A Report from the Council on Family Law
Dan Cere, Principal Investigator

The Future of Family Law

Law and the Marriage Crisis in North America

Institute for American Values
Institute for Marriage and Public Policy
Institute for the Study of Marriage, Law and Culture

The Council on Family Law, chaired by Mary Ann Glendon of Harvard Law School, is an interdisciplinary group of scholars and leaders who have come together to analyze the purposes and current directions of family law in Canada and the United States and to make recommendations for the future. The Council is independent and nonpartisan. It is jointly sponsored by the Institute for American Values, the Institute for Marriage and Public Policy, and the Institute for the Study of Marriage, Law and Culture. This Report's Principal Investigator, Dan Cere, teaches ethics at McGill University in Montreal and directs the Institute for the Study of Marriage, Law and Culture.

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The Future of Family Law
Law and the Marriage Crisis in North America

Executive Summary

FAMILY LAW IS on the front pages of our newspapers and is implicated in some of our deepest cultural conflicts, from no-fault divorce, to the status of cohabitation to, most recently, same-sex marriage.

At their core, these ongoing disputes are fueled by competing visions of marriage and of the role of the state in making family law.

This report on the current state of family law holds up for clear public view the underlying, dramatically different models of marriage that are contributing to deep public clashes over the law of marriage, cohabitation, and parenthood. Obtaining conceptual clarity about marriage and its meanings will allow family law experts, scholars from other disciplines, judges, legislators, and the general public to make more informed choices among competing legal proposals now being advanced in the United States and Canada.

Two Recent Reports

Recently two highly influential reports have been published by legal scholars, one in the United States and one in Canada. Both reports are deeply influenced by a new vision of marriage. Both reports have potentially profound and far-reaching consequences for social attitudes and practices concerning marriage, parenthood, and children.

The first report is the *Principles of the Law of Family Dissolution*, published in 2002 by the American Law Institute (ALI). This report moves away from the idea that there can be public standards guiding marriage and parenthood. Instead, it says that the central purpose of family law should be to protect and promote family diversity. The report sidelines what it calls "traditional marriage," viewing marriage as merely one of many possible and equally valid family forms. In the process the report denies the central place of biological parenthood in family law and focuses instead on the newer idea of "functional parenthood."

The second report is *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, published in 2001 by the Law Commission

of Canada. This report proposes a fundamental reconstitution of contemporary family law. It argues that the law must go "beyond conjugality" and focus on the "substance of relationships" rather than giving legal recognition to any specific arrangements such as marriage. It recommends that the traditional conjugal idea of marriage be put on a level playing field with all other kinds of relationships. It also argues for redefinition of marriage and its extension to same-sex couples.

The Current Directions of Family Law

These recent reports indicate that family law is headed in one or more of at least four troubling directions. Some of these changes have already been implemented in some jurisdictions in the United States and Canada.

1. **Equivalence Between Cohabitation and Marriage**
   Many now argue that marriage and cohabitation should be treated equally under the law. This approach denies that some couples might intentionally choose not to marry. Most dramatically, it would have the law treat two institutions similarly when social science data show that, when it comes to the well-being of children, cohabitation is on average much less stable and safe.

2. **Redefining Marriage as a Couple-Centered Bond**
   In order to accommodate same-sex couples, this approach redefines marriage as a gender-neutral union of two persons. By doing so it neutralizes the law's ability to say that children need their mothers and fathers and reifies a new conception of marriage that is centered on the couple rather than children.

3. **Disestablishment, or the Separation of Marriage and State**
   Given serious and seemingly irresolvable cultural and political clashes between competing visions of marriage, increasing numbers of advocates on the left and the right are calling for disestablishment of marriage, or getting the state "out of the marriage business." This approach denies the state's legitimate and serious interest in marriage as our most important child-protecting social institution and as an institution that helps protect and sustain liberal democracy.

4. **Why Just Two?**
   The gendered definition of marriage has already met serious challenges (and been defeated) in some U.S. and Canadian courts. Challenges to the two-person definition of marriage are only a matter of time. Legal scholars are now publishing articles that make this case.

Children: The Missing Piece

What is missing in new proposals in family law is any real understanding of the central role of marriage as a social institution in protecting the well-being of children.

Marriage organizes and helps to secure the basic birthright of children, when possible, to know and be raised by their own mother and father. It attempts to forge a strong connection between men and women and the children resulting from their bonds. These new marriage proposals call for a fundamental reevaluation of the relationships between children and their parents. These new reports make clear that eliminating the notion of biology as the basis of parenthood, and allowing parenthood to fragment into its plural and varied forms, is necessary if courts are to make family diversity a legal and cultural reality.

The vision outlined in these two reports frees adults to live as they choose. But social science data strongly suggest that not all adult constructions of parenthood are equally child-friendly. Further fragmentation of parenthood means further fragmented lives for a new generation of children who will be jostled around by increasingly complex adult claims. This vision also requires more systematic intrusion into the family and adjudication of its internal life by the state and its courts.

Clashing Models of Marriage

What are the competing models of marriage that are at odds in today's family law debates?

1. **The Conjugal View**
   The model of marriage broadly reflected in law and culture until quite recently can be called the "conjugal model." Marriage in this view is a sexual union of husband and wife who promise each other sexual fidelity, mutual caretaking, and the joint parenting of any children they may have. Conjugal marriage is fundamentally child-centered. Theorists of liberal democracy from John Locke to John Rawls have underlined the important, generative work that conjugal marriage does for society. This normative model of marriage is under attack in these recent reports.

2. **The Close Relationship Model**
   This competing vision of marriage has emerged in recent decades. In it, marriage is a private relationship between two people created primarily to satisfy the needs of adults. If children arise from the union, so be it, but marriage and children are not seen as intrinsically connected.

This second and newer vision has been fueled by a new discipline called close relationship theory. For close relationship theorists, marriage is simply one kind of close personal relationship. The structures of the discipline tend to strip marriage of the features that reflect its importance as a social institution. Marriage is examined primarily as a relationship created by the couple for the satisfaction of the two individuals who enter into it.

This view of marriage radically sidelines the main feature that makes marriage unique and important as a social institution — that is, the attempt to bridge sex difference and struggle with the generative power of opposite-sex unions, including the reality that children often arise (intentionally and not) from heterosexual unions.

Today's close relationship theorists argue that conjugal marriage can no longer serve as a useful focus for scholarly research on closely bonded human relationships. They argue that the traditional marriage-and-family paradigm imposes an ethnocentric "benchmark" or "ideal." This paradigm, they say, does not speak to the experience of racial minorities, women, single parents, divorced and remarried persons, gays and lesbians, and others. Their perspective is finding a new and powerful voice in today's family law proposals.

Conclusion

Family law today appears to be embracing a big new idea. The idea is that marriage is only a close personal relationship between adults, and no longer a pro-child social institution. This idea is fundamentally flawed. It will hurt children and weaken our civil society. For this reason, there is an urgent need for those outside the legal discipline to understand and critique the new understandings of marriage and family life that are driving current legal trends. Marriage and family are too important as institutions, affecting too many people, for basic decisions about their legal underpinnings to remain the province of legal experts alone.

If the proposed changes are put in place, there are likely to be important negative impacts on the lives of everyday people. A "close relationships" culture fails to acknowledge fundamental facets of human life: the fact of sexual difference; the enormous tide of heterosexual desire in human life; the procreativity of male-female bonding; the unique social ecology of parenting which offers children bonds with their biological parents; and the rich genealogical nature of family ties and the web of intergenerational supports for family members that they provide.

These core dimensions of conjugal life are not small issues. Yet at this crucial moment for marriage and parenthood in North America, there is no serious intellectual platform from which to launch a meaningful discussion about these elemental features of human existence. This report on the state of family law seeks to open that debate.

Introduction: The Marriage and Family Law Crisis

FAMILY LAW IS HOT. It is on the front pages of our newspapers and is implicated in some of our deepest cultural conflicts, from no-fault divorce to the status of cohabitation to, most recently, same-sex marriage.

Family law now operates in a global context with legal scholars in one nation often influencing their peers elsewhere. Because marriage and the family are pervasive social institutions, touching the lives of all citizens, changes in family law can generate unusually intense social discomfort. John Dewar, the dean of law at Griffith University in Australia, puts it this way:

> There are few areas of law that generate as much controversy and disagreement as family law. It's something potentially that affects us all, in which we all feel we have a stake and of which some of us have had direct experience. Indeed, there are probably few areas of law that affect so many people so directly in their everyday lives.[1]

The ongoing disputes in family law are centrally about competing visions of marriage.

Legal theory about the family, he notes, has become "a confused and tangled terrain of conflicting ideas and tendencies."[2]

The purpose of this report is to bring conceptual clarity into the confused and tangled terrain of the family law debate. *Here is our central thesis: the ongoing disputes in family law are centrally about competing visions of marriage.* While at the far ends of a conceptual divide lie a bewildering variety of specific new proposals (same-sex marriage, covenant marriage, de facto parenting, cohabitation, constitutional amendments to define marriage, and more) these disputes begin with and are fueled by dramatically different concepts of marriage and of the role of the state in making family law.

The competing visions of marriage and family contained in family law are important. Because marriage is a public, legal status, the state's vision of marriage has unusual social power. In regulating marriage, the state not only defines the rights of individuals and couples but also can and does command other institutions of civil society (corporations, faith communities, and even private individuals) to treat married couples differently because they are married.

Yet the meanings of marriage at stake in these debates are often not very clear. In part, as we shall see, this lack of clarity stems from the fact that the law's characteristic method, incrementalism, tends to obscure ultimate consequences. In part it is because the social meanings of the word "marriage," and the underlying reality it denotes, are in play in our society as they have seldom been before. The competing visions of marriage at the heart of the family law debate are deeply incompatible — the adoption of one model of marriage moves us in a very different

direction than its alternative. But unless the conceptual issues at stake are clarified, this problem is not obvious to most observers, in part because most of us in North America today have been influenced in our marriage dreams by *both* of these visions of marriage.

Further, the stakes in the family law debates have been left unclear because some champions of this new marriage model appear to be reluctant for tactical reasons to explain the ultimate consequences of adopting their proposals, while many advocates of our marriage traditions have been less than articulate about what it is they seek to uphold or why the legal understanding of marriage matters.

"Rights talk" can obscure as much as it reveals. In particular, the portrayal of certain legal reforms as advancing state "neutrality" between the moral positions of individuals, or as increasing individual liberty in a straightforward way, obscures the reality of what is being proposed: a new substantive model of marriage endorsed and promoted by law. The shift to unilateral divorce, for example, does not merely make the state more "neutral" regarding divorce, nor does it merely increase individual liberty. Unilateral divorce, as a legal institution, increases the freedom of individuals to divorce by reducing their capacity to make enforceable marriage contracts with each other; it shifts legal power in divorce negotiations from the spouse who clings to the marriage vow to the spouse who wishes to end it. Some of us may view changes such as unilateral divorce as necessary accommodations to social change. Some of us may view them negatively, and as ripe for reform. But we all must recognize that such changes are not neutral or merely freedom-enhancing. They are powerful interventions by government into a key social institution and thus worthy of sustained and intelligent public debate.

A major goal of this essay is to hold up for clear public view these underlying, competing models of marriage that are contributing to deep public clashes over the law of marriage, cohabitation, and parenthood. We hope that obtaining conceptual clarity about marriage and its meanings will allow family law experts, scholars, judges, legislators, and the general public to make more informed choices among competing legal proposals.

How Does Family Law Matter?

Laws do more than distribute rights, responsibilities, and punishments. Laws help to shape the public meanings of important institutions, including marriage and family. The best interdisciplinary studies of institutions conclude that social institutions are shaped and constituted by their shared public meanings. According to Nobel Prize winner Douglass North, institutions perform three unique tasks. They establish public norms or rules of the game that frame a particular domain of human life. They broadcast these shared meanings to society. Finally, they shape social conduct and relationships through these authoritative norms.[3]

The courts today have become major sites for reconstructing the public meanings of family, marriage, permanence, and parenthood. Legal theorists of diverse ideological stances acknowledge the impact of family law on marriage and family life. Harry Krause argues that the law "has deeply affected (and helped to affect) family behavior over time. Moreover, is it not the role of law to help shape and channel our future in this most important playground of human existence?"[4]

Another legal scholar argues: "There is no part of modern life to which law does not extend.… The rule of law shapes our experience of meaning everywhere and at all times. It is not alone in shaping meaning, but it is rarely absent."[5] The Chief Justice of the Supreme Court of Canada concurs: "The rule of law exerts an authoritative claim upon all aspects of selfhood and experience in a liberal democratic society. Some such claims are made by the institutional structures of the law. Others are ancillary claims arising from a diffused ethos of legal rule that influences local, community, and familial structures."[6]

Family law is reconstructing the public meanings of marriage and parenthood.

William Eskridge, a Yale law professor and a prominent architect of same-sex marriage strategy, argues that "law cannot liberalize unless public opinion moves, but public attitudes can be influenced by changes in the law."[7] Feminist legal theorist Martha Fineman, who urges the abolition of marriage as a legal category, says that institutions such as the family "are actually created and constituted as coherent institutions through law. Their very existence as objects of state regulatory concern comes into being through law.… State policies can profoundly affect the form and functioning of the family."[8]

The Veil of Incrementalism

Yet to the layperson, the family law debate is often highly confusing, in part because of the law's characteristic language and method of incrementalism. Legal theorists in the ivory tower may tout broad, sweeping changes, but quite often these changes are enacted by courts incrementally, through individual cases and the reshaping of discreet legal categories. There is nothing nefarious or inappropriate about incrementalism as a legal method. But in the current family law context, this legal process can obscure deep and lasting changes that end up shaping people's everyday lives in unexpected ways.

Make no mistake: incremental changes do not mean unimportant changes. William Eskridge explains the tactical advantages of advocating only incremental changes to the law. Though he supports same-sex marriage, for strategic reasons, he advises against any direct push for legal redefinition of marriage.[9] He writes that a main benefit of incrementalism is that it leaves resulting changes largely immune from direct public criticism and debate.[10] He points to Holland and other European

countries which, in a fairly short amount of time, have ushered in a variety of state-sanctioned relationships that now compete with marriage. According to Eskridge, these "equality practices" help to "denormalize marriage."[11]

Marriage and family are too important as social institutions, affecting too many people, especially children, for basic decisions about their legal underpinnings to remain the private province of legal experts alone. There is an urgent need for the involvement of disciplines besides the law to identify, understand, and critique the legal theories of marriage and family life that are helping to shape new trends.

Marriage Law in the New World of "Close Relationships"

WHAT ARE THE models of marriage now in play in family law in North America?

Marriage: The Conjugal View

The model of marriage broadly reflected in law and culture until quite recently can be called the "conjugal model." Marriage in this view is a sexual union of husband and wife, who promise each other sexual fidelity, mutual caretaking, and the joint parenting of any children they may have. In essence, conjugality refers to the sex-bridging, procreative dimension of marriage.

Conjugal marriage has several characteristics. First, it is inherently normative. Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid. Instead, its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.

As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage. This mutual attraction is inherently linked to the "reproductive labor" that is essential to the intergenerational life of all societies, including modern liberal societies.[12] The default position for men and women attracted to the opposite sex, absent strong social norms, is too many children born without fathers, too many men abandoning the mothers of their children, and too many women left alone to care for their offspring. If law and culture choose to "do nothing" about sexual attraction between men and women, the passive, unregulated heterosexual reality is multiple failed relationships and millions of fatherless children.

Marriage, like the economy, is one of the basic institutions of civil society. It provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for

their children. The seminal theorists of liberal democracy from John Locke to John Rawls have always underlined the generative work of this conjugal form of life. John Locke's *The Second Treatise on Government* underlines the core social purpose of marriage for a liberal polity.[13] John Rawls argues that the family as a "basic institution" is geared to "the orderly production and reproduction of society and of its culture from one generation to the next."[14]

From this basic human reality arises the need for the wider society to direct immense energy into helping manage the reality of individual men's and women's desire for sex and intimacy in ways that ultimately protect them, their children, and the interests of the community. As a highly visible social and legal institution, marriage provides both the structure and the hope men and women need, so that such a resolution of male and female sexual interests is not only possible but attainable. As we shall see, this normative function of marriage is the one that is most directly under attack by the authors of the American Law Institute report.

Conjugal marriage is fundamentally child-centered.

Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation. Not every married couple has or wants children. But at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and women often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care. Conjugal marriage attempts to sustain enduring bonds between women and men in order to give a baby its mother and father, to bond them to one another and to the baby.[15]

A great deal of social science evidence now confirms the traditional understanding of the law. Children do better, on average, when raised by their own mother and father in a harmonious relationship. A Child Trends research brief summed up the new scholarly consensus:

> Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes.... There is thus value for children in promoting strong, stable marriages between biological parents.[16]

Of course, marriage always has and still does many other important things. It protects and supports the man and woman as they grow older and provides sexual pleasure and comfort even when children do not result. It also helps to organize property, inheritance, and more. But the core insight fueling the conjugal view of

marriage is this one: if human beings did not reproduce sexually, creating human infants with their long period of dependency, marriage would not be the virtually universal human social institution that it is.[17]

Marriage: The Close Relationship Model

In recent decades, however, a competing vision of marriage has emerged. In this new view, marriage is seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. Marriage is about the couple. If children arise from the union, that may be nice, but marriage and children are not really connected.[18]

In a moment we shall see how the close relationship model has begun to dominate family law. To understand the features of this new model of marriage most clearly, the place to start is with its contemporary theoreticians, who are primarily psychologists and, to a lesser extent, sociologists.

As a discipline, "close relationship theory" emerged prominently in the 1980s, spearheaded by a diverse group of scholars and academic associations, such as the International Society for the Study of Personal Relationships and the International Network on Personal Relationships. This new disciplinary framework now has two major journals — *The Journal of Social and Personal Relationships* (1984-) and *Personal Relationships* (1994-) — as well as a number of major publication series, including the *Sage Series on Close Relationships* and *Advances in Personal Relationships*.[19]

Close relationship theory focuses primarily on the nature of relationships between two people (or what is called "dyadic" relationships). For close relationship theorists, marriage becomes a subcategory of this core concept; marriage is simply one kind of close personal relationship. The structures of the discipline tend to strip marriage of the features that reflect its status and importance as a social institution. Marriage is examined primarily as a relationship created by the couple for the satisfaction of the two individuals who are in it.

Of course close relationship theorists are not operating in a vacuum. Close relationship theory reflects real trends in society that are making marriage less connected to its classic purposes as a social institution. For example, while marriage remains a wealth-generating institution,[20] other institutions of society (such as the market and government) have taken over large parts of the economic and social insurance functions marriage once had. While marriage remains a socially preferred context for sexual intercourse, the sexual revolution (including the growth in social acceptance for couples living together) has reduced the stigma for those who have sex outside of marriage. While marriage continues to have considerable connection to children in the public mind, large increases in unmarried childbearing have increased social acceptance of unwed parents and their children. In addition, high

rates of divorce and the personal longings for a soul mate are changing the way young people think about marriage.[21]

Anthony Giddens, probably Britain's most distinguished sociologist, writes that the close relationships approach to human sociality is reconfiguring popular as well as academic culture, bringing about a new grammar of intimacy. He believes that we are moving from a marriage culture to a culture that celebrates "pure relationship."[22] A "pure relationship" is one that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship currently brings to the individuals involved.

In the new view, marriage is to satisfy adult needs. Marriage and children are not connected.

As an academic field, close relationship theory insists on bringing a common theoretical and methodological approach to the study of all "sexually based primary relationships."[23] Similar values and processes are said to govern the initiation, maintenance, and dissolution dynamics of all close relationships. The existence (or lack) of a legally recognized bond such as marriage is a secondary consideration.

In one sense, there is nothing particularly novel about the idea of marriage as a close personal relationship. Classical Western perspectives on marriage have always stressed that marriage must be grounded in committed friendship. Close relationship theory can help us to understand this dimension of marriage.

But it is also clear that once marriage is viewed as just another dyadic relationship, the distinctive features grounding the conjugal understanding of marriage are simply edited out of the discourse.[24] That which is distinctive about marriage is not allowed to enter the discussion.[25]

What gets left out? The answer is the main feature that makes marriage unique — the attempt to bridge sex difference and the struggle with the generative power of opposite-sex unions. Conjugal marriage attempts to confront the fact that heterosexual sex acts can and often do produce children. This reality raises a set of concerns of critical importance to children, couples, and the species — concerns that close relationship theory is not prepared to take on.

Instead, many close relationship theorists maintain that what was once called the nuclear conjugal family can no longer serve as a useful focus for research on closely bonded human relationships.[26] They argue that viewing sexual and procreative life through the lens of conjugal marriage constitutes an external, "ideological" perspective that distorts objective analysis. The traditional marriage-and-family paradigm imposes an ethnocentric "benchmark" or "ideal." This paradigm, they say, does not speak to the experience of racial minorities, women, single parents, divorced and remarried persons, gays and lesbians, and others.[27]

In the late 1980s, leading close relationship theorists recommended that legal theorists expand their thinking about sexually bonded intimacy beyond the confines of the family to include all "close relationships."[28] And so, as we shall see, they have.

Two Case Studies: The American Law Institute's *Principles of the Law of Family Dissolution* and the Law Commission of Canada's *Beyond Conjugality*

The clearest evidence of the intellectual dominance of the close relationship model of marriage in family law discourse can be found in two highly influential law reports, published within a short time of each other, one in the United States and one in Canada.[29]

The first report is the *Principles of the Law of Family Dissolution*, published in 2002 by the American Law Institute (ALI). The ALI usually publishes what it calls "restatements" of the law. These influential reports are used by academics, attorneys, and judges to help make sense of laws that may not have been decided yet by a state's own case law, and courts will sometimes adopt their restatements. It is rare for the ALI to take on family law and rarer still for them to suggest changes to existing law — as they have in the *Principles of the Law of Family Dissolution* — rather than simply restating the law.[30]

The second report is *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, published in 2001 by the influential Law Commission of Canada. The Law Commission of Canada is appointed by the Canadian federal government as an independent federal law reform agency that advises Parliament on how to improve and modernize Canada's laws.

Both reports come from legal organizations that have shaped the development of laws in their respective nations in the past. These two new reports are a good vantage point from which to analyze and view the direction of conventional legal thought on marriage and family law in North America.

We have no reason to suppose that the authors of these reports have necessarily read the work of leading close relationship theorists. But the underlying concepts of marriage becoming predominant in the culture and developed most clearly by close relationship theorists exert a powerful influence on these leading theorists of family law. Both of these reports push family law in profoundly new directions whose purposes and aims are sometimes far removed from (and often contrary to) family law's former public purposes that included protecting marriage and the best interests of children.

The American Law Institute Report: *Principles of the Law of Family Dissolution*

The ALI report seeks to change existing family law in a number of key areas. First, the report moves away from the notion of public standards for marriage and parenthood. Instead, it emphasizes individualized decision-making and voluntary adult arrangements through prenuptial and marital agreements, parenting plans, and separation agreements.[31] Public standards of the sort that once influenced family law are, in this report, subject to relentless critique for their failure to promote

diversity and their tendency to impose social "stereotypes."[32] Such standards for familial life "run counter to the commitment this society avows towards family diversity."[33] The authors warn that "even when a determinate standard conforms to broadly held views about what is good for children, it can intrude — just as indeterminate standards do — on matters concerning a child's upbringing that society generally leaves up to parents themselves, and standardize child-rearing arrangements in a way that unnecessarily curtails diversity and cultural pluralism."[34]

Protection of diversity becomes the central public task of family law.

Professor Katherine Bartlett, one of the report's three main drafters (or "reporters"), said that the passion that drives her work is

> the value I place on family diversity and on the freedom of individuals to choose from a variety of family forms. This same value leads me to be generally opposed to efforts to standardize families into a certain type of nuclear family because a majority may believe this is the best kind of family or because it is the most deeply rooted ideologically in our traditions.[35]

Instead, Bartlett wants to embrace equally all forms of "intimate relationships." She and her peers aim to de-privilege marriage by treating cohabiting and other kinds of relationships just like marriage. In this view, protection of diverse constructions of intimacy becomes the central public task of family law.

Second, the ALI proposes to sideline what it calls "traditional marriage," resituating marriage as merely one of many possible and equally valid family forms, along with cohabiting couples, singles, gay and lesbian families, and others.[36] The report presses toward full legal marriage rights for same-sex couples by seeking to place same-sex couples, cohabiters, and married people all on the same level playing field when they dissolve their unions. The only sustained discussion of the characteristics of conjugality occurs in the chapter devoted to domestic partnerships. The report pushes aside "the legal formality of marriage" in order to refocus family law on "relationships that may be indistinguishable from marriage."[37] The social ecology of male/female bonding does not appear as one of the thirteen indicia of a marriage-like relationship.[38] This new understanding of marriage seeks to replace "conjugality" with "relationship" or couplehood as the central organizing principle of family law. According to the ALI report, this emphasis on "the character of the relationship" and the recognition of a diversity of "marriage-like" relationships "draws its inspiration from Canada."[39]

Third, the report's recommendations shift the focus from biological parenthood to functional parenthood (with "functional parenthood" meaning the day-to-day work of raising children). The report argues that the traditional biological view of parenthood as "an exclusive, all-or-nothing status" fails to grapple with diverse constructions of parenting in contemporary society.[40]

Finally, the report is reluctant to define some of the key institutions — marriage, family, and parenthood — that it targets for legal reform. Yet despite the authors' reluctance to pin themselves down, a discernible vision of human relationships percolates through this document. In their view, marriage and parenting are relationships with very high degrees of plasticity and indeterminacy. They are only given meaning by the choices of diverse individuals in a wide array of relationships.

In this view, marriage is infinitely malleable. Only the vaguest definitions are possible. "Marriage," the authors venture, "is an emotional enterprise, with high returns and high risks."[41] It is a function of individual commitments and accommodations: "Different couples arrive at different accommodations in their relationships, and some depart from the social conventions. Intimate relationships often involve complex emotional bargains that make no sense to third parties with different needs or perceptions."[42] In the view of the ALI authors, marriage has almost no real public content. Instead, marriage is the relational play of highly subjective, diverse constructions of intimacy and love.

The implications of this constructivist view of marriage surface in the document's opening discussions of no-fault divorce. In a constructivist world of marital intimacy, it is all but impossible to assign fault when intimacy breaks down. Without anchors of meaning for marriage, fault becomes an almost empty concept. Even the word "cause" loses meaning; there can be no such thing as an objective "cause" of a divorce. The authors of the ALI report tell us that some individuals tolerate a spouse's drunkenness or adultery and never resort to divorce. Others, they say, may seek a divorce if a spouse grows "fat" or spends long hours in the office.[43] When this happens, they ask, is the divorce "caused" by one spouse's offensive or unattractive conduct, or by the other's unreasonable intolerance? The report's answer is: who can say? The complexity of individual choices makes it impossible to determine "cause."[44] The ALI reporters warn that any attempt to do so necessarily involves a "sleight of hand," since it requires a moral assessment that amounts to "rewarding virtue and punishing sin."[45] Aside from the most minimal of standards of conduct — for example, it bars domestic violence — the report concludes it is nearly impossible to determine after the fact what was right or wrong about spousal conduct in a marriage that is ending.

Beyond Conjugality: The View from Canada

Beyond Conjugality proposes a fundamental reconstitution of contemporary family law. As its title says, the report argues that the law must go "beyond conjugality" and focus on the "substance of relationships" rather than giving legal recognition to any specific "arrangements," such as marriage. It contends that governments "should recognize and support" all significant adult "close relationships" that are neither dysfunctional nor harmful.[46] The only clear standards for relational behavior are the offside zones delineated by criminal law.

The authors of *Beyond Conjugality* define a "close personal relationship," offering a fluid definition in which marriage is firmly placed as just one of the varied relationships adults might form:

> The focus in this Report is on interdependent relationships between adults: those personal relationships that are distinguished by mutual care and concern, the expectation of some form of an enduring bond, sometimes a deep commitment, and a range of interdependencies — emotional and economic — that arise from these features.... These economically and emotionally interdependent relationships are one of the very foundations of Canadian social life. They may or may not involve parenting responsibilities that certainly influence the range of interdependencies created. They may or may not involve sexual intimacy. They may or may not be characterized by deep economic interdependency. Governments need to ensure that the law respects the diverse choices that Canadians make.[47]

Marriage becomes just one of the many varied relationships adults might form.

Two legal scholars who contributed to the preparatory work for this report have argued: "The role of the law ought to be to support any and all relationships that further valuable social goals, and to remain neutral with respect to individuals' choice of a particular family form or status."[48]

In *Beyond Conjugality*, the Law Commission of Canada spells out the full logic of these legal ideas and trends. It recommends that legal reformers eliminate the special status accorded to "marital" relationships. In this view, conjugality is too restrictive, since it excludes whole categories of interpersonal relationships that exhibit patterns of interpersonal, emotional, and economic interdependence that are equivalent to, or in some cases surpass, the commitments of sexualized close relationships between heterosexuals. It urges the federal government to provide a legal framework that would capture the "relational equality" of all close personal relationships.[49]

The main direction of the *Beyond Conjugality* report is toward the complete elimination of the category of marriage from law. In a somewhat confusing maneuver, however, the report concludes by proposing major — and significantly contradictory — reforms. The bulk of the report lays out a new legal framework for dealing with close adult relationships that would replace the traditional conjugal category of marriage with one that puts all relationships on an equal playing field. Then, in the last chapter, the report does an about-face to reaffirm the legal institution of marriage while arguing for its redefinition and extension to same-sex couples.

The closing argument for the redefinition of marriage in *Beyond Conjugality* has stolen the legal and political stage in Canada, laying out the legal template for the

major Canadian court decisions in favor of the redefinition of marriage. This template also appears in the proposed new Civil Marriage Act (Bill C-38) which redefines marriage as a union of two persons.

Critiquing These Reports: What's Left Out?

In these legal reconstructions, what drops out of view? Quite a lot, it turns out. Marriage serves a number of critical purposes in human culture. It addresses the fact of sexual difference between men and women, including the unique vulnerabilities that women face in pregnancy and childbirth. It promotes a public form of life and culture that integrates the goods of sexual attraction, interpersonal love and commitment, childbirth, child care and socialization, and mutual economic and psychological assistance. It provides a social frame for procreativity. It fosters and maintains connections between children and their natural parents. It sustains a complex form of social interdependency between men and women. It supports an integrated form of parenthood, uniting the biological (or adoptive), gestational, and social roles that parents play.

These are large issues. Yet in these reports, with a wave of the constructivist wand, these long-standing human concerns are systematically displaced from their formerly central position in family law. In their place the authors are recommending the legal imposition of a new model of close personal relations.

Despite the fact that sex-difference and opposite-sex attraction and bonding are fundamental features of human existence, and that marriage is an institution that attempts to work within this vast and complex domain, in contemporary legal debates in the U.S. and Canada, these core issues are being pushed off the table.[50] Legal scholars make much of the fact that theorists have discovered "no difference" between married and unmarried couples, or homosexual and heterosexual relationships, when it comes to the basic dynamics of love, compatibility, and intimacy. But the authorities cited to support this thesis are strong proponents of close relationship theory.[51]

The problem with close relationship theory is that it is fine-tuned to discover exactly what it predicts, namely, that unmarried same-sex and opposite-sex couples reveal the same patterns of interpersonal intimacy evident in married couples. The core relational values of intimacy, commitment, interdependence, mutual support, and communication get cranked out as the exemplary values for all close relationships, including marriage. Certainly, good marriages partake of these core relational values, but marriage as an *institution* encompasses much more than this limited set of interpersonal concerns. Understanding marriage only as a close personal relationship, but nothing more, leaves our understanding flat and impoverished.

The kinds of values or patterns cited by close relationship theorists turn out to be found in many types of relationships, not just ones in which the two people have

sex. Friendships, sibling relationships, and parent-child attachments also partake of values such as commitment, mutual support, and the rest. By talking about relationships in terms of generic "interpersonal intimacy," close relationship theorists bracket out, before the discussion even begins, the specificity of *marriage* as a form of life struggling with the unique challenges of bonding sexual difference and caring for children who are the products of unions.[52]

Today, contemporary family law theorists are bent on hammering this new theory into law, usually using the avenue of constitutional law. What is striking is the breathless speed of these developments in the absence of any real scholarly or public debate. A particular school of thought openly aimed at re-conceptualizing marriage first took root in the academy in the 1980s. By the late 1990s it had come to dominate fashionable academic theorizing on sexual intimacy. That school of thought is successfully urging family law scholars to think in radically new ways about family law. Much of the new thinking centers on ways to transform family law from its historic role as the protector of marriage into something very close to its antagonist.

What is striking is the speed of these developments in the absence of any public debate.

What is likely to happen next?

The Future of Family Law: Four Possible Directions

IF THE CLOSE relationship model of marriage triumphs, where is family law headed? One or more of at least four troubling outcomes for family law is likely.

The First Direction: Equivalence Between Cohabitation and Marriage

The first direction that family law might take is to reduce the distinctions between marriage and cohabitation by treating more and more cohabiting couples as if they were married. After all, if marriage is just a word that means "close intimate relationship," what is the legal justification for treating people differently based on a wedding? In some jurisdictions, this transition is already well established.

Since the characteristic features that are distinctive to marriage (including shared social norms about roles and expectations and the public vow before community, God, and the law) have already been ruled off the table by close relationship theory, today these features tend to be ignored by legal experts in favor of those aspects that make marriage and cohabitation similar.

Thus, the American Law Institute report argues that the movement toward equivalence should be harmonized and universalized. The rights and benefits regarding partners should be based on "the character of their social relationship,"

not their marital status.[53] (The possibility that marriage might change the character of the spouses' relationship is not considered.) The ALI report treats the "failure to marry" as insignificant and meaningless:

> As the incidence of cohabitation has dramatically increased … it has become increasingly implausible to attribute special significance [to] the parties' failure to marry. Domestic partners fail to marry for many reasons. Among others, some have been unhappy in prior marriages and therefore wish to avoid the form of marriage, even as they enjoy its substance with a domestic partner. Some begin in a casual relationship that develops into a durable union, by which time a formal marriage ceremony may seem awkward or even unnecessary.… Failure to marry may reflect group mores. Some ethnic and social groups have a substantially lower incidence of marriage and a substantially higher incidence of informal domestic relationships than do others. Failure to marry may also reflect strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage. Finally there are domestic partners who are not allowed to marry each other under state law because they are of the same sex.… In all of these cases the absence of formal marriage may have little or no bearing on the intentions of the parties, the character of the parties' domestic relationship, or the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage. Normatively, Chapter 6 takes the view that family law should be concerned about relationships that may be indistinguishable from marriage except for the legal formality of marriage.[54]

Because the goal of the ALI is to treat all "marriage-like" relationships similarly, it is forced to define not marriage, but "domestic partnership." *This* concept, rather than marriage, becomes the underlying social reality to which the law must conform. The ALI report defines domestic partnerships by a set of generic relationship characteristics that mark "a life together as a couple."[55]

As more cities in the United States establish "domestic partnership" registries, this term is gaining recognition in law as a kind of midway status between marriage and singleness. Increasing numbers of private corporations and union agreements use any valid government recognition of a relationship as the basis for providing contractually guaranteed benefits to unmarried couples, and some permit couples simply to file affidavits affirming that they are domestic partners as the condition for receiving benefits such as health insurance. Overall, though, the argument that cohabiters have a general right to be treated as married has made relatively little headway in the United States, except in the case of same-sex couples who can legally marry in Massachusetts.

Canadian courts, by contrast, have been quite receptive to the idea that treating couples differently based on marital status constitutes unjust discrimination. Like the

ALI report, Canadian courts have cited as determinative the characteristics that are often common to both married and non-married intimacy,[56] including common shelter, sexual and personal behavior,[57] mutual service, social life together, societal perceptions of the couple, economic support, and parenting.

Although Canadian courts have appealed to "conjugal characteristics" in order to establish the fundamental similarity of marital and non-marital forms of intimate life, they have also demonstrated a surprising awareness of the dangers of doing so. For ironically, the argument that all "marriage-like" relationships should be treated alike still requires the law to define which relationships are worthy of being treated as "marriage-like" by the courts, and continues to use "marriage" as the basic social norm for making this distinction. In other words, when courts replace marital norms with close relationships norms, they still leave the law in the position of promoting certain "normative" concepts of conjugality.

If marriage is just a close relationship, why treat people differently based on a wedding?

Canadian courts have mostly dealt with this problem by calling attention to the fluidity and plasticity of the standards they have created. In *Macmillan-Dekker v. Dekker,* Supreme Court Justice Bertha Wilson writes that characteristics such as sharing a home or having a sexual relationship are merely "indicia" of "a conjugal/spousal relationship." Wilson stresses their malleable nature:

> I conclude that there is no single, static model of a conjugal relationship, nor of marriage. Rather, there are a cluster of factors which reflect the diversity of conjugal and marriage relationships that exist in modern Canadian society. Each case must be examined in light of its own unique, objective facts … the seven factors [that define conjugality] are meant to provide the Court with a flexible yet objective tool for examining the nature of relationships on a case-by-case basis.[58]

In a dissenting opinion in 1993, Justice Claire L'Heureux Dubé anticipated later legal developments in arguing that these conjugal characteristics should not reinforce a normative model of conjugality:

> The use of a functional approach would be problematic if it were used to establish one model of family as the norm, and to then require families to prove that they are similar to that norm. It is obvious that the application of certain variables could work to the detriment of certain types of families. By way of example, the requirement that a couple hold themselves out to the public as a couple may not, perhaps, be appropriate to same-sex couples, who still often find that public acknowledgement of their sexual orientation results in discriminatory treatment.[59]

To avoid the risks of normativity, Justice Peter Cory, writing for the majority in *M. v. H.,* suggests an "infinitely" plastic definition of conjugality:

> Certainly an opposite-sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true of same-sex couples. *Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.*[60] [emphasis added]

The heart of the equivalence approach is the idea that marital status is a mere formality. Similar relationships should be treated similarly, regardless of whether or not a marriage ceremony ever took place.

There are at least two serious problems with the equivalence approach. First, it runs roughshod over the long-established principle that marriage requires consent. Cohabiters are now to be locked by government into a marital regime whether they like it or not.[61]

Indeed, for some legal scholars, coercion is precisely the point. According to Roderick Macdonald, the former president of the Law Commission of Canada, "self-ascription" — that is, the couple's understanding of the relationship — is of limited value in determining a couple's legal status, since any such definition can be effectively blocked by one non-consenting partner in the relationship:

> No matter how broadly a concept is defined by law, if the status it confers depends only on self-ascription, many of those intended to be the beneficiaries of the status will be excluded. Suppose for a moment that the law were amended to provide that persons of the same sex could get married, and that, were they to do so, the full panoply of rights and responsibilities attaching to the status of marriage would apply. This opening up of the concept of marriage might well address many of the legal concerns now expressed by same-sex couples. But, just as for heterosexual couples, it would be of no help to a partner in a common-law same-sex relationship who wants to marry but whose partner does not.[62]

But for many who advocate "equivalence" as part of a broader embrace of family diversity, the coercive aspects of this legal regime remain troubling. In the *Nova Scotia v. Walsh* decision, for example, the Canadian courts abruptly reversed years of legal movement in the direction of equivalence. Instead, the Court suddenly insisted on the need to respect individuals' freedom to choose, or not to choose, more committed forms of partnership. Quoting an earlier opinion of Justice L'Heureux-Dubé, *Nova*

Scotia v. Walsh argues that "the decision to marry or, alternatively, *not* to marry, depends entirely on the individuals concerned." According to the judges, "family means different things to different people … all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law." The state should not impose a marital regime "retroactively."[63]

The second problem with the equivalence approach is that social science evidence by and large fails to support its central contention, which is that marriage is just a formality. Instead, the differences between marital and cohabiting relationships appear to be real and significant, at least in the United States, where most of the research has been conducted.[64] A group of twelve diverse U.S. family scholars, for example, recently concluded:

Scholarship fails to support the central contention of the equivalence approach.

> Cohabitation is not the functional equivalent of marriage. As a group, cohabiters in the United States more closely resemble singles than married people. Children with cohabiting parents have outcomes more similar to the children living with single (or remarried) parents than children from intact marriages. Adults who live together are more similar to singles than to married couples in terms of physical health and emotional well-being and mental health, as well as in assets and earnings.… Couples who live together also, on average, report relationships of lower quality than do married couples — with cohabiters reporting more conflict, more violence and lower levels of satisfaction and commitment. Even biological parents who cohabit have poorer quality relationships and are more likely to part than parents who marry. Cohabitation differs from marriage in part because Americans who choose merely to live together are less committed to a lifelong relationship.[65]

Moreover, three-quarters of children born to cohabiting couples are likely to see their parents split up by the time they are sixteen years old.[66] Whether the standard is relationship durability or relationship satisfaction or tangible benefits to adults or the well-being of children, cohabitation is not the same thing as marriage. The "equivalence" regime is *unjust* because it treats couples who are unwilling to make a marriage commitment as if they have done so. It is *unwise* because the law communicates to younger people the demonstrably false idea that marital status makes no difference for the well-being of a couple or their children.

The Second Direction: Redefining Marriage as a Couple-Centered Bond

A second direction marriage law might take is substantive redefinition. In this approach, the law would continue to allow distinctions to be made between married couples and cohabiting couples, with marriage remaining a distinct legal status. But

the meaning of marriage would be redefined by courts, primarily on behalf of same-sex couples, as a commitment between any two people. The new legal definition strips all remaining remnants of sex, gender, and procreativity from the public, shared meaning of marriage. In contrast to the "equivalence" view, once full access to marriage is granted irrespective of sex, any legal benefits to domestic partnerships should in theory be rolled back.[67] (This approach has been called the "Levelling Position.")[68] Marriage becomes the only legally recognized close relationship.[69]

To privilege one version of marriage in law — as a gender-neutral, couple-centered bond that centers primarily on commitment — necessarily involves the public repression of alternative meanings. In classrooms and courtrooms today, proponents of the couple-centered conception of marriage are arguing that the commonly held view of marriage as a conjugal union of man and woman is a prejudice analogous to racism. In Canada, the majority of provincial courts have argued that this irrational and discriminatory view of marriage needs to be weeded out of public law and replaced. The proposed Civil Marriage Act is attempting to bring the rest of Canada into harmony with this legal conclusion. Meanwhile, alternative legal categories such as civil unions have been panned as a repugnant "separate but equal category."[70] Because the law retains the special legal status associated with marriage, the redefinition approach authorizes the state to begin to exert negative pressure on private individuals, organizations, and communities that subscribe to the older conjugal view of marriage now viewed as "discriminatory" by the courts.

Court decisions in both Massachusetts and Canada authorizing same-sex marriage follow this basic script. Each calls for the substantive redefinition of marriage as a "union of two persons." Each also inaugurates the process of stigmatizing the alternative conjugal view of marriage as discriminatory, suggesting the future pariah status of people who cling to the older view.

In Canada, Ontario Justice Harry S. Lafarge argues that "the real, although unstated, purpose of the restriction [of marriage to a man and a woman] is to preserve the exclusive privileged status of heterosexual conjugal relationships in society." He declares this understanding of marriage to be "repugnant."[71] In the U.S., the four judge majority in *Goodridge v. Department of Public Health* (which legalized same-sex marriage in Massachusetts) denounced as "discriminatory" the conjugal view of marriage as a union of man and woman. The belief that marriage intrinsically unites male and female in a sexual bond that reinforces their personal obligations to each other and to any children they produce is dismissed as "rooted in persistent prejudices against persons who are (or who are believed to be) homosexual." "The Constitution," they warn, quoting a 1984 Supreme Court case, "cannot control such prejudices but neither can it tolerate them."[72] As the majority in *Baehr v. Lewin* (a 1993 case in Hawaii regarding same-sex unions) warned, "constitutional law may mandate, like it or not, that customs change with an evolving social order."[73]

This strong language suggests that the legal creation of a couple-centered understanding of marriage is achieved by placing the older conjugal meaning of marriage under a moral and legal cloud of suspicion. It will place the law in a stance that is hostile towards cultural and religious communities that adhere to the ethos of conjugal marriage as the backbone of their communal life.

In an important decision, Canadian Justice Robert Blair candidly remarked that this change was not an "incremental" one but rather a "profound change" with serious implications for vast areas of marriage and family law. Blair states that

> the consequences and potential reverberations flowing from such a transformation in the concept of marriage … are extremely complex. They will touch the core of many people's belief and value systems, and their resolution is laden with social, political, cultural, emotional, and legal ramifications. They require a response to a myriad of consequential issues relating to such things as inheritance and property rights, filiation, alternative biogenetic and artificial birth technologies, adoption, and other marriage-status driven matters.[74]

Sex, gender, and procreativity are stripped from marriage's public meaning.

Both advocates and opponents agree that the redefinition of marriage would do far more than simply incorporate the small number of homosexuals in the population into the existing marital regime.

The Third Direction: Disestablishment, or the Separation of Marriage and State

How might we avoid contentious public disputes about the meaning of marriage? One possible solution is to conclude that the law should no longer establish *any* definition of marriage. Only a few years ago, almost no one favored this idea. But today this option appears to be gaining converts across the political spectrum.[75] Disestablishment is thus a third possible direction for the future of marriage.

On the left, "queer theorists" such as Michael Warner adopt a radical liberationist argument for disestablishment.[76] Warner argues that the extension of marriage to gays and lesbians is no less than an attempt to herd all human sexuality into the narrow conjugal box. Others support disestablishment because they feel that marriage is essentially a religious institution, something in which a secularized liberal state should have no role. One proponent of this view, Nancy Cott, argues that Christian models of conjugal monogamy have been legally imposed on social life.[77] Another author similarly characterizes the "permanent, monogamous, marriage, nuclear, heterosexual" concept of family as "an explicitly Christian concept of marriage."[78] In this view, the heterosexual definition of marriage legally imposes a particular theological or religious vision of marriage on society, one that violates the convictions

of sexual dissenters and nonconformists.[79] Cott and others feel that the separation of church and state requires ridding the law of any theological vision of marriage.

However, redefining marriage provides no easy solution to the dilemma of state endorsement of some religious view. Religious groups can be found that endorse same-sex marriage, polygamy, monogamy, and even polyamory.[80] In choosing any substantive vision of marriage, therefore, the state will end up endorsing some religion's marital vision.

Faced with competing and conflicting conceptions of marriage, proponents of disestablishment argue that the state should take this breakdown of social consensus as the cue for it to get out of the marriage business.[81] They argue that the liberal state learned how to adopt a stance of measured distance towards religion and the economy. It must now adopt a stance of measured distance towards marriage. Civil matters related to interdependent relationships (taxation, inheritance, community property, and more) could be handled by a more neutral registry system.

The removal of marriage as a legal category was one option put forward by the Canadian court decisions striking down the existing law of marriage.[82] It was also proposed as an option by the Department of Justice in its directives to Canada's Standing Committee on Justice and Human Rights in hearings on the question of same-sex marriage. The disestablishment of marriage would be achieved by "removing all federal references to marriage and replacing them by a neutral registry system."[83]

In the *Beyond Conjugality* report, the Law Commission of Canada considers Nancy Cott's argument for disestablishment:

> Borrowing the term from the history of church and state, Nancy Cott has described the transformation in the relationship between marriage and the state in the United States as "disestablishment." Just as the state does not recognize a single, officially established church, no longer is any single, official model of adult intimate relationship supported and enforced by the state.[84]

Instead, the law would embrace virtually all interdependent relationships. Indications of a marital, conjugal relationship — such as sexual intimacy, cohabitation, the dyadic restriction (only two people can get married), and even restrictions based on consanguinity — would be removed from law.[85] This approach is grounded in the conviction that democratic societies have a fundamental obligation to "respect and promote equality between different kinds of relationships," to celebrate "the diversity of personal adult relationships," and to honor "the freedom to choose whether and with whom to form close personal relationships."[86] The new family law would be in essence a universal buddy system that offers legal protections for all citizens, whether straight or gay, parents or not, and whether they are involved with only one person, or many.

Yet once family law becomes a universal buddy system, some have reasonably asked why the law should be concerned at all about who is having sex with whom.[87] That the law traditionally has an interest in sexual activity largely because children often arise — intentionally or not — from heterosexual couplings seems currently to escape the attention of many scholars and, indeed, an increasing number of judges. Rather, they conclude that the legal preoccupation with sexual intimacy is arbitrary and pointless. One study on the legal "irrelevancy" of sex approvingly cites Eric Lowther, a member of the Canadian Parliament, who said the following when speaking in opposition to the extension of benefits to same-sex couples:

As the law becomes a universal buddy system, why should it care about who is having sex with whom?

> There are many types of gender relationships: siblings, friends, roommates, partners, et cetera. However, the only relationship the government wants to include is when two people of the same gender are involved in private sexual activity, or what is more commonly known as homosexuality. No sex and no benefits is the government's approach to this bill. Even if everything else is the same, even if there is a long time cohabitation and dependency, if there is no sex there are no benefits. Bill C-23 is a benefits-for-sex-bill. It is crazy.[88]

Lowther favors the existing definition of marriage as a heterosexual bond. His critics are advocates of same-sex marriage. Yet both agree that there is a fundamental flaw in the current legal construction of conjugality. According to them,

> the question of whether a relationship has a sexual component bears no connection to legitimate state objectives. Once this is recognized, and sex is removed from the scope of relational inquiries, the distinction between conjugal and non-conjugal relationships collapses. And we then need to develop better ways to determine when and how the existence of an adult personal relationship is relevant and should be recognized in law.[89]

The fundamental argument of the Law Commission of Canada in *Beyond Conjugality* is the same. The report argues for a broad legislative approach to all adult close relationships that involve significant mutual dependence. The presence or absence of sexual conduct in the relationship is considered incidental. The fact that some kinds of sex acts produce children and some do not merits no consideration.

As mentioned earlier, *Beyond Conjugality* does end somewhat confusingly with a call for the redefinition of marriage, even after making a strong case for disestablishment.[90] However, the original thrust of the report, found in its title, was to lay out a new legal framework which would eliminate the category of conjugality from

law and replace it with a more inclusive civil registry system. In such a system, marriage as we have known it — marriage as a social institution — would likely still play a role for some time to come. But in the eyes of the law, that role will be a bit part, written in very small print and destined eventually to wither away.

In Canada this classical liberal argument for disestablishment has been drowned out by a newer and more aggressive social liberalism arguing for a redefinition of marriage. But it was one of Canada's historical Liberal leaders, Pierre Elliot Trudeau, who laid down the principle that the state must get out of the bedrooms of the nation. Some liberals argue that disestablishment is the only viable alternative in the face of apparently irresolvable legal and political disagreements about the authoritative meaning of conjugality.

On the right-leaning end of the spectrum, certain religious constituencies are also questioning whether disestablishment might be preferable to a full-fledged legal redefinition of marriage. They point out that the political regulation of marriage was a relatively late development in the history of Western marriage. For some, the state has done more harm than good in its attempts to influence the direction of the marriage culture. Perhaps it's time to get the state out of the marriage business.[91] They hope that, just as the separation of religion and state is responsible for the relatively flourishing religious sector in the United States, getting the government out of marriage would be a prelude to a marriage revival. They argue that marriage, like religion, can only really flourish when it is freed from political control and manipulation.

But it is clear that there is nothing "neutral" about the state refusing to recognize and accommodate the fact of marriage in law. In places like the United States, where marriage remains a significant legal category, its disestablishment would take an enormous amount of political and cultural energy of the kind that is unlikely to feed a flourishing marriage culture. More likely the disestablishment of marriage would support a troubling and already all too common perception that marriage may be a nice ceremony but is no longer a key social institution.

Ironically, the consequence of disestablishment is not likely to be greater individual freedom, but rather more intense and far-reaching state regulation of formerly private relations. Married people generally regulate their family affairs without direct government interference, except in cases of criminality or violence. By comparison, the state routinely tells divorced and unmarried parents when they can see their kids and how much child support to pay, and often intervenes in thorny disagreements such as what school the child will attend, or what religion he or she will be raised in, or if a parent is allowed to relocate. Outside of marriage, the state is necessarily drawn into greater and more intrusive regulation of family life. Because sex between men and women continues to produce children, and because women raising children alone are economically and socially disadvantaged, governments will continually wrestle with expensive and intrusive efforts to protect children born outside of marital unions.

Finally, the right's disestablishment argument presumes that the state has no key interest in the existence of marriage. While marriage is partly a religious institution for religious people, it has never been *only* a religious act. In the Western tradition marriage has represented the best efforts of state and society to integrate disparate goods — love, money, mutual support, sex, children — in the service of helping men and women raise the next generation in circumstances most likely to sustain them, their children, and the society.

The huge and complex slice of human experience constituted by heterosexual bonding, procreativity, and parent-child connectedness sweeps across non-religious as well as religious spheres of social activity and meaning. In a real sense, marriage is bigger and more elemental to human life than religion. Marriage in every known society has been deeply influenced and colored by religious traditions in the societies in which it has taken root. But marriage is even older than some of our oldest religious traditions. It existed before Judaism and well before Christianity and Islam. Marriage is influenced by religion, but it is not solely a religious institution, and it is certainly not solely a Christian institution. Religious traditions and civil society have critical roles to play in shaping a marriage culture; but in a large, complex society, government and the law will ignore marriage at their peril.

Absent marriage, the state is drawn into more intrusive regulation of family life.

Some disestablishment proponents also seem to assume that children can be treated as a category separate from adult relationships. Martha Fineman, for instance, argues that the law should get out of adult relationships and leave them to private contracts. She believes that this move would allow the law and public policy to focus its attention on adult-child caregiving relationships. However, this seemingly logical deconstruction is but a symptom of the family fragmentation that has a deeply negative impact on children. Disestablishment might work well in a world of freestanding adult relationships. But the bedrooms of the nation still produce children. The offspring of our sexual bonds are profoundly vulnerable and demand the state's interest.

Why Just Two?

As *Beyond Conjugality*'s provocative title suggests, the family legal trends sweeping North America and the world have no natural or necessary stopping point. All of these major trends in law are part of a movement to channel public law into a new authoritative framework that is "beyond conjugality." Where is this movement leading? Once marriage is repositioned as merely one of many equally valid examples of a close relationship, is there a compelling rationale for refusing legal recognition to any close relationship, including all forms of friendship and mutual care? Probably not. If conjugal relationships "vary widely and almost infinitely," then virtually any

caring or sharing close relationship is arguably worthy of state recognition and social support. Such a move appears to set the stage for a vast extension of the rule of law into the sphere of intimate relations, including legal recognition of multiple close relationships.

Those determined to alter the public meaning of marriage admonish us to shelve such questions. A Canadian human rights lawyer insists that problematic concerns about where new legal changes might lead need "not be decided at this point." The immediate and pressing legal challenge is to redefine marriage in order to include same-sex couples. Raising the problem of future legal implications "merely complicates an already thorny issue."[92]

However, the debate about the next round of legal reforms has already begun. In *An Introduction to Family Law,* Gillian Douglas of Cardiff Law School agrees with the American Law Institute report, arguing that the "continuing limitation of marriage to heterosexual couples … derives from an ideological rather than a logical imperative." She follows this observation with a deconstructive swipe at another key pillar of what she terms "the traditional view of marriage" — its limitation to two people. Douglas writes: "The abhorrence of bigamy appears to stem again from the traditional view of marriage as the exclusive locus for a sexual relationship and from a reluctance to contemplate such a relationship involving multiple partners."[93]

Critics of legalizing same-sex marriage have occasionally argued that once gender is removed from the definition of marriage, there will be little rationale to limit the number of people in a marriage. This "slippery slope" argument is usually derided by advocates of same-sex marriage as being made in bad faith. What most people do not know is that the argument for the legal recognition of polyamory is more likely today to be raised in legal circles by leading proponents of close relationship theory, not critics of same-sex marriage. Much talk about polyamory is coming from the left, not the right. Hoping to ride the coattails of the gay marriage movement, some, like the Unitarian Universalists for Polyamorous Awareness, are now pushing for liberal religious traditions to recognize multiple-partner marriage.[94]

Similarly, *Beyond Conjugality* raises the question of whether the new legal category of "close personal relationship" should be "limited to two people." The report insists that "the values and principles of autonomy and state neutrality require that people be free to choose the form and nature of their close personal adult relationships."[95] Roger Rubin, a former vice-president of the National Council on Family Relations, is confident that the current movement to redefine marriage "has set the stage for a broader discussion over which relationships should be legally recognized."[96] Professor Elizabeth Emens of the University of Chicago Law School has followed up with a major legal defense of polyamory.[97]

We discover that in the plastic world of "intimate relationships," firm distinctions begin to dissipate. Severed from its link to the biology of heterosexual reproduction, conjugality begins to inflate and morph. The first inflation successfully drew

cohabitating relationships into the marital regime. The second inflation, the assimilation of same-sex relationships, has jumped quickly from the academy into the courtroom. Its legal victories are beginning to stack up. The legal challenge to the two-person nature of marriage is only a matter of time.

Yet when the dust settles, there is likely to be real dissatisfaction with the impoverished horizons of this new paradigm, especially with its likely negative impact on the lives of everyday people. A culture of pure relationships is marked by profound intellectual myopia. It fails to bring into focus fundamental facets of human life: the fact of sexual difference; the enormous tide of heterosexual desire in human life; the massive significance of male/female bonding and procreativity; the unique social ecology of parenting, which offers children bonds with their biological parents; and the rich genealogical nature of family ties and the web of intergenerational supports for family members that they provide.

The bedrooms of the nation still produce children.

These core dimensions of conjugal life are not small issues. Yet in the current debate, even alluding to them typically invites blank, angry stares. At this crucial moment for marriage and parenthood in North America, there appears to be no serious intellectual platform from which to launch a meaningful discussion about these elemental features of human existence. About these fundamentally important issues, contemporary family law scholarship is both silent and dismissive.

Parenthood: The Next Legal Frontier

HOW WILL MOVING "beyond conjugality" affect legal notions of parenthood?

Marriage organizes and helps to secure the basic birthright of children, when possible, to know and be raised by their own mother and father. A pivotal purpose of this social institution has been to forge a strong connection between male/female bonds and the children resulting from those bonds. Moving beyond the conjugal view of marriage inevitably involves a legal reevaluation of the relationships between children and their parents. In particular, what is being put into play is the idea of biological parenthood as a fixed right that the state is obliged to recognize.

The Civil Marriage Act proposed by the Canadian government not only redefines marriage but also simultaneously eliminates the category of "natural parent" from federal law and replaces it with the category of "legal parent."[98] This kind of move threatens a fundamental reconfiguration of the norms of marriage and parenthood.

Some indication of the future might lie in the reports put out by the American Law Institute and the Law Commission of Canada. These reports have much to say about parenting, much of which may be disturbing to parents.

Beyond Conjugality draws a bright line between marriage (a recognized close personal adult relationship) and parenthood. The authors argue that these two categories "raise very different issues."[99] Parenthood is not related to marriage. The central purpose of marriage is "to provide an orderly framework in which couples can express their commitment to each other and voluntarily assume a range of legal rights and obligations."[100] Children are stripped from the core meaning of marriage and instead shuffled into another category of close personal relationships known as "intergenerational relationships that involved the rearing of children."[101]

The American Law Institute carries its suspicion of legally enforced norms in family life into the very definition of parenthood. For the ALI authors, even age-old standards, such as the one stating that family law should operate in "the best interests of children," are questioned on the grounds that they introduce moral norms into family law.[102]

Katherine Bartlett, one of the ALI authors, writes that too often this age-old standard masks normative judgments about preferred models of child-parent relationships:

> [T]he best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data about what is "best" for children. The resolution of conflicts over children ultimately is less a matter of objective fact-finding than it is a matter of deciding what kind of children and families — what kind of relationships — we want to have.[103]

In the ALI report, Bartlett and her co-authors worry that any appeal to an "objective" standard for parental conduct might threaten the one value that figures most prominently throughout the pages of their report, that of family diversity:

> [E]ven when a determinate standard conforms to broadly held views about what is good for children, it can intrude — just as indeterminate standards do — on matters concerning a child's upbringing that society generally leaves up to parents themselves, and standardize child-rearing arrangements in a way that unnecessarily curtails diversity and cultural pluralism.[104]

In a lecture, Bartlett notes proudly that she and her team were able to come up with a "default rule that avoids these kinds of empirical and normative assumptions about the family and is, accordingly, less family-standardizing."[105] This "default rule" points to past parenting practices. How individual adult claimants have historically participated in the day-to-day raising of the children with whom they are in close

relationship will determine their parental status: "[This rule] operates not from a state-determined, family-standardizing ideal but from where the parents themselves left off. It is based not on empirical evidence of the experience of families in the aggregate but on the individual experiences of the family before the court."[106] Moreover, methods of determining custody or parental arrangements must be challenged if they "run counter to the commitment this society avows toward family diversity."[107]

In service of this goal, the ALI report affirms "the positive correlation between the interests of the parents and the welfare of their children."[108] It argues that the courts must carefully respect the diverse choices and lifestyles of parents since the "improved self-image" of the parents rebounds to the "ultimate benefit" of the child.[109] It suggests that the law must protect and foster parental "self-esteem." If basic self-esteem needs are not met in the judicial process, then "parents are more likely to engage in strategic, resentful or uncooperative behavior from which children may suffer."[110]

The ALI's close relationship regime transforms parenthood into a domain created by the state.

This broad support for any family that adults dream up is supposed to be in the interests of children. But just in case, and with remarkable bluntness, the ALI report notes: "Even a child's awareness of such a relationship, or dislike of the individual with whom a parent has developed an intimate relationship, should not justify interferences relating to the child's welfare or parental fitness; children cannot be protected from every source of unhappiness and unease."[111]

In the ALI report, even the question "who is a parent?" is up for grabs. In a nutshell, their viewpoint states that "unless otherwise specified, a parent is either a legal parent, a parent by estoppel, or a de facto parent." The category of the natural or biological parent does not figure as an independent category in this threefold classification, nor do adoptive parents. Instead, biological and adoptive parents are folded into the other three categories.[112]

Traditionally, parent by estoppel has been the case in which a man, in good faith, believes that he is the father of his spouse's child and continues fully accepting his parental responsibilities even after he learns that he is not the biological father. The ALI report pries open this concept in order to offer it to any biologically unrelated person who wants to take on parenting responsibilities. Thus, a parent could be a person who "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent."[113] The report thus defines a parent by estoppel as "an individual who, even though not a legal parent, has acted as a parent under specified circumstances which serve to estop [stop, block] the legal parent from denying the individual's status as a parent." This category is "afforded all of the privileges of a legal parent."[114]

The extension of the category of estoppel aims, in part, at legalizing the parental status of same-sex partners:

> [This report] contemplates the situation of two cohabiting adults who undertake to raise a child together, with equal rights and responsibilities as parents. Adoption is the clearer, and thus preferred, legal avenue for recognition of such parent-child relationships, but adoption is sometimes not legally available or possible, especially if one of the adults is still married to another, or if the adults are both women, or both men.[115]

What is missing from the triad of legal parent, parent by estoppel, and de facto parent? What is missing is the core idea that parenthood is a category based on biological realities beyond governmental redefinition. The legal definition of parent is severed from its deep links to biology and based on a more pliable assessment of the people who are said to care for a child on a day-to-day basis. Parenthood thus becomes a flexible category that gives courts and legislatures the capacity to redefine parental relationships based on evolving standards. In the ALI report, these standards are typically portrayed as "permissive." For example, if an adult wishes to take on quasi-parental responsibilities for a child, the courts should enforce his or her rights. But in principle, if the best interests of the child require the imposition of parental responsibilities on unrelated adults, there is no good reason in the ALI worldview to abstain from doing so. By living with a parent, a boyfriend or girlfriend can acquire legally enforceable rights to a child. They may also (and this point is typically unclear) acquire legally enforceable responsibilities. Parenthood becomes a flexible legal category, with the courts — rather than the child's existing parents — determining when a person has devoted enough care and attention to an unrelated child to acquire parental rights.

Such proposals attribute a great deal of intention and self-awareness to choices that adults often make without thinking them through a great deal. For instance, does a father really intend for his current live-in girlfriend to have a long-term role as a "parent" in his child's life, even after he breaks up with her, simply because he welcomed her caring for his child while they lived together? When a parent remarries, he or she makes an active decision to form a new family, to bring a stepparent into their child's life in a parent-like role. Do cohabiting parents approach the decision to move in together with the same sense of investment? Some may, but many may not and may avoid marriage precisely because they are unsure how long they want the relationship to last or how much influence they want their current love interest to have in their child's life. Surely some adults would be aghast to think that, simply by living with a child's parent, the law might someday require them to take on financial or other responsibilities for the child, even if they were no longer involved with the child's parent.

Fragmenting Parenthood

Almost as an afterthought, the ALI's new close relationship marital regime transforms parenthood into a domain created by the state. One scholar writes that the traditional "privileging of biological parenting" represents a "heterosexual" constraint on "the wide range of family forms and practices."[116] Eliminating the notion of biology as the basis of parenthood, and allowing parenthood to fragment into its plural and varied forms, is necessary if courts are to make family diversity a legal and cultural reality.[117]

Is the father's ex-girlfriend a parent?

Jonathan Herring, who sees such fragmentation as a positive change, identifies five contemporary varieties of parenthood. First, he writes, there is "genetic parenthood," the individuals that supply the egg and sperm needed to produce a baby. Second, there is "coital parenthood," the union of sperm and egg (typically, but not always, in heterosexual intercourse). Third, there is "gestational parenthood," the carrying of the fetus by a pregnant woman.[118] Fourth, there is "post-natal (social or psychological) parenthood," the raising of the child after birth. Finally, there is a fifth category that the author calls "intentional parenthood," when an adult or adults who intend to be parents initiate a process (through surrogacy or assisted reproduction) leading to the birth of a child.[119]

All five forms of parenting can be analytically and practically separate from one another, as diverse adults participate in the distinct activities of supplying genetic material, conceiving, carrying, birthing, and nurturing.

Might breaking parenthood up into all its constituent parts lead to some confusion? The American Law Institute report authors think so. They explore this expanding pastiche of parental identities that Herring sifts out of current legal debates, trying to open new legal doors to accommodate the fragmentation. One scholar, Richard Storrow, argues that the report's shift towards a functional view of parenthood is heading in exactly the right direction, but suggests that the tweaking of legal categories will have to go further. Specifically, Storrow argues that the interests of "intentional parents" must be addressed.[120] Parenthood by "pure intention" represents the full cultural shift from an emphasis on "biogenic unity" to an emphasis on "the family of choice."[121] Parents who set the process in motion through assisted reproduction or surrogacy become his ideal type for this type of parenthood.

One rather large problem with this idea is that about half of pregnancies today are still unplanned. They are "unintentional." The brave new world of intentional parenthood is supposed to provide a child for every adult who wants one. But let's flip the picture and look at the situation from the child's point of view. If intention, not biology, becomes the thin legal ground holding parents accountable to their children, what happens to all the children who are conceived in a moment when

they were not actively wanted by both parents? At a minimum, how will the state enforce child support payments from fathers who can claim that they never intended to be a parent in the first place? If enough parents were to buy the American Law Institute view that biology is essentially unimportant, are there enough "intentional" adoptive parents out there to raise all the "unintended" children who happen to be born anyway?

In their push to delink law from biology, legal reformers seem blind to the basic facts of human reproduction. Only the tiniest fraction of babies are born today through elaborate fusions of genetic, coital, and gestational parenthood. The baby born of one woman's eggs, in another woman's womb, with the aid of a sperm donor, rates headlines precisely because the event is so rare. The vast majority of babies are still born, both intentionally and not, to men and women who are engaging in the passionate and often unpredictable business of sex.

Fragmentation of parenthood means more fragmented lives for children who will be jostled around by an increasingly complex set of adult claims. It also means more systematic intrusion into the family and adjudication of its internal life by the state and its courts.

To address the problem, the courts might be wise to consider an old idea: marriage. When it works, marriage unfragments. It manages to hold together the intentional, the biological (genetic, coital, and gestational) and the psychological and social dimensions of parenthood. It creates a thick social ecology that integrates, rather than endlessly fractures, the basic features of human parenthood.

Across cultures, the institution of marriage works to support the ties of natural and adoptive parents to their children. It provides broad public affirmation and support for this type of bond. It enshrines a basic birthright of children whenever possible to know, to be connected to, and to be raised by both of their biological parents. It does so in a robust but malleable way (with the possibility of adoption for exceptions to the rule).[122] The United Nations *Convention on the Rights of the Child* states that "the child shall … have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents" (Art. 7).[123] The authors of this convention brilliantly recognize several key features of children's individual identity and security — having a name, being a citizen of a nation whose laws protect you, and, whenever possible, being raised by the two people who made you.

New legal changes threaten further to undermine this birthright. For instance, whatever one feels about the merits of same-sex marriage, it is clear that legalizing these unions must, of necessity, diminish the social importance of children being raised by their own biological parents. Rewriting marriage laws to accommodate same-sex unions sends a powerful signal to the vast majority of would-be parents, who are heterosexuals, that the law is not explicitly concerned about children being raised whenever possible by their biological mother and father. Even candid

advocates for same-sex marriage recognize that the inclusion of these unions in the social ecology of parenting entails fundamental shifts for children. One advocate concedes (and celebrates) the fact that building law upon gay experience

> involves the reconfiguration of family — de-emphasizing blood, gender, and kinship ties and emphasizing the value of interpersonal commitment. In our legal culture the linchpin of family law has been the marriage between a man and a woman who have children through procreative sex. Gay experience with "families we choose" delinks family from gender, blood, and kinship. Gay families of choice are relatively ungendered, raise children that are biologically unrelated to one or both parents, and often form no more than a shadowy connection between the larger kinship groups.[124]

Intention, not biology, holds parents accountable to their children.

Precisely this disconnect between children and natural parents is the new legal vision of marriage that has emerged out of the recent Canadian judgments in favor of same-sex marriage in Ontario, British Columbia, and Quebec. These decisions evaluate two features: the unity of the couple and functional parenthood (that is, the day-to-day raising of children). In this view, the procreative link between marriage and children drops completely out of view, as well as the genealogical rights of children to know and be connected to their ancestors. Further, in Canada's proposed new Civil Marriage Act, the redefinition of marriage requires the elimination of the category of "natural parent" across federal law. Parenthood is thus transformed into a legal construct that has no inherent relationship to sexuality and childbirth.

In the world of the *Principles of the Law of Family Dissolution* and *Beyond Conjugality*, adults construct relationships and children adjust. This understanding of parent-child relationships frees adults to live as they choose. But the data strongly suggest that not all adult constructions of parenthood are equally child-friendly. For example, the common assumption of those who advocate for flexible definitions of parenthood is that children are just as safe in continuing contact with non-biologically related caretakers as they are with biological parents. But the actual evidence points in the opposite direction. A large body of social scientific evidence now shows that the risk of physical or sexual abuse rises dramatically when children are cared for in the home by adults unrelated to them, with children being especially at risk when left alone with their mothers' boyfriends. Robin Wilson, a legal scholar at the University of Maryland, has presented the empirical evidence of increased risk in an article in the *Cornell Law Review*.[125] To put it mildly, the data suggest that legal theorists are standing on very thin ice when they dismiss or debunk the significance of biological parenthood.

Delinking parenthood from marriage, embracing the variety of relationships that adults construct as the new "standard," and conceptualizing the parent-child

relationship as just another "close relationship," may free adults to live in the diverse family types they choose, but it seriously undermines the law's historic role to seek to protect the best interests of children. Children need and desire, whenever possible, to be raised by their own parents.[126] Though fallible, marriage is society's best known way to try to fulfill that need. A legal system that moves its emphasis "from partners to parents" may sound good for children, but the actual practice of fragmenting parenthood and valuing "intentional" parenthood over all else will ultimately leave children more, rather than less, insecure.

Conclusion

SOCIAL INSTITUTIONS ARE constituted by their shared public meanings. The legal imposition of new and contested public meanings upon marriage and parenthood represents the power of the state hard at work in the soft-shelled domain of civil society. This legal and political imposition on marriage seeks to re-engineer the authoritative public norms of these institutions on the basis of appeals to relatively new theories of diversity, relationality, and functional parenthood.

This trend raises fundamental questions for liberalism. Is the state violating the measured distance that the liberal state should adopt towards the basic institutions of civil society? Are the courts legally imposing a sectarian form of social liberalism? Are the courts abandoning their traditional role of protecting civil society from encroachment by the state?[127]

These moves also hold questions for the future of marriage itself. Institutions like marriage and parenthood are not simply mechanisms to fulfill individual needs and aspirations. They are also thick, multi-layered realities that speak to the needs for meaning and identity within human community. Marriage is the complex cultural site for opposite-sex bonding. A rich heritage of symbols, myths, theologies, traditions, poetry, and art has clustered around the marital bond. To change the core features of marriage is to impact real people, adults and children, whose lives will be significantly shaped by the renewal or decline of this institution.

The type of legal theorizing proposed by the American Law Institute's *Principles of the Law of Family Dissolution* and the Law Commission of Canada's *Beyond Conjugality* systematically marginalizes, and drives to the very periphery of public law, the core features of conjugal marriage and parenthood. The complex social institution of marriage does require ongoing change to sustain and enrich its development. But the well-being of children, parents, couples, and society is seriously threatened by the push to "de-normalize" the core features of marriage and parenthood and to strip their historic public meanings from law and public discourse.

In this remade world, marriage is reconstituted in order to celebrate relationship diversity. What drops out of view? Quite a lot, it turns out. Marriage serves critical

purposes in human culture. It addresses the fact of sexual difference between men and women, including the unique vulnerabilities that women face in pregnancy and childbirth. It promotes a unique form of life and culture that integrates the goods of sexual attraction, interpersonal love and commitment, childbirth, child care and socialization, and mutual economic and psychological assistance. It provides a social frame for procreativity. It fosters and maintains connections between children and their natural parents. It sustains a complex form of social interdependency between men and women. It supports an integrated form of parenthood, uniting the biological (or adoptive), gestational, and social roles that parents play.

The value of diversity is key to justice in our civil society. But by itself, diversity is an inadequate basis for understanding marriage as an institution. The diversity-trumps-everything approach marginalizes what tradition, religion, and even now the social sciences tell us about family formation, parenting, and children's well-being.

Can an insistence on family diversity as our primary lodestar offer any meaningful insight into the distinctive significance of marriage in human culture? Can close relationship theory stir up any reflective wonder about the remarkable social-sexual ecology that animates human culture? Can functional parenthood capture the deep-seated human concern for connection between children and their natural parents? For most ordinary citizens on both sides of this longest border in the world, the common sense answer to these questions is "no."

This rough human wisdom suggests that our leading academics and legal theorists may be getting it wrong. Not just a little wrong. Not just wrong in a few places. But deeply, fundamentally wrong. Perhaps we should insist that they go back to the drawing board and try to get it right.

Recommendations

1. Recognize that marriage is a social institution, not merely individuals following laws devised by legal professionals.

2. Identify and encourage people going into the field of family law who will seek to strengthen rather than weaken marriage.

3. A minimum five-year moratorium should be placed on any changes to the laws affecting the definition of marriage. The purpose of the moratorium is to allow for informed democratic consultation and deliberation.

4. Research into family law should broaden its base and welcome a more interdisciplinary approach to issues of marriage, parenthood, and family. Legal research associations such as the American Law Institute and the Law Commission of Canada should recognize the limits of their competence to reform these fundamental features of ordinary life. Their work should be undertaken in a far more interdisciplinary, exploratory, and collaborative way.

5. Governments should foster more democratic consultation and deliberation on the question of the role of marriage in society. Broad-based representative commissions should be formed to explore public interest concerns in the area of marriage and family life. These commissions should consist primarily of those affected by changes to the institution of marriage: ordinary citizens, cultural communities, marriage and family life associations, and religious communities, rather than lawyers and academics.

6. Governments and universities should invest in more research on marriage and family life. Research should focus on the following:

- Gathering relevant statistical information on national trends and developments in marriage, parenthood and family life;
- Gathering cross-cultural and trans-national data;
- Interdisciplinary conferences, research and programs on marriage, parenthood and family life;
- Research on the impact of diverse family forms on the well-being of children; and
- Research to track properly the shifting attitudes and behaviors of youth culture in relationship to marriage and pathways to marriage.

Endnotes

1. John Dewar, "Family Law and Its Discontents," *International Journal of Law, Policy and the Family* 14 (2000): 59-60.

2. Ibid.

3. Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (New York: Cambridge University Press, 1990a). The "new institutionalism" in economics, sociology, and social anthropology underlines the critical importance of public norms and rules. For some classic discussions see North as well as Mary C. Brinton and Victor Nee, eds., *The New Institutionalism in Sociology* (New York: Russell Sage Foundation, 1998); Mary Douglas, *How Institutions Think* (Syracuse, NY: Syracuse University Press, 1986).

4. Harry Krause, "Marriage for the New Millennium: Heterosexual, Same-Sex — Or Not At All?" *Family Law Quarterly* 34 (2000): 284-85.

5. Paul Kahn, *The Cultural Study of Law* (Chicago: University of Chicago Press, 1999), 123-24.

6. Beverly McLachlin, "Freedom of Religion and the Rule of Law," in *Recognizing Religion in a Secular Society*, ed. Douglas Farrow (Montreal, QC and Kingston, ON: McGill-Queen's University Press, 2004), 14. See also Katharine T. Bartlett, "Re-Expressing Parenthood," in *Family, State and Law*, vol. 2, ed. Michael D. Freeman (Dartmouth: Ashgate, 1999), 163.

7. William N. Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* (New York: Routledge, 2002), 154.

8. Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004), 63.

9. "One lesson Professor Waaldjik [a leading European gay law theorist] and I would draw [from the experience of same-sex marriage] … is that legal recognition of same-sex marriage comes through a step-by-step process.… Such a process is sequential and incremental: it proceeds by little steps. Registered partnership laws have not been adopted until a particular country has first decriminalized consensual sodomy and equalized the age of consent for homosexual and heterosexual intercourse; then has adopted laws prohibiting employment and other kinds of discrimination against gay people; and, finally, has provided other kinds of more limited state recognition for same-sex relationships, such as giving legal benefits to or enforcing legal obligations on cohabiting same-sex couples. That the Netherlands has just recognized same-sex marriages was facilitated by its prior recognition of, and successful experience with, registered partnerships." Eskridge, *Equality Practice*, 153-54.

10. "[L]aw cannot liberalize unless public opinion moves, but public attitudes can be influenced by changes in the law. For gay rights, the impasse suggested by this paradox can be ameliorated or broken if the proponents of reform move step by step along a continuum of little reforms. [There are] pragmatic reasons why such a step-by-step process can break the impasse: it permits gradual adjustment of antigay mindsets, slowly empowers gay rights advocates, and can discredit antigay arguments." Ibid., 154.

11. Ibid., 225. Margaret Brinig notes that Canada proceeded along a series of small steps towards legalizing same-sex marriage. See "Chapter 6 and Default Rules," in *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of*

Family Dissolution, ed. Robin Wilson (Cambridge: Cambridge University Press, forthcoming). The same case has also been made for Norway and Scandinavia; see Turid Noack, "Cohabitation in Norway: An Accepted and Gradually More Regulated Way of Living," *International Journal of Law, Policy and the Family* 15 (2001): 102-17.

12. John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 162.

13. John Locke, *Second Treatise on Government*, chap. VII, sec. 78.

14. Rawls, *Justice as Fairness*, 162-3.

15. See Maggie Gallagher and Joshua K. Baker, "Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child," *Margins* 4 (2004): 161-180.

16. Kristin Anderson Moore, Susan M. Jekielek, and Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?* Child Trends Research Brief (Washington, DC: Child Trends, June, 2002), 1. Also available at http://www.childtrends.org/files/MarriageRB602.pdf. For more evidence of the importance of intact families for children see Sandra L. Hoffreth and Kermyt G. Anderson, "Are all dads equal? Biology versus marriage as a basis for paternal investment," *Journal of Marriage and Family* 65, no. 1, (2003): 213-32; and Wendy D. Manning and Kathleen A. Lamb, "Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families," *Journal of Marriage and Family* 65, no. 4, (2003): 876-93.

17. This line of argument is common in evolutionary psychology. For discussions of kin altruism and parental investment see chapter three in Louise Barrett, Robin Dunbar, and John Lycett, *Human Evolutionary Psychology* (Princeton, NJ: Princeton University Press, 2002); Mary Daly and Margo Wilson, *Sex, Evolution and Behavior* (Belmont, CA: Wadsworth, 1978).

18. *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529 (Can.), par. 130; *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961-64 (2003).

19. See Dan Cere, *The Experts' Story of Courtship* (New York: Institute for American Values, 2000), 15-31.

20. See, for example, Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier and Better-Off Financially* (New York: Doubleday, 2000).

21. See David Popenoe and Barbara Dafoe Whitehead, *The State of Our Unions: The Social Health of Marriage in America, 2001,* (Rutgers, NJ: The National Marriage Project, 2001).

22. Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford, CA: Stanford University Press, 1992), 58.

23. John Scanzoni, Karen Polonko, Jay Teachman, and Linda Thompson, *The Sexual Bond: Rethinking Families and Close Relationships* (Newbury Park, CA: Sage Publications, 1989), 9, 13.

24. One consequence of this flattening of marriage into a close personal relationship is that the public meaning of marriage must be redefined and shaped by the common patterns of same-sex relationships, not the distinctive capacities of opposite-sex ones. The Ontario Court of Appeals was blunt. It stated that the law of marriage needed to be redesigned to meet the "needs, capacities and circumstances of same-sex couples, not … the needs,

capacities and circumstances of opposite-sex couples." This view rested on the basis that "the purpose and effects of the impugned law must at all times be viewed from the perspective of the claimant." *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529 (Can.), par. 91.

25. For a generalized discussion of how institutional frameworks (like scholarly disciplines) make certain kinds of thoughts "unthinkable," see Douglas, *How Institutions Think* (see n. 3).

26. Scanzoni, et al., *The Sexual Bond*, 9, 13.

27. Julia Wood and Steve Duck, "Off the Beaten Track: New Shores for Relationship Research," in *Understudied Relationships: Off the Beaten Track*, ed. Julia Wood and Steve Duck (Thousand Oaks, CA: Sage, 1995).

28. Scanzoni, et al., *The Sexual Bond*, 14-24.

29. The European Commission on Family Law is also proposing major legal reforms to harmonize European family law codes. One of its most recent reports is *Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses* (Antwerp: Intersentia, 2004).

30. *The Principles of the Law of Family Dissolution* is the work of a select group of legal academics who had enormous autonomy in the development of this report. David Westfall raises some critical concerns about the controlled nature of the consultative process. See "Unprincipled Family Dissolution: The American Law Institute's Recommendations for Spousal Support and Division of Property," *Harvard Journal of Law and Public Policy* 27 (2004): 918-20.

31. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Philadelphia: American Law Institute, 2002), chap. 1, I-III (hereinafter *ALI Principles*).

32. For example, see the discussion of "prohibited factors" in the analysis of "Criteria for Parenting Plan," *ALI Principles*, sec. 2.12.

33. Ibid., chap. 1, I.b.

34. Ibid., sec. 2.02, cmt. c.

35. Katharine T. Bartlett, "Saving the Family from the Reformers" (Brigitte M. Bodenheimer Memorial Lecture on the Family), *University of California, Davis Law Review* 31 (1998): 817.

36. *ALI Principles*, chap. 6.

37. Ibid., chap. 1, "Overview of Chapter 6 (Domestic Partners)."

38. Ibid., sec. 6.03.

39. Ibid., chap. 1, "Overview of Chapter 6 (Domestic Partners)."

40. Ibid., chap. 1, I.b.

41. Ibid., chap. 1, IV.b.

42. Ibid.

43. "In the context of marital failure, however, the word 'cause' has no such meaning, and its use simply masks a moral inquiry with a word pretending a more objective assessment. Some individuals tolerate their spouse's drunkenness or adultery and remain in the marriage. Others may seek divorce if their spouse grows fat, or spends long hours in the office. Is the divorce 'caused' by one spouse's offensive conduct, or by the other's unreasonable intolerance? In deciding that question the court is assessing the parties' relative

moral failings, not the relationship between independent and dependent variables. And the complexity of marital relations of course confounds the inquiry." Ibid., chap. 1, III.a(1).

44. Ibid.

45. Ibid.

46. Law Commission of Canada, "Recognizing and Supporting Close Personal Relationships Between Adults" (discussion paper) (Ottawa: Law Commission of Canada, 2000), sec. 2(b).

47. Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada, 2001), xxiv-xxv (hereinafter *Beyond Conjugality*).

48. Brenda Cossman and Bruce Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Toronto, ON: Ontario Law Reform Commission, 1993), 5.

49. *Beyond Conjugality*, xxii-xxiii, 13-15.

50. In the Ontario Superior Court marriage decision, Justice Robert Blair stated that "marriage must be open to same-sex couples who live in long-term, committed, relationships — marriage-like in everything but name — just as it is to heterosexual couples." *Halpern v. Canada,* 215 D.L.R. (4th) 223 (Can.), par. 32.

51. For example, Eskridge's argument for the similarity of same-sex and opposite-sex relationships cites as his authorities the research of close relationship theorists Letitia Anne Peplau and Susan D. Cochrane, "A Relationship Perspective on Homosexuality" in *Homosexuality/Heterosexuality: Concepts of Sexual Orientation*, ed. David P. McWhirter (New York: Oxford University Press, 1990. William N. Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: Free Press, 1996), 109, fn.6.

52. One consequence of this flattening of marriage into a close personal relationship is that the public meaning of marriage must be redefined and shaped by the common patterns of same-sex relationships, not the distinctive capacities of opposite-sex ones. The Ontario Court of Appeal was blunt. It stated in *Halpern* that the law of marriage needed to be redesigned to meet the "needs, capacities and circumstances of same-sex couples, not … the needs, capacities and circumstances of opposite-sex couples" (see n. 24).

53. *ALI Principles*, sec. 6.01.

54. Ibid., chap. 1, "Overview of Chapter 6 (Domestic Partners)."

55. Ibid., sec. 6.03. Sharing a life together as a couple is characterized by features such as common commitments or promises to one another (oral or written) or representations to others of their relationship, economic interdependence, collaborative life together, evidence that the relationship wrought change in the life of "either or both of the parties," responsibilities for each other such as each naming the other as beneficiary, qualitative distinctiveness of the relationship compared to other relationships, emotional or physical intimacy of the relationship, assumption of parental functions toward a child.

56. *Molodowich v. Penttinen*, [1980] 17 R.F.L. (2d) 376 (Can.).

57. Under sexual and personal behavior Judge Kurisko posed the following questions: "Did the parties have sexual relations? If not, why not? Did they maintain an attitude of fidelity to each other? What were their feelings toward each other? Did they communicate on a personal level? Did they eat their meals together? What, if anything, did they do to

assist each other with problems or during illness? Did they buy gifts for each other on special occasions?" *Molodowich v. Penttinen*, par. 21-27.

58. *Macmillan-Dekker v. Dekker* [2000] 10 R.F.L. (5th) 352 (Can.), par. 68, quoted in Brenda Cossman and Bruce Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugality," *Canadian Journal of Family Law* 18 (2001): 269, 290.

59. *Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554 (Can.), par. 60. In this case an employee was denied bereavement leave based on family status to attend the funeral of the father of his same-sex partner. The majority decided against the complainant.

60. *M. v. H.*, [1999] 2 S.C.R. 3 (Can.), par. 60. This ground-breaking decision extended the right to spousal support to gays and lesbians in same-sex unions.

61. Marsha Garrison, "Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligations," *University of California, Los Angeles Law Review* 52 (2005).

62. Roderick A. Macdonald, "All in the Family," *Transition Magazine* 30, no. 2 (2000), http://www.vifamily.ca/library/transition/302/302.html#1.

63. *Miron v. Trudel*, [1995] 2 S.C.R. 418 (Can.), par. 105; *Nova Scotia vs. Walsh,* [2002] 4 S.C.R. 325 (Can.), par. 42.

64. Much research in Canada and Europe combine "formal" and "informal" couples in one category. While this may be a justifiable decision for some purposes it has the side effect of making it impossible to discern in those studies whether and how married and cohabiting couples differ.

65. William J. Doherty, et al., *Why Marriage Matters: 21 Conclusions from the Social Sciences* (New York City: Institute for American Values, 2002), 7-8 (internal citations omitted).

66. "Fully three-quarters of children born to cohabiting parents will see their parents split up before they reach age sixteen, whereas only about a third of children born to married parents face a similar fate. One reason is that marriage rates for cohabiting couples have been plummeting. In the last decade, the proportion of cohabiting mothers who go on to eventually marry the child's father declined from 57% to 44%." From David Popenoe and Barbara Dafoe Whitehead, *Should We Live Together? What Young Adults Need to Know about Cohabitation Before Marriage*, 2nd ed. (Piscataway, NJ: National Marriage Project, 2002), 8. They cite Wendy Manning, "The Implications of Cohabitation for Children's Well-Being," in *Just Living Together: Implications for Children, Families, and Public Policy*, ed. Alan Booth and Ann C. Crouter (Hillsdale, NJ: Lawrence Erlbaum Associates, 2002).

67. James M. Donovan, "An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples," *Law and Sexuality* 8 (1998): 649.

68. Terry Kogan, "Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnerships and Ordinances," *Brigham Young University Law Review* 2001: 1023-44.

69. Jonathan Rauch argues for this approach in *Gay Marriage: Why It is Good for Gays, Good for Straights, and Good for America* (New York: Henry Holt and Company, 2004).

70. See, for instance, Prime Minister Paul Martin's opening speech in favor of the new Civil Marriage Act, House of Commons, Hansard, Feb. 16, 2005.

71. *Halpern v. Canada*, 215 D.L.R. (4th) 223 (Can.), par. 243.

72. *Goodridge*, which on November 18, 2003, rendered a four-three decision in favor of same-sex marriage, was the American version of *Halpern v. Canada*. The quoted phrases

are drawn from the opinion of Justice Greaney. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 968 (2003); *Palmore v. Sidoti* 466 U.S. 429, 433 (1984). See also the opinion of Justices Marshall, Greaney, Ireland, and Cowin in *Opinion to the Senate*, 802 N.E.2d 565, 569-72 (2004).

73. *Baehr v. Lewin*, 74 Haw. 530, 570 (1993).

74. "The Courts are not the best equipped to conduct such a balancing exercise, in my opinion. This is not an incremental change in the law. It is a profound change. Although there may be historical examples of the acceptance of same-sex unions, everyone acknowledges that the institution of marriage has been commonly understood and accepted for centuries as the union of a man and a woman. Deep-seated cultural, religious, and socio-political mores have evolved and shapes society's views of family, child-rearing and protection, and 'couple-hood' based upon that heterosexual view of marriage. The apparent simplicity of linguistic change in the wording of a law does not necessarily equate with an incremental change in that law. To say that altering the common law meaning of marriage to include same-sex unions is an incremental change, in my view, is to strip the word 'incremental' of its meaning." Justice Robert Blair in *Halpern v. Canada*, 215 D.L.R. (4th) 223 (Can.), par. 97-99.

75. For discussion in the popular press, see for example, John Havelock, "State should limit role to civil unions," *Anchorage (AK) Daily News*, July 31, 2004; Editorial, "Avoid divisiveness over who marries; Religious bodies should bless holy matrimony; government should protect civil unions," *San Antonio (TX) Express-News*, Nov. 15, 2004; Michael Kinsley, "Abolish Marriage; Let's really get the government out of our bedrooms," *Washington Post*, July 3, 2003; Deroy Murdock, "Stop Licensing Marriage," Scripps Howard News Service, July 10, 2004.

76. Michael Warner, *The Trouble With Normal: Sex, Politics and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 2000).

77. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2001).

78. Nicholas Bala, "Context and Inclusivity in Canada's Evolving Definition of the Family," *International Journal of Law, Policy and the Family* 16 (2002): 147.

79. See Janet R. Jacobsen and Ann Pelegrini, *Love the Sin: Sexual Regulation and the Limits of Tolerance* (New York: New York University Press, 2003); Larry C. Backer, "Religion as the Language of Discourse of Same Sex Marriage," *Capital University Law Review* 2002: 221-278.

80. "Polyamory" means "many loves," while polygamy means "many marriages." Polyamorous unions of three or more people may or may not involve one or more couples who are married to one another.

81. Some calling for disestablishment include: Paula L. Ettelbrick, "Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All," *Albany Law Review* 64 (2001): 905; Dianne Post, "Why Marriage Should Be Abolished," *Women's Rights Law Reporter* 18 (1997): 283; Patricia A. Cain, "Imagine There's No Marriage," *Quinnipiac Law Review* 16 (1996): 27; Nancy D. Polikoff, "Why Lesbians and Gay Men Should Read Martha Fineman," *American University Journal of Gender, Social Policy and Law* 8 (1999): 167, 176; Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth-Century Tragedies*

(New York: Routledge, 1995), 270-72; Nancy D. Polikoff, "We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage,'" *Virginia Law Review* 79 (1993): 1535; Jennifer Jaff, "Wedding Bell Blues: The Position of Unmarried People in American Law," *Arizona Law Review* 30 (1988): 207.

82. *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529 (Can.), par. 150.

83. Department of Justice Canada, "Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper" (discussion paper) (Ottawa: Department of Justice Canada, 2002), http://www.justice.gc.ca/en/dept/pub/mar/mar_e.pdf.

84. *Beyond Conjugality*, 128.

85. Ibid., 118-120.

86. Ibid., 13, 17.

87. For instance see Cossman and Ryder, "What is Marriage-Like Like?" (see n. 58).

88. Ibid., 323.

89. Ibid., 326.

90. This tension in the report may be due to the fact that the composition of the report occurred under the leadership of two presidents of the Law Commission.

91. In 1880, the first modern papal encyclical on marriage, "On Christian Marriage" by Leo XIII, expressed serious concerns about the political usurpation of marriage by the modern state.

92. Julius Grey, "Equality Rights Versus the Right to Marriage: Toward the Path of Canadian Compromise," *Policy Options* (October, 2003): 33.

93. Gillian Douglas, *An Introduction to Family Law,* Clarendon Law Series (Oxford: Oxford University Press, 2001), 30-31.

94. See http://www.uupa.org.

95. *Beyond Conjugality*, 133, fn.16.

96. See Rubin's "Alternative Lifestyles Today" in *Handbook of Contemporary Families*, ed. M. Coleman and L.H. Ganong (Thousand Oaks: Sage Publications, 2004), 32-33. Note that same-sex marriage laws also threaten the dyadic restriction on marriage because in order for same-sex couples to have children without resorting to adoption they must necessarily involve a third person in order to conceive and bear a child.

97. Elizabeth F. Emens, "Monogamy's Law: Compulsory Monogamy and Polyamorous Existence," *New York University Review of Law and Social Change* 29 (2005).

98. See Bill C-38, *Civil Marriage Act*, 1st sess., 38th Parliament (2005), "Consequential Amendments."

99. *Beyond Conjugality*, xxiv.

100. Ibid., 129.

101. Ibid., xxiv.

102. *ALI Principles*, sec. 2.08, cmt b.

103. Bartlett, "Re-Expressing Parenthood," 173 (see n. 6).

104. *ALI Principles*, 2.02(c).

105. Bartlett, "Saving the Family from the Reformers," 852 (see n. 35).

106. Ibid., 853.

107. ALI Principles, 1.01.

108. Ibid., 2.02, reporter's note a.

109. Ibid.

110. Ibid., 2.02(b).

111. Ibid., 2.12(f).

112. Ibid., 2.03(1). The legal category will "ordinarily include biological parents, whether or not they are or ever have been married to each other, and adoptive parents." Ibid., 2.03, cmt. a.

113. Ibid., 2.03(1)(b)(iii).

114. Ibid., 2.03(1)(b); ibid., cmt. b.

115. Ibid., 2.03.

116. Helen Rhoades, "The Rise and Rise of Shared Parenting Laws: A Critical Perspective," *Canadian Journal of Family Law* 19 (2002): 107-108.

117. Studies arguing for the deconstruction of the concept of natural parent and kinship relations include: Sara Franklin and Susan McKinnon, eds., *Relative Values: Reconfiguring Kinship Studies* (Durham, NC: Duke University Press, 2001); Judith Butler, "Is Kinship Always Heterosexual?" in *Undoing Gender* (New York: Routledge, 2004), 102-130.

118. Most people are familiar with the concept of a surrogate mother, a woman who carries a baby which is genetically her child with plans to give the baby to another person or couple after birth. A newer form of surrogacy is the "gestational carrier" who carries a fetus created by using another woman's egg. Infertile couples might prefer gestational carriers because of the possibility of having a baby that is genetically their own and/or the lower perceived risk that the surrogate will change her mind and keep the child.

119. Jonathan Herring, *Family Law* (London: Longman, 2001), 264, 305f.

120. Richard F. Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage," *Hastings Law Journal* 53 (2002): 597-679; Janet L. Dolgin, "Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family," *Connecticut Law Review* 32 (2000): 520-566.

121. Storrow, "Parenthood by Pure Intention," 628.

122. Current legislation in Quebec dealing with sperm donation places the rights of adults over the rights of children to know their biological parents.

123. This right also implies that children should not to be the subjects or products of experimental reproductive technologies that may have long-term effects on life, health, and identity that remain as yet unknown.

124. William N. Eskridge Jr., *Gaylaw: Challenging Apartheid in the Closet* (Cambridge, MA: Harvard University Press, 1999), 11.

125. Robin Wilson, "Children at Risk: The Sexual Exploitation of Female Children after Divorce," *Cornell Law Review* 86 (2001) 251, 256.

126. June Carbone, *From Partners to Parents: The Second Revolution in Family Law* (New York: Columbia University Press, 2000), 227

127. See F. C. DeCoste's insightful discussion in "The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law," *Alberta Law Review* 41 (2003): 619.

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