

**AFTERWORD**  
**EXPLORING THE FRONTIERS OF LAW, RELIGION, AND  
FAMILY LIFE**

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Over the past seven years, the Center for the Study of Law and Religion at Emory University has had the privilege of leading two major research projects on sex, marriage, family, and children.<sup>1</sup> Our first major project, on “Sex, Marriage, and Family and the Religions of the Book” (2001–2006), involved eighteen Emory Senior Fellows under the principal direction of Visiting Woodruff Professor Don S. Browning. The project was designed to take stock of the dramatic transformation of marriage and family life in the modern world and to craft enduring solutions to the many new problems that this transformation has occasioned. The project was interdisciplinary in methodology. It sought to bring the enduring wisdom of religious traditions into greater conversation with the modern disciplines of law, health, public policy, social science, and the humanities. The project was interreligious in inspiration. It sought to understand the lore, law, and life of marriage and family within Judaism, Christianity, and Islam both in their genesis and in their exodus, in their origins and in their diasporas. And the project was international in orientation. It sought to place current American debates over sex, marriage, and family within an emerging global conversation.

This first major project yielded a semester-long faculty seminar, two faculty retreats, ten new cross-listed courses, eighteen public forums, eleven collaborative side projects, and a major international conference featuring eighty speakers and seven hundred fifty registrants. More than two dozen new volumes<sup>2</sup> have come from this project to date, with a dozen more volumes in final production.

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<sup>1</sup> See details of the Center’s work on our website: <http://www.law.emory.edu/csrlr>.

<sup>2</sup> AMERICAN RELIGIONS AND THE FAMILY: HOW FAITH TRADITIONS COPE WITH MODERNIZATION AND DEMOCRACY (Don S. Browning & David A. Clairmont eds., 2006); AUTHORIZING MARRIAGE? CANON, TRADITION, AND CRITIQUE IN THE BLESSING OF SAME-SEX UNIONS (Mark D. Jordan with Meghan T. Sweeney & David M. Mellott eds., 2006); DON S. BROWNING, CHRISTIAN ETHICS AND THE MORAL PSYCHOLOGIES

Our second major project, on “The Child in Law, Religion, and Society” (2003–2007), involved twenty-one Emory Senior Fellows, under the principal direction of Visiting Woodruff Professor Martin E. Marty. The project was focused on children *qua* children—in their being and becoming, in their birth and growth. We analyzed the complex rites and rights attached to birthing and naming, baptism and circumcision, education and discipline. We examined the steps and stages in a child’s physical, emotional, sexual, moral, and spiritual formation, as well as the rituals and ordeals, and the rights and responsibilities attached to each. We recounted the pathos of child abuse and rape, child poverty and homelessness, juvenile delinquency and violence, and illegitimacy and infanticide. And, we probed the mystery of the child—the combination of innocence and imagination, acuity and candor, empathy and healing, and sharing and caring that uniquely become a child.

This second project yielded a semester-long faculty seminar, two faculty retreats, eleven collaborative side projects, thirteen public forums, and four

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(2006); DON S. BROWNING, MARRIAGE AND MODERNIZATION: HOW GLOBALIZATION THREATENS THE MODERN FAMILY AND WHAT TO DO ABOUT IT (2003); MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA (2001); COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE (John Witte Jr. & Eliza Ellison eds., 2005); THE EQUAL-REGARD FAMILY AND ITS FRIENDLY CRITICS: DON BROWNING AND THE PRACTICAL THEOLOGICAL ETHICS OF THE FAMILY (John Witte Jr., M. Christian Green & Amy Wheeler eds., 2007); FAMILY IN AFRICA AND THE AFRICAN DIASPORA: A MULTIDISCIPLINARY APPROACH (Olga Barrios & Frances Smith Foster eds., 2004); FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE (Steven M. Tipton & John Witte Jr. eds., 2005); ROBERT M. FRANKLIN, CRISIS IN THE VILLAGE: RESTORING HOPE IN AFRICAN AMERICAN COMMUNITIES (2007); INTER-RELIGIOUS MARRIAGES AMONG MUSLIMS: NEGOTIATING RELIGIOUS AND SOCIAL IDENTITY IN FAMILY AND COMMUNITY (Abdullahi A. An-Na’im ed., 2005); ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK (Abdullahi A. An-Na’im ed., 2002); TIMOTHY P. JACKSON, THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE (2003); MARK D. JORDAN, BLESSING SAME-SEX UNIONS: THE PERILS OF QUEER ROMANCE AND THE CONFUSIONS OF CHRISTIAN MARRIAGE (2005); MARK D. JORDAN, THE ETHICS OF SEX (2002); MARK D. JORDAN, TELLING TRUTHS IN CHURCH: SCANDAL, FLESH, AND CHRISTIAN SPEECH (2003); LATINO IMMIGRATION AND THE TRANSFORMATION OF THE U.S. SOUTH (Mary E. Odem & Elaine Lacy eds., forthcoming 2009); LOVE AND MARRIAGE IN EARLY AFRICAN AMERICA (Frances Smith Foster ed., 2007); MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2006); MARRIAGE, SEX, AND FAMILY IN JUDAISM (Michael J. Broyde & Michael Ausubel eds., 2005); CHARLES J. REID JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW (2004); SEX, MARRIAGE, AND FAMILY IN THE WORLD RELIGIONS (Don S. Browning, M. Christian Green & John Witte Jr. eds., 2006); TO HAVE AND TO HOLD: MARRYING AND ITS DOCUMENTATION IN WESTERN CHRISTENDOM, 400–1600 (Philip L. Reynolds & John Witte, Jr. eds., 2007); JOHN WITTE JR., GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION (2006); JOHN WITTE, JR., LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION (2002); JOHN WITTE, JR., & ROBERT M. KINGDON, SEX, MARRIAGE, AND FAMILY IN JOHN CALVIN’S GENEVA I: COURTSHIP, ENGAGEMENT, AND MARRIAGE (2005); Cynthia B. Patterson, *Antigone’s Answer: Essays on Death and Burial, Family and State in Classical Athens*, 33 HELIOS (SPECIAL ISSUE) 1 (2006).

conferences, including a major international conference on children's rights with twenty speakers and five hundred registrants. More than a dozen new volumes have emerged from this project to date,<sup>3</sup> with a dozen more in production.

Given our Center's emphasis on issues of sex, marriage, family, and children, it was only natural that we would devote a portion of our Center's silver anniversary conference in October 2007 to these issues. The main aim of the conference was to try to map some of the frontiers of scholarship on law and religion in many fields, including domestic relations. We asked our twenty-five speakers to try to anticipate and articulate some of the hardest questions of law and religion that will face us over the next twenty-five years, and to formulate and illustrate how these questions might be best approached and answered.

The six speakers featured in the foregoing pages ultimately focused on three main questions on the frontiers of sex, marriage, and family life. The first main question, posed especially by Enola Aird, Don Browning, Stephen Carter, and Leah Ward Sears is this: Why has the family, especially the African-American family, suffered such a breakdown in the past four decades, and what remedies and reforms are needed to ameliorate that breakdown? Among the most important causes of family breakdown noted in these pages: the deprecation of marriage, the rise of nonmarital cohabitation and transient troth, the privatization of intimacy, the destigmatization of nonmarital sex, the glorification of the sexual body, the therapeutization of the private self, the rise of cultural individualism, and the erosion of the public school. Enola Aird further emphasizes the "lie of black inferiority" that has shattered the African-

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<sup>3</sup> DON S. BROWNING, *EQUALITY AND THE FAMILY: A FUNDAMENTAL PRACTICAL THEOLOGY OF CHILDREN, MOTHERS, AND FATHERS IN MODERN SOCIETIES* (2007); *THE CHILD IN AMERICAN RELIGIONS* (Don S. Browning & Bonnie Miller-McClemore eds., forthcoming 2009); *THE CHILD IN WORLD RELIGIONS* (Don S. Browning & Marcia Bunge eds., forthcoming 2008); *GEORGIA'S RESPONSIBILITIES TOWARD CHILDREN IN FOSTER CARE: A REFERENCE MANUAL* (Karen Worthington ed., 2004), available at <http://childwelfare.net/resources/FCResponsibility/GAFCResponsibilityManual20050216.pdf>; E. BROOKS HOLIFIELD, *GOD'S AMBASSADORS: A HISTORY OF THE CLERGY IN AMERICA* (2007); MARK D. JORDAN, *QUEER ADOLESCENCE IN CHRISTIAN AMERICA* (forthcoming 2009); MARTIN E. MARTY, *THE MYSTERY OF THE CHILD* (2007); MARY ELIZABETH MOORE, *CHILDREN, YOUTH, AND SPIRITUALITY IN A TROUBLING WORLD* (forthcoming 2009); *THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES* (Timothy P. Jackson ed., 2005); *THE VOCATION OF THE CHILD* (Patrick M. Brennan ed., forthcoming 2008); *WHAT IS RIGHT FOR CHILDREN? THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS* (Martha A. Fineman & Karen Worthington eds., forthcoming 2009); JOHN WITTE, JR., *THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED* (forthcoming 2009); Karen L. Worthington, *The Convergence of Child Development, Child Welfare Laws and Juvenile Court Practice* (Childwelfare.net 2005); Symposium, *What's Wrong with Rights for Children?*, 20 EMORY INT'L L. REV. 1 (2006).

American family.<sup>4</sup> Don Browning also notes the dangers born of the “increased separation of love from sexual exchange, sexual intercourse from marriage, marriage from conception, marriage from childbirth, childbirth from parenthood, sexual intercourse from parenthood, child-rearing from marriage, child-rearing from biological parenthood, and the economic viability of individuals from the economic dependencies of marriage.”<sup>5</sup> What can be done? Among other things, strong new civic and governmental community-building projects; much better sex and morals education; much stronger emphasis on preserving biological family ties; much better role-modeling and big-brother or big-sister guardianship programs for children; greatly enhanced child-care and adoption programs; better social welfare signaling and incentive systems; and, above all, the eradication of the lie of black inferiority so that all Americans, equally, can get their houses in order.

The second main question, posed especially by Margaret Brinig,<sup>6</sup> Don Browning, and Stephen Carter<sup>7</sup>: what role can and should religious ideas and institutions play in the reformation of American marriage and family life, particularly given our cultural appetite, if not constitutional mandate, for separation of church and state? Among their most important findings: Religious ideas and experiences are indispensable to the healthy formation of the child, and they deserve far more nuanced attention in primary education and child custody battles than is currently fashionable. Moreover, religious institutions and practices are critical to the reform of sexual morality, marital fidelity, and family stability, particularly in African-American communities today (just as they were critical to the emergence of the civil rights movement in the 1950s and 1960s). And religious understandings of sex, marriage, and family life deserve equal time in our public debates about sex, marriage and family, and are no more value-laden than the purportedly neutral modern tropes of sexual liberty, privacy, and equality. The basic constitutional separation of church and state is indispensable to the freedom of all. But this First Amendment mandate has never meant that our public services, policies, and debates must be hermetically or hermeneutically sealed from any religious influence, Don Browning and Stephen Carter make clear. Religion has

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<sup>4</sup> Enola G. Aird, *Toward a Renaissance for the African-American Family: Confronting the Lie of Black Inferiority*, 58 EMORY L.J. 7 (2008).

<sup>5</sup> Don S. Browning, *Modern Law and Christian Jurisprudence on Marriage and Family*, 58 EMORY L.J. 31, 34 (2008).

<sup>6</sup> Margaret F. Brinig, *Children's Beliefs and Family Law*, 58 EMORY L.J. 55 (2008).

<sup>7</sup> Stephen L. Carter, *Religion, Education, and the Primacy of the Family*, 58 EMORY L.J. 23 (2008).

immense resources that need to be better tapped by citizens and channeled by government to improve our domestic lives and family policies.

The third main question, addressed especially in the contribution by Jean Bethke Elshtain,<sup>8</sup> is this: what roles can and should law play in the governance of our domestic and private lives? Part of this is the perennial issue of jurisdiction in America, noted by several of the essays. Family law has long been principally the domain of state not federal law, and of legislative not judicial lawmaking. The question of which law governs what and when will be a major frontier in the family law battles of the next decades. But a bigger question, posed by Elshtain, concerns where the writs of law should stop and the mandates and methods of prudence, custom, and civil society take over. To leave domestic questions entirely to private ordering is an invitation to abuse and abandonment, especially of children, by the stronger and more calculating. To turn to government alone to resolve all such questions is to court the grave risks of tyranny and oppression which remain all too memorable from the socialist and communist experiments of the last century. Somewhere between these two extremes our communities must find a balance, and Elshtain gives a number of pointed examples of legal overreach and underreach in domestic life to drive home her point.

The five essays herein, together with Chief Justice Leah Ward Sears's fine foreword, provide illustrations of a few of the hard questions on the frontier of law, religion, and family life. There are and will be many more such questions that could be addressed: three other issues came to dominate the headlines in the months after our conference, and I reflect on them briefly in the next three Parts.

#### RELIGION AND THE GLOBAL FRONTIERS OF MARITAL PLURALISM<sup>9</sup>

On February 7, 2008, Anglican Archbishop Rowan Williams set off an international firestorm by suggesting that some accommodation of Muslim family law was "unavoidable" in England. His suggestion, though tentative, prompted numerous articles in the world press, the vast majority denouncing the proposal. England will be beset by "licensed polygamy," "barbaric procedures," and "brutal violence" against women and children, his critics

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<sup>8</sup> Jean Bethke Elshtain, "*There Oughta Be a Law*"—*Not Necessarily*, 58 EMORY L.J. 71 (2008).

<sup>9</sup> This section is reprinted from my editorial opinion, John Witte Jr., *The Future of Marriage*, ATLANTA J.-CONST., Feb. 24, 2008, at B1.

argued, all administered by “legally ghettoized” Muslim courts immune from civil appeal or constitutional challenge. Consider Nigeria, Pakistan, and other former English colonies that have sought to balance Muslim Shari’a with the common law, other critics added. The horrific excesses of their religious courts—even calling the faithful to stone innocent rape victims for dishonoring their families—prove that religious laws and state laws on the family simply cannot coexist. Case closed.

This case won’t stay closed for long, however. The archbishop was not calling for the establishment of independent Muslim courts in England, let alone the enforcement of Shari’a law by state courts. Instead, he wanted his nation to have a full and frank debate about what it means to be married in a growing multicultural society. What forms of marriage should citizens be able to choose, and what forms of religious marriage law should government be required to respect? These are “unavoidable” questions for any modern society dedicated to protecting both the civil and religious liberties of all its citizens.

These are quickly becoming “unavoidable” questions for America, too. We already have a lot more marital pluralism than a generation ago—with a number of legal options now available. Massachusetts, California, and Connecticut offer traditional marriage and same-sex marriage to their citizens. Several more states will likely follow suit. Vermont leads four states in offering straight couples marriage and gay couples civil union, with comparable rules governing each form. A dozen more states are considering this two-tiered system. Six states offer domestic partner registration status, providing straight and gay couples with some of the same benefits and protections of marriage. Louisiana, Arkansas, and Arizona offer couples either a simple contract marriage or a covenant marriage with more traditional and rigorous rules of entrance and exit.

While these marital options remain firmly under state law, other options now draw in religious law, too, implicitly or explicitly. Utah and surrounding states, for example, house some 30,000 polygamous families. These families and the fundamentalist Mormon churches that govern them are openly breaking state criminal laws against bigamy, but the states will not prosecute unless minors are forced into marriage. In New York, Orthodox Jewish couples cannot get a state divorce without first obtaining a rabbinic divorce. This privileges Jewish family law over all other religious laws, and it forces some New York citizens to discharge a religious duty to gain a civil right to divorce. In more than twenty states, marriages arranged by Hindu, Muslim,

and Unification Church officials have been upheld, with divorce the only option left for parties who claim coercion or surprise. A number of religious couples now choose to arbitrate their marital and family disputes before religious courts and tribunals rather than litigate them in state courts. Courts generally uphold the judgments of Jewish and Christian tribunals in these cases. Muslims, Hindus, and other religious minorities are now pressing for equal treatment for their systems of religious arbitration of marriage and family disputes.

Granting Muslims and others equal treatment in these cases does seem “unavoidable” if the parties have freely consented to this method of dispute resolution. To deny Muslims divorce arbitration while granting it to Jews and Christians is patently discriminatory. But the bigger question is whether state recognition of any religious tribunals and religious marriage laws puts us on a slippery slope that ends with parallel state and religious legal systems of marriage, and no control over the latter if they become abusive. What if religious parties want freedom to “covenant” out of the state’s marriage laws and into the marriage laws maintained by their own voluntary religious communities? Which religious laws deserve deference from the state: just those governing husband and wife, or those on parent and child, property and inheritance, education and maintenance as well? Which religious communities have religious laws that deserve state deference—Christians? Jews? Muslims? Mormons? Hindus? What about the 1,200 other religions now in place in America, a few with very different marriage and family norms? May a state recognize only some religious laws but not others, consistent with the nondiscrimination rules of the First Amendment Free Exercise Clause? May a state cede any of its authority over marriage consistent with the nondelegation rules of the First Amendment Establishment Clause? These are the frontier questions of religion and marriage that will soon face American courts and legislatures. We do not have much constitutional guidance yet.

It is unlikely that courts will invoke the principle of separation of church and state, return all marriage and family questions to the state, and roll back the concessions already made to religious laws and tribunals. Not only is separation of church and state increasingly a constitutional dead letter today, but this solution would have enormous implications for the complex laws of labor, charity, and education where religions and states cooperate closely.

We have better guidance in the law of religion and education. A century ago, several states wanted a monopoly on education in public schools.

Churches and parents claimed a right to educate their children in religious schools. In the landmark case of *Pierce v. Society of Sisters*,<sup>10</sup> the Supreme Court held for the churches and ordered states to maintain parallel public and private education options for their citizens. But later courts also made clear that states could set basic educational requirements for all schools—mandatory courses, texts, and tests; minimal standards for teachers, students, and facilities; common requirements for laboratories, libraries, gymnasias, and the like.<sup>11</sup> Religious schools could add to the state's minimum requirements, but they could not subtract from them. Religious schools that sought exemptions from these requirements found little sympathy from the courts, which instructed the schools either to meet the standards or lose their licenses to teach.

This compromise on religion and education, forged painfully over a half century of wrangling, has some bearing on questions of religion and marriage. Marriage, like education, is not a state monopoly. Religious parties have always had the right to marry in a religious sanctuary or before a state official. Religious officials have long had the right to participate in the weddings, annulments, divorces, and custody battles of their voluntary members. But state legislatures have also long set the threshold requirements of what marriage is and who may participate—with religious communities free to participate actively in the legislative process along with everyone else. But once legislation is passed setting these threshold marriage requirements, religious officials must obey these laws just like everyone else. Religious officials may add to these state law requirements but not subtract from them. A minister may insist on premarital counseling before a wedding, even if the state will marry a couple without it. But if a minister bullies a minor to marry out of religious duty, the state could throw him in jail. A rabbi may encourage a bickering couple to repent and reconcile, but she cannot prevent them from filing for divorce. An imam may preach of the beauties of polygamy, but if he knowingly presides over a polygamous union, he is an accessory to crime.

If religious tribunals get more involved in marriage and family law, states will need to build on these precedents and set threshold requirements in the form of a license. Among the most important license rules to consider: no polygamy, child marriages, or other forms of marital union not recognized by

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<sup>10</sup> 268 U.S. 510 (1925).

<sup>11</sup> See JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 208–20 (2d ed. 2005).

the state; no compelled marriages or coerced conversions before weddings that violate elementary freedoms of contract and conscience; no threats or violations of life and limb, or provocations of the same; no blatant discrimination against women or children; no violation of basic rules of procedural fairness, and more. Religious tribunals may add to these requirements but not subtract from them. Those who fail to conform will lose their licenses and find little sympathy when they raise religious liberty objections.

This type of arrangement worked well to resolve some of the nation's hardest questions of religion and education. And it led many religious schools to transform themselves from sectarian isolationists into cultural leaders. Such an arrangement holds comparable promise for questions of religion and marriage. It not only prevents the descent to "licensed polygamy," "barbaric procedures," and "brutal violence" that the archbishop's critics feared. It also encourages today's religious tribunals to reform themselves and the marital laws that they offer.

#### THE LEGAL CHALLENGES OF RELIGIOUS POLYGAMY<sup>12</sup>

A century and a half ago, Mormons made national headlines by claiming a First Amendment right to practice polygamy, despite criminal laws against it. In four cases from 1879 to 1890, the United States Supreme Court firmly rejected their claims, and threatened to dissolve the Mormon Church if they persisted. Part of the Court's argument in these cases was historical: The common law has always defined marriage as monogamous, and to change those rules would be a "return to barbarism."<sup>13</sup> Part of the argument was prudential: Religious liberty can never become a license to violate general criminal laws, lest chaos ensue.<sup>14</sup> And part of the argument was sociological: Monogamous marriage is "the sure foundation of all that is stable and noble in our civilization," and it cannot be moved without upending our whole

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<sup>12</sup> This section is reprinted from my article, John Witte Jr., *Can America Still Bar Polygamy?*, CHRISTIANITY TODAY, May 2008, <http://www.christianitytoday.com/ct/2008/mayweb-only/121-52.0.html>.

<sup>13</sup> Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).

<sup>14</sup> See *id.*; Reynolds v. United States, 98 U.S. 145, 167 (1878) ("To permit [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

culture.<sup>15</sup> These old cases are still the law of the land, and most Mormons renounced polygamy after 1890.<sup>16</sup>

This past spring, the question of religious polygamy was back in the headlines—this time involving a fundamentalist Mormon group on a Texas ranch, which has retained the church’s traditional polygamist practices. Many of the legal questions raised since this group was raided are easy. Under-aged and coerced marriages, statutory rape, and child abuse are all serious crimes. If any of those adults on the ranch committed these crimes, or intentionally aided and abetted them, they are going to be charged and tried; nine persons are now under indictment.<sup>17</sup> If duly convicted, they will have no claim of religious freedom that will excuse them, and no claim of privacy that will protect them. Dealing with the children, ensuring proper procedures, sorting out the evidence, and the like are all practically messy and emotionally trying questions, but not legally hard. The recent decision by the Court of Appeals of Texas,<sup>18</sup> ordering the return of the 450-plus children who had been seized from their homes during the raid, underscores a further elementary legal principle—that decisions about child custody and about criminal liability must be done on an individual basis as much as possible.

The harder legal question is whether criminalizing polygamy is still constitutional. Texas and all other states still have criminal laws against polygamy on their books. Can these criminal laws withstand a challenge that they violate an individual’s constitutional rights to private liberty, equal protection, and religious liberty? In the nineteenth century, none of these rights claims was available. Now they are, and they protect every adult’s rights to consensual sex, marriage, procreation, contraception, cohabitation, sodomy, and more. May a state prohibit polygamists from these same rights, particularly if they are inspired by authentic religious convictions? What rationales for criminalizing polygamy are so compelling that they can overcome these strong constitutional objections?

Theologians often cite the Bible, which says that two—not three or four—parties must join in “one flesh” to form a marriage.<sup>19</sup> Others remind us that

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<sup>15</sup> *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885); see also *Davis v. Beason*, 133 U.S. 333, 343–45 (1890).

<sup>16</sup> For a similar result, see *Cleveland v. United States*, 329 U.S. 14, 20 (1946) (“[I]t has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy.”).

<sup>17</sup> See Emily Ramshaw, *More Sect Members Indicted in Underage-Marriage Case*, DALLAS MORNING NEWS, Sept. 24, 2008, at 4A.

<sup>18</sup> *In re Steed*, 2008 WL 2132014 (Tex. App. May 22, 2008).

<sup>19</sup> *Genesis* 2:24; *Matthew* 19:5; 1 *Corinthians* 6:16; *Ephesians* 5:31.

early biblical polygamists did not fare well. Think of the problems confronted by Abraham with Sarah and Hagar, or by Jacob with Rachel and Leah. Or think of King Solomon with his thousand wives; their children ended up killing each other. This may be a strong foundation for a church or synagogue to prohibit polygamy among its voluntary members, but can arguments straight from the Bible prevail in a pluralistic nation that prohibits the establishment of religion?

Feminists pose equal protection arguments: Why should the state permit one man to have several wives, but not one woman to have several husbands? After getting past the jokes about which husband would control the television remote or which woman would be so crazy, does this equal protection argument sound any stronger than that of polygamists who just want the same right of private association as everyone else?

Public health experts raise concerns about communicable diseases among children within the extended household, and transmittable sexual diseases within the rotating marital bed. But what about all those other group gatherings that children occupy—schools, churches, and dorms—must they be closed, too, for fear of contagion? And isn't self-contained polygamous sex much safer than casual sex with multiple partners, which is constitutionally protected?

Political scientists raise worries about administrative inefficiency. After all, so much of our law presupposes a single definition of marriage and family life. What would we do if the man dies, or one of the wives files for divorce? There are no guidelines about how to allocate the marital property, military or social security benefits, life insurance proceeds, and the like. But we have found a way to do this for the vast numbers of single parent, mixed parent, and multiple generation households that today collectively far outnumber families with two parents and their natural children. This is administratively doable.

Child experts raise serious concerns about the development of children of polygamy. Won't these children be confused by the mixed parental signals and attachments, and by the inevitable rivalries and rancor with their half-siblings? And won't these children be stigmatized by their peers for being different? These arguments have some bite. But how different is the polygamous lifestyle in our current pluralistic culture? Children are raised by live-in grandparents, nannies, and day-care centers. They live in large blended families and boarding schools. Their parents may be gay or lesbian couples, or

their families may have religious dress or dietary codes that set them apart from their peers. Are children of polygamy so differently positioned?

The strongest argument against polygamy is the argument from moral repugnance. Polygamy is inherently wrong—“just gross” as my law students say, “*malum in se*” as we law professors put it. States legislate against a lot of activities—slavery, indentured servitude, gambling, prostitution, obscenity, bestiality, incest, sex with minors, self-mutilation, organ-selling, and more—just because those activities are wrong or because they will inevitably foster wrongdoing. That someone wants to engage in these activities voluntarily for reasons of religion, bravery, custom, or autonomy makes no difference. That other cultures past and present have allowed such activities also makes no difference. For nearly two millennia, the Western tradition has included polygamy among the crimes that are inherently wrong. Not just because polygamy is unbiblical, unusual, unsafe, or unsavory. But also because polygamy routinizes patriarchy, jeopardizes consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, confuses children, and more. Not in every case, to be sure, but in enough cases to make the practice of polygamy too risky to condone.

Furthermore, allowing religious polygamy as an exception to the rules is even more dangerous because it will make some churches and mosques a law unto themselves. Again, some religious communities and their members might well thrive with the freedom to practice polygamy. But inevitably closed repressive regimes, like the Texas ranch compound, will also emerge—with under-aged girls duped or coerced into sex and marriages with older men, with women and children trapped in sectarian communities with no realistic access to help or protection from the state and no real legal recourse against a church or mosque that is just following its own rules. We prize liberty, equality, and consent in America too highly to court such a risk. If you are not sure, just ask some of those moms and kids on the Texas ranch.

### SEX MAY BE FREE, BUT CHILDREN ARE NOT<sup>20</sup>

A third issue to make the headlines in the months after our Center’s silver anniversary conference concerned the costs of nonmarital children. Thirty-eight percent of all American children are now born out of wedlock, and it

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<sup>20</sup> This section is adapted from my editorial, John Witte Jr., *Sex May Be Free, but Children Come with a Cost We Must Accept*, ATLANTA J.-CONST., Aug. 10, 2008, at C1.

costs American taxpayers \$112 billion per year.<sup>21</sup> Those are the sobering numbers recently reported by the U.S. Census Bureau and by the Institute for American Values. The Census Bureau numbers break down as follows: 25% of all Caucasian, 46% of all Hispanic, and 69% of all African-American children were born to single mothers in 2007.<sup>22</sup> Compared to children born and raised within marital households, nonmarital children, on average, impose substantially higher costs on society in lost tax revenues and for antipoverty, criminal justice, and education programs.<sup>23</sup> According to the Institute for American Values, those costs exceeded \$1 trillion this past decade.<sup>24</sup>

Happily, we no longer visit the sexual sins of fathers and mothers upon their illegitimate children. American states have removed most of the chronic legal disabilities that were historically imposed on an illegitimate child's rights to property, inheritance, jobs, education, civil benefits, and more. Most remaining forms of discrimination against illegitimate children are now struck down as violations of the Equal Protection Clause of the Fourteenth Amendment. But what the Fourteenth Amendment gives with its Equal Protection Clause, it takes back with its Due Process Clause. Due Process privacy rights now spare adults from criminal liability for engaging in consensual sex outside of marriage. With the legal stigma of both illegitimacy and promiscuity eliminated, illegitimacy rates in the United States have soared—more than doubling since 1975—and the corresponding extra social costs have soared, too.

Rather than simply continuing to pass on the costs of sexual liberty to taxpayers, we need to get better about assigning responsibility where it is due—on both the mother and the father of the nonmarital child. Historically, adulterers, fornicators, and other sexual criminals paid dearly for their crimes—by fine, prison, whipping, or banishment, and by execution in extreme cases. But those punishments often only exacerbated the plight of their illegitimate child, who in extreme cases was now left without a natural network of family resources and support. Today, adulterers and fornicators pay little if any for their consensual sex—protected in part by new cultural norms and

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<sup>21</sup> BENJAMIN SCAFIDI, INST. FOR AM. VALUES, THE TAXPAYER COSTS OF DIVORCE AND UNWED CHILDBEARING: FIRST-EVER ESTIMATES FOR THE NATION AND ALL FIFTY STATES 5 (2008), available at <http://www.georgiafamily.org/policy/upload/COFF%20Final%20Report.pdf>. For further links to census data, see Ctr. for Marriage and Families, <http://http://center.americanvalues.org> (last visited Sept. 19, 2008).

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.* at 7–8.

<sup>24</sup> *Id.* at 5.

constitutional laws of sexual privacy. Even if one wanted to pursue a neo-Puritan or Talibanic path (I, for one, do not!), it is highly unlikely that a new criminalization of adultery or fornication could pass constitutional or cultural muster.

But the elimination of criminal punishment for extramarital sex should be coupled with a much firmer imposition of ongoing civil responsibility on couples whose sexual dalliances produce children. After all, the same Due Process Clause that exonerates promiscuity also licenses contraception, which is widely and cheaply available now, indeed free in some quarters. Those who choose to have children out of wedlock notwithstanding these options need to pay for their children's support. And that support needs to be enough to ensure that these children will have a life comparable to that of children born within marriage. Fathers, in fact, need to pay a bigger share of those costs, given that mothers bear the heavier biological costs in bringing the child to term.

I am no fan of shotgun marriages or forced cohabitation of a couple suddenly confronted with the prospect of a new child. That often deepens the pain for everyone. I am, however, a fan of aggressive paternity and maternity suits, now amply aided by cheap genetic technology. I support firm laws that compel stiff payments of child support for noncustodial parents and garnish the wages, put liens on the properties, and seek reformation of insurance contracts and testamentary instruments of those parents who choose to ignore their dependent minor children. I also support tort suits by illegitimate children who, as adults, seek compensatory and even punitive damages from their parents or their parents' estates in instances where these children have been cavalierly abandoned or notoriously abused as children. And I am a big fan of a much more ambitiously funded and amply facilitated adoption law that would give parents of illegitimate children another real option.

This is not grumpy conservatism, but elementary liberalism. Every right has a corresponding duty, and the misuse of a right can trigger heavy ongoing responsibilities. There may be a right to bear arms in the United States, but there is a duty not to kill another except in proper self-defense. A single impulsive act of unjustly killing another may trigger a lifetime of responsibilities to pay back the victim's family and society. So it is with the right to have sex. Government has no business policing the consensual private sexual activities of adults. But a single impulsive act of conceiving a child should trigger a lifetime of responsibilities to care for that child. As with the

taking of life, so too with the making of life; there are no statutes of limitation on these responsibilities. Sex may be free, but children are not.

The state imposes child support obligations automatically if the child is born to a married couple; the father or mother will pay dearly if they ignore, abuse, or desert their child, especially in its tender years. It should be no different for a child conceived out of wedlock. Ongoing support for that child should not just depend upon the voluntary good will of the father, or a successful paternity suit by the mother. Absent adoption by another, that child is the moral and fiscal responsibility of its father and mother until it reaches the age of majority. And the state needs to impose these costs automatically and hold parents of nonmarital children accountable if they fail to pay.

In the old days, this was accomplished by putting deadbeat parents of illegitimate children under indentured servitude contracts managed by local justices of the peace. The parents worked for the state as many years as was necessary to repay the tax costs for their children's support. This is no solution for our day. Indentured servitude has long been outlawed as a species of slavery, and leaving enforcement of child support to local justices does not work given our modern means and rights to travel.

Modern technology offers a better way to hold irresponsible parents accountable to support their children, regardless of where they go. Birth certificates should carry more specific information about both parents—not just their names and addresses as now, but their social security numbers, blood types, and genetic data as well. And a national registry of these birth certificates should be developed to ensure that parents can be found regardless of where they move. Having those more refined parental data available will enable an unsupported child, an abandoned parent, or, if necessary, a government official to track down a delinquent parent and hold that party to account in the case of delinquency. This might sound Orwellian at first blush. But is it really any more intrusive on our liberty than government's reaching into all taxpayers' pockets to collect the extra \$112 billion a year needed to pay for our nonmarital children?

The government must, of course, develop procedures and safeguards to ensure the privacy and proper use of these parental, personal data. The government must also provide backup support when parents cannot be found or cannot afford support for their children, despite their best efforts. No child in a nation with our wealth and values should be left uninsured, undernourished, or poorly educated. But we need a much better organized and

advertised state and federal system of holding parents financially accountable for the children they bring into the world. That will do much to deter irresponsible sex and to promote responsible childbearing within marriage.

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