COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-08860

HILLARY GOODRIDGE, JULIE GOODRIDGE, DAVID WILSON, ROBERT COMPTON, MICHAEL HORGAN, EDWARD BALMELLI, MAUREEN BRODOFF, ELLEN WADE, GARY CHALMERS, RICHARD LINNELL, HEIDI NORTON, GINA SMITH, LINDA DAVIES, AND GLORIA BAILEY,

PLAINTIFFS-APPELLANTS,

v.

DEPARTMENT OF PUBLIC HEALTH AND DR. HOWARD KOH, in his official capacity as COMMISSIONER OF DEPARTMENT OF PUBLIC HEALTH,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT

AMICI CURIAE BRIEF OF THE PROFESSORS OF THE HISTORY OF MARRIAGE, FAMILIES, AND THE LAW

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I. Statement of the Case and the Amici's Interest

We are history scholars specializing in the history of marriage, families, and the law at various universities around the United States; our names, institutional affiliations, and brief biographies are listed in an Appendix to this brief. We have written leading books and articles uncovering and analyzing the history of marriage and marriage law in the United States and in Massachusetts. This brief is submitted to assist the Court's deliberations by offering an analysis of the history of marriage law and practice in Massachusetts based on our scholarship.

We adopt the Statement of the Case and Statement of Facts in the brief of the Plaintiffs-Appellants.

II. Summary of Argument and Introduction

Throughout the history of Massachusetts, marriage has been in a state of change. In the 17th, 18th and 19th centuries, blacks were forbidden from marrying whites, and women lost their legal identity on their wedding day. Massachusetts courts and lawmakers remedied these injustices by reforming marriage laws, at times radically, to reflect contemporary views of racial and gender equality and fundamental fairness. That marriage remains a vital and relevant institution

is a tribute to the law's ability to accommodate changing values, not the rigid adherence to rules and practices of another time.

The Department of Public Health's refusal to grant marriage licenses to the gay and lesbian plaintiff couples here flouts this robust tradition. Massachusetts law today recognizes that gays and lesbians are capable of creating committed, long-term, intimate relationships, and of adopting or conceiving children, as four of the seven plaintiff couples have. Yet the Department arbitrarily withholds from such committed couples the right to marry and to give their families the benefits that marriage confers.

As Massachusetts courts and lawmakers ultimately concluded during the process of recognizing the full equality of African Americans, all citizens must have full marriage rights to be truly equal under the law. Allowing same-sex couples to participate as full citizens in the institution of marriage is no radical change. Rather, it represents the logical next step in this Court's long tradition of reforming marriage to fit the evolving nature of committed intimate relationships and the rights of the individuals in those relationships.

III. Marriage in Massachusetts has always been a state-created civil institution.

Marriage has always been a civil institution in Massachusetts, intended to promote public aims and governed entirely by civil, not religious, law. It has therefore been the job of the courts and the legislature to ensure that marriage continues to serve the public interest and reflect public values.

In Massachusetts, the institution of marriage has evolved from an English model that was influenced by both religious tradition and civil law. The early Christians developed an institution whose most essential elements were the free choice and consent of the parties to the marriage. See Nancy F. Cott, Public Vows: A History of Marriage and the Nation 11 (2000). The Catholic Church, during the medieval period, declared marriage a religious sacrament, and church-controlled governments developed ecclesiastical laws which they used to shape the lives of the populations they governed. See Michael Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America 65-66 (1985).

In post-Reformation England, the Church of England rejected the Catholic doctrine that marriage

was a religious sacrament; however, ecclesiastical courts continued to exercise control over marriage to promote "respectability and stability" and to discourage sexual promiscuity. See id. at 66. The government justified its control by emphasizing the positive law and contractual nature of the marriage relationship and de-emphasizing its natural law and religious roots. See id. Nevertheless, freedom and consent remained at the heart of the institution of marriage.

Massachusetts colonists plainly rejected the Church of England and the system of ecclesiastical laws. Freed from this tradition, they established marriage in the new colony as a purely civil institution, designed to promote the interests of the community as a whole. See Grossberg, supra, at 19; cf. Inhabitants of Milford v. Inhabitants of Worcester, 7 Mass. (7 Tyng) 48, 52 (1810) (affirming that marriage is "unquestionably" a civil contract). Having rejected the church's control over marriage, the colonists endowed civil magistrates with powers to perform marriage, and a religious ceremony was not required. See Grossberg, supra, at 67-68. While a couple could choose to have a minister solemnize their

marriage, the minister's authority to legally sanction the marriage was conferred solely by the civil government. Prov. St. of 1695-6 (7 W. III.) c. 2, § 4.

In early Federal times, as state governments began to exercise greater control over the population, Massachusetts continued to treat marriage as a state-created, civil contract, subject to government control. The government used that influence to promote various social policies, including social stability, fraud prevention, the protection of property rights, and curtailment of promiscuity. In the following centuries, Massachusetts courts and the legislature played defining roles in shaping and reshaping the institution of marriage. In effecting change, the courts and legislature have not been beholden to religious interests, but rather have advanced broader societal goals grounded in freedom and equality.

IV. Between the 17th and 19th centuries, the institution of marriage increasingly recognized individuals' freedom to choose their own spouse.

A. Coverture and the division of labor

Before 1845, Massachusetts marriage law recognized the legal fiction that married couples were

a single legal person, with the husband serving as the legal representative of that unit. Cf. Hendrik Hartog, Man & Wife in America: A History 106 (2000) (describing American marriage law at the turn of the 19th century). For much of the colonial and early Federal period, this legal regime reflected society's view of marriage as a unit naturally headed by the male. With women increasingly earning their own incomes and making their own voices heard throughout the 1800s, the notion that the state should interact with married women only through their husbands appeared to clash with the realities of the developing society. To preserve the vitality and relevance of marriage, the courts and legislature did not entrench the old rules of a wife's submission to her husband, but altered those rules radically to take account of spouses' actual relationships with each other and society.

The colonial family was a "little commonwealth" whose members were bound together by a well-defined set of reciprocal duties and the shared aims of domestic tranquility and economic self-sufficiency. Grossberg, supra, at 5 (quoting John Demos, A Little Commonwealth x (1970)). As the most basic unit of the

social order, the family both reflected and determined the well-being of the community at large.

The community therefore took a deep and abiding interest in family life, and intervened both formally and informally in the activities of the family by monitoring children's behavior, adults' fulfillment of their parental roles, and spouses' adherence to their marriage vows. See Grossberg, supra, at 4. Magistrates, neighbors and other community members exerted a strong normative effect on the composition of the family and the roles assigned to each member. The husband was, by legal entitlement and informal social code, the "governor" of the colonial household. Id. at 5. The community "charged [the husband] with the duty of maintaining a well-governed home and sustained his authority by granting him control of its inhabitants as well as of family property and other resources." Id.; see also Hartog, supra, at 136-37. The wife and children, in turn, were dependents within the husband's domain, responsible for maintaining the home and helping in the fields and the workshop. See Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United

States 6-13 (1994) (discussing colonial fathers' rights and responsibilities).

As would be expected in a society emphasizing the economic viability of the family, romantic love was not considered an essential element of colonial marriage. "Most Puritans believed that love developed after marriage rather than as a prerequisite to it. If love failed to grow, couples were expected to stay together, bonded by their cooperation as economic partners and parents." Glenda Riley, Divorce: An American Tradition 16 (1991).

Although the modern notion of companionate marriage, with its emphasis on affective bonds between family members, was firmly entrenched in the United States by the latter half of the 19th century, see Grossberg, supra at 9, early-American law preferred to rely on legal interdependency – not affection - as the basis for stable relationships. It advanced this aim by imposing an intricate set of reciprocal rights and duties premised on the husband's primacy. These duties were embedded in the law through the common law doctrine of "coverture," which codified the community's view of marriage as a patriarchal relationship.

Under the coverture regime, a woman entering into marriage witnessed a sudden, unalterable change in her rights as a citizen. See Cott, supra, at 11. Most notably, her personal and real property, whether acquired before or after the marriage, immediately became the property of her husband. See, e.g., Commonwealth v. Manley, 29 Mass (12 Pick.) 173, 175 (1831) ("[A]ll personal property of the wife which comes into the possession of the husband during coverture, becomes absolutely his, may be disposed of by him, is liable for his debts, and goes to his executor or administrator."); Clapp v. Stoughton, 27 Mass. (10 Pick.) 463, 469 (1830) ("By the marriage the husband becomes the absolute owner of all the wife's personal property, and acquires a full and perfect title to the rents and profits of her real estate during the coverture."); see also Hartog, supra, at 115. Moreover, property bought by the wife through her own earnings became the absolute property of the husband, even if the husband had abandoned her, was living in adultery, or was in jail. See, e.g., Gerry v. Gerry, 77 Mass. (11 Gray) 381 (1858); Casey v. Wiggin, 74 Mass. (8 Gray) 231 (1857); Ames v. Chew, 46 Mass. (5 Met.) 320 (1842); Russell v. Brooks, 24 Mass.

(7 Pick.) 65 (1828); see also Hartog, supra, at 115-16.

Finally, the law of coverture entrenched the husband's role as the sole public representative of the marital unit by denying married women the right to enter into a contract or to sue or be sued individually. See Lewis v. Lewis, 370 Mass. 619, 621 (1976); Bartlett v. Cowles, 81 Mass. (15 Gray) 445, 446 (1860); see also Hartog, supra, at 143.

In exchange for this mandatory transfer of rights upon marriage, "the wife was promised material support and protection for life." Kathleen M. O'Connor, Marital Property Reform in Massachusetts: A Choice for the New Millennium, 34 New Eng. L. Rev. 261, 273 (1999). The law therefore disabled the married woman from undertaking activities as an independent economic actor but imposed a duty upon her husband to oversee the total operations of the family as an economic unit. See Hartog, supra, at 99-101.

With its roots in an agrarian society in which land was the primary source of wealth, coverture "reflected the need of the propertied class to control the disposition" of land and keep "estates intact while under the control of a single male." O'Connor,

supra, at 273. Coverture mirrored – and promoted – the gender-based division of labor that characterized marriage in pre-industrial Massachusetts. While the husband generally represented the family in public dealings, including commercial and legal activities, the wife was consigned to the subordinate economic role, performing domestic chores, raising children and otherwise assisting the husband with his economic activities.

As repugnant as the coverture system seems to modern sensibilities, it was largely uncontroversial during colonial times – a perfect reflection of society's view of marriage. It was deemed necessary because "women would run amok if they could own their own property. [If women owned property, it] 'would lead to perpetual discord,' [causing] the 'breakdown of . . . the love of home, the purity of husband and wife, and the union of one family." Id. at 274 (quoting Margaret Valentine Turano, Jane Austen, Charlotte Bronte, and the Marital Property Law, 21 Harv. Women's L.J. 179, 185 (1998)). Indeed, when feminists began arguing for greater rights in marriage in the 19th century, their opponents went one step further, arguing that removing the husband from his

role as the "ultimate locus of power within the home" would lead to domestic chaos and the destruction of the nation. Grossberg, supra, at 282; see also E.J. Graff, What is Marriage For? The Strange Social History of Our Most Intimate Institution 30-32 (1999). History would prove both predictions wrong.

B. The demise of coverture disabilities in Massachusetts

By the mid-19th century, the ancient doctrine of coverture, which codified the notion of the primacy of the husband in marriage, no longer reflected the reality of marriage roles in a rapidly industrializing society. Where the orderly control and transfer of real property was the foundation of an agrarian society, work was the backbone of industrial Massachusetts. With exploding demand for laborers in the mills of Lawrence, Lowell and Springfield, women joined the work force in ever greater numbers. And the change in their status in society demanded a change in their status in marriage as well.

This feminization of the workforce in Massachusetts cities highlighted the inequities of coverture, as women workers saw their earnings slip, as an operation of law, into the pockets of their

husbands, even where the husbands were not supporting the family. See Casey v. Wiggin, 74 Mass. (8 Gray) 231 (1857) (holding that a husband in jail was entitled to the money held by his wife); Russell v. Brooks, 24 Mass (7 Pick.) 65 (1828) (holding that the creditors of a husband were entitled to the money received by his wife from her separate earnings despite the fact that the husband was living in adultery). At the same time, women began taking collective action in the political sphere, and succeeded in putting "their objections to the power disparity between husbands and wives . . . on the national agenda." Cott, supra, at 67-68; see also Hartog, supra, at 117.

Women's new prominence in the workplace and the political domain made an impression on the Massachusetts legislature. In 1845, the legislature passed the Married Women's Property Act, which had the effect of "recogniz[ing] and invigorat[ing] the legal identity of married women" by permitting them to own real and personal property, to enter into contracts, and to sue or be sued. Lewis v. Lewis, 370 Mass. 619, 622 (1976). The Act was an important first step, but it did not eliminate coverture or equalize women's

status in marriage. That was left largely to the courts, which saved marriage from obsolescence by interpreting and applying statutes and the common law to fit the changing nature of the relationship.

In Bradford v. Worcester, 184 Mass. 557 (1904), for example, the Court refused to abide the injustice that would follow from applying a remaining vestige of coverture, the principle that a wife's legal residence was determined by her husband's abode. In that case, after the husband abandoned the wife, the wife sought a "pauper settlement" from the city of Worcester. The city of Worcester denied the wife a settlement by claiming that under the common law the husband and wife are one, and therefore the wife was a resident of the city in which the husband was domiciled.

The Court altered the legal rules of marriage to fit the practical realities faced by the plaintiff. It rejected the city's coverture-based argument because the notion that husband and wife are one "d[id] not in truth reflect [the wife's] domestic situation." Id. at 561. The Court also observed that other courts had already rejected this legal fiction where it would produce a "harsh injustice," such as in divorce proceedings and suits for support and

maintenance. Id. (citing Osgood v. Osgood, 153 Mass. 38, 39 (1891)and Burtis v. Burtis, 161 Mass. 508 (1894)).

Massachusetts courts also attacked vestiges of coverture by modifying common law doctrines that hinged on traditional notions of the marital unit. In Lewis v. Lewis, 370 Mass. 619 (1976), for example, a wife brought a civil action for personal injuries against her husband. The husband defended on the ground that the common law immunized him from suits brought by his wife. After "examin[ing] the reasons offered in support of the common law immunity doctrine and, whatever their vitality in the social context of generations past," the Court concluded that they were "inadequate today to support a general rule of interspousal tort immunity." Id. at 629; see also Nolin v. Pearson, 191 Mass. 283, 290 (1906) (If a married woman has "suffered an injury intentionally inflicted, followed by damage, she ought not to be remediless unless relief is refused by reason of an absolute legal prohibition, which we do not find.").

C. The rise of contract

As coverture fell out of sync with the realities of life in industrializing Massachusetts in the late

18th and early 19th centuries, a more modern conception of marriage took hold among citizens and lawmakers. Powerfully influenced by the ascendant principles of the free market, courts aggressively promoted a vision of marriage as a transaction comparable to others in the marketplace. See Grossberg, supra, at 19-20. This heightened emphasis on individuals' free choice in marriage served not only to weaken community involvement in marital choices, but also to wash away certain age- and race-based legislative restrictions on the freedom to marry.

1. Enforceability of promises to marry

Massachusetts courts took an important step towards promoting the contractual view of marriage by allowing plaintiffs to recover where suitors promised to marry and later reneged. In Wightman v. Coates, 15 Mass. 1 (1818), the Court issued the leading American decision addressing actions for the breach of promises to marry. See Grossberg, supra, at 35-39. In that case, a young woman sued her suitor for breaching his promise to marry her. The plaintiff relied on the defendant's conduct and letters he had written to support her claim that "a mutual engagement subsisted

between the parties." Id. at 5. After the trial, a jury awarded the plaintiff damages. The defendant appealed, attacking the cause of action and contending that circumstantial evidence of the parties' relationship was insufficient proof of their engagement. The Court rejected both arguments, thereby recognizing the cause of action and dispensing with any requirement that plaintiffs prove "express promise[s]" to marry. Id.

Following Wightman, spurned parties tended to look to the courts for recourse rather than to their families and their communities. See Grossberg, supra, at 39. Instead of the informal community sanctions that traditionally governed courtship, an intricate body of case law developed in which Massachusetts courts promoted a view of marriage modeled largely upon commercial law.

Van Houten v. Morse, 162 Mass. 414 (1894), demonstrates the Court's reliance on commercial law in defining the scope of the breach of promise action. In that case, a woman sued a man for breach of promise. Alleging that his fiancée had fraudulently concealed information about her racial background and her marital history, the defendant argued that this

concealment released him from any duties arising under the contract.

To determine the scope of the plaintiff's premarital disclosure duties, the Court looked to Potts v. Chapin, 133 Mass. 276 (1882), and Burns v. Dockray, 156 Mass. 135 (1892), cases dealing with disclosure in the land transactions and banking contexts. Relying on these cases, the Court set forth a general rule that applied to both commerce and courtship: if the plaintiff described her background in factually accurate but incomplete terms, her failure to remedy the resulting misimpression could constitute fraudulent inducement.

The Court routinely applied contract doctrine to marriage promises without giving special consideration to the substantive differences underlying commercial and intimate relationships. In Coolidge v. Neat, 129 Mass. 146 (1880), for example, the prospective groom sought to escape his promise to marry the plaintiff on the ground that "the proposed marriage would not tend to the happiness of both parties." Id. at 150. Reasoning that "[t]his proposition is equivalent to saying that the defendant has the right to recede from the contract, if he should be disinclined to fulfill

it," the Court rejected this argument. Id. Thus, even though the action might lead to ill-considered marriages, the promise to marry was not terminable at will under Massachusetts law. Courtship therefore proceeded along the model of the marketplace; individuals were unencumbered by family loyalties or community preferences in making their choices, but reconsideration of their commitments had financial consequences.

2. Contractual marriage

Massachusetts courts' enforcement of promises made during courtship reflected the broader principle underlying contract law: where individuals, of their own free will, consent to bind themselves to a promise, the court serves the public good by holding those individuals to their promises. This focus on individual consent contrasted starkly with colonial times, when the family and the community figured prominently in individuals' choice of spouses.[1]

[1] Early colonial law protected the family's and the community's right to dictate marital choices. A Massachusetts Bay statute provided, for example, that anyone "endeavor[ing], directly or indirectly, to draw away the affection of any maid in this jurisdiction, under promise of marriage, before he hath obtained liberty and allowance from her parents, or governors, or, in absence of such, from the nearest magistrate," shall be punishable by fine and imprisonment. See Rep. by Joint

As an extension of the contract principle, Massachusetts courts and lawmakers whittled away at earlier legislative enactments restricting individuals' choice of partner. In challenging ancient restrictions on youthful marriages and interracial marriages, lawmakers reasoned that the law should ennoble intimate relationships by recognizing them and giving them the sanction of law.

(a) Age restrictions

By subverting legislation that purported to prohibit youthful marriages, Massachusetts courts advanced the notion that marriages should be founded on the freely-given consent of the parties.

Marriages were valid at common law so long as the spouses had reached the age of consent – twelve years old for girls and fourteen for boys – but the Massachusetts legislature passed legislation in 1786 that imposed heavy penalties on ministers and magistrates who solemnized any marriages of men under twenty-one or women under eighteen without the consent of their guardians.

Special Comm., House of Representatives, March 6, 1840 (quoting colonial statute).

This legislation was put to the test in Parton v. Hervey, 67 Mass. 119 (1854). In that case, a young groom asked the court to order his mother-in-law to release his new wife, after the mother-in-law "prevented [the wife] by force from joining the petitioner and living with him as his wife." Id. at 120. The mother-in-law defended on the ground that her daughter was a minor, and that the statute voided all marriages solemnized without the consent of a minor's parent or guardian. The Court disagreed. While acknowledging that the statute imposed penalties upon the minister or magistrate who presided over the nuptials, the Court held that the statute's silence with respect to the validity of such a marriage left the common law rule in place. Thus, the Court enforced the marriage and ordered the mother-in-law to release her daughter.

Parton is noteworthy in part because the Court refused to abide the policy judgments implicit in the 1786 statute. The Court defended the common law rule by noting that it permitted individuals to marry when "the sexual passions are usually first developed." Id. at 121. Since youths were likely to act on their sexual impulses, the Court reasoned, the common law

rule "guard[ed] against the manifold evils which would result from illicit cohabitation." Id. Moreover, the common law rule corresponded to the underlying judicial principle of the age, that marriage must respect – and derive from – the spouses' free choice. Satisfied that the common law set forth the better rule, the Court concluded that the statutory prohibition against solemnizing under-aged marriages did not invalidate illegally solemnized marriages.

Thus, the Court clearly identified the parties' consent as the core of marriage, notwithstanding the legislature's thoughts on the matter. Although lawmakers have sought to give effect to parties' free choice in different ways over the years, the emphasis has never shifted from the primacy of the individual's consent to marry.

(b) Anti-miscegenation laws and their repeal

The idea that marriage was a contract between two individuals, coupled with the revolutionary mandate that the state must treat individuals equally, ultimately led the courts and legislature to cast aside the ancient Massachusetts law against racially-mixed marriages. Just as the demise of coverture was

necessary for the advancement of womens' rights, the law could not recognize blacks' civil rights without recognizing their full marriage rights. And, once again, the idea that the law would grant marriage rights to disenfranchised citizens' prompted doomsayers to predict social chaos, which never materialized.

Massachusetts had laws prohibiting miscegenation at least as early as 1705, when a provincial law barred marriages between "her Majesty's English or Scottish subjects, [or] of any other Christian nation" with "any Negro or Mullato." Rep. by Special Comm., House of Representatives, Jan. 19, 1841 (quoting Massachusetts 1705 provincial statute). Following the American Revolution, the legislature reaffirmed the ban by enacting legislation entitled "An Act for the orderly Solemnization of Marriages." That act, passed in 1786, provided that "no person . . . shall join in marriage any white person with any Negro, Indian or Mulatto, on penalty of the sum of fifty pounds." 1786 Mass. Acts c. 3. It also declared "all such marriages . . . absolutely null and void." Id.

In Inhabitants of Medway v. Inhabitants of Natick, 7 Mass. (7 Tyng) 88 (1810), the Court took the

first major step towards removing the ban on mixed-race marriages in Massachusetts. Ruling on a dispute that turned on the validity of a marriage between a white man and a woman who was born of a white mother and a half-black, half-white father, the Court sharply limited the effect of the statute by narrowly defining the term "mulatto." The Court held that "a mulatto is a person begotten between a white and a black." Id. at 89. Since the wife's "father . . . was a mulatto, and her mother was a white woman," the Court concluded that the wife was not a "mulatto." Id. As such, the Act for the orderly Solemnization of Marriages did not render the marriage void. Although the Court's decision mooted the constitutional issue, it clearly subverted the Legislature's intended aim of limiting parties' freedom to choose a spouse.

The issue presented in Medway underscored the tension that inhered in Massachusetts marriage law in the early 19th century. Although the revolutionary notion of individual equality held sway in the Commonwealth, it was sometimes difficult to reconcile with the communitarian culture that had flourished during the colonial era. Thus, Massachusetts lawmakers, armed with the radical ideology of

individual rights, were pioneers in the abolition of slavery in the United States, but early 19th century law persisted in reflecting community prejudices about proper marriage choices.

Ultimately, however, the Commonwealth's vigilance in advancing the principle of individual equality swept away the anti-miscegenation laws. Even before the American Revolution, Massachusetts courts had developed "something of a . . . 'common law' of abolition." Robert M. Spector, The Quock Walker Cases (1781-83) – Slavery, its Abolition, and Negro Citizenship in Early Massachusetts, 53 J. Negro Hist. 12, 24 (1968). The courts did not actually abolish slavery in Massachusetts, however, until after the ratification of the "free and equal clause" of the Declaration of Rights in 1780. That clause provided: "All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their Lives and Liberties." Mass. Const. Art. I.

In the Quock Walker Cases, Massachusetts courts seized on that language to declare slavery unconstitutional in the Commonwealth. They reached this conclusion even though analogous provisions in

other states' constitutions had not been held to abolish slavery, and the legislative history contained no indication that the clause was intended to free slaves. Spector, supra, at 26.

The judicial successes of the Commonwealth's abolition movement left the anti-miscegenation statute in stark relief as the "last relic of the old Slave Code of Massachusetts." Rep. by Joint Special Comm., House of Representatives, March 6, 1840. Beginning in 1833, local abolitionist groups turned their attentions to the statute, and began agitating for its repeal. Francis H. Fox, Discrimination and Antidiscrimination in Massachusetts Law, 44 B.U. L. Rev. 30, 50 (1964).

Abolitionists' arguments against the statute sounded in the rhetoric of both civil rights and family values, but were ultimately grounded in the dignity of the individual. They argued, for example, that the statute, as "the only legislative recognition to be found in our statute book, of inequality among the different races of our citizens," must be repealed, because it "stands in direct and odious contrast with all our principles and our practice in

other particulars." Rep. by Joint Special Comm., House of Representatives, March 6, 1840.

Moreover, the opponents of the statute argued that it was unsound family policy. Reasoning that individuals would choose mates regardless of the legal rule, they contended that the law's failure to recognize and sanction these relationships would only serve to encourage "licentiousness." Id. To promote individual dignity in the sphere of intimate relations, then, the opponents of the anti-miscegenation statute declared that the law must respect an individual's free choice of mates, and hold him or her to that choice.

Thus, drawing from both earlier court decisions abolishing slavery and the contractual approach to marriage favored by contemporary courts, abolitionists concluded that the anti-miscegenation law degraded the individual. In their view, only by recognizing individuals' equality and respecting their free choice in questions of intimate relations would marriage law accord them their due dignity.

Doomsayers once again accused reformers of tearing apart the social fabric. The New England Palladium, for example, feared that the repeal of the

anti-miscegenation statute would cause “the real Anglo-Saxon blood” of Massachusetts to disappear. Louis Ruchames, Race, Marriage, and Abolition in Massachusetts, 40 J. of Negro Hist. 250, 251 (1955) (quoting New England Palladium, March 18, 1831). Rather than validating individuals’ free choice, the Palladium argued, “[l]aw should combine with public opinion to prevent alliances, the consequences of which are so foreign to our habits and prejudices.” Id. at 251-52.

Lawmakers disagreed that the law should simply reflect the prejudices of the age, however, and they repealed the statute in 1843. Fox, supra, at 50. Thus, Massachusetts affirmed that freedom of choice of one’s marriage partner was a basic right, not to be denied by community preconceptions, no matter how apparently deep-rooted.

3. Divorce: a remedy for breach of the marriage contract

The contractual approach to marriage that gained favor in the 19th century forced courts and legislators to devise remedies for parties aggrieved by nonperforming spouses. After all, 19th century lawmakers reasoned, “[h]ow could consent in marriage

. . . be considered fully voluntary, if it could not be withdrawn by an injured partner?" Cott, supra, at 47.

Lawmakers addressed this problem by creating the precursor to the modern divorce regime. No longer did aggrieved spouses petition state legislatures for divorces, as they had done during colonial times and the early Federal period. See generally Hartog, supra, at 71. Rather, courts generally heard divorce petitions in adversarial proceedings. Where the plaintiff "show[ed] that the defendant had broken the [marriage] contract" in one of several, statutorily-defined ways, the court terminated the marriage and released the innocent party from her own marital obligations. Cott, supra, at 48. In Massachusetts, a spouse could sue for divorce where her husband (or his wife) was "sentenced to confinement to hard labor" for more than five years, or was guilty of desertion, cruelty, impotency, or adultery. G.L. c. 107, § 7 (1860).

The expansion of divorce grounds during the 19th century convinced critics that traditional marriage was under siege. The president of Yale College, Rev. Theodore Woolsey, "led the charge . . . lament[ing]

the uneven and unwarranted expansion of divorce grounds. He expressed his fears for marriage and hence for society, and made the case that the only divinely approved (and therefore truly legitimate) reason for divorce was adultery." Cott, supra, at 106. At the time Woolsey was writing, there were fewer than two divorces per thousand marriages in the United States. Id. at 107.

Despite critics' fears that liberalizing divorce laws would undermine marriage and the fabric of society, courts and legislators ultimately concluded that granting spouses a remedy in the event of breach had the opposite effect. Rather than weakening the terms of marriage, courts and politicians "emphasized that states were acting to assure that the marital bargain continued to be rightly observed." Id. at 52. Thus, reformed divorce laws sought to make the marriage vows more meaningful, and created remedies for spouses who received less than they had bargained for.

V. The 20th century brought about a gender-neutral and equal status relationship in Massachusetts marriages.

At the end of the 19th and the beginning of the 20th centuries, marriage law in Massachusetts was

conflicted and unclear. The common law disabilities associated with coverture were fading into obsolescence, as women's emergence into the commercial and political spheres (and its concomitant effects on notions of equality) made the fiction of marital unity ever more obsolete. At the same time, the view of marriage as contract failed to reflect the institution's importance in maintaining and promoting social order. Thus, while marriage as contract appeared too malleable to effectively channel the behavior of parties to intimate relationships, the view of marriage as a status relationship remained infused with anachronistic gender inequities and divisions of labor.

Courts struggled to address these tensions by placing limitations on spouses' capacity to customize their marital relationship through contract, while chipping away at the inequalities inhering in the status regime of reciprocal rights and duties that originated in coverture. The result was a new status relationship, with spouses assigned well-defined, but gender-neutral, rights and responsibilities.

A. Marriage as status

Twentieth-century courts have made clear that marriage is not an infinitely elastic contract between two people, but rather a status relationship, with well-defined rights and responsibilities corresponding to contemporary realities. By updating the terms of marriage to reflect modern notions of gender equality and individual rights, all the while refusing to bestow the social benefits of marriage on individuals who choose not to marry, the courts have promoted marriage's continuing vitality and relevance.

Modern marriage is a status relationship because it consists of an invariable set of rights and responsibilities, and because it defines the rights of married people with respect to third-parties. In French v. McAnarney, 290 Mass. 544 (1935), the Supreme Judicial Court set out its view that the parties to a marriage could not vary the fundamental terms of marriage by agreement. In that case, the Court attacked the contractual view of marriage that had prevailed for much of the previous century by affirming that some "terms" of the marriage bargain could not be waived by spouses, regardless of their mutual intent. Contrary to the rhetoric of earlier

decisions, the Court held that marriage was "not merely a contract," but rather a "social institution of the highest importance." Id. at 546.

Under this Court's jurisprudence, marriage also qualifies as a status relationship because it gives married people social rights (i.e., rights as against third-parties) that are simply unavailable to the unmarried. In Feliciano v. Rosemar Silver Co., 401 Mass. 141 (1987), for example, the Court held that loss of consortium claims are only available to spouses, not to unmarried partners. Likewise, in Collins v. Guggenheim, 417 Mass. 615 (1994), the Court held that only married people – not unmarried cohabitants – have a right to equitable contribution upon the dissolution of their relationship.

While Massachusetts courts have clearly held that marriage is defined by certain fundamental terms, they have been equally clear in insisting that the fundamental terms of marriage are not fixed in time. In Lewis v. Lewis, 370 Mass. 619 (1976), for example, the Court rejected the common law doctrine of interspousal immunity, which immunized a spouse from suit for a tort committed against the other spouse. Given the overthrow of "antediluvian assumptions

concerning the role and status of women in marriage and in society," the Court reasoned that any doctrine rooted in those assumptions was no longer viable. Id. at 621-23. Thus, the fundamental terms of the status relationship during the coverture era bore no resemblance to those of modern marriage.

By recognizing marriage as a status relationship, Massachusetts courts have promoted it as a behavior-shaping institution. As the next sections show, however, the behavior promoted by marriage law has nothing to do with the parties' gender or their desire (or capacity) to procreate. Rather, the law sanctions committed, consensual, intimate relationships — precisely the relationships the seven plaintiff couples have and seek to formalize. Denying gay and lesbian couples, and them alone, the right to choose the status of marriage not only denies them equal status, it denies them their humanity.

B. Gender equality

While entrenching the special status of the marital relationship during the course of the 20th century, Massachusetts lawmakers have gone to great lengths to strip that status of its traditional gender bias. For example, the duty of support, which once

flowed only from husband to wife, Jordan Marsh Co. v. Hedtler, 238 Mass. 43 (1921), is now reciprocal, see Silvia v. Silvia, 9 Mass. App. Ct. 339, 341 & n.3 (1980). Likewise, after a divorce, either spouse may seek alimony and both parties have a duty to support their children. See Silvia, 9 Mass. App. Ct. at 341-42.

The evolution of the cause of action for loss of a spouse's labor and services best illustrates the impact of gender-neutrality on the judicial conception of marriage.

At the common law, the husband had a right to the labor and services of his wife, and in suing for damages which are personal to the husband for an injury to his wife, he was permitted to recover, not only for the expenses of her care and cure, but for his loss of her labor and services and the loss of consortium. Feneff v. N.Y. Cent. & Hudson River R.R. Co., 203 Mass. 278, 279 (1909); see also Hartog, supra, at 298-99. When a husband was injured, however, a married woman did not have a comparable right to sue for the loss of consortium and her husband's labor and services, ostensibly because she

was under a disability from suing in her own name. Feneff, 203 Mass. at 279-80.

This explanation was pretextual, however, since loss of consortium was (and is) merely a specific type of personal injury, and injuries suffered by married women remained actionable even under coverture. Thus, the better explanation for the disparate treatment of married men and women was that courts believed that men and women made different contributions to the marriage. That is, since a husband's contributions to the family were primarily commercial, compensation for his contributions – e.g., lost wages – would be embedded in his legal claim. By contrast, a wife's contributions were primarily noncommercial, and to make the family whole the courts were required to recognize the loss of the wife's "free" services by allowing the husband to recover for lost services and consortium claims. Thus, the traditional doctrine of loss of consortium and services was based on a traditional notion of the division of labor in a marital relationship.

That doctrine obviously conflicted with the principle of gender equality, and was so linked to coverture that there was some question whether the

Married Women's Property Act had effectively barred such a claim. See, e.g., Kelley v. N.Y., N.H. & Hartford R.R. Co., 168 Mass. 308, 311-12 (1897) (rejecting the contention that the Married Women's Property Act abolished the loss of consortium claim; refusing to decide whether wives have the right to bring such an action). Rather than hold the claim for loss of consortium precluded by the Married Women's Property Act, the Court held that in the post-coverture era the right of action must extend to both husband and wife. See Nolin v. Pearson, 191 Mass. 283 (1906).

This judicial action neatly demonstrates the courts' role in defining the new rights and obligations of marriage after the enactment of the Married Women's Property Act. While that legislation undoubtedly transformed marriage in Massachusetts, it did so by permitting married women to own property in their own names. The job of redefining the rights and obligations of spouses in light of this legislative pronouncement fell to the courts, and they accomplished this by stripping the rights and obligations of marriage of their gender-specificity.

C. Sex and procreation

In the popular imagination and the law, sexual intimacy is a core element of marriage. In Bell v. Bell, 393 Mass. 20 (1984), for example, the Court considered the existence of an intimate relationship essential to its determination that a couple living together gave the "outward appearance" of being married. Id. at 21 (stressing the trial court's finding that the couple at issue "shared the same bedroom"). Absent the finding of an intimate relationship, it seems, the majority would have been hard-pressed to conclude that a cohabiting couple gave the outward appearance of marriage; roommates may well live together for extended periods of time and share household expenses, but no one confuses that relationship with marriage where the roommates are not romantically involved.[2]

Procreation, on the other hand, is not fundamental to marriage. Indeed, the common law's

[2] Some Massachusetts case law suggests that marriage need not be sexual to be valid. See Martin v. Otis, 233 Mass. 491, 495 (1919) (impotence renders a marriage voidable, but not void ab initio). Indeed, the Court has held that an unconsummated marriage is valid where the parties have complied with the formal requirements imposed by the Commonwealth, even where an annulment is sought. See, e.g., Hanson v. Hanson, 287 Mass. 154 (1933). Marriage is, however, characterized by a romantic passion that is most typically expressed through sexual activity.

sharp differentiation between impotence and sterility as grounds for divorce or annulment make it clear that marriage is more about intimacy than biological procreation.

Under the common law, impotence was grounds for annulment, but "mere sterility [could] in no case form a sufficient ground for a decree of nullity." Devanbagh v. Devanbagh, 5 Paige 554 (N.Y. Ch. 1836); see also Martin v. Otis, 233 Mass. 491, 495 (1919) (impotence is cause for voiding a marriage "at suit of the party conceiving himself or herself to be wronged"); Schroter v. Schroter, 106 N.Y.S. 22, 23 (1907) (marriage could not be annulled where the wife was capable of intercourse but incapable of bearing children); S. v. S., 29 A.2d 325, 327 (Del. Sup. Ct. 1942) ("mere incapability of conception [is] not a sufficient ground for a decree of nullity"). In Wendel v. Wendel, 52 N.Y.S. 72 (1898), the New York appellate court reaffirmed this principle, holding that the inability of a woman to conceive did not render her incapable of "entering the marriage state," id. at 73, and noting that holding otherwise would lead to absurd results. All women go through menopause, "and yet it has never been suggested that a

woman who has undergone this experience is incapable of entering the marriage state." Id. at 74. Thus, the Wendel court held, the capacity to procreate cannot be deemed "essential to entrance to the marriage state, so long as there is no impediment to the indulgence of the passions of that state." Id.

Impotence rendered a marriage voidable because the inability to engage in sexual intimacy would mean that "there is a complete failure of one of the ends of matrimony," Kirschbaum v. Kirschbaum, 111 A. 697 (N.J. Ch. 1920); by contrast, "in commonlaw countries the marriage will be good if there is adequate power" to engage in sexual intimacy, even where the capacity to procreate is lacking, id.; see also S v. S ., 192 Mass. 194, 195 (1906) (husband was entitled to a divorce where intercourse with wife was impossible without endangering her health); Peter v. Peter, 222 A.2d 511, 511 n.1 (Pa. Super. Ct. 1966) (sterility alone is not grounds for divorce, but husband's total withdrawal from his wife is adequate for "indignities to the person" ground for divorce).

By placing the focus on intimacy rather than procreation, Massachusetts lays bare the regulatory aims of its marriage law. It is not intended to

privilege procreation over sexual intimacy that does not – or indeed, cannot – lead to procreation. Rather, to the extent it regulates intimacy, Massachusetts marriage law bundles social rewards and legal obligations to encourage parties to choose committed relations over transient ones. Permitting same-sex couples to marry would only serve to advance this traditional aim.

D. The new choice: freedom to choose marriage in the 20th century

That marriage's legitimacy derives from the spouses' consent has been clear throughout Massachusetts history. From the repeal of the anti-miscegenation law to the creation of a modern divorce law, lawmakers have ceaselessly sought to give greater effect to parties' freedom to choose marriage. Those efforts have culminated, to date, in no-fault divorce, since that regime recognized the corollary to the freedom to choose marriage: the freedom to choose whether to stay married.

As noted above, nineteenth century lawmakers sought to give effect to spouses' free choice by modernizing divorce law to recognize that innocent parties needed remedies in the event of their spouses'

breach. Twentieth century lawmakers concluded, in turn, that spouses could not freely consent to marriage unless they could decide for themselves what constituted a breach. Thus, rather than restricting the grounds for divorce to several well-defined categories, the law – in the form of no-fault divorce – permitted couples to seek divorces for their own subjective reasons.

The no-fault revolution began in California. Well into the mid-1900s, California courts, like courts in other states, required proof of marital fault to grant a divorce. In a seminal decision in 1952, however, Chief Justice Traynor "seriously undermined the fault standard" as it existed in California. James Herbie Difonzo, Customized Marriage, 75 Ind. L.J. 875, 897 (2000). In deciding DeBurgh v. DeBurgh, 250 P.2d 598 (Cal. 1952), Chief Justice Traynor advanced a path breaking principle: rather than focusing on "[t]echnical marital fault," courts should first consider the "prospect of reconciliation" in considering whether to grant a divorce. Id. at 606. Under this approach, the job of the courts was not to determine whether fault existed but rather whether "the legitimate objects of matrimony have been

destroyed or whether there is a reasonable likelihood that the marriage can be saved." Id.

The California legislature adopted this view the following decade, enacting the first no-fault divorce statute in the country. 1969 Cal. Stat. 3312 (repealed 1994). In response to the fault system which, in practice, promoted cursory fact-finding hearings and massive fraud upon the court by colluding spouses, the new legislation allowed judges to refuse to grant a divorce, even where a spouse had committed a marital fault, in the event the marriage still "contain[ed] a spark of life." Rep. of the Governor's Comm'n on the Family 1, 27 (1966) (quoted in Difonzo, supra, at 900). Thus, no-fault divorce was not intended to make divorces easier to obtain, but rather to grant courts greater power to distinguish salvageable marriages from those "unwholesome relationship[s] [which make] a mockery of marriage." Deburgh, 250 P.2d at 603.

The logic advanced by the California Supreme Court and the California legislature proved nearly irresistible to lawmakers around the country. By 1977, all but three U.S. states had adopted some form of no-fault divorce. Difonzo, supra, at 906.

Massachusetts followed California's lead in 1975, amending its divorce statute to allow spouses to divorce where their marriages were irretrievably broken down. Hon. John C. Stevens III & Harvey Beit, Grounds for Divorce, in 1 Massachusetts Family Law Manual ch. 6 (1996). Thus, as elsewhere in the country, Massachusetts couples in failed marriages could now divorce for reasons of their own choosing, not simply those deemed important by the Legislature.

No-fault divorce was a radical innovation in Massachusetts domestic relations law, but not because it placed unprecedented emphasis on parties' consent to marriage. Rather, it was radical because it fundamentally altered the terms of every marriage in the Commonwealth.[3] A woman marrying in 1946 took her vows with the expectation that the state would recognize them for life. She was sure to remain married unless she committed a marital fault or had grounds to sue for divorce and chose to do so. The amendment to G.L. c. 208, § 1 in 1975 undermined those

[3] By comparison, the repeal of anti-miscegenation laws in 1843 was merely an incremental change in the nature of marriage, since the vast majority of Massachusetts marriages were unaffected by the legalization of such marriages. Likewise, allowing same-sex couples to participate in marriage as full citizens would have no retroactive effect on marriages in the Commonwealth.

expectations. Nevertheless, Massachusetts lawmakers concluded that the essence of marriage is not permanence but consent. And until the law gave spouses more power to determine for themselves when to stay married, it could not fully implement the principle that modern marriage is based on mutual consent.

VI. The next logical step for Massachusetts marriage law is to grant same-sex couples the right to marry.

The evolution of marriage during the 20th century has logically led courts to the present question: Are same-sex couples entitled to marry under Massachusetts law today? The historical refusal to grant marriage licenses to gay and lesbian couples was rooted in a system that outlawed sex between same-sex couples and rigidly enforced traditional gender roles in marriage. But these outdated notions have been abandoned by Massachusetts courts.

Massachusetts courts and lawmakers have demolished any remaining basis in Massachusetts law for denying marriage licenses to gays and lesbians. First, they abolished the legal rules that enforced traditional gender roles in marriage. Legal issues involving married couples can now be decided without

reference to gender, and social roles attributed to spouses are legally irrelevant.

Second, they abolished the traditional legal prohibition on private, consensual same-sex intimacy. In Jaquith v. Commonwealth, 331 Mass. 439 (1954); Commonwealth v. Balthazar, 366 Mass. 298 (1974); and Gay & Lesbian Advocates & Defenders v. Att'y General, 426 Mass. 132, 133-34 (2002), this Court held that the statutory prohibitions on sexual activity could not be enforced against parties engaging in private, consensual relations. Since the rationales underpinning the traditional prohibition against gays marrying have been abandoned, the ban today is based on nothing more than debunked doctrine and ancient community prejudice.

Moreover, by recognizing that gay and lesbian couples are capable of creating loving families, the courts have shown the refusal to grant those couples marriage licenses to be cruel and arbitrary. In Massachusetts, same-sex couples may jointly adopt children – but they may not have the legal security that derives from the defined set of rights and responsibilities flowing from the marriage relationship. Compare Adoption of Tammy, 416 Mass.

205 (1993) (unmarried couples may jointly adopt child); Adoption of Galen, 425 Mass. 201, 206 (1997) (that prospective adopting couple is same-sex is completely irrelevant to their fitness as parents), with Feliciano v. Rosemar Silver Co., 401 Mass. 141 (1987) (unmarried cohabitant has no action for loss of partner's consortium); Connors v. City of Boston, 430 Mass. 31 (1999) (Massachusetts municipalities cannot extend health coverage benefits to unmarried partners of city employees). The legal uncertainties associated with gay and lesbian relationships harm not only the couples but also their children, who need legal certainty and regularity in the event one of their parents dies or gets sick.

Like blacks and women during the first half of the 19th century, gays and lesbians in present-day Massachusetts face a schizophrenic legal regime – their citizenship is only partly recognized. But lifting the bar that prevents gays from marrying would be in perfect keeping with the marked historical trend in Massachusetts: where a group has been legally stigmatized in the past, the recognition of their marriage rights is part and parcel of the process of recognizing their civil rights. Thus, the judicial

abolition of slavery in Massachusetts was followed by the demise of anti-miscegenation laws. And women's increasing prominence in the workplace and the political arena was followed by the dismantling of coverture. Today, gays and lesbians have been granted many of the rights accorded to their fellow citizens, but still cannot choose to marry the person they love. As lawmakers have long acknowledged, individuals can only be equal under the law when they are free to marry as equals. For this reason, allowing gays and lesbians to marry would be perfectly consistent with the history of Massachusetts.

VII. Conclusion

Marriage in Massachusetts has always been a civil institution through which the Commonwealth formally recognizes and ennobles long-term, committed, intimate relationships. These relationships are founded on the free choice of the parties and their continuing mutual consent to stay together. Over the past four centuries, through the actions of this Court, the institution of marriage has evolved many times. For example, this Court recognized that marriage is not about some metaphysical "unity" of one man and one woman - the notion that fueled the discredited

doctrine of coverture, which rendered women legal non-entities after marriage. This Court also played an instrumental role in the repeal of anti-miscegenation laws, and the recognition of the equality of all races. This Court has brought marriage in Massachusetts to where it is today: an equal, gender-neutral partnership, with each party having the same rights and obligations to each other and to society.

That is precisely the kind of relationship the plaintiff couples in this case share. All have freely chosen to enter and remain in their long-term, committed, intimate relationships. Four of the seven couples are raising children together, and all seven seek to legally formalize their relationships, to undertake the obligations of marriage, and to obtain the benefits for their partners and for their children. These relationships are already recognized by society, with many employers providing family benefits for same-sex couples, and by this Court, with its rulings that same-sex couples may adopt children. All that remains is for the law to recognize formally what is already a reality - just as it did when it abolished coverture to reflect women’s changing status

in society and when it granted citizens of all races the right to marry the partner of their choosing.

The history of marriage in Massachusetts shows that this Court has kept marriage relevant not by adhering to concepts from another era but by molding the institution to fit the times. The time to jettison this vestige of discrimination against same sex-couples by allowing these plaintiffs to formalize their commitments through marriage is now.

Respectfully submitted,

The professors of the history of marriage, families, and the law,

By their attorneys,

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Dated: November 8, 2002

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

HILLARY GOODRIDGE, JULIE GOODRIDGE, DAVID WILSON, ROBERT COMPTON, MICHAEL HORGAN, EDWARD BALMELLI, MAUREEN BRODOFF, ELLEN WADE, GARY CHALMERS, RICHARD LINNELL, HEIDI NORTON, GINA SMITH, LINDA DAVIES, AND GLORIA BAILEY, Plaintiffs-Appellants, v. DEPARTMENT OF PUBLIC HEALTH AND DR. HOWARD KOH, in his official capacity as COMMISSIONER OF DEPARTMENT OF PUBLIC HEALTH, Defendants-Appellees.	No. SJC-08860

APPENDIX:
BIOGRAPHIES OF AMICI

Peter W. Bardaglio, Ph.D., is Provost and Professor of History at Ithaca College. He is the author of Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (University of North Carolina Press, 1995), which won the 1996 James Rawley Prize from the Organization of American Historians for best book published on the history of race relations in the United States. Bardaglio has also published numerous articles and

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Norma Basch is a professor of history at Rutgers University. She has written extensively on marriage and domestic relations in nineteenth-century American law, including a recent book on the history of divorce published by the University of California Press. She teaches courses on gender history, women's history, and American legal history in both the undergraduate and doctoral programs at Rutgers.

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Robert W. Gordon is Chancellor Kent Professor of Law and Professor of History at Yale University. He teaches courses on American Legal History and has written extensively on the history of law regulating relationships in the household and workplace.

Michael Grossberg is Professor of History and Law at Indiana University, Bloomington and Editor of the American Historical Review. His research focuses on the relationship between law and social change, particularly the intersection of law and the family. He has written a number of books and articles on legal and social history. His 1985 book, Governing the Hearth, Law and the Family in Nineteenth-Century America (University of North Carolina Press, 1983) won the Littleton-Griswold Prize in the History of Law and Society in America given by the American Historical Association. He also served as a consultant on Studies in Scarlet: Marriage and Sexuality in the United States and the United Kingdom, 1815-1914, a digital collection of legal materials produced by the Research Libraries Group.

Hendrik Hartog is the Class of 1921 Bicentennial Professor of the History of American Law and Liberty at Princeton University. He is the author of Man and Wife in America: A History (Harvard University Press, 2000) and other works on the legal history of marriage and the family.

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Elaine Tyler May is Professor of American Studies and History at the University of Minnesota. She has served recently as President of the American Studies Association and as the Distinguished Fulbright Chair in American History at University College, Dublin, Ireland. She has published several books and articles on marriage and divorce, the Cold War era, women and the family in the United States, the history of sexuality and reproduction, and the relationship between private life, politics and public policy.

Linda McClain is Professor of Law at Hofstra University School of Law. She is a former Faculty

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Peggy Pascoe is Associate Professor and Beekman Chair of Northwest and Pacific History at the University of Oregon, where she is completing a book on the history of miscegenation law in the United States from 1860 to 1967. Among the articles she has written on the topic of marriage law is Miscegenation

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Elizabeth H. Pleck, Ph.D., is Professor of History and Human Development and Family Studies at the University of Illinois, Urbana/Champaign. She teaches undergraduate and gradate courses in U.S. family history. She is the author of four scholarly monographs on American family history.

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Amy Dru Stanley, Ph.D., is Associate Professor of History at the University of Chicago. A historian of nineteenth-century American history, she has written extensively on law, marriage, gender, and the household. She is the author of From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation (Cambridge University Press, 1998), which won several academic awards, including the Frederick Jackson Turner Award for the best first book in American History.

Lee E. Teitelbaum is a member of the faculty at the Cornell Law School. He has an extensive record of publications and professional research in the areas of family law and the law relating to children, parents

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