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"CONTRACT THINKING" WAS MARVIN'S FATAL FLAW

*Ira Mark Ellman**

*Marvin v. Marvin*¹ held that claims that unmarried partners might have against one another at the conclusion of their relationship would be governed primarily by principles of contract law.² That is, they would have such obligations to one another as they had previously agreed they would have, no more and no less.³ When *Marvin* was decided in 1976, it was greeted by most commentators as a just development, as well as a liberating one.⁴ It was seen as just in comparison to the alternative of allowing no financial claims at all between unmarried cohabitants whose relationship had ended (an alternative

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1 557 P.2d 106 (Cal. 1976).

2 *See id.* at 122.

3 This is a bit of an oversimplification. The court also permitted reliance upon the contract-allied doctrine of quantum meruit, as well as the equitable doctrine of constructive trust. *See id.* at 116–22. Neither in fact adds much, however. Quantum meruit is of very limited utility, as commentators soon pointed out. *See generally* Grace G. Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1165–66 (1981); Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 51–54 (1978). The doctrine of constructive or resulting trust in fact creates no new claims, but is simply the name given to one remedy that is available to a plaintiff who shows that the defendant holds legal title to property that is properly treated as the plaintiff's. The important hurdle, of course, is the initial showing of entitlement to the property to which another holds title, and the court's mention of the constructive trust remedy does not itself provide any basis upon which a cohabitant could make the showing that entitles one to it. Footnote twenty-five of the *Marvin* case seemed to invite the development of new equitable remedies, but that potential was cut short on the *Marvin* remand itself. *See Marvin*, 557 P.2d at 123 n.25. The trial judge to whom the *Marvin* case was remanded attempted to fashion such a remedy for Michelle Marvin, after finding she had no claim in contract, but was reversed. *Marvin v. Marvin*, 176 Cal. Rptr. 555, 558–59 (Ct. App. 1981). The appeals court noted that the trial court's attempted award, being "nonconsensual in nature," required support from "some recognized underlying obligation in law or in equity." *Id.* at 559. But there was no such obligation.

4 *See, e.g.*, Herma H. Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 937, 968–77 (1977).

chosen three years later by the Illinois Supreme Court⁵). Writers concerned with the impact of unmarried cohabitation on women were, perhaps, thus particularly pleased, apparently assuming that *Marvin* would protect these women from the financial penalty they might otherwise suffer when their higher-earning male partners chose to leave.⁶ *Marvin* was also seen as liberating, however, in comparison to a different alternative holding considered but rejected by the California Supreme Court, that of assimilating unmarried cohabitants into the legal regime of marriage.⁷ This alternative was later chosen by the Washington Supreme Court⁸ and more recently by the American Law Institute.⁹ California's choice of a contract remedy was seen as giving options to partners in intimate relationships, options that would allow each couple to ensure that the law took proper account of the way they had chosen to fashion their particular relationship.¹⁰ Other writers, perhaps inspired by this development, urged that marriage itself be reconceptualized in contract terms, so that all intimate partners, not just those who declined to marry, could benefit from the diversity in formal relationships that contract would make possible.¹¹ One widely-noted book offered a variety of contractual forms to facilitate the choices.¹² While contracts scholars were writing (prematurely, as it turned out) about the field's decline as a separate source of obliga-

5 See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979) (holding that a financial claim was barred by public policy implicit in the statutory scheme).

6 The *Marvin* doctrine was initially urged in part on that basis by Professor Carol Bruch, whose writing was influential with the court. See Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 125-26, 134-36 (1976).

7 See *Marvin*, 557 P.2d at 120.

8 Washington's assimilation of cohabitants into the legal regime of marriage applies only to the community property system, not to claims for post-relationship support. Recent applications of the Washington rule include *In re Marriage of Lindemann*, 960 P.2d 966 (Wash. Ct. App. 1998), and *Koher v. Morgan*, 968 P.2d 920 (Wash. Ct. App. 1998). The rule was developed by the Washington Supreme Court in the cases of *In re Marriage of Lindsey*, 678 P.2d 328, 332 (Wash. 1984) (holding that property acquired by intimate partners during their nonmarital relationship should be divided equitably between them), and *Connell v. Francisco*, 898 P.2d 831, 837 (Wash. 1995) (extending *Lindsey* to hold that courts should presume that property acquired by unmarried partners during the cohabitation period should, like community property acquired during marriage, be presumed to be jointly owned by the couple).

9 See *infra* notes 22-23 and accompanying text.

10 A thoughtful piece along these lines is Kay & Amyx, *supra* note 4.

11 See, e.g., Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 328-34 (1982); Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121, 139-53 (1985).

12 See LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* (1981).

tion,¹³ family law scholars were welcoming contract as the way to shed what was seen as family law's quaint, stultifying, and gender-bound reliance on concepts of status.¹⁴

There were, however, a few voices dissenting from this triumph of contract over status,¹⁵ and I believe time has vindicated them. The lesson learned from the legacy of *Marvin* is that contract is a poor model for intimate relations. Old-fashioned status rules, updated as needed to shed gender-role rigidities, are far better. That is the central point of this brief Essay.

I.

The main defect with contract as the conceptual underpinning for claims between intimate partners is that couples do not in fact think of their relationship in contract terms.¹⁶ Perhaps the most obvious symptom of this defect is that decades of urging by contract enthusiasts have led few couples (married or unmarried) to make express contracts at all, much less comprehensive contracts intended to capture what their relationship is all about.¹⁷ The paucity of ex-

13 See GRANT GILMORE, *THE DEATH OF CONTRACT* 65-85 (1974).

14 See *supra* note 11.

15 See, e.g., Blumberg, *supra* note 3, at 1159-70; Ruth L. Deech, *The Case Against Legal Recognition of Cohabitation*, 29 INT'L & COMP. L.Q. 480, 494-97 (1980). I was also an early skeptic. See my discussion of contract in Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 13-40 (1989).

16 I will return to and amplify this point, see *infra* Part II, but I wish first to explore why it matters.

17 Real data on the frequency of contracting are scarce, but the basic claim is not in serious dispute. Certainly written agreements between cohabitants are rare among the reported cases, and while express oral agreements are easier to allege, the claim is usually disputed and generally rejected. See, e.g., *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 898-900 (Ct. App. 1993) (holding that an implied agreement was not supported by the evidence). The thoughtful observer might nonetheless suggest that couples with express agreements might still be a large portion of all unmarried couples, even if they are uncommon among reported cases, because the very fact of their express agreement makes litigation between them less likely. Those working in this area on a day-to-day basis suggest otherwise, however. For example, Frederick Hertz, an attorney in the San Francisco Bay Area whose practice focuses on unmarried couples, both gay and heterosexual, told me that in his experience the proportion of such couples who enter written agreements is "miniscule." Interview with Frederick Hertz, Of Counsel, Margolin & Biatch, in Berkeley, Cal. (Mar. 13, 2001). He also observed that a larger proportion seek advice on written agreements at some point and may even hire an attorney to draft one, but in the end they do not execute it. *Id.* For more on Hertz's practice, see Fredrick Hertz, *Legalize Your Relationship with Pride*, at <http://www.samesexlaw.com/index.html> (last modified Feb. 9, 2001).

More common, although still a small minority, are agreements between intimate partners that have a more narrow scope. Premarital agreements meant to limit or

press contracts for intimate relationships leads directly to the defect's more serious legal consequence: courts have no sensible rule to apply in dealing with end-of-relationship disputes between the typical unmarried partners who have no express agreement. Some courts hold that in the absence of an express agreement there can be no claim at all,¹⁸ but more seem to follow *Marvin* and ask whether an agreement between parties can be implied from their conduct.¹⁹ The difference between these two approaches may be more apparent than real, however. If couples do not in fact think of their relationship in contract terms, then a doctrine that directs courts to decide their disputes by looking for a contract is unlikely to find one. This should lead the observer to question whether the inquiry is misdirected from the start. Do we want courts to think broadly about the rules that yield a fair dissolution of an unmarried couple's relationship, or do we want to limit courts to searching the parties' conduct for evidence that at some point in the past they agreed upon terms that should now govern their mutual obligations?

The contract inquiry is obviously the more narrow one, for contract focuses on one particular aspect of fairness, keeping one's promises. The very idea of contract is to bind parties now to terms that they agreed upon earlier, to require the later self to remain true to the earlier self's commitments. Our willingness to allow persons to

avoid some of the legal consequences of marriage are familiar, and in recent years, unmarried couples have similarly entered, on occasion, "anti-*Marvin*" agreements. See, for example, the agreement in *Wilcox v. Trautz*, 693 N.E.2d 141 (Mass. 1998). A contract with the focused purpose of avoiding particular consequences that the law might otherwise attach to the parties' relationship is a very different item, however, than the kind of agreement envisioned by *Marvin* and those who welcomed its coming. Under the *Marvin* rubric, the contract is the sole source of any obligations between the partners, not a limit upon obligations the law may otherwise treat as arising from the relationship.

18 *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980), is the leading example of a court requiring express agreements but otherwise following *Marvin*. See also *Tapley v. Tapley*, 449 A.2d 1218, 1219 (N.H. 1982) (refusing to recognize implied contracts for homemaker services). Some legislatures responded to *Marvin* by requiring written agreements for claims between unmarried partners, which are more restrictive, since *Morone* accepts express oral agreements. See, e.g., MINN. STAT. ANN. §§ 513.075-.076 (West 1990); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (Vernon 1987). But other states rejected similar legislative proposals. See Carol S. Bruch, *Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial-Legislative Interaction*, 29 AM. J. COMP. L. 217, 226-27 (1981).

19 Cases in which courts followed the broader *Marvin* approach include *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1331-32 (Ind. Ct. App. 1980) (allowing recovery on express or implied contract); *Goode v. Goode*, 396 S.E.2d 430, 435-38 (W. Va. 1990) (same); and *Watts v. Watts*, 405 N.W.2d 303, 310 (Wis. 1987) (same).

bind themselves in this way depends in important part on our assumption that individuals have the capacity to determine for themselves whether it is in their interest to make such a commitment about their future conduct. With respect to individuals for whom we doubt that factual assumption, such as children, contractual promises are not binding.²⁰ Yet, there is considerable social science evidence that perfectly competent adults lack the capacity to evaluate rationally the contractual commitments involved in an agreement about the consequences that should flow from the dissolution of their intimate relationships—a dissolution which they do not expect to occur and which may well occur, if it does occur, many years in the future when their lives are dramatically different.²¹ Relationships develop over time in ways that competent adults will often fail to anticipate and that may change their lives fundamentally. These considerations were important to the recommendations in the American Law Institute's recently promulgated *Principles of the Law of Family Dissolution* that courts consider whether injustice will result from the enforcement of a premarital agreement when it was made years before its enforcement is sought or before the contracting parties had children together.²² The Institute's position, in fact, reflects the treatment of premarital agreements by many American courts.²³

If such concerns over the ability of spouses to foresee the long-term consequences of premarital agreement require limits on their enforceability, then surely those same concerns also cast doubt on any rule that would decide claims between unmarried partners by reference to express contracts they made years earlier. Even more doubtful would be a rule directing the court, if there is no express contract, to decide the claim by attempting to plumb the intentions that the parties may have brought to the relationship years before their current dispute arose. Contracts bind parties forever to the terms they agreed upon at execution, and this static conception of obligation is unsuited to the realities of intimate relationships.²⁴

20 See RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 14 (1979).

21 See in particular Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 254-58 (1995).

22 See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES (Tentative Draft No. 4)]. The Family Dissolution Principles were approved for final publication by the Institute at its annual meeting in 2000, and publication of the final version is expected in 2001.

23 See *id.* § 7.05 Reporter's Notes.

24 Some have argued that this is an oversimplified idea of contract and that intimate relationships can be understood as "relational contracts," relying upon a literature on that topic. See, e.g., Margaret F. Brinig & Steven M. Crofton, *Marriage and*

One need only look at some of the cases to see how far a contract rubric takes one from results that sensibly and fairly coordinate with actual human behavior. *Friedman v. Friedman*,²⁵ a California case, was decided nearly twenty years after *Marvin*, but involved a couple (Terri and Elliott) who began living together in 1967, before *Marvin* had been decided.²⁶ Children of the 1960s, they did not believe official marriage necessary for the lifetime commitment they intended and so vowed to be "partners in all respects 'without any sanction by the State.'"²⁷ They purchased property in Alaska as "Husband and Wife," had two children together, and in the late 1970s moved to Berkeley where Elliott attended law school and prospered economically.²⁸

By 1982, their attitude about relationships had perhaps changed, because they made plans to marry.²⁹ Yet when bad weather kept Elliott from returning from a business trip in time for the wedding, it was never rescheduled,³⁰ suggesting perhaps that the interest in marriage was not entirely mutual. By the mid-1980s, Terri, who had performed the classic homemaking role throughout their relationship, became

Opportunism, 23 J. LEGAL STUD. 869, 881-83 (1994). The most ambitious effort of this kind is probably Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998). But while the concept of relational contracting may be of assistance to an economist or sociologist seeking to understand the behavior of parties in long-term relationships, it provides little or no assistance to courts asked to decide real cases framed as contract disputes. Either the parties had an agreement that governs their particular dispute, or they did not, and the literature of relational contracting does not offer courts much assistance in deciding this question. Those who deal with one another repeatedly in commercial transactions may surely make adjustments in response to changing circumstances in order to preserve a commercial relationship they both find beneficial. But this observation cannot offer any help in formulating new or different rules of contract law by which to govern their disputes, if they have them. If one of the parties ceases to see the relationship as sufficiently beneficial to warrant further adjustments and decides instead to take his or her business elsewhere, the relational contract literature cannot justify reliance on any new or special contract principle by which to give the other party a claim for breach. This point is well-made by a leading contracts scholar in Melvin A. Eisenberg, *Relational Contracts*, in GOOD FAITH AND FAULT IN CONTRACT LAW 291, 296-98 (Jack Beatson & Daniel Friedman eds., 1995), and in Melvin A. Eisenberg, *Why There is no Law of Relational Contracts*, 94 NW. U. L. REV. 805, 818-21 (2000). I have made these points before. See Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 745-47.

25 24 Cal. Rptr. 2d 892 (Ct. App. 1993).

26 See *id.* at 894.

27 *Id.*

28 See *id.* at 894-95.

29 See *id.* at 895.

30 *Id.*

disabled with serious back problems.³¹ Their relationship apparently deteriorated with her back, and in 1992, Terri filed a legal complaint seeking equitable relief, including support.³² The trial court found the parties had an "implied contract" providing that if they separated Elliott would support Terri in the same manner as if they had married and, accordingly, ordered temporary support pending final determination of Terri's claim.³³ The couple had no express agreement defining the obligations they would have to one another at their relationship's end, and the appeals court, plausibly enough, held the evidence of implied agreement also insufficient to sustain the trial court's order.³⁴ Indeed, the parties' decision to live together "without any sanction by the State" was inconsistent, the court concluded, with Terri's claim that they agreed to be bound by the support rules applicable to marriage.³⁵ As Elliot said of Terri's claim for post-relationship support: "That was not part of our life. It was not part of what we were doing. . . . [W]hen we split up, we split up."³⁶

Even those most sympathetic to Terri's claims must concede that Elliot's understanding of the couple's arrangement, at the time they decided to live together, was entirely plausible. Young persons in their twenties, with no children, few responsibilities, and many prospects in front of them, may see little reason to bind themselves to lifetime obligations that could outlast their mutual affection. But for Terri, 1967 is then; 1992 is now. Much of a lifetime has passed. Should the law really say that after twenty-five years together raising two children, Elliott can leave their relationship lucratively employed and with no obligations at all to Terri, who has become disabled, because she cannot show that at some earlier time he had entered into a contract agreeing to them? Some might argue that the problem is that the court is looking for the wrong contract. It need not find an agreement about post-relationship obligations; it need only find an agreement to have the relationship itself, an agreement it could then conclude that Elliot has breached, leaving him liable for support. But that analysis is no better, for it is hardly certain that Elliot is in breach of any such agreement. Maybe, after all, they agreed to stay with one another only so long as love endured, and neither of them is in breach. Or maybe Elliott can argue that some aspect of Terri's recent conduct violates their 1967 understanding, putting her in breach,

31 *See id.*

32 *See id.* at 893-94.

33 *See id.* at 894.

34 *See id.* at 896-99.

35 *See id.* at 899.

36 *Id.* at 895.

even if he is the one who wishes to leave. Can the 1992 court really reconstruct the 1967 understanding or even, if one were claimed, a revised 1977 version? As I said years ago in a different context:

Indeed, one might well argue that couples divorce precisely because they discover, as specific issues arise after some years of marriage, that in fact there never was a clear contract, that they do not have the same understanding of their mutual commitment. Although they had an agreement of sorts, it was at a level of great generality. Mutual love, mutual support, mutual respect, are all commitments newlyweds might readily agree they undertook, even though they differ later in their understanding of the concrete consequences of those commitments. A court would typically have no basis for deciding which understanding was correct. The spouses' "agreement" was simply too vague to provide a court with sufficient guidance to determine whether it has been breached.³⁷

Sociologists tell us that, in the United States, long-term relationships between unmarried cohabitants are not the norm; such persons usually either split up or marry.³⁸ But cases involving long-term cohabitations do exist, and surely a doctrine intended to work justice at the dissolution of cohabiting relationships ought to deal aptly with them. The *Marvin* doctrine does not. There are other cases like *Elliott's* and *Terri's* with similar results.³⁹ There are also cases in which the court responds to similar facts by stretching contract doctrine beyond recognition in order to justify a remedy,⁴⁰ as the dissenting judge urged in *Friedman* itself.⁴¹ Either response would seem to indi-

37 Ellman, *supra* note 15, at 20.

38 There are many studies replicating this finding. One is Wendy D. Manning & Pamela J. Smock, *Why Marry? Race and Transition to Marriage Among Cohabitants*, 32 *DEMOGRAPHY* 509, 512 (1995) (finding that 81% of heterosexual, cohabiting unions end within four years, because the parties either marry or split up). For similar British data, see John Haskey & Kathleen Kiernan, *Cohabitation: Some Demographic Statistics*, 20 *FAM. L.* 442, 442-43 (1990).

39 Other cases involving long-term relationships for which the contract rubric provided little basis for relief, despite compelling equitable claims, include *Rissberger v. Gorton*, 597 P.2d 366, 370 (Or. Ct. App. 1979) (reversing a trial court finding of intent to share equally a duplex and other personal property), and *Featherston v. Steinhoff*, 575 N.W.2d 6, 10-11 (Mich. Ct. App. 1997) (involving an eight year relationship that produced a child; reversing a trial court finding of implied contract of support).

40 See, e.g., *Kozlowski v. Kozlowski*, 403 A.2d 902, 906-07 (N.J. 1979) (finding the man bound by an express agreement to provide support for the woman when, in the course of their relationship, he said he would provide for her for the rest of her life, if she would return and live with him). For criticism of the contract logic of *Kozlowski*, see Ellman, *supra* note 15, at 21-23.

41 "The result reached by the majority may be, in the eyes of some, good law; it is lousy justice." *Friedman*, 24 Cal. Rptr. 2d at 896 (Poche, J., dissenting).

cate a mismatch between the problem (what do people owe one another when it is over?) and the doctrine these courts employ to deal with it.

II.

Let me now return to examine further my central premise, that people do not think of their intimate relationships in contract terms. We surely do think of successful marriages and marriage-like relationships as reciprocal, which can easily seem like "contractual." But contract involves more than reciprocity; it involves a bargained-for exchange.⁴² The difference is central. There is reciprocity when I pick up the tab at lunch with a friend. Perhaps he paid last time, or perhaps we have spent lunch discussing my plans for my son. Either way, I want to pay down my social debt. There is a bargained-for exchange, on the other hand, as between my friend and I and the restaurant. When we ordered, we made a deal: if you bring us hamburgers, we will pay you the price shown on the menu. This deal is a discrete item, which is not to say that repeat customers cannot develop fuller relationships with their vendor: I might be more likely to tolerate one day's badly charred burger, and the restaurateur more likely to react civilly when I ask to pay tomorrow. But none of this changes our understanding about the bill for lunch. When I pay, I satisfy a legal debt, not a social one. Commercial actors can exchange all the civilities in the world, and may even be friends in other contexts, but business is business.

Now, the confusion in the law arises from the fact that while marriages (and domestic partnerships) are quite obviously more like friendships than hamburgers, they also give rise to legally enforceable obligations, which lead some people to forget the obvious and think they are like hamburgers after all. The error apparently arises from the mistaken assumption that the legal obligations arising from marriage must have their source in a bargained-for exchange. The mistake is probably facilitated by the fact that the reciprocal nature of a successful marriage gives it a superficial resemblance to a bargained-for exchange, which is, after all, the source of so many legal obligations. But we must remain clear about the difference. Lunch with my friend may leave me with a sense of social debt that is real, but non-

⁴² As the *Restatement of Contracts* explains, "the typical contract is a bargain" and "the two essential elements of a bargain [are] agreement and exchange." *RESTATEMENT (SECOND) OF CONTRACTS* § 17, cmt. b (1979). While some contracts are not bargains, such as a promise made under seal to make a gift, they are atypical, subject to special rules, and not relevant to the question considered here. *See id.* § 3, cmt. e.

specific. My opportunities to reciprocate may vary from paying for lunch to helping my friend's brother prepare for a job interview, and for each of us gauging what is appropriate to offer or expect is an important social skill. Our debt to the restaurant is not so open-textured. Friendship involves communicating interest in and concern for one another's welfare over a longer time horizon; opportunities to reciprocate may not present themselves in a convenient sequence for turn-taking. The debt to the restaurant, by contrast, involves paying \$23.37—now.

So contractual obligations are well-defined in both time and nature, while the reciprocities expected in close social relationships are not. Contractual obligations are discrete while social obligations are embedded in a larger relationship on which they depend for their existence and meaning. The strength of a friendship may be inversely proportional to the extent to which either party feels a need to keep careful tabs on favors extended or received. There is indeed some recent data on marriages that make this very point. As the sociologist Steven Nock has observed in interpreting that data, "[K]eeping the mental books . . . is dangerous for a marriage."⁴³ If lovers have bargains, they are complex emotional bargains in which they themselves may not easily identify the quids and quos. Sociologists have found that even though wives almost always do much more of the housework, most wives believe this division of labor is fair.⁴⁴ Not equal—fair. How can wives believe this? Presumably because they see a marital relationship as a whole, not as a series of discrete transactions, and believe that in this whole, both partners are contributing. They also see marriage, as Nock observes, as existing over time, with a past and a future, in which the balance sheet need not tally day by day.⁴⁵ Husbands undoubtedly make similar kinds of assessments. How else could so many husbands who work long hours providing the lion's share⁴⁶ of the family's income simultaneously feel they gain so much from their marriages? And of course if they feel that way, who is to

43 Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1981 (2000). Nock gives a summary account of the data here; it is more fully presented, he tells us, in a forthcoming piece. See *id.* at 1977 n.15.

44 Nock gathers these studies. See *id.* at 1977, 1981–84.

45 *Id.*

46 I use the phrase with intentional irony and whimsy. Many years ago, I had the good fortune to spend some time observing lions in the wild in several East African game parks. I there learned what is apparently conventional wisdom among naturalists, that all the real hunting is done by the lioness. The lion is occasionally pressed into service to roar loudly at a herd of surprised wildebeast, sending them running in the direction of the hidden and waiting lioness. But whether she has such assistance or not, it is the lioness who always makes the actual kill. Among lions, in other words,

gainsay them? Nock guesses, quite plausibly I believe, that most husbands think it fair that they are expected to work for pay even if their wives are not.⁴⁷

The point here is that the successful marriage, and by extension the successful domestic partnership, is not based upon the parties' compliance with any agreement explicit enough in its terms for the law sensibly to treat it as a contract. The successful intimate relationship is reciprocal, but not contractual. This intuition would seem to lie behind the old rule, still seen in the cases, that services rendered in the course of a nonmarital "meretricious" relationship are presumed to have been provided gratuitously, and not with any expectation of repayment.⁴⁸ On the one hand, this characterization often seems jarring, because the relationship is reciprocal, and services are not donated by one party to the other in isolation from assumptions that the relationship will continue and is important in the lives of both partners. On the other hand, because long-term intimate partners do not in fact usually provide services for one another as part of a bargained-for exchange, the presumption that services are rendered "gratuitously" is probably correct as a matter of contract law.⁴⁹ Mutual gifting arising from mutual concern and affection is not the same as a bargained-for exchange.

These points, of course, apply equally to married partners, which tells us that the legal claims allowed between former spouses are not based upon contract, but something else. What else? The legal duties that arise when people's lives become entwined. Relationships are themselves the source of legal duties, without the need for any assistance from contract. This is not a new idea. Landlords and tenants, employers and employees, neighbors, lawyers and clients, and doctors and patients all incur legally enforceable duties to one another arising from their relationships.⁵⁰ They may have a contract which itself cre-

the lioness provides the lion's share of the family income. So much for the folk wisdom inherent in traditional metaphors.

47 Nock, *supra* note 43, at 1977.

48 A recent example is *Featherston v. Steinhoff*, 575 N.W.2d 6, 9 (Mich. Ct. App. 1997). See also *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) ("The major difficulty with implying a contract from the rendition of services for one another by persons living together is that it is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously.").

49 See *supra* note 42 and accompanying text.

50 In making the decision whether a duty is justified, courts have recognized the existence of a relationship between the parties as a primary factor. Of course, it is true that even in the briefest of encounters with relative strangers, the law imposes upon each person an obligation to use due care. See, e.g., *Rodriguez v. Bethlehem*

Steel Corp., 525 P.2d 669, 680 (Cal. 1974) (discussing the general principle that each person owes a duty of due care to all those who are at foreseeable risk of his unreasonably harmful conduct); *Sargent v. Ross*, 308 A.2d 528, 530 (N.H. 1973) (noting the general principles of tort law that ordinarily impose liability upon persons for injuries caused by their failure to exercise reasonable care). When a more established relationship is involved, additional obligations may arise. These duties are not based upon contract or agreement, but upon the relationship itself. For a sophisticated philosophical examination of this process, see Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189 (1997), and SAMUEL SCHEFFLER, *FAMILIES, NATIONS AND STRANGERS* (Lindley Lecture 1994). For a sociological perspective on how norms of relational responsibility develop over time between husband and wife, see generally Nock, *supra* note 43, at 1975–80.

In the law, duties arise from relationships in a variety of contexts, including the relationship of doctor and patient, employer and employee, shareholder and corporate officer, landlord and tenant, and business owner and patron. Some are imposed by the common law, others by statute. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986) (finding that employers have a duty to their employees to provide a workplace that is free from discrimination and abuse); *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970) (acknowledging the appropriateness of imposing a duty on landlords to protect tenants from third-party criminal assaults in some situations based on the significance of the relationship, and noting that while the “landlord is no insurer of his tenants’ safety . . . he certainly is no bystander”); *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 212–13 (Cal. 1993) (recognizing that commercial landowners owe both tenants and patrons a general duty of care, which has been held to include the obligation to take reasonable steps to secure common areas against foreseeable criminal acts of third parties); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 344 (Cal. 1976) (holding that when a therapist enters into a doctor-patient relationship, “the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient”); *Sharp v. W.H. Moore, Inc.*, 796 P.2d 506, 509 (Idaho 1990) (imposing a duty in certain circumstances on a business owner to protect patrons from the foreseeable criminal conduct of third parties); *Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 452 (Iowa 1988) (acknowledging that because there is a fiduciary relationship, corporate officers owe shareholders a duty of loyalty); *Francis v. United Jersey Bank*, 432 A.2d 814, 821 (N.J. 1981) (recognizing the duty of directors to exercise the care of ordinarily prudent and diligent persons based on the fiduciary relationship between corporate officers and shareholders).

There are many examples of when courts have sought to impose obligations based on the existence of some special relationship. See *Abbott v. U.S. Lines, Inc.*, 512 F.2d 118, 121 (4th Cir. 1975) (imposing a duty on the ship’s officers to search and attempt a rescue of a crewman who had fallen overboard); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 35–36 (Ct. App. 2000) (finding that public policy factors, including the special relationship between a boy scout organization and its scouts, support the imposition of a duty of care to have taken reasonable protective measures to protect the children from the risk of sexual abuse by adult volunteers involved in scouting programs); *Yu v. N.Y., New Haven & Hartford R.R.*, 144 A.2d 56, 58 (Conn. 1958) (requiring a common carrier to take reasonable affirmative steps to aid a passenger in danger); *Iglesias v. Wells*, 441 N.E.2d 1017, 1021 (Ind. Ct. App.

ates obligations, and we may think of their mutual decision to enter into the relationship as a kind of contract. But in all these cases, the law may impose duties upon them which are based upon the relationship itself, not upon any agreement between them.

And family law provides perhaps the oldest examples of legal duties arising from relationships, whether as husband and wife, or parent and child. These are relationships to which the law gives special attention; the terms *husband*, *wife*, *parent*, and *child* are status labels conferred by the law, with legal consequence. In the case of parent and child, the limited utility of contract conceptions as the foundation of legal duty is obvious. But the noncontractual foundation of legal duties between intimate partners is nearly as clear, I think, once one gives it much thought.

Understanding that the law's recognition of legal obligations between husbands and wives is *not* based upon contract tells us that *Marvin's* focus on contract with respect to nonmarital couples missed the mark conceptually, which explains why it fails in cases like *Terri's* and *Elliott's*.⁵¹ A sensible legal rule for deciding when legal duties arise between unmarried cohabitants will not ask whether they had a contract, but whether their nonmarital relationship shares with marriage those qualities which lead us to impose legal duties as between husbands and wives. What are those qualities? And how can law state an administrable rule that captures them in the nonmarital context? These are the important tasks confronting any court or legislature devising a rule to govern nonmarital relationships. I believe a promising approach to them is offered by the American Law Institute's recent effort in the *Principles of the Law of Family Dissolution*.⁵² I cannot repeat

1982) (recognizing the duty of law enforcement officers to keep prisoners safe and free from harm); *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326, 1337 (Or. 1987) ("It is a special duty arising from the relationship between educators and children entrusted to their care apart from any general responsibility not unreasonably to expose people to a foreseeable risk of harm.").

51 See *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 896-99 (Ct. App. 1993); see also *supra* notes 39-41 and accompanying text.

52 See ALI PRINCIPLES (Tentative Draft No. 4), *supra* note 22, §§ 6.01-.06. My enthusiasm for the Institute's approach will not surprise readers who know that I was Chief Reporter for this Institute project and one of the two Reporters (the other was Grace Blumberg, who did most of the work after the coauthored initial drafts) primarily responsible for its chapter on domestic partners. The Institute's analysis of when former spouses incur continuing legal duties to one another is contained primarily in Sections 5.02 through 5.05, while the key section with respect to unmarried partners is 6.03. (These are the section numbers that will be employed in the final published version, which is expected to appear in print before the end of 2001, although the numbering of sections 5.02 and 6.03 remain unchanged). As of this date, the most

the Institute's entire analysis in this brief Essay. But it would perhaps be useful to describe the Institute's approach toward identifying those nonmarital relationships which bear a sufficient resemblance to marriage to justify and require similar, post-relationship legal obligations between the parties whom the Institute calls "domestic partners."⁵³

Section 6.03 defines domestic partners 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."⁵⁴ A key phrase in this definition is "share . . . a life together as a couple." The same section lists circumstances that bear on deciding whether any particular unmarried couple falls within this class.⁵⁵ The list includes many of the typical practicalities of sharing lives, such as the extent to which the parties commingled their finances, but it also includes considerations of another kind, such as the extent to which the parties themselves treated their relationship "as qualitatively distinct from the relationship either party had with any other person,"⁵⁶ and other circumstances that perhaps combine these two, such as whether the relationship "wrought change in the life of either or both parties."⁵⁷ Another factor that this section includes among those supporting the conclusion that the parties "share a life together as a couple" is the "physical intimacy" of the parties' relationship.⁵⁸ Surely, physical intimacy is psychologically and socially one central fact distinguishing true couples whose relationship should trigger continuing legal obligations from friends whose relationship should not. Yet *Marvin* had great difficulty with this simple but central point, for its very treatment of true couples under the contract rubric risks likening them to coupling that *is* commercial. So the *Marvin* court apparently felt constrained to caution that, of course, any sex must be severed from the enforceable part of the contract, that no recovery can be had for any portion of the agreement that "rests upon" illicit sexual services.⁵⁹ Yet, one might ask, what kind of relationships did the *Marvin* court have in mind? Must the *Marvin* petitioner show that

recent published version of section 6.03 is contained in Tentative Draft No. 4 (April 2000), while the sections from Chapter 5 can be found in the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 5.02--05 (Proposed Final Draft, Pt. 1, 1997). The project received final approval at the Institute's May 2000 annual meeting.

53 ALI PRINCIPLES (Tentative Draft No. 4), *supra* note 22, § 6.03(7).

54 *Id.*

55 *See id.*

56 *Id.* § 6.03(7)(g).

57 *Id.* § 6.03(7)(e).

58 *Id.* § 6.03(7)(h).

59 *See Marvin v. Marvin*, 557 P.2d 106, 112 (Cal. 1976).

the couple's sexual relationship had no important meaning to them, that they could just as easily have been celibate without any impact upon the give and take in the rest of their relationship? If so, then one would expect the case to apply to precious few couples.⁶⁰

Quite clearly, some of the considerations listed in section 6.03 could present a factfinding challenge, and so, for ease of administration, the section goes on to provide that persons who have a child together and share a common household for a certain minimum period of time are domestic partners.⁶¹ Even if they have no common child, persons who share a common household for a long enough period⁶² are treated as domestic partners unless one of them shows that they did *not* share a life together as a couple. When a couple lives together long enough, in their own primary residence, and certainly when they combine that with having children together, it is reasonable to assume they have a relationship of a kind that gives rise to mutual obligations of which the law should take cognizance. Perhaps contract could have a role for couples who wish to *avoid* that legal conclusion, just as the law allows married couples to vary, by contract, some of the consequences of their marital status.⁶³ But contract is not the *basis* of their legal obligations to one another.

III.

Twenty-five years later, *Marvin* thus seems dated, the harbinger of a revolution that never took place. To be sure, there has been a large

60 A far more sensible approach to this problem was taken by the Oregon Supreme Court in *Latham v. Latham*, 547 P.2d 144 (Or. 1976), when it held that it would enforce agreements so long as sexual services were not the "primary consideration"—so long as the agreement "contemplated all the burdens and amenities of married life." *Id.* at 147. But note that in requiring a contract of such broad scope, the court moved toward a requirement quite similar to the Institute's, for it might seem a claim would arise under this doctrine whenever the parties stayed together for a while in a relationship which was regarded by them as the equivalent of marriage. Terri and Elliott, for example, would seem to have fallen within the ambit of this test. In fact, Oregon courts were later more explicit in abandoning exclusive reliance upon contract ideas, concluding that while the parties' intent is important, the court is "not precluded from exercising [its] equitable powers to reach a fair result based on the circumstances of each case." *Wilbur v. DeLapp*, 850 P.2d 1151, 1153 (Or. Ct. App. 1993).

61 The Institute suggests two years as the minimum period of time. See ALI PRINCIPLES (Tentative Draft No. 4), *supra* note 22, § 6.03 cmt. d, at 23.

62 The Institute suggests three years. *Id.*

63 Chapter 7 of the ALI *Principles*, which governs the enforceability of premarital agreements, in fact applies as well, by its terms, to agreements between domestic partners that would vary the *Principles'* application to them. See ALI PRINCIPLES (Tentative Draft No. 4), *supra* note 22, § 7.01(2)(a).

increase in the number of unmarried, cohabiting couples.⁶⁴ But that was the revolution *Marvin* was responding to, not the revolution that some thought it would engender. If one takes a global perspective, the ALI's approach to handling nonmarital relationships appears to be the trend, in locations as close as Canada and as far as Australia.⁶⁵ The trend has been pushed in important part by society's gradually increasing acceptance of same-sex couples. The *Marvin* doctrine has itself been applied to same-sex couples,⁶⁶ to be sure, but the enforcement of private agreements, while better than nothing, does not offer the same symbolic recognition as the inclusion of same-sex couples within a state-defined status classification such as "domestic partners." And of course it is same-sex couples, for whom marriage is not available, who are the most interested parties to this legal development. Fuller recognition of same-sex couples of course involves not only the availability of marriage-like rules as between the partners themselves, when their relationship ends, but also the recognition of such couples by third parties, such as employers and government, as equivalent to married couples in connection with any of the myriad benefits that flow from marital status.⁶⁷ This current arena of reform is, of course, entirely beyond the scope of the contract question addressed by *Marvin*, which thus has little to contribute to it.⁶⁸ *Marvin* was perhaps a necessary first step, but it surely was not the last.

64 See IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 929 (3d ed. 1998).

65 See ALI PRINCIPLES (Tentative Draft No. 4), *supra* note 22, § 6.03 (citing various authorities in the reporter's notes).

66 See, e.g., *Posik v. Layton*, 695 So. 2d 759, 761 (Fla. Dist. Ct. App. 1997) (citing *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988)).

67 For a compendium of such third-party recognitions kept current, see Human Rights Campaign, *Domestic Partner Benefits*, available at <http://www.hrc.org/worknet/dp/index.asp> (last modified Apr. 30, 2001).

68 It was also beyond the scope of the ALI PRINCIPLES (Tentative Draft No. 4), *supra* note 22, which dealt only with the rights of unmarried parties *inter se*, even though the status classification which it adopted may lend itself more easily to wider application.