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A Nonfeminist's Perspectives of Mothers and  
Homemakers Under Chapter 2 of the ALI *Principles  
of the Law of Family Dissolution*\*

E. Carolyn Graglia\*\*

I. INTRODUCTION

From the vantage point of a nonfeminist mother and homemaker, chapter 2, as well as chapter 6, of the *ALI Principles of the Law of Family Dissolution* contributes to the deconstruction of traditional nuclear families. This deconstruction will promote the feminist goal to deny sexual differences in order to create an androgynous society in which men and women are as identical as possible. Such a society is antithetical to the maintenance of traditional families in which husband and wife perform complementary, not androgynous, roles: the wife as primarily a homemaker and child-rearer and the husband as primarily the financial provider for the family. The three-decade decline in the number of these traditional families in our society has been accompanied by an increasing tangle of pathologies that now characterize so many American families.

In examining the legal profession's attitudes toward traditional marriage, William C. Duncan points out that the Fall 1999 ALI Reporter had noted, "presumably with some pride," that *Playboy* magazine ranked the ALI 34th in its list of "men and women who changed the face of sex, for good or bad, during the past hundred years." Tribute was due the ALI, said *Playboy*, as "the unsung heroes of the sexual revolution."<sup>1</sup> That the ALI surely is and, with these family dissolution principles, will continue to be.

Those who think the sexual revolution was good for our society,

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1. William C. Duncan, State of the Bar: Marriage, "Sexual Orientation" and the Legal Profession 60 (unpublished manuscript, on file with author).

who think that there are no important biological differences between the sexes so that men and women should be considered fungible, who think that the traditional family plays no valuable role in creating a civil society, and who think that androgyny is a proper goal for a society would probably support all of the ALI *Principles of the Law of Family Dissolution*. Anyone who rejects these attitudes, however, should recognize that some of the *Principles* subvert the traditional family.

The relevant provisions of the ALI *Principles*, discussed in Part II, recognize the functional equivalence of a variety of family structures, without regard to whether the cohabitants are married or unmarried or of the same or opposite sex. Through this recognition, the ALI accepts and validates the demise of traditional sex roles within our culture and the resulting creation of an androgynized society. Part III discusses how these ALI *Principles* can be seen as the culmination of a nearly four-decade war that our society has waged against the traditional family and traditional sexual morality. The most powerful weapons in this war were the status degradation of the housewife's role and the passage of no-fault divorce laws, which undermined her social and economic security. With these principles, the ALI accepts the fruits of the sexual revolution and the breakdown of the traditional family, abandoning that family as being no longer normative in our society but only one of several equivalent family structures.

Part IV defends a family structure in which husband and wife perform traditional sex roles. Despite feminist claims that women who profess happiness in such roles are suffering from "false consciousness" and "may not be the best judges of their own interests," I contend that these roles are fulfilling for some women and that this family structure contributes to societal health and well-being. The great harm that divorce does to children is discussed in Parts V and VI, where I argue that the rearing of children by both natural parents is generally far preferable to rearing by a single parent or by same-sex partners. In conclusion, Part VII questions the wisdom of continuing further on the path towards androgyny that has already taken us far towards sexual depolarization of our society.

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## II. RELEVANT PROVISIONS OF THE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION

Chapter 6 of the *Principles* undermines the traditional family by giving certain rights to unmarried couples upon the dissolution of their relationship. The “domestic partners” created by this chapter are defined as “two persons of the same or opposite sex, not married to one another.”<sup>2</sup> Chapter 2 similarly protects the interests of cohabiting adults in an unmarried relationship. By creating the statuses of “parents by estoppel” and “de facto” parents, chapter 2 enables a cohabiting partner of the legal parent to share in custodial and decisionmaking responsibility for children of the legal parent after the cohabiting relationship ends.<sup>3</sup>

The comment to section 2.03 explicitly recognizes that “[a]lthough adoption is the clearer and thus preferred legal avenue for recognition of such parent-child relationships, adoption is sometimes not possible, especially if the adults are both women, or both men.”<sup>4</sup> Furthermore, the comment notes that the “factfinder’s determination should not turn upon whether the parties are a same-sex couple or a different-sex couple, or even whether the parties are married, since these factors do not bear on whether a family relationship is planned.”<sup>5</sup>

In allocating responsibility for children to individuals other than legal parents, section 2.21(2) provides for allocation to a grandparent or other relative who has “developed a significant relationship with the child” if the legal parent or parent by estoppel consents to the allocation and if the objecting parent “has not been performing a reasonable share of parenting functions.”<sup>6</sup> This provision would seem to represent a small interference with the rights of legal parents and thus be little threat to the nuclear family. The Reporter’s Notes, however, recognize that states may apply a more liberal standard in visitation than in custody matters, noting that all states allow grandparent visitation in some circumstances.<sup>7</sup> As in the case of the very

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2. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) § 6.01(1).

3. *Id.* § 2.03.

4. *Id.* § 2.03 cmt. b at 211.

5. *Id.*

6. *Id.* § 2.21(2).

7. *See id.* § 2.21 cmt. b at 266.

broad Washington visitation statute, which was recently invalidated by the United States Supreme Court, some of these statutes do indeed permit what some supporters of the traditional family consider an unwarranted interference with parental rights.<sup>8</sup>

The ALI *Principles of the Law of Family Dissolution* would assuredly solidify changes wrought by the sexual revolution. Chapter 6 substantially validates homosexual partnerships by elevating them to a status comparable to that of married couples, thus paving the way for legalization of same-sex marriages. At the same time, chapter 6 protects many interests of cohabiting but unmarried heterosexual couples, thereby also validating these relationships and diluting incentives to marry. Similarly, chapter 2 validates the rearing of children by same-sex couples through its recognition of their co-parenting agreements and its creation of custodial rights in a partner of the legal parent upon termination of their relationship, despite the objection of that legal parent. By creating custodial rights in the opposite-sex cohabiting partner of a legal parent, chapter 2 also dilutes incentives to marry and legally adopt the child of a partner.

How, one might ask, did such radical provisions find their way into recommendations of the American Law Institute, an organization that, at one time, at least, was not perceived as a proselytizer for radical change in the law, but rather as a body of centrists who seek a moderate consensus on legal issues? Understanding this evolution requires a recognition of how far our society has traveled towards a rejection of traditionalism in matters pertaining to the family.

### III. SUBVERSION OF THE TRADITIONAL FAMILY

Reflecting the tenuous state of marriage in our society, the presence or absence of a marital relationship is a largely irrelevant factor in decisions under either chapter 2 or 6 of the ALI *Principles of the Law of Family Dissolution*. This cavalier treatment of the marriage institution by the ALI continues the war on the traditional family and traditional sexual morality that has been waged for over three decades—in particular, by the feminist movement—to drive the homemakers out of the home and into the workplace. This war began in 1949 when Simone de Beauvoir, followed by Betty Friedan fourteen

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8. See *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that the visitation ordered in this case violated the parent's fundamental due process right "to make decisions concerning the care, custody, and control of her two daughters").

years later, undertook to degrade the status of the homemaker to the lowest position it has ever had in modern society.<sup>9</sup> The women who spearheaded the feminist revolution became the darlings of the media, which quickly embraced the feminist cause and disseminated the movement's castigations of homemakers as "parasites" who, according to Betty Friedan, live without using adult capabilities or intelligence. Homemakers' lives, said Friedan, lack "a real function" and are a "waste of a human self."<sup>10</sup>

This feminist effort to convince society that a woman's role as homemaker and child-rearer is vastly inferior to the role of market producer was hugely successful. Proof of its overwhelming success is all around us. On December 30, 1999, the front page of *The New York Times*, for example, quoted President Clinton's statement praising the great success in putting mothers, who had been on welfare, into the work force and their children into day care. He said: "Work is more than just a weekly paycheck"; "[i]t is, at heart, our way of life. Work lends purpose and dignity to our lives."<sup>11</sup> This is the essence of feminism.

In the 1950s, a president would have been far more likely to say that the home and the family and the rearing of children—not market work<sup>12</sup>—was, "at heart, our way of life" and that no other way of life could have a higher purpose and a greater dignity than rearing one's own children at home. Who dares to make such a statement today? The latest *New York Times Style Manual*, on the contrary, explicitly tells writers to avoid using the term "housewife" and to resist using the term "homemaker" since the word is "belittling."<sup>13</sup> As one psychotherapist has noted, although "1950s' culture accorded its full-time mothers unconditional positive regard," today's "stay-at-home mothers I know dread the question 'And what do *you* do?'"<sup>14</sup>

9. F. CAROLYN GRAGLIA, *DOMESTIC TRANQUILITY: A BRIEF AGAINST FEMINISM* 2, 106–20 (1998).

10. *Id.* at 115–16.

11. Jason DeParle, *Bold Effort Leaves Much Unchanged for the Poor*, N.Y. TIMES, Dec. 30, 1999, at A1.

12. The terms "market work" and "market production" refer to work for wages, usually, but not always, performed outside the home, as distinguished from domestic activities, including child-rearing, performed by the homemaker within her own home.

13. TIMES BOOKS, *THE NEW YORK TIMES MANUAL OF STYLE AND USAGE* 160, 162 (Allan M. Siegal & William G. Connolly eds., 1999).

14. SHARI L. THURER, *THE MYTHS OF MOTHERHOOD: HOW CULTURE REINVENTS THE GOOD MOTHER* xix (1994).

The most powerful weapon used against this “belittled” homemaker was probably the passage of no-fault divorce laws by all of our states between 1969 and 1985. The traditional fault-based divorce law had been the single most important structure at the foundation of traditional marriage. This law was designed to ensure the viability of marriages that were based on a sexual division of labor in which the wife assumed the domestic responsibilities of homemaking and child-rearing and the husband provided the economic support of the family.<sup>15</sup> It is that traditional family which fault-based divorce laws were designed to protect. And it is that family which no-fault divorce laws are designed to destroy.<sup>16</sup>

Through the enactment of no-fault divorce, society warned women that they were expected to abandon their child-rearing role, cease being financially dependent on their husbands, and become self-supporting. Because they viewed the traditional family as women’s oppressor, the feminist champions of no-fault divorce argued that women must pursue the careers which, feminists are convinced, can be the only source of identity and self-fulfillment. With this ideology, feminists rejected the value of the female role, the rewards and importance of motherhood, and the worth of children to a degree never before witnessed in our society.<sup>17</sup>

Thus, the function of no-fault divorce laws was to convince women that the entire society had also adopted this feminist ideology, which devalued homemaking and child-rearing and respected only those who engaged in market production. The “present legal system,” concluded Lenore Weitzman, “makes it clear that instead of expecting to be supported, a woman is now expected to become self-

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15. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 15–20 (1985); Martha Heller, Note, *Should Breaking-Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have upon Domestic Violence*, 4 VA. J. SOC. POL’Y & L. 263 (1996); Nicole D. Lindsey, Note, *Marriage and Divorce: Degrees of “I Do,” an Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL’Y 265, 268 (1998).

16. Under fault-based divorce law, a woman could make her marriage her career because “if the marriage did not endure and if the wife was virtuous, she was nevertheless promised alimony—a means of continued support.” WEITZMAN, *supra* note 15, at 11. No-fault divorce changed marriage from an institution in which one had a right to remain married, if one adhered to the marriage contract, to an institution in which the protected right became the right to divorce. By taking all bargaining power away from the spouse who does not want the divorce, no-fault has greatly increased “the likelihood that divorce will in fact occur” and that it will be both “less difficult” and “less costly.” *Id.* at 27.

17. GRAGLIA, *supra* note 9, at 1–5, 33–35, 87–90.

sufficient.”<sup>18</sup> Through our divorce laws, Mary Ann Glendon acutely observed, society tells mothers it is unsafe to devote themselves to raising children.<sup>19</sup>

But has the evidence of family breakdown and of the resulting economic privation suffered by so many women and children under our current divorce regime caused feminists to change their minds?<sup>20</sup> On the contrary, the feminist remolders of society<sup>21</sup> refuse to relinquish their strongest weapon in the battle to force all women to live by the feminist script. No-fault divorce laws must be retained, they argue, as the surest incentive to keep in the workplace the woman who would otherwise choose a traditional role in order to concentrate on what she values most highly: her marriage, her husband, and her children.

To feminists, evidence of the economic hardship that divorce has inflicted on women and children simply reinforces their argument that women should never choose to be homemakers. The current divorce regime must be retained, claims Herma Hill Kay, who was one of its architects. She concedes that “many couples still choose to follow the traditional allocation of family functions by sex” and this “choice typically produces a family in which the wife and children are dependent upon the husband and father for support.”<sup>22</sup> It is women’s “willingness to assume their traditional role as caretakers of children” which causes “their vulnerability at divorce.”<sup>23</sup> Although “in the short run” some steps should be taken to alleviate the situation of current older housewives, Kay argues, “[i]n the long run” we should not “encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce.”<sup>24</sup>

Kay warns that the danger in changing no-fault divorce laws to “prevent present disadvantage to women who have chosen tradi-

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18. WEITZMAN, *supra* note 15, at 143.

19. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 111 (1987).

20. Even Betty Friedan acknowledged that “housewives who divorced were in terrible straits.” WEITZMAN, *supra* note 15, at 360.

21. GRAGLIA, *supra* note 9, at 262–89.

22. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 78 (1987).

23. *Id.* at 78–79.

24. *Id.* at 79–80.

tional roles in the past” is that this change will “encourage future women to continue to select traditional roles.”<sup>25</sup> Her willingness to use divorce law to discourage marriages based on a traditional sexual division of labor is grounded in the belief, which is intrinsic to feminist ideology, that “when both parents are available, neither should become the primary nurturing parent.”<sup>26</sup> This is the goal that Kay would have divorce law serve, despite her recognition that many women want to assume a traditional role, despite her acknowledgment of “the uniform historical practice in most primate and all known human societies of assigning the task of child care to the female,” and despite her awareness of significant scientific support for “the assertion that this particular division of function is based firmly on biological sex differences.”<sup>27</sup>

For those mothers who yearn to be full-time child-rearers, it will be very difficult to comply with Kay’s admonitions to “recognize that their unique role in reproduction ends with childbirth” and to realize that if they would only accept this feminist insight, then they, “like men, should be able to lead productive, independent lives outside the family.”<sup>28</sup> Kay does reassure these mothers that she does “not propose that the state attempt to implement this view of family life by enacting laws requiring mothers to work or mandating that fathers spend time at home with their children.”<sup>29</sup> In order to accomplish her goal, Kay says, it is only necessary for society “to withdraw existing legal supports” for traditional marriage “as a cultural norm,” a goal that she believes—quite accurately—no-fault divorce laws are already accomplishing.<sup>30</sup>

It is beyond Kay’s ken, as well as that of most feminists, to recognize that some women consider the rewards of what Kay describes as “productive, independent lives outside the family” to be vastly inferior to the relatively unlimited freedom of a domestic life rearing children at home. To understand why our society so readily chose to enact divorce laws designed to destroy the traditional family, one must realize that feminists with Kay’s views play an important, respected role in the legal profession. Herma Hill Kay, for example, is

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25. *Id.* at 90.

26. *Id.* at 81.

27. *Id.* at 82.

28. *Id.* at 84–85.

29. *Id.* at 85.

30. *Id.*

a law professor and was dean of the University of California Law School at Berkeley and president of the Association of American Law Schools.<sup>31</sup> She was a member of the California Governor's Commission on the Family, she was the co-reporter of the Uniform Marriage and Divorce Act, and she was a co-investigator on the California Divorce Law Research Project.<sup>32</sup> This woman, who admonishes other women "to recognize that their unique role in reproduction ends with childbirth," is not considered a radical feminist on the fringe of society; rather, she is a dominant policymaker within society. It is the input of those with views like hers that has created and still maintains our current divorce regime that institutionalizes those views.

Herma Hill Kay represents the overwhelmingly dominant view in legal academia. Few voices would be raised against her views, and many are raised to echo them, such as the call of a recent commentator for "measures that envisioned wage work as an important component of women's lives and identities, and, more radical still, of their independence from men."<sup>33</sup> The measures she advocates would include "better jobs and job training, wage subsidies, and collectivized child care."<sup>34</sup>

The feminist credo to which legal academia largely subscribes is that in a properly organized society all women would assume workplace roles and share child-rearing and domestic tasks equally with their husbands. This belief requires rejection of divorce reforms that "would undermine any such strategy of equalizing parenting roles within the family. If once again given the option of relying on marriage for lifelong support in order to allow the assumption of traditional gender roles, many women undoubtedly will be more likely to choose this option."<sup>35</sup> Even when the proposed divorce reform simply offers a covenant marriage option<sup>36</sup> while leaving the no-fault sys-

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31. ASS'N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS 654 (2000-2001).

32. Kay, *supra* note 22, at 1.

33. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1918 (2000).

34. *Id.*

35. Heller, *supra* note 15, at 281.

36. Louisiana and Arizona have enacted such covenant marriage laws. LA. REV. STAT. ANN. § 9:272 (West Supp. 1998) *amended by* 1997 La. Acts 1380, § 3; ARIZ. REV. STAT. § 25-901 to 25-906 (1998). Covenant marriage laws have been proposed, but not enacted, in a number of states. The covenant marriage requirements would apply only to those who choose them. Generally, couples choosing a covenant marriage must participate in premarital counseling; they must also agree to attend counseling in the event of marital difficulties and to make

tem intact, the same arguments are used to defeat merely the possibility of allowing some couples to choose a more binding marital commitment. Thus, Louisiana's covenant marriage option is criticized because it "would encourage women to resume traditional gender roles" and thereby "would cause a loss of ground in the area of financial independence for women."<sup>37</sup>

#### IV. A DEFENSE OF THE TRADITIONAL FAMILY

Compared to the impact of no-fault divorce on the traditional family, the ALI *Principles of the Law of Family Dissolution* are insignificant. To object to them, while accepting no-fault divorce, is indeed to strain at a gnat while swallowing a camel. The ALI *Principles* are designed to recognize and make accommodations to the wreckage left in the wake of the sexual revolution and the breakdown of the traditional family. And by traditional family, I do not mean simply a male-and-female-headed family as opposed to a single-sex-headed family, but a family in which the male is the primary breadwinner and the female is the primary child-rearer.

The ideological underpinning of the two-career family, which is touted by our cultural elite as normative and encouraged by all feminist initiatives, is feminist Karen DeCrow's dictate: "[N]o man should allow himself to support his wife—no matter how much she favors the idea, no matter how many centuries this domestic pattern has existed, no matter how logical the economics of the arrangement may appear, no matter how good it makes him feel. . . . [L]ove can flourish between adults only when everyone pays his or her own way."<sup>38</sup> This feminist dogma demands that husband and wife discard the different, complementary roles that the experiences of the past

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reasonable efforts to preserve their marriage. A divorce can be obtained if these efforts fail. The grounds for divorce usually include adultery, conviction of a felony, abandonment, commission of family violence, a legal separation, or living without cohabitation for a stated number of years (often two).

37. Lindsey, *supra* note 15, at 280. One shining exception to the monolithic support of no-fault divorce in academia is the work of Professor Katherine Shaw Spaht, who drafted the Louisiana Covenant Marriage Law, enacted in 1997. See generally Katherine Shaw Spaht, *Beyond Baehr: Strengthening the Definition of Marriage*, 12 BYU J. PUB. L. 277 (1998); Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998); Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998). Professor Mary Ann Glendon has also criticized the current divorce regime. See generally GLENDON, *supra* note 19.

38. *Letters to the Editor*, N.Y. TIMES MAGAZINE, May 31, 1992, at 12.

sixty years indicate are the most likely to produce stable marriages, enlivened by satisfying sexuality.<sup>39</sup>

According to feminists, the ideal heterosexual marriage should be like a same-sex marriage, an institution now being fought for that would be the fitting capstone of a feminist society. The husband and wife that De Crow describes are simply roommates, each paying his own way and replicating each other. It would seem difficult for such a marriage to satisfy what Roger Scruton identified in his book *Sexual Desire* as the foundation of heterosexual sexual excitement: “the energy released when man and woman come together is proportional to the distance which divides them when they are apart.”<sup>40</sup> In their shared dedication to market work outside the home, their role-sharing within the home, and their delegation of the bulk of child-rearing activities to paid employees, these two-career heterosexual couples seem little different from same-sex couples.

When the adults in both same-sex- and opposite-sex-headed families spend most of their waking hours doing market work, and when the children in both kinds of families are cared for during most of their waking hours by paid employees, on what basis can we distinguish between the two kinds of families? Is the fact of physical sexual difference enough on which to ground distinctions when that difference no longer manifests itself through the assumption of traditional sex roles? To the degree that heterosexual two-career families assume a respected and dominant position within our culture, it becomes increasingly difficult to resist the demands of same-sex couples to be treated in exactly the same way heterosexual couples are treated. Unless our society can sustain at least a noticeable proportion, if not a critical mass, of traditional families—which are respected and supported by the culture—then there is very little left to juxtapose against the androgynous society that the ALI now accepts as normative and seeks to accommodate with the *Principles of the Law of Family Dissolution*.

But what societal needs will be served by restoring respect and support to the traditional family? Women like myself—and I am not alone in my feelings—can only be completely happy and fulfilled

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39. GRAGLIA, *supra* note 9, at 24–26, 348–52.

40. ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 273 (1986).

within the traditional family. We make our marriage our career.<sup>41</sup> When feminists tell us that our role is subservient—that we are oppressed by men and worthless to society in this role—we reply that, for us, entering the marketplace would be oppressive. For us, to leave our children with another woman in order to go do market work is not liberation but perdition.

In reply, feminists tell us that we simply are suffering from “false consciousness.” We have, they say, been socialized by our culture to feel this way—our “preferences are socially constructed.”<sup>42</sup> We have, in fact, internalized our own oppression, and because of our “incomplete agency,” we “may not be the best judges of [our] own interests or those of the community.”<sup>43</sup> It is such cavalier dismissal of other women’s felt needs that justifies Herma Hill Kay’s use of no-fault divorce laws to force these other women to adopt what Kay considers her more enlightened feminist belief that the unique female role in reproduction should end with childbirth—except, of course, in the case of those women who are paid child-care workers.

#### V. ENCOURAGING AND PRESERVING MARRIAGE FOR THE CHILDREN’S SAKE

I do not believe there is much room for accommodation between these opposing views. Through their position in government bureaucracies, academia, and the media, moreover, feminists have largely put in place the current family policies of our society. They have been controlling the debate. But for the sake of our children, the traditional family deserves a defense; it has served our society well and should be enabled to continue in that service. In opposing legislation that would validate domestic partnerships, John Cardinal O’Connor observed that equating the non-married state with the married state will influence the young by discouraging marriage. Certainly, our no-fault divorce laws already deliver the message that marriage does not matter in our society, and the recognition of legal rights in cohabiting partners will simply reinforce that message. The traditional family serves society’s needs, said Cardinal O’Connor, because “the lifelong commitment of one man to one woman in mar-

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41. GRAGLIA, *supra* note 9, at 106–08.

42. Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1690 (1997).

43. *Id.* at 1696.

riage gives full expression to the kind of relationship that is best suited to the procreation, rearing and education of children.”<sup>44</sup>

There can be no doubt that the period following World War II, when respect for the traditional family was at its height, was the golden age of the American family, with high marriage and birth rates, low illegitimacy, divorce, and crime rates, and the growth of a broad and stable middle class. But then our marriage and birth rates plummeted, while the rates of crime, unmarried cohabitation, divorce, illegitimacy, and abortion skyrocketed. We now have the highest divorce and abortion rates in the western world, and one out of three children born today in this country is illegitimate.<sup>45</sup> As a result of this startling increase in the number of divorces, as well as in the number of children born out of wedlock, a child today has only a fifty percent chance of reaching adulthood with a biological father in the home.<sup>46</sup>

The benefits to children of living in an intact home with their natural parents are amply documented. Children living with fathers in the home have significantly higher intelligence scores than children in homes without fathers.<sup>47</sup> Children of divorced parents often experience poor school performance, poor self-control, drug abuse, and incapacity to provide for themselves or to form stable marriages when adults.<sup>48</sup> To be raised in a single-parent home greatly increases the risk that children will live in poverty, that they will drop out of high school, and, for girls, that they will bear a child out of wedlock.<sup>49</sup> The risk of physical abuse and of all types of neglect is higher among children of single parents, and one study has shown that preschoolers living with a stepparent and a natural parent are forty times as likely to be abused as those living with both natural parents.<sup>50</sup> Boys raised without a father are statistically far more likely to become

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44. John Cardinal O'Connor, *Minimizing Marriage*, WALL ST. J., May 29, 1998, at W9.

45. GRAGLIA, *supra* note 9, at 290–307.

46. David Popenoe, *Parental Androgyny*, SOC'Y, Sept.–Oct. 1993, at 5.

47. DANIEL P. MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 36 (photo. reprint 1981) (1965).

48. THOMAS G. WEST, *VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA* 95 (1997).

49. GLENN T. STANTON, *WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY* 108–19 (1997).

50. WEST, *supra* note 48, at 95–96.

violent criminals.<sup>51</sup>

Analyzing the ways in which divorce harms both children and parents, Paul R. Amato and Alan Booth found that “parental divorce is associated with lower affection between children and parents,” “less coresidence with parents,” and “less frequent contact with parents.”<sup>52</sup> These “consequences of marital dissolution tend to be stronger for fathers than mothers.”<sup>53</sup> “[A]dolescents from divorced families (both sons and daughters) become sexually active at younger ages and have a greater number of partners than do other adolescents.”<sup>54</sup> Parental divorce increases the risk that offspring will also divorce and that they will themselves experience lower marital quality. Thus, offspring of divorced parents are justifiably fearful about their own prospects for marrying and maintaining long-term intimate relationships, and many of them fear betrayal from their commitments.<sup>55</sup>

Children of divorce suffer lower educational and occupational attainment. They complete fewer years of education than children from intact families and these consequences are stronger for daughters than for sons.<sup>56</sup> It is well established that “the socioeconomic resources of stepfathers . . . have few consequences for stepdaughters. This finding is consistent with research suggesting that young adult offspring receive less assistance from stepfamilies than from continuously intact families”: “some stepfathers may be unwilling to invest economic or interpersonal resources in their stepdaughters because of the tension that frequently characterizes these relationships.”<sup>57</sup> “Divorce appears to suppress most dimensions of socioeconomic attainment . . . by lowering parental support of children (helping chil-

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51. *Id.* at 97; Maggie Gallagher, *Fatherless Boys Grow Up into Dangerous Men*, WALL ST. J., Dec. 1, 1998, at A22 (noting that boys raised outside of intact marriages are more than twice as likely as other boys to end up jailed: each year spent without a father in the home increases the odds of future incarceration by about five percent).

52. PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 81 (1997).

53. *Id.*

54. *Id.* at 107.

55. *Id.* at 108–09.

56. *Id.* at 173. The children of divorce have an education deficit of about one-half year. Although this “may not sound like much,” since “each year of education raises annual income by nearly \$4,000,” this annual gap in income “multiplied by the number of years that a person is in the workforce, amounts to a substantial lifetime difference in earnings.” *Id.* at 222.

57. *Id.* at 162–63.

dren with homework, discussing children's personal problems, and so on) and parents' expectations for children's education." Moreover, since "divorce proneness" in continuously married families also predicts offspring's outcomes, it appears that "both the increasing divorce rate and the increasing instability of intact marriages are lowering the potential of future generations to succeed economically."<sup>58</sup>

Against this well-documented background of children's suffering, the American Law Institute does not suggest reform of our divorce laws so as to teach our citizens that marriage matters and, in particular, that great efforts should be expended to preserve marriages that have produced children. Rather the ALI, apparently in devotion to the right of adults to pursue individual autonomy without regard to any other obligations, further trivializes marriage by giving status to and protecting the interests of adults in cohabiting relationships. Thus, it encourages relationships that are much less stable than marital ones and that are producing increasing numbers of children, who will often have all the problems of children of divorce compounded by the fact that they are born out of wedlock.

#### VI. PARENTAL ANDROGYNY

But cannot the ills of single parenthood be ameliorated by offering the child two mommies or two daddies, a lifestyle that the ALI *Principles of the Law of Family Dissolution* would validate? However good the outcomes may appear to be in any particular case, society should encourage and validate the family in which Heather has a mommy and a daddy, not two mommies.<sup>59</sup> Without doubt, our culture's encouragement of "parental androgyny," in which fathers and mothers play essentially the same social roles in the family, has created fertile ground for social acceptance of Heather's two mommies. But as David Popenoe, a sociologist of the family, states, "family organization is based on very real, biological differences between men and women. Parental androgyny is not what children need. Neither is it a good basis for a stable, lasting marriage."<sup>60</sup>

We can expect optimal child development to occur when both a father and a mother are in the home, each acting in different ways,

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58. *Id.* at 181.

59. See LESLEA NEWMAN, *HEATHER HAS TWO MOMMIES* (1989) (validating homosexual parenting).

60. Popenoe, *supra* note 46, at 6.

distinctively masculine or feminine, towards the child. It is socially destructive when society refuses to acknowledge the very real differences between men and women and the myriad ways in which these differences mold the parents' relations with their children. Because of their biological differences, says Popenoe, "the sexes are not interchangeable in child care."<sup>61</sup> "Most dads," he observes, "do not want to be mom, and they do not feel comfortable being mom."<sup>62</sup> Furthermore, he notes that "[n]owhere in the world has there ever been a society known to exist in which men were the primary caretakers of young children. The reason has much to do with the biological nature of males and females."<sup>63</sup>

It would seem counterintuitive to believe that biological organisms, which have developed to reproduce themselves through the sexual union of male and female, do not also require the input of both male and female in order to rear, with optimal success, the children produced by their sexual union. Certainly, circumstances will sometimes prevent what is optimal from happening. But it is extremely foolish for society to treat the accommodations we must make in order to survive bad circumstances as if they are on an equal footing with the best outcomes. Society should not teach its citizens that being reared by two women or two men, who are admittedly unwilling or unable to unite with the opposite sex, is just as good as being reared by a father and a mother, who have proved themselves capable both of uniting and then living with that other sex—which is, of course, about one-half of the world's population.

Children learn the most important lessons about how to relate to the opposite sex from observing how their parents interact with their own children and with each other in their daily lives. These crucial lessons will be denied to any children raised by same-sex couples, who will never teach by their own example how to live with the opposite sex. It is very difficult to absorb these lessons from books or television or from conversations with one's peers; anyone who has been raised by a single parent knows that this is true. And what the children of divorce have always known, is now being established by research that shows that the adverse impact of divorce on children is

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61. *Id.* at 7.

62. *Id.*

63. *Id.*; see also DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY (1999).

often deep, long lasting, and, in fact, increases over time.<sup>64</sup>

As Amato and Booth point out, “fathers are mainly important to the extent that they are part of a larger mother-father-child triad.”<sup>65</sup> Rather than questioning the relative importance of mothers and fathers in influencing children’s development, it is more meaningful, they say, to think about the “quality of the mother-father-triad as being a key predictor of children’s outcomes,” which suggests that “fathers may play their most important role in children’s lives as a member of the marital partnership.”<sup>66</sup> This concept that the family does its best for the child through the interaction of man, woman, and child is summed up in David Blankenhorn’s statement that “the preconditions for effective fatherhood are twofold: coresidency with children and a parental alliance with the mother.”<sup>67</sup>

After an extensive analysis of the advocacy efforts to establish that homosexual parenting is as good for children as heterosexual parenting, Lynn Wardle has concluded that the evidence does not support this claim. Most studies of homosexual parenting are “based on very unreliable quantitative research, flawed methodologically and analytically,” but even from this body of research “there are indications of some significant potential detriments to children from homosexual parenting.”<sup>68</sup> As Wardle notes, because “there are gender-linked differences in child-rearing skills,” heterosexual parenting has the great advantage of providing children with the different “strengths and attributes” of both men and women.<sup>69</sup> “Homosexual parenting,” Wardle concludes, “poses particular risks for the emotional and gender development of children,” who will “do better in school, have

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64. JUDITH S. WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000). The overwhelmingly positive effects on both children and parents of living in a married household are set forth by Linda J. Waite and Maggie Gallagher in *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY* (2000).

65. AMATO & BOOTH, *supra* note 52, at 230.

66. *Id.*

67. DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 18 (1995).

68. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 844 (1997); *see also* ROBERT LERNER & ALTHEA NAGAI, *MARRIAGE LAW PROJECT, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING* (2001) (analyzing forty-nine studies and concluding they are all gravely deficient).

69. Wardle, *supra* note 68, at 857; *see also* George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 634 (1999) (arguing that children with both a mother and a father will learn better how to live in a world consisting of males and females).

fewer emotional crises, and become functioning adults best when they are reared in two-parent, dual-gender families.”<sup>70</sup>

David Blankenhorn has documented the devastating effects of father absence on children, especially on boys. Anyone who is tempted to think that a young boy being raised by a single woman or by homosexuals of either sex is not being deprived of something that boys need for optimal growth and social adjustment—no matter how kind, loving, and well-intentioned these people may all be—should pay heed to Blankenhorn’s description of what boys require to mature into fully functioning, socially well-adjusted adult men.

The father, says Blankenhorn, is “irreplaceable” in helping boys “to separate from their mothers in search of the meaning of their maleness.”<sup>71</sup> The father “enables the son to separate from the mother” by “showing him on good authority that he can be ‘man enough.’”<sup>72</sup> Thus, the boy becomes the son of his father and later “he will reunite with the world of women, the world of his mother, through his spouse and children.”<sup>73</sup> But when this process does not succeed, the result is rage: “[r]age against the mother, against women, against society. It is a deeply misogynistic rage, vividly expressed, for example, in contemporary rap music with titles such as ‘Beat That Bitch with a Bat.’”<sup>74</sup>

Insofar as the ALI *Principles* validate homosexual parenting, they strike the same blow for favoring the individual autonomy of adults over the interests of children that they strike when validating unmarried cohabitation. The ALI apparently accepts the fact that the traditional family is in decline and seems unwilling to make any attempt to resurrect it. A variety of family forms are equal, the ALI concludes, or at least are good enough. That our society needs laws that would try to teach its citizens about their duty to exert themselves mightily so that their children can grow up in a marital home with their natural father and mother is, unfortunately, not a proposition which seems congenial to the ALI.

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70. Wardle, *supra* note 68, at 863.

71. BLANKENHORN, *supra* note 67, at 30.

72. *Id.*

73. *Id.*

74. *Id.*

## VII. A SEXUALLY DEPOLARIZED SOCIETY

How do we manage to trash our own society so badly? Some insight into this question appears in Charles Winick's *The New People: Desexualization in American Life*,<sup>75</sup> which describes the process of male feminization and female masculinization that, by the end of the 1960s, had produced an increasingly androgynous society. Writing in 1968, Winick documented the unprecedented neutering of our society by examining music and dancing, fiction, painting, theater, men's and women's clothing, men's phenomenally increased use of beauty products, our manner of speaking, names given to children, recreational activities, and the manner of consummating sexual relations.

The process of turning this culture around may begin when enough people acknowledge, and then act upon, the truth of Winick's many insights. "Archeologists of the future," he observes, "may regard a radical dislocation of sexual identity as the single most important event of our time" because "radical changes in sex roles may lead to extermination of whole species."<sup>76</sup> And when we bemoan the intractable drug problem in this country, we might heed Winick's warning that the "depersonalization and flattening of sex roles can be so threatening that young people withdraw from active participation to the world of inner experience provided by drugs. Many who have lost moorings to masculinity and femininity anchor upon the self and employ drugs as an ultimate prosthetic."<sup>77</sup>

Perceiving few signs of any change in the direction in which our culture was moving, Winick concluded that if we continued our drift toward "depolarization of sex," men and women might "ultimately be able to produce nothing together and each will become a less appropriate audience for the distinctive performance of the other."<sup>78</sup> Anyone who sees a smattering of truth in these observations should consider carefully before supporting any measures that might further subvert a traditional organization of family relations.

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75. CHARLES WINICK, *THE NEW PEOPLE: DESEXUALIZATION IN AMERICAN LIFE* x (1968).

76. *Id.*

77. *Id.* at 335.

78. *Id.* at 358.

## VIII. CONCLUSION

If Charles Winick is correct that the most important event of our time has been the radical dislocation of sexual identity, and if he is also correct that radical changes in sex roles may lead to extermination of whole species, then surely our culture is in danger. The feminist movement's quest for androgyny—the quintessential radical dislocation of sexual identity—has witnessed stellar success. With the twin weapons of no-fault divorce and the status degradation of homemakers, feminists successfully convinced large numbers of women to abandon their homemaking and child-rearing roles, and the two-career family has become the cultural paradigm.

In these feminist efforts, the ALI has been a willing ally. The sexual depolarization of our society is already evidenced by the great decline in the number of heterosexual couples who assume traditional sex roles within the family. Further depolarization of the sexes will continue with validation of same-sex domestic partnerships and of homosexual parenting and may well reach completion with the legalization of same-sex marriage. With these *Principles of the Law of Family Dissolution*, the ALI takes its place at the forefront of the feminist march to complete androgyny.