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**Afterword:
Exploring the Frontiers of Law, Religion, and Family Life**

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Abstract

This Article at the conclusion of a law review symposium on sex, marriage, and family life and the world religions, briefly sketches the growing legal, cultural, and political battles over faith-based family laws in liberal democracies, faith-based claims to practice polygyny, and the growing personal, social, and financial costs of non-marital procreation.

Keywords: family law, children's rights, polygyny, polygamy, faith-based family law, non-marital children, illegitimacy, church-state relations, sexual liberty, privacy, domestic autonomy

Over the past seven years, the Center for the Study of Law and Religion at Emory University has had the privilege of leading two major research projects on sex, marriage, family, and children.² Our first major project, on "Sex, Marriage, and Family & the Religions of the Book" (2001-2006), involved eighteen Emory Senior Fellows under the principal direction of Visiting Woodruff Professor Don S. Browning. The project was designed to take stock of the dramatic transformation of marriage and family life in the modern world and to craft enduring solutions to the many new problems that this transformation has occasioned. The project was interdisciplinary in methodology. It sought to bring the enduring wisdom of religious traditions into greater conversation with the modern disciplines of law, health, public policy, social science, and the humanities. The project was interreligious in inspiration. It sought to understand the lore, law, and life of marriage and family within Judaism, Christianity, and Islam both in their genesis

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² See details of the Center's work on our website: www.law.emory.edu/csrl/

and in their exodus, in their origins and in their diasporas. And the project was international in orientation. It sought to place current American debates over sex, marriage, and family within an emerging global conversation.

This first major project yielded a semester-long faculty seminar, two faculty retreats, ten new cross-listed courses, eighteen public forums, eleven collaborative side projects, and a major international conference featuring 80 speakers and 750 registrants. More than two dozen new volumes³ have come from this project to date, with a dozen more volumes in final production.

Our second major project, on “The Child in Law, Religion, and Society” (2003-2007), involved twenty-one Emory senior fellows, under the principal direction of Visiting

³ Abdullahi Ahmed An-Na'im, ed., *Inter-religious Marriages Among Muslims: Negotiating Religious and Social Identity in Family and Community* (Global Media, 2005); Abdullah Ahmed An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book* (Zed Books, 2002); Anita Bernstein, ed., *Marriage Proposals: Questioning a Legal Status* (New York University Press, 2006); Don S. Browning, *Christian Ethics and the Moral Psychologies* (Wm. B. Eerdmans, 2006); Don S. Browning, *Equality and the Family: A Fundamental Practical Theology of Children, Mothers, and Fathers in Modern Societies* (Wm B. Eerdmans, 2006); Don S. Browning, *Marriage and Modernization: How Globalization Threatens the Modern Family and What to do About it* (Wm. B. Eerdmans, 2002); Don S. Browning and David Clairmont, eds., *American Religions and the Family: How Faith Traditions Cope with Modernization and Democracy* (Columbia University Press, 2006); Don S. Browning, M. Christian Green, and John Witte, Jr., eds., *Sex, Marriage and Family and the World Religions* (Columbia University Press, 2006); Michael J. Broyde, *Marriage, Divorce, and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problem in America* (KTAV, 2001); Michael J. Broyde and Michael Ausubel, eds., *Marriage, Sex, and Family in Judaism* (Rowman & Littlefield Publishers, 2005); Frances Smith Foster, *Love and Marriage in Early African-America* (Northeastern University Press, 2007); Frances Smith Foster and Olga Barrios, eds., *The Family in Africa and the African Diaspora: A Multidisciplinary Approach* (Imprenta Kadmos, 2004); Robert M. Franklin, *Crisis in the Village: Restoring Hope in African American Communities* (Fortress Press, 2007); Timothy P. Jackson, *The Priority of Love: Christian Charity and Social Justice* (Princeton University Press, 2003); Mark D. Jordan, ed., *Authorizing Marriage? Canon, Tradition, and Critique in the Blessing of Same-Sex Unions* (Princeton University Press, 2006); Mark D. Jordan, *Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage* (University of Chicago Press, 2005); Mark D. Jordan, *Telling Truths in Church: Scandal, Flesh and Christian Speech* (Beacon Press, 2003); Mark D. Jordan, *The Ethics of Sex* (Blackwell, 2002); Mary E. Odem, *Latin American Immigrant Families and Communities in the U.S. South* (Kennesaw State University Press, 2006); Cynthia D. Patterson, ed., "Antigone's Answer: Death, Burial, and Commemoration in Sophocles' Athens," Special Issue of *Helios* (Winter, 2006); Charles J. Reid, Jr., *Power Over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Wm. B. Eerdmans, 2005); Philip L. Reynolds and John Witte, Jr., eds., *To Have and to Hold: Marrying and its Documentation in Western Christendom, 400-1600* (Cambridge University Press, 2007); Steven M. Tipton and John Witte, Jr., eds., *Family Transformed: Religion, Values, and Society in American Life* (Georgetown University Press, 2005); John Witte, Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Wm. B. Eerdmans, 2006); John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge University Press, 2002); John Witte, Jr., M. Christian Green and Amy Wheeler, eds., *The Equal-Regard Family and its Friendly Critics: Don Browning and the Practical Theological Ethics of the Family* (Wm. B. Eerdmans, 2007); John Witte, Jr. and Eliza Ellison, eds., *Covenant Marriage in Comparative Perspective* (Wm. B. Eerdmans, 2005); John Witte, Jr., and Robert M. Kingdon, *Sex, Marriage and Family in John Calvin's Geneva: Courtship, Engagement, and Marriage* (Wm. B. Eerdmans, 2005).

Woodruff Professor Martin E. Marty. The project was focused on children *qua* children -- in their being and becoming, in their birth and growth. We analyzed the complex rites and rights attached to birthing and naming, baptism and circumcision, education and discipline. We examined the steps and stages in a child's physical, emotional, sexual, moral, and spiritual formation, as well as the rituals and ordeals and the rights and duties attached to each. We recounted the pathos of child abuse and rape, child poverty and homelessness, juvenile delinquency and violence, and illegitimacy and infanticide. And, we probed the mystery of the child -- the combination of innocence and imagination, acuity and candor, empathy and healing, sharing and caring that uniquely become a child.

This second project yielded a semester-long faculty seminar, two faculty retreats, eleven collaborative side projects, thirteen public forums, and four conferences, including a major international conference on children's rights with 20 speakers and 500 registrants. More than a dozen new volumes⁴ have emerged from this project to date, with a dozen more in production.

Given our Center's emphasis on issues of sex, marriage, family, and children, it was only natural that we would devote a portion of our Center's silver anniversary conference in October 2007 to these issues. The main aim of the conference was to try to map some of the frontiers of scholarship on law and religion in many fields, including domestic relations. We asked our twenty-five speakers to try to anticipate and articulate some of the hardest questions of law and religion that will face us over the next twenty-five years, and to formulate and illustrate how these questions might be best approached and answered.

The six speakers featured in the foregoing pages ultimately focused on three main questions on the frontiers of sex, marriage, and family life. The first main question, posed especially by Enola Aird, Don Browning, Stephen Carter, and Leah Ward Sears is this: Why has the family, especially the African American family, suffered

⁴ Patrick M. Brennan, ed., *The Vocation of the Child* (Wm. B. Eerdmans, 2008); Don S. Browning, *Equality and the Family: A Fundamental Practical Theology of Children, Mothers, and Fathers in Modern Societies* (Wm B. Eerdmans, 2006); Don S. Browning and Marcia Bunge, eds., *The Child in American Religions* (Rutgers University Press, 2008); Don S. Browning and Bonnie Miller-McClemore, eds., *The Child in World Religions* (Rutgers University Press, 2008); Martha A. Fineman and Karen Worthington, eds., *What is Right for Children? Competing Paradigms of Religion and Human Rights* (Ashgate, 2008); E. Brooks Holifield, *God's Ambassadors: A History of the Clergy in America* (Wm. B. Eerdmans, 2007); Timothy P. Jackson, ed., *The Morality of Adoption: Social-Psychological, Theological, and Legal Perspectives* (Wm. B. Eerdmans, 2005); Mark D. Jordan, *Queer Adolescence in Christian America* (University of Chicago Press, 2009); Martin E. Marty, *The Mystery of the Child* (Wm. B. Eerdmans, 2007); Mary Elizabeth Moore, *Children, Youth and Spirituality in a Troubling World* (Chalice Press, 2008); Symposium, "What's Wrong with Rights for Children?" *Emory International Law Review* 20 (2006): 1-239; John Witte, Jr., *Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge University Press, 2009); Karen L. Worthington, *The Convergence of Child Development, Child Welfare Laws and Juvenile Court Practice* (Childwelfare.net, 2005); Karen L. Worthington, *Georgia's Responsibilities Toward Children in Foster Care* (Barton Child Law and Policy Clinic, 2005).

such a breakdown in the past four decades, and what remedies and reforms are needed to ameliorate it? Among the most important causes of family breakdown noted in these pages: the deprecation of marriage, the rise of non-marital cohabitation and transient troth, the privatization of intimacy, the destigmatization of nonmarital sex, the glorification of the sexual body, the therapeutization of the private self, the rise of cultural individualism, and the erosion of the public school. Enola Aird further emphasizes the “lie of black inferiority” that has shattered the African American family. Don Browning also notes the dangers born of the “increasing separations between marriage and sexual intercourse, marriage and childbirth, marriage and child rearing, childbirth and parenting, and - with the advent of Assisted Reproductive Technologies (ART) – childbirth from sexual intercourse and biological filiation.” What can be done: among other things, strong new civic and governmental community-building projects, much better sex and morals education, much stronger emphasis on preserving biological family ties, much better role-modeling and big-brother/sister guardianship programs for children, greatly enhanced child care and adoption programs, better social welfare signaling and incentive systems, and, above all in African-American communities the eradication of the lie of black inferiority so that all Americans, equally, can get their houses in order.

The second main question, posed especially by Margaret Brining, Don Browning, and Stephen Carter: what role can, and should religious ideas and institutions play in the reformation of American marriage and family life, particularly given our cultural appetite, if not constitutional mandate, for separation of church and state? Among their most important findings: Religious ideas and experiences are indispensable to the healthy formation of the child, and they deserve far more nuanced attention in primary education and child custody battles than in currently fashionable. Moreover, religious institutions and practices are critical to the reform of sexual morality, marital fidelity, and family stability, particularly in African American communities today (just as they were critical to the emergence of the civil rights movement in the 1950s and 1960s). And religious understandings of sex, marriage, and family life deserve equal time in our public debates about sex, marriage and family, and are no more value-laden than the purportedly neutral modern tropes of sexual liberty, privacy, and equality. The basic constitutional separation of church and state is indispensable to the freedom of all. But this First Amendment mandate has never meant that our public services, policies, and debates must be hermetically or hermeneutically sealed from any religious influence, Don Browning and Stephen Carter make clear. Religion has immense resources that need to be better tapped by citizens and channeled by government to improve our domestic lives and family policies.

The third main question, addressed especially in the contribution by Jean Bethke Elshtain is this: what roles can and should law play in the governance of our domestic and private lives. Part of this is the perennial issue of jurisdiction in America, noted by several of the articles. Family law has long been principally the domain of state not federal law, and of legislative not judicial law-making. The question of which law governs what and when will be a major frontier in the family law battles of the next decades. But a bigger question, posed by Elshtain, concerns where the writs of law

should stop and the mandates and methods of prudence, custom, and civil society take over. To leave domestic questions entirely to private ordering is an invitation to abuse and abandonment, especially of children, by the stronger and more calculating. To turn to government alone to resolve all such questions is to court the grave risks of tyranny and oppression which remain all too memorable from the socialist and communist experiments of the last century. Somewhere between these two extremes our communities must find a balance, and Elshtain gives a number of pointed examples of legal overreach and underreach in domestic life to drive home her point.

These six essays herein provide illustrations of a few of the hard questions on the frontier of law, religion, and family life. There are and will be many more such questions that could be addressed. Three new issues came to dominate the headlines in the months after our conference, and I reflect on them briefly in the next three sections.

Religion and the Global Frontiers of Marital Pluralism⁵

On February 7, 2008, Anglican Archbishop Rowan Williams set off an international firestorm by suggesting that some accommodation of Muslim family law was “unavoidable” in England. His suggestion, though tentative, prompted numerous articles in the world press, the vast majority denouncing the proposal. England will be beset by “licensed polygamy,” “barbaric procedures” and “brutal violence” against women and children, his critics argued, all administered by “legally ghettoized” Muslim courts immune from civil appeal or constitutional challenge. Consider Nigeria, Pakistan and other former English colonies that have sought to balance Muslim Sharia with the common law, other critics added. The horrific excesses of their religious courts — even calling the faithful to stone innocent rape victims for dishonoring their families — prove that religious laws and state laws on the family simply cannot coexist. Case closed.

This case won't stay closed for long, however. The archbishop was not calling for the establishment of independent Muslim courts in England, let alone the enforcement of Sharia law by state courts. He, instead, wanted his nation to have a full and frank debate about what it means to be married in a growing multicultural society. What forms of marriage should citizens be able to choose, and what forms of religious marriage law should government be required to respect? These are “unavoidable” questions for any modern society dedicated to protecting both the civil and religious liberties of all its citizens.

These are quickly becoming “unavoidable” questions for America, too. We already have a lot more marital pluralism than a generation ago -- with a number of

⁵ This section is reprinted from my editorial opinion, “The Future of Marriage,” *Atlanta Journal and Constitution* (February 24, 2008).

legal options now available. Massachusetts and California offer traditional marriage and same-sex marriage to their citizens. Several more states will likely follow suit. Vermont leads four states in offering straight couples marriage and gay couples civil union, with comparable rules governing each form. A dozen more states are considering this two-tier system. Six states offer domestic partner registration status, providing straight and gay couples with some of the same benefits and protections of marriage. Louisiana, Arkansas and Arizona offer couples either a simple contract marriage or a covenant marriage with more traditional and rigorous rules of entrance and exit.

While these marital options remain firmly under state law, other options now draw in religious law, too, implicitly or explicitly. Utah and surrounding states, for example, house some 30,000 polygamous families. These families and the fundamentalist Mormon churches that govern them are openly breaking state criminal laws against bigamy, but the states will not prosecute unless minors are forced into marriage. In New York, Orthodox Jewish couples cannot get a state divorce without first obtaining a rabbinic divorce. This privileges Jewish family law over all other religious laws, and it forces some New York citizens to discharge a religious duty to gain a civil right to divorce. In more than 20 states, marriages arranged by Hindu, Muslim and Unification Church officials have been upheld, with divorce the only option left for parties who claim coercion or surprise. A number of religious couples now choose to arbitrate their marital and family disputes before religious courts and tribunals rather than litigate them in state courts. Courts generally uphold the judgments of Jewish and Christian tribunals in these cases. Muslims, Hindus and other religious minorities are now pressing for equal treatment for their systems of religious arbitration of marriage and family disputes.

Granting Muslims and others equal treatment in these cases does seem “unavoidable” if the parties have freely consented to this method of dispute resolution. To deny Muslims divorce arbitration while granting it to Jews and Christians is patently discriminatory. But the bigger question is whether state recognition of any religious marriage tribunals and laws puts us on a slippery slope that ends with parallel state and religious legal systems of marriage, and no control over the latter if they become abusive. What if religious parties want freedom to “covenant” out of the state’s marriage laws and into the marriage laws maintained by their own voluntary religious communities? Which religious laws deserve deference from the state: just those governing husband and wife, or those on parent and child, property and inheritance, education and maintenance as well? Which religious communities have religious laws that deserve state deference – Christians? Jews? Muslims? Mormons? Hindus? What about the 1,200 other religions now in place in America, a few with very different marriage and family norms? May a state recognize only some religious laws but not others consistent with the non-discrimination rules of the First Amendment free-exercise clause? May a state cede any of its authority over marriage consistent with the non-delegation rules of the First Amendment establishment clause? These are the frontier questions of religion and marriage that will soon face American courts and legislatures. We don’t have much constitutional guidance yet.

It's unlikely that courts will invoke the principle of separation of church and state, return all marriage and family questions to the state, and roll back the concessions already made to religious laws and tribunals. Not only is separation of church and state increasingly a constitutional dead letter today, but this solution would have enormous implications for the complex laws of labor, charity and education where religions and states cooperate closely.

We have better guidance in the law of religion and education. A century ago, several states wanted a monopoly on education in public schools. Churches and parents claimed a right to educate their children in religious schools. In the landmark case of *Pierce v. Society of Sisters* (1925),⁶ the Supreme Court held for the churches and ordered states to maintain parallel public and private education options for their citizens. But later courts also made clear that states could set basic educational requirements for all schools – mandatory courses, texts and tests, minimal standards for teachers, students and facilities, common requirements for laboratories, libraries, gymnasias and the like. Religious schools could add to the state's minimum requirements, but they could not subtract from them. Religious schools that sought exemptions from these requirements found little sympathy from the courts, which instructed the schools either to meet the standards or lose their licenses to teach.

This compromise on religion and education, forged painfully over a half century of wrangling, has some bearing on questions of religion and marriage. Marriage, like education, is not a state monopoly. Religious parties have always had the right to marry in a religious sanctuary or before a state official. Religious officials have long had the right to participate in the weddings, annulments, divorces and custody battles of their voluntary members. But the state has also long set the threshold requirements of what marriage is and who may participate. Religious officials may add to these state law requirements but not subtract from them. A minister may insist on premarital counseling before a wedding, even if the state will marry a couple without it. But if a minister bullies a minor to marry out of religious duty, the state could throw him in jail. A rabbi may encourage a bickering couple to repent and reconcile, but she cannot prevent them from filing for divorce. An imam may preach of the beauties of polygamy, but if he knowingly presides over a polygamous union, he is an accessory to crime.

If religious tribunals get more involved in marriage and family law, states will need to build on these precedents and set threshold requirements in the form of a license. Among the most important license rules to consider: No polygamy, child marriages or other forms of marital union not recognized by the state. No compelled marriages or coerced conversions before weddings that violate elementary freedoms of contract and conscience. No threats or violations of life and limb, or provocations of the same. No blatant discrimination against women or children. No violation of basic rules of procedural fairness, and more. Religious tribunals may add to these requirements but

⁶ 268 U.S. 510 (1925).

not subtract from them. Those who fail to conform will lose their licenses and will find little sympathy when they raise religious liberty objections.

This type of arrangement worked well to resolve some of the nation's hardest questions of religion and education. And it led many religious schools to transform themselves from sectarian isolationists into cultural leaders. Such an arrangement holds comparable promise for questions of religion and marriage. It not only prevents the descent to "licensed polygamy," "barbaric procedures" and "brutal violence" that the archbishop's critics feared. It also encourages today's religious tribunals to reform themselves and the marital laws that they offer.

The Legal Challenges of Religious Polygamy

A century and a half ago, Mormons made national headlines by claiming a First Amendment right to practice polygamy, despite criminal laws against it. In four cases from 1879 to 1890, the United States Supreme Court firmly rejected their claim, and threatened to dissolve the Mormon church if they persisted. Part of the Court's argument was historical: the common law has always defined marriage as monogamous, and to change those rules "would be a return to barbarism." Part of the argument was prudential: religious liberty can never become a license to violate general criminal laws "lest chaos ensue." And part of the argument was sociological: monogamous marriage "is the cornerstone of civilization," and it cannot be moved without upending our whole culture.⁷ These old cases are still the law of the land, and most Mormons renounced polygamy after 1890.

This past spring, the question of religious polygamy was back in the headlines – this time involving a fundamentalist Mormon group on a Texas ranch that has retained the church's traditional polygamist practices. Many of the legal questions raised since this group was raided are easy. Under-aged and coerced marriages, statutory rape, and child abuse are all serious crimes. If any of those adults on the ranch committed these crimes, or intentionally aided and abetted them, they are going to be charged and tried: eight persons are now under indictment. If duly convicted, they will have no claim of religious freedom that will excuse them, and no claim of privacy that will protect them. Dealing with the children, ensuring proper procedures, sorting out the evidence, and the like are all practically messy and emotionally trying questions, but not legally hard. The recent decision by the Texas court of appeals⁸ ordering the return of the 450 plus children who had been seized from their homes during the raid underscores a further

⁷ Reynolds v. United States, 98 U.S. 145 (1879); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Davis v. Beason, 133 U.S. 333 (1890); Church of Jesus Christ of Latter Day Saints v. United States together with Romney v. United States, 136 U.S. 1 (1890). See similar result in Cleveland v. United States, 329 U.S. 14 (1946).

⁸ In re Steed, 2008 WL 2132014 (May 22, 2008).

elementary legal principle – that decisions about child custody and about criminal liability must be done on an individual basis so much as possible.

The harder legal question is whether criminalizing polygamy is still constitutional. Texas and all other states still have criminal laws against polygamy on their books. Can these criminal laws withstand a challenge that they violate an individual's constitutional rights to private liberty, equal protection, and religious liberty? In the nineteenth century, none of these rights claims was available. Now they are, and they protect every adult's rights to consensual sex, marriage, procreation, contraception, cohabitation, sodomy, and more. May a state prohibit polygamists from these same rights, particularly if they are inspired by authentic religious convictions? What rationales for criminalizing polygamy are so compelling that they can overcome these strong constitutional objections?

Theologians often cite the Bible which says that "two" -- not three or four -- parties must join in "one flesh" to form a marriage.⁹ Others remind us that early biblical polygamists did not fare well. Think of the problems confronted by Abraham with Sarah and Hagar, or by Jacob with Rachel and Leah. Or think of King Solomon with his thousand wives; their children ended up killing each other. This may be a strong foundation for a church or synagogue to prohibit polygamy among its voluntary members, but can arguments straight from the Bible prevail in a pluralistic nation that prohibits the establishment of religion?

Feminists pose equal protection arguments: Why should the state permit one man to have several wives, but not one woman to have several husbands? After getting past the jokes about which husband would control the television remote or which woman would be so crazy, does this equal protection argument sound any stronger than that of polygamists who just want the same right of private association as everyone else?

Public health experts raise concerns about communicable diseases among children within the extended household, and transmittable sexual diseases within the rotating marital bed. But what about all those other group gatherings -- schools, churches, and dorms -- that children occupy: must they be closed, too, for fear of contagion? And isn't self-contained polygamous sex much safer than casual sex with multiple partners, which is constitutionally protected?

Political scientists raise worries about administrative inefficiency. After all, so much of our law presupposes a single definition of marriage and family life. What would we do if the man dies, or one of the wives files for divorce? There are no guidelines about how to allocate the marital property, military or social security benefits, life insurance proceeds, and the like. But we have found a way to do this for the vast numbers of single, mixed parent, and multiple generation households that today

⁹ Genesis 2:24; Matthew 19:5; 1 Corinthians 6:16; Ephesians 5:31.

collectively far outnumber families with two parents and their natural children. This is administratively doable.

Child experts raise serious concerns about the development of children of polygamy. Won't these children be confused by the mixed parental signals and attachments, and by the inevitable rivalries and rancor with their half siblings? And won't these children be stigmatized by their peers for being different? These arguments have some bite. But how different is the polygamous lifestyle in our current pluralistic culture? Children are raised by live-in grandparents, nannies, and day care centers. They live in large blended families and boarding schools. Their parents may be gay and lesbian couples, or their families may have religious dress or dietary codes that set them apart from their peers. Are children of polygamy so differently positioned?

The strongest argument against polygamy is the argument from moral repugnance. Polygamy is inherently wrong -- "just gross" as my law students say, "*malum in se*" as we law professors put it. Many states legislate against a lot of activities -- slavery, indentured servitude, gambling, prostitution, obscenity, bestiality, incest, sex with minors, self-mutilation, organ-selling, and more -- just because those activities are wrong or because they will inevitably foster wrongdoing. That someone wants to engage in these activities voluntarily for reasons of religion, bravery, custom, or autonomy makes no difference. That other cultures past and present allow such activities also makes no difference. For nearly two millennia, the Western tradition has included polygamy among the crimes that are inherently wrong. Not just because polygamy is unbiblical, unusual, unsafe, or unsavory. But also because polygamy routinizes patriarchy, jeopardizes consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, confuses children, and more. Not in every case, to be sure, but in enough cases to make the practice of polygamy too risky to condone.

Furthermore, allowing religious polygamy as an exception to the rules is even more dangerous, because it will make some churches and mosques a law unto themselves. Again, some religious communities and their members might well thrive with the freedom to practice polygamy. But inevitably closed repressive regimes like the Texas ranch compound will also emerge -- with under-aged girls duped or coerced into sex and marriages with older men, with women and children trapped in sectarian communities with no realistic access to help or protection from the state and no real legal recourse against a church or mosque that is just following its own rules. We prize liberty, equality, and consent in America too highly to court such a risk. If you're not sure, just ask some of those moms and kids on the Texas ranch.

Sex May be Free, but Children are Not¹⁰

A third issue to make the headlines after the conference concerned the costs of non-marital children. Thirty-eight percent of all American children are now born out of wedlock, and it costs American taxpayers \$112 billion per year. Those are the sobering numbers just reported by the U.S. Census Bureau and by the Institute for American Values. The Census Bureau numbers break down as follows: 28% of all Caucasian, 50% of all Hispanic, and 71% of all African-American children were born to single mothers in 2007. Compared to children born and raised within marital households, non-marital children on average impose substantially higher costs on society for anti-poverty, criminal justice, and education programs and in lost tax revenues. According to the Institute for American Values, those costs exceeded \$1 trillion this past decade.

Happily, we no longer visit the sexual sins of fathers and mothers upon their illegitimate children. American states have removed most of the chronic legal disabilities that were historically imposed on an illegitimate child's rights to property, inheritance, jobs, education, civil benefits, and more. Most remaining forms of discrimination against illegitimate children are now struck down as violations of the equal protection clause of the Fourteenth Amendment.

But what the Fourteenth Amendment gives with its equal protection clause, it takes back with its due process clause. Due process privacy rights now spare adults from criminal liability for engaging in consensual sex outside of marriage. With the legal stigma of both illegitimacy and promiscuity eliminated, illegitimacy rates in the United States have soared – more than doubling since 1975 -- and the corresponding extra social costs have soared, too.

Rather than simply continuing to pass on the costs of sexual liberty to taxpayers, we need to get better about assigning responsibility where it is due: on both the mother and the father of the non-marital child. Historically, adulterers, fornicators, and other sexual criminals paid dearly for their crimes -- by fine, prison, whipping, or banishment, by execution in extreme cases. But those punishments often only exacerbated the plight of their illegitimate child, who in extreme cases was now left without a natural network of family resources and support. Today, adulterers and fornicators pay little if any for their consensual sex -- protected in part by new cultural norms and constitutional laws of sexual privacy. Even if one wanted to pursue a neo-Puritan or Taliban path --

¹⁰ This section is adapted from my editorial, bearing the same title, in *Atlanta Journal and Constitution* (August 10, 2008). The report noted in this section can be found in "The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States," a report issued by the Institute for American Values. www.americanvalues.org with further links to census data.

I, for one, do not! -- it is highly unlikely that a new criminalization of adultery or fornication could pass constitutional or cultural muster.

But the elimination of criminal punishment for extramarital sex should be coupled with a much firmer imposition of ongoing civil responsibility on couples whose sexual dalliances produce children. After all, the same due process clause that exonerates promiscuity also licenses contraception, which is widely and cheaply available now, indeed free in some quarters. Those who choose to have children out of wedlock notwithstanding these options need to pay for their children's support. And that support needs to be enough to ensure that these children will have a life comparable to that of children born within marriage. Fathers, in fact, need to pay a bigger share of those costs, given that mothers bear the heavier biological costs in bringing the child to term.

I am no fan of shotgun marriages or forced cohabitation of a couple suddenly confronted with the prospect of a new child. That often deepens the pain for everyone. I am, however, a fan of aggressive paternity and maternity suits, now amply aided by cheap genetic technology. I support firm laws that compel stiff payments of child support for non-custodial parents and that garnish the wages, put liens on the properties, and seek reformation of insurance contracts and testamentary instruments of those parents who choose to ignore their dependent minor children. I also support tort suits by illegitimate children who, as adults, seek compensatory and even punitive damages from their parents or their parents' estates in instances where these children have been cavalierly abandoned or notoriously abused as children. And I am a big fan of a much more ambitiously funded and amply facilitated adoption law that would give parents of illegitimate children another real option.

This is not grumpy conservatism but elementary liberalism. Every right has a corresponding duty, and the misuse of a right can trigger heavy ongoing responsibilities. There may be a right to bear arms in the United States, but there is a duty not to kill another except in proper self-defense. A single impulsive act of unjustly killing another may trigger a lifetime of responsibilities of paying back the victim's family and society. So it is with the right to have sex. Government has no business policing the consensual private sexual activities of adults. But a single impulsive act of conceiving a child should trigger a lifetime of responsibilities to care for that child. As with the taking of life, so with the making of life, there are no statutes of limitation on these responsibilities. Sex may be free, but children are not.

The state imposes child support obligations automatically if the child is born to a married couple; the father or mother will pay dearly if they ignore, abuse, or desert their child especially in its tender years. It should be no different for a child conceived out of wedlock. Ongoing support for that child should not just depend upon the voluntary good will of the father, or a successful paternity suit by the mother. Absent adoption by another, that child is the moral and fiscal responsibility of its father and mother until it reaches the age of majority. And the state needs to impose these costs automatically and hold parents of illegitimate children accountable if they fail to pay.

In the old days, this was accomplished by putting dead beat parents of illegitimate children under indentured servitude contracts managed by local justices of the peace. The parents worked for the state as many years as was necessary to repay the tax costs for their children's support. This is no solution for our day. Indentured servitude has long been outlawed as a species of slavery, and leaving enforcement of child support to local justices does not work given our modern means and rights to travel.

Modern technology offers a better way to hold irresponsible parents accountable to support their children, regardless of where they go. Birth certificates should carry more specific information about both the parents – not just their names and addresses as now, but their social security numbers, blood types, and genetic data as well. And a national registry of these birth certificates should be developed to ensure that parents can be found regardless of where they move. Having those more refined parental data available will enable an unsupported child, an abandoned parent, or, if necessary, a government official to track down a delinquent parent and hold that party to account in the case of delinquency. This might sound Orwellian at first blush. But is it really any more intrusive on our liberty than government reaching into all taxpayers' pockets to collect the extra \$112 billion a year needed to pay for our non-marital children?

The government must, of course, develop procedures and safeguards to ensure the privacy and proper use of these parental personal data. The government must also provide back-up support when parents cannot be found or cannot afford support for their children, despite their best efforts. No child in a nation with our wealth and values should be left uninsured, undernourished, or poorly educated. But we need a much better organized and advertised state and federal system of holding their parents financially accountable for the children they bring into the world. That will do much to deter irresponsible sex and to promote responsible childbearing within marriage.

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