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DOES THE FAMILY HAVE A FUTURE?

WILLIAM C. DUNCAN*

*Look homeward Angel now, and melt with ruth.*¹

I. INTRODUCTION

Competing policy prescriptions for the family—regarding the definition of marriage, the ease of obtaining divorce, the responsibilities of parenthood, etc.—in the law are premised on competing views of the nature of the family. On the one hand, a view of marriage and family inherited from centuries of human experience, and on the other, a recent but powerful shift in the legal posture of the family brought on by adoption of a number of new policy initiatives in the past few decades. The future of the family in family law may well depend on the degree to which the inherited understanding can hold out against ideological challenges reflected in these new family policies.

II. FAMILY HERITAGE

A. SOCIAL ECOLOGY

At the outset, it is important to note that the family is more than a mere legal construct although the understanding of family we have inherited from centuries of human experience is reflected in some ways in our state laws.² Family is not a government program; it is a social institution. It is a key element in our “social ecology.”³ The authority of the family is independent of, not derived from, the state. As one state supreme court has noted:

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1. JOHN MILTON, *Lycidas*, in ENGLISH MINOR POEMS 27, 31 (William Benton 1952).

2. See F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage*, 42 ALBERTA L. REV. 1099, 1112-13 (2005) (“[T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and (c) the Catholic Church only began requiring the attendance of a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke’s Marriage Act, that the British state became a significant player in the joining together of men and women as husbands and wives.”) (citation omitted); Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 n.29 (2000) (“The law no more ‘creates’ the family than the Rule Against Perpetuities ‘creates’ dirt.”).

3. ROGER SCRUTON, A POLITICAL PHILOSOPHY 34 (2006).

“The rights inherent in family relationships—husband-wife, parent-child, and sibling—are the most obvious examples of rights retained by the people. They are ‘natural,’ ‘intrinsic,’ or ‘prior’ in the sense that our Constitutions presuppose them, as they presuppose the right to own and dispose of property.”⁴

The family is an excellent example of an intermediate institution that stands between the individual and the state, to form values and upbringing independent of state control.⁵ The family is an integral part of the vision “that our American forebears were committed and to which they dedicated their lives and new federal political structure,” a vision of “social constraint and the shaping of individual moral character through local intermediate institutions.”⁶ The family protects “individual rights, while recognizing that these have to be secured within the social context.”⁷

The law, of course, has a role to play in regards to the social institutions of marriage and family. For instance, the state can and ought to provide a legal structure for marriage and the family to be recognized and it ought to protect the integrity of that structure. Professor Bruce C. Hafen notes: “[T]he contribution of family life to the conditions that develop and sustain long-term personal fulfillment and autonomy depends . . . upon maintaining the family as a legally defined and structurally significant entity.”⁸ This structure can assist third parties in their interactions with the family and create lines of demarcation beyond which the state itself should not pass except in the direst emergency.

The importance of this reality of marriage and family as social institutions is underscored by a concurring opinion in an Alaska Supreme Court case:

The family is one of the oldest institutions known to mankind and forms the basic unit of our society. The family should enjoy considerable autonomy and independence from state interference. If the rule were otherwise, we would be taking a step toward a totalitarian government. Children could be removed from their parents’

4. *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982).

5. See Bruce C. Hafen, *Law, Custom, and Mediating Structures: The Family as a Community of Memory*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 82, 100 (Richard John Neuhaus ed., 1989) (“It is characteristic of totalitarian societies, by contrast, to centralize the transmission of values. Our system thus fully expects parents to interact with their children in ways we would not tolerate from the state—namely, through the explicit inculcation of intensely personal convictions about life and its meaning.”).

6. Barry Alan Shain, *American Community*, in *COMMUNITY AND TRADITION* 39, 41 (George W. Carey & Bruce Frohnen eds., 1998).

7. Richard Weaver, *Two Types of American Individualism*, 7 *MODERN AGE* 119, 122 (1963).

8. Bruce C. Hafen, *The Family as an Entity*, 22 *U.C. DAVIS L. REV.* 865, 867 (1989).

custody at the will of the state, depending upon what some governmental petty tyrant decides is meant by the term “welfare” or “best interests” of the children. Such a state of affairs would be entirely contrary to the form of government envisioned by the founding fathers of our nation.⁹

Marriage and family are social, not just in that they develop apart from the state, but in that their purposes are not state (i.e. purposes that advance the interests of the state in aggrandizing its power or promoting an official government ideology), nor merely individual, purposes. Wendell Berry describes how community involves “a set of arrangements between men and women” including marriage and family structure that

exist, in part, to reduce the volatility and the danger of sex—to preserve its energy, its beauty, and its pleasure; to preserve and clarify its power to join not just husband and wife to one another but parents to children, families to the community, the community to nature; to ensure, so far as possible, that the inheritors of sexuality, as they come of age, will be worthy of it.¹⁰

Professor Robert Nagel notes that “marriage is the primary institution that has been used all over the world to tame the turbulent power of human sexuality, to raise psychologically healthy children, to instill moral values, and to provide for some degree of mutual protection and support.”¹¹ As I have noted elsewhere: “The social understandings and practices that have contributed to our current marriage laws, particularly the continued acceptance of marriage as the union of a man and a woman are, in turn, rooted in realistic understandings of human nature and the consequences of sex difference.”¹² These include “the reality that only opposite-sex sexual relations can result in procreation without intention and without the participation of a third party.”¹³

A Washington Supreme Court judge notes: “The unique and binary biological nature of marriage and its exclusive link with procreation and responsible child rearing has defined the institution at common law and in

9. *Turner v. Pannick*, 540 P.2d 1051, 1055-56 (Alaska 1975) (Dimond, J., concurring).

10. WENDELL BERRY, *SEX, ECONOMY, FREEDOM & COMMUNITY* 120-21 (1993).

11. Robert F. Nagel, *Diversity and the Practice of Interest Assessment*, 53 DUKE L.J. 1515, 1533 (2004).

12. William C. Duncan, *Marriage and the Utopian Temptation*, 59 RUTGERS L. REV. 265, 267-68 (2007).

13. *Id.* at 268; see also *Andersen v. King County*, 138 P.3d 963, 1002 (Wash. 2006) (Johnson, J., concurring) (“The binary character of marriage exists first because there are two sexes.”).

statutory codes and express constitutional provisions of many states.”¹⁴ This and similar decisions recognize “that a premier value of marriage is its ability to protect the parties most vulnerable to the consequences of opposite-sex sexual relations, the woman who may become pregnant and the child that will result.”¹⁵

There are, as well, functions that marriage and family are not meant to fulfill. There is a notion current among some litigators and law professors that redefining marriage to include same-sex couples is important because it “represents an important human rights advance for gays and lesbians . . . in terms of the values of respect and dignity.”¹⁶ It is well to remember, however, that: “Marriage does not exist in order to address the problem of sexual orientation or to reduce homophobia. Marriage does not exist in order to embody the principle of family diversity or to maximize adult choice in the area of procreation and childrearing.”¹⁷

Marriage and family are also much more than mere individual choices although marriage begins with choices made by individuals. Roger Scruton observes: “Marriage is chosen, but its obligations are largely indeterminate, being generated by the institution itself, and discovered by the participants as they become involved in it.”¹⁸ Also, as F.H. Bradley notes: “Marriage is a contract, a contract to pass out of the sphere of contract; and this is possible only because the contracting parties are already beyond and above the sphere of mere contract.”¹⁹

The institutional nature of marriage includes its connection to creation of a family, contrary to “those who see nothing in marriage but the pleasure married people derive from one another, that is, only the first beginnings of marriage and not its whole significance, which lies in the family.”²⁰ Another implication of this reality is that marriage and family, as we have understood them until quite recently, cannot be discarded on an individual

14. *Andersen*, 138 P.3d at 991 (Johnson, J., concurring); *see also id.* at 1002 (“A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children.”); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Standhardt v. Superior Ct.*, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005).

15. Duncan, *supra* note 12, at 268; *see also* William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 168-69 (2004).

16. Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partnership Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1587 (2004).

17. DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 199 (2007).

18. ROGER SCRUTON, *THE MEANING OF CONSERVATISM* 132 (3d ed. 2002).

19. F.H. Bradley, *F.H. Bradley*, in *CONSERVATIVE TEXTS: AN ANTHOLOGY* 40, 58 n.1 (Roger Scruton ed., 1991).

20. LEO TOLSTOY, *WAR AND PEACE* (Ann Dunnigan trans., 1968) (1869).

whim. “Almost nothing about the family union rests in contract or consent, and none of the values which spring from it can be understood except in terms of the peculiar lastingness with which it is endowed.”²¹

What is true in this regard is also true as it relates to the ties created by parenthood. Being a parent creates social and moral obligations, as well as legal responsibilities, that cannot accurately be characterized as freely chosen in the same way one would think of a dickered bargain.²² The importance of being a parent transcends the purely personal benefit it may bring to the parent in terms of personal fulfillment: “Though the bond often fulfills us, it does not exist for the sake of our fulfillment.”²³

B. LAW

Our laws have traditionally respected these realities, recognizing but not creating marriage and family ties. Indeed, a number of state statutes do not even include formal definitions of marriage.²⁴ As another example, we might consider the fact that state laws require a formal process for divorce; in other words, a marriage does not end merely because one spouse decides it is over—the institution requires something more than that.²⁵ Legal obligations imposed on parents to support and protect their children similarly reflect traditional understandings of what is meant by being a parent.

The importance and value of these understandings should not be slighted just because they are not always explicitly spelled out in a statute or other legal source. Professor Robert Nagel explains: “The quiet flow of human conduct is not necessarily less eloquent than the excited noise of public debate.”²⁶ Thus, he warns: “If, in enforcing our Constitution, judges

21. SCRUTON, *supra* note 18, at 130.

22. For instance, one may choose to bear a child but cannot choose the characteristics, some that will be extremely challenging, of that child. These will not only include health characteristics but also emotional, psychological and other traits. The same goes for financial costs of music lessons, tuition, etc.

23. Gilbert Meilander, *The Meaning of the Presence of Children*, in *THE NINE LIVES OF POPULATION CONTROL* 149, 154 (Michael Cromartie ed., 1995).

24. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 952 (Mass. 2003) (“[The] definition of marriage, as both the department and the Superior Court judge point out, derives from the common law.”); *Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006) (“Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only people of different sexes may marry each other, but that was the universal understanding when articles 2 and 3 were adopted in 1909.”).

25. Thus, despite some calls to privatize the process, a divorce still requires a legal proceeding. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 952-56 (1979). If one marries before a former marriage is dissolved, that person will be guilty of bigamy. 11 *AM. JUR. 2D Bigamy* § 1 (1997).

26. Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 *U. COLO. L. REV.* 685, 700 (1990).

are to establish our values by interpreting our political history, then judges should interpret our whole history, not only what has been desired and said but also what has been accepted and left unspoken.”²⁷

In fact, understanding that marriage and family are organic institutions that have developed over time in response to human experience, should caution us not to dramatically disturb traditional understandings without a compelling justification. Edmund Burke’s warning is apposite: “[I]t is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society.”²⁸ Or, in Russell Kirk’s paraphrase: “The continuity of a nation’s establishments and institutions, the true consensus of many generations, must not be imperiled by the rash innovations of a talented reformer; for though the individual is foolish, the species is wise.”²⁹

The social institutional nature of marriage and family also counsel attention to social realities in lawmaking. As Dr. Steven L. Nock notes:

Whenever a law is viewed as illegitimate, it is unlikely to influence social norms, at least in the short term. A norm is more than average behavior. The fact that most married people are sexually faithful most of the time is not what makes fidelity a norm. Fidelity is a norm because it is widely regarded as right. A norm is an “ought” or “ought not” that is widely shared and deemed to be legitimate. A norm is an average bolstered by a sense that this is how things ought to be. The key to understanding the relationship between laws and norms, therefore, is the legitimacy of law. Laws may influence or bolster social norms, but they do so mainly when they are viewed as legitimate.³⁰

Governments, however, can and do overstep their bounds in relation to the family and can, especially in the long term, change the way family life is experienced by individuals and modify societal norms.

III. LEGAL DISTORTIONS

Standing in contradistinction to an older tradition, still reflected in some areas of law but more in the lived experience of many people, is a legal formulation increasingly at odds with settled understandings; a

27. *Id.* at 701.

28. Jeffrey Hart, *Burke and Radical Freedom, in AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY* 461, 480 (William F. Buckley ed., 1970) (quoting Edmund Burke).

29. RUSSELL KIRK, *EDMUND BURKE: A GENIUS RECONSIDERED* 83 (1967).

30. Steven L. Nock, *The Future of Public Laws for Private Marriages*, 11 *THE GOOD SOCIETY* 74, 74 (2002).

formulation, in fact, that threatens to distort the nature of the institution. Professor Robert Nagel notes the possibility that “the legal class” will have “disproportionate influence on current debates about marriage” and that this “influence is likely to distort and impoverish public understanding.”³¹ He argues “that the judiciary ought not be in constant confrontation with society.”³² There are, however,

more and more judges, more and more lawyers, and more and more law students and professors who have entered easily into a state of mind that sees in the Supreme Court precisely what Rousseau saw in his archetypical legislator and Bentham in his omnipotent magistrate: sovereign forces for permanent revolution.³³

This threat is made more real because the “creed” to which many courts subscribe

is of [their] own making, originating in sources independent of society and . . . tradition. It bears a close affinity to the standards and morality that attach to the progressive vision of a national ‘community’ marked by ‘enlightened’ norms and principles whose inherent worth should be evident to all.³⁴

A. LEGAL REASONING

As increasing aspects of family life have become matters of legislation and court decision—particularly with the increase of individual rights claims in constitutional cases—one inevitable result is the application of current patterns of legal decision-making to family matters. For instance, Professor Nagel notes that some of “the reasons that argue against expanding individual rights are abstract reasons” that “are important, but their importance is based in large measure on theoretical considerations. These considerations do have real world consequences but often only in the long run and only in a diffuse or systemic way.”³⁵ In a lawsuit, however, these kinds of considerations “come into conflict with highly individualized claims of right, and at each such juncture, it is likely that the structure will seem basically secure and—in any event—rather an abstract matter, while

31. Robert F. Nagel, *A Response to Professor Bix*, 42 SAN DIEGO L. REV. 835, 838-39 (2005).

32. ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 22-23 (1989).

33. ROBERT NISBET, PREJUDICES: A PHILOSOPHICAL DICTIONARY 210 (1982).

34. George W. Carey, *The Constitution and Community*, in COMMUNITY AND TRADITION 63, 83 (George W. Carey & Bruce Frohnen eds., 1998).

35. Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 322 (1992).

the individual's interest is likely to seem concrete, immediate, and in jeopardy."³⁶ Similarly, any particular aspect of the law "can be made to seem unnecessary or unimportant or even senseless if it is detached from the institutional and social web that gives it meaning."³⁷ Thus, despite lawyers' or judges' insistence that their objectives in a particular matter are limited, "in fact they are quite ambitious" in effect.³⁸

An illustration of the potentially distorting effect of some current patterns of legal reasoning can be seen in the ongoing debate over whether marriage ought to be redefined to include same-sex couples. Plaintiffs in these cases have stressed the claim that current marriage laws create a tangible hardship for same-sex couples who are denied the benefits of being married, such as hospital visitation or testimonial privilege.³⁹ Judges who accept these claims can explain their decision with the relatively straight-forward reasoning that some are getting privileges not given to others and this is, *ipso facto*, a constitutional problem.⁴⁰ Supporters of marriage laws, on the other hand, must explain marriage laws by references to social context and more "abstract" concepts, such as the channeling function of the law. Thankfully, many courts have understood and accepted these rationales but often, only by narrow margins.⁴¹

Court decisions can also upset settled understandings by examining current family policies using artificial policy interests and creative manipulations of comparison groups in their legal analysis. In the definition of marriage example, the courts may frame the comparison as adults who have chosen to be in a same-sex relationship versus adults who have chosen to be in an opposite-sex relationship. Since these two groups are extremely similar, the court can express disdain for the different treatment they believe is created by marriage laws. On the other hand, the court might frame the comparison as involving a group of adults whose relationships might result in children without any intention to do so versus a group whose relationships can only acquire children with the involvement of third parties. If this latter comparison is used, the state's policy of encouraging marriage for those in the second group can more easily be linked to

36. *Id.* at 322-23.

37. *Id.* at 322.

38. Nagel, *supra* note 31, at 837.

39. *E.g.*, Lewis v. Harris, 908 A.2d 196, 217-18 (N.J. 2006).

40. *E.g.* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003); Lewis v. Harris, 908 A.2d 196, 215-16 (N.J. 2006); Baker v. Vermont, 744 A.2d 864, 880 (Vt. 1999).

41. *See* Citizens for Equal Protection v. Bruning, 455 F.3d 859, 867-68 (8th Cir. 2006); Standhardt v. Superior Court, 77 P.3d 451, 459 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15, 26 (Ind. Ct. App. 2005); Hernandez v. Robles, 855 N.E.2d 1, 7-8 (N.Y. 2006); Andersen v. King County, 138 P.3d 963, 987 (Wash. 2006).

marriage's social purpose of encouraging those who may create children to commit to one another and to the children they create. The first comparison masks a real difference in order to justify a policy (by emphasizing adult choice) significantly at odds with the logic of marriage as it has long been recognized, which would require recognition of marriage's link to children.

An example of the effect of a court's identification of relevant policy interests has arisen in cases involving parenting such as where a non-parent asserts a right to custody or visitation of the child based on the non-parent's relationship with the child's biological or adoptive parent. In a recent case, for example, the Minnesota Supreme Court overrode the wishes of an adoptive mother in regards to visitation with her child by the mother's former partner.⁴² In doing so, the court said the longstanding constitutional policy of deference to a parent's decisions regarding the care and custody of her children should bow to the state's "compelling interest in promoting relationships among those in recognized family units . . . in order to protect the general welfare of children."⁴³ In this kind of case, the policy articulated by the court is crucial. If the interest is characterized as protecting a parent's fundamental right to the custody and control of her children, one result seems obvious. If the interest is "promoting relationships among those in recognized family relationships," the result will be entirely different. Ironically, the second standard is particularly tautological because it is the government that makes a relationship "recognized." Thus, the Minnesota court's standard is that the government can override a parent's wishes in pursuance of the government's interest in promoting relationships the government has designated as worthy of recognition. By manipulating the terms of its analysis, the court can give the appearance of applying a test that is in reality entirely discretionary.

Something similar is happening when a court says a longstanding marriage definition cannot be justified by a state's interest in children's wellbeing because unmarried couples are raising children who might be marginally benefited as second-hand beneficiaries of the marital status accorded to the heads of the household in which they live.⁴⁴ This result, however, is only possible if the state's interest in marriage is merely to give as many children as possible the government benefits through the widespread extension of marital status. Another court describes the government's interest in marriage more accurately:

42. *In re SooHoo*, 731 N.W.2d 815, 826 (Minn. 2007).

43. *Id.* at 822.

44. *Goodridge*, 798 N.E.2d at 964.

[T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.⁴⁵

This more careful statement of the government interest in marriage discloses the absence of any constitutional problems in the state's definition of marriage. It is clear that a particularly nebulous legal standard, such as the best interests of a child, will make it simple for courts and legislatures to identify interests in a way that promotes favored policies.

Court decisions and other legal actions create a particular threat to settled understandings of marriage and family when they are motivated by a view of the law “as requiring a continuing presumptive hostility to the past.”⁴⁶ Professor Nagel notes that this “creates a serious danger that courts will prevent people from building a coherent knowledge and sense of morality” and even “carries the risk that certain groups will come to see the Constitution [or a statutory code] as an alien document, used by segments of the educated classes to belittle and undermine their ways of life.”⁴⁷ Examples include spouses who feel betrayed when their husband or wife ends a marriage with the collusion of a divorce law that favors the party who wants a divorce over the spouse who objects;⁴⁸ or spouses whose decisions to stay at home with their children or to closely direct their children's educations have been lost in court battles.⁴⁹ The no-fault divorce

45. *Hernandez*, 855 N.E.2d at 6-7.

46. Robert F. Nagel, *American Constitutional Law*, 127 U. PA. L. REV. 1174, 1188-89 (1979).

47. *Id.*

48. *See* *Waite v. Waite*, 150 S.W.3d 797, 799 (Tex. App. 2004).

49. *See e.g.*, *Biliouris v. Biliouris*, 852 N.E.2d 687, 690-91 (Mass. App. Ct. 2006) (“Although the parties agreed that the wife would leave her job in order to be a ‘stay-at-home’ mother, there is nothing in the record to suggest that the wife would be incapable of working and earning

revolution, as Maggie Gallagher notes, was not a reaction to “an anguished public, chained by marriage vows[,]” but rather the work of “lawyers, judges, psychiatrists, marriage counselors, academics, and goo-goo eyed reformers who objected to, of all things, the amount of hypocrisy contained in the law.”⁵⁰

B. IDEOLOGY

One explanation for the distorting impact of legal trends on marriage and family life is the ideological commitments that these trends are meant to advance; commitments at odds with the traditional understanding of marriage and family as social institutions with a logic not driven by state values. These ideological goals become the rationale for a court or legislative decision to impose new understandings of marriage or family. This distortion is, thus, intentional.

1. *Individualism*

A primary element of the new ideological legal depiction of the family, for instance, is its emphasis on radically individualistic and contractual notions. The most prominent example is the no-fault divorce revolution. As Maggie Gallagher says, “[i]n a single generation, marriage has been demoted from a covenant, to a contract, to a private wish in which *caveat emptor* is the prevailing legal rule.”⁵¹ Neither is this merely a symbolic change: “Estimates vary, but the best evidence suggests no-fault divorce increases the divorce rate on the order of 10 percent.”⁵² In a no-fault divorce regime, the government sides with a party who seeks a divorce against the spouse who might be willing to save a marriage.⁵³ The law privileges the “choice” of one spouse to leave over the obligation to the marriage (and family) implied in the original decision to marry.

Another example is the widespread acceptance of individual intent as the basis for gaining parent status in the absence of a biological tie to a child. A number of court decisions have concluded that a former partner of

income to support herself in the event of a divorce in the future.”); *Stephen v. Stephen*, 937 P.2d 92, 94 (Okla. 1997).

50. MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE* 147 (1996).

51. *Id.* at 146.

52. Douglas W. Allen & Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate?*, 1 IMAPP RESEARCH BRIEF 1, 7 (2007).

53. This is true because when one party alleges irreconcilable differences (the no-fault ground for divorce), the other party cannot contest this as they would be able to do if the spouse initiating the divorce had alleged adultery or abuse. Thus, the existence of no-fault “grounds” allows one party an irrefutable reason for a court to grant the divorce but no opposite mechanism for a non-initiating spouse to challenge the effort to divorce.

a child's mother can seek custody and visitation or other parental status because the adults in the relationship intended that result.⁵⁴ In one decision, the California Supreme Court improbably ruled: "We perceive no reason why both parents of a child cannot be women" because the two women involved in the case actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children's second parent.⁵⁵

In other cases, courts have decided that a child should have no relationship to their natural father, not in deference to a marital family or because of parental unfitness, but because that is the result intended by one of the adults.⁵⁶ It is common for states to allow individuals to create a child with only one legal parent if, again, that is the intention of an adult anxious to have a child whether that be a mother (in the case of artificial insemination)⁵⁷ or a father (as in some surrogacy contracts or egg donation agreements).⁵⁸

In a recent New Jersey case, a court ruled that a same-sex partner of a child's mother, who had conceived through artificial insemination, could be a co-parent.⁵⁹ In doing so, the court said the sperm donor father was not a legal parent because he had not been a party to a legal agreement granting him "any birthrights to the child."⁶⁰ This curious use of the word "birth-right," which we usually use to mean a child's inheritance, to mean an adult's bartered interest in a child, typifies the way that legal preferences for

54. See *C.E.W. v. D.E.W.*, 2004 ME 43, ¶ 1, 845 A.2d 1146, 1147; *E.N.O. v. L.L.M.*, 711 N.E.2d 886, 888 (Mass. 1999); *LaChapelle v. Mitten*, 607 N.W.2d 151, 157 (Minn. Ct. App. 2000); *In re T.L.*, No. 953-2340, 1996 WL 393521, at *4 (Mo. Cir. May 7, 1996); *V.C. v. M.J.B.*, 748 A.2d 539, 542 (N.J. 2000); *A.C. v. C.B.*, 829 P.2d 660, 664-65 (N.M. Ct. App. 1992); *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959, 961 (R.I. 2000); *In re L.B.*, 122 P.3d 161, 163 (Wash. 2005); *In re Clifford K.*, 619 S.E.2d 138, 142 (W. Va. 2005); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 420 (Wis. 1995).

55. *Elisa B. v. Superior Ct.*, 117 P.3d 660, 666 (Cal. 2005).

56. See *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007); *McIntyre v. Crouch*, 780 P.2d 239, 241 (Or. Ct. App. 1989).

57. See, e.g., ALA. CODE § 26-17-21 (2007); CAL. FAM. CODE § 7613 (2008); CONN. GEN. STAT. § 45a-775 (2008); DEL. CODE ANN. tit. 13, § 8-702 (2007); KAN. STAT. ANN. § 38-1114 (2007); MINN. STAT. § 257.56 (2008); MO. REV. STAT. § 210.824 (2007); MONT. CODE ANN. § 40-6-106 (2007); NEV. REV. STAT. § 126.061 (2007); N.D. CENT. CODE § 14-20-60 (2007); OHIO REV. CODE § 3111.95 (2008); OR. REV. STAT. § 109.239 (2007); UTAH CODE § 78-45g-702 (2007); WIS. STAT. § 891.40 (2007); *Lamaritata v. Lucas*, 823 So. 2d 316, 317 (Fla. Dist. Ct. App. 2002).

58. See, e.g., 750 ILL. COMP. STAT 47/15 (2007); IOWA CODE § 710.11 (2008); TEX. FAM. CODE § 160.754 (2007); TEX. FAM. CODE § 160.702 (2007); UTAH CODE ANN. §§ 78-45g-702,-801 (2007).

59. *In re Robinson*, 890 A.2d 1036, 1042 (N.J. Super. Ct. 2005).

60. *Id.* at 1038 n.2.

contractual and individualistic paradigms of family have turned traditional assumptions on their heads. As David Velleman has noted, “[t]he experiment of creating these children is supported by a new ideology of the family, developed for people who want to have children but lack the biological means to ‘have’ them in the usual sense.”⁶¹

At the fringes of this contractual view of the family, is one formulation that garnered the votes of three Supreme Court justices—that the obligations of marriage are irrelevant and an adulterous coupling can be a “family” entitled to constitutional recognition.⁶² The case involved a child conceived in an adulterous relationship. The presumed biological father of the child sought to establish paternity, but a plurality of the Court concluded he could not do so.⁶³ Justice Brennan dissented, joined by Justices Marshall and Blackmun, and took aim at the plurality’s assumptions about what a family is: “Even if we can agree, therefore, that ‘family’ and ‘parenthood’ are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.”⁶⁴ The dissent would have defined “family” solely by the facts of joint residence and adult intent⁶⁵ even if that meant, in this case, designating the relationship between a married woman, her adulterous companion and their child a family. To link the notion of family to marriage, to these justices was a “pinched conception.”⁶⁶

2. Equality

The program of radical personal autonomy is bolstered by the potent ideology of egalitarianism that aims to level all distinctions in order to prevent the unpleasant consequences of choices.⁶⁷ Some legal activists see family and marriage as “tools to be used, and when necessary reshaped, to serve the cause of social justice” because to them “[e]galitarian political action is the essence of citizenship.”⁶⁸

Thus, for example, in the effort to redefine marriage, the “state is being asked not only to distribute benefits equally but to legitimate gay people’s

61. J. David Velleman, *Family History*, 34 *PHILOSOPHICAL PAPERS* 357, 360 (2005).

62. *Michael H. v. Gerald D.*, 491 U.S. 110, 139-40 (1989) (Brennan, J., dissenting).

63. *Id.* at 119-21 (plurality opinion).

64. *Id.* at 141 (Brennan, J., dissenting).

65. *Id.* at 143-44 (“The evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael “Daddy,” Michael contributed to Victoria’s support, and he is eager to continue his relationship with her.”).

66. *Id.* at 145.

67. See Robert Nisbet, *The Pursuit of Equality*, 35 *PUBLIC INTEREST* 103, 103 (1982).

68. BRUCE FROHNEN, *THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM* 138 (1996).

love and affection for their partners” and “gay couples now marrying in Massachusetts want not only the same protections that straight people enjoy but the social status that goes along with the state’s recognition of a romantic relationship.”⁶⁹ The effort to secure equality of esteem is clearly a major, if not the most important, impetus for the redefinition effort. This is evident in the unwillingness of activists to accept a statutory scheme that would provide same-sex couples the benefits of marriage through creation of a separate status like civil unions.⁷⁰

The redefinition program also employs the extreme egalitarian argument that men and women are essentially fungible when it comes to marriage. Even some courts have ruled that marriage is a form of sex discrimination merely because marriage laws note the gender of the parties to the marriage.⁷¹ This requires, of course, ignoring matters such as procreative capacity (i.e. the reality that it still takes a man and a woman to create a child). As Professor Nagel has observed regarding this fungibility argument used in another context: “The disadvantage is that it elevates the conceptual over the experiential and historical, and thereby achieves goofiness.”⁷²

A less obvious illustration is provided by the effort to make alimony (spousal support) temporary so as to promote the practice of divorced spouses providing for themselves rather than continuing in the differentiated roles they had assumed during their marriage.⁷³ This effort requires courts to treat parties to a divorce as uniform even if the lived circumstances of their marriage were based on the “inequality” of role differentiation. In this matter of egalitarianism, it is well to remember Tocqueville’s warning that “men will never found an equality that is enough for them.”⁷⁴

69. Adam Haslett, *Love Supreme*, THE NEW YORKER, May 31, 2004, at 76, 79.

70. See David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73, 77-79 (2005).

71. See *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993); *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *1 (Md. Cir. Ct. 2006), *overruled by* *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007).

72. Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633, 647 (1990).

73. See *In re Harvey*, 899 A.2d 258, 264 (N.H. 2006), *overruled on other grounds by* *In re Chamberlin*, 918 A.2d 1, 3 (N.H. 2007).

74. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000).

IV. WEAKENED FAMILIES/STRENGTHENED STATE

In attempting to change the family to promote boundless personal autonomy and egalitarianism, the law has contributed to weakening of the family as a social institution and, by extension, the strengthening of the state *vis-à-vis* the social realm.

A. FAMILY WEAKNESS

Legal changes can have a profound effect on families because although we may pursue change to benefit a small group (like same-sex couples or unwed spouses or unwed parents), the default rules created to respond to these situations will apply to all marriages and families. As David Blankenhorn notes, “changing marriage, regardless of why we do it, changes marriage for *everyone*. In particular, it changes parenthood for everyone.”⁷⁵

In a recent lecture, Berkeley sociologist Ann Swidler noted the institutional weakness of the family in America, manifested by its small size, its instability, the smaller portion of individual lives spent in a family (both as a portion of the day and over a lifetime), its unclear definitions and an increasing tendency of family to be organized by a logic of choice rather than obligation.⁷⁶ As Blankenhorn has written,

[a] rise in unwed childbearing and a decline in the belief that people who want to have children should get married. High divorce rates and less belief in marital permanence. The embrace of gay marriage and of the belief that marriage itself is a personal private relationship. The acceptance of collaborative reproduction and of the casual effacing of the child’s double origin. *These things go together.*⁷⁷

1. *No-Fault Divorce*

The no-fault divorce revolution may have been meant to help a small number of persistently unhappy or unhealthy marriages but the legal changes it created have significantly weakened the institution not only for those who would have been inclined to divorce under the old fault regime, but for everyone.⁷⁸ Wendell Berry notes:

75. BLANKENHORN, *supra* note 17, at 198.

76. Ann Swidler, Univ. of Cal., Berkeley, Fighting for the American Family: Families in the Crosshairs of the Culture Wars, Lecture at Brigham Young University (Oct. 18, 2007).

77. BLANKENHORN, *supra* note 17, at 233.

78. See Carl E. Schneider & Lee E. Teitelbaum, *Life’s Golden Tree: Empirical Scholarship and American Law*, 2006 UTAH L. REV. 53, 81 (“Changing divorce, changed marriage.”); Alan J.

If you depreciate the sanctity and solemnity of marriage, not just as a bond between two people but as a bond between those two people and their forbears, their children, and their neighbors, then you have prepared the way for an epidemic of divorce, child neglect, community ruin, and loneliness.⁷⁹

The impact of divorce law on human lives can be very practical as reported in a recent economic study that found that the “adoption of unilateral divorce . . . reduces investment in all types of marriage-specific capital considered except home ownership.”⁸⁰ Thus, regardless, “[u]nilateral divorce laws—regardless of the property division laws—lead to less support of a spouse’s education, fewer children, greater female labor force participation and an increase in households with both spouses engaged in full-time work.”⁸¹ There is much additional evidence of the very real negative consequences for the parties⁸² to a divorce, and for the children who are involved.⁸³

There are also less tangible, but extremely significant, impacts of no-fault divorce regimes. For instance, the law’s aggressively nonjudgmental approach to divorce—with its attendant feigned ignorance of the wrongs suffered by the parties—contributes to a sense that not only is there no legally cognizable harm in a divorce, but also that divorced parties really suffer no kind of harm at all. In other words, the disappearance of legal costs for divorce has made it less likely that anyone will suffer social sanctions, such as stigma, for their decision to divorce. This is a welcome development for some, but for many others it may contribute to feelings of anger and alienation, as they believe their experiences of hurt and betrayal are ignored.⁸⁴

The increasing instability and impermanence of marriage may contribute to a distortion in expectations for marriage—resulting in a

Hawkins, *Will Legislation to Encourage Premarital Education Strengthen Marriage and Reduce Divorce?*, 9 J.L. & FAMILY STUD. 79, 82-83 (2007) (“[R]ecent research suggests that most divorces are initiated because of ‘softer’ personal or relationship problems, such as falling out of love, changing personal needs, lack of satisfaction, feelings of greater entitlement, and so forth.”); Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379, 379-80 (2001).

79. BERRY, *supra* note 10, at 125.

80. Betsey Stevenson, *The Impact of Divorce Laws on Marriage-Specific Capital*, 25 J. LABOR ECON. 75, 75 (2007).

81. *Id.*

82. *See generally* JUDITH WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE* *passim* (2000).

83. *See generally* ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* *passim* (2005).

84. *See* Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741, 742.

hesitance to marry out of fear that it will not work out—and, ironically, to behaviors that make marriage success less likely (like cohabitation).⁸⁵ A recent study convincingly portrays communities in which marriage is less an aspirational norm than a recurring fantasy.⁸⁶ While it is positive that most Americans would like to, or even plan to, marry, trends that devalue marriage and increase its instability could make marriage like the weather—everyone talks about it but no one does anything about it.⁸⁷

2. *Redefining Marriage*

Just as a marriage institution that is seen as increasingly impermanent is not likely to shape behavior, neither is an institution that lacks any substantive meaning. This is particularly true as it relates to the way marriage fills the need to encourage men and women who create children to provide for those children. David Velleman describes how this works:

Some truths are so homely as to embarrass the philosopher who ventures to speak them. First comes love, then comes marriage, and then the proverbial baby carriage. Well, it's not such a ridiculous way of doing things, is it? The baby in that carriage has an inborn nature that joins together the nature of two adults. If those two adults are joined by love into a stable relationship—call it marriage—then they will be naturally prepared to care for it with sympathetic understanding, and to show it how to recognize and reconcile some of the qualities within itself. A child naturally comes to feel at home with itself and at home in the world by growing up in its own family.⁸⁸

David Blankenhorn says: “Across history and cultures . . . marriage’s *single most fundamental idea* is that every child needs a mother and a father.”⁸⁹

Unfortunately, some legal changes would endorse a dramatic shift in the way the institution of marriage relates to the linkage between parents and children. Again from David Blankenhorn: “the biological and social dimensions of being a parent stand best when they stand together. Marriage as a social institution supports these ideas. The logic of same-sex marriage

85. See William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1002 (2003) (collecting studies indicating cohabitation leads to poor outcomes in later marriage).

86. See KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD AHEAD OF MARRIAGE 109 (2005).

87. LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 2-3 (2000).

88. Velleman, *supra* note 61, at 370-71.

89. BLANKENHORN, *supra* note 17, at 178.

requires us to reject them.”⁹⁰ The idea of marriage as having little or nothing to do with its traditional purpose of ensuring enduring ties between children and their parents is central to the effort to redefine marriage as the union of any two people. This legal change would endorse radically fatherless or motherless homes; homes that are motherless or fatherless by design. Thus, “[i]nstead of regarding the family as the present generation’s way of sacrificing itself for the next, we are being asked to create families in which the next generation is sacrificed for the pleasure of the present one.”⁹¹

Thus, state and national laws that have been enacted to redefine marriage or create an alternative status have almost invariably affected laws on parenthood. The most significant example comes from Canada, where, when the Parliament redefined marriage, the legislation’s consequential amendments included the introduction of the new term “legal parent” to various provisions of national law, replacing natural or adoptive parents.⁹² California’s domestic partnership law provides that the “rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.”⁹³ Similarly, New Jersey’s civil unions law provides:

The rights of civil union couples with respect to a child of whom either becomes the parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either spouse . . . becomes the parent during the marriage.”⁹⁴

The laws of Oregon and Vermont contain similar provisions.⁹⁵ Each of these illustrations makes clear that a redefinition of marriage or the creation of a substitute is likely to lead to a separation of the concepts of legal and biological parenthood.

3. *Defining Parenthood Down*

Another example of the law’s contribution to weakened families involves the dilution of the law’s recognition of natural parenthood. This article has already noted the law’s shift from an endorsement of the duty of parents to provide for children to a regime that values children’s ability to

90. *Id.* at 156.

91. Roger Scruton, *This ‘Right’ for Gays Is an Injustice to Children*, SUNDAY TELEGRAPH, Jan. 28, 2007, at 24.

92. Canada Civil Marriage Act, 2005 S.C., ch. 33 (Can.).

93. CAL. FAM. CODE § 297.5 (2006).

94. N.J. STAT. ANN. § 37:1-31(e) (2007).

95. OR. REV. STAT. ANN. tit. 11, ch. 106, § 9(1) (West 2007); VT. STAT. ANN. tit. 15, § 1204(e)(4) (2007).

provide meaning and purpose to adults. This continued legal endorsement of alternative families requires instrumental means to allow adults to procure children—and requires the intentional exclusion of one or both of a child’s natural parents from the “family” equation—marks an increasing instrumentalization of children.

As David Velleman notes, traditionally, the desire to procreate has been thought to ground a moral right to procreate only for those who are in a position to provide the resulting child with a family. According to the new ideology of the family, of course, virtually any adult is in a position to satisfy this requirement, since a family is whatever we choose to call by that name.⁹⁶

In this way, “our society has embarked on a vast social experiment in producing children designed to have no human relations with some of their biological relatives.”⁹⁷

This instrumentalization has developed coincident with a longstanding devaluation of parental authority and family autonomy. Philosopher Michael Oakeshott describes the sequence of this weakening process: “First, we do our best to destroy parental authority (because of its alleged abuse), then we sentimentally deplore the scarcity of ‘good homes,’ and we end by creating substitutes which complete the work of destruction.”⁹⁸

The degree to which the commitment of American law to recognizing parental status and authority has declined is illustrated by a comparison of United States Supreme Court precedent separated by seventy-five years. In the 1920s, the Court decided two cases related to parental authority in the education context. The first involved the prosecution of a parochial school teacher who had given instruction in German.⁹⁹ In that case, the Court recognized a constitutional right of parents to control the education of their children premised in part on “the natural duty of the parent” to educate their children.¹⁰⁰ The Court noted that although there have been societies which see the child as a creature of the state and disregard family obligations and prerogatives, these

ideas touching the relation between the individual and the State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose

96. Velleman, *supra* note 61, at 364.

97. *Id.* at 360.

98. MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 41 (1991).

99. *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923).

100. *Id.* at 400-03.

such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.¹⁰¹

Shortly thereafter, the Court struck down a prohibition on non-public schools enacted by a popular referendum in Oregon.¹⁰² In invalidating the law, the Court again recognized “the liberty of parents and guardians to direct the upbringing and education of children under their control.”¹⁰³ Interestingly, the Court once again repudiated state-centered approaches to the family: “The child is not the mere creature of the State.”¹⁰⁴

These cases have been prominently featured in string citations produced to support some of the Court’s more expansive readings of constitutional law. In 2000, however, a case reached the Court that directly raised the concerns addressed in these earlier decisions. The Court’s 5-4 decision in this case, *Troxel v. Granville*,¹⁰⁵ was that a Washington statute that allowed any person to seek visitation with children was unconstitutional because the statute should have given special weight to the wishes of a fit parent.¹⁰⁶ This result does not seem particularly at variance with the earlier precedent. However, the reasoning of the Court makes clear that the plurality was replacing the earlier robust doctrine of parental liberty with a formulaic test that would only require the state to treat a parent’s wishes as an important factor in disputes with non-parents even if the state ultimately disregarded those wishes.

Professor Robert Nagel has pointed out that the Supreme Court’s reliance on such formulae is inherently problematic:

Despite their superficial precision, neither the content nor the shape of modern formulae communicates clarity and constraint. The formulae are demands—multiple, repetitive, shifting, and sometimes inconsistent demands. The style reflects intellectual embarrassment about the existence of judicial discretion but is designed to assure plentiful opportunities for its exercise. In combination with the mechanical tone of formulaic opinions, the palpable range of choice inherent in the formulae communicates, not objectivity, but power without responsibility. Rather than

101. *Id.* at 402.

102. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 536 (1925).

103. *Id.* at 534-35.

104. *Id.* at 535.

105. 530 U.S. 57 (2000).

106. *Troxel*, 530 U.S. at 72.

binding, the formulaic style frees the Court, like some lumbering bully, to disrupt social norms and practices at its pleasure.¹⁰⁷

In *Troxel*, the Court's formula creates the appearance of protection of parental rights while leaving lower courts free to ignore an actual parent's preference by saying that we are treating the parent preference as a plus factor, but after balancing all considerations, we feel free to disregard that preference.

Indeed, this is what appears to be happening in some recent cases. For instance, the supreme courts of Ohio and Utah have recently issued decisions in cases where grandparents sought visitation over the objection of a fit parent (the same fact scenario as *Troxel*). In both instances, the courts allowed visitation.¹⁰⁸ The courts believed that as long as the parents' wishes were consulted, the legal system's sense of the "best interests of the child" should be determinative even if that standard were to result in disregard for parental preference. Similarly in a recent Washington Supreme Court case, the court ruled that the former same-sex partner of a child's biological mother was entitled to visitation over the objection of the mother because the partner was, essentially, a parent to the child.¹⁰⁹ An appeals court in Maryland reached the same result in a dispute between an adoptive parent and her former partner.¹¹⁰ These examples are not exhaustive.

By employing a test that treats a parent's wishes as only one consideration for the ultimate decisionmaker—the state—to consider, our courts are weakening their traditional deference to the principle of family autonomy in favor of a state centered approach. This new, ideological, approach is similar to that of a recent European Court of Human Rights decision entirely at odds with the United States precedent regarding parents and education. That decision upheld Germany's investiture of educational decisionmaking entirely in the hands of the state, and stated, "respect is only due to convictions on the part of the parents which do not conflict with the right of the child to education" so "parents may not refuse the right to education of a child on the basis of their convictions."¹¹¹ This ideological approach is also inherent in a recent argument, by the Massachusetts chapter of the American Civil Liberties Union, in a federal court case involving parents' objections to curriculum choices made by the school in which the parents'

107. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 202-03 (1985).

108. *Harrold v. Collier*, 107 Ohio St. 3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, at ¶ 48; *In re Estate of S.T.T.*, 2006 UT 46, ¶ 43, 144 P.3d 1083, 1095-96.

109. *In re Parentage of L.B.*, 122 P.3d 161, 179 (Wash. 2005).

110. *Janice M. v. Margaret K.*, 910 A.2d 1145, 1152 (Md. 2006).

111. *Konrad v. Germany* (No. 35504/03), Eur. Ct. H. Rts. 1, 7 (2006).

children attend.¹¹² The ACLU argues: “What individual parents may not do, however, is demand control over the ideas to which their children will be exposed.”¹¹³

B. STATE STRENGTH

A family that is unstable and impermanent and that lacks any substantive meaning is less able to mediate between individuals and the state. As George Steven Swan notes: “Today’s family, continually threatened by dissolution, is less and less able to serve as the context in which millions of Americans pluralistically contract to organize their lives independently of central political authority.”¹¹⁴

Barry Alan Shain notes that the formative leaders of the United States rejected “a more aggressive, individualistic theory of the good political life” that “holds that human development is best pursued by freeing the individual from restrictive and intrusive familial, social, religious, and local political intervention.”¹¹⁵ According to this rejected view, the state would be the instrument of this “freeing” by weakening or destroying the traditional authority of these non-political institutions in order to foster individual choice.

To this end, the modern state has neglected the concept of rights as limitations on the power of the state in favor of a conception of rights as a protection by the state against the demands of social institutions like the family.¹¹⁶ This has led to a weakening of non-political authority over individuals and a strengthening of state authority over these individual’s lives.

This is no surprise since as Robert Nisbet notes: “It is the nature of both family and state to struggle for the exclusive loyalty of their respective, and overlapping, members.”¹¹⁷ M.E. Bradford explains: “In a modern context the alternatives are either a society whose sphere is protected by and from the state *or* life under the absolute control of government, with no

112. *Parker v. Hurley*, 474 F. Supp. 2d 261, 263 (D. Mass. 2007).

113. Memorandum Amicus Curiae of the American Civil Liberties Union of Massachusetts et al., at 2, *Parker v. Town of Lexington*, No. 06-cv-10751-MLW (Sept. 20, 2006).

114. George Steven Swan, *The Political Economy of American Family Policy, 1945-85*, 12 POPULATION & DEV. REV. 739, 752 (1986).

115. BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM* 13 (1994).

116. See Mark C. Henrie, *Rethinking American Conservatism in the 1990s: The Struggle Against Homogenization*, 28 INTERCOLLEGIATE REV. 8, 10 (1993). Wendell Berry points out that, ironically, “as the emphasis on individual liberty has increased, the liberty and power of most individuals has declined. Most people are now finding that they are free to make very few significant choices. It is becoming steadily harder for ordinary people . . . even to choose to raise their own children.” BERRY, *supra* note 10, at 151.

117. NISBET, *supra* note 33, at 110.

sacrosanct protective social buffer.”¹¹⁸ Jose Ortega y Gasset describes the latter alternative as “the absorption of all spontaneous social effort by the State.”¹¹⁹

Modern ideologues “seek to control local institutions” such as the family “so that those institutions will teach values—primarily toleration, equality, and authenticity—of which communitarians approve.”¹²⁰ Alexis de Tocqueville had warned of this tendency:

Once the sovereign had the general right to authorize associations of every kind under certain conditions, it would not be slow to claim that of overseeing and regulating them, in order that they not be able to deviate from the rule that it had imposed on them. In this manner the state, after having put all those who have the wish to associate with each other in its dependence, would then put there all those who have associated, that is to say, almost all men who live in our day.¹²¹

Perhaps he was thinking of the precedent in France where the Revolution severely weakened the solidarity of the family in line with its general policy toward all intermediate groups. “The family was considered no exception to the general principle that the individual is the true unit of the state and that all social authority *must pass over into the formal structure of the state.*”¹²²

The legal changes to marriage and family life, both those accomplished and others still pending, have had exactly this result. The legal norms that must be developed to make practical no-fault divorce or same-sex marriage or fatherless and motherless households, i.e. court-supervised visitation and default terminations of parental rights, are state-centered and often intrusive. When these new norms become, as they increasingly threaten to, the default patterns for all of family life, the family begins to look less like an autonomous social institution and more like a small administrative unit of government designed to streamline government functions such as delivery of welfare services or care for children who are, ultimately, creatures of the state.

118. M.E. Bradford, *On Remembering Who We Are: A Political Credo*, 26 MODERN AGE 144, 149 (1982).

119. JOSE ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 120 (1993).

120. FROHNEN, *supra* note 68, at 139.

121. DE TOCQUEVILLE, *supra* note 74, at 658.

122. Robert A. Nisbet, *The French Revolution and the Rise of Sociology in France*, 49 AM. J. SOC. 156, 160 (1943) (emphasis added).

V. THE FAMILY'S FUTURE

I have argued here that recent trends in family law, motivated by ideological commitments to radical personal autonomy and extreme egalitarianism, have threatened to distort our understanding of family as a spontaneous social institution. These trends have weakened the family and made it more susceptible to state control. If this is true, then we may well ask whether the family has a future as a legal matter.

The answer to this question will depend on whether we recognize the predicament and return to a more humble view of the law's place with regard to marriage and family. The first step is recognition that "change is not reform."¹²³ Wendell Berry illustrates the risk to the social ecology of the family in an analogy to our natural environment:

By their common principles of extravagance and undisciplined freedom, our public economy and our public sexuality are exploiting and spending moral capital built up by centuries of community life—exactly as industrial agriculture has been exploiting and spending the natural capital built up over thousands of years in the soil.¹²⁴

Policymakers considering "reform" to marriage and family are faced with a temptation to seek an imaginary perfection of limitless personal freedom and total uniformity of esteem among personal relationships. They may be motivated by a desire to help those who feel ill served by a return to our family heritage or who have been harmed by very human failings in their own families or communities. As the narrator of Anthony Trollope's novel *Barchester Towers* says, however, "Till we can become divine we must be content to be human, lest in our hurry for a change we sink to something lower."¹²⁵

The long held ideals of marriage and family as institutions providing unique benefits to children and society free from the constraints of an overweening state ought to be preserved. Marriage and family have served as the basic and primary sources of personal meaning, provision, support and mediation between individuals and the demands of the outside world.¹²⁶ Family life, for both good and ill, provides crucial lessons and experiences that shape character and, at their best, nurture deep happiness and

123. RUSSELL KIRK, *JOHN RANDOLPH OF ROANOKE* 218 (1997) (quoting John Randolph).

124. BERRY, *supra* note 10, 143.

125. ANTHONY TROLLOPE, *BARCHESTER TOWERS* 175 (Oxford Univ. Press 1998) (1857).

126. See Bruce C. Hafen, *Law, Custom, and Mediating Structures: The Family as a Community of Memory*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 82, 98-100 (Richard John Neuhaus ed., 1989).

fulfillment.¹²⁷ Marriage, as the foundation of a family, gives the world a future. Abandoning these ideals for whatever noble or ignoble purpose will not come without costs. In our impatience to pursue an ideological perfection, will we repudiate our inheritance? The answer to this question, as it will be reflected in the laws we adopt and enforce, may well determine whether the family has a future.

127. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy*, 81 MICH. L. REV. 463, 472-84 (1983).