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"MAKING MARRIAGE AND DIVORCE SAFE FOR WOMEN"
REVISITED

Herma Hill Kay*

This timely and important symposium on Marriage, Democracy, and Families examines in depth the implications for a democratic society of the federal government's recently asserted interest in promoting marriage as a way of combating poverty. The government's interest in marriage is not merely rhetorical. Among its other provisions, the 2003 Temporary Assistance for Needy Families ("TANF") welfare program introduced into Congress last month renews the 1996 measure and includes appropriations of up to $1.5 billion to be allocated among the states for programs promoting marriage among poor families. It is not entirely clear, however, what model of marriage the government has endorsed. Apart from a reference to "healthy marriages" in the subsection on Family Support Services, the statute nowhere defines

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1. See 42 U.S.C. § 601(a) (2000) ("The purpose of this part is to increase the flexibility of States in operating a program designed to . . . (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.").


The term "family support services" means community-based services to promote the safety and well-being of children and families designed to increase the strength and stability of families (including adoptive, foster, and extended families), to increase parents' confidence and competence in their parenting abilities, to afford children a safe, stable, and supportive family environment, to strengthen parental relationships and promote healthy marriages, and otherwise to enhance child development.
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marriage. In this Article, I will argue that if the government’s preferred model is that of traditional marriage, its goal is inconsistent with the ideal of equality that should permeate a democratic society, and accordingly should not be imposed on poor families as a component part of their receiving welfare.

I. INTRODUCTION: DIVORCE REFORM AS PRELUDE TO RE-EXAMINING MARRIAGE

Marriage law in the United States is currently undergoing fresh evaluation at the state level. Paradoxically, the most recent legislative efforts to modernize marriage law began in the 1960s as a by-product of the divorce reform movement. Nearly forty years ago, on January 8, 1964, the California Legislature opened a series of hearings to determine how the state’s divorce laws functioned in practice.5 One of the first witnesses offered a different perspective on what poor families needed than the view presently held by the federal government. Mr. Harold E. Simmons, representing the Director of the California Department of Social Welfare, urged legislative funding for divorce, rather than for marriage.6 Specifically, he noted that the Department was working with a group of approximately seven hundred welfare families in which the father wanted to divorce a former wife in order to marry the woman with whom he was currently living in order to legitimate the children born of their non-marital relationship.7 Mr. Simmons suggested that the

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6. See id. at 82-91.
7. See id. at 82.
legislature might accomplish this goal by appropriating funds for legal services programs to enable them to secure the necessary divorces.8

At the time of these hearings, California in common with nearly all other states recognized only children born to married parents as legitimate at birth.9 Moreover, its model of legal marriage was one in which marital functions were assigned by sex between the spouses. The roots of this model extended to English law. As Professor Homer H. Clark, Jr., a noted family law expert, put it in 1968,

Anglo-American law has for centuries prescribed rules for the proper behavior of husbands and wives in marriage. These rules . . . say that the husband has a duty to support his wife, that she has a duty to render services in the home, and that these duties are reciprocal. In a sense such a statement is misleading, because rules take on a different aspect when one examines the remedies existing for their enforcement and the circumstances in which they operate. . . . But these rules acquire much of their force and vitality from the fact that they construct a model of correct behavior. They are moral precepts. . . .

Another comfortable feature of these rules is their extraordinary conservatism. They describe the traditional roles of husband and wife. The husband is to provide the family with food, clothing, shelter and as many of the amenities of life as he can manage, either (in earlier days) by the management of his estates or (more recently) by working for wages or a salary. The wife is to be mistress of the household, maintaining the home with the resources furnished by the husband, and caring for the children. A reading of contemporary judicial opinions leaves the impression that these roles have not changed over the last two hundred years, in spite of the changes in the legal position of the married woman carried through in the Nineteenth Century and in her social and economic position in this century. One can only account for the tenacity of the rules on the theory that since they express moral precepts backed up by religious teachings they are independent of time, place and circumstances. Their conservatism is reinforced by the reciprocal nature of the duties imposed, making it easier to treat deviations as evidence of moral fault and of breach of faith.10

8. See id. at 83-84.
9. Children born out of wedlock could be legitimated by the marriage of their parents, or under some circumstances, by the father’s public acknowledgment of the child. See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 5.2, at 158 (1968). The mother, acting alone, could not legitimate a child born illegitimate. See id. at 159.
10. Id. § 6.1 (footnotes omitted).
The legal structure of the Anglo-American model of marriage was more agreeable for men than for women. Its division of labor by sex was reinforced not only by moral precepts, but also by economic and social arrangements that gave men priority over women in the workplace and that deprived women of the power to control their reproductive capacity. Under these circumstances, marriage was not only the most readily available opportunity for women, it was often the only feasible choice, particularly for middle and upper class women.

During those early California hearings, however, a seed was planted that ultimately flowered into a new approach to divorce law. The idea of eliminating fault as the basis for marriage dissolution, spousal support, property division, and child custody adjudication was proposed there. Although the California legislature did not act on any of those proposals at that time, the hearings nonetheless provided the opportunity for a small interdisciplinary group of professionals in northern California to come together in support of divorce law reform. In 1966, Governor Edmund G. “Pat” Brown appointed several members of this group to his Governor’s Commission on the Family. That Commission’s Report, after further study by the Family Law Committee of the State Bar of California, became the basis of the nation’s first no-fault divorce bill that was enacted by the California legislature in 1969, and signed into law by Governor Ronald Reagan.

Meanwhile, a national study of marriage and divorce law had been underway since 1965 under the leadership of Professor Robert J. Levy, sponsored by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). That study culminated in the 1970 draft of the Uniform Marriage and Divorce Act, which also recommended no-fault divorce. Following a two-year struggle between the NCCUSL and the American Bar Association’s (“ABA”) Committee on Family Law

12. See Krom, supra note 11, at 170-71.
13. See Kay, supra note 11, at 2050.
14. See id. at 2052; see also Krom, supra note 11, at 180.
15. See Kay, supra note 11, at 2055.
16. See id.
over the statement of the no-fault principle, a less innovative draft was approved by the ABA and promulgated by the NCCUSL in 1973.\textsuperscript{17}

Thus, at the time I published my 1972 book review essay, \textit{Making Marriage and Divorce Safe for Women},\textsuperscript{18} the first round of divorce law reform had largely been completed. The essay was a review of an important book by my family law professor, Max Rheinstein of the University of Chicago.\textsuperscript{19} After thirty more years of work and reflection on this subject, I want to revisit the ideas and arguments put forth in that essay with you today.

II. LEGAL MARRIAGE THEN AND NOW: A THIRTY YEAR REASSESSMENT

Rheinstein's view of divorce, like that expressed at the California hearings by Mr. Harold E. Simmons on behalf of the Department of Social Welfare, was an instrumental one. "[T]he very purpose ... a divorce law ought to pursue," he said, is "that of facilitating remarriage."\textsuperscript{20} Taking issue with that statement, I argued that

Rheinstein's point that legal divorce should be seen only as a readmission ticket to the "freedom of the marriage market" still assumes that remarriage is the happy ending to the status of divorce. Yet this assumption is being questioned, at least for women, by those who are concerned with the social and legal position of women. Marriage itself, let alone remarriage, is being viewed as a limitation on the woman who seeks to realize her own individuality rather than achieving identity through her husband.\textsuperscript{21}

In exploring why many women might not see remarriage as their best option following divorce, I set out three major categories of feminist criticism of traditional marriage, identified as "(1) financial problems, including the obligation of support and property rights; (2) the identity


\textsuperscript{19} See MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW (1972).

\textsuperscript{20} Id. at 124 (adding that "[b]y its very essence[,] a divorce is a restoration of the parties to the freedom of remarriage. Early remarriage creates the chance of marital satisfaction for both parties and a new home for the children that will be presumably more harmonious than the former one.").

\textsuperscript{21} Kay, supra note 18, at 1685 (footnotes omitted).
of the married woman, encompassing name, domicile, and occupation; and (3) childrearing.\textsuperscript{22}

Thirty years of agitation by women's groups and their male allies, scholarship and criticism by feminist legal scholars of both sexes, legislative reform often led by female politicians and supported by their male colleagues, and litigation by public interest groups and private parties have produced positive changes in all three of these categories. I will briefly review the most significant developments.

\textit{A. Marriage Law Reform}

1. Financial Problems

In 1972, the laws in every state placed the primary obligation of family support upon the husband.\textsuperscript{23} As I noted, this allocation of support by sex carried with it at least three implications for the position of women in marriage: 1) the legal view that the married woman was an economically nonproductive person dependent upon others for the necessities of life; 2) that the wife's work in the home was a service she owes to her husband, rather than a job deserving the dignity of economic return; and 3) that the housewife cannot provide for her old age, since she cannot contribute to social security and has no pension or retirement plan.\textsuperscript{24}

Today, the obligation of support during marriage has become gender-neutral, a position which recognizes that the majority of wives living with their husbands are in the labor force.\textsuperscript{25} The homemaking wife's work in the home, however, is still not a paying job capable of both producing current income and generating the right to retirement with an old age pension.

The married woman's right to property acquired during the marriage has been more resistant to change than her support obligation. It remains true now, as in 1972, that "[o]nly in the... community property states does each spouse acquire a vested interest in property

\textsuperscript{22} \textit{Id.} at 1690.

\textsuperscript{23} \textit{See id.}

\textsuperscript{24} \textit{See id.} at 1690-92.

\textsuperscript{25} \textit{See U.S. Dep't of Commerce, Census Bureau, Series P-20, No. 537, America's Families and Living Arrangements 13 (2001) available at http://www.census.gov/prod/2001pubs/p20-537.pdf. (reporting that 60.3 percent of married women living with their husbands participated in the labor force in 2000). In 1971 almost three-fifths of the 31.5 million women in the labor force were married women living with their husbands. See U.S. Dep't of Labor, Women's Bureau, Bulletin No. 3119, Women Workers Today (1971).}
earned by the other during the marriage." 26 The only difference is that the number of community property states has increased from eight to nine with the addition of Wisconsin, which in 1984 became the only common law state to adopt a community property system. 27 Between 1972 and 1980, all of the eight original community property states enlarged the wife’s power to manage and control the community property, 28 but in some states this power is more theoretical than real during the existence of the marriage. 29 While by 1987 all of the common law states had adopted an equitable distribution approach to the division of marital property upon divorce, 30 these states have not accorded the homemaking spouse the dignity of shared ownership of property acquired during the marriage.

2. Women’s Identity
The greatest changes of the past thirty years have occurred in the laws that formerly prevented the married woman from establishing her own identity: age at marriage, married name, and legal domicile. In 1972, women were free to marry at eighteen, men not until twenty-one, a legal distinction that suggested “to young women that marriage is their proper life’s choice and that education for future careers should be reserved for men." 31 While the norm for first marriages in the United States is still characterized by a husband who is approximately two years older than his wife, the legal age of marriage is now eighteen for both sexes. 32 Of more significance is the fact that in recent years, both men

28. See O’Connor, supra note 27, at 280.
31. Kay, supra note 18, at 1693.
32. See US Teen Marriage License Laws, at http://marriage.about.com/library/blteen.htm (last visited Sept. 20, 2003) (noting that Nebraska is the only state that sets the legal age of marriage without parental permission at nineteen).
and women have postponed marriage further into their twenties. In 1970, the median age of marriage for males in the United States was 23.2, and for females 20.8, while in 2000 these medians had risen to 26.8 and 25.1 respectively.\footnote{33}

Thirty years ago, a woman customarily exchanged her surname for that of her husband upon marriage.\footnote{34} Although the extent to which this practice was compelled by law rather than dictated by social custom remains unclear,\footnote{35} it is clear that more options are available to married women today. Among these options are retaining her birth name, using a hyphenated name composed of her birth name and her husband’s surname, and creating a fused name.\footnote{36} Still controversial in some states is the matter of whether a divorced father may compel the child to continue to use his name, rather than the name the mother has assumed after remarriage.\footnote{37}

Rules determining a married woman’s legal domicile have proven more resistant to change. Traditionally, a wife took her husband’s domicile upon marriage,\footnote{38} but she could acquire a separate domicile by living apart from him if she was not guilty of desertion.\footnote{39} More recently, the common law rule has been recognized to be “clearly inconsistent with contemporary views relating to the legal position of married women.”\footnote{40} Accordingly, the Restatement (Second) of Conflict of Laws (“Restatement Second”) was revised in 1988 to provide that “[t]he rules for the acquisition of a domicile of choice are the same for both married and unmarried persons.”\footnote{41} This position does not squarely reject the common law rule. Rather, it appears to assume that if a married

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35. See Priscilla Ruth MacDougall, The Right of Women to Determine Their Own Names Irrespective of Marital Status, 1 FAM. L. REP. 4005, 4006 (1974); see also Kay, supra note 18, at 1693-94.
37. See Leadingham ex rel. Smith v. Smith, 56 S.W.3d 420 (Ky. Ct. App. 2001) (denying petition of twelve year old child of divorced parents whose mother had remarried and assumed her second husband’s name to change her name from her father’s name to a hyphenated name composed of the surnames of her father and step-father); see generally Merle H. Weiner, “We Are Family”: Valuing Associationalism in Disputes Over Children’s Surnames, 75 N.C. L. REV. 1625 (1997) (footnote omitted).
38. See RESTATEMENT OF CONFLICT OF LAWS § 27 cmt. b (1934).
39. See id. § 28.
41. Id. § 21.
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woman's domicile is changed by operation of law to that of her husband because of their marriage, she has the option of changing it back to her former domicile or of choosing another domicile. Even this possibility is limited, however, by the Restatement Second's observation that since most married couples live in the same place, they will continue to have the same domicile.\textsuperscript{42} It is questionable whether this observation adequately meets the needs of couples engaged in today's dual career commuting marriages.

3. Childrearing

In 1972, I identified a "cluster of laws that make mothers primarily responsible for childrearing."\textsuperscript{43} These included job discrimination against mothers, the inadequate availability of childbearing and childrearing leaves of absence, meager tax support for child care expenses, and the absence of any governmental plan to facilitate labor market entry and job continuity for mothers of young children.\textsuperscript{44} Despite improvements in the legal regulation of these matters, it remains true today that our culture identifies mothers, rather than fathers, as the primary caretakers of infants and pre-school aged children. For example, a recent study based on data from the National Institute of Child Health and Human Development Study of Early Child Care reported that three-year-old children whose mothers had worked more than thirty hours per week by the time the child was nine months old did not do as well on school-readiness tests as children whose mothers did not work during the same period.\textsuperscript{45} The headline to this story, as reported in the New York Times, was "Study Links Working Mothers to Slower Learning."\textsuperscript{46} The story did not indicate whether fathers were present in the home, nor, if they were, what their work schedules might have been. The Family and Medical Leave Act of 1993\textsuperscript{47} does not restrict its provisions to mothers, 

\begin{footnotes}
\item{42.} See id. § 21 cmt. a.
\item{43.} Kay, supra note 18, at 1695.
\item{44.} See id. at 1695-96.
\item{45.} See Jeanne Brooks-Gunn et al., Maternal Employment and Child Cognitive Outcomes in the First Three Years of Life: The NICHD Study of Early Child Care, 73 CHILD DEV. 1052, 1064 (2002) (reporting that three year olds from an average home environment in average-quality child care whose mothers did not work by the ninth month scored at the fiftieth percentile on the Bracken School Readiness test, while children in similar settings whose mothers worked by the ninth month scored at the forty-fourth percentile).
\item{46.} See Tamar Lewin, Study Links Working Mothers to Slower Learning, N.Y. TIMES, July 17, 2002, at A14.
\item{47.} See Family and Medical Leave Act, Pub. L. No. 103-3 (codified at 29 U.S.C. §§ 2601-2654 (2000)).
\end{footnotes}
but given that it provides only job security and not paid leave, the continuing wage gap between women and men tends to make its benefits more attractive to mothers than fathers.

B. Reforms in Laws Impacting Marriage

In reviewing Rheinstein’s book, I recognized that reform of the laws directly regulating marriage was not sufficient to achieve lasting change. I argued “that a close union must now be formed between the women’s movement and the reformers of marriage and divorce laws if the legal framework surrounding the American family is truly to be restructured to provide an institution capable of supporting the fullest possible self-realization of all its members.” 48 Although it took some time for that coalition to be formed, 49 and while there were sharp disagreements along the way, 50 members of both groups ultimately were able to support broader changes in the laws related to marriage and the status of married women. The past thirty years have seen substantial reforms in areas of law that impact on marriage. Three are of paramount importance: (1) laws prohibiting sex discrimination in the market place; (2) the married woman’s increased ability to control her reproductive capacity through contraception and abortion, or to extend it by using new medical techniques of assisted conception; and (3) laws prohibiting marital rape and seeking to control domestic violence. Virtually none of these laws were in place in January of 1964, when the California legislature began its inquiry into divorce. At that time, the Equal Pay Act, which prohibited employers from paying women less than men “for equal work on jobs[,] the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions,” 51 had been in force for only about one year. Title VII of the Civil Rights Act, 52 which ultimately prohibited sex

48. Kay, supra note 18, at 1685.
49. See Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms, in DIVORCE REFORM AT THE CROSSROADS 191, 195 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).
discrimination in employment, was still under consideration by Congress. Women were hampered in their work force participation and in their career planning by the uncertainty of pregnancy. As in most states, legal abortion was available in California only when the procedure was necessary to preserve the life of the mother.\textsuperscript{53} Contraception, where available, was less than totally reliable, and the birth control pill had only recently been introduced in 1960.\textsuperscript{54} Domestic violence was not yet on the agenda of law reform, and no state had enacted a law protecting a wife against unwanted sexual intercourse with her husband.\textsuperscript{55}

Today, while a woman’s constitutional right to decide whether to have an abortion remains at risk of pro-life judicial appointments to the United States Supreme Court, the law in all three of these areas has changed in ways that are substantially more supportive of equality between men and women in marriage. Except for marital rape reforms, these developments apply both to single and married women. Given the focus of this paper, however, I will limit the ensuing discussion to the impact of these changes on married women.

1. Sex Discrimination in Employment

As noted above, federal legislation was enacted in the early 1960s that ensured women equal pay for equal work, and more broadly outlawed discrimination based on sex.\textsuperscript{56} While implementation of these laws has been somewhat uneven, in general they have been successful in eliminating the classification of many blue collar jobs as “male” and “female” and in opening opportunities in higher level jobs to women. Where a woman’s traditional role as a mother is seen to conflict with her labor market activity, however, the path to equal treatment has been less direct. Early court interpretation of the prohibition against sex discrimination in Title VII of the Civil Rights Act faltered over problems of interpretation which suggested that some judges were unclear on the statutory concept. Thus, when an employer’s practice of hiring fathers but not mothers of pre-school age children was challenged as a violation of Title VII, there was some confusion regarding whether the

\textsuperscript{53} See Kay, \textit{supra} note 11, at 2057.
\textsuperscript{55} See Lalena Weintraub Siegel, Note, \textit{The Marital Rape Exemption: Evolution to Extinction}, 43 CLEV. ST. L. REV. 351, 352 n.5 (stating that in 1976 Nebraska became the first state to remove the marital exemption from its rape statute in \textit{NEB. REV. STAT. ANN. § 28-319} (Michie 1995)).
\textsuperscript{56} See \textit{supra} text accompanying notes 50-51.
discrimination was based on "sex" or "motherhood." The plaintiff, Ida Phillips, the mother of a pre-school age child, applied but was not hired for the position of "Assembly Trainee." The defendant, Martin Marietta Corporation, showed that approximately seventy-five to eighty percent of its employees holding this position were women. It argued that it had not failed to hire plaintiff because of her sex. The district court agreed, as did a panel of the Fifth Circuit, with the latter reasoning that:

The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired.

Judge Brown, dissenting from the court’s refusal to grant rehearing \textit{en banc}, quickly exposed the fallacy in the panel’s reasoning. He observed:

The case is simple. A woman with pre-school children may not be employed, a man with pre-school children may. The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query, the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

The United States Supreme Court vacated in a terse \textit{per curiam} decision which held that a \textit{per se} violation of the Act had been shown, but left open the disturbing possibility that the employer might prevail on remand if it could show that the "existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man," might constitute "a bona fide occupational qualification ["BFOQ")] reasonably necessary to the normal operation

\begin{itemize}
\item \textit{57.} \textit{See Phillips v. Martin Marietta Corp., 411 F.2d 1, 2 (5th Cir. 1969), vacated, 400 U.S. 542 (1971).}
\item \textit{58.} \textit{See id. at 2.}
\item \textit{59.} \textit{See id.}
\item \textit{60.} \textit{See id.}
\item \textit{61.} \textit{Id. at 4.}
\item \textit{62.} Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1259 (footnote omitted) (5th Cir. 1969) (Brown, C.J., dissenting from denial of rehearing).}
\end{itemize}
of that particular business or enterprise” under § 703(e) of the Act. Justice Marshall, concurring, accurately identified the danger in the Court’s dictum:

I cannot agree . . . that a . . . showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities [could establish a BFOQ exception]. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.

But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.

Fortunately, the BFOQ exception has not been expanded as broadly as Justice Marshall feared. In 1991, the Court refused to apply the BFOQ exception to permit a manufacturer of batteries to exclude as employees, who would be exposed to lead in the manufacturing process, fertile women but not fertile men. While a few of the Court’s Title VII decisions over the years have been marred by its failure to identify discrimination based on sex in employment practices that impinge on women’s traditional role as caregivers of children, still that statute and the state laws that have followed in its wake have purged the work place of the most explicit forms of sex discrimination.

2. Control of the Body
Over a twelve year period between the mid-1960s through the late 1970s, the United States Supreme Court issued a series of decisions creating and applying a right of privacy to matters affecting the conception and birth of children. In 1965, the Court recognized the right

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64. Id. at 544-45 (Marshall, J., concurring).
66. See, e.g., General Electric Co. v. Gilbert, 429 U.S. 125, 134-35 (1976) (holding that an employer’s failure to cover pregnancy in its employee health insurance plan did not constitute sex discrimination under Title VII because the statutory classification was drawn between “pregnant women” and “nonpregnant persons” rather than between women and men) (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 & n.20 (1974)).
of a married couple to implement family planning decisions through the use of contraceptives. The Court based its holding on "notions of privacy surrounding the marriage relationship" that prevented the government from implementing an anti-contraception policy by allowing "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." In 1973, a 7-2 majority of the Court recognized that this same right of privacy was "broad enough to encompass a woman’s decision whether or not to terminate her pregnancy." In 1976, a 6-3 majority of the Court conferred authority on the pregnant woman to make this decision even if her husband objected. In 1977, over the dissent of Chief Justice Rehnquist, the Court held that "the constitutionally protected right of privacy extends to an individual’s liberty to make choices regarding contraception," thus announcing a holding consistent with its earlier dictum that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

In 1992, fifteen years after the last of these cases was decided, a plurality of the Court rejected the "trimester" approach to abortion regulation set forth in Roe v. Wade in favor of reaffirming its "essential" or "central" holding regarding the woman’s liberty interest by establishing a bright line at viability coupled with an "undue burden" standard for determining the woman’s right to decide. Justice Sandra Day O’Connor, writing for the Court, and Chief Justice William Rehnquist, writing for four dissenters, disagreed sharply over the impact of the Roe decision on the role of women in society. Justice O’Connor observed in discussing the precedential importance of Roe that "[a]n entire generation has come of age free to assume Roe’s concept of

68. Id. at 485-86.
70. See Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976) (reasoning that: [W]hen the wife and husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor).
73. See Roe, 410 U.S. at 164-65.
liberty in defining the capacity of women to act in society, and to make reproductive decisions." The Chief Justice disagreed. In his view,

[s]urely it is dubious to suggest that women have reached their "places in society" in reliance upon Roe, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men. The Chief Justice seems impervious to the disruptive effect of unplanned and irreversible pregnancy upon the women whose achievements he applauds. Without the security of reproductive control, the ability of women to plan their lives according to their abilities and aspirations would be severely restricted. Two thoughtful observers have characterized the differences between the type of reasoning employed by O'Connor and that used by Rehnquist as that "between deductive and inductive, contextual and generalizing, and relational and rule-based reasoning modes." They observe that "Justice O'Connor's intellectual versatility suggests a capacity to overcome dissociation and use a full range of reasoning and problem solving modes." Nonetheless, they warn that:

The Court cannot give appropriate effect to the Fourteenth Amendment's mandate to protect the generalized right of personhood in the reproductive rights context unless it develops a particularized and respectful appreciation of the perspectives of pregnant women. Should the Court fail to address and appreciate the perspective of the pregnant woman or to focus on her as a decision maker, its undue burden test will prove too feeble to guarantee the full personhood that the Amendment promises.

This warning comes at an appropriate moment. Today, this guarantee is endangered. Following its decision in Casey, a 5-4 majority of the Supreme Court adopted the "undue burden" test. New
appointments on the Supreme Court are widely expected to occur before the end of the present administration. In 2002, my home state of California enacted legislation to safeguard a woman’s right to choose whether to terminate her pregnancy under state law even if the federal constitutional protection is dissolved. Other states should follow suit.

3. Marital Rape and Domestic Violence

In 1984, the New York Court of Appeals became the first state high court to declare unconstitutional the husband’s statutory marital exemption from the offense of raping his wife. In the course of his scholarly opinion for a unanimous court, Judge Wachtler traced the exemption’s origin to a statement by the seventeenth century English jurist, Lord Hale, who wrote, “[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” The court also noted that over forty states retained some form of marital exemption for rape. Today, although sixteen states and the District of Columbia have followed New York’s lead, either by judicial decision or statutory enactment,

A majority of states still retain some form of the common law regime: They criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions.

Domestic violence is not, of course, an entirely separate topic from marital rape. One study found that in thirty-seven percent of marriages where violence was present, the wives had been both beaten and raped.

82. See CAL. HEALTH & SAFETY CODE §§ 123460–123468 (West Supp. 2003) (providing in § 123466 that “[t]he state may not deny or interfere with a woman’s right to choose or obtain an abortion prior to the viability of the fetus, or when the abortion is necessary to protect the life or health of the woman”).
84. Id. at 572 (quoting 1 SIR MATTHEW HALE, HISTORY OF PLEAS OF THE CROWN 629 (P.R. Glazebrook ed., Prof’l Books Ltd. 1971) (1736)) (alteration in original).
85. See id.
by their husbands. What has come to be known as “woman abuse,” however, goes beyond rape and includes all forms of battering, both physical and psychological. Today, it “is the single largest cause of injury to women in the United States.” Despite the prevalence of domestic violence, no effective means of controlling and punishing it has emerged. The civil remedy provision of the Violence Against Women Act of 1994 was invalidated by the Supreme Court as beyond the power of Congress to implement the Fourteenth Amendment and not within its power to regulate commerce.

The law’s view of marriage and the married woman has changed dramatically in the past thirty years. This overview of reforms in the law of marriage and its surrounding regulatory areas discloses that the married woman is no longer required to take her legal identity from that of her husband. Rather, she is an independent legal agent with the power to choose her own role in marriage and to determine how she will combine that role with her public obligations as a citizen. It remains to determine whether her new status is accurately reflected in the view of marriage found in the 2003 federal welfare law.

III. A NEW VISION OF MARRIAGE AND DIVORCE

Towards the end of the thirty year period under discussion, a new institutional actor entered the arena of divorce reform. The American Law Institute (“ALI”) began planning its project on family dissolution in

88. See DIANA E.H. RUSSELL, RAPE IN MARRIAGE 90 (1982).
90. United States v. Morrison, 529 U.S. 598, 632 (2000) (Souter, J., dissenting) (internal quotation marks and citation omitted). Quoting from the Congressional findings accompanying the Violence Against Women Act, Justice Souter directs attention to statistics indicating that “[t]hree out of four American women will be victims of violent crimes sometime during their life” and that “[v]iolence is the leading cause of injuries to women ages 15 to 44.” Id. at 631 (citations omitted).
91. See id. at 632. “An estimated 4 million American women are battered each year by their husbands or partners. Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners. Between [two thousand] and [four thousand] women die every year from [domestic] abuse. Arrest rates may be as low as [one] for every [hundred] domestic assaults.” Id. (citations omitted).
93. See Morrison, 529 U.S. at 617, 619, 627.
94. See supra notes 30-35 and accompanying text.
1989, started the drafting process in early 1990, and approved the final
draft of its Principles of Family Dissolution ("Principles") at its May
2000 annual meeting.\(^5\) In addition to path-breaking innovations in
family support, child custody, and property division, the ALI Principles
recognize that family dissolution is not limited to married couples.
Chapter Six creates principles to govern the financial claims of domestic
partners, defined as "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."\(^6\) That such a bold
proposal was put forward by the highly respected ALI has stimulated
both media attention\(^7\) and scholarly comment.\(^8\)

The relevance of the ALI Principles to this discussion lies in its
role in expanding the availability of legal remedies to non-traditional
families. To be sure, Chapter Six imposes these remedies on domestic
partners who maintain a common household with their common child for
a specified continuous period of time\(^9\) if they fail to opt out of its
provisions,\(^1\) leading one observer to suggest that this provision is
probably not what most heterosexual cohabitants want.\(^1\) Still, the
remedies provided in Chapter Six may hold greater attraction for same-
sex couples who cannot marry.\(^2\) In any event, the ALI approach is

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\(^{95}\) See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND
RECOMMENDATIONS (2002) [hereinafter "ALI PRINCIPLES"].

\(^{96}\) See id. § 6.01.

\(^{97}\) See Robert Pear, Legal Group Urges States to Update Their Family Law, N.Y. TIMES, Nov. 30, 2002, at A1. The first sentence of this account reads: "An influential group of lawyers and judges has recommended sweeping changes in family law that would increase alimony and property rights for many divorced women, while extending such rights for the first time to many cohabiting domestic partners, both heterosexual and gay." Id.


\(^{99}\) See ALI PRINCIPLES, supra note 95, § 6.03(2).

\(^{100}\) See id. § 6.01(2).

\(^{101}\) See Margaret F. Brinig, Domestic Partnership: Missing the Target? 4 J. L. & FAM STUD. 19, 20 (2002); see also David Westfall, Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution, 76 NOTRE DAME L. REV. 1467, 1470 ("Imposing marital obligations on parties in an informal relationship is wholly at odds with some of the potentially liberating implications of the Marvin court's decision.")

consistent with developments in other countries that are moving toward an expanded definition of marriage.103

I agree with a critic who has argued that "the Principles would change the way we think about marriage."104 I do not agree, however, with her further point that the ALI Principles will have the negative effect of downgrading and diluting marriage.105 Rather, I suggest that the ALI Principles will have a positive effect on the way we think about marriage by providing a legal framework that enables couples to design their family relationships to suit their individual aspirations as they evolve over time.

To this end, I have proposed elsewhere that we reconceive marriage as a joint venture: an enterprise undertaken by parties with similar resources and interests to achieve a particular goal.106 I argued that, although the joint venture is not an ongoing relationship—a point that distinguishes it from a partnership—it may be renewed to encompass subsequent projects.107 In implicitly rejecting the traditional ideal of marriage as a lifelong affiliation indissoluble except by death, I intended no disrespect for marriage. Rather, I sought its transformation in light of the unilateral nature of no-fault divorce into an institution with the capacity to shelter two individuals and their children who value autonomy and seek to enjoy a shared intimacy for the duration of their common project.

The emergence of covenant marriage towards the end of the twentieth century108 and its legislative adoption in at least three states,109 represents a different approach to marriage. Professor Herbie DiFonzo calls it "the newest weapon of the divorce counterrevolution."110 Professor Katherine Shaw Spaht, the drafter of the first Covenant Marriage Act, forcefully charged that, "[l]aw played an indispensable

103. See Grace Ganz Blumberg, The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State, 76 NOTRE DAME L. REV. 1265, 1281-82 (2000) (mentioning Denmark; Norway; Sweden; Iceland; Greenland; Netherlands; Catalunya, Spain; Aragon, Spain; and France).
105. See id. at 107.
106. See Kay, supra note 11, at 2089.
107. See id.
role in the near-destruction of marriage, so surely it can and must in light of its complicity, contribute to the rehabilitation of marriage—for the sake of the children."  

111 Couples who choose covenant marriage in Louisiana undergo premarital counseling prior to filing a declaration of intent that "marriage is a covenant between a man and a woman who agree to live together . . . for so long as they both may live."  

112 They also agree to take all reasonable efforts to preserve their marriage, including marital counseling.  

113 Divorce is possible only on specified fault-based grounds or on the ground of living separate and apart for two years.  

114 Critics of covenant marriage have shown that one of its chief effects is to bring back the negative aspects of fault-based divorce law that were abolished in the no-fault reforms.  

115 To date, the percentage of couples choosing covenant marriage has remained small.  

Family law in general, and the law of marriage in particular, is at bottom a codification of a society’s attitudes about women. While these attitudes are far from settled, and great regional variations continue to exist even within the United States, the developments of the past thirty years have resulted in a sea change in the social and legal position of women. Today’s women will not easily give up their improved status. As I observed thirty years ago,

[I]t is frequently remarked that one way of reducing divorce is to strengthen marriage. And from the point of view of feminists, marriages are strengthened not merely by family life education, marriage counseling, and conciliation—useful as these things are—but rather by restructuring the institution itself so that it may better accommodate equalitarian relationships. Moreover, if marriage is freer, divorce should become less punitive. A woman who has maintained her independence during marriage and who retains the ability to lead her own life should be better able to recognize an irretrievably broken marriage and to respond by seeking release on equitable terms. It remains only for divorce reformers to recognize this new attitude by

113. See id.
116. See Ira Mark Ellman, Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles, 34 Fam. L.Q. 1, 15 (noting that “[t]he two states adopting covenant marriage [at that time only Louisiana and Arizona] have found that their constituents have had little interest in it. . . .).
giving up fault-finding and punitive financial and custodial provisions in favor of an approach that will allow both spouses to separate, perhaps with regret, but it is hoped without rancor.\textsuperscript{117}

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117. Kay, supra note 18, at 1696.
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