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AUTONOMY TO CHOOSE WHAT CONSTITUTES FAMILY: OXYMORON OR BASIC RIGHT?

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Alasdair MacIntyre, Michael Sandel and other critics have argued that liberalism is living off the borrowed capital of Western civilization.¹ That is, to the extent that liberalism requires neutrality among theories of the good, the generation of values – of strong families, hard workers, honest people, engaged citizens, and devout church members – takes place offstage. These critics worry that the institutions producing such values, e.g., churches and families, have atrophied in the modern secular state, and liberalism could no longer assume that private institutions would serve the purposes that, before the rise of liberalism, had been seen as the province of the state.²

William Galston responded to this critique by arguing that liberalism does not require neutrality toward the creation of values central to liberalism itself.³ A liberal democratic state should be able to foster “liberal virtues” such as tolerance, industry, honesty, family stability and civic engagement. Indeed, historically, liberal states have strongly regulated sexual morality, family stability and educational quantity and content.

The issue then arises, however, how a liberal state promotes such values in the absence of consensus not just on the values themselves, but on the institutions necessary to inculcate them. The United States today, for example, deals with differences in educational philosophies by allowing parents and students to choose among public or private schools, established schools or home schooling.⁴ The relationship between church and state similarly involves a long and tortured effort to balance free expression, which necessarily requires a measure of autonomy in creating religious institutions, and the establishment clause, which mandates state neutrality among the institutions created.

Some issues, however, require that the state choose. Traffic regulation is an easy example; drivers cannot construct rival roadways some of which mandate driving on the left and others on the right. The choice of a democracy over a monarchy provides

¹ See Alasdair MacIntyre, *After Virtue* (2d ed. 1984); Michael J. Sandel, Introduction, in Michael J. Sandel, ed, *Liberalism and Its Critics* 5 (NYU, 1984), Michael J. Sandel, *Democracy’s Discontent* 7-8 (1996). For a summary of this debate within family law, see Jennifer Wriggins *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender* 41 B.C. L. Rev 265, 265-67(2000)(summarizing discussion including Bruce Hafen, Carl Schneider, and Mary Ann Glendon, about the law’s expressive function and the communitarian critique of individualism). See also William A. **Error! Main Document Only.**Galston, *Liberal Purposes: Goods, virtues, and diversity in the liberal state*, 304 (Cambridge: Cambridge University Press, 1991) (“In the past generation, thinkers along the political spectrum from Irving Kristol to Jurgen Habermas have contended that liberalism is dependent on -- and has depleted -- the accumulated moral capital of revealed religion and premodern moral philosophy.”) **Error! Main Document Only.**

² See, e.g., *Reynolds v. the United States*, 98 U.S. 145, 162 (1879)(noting that the colonies sometimes required church attendance and used tax dollars to support established churches).

³ William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* 220-21 (1991). See also Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* 200 (1990).

⁴ Indeed, the United States has enjoyed a healthy debate both on the most effective form of educational institutions (comprehensive public schools versus niche designed charter schools, vouchers to subsidize public schools, etc.) and the extent of state power to compel attendance. See, e.g., *Yoder v.*

another illustration. A state may recognize an individual's right to express a preference for a monarchy over a democracy without giving the individual a right to be governed by a monarchy or to opt out of the requirements of democratic governance. In these cases, the autonomy of the individual to choose one institution over another is necessarily limited.

The question that is emerging today is whether state regulation of the family is such an area. Historically, the idea of autonomy with respect to the creation of family form would have been considered an oxymoron to the extent that the issue arose at all. The traditional family of biological mother, father and child was often treated as prior to the state,⁵ if not foundational to society itself.⁶ The Supreme Court has recognized marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."⁷ Nor has the state been neutral among the possible forms of marriage. When the Supreme Court confronted the issue of polygamy as an expression of Mormon religious practice in the Utah territories during the nineteenth century, it had no trouble declaring "the organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."⁸

The basis for these decisions, for the denial of autonomy with respect to the choice of institutions, and not just individual behavior, bears revisiting. As an initial matter, the Supreme Court has distinguished between belief and practice. The First Amendment protects the former, but not necessarily the latter.⁹ That distinction holds today, especially with respect to a practice that is permitted, but not compelled, by one's religion.¹⁰ Second, in determining whether the state could regulate practice, the Court has considered the existence of consensus, consensus based on factors that shift over time. In the nineteenth century, for example, the Court explicitly acknowledged the United States's legacy as a nation of European immigrants, stating bluntly that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of

⁵ See, e.g., Peachey, Paul, ed.: *Private and Public Social Inventions in Modern Societies*, also ed. by Leon Dyczewski and John Kromkowski (HTML at crvp.org) ("Conventionally we view the family as prior to the society, both genetically and historically; genetically, because the family provides the human material from which the state and other social formations are constructed; historically, because as we well know the family precedes the state.") http://www.crvp.org/book/Series04/IVA-2/chapter_iv.htm

⁶ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding marriage "fundamental to our very existence and survival").

⁷ *Maynard v. Hill*, 125 U.S. 190, 210-211 (1888).

⁸ *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 48-49 (1890).

⁹ *Reynolds*, supra, at 166, observing that:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

¹⁰ See, e.g., the more recent cases holding that a landlord cannot refuse to rent to unmarried intimate partners whose behavior violates her religious beliefs because nothing in those religious beliefs requires her to be in the business of renting apartments. *Smith v.*

the life of Asiatic and of African people.”¹¹ More fundamentally, however, the Court went on to examine the basis for the preference of monogamy over polygamy. It concluded that:

Upon . . . [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.¹²

The state could accordingly choose one institution (monogamy) over another (polygamy) where that choice reflected both the consensus views of the populace and the promotion of values (liberty and equality over despotism) consistent with a democracy.

This reasoning leaves open the obligation of the state over the choice of basic institutions where these conditions do not hold. What if, on questions basic to the organization of family, no consensus exists? What if different demographic and economic circumstances create different family traditions among different states? What if fundamentally different values in different parts of the country produce polarization rather than agreement on the family values appropriate for a liberal democracy? Does the state obligation to recognize autonomy in the selection of family form change?

This paper will address these issues by, first, examining the debate about the regulation of morality and distinguishing the control of individual behavior from the selection of basic institutions. Second, it will examine the polarization now taking place on the definition of family values among the states and argue that these differences reflect different challenges produced by the nature of the interaction among marriage, childbearing and the adult life cycle. Third, it will maintain that these differences, while the product of different approaches to family institutions consistent with historic efforts at secular family regulation, interact with religious as well as secular beliefs. Finally, the paper will consider what some measure of autonomy and respect for others might entail in a system in which different states adopt fundamentally different approaches toward the definition and regulation of family values.

The paper will conclude that in an era of polarization the state cannot remain neutral in the choice of basic values, and it should be able to choose, on a majoritarian basis, to promote one set of values over another. Autonomy in the constitution of family as a state-sanctioned status thus becomes impossible. In these circumstances, the obligation of a liberal state then becomes one of minimizing the “moral affront” to the

¹¹ Reynolds, *supra*, at 164.

¹² *Id.* at 165-66 (citations omitted). The Court stated further: “An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.” *Id.* at 166.

views of the rejected minority, and preserving individual autonomy in the expression of contrary views or private conduct.

I. The Regulation of Sexual Morality

The regulation of individual behavior is distinct from the regulation of institutions. Nonetheless, the two are related and even in liberal states committed to individual autonomy, some regulation of sexual morality has been the norm. The question of whether that regulation can be reconciled with individual liberty has generated centuries of discussion.¹³ Perhaps the classic debate within the Anglo-American tradition occurred between Patrick Devlin and H. L. A. Hart in the fifties. A British Parliamentary Committee had proposed deregulating sexual behavior between consenting adults, and repealing the laws that criminalized, among other things, homosexuality and prostitution. Lord Devlin opposed the liberalization on two grounds. He argued, first, that every society has the right to conserve its own traditions, to preserve the practices that are distinctive to its culture,¹⁴ and, second, that a society must preserve its fundamental morality in order not to disintegrate.¹⁵

Devlin would judge a society's fundamental morality in terms of those acts that a jury of representative citizens would find offensive. Michael McConnell defends this deference to a communal or consensus based moral view in terms not so different from the Supreme Court's nineteenth century deference to "Western civilization." He argues that:

An individual has only his own, necessarily limited, intelligence and experience (personal and vicarious) to draw upon. Tradition, by contrast, is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time, each of them making incremental and experimental alterations (often unconsciously), which are then adopted or rejected (again, often unconsciously) on the basis of experience -- the experience, that is, of whether they advance the good life.¹⁶

H.L. A. Hart responded to Devlin (and implicitly to McConnell's identification of the source of Devlin's morality) by questioning whether any notion of morality can be determined with certainty, and whether change over time could be said to produce the "disintegration" of society. He observed that Devlin's argument moved "from the acceptable proposition that some shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society," and called the latter proposition "absurd."¹⁷

¹³ Some would date the Anglo-American discussion to John Stuart Mill, *On Liberty*. See Robert C.L. Moffat, *Commentary: "Not The Law's Business: The Politics Of Tolerance And The Enforcement Of Morality"*, 57 Fla. L. Rev. 1097, 1098 (2005).

¹⁴ Patrick Devlin, *The Enforcement of Morals* 11 (1972).

¹⁵ *Id.* at 10 ("[W]ithout shared ideas on politics, morals, and ethics no society can exist If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; . . . the society will disintegrate.")

¹⁶ Robin West, *Progressive And Conservative Constitutionalism*, 88 Mich. L. Rev. 641, 654-55 (1990).

¹⁷ H.L.A. Hart, *Law, Liberty, and Morality* 51,52 (1963). He continued: "Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. But it is only on this absurd criterion of what it is

As Hart emphasizes, part of the challenge for those who would regulate morality is to identify the possibilities for change. Must the Aztecs, for example, continue to honor human sacrifice or the United States take the position that the racial segregation deeply rooted in its traditions cannot be changed?¹⁸ Just as fundamental for the Hart/Devlin debate is the notion of harm. Mill originated the idea of harm to others as the principal justification for state regulation of individual conduct.¹⁹ At what point can private consensual behavior between adults be said to affect anyone else?²⁰ Perhaps the best answer for Devlin is Professor Jeffrie Murphy's. "[O]ne might ... argue," he suggested, "that open toleration of the flouting of sexual norms threatens the honorific position historically accorded the traditional nuclear family and that such a threat risks undermining the social stability generated by such family units."²¹ If individuals do not have an obligation to resist "temptation," if those around them engage in "sin" without condemnation or consequences, then the internalized norms of fidelity and commitment will atrophy, and a higher percentage of the next generation's children will be raised in suboptimal circumstances. Devlin's position, as Murphy suggests, is that the internalization of shared norms is simultaneously fragile and fundamental to the society implementing it. Nonetheless, it is still important to determine whether particular moral precepts remain "shared" or "fundamental" over time.

The Supreme Court's decision in *Lawrence v. Texas*,²² overturning Texas's criminal ban on same-sex sodomy, would appear to answer that at least for now the public attitude toward private sexual behavior between consenting adults has changed. Poll data supports the conclusion of a widespread change in attitudes. The Gallup organization has polled American adults since 1977, asking whether they believe that homosexual activity should be criminalized:

Date	Legal	Not legal	No opinion
1977-JUN	43%	43	14
1982-JUN	45	39	16
1985-NOV	44	47	9
1986-JUL	32	57	11
1986-SEP	33	54	13
1987-MAR	33	55	12
1988-JUL	35	57	11
1989-OCT	47	36	17
1992-JUN	48	44	8
1996-NOV	47	47	9

for the same society to continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existence." *Id.* at 52.

¹⁸ Moffat, *supra*, at 1104.

¹⁹ See sources in note 13, *supra*.

²⁰ *Id.* at 1102.

²¹ Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 *Ariz. L. Rev.* 73, 77 (1995).

²² 539 U.S. 558 (2003).

1999-FEB	50	43	7
2001-MAY	54	42	4
2002-MAY	52	43	5
2003-MAY	60	35	5

These poll results show a substantial shift in attitudes over time, with 60% favoring the legalization of such behavior before the Supreme Court ruled on the issue in 2003.²³

The scholarly debate over *Lawrence* has focused less on the outcome, and more on the question of whether Justice Kennedy’s majority opinion simply declared such intimate behavior to be beyond the scope of legitimate government intervention, or went further to affirm the value and dignity of same-sex relationships.²⁴ The majority opinion, acknowledging the “powerful voices” condemning homosexuality as immoral, nonetheless emphasized that the “issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’”²⁵ Kennedy’s opinion underscored “the respect the Constitution demands for the autonomy of the person in making these choices,” and cited the abortion cases to reiterate that:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the

²³ http://www.religioustolerance.org/hom_poll2.htm, asking “Do you think homosexual relations between consenting adults should or should not be legal?” Both the majority and dissenting opinions in *Lawrence* acknowledged the changing sentiment. Kennedy observed that “later generations can see that laws once thought necessary and proper in fact serve only to oppress.” *Lawrence* at 579. Scalia responded “and when that happens, later generations can repeal those laws.” *Id.* at 604.

²⁴ See David D. Meyer, *Domesticating Lawrence*, 2004 U Chi Legal F 453, 466; Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 30 (2004) (“*Lawrence* is also clear that the case did ‘not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Thus, same-sex marriage and military service were explicitly excluded from the ruling.”), Martin R. Gardner, *Adoption by Homosexuals in the Wake of Lawrence v. Texas*, 6 J. L. & FAM. STUDS. 19, 43 (2004) (“There is good reason to disagree, however, with Justice Scalia’s conclusion that *Lawrence* will inevitably lead to a constitutional requirement of homosexual marriages.”). See also Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich. L. Rev. 1555, 1583 (2004) (criticizing *Lawrence* as a wrong-headed extension of substantive due process and wondering whether “something resembling the Playboy Philosophy will become the official doctrine of the United States”); cf. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 Colum. L. Rev. 1399, 1417 (2004) (“Sex gets figured, if at all, in *Lawrence* as instrumental to the formation of intimate relationships—it seems not to have a social or legal status in its own right. As a result, sexual rights qua sexual are exiled from the legal struggle on behalf of gay men and lesbians.”); Mark Strasser, *Monogamy, Licentiousness, Desuetude And Mere Tolerance: The Multiple Misinterpretations Of Lawrence v. Texas*, 15 S. Cal. Rev. L. & Women’s Stud. 95 (2005) (summarizing different views and concluding that *Lawrence* should be seen as affirming gay, lesbian and other non-traditional relationships).

²⁵ *Lawrence*, supra at 571.

universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²⁶

Justice Scalia's dissenting opinion castigates the majority for "taking sides in the culture wars." Although Kennedy emphasized that the case did not address "whether the government must give formal recognition to any relationship that homosexual persons seek to enter,"²⁷ Scalia responded,

More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."²⁸

Lawrence, precisely because of its emphasis on privacy, leaves open the larger issue of the role of moral regulation in a democracy. The state after all rarely polices consensual sexual behavior between adults, whether or not the conduct is legal; it routinely regulates the creation and dissolution of families. Decisions about which relationships to recognize and which to ignore, which factors to recognize in custody decisions, and which family members to protect all involve moral judgments.²⁹ In addition, while Hart argues persuasively that the "disintegration" that might be associated with private sexual conduct is too tangential a harm to justify punitive measures, the constitution and conduct of families affects children – often directly – and almost always as part a social compact that establishes the bases on which children receive support.

The question accordingly arises is Scalia right? Does Kennedy's recognition of autonomy with respect to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" necessarily mean that a liberal state must also recognize autonomy to create and win state recognition for the institutions necessary to implement such personal decisions?

II. The Polarization of Family Values

A. The Redefinition of Family Values

While the regulation of family institutions (e.g., recognition of marriage, divorce and parentage) is distinct from the regulation of sexual conduct, both have historically rested on the same values. Chancellor Kent, for example, in his summary of American law at the beginning of the nineteenth century, observed that:

The primary and most important of the domestic relations is that of husband and wife. It has its foundations in nature, and is the only lawful relation by which

²⁶ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

²⁷ *Lawrence*, supra at 578.

²⁸ *Id.* at 604. (Emphasis in Scalia's original).

²⁹ Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 *Stan. L. Rev.* 225 (1997).

Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of the moral order. We may justly place to the credit of the institutional of marriage a great share of the blessings which flow from the refinement of manners, the education of children, the sense of justice, and cultivation of the liberal arts.³⁰

For Kent, the relation of “husband and wife” was a legal one separate from that of biological mother and father. It had its “foundations in nature” in that marriage provided a providentially mandated way to channel the natural inclinations arising from sex and reproduction.³¹ It served, moreover, not just as the foundation of the moral order, but as a principal way to secure the “education of children,” a “sense of justice” and other practical ends important to a well functioning state. Accordingly, a major purpose of domestic relations law was to distinguish between properly constituted versus illicit relations. Sexual morality and family regulation were intricately intertwined.

Modern critics, in contrast, have charged that contemporary family law no longer serves to promote marriage as the foundation of the moral order. These criticisms have two components. First, a series of scholars, starting with Carl Schneider, claim “a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated.”³² Moral values, and the promotion of the conduct associated with them, have become the province of private institutions and individual actors rather than the state. A second group maintains that the state, while it may endorse some values, fails to promote the right ones. These advocates maintain “that traditional families--two parent, heterosexual married couples with children--are essential to a healthy society and must be encouraged.”³³ What the critics have largely not considered is the possibility that the states, entrusted in the American federal system with primarily responsibility for the regulation of family law, may be adopting not only different, but incompatible systems.

³⁰ James Kent, *Commentaries on American Law*, 12th ed., ed. Oliver Wendell Holmes, Jr. (Boston: Little Brown, 1896), Vol. 2, 76.

³¹ See, e.g., Stephen J. Pope, “Sex, Marriage and Family Life: The Teachings of Nature,” in *Family Transformed: Religion Values, and Society in American Life*, Steven M. Tipton and John Witte, Jr., eds. (2005) Georgetown University Press, at 65.

³² Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1808-09 (1985). See also Bruce C. Hafen, *The Family as an Entity*, 22 U.C. Davis L. Rev. 865, 879 (1989) (“state intervention into family life . . . is less likely now than previously to be based on moral judgments”); Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443, 1527 (1992) (arguing that the “increased dissociation of law and morality . . . is directly linked to the privatization of family law”); Lee E. Teitelbaum, *The Last Decade(s) of American Family Law*, 46 J. Legal Educ. 546, 547 (1996) (noting a decline in moral discourse in some areas of family law).

³³ Jane C. Murphy, *Rules, Responsibility And Commitment To Children: The New Language Of Morality In Family Law*, 60 U. Pitt. L. Rev. 1111, 1113 (1999)(summarizing debate and arguing that in fact family law promotes a different and more appropriate set of values). See also Judith E. Koons, *Motherhood, Marriage, And Morality: The Pro-Marriage Moral Discourse Of American Welfare Policy*, 19 Wis. Women's L.J. 1, 23 (2004)(summarizing the argument of marriage advocates that “over the past forty years there has been an “extraordinary shift in cultural norms concerning sex, marriage, and childbearing,” including the advent of birth control, the entry of more women into the labor force, and the increasing acceptability of cohabitation outside of wedlock. . . . Widened opportunities for women, including alternatives to marriage, that were the fruits of the women's and civil rights movements are constitutive of this normative shift.”)

Family law scholars have, however, charted the emergence of a set of values different from those Chancellor Kent championed. Naomi Cahn, for example, argued almost a decade ago that a newly evolving morality recognized responsibility for children as a familial obligation, albeit with public support, made gender equity a “primary objective,” and placed individual rights “within the contexts of community, equality, and commitment.”³⁴ Jane Murphy seconded the idea, maintaining that there is a “broader concept of morality” that emphasizes the “virtues of care and protection of children” and addresses “issues that are more commonly thought of as economic or psychological issues, such as how to guarantee adequate support for children and how to evaluate parental fitness.”³⁵

This alternative set of family values, with its emphasis on care and support for children, draws as much on Anglo-American tradition as the model that rests on sexual regularity. Lawrence Stone, in his history of the family in England, emphasized the relatively high portions of the population who never married, and the relatively late of marriage for those who did, as “an extraordinarily and unique feature of north-west European civilization.”³⁶ Stone explained that while in some parts of the world newlyweds remained with their parents, the English tradition (and that of northwestern Europe more generally), emphasized the ability to establish a financially independent household as the indication of readiness for marriage. Moral responsibility meant financial as well as sexual restraint in preparation for parenthood.

In similar fashion, a shift in investment strategies produced a transformation in family norms in the nineteenth century U.S. With industrialization, the professions and the executive ranks replaced farms and shops as the most secure avenues to middle class status. Prescient families began to invest more in their son’s formal education and daughters’ virtue, and to keep their growing children more carefully supervised in the home. As a result, the average age of marriage rose, the number of births per family fell, women gained greater status as the guardians of family virtue,³⁷ greater condemnation attended engagement-period intercourse, and pregnancy rates fell from one-third of brides to ten percent by mid-century.³⁸ The Protestant middle class remade “family values” and celebrated their moral superiority to the detriment of Catholic immigrants, freed slaves and others who could not afford to keep women and children insulated from temptation.³⁹ These values, firmly cemented within the northwest European tradition to

³⁴ Cahn, *supra*, at 270-71.

³⁵ Murphy, *supra*, at 1204.

³⁶ Lawrence Stone, *The Family, Sex and Marriage in England, 1500-1800*, abridged ed. 44 (1979).

³⁷ See Jane E. Larson, “Women Understand So Little, They Call My Good Nature ‘Deceit’”: A Feminist Rethinking Of Seduction, 93 *Colum. L. Rev.* 374, 388 (1993). (“Victorian culture exalted sexual restraint and designated women as caretakers of society’s sexual virtue.”) Larson also notes, however, that: “Although the Victorian convention of female sexual modesty repressed women’s sexuality, it also strengthened women’s social authority and dignity, empowering women to resist male sexual demands and thus shifting the balance of power between men and women in the private sphere.” *Id.* at 389-90.

³⁸ See Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* 9, 180-83 (1980) (on declining birth rates that followed women’s greater ability to decline sexual intercourse). Linda Hirshman & Jane Larson, *Hard Bargains: The Politics of Sex* (1998). (The number of women giving birth within eight and a half months of marriage fell from thirty percent at the end of the eighteenth century to ten percent by the middle of nineteenth.)

³⁹ For discussion of the class and racial aspects of these developments, see June Carbone, *From Partners to Parents: The Second Revolution in Family Law* 108-110 (2000). See also Larson, *supra* at 388, n 55,

which Americans are heirs, continued to herald financial independence and investment in children as hallmarks of family morality.

The twentieth century's post-industrial economy further remade the family bargain. The rise of the service sector increased demand for women's market services, and rewarded greater investment in women. Women then reorganized themselves as higher earning women hired other women (and McDonald's and frozen foods) to provide the less specialized services they had once performed within the home. As women joined men in securing higher education, the new path to secure middle class status lay in delayed marriage and childbearing for women as well as men. Ironically, the new movement grew out of the fifties in which all of the trends that had otherwise characterized the twentieth century reversed themselves. Stephanie Coontz writes that "[f]or the first time in more than one hundred years, the age for marriage and motherhood fell, fertility increased, divorce rates declined, and women's degree of educational parity with men dropped sharply."⁴⁰ The solution was the pill in the sixties, abortion in the seventies, and the effective disappearance of the norms of sexual restraint for adult singles. By 1997, the Gallup poll found that fifty-five percent of American adults say that premarital sex is not wrong, and among the most directly affected, *viz.*, the younger crowd aged 18-29, 75% agreed that "pre-marital sexual relations are not wrong."⁴¹ The new middle class pathway separated sex and childbearing; improvident childbearing could still derail a woman's education, marriage and income prospects, while the former had become available without stigma or commitment.⁴²

As with the nineteenth century changes, the twentieth century changes in women's status and independence changed the terms on which they were willing to enter into and stay in marriages. Stephanie Coontz comments that:

As women gained experience and self-confidence, they won benefits that made work more attractive and rewarding; with longer work experience and greater educational equalization, they became freer to leave an unhappy marriage; and as divorce became more of a possibility, women tended to hedge their bets by insisting on the right to work. Although very few researchers believe that women's employment has been a direct cause of the rising divorce rate, most agree that women's new employment options have made it easier for couples to

observing that : "The separate spheres ideology largely applied to white, middle-class, heterosexual women. Although society measured women outside this category against these feminine ideals of sexual purity and domesticity (often to their detriment), more marginalized women were rarely accorded the moral authority and social respect which the separate spheres ideology implied that all women deserved. See, e.g., Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South 192-241* (1988) (describing gulf between slaveholding and enslaved women in the antebellum American South); Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present 1-151* (1985) (comparing experience of free and enslaved black women in southern United States)."

⁴⁰ Stephanie Coontz, *The Way We Never Were: American Families and the Nostalgia Trap 202-03* (1992).

⁴¹ Frank Newport, Gallup Poll Review From The Poll Editors: *Sexual Norms: Where Does America Stand Today?* The Gallup Poll, December, 1997, <http://www.hi-ho.ne.jp/taku77/refer/sexnorm.htm>.

⁴² Whitehead notes that ninety percent of women born between 1933 and 1942 were either virgins when they married to had first intercourse with the man they married. Today, in contrast, the average age of first intercourse for women is 17 while the average age of first marriage is twenty-five. Barbara Dafoe Whitehead, "The Changing Pathway to Marriage: Trends in Dating, First Unions, and Marriage among Young Adults," in Tipton and Waite, *supra*, at 170.

separate if they are dissatisfied for other reasons. In turn, the fragility of marriage has joined economic pressures, income incentives, educational preparation, and dissatisfaction with domestic isolation as one of the reasons that modern women choose to work.⁴³

The economic coercion that complemented the moral suasion of the older family system gave way, and so did the effectiveness of the mechanisms that promoted family stability for centuries.

As Cahn and Murphy emphasized, however, the results are not entirely unhappy ones. The new middle class morality emphasizes the financial contributions of mothers and fathers, and it celebrates marriage in terms of equality and companionship. While the research evidence on marital happiness is mixed, there are many reasons to believe that the most troubled adults have become less likely to marry or stay married, those who rate their relationships fair or equitable are more likely to stay together, and two incomes have become critical to families' financial well-being for all but the wealthiest Americans.⁴⁴ The middle class may see no alternative to the strategy of later, more egalitarian marriages – at least on the coasts.

The families of a large part of the rest of the country, however, are in crisis. The combination of the atrophy of the traditional constraints on sexual behavior with the difficulty of engineering the new middle class ideal of companionate relationships has undermined the conventional links between adult resources and support for children. For the country as a whole, non-marital births have risen to a third of the total. Divorce rates has risen steadily from 5% of marriages in 1867, to 10% of those contracted in 1900, to half of those in 1967, and perhaps as many as two-thirds of those who married in 1980.⁴⁵ Half of American children can expect to live in a single parent family at some point in their childhood, and the outcomes for children in single parent families are demonstrably worse on a host of measures than for those in married families. Moreover, some scholars argue that even though more troubled adults have become less likely to marry, the quality of marital happiness has not risen. Robert Wurthnow, for example, cites poll data that shows 62.4% of married couples claiming to be very happy in 2000 compared to 67.8% in 1973.⁴⁶ And these issues do not play out evenly across the country. Instead, they divide by race, income, education -- and geography. The “blue” states, that is, the states that voted Democratic in the last presidential elections, show the lowest rates of teen pregnancy, divorce, and poverty; the “red” states, which voted Republican in the last election, show the highest rates of improvident teen births and divorce.

The “red states” also believe they have an answer – a much higher percentage of

⁴³ Coontz, *Nostalgia*, supra, at 166.

⁴⁴ See, e.g., John M. Gottman et al., *Predicting Marital Happiness and Stability from Newlywed Interactions*, 60 *J. Marriage & Fam.* 5 (1998) (stating men's rejection of their wives' influence best predicts divorce); Kristi Williams, *Has the Future of Marriage Arrived? A Contemporary Examination of Gender, Marriage, and Psychological Well-Being*, 44 *Journal of Health and Social Behavior* 470-487 (Dec., 2003)(individuals are better divorced than in unhappy marriages). But see Robert Wurthnow, “The Family as Contested Terrain,” in Tipton and Witte, supra, at 74 summarizing evidence of greater unhappiness of those currently married in comparison with earlier areas, and greater well-being of the married compared to the unmarried.

⁴⁵ Wurthnow, supra, at 74, noting that while divorce rates have leveled off more recently, the change is due in part to the fact that fewer couples are marrying. Any effect of greater self-selection today may not necessarily be reflected in those married in 1980.

⁴⁶ *Id.* at 74.

their populations would say “no” to the new middle class morality of unregulated sex and egalitarian marriage. Instead, they would embrace a more traditional, and more religiously grounded, definition of family morality. Critical to that definition is the unity of sex, marriage, and reproduction. A recently released letter from the Religious Coalition for Marriage, for example, explains:

Marriage is particularly important for the rearing of children as they flourish best under the long term care and nurture of their father and mother. For this and other reasons, when marriage is entered into and gotten out of lightly, when it is no longer the boundary of sexual activity, or when it is allowed to be radically redefined, a host of personal and civic ills can be expected to follow.⁴⁷

The marriage movement, which has been more influential in red states than blue ones,⁴⁸ would accordingly advocate greater emphasis on the distinction between licit and illicit sex, greater commitment to marriage, and reaffirmation of the importance of the biological two parent family.

In addition, many of the researchers supporting these movements believe that traditional notions of family and a gendered division of family responsibilities are critical to the outcome. All researchers report that women are more likely than men to initiate divorce, and that women’s emotional satisfaction in marriage is a factor in predicting divorce. Steven L. Nock and Bradford Wilcox and Steven L. Nock, recent study, "What's Love Got To Do With It?: Equality, Equity, Commitment and Women's Marital Quality,"⁴⁹ finds further that married women are happier if they hold traditional rather than egalitarian expectations about marriage, and if they share with their husbands high levels of church attendance and normative commitment to marriage as an institution. The study suggests that traditional wives may be happier because they expect less, and thus, when they get less, they are not disappointed.⁵⁰ At the same time, by expecting less, they might actually persuade their husbands to be more emotionally responsive and to invest more, because the husbands experience less conflict with their wives over the household division of labor.⁵¹ In short, socialization for commitment and acceptance of traditional gender roles may be necessary to promote marital success.

Whether or not these positions are empirically true,⁵² they represent fundamentally different approaches to family regulation. One emphasizes the internalization of norms of sexual restraint, a gendered division of family responsibilities, and commitment to marriage. The other insists on commitment to gender equality, financial and emotional preparation for childrearing, greater investment in women and children, and individual autonomy rather than community centered support for families. Fully implemented they support radically different lifestyles and family law systems.

⁴⁷ Religious Coalition for Marriage, A Letter from America’s Religious Leaders in Defense of Marriage (2006), <http://www.religiouscoalitionformarriage.org>.

⁴⁸ See data below.

⁴⁹ 84 Social Forces 1321(March 2006).

⁵⁰ Id. at 1324.

⁵¹ Id. at 1325-28.

⁵² For a response to Nock and Wilcox, for example, see Joanna Grossman And Linda McClain, “Desperate Feminist Wives”: Does The Quest For Marital Equality Doom Marital Happiness? Findlaw: Legal News And Commentary, April 4, 2006, Http://Writ.News.Findlaw.Com/Commentary/20060404_Mcclain.Html

B. Demographic Divisions

The debate over family values is intense not just because the positions differ ideologically, but because they correspond to different lived experiences, and different family systems in various parts of the country. Naomi Cahn and I are in the process of bringing together a variety of statistical measures that create a picture of these two different family systems. The statistics below provide a preliminary, broad brush depiction of the differences in lifestyles that have emerged between the two systems.⁵³

Take, first, the experience of marriage and childbearing. In 2000, the mean age of the mother at her first live birth for the nation as a whole was 24.9. Yet, the states with the highest average ages were entirely “blue:”⁵⁴ Massachusetts led at 27.8, followed by Connecticut (27.2), New Jersey (27.1), New Hampshire (26.7), and New York (26.4). The states with the lowest average ages were entirely red: Arkansas had the lowest (22.7), followed by Louisiana and New Mexico (23.0), Oklahoma (23.1), and Wyoming (23.2).⁵⁵ Over the past 30 years, all states have experienced an increase in the mean age of mothers at which the first child is born, but the changes range from a 5.3 year increase in Massachusetts to a 1.9 year increase in Utah.⁵⁶

Add in now the average age of marriage. In the United States, the median age of marriage for women is 25.1, 26.7 for men.⁵⁷ In contrast, in 1960, the median age at first marriage was 20.3 for women, and 22.8 for men.⁵⁸ The five states with the lowest median age of marriage for women are red: Utah (23.9, 21.9), Oklahoma (24.9, 22.7), Idaho (24.6, 22.8), Arkansas (25, 22.8), and Kentucky (25.3, 22.8). Correspondingly, the states with the highest median age of marriage for women are blue: Massachusetts (29.1, 27.4), New York (28.9, 27), Rhode Island (27.6, 26.7), Connecticut (28.9, 26.4), and New Jersey (28.6, 26.4).⁵⁹

The differences between an average first birth at 22.7 versus 27.8 are substantial. So are the differences in marriage ages from 21.9 to 27.4 for women, and 23.9 to 29.1 for

⁵³ The single biggest limitation in these general statistics are the failure to break down the characteristics by race.

⁵⁴ The blue states are: California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. The rest are red. See Michael Gastner, Cosma Shalizi, and Mark Newman, et al., Maps and cartograms of the 2004 US presidential election results, <http://www-personal.umich.edu/~mejn/election>. As they emphasize, however, using a scale of percentage of voters results in a map that is more purple than red. Id.; see Robert J. Vanderbiel, Election 2004 Results, <http://www.princeton.edu/~rvdb/JAVA/election2004/>

⁵⁵ T.J. Mathews and Brady E. Hamilton, Mean Age of Mother, 1970-2000 10 (Table 3) (2002), http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_01.pdf.

⁵⁶ Id.

⁵⁷ Talles Johnson and Jane Dye, Indicators of Marriage and Fertility in the United States from the American Community Survey: 2000 to 2003, Table 1 (2005), <http://www.census.gov/population/www/socdemo/fertility/mar-fert-slides.html>.

⁵⁸ Infoplease, Median Age at First marriage, <http://www.infoplease.com/ipa/A0005061.html>. On the other hand, in 1890, the median age of first marriage for men was 26.1, and 22.0 for women.

⁵⁹ Id. at <http://www.census.gov/population/www/socdemo/fertility/slideshow/table01.csv>

men. Testosterone levels peak in the mid-twenties. Helen Fisher observes that higher testosterone levels can reduce oxytocin and vasopressin, making attachment less likely,⁶⁰ and that "men with high baseline levels of testosterone marry less frequently, have more adulterous affairs, commit more spousal abuse, and divorce more often."⁶¹ In addition, new research on brain development indicates that the areas in the brain associated with higher level reasoning, maturity and judgment do not fully mature until the mid-twenties. Less mature adults engage in higher levels of risk-taking, may have less impulse control, and display less judgment than they will at older ages. Couples marrying and giving birth in their late twenties should have fully developed mental faculties, and begun to settle down; couples still in their early twenties are still developing, experimenting, and "sowing their wild oats."

Divorce statistics bear out these predictions. The states with the highest divorce rates are red: Nevada, Wyoming, Arkansas, Kentucky, Mississippi and Florida, while those with the lowest are primarily blue: Massachusetts, followed by Pennsylvania, North Dakota, Illinois, and Connecticut.⁶² Researchers confirm that a younger age of marriage, lower economic status, and having a baby either prior to marriage or within the first seven months after marriage each increases the risk of divorce, holding other factors constant.⁶³

These statistics suggest that red state characteristics combine the factors that make family instability more likely to occur. That is, younger marriages, especially if they are prompted by an improvident pregnancy, increase divorce rates. So, too, does lower socio-economic status, and red states, which may be more likely to reject middle class strategies because they are poorer or poorer because they reject middle class family strategies, are not as well off as red states.

The risk factors for red states involve more than divorce. Teen births are also higher. The five states with the lowest teen birth rates were New Hampshire, Vermont, Massachusetts, Connecticut, and Maine; the states with the highest teen birth rates were Texas, New Mexico, Mississippi, Arizona, and Arkansas.⁶⁴ On the other hand, while the percent of nonmarital teen births in the United States was 82% in 2004, the states with the lowest percentage of teen births to nonmarital mothers were Idaho, with 64%, Utah, with 66%, Texas, with 73%, and Colorado, Kentucky, and Wyoming, each with 74%.⁶⁵ Those states with the highest percentage of nonmarital teen births were Massachusetts (92%), Delaware, Pennsylvania, and Rhode Island (91%), and Connecticut and Maryland

⁶⁰ Fisher, *Why We Love*, at 90.

⁶¹ *Id.*

⁶² U.S. Census Bureau, *Statistical Abstract of the United States 2005-2006* 93 (Table No. 117) <http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf>.

⁶³ Paul Amato and Stacy Rogers, ; Barbara Dafoe Whitehead and David Popenoe, *The State of Our Unions: The Social Health of Marriage in America*, Box 2 (2004), <http://marriage.rutgers.edu/Publications/SOOU/TEXTSOOU2004.htm#Divorce>

⁶⁴ Child Trends, *Teen Birth Rates Ranked Lowest to Highest*, 2003, <http://www.childtrends.org/Files/FAAG2006StatebyState.pdf>.

⁶⁵ ChildTrends, *Facts at a Glance*, Table 1 (2006), <http://www.childtrends.org/Files/FAAG2006.pdf>

(90%).⁶⁶ In other words, one set of states has lower teen birth rates, and higher rates of nonmarital births, while a second set tends to have higher teen birth rates, but more births occurring within marriage,⁶⁷ and, correspondingly, younger ages of marriage.⁶⁸

Abortion ratios complete the picture. Blue states had the ratios of abortions per 1,000 live births: New York, Delaware, Washington, Massachusetts, and Connecticut each had a ratio over 300. The states with the lowest abortion ratios, with rates under 100, were red: Colorado, Utah, Idaho, and South Dakota.⁶⁹ Similarly, states with the lowest abortion rates – number of abortions per 1000 women between the ages of 15-44 – were Colorado, Utah, Idaho, Kentucky, and South Dakota, while those with the highest abortion rates were New York, Delaware, Washington, New Jersey, and Rhode Island.⁷⁰

These figures confirm once again the existence of two different family systems: one creating pressures for early marriage and childbearing. The other for avoiding teen births – and early marriages – through measures that include greater resort to abortion.

The final figures involve overall fertility. The percent of childless women is highest in the Northeast states, and lowest in the southern states.⁷¹ The nineteen states with the highest fertility rates are red, while the 16 states with the lowest fertility rates are blue.⁷² In the United States, there are 1,182 children born for every 1,000 women.⁷³ Alaska has the highest fertility rate, with 1,435 children born per 1,000 women, followed by Arkansas (1,418), Utah and Mississippi (1,393), and South Dakota (1,368). The states

⁶⁶ Id.

⁶⁷ Vermont, New Hampshire, and Maine, among the states with the lowest teen birth rate, also had high percentages of nonmarital teen births: in Vermont, it was 87%, New Hampshire 89%, and Maine 88%. Id. The percent of births to teen mothers with respect to all births in the state was highest in New Mexico (17%), followed by Mississippi (16%), Arkansas and Louisiana (15%), and Alabama and Oklahoma (14%). Id. The lowest percentages were in Massachusetts, New Hampshire, New Jersey and Vermont (6%), and Connecticut, Minnesota, New York, and Utah (7%).

⁶⁸ The overall rate of non-marital births is harder to assess, in part, because of the influence of race. The states with the highest overall rates of non-marital births (D.C., Miss., and La.) all have high African-American populations. The states with the lowest rates (Utah, Idaho, and Minnesota) have much lower rates. See <http://www.gutmacher.org/pubs/ib22.html>.

⁶⁹ Laurie D. Elam-Evans, Abortion Surveillance, United States, 2000 (29 (Table 3)(2003), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5212a1.htm>. Florida and Louisiana had low rates as well, but did not report the number of abortions with respect to in-state residents. Id.

⁷⁰ Id. States with incomplete measures of were again excluded, as was the District of Columbia.

⁷¹ Jane Lawler Dye, Fertility of American Women: June 2004 4 (Table 2)(2005), <http://www.census.gov/prod/2005pubs/p20-555.pdf>. It was 48% in the northeast, which includes Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania; and 42.5% in the south, which included Delaware, Maryland, DC, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Louisiana, Oklahoma, and Texas. The statistics did not include a further breakdown by state.

⁷² Steve Sailer, Birth Gap: How birthrates color the Electoral Map, The American Conservative (Dec. 2004), http://www.amconmag.com/2004_12_06/cover.html.

⁷³ U.S. Census Bureau, Fertility of American Women, Table S1 (June 2004), <http://www.census.gov/population/socdemo/fertility/tabS1.xls>. D.C. is, once again, an outlier, with a fertility rate of 776. States with the lowest fertility rates for never-married women were mixed, with Utah, a red state, with the lowest rate of 208, followed by Delaware (213), Minnesota (234), North Dakota (241), Idaho (247), and New Hampshire (254). Id.

with the lowest fertility rates are: Maryland (991), Vermont (1,000), Massachusetts (1,020), Maine (1,022), and Delaware (1,023).

While these statistics cannot provide a complete view of different cultural values, they suggest that red state and blue state families are living different lives.

C. Legal Fractures

The largest difference in the two family systems involves the regulation of sexuality. One system deregulates sexuality, but discourages early childbearing; the other system attempts to reinforce the link between sexuality and marriage. Comprehensive differences, some minor, others profound, divide the family law systems among the states. Two flashpoints, in particular though, symbolize the divide among the states.

The first is abortion. Given the Supreme Court's recognition of a women's right to choose, a central battleground has been parental notification laws.⁷⁴ Carol Sanger argues that, although these laws are framed as representing children's interests, they in fact represent a political decision on behalf of third parties to prevent minors from obtaining abortions, to reinforce parental authority, and to punish the girls for their sexual behavior.⁷⁵ Childbirth as the price of illicit sex is an important factor in reinforcing a traditional understanding of sexual morality.⁷⁶

An overwhelming majority of states require some form of parental involvement, generally subject to the judicial bypass option. In 21 states, parental consent is required before a minor can obtain an abortion, with two red states (Mississippi and North Dakota) mandating that both parents consent, while in 13 states, parental notification is required.⁷⁷ In another nine states – Alaska, California, Idaho, Illinois, Montana, Nevada, New Hampshire, New Jersey, and New Mexico -- enforcement of statutes requiring parental involvement has been permanently enjoined.⁷⁸ Seven states, all of which are blue – Connecticut, Hawaii, Maine, New York, Oregon, Vermont, and Washington -- do not

⁷⁴ See *Ayotte v. Planned Parenthood*, 126 S. Ct. 961, 966, n.1 (2006) (noting that 44 states have enacted laws mandating parental involvement). In four of those states, there is no exception to the parental involvement requirement based on an emergency concerning the minor's health).

⁷⁵ Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 *Intl. J.L. & Pol'y & Fam.* 305, 315 (2004).

⁷⁶ The argument extends to more than abortion. See, e.g., Russell Shorto, *Contra-Contraception*, *New York Times Magazine*, May 7, 2007. ("We see a direct connection between the practice of contraception and the practice of abortion," says Judie Brown, president of the American Life League, an organization that has battled abortion for 27 years but that, like others, now has a larger mission. "The mind-set that invites a couple to use contraception is an antichild mind-set," she told me. "So when a baby is conceived accidentally, the couple already have this negative attitude toward the child. Therefore seeking an abortion is a natural outcome. We oppose all forms of contraception.")

http://www.nytimes.com/2006/05/07/magazine/07contraception.html?_r=1&oref=slogin

⁷⁷ Guttmacher Institute, *Parental Involvement in Minors' Abortions* (Jan. 1, 2006), available at http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

⁷⁸ *Id.*

require any form of parental involvement in minors' abortion decisions.⁷⁹ Studies show that parental involvement laws result in fewer abortions and more births.⁸⁰

The second and most perplexing is gay marriage. Supporters of the new middle class model adopted by Blue America simply do not get it. One op-ed piece titled "Gay Marriage: Why Would It Affect Me?" observed:

When opponents talk about the "defense of marriage," they lose me. James Dobson's Focus on the Family just sent out a mailer to 2.5 million homes saying: "The homosexual activists' movement is poised to administer a devastating and potentially fatal blow to the traditional family." And I say, "Huh?" How does anyone's pledge of love and commitment turn into a fatal blow to families?⁸¹

Dobson responded, referring to Genesis:

The legalization of homosexual marriage will quickly destroy the traditional family. . . . [W]hen the State sanctions homosexual relationships and gives them its blessing, the younger generation becomes confused about sexual identity and quickly loses its understanding of lifelong commitments, emotional bonding, sexual purity, the role of children in a family, and from a spiritual perspective, the "sanctity" of marriage. Marriage is reduced to something of a partnership that provides attractive benefits and sexual convenience, but cannot offer the intimacy described in Genesis. Cohabitation and short-term relationships are the inevitable result.⁸²

This debate replicates the earlier disagreements on the regulation of morality that occupied Hart and Devlin. Naomi Cahn and I have argued that the biological evidence suggests that human beings as a species are in fact more geared to serial monogamy (i.e., "cohabitation and short-term relationships") than long term fidelity.⁸³ The more difficult it is to rechannel behavior, the more important (and fragile) internalized norms become. Ariela Dubler writes that the Christian constructions of sexual morality that influenced American judges and continue to influence contemporary politics "posited marriage as

⁷⁹ "Blue" states voted Democratic in the 2004 election. See *infra* nn. ___.

⁸⁰ See, e.g., Michael J. New, *Using Natural Experiments to Analyze the Impact of State Legislation on the Incidence of Abortion* (2006), www.heritage.org/Research/Family/cda06-01.cfm. He found:

when a parental involvement law is enacted, the abortion rate decreases by 16.37 abortions for every thousand live births [the abortion ratio] and the abortion rate decrease by 1.15 abortions for every thousand women between the ages of 15 to 44 [the abortion rate]. Parental involvement laws that are passed and then nullified by the judiciary result in modest increases in the abortion rate and a modest decline in the abortion ration.

Id. at 11. See also Theodore Joyce, Robert Kaestner, and Silvie Colman, *Changes in Abortions and Births and the Texas Parental Notification Law*, 354 *New Eng. L. Med.* 1031 (2006).

⁸¹ Dr. James Dobson, "Eleven Arguments Against Same-Sex Marriage," *CitizenLink.org*, May 23, 2004 <http://www.family.org/cforum/extras/a0032427.cfm>, citing a column by Steve Blow in the *Dallas Morning News*.

⁸² Dobson, *id.* (Emphasis in original).

⁸³ *The Biological Basis of Commitment: Does One Size Fit All?* June Carbone & Naomi Cahn, 25 *Women's Rights L. Rep.* 223 (2004).

the site where lust was transformed into virtue.”⁸⁴ If it is part of human nature to experience lust, to be tempted to engage in illicit acts that range from bestiality to adultery, then the preservation of marriage as a privileged state is necessary to resist those temptations. Redefining marriage to include “sinful acts”⁸⁵ or to recognize relationships based on something other than the unity of sex, reproduction and childrearing undermines the enterprise. If anyone can claim the blessings of marriage, what is the point of abstinence? If the relationship does not elevate those within it, why work to maintain the institution when life turns difficult? The issue is inflamed further by the identification of gays and sometimes lesbians with greater promiscuity, within or without marriage.⁸⁶ Yet, for the upwardly mobile middle class, who replaced abstinence with an emphasis on emotional and financial preparation for childrearing, the argument is barely cognizable. The “huh?” response is real.

State legislation reflects the divide. Thirty-three states now have statutory bans on marriage for same-sex couples, and six have enacted constitutional amendments banning gay marriage.⁸⁷ Sixteen of the seventeen states with some form of constitutional amendment or statute adopting broader anti-gay measures are red, while only one is blue (Michigan). The only red states not to have some form of anti-gay measure are Wyoming and New Mexico. In contrast, the other seven states without any form of anti-gay measure are Maryland, Massachusetts, New Jersey, New York, Connecticut, Rhode Island, and Vermont – lean blue. The six states to extend same-sex couples legal recognition and benefits comparable to marriage are all blue.⁸⁸

⁸⁴ Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex* 115 *Yale L.J.* 756, 763 (2006).

⁸⁵ See Dubler’s comment that: “Marriage is at once powerful to confer legal privileges and to shield people from the dangers of sexual illicitness, and powerless to protect itself from the taint of those very illicit practices.” *Id.* at 812.

⁸⁶ See, e.g., Religious Coalition for Marriage, *Top 10 Social Scientific Arguments Against Same Sex Marriage* 4, http://www.religiouscoalitionformarriage.org/html/top_ten.php, observing that:

In the first edition of his book in defense of marriage, *Virtually Normal*, Andrew Sullivan wrote: “There is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman.” . . . One recent study of civil unions and marriages in Vermont suggests this is a very real concern. More than 79 percent of heterosexual married men and women, along with lesbians in civil unions, reported that they strongly valued sexual fidelity. Only about 50 percent of gay men in civil unions valued sexual fidelity.

In addition, younger ages of marriage also change the context for recognizing homosexuality, with gays and lesbians more likely to “come out of the closet” in Red America the time of divorce, linking homosexuality in the minds of some with adultery. In communities with later average ages at marriage, and more gay friendly environments, the link does not exist.

⁸⁷ <http://www.thetaskforce.org/downloads/marriagemap.pdf>.

⁸⁸ See Leslie Harris, *Same-Sex Unions Around the World: Marriage, Civil Unions, Registered Partnerships—What are the Differences and Why do the Matter?*, 19 *Probate & Property* 31, 33 (Sept/Oct 2005); Human Rights Campaign, *Relationship Recognition in the U.S.*, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=26860&TEMPLATE=/ContentManagement/ContentDisplay.cfm> Maine’s legislation, which is the most limited, allows both same-sex and opposite sex couples to register for domestic partnership, a status which grants various rights in protective proceeding and intestacy; California, Connecticut, and Vermont offer couples almost all of the rights associated with marriage (Vermont and Connecticut’s legislation are limited to same-sex partners); New Jersey and Hawaii offer somewhat less expansive rights. *Id.*

The efforts to control sexuality extend across a broader, if less publicized, front. They include greater scrutiny into non-marital cohabitation in custody cases, continuing recognition of adultery in custody or financial awards, and the more celebrated efforts to adopt covenant marriage. While adoption of such measures is far from uniform, enforcement may be uneven, and support for the return of fault is mixed even in the reddest of red states, these measures, together with the high profile fights over abortion and gay marriage, suggest the existence of two internally coherent, and incompatible family law systems.

III. Can Individuals Exercise Autonomy in the Selection of Institutions?

The emerging differences in family law raise an issue that does not exist at a time of consensus about family values: *viz.*, how much deference should be given, in the selection of institutions as opposed to private beliefs and practices, to individual autonomy. The question is one with deep roots within liberal democracies.

John Rawls, after his enormously influential theory of justice,⁸⁹ wrote *Political Liberalism* precisely to address the obligations of liberalism in such circumstances. He observed that a “modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines.”⁹⁰ To deal with this plurality of views, Rawls advanced the idea of the “overlapping consensus,” which he defined not just as a *modus vivendi* to which parties agreed to the extent it advanced their short term self-interest, but to which they adhered because it reflected a deep moral commitment on the basis of their individual comprehensive schemes.⁹¹ Rawls emphasized that the “fact that people affirm the same political conception on those grounds does not make their affirming it any less religious, philosophical, or moral, as the case may be, since the grounds sincerely held determine the nature of their affirmation.”⁹²

Opposition to polygamy at the time of the nineteenth century cases – and probably still today – provides such an example. The United States in the nineteenth century thought of itself as a Christian nation, if not a Baptist, or Catholic one, and all of the different Christian churches, and most modern secular and moral philosophies in the United States today, oppose polygamy. Accordingly, the U.S. as a liberal state could justify outlawing polygamy without necessarily embracing all or any one of the different justifications for doing so. Moreover, as the Supreme Court’s invocation of Lieber’s political philosophy indicated, the Court could uphold such a restriction not just because of widespread consensus, but because it found such principles consistent with equality and equal respect within a liberal democracy.⁹³

⁸⁹ John Rawls, *A Theory of Justice* (1971).

⁹⁰ John Rawls, *Political Liberalism*, xvi (1993).

⁹¹ *Id.* at 147.

⁹² *Id.* at 147-48.

⁹³ *Id.* at 337-38.

Conversely, in dealing with churches, Rawls, the U.S. Constitution and almost all theories of liberalism distinguish between the authority churches hold over their members because of the members' consent, and the authority of the state to compel membership, or to enforce the precepts of a particular church or religion.⁹⁴ Liberalism began as a response to the wars fought over established churches,⁹⁵ and neutrality among competing visions of the good may be its most important contribution. The American state may thus permit free expression and encourage religious worship as critical to the inculcation of virtue,⁹⁶ but still stay out of regulation of churches as institutions. Indeed, the Universal Life Church, which offers on-line ordination to anyone who applies, provides a wonderful example.⁹⁷ The state does not oversee the church or its power to grant ordination. But it does recognize the ordination as conferring the power to conduct a marriage ceremony.

Individual states could, of course, deal with the clash in family systems on the same model as religion, and some countries have. Commentators have proposed that the state recognize only civil unions; that is, that the state administer only the financial and practical consequences of marriage. Ceremonial marriage along with its ritual and emotional components would be relegated to the private sphere. The state would replace marriage licenses with civil union certificates allowing couples to choose the church, synagogue, commitment ceremony or universal life minister of their choice to perform the ceremony – or to restrict their relationship to the civil aspects recognized by the state.⁹⁸

This approach, however, would institutionalize the blue state deregulation of sexuality more than it would maintain parity among the competing systems. The problem is that formal neutrality, desirable though it may be with respect to speech and private conduct, and critical though it may be with respect to such essential clashes as those over religion, may not be enough to address the expressive role of the state. Libertarian Robert Nozick has written that

[w]ithin the operations of democratic institutions, too, we want expressions of the values that concern us and bind us together. The libertarian position I once propounded now seems to me seriously inadequate, in part because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric. It neglected the symbolic importance of an official political concern with issues or problems, as a way of marking their importance or urgency, and hence of expressing, intensifying, channeling, encouraging, and validating our private actions and concerns toward them.⁹⁹

⁹⁴ Id. at 221-222.

⁹⁵ Id. at xxiv.

⁹⁶ William A. Galston, *Liberal Purposes* 257 (1991).

⁹⁷ See <http://www.ulc.org>.

⁹⁸ Edward A. Zelinsky, *Symposium Abolishing Civil Marriage: Deregulating Marriage: The Pro-Marriage Case For Abolishing Civil Marriage*, 27 *Cardozo L. Rev.* 1161 (2006)

⁹⁹ Robert Nozick, *The Examined Life* 286-87 (1989).

The expression of traditional family values in red states, and for many in the country as a whole, is a matter of urgency because of the state of our families. Channeling appropriate intimate behavior is challenging, and the institutions that have historically inculcated and policed family norms have atrophied. The problems are particularly great for those ready to assume adult responsibilities at younger ages, and for those most directly threatened by the transition to a post-industrial economy. The reaffirmation of shared values and the “symbolic importance of . . . official political concern” becomes particularly important when those values are seen as under assault.

The ability of the state to act at all in this arena therefore involves a choice between the two sets of values, and it is not a choice that can be avoided: doing nothing reaffirms the traditional state sanction of heterosexual marriage consistent with the promotion of traditional notions of sexual morality, and deregulating marriage in favor of civil unions or private ceremonies affirms equality and choice at the expense of the traditional family values.¹⁰⁰

Nozick suggests, consistent with his celebration of liberty, that the solution is not to avoid all expression of controversial values, but rather “when someone conscientiously objects on moral grounds to the *goals* of a public policy,” he or she should be allowed to opt out of that policy to the extent possible.¹⁰¹ He emphasizes, however, that while some even “propose removing anything morally controversial from the political realm, leaving it for private endeavor, . . . this would prevent the majority from jointly and publicly affirming its values.”¹⁰² Instead, he advocates balancing the symbolic expression of the majority against the individual’s ability to resist compelled participation.

I believe, despite my preference for blue state values, that Nozick is right that the state should retain the power to express the values of the majority,¹⁰³ and that within the American family law context that means preserving some space for the expression of different values in different states.¹⁰⁴ States can choose which values to promote on a majoritarian basis, and provide for their symbolic promotion, and active inculcation

¹⁰⁰ Though not, as we have argued above, the family values of financial regularity and commitment to children.

¹⁰¹ *Id.* at 290. (Emphasis in original).

¹⁰² *Id.*

¹⁰³ This argument depends, however, on representation in the expression of values. It is one thing for a legislature representing majoritarian views to promote values that affect all citizens equally. (Legislative efforts to stigmatizing adultery, for example, carry greater moral weight when unfaithful legislators are among those affected.) It is another thing, however, when the majority exercises political power to stigmatize behavior primarily associated a minority. It is arguable, for example, that welfare reform involved imposition of the views of a majority (marriage promoting middle class whites) through regulation of a program disproportionately affecting a minority (welfare recipients who are disproportionately poor people of color) who might embrace different values or priorities. To that end, promotion of the unity of sex, marriage and procreation by a heterosexual majority might be legitimate, but prohibition of same-sex (but not different-sex) sodomy clearly would not be.

¹⁰⁴ See Libby S. Adler, *Federalism and Family*, 8 *Colum. J. Gender & L.* 197, 197-99 (1999) (“Under our federalist system, the axiom has it, family law resides within the province of the states ... As a factual matter, however, the federal government exerts tremendous power over family.”).

through education and voluntary programs.¹⁰⁵ I believe that the limits on state power and the preservation of autonomy lie in avoiding where possible a “symbolic affront” in the clash of values, and preserving the autonomy of individuals to express different beliefs, and participate in private consensual conduct at odds with public norms.¹⁰⁶

The idea of “symbolic affront” requires explication. All choices of one set of values over another involves a “symbolic affront” to those rejected. Indeed, state inculcation of shared values necessarily involves efforts to undermine opposing views. Nonetheless, clashes between values do not always involve polar opposites. For example, those who would affirm women’s equality and autonomy, and maintain that a woman’s most important obligation to her children involves deferring childbearing until she is able to optimally provide for the children she rears, do not necessarily advocate abortion as an unqualified right. Instead, they see it as instrumental to values they do hold. Where different states vary in the choice of primary values, and both value choices are defensible, national decisions and the resolution interstate conflicts should attempt to minimize the symbolic affront to values actively promoted in some states, but not others.¹⁰⁷ In the abortion context, for example, this may mean that public funding, to the extent it occurs at all, exists at the state level, where it can be implemented in a way that complements the expression of shared values, rather than the federal level.

With respect to the expression of individual views and conduct, Nozick provides the example of a conscientious objector, who he argues should be permitted to substitute taxes for war for contributions of equal or greater value to another government program, and his suggestion works in the blue states. That is, someone who objects to state contributions to family planning or abortion services might be given the option of redirecting tax dollars. Indeed, the federal government has largely eliminated federal funding for abortion and similar services for reasons akin to those Nozick advances.

¹⁰⁵ Individual students or families, however, should have the option of not participating in public education to which they object. The ability not to participate in sex education classes or discussions of controversial literature provide an existing example.

¹⁰⁶ This leaves open the question of what behavior, such as polygamy, can still be banned as inconsistent with the overlapping consensus or the harm principle discussed above. See William N. Eskridge, Jr., *Body Politics: Lawrence V. Texas And The Constitution Of Disgust And Contagion*, 57 Fla. L. Rev. 1011, 1056 (2005), observing that:

The original principles undergirding the Fourteenth Amendment plus the admonition against raising the stakes of politics can be synthesized into doctrinal variables-features of a liberty- infringing policy that render it more or less constitutionally vulnerable under the Fourteenth Amendment. So a morals law that criminalizes conduct that (1) is no longer widely criminalized and (2) does not seem to impose harm on third parties but (3) is important to a coherent and well-organized social group is most constitutionally objectionable. Like consensual sodomy, fornication easily fits within this unregulable core: Most states have decriminalized it, there is virtually no evidence of third-party harms, and a whole generation (the baby boomers) consider the right to fornicate important to their lives, or formative experiences in their youths.

¹⁰⁷ This provides a basis for distinguishing *Loving v. Virginia*, 388 U.S. 1 (1967). By the time the case was decided in 1967, the moral basis of the anti-miscegenation statutes, which rested on an ideal of racial purity, could be said to be in disrepute whatever the majority response in some state polls might be. The Court accordingly held that the Virginia statute served no legitimate purpose. The identification of marriage with the unity of sex, procreation and childrearing, while under assault, cannot at this point be said to be in disrepute. See discussion *infra*.

The larger issues, however, involve the autonomy of individuals to order their lives, their relationships, and their families. No state is likely to compel participation in marriage, and though the shotgun marriage may still be alive in some parts of the country (and still apparently desired in Congress), direct coercion is rare.¹⁰⁸ Instead, the difficulty arises most from the symbolic affront that occurs from placing the imprimatur of the state on – or actively condemning -- controversial relationships.

To the extent that opponents of same-sex marriage have a legitimate basis on which to invoke the power of the state on a majoritarian basis, it comes from the identification of marriage, on a historical, emotional and religious level, with procreation, and the dissonance that arises from extending that relationship to non-procreative unions.¹⁰⁹ Conversely, the strongest claim to state recognition of same-sex marriage involves what Justice Scalia has referred to as the “homosexual agenda,” “directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”¹¹⁰ Affirmation of same-sex marriage involves practical and symbolic affirmation of the values of autonomy, equality and fairness.¹¹¹ It also involves recognition of the parenting status of two adults who may have undertaken important roles in children’s lives.

Those states, therefore, which wish to affirm equality and responsibility to children while deregulating sexuality, should encourage the creation of private spaces for the expression of traditional values. The separation of civil and religious marriage provides a perfect example.

For those states which wish to affirm the continuing limitation of marriage to a man and a woman, the answer may be to distinguish the symbolic affirmation of values from practical compulsion, and to separate federal recognition of basic rights governing conduct from greater state autonomy to express values.

The first component in this balance is national protection for private conduct. Ariela Dubler argues that Kennedy’s opinion in *Lawrence* represents the ultimate dismantling of marriage as the bright line between licit and illicit sex.¹¹² *Lawrence* instead effectively recognizes three categories of intimate behavior: state-sanctioned activity within marriage, illicit sex that continues to be criminalized such as prostitution or polygamy, and a new category that is neither approved nor condemned. Kennedy

¹⁰⁸ It is sadly more of an issue with respect to parental notification statutes; these issues, however, turn on the relationship of parental authority over a minor. See Sanger, *supra*.

¹⁰⁹ See, e.g., Chai Feldman’s summary of the arguments, observing that “[d]uring early congressional debates on marriage, opponents of marriage equality contended that marriage for same-sex couples would result in condoning gay sexual coupling and would thereby radically redefine and irrevocably shatter the moral foundations of both marriage and society. In later congressional debates, opponents shifted their argument to the claim that having a “mom and a dad” represented the optimal environment for passing on moral and social values to children.” Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 *Yale J.L. & Feminism* 139, 141 (2005).

¹¹⁰ *Lawrence v. Texas*, 539 U.S. 558, 602 (2003).

¹¹¹ Feldblum, *supra*, at 144.

¹¹² Dubler, *supra*, at 812.

takes pains in *Lawrence* to recognize the potential value of same-sex bonds, but he deliberately stops short of insisting that the state must extend formal recognition to the relationships. In doing so, he creates a protected space for individual behavior while minimizing the symbolic affront to majoritarian values.

Second, the harm principle should limit the policing of other aspects of traditional morality as it relates to children. Virtually all custody precedents, for example, require a nexus between sexual behavior and children's interests as a consideration in custody cases.¹¹³ Such cases allow symbolic reinforcement of traditional values without (*if* effectively followed) too great an infringement on private conduct.

Third, while interstate recognition of same-sex union may trigger resistance, adoptions and property judgments should clearly come under the protection of the full faith and credit clause. These court orders may not necessarily involve state embrace of the underlying adult unions; yet, they are of enormous potential significance in the private ordering of individual lives.¹¹⁴

The abortion cases pose greater challenges, in part, because the issue involves not just a clash over family values, but deep, religiously based divisions over the definition of life. I believe that at least part of the reason for the enduring clash over abortion is the fact that the Supreme Court's decision in *Roe* does pose a symbolic affront to deeply held values that has not dissipated with the passage of time. I will leave the definitions of life to others, but argue that the approach I have maintained with respect to same-sex marriage also holds with respect to abortion in at least two respects.

First, parental notification measures involve a symbolic reaffirmation of parental authority over sexual conduct. Protection for vulnerable minors should come through safeguards built into implementation of the procedures rather than a direct assault on the principle.

Second, greater protection should be accorded to interstate travel. Choice may be meaningless without access.

Finally, as noted above, the ability of individuals to opt out, or express disapproval should be respected. As a practical matter, this involves a balance between

¹¹³ See Harris, Teitelbaum and Carbone, *Family Law* 666 (2005).

¹¹⁴ The traditional rule that states must recognize out of state marriages unless the marriages offend the basic public policy of the states, in contrast with the full faith and credit laws, does not require deference to the different values of different jurisdictions. Instead, the home state is free to choose to affirm its values at the expense of a sister state's. Because of this legal frame, the symbolic meaning of recognition of an out of state marriage is greater than the symbolic meaning of an out of state adoption or property judgment. See June Carbone, (work in progress).

securing access to abortion and family planning services and allowing individual providers of medical services not to participate in actions they find objectionable.¹¹⁵

Conclusion

Both Kennedy's *Lawrence* majority opinion and Scalia's dissent recognized that the expression of values reflects evolving, rather than static norms. They disagreed on the respective roles of the legislature and the courts in recognizing changes over time. The argument in this paper suggests that the evolution also reflects, not just geographic divisions, but differing responses to class, gender and economic shifts that may play out at different times and with different consequences in various parts of the country. In the face of such fundamental differences, choosing one set of values over another may simply deepen a polarization that encourages not just the rejection, but the disrespect of opposing views and those who hold them. This paper has argued that a liberal democracy ought to be able to promote controversial values, but it should do so in ways that minimize "the symbolic affront" to minority perspectives and preserve the individual autonomy of expression and conduct that leaves room for institutional evolution.

In the meantime, this solution insists on recognition of differing roles for legislatures and those courts that would impose uniform national results as a matter of constitutional right. The articulation of majoritarian values can be an appropriate role for the legislature even in the face of a vigorous dissent. The courts, in contrast, should protect individual autonomy in the expression of beliefs, participation in symbolic activities, and private conduct. Bill Eskridge, who has strongly advocated recognition of same-sex marriage in other contexts, maintains that:

The politics of tolerance strongly counsels that the Court do nothing for the time being. Either rejecting or endorsing the constitutionality of same-sex marriage bars would immediately raise the stakes of national politics. The reason is that the issue of same-sex marriage not only remains divisive, but also divides in ways that cut to the core of people's identities. Under these circumstances, the Court's best strategy is to leave the matter to the states, the famous "laboratories for experimentation."¹¹⁶

It is important to emphasize that allowing room for state promotion of controversial values holds only so long as the expression of values represents defensible values important to legitimate state interests, and the states, through the legislature or the courts, protect what might otherwise be unpopular groups from oppression. At the point where it can no longer be said that any legitimate state interest is served, or where majoritarian values have so shifted to undermine the basis for the values expressed, the balance between symbolic expression and individual autonomy may change. Thus,

¹¹⁵ This clearly means that an individual doctor should not be compelled to perform an abortion. It does not mean, however, that the state may not guarantee access to abortion services by requiring that all doctors employed in certain clinics be willing to provide abortion services as a condition of employment.

¹¹⁶ Eskridge, *supra*, at 1057-58.

Loving v. Virginia,¹¹⁷ which in many ways involved the same type of clash between a traditional vision of the role of marriage and a claim of equal rights for an oppressed majority, avoided the type of symbolic affront described here because the anti-miscegenation principle enshrined in the challenged statute had lost its legitimacy. While in some parts of the country the case against same-sex marriage is equally tenuous, in other places the continuing celebration of the unity of marriage, sex and procreation retains enough integrity to counsel deference to majoritarian expression. Autonomy in the definition of family, as a state created status, thus remains unattainable.

¹¹⁷ 388 U.S. 1 (1967).