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Nancy Polikoff

American University Washington College of Law, npoliko@wcl.american.edu

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VALUING ALL FAMILIES: AN INTRODUCTION TO THE 2008 SANTA CLARA LAW REVIEW SYMPOSIUM

Nancy D. Polikoff*

The family has changed over time. Historians, sociologists, and anthropologists have documented these changes.¹ When politicians invoke “family values” as a touchstone of their policies, they rarely acknowledge that change and diversity in family structure are the norm, not an unwelcome aberration.² Such politicians do not support the well-being of all families. Rather, they “promote” marriage, using taxpayer dollars, foisting upon the public an ideological position that attributes all social ills to the decline of life-long heterosexual marriage.³

But the laws concerning marriage and families have changed as society has changed. Thank goodness. For centuries, until just a few decades ago, the following statements accurately described family law:

- The law punished nonmarital sex; the most draconian punishment came not in the form of criminal penalties— although those existed—but in the legal disabilities attached to children born outside marriage and to their parents;⁴
- The law dictated distinct roles for married men and

* Nancy D. Polikoff, Professor of Law, American University Washington College of Law; author, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW*. (2008)

1. See NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 6-8 (Harvard University Press 2000)

2. See Frank Furstenberg, *Can Marriage Be Saved?* *DISSENT*, Summer 2003.

3. See NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 63-82 (Beacon Press 2008).

4. HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 25-28 (Bobbs-Merrill Press 1971).

women, an arrangement carried out in tandem with sex discrimination in the public sphere;⁵ and

- The law carefully restricted ending a marriage and imposed dire consequences on a spouse whose “fault” led to divorce.⁶

None of those principles are the law today, largely as a result of irreversible changes in the 1960s and 1970s. A combination of three social phenomena during that period facilitated those changes:

The Sexual Revolution: The introduction of the birth control pill in 1960 made it more possible than ever to separate sex from childbearing. “Make love, not war” was one of the most recognized slogans of the decade. Sex outside marriage became the norm and lost its taboo status. The Supreme Court ruled that both married and unmarried people had a right to access birth control and that Congress could not punish poor people living in “hippie communes” by denying them food stamps. Reversing centuries of law and practice, the Court also ruled that children born outside marriage were entitled to Equal Protection under the law.

Feminism: The first wave of feminism in the mid 19th century moved law away from the total eradication of women’s identity upon marriage. Eventually, it resulted in women’s suffrage. The 1960’s saw a resurgence of feminism: liberal feminism, radical feminism, and lesbian feminism. Women’s demands, in the context of the other great political movements of the 1960s, made the continuation of de jure discrimination untenable. In combination with greater control over reproduction, the Supreme Court decisions eliminating sex-based classifications and the passage of equal employment laws facilitated a dramatic increase in the percentage of women in the workforce.

The Demand for Divorce: Married couples separated. Many re-coupled with other partners. They could not remarry because they could not divorce. The demand for divorce produced bogus legal proceedings in which couples

5. POLIKOFF, *supra* note 3, at 13-15.

6. Herma Hill Kay, *From the Second Sex to Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century* 88 CAL. L. REV. 2017-94 (2000).

swore falsely that “grounds” existed. This made a mockery of the rule of law. No-fault divorce became the norm.

Some opposed these legal reforms. Take the status of children born to unmarried women, for example. In 1968, Louisiana urged the correctness of its statutes offering less protection to mothers and their children when those children were born outside marriage. In the wrongful death context, this meant that Minnie Glona could not recover for the death of her son in a car accident and five children could not recover for the death of their mother, Louise Levy, as a result of medical malpractice. In the face of a constitutional challenge, lower courts upheld the statutes as “properly” discouraging nonmarital childbearing.⁷

When these cases went to the United States Supreme Court, Louisiana assured the Court that it was not trying to punish or discriminate. Rather, it was trying to encourage marriage. The state’s brief read:

Louisiana’s purposes . . . are positive ones: the *encouragement* of marriage as one of the most important institutions known to law, the preservation of the legitimate family as the preferred environment for socializing the child . . .

Since marriage as an institution is fundamental to our existence as a free nation, it is the duty of . . . Louisiana to encourage it. One method of encouraging marriage is granting greater rights to legitimate offspring than those born of extra-marital unions. Superior rights of legitimate offspring are inducements or incentives to parties to contract marriage, which is preferred by Louisiana as the setting for producing offspring.⁸

The Supreme Court rejected this reasoning, refusing to allow wrongdoers to escape responsibility for their negligence simply because children were born outside of marriage.⁹ Encouraging marriage and expressing disapproval of nonmarital sex were no longer constitutionally sufficient reasons to deny rights to children or to their parents.

7. Brief for the Attorney General, State of Louisiana as Amici Curiae, *Levy v. Louisiana*, 391 U.S. 68 (1968).

8. *Id.*

9. *Glona v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

Four years later, the Supreme Court ruled that marriage was not a prerequisite to recognizing a father's right to raise his children.¹⁰ Peter Stanley challenged the constitutionality of an Illinois statute that made his three children wards of the state after their mother died. The Court ruled that the state could not presume Stanley unfit simply because he was never married to the children's mother. In doing so, the Court overturned centuries of law that created a father-child relationship only for a man married to a child's mother. The next year the Court ruled that children's right to support payments could not turn on whether their father and mother were married.¹¹

The outcome of *Stanley v. Illinois* may seem obvious today, but it was extraordinary in 1972. That decision required *every single* state to revise its laws to recognize a parent-child relationship between a man and his nonmarital children.

Today we take for granted that marriage is not the right dividing line for the rights or obligations of parents. The political forces behind "marriage promotion" today rarely admit they want to return children born outside marriage to second-class status, but they are ever willing to extol a special legal status for marriage at the expense of many—even most—American families.

For example, when the American Law Institute (ALI) proposed treating separating domestic partners identically to divorcing married couples, "marriage movement" ideologues called it a "war on the traditional family."¹² One spokesperson said, "Anyone who cares about the state of marriage, which is weak enough already, if you want it to become weaker still, knock away legal protections marriage enjoys."¹³ But the ALI was not knocking any protections away from marriage; it was extending them to unmarried couples who also needed them. Since the 5.5 million cohabiting couples¹⁴ no longer break any laws or violate social

10. *Stanley v. Illinois*, 405 U.S. 645 (1972).

11. *Gomez v. Perez*, 409 U.S. 535 (1973).

12. POLIKOFF, *supra* note 3, at 177-79

13. Geraldine Sealey, *Family: The Debate that Won't Die*, <http://abcnews.go.com/US/story?id=90928&page=1>. (last visited May 8, 2008).

14. TAVIA SIMMONS & MARTIN O'CONNELL, *MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000* (U.S. Census Bureau 2003).

taboos, it's inexcusable that their dissolution might leave one partner economically devastated solely for the lack of a marriage license.

And if we care about the well-being of all children, we need to change the laws that now privilege marriage at the expense of children. Without a valid prenuptial agreement, in almost every state a husband cannot disinherit his wife (and vice-versa).¹⁵ But every state except Massachusetts and Louisiana allows a parent to disinherit minor children.¹⁶ When a man had no obligation to support children born to anyone except his wife, and when the rarity of divorce made it unlikely that a man's children would be living with anyone other than his current wife, the guaranteed inheritance for a wife might have, to some extent, protected the economic well-being of children. This is no longer the case.

When Pfc. Hannah McKinney deployed for Iraq, she left behind a man she had just married and a two-year-old son from an earlier relationship whom she entrusted to her parents. Hannah died in Iraq, and the military paid a \$100,000 death benefit to her husband, not to her parents, who will raise her son.¹⁷

This federal benefit—originally a much smaller dollar figure—was created in 1908.¹⁸ Divorce was rare and a man had no obligation to support his children unless his wife gave birth to them. Congress might have reasonably assumed that if a service member was married and had children, then those children would be with his surviving spouse. Congress might have thought that by paying the spouse, the government was providing for the children. As Hannah's example demonstrates, that assumption no longer holds true.

These are just a few examples of laws that need rethinking given the composition of today's families. Husbands and wives receive many "special rights"—spousal employment benefits, Social Security and workers compensation survivors benefits, and the ability to request ongoing support when a relationship dissolves, to give just a

15. POLIKOFF, *supra* note 3, 188-89.

16. *Id.*

17. Donna St. George, *The Forgotten Families; Grandparents Raising Slain Soldiers' Children Are Denied a Government Benefit Intended to Sustain the Bereaved*, WASH. POST, Feb. 16, 2007.,

18. POLIKOFF, *supra* note 3, at 138-39.

few examples—simply because they are married. A woman married to a retired worker for nine months is entitled to social security benefits based on his life-long earnings when he dies;¹⁹ a woman who lived with an unmarried partner for twenty-nine years, even if she raised children with him, is not eligible. The benefits look like part of the package of rewards for marrying, and are justified as proper incentives to marry. That sounds—all over again—like Louisiana defending its exclusion of nonmarital children and their mothers from wrongful death recovery.

The composition of today's families and households differs from that of earlier times. When Congress enacted social security benefits for wives and widows in 1939 (husbands and widowers were not equally entitled until the 1970s), only 15% of married women worked outside the home.²⁰ Some workers compensation death benefit schemes—which also treated widowers less favorably than widows—were passed when only 7% of married women worked outside the home.²¹ Now, in 60% of married couples, both spouses work outside the home; 63.5% of women with children under the age of 6 and 75.0% of women with children in school and in the work force.²²

Today, less than 50% of all households contain a married couple, down from 78% in 1950.²³ Since 1950, the divorce rate has increased about 40%.²⁴ During that same period, the percentage of births to unmarried women has gone from 4% to almost 37%.²⁵ We've got to revise our laws to protect the

19. *Id.* at 202-07.

20. URBAN INSTITUTE, SOCIAL SECURITY AND THE FAMILY: ADDRESSING THE UNMET NEED IN AN UNDERFUNDED SYSTEM 26 (Melissa M. Favreault et. al., eds. 2002).

21. See Brief for the United States as Amicus Curiae at note 5, *Wengler v. Druggists Mut. Ins. Co.*, (U.S. Dec. 21, 1979). (presenting information about Missouri)

22. TRUDY A. SUCHAN ET. AL., CENSUS ATLAS OF THE UNITED STATES 178 (U.S. Census Bureau 2007).

23. FRANK HOBBS & NICOLE STOOPS, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 137 (U.S. Census Bureau 2002); Sam Roberts, *To Be Married Means to Be Outnumbered* N.Y. TIMES, October 15, 2006.

24. U.S. Census Bureau, *Marriages and Divorces—Number and Rate by State: 1990 to 2005*, <http://www.census.gov/compendia/statab/tables/08s0121.pdf> ; National Center for Health Statistics, *Final Divorce Statistics, 1975*, http://www.cdc.gov/nchs/data/mvsvr/supp/mv26_02s2acc.pdf.

25. Center for Disease Control and Prevention, *Number and Percent of Births to Unmarried Women, by Race and Hispanic Origin: United States, 1940-2000*,

economic security and emotional peace of mind of the full variety of today's families and relationships. The articles in this symposium move us in the right direction.