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Part I. Marriage Mutates into Modern Modes

A. Musings on Formal, Semi-Formal and Informal Relationships of Heterosexual and Same-Sex Partners

Along with much of the world, the United States is in the midst of a radical revolution in the traditional social order of sexual pairing, child bearing, and child raising.[1] Vigorous disagreement still clouds the outcome of that revolution, even while enormous social and legal change has come to be accepted in Europe as well as in the United States. At the same time and perhaps in reaction to Western influence, equally enormous change — but in quite the opposite direction – is occurring in countries under the influence of recidivist, radical Islam, such as Iran, Afghanistan and Saudi Arabia, among others.

The essential conflict is between private, religious and public ordering of intimate relationships. Traditionally, religious ordering of sexual relationships and their consequences was all-encompassing. That came to be replaced in Western societies by state ordering. Private conduct that did not fit into the perceived public order was held criminally or civilly illegal, or at the minimum, was socially not tolerated. And even after the demise of state religions, religious teachings and religious sanctions continue to reinforce the state's – and vice versa.

Not long ago —

*Marriage was a unitary — "one size fits all" — concept.

*Heterosexuality was the unquestioned call of nature, and homosexuality was "the unspeakable, abominable crime against nature."

*In the words of the 19th century U.S. Supreme Court, polygamy was "odious among the northern and western nations of Europe, and,

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1. For a summary review of current American family law, see Krause, "Family Law Highlights and Trends," in D. Clark & T. Ansay, (eds.), *Introduction to the Law of the United States* 219 (1992).

until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[2]

*The old-time market place did not accept women. The pre-birth-control rationale was that pregnancy — which would occur sooner or later — limited most women's economic potential. This limited women to family roles and reinforced early marriage and early and many births. The other side of that coin was that the man's role as the primary economic provider for his family was legitimated and enforced, as well as facilitated by protecting him from competition by women in the market place.

*Children were the all but unavoidable consequence of marriage. The social stigma and disastrous economic consequences of illegitimacy had women limit sexual relations to marriage and, not coincidentally, this quite encouraged men to marry.

*Marriage without the option of divorce protected women — if sometimes in the equivalent of economic servitude. When divorce became available, it was hard to get and was socially not acceptable. In the United States, this attitude – combined with fearsome alimony obligations – lasted in business and politics through the 1950s, and continued to provide women with some protection against the risks of role division.

Then, the sole institutional framework was marriage. Alternatives carried social and legal sanctions. Today, Western society offers a broad variety of lifestyles for sexual partners:

*Yes, we still see the traditional model of marriage with minor children in which one spouse takes on primary responsibility for the raising of the children, thereby sacrificing earnings and career prospects, so that the other is freed to build a career. But the downside of traditional marriage is that one partner — typically the woman — has sacrificed earnings and career to raise children and, on divorce, has little property and limited employment prospects, even if the economic risk of divorce is mutual in that the earning partner faces serious, long-term financial responsibilities after divorce.

* A significant consequence of the risk of divorce has been that marital "role division" has become ever less attractive. So we increasingly see a modern variant of traditional marriage with minor children where both parents participate in the job market. The child-care function may be delegated, in part, to extended family, day-care, nursery schools, kindergarten, the school system, or to a "nanny" or "babysitter."

2. Reynolds v. United States, 98 U.S. (8 Otto) 145, 25 L.Ed.244 (1878).

*And we see marriage or cohabitation of elderly partners for social companionship or financial convenience as well as mutual care.

*But more radically, we now see many childless relationships, married or unmarried, heterosexual or of the same sex, in which partners pursue their individual careers and, along with their sexual relationship, set up housekeeping together. Birth control technology all but assures that even heterosexual partners need not have children.

*Without calling it by that name, modern divorce law and practice have resulted in a sort of legitimization of polygamy by way of legalizing multiple, successive marriages or relationships of persons who have continuing legal, financial and social ties to prior partners and children.

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In sum, while marriage once was in the vital public interest, decades of divorce reform, along with changes in the very definition of marriage and its consequences (especially by means of enforceable antenuptial agreements), have redefined marriage into an institution of much less public interest. Even the unintended side effects of social assistance programs have helped rob marriage of much of its original legal, economic and social meaning. Secular marriage is not what it used to be.

In a long-gone past, when secular marriage was essentially coterminous with religious marriage, the association of marriage and religion was unquestioned and there was no need for questions. Today, there is a need for questions, but the continuing cultural echo of that once so close association between religion and marriage hinders rational analysis. Of course, modern Western states generally guarantee that, within their religions, parties may by and large do or not do what they wish or what their religion requires or allows. At the same time, the doctrine of separation of church and state – generally accepted in the Western World, even in states with nominally "established churches" – prohibits state endorsement of one religion over another.

More narrowly, in the U.S., it is a matter of constitutionally secured "First Amendment" freedom to allow any and all religions to define their own concepts of marriage in terms of their own desired ends. People may act within and in accordance with their religious tenets – so long as these do not offend overriding (albeit ever-shrinking) social values, such as the principle of monogamy and, so far, the traditional prohibition on homosexual conduct (still illegal, but scarcely enforced, in about 12 U.S. states). Abortion, adultery, un-

married cohabitation along with many other "moral" issues once thought public are now deemed to be private concerns.

But just as adherents of a religion are entitled to define and live their lives and marriages in terms of their religion, so should and must secular society define its secular concept of marriage in terms of society's desired ends. In the modern secular state, religion is given no role in secular affairs. Conversely, the secular legislator has no role beyond proper civil business.

Focusing now on the secular level, today's debate rages between "traditionalists" and "progressives." The former favor state-regulated marriage as the best or only model for continuing to order intimate – and particularly child-rearing — relationships, whereas the latter increasingly think in terms of sexual pairing as private relationships.

Whatever "progress" may be made, many legal problems need to be addressed and solved in terms of (1) modern models of private ordering (by way of express or implied contract in cohabitation arrangements), and (2) public ordering (whether by way of traditional models of marriage or through modern variants of "sub- or near- marriage" partnerships). If unmarried partnerships, whether heterosexual or same-sex, are to move beyond unpredictable, sporadic, single-issue-oriented, and prohibitively expensive case law, clear and predictable rules must govern issues of proof, as well as many points of substance. Let us define the questions that must be addressed:

*If The Cohabitants Have An Express Agreement (Written or Oral):

1. Formality. The first question is whether — and to what extent — such express agreements should be enforceable? The second question is whether such agreements should be required to be in writing. (It is noteworthy here that the Statute of Frauds has long required premarital contracts to be in writing.)

2. Substance. Should there be substantive limits on contractual freedom and the enforceability of express contracts, other than the general rules governing validity and enforcement of contracts? More pointedly, should persons be permitted to contract themselves into cohabitation relationships with legal effects that differ from "standard cohabitation" *more than standard marriage may be modified by marital contracts*?

*If An Agreement Is To Be Implied In The Facts of Cohabitation:

1. Should cohabiting partners be permitted to contract out of (deny in advance) implied obligations that would otherwise arise out of their cohabitation arrangements? To what extent — if at all — should the parties' later conduct be permitted to revoke or alter an earlier express (written or oral) agreement or disclaimer?

2. If cohabitants do not have an express agreement, should a cohabitation arrangement be deemed implied in the fact of cohabitation over some period or should cohabitation without specific agreement carry no legal consequences at all? Note that an agreement implied in fact is consistent with the parties' conduct. (Distinguish an agreement implied from the facts from an agreement "implied in law." The latter would be imposed regardless of the parties' intentions.)

3. Should "domestic partnership" be a formal "opt-in" or "opt-out" status requiring some form of registration or other public notice? Note that some formal notice would avoid the costly and frustrating retroactive re-hashing of whether there was or was not a cohabitation agreement or even a relationship and what it involved. (Note that the institution of informal, common law marriage was abandoned in most common law jurisdictions precisely because of the chaos that resulted from unproven and unprovable relationships.)

4. Should legislation "regulating" cohabitation of unmarried couples extend equally to same-sex as well as to heterosexual couples? Or should such legislation exclude either category? (Note that the availability of Hawaii's reciprocal beneficiaries legislation is limited to same-sex couples because the marriage option is not now available to them, and so is Vermont's. Note also that if a domestic partnership law allows heterosexual couples to opt for such a partnership — and on equality principles it may be difficult to justify denying that option to heterosexual couples — the existence of the partnership option may have profound implications for heterosexual marriage.)

5. Should any of the customary marriage prohibitions apply to domestic partners? If so, which? (i) At first glance, it seems obvious that the incest prohibition should not have the same meaning with regard to a same sex union that it has in a heterosexual association, but note that Vermont's new law would prohibit "incestuous" same-sex partnerships. On the other hand, Hawaii's domestic partnership would allow a mother and son, or other relatives, to enter into a domestic partnerships. (ii) Should age and parental consent requirements be transferred from marriage regulation into the context of domestic partnership? (iii) What is to be done with the "bigamy" prohibition? In short, may one person have several simultaneous domestic partners? Should a married person be allowed to enter into a domestic partnership "on the side"? (Note that the actor Lee Marvin, of California's famous *Marvin* case, was married during his affair with Michelle, but note also that Vermont's new law would prohibit simultaneous marriage and/or partnerships.) The fact is that unrestricted unmarried cohabitation with legal consequences, may spell the end of the polygamy taboo beyond even the "serial polygamy" al-

ready tolerated by our divorce laws and the "putative spouse doctrine."

6. Aside now from the creation of legal rights between the parties, what — if any — "public consequences" should attend the parties' private arrangements? To illustrate, should a cohabitant be entitled, through his or her partner, to receive the same or similar social benefits that marriage partners may derive through their spouses? Should cohabitants bear the same or similar legal (e.g., support) burdens vis-à- vis each other and vis-à-vis the public as are imposed on married partners?

7. But the ultimate question goes to the role of quasi-contract – referred to above as "contracts implied in law." Should cohabitation carry defined consequences imposed by law — on the basis of what seems "fair" and "reasonable"? The issue is whether, to avoid overreaching by the "stronger" party, cohabitants who do not have any agreement (or have one that is not enforceable under rules formulated to govern such agreements) should be deemed by law to have created a status that imposes specific rights and obligations on them? More pointedly, should the law create the "forced mini-marriage" implicit in the "extended" *Marvin*[3] doctrine? If so, precisely in what circumstances?

Here – I think – lies the ultimate question on the road to submarriage/partnership legislation. That question is whether current conditions warrant the truly radical step of imposing rights and obligations on those who do not choose to undertake them? Let us not forget that cohabitation without marriage remains attractive to many adult citizens precisely because it permits separation without divorce and without financial consequences.

If we decide to opt for "imposed consequences," how similar to marriage should these consequences be? Should they be less than marriage? How much less? Or should the outcome be akin to retroactive imposition of common law marriage when that seems "equitable"? (Note that common law marriage originally depended on the parties' intent, but has in many states been modified to a near-discretionary device, to provide "justice" for a person who would otherwise be wronged.) Again, what is wrong with common law marriage? If anything, it is the uncertainty of whether a marital relationship in fact existed. If found, the full legal consequences of marriage are imposed. But for this seemingly minor issue of proof England – and most of our states – abandoned common law marriage — despite its beneficial capability to impose clearly defined legal consequences

3. See Krause, "The Legal Position of Unmarried Couples," 34 *Am. J. Comp. L.* 533 (Supplement 1986).

where society (through a judge) believes there should be such consequences. Consider that problem of proof would be much worse in the partnership context than they were when they caused the demise of common law marriage. Now we would be asking not only whether a legally recognizable relationship existed, but we would also have to ascertain precisely what specific legal consequences the parties intended — or should have intended? It seems very difficult to avoid the conclusion that, unless a secular, legal formality "seals" (and let's not say "sanctifies") the partnership, the expense and uncertainty of litigating decades later whether a status actually existed and what it was or is, may simply not be worth the unpredictability it would cause in human relations.

If the conclusion is that a legal formality must "seal" a partnership that is to have legal consequences, should the parties not be asked to use the statutory framework of "marriage," as modifiable by an enforceable antenuptial contract? (While the marriage-cum-contract option is still limited to those who are allowed to marry, it is very instructive to note that the same-sex partnership laws now being enacted or discussed require a marriage-like declaration or registration.)

Social philosophers debate whether giving legal status to cohabitants is "progressive" — as liberal advocates insist it is — or whether it is in reality "reactionary" — as conservatives deny. In reality, quite opposed to accepting and adapting modern law to "modern lifestyles," the legalized cohabitation movement would make "free love" unfree. At worst, of course, the provision of legal consequences for cohabitants resurrects a retread of the time-honored legal institution of "concubinage," conferring on the "concubine" or "concubinor" a legal status somewhere below that of a spouse!

B. *Issues in Public Ordering Through Differentiated Marriage Models*

Today's sexual and associational lifestyles differ so much that the State should not continue to deal with them as though they all were the role-divided, procreative marriage of history. That marriage may not yet be history, but it has become just one lifestyle choice among many.

In a rational world, marriage, qua marriage, would not be the one event that brings into play a whole panoply of legal consequences. A pragmatic, rational approach would ask what social functions of a particular association justify extending what social benefits and privileges.

Legal benefits and obligations would be tailored to the social value of the parties' relationship. Put crudely, what does society

(that is the taxpayer) get from the parties to that relationship, in exchange for the parties' being granted specific rights and social (including tax) benefits?

There will be disagreement on particulars, but it seems fair to say that society gains — for example, through lessened need for taxation, increased gross domestic product (GDP), and more "gross domestic happiness" (GDH) – if "marriage" and "family" provide

*an efficient and orderly setting for sexual activity — "efficient" and "orderly" through permanent, publicized pairings, thus signaling married persons to be at least presumptively unavailable and avoiding the disruptive potential of a permanent "open season" — disruptive in terms of the other functions of marriage (e.g., child rearing), and in terms of efficient functioning in economic and social activity;

*an efficient and orderly setting for social companionship and psychological support;

*an efficient and orderly setting for mutual (husband and wife, parents and children) economic insurance against economic adversity, including "elder care," thus relieving the taxpayer of potential economic responsibility;

*an efficient and orderly setting for long-run economic assurance offered by marriage that permits role division in terms of career and child raising functions without threat of ultimate destitution for the "at-home-partner" before or after the job is done;

*an efficient and orderly setting for procreation in associationally and economically secure circumstances: Two child support earners and custodians are better than one. Legal and social circumstances should allow the parents autonomy in the socialization of their children in their early years, that task to be shared later by schools pursuing broader social goals. This setting corresponds to our social values that rank diversity high and abhor state-run child-rearing;

*an efficient and orderly setting for socialization of children who are (at least statistically) more likely than children in "single-parent-families" to contribute to a future economy, and who will not only fund the social security system for everyone, but further stand ready to contribute financially to their own parents in old age.

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The fact is, much marriage-related regulation makes little sense today, even if regulation is accepted in principle. Tradition-bound (and thereby now misdirected) legislative irrationality may be illustrated by many examples. For instance, the legislators' careless disregard for functional rationality may be illustrated by the U.S. federal income tax law that imposes what has been graphically described as

a "marriage penalty" as well as a "marriage bonus," based solely on marriage, not on the partners' actual or presumptive ability to pay as related to their marriage or partnership.

The rational answer seems clear: Married and unmarried couples who are in the same *factual* positions should be treated alike. We should reevaluate the tax preference or penalty that the *technicality* of legal marriage triggers. Instead, tax significance should be seen in the *actuality* of ability to pay that is increased by economies of scale or reduced by children. That approach would recognize expenses for child rearing as being on a higher level of social utility than, say, love-boat cruises. Who would argue that this would not be a socially sensible and responsible value judgment?

A second example of state-imposed, but misplaced, disincentive to marital role division is found in our federal social security system. That system primarily bases eligibility on market-place earnings, with some additional recognition of marriage. The result is that, aside from forgoing earnings during the marriage, the stay-at-home or secondary career partner (still typically the mother) accrues only a lesser, typically derivative (from the husband's), retirement eligibility. Indeed, some recent thinkers challenge even the derivative benefits now available to widows, wives and some divorced ex-spouses. If reason were to guide the legislator, social security law – based as it is on the income stream of future generations – would view the raising of children as the primary (or at least an alternative) contribution on which eligibility for benefits would be based.

C. What About Same-Sex Marriage?

The struggle over the modern meaning of "marriage" is reflected particularly poignantly in the demand for marriage of hitherto excluded groups, particularly gays and lesbians. When liberal divorce reform was the order of the 1960's, skeptics quipped that soon only priests and gays would want to marry. While priests remain the church's business, secular law — albeit still (unduly?) influenced by canon law tradition — now seeks to deal with the gay rights challenge to the traditional, monolithic heterosexual culture in general and marriage in particular.

Many Western countries have recently recognized same-sex partnerships as having the potential of marriage-like legal incidents.[4] In-

4. At the request of and for the use of the German Ministry of Justice, a detailed review was undertaken in 1998-99 of the laws of the Nordic countries, the Netherlands, France, Spain and Spanish-derived legal systems, Hungary, the U.K., the U.S., and published along with papers detailing the Roman Catholic position, the theological views of European Protestant denominations, a "sexual-scientific" view of homosexuality as well as a social scientist's paper on the effect of same sex partnerships on children. "Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften," *Bei-*

deed, Vermont's Supreme Court blazed a rare trail in American law by invoking the laws of several European civil law countries in its own pace-setting decision on Vermont's newly discovered constitutional requirement that same-sex partnership be offered the same legal rights as heterosexual marriage partners. Similar changes in the law are in the making or have been accomplished in the laws of numerous common law countries, such as Australia, New Zealand, and Canada. Indeed, Australian states were the forerunners among common law jurisdictions to enact statutes regulating unmarried cohabitation, ironically the chief motivation then being the elimination of welfare benefits then available to unmarried partners that were denied to married partners.

In the United States, the debate whether to legalize gay marriage or to provide some equivalent legal relationship goes on, even while about one quarter of the fifty U.S. states still criminalizes same-sex conduct. The debate is taking place at the state and federal levels — as well as in the churches of various religions and the market place occupied by corporations seeking to steer a prudent course of business.

Recent federal law commanded that for purposes of federal law, only heterosexual marriage will be recognized. Many or most states provide the same by legislation or by amended state constitutions. On the other side of the equation, however, same-sex partnerships are now being recognized in varying degrees by court decisions, by legislation in cities and states, and by more or less voluntary actions by business and educational corporations.

A rational analysis of what useful social functions are capable of being fulfilled by what unions – look to the listing above – quickly yields the answer that, in many particulars, rational law would not differentiate between unions solely on the basis of the sexual orientation of the partners. The rational question is why any couples – heterosexual or same-sex – should be entitled to a panoply of legal right vis-a-vis each other and vis-a-vis society, if they simply transit from unmarried to married cohabitation, without there occurring any factual change in their circumstances? Put more pointedly, there well may be nothing so much wrong with not including same-sex couples in the definition of potential marriage partners, as instead, it may be wrong to allow only heterosexual couples a choice of legal consequences that, in fact, have no bearing on their life situations.

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traege zum Auslaendischen und Internationalen Privatrecht #70 (J. Basedow, K. Hopt, H. Koetz, & P. Dopffel eds., 2000). Within that volume, the author of this paper provides a detailed review of the relevant law of the United States (in English), id. at 187-273.

In short, rational law should differentiate between intimate associations on the basis of actual differences in social functions that are or can be fulfilled by particular unions. In those rational terms, far fewer differences appear between heterosexual and same-sex couples, and far greater differences appear between child-rearing and childless couples, than many traditionalists see.

Part II. The Bonds and Bounds of Childrearing

More than two decades ago, Professor Mary Ann Glendon noted the emergence of what she called the "New Family" of the 20th Century.[5] Family, she observed, was characterized by "increasing fluidity, detachability and interchangeability," not only in adult relationships but also in those between parents and children.[6] Unwilling to accede to the status assigned them by law and tradition, family members would more often insist that their relationships be constructed and sustained upon their own terms. Family would be valued to the extent it provided emotional satisfaction, but might just as easily be discarded if alternative outlets or pursuits appeared to offer more fulfillment.[7] In short, the "New Family" was predominantly one of *choice*, which implied not only a rejection of tradition as a binding determinant of family roles, but also more fundamentally a rejection of "family" itself as an essential or primary source of personal identity and gratification.

In many ways, the trends that Professor Glendon spotted nearly a quarter-century ago have only accelerated. There is today even stronger consensus that tradition should give way to individual preference in the construction of many aspects of family life. At the same time, however, there is evidence of another consensus forming which importantly qualifies the first. Just as many have come to accept that tradition is not all it was cracked up to be in defining notions of family, there is growing sentiment that tradition's putative successor – choice – has significant drawbacks of its own. As a consequence, debates about childrearing in the 21st Century will be framed less in the rhetoric of tradition-versus-choice, and centered more directly on competing conceptions of what is truly valuable about the intimate caregiving relationship.

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5. Mary Ann Glendon, *The New Family and the New Property* (1981) [hereinafter Glendon, The New Family].

6. Id. at 3.

7. Professor Glendon pointed out that social and legal changes facilitating easy exit from unsatisfying family relationship coincided with legal changes *increasing* the durability of the employment relationship. Together, she noted, the two trends signaled "a vast reorganization of social relationships" and a shift of focus of individual identity and investment from family to work. See id. at 11.

A. *The Ascendancy of Choice*

In the United States, as elsewhere, family law has moved significantly toward broader accommodation of individual choice in the construction of childrearing relationships. Signs of this change, mostly only nascent at the time of Professor Glendon's writing, are now everywhere and unmistakable. Rules of standing have been relaxed to permit non-parents more often to seek custody or visitation.[8] Substantive rules of decision also have changed to make it easier for non-parents to prevail in custody disputes once they do get into court. Although the law in all states continues to prefer custody with a parent, that preference has been softened in important ways. Whereas non-parent custody once was possible only upon proof of dereliction by a parent so great as to constitute wholesale unfitness, now a growing number of states permit a non-parent to prevail on the somewhat lesser showing that custody with the parent would be a serious detriment to the child.[9] Once having gained custody, moreover, a non-parent is now more likely to keep it against a subsequent challenge by a parent.[10]

Even within the realm of custody disputes between parents, the law has shown greater deference to individual choice. Court decisions and legislative acts have narrowed the ability of trial judges to base custody decisions on the unconventional life choices of parents. On constitutional grounds, the U.S. Supreme Court has barred lower courts from taking account, in their assessments of a child's best interests, of a parent's subsequent election to enter into an interracial marriage.[11] Some lower courts have carried this prohibition over to a

8. See, e.g., Ky. Rev. Stat. Ann. § 403.270 (2001); Or. Rev. Stat. § 109.119 (2000); In re Custody of A.D.C., 969 P.2d 708, 710 (Colo. Ct. App. 1998) (discussing Colo. Rev. Stat. § 14-10-123(1)); In re M.T., 21 S.W.3d 925, 927 (Tex. Ct. App. 2000).

9. See, e.g., In re Custody of RRB, 31 P.3d 1212, 1218-19 (Wash. Ct. App. 2001); In re Guardianship of Olivia J., 101 Cal. Rptr. 2d 364, 368 (Ct. App. 2000). A few jurisdictions even permit non-parents to prevail on a showing that it would serve a child's best interests, although status as a parent still counts for a great deal in determining the child's interests, see in re Guardianship of Doe, 4 P.3d 508, 519-20 (Haw. 2000); Cahn, "Reframing Child Custody Decision-making," 58 Ohio St. L.J. 1, 16 (1997) (discussing Pennsylvania case law).

10. Although family law typically is biased against efforts to challenge settled custody arrangements, many states traditionally set aside that bias when the challenger was a parent seeking to regain custody from a non-parent. If a mother initially lost custody because of drug addiction, for example, she might well be permitted to reclaim custody, even years later, on a bare showing that she had regained her fitness to act as a parent. See Meyer, "Family Ties: Solving the Constitutional Dilemma of the Faultless Father," 41 *Ariz. L. Rev.* 753, 795-97 (1999). In recent years, however, several states have begun to give non-parent custodians the benefit of family law's usual bias against modification, demanding that parents show that a change of custody would benefit the child. See Kenney v. Kenney, 2001 WL 1485878 (Ohio St. App. Nov. 26, 2001); C.R.B. v. C.C., 959 P.2d 375, 380 & n.10 (Alaska 1998) (collecting additional cases).

11. See Palmore v. Sidoti, 466 U.S. 429 (1984).

parent's election to enter into a homosexual relationship as well.[12] Indeed, most jurisdictions have moved generally to limit the ability of trial judges in a best-interests determination to consider a parent's choices concerning sexuality, insisting, for instance, that there be proof that the parent's sexual behavior has actually adversely affected the child's welfare.[13]

Indeed, dissatisfaction with the indeterminacy and potential for bias associated with the best-interests standard has spurred interest of late in an alternative approach that would further enhance the role of individual preference in child-custody law. Under the "approximation" standard, courts would be directed to fashion a custody arrangement that mirrored, as closely as possible, the allocation of childrearing responsibilities that existed before the parents' separation.[14] This standard, already enacted into the law of one state[15] and recently embodied in the American Law Institute's *Principles of the Law of Family Dissolution*,[16] quite expressly minimizes the normative aspirations of custody law.[17] By basing the custody decision on the parents' own past practices, rather than on some external norm of ideal family structure, the court's action is calculated to honor the "internalized values and preferences"[18] of the parents themselves and, thus, is said to "represent[ ] the optimal response to the current pluralism in family structure."[19]

Indeed, several recent changes make it easier for non-traditional claimants to gain not merely custody or visitation, but even the very status of parenthood. The law has begun to give a greater measure of protection and stability to relationships within foster families,[20] for

12. See Jacoby v. Jacoby, 763 So.2d 410, 413 (Fla. Ct. App. 2000); Inscoe v. Inscoe, 700 N.E.2d 70, 81-82 (Ohio Ct. App. 1997); S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985). But see S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

13. See, e.g., Zepeda v. Zepeda, 632 N.W.2d 48, 54-55 (S.D. 2001) (affirming custody award to mother, finding insufficient evidence that mother's practice of engaging in "cybersex" in internet chat rooms or her extramarital liaison in the martial home while child was sleeping had a "harmful effect" on child); Shapiro, "Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children," 71 *Ind. L.J.* 623, 635-39 (1996); Wardle, "The Potential Impact of Homosexual Parenting on Children," 1997 *U. Ill. L. Rev.* 833, 874-78.

14. This approach was first proposed by Professor Elizabeth Scott. See Scott, "Pluralism, Parental Preference, and Child Custody," 80 *Calif. L. Rev.* 615 (1992).

15. See W. Va. Code § 48-11-106 (2000).

16. See American Law Institute, Principles of the Law of Family Dissolution § 2.03 (Tentative Draft No. 4, Apr. 10, 2000) [hereinafter ALI Principles].

17. See Meyer, "What Constitutional Law Can Learn from the ALI Principles of Family Dissolution," 2001 *B.Y.U. L. Rev. 1075* (forthcoming).

18. Scott, supra n. 14, at 633-34.

19. Id. at 619; see also Bartlett, "Saving the Family from the Reformers," 31 *U. Cal. Davis L. Rev.* 809, 818, 851-52 (1998) (describing the ALI's approach to custody as "family-enabling" rather than "family-standardizing").

20. Some states, for example, have enacted legislation giving foster parents the right to participate in judicial proceedings involving the child and, in some cases, a preference over other petitioners in the event the child becomes available for adoption. See, e.g., Ill. Ann. Stat. § 520/1-15 (Smith-Hurd 2001); N.Y. Soc. Serv. Law § 383

instance, at the very same moment in which federal legislation has spurred states to make it easier for some foster parents to normalize their childrearing status fully through adoption.[21] Other federal enactments, meanwhile, have sought to end the practice, common among some case workers and adoption agencies, of blocking transracial adoptions.[22] Adoption statutes also have been amended or reinterpreted to permit same-sex couples to adopt, even though this means acknowledging the previously unthinkable possibility that a child could have more than one father or mother at a time.[23]

The most aggressive expression of this trend is found in the ALI's *Principles*, which encourages courts to recognize as *parents* some caregivers who lack any biological or adoptive ties to a child. To the traditional categories of legal parents, the ALI *Principles* would add new categories of "*de facto* parents" and "parents by estoppel" who

(McKinney 2001); Tenn. Code Ann. § 37-2-415 (2000); In re Adoption of A.K.S.R., 71 S.W. 3d 715, 718 (Tenn. Ct. App. 2001) (holding that statute requires that foster parents be given preference over child's relatives in contested adoption). Similarly, some courts recently have held that children or their foster parents have a constitutional right to preserve their relationship against state intervention, see, e.g., Webster v. Ryan, 729 N.Y.S.2d 315 (Fam. Ct. 2001); In re Santos Y., 112 Cal. Rptr. 2d 692, 725 (Cal. Ct. App. 2001), a question which the Supreme Court left unresolved in Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977).

21. The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.), encourages states in some cases of child abuse or neglect to dispense with efforts aimed at family preservation and to move children more quickly toward the goal of adoption into new families. See generally Elizabeth Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (1999); Gordon, "Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997," 83 *Minn. L. Rev.* 637 (1999).

22. The new law makes it unlawful to "delay or deny" an adoption on the basis of the race of the child or prospective adoptive parents. See Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 4056, amended by Adoption Assistance Act of 1996, Pub. L. 104-188, § 1808(c), 110 Stat. 1904 (codified as amended as 42 U.S.C. § 1996b (West 2001)). For discussion of the practice existing before the enactment of this law, see Bartholet, "Where Do Black Children Belong? The Politics of Race Matching in Adoption," 139 *U. Pa. L. Rev.* 1163 (1991). Although this federal legislation was "truly revolutionary" in its ambition to tear down racial barriers to adoption, "enormous resistance" by case workers has limited its impact so far. Bartholet, "Taking Adoption Seriously: Radical Revolution or Modest Revisionism?," 28 *Cap. U. L. Rev.* 77, 85, 88 (1999).

23. See Schacter, "Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoptions," 75 *Chi.-Kent L. Rev.* 933, 934 (2000) (noting that "[i]n the last several years, courts in at least twenty-one states have authorized this sort of adoption, and appellate courts in five states and the District of Columbia have affirmed the second-parent adoption theory," and that, as a consequence, "second-parent adoption has 'become the unmistakable trend of the law's development in this area'"). For discussion of the law's traditional resistance to the concept of multiple parenthood generally, and second-parent adoption specifically, see Bartlett, "Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed," 70 *Va. L. Rev.* 879 (1984) (multiple parenthood); Polikoff, "This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families," 78 *Geo. L.J.* 459 (1990) (second-parent adoption).

would then be entitled to a share of custody and childrearing authority along with the child's biological or adoptive parents – all premised heavily on notions of parental consent.[24] Although legislative enactment is not on the immediate horizon, the *Principles*' expansive concept of parenthood already has begun to exert influence in the courts, which have used it to justify allowing longtime caregivers to preserve their parenting role, if not quite to attain parenthood itself.[25]

In these and other ways, the law now plainly accords greater respect to non-traditional caregiving relationships and permits individuals wider freedom to forge durable bonds with children outside the boundaries of convention. There is less certainty about the importance, or in some quarters even the relevance, of marriage in providing a context for childrearing.[26] Lines that once clearly marked the boundaries of family identity and childrearing authority, such as childbirth, marriage licenses, and adoption decrees, are blurring. And the easy answers provided by tradition to the salient questions of childrearing – *Who counts as a parent? What rights do parents have? Should children have some rights, or at least some voice, of their own?* – seem less self-evident, natural, or benign.

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24. See ALI Principles, supra n. 16, § 2.09; Brinig, "Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution," 8 *Duke J. Gender L. & Pol'y* 301 (2001); Meyer, "What Constitutional Law Can Learn," supra n. 17.

25. See Rubano v. DiCenzo, 759 A.2d 959, 974-75 (R.I. 2000) (drawing support from the ALI Principles for holding that "a person who has no biological connection to a child but has served as a psychological or de facto parent to that child may . . . establish his or her entitlement to parental rights vis-a-vis the child"); E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass.) (relying in part upon ALI Principles in holding that "the best interests calculus must include an examination of the child's relationship with both his legal and de facto parent[s]"), cert. denied, 528 U.S. 1005 (1999); Youmans v. Ramos, 711 N.E.2d 165, 167 & n.3 (Mass. 1999) (embracing ALI's definition of "de facto parent" in holding that child's former guardian was entitled to seek court-ordered visitation).

26. See Baehr v. Miike, 1996 WL 694235, at * 17 (Haw. Cir. Ct. Dec. 3, 1996) (noting evidence of "diversity in the structure and configuration of families," and concluding that "the single most important factor in the development of a happy, healthy, and well-adjusted child" is not family structure but a "nurturing relationship between parent and child"), aff'd, 950 P.2d 1234 (Haw. 1997); In re M.M.D., 662 A.2d 837, 854 (D.C. 1995) (suggesting that it would be "absurd" for a legislature to preclude adoptions by unmarried persons when there is a shortage of married applicants); compare Duncan, "'Don't Ever Take a Fence Down'": The 'Functional' Definition of Family – Displacing Marriage in Family Law," 3 *J. L. & Fam. Stud.* 57 (2001), and Galston, "Causes of Declining Well-Being Among U.S. Children," in *Sex, Preference, and Family* 290 (David M. Estlund & Martha C. Nussbaum eds., 1997) (decrying this trend), with Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other 20th Century Tragedies* (1995); Nancy E. Dowd, *In Defense of Single-Parent Families* (1997); and Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage," 53 *Hastings L.J.* 547 (2002) (contending that this trend has not gone far enough).

B. The Limits of Choice

Although tradition continues to lose ground as a polestar of family law, the ascendance of individual choice increasingly appears to have limits of its own. While a dominant theme of family-policy debates in the closing decades of the 20th Century was the need for family law to accommodate the reality of unconventional family life, an emerging theme in the opening years of the 21st Century is the need to define the limits of that accommodation. Just as most lawmakers have come to emphasize individual liberty as an important value in family law, there is fresh acceptance that personal autonomy in and of itself is a vacuous and "deeply unsatisfying" end in the context of family.[27] Indeed, many of those who helped lead the movement to open up the law to non-traditional families readily agree that "[t]he danger of an expansive, functional voluntarist view of the family – in which people can pick and choose what kinds of family ties they want to have – is that people will choose to walk out when it gets tough and to avoid responsibilities when it is no longer fun."[28]

In keeping with this judgment, several recent developments are directed at increasing the substance and durability of the bonds between parents and children. Traditionally, for example, the law acquiesced in – or, more accurately, aided and abetted – the estrangement between children and their non-custodial parents. For a great many non-custodial parents, divorce signaled an end not only to marriage but to any real parenting role[29]; family law, through haphazard visitation laws and lax child-support enforcement, made little effort to keep these parents from drifting away. In recent years, however, states have made concerted efforts to bind parents more closely to their children following separation or divorce. In particular, they have imposed duties of support more universally, even when parents are impecunious or the children have no real apparent need, as a means of reinforcing notions of parental care and duty.[30] In addition,

27. Teitelbaum, "The Family as a System: A Preliminary Sketch," 1996 *Utah L. Rev.* 537, 545; see also Milton C. Regan, *Family Law and the Pursuit of Intimacy* (1993); Schneider, "Moral Discourse and the Transformation of American Family Law," 83 *Mich. L. Rev.* 1803 (1985).

28. Minow, "Redefining Families: Who's In and Who's Out?," 62 *U. Colo. L. Rev.* 269, 283 (1991); see also Eskridge, Jr., "Beyond Lesbian and Gay 'Families We Choose'," in Sex, Preference, and Family, supra n. 26, at 277, 277-78; Woodhouse, "'It All Depends on What You Mean by Home': Toward a Communitarian Theory of the 'Nontraditional' Family," 1996 *Utah L. Rev.* 569, 580-83.

29. See Galston, supra n. 26, at 302 (noting that in the period immediately following a divorce nearly half of children lose all contact with their fathers and, after 10 years, the figure rises to nearly two-thirds); Melli, et al., "Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin," 1997 *U. Ill. L. Rev.* 773, 776 (noting that custody law traditionally contemplated that "[t]he non-custodial parent had a very limited role" to play in the child's upbringing).

30. See Krause, "Child Support Reassessed: Limits of Private Responsibility and the Public Interest," 1989 *U. Ill. L. Rev.* 367, 382-83; Melli, supra n. 29, at 791-92

states have generally unbundled visitation from support, so that payment disputes need not sever a child's contacts with a parent,[31] and have grown far more aggressive in enforcing awards.[32]

The law's emerging consensus on parental choice in this context is well illustrated by the contrasting treatment given to men who seek to establish or to disprove their paternity following some involvement with a child. In 1989, the U.S. Supreme Court upheld the constitutionality of a California law which absolutely barred men from seeking to establish their paternity of a child born to a woman in an intact marriage to another man.[33] Since that decision, however, a growing number of states have changed their law, by legislation or by court action, to allow such challenges.[34] Yet, they have been much less receptive to the claims of men who stand at the other corner of this triangle and who seek to disentangle themselves from an established parental role on the grounds that the child was actually fathered by another man.[35] Something of the same pattern can be found in cases arising out of broken co-parenting agreements. Where a legal parent has induced a non-parent to assume a substantial parenting role toward a child before later changing her mind, courts are showing more willingness to enforce promises of continued involvement with the "*de facto* parent."[36] The upshot of all of these cases seems to be that courts are more accommodating of unconventional choices to *enter into* the parent-child relation than they are of subsequent choices to *exit* or *quash* that relationship. In this way, law is finding a new balance between the values of individual choice and society's own conception of the essential durability of parenthood.

(study of recent Wisconsin divorce cases shows that "the percentage of [child-support] awards in sole custody cases has increased substantially").

31. See, e.g., Farmer v. Farmer, 735 N.E.2d 285 (Ind. Ct. App. 2000); Leasure v. Leasure, 1998 WL 108137, at *4 (Ohio Ct. App. Mar. 12, 1998); In re Marriage of Bronzynski, 806 P.2d 8, 10 (Mont. 1990).

32. See Elrod, "Child Support Reassessed: Federalization of Enforcement Nears Completion," 1997 *U. Ill. L. Rev.* 695; Krause, Child Support Reassessed, supra n. 30.

33. See Michael H. v. Gerald D., 491 U.S. 110 (1989).

34. See, e.g., In re Witso, 627 N.W.2d 63 (Minn. Ct. App. 2001); Callender v. Skiles, 591 N.W.2d 182, 189-90 (Iowa 1999); State ex rel. Roy Allen S. v. Stone, 474 S.E.2d 554 (W. Va. 1996); In re J.W.T., 872 S.W.2d 189, 198 (Tex. 1994).

35. See, e.g., W. v. W., 728 A.2d 1076 (Conn. 1999); Godin v. Godin, 725 A.2d 904 (Vt. 1998); Pietros v. Pietros, 638 A.2d 545 (R.I. 1994); cf. Wright v. Newman, 467 S.E.2d 533 (Ga. 1996) (mother's former boyfriend who acted as child's father obligated to pay support); see also ALI Principles, supra n. 16, § 3.02A comment d (noting that "[t]he common theme of such cases is that the child's interests may be jeopardized by allowing a husband who has taken paternal responsibility for his wife's children to suddenly disclaim them, leaving them fatherless financially as well as emotionally").

36. See, e.g., Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); LaChappelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App.), cert. denied, 531 U.S. 1011 (2000); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass.), cert. denied, 528 U.S. 1005 (1999).

C. *The Enduring Substance of Family*

When Professor Glendon wrote of the "New Family" of the 20th Century, she warned that the ascendance of choice could lead, in this century, to a dramatic fragmentation of society – to a future in which, as intimacy lost much of its durability and richness, individuals would grow ever more disconnected from those around them and in which the very concept of family would be imperiled.[37] The triumph of a liberalism in which each individual is unfettered in the pursuit of self-gratification through chosen relationships would ultimately frustrate the "need for human inter-connection that impels people to form families in the first place."[38] Although all would be diminished by this disintegration, the costs surely would fall hardest of all upon children.[39]

Recent developments in the law affecting childrearing, however, give reason for optimism that this prophesy will not be fulfilled. These developments reflect that, while family law now has a more open mind about the identity of the individuals who may establish bonds with a child, it is prepared to insist that the substantive content of those bonds conforms with society's own basic expectations about family. Family in the 21st Century will be less defined by tradition, therefore, but neither will it be solely a matter of personal choice; instead, there is growing acceptance that family ultimately must be defined by modern consensus about what is essentially good and special about that relation.[40] It is in this context that thoughtful observers have called increasingly for – and some already have detected – the emergence of a "new morality" in family law, one that is concerned not with conformity to tradition but with conformity to modern consensus about the moral claims of intimate dependency.[41]

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37. See Glendon, supra n. 5, at 245 (asserting that "[i]t seems likely that, in the future, what we have here called the new family and the new property will be . . . identified with a period of extreme separation of man from man"). Indeed, others writing at the same time also saw reason to question the ultimate sustainability of the family as an institution. See Crouch, "International Declaration/Convention Efforts and the Current Status of Children's Rights in the United States," in *The Family in International Law: Some Emerging Problems* 19, 76-77 (Richard B. Lillich ed., 1981) (calling it "an open . . . question in American jurisprudence . . . whether the family is worth saving . . . as the primary unit or place of human nurture").

38. Eskridge, supra n. 28, at 278.

39. See Krause, "'Family Values' and Family Law Reform," 9 *J. Contemp. Health L. & Pol'y* 109, 124 (1993) (warning that, as a result of changes in social and family policy, "[w]e seem to be moving not toward a 'unified society,' but toward a fractured society in which the needs of children are 'met not by parents' and 'not by government'"); cf. Galston, supra n. 26, at 299-303 (cataloging ways in which the loosening of family structure has affected the well-being of children).

40. See Meyer, "Self-Definition in the Constitution of Faith and Family," 86 *Minn. L. Rev.* 791 (2002).

41. See Regan, supra n. 27; Cahn, "The Moral Complexities of Family Law," 50 *Stan. L. Rev.* 225, 228-29, 238-40 (1997); Murphy, "Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law," 60 *U. Pitt. L. Rev.* 1111 (1999).

The central aim of this new code, moreover, is the definition and enforcement of durable adult responsibilities toward children.[42]

The U.S. Supreme Court's most recent foray into the area reflects family law's ambition – and its challenge. In *Troxel v. Granville*,[43] the Court confronted a family conflict rooted in tragedy. A mother sought to curtail contact between her two young daughters and their paternal grandparents following the suicide of the girls' father. State law authorized the trial court to order continued contact with the grandparents based on a finding that visitation would be in the girls' best interests, but the mother objected that the state's interference violated her constitutional rights as a parent. Tradition provided a relatively direct answer to the conflict: U.S. tradition has long accorded parents exclusive decisionmaking authority over such questions and so the matter might have ended there, at least absent the most exigent circumstances.[44] In a splintered decision, however, the Justices attempted to find some middle ground, affirming the importance of the parent's traditional authority while also leaving room for the possibility that competing childrearing relationships of real emotional substance might endure.[45] The boundaries of parental autonomy, the Justices suggested, must bend to accommodate the flourishing reality of non-traditional family bonds – and the modern public judgment that the preservation of these bonds must sometimes take precedence over respect for traditional prerogative.

In this way, family law is less tethered to tradition, but also rejects the trajectory of "increasing fluidity, detachability, and interchangeability" that characterized the New Family of the 20th Century.[46] Family may well be reconceived in its details or particular configurations, but as an essential institution remains secure. Indeed, in the new era of global uncertainty and insecurity following

42. June Carbone, *From Partners to Parents: The Second Revolution in Family Law* (2000); Cahn, supra n. 41, at 229 ("Instead of using a particular family form as the symbol for health, the new morality focuses on nurturing relationships."); Krause, "Family Values," supra n. 39, at 123 ("What is the most intelligent legal response to our looser, freer lifestyles? Whatever else we decide regarding the conduct of consenting adults, we need to be reminded that children are not adults and they are not consenting."); Minow, "All in the Family and in All Families: Membership, Loving and Owing," in Sex, Preference, and Family, supra n.26, at 249, 272 (suggesting that "we shift to the task of articulating more fully parents' *duties* in this context, including duties to attend to the impact of their prerogatives on the child"); Minow, supra n. 28, at 277-83; Murphy, supra n. 41, at 1116; Woodhouse, supra n. 28, at 580-83.

43. 530 U.S. 57 (2000).

44. Indeed, this was the rationale upon which the Washington state supreme court decided the case. See In re Custody of Smith, 969 P.2d 21 (Wash. 1998), aff'd sub nom. Troxel v. Granville, 530 U.S. 57 (2000).

45. Compare Buss, "Adrift in the Middle: Parental Rights After Troxel v. Granville," 2000 *Sup. Ct. Rev.* 279 (criticizing this approach), with Meyer, *"Lochner* Redeemed: Family Privacy After *Troxel* and *Carhart*," 48 *UCLA L. Rev.* 1125 (2001) (lauding this approach).

46. Glendon, supra n. 5, at 3.

the terrorist attacks of September 2001, early evidence suggests a resurging appreciation of the value of family life – of the substance of durable and sometimes selfless human intimacy.[47] Society's task in formulating family law in the years ahead will be to articulate its own family values, not merely to accept those proffered by history or contemporary individual choice. The Family that will emerge – and endure – in the 21st Century will be one defined overwhelmingly not by tradition or transitory choice, but by a consensus, yet to emerge in any detail, over what human intimacy and commitment is truly valuable.

47. Anecdotal evidence suggests that since the September 11, 2001, attacks, there has been a surge in marriage proposals and weddings and a general turn toward family; as one writer put it, "[b]onding with someone is the best – sometimes, the only – defense we have against life's contingencies and randomness." Matthew Klam, "Love in the 21st Century: At a Time When Everything Feels Unmoored, the Desire To Anchor One Life to Another Is Stronger than Ever," *N.Y. Times Mag.*, Oct. 14, 2001, at 71, 74; see also Anne D'Innocenzio, "Couples Are Hurrying To Tie the Knot," *Detroit Free Press*, Nov. 20, 2001, at 4A; Virginia Heffernan, "Getting Serious," *N.Y. Times Mag.*, Oct. 14, 2001, at 30; "Profile: People in the Minneapolis-St. Paul Area and How They Are Coping with the Stress from September 11th," Nat'l Pub. Radio: All Things Considered, Oct. 30, 2001 (transcript of broadcast available at 2001 WL 9437018).