

University of Michigan Journal of Law Reform

Volume 18

1985

Coercive Freedom: A Response to Professor Chambers

Robert A. Burt
Yale Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Family Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Robert A. Burt, *Coercive Freedom: A Response to Professor Chambers*, 18 U. MICH. J. L. REFORM 829 (1985).

Available at: <https://repository.law.umich.edu/mjlr/vol18/iss4/3>

This Symposium Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COERCIVE FREEDOM: A RESPONSE TO PROFESSOR CHAMBERS†

Robert A. Burt*

At this happy gathering of the Michigan family it is fitting to begin by discussing the law of the family.

David used the *Marvin* case as the central example of the various principles which he supported and opposed. I want to focus on that case in order to consider whether he has successfully distinguished among these principles of state coercion and state facilitation of individuals' free choice. Let me begin by briefly restating David's view of the *Marvin* case, as I understand it.

David admired the California Supreme Court's willingness to enforce unmarried couples' explicit mutual promises on the ground that this policy would enhance their freedom effectively to implement their own choices regarding the terms of their relationships. As David aptly observed, there is a paradox in this conception of freedom: it cannot exist without government; this kind of freedom requires governmental intervention. Moreover, David saw a danger in this kind of intervention, and in the *Marvin* case specifically. The danger was epitomized in the court's announced willingness in some circumstances to presume from the conduct of the parties that they intended to bind themselves even though they might not have explicitly said so. David properly pointed out that, with this judicial presumption, it was likely that judges would impose their own moral values on the parties rather than restricting themselves simply to facilitating the choices that the parties themselves had made at some earlier time. David then suggested that this kind of judicial imposition was undesirable and could not be distinguished in principle from the kinds of coercive imposition he saw and criticized in legislative measures such as the proposed Senate Family Protection Act and traditional state laws that imposed criminal penalties on unmarried couples on grounds of "fornication."

I agree with David that the California Supreme Court's will-

† This response to Professor Chambers's article also originally was delivered at the dedication of the new wing of the Michigan Law School Library in 1981. It was revised in 1984.

* Southmayd Professor of Law, Yale Law School. B.A., 1960, Princeton University; M.A., 1962, Oxford University; LL.B., 1964, Yale University.

ingness to presume agreements almost inevitably will lead judges to impose their moral values on the unmarried couples in these cases, and I agree that this imposition is similar in principle to these other, more obviously coercive measures. I am not confident, however, that these impositions are clearly different in principle from the specific holding of the *Marvin* case that David applauds—that, after the unmarried couple had separated, a court should enforce the specific terms of agreements that the parties had made at some earlier time when they were happily living together. Let me set out the reasons for my doubts on this score, and then suggest the consequences of these doubts for the position that David has taken.

First: my doubts about the principle of the matter. I think it is fair to say, as David suggests, that judicial willingness to enforce promises does enhance people's freedom of choice. But this implies, as he recognizes, a complicated and even paradoxical conception of "freedom." Certainly Lee Marvin did not see the California Supreme Court's opinion at the time as enhancing his freedom of choice; if the lower court had found on remand that Marvin had entered into an agreement with Michelle Triolla, Marvin's freedom would have been substantially curtailed by the court's order that he pay over substantial resources to her or suffer penalties. Marvin might well have considered such a court order and the prospect of penalties as onerous as—and perhaps even equivalent to—a law that threatened him with imprisonment for fornication.

This, however, would be Marvin's perspective after he had decided to leave Michelle Triolla. He might have had a very different perspective at an earlier time when they first decided to live together. He might have wanted at that time to bind himself to her, to give her assurances that their relationship was not casually entered and could not be casually broken. This is the "freedom of choice"—the capacity to choose to bind himself—to which David alluded in his characterization of the Court's opinion.

But why is this an important capacity for Marvin to have? What precisely will he lose if he does not have this capacity? I think the issue at stake is not simply Marvin's freedom to do what he wants when he wants. I think the crucial issue is whether the state will assist Lee Marvin in entering a genuinely trusting relationship—a relationship in which both he and Michelle Triolla will put aside their suspicions, their wariness about the other's reliability, a relationship in which they will take the risk of making themselves vulnerable to one another.

Both Lee and Michelle may believe that they can best overcome their mutual suspicions, their initial mistrust of one another, if they can convincingly promise one another that, come what may, certain obligations of financial support at least will not be broken.

Why might the state want to facilitate this kind of relationship? Again, I believe, not simply to enhance this couple's freedom as such; but more fundamentally, to foster a specific kind of human relationship—a relationship in which the question of mutual loyalty and fidelity is not always up for grabs, a momentary and fragile thing. And why in turn might the state want to foster this kind of relationship in preference to others? One reason, of course, is simply to perform a service to those couples who want to opt into this kind of relationship. But this justification has a paternalistic aspect; one might view the state enforcement weapon as a crutch, a fake substitute for genuinely trusting relationships.

By enforcing promises, the state may not be imposing its morality on unwilling people; but it is depriving people of the freedom to change their minds, it is imposing a morality that they may have once embraced but now regret. To this extent—by depriving people of an opportunity to change their minds, even if that deprivation only comes in response to their request that they be deprived of this freedom—the state is taking sides, lending its coercive weight to one essentially moral position over another about the true nature of “freedom.”

There is, of course, an equally coercive implication in the state's willingness to enforce commercial contracts. To identify the existence of state coercion in commercial contracts only means, however, that the coercion must be analytically justified (on economic efficiency grounds, perhaps) rather than hidden under a rhetorical fog of self-evidently proper state protection of “freedom of contract.”

This is one kind of coercion—a paradoxical kind—that I see in the *Marvin* case. Another kind of moral coercion also falls on unmarried couples from the *Marvin* case—a coercion that comes from the simple fact that the case offers them the option of making binding promises. The availability of this option in itself can easily work to *create* the relationship. If this option had clearly existed when Lee and Michelle had first met and had first considered living together, it would have been a tempting means for them to *prove* their fidelity to one another, to enter into a formally binding agreement as a means of reassuring and even seducing one another. The fact that they had entered this

binding agreement might even sufficiently appease their mistrust, that entering it would virtually create the relationship that could not have taken solid form without it. The existence of the promissory enforcement option can itself thus create pressures and temptations for its use, and create rather than simply reflect relationships.

If I am right in this—if the option itself creates pressures and temptations to use it—then can it be truly said that the state that offers the option is simply enhancing this unmarried couple's freedom of choice? Or is the state creating subtle but powerful incentives that lead this couple toward the kind of the long-term, mutually trusting relationship that the state finds desirable? David has already suggested that the state's invitation in the *Marvin* case to unmarried couples to enter binding agreements may be the invitation of the spider to the fly. But he used this metaphor only regarding the California court's willingness to presume agreements rather than its readiness to enforce explicit promises. The state spider may, however, be even craftier than David thought. This web of promises may be stickier, more entangling, than he acknowledged. By offering the seductive option of enforcing unmarried couples' promises, the state may be creating a more effective penalty for fornication (one likely to be extensively enforced by jilted lovers) than if it relied on traditional criminal statutes.

I am not disagreeing here with David's position that the California Supreme Court should have restricted judicial enforcement to express agreements. I am suggesting that enforcement even of only express agreements has substantial coercive implications of the kind that David fears regarding enforcement of implied agreements. Does this mean that, having seen the spectre of state-imposed morality even in this narrow holding of the *Marvin* case, we should jettison the whole idea? I don't think this follows. I think a good case can be made that the state should encourage this kind of long-term fidelity between couples, that it is good for them and for society. I think a particularly strong case can be made that these couples do not always enter their relationships as equals, that there is a danger that one will mislead, overreach, abuse the other; in the past, at least, women have been too easily victimized by men in many such relationships. This was the heart of Michelle Triolla's claim against Lee Marvin, and I think a strong case can be made that the state should hold itself out as a potential protector of the weaker party in this, and many other transactions. If this means that the state is imposing its morality on one unwilling party in

the relationship, I am prepared to accept this coercion because the state can claim in good faith that, without its assistance, the strong would wrongly abuse the weak. This is, after all, the fundamental justification for state claims to combat many different kinds of discriminatory or abusive conduct in our society.

I may be wrong about these implications of the *Marvin* case. Couples may not be led to make binding promises to one another simply because the state offers them this option. Enforcing these promises may not foster rewarding long-term relationships or provide protection against abuse to the most vulnerable party in the relationship. But these propositions are difficult to prove or to disprove empirically, quite aside from the difficulties of establishing them as moral ideals that the state should promote. And, I regret to say, these same empirical propositions and moral ideals are put forward by the proponents of the traditional criminal fornication statutes and other impositions that David criticized in his paper, and that I also find distasteful. These proponents argue that state policy should actively foster certain kinds of relationships in preference to others, that greater social stability will result from this preference, and that weaker people will also thereby be protected from abuse by the strong. I think these arguments have less empirically-demonstrable force for criminal fornication statutes than for the *Marvin* holding enforcing unmarried couples' promises. But the arguments are the same in principle on both matters; and I find state coercion in both instances.

I agree with David that in family matters the proponents of the 1981 Family Protection Act would cast the net of state coercion much more widely than either he or I would advocate. This does not mean, however, that we more than they are "friends of freedom" in social affairs generally. They can convincingly argue that our willingness to invoke state coercion in other areas of social life (such as, for example, forbidding racial discrimination or reallocating income toward poor people) forfeits our claim to the "freedom-fighter" award insofar as we are advancing that claim on a net quantitative basis.

I believe David and I must argue for our moral positions on the basis of a forthright admission that we favor some state coercions and oppose others. We should not obscure this proposition with a kind of double-speak argument that some coercions are more like freedom than others. I am not convinced by David's specific argument, as I understand it, that there is a bright line of principle between the *Marvin* case, which represents "freedom," and other traditional state familial policies,

which represent "moral coercion." All of David's eloquence and his moral passion do not convince me; I wish they did. But for as long as we have known one another—for the brief time we were friends before we became colleagues, for the long time we were colleagues here and for the time to come that we will remain friends even though no longer colleagues—for all this time, we have each been wanting to convince the other of some proposition—and only rarely have either of us succeeded. Chalk it up to stubbornness, perhaps; or chalk it up to the kind of arguments that can only take place and blossom fruitfully in a good and loyal family relationship.