

Images and Illusions of Progressive Change in American Family Law

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Outline of Images and Illusions

- I. Introduction: Theme - The Waning of Family Law and the Revival of Domestic Relations Law*
- II. Marital Families Are “Disintegrating” in the United States in 2015*
- III. The Harmful Impacts of Family Disintegration on Children*
- IV. Conclusion: The World Has Changed and Is Changing, Yet Conjugal Marriage and Marital Families Are Still Very Important for the Welfare of Children, Adults and Society*

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- I. Introduction: The Waning of Family Law and the Revival of Domestic Relations Law*

Recent changes in the definition and structure of relationships recognized legally as family relationships often are portrayed as images of significantly progressive, egalitarian, and beneficial social advances. My paper presents a critical analysis of such interpretations and offer an alternative interpretation of recent developments. I suggest that we are seeing the disintegration of “family law” and the resurgence of “domestic relations law” in the United States. “Domestic relations law” is not a new category or status but has deep historical roots. It is broader and more inclusive than family law but less supportive of marriage and marital families.

The Supreme Court decision in *United States v. Windsor*¹ altered the traditional structural allocation of family-regulating authority as between the states and the federal government. This paper explains how that balance of authority has been changed. It also explains how *Windsor* and the subsequent federal courts that have mandated the legalization of same-sex marriage in the states have altered the basic principle of federal judicial deference to state regulation of family relations. It is clear that those recent judicial rulings significantly changed the meaning of marriage in the United States legally and, to some extent, socially. Such changes often have been justified or supported by claims that they will benefit children raised by parents in such relationships; this paper suggests that there is very thin evidence supportive of that claim, and substantial evidence to the contrary. Finally, this paper provides comparative international perspectives matching and contrasting a comprehensive review of such recent family law developments in the United States with the status and trends in family law in other nations.

The re-emergence of “domestic relations law” is a revival of an earlier time when the law of domestic relations included all relationships deemed relevant to and a part of the household. Throughout most of the legal history of the United States, the area of law which has come to be called “Family Law” was known as the “Law of Domestic Relations.” Thus, master-servant relationships, including the legal relationship between slaves and their masters were included in and regulated under the “law of domestic relations.” For example, four chapters in Book I of WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND dealt with the rights of persons and personal relationships: Chapter XIV. Of Master and Servant, Chapter XV. Of Husband and Wife, Chapter XVI. Of Parent and Child, and Chapter XVII. Of Guardian and Ward.² The first three of these he described as “[t]he three great relations in private life.”³ Blackstone described master-servant relations as being “founded in convenience,” marital relations as being “founded in nature,” and the parent-child relationship to be “consequential to that of marriage.”⁴

¹ 570 U.S. ___, 133 S.Ct. 2675 (2013). In *Windsor* the Supreme Court invalidated Section 3 of the Defense of Marriage Act which provided that for purposes of federal laws, programs and agencies the term “marriage” and cognate and spousal terms referred only to conjugal marriages between a man and a woman.

² WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *422 (1765).

³ *Id.*

⁴ *Id.*

Using Blackstone’s analytical conditions of nature, consequence of nature and convenience to categorize same-sex unions, I suggest that they fall into the category of relations of convenience and, thus, are dissimilar to relations of husband and wife. Thus, conceptually same-sex relationships are more comparable to a “friendship” with some legal commitment, or perhaps like a mutual, reciprocal, and egalitarian master-servant relationship.

Nearly a century after Blackstone’s Commentaries was first published, the first significant American treatise on the legal significance, effects and aspects of marriage appeared. That was JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, first published in 1852.⁵ In Book III, Bishop discusses void and voidable marriages and several impediments to marriage including want of mental capacity or of age, the impediment of slavery, the effects of emancipation, parental consent, and impediments of prior undissolved marriage, post-divorce marriage restrictions, impediments of race and civil condition, consanguinity and affinity, impotence or physical incapacity, and the penal consequences of irregular marriage.⁶ Using Bishop’s chapter headings as categories, same-sex marriage would fit comfortably in the category of void (or, perhaps in some states, voidable) marriages. The legal significance of the impediment to same-sex marriage might be compared to the legal impediments of permanent physical incapacity, or by analogy to permanent want of mental capacity, and to consanguinity.⁷

Thus, the legalization of same-sex marriage conceptually is not a new development, but rather is a revival of the law and legal concepts of an earlier era when many alternative kinds of relationships within a household were deemed part of the law of “domestic relations.”

The substitution of “family law” for “domestic relations law” represented an early progressivist, feminist, and moral movement to channel relationships into those which were most

⁵ Joel Prentiss Bishop, Commentaries on the Law of Marriage and Divorce (1852; 4th ed. 1881). In the Preface to his first edition, Bishop acknowledges three prior books about marriage law that had been published previously in English; two in England and one in the USA.

The first, . . . by Thomas Poynter, a proctor in Doctors’ Commons, and the second and last edition of which was published in 1824. . . . The second . . . by Leonard Shelford, a barrister, and author of several other law compilations; it was published in 1841 The American book is entitled “A View of the Law relating to the Subject of Divorce, in Ohio, Indiana, and Michigan, by Henry Folsom Page;” it was published at Columbus, O., in 1850.

Id.

⁶ *Id.*, Book III, Chs. VI – XXI. *See also id.*, at Table of Contents, xxvi – xxvii.

⁷ The impediment to same-sex marriage also might be compared to slavery, civil condition, and other impediments that are temporary, not permanent.

beneficial and healthy for the parties to the relationships and to their households and to society, and most protective of those who invested the most in nurturing those relationships. The legalization of same-sex marriage and same-sex parent-child relations, in contrast, returns to the historically broader, more inclusive concept of the kinds of relationships given domestic legal status.

This paper will consider the possibilities and implications of these developments. It also will discuss what legal policies might be adopted now that would help future generations of Americans to be prepared to cope with and not be overwhelmed by these coming developments.

A starting point is 2013 the Supreme Court decision in *United States v. Windsor*.⁸ Prior to *Windsor*, for over two centuries, the Court and the federal government recognized the principle of federalism in family law. That is, the national government and its agencies recognized that the regulation of domestic relations was a type of government regulation beyond the jurisdiction of the federal government but was the virtually exclusive province of the state governments to regulate. Out of respect for the principle of federalism, when the federal government used terms denoting family relationships in federal laws and programs, it generally deferred to and incorporated the relevant state definition of such terms and relationships. However, in respect of the separate spheres of federal and state regulation, Congress and the Executive Branch reserved and repeatedly exercised the right to define family relationships for purposes of federal law in order to prevent the subversion of federal laws and policies by the passive incorporation of inconsistent state definitions of family law. In passing the Defense of Marriage Act, Congress expressed concern that some federal courts would force the federal government to recognize same-sex marriage by judicial decree, and also concern that if any single state legalized same-sex marriage, courts would require all other states and the federal government to recognize such marriages. In striking down Section Three of DOMA in *Windsor* the Supreme Court rejected the federalism principle of “separate spheres” and required Congress to passively defer to state definitions of family relations (including same-sex marriages) and to blindly incorporate those state definitions of marriage into all aspects of federal law that use family relations to define

⁸ 570 U.S. ___, 133 S.Ct. 2675 (2013). In *Windsor* the Supreme Court invalidated Section 3 of the Defense of Marriage Act which provided that for purposes of federal laws, programs and agencies the term “marriage” and cognate and spousal terms referred only to conjugal marriages between a man and a woman.

eligibility for benefits, privileges and duties. That decision, of course, destroyed the unity of federal law and promoted the spread of same-sex marriage.

II. Marital Families Are “Disintegrating” in the United States in 2015

We are witnessing the redefinition of marriage and family relationships in many jurisdictions. The legalization of same-sex marriage is the most well-known, but hardly the only significant change in family demographics in industrialized nations. For example, in the USA today nearly one in every two children lives in a single-mother home and nearly half of them live with never-married mothers. Just four decades ago, the number of children being raised by never-married mothers was one in 16, just one-seventh of today’s figure.

The percentage of couples living together without marriage has increased ten-fold, from slightly more than one percent of all couples in 1960 to nearly 12 percent in 2011. The percentage of adults who are married has fallen - from about 70% in 1960 to about 44% in 2010. The percentage of marriage that last 20 years has dropped from 67% to about 56% in just twenty years (through 2005). Marriage is not a priority for either Gen-X-ers or for Millennials. The percentage of children who are born out of wedlock has stabilized at about 40% for all Americans. These indicators suggest that the traditional male-female marital family is in decline in the United States, and other family forms are replacing it. The implications of that family demographic shift for life as we and our children and grandchildren know it and expect it to be, for the economy, for the well-being of future generations has not been considered much by family law scholars.

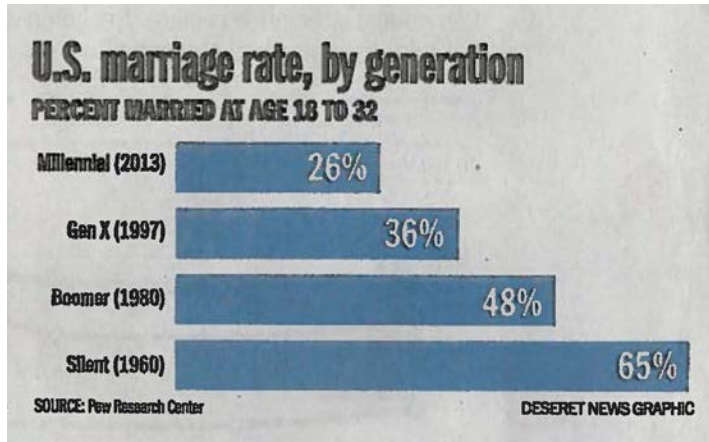
Demographers have been predicting a “demographic winter” is coming in many affluent nations as birth rates have fallen below replacement level (far below in some nations) while the aged are living longer. Additionally, an economic seismic shift may occur when the ratio of workers to non-workers in a given society falls below levels capable of sustaining retirement, pension, social security and welfare programs as they are now operated.

Many other social influences – including immigration, education, employment, generational work-ethic, and religiosity, to name a few – can magnify or minimize the potential detrimental effects of these family demographic factors. Put them all together – and you have the makings of a demographic-socio-economic-political “perfect storm.” If preparations are not

made now to deal with the confluence of such developments, the consequences for the next four generations may be devastating.

One major factor in the disintegration of families in America is the movement of young adults away from marriage. Nonmarital cohabitation and temporary “hooking up” have to some extent displaced marriage in some segments of the young adult population.⁹

IMAGE 2 >



The following graph based on data from the Pew Research Center shows clearly the dramatic drop in marriage among young Americans age 18 to 32 during the current and three preceding generations. Current fewer than half as many (about 40% as many) of young Americans 18-32 have married than young Americans of the same age just three generations earlier (in about 1960).¹⁰

IMAGE 3 >

The marriage rate is “expected to drop even further next year.”¹¹

IMAGE 4 >

Similarly, marriage has become devalued, as you would expect. Fewer than half of Americans surveyed a year ago by Pew Research agreed that society is better off if marriages

⁹ See Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, Pew Research Center, Sept. 24, 2014, at <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/> (seen 2 June 2015).

¹⁰ Lois M. Collins, *U.S. Marriage rate hits new low, may continue to decline*, Deseret News (Utah), May 31, 2015, available at ____, citing Pew Research Center, ____.*

¹¹

and children are given priority, while 50% of those surveyed responded that society is just as well off if people have other priorities.

IMAGE 5 >

The percentage of American men and women ages 25 and older who have never been married has steadily risen from 1970, when it was under 10% for both men and women, to present, when it is 23% of men and 17% of women. The share of never-married has more than doubled in about four decades.

IMAGE 6 >

There are age-generational difference in the disintegration of marriage. Nearly as many (percentage of) couples who are under age 25 are living in unmarried partner households as are married couples.

IMAGE 7 >

The pool of unmarried men age 25-34 who have jobs has fallen steadily from 1960 (139 million) to 2012 (only 91 million). That may impact the number of marriages; women may have fewer responsible men to consider as marriage partners.

IMAGE 8 >

Likewise, the education gap between never-married men and women age 25 and over has widened, again leaving women with fewer responsible men to consider as marriage partners.

<IMAGE 8a>

Most never-married women want a spouse who has a steady job.

IMAGE 9 >

There also is an increasing gap among races regarding the share of never married adults. That foretells the perpetuation of serious problems among racial communities.

IMAGE 10 >

As a result of divorce and the consequences of divorce, the percentage of never-married adults has dramatically increased. One in four young adults Americans today may never marry.

IMAGE__>

The Census Bureau reports that in 2014 there were nearly 74 million minor children; 47.5 million were being raised by their married parents and 3.1 million by their unmarried parents;

914,000 were being raised by their mother only and 175,000 by their father only.¹² IMAGE 12 >
(11 is blank)

IMAGE__>

Nearly half of children being raised by their mother alone (45%) are living in poverty.

S-12 is now S-20

Another evidence of the marriage crisis is the spread in the USA of same-sex marriage.

IMAGE 13 >

Currently only seventeen nations (out of 193 sovereign nations) allow same-sex marriage.

IMAGE 14 >

At least 47 nations (nearly one-quarter of all nations) have adopted constitutional language that appears to bar same-sex marriage. For example:

Article 24, Constitution of Japan: “Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. . . .”

Likewise, Article 110, Constitution of Latvia: “The State shall protect and support marriage—a union between a man and a woman, . . .”

IMAGE 15 >

In the USA, 2/3 of the states (37 states) now permit same-sex marriage but only 1/3 of those states did so through democratic processes like legislation or popular referendum. In 2/3 of the states that allow same-sex marriage, that policy was created and enforced by a judicial decree, not democratic process.

IMAGE 16 >

Same-sex marriages has been prohibited by voter-approved constitutional amendments in 31 US states. The courts have overturned some of those.

IMAGE 17 >

The biggest jump in states with same-sex marriage occurred when the Supreme Court struck down the provision of the Defense of Marriage Act barring recognition of same-sex marriages by the federal government and its agencies and programs.

IMAGE 18 >

¹² Census Bureau,

Here are the 37 states where same-sex marriage is permitted now (and for about the past year).

IMAGE 19 >

Here are the roughly 25 states where same-sex marriage was permitted just a year earlier.

IMAGE 20 >

There are several different types of state marriage amendments barring or authorizing the barring of same-sex marriage.

IMAGE 21 >

As of today, of the 176 nations that do not allow same-sex marriage only one (Israel) will recognize same-sex marriages that are lawfully entered into in another jurisdiction.

The issue of same-sex marriage is still in play and many nations. For example, On April 28, 2015, the Supreme Court of the United States heard oral arguments in four consolidated cases involving challenges to the marriage laws of those states which do not allow same-sex couples to marry. The Court is expected to announce what certainly will be a historic decision on same-sex marriage later this month. Chief Justice John Roberts boiled the argument down to the fundamental issue: “You’re not seeking to join the institution,” he said. “You’re seeking to change what the institution is.”¹³

Law Professor Clare Huntington has called the growth of nonmarital childbearing “the single most important issue facing family law today”¹⁴

According to the recent Brooklyn Declaration:¹⁵

Children in father-absent homes are almost four times more likely to be poor. In 2011, 12 percent of children in married-couple families were living in poverty, compared to 44 percent of children in mother-only families.¹⁶

Children in female headed families with no spouse present had a poverty rate of 47.6 percent, over 4 times the rate in married-couple families.¹⁷

¹³ Margaret Datiles Watts, *Prejudice, Religious Liberty, and Children: Supreme Court Hears Oral Arguments on Same-Sex Marriage*, Culture of Life Foundation, Posted: May 12, 2015.

¹⁴ Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 Stanford L. Rev. 167 (2015).

¹⁵ Brooklyn Declaration, received 21 May 2015, available at * ____.*

¹⁶ *Brooklyn, supra note __ at __*.

The U.S. Department of Health and Human Services states, “Fatherless children are at a dramatically greater risk of drug and alcohol abuse.”¹⁸ There is significantly more drug use among children who do not live with their mother and father.¹⁹

A study of 1,977 children age 3 and older living with a residential father or father figure found that children living with married biological parents had significantly fewer externalizing and internalizing behavioral problems than children living with at least one non-biological parent.²⁰

Children of single-parent homes are more than twice as likely to commit suicide.²¹

Data from three waves of the Fragile Families Study (N=2,111) was used to examine the prevalence and effects of mothers’ relationship changes between birth and age 3 on their children’s well-being. Children born to single mothers show higher levels of aggressive behavior than children born to married mothers. Living in a single-mother household is equivalent to experiencing 5.25 partnership transitions.²²

Children in grades 7-12 who have lived with at least one biological parent, youth that experienced divorce, separation, or nonunion birth reported lower grade point averages than those who have always lived with both biological parents.²³

Children living with their married biological father tested significantly higher level than those living with a non-biological father.²⁴

¹⁷ *Brooklyn, supra note __ at __*.

¹⁸ *Brooklyn, supra note __ at __*.

¹⁹ *Brooklyn, supra note __ at __*.

²⁰ *Brooklyn, supra note __ at __*.

²¹ *Brooklyn, supra note __ at __*.

²² *Brooklyn, supra note __ at __*.

²³ *Brooklyn, supra note __ at __*.

Father involvement in schools is associated with higher likelihood of a student getting mostly A's. This was true for fathers in biological parent families, stepfathers, and for fathers heading single-parent families.²⁵

71% of high school dropouts are fatherless; fatherless children have more trouble academically, scoring poorly on tests of reading, mathematics, and thinking skills; children from father-absent homes are more likely to be truant from school, more likely to be excluded from school, more likely to leave school at age 16, and less likely to attain academic and professional qualifications in adulthood.²⁶

Adolescents living in intact families are less likely to engage in delinquency than their peers living in non-intact families. Compared to peers in intact families, adolescents in single-parent families and stepfamilies were more likely to engage in delinquency. This relationship appeared to be operating through differences in family processes—parental involvement, supervisions, monitoring, and parent-child closeness—between intact and non-intact families.²⁷

A study using data from the National Longitudinal Study of Adolescent Health explored the relationship between family structure and risk of violent acts in neighborhoods. The results revealed that if the number of fathers is low in a neighborhood, then there is an increase in acts of teen violence the statistical data showed that a 1% increase in the proportion of single-parent families in a neighborhood is associated with a 3% increase in an adolescent's level of violence. In other words, adolescents who live in neighborhoods with lower proportions of single-parent families and who report high levels of family integration commit less violence.²⁸

²⁴ *Brooklyn, supra note __ at __*.

²⁵ *Brooklyn, supra note __ at __*.

²⁶ *Brooklyn, supra note __ at __*.

²⁷ *Brooklyn, supra note __ at __*.

²⁸ *Brooklyn, supra note __ at __*.

Children age 10 to 17 living with two biological or adoptive parents were significantly less likely to experience sexual assault, child maltreatment, other types of major violence, and on-victimization type of adversity, and were less likely to witness violence in their families compared to peers living in single-parent families and stepfamilies.²⁹

A study of 109 juvenile offenders indicated that family structure significantly predicts delinquency.³⁰

A study using a sample of 1409 rural southern adolescents (851 females and 558 males) aged 11-18 years, investigated the correlation between father absence and self-reported sexual activity. The results revealed that adolescents in father-absence homes were more likely to report being sexually active compared to adolescents living with their fathers.³¹

Being raised by a single mother raises the risk of teen pregnancy, marrying with less than a high school degree, and forming a marriage where both partners have less than a high school degree.³²

No-fault divorce, effective *de facto* in all states by the end of the 1970s (Divorce is a major ingredient in the disintegration of families in the United States.³³) Forty-three (43) of the fifty (50) states adopted no-fault divorce laws that became effective in or before 1979.³⁴ Forty-eight of the states' no-fault divorce laws (all states except Arkansas and Utah) became effective in or before 1985.³⁵ However, in many states the regime of no-fault divorce began long before the laws formally changed.

²⁹ *Brooklyn, supra note __ at __*.

³⁰ *Brooklyn, supra note __ at __*.

³¹ *Brooklyn, supra note __ at __*.

³² *Brooklyn, supra note __ at __*.

³³ See generally Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51(4) Fam. Rel'ns 317 (Oct., 2002), available at <http://www.jstor.org/stable/3700329> (last seen 19 May 2015) (hereinafter "Vlosky & Monroe").

³⁴ The seven states whose no-fault divorce laws took effect after 1979 are: Arkansas (1991), Utah (1987), South Dakota (1985), Illinois (1984), Maryland (1983), Ohio (1982) and Pennsylvania (1980). Vlosky & Monroe, *supra* note __, at 323, Table 3.

³⁵ *Id.*

There is no “emerging global consensus” for same-sex marriage. In fact, any form of same-sex marriage has only been adopted by 17 of the 193 member states of the United Nations.³⁶ Most of the remaining countries are not the “anti-models” that *Koh amici* suggest, but are constitutional democracies that share our values of individual liberty. In fact, the 12 national and international tribunals in 11 states that have explicitly upheld male-female marriage as consistent with human rights³⁷ include some of the jurisdictions with the earliest and strongest LGBT protections in the world, such as France, Germany, Spain, Finland, the European Court of Human Rights, and the U.N. Human Rights Committee.³⁸

These courts recognize that there are significant moral, religious, and social reasons for opposing same-sex marriage unrelated to impermissible animus. Even the South African Constitutional Court, which is deeply solicitous of minority rights, including the rights of sexual minorities, has stated that “[i]t would be wrong and unhelpful to dismiss opposition to homosexuality on religious grounds as simply an expression of bigotry to be equated with racism.”³⁹

III. The Harmful Impacts of Family Disintegration on Children

Divorce always is traumatic but sometimes necessary. The effects of divorce upon children are generally traumatic and negative and very troubling. However, the effects of divorce upon children and adults vary depending upon the pre-divorce quality of family life. Professor Solangel Maldonado has written:

Scholars have found that the long-term effects of divorce on children’s well-being depend on the level of parental discord before the divorce. In cases where the level of parental discord was high, children’s well-being improved after the divorce. In contrast, where the level of parent discord before the divorce or separation was low, children’s well-being deteriorated after the divorce and these negative effects often lasted in adulthood. Studies have also found that marital

³⁶ See *infra* note 14. *Koh amici* count 20, but only by including England, Scotland, and Wales separately, which have limited sovereignty and are not U.N. member states, and Finland, which has legislation that has not passed its second reading and would not take effect until 2017. We include the UK as a nation with same-sex marriage, since the majority of its jurisdictions have adopted same-sex marriage.

³⁷ See *infra* Section I.B.

³⁸ See *infra* Section I.B.

³⁹ *Fourie*, ¶91.

enrichment programs with a forgiveness component can help couples experiencing marital dissatisfaction.⁴⁰

There is no doubt that conflict between spouses is a cause of distress for children, whether the parents are married or not.⁴¹ Thus, the good news is that the problem can be identified and corrected; parties can learn to disagree without violence, hostility and anger. The bad news is that such skills do not seem to be considered important enough for states to promote and teach.

This concern for the varied and deeply felt societal views on same-sex marriage has led virtually all foreign jurisdictions to defer to legislatures on this issue. None of these courts have sought to have the final word on same-sex unions, instead expressly inviting and approving legislative responsibility for crafting marriage laws. Legislatures play an important role in this sensitive area, because of both the need for democratic legitimacy and the important moral and social views that are raised. The European Court of Human Rights, for instance, observed that

marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of the national authorities, who are best placed to assess and respond to the needs of society.⁴²

Courts have recognized the importance of not freezing the social discussion on same-sex marriage and have noted that same-sex couples themselves will benefit from legislative resolution of these issues because of the compromise and resulting stability that the democratic process entails. The South African Constitutional Court, for example, reasoned that “[g]iven the great public significance of the matter, the deep sensitivities involved and the importance of establishing a firmly-anchored foundation for the achievement of equality in this area, it is

⁴⁰ Solangel Maldonado, *Facilitating Forgiveness and Reconciliation in “Good Enough” Marriages*, 13 Pepperdine Dispute Resolution J. No. 105 (2013), available at (Family & Children’s Law e-journal, 5 June 2015).

⁴¹ Janet A. Flaccus, *Post Divorce Fighting-Can It Be Predicted? Divorce and Children at Risk*, 2008 Ark. L. Notes 17, 17 (2008). . “Boys between the ages of six to twelve often seem to be the most affected. Girls in this age group seem to get back to normal more quickly. While going through this process, children can be inattentive and disruptive at school, filled with angry outbursts, sleepless, complaining, and antisocial. The younger children often have tantrums. The older children are more likely to have angry outbursts.” *Id.* at 17-18.

⁴² *Schalk and Kopf v. Austria*, No. 30141/04 (ECtHR, 24 June 2010), ¶62.

appropriate that the legislature be given an opportunity to map out what it considered to be the best way forward.”⁴³ That court rejected even a temporary judicially-crafted remedy, which “would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action [T]he greater the degree of public acceptance for same-sex unions, the more will the achievement of equality be promoted.”⁴⁴ A judicial rush to judgment seems particularly inopportune in a country in which general social attitudes appear to be shifting anyway.⁴⁵

A recent (the largest study yet addressing same-sex households and childrens emotional outcomes) study published in February 2015 in the British journal of Education, Society, and Behavioral Science reveals that on eight out of twelve psychometric measures, the risk of clinical emotionsl problems, developmental problem, or use of mental health treatment services is nearly double among those with same-sex parents when contrasted with children of opposite-sex parents.”⁴⁶

Easy and frequent divorce changes a culture in ways that hurt children and mothers, especially. Sol R. Rappaport has reported:

approximately one fifth (21.5%) of custodial mothers who divorced in the prior twelve months live in poverty-and living with them are children of all ages, not just children under the age of six, as compared to 10.4% of married women. This is almost twice as high as the overall poverty rate. “Separating or divorcing mothers are 2.83 times more likely to be below the poverty line than those that remain married.”⁴⁷

Another team of researchers seventeen years ago reported that the empirical evidence addressing the relationship between divorce, family composition, and children's well-being

⁴³ *Fourie*, ¶147.

⁴⁴ *Id.* ¶¶136, 139.

⁴⁵ See Robyn Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. L. REV. 1161 (2014); cf. Cass Sunstein, *Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991) (“*Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out longlasting solutions based upon broad public consensus.”).

⁴⁶ Mark Regnerus, *New Research on Same-Sex Households Reveals Kids Do Best With Mom and Dad*, The Public Discourse, Feb. 10, 2015, available at ____* (cite bottom on paper).

⁴⁷ Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children* _____. [binks]

showed that children's emotional adjustment, gender-role orientation, and antisocial behavior are affected by family structure, whereas other dimensions of well-being are unaffected.⁴⁸

A Pew Research Report four years ago,⁴⁹ reported that:

Children whose parents have divorced are increasingly the victims of abuse. They exhibit more health, behavioral, and emotional problems, are involved more frequently in crime and drug abuse, and have higher rates of suicide.

Children of divorced parents perform more poorly in reading, spelling, and math. Are also more likely to repeat a grade and have higher drop-out rates and lower rates of college graduation.

Almost 50 percent of the parents with children going through a divorce move into poverty after the divorce.

The Heritage Foundation had earlier reported that:

Children whose parents have divorced are increasingly the victims of abuse and neglect. They exhibit more health problems, as well as behavioral and emotional problems, are involved more frequently in crime and drug abuse, and have higher rates of suicide.

Children of divorced parents are more frequently demonstrate a diminished learning capacity, performing more poorly than their peers from intact two-parent families in reading, spelling, and math. They also are more likely to repeat a criminal offense.

Children of Divorced parents are up to six times more likely to be delinquent than children from intact families⁵⁰

Two Indiana University Professors (of law and of economics) have noted that: “The fewer rights that obtain upon marriage, the less interest the state has in overseeing it.

⁴⁸ David H. Demo, Alan C. Acock, *The Impact of Divorce on Children*, 50(3) *Journal of Marriage and Family*, at 619 (Aug 1988).

⁴⁹ Richard Fry, D’Vera Cohn, “Living Together: The Economics of Cohabitation,” Pew Research Center, *Social and Demographic Trends*, (June 2011).

⁵⁰ Patrick F. Fagan, Robert Rector , “*The Effects of Divorce on America*,” The Heritage Foundation, *Backgrounder*, #1373, (June 2000).

Interestingly enough, the Court also found a ‘right to divorce’ of sorts, holding that the state cannot require indigents to pay court fees in order to obtain a divorce.”⁵¹

Professor Elizabeth Scott has written about how no-fault divorce laws have dumbed-down public and social attitudes about marriage. “Modern divorce law reinforces a pessimistic account of contemporary marriage as a relationship involving minimum commitment and maximum self-gratification.”⁵² She notes that “the discredited fault-based divorce law, despite other inadequacies, may have served a beneficial function by imposing costs on divorce.”⁵³ She recommends economic sanctions for getting a divorce, requirement of mutual agreement for no-fault divorce, and significant waiting periods to “make people think more carefully and weigh their options before getting a divorce.”⁵⁴ The challenge is how to craft laws that give persons who are in painful, unhappy marriages a way out that is not unduly distressing, while at the same time preserving in law the principle of the importance of marriage for individuals and for society.

⁵¹ Eric Rasmusen & Jeffrey Evans Stake, Lifting the Veil of Ignorance: Personalizing the Marriage Contract, 73 Ind. L.J. 453 (1998), or available at http://www.rasmusen.org/published/Rasmusen_98.ILJ.marriage.pdf (seen 4 June 2015)..

⁵² Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 10, 22 (1990).

⁵³ *Id.* at 13.

⁵⁴ *Id.* at 73.

Divorce and the changes associated with it are stressful to parents and children. (after the initial shock of divorce, children in divorced families typically do better than children in high-conflict non-divorced families.) [D]ivorce can create lingering feelings of sadness, longing, worry, and regret that coexist with competent psychological and social functioning."⁵⁵

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Professor Maldonado recommends that “lawmakers should educate parents seeking to divorce about the effects of divorce on children’s well-being and offer free marital enrichment programs with a forgiveness component to parents who wish to attempt to "save" their marriages.”⁵⁶

IV. Conclusion: The World Has Changed and Is Changing, Yet Conjugal Marriage and Marital Families Are Still Very Important for the Welfare of Children, Adults and Society

Because men and women differ in significant ways relevant to the social purposes of marriage,⁵⁷ the integration of their complementary differences in marriage creates a unique relationship of unique value to society. Sexually complementary marriage furthers social functions that are essential to the welfare of the family, the state, and its citizens, especially children.⁵⁸ Three of the important public purposes of marriage—to protect and promote the social

⁵⁵ Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children* ___* [Binks]

⁵⁶ Maldonado, *supra* note __.

⁵⁷ George W. Dent, Jr., *Straight Is Better: Why Law and Society May Legitimately Prefer Heterosexuality*, 15 TEX. REV. L. & POLITICS 359 (2010) (discussing gender differences).

⁵⁸ A. Dean Byrd, *Conjugal Marriage Fosters Healthy Human and Societal Development*, in WHAT’S THE HARM? 3, 5-9 (Lynn D. Wardle ed. 2008) (research shows that mothers and fathers have different, complementary parenting skills, each contributing in different ways to healthy child development). See Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, “Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do About It?” 6

interests in safe sex, responsible procreation, and optimal child rearing —are closely linked in our laws and social policies, just as they are closely linked by human nature—“the ties of nature” as Blackstone put it.⁵⁹ Human nature, however, is imperfect, which is why society attempts to reinforce them through marriage law.

The Supreme Court and clearly links marriage with gender-integration, and especially to society’s interest in the institution that fosters responsible sexuality, procreation, and child rearing. Marriage provides the optimal environment for sexual relations, procreation, childbirth and child-rearing. Indeed, in all of the Supreme Court decisions about constitutional marriage, “the right to marry is directly linked with responsible procreation and child rearing.”⁶⁰ See *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, concurring) (“The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.”); *Loving*, 388 U.S. at 12 (“Marriage is . . . fundamental to our very existence and survival.”); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (“As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society.”); *id.* at 389-90 (Black, J., dissenting) (“The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children. . . .”); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (the constitutional right of privacy “has some extension to activities relating to marriage . . . [i.e.,]

Child Trends Research Brief (June, 2002) (“the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage”).

⁵⁹ I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *458. See also *In re G Children* (FC) [2006] UKHL 43 at ¶¶ 33-35 (discussing benefits of genetic and gestational parenthood).

⁶⁰ Lynn D. Wardle, *Loving v. Virginia and The Constitutional Right to Marry, 1790-1990*, 41 How. L. J. 289, 338 (1998).

procreation, . . . contraception, child rearing”); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the “liberty” protected by the Fourteenth Amendment includes “the right of the individual . . . to marry, establish a home and bring up children” (emphasis added)); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race”); *Maynard v. Hill*, 125 U.S. 190, 205. 209-210 (1880) (“Marriage, as creating *the most important relation in life, as having more to do with the morals and civilization of a people than any other institution*” and “*it is the foundation of the family and of society, without which there would be neither civilization nor progress.*”).

The social impact of legalizing same-sex marriage upon the well-being of children is controversial. Accordingly, that issue, especially, should be discussed by all and decided by the representatives of the people, not dictated by the courts.

Conferring the status of marriage on same-sex couples will send a clear social and legal message further disconnecting marriage from procreation and child-rearing. Gender-integrating marriage promotes childbirth and thus the perpetuation of the species. This is a matter of special concern at present, since few developed nations in the world today have replacement birthrates. In Europe, a “demographic winter” is looming, which British historian Niall Ferguson calls “the

greatest sustained reduction in European population since the Black Death of the 14th Century.”⁶¹ Preventing that disaster from occurring here is a compelling concern of State lawmakers.

Marriage between mother and father strengthens the bond of parents to their offspring. “Same-sex marriage puts in jeopardy the rights of children to know and experience their genetic heritage in their lives and withdraws society’s recognition of its importance to them, their wider family, and society itself.”⁶² Gender-integrating marriage enhances the “belonging” in marriage which benefits not only the married couple but their children.⁶³ “As the family goes, so goes the nation, and so goes the world in which we live.”, Pope John Paul II quoted in My Catholic Family at <http://www.my-catholic-family.com/280/pope-john-paul-ii-as-the-family-goes-so-goes-the-nation/> (seen 10 February 2014).

As the Supreme Court prepares to decide pending cases involving whether states may decline to allow same-sex marriage, The Pew Research Center reports that public support for allowing gays and lesbians to marry legally continues to rise.⁶⁴ As recently as five years ago,

⁶¹ Niall Ferguson, “Eurabia?”, N.Y. Times Magazine, April 4, 2004, available at <http://www.nytimes.com/2004/04/04/magazine/04WWLN.html> (seen February 10, 2014); *see also* EUROPEAN BIRTH RATES REACH HISTORIC LOW IN PART BECAUSE OF RECENT FALL IN EASTERN EUROPE, Sept. 8, 2006, ¶1, available at <http://www.medicalnewstoday.com/releases/51329.php> (seen 7 February 2014).

⁶² Dent, *supra* at p. 11 (quoting Professor Margaret Somerville).

⁶³ Lynn D. Wardle, *The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 B.Y.U. J. Pub. L. 287, 289-90 (2011).

⁶⁴ Pew Research, *Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed*, available at [http://www.people-press.org/2015/06/08/support-for-same-sex-marriage-at-record-high-but-key-segments-remain-](http://www.people-press.org/2015/06/08/support-for-same-sex-marriage-at-record-high-but-key-segments-remain-opposed/)

more Americans opposed (48%) same-sex marriage than supported it (42%). Today, 57% majority of Americans now favor allowing same-sex marriage and 39% oppose. <*S- > So there has been a dramatic shift in public opinion in favor of allowing same-sex marriage – an increase in support of between about 15-20% in the past six years. Today, nearly three-fourths of Millennials now support same-sex marriage, while more Boomers oppose than support same-gender marriage, and most Silent, Black, White Evangelicals population cohorts solidly oppose same-sex marriage. <*S- > While both Liberals and Conservatives have increased their support for same-sex marriage by about 12% in the past decade, support has increased by about 20% among Independents and Moderates (both Democrats and Republications). <*S- >

Yet there is strong opposition to same-sex marriage in significant population sub-groups, including the Silent generation, the Black community and White Evangelical Protestants. Pew Research reports: “One of the strongest factors underlying views of same-sex marriage is religion, and the sense that homosexuality is in conflict with one’s religious beliefs.” Fewer than one-third of Black Protestants and White Evangelicals support same-sex marriage <*S- > Likewise, religiosity (attendance at church) correlates with lack of support for same-sex marriage. Likewise, there are differences by race, with Whites showing strong support for same-sex marriage (59%) and Blacks showing much less support (41%). <*S- > Indeed, in 2008 when Californians voted on Proposition 8 to amend the state constitution to ban same-sex marriage, the Black vote for Prop 8 was significantly higher than the White vote; Black votes carried Prop 8 to passage.⁶⁵ However, Pew also reports that three-fourths of Americans believe that legalization of same-sex marriage is eventually “inevitable.” <*S_ >

The potential for conflict between same-sex marriage and religious liberty of both individuals, churches, and other organizations is profound. Indeed, the *Hobby Lobby* decision illustrates the grave potential for government efforts to cram down programs and policies that

[opposed/?utm_source=Pew+Research+Center&utm_campaign=1de6a181d2-](#)

[Religion Weekly June 11 2015&utm_medium=email&utm_term=0_3e953b9b70-1de6a181d2-399963333](#) (seen 150612).

⁶⁵ * _____

reflect the ideology of the prevailing administration over the strong objections and deeply-held beliefs of individuals and their businesses and other associations.⁶⁶

Professor Patrick Parkinson from the University of Sydney has noted that:

The model on which divorce reform was predicated in the late 1960s and early 1970s was built upon a consensus that dead marriages should be given a decent burial and that it should be possible for the parties to get on with their lives and start afresh once decisions had been made about financial matters and custody. In the divorce law at that time, issues about property and custody were dealt with by a once-for-all process of allocation. . . . The aim in some jurisdictions was to achieve a clean break The court also allocated the children. Typically, the courts would award “custody” to one parent, usually the mother, and grant “access” or “visitation” to the other. . . . “Custody” included virtually all the rights and powers that an adult needed to bring up a child, including the right to make decisions about a child’s education and religion. . . . Since maternal custody was the predominant pattern, fathers were frequently relegated to a peripheral role in their children’s lives.

Custody law was thus binary in character. The assumption that was universally held at that time was that custody decisions involved a definitive choice between one home and another. . . .

The consequence of this view of custody decision-making was that divorce involved a clean break in terms of parental responsibility once the issue of custody allocation was decided. . . . Only one of the two parents could continue in that [parental] role after the divorce⁶⁷

. . . [I]n 1986, Irène Théry, the French sociologist, characterized the original divorce reform model as the substitution model of post-divorce parenting. Under the substitute family model, the parents’ legal divorce necessarily required a divorce between them not only as partners but also as parents. Only one of the

⁶⁶ *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S.Ct. 2751 (2014).

⁶⁷ Patrick Parkinson, *When is parenthood dissoluble*,

two parents could continue in that role after the divorce, and the other's role would be no more than a visiting one in most cases.⁶⁸

We live in an imperfect world filled with imperfect human beings. At various times, all of us make mistakes, struggle and stumble. When disappointments, discord, and struggles occur in marriages those troubles can make even the most measured and prudent adults lose perspective in ways that harm not only them (the unhappy spouses) but that also harm those they love and care about the most. Thus, tragically, children most frequently are the most innocent and most helpless victims of divorce in most cases of divorce. Recognizing this undisputed fact, it should be the policy of all states and nations to assist spouses in troubled marriages to try to find solutions to their problems that will help to correct the problems, will strengthen the parties individually and strengthen their relationship, and that will put the needs and interests of the children at the forefront of their concerns, their lives, their marriages, and of society.

There is great need for improvement in the families laws in the United States to strength, support, and encourage the culture of marriage. That is essential to the well-being of children. States need to do more to educate parents seeking to divorce about the effects of divorce on children's well-being. States should provide couples in struggling marriages with access to marital skill development and enrichment programs that teach, *inter alia*, the skills of forgiveness and reconciliation.

I agree with Professor Huntington that "it is essential for family law to address the needs of both marital and nonmarital families" and that this requires "a new theory of state regulation as well as new doctrines, institutions, and norms in practice."⁶⁹ But the key is to revive a marriage culture in our society. That will require moral as well as political courage of all.

The contemporary American culture embraces and promotes images of progress in family law, but most of those images are only illusions without substance. The celebrated developments including especially increased rates of nonmarital cohabitation, child-bearing and child-rearing out of wedlock, and same-sex marriage are disintegrative social changes. Those alternative relationships (or non-relationships) weaken and eschew the core and basic unit of society. Society can accommodate some marginal relationships like these, but when those alternations relationships reach a critical mass, they significantly influence the traditional social relationships

⁶⁸ *Id.* citing Irène Théry, 'The Interest of the Child' and the Regulation of the Post-Divorce Family, 14 INT'L. J. SOC. L. 341 (1986).

⁶⁹Huntington, *supra* note 5, at 167.

of marriage and marital families. They exert a gravitational pull that alters the shape and substance and social understanding of marriages and families. They modify the expectations and diminish the value and importance of traditional marriages and families. As such nonmarital cohabitation, child-bearing and child-rearing out of wedlock, and same-sex marriage are transforming our society generally and they transmute the core social institutions of marriage and families. The long-term effects of this metamorphosis of the core institutions of society upon individuals, upon children and dependents, upon relationships generally and upon the social order remain to be seen.
