

**THE JURISPRUDENCE OF MARRIAGE  
AND OTHER ADULT INTIMATE RELATIONSHIPS**

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## **Human Dignity: Its Implications for Marriage, the Family and Society**

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Human dignity is a central normative concept in international human rights instruments and is increasingly a feature of modern constitutions. The implications of respect for human dignity in marriage and family law have not, however, been deeply probed. The paper seeks to identify some of the more important issues that arise in this context and to propose possible solutions. It examines the relevance of notions of free will, commitment and autonomy and considers how society can most appropriately give respect to human dignity in the light of these notions.

## **Marrying the Body with the Person in the Law Governing Intimate Adult Relationships**

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The embodiedness of the persons engaged in intimate adult relationships plays too small a role in nearly all family-law-normative proposals regarding such relationships. In large part, this is due to defensible concerns about biological determinism and gender stereotyping. It is also due to a pronounced and ongoing tendency in U.S. family law to support contractual and technological – as contracted with personalistic or organic – responses to personal and social dilemmas facing persons precisely as male, or female or as a heterosexual couple. Contemporary proposals to elevate the legal and social status of heterosexual cohabitation are an important example of this failure to account for human embodiedness. U.S. family law has virtually—but not completely—lost the vocabulary to consider and integrate embodiedness as an intrinsic component of human flourishing, into the conversation about the eligibility of one or another intimate relationship for legal status. Family law can be assisted to recover and to expand its own vocabulary by considering the sophisticated philosophical and theological proposals about the meaning of the embodied person and intimate relationships, offered by Pope John Paul II and other philosophers and theologians, under the heading of the Theology of the Body.

## **What Difference Does It Make If Marriage Is a Sacrament? An Historical Approach**

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The sacramentality of marriage, whether it is asserted or denied, has meant different things at different times in the history of Western thought. This paper will explore the argument that certain features of the western law of marriage, as it existed historically for a rather long period, and to some extent exists today, are easier to

understand if we consider them in the light of the view that marriage is a sacrament. These features include the fact that marriages were thought to be made by the present consent of the parties to the marriage, that marriages were thought to become fully completed when the parties had sexual intercourse following the exchange of that consent, and that they were at that point indissoluble so long as both parties lived. This feature of absolute indissolubility, however, applied only to marriage between Christians. Putting it another way, what distinguishes Western marriage law historically from what is found in whole or in part in other cultures and religions is monogamy, indissolubility, the relative unimportance of the marriage contract as opposed to the marriage itself, and the absence of any requirement that property arrangements or family consents accompany the marriage. Having suggested that these features are best understood in the light of the notion of the sacramentality of marriage, the paper will then go on to question whether that notion fully explains them.

### **The Jurisprudence of Marriage: Recognizing the Uniqueness of Marriage**

Lynn D. Wardle

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The idea of creating a jurisprudence of marriage and other adult intimate relationships assumes that both kinds of relationships share critical characteristics in common that would make it appropriate to treat them equally in the law. This paper will assert that such an endeavor, however interesting it may be, is flawed from the outset because marriage is a unique, and uniquely valuable kind of human relationship that merits unique legal treatment and recognition as an appropriate subject of a unique jurisprudence. A jurisprudence of all adult intimate relationships including marriage would not only unjustly level those relationships but also would hide from the eyes of the law the most socially valuable and legally significant attributes of marriage.

### **Basic Principles of Legal Recognition: Veracity and Respect**

Scott FitzGibbon

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Judges, and all who speak for the law, have a duty to uphold standards of truthfulness and respect. They must avoid mendacity, and they should eschew commentary which explicitly or by implication unfairly denigrates those who are subject to the law. They should give a true account of the matters they discuss, and they should manifest respect rather than denigrating or trivializing those actions and associations which are meritorious. These principles apply with special dimensions when the law concerns itself with socially established forms of association such as marriage. Courts, legislators and other legal officials should eschew the primitive instrumentalism which defines and appraises associational forms in whatever way serves to support a legislative goal. The requirements of veracity and respect demand that they carefully consider, fairly depict, and legally recognize the structure, aims, and merits of such associations.

## **Against Using Law to Validate Moral Claims**

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This paper will argue that law should not be used as a stamp of moral approval and support, in this case approval and support of same-sex unions. The State should avoid taking sides on purely moral issues, such as the meaning of human sexuality, favoring only liberty and robust debate. When the State validates and subsidizes controversial private orderings, without a strong public need to do so, it wrongly discriminates (negatively and positively) against other moral views and orderings. Moreover, in the very act of State validation, the newly validated orderings take on burdens and lose a significant degree of their normative autonomy. Indeed, those who ask for State validation may be doing so out of a conceptual mistake: They may think that the only alternative to full State validation is social annihilation through prohibition or invalidation. This paper will outline and recommend a better alternative, that which I shall call nonvalidation.

## **What's Love Got to Do With It?**

Martha Albertson Fineman

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Marriage is a legal construct that defines the reproductive couple as the core family unit. It presumes the committed and formalized sexual affiliation of adults is the primary and preferred intimate connection. Legal marriage carries with it significant societal benefits and subsidies from the state, not available to those who are not married for whatever reason. How can this form of privilege be justified in contemporary American society with its norms of gender equality and individual privacy? My chapter argues that marriage should be truly private, outside of state regulation and control. As such, people would be free to make their individual commitments to each other through religious or symbolic means, but without some generalized legal manifestation, such as contract, those commitments would carry no automatic consequences enforceable in law. Nor would marriage be set apart from other forms of relationships for special, preferential treatment by the state and its institutions.

Marriage is an antiquated institution, justified by its proponents through a litany of outmoded assumptions and unexamined premises. One of the state's historic interests in the institution was to use the regulation of marriage and divorce to mediate relations of dependency between husbands and wives. Since wives are no longer deemed dependent persons—at least not by the state—who are confined to home and hearth, this no longer serves as an appropriate rationale for the state's involvement in marriage. Nor does the nature of the institution provide a reason for privilege. Marriage has been largely

deregulated, at least in terms of its stability and duration. Divorce is now freely available without state limitation as to the reasons or necessity for a determination of fault. And given aspirations of gender equality, which posit that couples are capable of making their own marital terms and freely deciding when and for what reasons to dissolve their relationships, it should be they, not the state, who make determinations about the contours and implications of their relationship.

But the inadequacy of marriage as a state-sponsored framework for the delivery of benefits and privileges does more than fail individual couples (both inside and outside the framework). In fact, marriage as a legal construct causes harm in the body politic. It simultaneously channels people into it at the same time that it further exacerbates existing social inequalities. Marriage drags along with it certain historic assumptions about the institution and its members that limit the coherent development of family policy. Most significantly, marriage impedes policy formation necessary to protect children and other dependent persons. Caretakers struggle to meet their responsibilities in a state that maintains myths about autonomy and self-sufficiency built largely on the shifting sands of an idealized and unsustainable view of marriage as the appropriate repository for dependency rather than the state and its institutions. Marriage has become the simplistic and ineffective policy fallback for social conservatives who resist the idea that the state has an unmet responsibility for the wellbeing of its citizens that cannot be mediated by other social arrangements. Marriage has been offered as the social policy resolution for poverty in welfare debates, as well as the solution for crime, juvenile delinquency and so on. The existence of the institution and assumptions surrounding it distort our policy and politics, and its theoretical availability interferes with the development of more focused solutions to social problems involving dependency and the need for caretaking.

In these circumstances, the questions remain: what is, and what should be, left of marriage as a status in modern American society? What societal purposes could state intervention and regulation of marriage serve in a no-fault, prenuptial, gender-egalitarian world? Shouldn't private lives be left to private ordering – to contract? This Chapter addresses these questions.

### **Toward a Pluralist Regulation of SPOUSAL Relationship**

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This article addresses the regulation of the economic relationship between unmarried cohabitants. It criticizes the current legal approaches to cohabitation, and ultimately offers a new legal model. The proposed model is based on pluralist theory which emphasizes the responsibility of the liberal state to create a variety of spousal institutions that offer meaningful choices to individuals. As the article shows this theory goes well behind the case of cohabitation law and provides the entire block for innovative pluralist regulation of spousal relationship.

**Same Sex Marriage—from Privacy to Equality**  
**The Failure of the “Equality” Justifications for Same Sex Marriage**

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In order to present my thesis regarding equality in the context of marriage, I begin with a brief introduction (Part I) that provides the launching point for considering a background that underlies the present chapter (Part II). I next proceed to a recap of an examination of some fundamental precepts regarding the legal notion of equality that were vital to the Framers (Part III). I then examine these fundamental ideas within the context of two cases that provided a crucial foundation for *Goodridge v. Department of Public Health* (the Massachusetts case in which same-sex marriage was judicially recognized), i.e., *Planned Parenthood v. Casey* and *Lawrence v. Texas* (Part IV). My analysis of *Casey* and *Lawrence* should reveal the substantial flaws in the reasoning of these two cases that were relied upon by same sex-marriage advocates to search for new Constitutional claims that would support the campaign for same-sex marriage. In essence, the *Casey* and *Lawrence* opinions provided the liberty-equality axis that led to *Goodridge*. This fourth component of my chapter provides the framework for testing the equality claims made in the advancement of same-sex marriage adopted in the *Goodridge* decision. But the equality claims and the justifications underlying them are built upon the unstable claims of proclamations *Casey* and *Lawrence*. Ultimately, the rationales of *Casey* and *Lawrence* inevitably fail when applied to the “equality” argument supporting same-sex marriage (Part V). This component of the present essay results in the inexorable conclusion that the argument based on equality cannot sustain the institution of same-sex marriage. I offer some final remarks in my conclusion (Part VI).

**Marriage, Households, and Social Cooperation**

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My paper will explore models of the household as a place in which members cooperate and perform certain functions in order to achieve certain ends. This inquiry is relevant to the question of the jurisprudence of marriage because some classical models of the household, such as those of Aristotle’s *Politics*, posit the household as the first, and most basic, association, in which husband and wife carry out different functions in order to meet needs and achieve certain goods. The relationship between husband and wife was one of natural inequality. Contemporary arguments for why marriage must be between a man and woman generally eschew this appeal to natural inequality as hierarchy, but sometimes justify the gender binary requirement in terms of complementarity, which is rooted in biological difference but may also spill over into differences in parenting and in modeling two different ways of being human. Defenses of marriage as a unique conjugal relationship tend to distinguish between marriage and

other household forms. My paper will look at the themes of social cooperation and gender complementarity both in Aristotle and in some more recent models of marriage. I will also consider some of the economic and gender and development literature on the household as a site of competition and cooperation. The paper aims to advance a feminist conception of the household and of social cooperation, which would support a more inclusive definition of marriage. It will also look at whether a jurisprudence about the household can help to develop a helpful way to consider forms of intimate relationship other than marriage, such as between friends (e.g., women supporting each other as they age), siblings, nonmarital cohabitants, or multi-parent families formed by same-sex couples.

### **Refounding the Liberal Family**

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We are prone to forget that the ‘family values’ often trumpeted today presuppose the destruction of family values in their traditional form, which emphasized the authority of fathers, and often set family against family at the expense of common citizenship. In fact, classic liberal theory is as deeply concerned with the family as it is with property and the social compact. Today’s model of the ‘normal’ family is itself at least partly the result of successive liberal efforts to refound the family from the ground up. Partly owing to the political and rhetorical success of these earlier liberal thinkers, we are inclined to view the family as a pillar of society rather than as the shaker and destroyer it has sometimes been. My paper will investigate these successive efforts of refounding, with a view to better understanding the dilemmas and opportunities that confront liberal societies today.

### **Liberalism and Conjugal Society**

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Together with religion, the family has always loomed as one of the central problematics for the liberal tradition. Liberals of all stripes agree that liberalism can be seriously derailed by flawed accounts of the relationship between the state and the family. Tocquevillian liberals argue these two domains of human life are pillars of a robust civil society vital to the flourishing liberal democracy. The state, in this view, must maintain a critical and respectful distance from the deep social diversity generated by these non-political forms of human life. Millean liberals argue that this intimate sphere of life lays the foundations for relationships ordered by justice, freedom and equality. The state must maintain a critically attentive interest and involvement in the intimately political domain of life.

Millean liberalism in all its modern variants works towards deconstructing arguments in defence of the historic concept of “conjugal society.” For some liberals, the

last and best line of defence for the conjugal society rests in some form of Tocquevillean or communitarian liberalism. This essay argues that Tocquevillean arguments aimed at shielding marriage from state intervention by concealing it within civil society cannot offer meaningful support for this legal conception of marriage.

Arguments for the “naturalness” of conjugal society were the traditional grounds from which classical liberalism attempted to mount a defence for the distinctiveness, integrity and autonomy of this form of life in relation to civil, religious, or political society. Given the fact that the concept of the “natural” has been subject to such serious deconstruction in contemporary law and political theory, it is not surprising that reconstructions of liberal arguments for conjugal society have veered away from any discourse of the ‘natural’ character of this form of social life. This essay argues that prospects for a coherent liberal argument in defence of this historic conception of the family as a “conjugal society” may hinge on a critical re-engagement with, and renewal of, a discourse on the “natural” dimensions of our human socio-sexual ecology. If this line of argument is doomed to fail given the current context of public debate, then some form of legal disestablishment may be the only viable alternative for liberals wishing to provide safe space for the historic forms of marriage in contemporary liberal democracies.

### **Reflections on Cousin Marriage: A Rationale for Getting Married**

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Britain's immigrant population, largely from Pakistan, has a culture (not religious but social) of marriage to a cousin, often invited to Britain from the home country for this purpose. Statistics and anecdotes reveal a higher than average rate of genetic abnormalities in the births of children to parents who are cousins. There are great difficulties in discussing this issue because it may be seen as racist or anti-immigrant; it is apparently a strongly held belief amongst those affected that it is safer, culturally and financially, to marry a close relative; there is a failure to understand genetic issues and sometimes a fatalistic acceptance of the medical problems; there is a failure to find ways to explain the genetic issues to the affected populations. How does one address the culture of specific marriage patterns within a minority population? Can one persuade those groups that marriage to unrelated persons is better from the health point of view? Should the marriage of certain relatives be banned? Is there any point in such a prohibition, given that people may cohabit and procreate without marriage, provided that they are not within the incestuous groups. Is there a link with forced marriages and domestic violence? What is a good reason for getting married - and preferring marriage to cohabitation - and can one system of family law deal satisfactorily with the issues that arise when those unions fail, or should religious law be given a place?

## **Sisterly Love: the Importance of Expressed Commitment in the Legal Recognition of Personal Relationship**

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In *Burden v. United Kingdom* (29 April 2008), the European Court of Human Rights considered the ECHR rights of two English sisters who had lived together for their whole lives. The sisters argued that their Convention rights were breached by the discrimination in inheritance tax rules as between their situation and the situation of married couples or civil partners. The Court rejected this argument. This paper analyses the judgment of the Court with a view to exploring two particular issues in greater depth. First, is the expression of presumptively life-long inter-personal commitment a necessary condition for the legal recognition of personal relationships? Second, what is the appropriate role of the law in recognizing inter-personal commitment at all?