

Introduction

For better or worse, we are in the midst of a family law revolution that is upending millennium-long laws and customs of the West. A century ago, a typical Western state defined marriage as an exclusive and enduring monogamous union between a man and a woman with the freedom and capacity to marry each other. Marriage was considered to be the heart of the family and household, designed for the mutual love and support of husband and wife, their mutual protection from sexual temptation, and their mutual procreation, nurture, and education of children. The law required that engagements be formal, and that marriages be contracted with parental consent and witnesses and with a suitable waiting period. It required marriage licenses and registration and solemnization before civil or religious authorities. It prohibited marriage and cohabitation by couples with various blood and kin ties or with marital contracts to others. It discouraged marriage where one party was impotent or had a disease that precluded sex and procreation or physically endangered the other spouse. Couples who sought to divorce had to publicize their intentions, to petition a court, to show adequate cause or fault, and to make property provision for the dependent spouse and children thereafter. Criminal laws outlawed fornication, adultery, prostitution, sodomy, polygamy, incest, contraception, abortion, and other sexual offenses. Tort laws held third parties liable for seduction, enticement, loss of consortium, or alienation of the affections of one's spouse. Many of these legal rules had millennium-long roots in the Western legal tradition, with several rules going deeper still into ancient Greek, Roman, and Mosaic laws.

Today, much of this traditional family law has fallen or been pushed aside in favor of new cultural and constitutional norms of sexual liberty, privacy, and autonomy. Courtship, cohabitation, engagement, marriage, and divorce are now mostly private sexual arrangements with fewer and smaller roles for church and state to play, and fewer restrictions on freedoms of entrance,

exercise, and exit. Many states now offer several off-the-rack models of straight and same-sex marriage, civil union, and domestic partnership with shrinking formal and functional distinctions between them. Privacy laws protect all manner of other voluntary sexual conduct and relationships among consenting adults, and rapidly growing portions of the population are “drifting into sex and parenthood without marriage,”¹ especially those with fewer means and less education. Free speech laws protect all manner of sexual expression short of obscenity, but the wildest unregulated frontiers of sexual adventure are now only a mouse-click away. Most traditional sex crimes have fallen aside in the West, save rape, sexual assault, and sexual abuse of children, which are now aggressively prosecuted. The classic crimes of incest, prostitution, and polygamy remain on most books, but they are now subjects of emerging academic and constitutional battles. The formal legal categories of marriage and the marital family also remain in place, but leading scholars are now pressing for their expansion, “disestablishment,” or outright “abolition.”

These exponential changes in modern Western family laws have been, in no small part, valiant efforts to bring greater freedom, choice, and equality to public and private life. They are also basic legal adaptations to the exponential changes that have occurred in the culture and condition of modern families: the stunning advances in reproductive technology; the exposure to vastly different perceptions of sexuality, kinship, and family structure born of globalization; the relaxation and diversification of norms and habits of sexual expression and interaction now greatly enhanced by the Internet and other media; and the implosion of the Ozzie and Harriet family born of new economic and professional demands on wives, husbands, and children. The sharp reduction of sex crimes further reflects the shift from the traditional fault-based system of criminal law that included consensual and victimless sex crimes to a “harm-based” system that focuses on protecting victims from “unwanted sex.”² It reflects shifts from traditional laws heavy on “thou shalt” and “thou shalt not” commands to modern laws focused on nudging and channeling citizens toward more socially desirable sexual behavior. And they reflect a new reliance on the modern welfare state to provide a good deal of the care for “the poor, orphans, widows” and other needy citizens that was

¹ Isabel V. Sawhill, *Generation Unbound: Drifting into Sex and Parenthood Without Marriage* (Washington, DC: Brookings Institution Press, 2014). See further June Carbone and Naomi R. Cahn, *Marriage Markets: How Inequality Is Remaking the American Family* (Oxford/New York: Oxford University Press, 2014).

² Steven J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, MA: Harvard University Press, 2000).

traditionally provided by the marital family and broader kin and social networks.

But all these rapid changes have introduced several “striking new separations in the sexual field,” Don Browning writes.³ They include separations: (1) between marriage and sex; (2) between marriage and childbirth; (3) between marriage and child-rearing; (4) between childbirth and parenting; (5) between sex and physical contact, given the advent of cybersex; and (6) between childbirth, sexual intercourse, and biological filiation, given the rise of artificial reproductive technology, sperm banks, and surrogacy. Historically, Western churches, states, and societies promoted the integration of marriage, sexual intercourse, childbirth, and child-rearing within a sturdy family framework anchored by a stable marriage. Not so much now. As Chief Rabbi Jonathan Sacks of the United Kingdom put it:

Sex has become, for the first time since the conversion to Christianity of the Roman Emperor Constantine, an almost value-free zone. Whatever happens between two consenting adults in private is, most people now believe, entirely a matter for them. The law may not intervene; neither may social sanction. It is simply not other people’s business. Together with a whole series of other changes, the result has been that what marriage brought together has now split apart. There has been a divorce between sex and love, love and marriage, marriage and reproduction, reproduction and education and nurture. Sex is for pleasure. Love is a feeling, not a commitment. Marriage is now deeply unfashionable. Nurture has been outsourced to specialized child carers. Education is the responsibility of the state. And the consequences of failure are delegated to social workers.⁴

It will come as no surprise to most readers to hear a distinguished religious official lament some of the excesses of the modern sexual revolution – although some religious leaders celebrate these modern reforms. Nor will it be a surprise to hear various conservative voices note with alarm the formidable psychological, social, and economic costs of the modern sexual revolution. Indeed, a number of leading scholars, advocates, and religious and political leaders have converted their concerns into a powerful new “marriage movement” over the past generation. This movement combines traditional teachings and modern social science and public health findings to advocate

³ Don S. Browning, “Family Law and Christian Jurisprudence” in John Witte, Jr. and Frank S. Alexander (eds.), *Christianity and Law: An Introduction* (Cambridge: Cambridge University Press, 2008), pp. 163–85, pp. 165–68.

⁴ Jonathan Sacks, *The Home We Build Together: Recreating Society* (London: Continuum, 2007), p. 210.

for stable marital families, responsible sex and parentage, and proper family planning as essential for private flourishing and social stability. And a number of churches, schools, charities, and entertainers have teamed up to address the “crisis in the village,” as Robert Franklin puts it, and to “restore hope” especially in African-American communities decimated by decades of family breakdown, exacerbated by the high incarceration rates of African-American men.⁵

THE NATURE OF THE MARITAL FAMILY

It will come as more of a surprise, at least for some readers, to learn that classical liberals warned strongly against the very kind of radical sexual revolution that we are now witnessing. But strong warnings are just what we hear from scores of European and North American Enlightenment liberals writing from 1600 to 1900. For all their post-Christian and antiestablishment zeal, most liberals supported the traditional marital family as the most natural, expedient, and desirable form and forum of domestic life. They warned that the destabilization of the marital family through easy divorce or transient troth would spell the “doom of all mortals.”⁶ They warned that unchecked “sexual libertinism”⁷ and thinned-out family law systems would put society on a dangerous slippery slope toward a sexual state of nature where life would be “brutish, nasty, and short” especially for women and children. And they reminded their readers of Aristotle’s famous dictum: “Just as man is the best of the animals when completed, when separated from law and adjudication he is the worst of all” – especially “with regard to sex and food.”⁸

This Enlightenment liberal warning was part and product of a 2,500-year running philosophical argument in the West about the nature and purpose of sex, marriage and family life. This argument started with several basic realities about human nature and sexual reproduction. First, unlike most other animals, humans crave sex all the time, especially when they are young and most fertile. They don’t have a short rutting or mating season, followed by a long period of sexual quietude. Second, unlike most other animals, human babies

⁵ Robert M. Franklin, *Crisis in the Village: Restoring Hope in African-American Communities* (Minneapolis: Fortress Press, 2007). See also James Forman, Jr., *Locking up our Own: Crime and Punishment in Black America* (New York, NY: Farrar, Straus and Giroux, 2018).

⁶ David Hume, *Essays: Moral, Political, and Literary*, rev. edn., ed. Eugene F. Miller (Indianapolis: Liberty Fund, 1987 [1777]), pp. 187–90.

⁷ William Paley, *The Principles of Moral and Political Philosophy*, D. L. LeMahieu, ed. (Indianapolis: Liberty Fund, 2002 [1785]), p. 189.

⁸ Aristotle, *Politics*, bk. 1, ch. 2.

are born weak, fragile, and utterly dependent for many years. They are not ready to run, swim, or fly away upon birth or shortly thereafter. They need protection, food, shelter, clothing, and education. Most human mothers have a hard time caring fully for their children on their own, especially if they already have several others. They need help, especially from the fathers and their kin networks. Third, however, most human fathers will bond and help with a child only if they are certain of their paternity. Put a baby cradle in a public place, and most women will stop out of natural empathy. Most men will walk by, unless they are unusually charitable or are deputized to give care. Once assured of their paternity, however, most men will bond deeply with their children, help with their care and support, and defend them at great sacrifice. For they will see their children as a continuation and extension of themselves, of their name, property, and teachings, of their genes, we now say. Fourth, unlike virtually all other higher animals, humans have the freedom and the capacity to engage in species-destructive behavior in pursuit of their own sexual gratification. Given the lower risks and costs to them, men have historically been more prone to extramarital sex than women, exploiting prostitutes, concubines, impoverished women, and servant girls in so doing and yielding a perennial underclass of “bastards” who have always fared poorly.

Given these four factors, this traditional philosophical argument went, rational human beings and societies have learned, often by cruel and hard experience, to develop enduring and exclusive sexual relationships, eventually called marriages, as the best form and forum of sexual bonding and reproductive success. Stable monogamous marriages are designed to provide for the ongoing sexual needs and desires of a husband and wife. They ensure that both fathers and mothers are certain that a baby born to them is theirs. They ensure that husband and wife will together care for, nurture, and educate their children until they mature. And they deter both spouses from destructive sexual behavior outside the home.

Especially in later forms, this argument emphasized that husbands and wives have to work hard to maintain active and healthy sex lives – even when, or indeed especially when, procreation was not or was no longer possible. Robust sexual communication within marriage is essential for couples to deepen their marital love and to remain in their own marital beds, rather than testing their neighbor’s. And marital sex sometimes is even more important when the marital home is (newly) empty and husbands and wives depend more centrally on each other (not on their children) for emotional confirmation and fulfillment. Not every sexual act within the marital bed needs to be procreative. Sexual intimacy between married couples is an

essential good in its own right, regardless of procreative intent, capacity, or result.

This argument further emphasized that parents and children have reciprocal natural rights and natural duties. It emphasized the vital organic bonds between mother, father, and child and stipulated that the man and woman who produce a child should have the *prima facie* right and duty to care for that child. It emphasized that children have the correlative right to be raised, if possible, by the parents who procreate them – or adopt them. And it emphasized that exclusive and enduring monogamous marriages are the best way to ensure that men and women are treated with the equal dignity and respect, and that husbands and wives, and parents and children, provide each other with mutual support and protection throughout their lifetimes and through their estates thereafter.

Finally, this argument warned against sexual activities and interactions that jeopardized the stability and support of the marital family, and the rights and liberties of its members. Polygyny was out because it fractures marital trust and troth, harms wives and children, privileges patriarchy and sexual slavery, and foments male lust and adultery. Polyandry was out because it creates paternal uncertainty and catalyzes male rivalry to the ultimate detriment of the children. Incest was out because it overrides the instincts of natural revulsion, it weakens bloodlines, and it deters the creation of new kinship networks that are essential for civil society and political coherence. Prostitution and fornication were out because they often exploit women, foster libertinism, deter marriage, and produce vulnerable bastards. Adultery was out for some of the same reasons, but even more because it shatters marital fidelity and trust, diffuses family resources and parental energy, and risks sexual disease and physical retaliation of the betrayed spouse. Easy divorce was out because it erodes marital fidelity and investment, jeopardizes long-term spousal support and care, and squanders family property on which children eventually depend to care for their elderly parents. By the turn of the twentieth century, similar natural rights arguments were being used to begin to stamp out the discrimination that the law still retained against spinsters, wives, and nonmarital children.

This philosophical argument about the nature of sex, marriage, and family life was already adumbrated by Aristotle and early Roman Stoics and by later Church Fathers such as St. Chrysostom and St. Augustine. It was elaborated by St. Thomas Aquinas and other scholastics in the thirteenth century and became a staple of the thought of early modern neo-scholastics like Francisco Vitoria as well as early modern Protestants like Martin Luther and John Calvin. Christian liberals, beginning with Hugo Grotius, John Selden, and

John Locke, took these arguments about marriage and the family as the starting point for their more expansive liberal theory of the family. Generations of later Enlightenment philosophers and common law jurists echoed and elaborated these views and eventually integrated them into the common law idea that the marital family has a special “status” in contractarian democratic societies. Today, evolutionary scientists, economists, social scientists, and public health experts alike have shown that enduring and stable pair-bonding strategies are the most expedient and efficient means of human reproduction and flourishing – comprising what Claude Levi-Strauss once called the “deep structure”⁹ of survival and reproductive success that the human species has evolved. The first half of this volume lays out variations of these philosophical arguments, and they percolate through several of the later chapters as well.

To be sure, as later chapters explore, some of the scientific assumptions and conditions at work in this philosophical argument about the marital household have changed. Genetic testing has made paternity easier to establish. Contraceptives have made extramarital sex safer to pursue. And artificial reproductive technology has made single reproduction a greater possibility. But these scientific advances are by no means universally available, nor are they foolproof when available. And while they can enhance and expand the sexual experiences and procreative activities of humans, these scientific advances do not alter the core logic at work in the traditional understanding of the nature of the marital family. Confining sex to marriage was important in earlier times to ensure paternal certainty. But the point of having paternal certainty was to ensure that a man could and would invest in the care of his child along with the mother, ideally in a stable marital household where the child would flourish best. Using contraceptives certainly widens the opportunities for safe or secret nonmarital sex. But it does not meet the traditional concern that rampant promiscuity often leads to sexual exploitation of women and sexual libertinism among men. Having artificial reproductive technology available certainly enhances the chances of having a child on one’s own or with one’s spouse or partner. But when a mother has drawn from an anonymous sperm bank or a frozen embryo collection, her child’s long-term concerns for its paternal origin and identity remain unmet. There are many valuable uses for paternity tests, contraceptives, and reproductive technology in modern society, notably among married couples whose lives can be greatly enhanced by them. But these modern scientific advances do not, in my view,

⁹ Quoted and discussed in Bernard Chapais, *Primeval Kinship: How Pair-Bonding Gave Birth to Human Society* (Cambridge, MA: Harvard University Press, 2008), pp. 10–11, 194.

undercut the core logic of the traditional philosophical argument about the nature, value, and utility of the marital family.

Also, to be sure, the modern Western welfare state now supplies nonmarital children, single mothers, abandoned or widowed spouses, aged parents, and other vulnerable and needy parties with vast new resources traditionally supplied by their own family and broader community networks. These new forms of welfare, too, are valuable advances that greatly promote social justice and cater to greater provision and happiness for all. But the availability of state-based social welfare relief does not, in my view, cancel the ongoing value of stable marital households and kin networks. It is wise to remember that the modern welfare state remains an expensive and risky political experiment, less than a century old, and now increasingly on the fiscal and ideological ropes. It is not clear to me that too heavy dependence upon it is a sustainable long-term solution for the marital family even for the affluent West, let alone for underdeveloped or developing countries. Moreover, even in America and other Western lands, those who depend exclusively on social welfare, Medicare, social security, and other state entitlements often face bitter financial and emotional hardship, and endless bureaucratic wrangling as they seek to secure basic food, health care, and job stability. Better social welfare systems are in place in Europe today. But these, too, depend on high median wealth in the population, all of which can disappear quickly, as we just saw during the Great Recession and our (grand)parents saw in the Great Depression. The modern social welfare state, while vital, is a supplement to, not a substitute for, the parental and intergenerational care and nurture provided by stable families and kin networks.

CHURCHES, STATES, AND FAMILIES

Even the most robust defenders of this traditional philosophical argument about sex, marriage, and family life have long understood that it yields only a wobbly normative framework for human families. Nature, reason, and experience might well incline humans to behave in certain ways in their sex, marriage, and family lives, and many humans in fact generally follow these inclinations without much further prompting. But given the Jekylls and Hydes that perilously reside within all of us, natural inclinations and rational calculus by themselves do not provide enough structure and stability. In reality, a good number of people stray on occasion from sexual conduct that is healthy and expedient for themselves, their families, and their communities. And a few folks stray all the time, harming many others and imposing ample costs by their conduct.

Human families thus need broader communities and narratives to stabilize, deepen, and exemplify these natural inclinations and rational norms. They need models and exemplars of love and fidelity, trust and sacrifice, and commitment and community to give these natural teachings further content and coherence. They need the help of stable institutions, like states, churches, schools, charities, hospitals, neighborhoods, and others, and stable professionals like lawyers, preachers, teachers, doctors, mentors, counselors, therapists, accountants, coaches, and others. And they depend ultimately on positive laws and procedures to enforce basic domestic norms when needed. The marital family is a multidimensional institution, and it depends upon multiple value systems and institutions to be fully stable and functional. As sociologist Robert Bellah aptly put it, while it takes a couple to make a marriage, and a village to raise a child, “it takes a society to raise a family.”¹⁰

Churches and states are the two social institutions whose roles in stabilizing and supporting the marital family I explore at length in this volume, though I touch on other supporting social institutions and professions as well. For nearly two millennia, churches and states viewed the marital family as a hybrid institution, with private and public, spiritual and temporal dimensions. Both churches and states, therefore, claimed responsibility for the family. They often collaborated in setting rules and procedures for sexual etiquette, courtship, and betrothal; for marital formation, maintenance, and dissolution; for conjugal duties, debts, and desires; and for parental roles, rights, and responsibilities. They also collaborated in setting moral and criminal laws to govern sexual relationships and expressions within and beyond the marital family.

With the liberal reform and gradual pluralization of Western societies over the past two centuries, most of these legal functions have gradually shifted from the church to the state. Today, the modern state dominates Western family law, even if its laws are now thinner than they used to be. The state still sanctions marital formation and dissolution. State laws nudge, facilitate, and reward citizens for creating and maintaining stable marital households. State officials intervene in family disputes and, when necessary, help dissolve marital families, divide marital properties, and reassign parental responsibilities. They protect the rights of family members as well as the sexual liberties of the broader citizenry. And state laws facilitate the transmission of marital and family property to the next generation and provide victims of sexual harm with avenues of personal redress while punishing sexual criminals.

¹⁰ Robert Bellah, “Epilogue: It Takes a Society to Raise a Family” in Steven M. Tipton and John Witte, Jr. (eds.), *Family Transformed: Religion, Values, and Society in American Life* (Washington, DC: Georgetown University Press, 2005), pp. 286–98.

Throughout the last half of this volume, I confirm these minimal but important modern state functions in facilitating stable families, in protecting sexual liberty, and in holding parties to account for the sexual harms they cause and the children they produce. I argue against some modern family scholars who call for the state to expand radically the number of off-the-rack models of marital families it makes available. I also argue against other scholars who call for the abolition of the legal category of marriage in favor of a privatized system of family life that leaves the state only to tend to the legal consequences of family dissolution. I argue that the state should continue to support and privilege the pair-bonding strategies of reproduction in a stable marital household and should continue to resist the growing pressure to validate and license polygamy, polyamory, pantagamy, and more. A state law and policy in favor of stable monogamous marital families caters best to the health, safety, and welfare of all.

Today, modern churches and other religious institutions have more limited legal roles to play in sex, marriage, and family life. Religious officials still solemnize marriages “by the power of the state vested in” the cleric. But even that limited role is being challenged today, given the new pressure for religious organizations to solemnize same-sex marriages. Religious organizations are still licensed by the state to offer such family services as pregnancy counseling, adoption, education, family charity, emergency relief, crisis intervention, and more. But these state licenses sometimes now impose conditions that run afoul of the religious organizations’ core mission and ministry, particularly in their demands to accommodate sexual liberty and equality norms of various sorts. Religious mediation and arbitration of marriage and family questions have become more popular among some Jewish, Christian, Muslim, and other religious groups dismayed by the marital fragility, family breakdown, and sexual libertinism of modern liberal societies. But a new battle is looming over the place of faith-based family laws in liberal democracies – especially ancient and sophisticated religious legal systems based on *halacha*, canon law, and Shari’a that are now quietly governing a good number of the family law questions of their voluntary members.

While fully acknowledging and accommodating the strong liberty interests on the other side, I defend the limited roles of faith-based family laws and services in governing the lives of their voluntary members who choose to use them. Using the mixed governance models of public and private schools and charities as prototypes, I call modern churches and other religious institutions to develop more rigorous and consistent religious laws and internal disciplinary structures to govern the family lives of their voluntary members. Using theories of social pluralism and multiculturalism, as well as modern