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Marriage, Family and the Positive Law

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FOREWORD

MARRIAGE, FAMILY AND THE POSITIVE LAW

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"May you live in interesting times" is reputed to be an ancient Chinese curse. For many people seeking to defend the traditional understanding of marriage and family in the public square, the accuracy of this characterization is readily apparent. Truly we are living in interesting times, and the consequences appear to be chaotic. Yet another proverb teaches "in chaos, there is opportunity." The articles in this issue of the *Notre Dame Journal of Law, Ethics, and Public Policy* identify some of the reasons for the seemingly chaotic public discourse concerning the family and suggest certain criteria for distinguishing the opportunities that may yield a truer description of marriage and family.

This foreword explores the question of whether the content of the positive law matters when dealing with marriage and family. I conclude that the content of positive law does matter, in so far as it acts as an interpretative filter for our experiences. Yet the law in this area is limited by the fact that it deals with a reality which is more primal than law. A partial description of the metaphysical reality of marriage and family is provided in hopes that this description will contribute some measure of certainty when assessing proposed changes in the law regulating marriage and family.

I. THE POWER AND LIMITS OF POSITIVE LAW'S DESCRIPTION OF MARRIAGE AND FAMILY

At the outset it is important to delineate the relationship of positive law to marriage and family. Advocates on both sides of the "culture war"[1] demand that the law be altered to more accu-

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1. JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (describing the clash of ideals held by those who have a theistic understanding and those who have a secular understanding of the culture). For general discussion of this polarization, see STEPHEN L. CARTER, THE

rately reflect their view of marriage and family. Implicit in these demands is a common belief that the content of the positive law matters. Neither side uniformly provides an extended explanation of why or how it matters, yet these unaddressed issues are at least equally important in explaining the depth of emotion revealed in public discussions of family law issues. Divergent understanding of why and how positive law relates to the family and marriage account for the more complex divisions of opinion that exist beyond the simplistic "left-wing/religious right" dichotomy presented in the media.

The role of positive law in contemporary society is complex. Clearly it has the coercive function that Justice Holmes described as the bad man's understanding of law.[2] The criminal law exemplifies society's use of law to coerce or prohibit conduct. Law also has a constitutive function, in that the positive law creates certain relationships or duties. The juridical personhood of the corporation is an example of the constitutive or creative power of the law. Finally law has a teaching function. The continuing existence of laws prohibiting adultery illustrates this function. In debates surrounding the repeal of adultery laws, legislators express concern that repealing such laws may be construed as approval of conduct that many people believe is immoral.

Family law functions in all of these ways. For example, it coerces parents to provide medical care, even when the proposed treatment violate the religious beliefs of the parents and the child.[3] By adoption, the positive law enables people to enter into family relationships where none previously existed. No-fault divorce teaches that marriage is a matter of mutual consent and endures only so long as consent continues.

These multiple functions of the law lead to the current conflict over its content. Should sexual relationships between adults be criminally sanctioned because the adults are legally related as

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CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 15, 22 (1993) (deploring the ways in which secular-oriented culture treats religious belief as "just another hobby").

2. *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

3. *See* Jehovah's Witnesses in State of Wash. v. King County Hospital Unit No. 1 (Harborview), 278 F. Supp. 488 (W.D. Wash. 1967).

step-parent and step-child?[4] Should new legal rights for children be created?[5] Should the positive law teach that marriage is permanent?[6] Debate of these and related questions necessarily includes debate over the function of law in our society. And the outcome of this debate will be experienced at the most basic level of society — in our homes.

In resolving these questions, it is important to recognize that law is confined by the reality experienced by people. Unlike corporate law, which is purely the product of legal imagination and therefore wholly subject to the positive law, the law governing family and marriage is constrained by the reality of the human relationships it seeks to regulate. In order to be effective the law must be truthful in its description of relationships existing independent of the law.[7] For example, it is conceivable that the positive law could define the relationship of parent and child to include the relationship of a childless pet owner to his or her pet. Yet such a definition would ultimately fail because people would not recognize this relationship regardless of the law's teaching. Instead people would ignore the positive law, and distinguish the relationship between the child and the human father or mother from the relationship of Rover and his or her owner. When law is untruthful, ultimately it fails in its ultimate purpose — to promote the common good.

To say law must be truthful when it describes and regulates preexisting relationships is not to say that law must, or has the capacity to, contain the full truth of the human relationships we are attempting to describe by the words "marriage" or "family". Positive law can only regulate the actions of people, not the disposition of their hearts. As a tool of the state, it may only properly regulate those actions that detract from or contribute to the common good. Its appropriate sphere of authority is limited to those actions and relationships that cannot be governed effectively by other more primary relationships like family and reli-

4. Jeannette Lofas, *Yes, the Allen-Soon-Yi Affair Is Incest*, NEWSDAY, Aug. 27, 1992, at 103 (discussing the implications of Woody Allen's romance with his step-daughter).

5. *See generally* Volume 7, Issue 2 of NOTRE DAME J.L. ETHICS & PUB. POL'Y (Symposium on the Rights of Children).

6. *See* Christopher Wolfe, *The Marriage of Your Choice*, FIRST THINGS, Feb. 1995, at 37.

7. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 16 (1989) ("Legal norms, to be sure, often may have some effect on the way people think, feel, and act, but it is striking how stubbornly the forms of behavior involved in family life seem to follow their own patterns independently of the legal system.").

gious community. As a limited mechanism of social control, the law's description of family and marriage need only be partial. For example, it is true that marriage is a mutual gift of self between husbands and wives,[8] but how could the positive law embody this truth? And for what purpose? Shall the state create a cause of action between spouses for failure to share their most intimate thoughts and desires? Shall the state become the arbiter of disputes regarding just allocation of familial duties and tasks? Surely not. The law is too clumsy a tool to fine-tune the relationships of love and trust that marriage and family are intended to be.

While positive law has only a limited capacity to influence the relationships we call family and marriage, the content of the law remains important. This is particularly true today since the content of the positive law is often understood to be the most widely-accepted statement of our common beliefs. Its unifying effect on the perception of our experiences is illustrated by the dramatic shift in public opinion concerning de jure segregation and abortion. In the first instance the teaching effect of the civil rights laws has unified the nation in a belief that race should not be the basis for extending privileges or forbidding participation.[9] In the second instance the law has taught a significant part of an entire generation that abortion is a matter of personal liberty.[10] Whether the law can or should effectively eliminate consideration of race, or free women from the obligations arising from sexual intercourse are questions that need not be answered in this article. Instead I raise these questions to illustrate the power of law, and to make the point that the content of the positive law matters. It matters because, at a minimum, the law acts as a lens through which we view our experiences.

II. CHARACTERISTICS OF MARRIAGE

Because law unavoidably affects our perception of reality, it is critical that the law governing marriage and family be truthful.[11] Therefore, we must ask: what is a truthful description of

8. POPE JOHN PAUL II, *Letter to Families*, No. 11 (1994) [hereinafter *Letter to Families*].

9. The accuracy of this statement is not diminished by the current debate over affirmative action. The debate may provide further evidence of the widespread belief that race should be irrelevant in decision making.

10. Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992) ("An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions. . . .").

11. *But see Letter to Families*, *supra* note 8, at No. 17.

marriage? There are at least five characteristics that may be definitive of the metaphysical reality called marriage. These are: 1) permanent duration; 2) mutually supportive; 3) consensual and committed; 4) exclusive; and 5) open to the creation of new life. Each of these characteristics have been challenged in current debates.

A. *Permanent Duration*

In her historical review of the institution of marriage in Western European nations, Professor Mary Ann Glendon found that marriage has always been defined as a relationship of extended duration, but subject to dissolution by mutual consent during many periods of history.[12] With the rise of Christianity's influence marriage came to be viewed as a life-time commitment, subject to dissolution only for grave reasons.[13] Once established, this ideal of marriage as a life-time commitment held sway in Western European countries until the mid-1960's.[14] Laws then began to recognize or expand the application of no-fault and mutual consent divorce statutes.[15] This change in the positive law has led to multiple sequential marriages.[16]

The resulting "divorce revolution," however, is under attack.[17] Calls for recognition that permanent marriage should be the presumption of the positive law, absent compelling reasons for dissolution, come from divergent groups for a variety of reasons. Reviewing the undisputed evidence that men prosper and women and children suffer economically after divorce, some feminists now support a return to a requirement of cause for divorce.[18] The same evidence convinces some fiscal conservatives that protection of the public purse from claims for assistance

12. GLENDON, *supra* note 7, at 17-34.

13. *Id.*

14. *Id.* at 149.

15. *Id.*

16. Some commentators refer to this as "serial polygamy." *See, e.g.*, Daniel D. Polsby, *Ozzie and Harriet Had It Right*, 18 HARV. J.L. & PUB. POL'Y 531 (1995); Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191 (1993).

17. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) (discussing the negative social and economic effects of the divorce revolution on women and children).

18. *See* Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WISC. L. REV. 789 (1983).

compels a rethinking of no-fault divorce.[19] Advocates for a return to traditional morality argue that permanency in marriage is required to provide stability in rearing the next generation, and mutual support throughout the lives of the spouses.[20] Religious arguments also support a return to permanency on the basis of the metaphysical reality of marriage.[21]

Life-long devotion characteristic of marriage permits not only a more complete revelation and gift of self, but also provides a shared history from which to learn more fully the goodness of life and the joy of shared existence.

B. *Mutually Supportive*

Mutual support is another characteristic of marriage that has been recognized throughout history and in all cultures.[22] Often articulated in state statutes[23] and judicial opinions,[24] this duty encompasses both the sharing of emotional[25] and financial

19. *See* Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994); *see also* Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 10 (1990) .

20. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 79-80 (1991).

21. *See* POPE JOHN PAUL II, *Letter to Families*, *supra* note 8, at No. 7. *Cf.* Blu Greenberg, *Women and Judaism in* CONTEMPORARY JEWISH RELIGIOUS THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS 1039, 1046 (Authur A. Cohen & Paul Mendes-Flohr, eds., 1987) [hereinafter Greenburg, *Women and Judaism*] ("A Jewish marriage is terminated by either death or the giving of a *get*, the writ of divorce."); ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAN LAW 124 (4th ed. 1974) [hereinafter FYZEE, MUHAMMADAN LAW] ("It [a contract regarding marriage] may also provide for the dissolution of the marriage by the wife, without the intervention of the court.")

22. GLENDON, *supra* note 7, at 110-13.

23. *See, e.g.*, LA. CIV. CODE ANN. art. 98 (West 1993); OHIO REV. CODE ANN. § 3103.03 (Anderson Supp. 1995); WIS. STAT. ANN. § 765.001(2) (West 1993).

24. *E.g.*, Landmark Medical Ctr. v. Gauthier, 635 A.2d 1145, 1152 (R.I. 1994) ("One of the principal incidents of marriage that continues to evolve has been the obligation of mutual support."); Brookhart v. Brookhart, No. 93CA1569, 1993 WL 483206 at *7 (Ohio Ct. App. Nov. 18, 1993) ("It is clear to us that when parties marry they assume mutual obligations of maintenance and support."); Braatz v. Labor and Industry Review Commission, 496 N.W.2d 597, 600 (Wisc. 1993) ("Wisconsin law imposes a mutual duty of general support upon married couples, but there is no comparable duty of support imposed upon adult companions."); Dunaway v. Dunaway, 560 N.E.2d 171, 175 (Ohio 1990) ("It is clear to us that when parties marry they assume mutual obligations of maintenance and support. It is a conscious election to share life together, and this necessarily includes financial circumstances.").

25. Blazek v. Superior Court, 869 P.2d 509, 513 (Ariz. Ct. App. 1994) (evidentiary privilege protecting marital communications grounded in the intimacy and mutual support between spouses).

resources.[26] This sharing of resources is the basis for the positive law governing spousal privilege,[27] taxation, and property ownership. It is presumed in laws defining creditors' rights and governmental entitlements, and is a major consideration in crafting laws regarding the obligations that continue after divorce.

Mutual support recognizes the natural division of labor which evolves when people undertake shared tasks — "You cook dinner, and I'll clean up afterward." This allocation of tasks is one way that couples create a shared life. Alternatively the common law recognized that many married couples arranged this sharing of day-to-day tasks by spheres of authority. Wives were responsible for home and hearth, and often reigned unchallenged in domestic matters. Husbands created or acquired the resources necessary to make domestic life possible with little input from their wives.[28] While modern conveniences and service providers have lessened the time required to maintain a home — we no longer must make our soap, bake our bread, or sew our family's clothes — this division of labor continues to be observed by many families, particularly while raising young children. Regardless of the specific form adopted by any particular couple, mutual support and sharing of day-to-day tasks remains a fundamental characteristic of marriage.

C. *Consensual and Committed*

Initial consent is another characteristic of marriage that is uniformly recognized throughout Western European nations.[29] Yet it is important to distinguish initial consent to the marriage from the current, yet pernicious idea that a marriage continues to exist legitimately only when husband and wife give continuing consent. One of the myths of our day is that any obligation to another must be the result of consent. Reflection reveals both the inaccuracy and undesirability of such a state of affairs. Many important obligations arise in relationships that are not the product of explicit consent by the participants. At least two morally

26. Carminucci v. Carminucci, No. FA9401387675, 1996 WL 88428 at *5 (Conn. Super. Feb. 14, 1996) ("The figures offered by the defendant to prove how much he spent during the marriage in order to obtain reimbursement for those expenditures are difficult to accept seriously. One of the obligations of marriage is mutual support. If the defendant feels that his expenditures somehow were not part of his obligations to support his wife during that time, perhaps he needs enlightening on that point.")

27. *See Blazek*, *supra* note 25.

28. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985).

29. GLENDON, *supra* note 7, at 38.

significant relationships arise before we are capable of even the most rudimentary consent — parent-child and citizen-state. The newborn does not consent to either of these relationships, yet the child owes certain duties and has certain rights by virtue of these relationships.

How do the obligations of marriage differ from those of parent-child or citizen-state? Unlike the status of citizen, daughter, or son, the status of wife or husband is dependent upon consent for its creation. This is true because of the fundamental nature of marriage. There can be no gift of self from the unwilling giver. Obedience, protection, sharing of possessions — all of these can be received from an unwilling giver, but not the essence of marriage. Thus consent must exist at the outset.[30]

However, consent to marriage is not the omniscient exercise of enlightened self-interest that much of modern contract law envisions. Instead it is a statement of personal commitment — an agreement to consistently will the good of another through the gift of self.[31] This is true because the decision to marry is made with incomplete knowledge. At the time of the marriage ceremony, it is impossible to fully understand the past experiences and present desires of the other. No amount of "due diligence" will completely eliminate this fact. Even more mysterious are the future events that both husband and wife must respond to as they live out their commitment to be married. Thus what begins by consent continues, not by continuous reconsideration

30. *See Letter to Families, supra* note 8, at Nos. 8, 10, 11. *See also* Greenberg, *Women and Judaism, surpa* note 21, at 1045 ("Rabbinic law states that a woman may not be married without her consent."); FYZEE, MUHAMMADAN LAW, *supra* note 21, at 88 ("Juristically, it [marriage] is a contract and not a sacrament. *Qua* contract, it has three characteristics: (i) there can be no marriage without consent; (ii) as in a contract, provisition is made for its breach, to wit, the various kinds of dissolution by act of parties or by operation of law; (iii) the terms of a marriage contract are within legal limits capable of being altered to suit individual cases.").

31. *See* POPE PAUL VI, *Humanae Vitae* [On the Regulation of Birth] No. 9 (1968):

> . . . [Marriage is] principally, an act of the free will, intended to endure and to grow by means of the joys and sorrows of daily life, in such a way that husband and wife become one only heart and one only soul, and together attain their human perfection.
>
> Then, this love is total, that is to say, it is a very special form of personal friendship, in which husband and wife generously share everything, without undue reservations or selfish calculations. Whoever truly loves his marriage partner loves not only for what he receives, but for the partner's self, rejoicing that he can enrich his partner with the gift of himself.

Id. (emphasis in original).

and renewal of the initial consent, but by acts of will, intellect, spirit and body consistent with the commitment expressed by the initial "I do."[32]

D. *Exclusive*

Marriage, as total gifts of self between husband and wife, is only fully experienced in an exclusive relationship. Implicit in the idea of exclusivity is the loyalty and intimacy enjoyed within the "bonds of matrimony." Exclusivity is a necessary condition for the complete revelation of self that marriage entails. In part, exclusivity eliminates any basis for comparison. This avoids the danger of devaluing the unique gift of the spouse, and the damage suffered from being evaluated, rather than loved.

Also limiting marriage to monogamous relationships affirms the equality of husband and wife. Both are the exclusive object of the other's affection and attention. In some societies recognizing polygamous marriage, the danger of wives being treated unequally is addressed by statutory requirements. Judicial approval of multiple unions is required, and that is conditioned upon a finding that the economic circumstances of each wife is assured, and that "there is no serious doubt regarding equal treatment of all wives."[33] While these requirements seemingly promise equality among the wives, no attention is given the inherent inequality between husbands and wives as persons. The husband receives the undiluted devotion of several women, while each wife receives only a partial portion of the man's love and attention.[34] This inequality may come to be viewed as a comparative measure of the worth of each spouse, resulting in a devaluing of women — both in the home and in the larger society. This inequality of persons may be the basis for the Supreme Court's observation that polygamy is inconsistent with our constitutional system of government.[35]

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

33. HARRY D. KRAUSE, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 6-7 (3d ed. 1990).

34. A Biblical example of the consequences of unequal devotion to both wives can be found in the story of Jacob, Leah and Rachel. *See Genesis* 29-35.

35. This may the unstated premise of the Court in Reynolds v. United States, 98 U.S. 145, 165-66 (1878):

> Upon it [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the

E. *Open to the Creation of New Life*

Marriage has been described as a communion of two giving rise to a community of persons greater than the two.[36] The expansive nature of married love between complementary persons is most fully realized in the creation of children. By conceiving and nurturing children, the couple exhibit a willingness to be joined together beyond their lifetimes. Willingly bearing children evidences faith in the goodness of life, regardless of the present circumstances.[37]

Many contemporary judges and commentators ground the state's recognition of marriage as a legal institution in the fact that children are most commonly created and nurtured in the context of marriage. The opinion from the United States District Court for the Central District of California in *Adams v. Howerton* is an example of this:

> [T]he main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race. Plaintiffs argue that some persons are allowed to marry and their union is given full recognition and constitutional protection even though the above-stated justification—procreation—is not possible. They point to marriages being sanctioned between couples who are sterile because of age or physical infirmity, and between couples who make clear that they have chosen not to have children. Plaintiffs go on to claim that sanctioning such unions within the protection of legal marriage, while excluding their union, constitutes an illegal discrimination. In my view, if the classification of the group who may validly marry is over inclusive, it does not affect the validity

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people in stationary despotism, while that principle cannot long exist in connection with monogamy.

Id.

36. POPE JOHN PAUL II, *Familiaris Consortio* [On the Family] No. 21 (1981); *see also Letter to Families*, *supra* note 8, at Nos. 7, 9; David Biale, *Family in* CONTEMPORARY JEWISH RELIGIOUS THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS 239 (Authur A. Cohen and Paul Mendes-Flohr, eds., 1987) ("To marry and have children thus became a cardinal religious duty incumbent on all Jewish men; women were excluded from this commandment, although the biblical verse seems clearly directed at both sexes. Yet marriage is not solely a union for purposes of procreation. Since woman was created from man's rib (*Gen.* 2:21-24), the unification of their bodies in marriage is a result of a natural tendency to make complete that which was originally sundered apart.").

37. Commentators have explained the high birth rates in war-ravaged nations in this manner. *See, e.g.*, Tracy Wilkinson, *Bosnian Women Repudiate Death by Giving Birth*, L.A. TIMES, Aug. 21, 1995, at A1.

> of the classification. In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals.[38]

The court's opinion continues with a discussion of the limitations upon government in seeking to favor procreation without unnecessarily intruding into the couple's marital privacy. Procreation as the basis for the state's recognition of marriage is explored further in this issue of the *Notre Dame Journal of Law, Ethics & Public Policy* by Professor Richard Duncan in his article *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a Homophobe?*

III. DEFINITION OF FAMILY

Independent of whether procreation is the basis for state recognition of marriage, the creation of new life radically transforms the relationship of husband and wife.[39] This transformation is captured to some degree by casual remarks like "We've postponed having a family," or "We are trying to start our family." In this context the word "family" means the unique relationships created by the birth of a child.[40] The conception of a child cre-

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38. Adams v. Howerton, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980) (rejecting claim that homosexual unions should be recognized as marriages for immigration purposes), *aff'd on other grounds* 673 F.2d 1036 (9th Cir. 1982). *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974):

> [I]t is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.

Singer, supra, at 1195. *But see* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that restriction of marriage to couples comprised of one female and one male partner is subject to strict scrutiny in light of state constitutional guarantee of equal protection).

39. *See also Letter to Families, supra* note 8, at Nos. 12, 16.

40. LAURENCE D. HOULGATE, FAMILY AND STATE: THE PHILOSOPHY OF FAMILY LAW 25 (1988) ("[a]lthough sociologists and anthropologists disagree

ates parent-child relationships, and alters the relationship between husband and wife. Many couples believe that the birth of a child creates a greater obligation to sustain the marriage. In addition to changes within the marriage, the child's birth alters the couple's relationship with others. Through the child, the spouse is permanently engrafted upon the family tree, and becomes a blood relative of people previously related in law only.

The common law defined family as people related by marriage, blood, or adoption.[41] This definition confined the term "family" to people whose lives were permanently connected. With the permanence of marriage eroded through no-fault divorce, and adoptive parents seeking to judicially set aside adoption decrees,[42] relationships based upon marriage or adoption seem more temporary. Their continuing inclusion within the definition of family makes it more difficult to distinguish other relationships from those properly designated as family relationships on the basis that "family" denotes lifetime commitments. This has led to a search for other characteristics that might distinguish family from other relationships. Various traits have been suggested including relationships based upon consent, affection, or mutual support. How well do any of these characteristics define the experience we seek to identify when using the word family?

A. *Consent*

Consent is offered as the defining characteristic of marriage more often than of family relationships. Yet with the wide-spread use of contraception and abortion to avoid childbearing, the relationship of parent and child, and more particularly mother and child, is increasingly understood to be based upon the parent's choice to bear the child. The idea that parental responsibilities is based upon choice is reflected in Justice O'Connor's opinion in *Planned Parenthood v. Casey*:[43]

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about the precise meaning of this term, most are inclined to agree that a common function of families is child-rearing.").

41. Village of Belle Terre v. Borass, 416 U.S. 1, 7-10 (1974) (upholding zoning restriction which partially defined family as individuals related by "blood, adoption or marriage").

42. *In re* Lisa Diane G., 537 A.2d 131 (R.I. 1988) (permiting parents to pursue nullifaction of adoption decree based upon claims of fraud by the Department of Children and Their Families). *But see* Rich v. Rich, 364 S.E.2d 804 (W. Va. 1987) (rejecting petition to revoke adoption by step-parent on the basis that marriage to natural parent terminated by divorce).

43. 505 U.S. 833 (1992).

> Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[44]

The choice of the woman is determinative of her obligations during her pregnancy. Her decision, or consent to continue the pregnancy, is also determinative of the father's choice, as illustrated by caselaw rejecting legislative attempts to condition the woman's right to seek an abortion upon notification of her husband.[45]

The inherent limitations upon any definition of family grounded in consent is illustrated by the courts' unwillingness to recognize choice or consent as a limitation upon the father's obligations to an undesired child. Substantial precedent rejects claims by putative fathers in paternity suits arguing that they should be excused from financial liability either because they do not wish to be fathers or because they offered to pay for an abortion.[46]

In the context of legal representation, Professor Thomas Shaffer has provided an eloquent critique of the consent-based understanding of family:

> Her [a wife's] affiliation with her husband, and with the children they have made and reared, is seen as a product of individuality(!), of contract and consent, of promises and the keeping of promises—all the consensual

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44. *Id.* at 851 (citations omitted).

45. *Id.*

46. *See, e.g.*, *In re* Paternity of J.L.H., 441 N.W.2d 273 (Wis. Ct. App. 1989); Inez M. v. Nathan G., 451 N.Y.S.2d 607 (N.Y. Fam. Ct. 1982); Harris v. State, 356 So.2d 623 (Ala. 1978); Shinall v. Pergeorelis, 325 So.2d 431 (Fla. Dist. Ct. App. 1975); and Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984). *Cf.* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (finding that gamete provider's interest in avoiding parenthood trumped egg provider's interest in donating embryo to another couple).

> connections that lonely individuals use when they want circumstantial harmony. The employment of the lawyer is a result, then, of the links, the promises, the contract, the consent, and the need for circumstantial harmony. The family in the office is there only as the product of promise and consent. It is relevant to the legal business at hand only because the (radical) individuals, each in momentary and circumstantial harmony with one another, want it to be. The promise and the consent create the family.
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> This description is offered by the legal ethics of radical individualism. It is sad, corrupting, and untruthful. An alternative argument is that the family created the promises, the contract, the consent, and the circumstantial harmony—not the other way around. . . . In these ordinary ways of accounting to ourselves for ourselves, it is the family that causes individuals to make the promises that begin, develop, and continue families. The family causes people to seek human harmonies and, consequently, to create more families, as well as associations such as businesses, clubs, and professions, that account for themselves with family metaphors.[47]

Family is not based upon consent, beyond the initial consent of the husband and wife when they enter into marriage. Children do not consent to be born into families, yet they are members of the family and create the future of the family. Without a sense of connection to a family, the individual is set adrift in a largely indifferent world. Yet a sense of connection, or even affection is not sufficient to establish a family relationship.

B. *Affection*

Affection generally is defined as "kind feeling: tender attachment".[48] Affectionate relationships usually are marked by playfulness and pleasure. Between family members affection can lighten shared burdens, and enhance shared joys. Affection is grounded in the emotions of the person both in its genesis and in its experience. The emotion is innate, but its depth is often a product of shared experiences.

Defining family as those who share affection is appealing when viewing family solely as a means of personal psychological gratification. Such a definition includes people whose company we enjoy and for whom we often are willing to suffer some incon-

47. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 970-71 (1987) (emphasis in original).

48. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (1986).

venience. It excludes those who seem alien or foreign to us, or who, by their conduct, invoke indifference or ill-will. Thus it is possible to conceive of family as a relationship primarily based upon shared affection. Yet this understanding is wrong. It is wrong because it is empty of any sense of commitment. It fails to recognize that, because we are self-contained as individuals, each of us is alien to some greater or lesser degree. I am constantly reminded of this as I watch my children grow from child within me, with whom I shared some aspect of every experience, to man- or woman-child who emerge as a mysterious other whom I love. Similarly, even after eighteen years of marriage, my husband continues to surprise me with new stories from his youth, or new depth of his character previously beyond my view. Even among family, the other whom we love is a mystery.

Affection often arises between family members by virtue of their shared life, but its existence or absence is not the key to discerning family relationship. As a product of emotion, affection ebbs and flows, in part in response to acts of others and in part due to our own emotional state. This ebb and flow of affection may be reflected in the actions of family members, but the duties and obligations owed to family members are constant. The greatest gifts of self to others often include some element of willfully overriding emotions that would preclude gifts of self. Common examples include truthfully defending a sibling who acted against your counsel, or forgiving a spouse for hurtful acts before the hurt has completely subsided.

Affection can lead to the creation of family relationships insofar as it often precedes marriage or adoption. Certainly the presence of affection between family members encourages continued acceptance of the other person in the relationship. The absence of affection can diminish the shared time and trust that nourish family relationships. Ultimately, however, affection is too ephemeral to act as the fundamental characteristic distinguishing family from other relationships.

C. *Mutual Support*

The positive law currently does not identify family by the parties' consent or their shared affection. Mutual support, however, was and remains a key consideration in distinguishing family from other relationships. Parents are required to provide financial support to their children until the children attain the age of majority,[49] and states are increasingly looking to adult chil-

49. *E.g.*, Greenspan v. Slate, 97 A.2d 390 (N.J. 1953) (discussion of historical foundation for common law parental duty of support).

dren to support their aged parents.[50] Yet the limitations recognized on the duty of financial support illustrate the limited utility of using mutual support as the defining characteristic of family. The adult son or daughter does not lose the status of family member by virtue of his or her financial self-sufficiency. Parents unable to provide the basic necessities of life do not forfeit the respect due from their children merely because they suffer from physical or educational limitations precluding support.[51]

While the positive law seeks only to enforce obligations of financial support, it recognizes other aspects of familial support. Examples of this recognition include the statutory preference for family members in guardianship laws,[52] and the family consent statutes that acknowledge family members' right to make health-care decisions for incompetent patients.[53] Compensation for loss of consortium claims by parents and children attempt to quantify the value of non-financial support.[54]

The exact nature of the support provided by family members changes as the circumstances encountered by the family change. Parents provide protection, education, moral guidance, and discipline. Young children provide respect, purpose and renewed wonder in the world. Older children provide vitality,

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50. *See, e.g.*, Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 CAL. W. L. REV. 351 (1990); Catherine D. Byrd, *Relative Responsibility Extended: Requirement of Adult Children to Pay for Their Indigent Parent's Medical Needs*, 22 FAM. L.Q. 88 (1988).

51. *E.g.*, *In re* A.S.C., 671 A.2d 942, 948, n.7 (D.C. 1996) ("parents' poverty, in and of itself, would not be an appropriate ground for determining that the child's best interests would be served by termination of parental rights").

> No one would say that the state would or should deprive the natural parent of the custody of its child because dire poverty, which may strike any of us, had stricken that parent. To the contrary, the state, in recognition that poverty shall not be a ground for the severance of the relation of parent and child, has made provision itself to aid in the support of the children of the poor, the parents being expected to contribute only in accordance with their limited means. It is only when a parent has abandoned the child, or has been found disqualified for other reasons than poverty alone, that under our law the parental rights of guardianship are terminated and destroyed.

In re Mathews, 164 P. 8, 9 (Cal. 1917).

52. *See* Alison P. Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L.J. 633, 686, 731 (1992).

53. *See* Charles Sabatino, *Death in the Legislature: Inventing Legal Tools for Autonomy*, 19 N.Y.U. REV. L. & SOC. CHANGE 309, 320 (1991-92).

54. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125 (5th ed. 1984). *See also* Johnny Parker, *Parental Consortium: Assessing the Contours of the New Tort in Town*, 64 MISS. L.J. 37 (1994).

hope and respect. Grandparents provide perspective, restraint, and wisdom. Aunts, uncles and cousins provide a sense of connection and concern outside the nuclear family. They also broaden the perspective of the family. The nature of the support included in this partial listing suggests that mutual support can not be quantified, and nor effectively compelled through positive law. Yet all of them are integral to the family's recognition of the strength and centrality of its identity in the world.

The definition of the family engaged in providing mutual support, and its relationship to the individual's identity as a member of a culture, people, or tribe is the focus of *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe.* Christine Bakeis struggles with the questions raised by federal legislation extending recognition of family-like rights to members of Indian tribes in hopes of protecting the existence and identity of Native Americans. Provocative questions are posed concerning the desirability and the limits of positive law in altering the dominant understanding of parent/child relationships in American society.[55]

In contrast, Professor Melinda Roberts challenges the dominant understanding of parental authority in her article *Parent and Child in Conflict: Between Liberty and Responsibility.* She suggests that current constitutional jurisprudence recognizes parents' interests in fulfilling their responsibilities, yet fails to adequately consider the child's desires and provide some avenue of legal enforcement of those desires. In place of what she characterizes as a "parent-centered model" of judicial decision-making, she argues that the law should recognize the decisions of children involving their fundamental rights, when those decisions are not inconsistent with their long-term best interest.

Both articles assume that the positive law is constitutive of family obligations. Each author questions the content of current law regulating the creation or destruction of family bonds. Neither fully account for the idea that family may exist independent of the positive law, and provide an independent sphere of authority which should be afforded great latitude as an "independent sovereign."

It is this failure to assert familial independence from many of the current attempts to define and regulate family relationships that distinguish these authors from Professor Douglas Kmiec. His book *Cease-Fire on the Family: The End of the Culture War*

55. For a general discussion of the the limits of federal law in the sphere of domestic relations, see Anne C. Dailey, *Federalism and Families*, 143 U. PA. L.REV. 1787 (1995).

is premised upon the idea that families, not legislatures or judges, define the future of individuals, marriage, family, and ultimately our nation. Professor James Hitchcock and Allan Carlson review this book and its underlying premise in their articles *The Cease-Fire May Be Premature . . . Reactions to Cease-Fire on the Family*, and *A Separate Peace*. While both Professor Hitchcock and Mr. Carlson are sympathetic to the premise, they express some reservations about the degree of independence that the family can achieve from contemporary culture, which in turn is significantly shaped by the structure of law.

IV. CONCLUSION

And so this foreword ends as it began, with questions about the relationship of marriage and family to the positive law and the society that creates and is created by these three powerful human institutions. Law, with its pervasive power to frame human understanding of individual situations, affirms or challenges the intuitive response of the person to the reality experienced. Marriage, as a product of initial consent and continuing commitment, provides a powerful testimony to the human capacity to accept and give to the other. Family, with its insoluble tie of flesh and blood, constantly challenges the ideas that consent is the only legitimate foundation for binding commitments, and that all ties are subject to severance at will. The strength of this issue of the *Notre Dame Journal of Law, Ethics, and Public Policy* is its blend of authors, each with a slightly different perception of the nature of family and its place in society, yet equally committed to the value of enduring human relationships.