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Can the State Be Neutral on Marriage?

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Abstract

Successful efforts to extend marriage recognition to same-sex couples have tempted some dispirited well-wishers of traditional marriage, among others, to call for the “privatization of marriage” by getting the state to adopt a neutral stance toward it. Such a policy would require the government to refrain from promoting and supporting marriage and parenthood, effectively making them merely private choices. This misguided approach subordinates considerations of how best to form self-governing citizens to the new ethic of self-expression, imagining that a responsible citizenry will spontaneously emerge. It also produces a culture increasingly hostile to marriage, ignores the problems posed by the human passions, and indirectly opens the door to intrusive state involvement. By contrast, government support for marriage as traditionally understood nurtures the best possible conditions for human flourishing.

Some people argue that the government should refrain as much as possible from making assumptions about the goals, form, and internal workings of marriage and about the desirability of entering into marriage and staying married. Both liberals and libertarians emphasize the importance of state neutrality as a means of securing individual autonomy and advocate, in essence, government agnosticism with respect to the nature and form of marriage.

It is possible to see why people might be inclined to favor governmental agnosticism about the nature of marriage. Much of marital and familial life is

essentially private. People experience much of it behind closed doors and beyond the legitimate scope of government. People do not love, marry, or have children pursuant to government directives. Couples arrange most of their common life without state intervention, and parents have enormous discretion as to how they educate their children. Much of the history of marriage and the state involves marking the limits of the state and the integrity or privacy of marriage and family life.

These private experiences, however, should not blind us to the important public dimension of marriage and family life. Every political community depends on private persons having and raising children responsibly. Therefore, no political community can be completely indifferent to the form of the institution that bears primary responsibility for raising the next generation of citizens.

Reflecting on the history of marriage in his *Lectures on Law*, James Wilson observed that the “most

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ancient traditions of every country ascribe to its first legislators and founders, the regulations concerning the union between the sexes.” After surveying marriage laws from China, Rome, Egypt, Athens, Old Saxony, and other civilizations, Wilson concluded: “As marriage has been instituted by the first, it has always been encouraged by the wisest legislators.”¹

Marriage thus partakes of both the private *and* the public. The government cannot be agnostic with regard to the characteristics that have made marriage such a powerful contribution to the common good throughout our nation’s history.

An involved, married mother and father personalize care for children better than any alternative arrangement can, and efforts to use the law to detach marriage from this natural bond compromise the ecology that is most conducive to the delivery of that care.

Proponents of a neutral marriage policy dismiss considerations regarding the importance of perpetuating a way of life and cultivating the virtues necessary for individuals and communities to contribute to a political community. They assume that social change is benign or progressive or that society will spontaneously produce what it needs to survive and thrive. They promote a morality of self-expression, or expressive individualism, that compromises the ethic of self-control on which stable families and marriages rest and on which the future of democratic self-government depends.

This morality of self-expression poses significant challenges to the formation of human character, because stable marriages are indispensable in tempering passions and directing the imagination of children toward self-mastery. An involved, married mother and father also personalize care for children better than any alternative arrangement can, and efforts to use the law to detach marriage from this natural bond compromise the ecology that is most conducive to the delivery of that care.

The Character of Governmental Agnosticism Toward Marriage

Governmental agnosticism toward marriage is synonymous with what most academic theorists refer to as “government neutrality” toward or “privatizing” marriage. It means that the government would withhold the force of law from favoring one form of marriage over others, neither recognizing marriages officially nor promoting or cultivating monogamous, stable marriages or any particular vision of marriage. Those involved in a marriage would make decisions regarding its form and meaning privately without the influence of public authorities.

Since government agnosticism toward marriage and the idea of privatized marriage are unprecedented, there are no examples or experiences to tell us what their advocates envision, and few advocates offer a clear account of what it would entail.² Nevertheless, some elements of their arguments are clear. For example, the most radical iteration of such proposals seems to be that the state would take no cognizance of adult relationships. Adult marriage-like relationships would not be part of the social contract and would need no contract or license. Like friendships, they would remain outside the notice of civil government.³

1. James Wilson, “Lectures on Law,” in *Collected Works of James Wilson*, Vol. 2, ed. Kermit L. Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), p. 226.

2. According to libertarian David Boaz, “‘Privatizing’ marriage can mean two slightly different things. One is to take the state completely out of it. If couples want to cement their relationship with a ceremony or ritual, they are free to do so. Religious institutions are free to sanction such relationships under any rules they choose. A second meaning of ‘privatizing’ marriage is to treat it like any other contract: The state may be called upon to enforce it, but parties define the terms. When children or large sums of money are involved, an enforceable contract spelling out the parties’ respective rights and obligations is probably advisable. But the existence and details of such an agreement should be up to the parties.” See David Boaz, “Privatize Marriage: A Simple Solution to the Gay-Marriage Debate” *Slate*, April 25, 1997, http://www.slate.com/articles/briefing/articles/1997/04/privatize_marriage.html (accessed July 10, 2017). See also Colin P. A. Jones, “A Marriage Proposal: Privatize It,” *The Independent Review*, Vol. XI, No. 1 (Summer 2006), pp. 115–119, http://www.independent.org/pdf/tir/tir_11_01_07_jones.pdf (accessed July 10, 2017). Steven Horwitz worries that this “ideal” has not been sufficiently brought down to reality in a world “where the state continues to do all the other things it does that depend upon marital status.” Steven Horwitz, *Hayek’s Modern Family: Classical Liberalism and the Evolution of Social Institutions* (New York: Palgrave, 2016), pp. 259ff. (emphasis in original).

3. This seems akin to James Madison’s teaching on religion as described in Phillip Munoz, *God and the Founders: Madison, Washington, and Jefferson* (New York: Cambridge University Press, 2009), pp. 24–29.

Such a relationship would be open as to number, sexuality, duration, depth, practice of fidelity, purpose, and sharing of resources. Whether it is a couple or a “throuple”; whether the individuals are gay or straight, faithful or unfaithful; whether the limits of the relationship are knowable or not; whether it is monogamous parents of six children, swingers, traditional polygamists, or some other form of “complex marriage,” the state would recognize only individuals and would be prohibited in principle from even recognizing marital contracts. Privileges like the one that protects spouses from testifying against one another in court would become anachronistic because the state would no longer recognize spouses for its purposes.

A slight variation on the “no cognizance” principle would give individuals the option to enter into a fully customizable marriage contract that the state would then be bound to enforce as it would any other contract. Individuals would not be required to enter such a contract. In this case, the state would take “no cognizance” of those in a marriage, except where they take on the terms of a contract. The state could make no assumptions about the relationship and individuals would be treated as individuals absent a contract. Violations of contracts could be treated as any other civil proceeding is treated. Absent a will or contract, for instance, inheritances would revert to the state, and no “spousal” support could be compelled absent a preexisting agreement.

Other elements that pertain to sharing a joint life would probably still require governmental discretion. Government benefits might flow only to individuals, for example, not to those in a marriage; filing jointly for purposes of taxation might or might not be allowed; and governments might or might not require banks to consider the resources of married individuals jointly when evaluating fitness for loans.

Experience teaches that there may be a nether region between “no cognizance” and a situation in which formerly cohabiting parties claim an “implicit” contract. States would probably have to devise default rules for adults who live together without entering into formal contracts. Default rules would be important when relations broke down, because the state would then have to enforce the default obligations against the parties to the now-broken living arrangement.

Current divorce law illustrates how this might work. Parties may enter marriage with a prenuptial

agreement describing, among other things, how they would divide property or whether and how to allocate spousal support in the event of divorce. Absent such an agreement, either parties to a broken relationship negotiate the terms of parting after the breakdown of the relationship or courts or administrators apply legal rules when the parties cannot reach an agreement. There often are questions about whether, in the absence of a prenuptial agreement or an official contract, the parties are married and therefore whether and how courts should become involved in the division of such property. Even if the state aspired to take “no cognizance” of adult relations, conflict over inheritance, child support, visitation, and exercises of parental discretion would probably continue.

Privatizing marriage would require government to refrain from promoting and supporting marriage and parenthood. Those who seek to privatize marriage would be skeptical of any law that has as its chief justification the maintenance of mores that support such relationships.

Moreover, privatizing marriage would require government to refrain from promoting and supporting marriage and parenthood. While it is difficult to describe all that this involves, those who seek to privatize marriage would be skeptical of any law that has as its chief justification the maintenance of mores that support such relationships. Laws prohibiting prostitution, pornography, and public nudity, for instance, could lose their *raison d'être* under these circumstances, for such laws exist mostly to guide actions and ideas concerning proper sexual relations and point people toward devoted monogamous relations. Laws attempting to support a monogamous, faithful vision of marriage more directly, either through public education or by incentivizing marriage through public benefits, would be viewed as illegitimate.

Libertarianism, Marriage, and the State

For libertarians, actions that do not harm others physically or directly should be immune from state regulation. Libertarians hold that individuals

should be free to enter into relationships without state permission or approval. These two ideas are in fact mutually reinforcing: As individuals need no permission (“mind your own business”), they also require no praise (no “equal concern and respect”).⁴

In principle, being much more concerned with guarding neutrality than they are with reconstructing public opinion, libertarians seem to be interested in limiting state power and providing space for private decisions without openly seeking to shape how people act. As freedom expands, libertarians expect more experiments in living and, as they view it, more happiness and less social friction as adults follow their desires.⁵

Libertarians are less concerned about describing the role of the state in parent–child relations. However, the libertarian assumption that all human beings are autonomous choosers begins to run up against serious problems when it comes to dealing with the care of children, who are dependent and incapable of genuine choice.

Some famous libertarians such as Murray Rothbard and Wendy McElroy, holding that “libertarianism does not recognize positive legal obligations except as established by agreement,” argue that “there is no positive obligation that legally forces a parent to provide sustenance or shelter” to a child.⁶ This means that parents could be legally responsible for abusing their children but not for neglecting them. Other libertarians, unwilling to go that far, emphasize the need to secure parental rights while remaking parental obligations into a product of consent so that, in effect, all parental duties appear to be products of a prior free choice.⁷ There is no parental

duty as such; there are only freely chosen duties that presumably could also be shirked if parents so chose.

The Liberal Case for Abolishing Marriage

Contemporary liberals believe that a just society best respects the autonomy of each individual through an official policy of purported government neutrality on the question of the good.⁸ They think that toleration of different lifestyle choices means that government owes all citizens “equal concern and respect.”⁹ A particular lifestyle cannot be promoted or forbidden, or even burdened or discouraged, by state action. Government cannot favor marriage over nonmarriage, nor can it favor any particular form of marriage over others.

To secure “equal concern and respect” for all citizens, argues the famed liberal theorist Ronald Dworkin, a political society may “impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth.”¹⁰ Dworkin, the most consistent advocate of this position, explains why he thinks such “moralism” is out of bounds: “No self-respecting person who believes that a particular way to live is most valuable for him can accept that this way of life is base or degrading.”¹¹

Any law that might disfavor someone’s lifestyle choice degrades self-respect, insults that person’s choice, and may discourage him or her from putting that choice into practice. Such degradation marks an unacceptable limit on personal autonomy and deprives individuals of the public affirmation that they need to feel safe—and, in fact, to be affirmed—in making their choices. With regard to marriage, for

4. Steven Kautz, *Liberalism and Community* (Ithaca, NY: Cornell University Press, 1995), p. 63.

5. Horwitz, *Hayek’s Modern Family*, pp. 79–100 and 209–240. “Marriage contracts,” the Cato Institute’s David Boaz writes, “could be as individually tailored as other contracts are in our diverse capitalist world.” Debates over marriage would be “depoliticized and somewhat defused if we keep them out of the realm of government.” Boaz, “Privatize Marriage.”

6. Wendy McElroy, “The Grayness of Children’s Rights,” *Daily Anarchist*, September 11, 2012, <http://dailyanarchist.com/2012/09/11/the-grayness-of-childrens-rights> (accessed July 10, 2017), and Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), pp. 100–102.

7. See Horwitz, *Hayek’s Modern Family*, pp. 226–230.

8. This distinction between *modus vivendi* or strategic liberalism and liberalism as a matter of principle runs through all contemporary liberal thinking, with a clear endorsement of the principled approach and much scorn heaped on the *modus vivendi*. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 147ff.; Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), pp. 14–45; and Patrick Neal, *Liberalism and Its Discontents* (New York: New York University Press, 1999), pp. 81–83.

9. Dworkin, *Taking Rights Seriously*, p. 272.

10. Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), pp. 205–206.

11. *Ibid.* (emphasis added).

example, this would mean that a society that recognizes only opposite-sex marriage, holding it up as an ideal, would deprive those who are interested in same-sex marriage of equal concern and respect and stigmatize those who do not marry.

The contemporary liberal aspiration to neutrality is an overriding principle that, for Dworkin, “trumps” considerations of social usefulness or public morality.¹² Contemporary liberals apply this principle to all lifestyle issues. “If someone has a right to something,” Dworkin writes, “then it would be wrong to deny it to him *even though it would be in the general interest to do so.*”¹³ The long-term “general interest” and truth of a social claim about the harms associated with a practice mean nothing when compared with the sanctity of moral independence or autonomy. In principle, contemporary liberals rule out questions about how a practice affects the common good. A good society is one in which individuals practice such moral independence regardless of whether it makes society more livable, better, morally more sustainable, or friendlier to families.

Few contemporary liberals seek to achieve governmental agnosticism toward marriage and family life all at once through the immediate abolition of marriage. The state is so entangled with marriage that such a goal defies the demands of practical politics. Instead, liberals apply the principle of neutrality to an ever-expanding number of different close personal relationships. They seek, in the words of feminist philosophy professor Elizabeth Brake, to “minimize” marriage.¹⁴

Minimizing marriage means extending marriage to “same-sex partners and diverse care networks,”

which include “urban tribes, best friends, quirky-alones, polyamorists,” and “throuples, foursomes and moresomes.”¹⁵ Marriage becomes little more than public validation of close personal relationships.¹⁶

As government becomes increasingly agnostic about marital form, completely “untying the knot” between marriage and the state becomes more possible.... Many contemporary liberals think agnosticism or neutrality culminates in the abolition of marriage altogether as a legal category.

As government becomes increasingly agnostic about marital form, completely “untying the knot” between marriage and the state becomes more possible.¹⁷ Ultimately, according to liberal feminist Tamara Metz, any public understanding of marriage violates “the type of neutrality necessary for the state to secure liberty and equality in a diverse polity” and casts the state in “the role of an *ethical authority*, a role for which it neither is or ought to be suited.”¹⁸ On this issue, many contemporary liberals, following the logic of their premises, think agnosticism or neutrality culminates in the abolition of marriage altogether as a legal category.¹⁹

The abolition of marriage leads to many complications, most notably involving children. Ultimately, this complication leads to the creation of state-sponsored and state-regulated institutions that would themselves be charged with caring for dependent

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12. Ronald Dworkin, “Rights as Trumps,” in *Theories of Rights*, Oxford Readings in Philosophy, ed. Jeremy Waldron (New York: Oxford University Press, 1984), pp. 153–167. Some of the language for this formulation comes from Harry M. Clor, *Public Morality and Liberal Society: Essays on Decency, Law, and Pornography* (Notre Dame, IN: University of Notre Dame Press, 1996), p. 149.
 13. Dworkin, *Taking Rights Seriously*, p. 269 (emphasis added).
 14. Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012).
 15. *Ibid.*, p. vi, and Ronald C. Den Otter, *In Defense of Plural Marriage* (New York: Cambridge University Press, 2015).
 16. Linda McClain’s answer to the question “should society (and family law and policy) move beyond marriage?—is ‘yes and no’.” See Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006), p. 193.
 17. Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton, NJ: Princeton University Press, 2010). See also Steve Vanderheiden, “Why the State Should Stay out of the Wedding Chapel,” *Public Affairs Quarterly* Vol. 13, No. 2 (April 1999), pp. 175–199, and Charles Rembar, *The End of Obscenity* (New York: Random House, 1968).
 18. Metz, *Untying the Knot*, p. 115. Emphasis in original.
 19. *Ibid.*, p. 134: “[A]s a legal category, marriage would be abolished.” Martha Fineman similarly states that “we do not need marriage and we should abolish it as a legal category.” Martha Fineman, *The Autonomy Myth* (New York: Norton, 2004), p. 123.
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children. Some contemporary liberals see a continued need for state involvement in the supervision of children, but many hope to “separate marriage and parenting” as well.²⁰ For them, marriage and relations between independent adults would be privatized. Such liberals envision the state reconfiguring its support and regulatory powers around the continued need for “intimate caregiving” of children and ill or aged family members.²¹ The state would recognize who is responsible for dependents, for instance, when school calls or when the hospital needs a decision.

Providing care, such theorists argue, is a public good that can create vulnerabilities for provider and recipient alike. Those providing care forego wages and opportunities; those receiving care are dependent on the care of others and vulnerable to the whims of a caregiver. Proper regulation and support are necessary to make sure that care can be given and properly delivered. Providers need financial grants, public welfare, and a reconfigured workplace so that they can safely invest their time caring for dependents. Dependents need support to ensure that providers achieve certain standards of caring behavior.

State recognition of “Intimate Caregiving Units” (ICGUs) would replace the former concern with marriage and family life. These new units, as Metz writes, “in many ways [would] look like marriage today” but would be “expressly tailored to protecting intimate care.” The state-created status would contain “assumptions of longevity” and “resource sharing,” with participants receiving state aid in the form of cash payments and public subsidies for health care and day care, among other things, so that those in a caregiving-dependent relation would be supported in their endeavors. All caregivers and dependents—friends caring for one another, brothers and sisters caring for one another, parents raising children, children caring for an elderly aunt, mother, or friend—could enter ICGUs.

In principle, the state could regulate or license these units, but advocates of this approach affect to

oppose this possibility as it involves a temptation to regulate adult relations, and they hope to assert a “limited shield” against state intrusion into ICGUs.²² The state is thereby invited to ensure that care, as it is understood, is delivered properly by whatever unit claims to be giving it.

Because the self-worth of liberals often depends on how the community judges their life choices, they make their private choices the business of the community. Once people are entitled to “equal concern and respect,” the community must provide that concern and respect by teaching citizens how to think and how to act accordingly. This requires a reeducation and reshaping of how private organizations and individuals treat what used to be considered alternative lifestyles. The government may need to regulate or shape opinions so that all feel accepted. Securing genuine “equal concern and respect” would thus require a revamping of public opinion in the name of securing respect for and sensitivity to different, diverging lifestyles.

The Myth of Marriage Agnosticism: Laws Reverberate in Culture

The main appeal of the liberal and libertarian arguments for government agnosticism toward marriage is that they seem to offer a way for people who disagree about the meaning of marriage to get along. According to this position, by withdrawing from an arena of moral conflict, the state could remain neutral, and all would be free to live their lives as they see fit. Neutrality seems to accommodate diversity. It promises that individuals will be free to choose their lifestyles, relationships, or identities autonomously and claims that the best governments remove obstacles and maximize everyone’s capacity for choice. This agnostic regime promotes, as Lawrence Friedman does, “‘the republic of choice’...a world in which the right ‘to be oneself,’ to choose oneself is placed in a special and privileged position; in which *expression* is favored over *self-control*.”²³

20. Brake, *Minimizing Marriage*, p. 145.

21. See Metz, *Untying the Knot*, pp. 119–151; Fineman, *The Autonomy Myth*, pp. 47–50 and 284–291; Den Otter, *In Defense of Plural Marriage*, pp. 301–318.

22. Metz, *Untying the Knot*, pp. 134–137.

23. Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge, MA: Harvard University Press, 1990), p. 3. Emphasis in original.

In truth, however, there is no such thing as a neutral law. Laws make some thoughts more thinkable and some actions more doable. They affect behavior and attitudes by attaching honor or shame to actions. Whether to allow choice in any given area is itself a choice that is shaped by particular moral considerations and that carries with it inevitable long-term moral ramifications. In other words, a decision that the state ought to leave people completely free to choose in a particular realm is a decision either to regard the realm in question (for example, the choice of hairstyle) as truly private or to elevate an individual choice (for example, the choice of how to define marriage) over the common good.

There is no such thing as a neutral law. Laws make some thoughts more thinkable and some actions more doable. They affect behavior and attitudes by attaching honor or shame to actions.

Laws always reverberate throughout the culture. Public policy that is agnostic with regard to the nature of marriage would shape morals and social conduct in a certain direction. The country would therefore be legislating morality. The only question at this point is which morality will be legislated: The law will either embody the idea, anchored in expressive individualism, that marriage is a malleable convention that individuals can mold to suit their desires or embody the idea, necessary for a political community to endure, that marriage is an institution with particular goals (procreation and the education of children) that are best accomplished through monogamous male–female unions.

For these liberal and libertarian thinkers, the neutral halfway house is but a Trojan horse to advance

their own shared commitment to expressive individualism. Contrary to the claims of some, if the ethic of expressive individualism is embodied in law, marriage will thereby be weakened. Even liberal theorists like Joseph Raz who welcome the expressive ethic recognize that monogamy “cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public’s attitude and through its formal institutions.”²⁴

If the law and culture no longer support monogamous marriage, there will be fewer monogamous marriages. This is true of other marriage-related aspects of life as well. If civil government were to repeal laws concerning adultery or fornication, it would provide a kind of blessing to those actions, partially removing the stigmas attached to them as well as expectations of monogamous, permanent marital commitment. Laws that subsidize contraception affect how women view children and how men and women approach sexual relations.

Marriage and family life are shaped both by what laws do and by what they leave undone. Alexis de Tocqueville, for example, marveled that previous political thinkers had “not attributed to estate laws greater influence on human affairs.”²⁵ By estate laws, Tocqueville was referring to laws concerning primogeniture (which devolves property to the first-born legitimate son) and entail (which requires that estates be bequeathed whole rather than divided among heirs). Feudal societies depended on such laws to build familial attachment to the landed estates, which were home to the extended intergenerational family. Patriarchal feudal families were static and permanent, thinking of themselves in light of obligations to great-grandfathers and great-grandsons.

In modern societies, such laws have been abolished.²⁶ The law of equal partition among heirs, Tocqueville writes, “succeeds in profoundly attacking landed property and in making families as well as fortunes disappear with rapidity.”²⁷ As a result,

24. Joseph Raz, *The Morality of Freedom* (Oxford, UK: Clarendon Press, 1986), p. 162.

25. Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield, Jr., and Delba Winthrop (Chicago: University of Chicago Press, 2000), Vol. 1, Part 1, Chapter 3 (hereafter 1.1.3), p. 47.

26. See John Locke, *First Treatise* (New York: Cambridge University Press, 1989), Paras. 90–92, and esp. Thomas Jefferson, “Bill for the Abolition of Entails,” August 1, 1776, <http://teachingamericanhistory.org/library/document/bill-for-abolition-of-entails/> (accessed September 15, 2017), and Tocqueville, *Democracy in America*, 1.1.3, p. 49: “English legislation on the transmission of goods was abolished in almost all the states in the period of the Revolution.”

27. Tocqueville, *Democracy in America*, 1.1.3, p. 49.

family feeling has been detached from the land, as land is always divided among heirs; this encourages its circulation and the fostering of the one-generational nuclear family.²⁸

Before America's no-fault divorce revolution in the late 1960s, divorce was rarer, relatively difficult to secure, and a matter of no small cultural stigma. Perhaps people remained in unhappy marriages because they knew the law limited their options; perhaps such people did not imagine desertion or divorce because the law so shaped their opinions; or perhaps they feared public rebuke. Adopting no-fault, at-will divorce laws changed actions and thoughts, further unsettling marriage by undermining expectations for permanence as well as some incentives for devoted behavior.

The real question today is whether laws will accelerate the cultivation of a self-centered ethic of self-expression or whether they will support a family-centered ethic that sustains stable political communities.

The result in America has been a marked increase in the number of divorces within a short period of time and a marital culture that is less supportive of enduring monogamous marriage.²⁹ Concern about the effects of divorce had long prevented the move to no-fault divorce, but after its acceptance, so many people were divorced that expressing concerns about it became increasingly difficult.³⁰ At roughly

the same time, statutes proscribing adultery either were repealed or fell into desuetude.³¹

These changes in law have brought an ethic of self-expression and an adult-centered vision of marriage more and more to the fore. Put another way, they have inevitably promoted a certain moral worldview. The real question today is whether laws will accelerate the cultivation of a self-centered ethic of self-expression or whether they will support a family-centered ethic that sustains stable political communities.

How Families Create Virtuous Citizens

Concepts like “equal concern and respect” or “consenting adults should be allowed to do what they want” ignore the paramount political considerations involved in perpetuating a political community. To greater or lesser extent, legislators have always promoted the family centered on the marriage of a man and a woman because doing so contributes to the common political good and helps to avert or address the challenges posed by human passions. Therefore, those who care about the future of democratic self-government—and not simply the individual autonomy that comes with a culture of expressive individualism—must see through the fake aspiration to neutrality and return considerations of character to politics. A marriage policy that applies only liberal or libertarian principles regardless of their effects on practice and the future of self-government cannot prevent the corruption or disintegration of society.

A more responsible politics seeks to balance privacy and individual freedom with ensuring that society perpetuates itself and produces citizens capable

28. Tocqueville's description is worth quoting in full: “In peoples where estate law is founded on the right of primogeniture, territorial domains pass most often from generation to generation without being divided. The result is that family spirit is in a way materialized in the land. The family represents the land, the land represents the family; it perpetuates its name, its origin, its glory, its power, its virtues. It is an imperishable witness to the past and a precious pledge of existence to come. ¶ When estate law establishes equal partition, it destroys the intimate connection that exists between the spirit of the family and the preservation of the land; the land ceases to represent the family, for, since it cannot fail to be partitioned at the end of one or two generations, it is evident that it must constantly be diminished and in the end disappear entirely.... ¶ As family no longer presents itself to the mind as anything but vague, indeterminate, and uncertain, each concentrates on the comfort of the present: he dreams of establishment of the generation that is going to follow him, and nothing more.” Tocqueville, *Democracy in America*, 1.1.3, pp. 48–49.

29. See Max Rheinstein, *Marriage Stability, Divorce and the Law* (Chicago: University of Chicago Press, 1972), pp. 51–105, 277–307, and 311–316, and Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (Chicago: University of Chicago Press, 1998), pp. 188–196.

30. Barbara Dafoe Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family* (New York: Vintage, 1998).

31. JoAnne Sweeny, “Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws,” *Loyola University Chicago Law Journal*, Vol. 46, Issue 1 (2014), pp. 127–156.

of self-government. The very existence of a political community depends on married adults having children and raising them to responsible adulthood, even when doing so comes at a cost. Hence, it depends on citizens capable of the sacrificial love that is at the heart of marriage and family life without requiring love as a condition of marriage.

Citizens in modern democracies, at a minimum, must be able to govern themselves: to possess significant self-control; take responsibility for their actions and live with the consequences of success or failure; possess more than a little perseverance, equanimity, and industriousness for the times when things do not go their way; act with civility toward their fellows; and learn to act on the basis of long-term instead of short-term views. Modern democracies depend on mutual forbearance and some level of mutual respect among citizens.

The very existence of a political community depends on married adults having children and raising them to responsible adulthood, even when doing so comes at a cost. It depends on citizens capable of the sacrificial love that is at the heart of marriage and family life.

This type of human character does not arise automatically or spontaneously from birth. Future citizens come from private families. Preparing children for responsible adulthood requires active supervision, correction, and the shaping of a child's affections toward responsible action. Human beings are endowed with certain powerful, irrational, and unsocial passions that can disrupt a common life if they are not tamed.

Natural passions pose great challenges and point in a variety of directions, some of which the public hopes to encourage and others that the public hopes to discourage or channel to support the perpetuation

and thriving of the political community. Human beings are social creatures who take some of their ideas from the laws and mores that are predominant in their time and place. How people approach parenthood, conceive of sexuality, and prioritize marriage and family in their busy lives depends greatly on public morality.

More specifically, philosophers since Aristotle have recognized this mastery of inclinations as the seed of future happiness.³² John Locke writes in *Some Thoughts Concerning Education*:

He that has not mastery over his inclinations, he that knows not how to resist the importunity of present pleasure and pain for the sake of what reason tells him is fit to be done, wants the true principle of virtue and industry, and is in danger of never being good for anything. This temper, so contrary to unguided nature, is to be got betimes; and this habit, as the true foundation of future ability and happiness, is to be wrought into the mind as early as may be.³³

Habits of self-control involve first denying present, short-term pleasures or satisfactions for greater long-term ones and ultimately controlling sensual appetites and ambitions in the service of a reasonable, civilized way of life. Self-mastery depends on involved parents superintending this character formation in their children. This superintendence must be a priority for parents, because it takes much time and energy to children instead of doing other tasks.

Sexual longings must also be channeled toward responsible procreation and enduring relationships. This is no easy task. Sexual passions can be difficult to resist, disorderly, and susceptible to whims, infatuations, and even violence. Self-centered urges and higher aspirations for unity compete with one another for center stage in sexual relations. Enduring sexual attachments can connect a man and a woman to each other and to their progeny, while fleeting expressions of sexual passion are difficult to integrate into a common life together.

Finally, raising children to responsible adulthood

32. Aristotle, *Nicomachean Ethics*, trans. Robert C. Bartlett and Susan D. Collins (Chicago: University of Chicago Press, 2011), 1147b20-1151b28.

33. John Locke, *Some Thoughts Concerning Education* (Indianapolis: Hackett, 1996), Para. 45; see also Paras. 50-52, 75-77, 90, and 103-104. See also Locke, *Essay Concerning Human Understanding* (Dover, DE.: Dover Publications, 1959), Vol. 1, Part 3, Para. 9: "Principles of Actions indeed there are lodged in Men's Appetites, but these are so far from being innate Moral Principles, that if they were left to their full swing, they would carry Men to the over-turning of all Morality."

requires the prioritization of family. Career, political life, religious practice, the arts, sports, various recreation activities and distractions, and many other good things appeal to the human imagination, and modern democracies allow people great freedom in pursuing happiness through such goods. The less people prioritize marriage and family life, the fewer children they are likely to have; and the less willing they are to contribute to the sound education of the children they do have, the more the community may suffer from a shortage of properly prepared future citizens.

A stable marriage and dedicated, engaged participation in family life are crucial to meeting the challenges posed by human passions and imagination. Stable married couples provide the environment in which unruly children are best brought to control their passions and prepare for citizenship. Scholar Harry Clor recognizes the importance of monogamous marriage to the preparation of responsible citizens:

The monogamous family (at its best) has long been recognized as a locus of mutual affection and devoted nurture that is virtually irreplaceable by anything available in the vast and impersonal societies of the modern world. This institution seems to be the best agency we have for the development of personalities who can be self-directing individuals capable of taking responsibility for their own lives and social beings with larger human sympathies and capability for public responsibility.³⁴

Married couples learn to govern their erotic longings and practice sexual responsibility and fidelity as they build a common life together. Sexual passion finds a subordinate place in a married couple's loving relationship. Sexual fidelity and responsibility are hallmarks of enduring marriages, and both require that sexual passion find its proper place within a good life.

It is also true that people value marriage and family if they are going to prioritize it in their lives. Only

if people value marriage will couples think about their long-term relations and subordinate their selfish passions while directing their sexual passions toward a common life together. Valuing family requires undertaking the serious job of raising children to responsible adulthood.

Valuing family requires undertaking the serious job of raising children to responsible adulthood.

Many legal prohibitions that remain in our advanced liberal society pertain to maintaining a citizenry that has a certain understanding of sexual attachments and engages in monogamous family life. Consider prohibitions against incest, polygamy, and open displays of pornography. Proscription of these practices derives in part from our knowledge of their harmful effects on public morality and the need to protect monogamous marriage. Prohibitions on incest and the laws surrounding parental responsibilities, for example, provide clear minimums of proper parental behavior and are intelligible as contributions to protecting and subtly encouraging monogamous marriage and sacrificial parental love.

Promiscuous viewing of pornography likewise erodes self-restraint and undermines loving, personal attachments, reducing intimacy between spouses (this applies especially to men) as well as interest in family.³⁵ In *Paris Adult Theatre v. Slaton*, a case allowing for proscription of hard-core pornography, the Supreme Court of the United States endorsed the view that how sex is depicted affects married life:

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.³⁶

34. Clor, *Public Morality and Liberal Society*, p. 61.

35. See James R. Stoner, Jr., and Donna Hughes, eds., *The Social Costs of Pornography: A Collection of Papers* (Princeton, NJ: Witherspoon Institute, 2010).

36. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 63 (1973), <https://supreme.justia.com/cases/federal/us/413/49/case.html#57> (accessed August 29, 2017).

Subsequent decades of experience have done little to upset this line of reasoning. The loosening of sexual morality depersonalizes sex, making the atmosphere of American culture less hospitable to enduring marriage, intimate monogamous relations instead of fleeting sexual relations, and responsible family life. These proscriptions are remnants of a more robust ethic of self-restraint in law and opinion that supports enduring monogamous relationships and conceives of marriage as a public institution insofar as it concerns the procreation and education of children.

Those who advocate the removal of such proscriptions have in mind the cultivation of an ethic emphasizing self-expression. According to this ethic, people must feel free to follow their instincts or choices, whatever they may be, as long as relations are consensual when they involve another person, and the public should welcome such expressions as long as they do not physically harm others. This ethic of self-expression fosters a view of human passions that is very different from the old ethic of self-control. The new view conceives of sexual desire as naturally good and unproblematic as long as social taboos do not impose artificial constraints on it and as long as the parties consent.³⁷

The ethic of self-expression downplays the importance of dedicated parental superintendence of children for the promotion of the child's eventual self-mastery. Still worse, it even views self-mastery as a form of repression. Self-mastery as an aim of moral education teaches the place of sexual desire within a larger ordering of goods so that children can grow up to responsible adulthood governing their passions in a way that is consistent with republican liberty.³⁸

Either way, “the kids will be fine,” as one book by a self-proclaimed “thoroughly modern” author puts it, regardless of how much parents and especially mothers do.³⁹ Parents need not worry about prioritizing their own ambitions or independence above the needs of their children, because the level of

investment needed to educate children is not as high as previously thought. Even the breakup of the adult relationship need not have a profound effect on the cultivation of character in the young.

Many victories have been won in the effort to reconceive public morality in terms of self-expression. These changes move toward the adoption of an adult-centered understanding of relationships, especially sexual relationships, that is centered not on the ordering purpose of procreation, but rather, in the words of Justice Sandra Day O'Connor, on “expressions of emotional support and public commitment” and the “receipt of government benefits.”⁴⁰ These profound changes in marital and sexual practices represent the replacement of a public morality dedicated to self-restraint with one defined by self-expression.

Public morality is never neutral as it meets the challenge of the human passions. It takes sides and hence makes some ways of living more possible than others.

Public morality is never neutral as it meets the challenge of the human passions. It takes sides and hence makes some ways of living more possible than others. The ethic of self-expression has the effect of moving family practice toward less dedication and devotion and less personalized relations. It filters marriage and family life through an individualistic, sexualized lens, deemphasizing marriage as a human good when compared to lives dedicated to labor or politics. It undermines the legal basis for supporting an ethic of self-control, shakes the confidence of those who are charged with executing such laws, and points to the need for ever-greater sensitivity on the part of those who—arbitrarily, it seems—cling to the ethic of self-control.

37. For a description of how the major 20th century sexologists forwarded this understanding of progress, see Paul Robinson, *The Modernization of Sex: Havelock Ellis, Alfred Kinsey, William Masterson and Virginia Johnson* (New York: Harper & Row, 1976). See also Rochelle Gurstein, *The Repeal of Reticence: America's Cultural and Legal Struggles over Free Speech, Obscenity, Sexual Liberation, and Modern Art* (New York: Hill and Wang, 1996), pp. 95-105.

38. For a classic treatment of repression, see Michel Foucault, *The History of Sexuality, Volume I: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1980), pp. 36-49.

39. Daisy Waugh, *The Kids Will Be Fine: A Guilt-Free Motherhood for a Thoroughly Modern Woman* (New York: Metropolitan Books, 2014).

40. *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), <https://supreme.justia.com/cases/federal/us/482/78/case.html> (accessed August 22, 2017).

Advocates of government agnosticism with regard to the nature of marriage might suggest that those who desire a life of devoted monogamy, dedicated to raising children, are still free to do so without the interference of the law and without cultural disapproval. There is some truth to this. Many people take their bearings from authorities such as churches, tradition, or simple habit that are outside of the law and the prevailing public morality. These institutions, as long as they are tolerated, can lend some support to the ethic of self-control, self-sacrifice, and governance of passions. Marriage also has an intrinsic attractiveness for many people as a deeply satisfying intimate relationship that persists even in a culture of self-expression. A culture is rarely so univocal and omnipotent that it prohibits what it does not encourage.⁴¹

Traditional family life is not so much outlawed through contemporary liberalism and its coincident ethic of self-expression as it is compromised and dishonored. Acceptance of no-fault divorce and the public acceptance of cohabitation as equal to marriage are abetted by laws that tend to bring about a culture of expressive individualism. Just as that culture depends on law, however, so does a culture emphasizing the cultivation of self-control and monogamous love. Certain elements of our laws still help to promote some elements of self-control. Since people are social creatures, the predominant culture, shaped in part by laws, affects everyone.

Human nature presents challenges: attaching men and women to each other, encouraging them to have children, and attaching each to the children that accompany their union. How human beings approach these challenges is shaped to an extent by the predominant opinions around them, which themselves are shaped in no small part by the law.

Culture is not neutral as it registers human nature and imagines the rank of human goods.⁴² Society cannot be uninterested in how people answer questions about whether people will have children, whether people will stay together to raise them, or how they will educate them. Society's very

survival (someone must have children), health (parents must be attached to their children), and stability (many men and women must have enduring relations) depend on how people approach these experiences. Contemporary liberalism has introduced laws that bring with them a public morality and a practice whereby families and marriages are less stable, parents have fewer children, and fewer people marry.

Contemporary liberalism has introduced laws that bring with them a public morality and a practice whereby families and marriages are less stable, parents have fewer children, and fewer people marry.

America has a complex set of laws and a diverse public morality: An adult-centered morality of self-expression that is more or less inimical to devoted marriage and family life exists alongside an ethic of support for monogamous marriage and sacrificial love. Advocates of government agnosticism about the nature of marriage suggest that the challenges of human nature are beyond the scope of legitimate public concern, assume that people will answer these questions in socially beneficial ways, or believe that technology and new institutions will arise to meet the challenges of human nature without excessive costs. The result, in practice, would be marriage that is more or less informed by principles of self-expression instead of by principles that support monogamous, devoted marriage.

This new ethic poses significant risks for a modern democracy. To state only the most obvious, the new vision means that there is no institution the public purpose of which is the procreation and education of children and the public morality of which comprises the institution most crucial to cultivating future citizens.

41. Thus, James Q. Wilson, noticing the triumph of the ethic of self-expression, marvels "that people get married at all." James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* (New York: HarperCollins, 2002), p. 104.

42. Several key facts support the conclusion that public morality quietly shapes human behavior. Polygamous patriarchy is not practiced among modern people. Fertility rates nearly everywhere in the modern world are declining below replacement rates, and families with more than three children are much rarer than they were several years ago (though there is no official limit on family size). Marriages take place later, and the rates are much lower (though no policy limits them officially).

Why There Is No Substitute for the Family

The most crucial practical difficulties created by a government policy that is ambivalent about the form of marriage concern the raising of children, establishment of parental rights, and responsible discharge of parental duties. There is general recognition that the responsible exercise of parental rights must be supported, at least minimally, through law.⁴³ Society requires someone to meet a child's needs, choose a child's school, and support and supervise children in the home. Schools must know who oversees children at home in order to hold them responsible. Failure to provide support or supervision constitutes neglect or abuse.

Historically, parental rights attach to children through marriage based on the idea that parents will love their children and can raise them to responsible adulthood better than anyone else could. To replace this arrangement, contemporary liberals would have the state create new entities such as "Intimate Care-Giving Units" (ICGUs) to regulate and support relations between caregivers and dependents. ICGUs would identify caregivers and then support caregiving through public monies, regulation of the workplace to provide time off or space to provide care to assigned caregivers, and the dispensation of certain powers to make decisions on the dependent's behalf.

American society has been conducting what amount to limited experiments with ICGUs. The state provides a network of aid to support the adult relationships under which children happen to find themselves living. The single-parenthood arrangement is, in effect, an ICGU. Results from these experiments, however, suggest that not all ways of raising children are equally effective.

The ICGU solution that contemporary liberals imagine, in one form or another, assumes that for the caregiver, the dependence of infants and children is no different from the dependence of the aged or infirm. It abstracts from how the relation between caregivers (marriages) gives impetus to the caring for dependents (children). The state would be forbidden to encourage stability or exclusivity between (or among) caregivers—and hence would

not promote stability, resource sharing, or mutual responsibility between (or among) "caregivers." Such instability would make it even more difficult to identify parents and to supervise, discipline, inspire, and educate children.

Other practical problems arise. In the absence of a marital presumption of paternity, for example, children under the ICGU framework become sources of legal controversy. The public, which under this scheme creates "parental rights," would also have the power to decide whether biological parents automatically exercise parental rights over children. There would be no reason for the public to defer to the facts of biology or the obligations of a preexisting sexual relationship between adults, because the state takes "no cognizance" of such relationships.

Nor is it clear what one would have to prove in order to be a caregiver in an ICGU. A dependent's caregiver could be just about anyone.

Another experiment in ICGUs is also becoming more prominent today. Imagine a lesbian couple in which one woman is mother to a child with her now ex-husband. In such a scenario, certain things are not clear:

- Who should have custody of the child?
- Should the father or the mother have a say in whether the new spouse should be part of the ICGU?
- Would the lesbian couple and the ex-husband be equal partners in the ICGU, or would the ex-wife and ex-husband be unequal partners in a threesome of caregivers?
- If the lesbian couple got custody and the birth mother and her lesbian partner wanted to be listed on the birth certificate as parents, it would seem that the result would be to create an irrevocable bond between the couple and their charge. If the couple broke up, however, would the prior nonbiological mother listed on the birth certificate still be considered a birth mother or have parental rights and obligations?

43. There is a robust debate within libertarianism on this matter, with some denying that there can be laws against parental neglect that are legitimate and others insisting on a subterranean violation of libertarian principles to require parents to care for children. See, respectively, Rothbard, *The Ethics of Liberty*, p. 100, and Horwitz, *Hayek's Modern Family*, pp. 225–230.

In short, leaving the solid ground of biology in search of a replacement for marriage creates more problems than it solves.

Because contemporary liberalism conceives of ICGUs as creations of the state, contemporary liberals advocate moving beyond conjugality to a partnership registration system centered on the goods of public recognition. Most scholars recognize that the state also provides great resources for individuals in these state-created contracts. As a result, this would pave “the way for claims of collective supervision and monitoring of parental stewardship” by the state.⁴⁴

Advocates swear that they do not want to exercise such supervision and monitoring, but there would be ample opportunity and motive to exercise this new power, and the leverage of state aid would be of great use in encouraging people into ICGUs. In such an arbitrarily drawn institutional form, there would be no line between family and state that the state could not cross at will, because the state would be the creator of the circle of privacy. For contemporary liberals, familial privacy is a revocable entitlement, not an indefeasible right rooted in nature.

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Nor would the definitions of care and intimacy be beyond controversy. ICGUs abstract from the actual, day-to-day work of parents, the conditions of love and a common life, and the enormous amount of time and personal investment that make parenting effective. ICGUs can receive government benefits in the form of financial assistance that enables individuals to invest time and resources in caring for members of the ICGU. It is not clear how intimate people would have to be to join an ICGU or how intimacy would be judged. This would create opportunities for massive fraud, especially since care could be extended to anyone needing care. Stopping such fraud would require greater intrusion into the sphere of personal relations than anything envisioned by the old regime of marriage.

It is tempting to think of contemporary liberals’ advocacy of ICGUs as putting old marriage wine into new, less-discriminatory wineskins. Some entity must arise to attach adults to children, but this new creation lacks two of the key elements that make the parent-child relationship within traditional marriage effective. As a creation of the state, its boundaries are nebulous, and because those boundaries are judged by how they promote society’s fundamental values, they can be changed to serve changing social functions. Since those values abstract from why married couples care for one another or why parents care for their children, this new form cannot promote the values of care as well as can the old marriage, with its self-sacrificing love and service to a common good. This points to a somewhat paradoxical truth: Marriage and family life provide great public benefits as long as they are not viewed as institutions designed primarily for public purposes rather than as institutions that precede the state.

Mere care is not the essence of marriage and family life: Common goods are its essence. Care is an indirect product of other, even greater goods manifest in a life lived with another. The best care tends to happen when an intact family centered on a husband and a wife, a mother and a father, is understood through a sense of common destiny, a binding love in which individuals grow in part by giving themselves to each other and to their children.

Moreover, care is not merely a question of material resources that can be provided through the state. Care is reflected in the time and attention necessary to carry burdens and overcome obstacles. A culture that supports a common life, sacrificial love, and responsible parenting is most likely to provide the kind of care that many agree is essential to human flourishing.

The more the state becomes agnostic with respect to the nature and form of marriage, the more the power of the state will increase as the maker and provider of that which replaces the family. Dedication to one’s ICGU is much more difficult to imagine than is dedication to one’s marriage and children, and without this dedication, it is difficult to imagine the involvement necessary to shape the character of self-governing citizens.

44. Fineman, *The Autonomy Myth*, p. 302.

Conclusion

How and why the state recognizes marriage and family life are not the same as what marriage and family life mean to those inside of them. The state's concern for marriage arises principally from the role of marriage in the procreation and education of children even though having children may not be the primary goal of many people entering marriage. Marriage and family life thus represent a marvelous example of indirection, whereby a private prepolitical institution provides great public benefits as it fulfills its own distinctive vision organically. The state plays some role in shaping public morality that supports the sacrificial love, dedication, and self-mastery of parents. It thereby helps to protect and support a culture in which fruitful, responsible, monogamous love can serve the state's important interest in perpetuating our self-governing republic.

A culture that supports a common life, sacrificial love, and responsible parenting is most likely to provide the kind of care that many agree is essential to human flourishing.

The chief theoretical problem with government agnosticism about marriage is unwillingness to take into account the likely effects of adopting contemporary liberal and libertarian principles in our context. Perhaps advocates of government agnosticism in family policy hope that their principles will have a benign or even progressive effect on society. Perhaps they believe that society will always spontaneously produce what it needs for its survival and thriving.

Whence these salutary assumptions? If public opinion and law play a role in keeping monogamous, faithful marriage relatively normative in practice, then removing law and changing public opinion will likely have the effect of making lifestyles that are not conducive to the common good themselves much more common. To argue that changes in law will affect neither opinion nor behavior is to ask people to believe that today's practice will extend indefinitely into the future without any support in law or opinion. But that is wishful thinking: Certainly, marital practices can always get much worse.

There is much that compromises marital practice today, most prominently including the ethic of self-expression and its illusory promise of human liberation. Many changes in law have abetted the creation of this ethic. To use the most recent example, only societies that have gone a long way toward embracing the ethic of self-expression consider same-sex marriage. As a result, there is an ever less stable conception of marriage.

While ascendant, however, the ethic of self-expression is not triumphant, and those who would defend marriage in the modern world should understand the aspects of the ethic of self-control that remain and *why* they remain. Marriage is still limited in law to two, non-blood-related individuals. Sex for hire is illegal, as are many expressions of obscenity, underage sex, public sex, and other practices inimical to an ethic that favors devoted monogamous love.

In today's context, agnosticism concerning marriage abets the culture of adult-centered self-expression. Where this goal is not accomplished through politics, it is sought through administrative or judicial fiat. This makes opposition to such an agenda difficult to wage politically (because of the polarization that comes with it) and morally (because moral opposition scarcely has a political outlet).

Opponents of these efforts must work to constitute public morality anew. Those who oppose this move must first emphasize the permanent challenges posed by human passions and human imagination and encourage reflection about the proper rank of the human goods. The law affects public morality in subtle, inescapable ways. Further erosion of laws supporting an ethic of self-control might involve passing laws that erode parental powers and laws that further undermine marital integrity.

Such erosion must at least be resisted. There may not always be ears to hear, but confidence in right as we are permitted to see it demands engaging in the long work of reconstituting a more responsible public opinion for a self-governing people.

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