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The Real Danger of Same-Sex Marriage

By Stephen Baskerville*

* Stephen Baskerville is an Earhart Fellow at The Howard Center for Family, Religion & Society. He is grateful to Allan Carlson and Bryce Christensen for critical comments of earlier drafts. Responsibility for the contents is his alone.

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Undermining traditional marriage threatens not only the family and social stability, but civil freedom.

The American Political Science Association recently began promoting same-sex marriage in a series of articles that read more like polemic on behalf of the gay and women's rights movements than dispassionate scholarly appraisals of a political phenomenon.[1] With the academic world increasingly accused of losing touch with the concerns of ordinary citizens, it is ironic that political scientists should depart from the norms of disinterested scholarship in such a way as to further marginalize the academy rather than explore issues that will bring it closer to public concerns. The trend reaches its *reductio ad absurdum* in Jyl Josephson's complaint that same-sex marriage will not likely do enough to erode heterosexual marriage.[2]

This is doubly unfortunate, because political scientists have a unique perspective to offer on social issues, which are often debated without full understanding of the operations of government institutions. Social reforms often carry unintended consequences, nowhere more so than in family policy. A full appreciation for the implications of same-sex marriage is more likely if we examine it in the larger political context of marriage and the family.

When we do, we may discover why the polarization of American society represented in the 2004 election has centered around precisely these questions of marriage and family and that same-sex marriage may prove only a preliminary skirmish. While both sides focus on homosexuality, larger questions lurk behind this controversy.

Aside from feminist treatments that are largely theoretical and almost uniformly hostile, the larger politics of marriage has received little practical attention from scholars concerned with the role and boundaries of the state. Family and marriage are generally debated as economic or cultural questions that remain largely the province of psychology, sociology, social work, and law. One exception proves the rule. When James Q. Wilson, weighed in recently on family non-formation in low-income communities, it was only to throw up his hands in despair: "If you believe, as I do, in the power of culture, you will realize that there is very little one can do."[3] Like many others (including the Clinton and Bush administrations), Wilson is reduced to advocating marriage "education."

Basic political questions are conspicuously missing from current debates: What precisely is the legal status of marriage, and what is the appropriate role of the state in private families and households? How does government-recognized marriage affect the boundary between public and private? What legitimate role does the church play, and what are the relations of church and state insofar as each claims a role in marriage?

Josephson argues for a "connection between access to the institution of marriage and full citizenship," insisting that "marriage is central to ideas of citizenship." She also notes that this "monumental public character" carries a paradoxical corollary: that

"marriage establishes the right to a realm of privacy."[4] But there are dimensions to these principles she does not explore, and they are precisely the ones that are now transforming public policy. One scholar likens the family crisis to the Civil War, with constitutional implications that could prove equally profound.[5] G.K. Chesterton once suggested that the family serves as the principal check on state power and predicted that someday the state and family would directly confront one another.[6] Same-sex marriage is just one indication that that day has arrived.

Another is the Bush administration's proposal for marriage education programs. These essentially continue the fatherhood programs promoted by the Clinton administration and other governments during the 1990s. They too are justified on the principle that marriage is a "public" institution, with public benefits extending beyond private individuals. "Marriage is a public social good," writes Matt Daniels of the Alliance for Marriage. "The health of American families — built upon marriage — affects us all."[7]

Conservatives insist that the family is the building block of civil society and that undermining marriage could therefore threaten the social basis of civilization itself. Though plausible, explaining precisely how this scenario will play out, both concerning the family generally and same-sex marriage in particular, has proved more elusive. While most Americans are instinctively uneasy about gay marriage, it is not obvious precisely how it will weaken conventional marriage. Even some traditionalists doubt the likely effectiveness of a constitutional amendment. Some oppose gay marriage as the "last straw" in a series of threats to the family. But simply preventing the last straw is not addressing the larger problem.

Likewise, some conservatives question the administration's plans to promote marriage education and ask how government officials can enhance anyone's marriage.[8] But liberal opposition has been more vocal. The *American Prospect* argues that government should not be meddling in private households. The *Economist* has called the initiative "Orwellian."[9]

Administration officials reply that marriage promotion will in fact reduce government intrusiveness. Assistant Secretary of Health and Human Services (HHS) Wade Horn argues that "rather than an expansion of government, the President's Healthy Marriage Initiative is an exercise in *limited government*." Horn points out that a huge volume of domestic spending is directly connected to family dissolution:

> My agency spends $46 billion per year operating 65 different social programs. If one goes down the list of these programs — from child welfare, to child-support enforcement, to anti-poverty assistance to runaway-youth initiatives — the need for each is either created or exacerbated by the breakup of families and marriages.... Controlling the growth of these programs depends on preventing problems from happening in the first place. One way...is to help couples form and sustain healthy marriages.[10]

Significantly, Horn illustrates with Orwellian scenarios of his own: "Government is most intrusive into family life when marriages fail," he adds. "Try getting married, having kids, and then getting a divorce.... Government will tell you when you can see your children, whether you can pick them up after school or not, and if so, on what days, whether you can authorize medical care for your children, and how much money you must spend on your kids. By preventing marital breakup in the first place...one obviates the need for such intrusive government."

Yet Horn does not distinguish the public's interest from the state's. Government is not necessarily a neutral player, and invoking the "public" nature of marriage to justify marshalling the state machinery to enhance citizens' private lives and even to define (and potentially redefine) marriage is, at the least, a complex and somewhat ironic maneuver. Whether his plan can succeed — and the likely consequences of same-sex marriage too — depends upon the larger political context of state structures that are already transforming marriage and family life.

A Public Institution

In different ways then, both sides are arguing for marriage as a "public" institution.[11] But this truism requires some qualification. The legal systems of the Common Law countries have long recognized the family as a private zone that is off-limits to government — what Supreme Court Justice Byron White called a "realm of family life which the state cannot enter."[12]

Family inviolability was never absolute, but the basic principle has been established for centuries and most emphatically in connection with what traditionalists themselves point out is the unique and foremost purpose of marriage and family: raising children. The private family creates a legal bond between parent and child that allows parents, within reasonable limits, to raise their children according to their own principles, free from government interference. "Whatever else it may accomplish, marriage

acknowledges and secures the relation between a child and a particular set of parents," writes Susan Shell. "The right to one's own children...is perhaps the most basic individual right — so basic we hardly think of it."[13]

This right has long been recognized by the Supreme Court and the Common Law. Numerous decisions have held that parenthood is an "essential" right, "far more precious than property rights," that "undeniably warrants deference, and, absent a powerful countervailing interest, protection."[14] "The liberty interest and the integrity of the family encompass an interest in retaining custody of one's children," according to one decision.[15] Parental rights have been characterized by the courts as "sacred" and "inherent, natural right[s], for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed."[16]

Today this principle has become largely a fiction, and not a fiction because of same-sex marriage. Shell summarizes commonplace notions that, until recently, have been virtually universal among free societies: "No known society treats the question of who may properly call a child his or her own as simply...a matter to be decided entirely politically as one might distribute land or wealth," she writes.

No known government, however brutal or tyrannical, has ever denied, in fact or principle, the fundamental claim of parents to their children.... A government that distributed children randomly... could not be other than tyrannical. ... A government that paid no regard to the claims of biological parenthood would be unacceptable to all but he most fanatical of egalitarian or communitarian zealots.[17]

Though unexceptionable as society's moral consensus, Shell's points also provide an unintended commentary on the ignorance that pervades today's debates. For current marriage law in the Western democracies has rendered these statements both prescient and factually false. "No known government" ever crossed this line until about thirty years ago — well before same-sex marriage — when most of the Western democracies did so. It is having precisely the consequences she postulates.

While Shell uses the gender-neutral "parents," this function of marriage to protect the parent-child bond is far more important for fathers than for mothers. Margaret Mead once pointed out that the weakest link in the family chain is always the father; motherhood is an indisputable biological fact, whereas fatherhood is a social construct.[18] The social institution that creates fatherhood is marriage.

In fact, it is no exaggeration to say that, politically speaking, the most important function of marriage is to create paternity. Other benefits are rightly claimed for marriage by its advocates. But in the end, the central one is this, to establish fatherhood.[19] Once this is understood, everything else about the current problems of marriage and the family falls into place. And once this is understood, the vitiating problem with same-sex marriage becomes clear.

Marriage turns a man from a sperm donor into a parent and thus creates paternal authority, allowing a man to exercise the authority over children that otherwise would be exercised by the mother alone. Feminists understand this when they renounce marriage as an institution of "patriarchy."[20] Among some conservatives, it has become almost a cliché that marriage exists foremost to civilize men and control their promiscuity.[21] If so, it performs this role as part of a larger function: to protect the father-child bond and with it the intact family. This point, potentially the strongest in their case, is overlooked by some traditionalists who argue that marriage undergirds civilization. For it is the presence of the father that creates both the intact family and, by the same measure, the civil institution itself. Thomas Hobbes attributed to married fatherhood a central role in the process of moving from the state of nature into civic life. In nature, Hobbes argued, "the dominion is in the mother":

> For in the condition of mere nature, *where there are no matrimonial laws*, it cannot be known who is the father, unless it be declared by the mother. And therefore the right of dominion over the child dependeth on her will and is consequently hers.[22]

Only in civil society, where "matrimonial laws" do operate, is authority over children shared with the father.

Our legal system has long insisted that marriage, not sperm, determines the father. This is the purpose behind Lord Mansfield's Rule stipulating that a child born within marriage is presumed to be that of the husband: It enabled a marriage to survive the wife's adultery.[23] (Earlier ages had perhaps a more balanced assessment of the female and male sex drives.)

The role of marriage in establishing paternity is also seen in its absence. Today, the weakening of marriage and the family

produces fatherless, not usually motherless, homes (at least not initially). As out-of-wedlock births have exploded, governments have developed elaborate bureaucratic substitutes for marriage in their efforts to "establish paternity" for purposes of collecting child support and (it is claimed) connecting fathers with their children.[24] The different but interchangeable labels used for similar family promotion programs to address this problem by the last two administrations recognize that fatherhood (Clinton) and marriage (Bush) are inseparable.[25]

Seen in this light, same-sex marriage serves no useful social purpose; indeed, it is an absurdity. It attempts to apply gender interchangeability at precisely the point where gender difference demands that biological reality (motherhood) be reconciled to social necessity (fatherhood), as the *Goodridge* decision acknowledges by replacing the presumption of paternity with a presumption of "parenthood." But far from establishing fatherhood, and therefore a settled and stable family situation, this compounds the problem of who precisely are the parents of a given child. A presumption of "parenthood" confers parent status on any individual recognized as "married" to another individual who acquires a child by whatever means. Gallagher calls this the problem of "too many parents,"[26] and it is not the only complication.

Once marriage becomes detached from procreation, therefore, the entire system of domestic and social stability that marriage exists to foster unravels.[27] Marriage then is no longer an autonomous and self-renewing institution, mediating the generational interface between public and private, and therefore limiting government power. Instead, it becomes merely a prize in the competition for power and one to be passed out by the very state it once served to control, a form of government patronage handed out to favored groups based on their relative power, like jobs or contracts. This is precisely what has now happened. It is the meaning of Josephson's claim and that of gay groups that access to marriage constitutes a badge of "citizenship" and mark of "equality." (Ironically but tellingly, as Josephson points out, "Feminist political and legal theorists have critiqued the institution of heterosexual marriage," with its inclusion of fatherhood, "as harmful to women's status *as citizens*.")[28] With this kind of marriage, the family no longer even renews itself naturally — its unique advantage over the state, according to Chesterton — since it cannot produce children of its own, but must take them from others.

Indeed, what is true of marriage is also true of those whom marriage exists to foster: children. As marriage has weakened, children have become pawns and weapons in the competition for political power. This is true in several obvious policy areas — divorce, child abuse and child protection, foster care, adoption, domestic violence, schooling — though it is spreading beyond family policy to a vast array of other policies and programs, from seat-belt laws to tobacco and gun lawsuits to welfare and even international treaties, that are now justified "for the children." Decisions previously left to parents are now taken by government officials, which not only transfers control over children from parents to the state, but also rationalizes policy innovations that limit adult freedom.

But while same-sex marriage may be the most stark example of how redefining marriage undermines the social function marriage serves, it is not the only one.

Redefining Marriage

Governments have long claimed some control over marriage, whether solemnized through a religious or a civil ceremony. Some object to practices like marriage licenses, claiming the state has no business defining the terms of a private agreement or of an institution that predates civil government. Libertarians propose "privatizing" marriage as a purely civil contract, and some liberals have more provocatively argued for "abolishing" marriage as a state-sanctioned act.[29] Traditionalists object, since this would presumably permit forms of marriage other than a man and a woman. Yet so long as a private marriage contract is enforceable in law, marriage would actually enjoy more legal protection than it has today.

Whatever the state's precise role in marriage formation, politically it is far less important than another question. The institutional strength of marriage — and its connection with larger issues of public policy — is determined not by the words through which a marriage is formed, but by the deeds through which a marriage is dissolved.

Here the central players, as both sides have acknowledged, are not homosexuals, but heterosexuals. "The weakening of marriage has been heterosexuals' doing, not gays', for it is their infidelity, divorce rates, and single-parent families that have wrought social damage," observes the *Economist*.[30] Marriage advocate Maggie Gallagher dismisses this argument as a "lawyer's trick,"[31] but proponents of gay marriage have used it to great effect. "The problem today is not gay couples wanting to get married," writes Jonathan Rauch. "The threat to marriage is straight couples not wanting to get married or straight couples not staying married."[32] Traditionalists' attempts to take the moral high ground have clearly been undermined, even among potential sympathizers, by their inability to answer this point effectively. "People who won't censure divorce carry no special weight as

defenders of marriage," writes columnist Froma Harrop. "Moral authority doesn't come cheap."[33] Some marriage advocates, like Michael McManus of Marriage Savers, themselves point out that "divorce is a far more grievous blow to marriage than today's challenge by gays."[34]

Though scholars defending gay marriage have picked up on this paradox,[35] its implications cut both ways. For the corollary is that the push for same-sex marriage is mostly a symptom of how altered marriage has already become for other reasons. Gay marriage would almost certainly not be an issue today if marriage had not already been transformed by heterosexuals. "Commentators miss the point when they oppose homosexual marriage on the grounds that it would undermine traditional understandings of marriage," writes Bryce Christensen. "It is only because traditional understandings of marriage have already been severely undermined that homosexuals are now laying claim to it."[36] Though gay activists cite their very desire to marry as evidence that their lifestyle is not inherently promiscuous, they also acknowledge that that desire arises only by the promiscuity permitted in modern marriage. "The world of no-strings heterosexual hookups and 50% divorce rates preceded gay marriage," Andrew Sullivan points out, unexceptionably. "All homosexuals are saying...is that, *under the current definition*, there's no reason to exclude us. If you want to return straight marriage to the 1950s, go ahead. *But until you do*, the exclusion of gays is simply an anomaly — and a denial of basic civil equality." Historian Stephanie Coontz likewise notes, "Gays and lesbians simply looked at the revolution heterosexuals had wrought and noticed that, *with its new norms*, marriage could work for them, too."[37] Josephson pushes the polemical envelope. Having accurately blamed marriage deterioration on heterosexual divorce, she uses that fact to rationalize undermining it further through same-sex marriage. "The state-created institution of marriage has historically been altered...to serve new or newly recognized state interests," she argues, invoking the same intrusive policy innovations cited by Horn: "no-fault divorce" and "heightened enforcement of child support."[38]

These arguments from both ends of the spectrum illustrate why it is futile to assess the strength of marriage as an institution or understand its significance for civic life without confronting its nemesis: divorce. Though traditionalists decry efforts to "redefine" marriage, the more basic redefinition of marriage has already been effected by the little-understood system of unilateral or "no-fault" divorce.

The Abolition of Marriage

Some three decades ago, while few were paying attention, the Western world embarked on what may turn out to be the boldest social experiment in its history. With no public discussion of the possible consequences, laws were enacted in virtually every jurisdiction that effectively ended marriage as a legal contract. Today it is not possible to form a binding agreement to create a family.

The result was more than the removal of government from enforcement of the contract; it allowed the government to enforce the abrogation of the contract. Regardless of the terms by which a marriage is entered, government officials can, at the request of one spouse, simply dissolve it (and the household created by it) over the objection of the other with no penalty to the moving party. Gallagher aptly titled her 1996 book, *The Abolition of Marriage*. It is difficult to see how legalizing gay marriage can weaken an institution that has already been legally "abolished," nor how a constitutional amendment can protect a contract that is now unenforceable in law.

In contrast to same-sex marriage, no-fault divorce was never subject to a public debate. Gallagher once attributed this silence to "political cowardice": "Opposing gay marriage or gays in the military is for Republicans an easy, juicy, risk-free issue," she complained. "The message [is] that at all costs we should keep divorce off the political agenda." No American politician of national stature has seriously challenged involuntary divorce. "Democrats did not want to anger their large constituency among women who saw easy divorce as a hard-won freedom and prerogative," writes Barbara Dafoe Whitehead. "Republicans did not want to alienate their upscale constituents or their libertarian wing, both of whom tended to favor easy divorce, nor did they want to call attention to the divorces among their own leadership."[39] In his famous denunciation of single parenthood, Vice President Dan Quayle was careful to make clear, "I am not talking about a situation where there is a divorce."[40] The exception proves the rule. When the late Pope John Paul II spoke out against divorce in January 2002, he was roundly criticized from both the right and the left.[41]

Why this deafening silence, even among political figures who now claim to be defending marriage?

In the years since it was enacted, no-fault divorce has grown into a huge state and private machinery; in fact, few enterprises have forged so intimate and elaborate a public-private symbiosis. Thirty years of unrestrained divorce has created vast interests with a stake in encouraging it. David Schramm cautiously estimates that divorce costs the public $33.3 billion annually.[42]

But divorce is more than a lucrative industry; it is also a vast governmental regime. Divorce and custody are the cash cow of the judiciary, constituting some 35-50% of civil litigation,[43] and also bring employment and earnings to a host of executive and legislative officials, plus private hangers-on: lawyers, psychotherapists, mediators, counselors, social workers, child support agents, and more. Divorce litigation fuels well-known lines of political and judicial patronage.[44] "The judge occupies a vital position...because of his control over lucrative patronage positions," according to Herbert Jacob, where appointments "are generally passed out to the judge's political cronies or to persons who can help his private practice."[45] Divorce also fills state and local government coffers with federal money for a host of divorce-related social problems. So entrenched has divorce become within our political economy and political culture that even its critics seem to have developed a stake in having something to bemoan. Hardly anyone has an incentive to bring it under control.

Indeed, divorce and unmarried childbearing may have political implications we are only beginning to understand, since they act as major engines for the overall expansion of government power at all levels. As Daniels and Horn point out, family dissolution breeds a host of societal ills for government to solve. Virtually every major social pathology, from violent crime to drug abuse to truancy, is directly attributable to family breakdown and fatherless homes more than any single factor, surpassing race and poverty.[46]

While this has long been recognized within social policy, the political implications have never been thoroughly pursued. "If we want less government, we must have stronger families," President Jimmy Carter once said, "for government steps in by necessity when families have failed."[47] But Carter may have perceived the cause-and-effect backward, for it follows that the state has a self-interest in failed families and a motive to step in and declare failure when given the opportunity. This is precisely what divorce courts do: "No-fault divorce gave judges, at the request of one-half of the couple, the right to decide when a marriage had irretrievably broken down."[48]

In ironic contrast to marriage, divorce is often defended as a "private" matter and therefore immune from public scrutiny; some even describe it as a "civil liberty."[49] In practice, divorce raises fundamental questions about the reach of the state into private life that have never been confronted. Far more than marriage, divorce by its nature requires active and almost incessant government intervention. Marriage creates a private household, which may or may not necessitate signing some legal documents. Divorce dissolves not only a marriage, but also the private household formed by it, usually against the wishes of one spouse. It inevitably involves state functionaries — including police and prisons — to enforce the post-marriage order. Otherwise, one spouse might continue to claim the protections and prerogatives of private life: the right to live in the common home, to possess the common property, or — most vexing of all — to parent the common children.

Few stopped to consider the implications of laws that shifted the breakup of private households from a voluntary to an involuntary process. If marriage is not a wholly private affair, involuntary divorce by its nature requires constant supervision over private life by state officials. Divorce by mutual agreement carries few consequences. But mutual agreement governs only about 20% of divorces; in the remaining 80% the government assumes control over the private life of at least one individual without that individual's consent — and when he or she may be unimpeachable before the law.[50] In these circumstances, unilateral divorce involves state agents forcibly removing people from their homes, confiscating their property, and separating them from their children. It poses an inherent threat to the inviolability of not only marriage, but the very concept of private life.

The involvement of the judiciary, with its handmaid, the penal apparatus, indicates how marriage dissolution blurs distinctions the justice system once delineated carefully: private versus public, civil versus criminal, therapy versus justice, sin versus crime. No-fault divorce introduced novel legal concepts, such as the principle that one could be decreed guilty of violating an agreement that one had, in fact, not violated. "According to therapeutic precepts, the fault for marital breakup must be shared, even when one spouse unilaterally seeks a divorce," observes Whitehead. "Many husbands and wives who did not seek or want divorce were stunned to learn...that they were equally 'at fault' in the dissolution of their marriages."[51] The "fault" that was ostensibly thrown out the front door of divorce proceedings re-entered through the back, but now without precise definition. The judiciary was expanded from its traditional role of punishing crime or tort to punishing personal imperfections and private differences: suddenly, one could be summoned to court without having committed any legal infraction; the verdict was pre-determined before any evidence was examined; and one could be found "guilty" of things that were not illegal. "Lawmakers eliminated a useful inquiry process and replaced it with an automatic outcome," writes Judy Parejko. "No other court process is so devoid of recourse for a defendant. When one spouse files for divorce, his/her spouse is automatically found 'guilty' of irreconcilable differences and is not allowed a defense."[52]

Though marriage ostensibly falls under civil law, the logic quickly extended into the criminal realm. The "automatic outcome" expanded into what effectively became a presumption of guilt against the involuntarily divorced spouse ("defendant"). Yet the due process protections of formal criminal proceedings did not apply, so involuntary litigants could be criminalized without any action on

their part and in ways they were powerless to avoid. In some jurisdictions, the defendant in a divorce case is the only party in the courtroom without legal immunity.[53]

Politically, no-fault divorce did much more than allow families to self-destruct. It permitted the state in the person of a single judge to assume jurisdiction over the private lives of citizens who were minding their own business and turn otherwise lawful private behavior into crimes. Previously, a citizen could be incarcerated only following conviction by a jury for willfully violating a specific statute, passed with citizen input and after deliberation by elected legislators, that applied equally to all. Suddenly, a citizen could be arrested and jailed without trial for failing to live in conformity with an order, formulated in a matter of minutes from limited information by an unelected judge, that applied to no one but himself (it is usually, for reasons we will see, the man) and whose provisions might well be beyond his ability to obey.[54] In effect, a personalized criminal code is legislated *ad hoc* around each divorced spouse, subjecting him or her to arrest for doing what anyone else may lawfully do.

Unilateral divorce thus placed the family in a legal-political status precisely the opposite of the original purpose of marriage. Far from preserving a private sphere of life immune from state intervention, involuntary divorce opened private lives to unprecedented state control. Thus the irony of those who question why gay partners should wish to have the "benefits" of marriage and thus open their private lives to the increasingly conspicuous horrors of family law proceedings.[55] Indeed, a California bill legalizing same-sex marriage was nicknamed the "gay divorce law," because it would force individuals wishing to part company into court proceedings and to spend money on lawyers.[56] Previously, in the eyes of the law, such a couple was simply two individuals in a household, whose sexual "intimacy" was a matter of official indifference. With marriage or civil unions, they become spouses or "intimate partners" into whose private lives the state may insert its coercive authority at the mere invitation of either, with any grievance or none.

The logic reached its conclusion in proposals recently published by the American Law Institute (ALI).[57] This influential practitioners' group announced that the scope of family law would be extended to encompass jurisdiction over non-marital private arrangements such as cohabiting couples, both heterosexual and homosexual, and indeed all private homes.

Marriage defenders protested, but they seem to have misunderstood the implications. As they now argue with respect to same-sex marriage, traditionalists charged that ALI was undermining marriage by blurring the distinction between traditional marriage and cohabitation.[58]

But ALI was doing much more than this. Family law practitioners were using the toehold they had established in married households through divorce law to extend state jurisdiction into every household entailing an "intimate relationship," regardless of whether that household was created through marriage. Divorce operatives were declaring that no home was too private to be beyond the reach of official scrutiny. With breathtaking irony, an "intimate relationship" (which officials reserved for themselves to define) became not a status which is off-limits to government supervision, but precisely the opposite, one that gives government an *entrée* to exert virtually unlimited power over personal life. The "abolition of marriage" brought in its wake the abolition of private life.

Parens Patriae, or the State as Parent

To compound the irony, the factor that now overwhelmingly justifies state intervention into private life is the very one that had previously necessitated keeping the state out: children. As with same-sex marriage, by ignoring children, a case can be made that divorce affects no one beyond the couple. Once children are introduced, the dynamic changes fundamentally. Here too the politics of same-sex marriage and divorce become further intertwined in ways not addressed in the current debates.

Before the divorce revolution, legal authority over children had long been recognized to reside with their parents, absent some transgression. "For centuries it has been a canon of law that parents speak for their minor children," wrote Supreme Court Justice Potter Stewart. "So deeply embedded in our traditions is this principle of the law that the Constitution itself may compel a state to respect it."[59] This too has been not only abrogated, but directly inverted by divorce law, which proceeds from precisely the opposite principle: that "the child's best interest is perceived as being independent of the parents, and a court review is held to be necessary to protect the child's interests."[60]

As many have observed of marriage itself,[61] introducing children into marriage politics brings pressures for gender differentiation. While differences in the treatment of men and women have theoretically been eliminated, those governing the allocation of children

remain stubbornly resistant. They are now, however, subject to some ironic distortions.

Traditionally, as Allan Carlson points out, governments set the terms of marriage less to provide rights than to impose obligations. Even the protections of marriage were originally "burdens," and (consistent with the state's interest in supervising marital dissolution) the ones Carlson enumerates all pertain to divorce: "alimony, child custody, and the division of property."[62] Not only do these obligations only come into play with divorce; they originally served as disincentives to it. Significantly, these burdens were not symmetrical; they all involved removing something from the man. But they were accepted, because as long as he remained faithful, the man in return derived from marriage that vital protection we examined at the beginning: the right to have children recognized as his. This too has become a fiction.

Because it demonstrates irrefutable limits to gender interchangeability, the role of marriage in establishing paternity is a central feminist grievance and marriage itself a feminist target. "Kinship laws still establish married men's paternity through marriage, not through their biological relationship with children," observes Josephson, echoing Hobbes. "By this means, women are equated with nature and their relationship to children is biological, whereas men's relationship to children is established politically through the law of marriage." Josephson emphasizes that the "political" nature of paternity constitutes the central feminist objection to marriage: "While it is true that men who are not married are declared fathers through paternity procedures in child support laws, which may entail paternity tests, the marital relation is still retained in paternity law: the existence of a legal marriage contract trumps biological paternity. The marriage contract creates fathers as *political* beings; moreover, marriage still functions to control women's sexuality for the purposes of ensuring a politically controlled genealogy."[63]

Josephson's exception is significant. Whatever objections proceed from their theoretical purity, feminists have also been very skillful at maneuvering these paternity rules to their own political purposes. Using the new divorce laws, they have diametrically inverted the effect of marriage and turned paternity into a crime. Under standard rules, the presumption of paternity served to preserve marriage, as we have seen. Today, by permitting what has come to be known as "paternity fraud," no-fault divorce law has transformed paternity establishment into an incentive to dissolve rather than preserve families. Not only can an adulterous wife now end paternal authority simply by filing for divorce, she can also (perhaps in collusion with the biological father) collect child support from the cuckolded husband for the children produced by the adultery.[64]

This is only one example of how the penal consequences of marital weakening are not symmetrical. Overwhelmingly when children are involved, the spouse on whom the penal apparatus will be brought to bear, and who will experience the state's growing capacity to seize children and criminalize the involuntarily divorced, is the father.

Some believe this is logical, and it may be inevitable. Certainly it would be appropriate if, as popularly believed, the father is the one abandoning the marriage. In fact, when children are involved, the divorcing parent is almost always the mother, usually without grounds.[65]

The failure of policymakers to accept this fact, and instead to address its symptoms, has led to ever-more invasive measures into private life and a panoply of highly repressive law-enforcement actions against primarily (though not exclusively) fathers. These are invariably justified to protect and provide for women and children once the father is gone. Yet these policies create the very fatherless homes they ostensibly assist. They are presented as responses to alleged social problems that were not problems only a few years ago: domestic violence, child abuse, and child support. Significantly, no public outcry ever demanded a government response to these claimed ills; the initiative has come entirely from government officials and government-funded interest groups.

Foremost among these are feminists. For the criminalization of divorced fathers did not come about by accident, and neither did no-fault divorce. Growing out of the cultural climate of the sexual revolution, it was really feminists who created the divorce revolution. The National Association of Women Lawyers (NAWL) claims credit for pioneering no-fault divorce, which it describes as "the greatest project NAWL has ever undertaken." "By 1977," NAWL proudly notes, "the ideal of no-fault divorce became the guiding principle for reform of divorce laws in the majority of states."[66] Divorce has a long feminist pedigree,[67] and Germaine Greer argues that the high divorce rate should be celebrated as the major sign of feminist progress.[68] Today, divorce liberalization continues to be promoted by feminist activists worldwide, often unopposed as a "human rights" measure. When Spain's socialist government came to power in 2004, their three domestic priorities were legalized abortion, same-sex marriage, and liberalized divorce. Turkey was forced to withdraw a proposal to criminalize adultery by the European Union, but liberal divorce counted in their favor.

Divorce has actualized the radical feminist dream of political warfare against men, and unlike other items on the feminist agenda, it

has done so virtually unchallenged. By playing upon popular and conservative sympathy for women and children and the fear of all politicians and advocacy groups to be seen as defending wife-beaters, child molesters, and "deadbeat dads," the feminist-driven divorce industry has launched, with hardly a voice of opposition, the greatest destruction of constitutional liberties in the Western world today. Dean Roscoe Pound has said that "the powers of the Star Chamber were a trifle in comparison with those of our juvenile court and courts of domestic relations."[69]

The Politics of Domestic Violence

The most immediate problem created by involuntarily divorce, that was never addressed, is how to get the forcibly divorced spouse out of the home. When that spouse is the father, the solution is to accuse him of domestic abuse. "It's an easy way to kick somebody out," according to one family law specialist, who claims to see at least one case a month where patently false charges are used to remove a spouse. "You spend a night in jail almost automatically. And your bail conditions restrict you from ever attending at the home again except to get your goods." One mother relates that a lawyer told her, "There's no reason for you to leave [your home]. Can you get him to hit you? ... If you do that, we can have him forcibly removed from the home."[70]

Like divorce, domestic violence has grown into a multi-billion dollar industry and "an area of law mired in intellectual dishonesty and injustice."[71] Feminists have depicted domestic violence as a political crime perpetrated to perpetuate male power. Yet the fact that women commit domestic violence equally often has been established in numerous studies.[72] More important than achieving gender balance, however, is to understand how the huge growth in domestic violence accusations is connected almost entirely with family dissolution and disputes over child custody.[73]

The very concept of "domestic violence" has never been clearly defined. Governments throughout the United States treat it not as a form of violent assault, but as a conflict, again, within an "intimate relationship." It therefore blurs the distinction between crime and disagreement and need not be either violent or criminal. Official definitions include "extreme jealousy and possessiveness," "name calling and constant criticizing," and "ignoring, dismissing, or ridiculing the victim's needs."[74]

Accusations are not constrained by due process of law. "With child abuse and spouse abuse you don't have to prove anything," the leader of a legal seminar tells divorcing mothers, according to one account. "You just have to accuse."[75] Parents accused during divorce are not usually formally charged, tried, or convicted, because evidence against them usually does not exist. Yet the accusation alone will usually prohibit a father's contact with his children.[76]

Restraining orders are routinely issued during divorce proceedings, usually without any evidence of wrongdoing. "Restraining orders and orders to vacate are granted to virtually all who apply," and "the facts have become irrelevant," according to Elaine Epstein, former president of the Massachusetts Women's Bar Association. "In virtually all cases, no notice, meaningful hearing, or impartial weighing of evidence is to be had."[77] Bypassing due process protections is so routine that New Jersey judge Richard Russell told his colleagues during a training seminar, "Your job is not to become concerned about the constitutional rights of the man that you're violating as you grant a restraining order. Throw him out on the street.... We don't have to worry about the rights."[78]

The close link between domestic violence and marital-family dissolution is seen in the practice of arresting fathers for attending public events such as their children's musical recitals, sports activities, or church services — events any stranger may attend and where abuse cannot occur without witnesses and intervention. Even accidental contact in public places is punished with arrest. Fathers are arrested for sending their children birthday and Christmas cards and for returning their telephone calls.[79]

More than simply an excess of zeal, we see here the political logic of involuntary divorce working itself out. A forcibly divorced parent who runs into his children in public is threatening the very principle of unilateral divorce.

Some argue that judges must balance the rights of accused men with the need of women for protection.[80] Yet elsewhere the criminal justice system operates on the principle that people are punished for crimes they commit, not for what someone says they might commit. A defendant charged with the most heinous violent crime "has all his or her rights preserved and carefully guarded when before a court," says Massachusetts attorney Gregory Hession. In domestic abuse cases, by contrast, "a defendant may lose all those things, with no due process at all. ... The abuse law throws out all of those protections."[81] According to the New Jersey family court, to allow accused abusers the due process protections afforded other criminal defendants "perpetuates the cycle of power and control whereby the [alleged?] perpetrator remains the one with the power and the [alleged?] victim remains powerless." Omitting the word "alleged" is standard in federal and state statutes and media reports, and "the mere allegation of

domestic abuse...may shift the burden of proof to the defendant."[82] David Heleniak identifies six separate denials of due process in the New Jersey statute, which he terms "a due process fiasco."[83]

Some insist that protective orders are issued on the principle of "better safe than sorry."[84] Yet it is not clear precisely how protective orders can prevent violence, since violent assault is already illegal. One father was "enjoined and restrained from committing any domestic violence" upon his wife.[85] But is he not already thus restrained, along with the rest of us? Clearly the orders are issued not to prevent violence, but to remove fathers and enforce divorce.

It is also likely that forcing parents to stay away from their children provokes precisely the violence it ostensibly aims to prevent. "Few lives, if any, have been saved, but much harm, and possibly loss of lives, has come from the issuance of restraining orders and the arrests and conflicts ensuing therefrom," writes retired Judge Milton Raphaelson of Dudley, Massachusetts, District Court. "This is not only my opinion; it is the opinion of many who remain quiet due to the political climate. Innocent men and their children are deprived of each other."[86]

More totalitarian still are new "integrated domestic violence courts," whose mandate is less to dispense impartial justice than, in the words of one feminist judge, to "make batterers and abusers take responsibility for their actions."[87] Walter Fox, a Toronto lawyer, describes similar Canadian courts as "pre-fascist": "Domestic violence courts...are designed to get around the protections of the Criminal Code. The burden of proof is reduced or removed, and there's no presumption of innocence."[88] Special courts to try special crimes that can only be committed by certain people are a familiar totalitarian device to replace impartial justice with ideological justice. New courts created during Terror of the French Revolution were consciously imitated in the Soviet Union. In Hitler's *Volksgerichte* or people's courts, "only expediency in terms of National Socialist standards served as a basis for judgment." Forced confessions, made famous by the Stalinist show trials, are extracted in jurisdictions like Warren County, Pennsylvania, where fathers are summarily incarcerated unless they sign confessions stating, "I have physically and emotionally battered my partner." The documents require fathers to state, "I am responsible for the violence I used. My behavior was not provoked."[89] The words of Friedrich and Brzezinski seem apposite: "Confessions are the key to this psychic coercion. The inmate is subjected to a constant barrage of propaganda and ever-repeated demands that he 'confess his sins,' that he 'admit his shame.'"[90]

The Politics of Child Abuse

Closely connected is the child abuse machinery, which has similarly weakened not only parent-child bonds, but civil liberties through procedures for removing children from not only fathers, but also mothers and intact families without due process protections. This too is connected with the apparatus administering divorce.

Like domestic violence programs, child protection procedures blur the distinction between therapy and law enforcement, allowing social workers to exercise police functions. "Although spoken of in terms of social services," writes Susan Orr, "the child-protection function of child welfare is essentially a police action." Orr calls child protection "the most intrusive arm of social services."[91] Indeed, social workers appear to act not only as police, but as judge and jury as well. In cases studied by Ralph Underwager and Holida Wakefield, "the decision as to whether the abuse was factual was made by custody evaluators and child protection workers rather than by the justice system."[92] A presumption of guilt similar to that characterizing domestic violence policy pervades the "child abuse industry," as one social worker calls it. "When I started working, we tried to prove a family was innocent," she recounts. "Now we assume they are guilty until they prove they are not."[93] In Massachusetts, child abuse is "substantiated" not by a court, but by the Department of Social Services (DSS), which issues letters stating, "At least one person said you were responsible for the incident and there was no available information to *definitively indicate otherwise*."[94]

Outbreaks of child abuse hysteria during the 1980s and 1990s resulted in some forty instances of parents losing their children and being criminalized as a result of accusations that were never proven or have since been disproved.[95] Even today, it is not clear that the hysteria has subsided and may have simply become institutionalized. Of the three million reports of child abuse annually, about two million are never substantiated.[96] Critics allege that innocent parents are harassed because of anonymous tips and that children are unnecessarily taken from loving parents who have done nothing wrong.[97] "There is an antifamily bias that pervades the policies and practices of the child welfare system," according to Jane Knitzer of the Children's Defense Fund. "Children are inappropriately removed from their families."[98] Other practitioners and scholars allege that children are removed unnecessarily from parents in "staggering proportions." A California commission concluded that "the state's foster care system runs contrary to the preservation of families by unnecessarily removing an increasing number of children from their homes each year."[99] Some suggest that bureaucratic aggrandizement fueled by federal funding have created "a new class of professionals — social workers, therapists, foster care providers, family court lawyers — who have a vested interest in taking over parental

function."[100]

Statistically, child abuse in intact two-parent families is rare; the vast majority takes place in single-parent homes.[101] Accusations against intact families and removals effected without formal charges and evidentiary hearings are therefore especially questionable. But larger questions arise about instances even of confirmed abuse, questions once again about the father's presence, which constitutes the single greatest disincentive to abuse.[102] "The presence of the father...placed the child at lesser risk for child sexual abuse," concludes one of the few studies willing to state this undisputed fact explicitly.[103] Even allowing that many child removals may be justified, therefore, public policy is still creating the environment conducive to the abuse used to justify the removals from the mostly single mothers by first removing fathers.[104] The heart of the child abuse and foster care crises, therefore, is marital dissolution or non-formation.

This also highlights another connection with divorce. Many unsubstantiated reports are made by one parent against the other, usually the father, during divorce proceedings. Some 75-80% of allegations made during divorce are "completely false."[105] Yet these allegations are routinely used to remove fathers from their children's homes, again creating the environment most likely to result in abuse. "The system appears to reward a parent who initiates such a complaint...and the alleged perpetrator has been denied any contact with his children," reports a San Diego Grand Jury investigation. "Some of these involve allegations which are so incredible that authorities should have been deeply concerned for the protection of the child from the contaminating parent." Moreover, officials have a vested interest in encouraging these allegations. "The social workers and therapists played pivotal roles in condoning this contamination" through false accusations, charged the Grand Jury. "They were helped by judges and referees."[106]

Despite undisputed facts about the protective value of intact families with fathers, the habits of child protective officials seems to be to further marginalize them. Underwager and Wakefield conclude that "an anti-male attitude is often found in documents, statements, and in the writings of those claiming to be experts in cases of child sexual abuse." They document techniques by social service agencies to systematically teach children to hate their fathers, including inculcating that the father has sexually molested them. "The professionals use techniques that teach children a negative and critical view of men in general and fathers in particular," they write. "The child is repeatedly reinforced for fantasizing throwing Daddy in jail and is trained to hate and fear him."[107]

The political interconnection between child protection and marital weakening, divorce, and domestic violence programs is indicated by married mothers who report being not only encouraged but pressured, on pain of losing their children, to separate from their husbands. One publicized case involved Heidi Howard, ordered by the Massachusetts DSS to take out a restraining order against her husband and divorce him. When she refused, the DSS seized her children, placed them in foster care, and began adoption proceedings. Neither parent was ever charged with abuse or any other legal infraction.[108]

It appears the child abuse system has allowed a variety of government agencies to operate what amounts to a traffic in children. The San Diego Grand Jury reports "a widely held perception within the community and even within some areas of the Department [of Social Services] that the Department is in the 'baby brokering' business."[109]

These political dynamics also suggest one possible consequence of same-sex marriage that has been ignored. Most discussion has centered on questions of children's welfare versus the rights of homosexuals.[110] Few have questioned where gay parents obtain their children. Granting gay couples the right to raise children by definition means giving at least one of the partners the right to have someone else's children, and the question arises whether the original parent or parents ever agreed to part with them or did something to warrant losing them. Current law governing divorce, domestic violence, and child abuse render this question open. The explosion of the foster care system and the assumed, but unexamined, need to find permanent homes for supposedly abused children has provided perhaps the strongest argument in favor of gay parenting.[111] Yet the politics of child abuse and divorce indicate that this assumption is not necessarily valid, even among heterosexual adoptions. Introducing same-sex marriage and adoption into the existing political structure governing family policy could dramatically increase the demand for children to adopt, thus intensifying pressure on social service agencies and biological parents to supply such children. While sperm donors and surrogate mothers supply some children for gay parents, in practice most are already taken from their natural parents for various reasons. Massachusetts Senator Therese Murray, claiming that 40% of adoptions have gone to gay and lesbian couples, urges sympathy for "children who have been neglected, abandoned, abused by their own families."[112] But it is not self-evident that these children are in fact victims of their own parents. What seems inescapable is that the very issue of gay parenting has arisen as the direct and perhaps inevitable consequence once government officials got into the business — which began largely with welfare and divorce — of distributing other people's children.

Fueling the Machinery: The Role of Child Support

The other dilemma raised by involuntary divorce — also now manifest in today's marriage controversies — was how to finance the increased costs it inevitably brought. The solution was child support, which provides financial incentives to weaken marriage and sever the ties between children and parents, particularly fathers.

Like most of the government machinery now used to administer divorce, child support grew directly out of welfare. It was designed not for middle-class divorced families, but for welfare families that had never been formed through marriage in the first place. Its justification was to recover welfare costs and save public revenue. (In fact, it has consistently lost money, with a current annual deficit approaching $3 billion.)[113] In fact, the subsequent experience might well be seen as a vindication of prophecies that a quasi-socialistic welfare state would inevitably create a "road to serfdom."

Though the social consequences of mass fatherlessness have been apparent for decades in welfare-dependent communities, thanks to the 1965 Moynihan Report, the political implications for freedom were not as apparent as they are now becoming with middle-class divorce. Because most low-income parents were not living together (which welfare discouraged), there was seldom a need to forcibly evict the father. Employing law-enforcement methods to coerce him to provide for the family was also readily justified, both because his children were receiving welfare and because he was not residing in the home where he could provide for his children as he saw fit. The fact that often he had not made a formal lifetime commitment to the family through marriage no doubt also contributed to the moral case for coercive action against him. No distinction was recognized between fathers who shirked their responsibilities and those who accepted them. Similar to the status later afforded to involuntarily divorced spouses, the unmarried father was treated as "guilty" of paternity and subject to the penal system.

Having erected this machinery to coerce relatively small sums from low-income fathers, where marriage had not taken place, the welfare agencies then extended their jurisdiction to middle-class fathers, whose marriages had to be — and because of no-fault divorce, now could be — forcibly dissolved by court action and where much more substantial sums were available. As with no-fault divorce, no public debate preceded a massive expansion in the scope of state power over family finances and private family life.[114]

It was already known that welfare payments to low-income mothers result in increased divorce (before it led them to forego marriage altogether).[115] Child support added a dimension of law enforcement and forced the middle-class father, as Jed Abraham puts it, "to finance the filching of his own children."[116] Child support thus became an "unintended economic incentive for middle-class women to seek divorce": "Strong enforcement...may, in fact, lead to...the unintended consequence of increasing the likelihood of divorce."[117]

‘‘Deadbeat dads" are another of those public malefactors whose crimes are so repugnant that innocence is no excuse. Yet no government agency has ever produced any scientific evidence that there is, or ever has been, a problem of parents not supporting their children other than that created by the government. Psychologist Sanford Braver, in the largest federally funded study ever undertaken on the subject, conclusively demonstrated that the "deadbeat dad" is largely a government creation. Described by FrontPageMagazine as "the most important work of conservative social science in a decade,"[118] Braver's study showed that the child support "crisis" consists of little more than the government separating children from their fathers, imposing patently impossible debts on fathers who have done nothing to incur those debts, and then arresting those who, quite predictably, cannot pay. His research undermined every justification for the multi-billion dollar criminal enforcement machinery. Yet eight years after Braver's book, no enforcement agency has responded to his findings.

Others have confirmed them. William Comanor and a team of scholars have documented the faulty economics. Ronald Henry calls the system and its rationalization "an obvious sham," "the most onerous form of debt collection practiced in the United States," and one "that is matched nowhere else in [the] legal system."[119]

The consequences are corrosive of not only family stability, but constitutional protections. Bryce Christensen argues for a "linkage between aggressive child-support policies and the erosion of wedlock" and writes, "the advocates of ever-more-aggressive measures for collecting child support have trampled on the prerogatives of local government, have moved us a dangerous step closer to a police state, and have violated the rights of innocent and often impoverished fathers."[120] Abraham writes that "the government commands an extensive enforcement apparatus, a veritable gulag, complete with sophisticated surveillance and compliance capabilities such as computer-based tracing, license revocation, asset confiscation, and incarceration. The face of this

regime is decidedly Orwellian."[121]

Like domestic violence and child abuse measures, child support enforcement is governed by an explicit presumption of guilt, wherein the accused must prove his innocence. "The burden of proof may be shifted to the defendant," according to an approving legal analysis by the National Conference of State Legislatures (NCSL). Further, "not all child support contempt proceedings classified as criminal are entitled to a jury trial," and "even indigent obligors are not necessarily entitled to a lawyer."[122] A father who has lost his children through literally "no fault" of his own must prove his innocence without a formal charge, without counsel, and without facing a jury of his peers.

Child support enforcement further blurs the distinction between guilt and innocence, since officials monitor parents with arrearages, those whose payments are current, and even citizens who are not under an order. The presumption of guilt against those obeying the law was revealed by one official who boasted that "we don't give them an opportunity to become deadbeats" and by former Attorney General Janet Reno, who referred to current payments "collected from deadbeat parents," branding as criminals parents who *do* pay.[123] The presumption that not only all parents under child support orders are already quasi-criminals, but all citizens are potential criminals against whom pre-emptive enforcement measures must be initiated now in anticipation of their future criminality, is revealed by NCSL, which justifies collecting names from the general population by saying, "At one point or another, many people will either be obligated to pay or eligible to receive child support."[124]

The role of child support in undermining marriage also explains why the fatherhood and marriage promotion measures of the last two administrations have achieved little and why they may be exacerbating the problem.

During the 1990s, the Clinton administration and other governments initiated programs to "promote fatherhood." Despite the professed (and possibly quite sincere) aim of extolling the importance of fathers and the need to reconnect them with their children, in practice these programs themselves often ended up serving as justifications for collecting child support. The result, therefore, was somewhat opposite of what was advertised, since the federal government was promoting fatherhood with one hand while subsidizing divorce and fatherless homes financially with the other.

Under the Bush administration, the emphasis shifted from fatherhood to marriage. Yet the substance remained similar. While the initiative seems likewise to have proceeded from a genuine desire to redirect priorities toward programs that enhance marriage, with funds devoted to marriage counseling, in practice it has also been compromised by political pressure to continue the essentially punitive approach to family dissolution dominated by the child support system. Since January 2003, some substantial grants announced by HHS under the Healthy Marriage initiative have gone to child support enforcement agencies and private groups involved in collection.[125]

In short, the debate about the desirability of the government promoting marriage and fatherhood may be rendered irrelevant by the fact that the programs are not always what they appear. Whatever the merits of programs encouraging marriage formation, it is not clear that these disbursements even can achieve the desired goal. It is more likely that by expanding programs that are predicated on the removal of the father from the home, the federal funds are undermining marriage rather than encouraging it. Whatever one's sympathies, on both sides the public debate over government marriage programs has been somewhat beside the point.

Unintended Consequences

Similar uncertainty seems to operate with proposed federal action over same-sex marriage. It is not clear that a constitutional amendment defining marriage in terms of its gender component can, in itself, achieve the aims of its proponents, either by strengthening marriage or even preventing same-sex unions. Ignoring the larger legal status and political definition of marriage could result in a constitutional Maginot Line. As one sympathetic columnist predicts, "Even if Republicans were to succeed in constitutionally defining marriage as a relationship between a man and a woman, some judge somewhere would soon discover a novel meaning for 'man' or 'woman' or 'between' or 'relationship' or any of the other dozen words that might appear in the amendment."[126]

This is already happening in custody cases involving transsexuals. "Some jurisdictions prefer to remain in the nineteenth-century understanding of binary sex that saw male and female as distinct, immutable, and opposite," states Florida Judge Gerald O'Brien, who suggests that both marriage and gender are primarily conditions of mind.[127] Britain's Gender Recognition Bill now allows transsexuals to alter their birth certificates to indicate they were born the gender of their choice. "The practical effect of the bill will inevitably be same-sex marriage," writes Melanie Phillips of the *Daily Mail*. "'Man' and 'woman' will no longer mean anything other

than whether someone feels like a man or a woman. As a result, priests may unwittingly marry people of the same sex."[128]

The Limits of Policy

A much broader debate on marriage is in order, one that includes the role of the state in defining and dissolving it. To be effective, this debate would have to include the state's roles with respect to fatherhood, divorce, child custody, and the very concept of private life itself. Rather than focusing on marriage as a status conferring economic privileges on adults, a thorough debate would come to terms with the role of marriage in guaranteeing the parent-child bond and the private sphere of life. This dilemma pervades every aspect of the growing family crisis and will continue to spawn a multitude of social ills and political controversies with attendant consequences to social order, political stability, and civil liberties.

Possibly we will conclude that unrestricted divorce, single-parenthood, same-sex unions, and other ways of redefining marriage and the family are valued enough as expressions of individual freedom that we are willing to break with past legal principle and accept that this bond is no longer sacrosanct. If so, it is only fair that this decision be made consciously and openly, so that prospective parents are aware in advance that any children they create may be taken from them through literally "no fault" of their own.

Yet it is far from clear that such a consensus exists. As recently as 2000, the Supreme Court reiterated the principle that "parental rights are absolute": "The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court," the court stated. "The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[129] If we still value this principle, then it must be applied consistently, for current family law has rendered it empty verbiage, leaving parents and children in limbo, the law vulnerable to contempt, and our social order in increasing disarray.

How might this be effected? Many argue that successful constitutional amendments serve to protect citizens' rights, and even some opponents of same-sex marriage question whether they can effectively be used to enact public policy. Constitutions traditionally limit the state rather than the citizenry, whose actions are more appropriately controlled by statute.

Accepting this principle for the sake of argument, it could be employed to strengthen marriage and the family without intrusive social engineering. Granting that the Constitution does need an amendment protecting family integrity from pressures that could not have been anticipated two hundred years ago, a more direct and comprehensive approach may be an amendment that guarantees the privacy and civil inviolability of the family and codifies traditional rights of parents to the care and custody of their children and to direct their upbringing free from arbitrary state interference. From homeschoolers to victims of questionable child abuse accusations to parents whose children are put on psychotropic drugs without their consent to divorced fathers, it is parents — not gay parents, but parents generally — who are being besieged by an increasingly repressive state apparatus and denied basic due process protections. Such a provision would address a problem recognized by both the left and right,[130] it would carry no hint of excluding any group, and it would be relatively impervious to judicial casuistry.

If we are to shift the terms of debate from the needs of children to the rights of adults to marry one another and form unions for the purpose of bringing up what must inevitably be someone else's children, it seems only fair to ensure that this not be done at the expense of traditional protections for biological parents when it comes to raising their own. The politicization of children in many venues and the disproportionate attention to the conjugal and parental claims of politically vocal groups — with virtually none to millions of unorganized parents who have experienced the confiscation of their own flesh and blood — starkly demonstrates that family law and politics today by no means guarantees that natural parents will not have their children taken away to supply children for groups with political influence. This is precisely what is now happening. It is just one illustration of why a debate on parenthood — and on marriage as a status that protects it — would be a debate on the substance of marriage rather than the word.

If Chesterton was correct about the private family being the principal check on official power, then the very concept of "family policy" may inevitably carry the curse of Midas, wherein that which the state touches, almost by definition, it must destroy. It is not difficult to see why scholars like Wilson give up hope of ever finding a solution to the ills of the family. Yet the way to cut this Gordian Knot may be not to mobilize public policy at all, but instead to limit it. And that is precisely what the Constitution is for.

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