

# THE TRANSFORMATION OF MARRIAGE AS A STATE INSTITUTION

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## *Introduction*

The greatest gift God has given us is the ability to love. This article explores the significance of marital love for the well-being of children and how it should be protected through the legal institution of marriage. However, there are many different forms of love, including friendship, affection, and appreciation. Whatever the form, love makes it possible for us to connect with God and with each other in a way that nurtures our humanity and allows us to flourish. It is therefore critical that we focus on removing the obstacles to love in our world, by promoting, among other things, a system of human rights to encourage love. Professors Siegfried Wiessner and Roza Pati are doing just that in a remarkably effective way. With true-hearted devotion, they have given their lives to making this world a better place for love. The authors would like to thank them for their marvelous contributions in the field of human rights—not only in their research and writing, but also in their legacy of students who now work and publish in the field of human rights throughout the world. Their Program in Intercultural Human Rights is world-renowned, and we are proud and honored to have been a part of it since its inception.

The family has a special role to play in society, by providing a sanctuary for building a culture of life for our children.<sup>1</sup> Children are at the core of what family is all about<sup>2</sup> and are particularly vulnerable

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<sup>1</sup> Pope John Paul II, Encyclical Letter, *Evangelium Vitae* ¶ 92 (Mar. 25, 1995) [hereinafter *Evangelium Vitae*].

<sup>2</sup> Pope Pius XI, Encyclical Letter, *Casti Conubii* ¶ 11 (Dec. 31, 1930)

in a culture that devalues their lives by treating them as objects to be manufactured or destroyed before birth, or by wrenching them from the intimacy of family life so crucially needed for their growth and development after birth. Therefore, it is important that the law nurture and protect the essence of marriage in our law, especially natural procreation,<sup>3</sup> as well as the permanence of family life. At present, the law has not been faithful to its task in this respect. The California Family Law Act of 1969 and the U.S. Supreme Court decision of *Obergefell* in 2015 changed two essential aspects of the legal institution of marriage. Before these reforms, marriage required the legal union of a man and a woman to encourage and protect the offspring born from, rooted in, and nurtured by the love of their natural parents. Marriage also required a lasting, exclusive, and faithful commitment of the man and the woman to encourage and protect the education and upbringing of those children in a continuous environment of parental love. *Obergefell* removed the focus on offspring born from, rooted in, and nurtured by the love of their natural parents, when it removed the requirement of the legal union of a man and a woman. The Family Law Act removed the focus on the education and upbringing of children in a continuous environment of parental love, when it removed the requirement of a lasting, exclusive, and faithful commitment between the man and the woman.

The first section of this essay explores why the good of children requires the institution of marriage to promote the procreation of children by the act of physical-spiritual love between a man and a woman. The second section explores why the good of children requires the institution of marriage to promote the upbringing of children by the lasting, exclusive, and faithful commitment of the couple. The third section explains why *Obergefell*'s removal of the requirement of a legal union between a man and a woman as an

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[hereinafter *Casti Conubii*] (observing that, "amongst the blessings of marriage, the child holds the first place").

<sup>3</sup> We define "natural procreation" as that which occurs by sexual intercourse between a man and a woman, and "artificial procreation" as that which occurs by an act that unites the sperm and the egg other than by the act of sexual intercourse. When the term "procreation" is used without qualification in this article, it means natural procreation.

essential aspect of marriage not only destroys the function of the marriage institution to promote the proper procreation of children, but in fact involves the State in regulating personal relationships to the detriment of individual privacy and autonomy. The fourth section explains why the Family Law Act's removal of the requirement of a lasting, exclusive, and faithful commitment between the man and the woman as an essential aspect of marriage seriously impairs the function of marriage to encourage and protect the education and upbringing of those children in a continuous environment of parental love, and instead promotes the abdication of parental responsibility. There is no doubt that the importance of morals to law is especially significant in the case of marriage.

### *I. The Procreation of Children*

Until recently, the State confined marriage to the legal union of a man and a woman, in order to encourage the natural procreation of children. By celebrating this union in the institution of marriage, the State encouraged the natural inclination of each spouse to sexual intercourse<sup>4</sup> that would bear fruit in children—the future citizens of the State. When a couple is open to bearing a child from a physical-spiritual act of love, this openness redefines the personhood of each parent from one of singularity to one of community. In one awesome step, the spouse moves from the autonomy of self to the union of family member,<sup>5</sup> relinquishing certain privileges of autonomy, in

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<sup>4</sup> THOMAS AQUINAS, SUMMA THEOLOGICA II-II.94.2 (asserting that the inclination to sexual intercourse is a natural inclination); Paul Gondreau, *The Natural Law Ordering of Human Sexuality to (Heterosexual) Marriage: Towards a Thomistic Philosophy of the Body*, 8 NOVA ET VETERA 553, 562-70 (2010) (explaining how this inclination to procreation is the metaphysical grounding which, combined with other inclinations, integrates into human rationality to order us to human flourishing); SERVAIS PINCKAERS, THE SOURCES OF CHRISTIAN ETHICS 437-42 (3d ed., Mary Thomas Noble, trans. 1995) (explaining the significance of sexuality as a human inclination).

<sup>5</sup> Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible*, 47 CATH. U. L. REV. 1245, 1250 (1998) (describing the creative capacity of this union on several levels and observing that, “[t]he union of their minds is evidenced by the willing exchange of their thoughts and perceptions of their

order to become a parent with shared joys and responsibilities. This step is crucial to the formation of the child in its being, identity, solidarity, and bonding.<sup>6</sup> The parents establish a permanent, inseparable bond in love with each other, in order to provide the proper foundation for these formidable aspects of the life of their child.<sup>7</sup> This bond far exceeds the bonds of affection, friendship, or appreciation, as each spouse becomes absorbed in the other through *eros*<sup>8</sup> and

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experiences. The union of their souls is evidenced by their loving embrace of the mysterious other who is their spouse. The union of their bodies is evidenced by the procreative potential of marital intercourse”). See also ELIO SGRECCIA, PERSONALIST BIOETHICS: FOUNDATIONS AND APPLICATIONS 392 (John A. Di Camillo & Michael J. Miller trans., 2012) (stating that, “[w]hen a man and woman unite, if the act is human and complete, it involves the body, the heart, and the spirit; if one of these dimensions is missing, then it is a humanly incomplete and objectively false union, because the body has no meaning if not as the expression of the totality of the person”).

<sup>6</sup> Pontifical Council for the Family, *Family, Marriage and “De Facto” Unions* ¶ 26 (2000) [hereinafter *Pontifical Council*] (observing that the origin of children from parents joined in marriage “safeguards the principle of the children’s identity not only from the genetic or biological viewpoint, but also from the biographical and historical perspective,” and that “marriage itself constitutes the most human and humanizing context for welcoming children, the context which most readily provides emotional security and guarantees greater unity and continuity in the process of social integration and education”). As David Forte has put it more particularly, “[w]ithin the well-functioning family, the child learns the rules of justice, the nature of authority, trust and reliance; he learns the techniques of negotiation, the constraints on sexuality, the adjustment of desires, the making of choices within scarcity, the meaning of sacrifice, and the healing that comes from forgiveness.” David F. Forte, *The Framers’ Idea of Marriage and Family*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 100, 114 (Robert P. George & Jean Bethke Elshtain eds., 2006).

<sup>7</sup> SGRECCIA, *supra* note 5, at 392 (stating that, “[c]onjugality therefore implies the permanence and stability of the unitive bond. This is not just out of the need to provide a stable educational environment for potential offspring but above all because it involves a gift of self, of one’s whole subjectivity”).

<sup>8</sup> Otherness is an important reason for the depth of the marital bond. Charles Rowe states that:

[S]exual identity goes much deeper than the biological level; in fact, it penetrates through the emotional and psychological layers all the way to the spiritual depths of the person. Sexual difference is what makes two human beings most distinctly other from each other. It is this otherness that also makes possible the strongest human love, namely, that between man and woman in marriage.

sustained in their love through the gift-love of charity.<sup>9</sup> The man and the woman surrender to each other in a conjugal love that wants to sacrifice self (die to a certain extent to self) in order to create new life in the community of family.<sup>10</sup> The intimacy of this union, in its physical and spiritual expression of openness to life, can exist at this deep level only if it anticipates permanence, exclusivity and

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Charles N. Rowe, *Love, Homosexual Marriage, and the Common Good*, 2011 NAT'L CATH. BIOETHICS Q. 267, 270 (2011). The ideology of gender, which holds that "masculine and feminine genders in society are the exclusive product of social factors, with no relation to any truth about the sexual dimension of the person," is destructive of this concept of otherness by its "tendency to give the name 'family' to all kinds of consensual unions, thus ignoring the natural inclination of human freedom to reciprocal self-giving and its essential characteristics which are the basis of that common good of humanity, the institution of marriage." *Pontifical Council*, *supra* note 6, at ¶ 8.

<sup>9</sup> See Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* ¶¶ 2-11 (Dec. 25, 2005) (explaining the interplay between *eros* and *agape* and how *eros* directs us toward marriage, whereby it fulfills its deepest purpose). See also C.S. LEWIS, *THE FOUR LOVES* 114-15 (Harcourt Brace & Co. Books 1960) (generally discussing the differences between these loves, but especially explaining that the selfless liberation of *eros* in the conjugal relationship is at best intermittent and requires the lovers to do the work of *eros* even when it is not present, a work that "will not be carried out except by humility, charity and divine grace"); Mark Latkovic, *Pope John Paul II's "Theology of the Body" and the Significance of Sexual Shame in Light of the Body's "Nuptial Meaning": Some Implications for Bioethics and Sexual Ethics*, 2 NOVA ET VETERA 305, 314 (2004) (stating that, according to Pope John Paul II, the two loves of goodwill and desire keep company with each other and attain their true end (union with the beloved) as the former shapes the latter).

<sup>10</sup> St. Paul compares this unity to the love between Christ and the Church in EPHESIANS 5:21-33, mentioning the interdependence of wife and husband, emphasizing their oneness, and quoting from GENESIS 2:24:

So [also] husbands should love their wives as their own bodies. He who loves his wife loves himself. For no one hates his own flesh but rather nourishes and cherishes it, even as Christ does the church, because we are members of his body. "For this reason a man shall leave [his] father and [his] mother and be joined to his wife, and the two shall become one flesh."

Teresa Stanton Collett emphasizes the all-embracing nature of this love when she states that, "[t]he object of marriage and its 'signature act' of consummation, marital intercourse, is to . . . permeate every aspect of the present relationship with the love of the couple, and extend it into the future by the creation of a new person as well." Collett, *supra* note 5, at 1250.

faithfulness.<sup>11</sup> In conceiving their child, the two parents are perfected in their unity,<sup>12</sup> which exists now not only more solidly between themselves, but also with their child, whose integrity as a person finds its roots in the parents united as one. The child, born of their flesh, embraced by their love, and nurtured with their care, becomes the face of their love.<sup>13</sup> In many ways, the triangle of parents and child reflects the Holy Trinity, because the three persons each maintain their identity as persons, but are nevertheless one in their nature as family.<sup>14</sup>

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<sup>11</sup> WILLIAM E. MAY, *MARRIAGE: THE ROCK ON WHICH THE FAMILY IS BUILT* 4-5 (2d ed. 1995) (describing the “act of irrevocable personal consent” in marriage through which a man and a woman “give themselves a new and lasting identity,” turning from “replaceable and substitutable individuals” in each other’s lives to “irreplaceable and non-substitutable persons”). As May states, “[t]hey simply cannot *unspouse* themselves.” *Id.* at 155.

<sup>12</sup> GERMAIN GRISEZ, *LIVING A CHRISTIAN LIFE* 568 (1993) (stating that, while children, as distinct persons, are good in themselves and should be loved for their own sakes, “[p]rocreating and raising children, as activities in which the husband and wife cooperate, not only benefit the children but fulfill the couple. Insofar as it fulfills the couple, parenthood—having a family—is not an extrinsic end to which one-flesh unity is instrumental, but a realization of its potentiality”).

<sup>13</sup> Pope John Paul II, Apostolic Exhortation, *Familiaris Consortio* ¶ 14 (Nov. 22, 1981) (stating that, “[t]he couple, while giving themselves to one another, give not just themselves but also the reality of children, who are a living reflection of their love, a permanent sign of conjugal unity and a living and inseparable synthesis of their being a father and a mother”).

<sup>14</sup> Don S. Browning & John Witte, Jr., *Emil Brunner*, in *CHRISTIANITY AND FAMILY LAW: AN INTRODUCTION* 307, 314-15 (John Witte, Jr. & Gary S. Hauk eds., 2017) (describing Emil Brunner’s conception of the bio-existential one-flesh union of mother, father, and child as a trinity of being). Brunner has argued that:

Since I, the father, as well as the mother and the child, know irrevocably that this fact is irrevocable, then we three persons are bound together in a way in which no other three persons have ever been bound together, in an unparalleled and indissoluble relation . . . This trinity of being we call the human structure of existence.

*Id.* A pastoral letter of the United States Conference of Catholic Bishops (“USCCB”) also affirms that married love is modeled on Trinitarian love, the mystery of the Trinity teaching us that “[t]o be in the image and likeness of God is not simply to have intelligence and free will, but also to live in a communion of love,” as seen in the Trinity. USCCB, *MARRIAGE: LOVE AND LIFE IN THE DIVINE PLAN* 35 (2009). Furthermore, “[j]ust as the Trinity of persons is a life-giving communion of love both in relationship to one another and to the whole of creation, so a married couple shares in this life-giving communion of love by together procreating children in the

This union in its most fundamental aspect can only be founded properly on love, whose very act of bringing the couple together expresses itself naturally in an outpouring of life.<sup>15</sup> The sexual union establishes strong ties of blood between the parents and the child<sup>16</sup> and strengthens the bond between the parents themselves.<sup>17</sup> It is one of the deepest mysteries of human life and one that helps define what it means to be human.<sup>18</sup> The life of the child that is poured out by this love is naturally a part of the parents but also its own self. From the moment of conception this new self grows from complete and utter dependence on the mother and then on the mother and father together to a more mature self who starts to think for itself and eventually to a largely independent self. This independent self still retains the familial identity and bonds in its being, but now this self is able to live on its

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conjugal act of love.” *Id.* at 37.

<sup>15</sup> See SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 26 (2012) (observing that, “in coitus, and there alone, a man and a woman’s bodies participate by virtue of their sexual complementarity in a coordination that has the biological purpose of reproduction—a function that neither can perform alone”). Pope Francis has stated that:

[T]he conjugal union is ordered to procreation “by its very nature.” The child who is born “does not come from outside as something added on to the mutual love of the spouses, but springs from the very heart of that mutual giving, as its fruit and fulfillment.” He or she does not appear at the end of a process, but is present from the beginning of love as an essential feature, one that cannot be denied without disfiguring that love itself. From the outset, love refuses every impulse to close in on itself.

Pope Francis, Apostolic Exhortation, *Amoris Laetitia* ¶ 80 (March 19, 2016) [hereinafter *Amoris Laetitia*] (footnotes omitted).

<sup>16</sup> David G. Hunter, *St. Augustine of Hippo*, in *CHRISTIANITY AND FAMILY LAW: AN INTRODUCTION* 69, 75 (John Witte, Jr. & Gary S. Hauk eds., 2017) (relying on St. Augustine for the proposition that, “God chose sexual union as the preferred method of multiplying human beings (rather than, for example, a spontaneous creation of each human being or a virginal conception of everyone) because it establishes ties of blood that are stronger than a simple similarity of nature”).

<sup>17</sup> PINCKAERS, *supra* note 4, at 445 (noting that Aristotle, “observes that children are a bond uniting the spouses and that they render the marriage more solid”).

<sup>18</sup> Pope Paul VI, Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes* ¶ 52 (Dec. 7, 1965) (stating that, “the family is a kind of school of deeper humanity”).

own and become, if desired, a parent in turn. In order to sustain this community of family the love of the parents must be unifying by drawing the love of their child in response to theirs. Through this love the child grows and develops strong roots completing the bond with its parents.

This transformation of self by each of the parents into a community of family is not an easy task. The first few months—perhaps the first few years—are usually a honeymoon. When the newness wears off, the real test of love is learning how to live with one another as a unity through the bad times, as well as the good. The bond of natural affection on which one counts for basic support sometimes falters in the face of perceived slights, failures, and a myriad other things that can go wrong. In such times, it is important for the continued unity of the family that help and support be available from family, friends, civic organizations, and, importantly, the State.<sup>19</sup> The State provides its support and help by maintaining a legal institution that recognizes the importance of family, promotes family for the birth and development of children within its naturally nurturing environment, and protects family from outside interference.<sup>20</sup> Until recently, this institution was called “marriage.”<sup>21</sup> Through this

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<sup>19</sup> The State has a powerful influence on marriage. For example, the State’s public message alone about what marriage is “affects people’s beliefs, and therefore their expectations and choices, about their own prospective or actual marriages.” SHERIF GIRGIS, ANDERSON & GEORGE, *supra* note 15, at 40.

<sup>20</sup> Robert P. George & Gerard V. Bradley, *Pope John Paul II*, in CHRISTIANITY AND FAMILY LAW: AN INTRODUCTION 363, 369 (John Witte, Jr. & Gary S. Hauk eds., 2017) (describing Pope John Paul II’s understanding of the obligation of public authority, “to enforce policies protecting parents’ moral authority over children and their education,” to “support a cultural milieu in which children can be brought up to embrace the virtues of chastity, honesty, constancy, and the like,” and “not to put any counterfeits of marriage (such as non-marital sexual cohabitation) on a moral par with the real thing”). George and Bradley note that:

Toward the end of his life, [Pope John Paul II] judged that the family was facing an epochal crisis . . . in which non-marital (and thus immoral) sexual acts and non-marital cohabitation were not only tolerated, but valorized and even facilitated and promoted by public authorities, [and t]he epitome of this assault was the equation of homosexual partnerships with genuine marriage.

*Id.* at 370.

<sup>21</sup> SHERIF GIRGIS, ANDERSON & GEORGE, *supra* note 15, at 44 (citing several



traditional notion of marriage, society celebrates the mystery of the trinity of love, which is the surest way to realize well-balanced, contributing citizens in the children.

No other institution provides the same assurance of good citizenry than marriage. Adoption is a second-best alternative for children, albeit an essential one for those who have no natural parents. Adoptive parents offer a very loving family environment for their children, but their children are not the fruit of their own love for each other. Even in this very loving environment, the stories are legion of adopted children seeking the parents who conceived them. Because a person's humanity is an integration of the physical and the spiritual,<sup>22</sup> missing in the adopted child's life is the source of their physical being, in whom they naturally would have grown their roots. There can be no doubt that the loving family environment provided by adoptive parents provides the best substitute for natural parents, or that many adopted children grow up to be well-balanced, contributing citizens, but their identity is not fully ensconced in their adoptive parents. They wonder what their natural parents were like in their personality as well as in their bodily makeup and expressions because these are traits that they well might have inherited through their genes. When they find that their natural parents may have abandoned them, if they did, there is a deep sense of loss to their humanity. It may express itself in greater gratitude to and love for their adoptive parents, but they cannot avoid the sense of loss.

Adoptive parents are also more prone than natural parents to feel alienation from their children in bad times. When the child behaves in a manner that challenges the family mores—and there are many times, especially during the teenage years, that this happens—adoptive parents may be tempted to blame the child's genes, thus separating themselves from responsibility. Natural parents, on the

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pre-*Obergefell* state supreme court cases indicating that marriage is a fundamental right because of the societal value of procreation).

<sup>22</sup> See Latkovic, *supra* note 9, at 309 (expounding on the work of Pope John Paul II and rejecting, “any form of anthropological dualism that separates the person from his or her body or treats the body only as an instrument to be used by the person,” since the body is “something intrinsically *personal* that shares in the dignity of the person”) (emphasis in original).

other hand, cannot avoid the fact that the child's genes are their own. Likewise, since the adoption was a choice to take in a child who is in need, the parents may feel that the child owes something for this grace. They may feel that a troublesome nature in the child is more than what they bargained for. Natural parents, on the other hand, cannot avoid the fact that they bore the child as part of themselves. These differences between natural and adoptive parents help explain why society did not design the traditional form of marriage to encourage adoption as an equal to natural child-bearing, although it rightfully promoted it as a second-best alternative, when a child was left without his or her natural parents.

Needless to say, society needs to discourage the deliberate abandonment of children by their natural parents, because of the alienation that the children will inevitably endure. Even more to be discouraged is the objectification of children that occurs through the choice to "manufacture" a child, such as through methods of artificial insemination, in vitro fertilization, gamete intrafallopian transfer, or zygote intrafallopian transfer. A person who intends the creation of a child, rather than receiving it as the gift of an act of physical-spiritual love in sexual intercourse, separates the child in its creation from the bodily and spiritual union of love between the parents, from which the child derives its being and identity.<sup>23</sup> The "manufactured" child becomes an object that is obtained for their love rather than a gift that is expressed by their love.<sup>24</sup> By the bond of love realized in sexual intercourse the couple provides the opportunity by which a child may be conceived not only physically from their bodies, but also spiritually

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<sup>23</sup> PATRICK LEE & ROBERT P. GEORGE, *CONJUGAL UNION: WHAT MARRIAGE IS AND WHY IT MATTERS* 48 (2014) (arguing that procreation, "[s]hould be recognized as a *gift* that supervenes on the embodiment of the spouses' marital love, not a *product* of the spouses' efficient activity").

<sup>24</sup> See Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day* ¶ B(4)(c) (1987) [hereinafter *Dignity of Procreation*] (stating that the child, "cannot be desired or conceived as the product of an intervention of medical or biological techniques;" since this "would be equivalent to reducing him to an object of scientific technology. No one may subject the coming of a child into the world to conditions of technical efficiency which are to be evaluated according to standards of control and dominion").

from the love by which the bond between the parents and the child is formed. Without the formative base of bodily and spiritual union in conjugal love, artificial procreation generates a product that stands apart from the person who produces it.<sup>25</sup> Not being an integral part of the parents themselves, the child is not only objectified, but also alienated. The child may be raised by very loving parents and prove to be a strong and thriving citizen in society, but the child still feels the loss of the love of natural parents it never had, even more than in the case of a child who had natural parents and lost them. For this reason, the institution of marriage is especially important today to promote the proper foundation of love, from which every child deserves to be born as a gift of the parents' selves.<sup>26</sup>

## *II. The Upbringing of Children*

Until fifty years ago, the State required the lasting commitment of spouses to a faithful and exclusive love, and protected these essentials of marriage by allowing divorce only in serious circumstances, punishing adultery as a crime, and forbidding polygamy. By requiring the permanence of the faithful and exclusive conjugal union in marriage, the State promoted the nature of marriage as a gift of self,<sup>27</sup> and thereby supported the natural inclination of each

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<sup>25</sup> LEE & GEORGE, *supra* note 23, at 48 (n.6) (observing that a child “produced” through artificial reproduction “may be loved for her own sake after she comes to be, but she comes to be as related to her parents in the first moment of her existence as a product is related to a producer”).

<sup>26</sup> See MAY, *supra* note 11, at 86-87 (distinguishing the marital act from the making of a product, by showing that the former is an act of doing that perfects the spouses and from which the child received is begotten, not made—a gift that permanently embodies the marital act itself).

<sup>27</sup> The gift of one's self involves such a transformation of self into the community of family, that it demands exclusivity and permanence. D. Vincent Twomey states that the intrinsic dynamics of the sexual urge aim at “union through a mutual self-giving, a union precisely of man as man and woman as woman, that is, as potential father or mother,” and not as a mere satisfaction of appetite. Therefore, “since one gives oneself (one's self to another self), this gift must be exclusive and total — that is, life-long — and open to the gift of new life.” D. VINCENT TWOMEY, *MORAL THEOLOGY AFTER HUMANA VITA: FUNDAMENTAL*

spouse to educate their child<sup>28</sup> as a future citizen of society. When the union is exclusive, one spouse is more careful to work with the other spouse in tending to the education of their child than if others share in the marriage. With others in the marriage, a spouse is more likely to shirk the work and leave it to others, not to mention the fact that a polygamous relationship is itself disruptive of the unity of the marriage by its interference with the biological tie between parent and child,<sup>29</sup> as well as by its removal of mutuality between husband and wife,<sup>30</sup> and its serious temptation to jealousy and rivalry.<sup>31</sup> When the spouses consider their union to be permanent, they are more likely to see the education of their child through to its successful completion. Knowing that the other spouse will remain, even after the child leaves home, a spouse is inclined to give up the pursuit of life interests that ensure his or her own individual security, in order to ensure the proper education of the child. A loss of confidence in the permanence of the relationship inclines a spouse to seek self-sufficiency and chills the disposition to forgo fully individual pursuits. Finally and most importantly, when the union is faithful, the spouses continue to share the conjugal love through which the child was born, and this love ensures that the inclination to educate their child is promoted by love, and not merely endured as a duty. The sacrifices of time, treasure, and talent that go into the education of a child often require the parents to give up the dreams they entertained when they were single, but they

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ISSUES IN MORAL THEORY AND SEXUAL ETHICS 137-39 (2010). The permanence of this bond goes beyond the mere consent of the married couple and inheres in marriage by its very nature, so that it cannot be dissolved by any civil law that permits divorce. *Casti Conubii*, *supra* note 2, at ¶ 34.

<sup>28</sup> AQUINAS, *supra* note 4, at II-II.94.2 (asserting that the inclination to educate one's children is a natural inclination).

<sup>29</sup> Browning & Witte, *supra* note 14, at 314-15 (describing Emil Brunner's consideration of monogamy as a strict requirement for the child's sake, because otherwise the bio-existential one-flesh union of mother, father, and child as a trinity of being is severed). For a review of the widespread rejection of polygamy in the Western legal tradition, see generally JOHN WITTE, JR., *THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY* (2015).

<sup>30</sup> LEE & GEORGE, *supra* note 23, at 61 (stating that, "[to] be open to an additional marriage with another, is to reduce marriage to a merely external union, not one involving a complete and self-transformative self-giving").

<sup>31</sup> GERMAIN GRISEZ, *LIVING A CHRISTIAN LIFE* 576 (1993).

do so willingly, by desire, and without any remorse, because of the love for their child.

It is not enough, however, to require these qualities of permanence, faithfulness, and exclusivity apart from conjugal love. These qualities can take a beating from the trials of life, and need for survival a love that by its nature is a total commitment. Conjugal love is just such a commitment, as opposed to a love formed merely by emotional attachment or mental resolve. Emotions without more are subject to one's desires and can waver. Mental choices which instrumentalize the body to accomplish certain ends are subject to a change of direction in one's plans. Such emotional and mental changes threaten the permanence, faithfulness, and exclusivity of the marriage relationship. Conjugal love, on the other hand, involves a conversion of one's whole self from singularity to the unity of family.<sup>32</sup> When spouses vow to take each other "to have and to hold from this day forward, for better, for worse, for richer, for poorer, in sickness and health, until death do us part," they literally take each other to become one in union.<sup>33</sup> Whatever problems that ensue, there is no turning away because the mindset or paradigm by which one lives is founded on union. Even at the height of distress, the spouse ultimately resolves problems through understanding, patience, humility, and compromise, but never through rejection. One's spouse in a way becomes one's own self, even while retaining the entire individuality of a separate person. It is from this union of the two as one that the child derives its own foundation as a person in communion with others.

One may ask why a single parent could not accomplish the education of their child in the same way as a couple united in marriage. There are many examples of children raised in a loving relationship

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<sup>32</sup> Christopher Tollefsen, *John Paul II and Children's Education*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 169-70 (2007) (stating that, "[h]usband and wife do not lose their individuality, but they enter into a social entity that is itself not a mere aggregate of persons but a whole, similar to other organisms in its unity, teleology, and even self-directedness").

<sup>33</sup> Jimmy Carter remarks that, "there must be a strong element of faith in one another," and that "this shared commitment can be transcendent, requiring a leap of faith more binding than all the others, designed to survive any future challenges or differences." JIMMY CARTER, FAITH: A JOURNEY FOR ALL 31 (2018).

with their single parent, and there are many times when circumstances force this result. However, the work of two parents united as one is an important part of the growth and development of the child. As human beings, we are defined by our relationships of love in community. Parents are the first real example of community for the child and, through example, they educate the child on what it means to love. As the spouses work through good and bad times, successes and failures, joys and sorrows, the child sees how conflicts are resolved, sometimes with tempers flaring out of control, but always with an underlying commitment to the other person. This lasting faithfulness is the solid foundation on which the child leans for support, and from which it derives confidence and stability of character for its future life as a citizen.<sup>34</sup> As more children are born into the family, this foundation strengthens and provides new opportunities for learning what it means to love by sharing with, and ultimately by serving, others.

Parents also educate their child by how they interact as man and woman, complementing each other with the different gifts they offer their child. The wife is naturally the more nurturing, as she brings the child into the family through childbirth, although both parents share a natural sense of consanguinity that motivates them to care for, instruct, and discipline their child.<sup>35</sup> The child forms a bond with the mother from the moment it nurses at her breast, while basking in the glow of her love, the child forms a bond with the father over time, while learning from his example, guidance, and discipline.<sup>36</sup> Of course

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<sup>34</sup> PINCKAERS, *supra* note 4, at 443 (stating that, “[t]he security of home gives [children] that personal self-assurance which will vitalize and support their activities in society,” and conversely, “insecurity bred in childhood by division within the family can have serious repercussions and prevent children from developing a courageous attitude toward life, so necessary for the forming of personality”).

<sup>35</sup> Pope John Paul II’s insightful analysis of motherhood notes that, “[t]he man - even with all his sharing in parenthood - always remains ‘outside’ the process of pregnancy and the baby’s birth; in many ways he has to *learn* his own ‘fatherhood’ from the mother.” Pope John Paul II, Apostolic Letter, *Mulieris Dignitatem* ¶18 (Aug. 15, 1988) (emphasis in original).

<sup>36</sup> Pope Francis sees both parents as offering important complementary gifts needed for the best growth of their child:

A mother who watches over her child with tenderness and compassion helps him or her to grow in confidence and to experience that the world is a good and welcoming place. This

these roles are not particular to each parent. The mother and the father both fill a nurturing and leadership role in their child's life albeit in different ways dependent on gender, personality and the diverse gifts each has to offer. By recognizing and using their different aptitudes to complement each other in the education of their child, the child receives a better education than either one of them can provide alone.

### III. Obergefell

The Supreme Court case of *Obergefell v. Hodges*<sup>37</sup> extended the right to marry to same-sex couples as a fundamental right, which the court found inherent in the liberty of a person. This extension proceeded from the Court's understanding that there are four reasons for the State to protect the right to marry: (1) marriage helps shape a person's definition of self by fulfilling "yearnings for security, safe haven, and connection,"<sup>38</sup> as well as by helping a person "find other freedoms, such as expression, intimacy, and spirituality;"<sup>39</sup> (2) it offers "the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other;"<sup>40</sup> (3) it safeguards children,<sup>41</sup> "allow[ing] children 'to understand the

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helps the child to grow in self-esteem and, in turn, to develop a capacity for intimacy and empathy. A father, for his part, helps the child to perceive the limits of life, to be open to the challenges of the wider world, and to see the need for hard work and strenuous effort. A father possessed of a clear and serene masculine identity who demonstrates affection and concern for his wife is just as necessary as a caring mother. There can be a certain flexibility of roles and responsibilities, depending on the concrete circumstances of each particular family. But the clear and well-defined presence of both figures, female and male, creates the environment best suited to the growth of the child.

*Amoris Laetitia*, *supra* note 15, at ¶175.

<sup>37</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>38</sup> *Id.* at 2599 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2600.

<sup>41</sup> *Id.*

integrity and closeness of their own family and its concord with other families in their community and in their daily lives,”<sup>42</sup> and “afford[ing] the permanency and stability important to children’s best interests;”<sup>43</sup> and (4) it is “the basis for an expanding list of governmental rights, benefits, and responsibilities.”<sup>44</sup> Most of these reasons miss the point of what a true marriage is all about.

The *Obergefell* opinion has removed the primary function of marriage to support and protect children and replaced it with a function to support and protect adults in their personal relationships. This is a remarkable turn of events. At one point in our history, the Court permitted state law to criminalize private homosexual acts of behavior.<sup>45</sup> Then the court withdrew the State’s involvement in such matters and left them to personal choice.<sup>46</sup> Now the Court requires the State to recognize and promote these acts in the form of marriage. All this happened within the space of less than thirty years. What a remarkable feat of judicial gymnastics! If the millenia during which church and state institutions recognized the fundamental nature of marriage as the union of a man and a woman for the procreation of children<sup>47</sup> are of any significance, one would think that the Court would leave it to state legislatures, rather than to a handful of judges, to attempt any change that removes the very essence of marriage.<sup>48</sup>

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<sup>42</sup> *Id.* (quoting *United States v. Windsor*, 570 U.S. 744, 772 (2013)).

<sup>43</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>44</sup> *Id.* at 2601.

<sup>45</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding no fundamental right to engage in homosexual conduct, and holding that the immorality of such conduct is a sufficient rational basis on which to criminalize it).

<sup>46</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (involving “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle,” and wherein the court decided that “[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government”).

<sup>47</sup> Justice Alito, for example, in his dissent to *Obergefell*, states that, “[f]or millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.” *Obergefell*, 135 S. Ct. at 2641 (Alito, J. dissenting).

<sup>48</sup> Chief Justice Roberts, in his dissent to *Obergefell*, rightly states that the Court should be engaged in judgment, not legislation, and “for those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening.” *Obergefell*, 135 S. Ct. at 2611 (Roberts, J. dissenting). He scathingly remarks that,



Now not only can the State not suppress what it determines to be behavior contrary to the common good, but must promote it through its recognition in an expanded form of marriage that completely disfigures the institution of marriage. Essentially, the Court has arrogated to itself the right to determine what behavior promotes the common good, even though a few years ago it maintained that the State should not get involved in such matters.

According to the Court, same-sex marriage is necessary to help one find oneself, fulfill yearnings for security, safe haven, and connection, as well as to find other freedoms, such as expression, intimacy, and spirituality. This focus on promoting the relationship of a married couple primarily for the sake of the married couple is not the traditional focus of marriage laws. Marriage, as a state institution, traditionally promotes the relationship of the married couple for the good of the child. Relationships between adults are left by the State to the private sphere, unless the State determines them to be harmful to the common good. This relegation to the private sphere actually promotes the exercise of freedoms, by refusing to bring them under state control.<sup>49</sup> However, with *Obergefell*, the tide has swung from a couple's constitutional right to be left alone to the couple's constitutional right to be recognized for a good that pertains only to

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“[t]he majority expressly disclaims judicial ‘caution’ and omits even a pretense of humility, openly relying on its desire to remake society according to its own ‘new insight’ into the ‘nature of injustice.’” *Id.* at 2612. He adds that, “[o]ur cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.” *Id.* at 2620. As for the genesis of marriage, he states that, “[i]t arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship,” because “for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.” *Id.* at 2613.

<sup>49</sup> LEE & GEORGE, *supra* note 23, at 113, observe:

A decision by the political community not to make such an endorsement [of same-sex marriage], and not to make such a false declaration [that same-sex marriage is the same as traditional marriage], does nothing whatsoever to limit the liberty of those who wish to form such [same-sex] relationships.

their own relationship.<sup>50</sup> In the process, the State by the necessity of this move can no longer promote the good of children by ensuring the type of sexual relationship that gives the child its greatest sense of being, identity, solidarity, and bonding. It now promotes marriages that do not have the possibility of a blood union, thus relegating the blood union to only one of several that will be responsible for the growth and development of the future citizens of our society.

*Obergefell* maintains that, “[j]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.”<sup>51</sup> It declares that marriage is the basis for an expanding list of governmental benefits. Of course, these benefits come at a cost. Citizens must support these costs through their taxes. They do not have any say in the matter. Contrary to cases such as *Masterpiece Cakeshop*<sup>52</sup> and *Hobby Lobby*,<sup>53</sup> where the petitioners were relieved from complying with legal mandates that required them to engage personally in behavior that violated their conscience, *Lee*<sup>54</sup> maintains that one is not exempted from the general civic obligation to pay taxes,

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<sup>50</sup> *Obergefell* introduced same-sex relationships into the marriage relationship. It may not be long before equal protection advocates seek the same protection of other sexual relationships, such as those involving polygamy and incest, and perhaps even non-sexual relationships, such as those between family members and best friends. See GIRGIS, ANDERSON & GEORGE, *supra* note 15, at 17 (asking with regard to non-sexual relationships: “[W]ould it not be patently *unjust* if the state withheld benefits from them only because they were not having sex with each other?”). G.J. McAleer relies on Scheler in suggesting that, “[t]he ruling ethos of an age of subjectivism is the radical rejection of inequality stemming from natural or divine gifts,” and he notes that defenders of gay marriage reject the inequality inherent in the traditional form of marriage that rightfully privileges those sex acts that are able to bear fruit through procreation. G.J. McAleer, *Two Case Studies in Schelerian Moral Theology: The Vatican’s 2005 “Instruction” and Gay Marriage*, 6 NOVA ET VETERA 205, 214 (2008). The result of this rejection is a call for social blindness to the reality of marriage in the social order, a social blindness that privileges a willed identity over existential diversity and can only bode ill for our society. *Id.* at 216-17.

<sup>51</sup> *Obergefell*, 135 S. Ct. at 2601.

<sup>52</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

<sup>53</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>54</sup> *United States v. Lee*, 455 U.S. 252 (1982).

even if the tax revenue supports such behavior. It is true that, before *Obergefell*, marriage was a positive right for heterosexual couples to marry and take benefits from the State. However, this right was founded on the need to protect and promote the proper procreation and education of children as future citizens of the State—an activity that well deserves the people’s tax support. Same-sex couples, by nature, do not procreate through the intimate physical-spiritual bond of sexual intercourse, which founds the very being, identity, solidarity, and bonding of a child at the deepest levels. Yet now taxes are required to support these personal relationships for their own sakes. To avoid this untoward result, the State was right in the past to make a distinction between homosexual and heterosexual couples. By eliminating the distinction, the Court has shifted the positive right of children to benefits to a positive right of couples engaged in sexual intercourse to benefits.

In addition to shaping a person’s definition of self and providing a basis for an expanding list of governmental benefits, the Court offers two other reasons for the institution of marriage. One is the assurance that, while both spouses still live, there will be someone to care for the other. This assurance is all but ephemeral, given the present state of divorce laws in our country. Divorce laws will be discussed in the next section. The other is the safeguarding of children and the teaching of children to understand the legitimacy of same-sex marriage. The safeguarding of children is certainly one of the traditional reasons for marriage. Unfortunately, it receives virtually no attention in the opinion. There is no elaboration of the good aspects of marriage for children, and a reader of the opinion is left with the feeling that the safeguarding of children is a gratuitous bow at best to the legitimacy of this concern. The other asserted benefit, the teaching of children about same-sex marriage, fulfills the agenda of the Court to find a way to force the acceptance of same-sex marriage on the culture of our society.<sup>55</sup>

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<sup>55</sup> See LEE & GEORGE, *supra* note 23, at 122:

[I]t is clear that what same-sex marriage supporters principally want is the social affirmation and endorsement of homosexual relationships and that clearly it is not just tolerance that is desired, since persons with same-sex attractions are free to engage in

When the right to marriage is found to be inherent in the liberty of the person with regard to that person's self-interest, not only are children ignored, but they are hurt in at least three ways. First, the protection of the adults in their exercise of autonomy derogates from the surrender of self to the other in conjugal love. It promotes the maintenance of a love relationship based on emotion or reason, rather than on a permanent, exclusive, faithful relationship. When love is not committed, it is easier to detach from family, which is why the relationship is more fragile and breakable. Total commitment is what provides the child with its deepest sense of being, identity, solidarity, and bonding. *Obergefell* lauds the choice of couples to enter into relationship, but despite its professed claim for marriage as giving an understanding and assurance of permanence, its very foundation promotes the opposite.

Second, the mindset of society is pushed toward an understanding of marriage that excludes children. One might think that an answer to the problem is to ignore *Obergefell*'s new definition of marriage, which promotes autonomy rather than commitment.<sup>56</sup>

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private sexual behavior and are free to establish for themselves long-term romantic and sexual relationships.

See also Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 172, 190 (Robert P. George & Jean Bethke Elshtain eds., 2006) (stating that "[c]hildren are to understand their parents' needs; the importance of being accepting of sexual orientation and alternative lifestyles; the contingencies of all attachments; the need for each of us to create our own meaning of the universe," with the result that children learn "that self-gratification is good, that a sense of entitlement is normative, and that acts or omissions need not have consequences").

<sup>56</sup> It should be noted that, if "to ignore" is taken to mean "to accept for others even if not for oneself," one's thought actually becomes a deliberate approval of what is detrimental to the good of marriage—an approval that mars one's mindset. John Finnis explains:

The bare thought that conduct X is permissible for people differently situated from me does not logically entail that I must have any interest, however tenuous and conditional, in doing X. But outside a legalistic morality of prohibitions and permissions, the thought "It's OK for them" will convey the judgment that the conduct in question has some value. . . . So the thought that it is permissible and OK for certain other people to get such satisfaction by nonmarital sex acts becomes deliberate approval,

However, the law is quite powerful in shaping societal beliefs, and its turn to autonomy will eventually lead society to think of marriage more in terms of feelings than of building what is necessary for the domestic sharing of family life.<sup>57</sup> Same-sex marriage promotes a wholly new understanding of the meaning of marriage,<sup>58</sup> and the change in law will lead to a change in culture that no longer addresses the good of children. The idea of a lasting, faithful, and exclusive union will fade as the individual adult looks to save his or her feelings from all the trials and tribulations that can arise in marriage, and

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i.e. a thought of the form: “If I were in their situation, I would be willing to get sexual satisfaction by nonmarital sex acts” . . . Deliberate approval of nonmarital sex acts is among the states of mind (understanding and willingness) which damage one’s capacity to choose and carry out *as marital* even those actual sex acts which in all other respects are marital in kind.

John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 122-23 (1997) (footnotes omitted).

<sup>57</sup> GIRGIS, ANDERSON & GEORGE, *supra* note 15, at 54-56; Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons* ¶ 6 (quoting *Evangelium Vitae*, *supra* note 1, at ¶ 90, when it stated that, “[c]ivil laws are structuring principles of man’s life in society, for good or for ill. They ‘play a very important and sometimes decisive role in influencing patterns of thought and behaviour’”); LEE & GEORGE, *supra* note 23, at 105 (noting that, “[t]he state’s laws and policies partly shape the general culture. If the state conveys a gravely distorted view of marriage, it will weaken and undermine its members’ capacities for full and rich participation in this critical aspect of human flourishing”).

<sup>58</sup> John Finnis notes that

The deliberate genital coupling of persons of the same sex . . . treats human sexual capacities in a way which is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage in the understanding that its sexual joys are not mere instruments or accompaniments to, or mere compensations for, the accomplishment of marriage’s responsibilities, but rather enable the spouses to *actualize and experience* their intelligent commitment to share in those responsibilities, in that genuine self-giving.

John M. Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049, 1069 (1994).

society will confirm that this is good.<sup>59</sup> *Obergefell* was right that marriage helps shape a person's definition of self, and its own effect on society's view of marriage will eventually be that marriage is a cultural norm to satisfy an individual's yearnings for autonomy of self, rather than a norm by which an individual commits to the good of children in family.<sup>60</sup>

Third, the very idea of bearing children as the fruit of sexual intercourse no longer will be the preferred mode of procreation. *Obergefell* added same-sex relationships to the institution of marriage partly out of consideration for the "hurt" produced by perceived discrimination.<sup>61</sup> After *Obergefell*, there may be occasion for further "hurt" by the distinction made between natural and artificial procreation.<sup>62</sup> Since same-sex couples cannot procreate naturally, there may arise a stigma against natural procreation as elitist and a consequent turn to artificial procreation as something that all married couples can participate in equally and without discrimination. Sexual

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<sup>59</sup> GIRGIS, ANDERSON & GEORGE, *supra* note 15, at 57-58.

<sup>60</sup> G.J. McAleer observes that "[t]he apparent affirmation of the value of marriage in the desire for gay marriage is actually underwritten by the devaluation of the value of fecundity, and marriage gutted of its dynamic content." G.J. McAleer, *Two Case Studies in Schelerian Moral Theology: The Vatican's 2005 "Instruction" and Gay Marriage*, 6 NOVA ET VETERA 205, 213 (2008).

<sup>61</sup> *Obergefell*, 135 S. Ct. at 2603 (stating that, "[t]he reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions"). The reference is to *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated bans on interracial unions that were truly discriminatory, since race has nothing to do with the essentials of marriage. However, *Obergefell* draws a false analogy to *Loving*, because the union of a man and a woman *is* essential to marriage.

<sup>62</sup> Sugrue, *supra* note 55, at 184-85 (describing the effect of same-sex couples claiming the right to procreate through artificial means and thus increasing the demand for reproductive technologies). She explains:

The cloning of children will become an area deemed worthy of further exploration by those who cannot mate but who can marry. It does, after all, clean up the aesthetically unpleasing reality that one of the partners in the same-sex marriage might otherwise forever be tied through a child to someone of the opposite sex. In short, where the logic of the market is applied to marriage, the result is the commodification of children.

*Id.*

intercourse, which is key to the conjugal love promoting the highest good of the child, may well fall into social disrepute.<sup>63</sup>

What the mindset of *Obergefell* ignores is that marriage under state law should exist to protect children, not adults. Children are vulnerable members of our society who need the protection of an institution directed to the best formation of the child in its being, identity, solidarity, and bonding. Adults are already formed and can fend for themselves. This does not mean that marriage for the sake of the married couple is not a good of human flourishing, itself similar to the goods of affection, friendship, and appreciation. In fact, the Church rightfully affirms that the unity of the married couple for their own sake is one of the chief aspects of marriage, together with the procreation of children.<sup>64</sup> However, the State should not be concerned with controlling all human flourishing, and it should not be its job to ensure the couple's unity for their own sake.<sup>65</sup> In marriage, it is the openness to children that calls for the State's protection of the parental unity. In other words, when the State promotes marriage, its promotion of the welfare of parents serves a state purpose only when this promotion ultimately promotes the welfare of children. When the

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<sup>63</sup> See ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932) (a dystopian novel exploring the ramifications of the State's replacement of sexual intercourse with artificial reproduction and its assumption of the entire education of children). Without the connection to natural procreation, marriage becomes manipulable by the State as a social construct, according to which "[m]arriage is not a specific type of community, founded on the nature of human persons, with an objective structure, but an association constructed by society for its own purposes, one whose basic structure and contours are chosen by the state and subject to modifications introduced by the state." LEE & GEORGE, *supra* note 23, at 39. Huxley's brave new world no longer paints such a fantastic future.

<sup>64</sup> See generally JOHN PAUL II, *MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY* (Michael Waldstein trans., Pauline Books & Media 2006) (containing Saint John Paul II's catechesis on marriage and sexual love); PHILIP L. REYNOLDS, *HOW MARRIAGE BECAME ONE OF THE SACRAMENTS: THE SACRAMENTAL THEOLOGY OF MARRIAGE FROM ITS MEDIEVAL ORIGINS TO THE COUNCIL OF TRENT* (Cambridge University Press 2016) (addressing the evolution of the sacrament of marriage in the Church).

<sup>65</sup> Charles N. Rowe, *Love, Homosexual Marriage, and the Common Good*, 2011 NAT'L CATH. BIOETHICS Q. 267, 271 (2011) (stating that, "[t]he securing of individual happiness or group interests is not, properly speaking, the purpose of the state; rather, this task falls first and foremost to individuals and groups themselves").

unity of a relationship does not involve an openness to children, the State should protect it in the same way it protects other relationships of affection, friendship, and appreciation—by giving people the right to engage in them as a matter of privacy and autonomy, not by giving others the obligation to accommodate them.<sup>66</sup>

The law should not repress every vice nor prescribe every virtue. As for vice, people are not perfect in virtue, and the State should avoid imposing legal prohibitions that would be unbearable and cause people to commit even more serious vices.<sup>67</sup> Thus, when state criminal laws prohibiting homosexual acts were seen as oppressive, the Court could find them unconstitutional,<sup>68</sup> even though many still found such acts immoral. As for virtue, the State should prescribe only those institutions that serve the common good.<sup>69</sup> Marriage is just such an institution, insofar as it serves the common good through its protection and support of children. On the other hand, the protection and support of personal relationships serve individual goods not needing the protection and support of the State and, in fact, open the door to oppression through state control.<sup>70</sup> Yet it is the personal relationships of same-sex couples that the Court now protects and supports within its expanded definition of marriage. *Obergefell*'s move to involve the State in protecting personal relationships not only distorts the fundamental purpose of marriage law, by diverting its

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<sup>66</sup> Charles Rowe states that the demand for recognition of same-sex marriage “goes beyond a simple request for tolerance, that is, respect for fundamental rights, to a kind of legally imposed social acceptance.” *Id.* at 275 (n. 20).

<sup>67</sup> AQUINAS, *supra* note 4, at I-II.96.2.ad2. Aquinas also states that, “[h]uman laws leave many things unpunished, which according to the Divine judgment are sins, as, for example, *simple fornication*; because human law does not exact perfect virtue from man, for such virtue belongs to few and cannot be found in so great a number of people as human law has to direct.” *Id.* at II-II.69.2.ad1 (emphasis added).

<sup>68</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>69</sup> AQUINAS, *supra* note 4, at I-II.96.3. See also Lynn D. Wardle, *The Future of the Family: The Social and Legal Impacts of Legalizing Same-Sex Marriage*, 13 AVE MARIA L. REV. 237, 250 (2015) (stating that “public laws are intended to protect and effectuate public interests, not private lifestyle preferences”).

<sup>70</sup> See, e.g., *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, 138 S.Ct. 1719 (2018), where the Supreme Court did not rule out the possibility that a baker could be compelled against his religious beliefs to bake a cake for a same-sex wedding, so long as the governmental entity requiring the act did not manifest religious hostility.



function away from the protection of children, but also threatens the function of human law to prescribe only those acts that serve the common good.

One might object that marriage encompasses the union of couples who are incapable of having children or do not intend to have children. It is true that the State does not have an inherent interest in including unions that are permanently incapable of having children,<sup>71</sup> although there should be no objection to including those who have a curable inability, or a contrary intention, since these can change. Nevertheless, the State may have other purposes for including those with incurable incapacities. It may not want to get into investigations

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<sup>71</sup> The State's interest is significantly different from that of the Church. With its focus on children, the common good of marriage for the State does not embrace the full good of marriage, which is embraced by the Church. This more comprehensive good of marriage includes the good for the couple considered in itself. Regarding sterile couples, John Finnis states:

The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow them to *experience* their *real common good*—*their marriage* with the two goods, parenthood and friendship, which (leaving aside the order of grace) are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by that act of genital union.

Finnis, *supra* note 58, at 1066. *See also* Finnis, *supra* note 56, at 106-11 (discussing the good of *fides* (i.e., “the disposition and commitment of each of the spouses to . . . be *maritally* and thus *bodily united with the other* and no other person”) in marriage). The Church recognizes and embraces this full good of marriage. Canon 1084 §3 of The Code of Canon Law provides that, “[s]terility neither prohibits nor invalidates marriage.” The commentary explains that the capability of sexual intercourse is what is “fundamental to the unitive and generative dimensions of marriage” but sterility “is not an impediment because fecundity is not absolutely necessary for the community of the whole of life.” THE CODE OF CANON LAW: A TEXT AND COMMENTARY 766 (James A. Coriden, Thomas J. Green, & Donald E. Heintschel eds., 1985). *Accord* BERNARD A. SIEGLE, MARRIAGE ACCORDING TO THE NEW CODE OF CANON LAW 66-69 (1986). The State, on the other hand, which traditionally has relegated relationships to the private sphere, should have no interest in including sterile unions in the state institution of marriage as an inherent good of marriage for the State, although it may have other reasons to do so.

that invade the privacy interests of couples, and there may be reasons of administrative efficiency to treat heterosexual couples as a species permitted to marry.<sup>72</sup> However, there is no invasion of privacy interests nor need for administrative efficiency in the treatment of same sex unions which by nature cannot exist for the natural procreation of children. A same-sex union exists for the relationship itself, a relationship that enjoys the right to be left alone,<sup>73</sup> but should not be supported by the State.

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<sup>72</sup> One United States District Court states that:

In my view, if the classification of the group who may validly marry is overinclusive, it does not affect the validity 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. There is no real alternative to some overbreadth in achieving this goal. The state has chosen to allow legal marriage as between all couples of opposite sex. The alternative would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family. Such tests and inquiries would themselves raise serious constitutional questions.

Adams v. Howerton, 486 F. Supp. 1119, 1124–25 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982) (citing Griswold v. Conn., 381 U.S. 479, 485–86 (1965)). Griswold, 381 U.S. at 483, states that “the First Amendment has a penumbra where privacy is protected from governmental intrusion,” and applies that notion of privacy to the marital relationship. One of the reasons to protect the privacy in the marital relationship is to preserve the intimacy that is so needed by children in their cognitive and emotional development and which state intrusion would diminish. Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 6, 9–10, 14–15 (1980).

<sup>73</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

*IV. Divorce*

The indissolubility of marriage has deep roots, not only in our religious heritage,<sup>74</sup> but also in our civil law.<sup>75</sup> Until recently, U.S. law embraced this essential element of marriage, by making it difficult to dissolve marriage.<sup>76</sup> Although marriage required the voluntary agreement of a man and a woman who satisfied eligibility requirements, this agreement could not be broken by a mere withdrawal of consent.<sup>77</sup> The couple willed not just current love, but a permanent commitment to each other and to the offspring born of their union in order to provide between themselves the stable environment most necessary for raising children.<sup>78</sup> This commitment took the matter of withdrawal out of their hands and placed it in the State in order to ensure that dissolution be granted only in rare circumstances, and only in accord with legislative policies. In this

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<sup>74</sup> Marriage is a permanent union where the “two shall become one flesh.” GENESIS 2:24. Jesus reiterates the Genesis truth about marital unity in MARK 10:5 and in MATTHEW 19:6: “What therefore God has joined together, let no man put asunder.”

<sup>75</sup> Katherine Shaw Spaht, *The Current Crisis in Marriage Laws, Its Origins, and its Impact*, in THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 213, 216 (Robert P. George & Jean Bethke Elshtain eds., 2006); Maynard v. Hill, 125 U.S. 190, 205 (1888) (“Marriage has more to do with morals and civilization than any other institution. The legislature has always had authority to regulate the institution concerning . . . grounds for dissolution”). While divorce was generally available in early America, it was only for cause. Divorce was difficult to obtain and, until recently, considered immoral and a threat to the well-being of society. ELIZABETH ABBOTT, A HISTORY OF MARRIAGE FROM SAME-SEX UNIONS TO PRIVATE VOWS AND COMMON LAW, THE SURPRISING DIVERSITY OF A TRADITION 206-07, 363 (2010).

<sup>76</sup> Ann Laquer Estin, *Golden Anniversary Reflections: Changes in Marriage After Fifty Years*, 42 FAM. L. Q. 333, 333 (2008).

<sup>77</sup> Maynard, 125 U.S. at 210-12.

<sup>78</sup> Paul Ramsey, *Marriage and the Biblical Covenant*, in RELIGION AND THE PUBLIC ORDER 41, 47, 55 (Donald A. Giannella ed., 1964). The “[m]oral obligations which attend marriage and the training of offspring, so intimately blended with the welfare and happiness of mankind[,] are the ties of wife and child.” JAMES SCHOUER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS; EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, AND MASTER AND SERVANT 5 (5th ed. 1895).

way, the marriage agreement formed a covenant requiring a lasting, exclusive, and faithful commitment of the man and the woman as an essential element of marriage. With the sexual revolution of the sixties, a concerted movement took place to eviscerate this covenant through the ideas of free love and self-directed autonomy. By 1969 a Family Law Act was enacted in California to remove the indissolubility requirement.<sup>79</sup> This section will examine how the removal of this requirement has seriously impaired the function of marriage to encourage and protect the education and upbringing of children in a continuous environment of parental love, promoting instead an abandonment of parental responsibility.

Until recent decades, legislative grounds for divorce existed only for serious disruptions to the marital unit. Grounds for divorce included adultery, cruelty, and desertion or abandonment.<sup>80</sup> In all three, a spouse acts in ways antithetical to the concept of marital unity. In adultery, one spouse corrupts the marital unit by introducing a stranger to the relationship.<sup>81</sup> Cruelty, as defined by violence and fear

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<sup>79</sup> Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 1 (1987) (referencing Family Law Act, ch. 1608, secs. 1-32, 1969 Cal. Stat. 3312). Although divorce was legally available long before 1976, the California law enabled dissolubility without meaningful involvement by the State. California was the first state to permit marriages to be dissolved merely because of "irreconcilable differences." WALTER WADLINGTON AND RAYMOND C. O'BRIEN, *FAMILY LAW IN PERSPECTIVE* (3d ed. 2012).

<sup>80</sup> SCHOULER, *supra* note 78, at 335, 337-39 (5th ed. 1895); MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 64-65 (1987). Grounds-based divorce is consistent with a view that marriage encompasses mutual duties between the spouses. Dissolution following marital offense enables the innocent aggrieved to be released following the other's breach of the marital duty. This sharply contrasts with the no-fault divorce model which is based on individual fulfillment and pursuit of happiness and not on duty toward family. JOHN EEKELAAR, *REGULATING DIVORCE* 16 (1991).

<sup>81</sup> According to Dr. Morse, a primary motive for elite legal institutions such as the American Law Institute to advocate no-fault divorce was to eliminate an adulterer's suffering post-divorce property distribution consequences. Adultery itself, she points out, has such strong roots in our Judeo-Christian culture, that it is one of the ten prohibitions in the Ten Commandments. It is also a leading cause of marital split. But if no-fault really means no-fault, why should an adulterer suffer no post-divorce distribution consequences while those who commit the less grave sin

of severe bodily harm, desecrates the marital unity by injuring the very flesh in one's spouse—the flesh of the marital union. Desertion or abandonment severs the integrity of the marital unit by removing oneself from the union.<sup>82</sup> Judicial review followed by a decree of divorce based on these grounds merely recognized in law what had already occurred in fact. This is not to say that there were no manipulations of the divorce laws. Although divorces were based on one spouse being at fault for violating a serious aspect of marital unity, there were times when the fault-based grounds claimed by one “innocent” party were in reality consent divorces made possible by collusion.<sup>83</sup> Yet the idea of marriage still retained the principle of indissolubility as an essential aspect of marriage.

Upon passage of the Family Law Act of 1969, California law destroyed the indissolubility principle, thereby pushing marriage away from the idea of a public institution based on status and morals and towards the notion of a privatized contract.<sup>84</sup> The Act provides for dissolution without fault, namely for “irreconcilable differences.”<sup>85</sup> Since the underlying policy of this legislation is to minimize hostility between spouses eager to end their marriage, not only is there no fault, but the courts are loathe even to determine whether the differences are irreconcilable. An examination or even production of evidence of irreconcilability would itself generate hostility.<sup>86</sup> Therefore, the determination of irreconcilability is left largely to the person making

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of financial misconduct have to pay for their faults? No-fault divorce did not merely modify dissolution law, it transformed marriage from a public institution to an at-will contract. JENNIFER ROBACK MORSE, *THE SEXUAL STATE: HOW ELITE IDEOLOGIES ARE DESTROYING LIVES AND WHY THE CHURCH WAS RIGHT ALL ALONG* 223-25 (2018); MARY ANN GLENDON, *supra* note 80, at 81.

<sup>82</sup> Historically, absence alone was insufficient and states required showing that an absence evidenced an intent to abandon conjugal obligations. THEODORE D. WOOLSEY, *ESSAY ON DIVORCE AND DIVORCE LEGISLATION, WITH SPECIAL REFERENCE TO THE UNITED STATES* 198 (photo. reprint 1982) (1869). In some states, the statutory time could be for as long as five years. *Id.*

<sup>83</sup> MARY ANN GLENDON, *supra* note 80, at 65.

<sup>84</sup> Estin, *supra* note 76, at 334-35.

<sup>85</sup> Kay, *supra* note 79, at 1.

<sup>86</sup> *Id.* at 4-5.

the claim.<sup>87</sup> Furthermore, although a 1966 Report by the Governor's Commission on the Family in California acknowledged that marriage law should sever the marital unit only if its objects truly and irretrievably have been lost,<sup>88</sup> the special Family Law Court that the Commission recommended to make this determination did not become part of the Act.<sup>89</sup> Not only is there little examination of whether marital ties are irretrievable, there is virtually no consideration of the effect on the children of the marriage.<sup>90</sup>

California's 1969 Family Law Act, as the first no-fault divorce legislation in the United States, triggered a trend toward no-fault divorce throughout the United States. In 1970, the National Conference of Commissioners on Uniform State Laws drafted and approved the Uniform Marriage and Divorce Act, advocating no-fault as the only ground for divorce.<sup>91</sup> By 1985, all states had fallen in line

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<sup>87</sup> See Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law From the Regulation of Marriage*, 63 LA. L. REV. 243, 244 (n. 3) (2003) (stating that, "[n]o state adopting no-fault divorce has required actual proof that the differences are irreconcilable or that the marriage has broken down"). The government neither asks many questions, nor documents motives for requesting a divorce. This vital information can be obtained only indirectly by such means as surveys. The 2014 Relationships in America project survey revealed that over 70% of the 3,900 responding adults replied that only one of the spouses wanted a divorce. MORSE, *supra* note 81, at 212.

<sup>88</sup> Kay, *supra* note 79, at 4-5, 27, 35-36 (1987); MARY ANN GLENDON, *supra* note 80, at 77. A consensus, even in the late sixties was that a good divorce law "should aim to buttress marriage." Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 FAM. L. Q. 237, 240 (2006).

<sup>89</sup> Kay, *supra* note 85, at 4-5. Originally, adopting no fault divorce was thought to compel court inquiry that would lead to reconciliation. However, the law that was enacted did not adopt the therapeutic court model. Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L. Q. 783, 796-97 (1999).

<sup>90</sup> Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 29, 46 (Robert P. George & Jean Bethke Elshtain eds., 2006).

<sup>91</sup> Kay, *supra* note 85, at 5. To prevent a possible slide back to fault, the 1970 version of the Uniform Marriage and Divorce Act of 1970 also advocated a no-fault basis for property distribution. *Id.* at 11-13. This dramatically altered former laws, by removing the innocent spouse's power to negotiate the split of property. MARY ANN GLENDON, *supra* note 80, at 81.

by granting no-fault divorces.<sup>92</sup> Despite its being a change brought about primarily by “an elite cadre of legal academicians, judges and lawyers” rather than a grassroots movement,<sup>93</sup> the result has been a profound shift from marriage as a permanent family unit to marriage as two autonomous (self-directed) individuals coming together only for as long as they (or one of them) wishes.<sup>94</sup>

The loss of indissolubility as an essential element of marriage has two problematic consequences. First, it places control over a moral decision concerning the couple—dissolution of marriage—in the *complete* control of only one.<sup>95</sup> Second, it puts offspring of the marriage at risk.<sup>96</sup> Even though judicial decisions affecting the child—especially custodial placement—are cast as reflecting the child’s best interests, the standard is indeterminate and unpredictable as a result of having no anchor following the demise of the marital family.<sup>97</sup> Even

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<sup>92</sup> MARY ANN GLENDON, *supra* note 80, at 78.

<sup>93</sup> Spaht, *supra* note 75, at 220.

<sup>94</sup> The result has been a shift in thinking toward an individual as the basic unit of society instead of natural families (which predated government). Jennifer Roback Morse, *Why Unilateral Divorce Has No Place in a Free Society*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 74, 85-86 (Robert P. George & Jean Bethke Elshtain eds., 2006). Professor Glendon predicted the demise of marriage as a result of its reconception as the union of autonomous individuals, instead of as a unit. Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 698 (1976).

<sup>95</sup> Spaht, *supra* note 75, at 220.

<sup>96</sup> MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 13-17 (1996).

<sup>97</sup> Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L. Q. 381, 391-92 (2008). The lack of predictability and the reliance on judicial “gut” in making custodial decisions remains, even with the long statutory list of issues to be weighed in considering what would be in the best interests of a child. *Id.* at 397. Couching a decision as in a child’s “best interest” has the danger of merely justifying the subjective view of the judge who makes a custodial decision following divorce. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 372 (2008). Moreover, the standard is loaded with policy values that are not necessarily reflective of a child’s well-being. For example, religious values and education, so vital to a child’s development, are squelched in custodial determinations. As divorce weakens the institution of marriage, it also weakens the protection of the true best interests of children. *Id.* at 374-75.

to the extent that a judge sincerely and objectively determines a child's best interests, the construct in the divorce context necessarily considers the matter only after the perceived best interests of the parents in dissolving the marriage are satisfied.<sup>98</sup> The autonomous choice to break up for the perceived good of oneself now trumps sacrifice for the real good of the child through the maintenance of a family relationship that safeguards, protects and nurtures. This modernistic take on autonomy prevalent in modern American society obscures the traditional definition of autonomy, which incorporates right reason.<sup>99</sup> In the true sense of autonomous choice, the moral choice cannot be about just one spouse's consideration of his or her own personal well-being. A moral choice must necessarily involve the other spouse and also their issue.

Some believe that children may benefit by removal from an environment where the marital relationship can be described as "high conflict." Consistent with a recognition that children may be better off under such circumstances, the State has long permitted divorces for irreconcilable differences where the conduct is so egregious that living together is no longer feasible.<sup>100</sup> However, with the advent of California-style no-fault divorce, the State no longer exercises

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<sup>98</sup> MORSE, *supra* note 80, at 198-99; David D. Meyer, *Family Diversity and the Rights of Parenthood*, in WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY 124, 131 (2013). The psychological well-being of the child is the typical focus in determining what is in the "best interest" of the child, and "should trump parents' needs and claimed rights." Cynthia C. Siebel, *Fathers and Their Children: Legal and Psychological Issues of Joint Custody*, 40 FAM. L. Q. 213, 226, 236 (2006) (quoting Eleanor E. Maccoby). In most cases, the psychological well-being of the child is for the parents to remain together with the child. However, this "best interests" polestar is not considered until after the parents (or at least one of the parents) has decided what is in his or her best interest. Instead, the term "best interests of the child" has fluidity, sometimes more concerned with economics or relational social capital. Don Browning, *Legal Parenthood, Natural and Legal Rights, and the Best Interests of the Child: An Integrative View*, in WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY 105, 107 (2013).

<sup>99</sup> Browning, *supra* note 98, at 112. Autonomy, as a principle for decision-making, can be traced to Immanuel Kant, whose views were based on rational thinking grounded in moral law, and not in content-free, lower-order ends such as personal pleasure. See J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 439, 444 (1987).

<sup>100</sup> SCHOULER, *supra* note 78, at 23.



effective regulatory oversight over dissolution in order to ensure that children remain within the marital community until the community is no longer sustainable. An effect of no-fault divorce is to devitalize an essential purpose of marriage which is to benefit children. One can still find this essential purpose in American annulment law. If one spouse does not disclose (prior to marriage) a known inability or unwillingness to be open to bear and raise issue, the State may grant an annulment nullifying the marriage.<sup>101</sup> The state thus clearly articulates its view that bearing and raising children is a paramount state interest in the institution of marriage by identifying the nondisclosure as fraud going to the essentials of marriage.<sup>102</sup>

No-fault divorce, with its removal of state supervision over its significant state interest, transforms marriage itself. By using “irremediable breakdown” or similar term as a qualifier for divorce, law abandons its institutional acceptance of love as an exercise of disciplined will to act for the well-being of the unit, which includes offspring born to the unit, in favor of an ephemeral, personal definition.<sup>103</sup> This acceptance of an exercise of will that discounts love of family in favor of love of self is a disunifying, anti-marriage concept, in disaccord with the marital purpose of safeguarding the flourishing of the human race. Personal flourishing is reduced to a

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<sup>101</sup> See, e.g., *Montenegro v. Avila*, 365 S.W.3d 822 (Tex. App. 2012) (annulling a marriage because the husband had an undisclosed intent not to have a child with his wife). Bearing and raising children is an essential of marriage because that is its primary object. *Burroughs v. Burroughs*, 4 F.2d 936, 937 (D.C. Cir. 1925). See also T. C. WILLIAMS, 4 A.L.R.2D 227 §3 (originally published in 1949) (referencing cases granting annulment for refusal to procreate); JOHN FRANCIS MAJOR, 42 AM. JUR. PROOF OF FACTS 2D 665 §3 (originally published in 1985) (updated 2018) (observing that, “[u]ndisclosed intent on the part of one of the parties at the time of the marriage not to have children, if adhered to after the marriage, will be deemed to be sufficient fraud to warrant an annulment of the marriage”).

<sup>102</sup> Mark Strasser, *Defining Sex: On Marriage, Family, and Good Public Policy*, 17 MICH. J. GENDER & L. 57, 68-69 (2010). Granting annulments nullifying marriage for refusal to have children means that being open “to the possibility of having children is part of the sexual rights mutually and absolutely conferred in marriage.” Paul Ramsey, *Marriage Law and Biblical Covenant*, in THE INSTITUTE OF CHURCH AND STATE, VILLANOVA UNIV., RELIGION AND THE PUBLIC ORDER 1963, at 41, 53 (Donald A. Giannella ed., 1964).

<sup>103</sup> MAGGIE GALLAGHER, *supra* note 96, at 21-23.

mere subjective choice, discounting the personal flourishing of those whom the spouse had committed to safeguard, protect, and nurture. In essence, the moral reason supporting the institution of marriage has been replaced by personal and psychological reasons for supporting divorce.<sup>104</sup>

Two beliefs help support this abandonment of indissolubility as an essential element of marriage.<sup>105</sup> The first maintains that children are better off if the parents are happily divorced rather than unhappily married. The second asserts that the disruption of children's lives caused by divorce is temporary.<sup>106</sup> Yet both these beliefs are unfounded. The first belief disregards the fact that many couples do not report being unhappy prior to their divorce,<sup>107</sup> and that a large proportion of divorcing couples—twenty-five percent by one account—come from low-discord marriages.<sup>108</sup> These marriages become unglued not because of unhappiness, but because the law makes it too easy to turn to self and away from other.<sup>109</sup> Even when spouses divorce because of extreme anger with each other, divorce does not necessarily ease this emotion. Rage continues after the divorce, particularly when sharing the children flames the fire.<sup>110</sup> Even in truly unhappy marriages, children generally fare better if their parents stay together unless there is violence, abuse, or “unremitting high conflict” in the home.<sup>111</sup>

Another problem with the post-divorce happiness belief is that it does not take into account the increased post-divorce *unhappiness* of the one who wishes to remain married, which is particularly unfair to the one who has invested more in the marriage through, for example, foregoing career advancement for the benefit of the family

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<sup>104</sup> Spaht, *supra* note 75, at 220.

<sup>105</sup> JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESKEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* xxiii-xiv (2000).

<sup>106</sup> *Id.*

<sup>107</sup> Solangel Maldonado, *Facilitating Forgiveness and Reconciliation in “Good Enough” Marriages* 13 PEPP. DISP. RESOL. L.J. 105, 107 (2013).

<sup>108</sup> *Id.* at 106.

<sup>109</sup> *Id.* at 108.

<sup>110</sup> WALLERSTEIN, LEWIS & BLAKESKEE, *supra* note 105, at 5.

<sup>111</sup> *Id.* at xxv.

unit.<sup>112</sup> Adopting the orienting description of divorce as “no-fault” facilitates easy, low-cost dissolution, but it also masks its unilateral nature.<sup>113</sup> The law’s desire to refrain from assigning blame is an injustice to the innocent spouse because it enables the blameworthy to escape accountability for bad behavior. No-fault divorce liberates and empowers the one who destroys the marriage to pursue individual desires outside the marital community.<sup>114</sup> The innocent parent, on the other hand, loses all ability to sustain the marriage—even through forgiveness—and has no recourse but to suffer the injustice of the other’s intemperance. This unhappiness is further aggravated by the resultant financial strain on the family members by the increased resources needed to sustain two households instead of one, especially in light of the fact that one spouse may have sacrificed her career advancement in favor of the development and education of their children. A stable home environment requires the security of a State-supported commitment to a permanent relationship, whereby the two parents support each other through such difficulties. By dissolving marriages at the whim of one of the spouses, the law undermines the importance of commitment and the meaning of love as an act of the will.<sup>115</sup> It also threatens to impoverish the other spouse and their offspring.<sup>116</sup>

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<sup>112</sup> Wardle, *supra* note 89, at 791.

<sup>113</sup> Morse, *supra* note 94, at 90.

<sup>114</sup> MAGGIE GALLAGHER, *supra* note 96, at 145.

<sup>115</sup> *Id.* at 21-22. A consequence of no-fault divorce is removing personal responsibility. Adultery has transformed from yesterday’s sin to today’s choice between consenting adults. This cultural shift to non-responsibility is problematic, since it “is detrimental to the sustainability of marriage . . . which some consider society’s fundamental building block.” Samuel V. Schoonmaker, III & Samuel V. Schoonmaker, IV, *Two Generations of Practitioners Assess the Evolution of Family Law*, 42 FAM L. Q. 687, 688-89 (2008).

<sup>116</sup> Following the California no-fault divorce law, the standard of living for divorced women who cared for their children dropped by 73% in the first year of their newly-single life. The impoverishment of divorced spouses with children had the same result in other countries that instituted similar reforms. EEKELAAR, *supra* note 79, at 40. One government study based on statistics from 1970-1991 found dramatic economic differences between divorced and married households. While 46% of children in female-headed families were poor, only half as many (23%) were poor in male-headed households, compared with only 9% in married households.

Even if one of the parents is happy with the divorce, the children in the post-divorce situation have cause to be unhappy. Stability is important to a child's well-being,<sup>117</sup> and divorce creates instability. No longer secure in the united embrace of both parents,<sup>118</sup> a child becomes self-aware of his or her vulnerability. Focus shifts away from self-development through play, and toward ensuring the nurturing protection of at least one parent.<sup>119</sup> Contrary to the view that parents and children share an interest in divorce, the interests of divorcing parents and that of their children are in conflict.<sup>120</sup>

The second belief that the disruption to children's lives caused by divorce is temporary is also unfounded. Psychologists have

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ELIZABETH ABBOTT, *supra* note 75, at 367. The federal government has adopted statutes to ameliorate the resultant poverty of children following divorce and promoted state educational programs to strengthen marriage. Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 282-3 (2005).

<sup>117</sup> MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 26-27 (1996). Stability is recognized as being of such paramount importance that state legislatures do not permit custody modification absent substantial, material change of circumstances not anticipated at the time of the former custodial order. Kimball Denton, *Does In Re Marriage of Lamusga Open a New Chapter or Close an Old One in the Move-Away Controversy?*, 16 J. CONTEMP. LEGAL ISSUES 267 (2007) (referencing *In re Marriage of Burgess*, 13 Cal. 4th 25 (1996)).

<sup>118</sup> The mother's embrace is understandably necessary, but so is the father's. It is not sufficient for fathers merely to be involved with their children following dissolution. Child flourishing is maximized when the child's father is in residence. Siebel, *supra* note 98, at 227. Special bonding occurs between fathers and their offspring early in life. The father need not spend the same amount of time as mothers to develop this special life-long bond, but the father must be present for it to occur. *Id.* at 227-28. The recognition of the ongoing importance of father-offspring relationships resulted in changes to post-divorce custody laws which subsequently promoted those relationships. Parkinson, *supra* note 88, at 243. Some of the changes included a movement from a single custodial parent (usually the mother) to joint custody, including a change in language to shared parental responsibility and the formation of formal parenting plans. The idea was to assure that the divorce of spouses did not result in a divorce of offspring from parents. If parents could not agree, courts imposed schedules, acknowledging that both parents had responsibilities toward their children as well as rights. *Id.* at 244-49.

<sup>119</sup> WALLERSTEIN, LEWIS & BLAKESKEE, *supra* note 105, at 18-19, 24, 27.

<sup>120</sup> *Id.* at 51; Parkinson, *supra* note 88, at 239 (recognizing that divorce and parenting are "irreconcilable conceptualizations").

assured divorcing parents that children are “resilient,”<sup>121</sup> and it is true that children are resilient insofar as they adjust to their circumstances. However, as one adult child of divorced parents put it, “just because children are resilient doesn’t mean that they are OK.”<sup>122</sup> Studies show that, as children of divorced parents go through their childhood and adolescent years, they encounter problems that differ from those of children from intact families. They feel rejected and angry, experience decreased self-worth, and suffer from other psychological pains.<sup>123</sup> Divorce disturbs their rooted identity derived from an interconnected, interdependent family and replaces it with a disconnected, disassociated separateness.<sup>124</sup> For a significant number of these children, the disunity of family extends to losing contact with one parent.<sup>125</sup> Both parents must also be seen in a new light as now government, through the judicial system, has replaced the authority of parents in certain regards with that of the judge. Parental judgments concerning their own children are no longer private family decisions, but rather subject to court approval and interference. Compared with children from intact families, children of divorced parents live in a separate, parallel universe.<sup>126</sup> They face all the same traumas, but also endure the additional burdens of familial alienation and loss of protective support. Despite the so-called ideals of post-divorce childrearing, legally expressed as “shared parental responsibility,”

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<sup>121</sup> MORSE, *supra* note 81, at 207.

<sup>122</sup> This was an unsolicited remark from a Family Law student when discussing divorce. Others in the class agreed.

<sup>123</sup> MAGGIE GALLAGHER, *supra* note 96, at 13-18; Cynthia R. Mabry, *Disappearing Acts: Encouraging Fathers to Reappear for Their Children*, 7 J. L. & FAM. STUD. 111, 113 (2005). Divorce is associated with increased risk of school failure, decreased college graduation and high status jobs, and an increased risk of mental illness and suicide rate. Maggie Gallagher, *(How) Does Marriage Protect Child Well Being?*, in THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 197, 199 (Robert P. George & Jean Bethke Elshtain eds., 2006).

<sup>124</sup> Rachel Ebling et al., “Get Over It”: *Perspectives on Divorce from Young Children*, 47 FAM. CT. REV. 665, 666, 672-73 (2009) (discussing how children manifested a disconnect with family members by excluding them from family portraits they drew after their parents’ divorce).

<sup>125</sup> EEKELAAR, *supra* note 80, at 48 (1991) (describing about 50% of children as being from divorced households in both Britain and the U.S.).

<sup>126</sup> WALLERSTEIN, LEWIS & BLAKESKEE, *supra* note 105, at 20.

parenting is not shared in a cooperative sense. Residential parenting is replaced with parallel parenting and other models requiring children to adjust expectations each time they change bedrooms.<sup>127</sup> The parents who gave them life and are supposed to protect them and love them unconditionally are, in the end, uncommitted and unreliable.<sup>128</sup> The parents who are supposed to put the best interests of their children first, do so only after their own interests are satisfied. For some children, this means stepping into the parental shoes, nurturing younger brothers and sisters, as well as the parent who, instead of providing support to her child, puts her child in the position of supporting her.<sup>129</sup>

One longitudinal study of the outcome of divorce on children over a twenty-five year period is particularly revealing. The study found, to the researcher's surprise, that the negative effects of growing up with divorced parents continues into adulthood.<sup>130</sup> Children who

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<sup>127</sup> Parkinson, *supra* note 88, at 253. After divorcing, parents must discontinue parenting in the manner the child has come to depend upon, and "reinvent" parental roles as individual relationships with their child. *Id.* at 275, 277.

<sup>128</sup> Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 777-783 (2002). Marital commitment is vital to child flourishing. It is insufficient for children to live with two parents in a second marriage or to live with parents who do not marry. Neither produces child flourishing on an equivalent basis with that produced by children who live with their married parents. And, when their parents divorce, children have poorer relationships with both mothers and fathers compared with children from intact families. *Id.* Jennifer Morse notes that a child cannot make sense of the impossible and unjust situation in which the divorcing parents say to their child that they love him or her, but just don't love each other anymore, when "the child's other parent is half of who he or she is" and "[i]n the child's little heart, he or she knows these things cannot both be true." MORSE, *supra* note 81, at 204.

<sup>129</sup> WALLERSTEIN, LEWIS & BLAKESKEE, *supra* note 105, at 10-13.

<sup>130</sup> See generally WALLERSTEIN, LEWIS & BLAKESKEE, *supra* note 105. A statistical study in the United Kingdom had similarly poor outcomes. Children whose homes were broken by divorce became adults with significant educational and employment disadvantages compared with children raised in intact families. Divorce was the significant variable because children raised in families where a parent had died did not suffer from the same educational or career disadvantage. The study also showed similarities to the American findings of increased mental health problems and difficulties with romantic relationships as adults. EEKELAAR, *supra* note 80, at 46 (1991). A Canadian study similarly found that parental divorce causes children long-term problems. ELIZABETH ABBOTT, *supra* note 75, at 395. A near consensus of studies which compares the well-being of children in different

nurture their parents continue to serve as rescuers of others to the detriment of their own well-being.<sup>131</sup> Many feel that they do not deserve happiness, and others fear they will never find it. Trust issues predominate.<sup>132</sup> As adults, these children find it difficult to commit to a romantic relationship.<sup>133</sup> Although some rush into relationships, they also rush into divorce.<sup>134</sup> Indissolubility is an essential element of marriage for the protection of children. If the marriage commitment is not lasting, exclusive, and faithful, the children's education and upbringing lose the environment of parental love which ensures a healthy growth to adulthood. With divorce, children lose many important opportunities, which may be particularly challenging for a teenager's flourishing: two-parent socializing and household supervision, greater financial resources, and physical presence that increases bonding through shared experiences.<sup>135</sup>

Law models behavior.<sup>136</sup> It also influences people's views.<sup>137</sup> Thus, to safeguard human flourishing—particularly in children who will grow up to become the next generation—couples who bear that next generation need greater encouragement and support from society and through law to keep them together. Communities should refocus on celebrating united life through the ceremony of marriage itself.

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household settings demonstrates that children who live with their married biological parents have a greater level of well-being, and “that it is marriage itself that explains this difference in child well-being.” Laura S. Adams, *Privileging the Privileged? Child Well-Being as a Justification for State Support of Marriage*, 42 SAN DIEGO L. REV. 881, 882 (2005).

<sup>131</sup> WALLERSTEIN, LEWIS & BLAKESKEE, *supra* note 105, at 8-9.

<sup>132</sup> *Id.* at 60-62.

<sup>133</sup> MORSE, *supra* note 81, at 205.

<sup>134</sup> Gallagher, *supra* note 128, at 788.

<sup>135</sup> Wardle, *supra* note 116, at 295-96.

<sup>136</sup> Gallagher, *supra* note 128, at 790. To promote vital father-offspring relationships following dissolution of marriage, the law not only provided for shared parenting, it also changed its language from terms like “custody” and “access” to terms like “parenting time” and “residential arrangements.” Adopting these terms recognizes the important role of both parents, reduces self-felt marginalization, and helps divorced parents navigate their ongoing role in the upbringing of their children. Parkinson, *supra* note 87, at 249-52.

<sup>137</sup> MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 312 (1989).

Too much attention is paid to the commercial aspects of celebration—the dress, the trimmings, the glamour of the day—which distract from the essential meaning of marriage as the coming together of two lives integrating into one unit. It is the latter than needs to be nurtured and revered.<sup>138</sup>

The law can help directly and indirectly. For example, laws could be more generous in enabling young mothers and fathers to nurture infants in their homes. Corporate and small business tax deductions could incentivize companies to permit leave, perhaps with some financial stipend to new parents.<sup>139</sup> The government could also modify welfare regulations to ensure that those who marry do not immediately lose the economic benefits they received while they were single.<sup>140</sup> Cities could establish meeting places similar to those established for the elderly. There, young parents could more easily support each other and share their concerns—perhaps with a nursery that could charge for babysitting on the premises during meetings. When couples are going through rough times, why not permit a small number of free couples' counseling sessions as a necessary part of a

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<sup>138</sup> ELIZABETH ABBOTT, *supra* note 75, at 239-41 (noting that the celebration has become a billion-dollar industry, is promoted on reality shows, and is disconnected from the meaning of marriage).

<sup>139</sup> The Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, provides some relief, but more is needed. The purpose of the Act is to enable employees to take off time from work to take care of important child or family health needs with the security that his or her job will be waiting for them when they return to work. *Id.* at § 2601, § 2614(1). The Act entitles employees to take up to twelve weeks of leave per twelve-month period. *Id.* at § 2612(a)(1). While this is an excellent start, not everyone who needs this time off may be in a position to take advantage of it since the entitlement does not extend to compensation; only unpaid leave is required to be offered. *Id.* at § 2612(c). It would also be good to have a mechanism, such as through tax incentives, to broaden eligibility to more employer groups. Currently, only public agencies, elementary and secondary schools (public and private), and employers with 50 or more employees are required to offer leave time. U.S. DEP'T LAB., FMLA (FAMILY & MEDICAL LEAVE), <https://www.dol.gov/general/topic/benefits-leave/fmla>.

<sup>140</sup> MORSE, *supra* note 81, at 230-32. Through these perhaps well-meaning regulations, the government has itself fostered an increasingly tolerant attitude toward those who do not commit to marriage. The regulations facilitate a choice to refrain from commitment to the very institution that was designed for the long-term protection of their offspring. Glendon, *supra* note 93, at 688-94, 711-13.



health insurance policy? And, when a husband or wife files a petition for divorce, change the policy of counseling to ensure, as a first priority, the attempt honestly and energetically to rehabilitate the couple. We do this much when we consider removing children from unfit parents, because we recognize the need for children to be with their parents.

We must make every effort to rehabilitate parents so that the children remain with them both. The most important divorce prevention may very well be to value, as a society, the longevity of marriages. We could do this by promoting a greater understanding of what to expect in marriage before vows are taken, such as through “covenant marriage” type regulations like mandatory premarital counseling.<sup>141</sup> If we honor the intrinsic worth of marriage, we provide needed encouragement and support to the couple to rise to the challenge of overcoming difficulties in order that they may work together again as a team for the benefit of themselves as well as their children.<sup>142</sup> It is also important to promote marriage by highlighting the benefits of marriage and the problematic social consequences of divorce that will orient not just the couple, but the community, to support marital cohesion.<sup>143</sup> In short, to achieve this goal, focus needs to shift away from mere adult desires and more toward the needs of the children.<sup>144</sup>

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<sup>141</sup> Wardle, *supra* note 89, at 787. Louisiana was the first to introduce a covenant marriage option for marriages as a response to increasing divorce rates. *Id.* Covenant marriage, with mandatory premarital counselling, contractual commitment to the marriage, and pre-1969 fault-based divorce, is promoted by many who link social ills with the breakdown of marital families. ELIZABETH ABBOTT, *supra* note 75, at 367. Louisiana, Arkansas, and Arizona enacted covenant marriage regulation as a policy response to increasing divorce rates. Estin, *supra* note 76, at 345.

<sup>142</sup> Morse, *supra* note 94, at 74, 99.

<sup>143</sup> Wardle, *supra* note 89, at 800.

<sup>144</sup> Spaht, *supra* note 75, at 215.

*V. Concluding Remarks*

In conclusion, we need to be fully cognizant that the welfare of our children imposes on us a fundamental duty to bring them into this world within the bounds of an institution devoted to promoting the very act of childbirth and to creating an environment of love, care, and education that provides our children with the best opportunity to realize their full flourishing as adults. Not only does society benefit from this institution, but the children themselves have a right to this support of the gift of life by the very dignity of their being:

The child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage: it is through the secure and recognized relationship to his own parents that the child can discover his own identity and achieve his own proper human development. The parents find in their child a confirmation and completion of their reciprocal self-giving: the child is the living image of their love, the permanent sign of their conjugal union, the living and indissoluble concrete expression of their paternity and maternity. By reason of the vocation and social responsibilities of the person, the good of the children and of the parents contributes to the good of civil society; the vitality and stability of society require that children come into the world within a family and that the family be firmly based on marriage.<sup>145</sup>

The importance of children to our society thus requires an institution that promotes marriage for the benefit of children. Although marriage does serve the good of the married couple, the State's interest in that good is for the children. The State has no business interfering in the personal relationship of the married couple for the benefit of the couple alone, because such interference tramples upon the personal freedoms enjoyed in that zone of privacy and legislates morals under the guise of protecting these relationships. When it comes to children, however, the State must make an

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<sup>145</sup> Dignity of Procreation, *supra* note 25, at ¶ II.1 (footnote omitted).

exception, because children are vulnerable members of society needing protection.

Morals are an important part of promoting marriage for the benefit of children. The marriage relationship by nature is an intimate one, requiring the commitment of the couple to a new life of unique love requiring exclusivity, faithfulness, and permanence in order to create an environment that will ensure the best formation of children in their being, identity, solidarity, and bonding. This environment requires the stability engendered by a complete transformation of each spouse into a life of sharing in family. Only a couple who is open to having children through their intimate bodily-spiritual union can truly experience this transformation, because it is a giving of oneself in union with another to the mystery of new life in the child. This relationship is sometimes fragile and needs the support of family, friends, church, and, yes, the State. The State does not create the morals nor the propensity of humans to find attraction in a procreating-potential partner,<sup>146</sup> but it is appropriate for the State to legislate the moral direction that every rational person understands in their nature to be good in order to protect the one institution that best serves the needs of our children. Morals in this sense brings human flourishing to fruition.<sup>147</sup>

We thank God for the blessing of children—in particular our own children and grandchildren—and pray that our society will not allow the State to cripple the wonderful institution of marriage which exists for their protection.

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<sup>146</sup> See Morse, *supra* note 94, at 76.

<sup>147</sup> In speaking about the exercise of sexual conjugality, Elio Sgreccia notes that, although we often think of morality as an expression of constraint, morality in this exercise really is “the realization of the fullness of being in the awareness of action.” SGRECCIA, *supra* note 5, at 393.