

The Future of Family Law

Law and the Marriage Crisis in North America

Executive Summary

FAMILY LAW IS on the front pages of our newspapers and is implicated in some of our deepest cultural conflicts, from no-fault divorce, to the status of cohabitation to, most recently, same-sex marriage.

At their core, these ongoing disputes are fueled by competing visions of marriage and of the role of the state in making family law.

This report on the current state of family law holds up for clear public view the underlying, dramatically different models of marriage that are contributing to deep public clashes over the law of marriage, cohabitation, and parenthood. Obtaining conceptual clarity about marriage and its meanings will allow family law experts, scholars from other disciplines, judges, legislators, and the general public to make more informed choices among competing legal proposals now being advanced in the United States and Canada.

Two Recent Reports

Recently two highly influential reports have been published by legal scholars, one in the United States and one in Canada. Both reports are deeply influenced by a new vision of marriage. Both reports have potentially profound and far-reaching consequences for social attitudes and practices concerning marriage, parenthood, and children.

The first report is the *Principles of the Law of Family Dissolution*, published in 2002 by the American Law Institute (ALI). This report moves away from the idea that there can be public standards guiding marriage and parenthood. Instead, it says that the central purpose of family law should be to protect and promote family diversity. The report sidelines what it calls “traditional marriage,” viewing marriage as merely one of many possible and equally valid family forms. In the process the report denies the central place of biological parenthood in family law and focuses instead on the newer idea of “functional parenthood.”

The second report is *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*, published in 2001 by the Law Commission

of Canada. This report proposes a fundamental reconstitution of contemporary family law. It argues that the law must go “beyond conjugality” and focus on the “substance of relationships” rather than giving legal recognition to any specific arrangements such as marriage. It recommends that the traditional conjugal idea of marriage be put on a level playing field with all other kinds of relationships. It also argues for redefinition of marriage and its extension to same-sex couples.

The Current Directions of Family Law

These recent reports indicate that family law is headed in one or more of at least four troubling directions. Some of these changes have already been implemented in some jurisdictions in the United States and Canada.

1. Equivalence Between Cohabitation and Marriage

Many now argue that marriage and cohabitation should be treated equally under the law. This approach denies that some couples might intentionally choose not to marry. Most dramatically, it would have the law treat two institutions similarly when social science data show that, when it comes to the well-being of children, cohabitation is on average much less stable and safe.

2. Redefining Marriage as a Couple-Centered Bond

In order to accommodate same-sex couples, this approach redefines marriage as a gender-neutral union of two persons. By doing so it neutralizes the law’s ability to say that children need their mothers and fathers and reifies a new conception of marriage that is centered on the couple rather than children.

3. Disestablishment, or the Separation of Marriage and State

Given serious and seemingly irresolvable cultural and political clashes between competing visions of marriage, increasing numbers of advocates on the left and the right are calling for disestablishment of marriage, or getting the state “out of the marriage business.” This approach denies the state’s legitimate and serious interest in marriage as our most important child-protecting social institution and as an institution that helps protect and sustain liberal democracy.

4. Why Just Two?

The gendered definition of marriage has already met serious challenges (and been defeated) in some U.S. and Canadian courts. Challenges to the two-person definition of marriage are only a matter of time. Legal scholars are now publishing articles that make this case.

Children: The Missing Piece

What is missing in new proposals in family law is any real understanding of the central role of marriage as a social institution in protecting the well-being of children.

Marriage organizes and helps to secure the basic birthright of children, when possible, to know and be raised by their own mother and father. It attempts to forge a strong connection between men and women and the children resulting from their bonds. These new marriage proposals call for a fundamental reevaluation of the relationships between children and their parents. These new reports make clear that eliminating the notion of biology as the basis of parenthood, and allowing parenthood to fragment into its plural and varied forms, is necessary if courts are to make family diversity a legal and cultural reality.

The vision outlined in these two reports frees adults to live as they choose. But social science data strongly suggest that not all adult constructions of parenthood are equally child-friendly. Further fragmentation of parenthood means further fragmented lives for a new generation of children who will be jostled around by increasingly complex adult claims. This vision also requires more systematic intrusion into the family and adjudication of its internal life by the state and its courts.

Clashing Models of Marriage

What are the competing models of marriage that are at odds in today's family law debates?

1. The Conjugal View

The model of marriage broadly reflected in law and culture until quite recently can be called the "conjugal model." Marriage in this view is a sexual union of husband and wife who promise each other sexual fidelity, mutual caretaking, and the joint parenting of any children they may have. Conjugal marriage is fundamentally child-centered. Theorists of liberal democracy from John Locke to John Rawls have underlined the important, generative work that conjugal marriage does for society. This normative model of marriage is under attack in these recent reports.

2. The Close Relationship Model

This competing vision of marriage has emerged in recent decades. In it, marriage is a private relationship between two people created primarily to satisfy the needs of adults. If children arise from the union, so be it, but marriage and children are not seen as intrinsically connected.

This second and newer vision has been fueled by a new discipline called close relationship theory. For close relationship theorists, marriage is simply one kind of close personal relationship. The structures of the discipline tend to strip marriage of the features that reflect its importance as a social institution. Marriage is examined primarily as a relationship created by the couple for the satisfaction of the two individuals who enter into it.

This view of marriage radically sidelines the main feature that makes marriage unique and important as a social institution — that is, the attempt to bridge sex difference and struggle with the generative power of opposite-sex unions, including the reality that children often arise (intentionally and not) from heterosexual unions.

Today's close relationship theorists argue that conjugal marriage can no longer serve as a useful focus for scholarly research on closely bonded human relationships. They argue that the traditional marriage-and-family paradigm imposes an ethnocentric “benchmark” or “ideal.” This paradigm, they say, does not speak to the experience of racial minorities, women, single parents, divorced and remarried persons, gays and lesbians, and others. Their perspective is finding a new and powerful voice in today's family law proposals.

Conclusion

Family law today appears to be embracing a big new idea. The idea is that marriage is only a close personal relationship between adults, and no longer a pro-child social institution. This idea is fundamentally flawed. It will hurt children and weaken our civil society. For this reason, there is an urgent need for those outside the legal discipline to understand and critique the new understandings of marriage and family life that are driving current legal trends. Marriage and family are too important as institutions, affecting too many people, for basic decisions about their legal underpinnings to remain the province of legal experts alone.

If the proposed changes are put in place, there are likely to be important negative impacts on the lives of everyday people. A “close relationships” culture fails to acknowledge fundamental facets of human life: the fact of sexual difference; the enormous tide of heterosexual desire in human life; the procreativity of male-female bonding; the unique social ecology of parenting which offers children bonds with their biological parents; and the rich genealogical nature of family ties and the web of intergenerational supports for family members that they provide.

These core dimensions of conjugal life are not small issues. Yet at this crucial moment for marriage and parenthood in North America, there is no serious intellectual platform from which to launch a meaningful discussion about these elemental features of human existence. This report on the state of family law seeks to open that debate. ■

About this Report

This report is from the Council on Family Law, an interdisciplinary group of scholars and leaders who have come together to analyze the purposes and current directions of family law in Canada and the United States and to make recommendations for the future. The Council is independent and nonpartisan and chaired by Mary Ann Glendon of Harvard Law School. It is jointly sponsored by the Institute for American Values, the Institute for Marriage and Public Policy, and the Institute for the Study of Marriage, Law and Culture. This Report's Principal Investigator, Dan Cere, teaches ethics at McGill University in Montreal and directs the Institute for the Study of Marriage, Law and Culture.

© 2005, Institute for American Values. No reproduction of the materials contained herein is permitted without the written permission of the Institute for American Values.

ISBN #978-1-931764-08-5

Institute for American Values

1841 Broadway, Suite 211

New York, NY 10023

Tel: (212) 246-3942

Fax: (212) 541-6665

Email: info@americanvalues.org

Web: www.americanvalues.org

Printed copies of this report are available from the Institute for American Values. Single copies are \$7.00 each. Volume discounts are available. For more information or to download an order form, visit:

<http://www.americanvalues.org/familylaw.htm#order>