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FAMILIES IN THE 21ST CENTURY: CHANGING DYNAMICS, INSTITUTIONS, AND POLICIES

INTRODUCTION: THE PAST AS PROLOGUE¹

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Welcome to “Families in the 21st Century: Changing Dynamics, Institution, and Policies.” Asking speakers to speculate about developments in the next one hundred years is a mighty order, fraught with the unexpected twists and turns of any future. Before we hear these speakers’ prognostications, I thought it might be interesting, maybe enlightening—at least fun—to look back a century. The past is prologue. How well did visionaries at the turn of the twentieth century do in identifying family law issues that would command resolution in their foreseeable future?

My librarian produced two lists: an index to periodicals for the period 1898–1907 and for 1908–1922. Scholars back then were clearly less verbose: One *Yale Law Journal* article lacked a single footnote and ran four pages in

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¹ “[W]hat’s past is prologue.” WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

length.² The writers during that early period produced many fascinating works, reflecting the concerns of the time. One article asks whether divorce is a sign of progress or degeneracy.³ Another article explores spousal abuse and the amazing common law “rule of thumb” doctrine which authorized a husband to chastize his wife, provided his chosen weapon did not exceed the diameter of his thumb.⁴ Yet the most provocative titles concerned the emergence of women’s equality claims. Two memorable articles that sound like anthropological studies are the incredulous, *Are Women People?*⁵ and the slightly more lofty, *Legal Evolution of Married Women*.⁶ But as strange as those titles are to modern ears, recall that at the time these articles about the status of women were written, women, whether single or married, were not even political beings; that would not come until 1920, when the Nineteenth Amendment extended the vote to women.⁷ Thus, the articles identified the changing status of married women as an issue for reform. In 1900, one author noted that “there has been a steady and growing tendency to recognize the married woman as an individual person, rather than a mere appendage to the man who is her husband.”⁸ In turn, the recognition of a married woman’s right to hold and manage property led to an increased recognition of marriage as an economic partnership, with equal equitable claims owing to both husband and wife.⁹ Another scholar noted the connection between recognition of the wife’s autonomy and her ability to make use of an antenuptial agreement that might

² See Talcott H. Russell, *The Recent Conference on Divorce*, 15 YALE L.J. 401 (1906). Recently, the *Harvard Law Review* notified would-be contributors that it would no longer publish articles in excess of seventy-five pages and would give preference to manuscripts of fewer than fifty pages. Harvard Law Review, *Joint Statement Regarding Articles Length*, http://www.harvardlawreview.org/PDF/articles_length_policy.pdf (last visited Sept. 25, 2005).

³ William N. Gemmill, *Divorce as a Sign of Degeneracy or of Progress*, 9 ILL. L. REV. 32 (1914).

⁴ Beirne Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. N.S. 241 (1917).

⁵ Vere Goldthwaite, *Are Women People?*, 37 CHIC. LEG. N. 39, 46 (1904).

⁶ Hon. Stanley Woodward, *Legal Evolution of Married Woman: Address before the Law School of the Young Men’s Institute, Wilkesbarre, Pa.*, 61 ALB. L.J. 213 (1900).

⁷ U.S. Const. amend. XIX.

⁸ Woodward, *supra* note 6, at 216.

⁹ The common law doctrine of coverture subsumed the wife’s legal identity into her husband’s; as a result, her property and earning power became his. The first reform wave of the married women’s property acts began around 1848. The conferred rights, previously withheld by English law, allowed a married woman to contract, manage, and control her own property. But that revolution was not completed until after the Second World War when Alabama, the holdout jurisdiction, finally capitulated. HOMER H. CLARK, JR. & ANN LAQUER ESTIN, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 643 (6th ed. 2000). The Uniform Marital Property Act calls for recognition of a marital partnership and the principle of a deferred community upon dissolution of the marriage. UNIF. MARITAL PROP. ACT, 9A U.L.A. 106–108 (1998). Although only Wisconsin has enacted the Uniform Act, most states now equitably distribute marital property upon dissolution, and the typical allocation is 50–50. CLARK, JR. & ESTIN, *supra*, at 643.

seek to vary her rights from those authorized by the general law. That notion anticipates one of the grand movements in twentieth century family law, from regarding marriage as a status with frozen rights imposed by law, to marriage as an agreement privately ordered by the spouses.¹⁰ On a more theoretical plane, Roscoe Pound envisioned the disentanglement of individual interests from group interests in the family as a social institution, positing that legal doctrine was in the fourth stage of development, with increased recognition of the moral and social independence and individualistic interests of each spouse.¹¹ In sum, exemplifying the notion that some social visionaries got it right are these early writers who foresaw the reform of the marriage relationship from one of conjugal subjugation and submersion of legal identity to a partnership with equitable rights in each partner to marital property and where the power of each person shaped the contours of their association.¹²

At the opposite margin, there was no clairvoyant scholar in 1900 who foresaw the revolution in the parent-child relationship that has occurred in this century. Several articles spoke of the plight of the illegitimate child, but reforms were then quite modestly aimed at easing the process of legitimating the bastard.¹³ No one was so bold as to suggest that all children should be equally entitled to support or equal inheritance rights¹⁴ or that punishing the child for the parents' nonmarital status was wrongheaded. One exception to

¹⁰ See generally Hubert R. Southall, *Antenuptial Conveyances in Fraud of Marital Rights*, 7 VA. L. REG. 822 (1902) (discussing how common law conveyances of real or personal property by a woman who was engaged to marry were void as a fraud on the marital rights of the husband, unless he consented to the conveyance). For more discussion on the historical use of such contracts to regulate postmarital rights, see Oscar C. Ronken, *Ante-Nuptial Contracts: Their Origin and Nature*, 24 YALE L.J. 65 (1914). After a slow start in the first half of this century, antenuptial contracts are now quite common and command their own Uniform Act, which has been adopted by twenty-five states and the District of Columbia. UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (2001); see also Howard O. Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Space*, 64 VA. L. REV. 1039 (1978) (discussing the interrelation between legal status and the freedom to contract).

¹¹ Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 180 (1916).

¹² Of course, the civil law always recognized marriage as an economic partnership of acquets and gains.

¹³ See, e.g., E.H. Randolph, *Should the Rights of Illegitimate Children, as They Now Exist under the Laws of Louisiana, Be Enlarged or Diminished?*, in REPORT OF THE LOUISIANA BAR ASSOCIATION (1909).

¹⁴ One article makes some suggestion of the equality of treatment thesis. In *Parent and Child: Legitimation Through Acts: Definition of "Family,"* 2 CAL. L. REV. 46, 78 (1913-14), O.K.M., the author, notes:

In 1793, Cambaceres, the founder of the modern civil law of France, secured the adoption of a law by the National Assembly placing illegitimate children upon the same basis as legitimate children with reference to succession to the property of their parents. This law was doubtless too radical, and did not, therefore, long endure; but it served as a basis of a new policy towards such children [permitting formal as well as informal legitimation under the French Civil Code.]

the scholarly silence about children was Judge Julian Mack's famous, folksy *Harvard Law Review* article spreading the news of the new paradigm of the juvenile court, first established in Chicago in 1898.¹⁵ Judge Mack proposed individualized treatment instead of punishment for delinquent children, what "had best be done in [the child's] interest and in the interest of the state to save him from a downward career."¹⁶ How many times thereafter during the twentieth century did someone write or talk about the child's "best interests"? Millions? Billions? And not just the best interests of juveniles accused of crimes, but children in custody disputes, children surrendered for adoption, and abused and neglected children.

Indeed, the "Century of the Child," as the twentieth century has been called,¹⁷ was not discerned by anyone writing at its beginning, though Roscoe Pound came close. He discerned the modern growth of "social interests" in the family: a social interest "in the maintenance of the family as a social institution and on the other hand a social interest in the protection of dependent persons, in securing to all individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future."¹⁸ That conceptualization is recognizable as the *parens patriae* doctrine, which in 1900 was just beginning to be resurrected for new uses.¹⁹ The *parens patriae* doctrine expanded dramatically as the twentieth century unfolded. The Social Security Act brought about the federalization of child welfare initiatives that not only provided protection to abused and neglected children but enforced the payment of child support by parents who financially abandoned their children.²⁰ Until then, there was scant attention paid to the collection of child

¹⁵ Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

¹⁶ *Id.* at 119–20. Judge Mack and juvenile court reformers helped to popularize but did not coin the phrase "best interests." Lord Mansfield holds that honor. See *Blissetts Case*, 98 Eng. Rep. 899 (1831).

¹⁷ Professor Katz notes that instead of "Century of the Child" or "Century of the Woman," the last century should be known as the "Century of the Person," an observation that echoes Pound's earlier insight. Sanford N. Katz, *Prologue*, 33 FAM. L.Q. 435, 445 (1999).

¹⁸ Pound, *supra* note 11, at 182.

¹⁹ The right of the state to intervene to protect a child from his parent or guardian was not labeled the *parens patriae* doctrine by the courts until 1696, when Lord Chancellor Somers laid claim to it in Chancery proceedings by observing (as if it were established beyond dispute), "[i]n this court there were several things that belonged to the King as *Pater patriae*, and fell under the care and direction of this court as charities, infants, ideots, lunatics . . ." *Falkland v. Bertie*, 23 Eng. Rep. 814, 818 (1696); see Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209 (1978).

²⁰ Although adoption was known by statute at the beginning of the twentieth century, it was then a very limited right. Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 24–32 (1999). No scholar argued for the revision or expansion of this new structure in early twentieth century publications. One article retrospectively traced adoption through

support from separated or divorced parents or the development of custody doctrine, no doubt due in large part to the recent recognition of divorce, even though the popularity of divorce was already then apparent. By 1920, there were 1.5 divorces for every thousand persons, dazzlingly numerous by nineteenth century mores, yet pale compared to current data of 4.0 per thousand.²¹

Indeed, the prime topic of family law interest at the turn of the century was divorce, especially the problem of migratory or “carpetbag” divorce and the larger issues of personal jurisdiction in a federal system in which states claimed subject matter jurisdiction over family matters. During its 1900–1901 Term alone, the U.S. Supreme Court handed down four decisions involving interstate jurisdictional disputes in divorce actions.²² As one contemporary scholar described the standoff: “There has been an unfortunate tendency of the various states towards a sort of legislative war. Certain states have practically invited citizens of other states to come to them for relief from the matrimonial restrictions which prevail in their own jurisdictions.”²³ The disruption of national harmony was so acute that at the second annual meeting of the American Bar Association in 1879,²⁴ a committee was directed to report back with recommendations for how the varying state laws governing jurisdiction and other divorce issues might be made more uniform.²⁵ Although some modest progress was made,²⁶ the Committee on Uniform State Laws ultimately

ancient custom rather than offered suggestions for its reform. See P.J. Hamilton-Grierson, *An Example of Legal Make-Believe*, 20 JURID. REV. 32 (1908).

²¹ Harbour Fraser Hodder, *The Future of Marriage*, HARV. MAG., Nov.–Dec. 2004, at 38, 42 (noting 4.0 divorces per 1000 Americans in 2002 and discussing provisional data that places the 2004 number at 3.7).

²² *Atherton v. Atherton*, 181 U.S. 155, 172–73 (1901) (finding constructive notice for a nonresident defendant of the pendency of a divorce action is sufficient when reasonable precautions for actual notice are taken); *Bell v. Bell*, 181 U.S. 175, 178 (1901) (holding that a court in a state in which neither party is domiciled lacks jurisdiction to enter a divorce judgment); *Streitwolf v. Streitwolf*, 181 U.S. 179, 183 (1901) (holding the lack of a bona fide in-state domicile invalidates a state’s jurisdiction over a divorce proceeding); *Lynde v. Lynde*, 181 U.S. 183, 186 (1901) (noting that a defendant who appears and was heard on the merits of alimony has waived objection to that court’s jurisdiction).

²³ Russell, *supra* note 2, at 404.

²⁴ Amasa M. Eaton, *Proposed Reforms in Marriage and Divorce Laws*, 4 COLUM. L. REV. 243, 243 (1904). Eaton reports that the American Bar Association was formally established in 1878 and that one of its objects was “to promote the administration of justice and uniformity of legislation throughout the Union.” *Id.* at 243. At the annual meeting in 1889, primary responsibility for that function was shifted to the newly appointed Committee (on Uniform State Laws), now the National Commission on Uniform State Laws. *Id.* at 247. The 1889 Committee ultimately decided that uniformity of laws among the states could best be achieved by proposing the identical reform statute for adoption in the legislatures of all the states, rather than by congressional or other federal initiative. *Id.* at 248.

²⁵ *Id.* at 243.

²⁶ The Committee recommended in its proposed statute that the domicile of at least one party, rather than

reported that achieving uniformity on divorce process would be more intractable than contractual and commercial matters,²⁷ and it moved on to those easier reforms. Certainly that prediction was accurate. Although the Uniform Commercial Code was universally enacted in only ten years during the 1960s, *even now* only eight states²⁸ have enacted the Uniform Marriage and Divorce Act.²⁹

Professor Goodrich, writing in 1921, identified a related and equally thorny conflicts issue: continuing jurisdiction of a former domicile over child custody disputes.³⁰ Uniformity in this area was not achieved for another half century with the universal enactment of the Uniform Child Custody Jurisdiction Act.³¹ The frustrations and social costs of interstate desertion and family nonsupport were already evident a century ago, but the reform proposals centered around the criminal process: a National Desertion Bureau, extradition, and effective probation.³² The use of civil process and administrative remedies of the Uniform Interstate Family Support Act appears to have been an unforeseen approach to “deadbeat” obligors who attempt to find asylum in another state.

mere residence, ought to be required by a state court before it accepted jurisdiction of the cause of action. *Id.* at 244. This notion was ultimately embraced by the Supreme Court in two separate cases involving the same parties, *Williams v. North Carolina*, 317 U.S. 287 (1942) and *Williams v. North Carolina*, 325 U.S. 226 (1945).

²⁷ Eaton, *supra* note 24, at 248–49. As of 1902, not a single state had adopted the Committee’s proposed statutes on divorce procedure or divorce grounds. *Id.* at 260. At least one other attempt was made within the first few years of this century to find agreement. A national conference was called at the invitation of the Governor of Pennsylvania concerning the grounds for divorce. Russell, *supra* note 2, at 402–03. The hope was that this convocation could produce an acceptable draft of a Uniform Divorce Code that would produce “legislative comity” between the states. *Id.* at 404. Instead, it produced only resolutions. Although states are still badly divided on the use and impact of marital fault upon support and property division, all do now recognize a “no fault” ground for divorce. CLARK, JR. & ESTIN, *supra* note 9, at 674–75. I should also credit Graham Wood, *Sane Solution to Divorce Problem*, 69 ALB. L.J. 191, 191 (1907), with suggesting the modern notion of a “trial divorce,” a concept very similar to a cooling-off period for reflection (and, as was true with some 1960s statutes, for mandatory counseling and attempts at reconciliation).

²⁸ Katz, *supra* note 17, at 438.

²⁹ UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. (Part II) 1 (1998). However, the Uniform Act had an impact by introducing the concept of irretrievable breakdown marriages as a ground for divorce and embracing the equitable division of marital property. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 411 (2d ed. 1988).

³⁰ Herbert F. Goodrich, *Custody of Children in Divorce Suits: The Conflict of Laws Problem*, 7 CORNELL L.Q. 1, 1 (1921).

³¹ UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. (Part IA) 261 (1999). That Act, created in 1968, was supplanted in 1997 by the vastly improved Uniform Child Custody Jurisdiction and Enforcement Act. 9 U.L.A. (Part IA) 649 (1999).

³² See William H. Baldwin, *The Most Effective Methods of Dealing with Cases of Desertion and Non-Support*, 8 J. AM. INST. CRIM. L. & CRIMINOLOGY 564 (1918).

Early twentieth century writers foresaw the need to find solutions to the enforceability of family judgments in a federal system and anticipated the decline in a state's monopolistic claims on marriage and divorce. What was entirely missed, however, was the growth of competing "shadow institutions," other intimate associations such as nonmarital cohabitation.³³ At the same time, they completely failed to comprehend the swelling tsunami of the state's interest in the parent-child relationship, which would carry the penultimate power to terminate that relationship for the sake of the child.

Can I explain why some doctrinal movements were perceived and others were not? Or why some scholars were more prescient than others about the future course of the law's regard of family matters? A simple explanation is that there was no academy of legal scholars one hundred years ago. Legal education was then still dominated by members of the practicing bar who taught part-time or provided instruction to those who studied in their chambers. The exception among the writers I surveyed is Roscoe Pound, a professor of biology who famously went on to become the Dean of Harvard Law School. Certainly, he was the single most successful forecaster, in large measure because he concentrated on highly theoretical conceptualizations of the family as a social institution that shaped, and in turn was shaped by, its legal regulation.³⁴ Otherwise, even this small sample of scholarly literature suggests that when a social or cultural shift was already evident, writers were quite good at spinning out the probable consequences for laws and legal institutions. The shift in the role of married women—married women's property acts, women's entry into the labor market, equal claims to the custody of children of the marriage—was already manifest in 1900. Where instead, the shift in knowledge occurred in other disciplines, legal scholars were less alert to the

³³ None of the literature surveyed reveals any discussion of marriage-like rights for heterosexual cohabitants or domestic partners, a serious absence given the increasing protections ultimately available throughout the United States. Cf. AM. BAR ASS'N., A WHITE PAPER: AN ANALYSIS OF THE LAW REGARDING SAME-SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS (2004), available at <http://www.abanet.org/family/whitepaper>. So too, the criminalization of homosexuality was examined in one piece, but no scholar predicted any change except the repeal of criminal laws prohibiting private consensual sexual activity between "congenital" homosexuals. Alfred W. Herzog, *Homosexuality and the Law*, 34 MED. LEG. J. 1 (1917). Ultimately repeal of such laws was achieved through a finding of unconstitutionality. *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁴ The presence of Pound in the scholarly pool is reminiscent of President Kennedy's comments at a White House dinner honoring the Nobel Prize winners of the Western Hemisphere: "I think this is the most extraordinary collection of talent, of human knowledge, that has ever been gathered together at the White House, with the possible exception of when Thomas Jefferson dined alone." President John F. Kennedy, Address to the Nobel Prize Winners (Apr. 29, 1962), available at <http://www.jfklibrary.org/jfkquote.htm>.

advance and its ramifications for law.³⁵ The rise of the *parens patrie* doctrine arose out of public concern for abused and neglected children which in turn arose out of the new science of child development or developmental psychology which began in the 1890s.³⁶

As Herbert Goodrich said, “[t]he role of the prophet is always, and deservedly, an extra-hazardous one.”³⁷ One hundred years ago, the average age of marriage was twenty-six for men and around twenty-two for women.³⁸ The average life expectancy in the United States was forty-seven years, more than ninety-five percent of all births took place at home, only six percent of all Americans had graduated high school, and only fourteen percent of all homes had a bathtub.³⁹ The twentieth century brought enormous economic prosperity following the Great Depression, the Social Security Act, three wars, two police actions, the Civil Rights Movement, reproductive freedom with the dissemination of “the pill,” the Feminist Movement, the rise of Christian fundamentalism, and more recently, a retrenchment to “family values,” compassionate conservatism, and a tightened embrace of the culture of ownership. Who could have foreseen those externalities and events and their impact on the lives of families in the United States? Who could have foretold that the decisive issue in the presidential election of 2004 was whether persons of the same gender might marry?⁴⁰

³⁵ In my sample of early writing, there is no evidence of interdisciplinary work or a consideration of scientific developments and their impacts upon law reform. Perhaps this is explained by the possibility that law was struggling for recognition as an independent scholarly discipline at the turn of the century. Dean Langdell had just introduced the use of judicial decisions in inaugurating the case method at Harvard Law School in 1890. See Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography*, 22 LAW & HIST. REV. 277, 277 (2004).

³⁶ Until scientists proved that what happened in childhood mattered, legal intervention to shield children was largely absent. Professor G. Stanley Hall is considered the father of child psychology. His seminal book, *ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION* was published in 1904. See DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 115–16 (2004).

³⁷ Goodrich, *supra* note 30, at 10.

³⁸ Hodder, *supra* note 21, at 42.

³⁹ Univ. of Chi. Sch. of Law, *1902 Statistics*, <http://www.law.uchicago.edu/centennial/history/funfacts/1902.html> (a version of these statistics exists on many websites).

⁴⁰ No mention was made by Herzog, *supra* note 33, or any of his contemporaries of a claim by same gender partners to marriage or other legally sanctioned relational status giving rise to enforceable obligations. The rulings from Massachusetts, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), and Vermont, *Baker v. State*, 744 A.2d 864 (Vt. 1999), that statutes limiting marriage to heterosexual couples constituted a denial of equal protection to same gender couples would have been as shocking to early twentieth century citizens as they were to some today.

If the most illuminating scholarship for the future provides either highly theoretical conceptualizations of the family or social institutions or speculation about the impact of important cultural shifts, then we have gained much from the analyses of those whose essays appear in this volume. There are examples of both types of approach in their presentations.

Professor Marmor dissects the Bush administration's proposals for the reform of the Medicare and Social Security programs in the context of the "ownership society."⁴¹ This movement, if it develops momentum, would seek to lessen governmental regulation and to increase family autonomy for health care decisionmaking. The fundamental societal question, Marmor says, is whether Americans will continue embracing the moral imperative of collective responsibility or will shift as much responsibility as possible to the family, or beyond that to individual members of a family unit.⁴² The choice is between the Poor Law notion of collective obligation, which has dominated Anglo-American welfare law for four hundred years,⁴³ and a return to enforceable private obligations for support of both antecedents and decedents. Parent and grandparent support orders might become as common as child support orders, even if society does not entirely return to the Roman law notion of the patrimony.⁴⁴

In a similar vein, Professor Roberts perceives a new transition from the welfare state mode of the twentieth century to the privatization of reproduction and asks troubling questions about "reprogenetics" and its impact on women.⁴⁵ She also points out the class and race biases in reproductive policy, forming in her words, "a reproductive caste system."⁴⁶ But paradoxically, both "crack babies" and "designer babies" share the same beginnings, with a lack of

⁴¹ Theodore Marmor, *The Presidential Election of 2004, the Politics of American Social Policy, and What Readers Interested in Family Policy Might Make of the Idea of New Social Risks*, 54 EMORY L.J. 1335 (2005).

⁴² *Id.* at 1340–42.

⁴³ For a discussion of the Elizabethan Poor Law, 43 Eliz. 1, c. 2, § 1 (1601), see Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 258–265 (1964). One section of the Poor Law also imposed liability for dependents upon members of his or her extended family. 43 Eliz. 1, c. 2, § 7 (1601) (granting authority to a justice of the peace to fix the support obligation for a disabled person and impose liability upon a father, grandfather, mother, grandmother, and children).

⁴⁴ See the discussion of family and succession in J.A. CROOK, *LAW AND LIFE OF ROME 90 B.C.–A.D. 212*, at 98 (reprint 1984).

⁴⁵ Dorothy Roberts, *Privatization and Punishment in the New Age of Reprogenetics*, 54 EMORY L.J. 1343 (2005).

⁴⁶ *Id.* at 1352.

governmental concern and with considerable social costs for all of society. The identification of the human genome and swiftly moving technological capabilities clearly will impact reproduction and the formation of families in the next century, bringing the two-faced coin of enhanced private control and the possible resurgence of eugenics. This all sounds chillingly close to *The Handmaid's Tale*,⁴⁷ as genetic counseling can beget an obligation to avoid a known genetic defect.

In contrast, Dean Alexander examines how housing regulations have shaped social policy and fundamental assumptions about the meaning of “family,” which is ultimately limited quite narrowly to those who are related by biology, marriage, or adoption.⁴⁸ Conventional views of normalcy are thus formed by laws justified as public health and safety measures. Having exposed the silent pressure for social conformity imbedded in housing laws, Dean Alexander calls for a reconsideration of those health and safety constraints that are the legitimate focus of zoning and other forms of housing regulation.⁴⁹

Professor Spindelman speaks about the goal of achieving “first class constitutional rights” for gays and lesbians.⁵⁰ The *Goodrich v. Department of Public Health*⁵¹ decision seeks not to redefine marriage, but to rediscover its essential structure as a private relationship of reciprocal care and support recognized by public celebration. However, Spindelman expresses concern about the impact of the normalization of gay marriage upon sexual violence. Taking sexual abuse seriously, he believes, may threaten the moral heuristic of marriage upon which *Goodrich* is posited.⁵²

Professor Dowd reflects the interdisciplinary work of the late twentieth century and presents a compelling case for the constitutional protection of a nurturing parent-child relationship between father and child.⁵³ Certainly the explosion of social science research today, for example, the meta-analysis of Michael Lamb and his colleagues,⁵⁴ confirms the early work of Freud,

⁴⁷ MARGARET ATWOOD, *THE HANDMAID'S TALE* (1986).

⁴⁸ Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231 (2005).

⁴⁹ *Id.* at 1233.

⁵⁰ Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361 (2005).

⁵¹ 798 N.E.2d 941 (Mass. 2003).

⁵² Spindelman, *supra* note 50, at 1405.

⁵³ Nancy Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271 (2005).

⁵⁴ See generally Michael Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393 (1997).

Goldstein, and Solnit.⁵⁵ From a child's perspective, the critical parenting relationship is the care-giving one: Water can be thicker than blood. Protection of rights should flow from actions rather than status. Dowd acknowledges the difficulties of assigning financial obligations vis-à-vis caretaking rights, if genetic or marital definitions of fatherhood are to be abandoned, but urges that "[g]enes . . . should not define fatherhood."⁵⁶ If nurturing were used as the measuring relationship deserving of constitutional protection, the Supreme Court's family law parental rights cases might become coherent.

The past is prologue, and the future already lies in the present. An easy forecast is that the now knowable realm of family law will be buffeted by cataclysmic social, cultural, and scientific changes here and in the ever-shrinking world we occupy. Prophesying is hazardous indeed, but we should not forget that it is a form of imagination, a critical human power that enables us to plan, to avoid at least the knowable hazards, and thus to survive. Prophesying can be also an exhilarating mental journey, as these essays attest.

⁵⁵ JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) (stability and continuity of care are more important to ensuring children's well-being than genetic connection between the child and caretaker).

⁵⁶ Dowd, *supra* note 53, at 1330.

