spouse's share of the remaining marital property by one-half of the value of

such gifts. This Paragraph applies only to gifts made after a date that is set by counting back, from the date on which the dissolution petition is served, a fixed period of time specified in a rule of statewide application.

(2) If marital property is lost, expended, or destroyed through the intentional misconduct of one spouse, the court should augment the other spouse's share of the remaining marital property by one-half the value of the lost or destroyed property. This Paragraph applies only to misconduct after a date that is set by counting back, from the date on which the dissolution petition is served, a fixed period of time specified in a rule of statewide application.

(3) If marital property is lost or destroyed through the negligence of one spouse, the court should augment the other spouse's share of the remaining marital property by one-half the value of the lost or destroyed property. This Paragraph applies only to negligence that took place after service of the dissolution petition.

(4) If a spouse is entitled to a remedy under Paragraph (1) or (2), or would have been entitled to a remedy had concealed or conveyed property not been recovered, the court should enlarge that spouse's share of the marital property by an amount sufficient to offset all reasonable costs, including professional fees, which that spouse incurred to establish or remedy the improper concealment or conveyance, whenever the court also finds that the other spouse's concealment or conveyance either

(a) had the purpose of denying the first spouse his or her share of the marital property at dissolution, or
(b) was undertaken with knowledge that such denial was its likely effect.

(5) Paragraphs (1), (2), and (3) may be applied to gifts, misconduct, or neglect that occurred prior to the date specified in the statewide rule required under those sections, if facts set forth in written findings of the trial court (section 1.02) establish that their application to the earlier incidents is necessary to avoid a substantial injustice.

(6) If there is insufficient marital property for an adjustment in its allocation to provide the appropriate remedy under this section, the court may achieve an equivalent result by (a) making an award to one spouse of some portion of the other's separate property, as allowed under section 4.11, or, if the available separate property is also inadequate for this purpose, (b) requiring one spouse to make equitable reimbursement to the other in such installment payments as the court judges equitable in light of the financial capacity and other obligations of the spouse making reimbursement.

The ALI Principles on Domestic Partnerships quoted above have been severely criticized by Professor Elizabeth Scott and Professor Marsha Garrison. Professor Scott, who finds the Principles “unnecessarily heavy handed and paternalistic”¹⁵. Professor Garrison takes the Principles to task for their approach, which she asserts are based on “equivalence [to marriage] and practicality [in establishing the relationship]”¹⁶. She has attacked the social science data, calling it misleading. She has written that having domestic partnerships as the functionally equivalent to marriage by applying property and support rules for divorcing couples to domestic partnerships is inappropriate for a variety of reasons. Basing her conclusions on her extensive social science research all found in the footnotes to her study, she writes that cohabitation is different from marriage in that cohabitation is usually short-lived. “Cohabitants tend to be younger and less prosperous than married couples; they

¹⁵ Elizabeth Scott, *Domestic Partnerships, Implied Contracts, and Law Reform* in RECONCEIVING THE FAMILY 331, 349 (Robin Fretwell Wilson, ed. 2006)

¹⁶ Marsha Garrison, *Marriage Matters:: What's Wrong with the ALI's Domestic Partnership Proposals*, in RECONCEIVING THE FAMILY, *supra* note 1, at 307.

are much less likely than married couples to have children, to pool their resources, to feel secure and unconflicted in their relationships, to value commitment, or to express commitment to their partners. They are more likely than married couples to be in a physically abusive relationship, and less likely to demonstrate sexual fidelity”¹⁷.

Further, Professor Garrison has written that from a comparative law and comparative religious perspective, the marriage is based on contract. She also points out that the ALI proposals conflict with the ideal of individual autonomy, which she writes is an important value in liberal societies and one that should be preserved, not abandoned. She concludes her study with a strong argument for preserving marriage, supporting her conclusion with solid social science findings illustrating all the advantages associated with marriage. She supports each of her statements with a footnote citing social science research, which she explains:

“Young American adults continue to describe a good marriage as one of their most important goals, and believe that marriage confers a wide range of private and public benefits. The evidence justifies their enthusiasm. Those who are married live longer and are less likely to become disabled than the unmarried; they get more sleep, eat more regular meals, visit the doctor more regularly, and abuse addictive substances less frequently. Even after controlling for age, married men earn more than either single men or cohabitants, and they are less likely to lose their earnings through compulsive gambling. Married couples also have a higher savings rate and thus accrue greater wealth than the unmarried. Married individuals rate their happiness and mental health more highly than the unmarried. They experience less domestic violence and greater physical security. Although a high divorce rate, rising rates of cohabitation, and later marriage have all weakened both the stability and status linked with marriage, marriage is still associated across nations and cultures with higher levels of subjective well-being”¹⁸.

It is hard to quarrel with Professor Garrison’s conclusions, given their solid foundation. It is often stated that marriage in the United States has moved from status to contract, over time. Yet the truth of the matter is that the relational and contractual aspects of marriage have lived side by side relatively undisturbed for years. Two cases illustrate this point: *Ponder v. Graham*¹⁹, a Supreme Court of Florida case decided in 1851, and *Maynard v. Hill*²⁰, a United States Supreme Court case decided thirty-seven years later. In *Ponder* the Supreme Court of Florida held that marriage, being a contract, could not be dissolved by the Florida legislature. In *Maynard*, the United States Supreme Court held that the legislative assembly of the territory of Oregon had the authority to dissolve the matrimonial bonds between Mr. Maynard and his wife.

¹⁷*Id.* at 308-09.

¹⁸ *Id.* at 323-24.

¹⁹ 4 Fla. 23 (1851).

²⁰ 125 U.S. 190 (1888).

It was in that case that Mr. Justice Field wrote the famous quotation about marriage:

“Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. The body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for the dissolution”²¹.

As I have written elsewhere, “In contemporary times (...) it is difficult to fit marriage neatly into the legal construct called contract. Normally, contract law assumes freedom of contract, party autonomy, and equal bargaining power. The marriage contract is not totally free of governmental regulation and therefore parties have limited freedom of choice”²². Monogamy, age and family relationships are obvious limitations. But people do have choice. Modern marriage ceremonies often involve couples expressing vows, not necessarily about obedience or dependency, but about mutual respect for each other and sometimes about each spouse’s responsibility. If contract is about relationships, and I think that fundamentally that is its basis, marriage fits into the category of an intimate relationship, based on a commitment involving affection, trust, fidelity and respect.

Where the law prevents individuals of the same-sex from entering into marriage, which is the case in all but one state, the Commonwealth of Massachusetts, in the United States an alternative is now available.

4. Registered domestic partnerships

Marvin laid the predicate for Registered Domestic Partnership legislation in the United States. The main feature of a registered partnership is that it formalizing a non-marital relationship that would otherwise have to be proven in order for the individuals in that relationship to have rights and responsibilities. It is a model for same-sex couples to use to formalize their relationship.

Registered domestic partnerships began as a status recognized by cities and municipalities and were designed to give employees of local government economic benefits ordinarily reserved for married couples. For the most part, individuals who registered were living in a same-sex relationship and would not be able to marry, thus preventing them from receiving the benefits of marriage, primarily health insurance.

In addition, certain private corporations also recognized the status for purposes of providing health insurance for their employees’ partners. Adopting this status was not without its difficulties. In

²¹ *Id.* at 205

²² See KATZ, *supra* note 1, at 36-37.

addition to moral objections, there were economic ones. For a governmental unit or corporation to expand employee benefits so as to provide health care, for example, for an employees partner would increase costs²³.

The registered domestic partnerships available in certain cities, provided the first step for states to embrace the concept and even broaden its scope to include matters beyond the obvious economic ones like sick leave to aid an ailing partner, visitation rights in hospitals when the partner is a patient, medical decision-making, etc. The major question for states was whether registered domestic partnerships should be available to couples, who could marry, but chose not to and thus making that relationship an alternative to marriage, or whether it should be limited to individuals who were prevented from marrying, like same-sex couples. Regardless of the answer to the question of who could enter into the relationship, the bigger issue was whether registered domestic partnerships should mirror marriage?

By 2007 at least seven American jurisdictions, California, Connecticut, the District of Columbia, Hawaii, Maine, New Jersey, and Vermont have enacted some form of registered domestic partnership statute²⁴. The Hawaii and Vermont versions of domestic partnership legislation were the result of two court cases in which same-sex couples sued to obtain marriage licenses. The couples were refused licenses and sought relief in the state courts. After litigation through the courts in Hawaii, the Hawaii Supreme Court in *Baehr v. Miike*²⁵ held that denying the couples the right to vote violated the state's equal protection clause in its constitution. In 1998, a year following the Miike decision, the Hawaii legislature enacted its Reciprocal Beneficiary Law, which provided same-sex couples with certain economic benefits²⁶. In 1998, Hawaii citizens voted to amend its constitution to limit marriage to one man and one woman²⁷. Later, the Hawaiian legislature passed a domestic partnership law entitled, "Reciprocal Beneficiary Law," which provided certain persons certain

²³ For a general discussion of these issues, see Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001).

²⁴ See the following statutes:

Hawaii Reciprocal Beneficiaries Statute, Haw. Rev. Stat. Ch. 572C-1 to 7 (1997)

Vermont Civil Unions Act, Pub. Act 91 H. 847, 2000 Vt. Acts & Resolves.

Vermont Reciprocal Beneficiaries Statute, Vt. St. T. 15 § 1301-6 (1999); 18 § 1853 (1999); 18 § 5220 (1999); 18 § 5240 (2006); 18 § 1852 (2006) 33 § 7301 (1999); 33 § 7306 (1999); 15 § 1101 (2006).

California Family Code §§ 297; 297.5; 298; 298.5; 299.5; 299.6 (2004).

California Code of Civil Procedure § 377.60 (2004).

California Code § 1714.01 (2006).

Connecticut General Statutes, T. 46B, Ch. 815F, § 46b-38aa to 46b-38pp (2006).

District of Columbia, Tit. 26 Ch. 8A, §§ 26:8A-1 to 12 (2001).

Maine Domestic Partner Registry, 22 Maine Revised Statutes c. 701, section 2710.

New Jersey, N.J.S.A. 26:8A-1 to 12 (2006).

²⁵ *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997).

²⁶ See HAW. REV. STAT. ch. 572C-1 to -7 (Michie Supp. 1998).

²⁷ See HAW. CONST. art. 1, § 23.

rights and benefits ordinarily attached to marriage. Unlike other domestic partnership schemes, the Hawaiian law did not limit its coverage to adults who could not marry because of sex, but included persons who could be related to each other, like a mother and a son, and changed its probate code to include reciprocal beneficiary wherever the word “spouse” was stated. The key to the Hawaiian law was economic dependency.

In 1999 Vermont, a New England state known for its liberal political leanings was faced with a challenge to its constitution. Same-sex couples sought to obtain marriage licenses and were denied. The case went through the Vermont courts and eventually went before the Vermont Supreme Court. That court held that limiting marriage to heterosexual couples violated the Common Benefits Clause of its state constitution²⁸. The court then went on to state that the judiciary was not the proper venue for the couples to seek relief. Rather, the state legislature was the appropriate body to act. And, act it did with the enactment of the Vermont Civil Union Statute²⁹. That statute provides same-sex partners with the benefits, protections and responsibilities ordinarily reserved to married couples.

Unlike the legislatures in Vermont and in Hawaii, which basically responded to the courts in their domestic partnership legislation, California’s legislature took it upon itself to enact its registered domestic partnership law, and it did so through a series of incremental steps beginning in 1999 and culminating in a law signed by the California governor in 2003, which Professor Blumberg described as “a shadow institution of marriage”³⁰. In the 2001 legislation, registered domestic partners were granted “the right to use stepparent adoption procedures; sue for wrongful death or infliction of emotional distress for the injury or death of a partner; be treated as a dependent or a partner for purposes of group health and disability insurance; file for state disability benefits on behalf of a mentally disabled partner; be appointed conservator for an incapacitated partner; use sick leave to care for an ill partner or partner’s child; use statutory form wills and be appointed as an administrator or a partner’s estate; receive unemployment benefits on moving to accompany a partner to a new job; and receive continued health insurance as a partner of a deceased state employee or retiree”³¹. Ultimately registered domestic partners were treated as intestate heirs for each other³².

²⁸ See *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999).

²⁹ Vermont Civil Unions Act, Pub. Act 91 H. 847, 2000 Vt. Acts & Resolves.

³⁰ Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1561 (2004). In that excellent article, Professor Blumberg not only analyzes the California Registered Partnership Act, providing a detailed legislative history of the act, but also analyzes the Canadian experience. Professor Blumberg spent thirteen years working on the American Law Institute’s Principles of the Law of Family Dissolution, nine of them as a reporter. *Id.* at 1594, n. 204.

³¹ *Id.* at 1560. Professor Blumberg gives a statutory citation to each of these benefits.

³² *Id.* at 1561.

5. *Beyond: same-sex marriage*

Twenty-seven years after the California Supreme Court decided *Marvin v. Marvin*, the Supreme Judicial Court of Massachusetts decided *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003). To me that decision may do to the regulations of state marriage laws what *Marvin* did to the regulation of marriage-like relationships. *Goodridge* got society thinking seriously about same-sex marriage, and that case, like *Marvin*, provoked state legislatures to act. Unlike the mostly positive reaction to *Marvin*, however, the legislative response to *Goodridge* was negative.

In *Goodridge*, seven same-sex couples including business executives, lawyers, an investment banker, educators, therapists and a computer engineer, all in long-term committed relationships who were denied marriage licenses because they were wished to marry a person of the same sex sued the state, arguing that their denial of a marriage license violated the liberties and equality afforded them under Article 1 of the Massachusetts Constitution. The state made three basic arguments: (1) the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation; (2) the traditional marriage between man and woman provided the optimal setting to raise children, and therefore, the state had an interest in encouraging such a union; (3) allowing same-sex couples to marry would undermine the institution of marriage, and the state has an interest in preventing that from happening. The Supreme Judicial Court was not persuaded by those arguments, and held that the state's prohibition on same-sex marriage did not pass rational basis scrutiny.

Throughout her opinion, Chief Justice Marshall refers to marriage as "civil marriage." I think that is important because I believe she did not wish to give the impression that she was unaware of strongly held religious views. Indeed, in the opening two paragraphs of the opinion, she wrote:

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it bring stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same sex couples.

We are mindful that our decision marks a change in the history of our marriage laws. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question

before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. 'Our obligation is to define the liberty of all, not to mandate our own moral code'(citations omitted)³³.

That quotation sets the tone and approach of the whole majority opinion, which reflects a respect for the religious and moral views of others while maintaining its focus on civil rights under the Massachusetts Constitution.

Unlike *Marvin, Goodridge* did not have a ripple effect in terms of receptivity. What it did do, however, was to provide an impetus to other same-sex couples to sue in other states for relief under the constitutions of those states. They lost in the highest courts in the State of Washington [*Andersen v. King County*, 138 P.3d 963 (Wash. 2006)], New York³⁴, and New Jersey³⁵ and the intermediate courts in Indiana³⁶ and California³⁷.

In addition to judicial responses to *Goodridge*, legislators took action and a number of state legislatures passed laws banning same-sex marriages. Forty-one states currently have statutory Defense of Marriage Acts³⁸ which limit marriage to a union between a man and a woman, all but three of which were passed after the federal Defense of Marriage Act in 1996³⁹. Twenty-seven states have similarly amended their constitutions to define marriage in a manner that unambiguously

³³ *Id.*

³⁴ See *Hernandez v. Robles*, 885 N.E.2d 1 (NY 2006).

³⁵ See *Lewis v. Harris*, 908 A.2d 196 (NJ 2006).

³⁶ See *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. Appeals 2005).

³⁷ See *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. Appeals 3d District 2006).

³⁸ Defense of Marriage Act 28 U.S.C. § 1738C; 1 U.S.C.A. § 7 (1996). The Act was passed by Congress (H.R. 3396) and was signed by President Clinton on September 21, 1996. Provisions of that Act read as follows:

28 U.S.C.A. § 1738C

"No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

1 U.S.C.A. § 7 - Definition of "marriage" and "spouse"

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife."

³⁹ National Conference of State Legislators, Same Sex Marriage (Jan. 2007), <http://www.ncsl.org/programs/cyf/samesex.htm> . See, e.g., Ind. Code § 31-11-1-1 (1997) ("(a) Only a female may marry a male. Only a male may marry a female. (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.").

excludes same sex couples⁴⁰. Arizona is the only state where a ballot measure proposing a constitutional amendment to prohibit gay marriage has failed⁴¹.

The road from *Marvin v. Marvin* to *Goodridge v. Department of Public Health* took over a quarter of a century on which to travel. I connect the cases because, not only was each path-breaking, but they relate to the recognition of non-traditional family relationships. Although other cases, like *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the United States Supreme Court held that a Texas law that made sodomy between two consenting males a crime was unconstitutional, might have provided a major impetus to the *Goodridge* majority, I think that creative lawyering, that is, thinking beyond traditional models or paradigms was at work. In the end, *Marvin* and *Goodridge* supported the legal recognition of human connections, which, in certain respects, follows tradition, but in another way represents new directions for family law in the United States.

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⁴⁰ National Conference of State Legislators, Same Sex Marriage (Jan. 2007), <http://www.ncsl.org/programs/cyf/samesex.htm>. See, e.g., VA. CONST. art. I, § 15-A. ("That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage."); MICH. CONST. art. I, § 25 ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.")

⁴¹ Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at P16 (noting that the Arizona rejection was the "first rejection in 28 statewide votes on similar measures since 1998").

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