ESSAY

LIBERTY IN A DIVIDED AND EXPERIMENTAL CULTURE: RESPECTING CHOICE AND ENFORCING CONNECTION IN THE AMERICAN FAMILY

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ABSTRACT

In this Essay, the author examines the need to expand our societal vocabulary to better describe the varieties of family relationships present within society. After first describing the ability of language to form notions of liberty, she focuses on the need to have our official language adequately describe the connections and choices made in familial lives. Focusing on the societal celebration of autonomy of choice and experimentation in family relationships, including the recognition of relationships between same-sex partners and other non-traditional forms of family connections, she then argues that both the Right and the Left fail to recognize this autonomy of choice by the creation of legal vocabulary. Coming from a societal tradition of experimentation and a recognition of "eccentricity" in our Constitutional jurisprudence, those forming domestic units at the edge of family definitions are trying to bring a vocabulary representing both choice and connection into the public dialogue. The author then describes the necessity for such a public vocabulary to change to provide adequate recognition to the new forms of family; indeed, the public dialogue

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has already started to recognize such terms as "non-custodial parent." Finally, she argues that such a public vocabulary is essential for the self-definition of children living within these new familial units.

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I. INTRODUCTION

A mother and child begin to live with the child's grandmother and great uncle. Although the uncle rears the child as the primary male relative, he has no recognized legal connection to her. Elsewhere, a father, eager to protect his children's inheritance, petitions a Connecticut court to dissolve the Vermont civil union that binds him to his partner. Although the father's partner agrees to the dissolution, the Connecticut court denies the father's request, insisting that the connection created in Vermont does not "exist" in Connecticut.

Both of these legally hard-to-classify domestic arrangements illustrate the uncertainties that affect critical connections, ranging from the relatively traditional but legally unrecognized ties of biology between the infant and her uncle to the intimate ties between two adult males (or two adult females). Such uncertainties often affect children's expectations about the dignity and security of "family" as it exists today. Americans exercise their "ideal freedoms" to create bonds that define family units, tolerating the

risk that some or all of their members do not fit into the legal grammar of family life and thus fall outside our "stupid laws."[1]

In a fractured culture with a wide spectrum of variation in basic life arrangements, we embrace liberty to make our own lives. We lack, however, the mediating help of a matching common structure to give them substance and the outlet of structure in communities of consensus into which our lives may be absorbed and regulated.[2] We can neither "move one valley over" to find a suitable governing framework for our choices,[3] nor find the collective inspiration to fashion a general structure into which our varieties of choice will encounter the demands and assistance of a mediating law.[4]

As a result, choice thrives unaffected, while connections languish for lack of legal recognition. Often, with impeccable (legal) logic, but with a harsh and unreflective impact on personal connections, courts confronted with a co-parent, often a co-mother, who shared in planning a pregnancy and in rearing the child, fail to recognize a legal connection between the child and the woman she calls her mother. The child may bear a cognate of her name, but the law has no words to capture this connection.

Delimiting these problems are choice[5] and connection,[6] concepts prominent in our values and in our human need. They are

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1. The phrases "ideal freedoms" and "stupid laws" are drawn from an essay by Cristina Nehring, in which she comments that "rigid adherence to ideal freedoms is as cruel as rigid adherence to stupid laws." Cristina Nehring, *The Vindications: The Moral Opportunism of Feminist Biography,* HARPER'S MAG., Feb. 2002, at 60, 64. For a discussion of the essay, see *infra*, note 90.

2. William E. Nelson describes a colonial period in which "most colonials who dissented from their own community's conception of right and justice could move without great difficulty to a more congenial community." WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGIN AND LEGACY OF JUDICIAL REVIEW 24 (2000).

3. *Id.*

4. In its PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, the American Law Institute has recently adopted a chapter on Domestic Partners that attempts to set forth principles to govern the financial claims of domestic partners. In addition, Chapter Two includes models for co-parent legal relationships, including parent by estoppel. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03, cmt. e (2002).

5. *See* RICHARD T. GILL, POSTERITY LOST: PROGRESS, IDEOLOGY, AND THE DECLINE OF THE AMERICAN FAMILY (1997) (suggesting that the process of progress creates "an ever more complex society, with constantly expanding ranges of individual choice and endless change"). A striking indication of the depth of the commitment to choice as reflected in our advice to one another about family obligations is provided by the statistic that 82 percent of Americans queried in a survey in 1989 said, "No," to the question of whether parents should stay together for the sake of the children. *See* David Popenoe, *American Family Decline, 1960 -1990: A Review and Appraisal*, 55 J. MARRIAGE & FAM. 527, 532 (1993) (citing Arland Thornton,

the building blocks of contemporary family life and vital components of personal welfare in a society that stays in flux, both individually and collectively. We need connection, but we cherish and understand choice better: we *grieve* when connection is ruptured,[7] but we *fight* if choice is restricted. We acknowledge both as central to our lives. At the same time, we contest the balance between choice and its attendant connections in disputes over the meaning of liberty—the moral value of autonomy[8]—and the effect on human happiness of a simultaneous quest for the ability

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Changing Attitudes Toward Family Issues in the United States, 51 J. MARRIAGE & FAM. 873–93 (1989)). It is a commonplace that individuals advise other individuals encountering dilemmas about a marriage or other relationship to "look out for yourself."

6. The importance of connection as a baseline value is expressed by the ongoing debate over the effect on children of divorce, with one side citing evidence that the severing of a connection through divorce inflicts massive damage, no matter the details, and the other side arguing divorce has virtually no effect independent of other factors that predict personal outcomes in families. Andrew J. Cherlin, *Going to Extremes: Family Structure, Children's Well-Being, and Social Science*, 36 DEMOGRAPHY, 421–28 (1999) (assessing evidence about the effect of severed connection on children of divorce and suggesting that divorce has some harmful effect but not as much as some critics argue). The assumption of the debate is that proof of the effect of severed parental connections on children's welfare would be decisive in designing the structures of choice about the duration of marriage. On the importance of connection for children, see Popenoe, *supra* note 5, at 540 ("People today, most of all children, dearly want family in their lives. They long for that special, and hopefully life-long, social and emotional bond that family membership brings.").

7. If told to "go away," for the most part, we do.

8. Theorists on the Left and the Right doubt the moral good of autonomy. *See, e.g.*, Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1992). On the Left, autonomy is sometimes castigated as a liberal value that serves as a guardian of private hierarchies of power. I suggest here that autonomy has a power to broaden our family lives and tax our imaginations and that the force of imagination, while not always benign in its impact on those swept into the field of individual questing, is nonetheless disruptive of hierarchy. John Garvey, in his book *What Are Freedoms For?*, gives a theoretical consideration to the question of his title by setting out and evaluating the various reasons to allow people freedom to do or not do various actions. JOHN GARVEY, WHAT ARE FREEDOMS FOR? (1996). Garvey rejects the view that autonomy is a good of itself, thus making the choice to do X or not X equally valid. A full consideration of the debate concerning the priority between the good and the right is beyond the scope of this article. Nonetheless, it is worth noting that Garvey: 1) clarifies that choice and autonomy are not the same thing, in that autonomy is a moral ideal while choice, or freedom, is a legal rule, *id.* at 6; 2) argues that to treat freedom as a grant of a full range of choice based on either of three theories–the moral good of freedom, the psychological equivalence of desire, or the political necessity of state neutrality in mediating strongly differing belief systems–is a mistake; and 3) concludes that the purpose of freedom is to allow citizens to engage in actions that are valuable. *Id.* at 19. Thus, if the state is forbidden by principles of freedom to prohibit homosexual sex, it is because same-sex love can be valuable. One-night stands between any two people are not of value, and the matter of whether same-sex intimacy can be good is subject to dispute. Critically,

to choose freely and to connect reliably. While the heated cultural debate proceeds, families are formed and needs are created. The culture's high-wire act of choice counterbalanced by cultural dispute succeeds in its creativity yet fails in its incompleteness. Specifically, this liberty unleashes creative family formation, but places many of the families so imagined in the cross hairs of conflict and fails to provide a working vocabulary to identify a liberty interest in enforcement of the obligations created and severed by the ever-renewing exercise of individual choice.

In this essay, I suggest the following mismatch in the progression of the American cultural and legal treatment of the

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the operative question is the goodness of sexual contact between a committed couple of the same sex, not a belief that any sexual act is simply a matter of taste.

How does Garvey's argument comment on the view presented here about the ubiquitousness of choice in Americans' domestic arrangements, choice both in the sense of personal changes of life plan by individuals and the selection by some of nontraditional family arrangements? First, his view presumably would reject the idea that the exercise of the political liberty celebrated in our constitutional history by capricious individuals writing a script of a creative life is in itself good or worthy of admiration or respect as the deep project of a people embarked on the good of living autonomous lives. Second, his stance would consider open for debate the choice to form a nontraditional family unit, in that it may serve the same good purposes as the formation of traditional families. Third, the Garvey analysis would presumably view it as acceptable to use state power to try to restrict the use of relatively unconstrained choice after the formation of commitments. Garvey would presumably reject the idea that individuals can make commitments and still hold a continued "license" to exercise autonomy, assert desire, or follow a personal understanding of family obligation.

In contrast, in this Essay, I celebrate liberty while acknowledging its questionable uses in family life. I celebrate liberty on the empirical basis that it is a defining feature of the American way of living and a critical factor in the larger American ideal that makes America both an "experimental" and a progressive society. I respectfully doubt the notion that an inquiry into which sex acts are good can produce sound moral judgments. Variations on conventional sexual practices have a deeply nuanced connection to a spectrum of other moral issues, including hierarchy in the relations between the sexes and pschyo/biological variations in human sexuality and thus deep need. Unfortunately, decisions about other people's sex lives tend to be made without empathy. I further suggest that the extent of our constitutional celebration of the right to be eccentric is factually dispositive of the philosophical debate about the right versus the good as a guiding constitutional lodestar–in some sense we love one another as Americans, with a political history that gives us a mutual understanding of one another as characters whom we value for our immigrant and reconstituting features. Thus, it is certain that we will continue both to choose and to celebrate change wholesale even though many of us are willing to make harsh judgments retail.

I nonetheless urge the need to try to seek solutions, within a framework of liberty, to the afflictions created by careless use of personal liberty. The inability to form overarching views of the good should not disable us from creating projects to manage the effects on the need for connection, particularly of children, of our overweening liberty to form and abolish both traditional and nontraditional family units.

family: the law lags behind actual family structures. Legal frameworks tend to support choice and autonomy broadly. Thus, even if the formalized recognition of innovation proceeds slowly, the toleration of it is complete and, moreover, is consonant with the basic liberties in our legal tradition. Analysis of the framework of choice and connection is distorted on the Left and the Right. Neither offers an adequate or accurate vision for handling the empirical pattern of choice in family life and the resulting abandoned and severed family connections. For different reasons, both are resistant to a realistic recognition of the robustness and dignity of choice. The Right disapproves of any legal treatment of non-traditional choices that sees them as valid, praiseworthy, or permissible. Of course, where the basis in tradition is clear, the Right views connection as worthy of the law's concern.

The Left, variously, disapproves of traditional choices as a template for the creations of our imagination; it disapproves of parallel but nontraditional choices being accorded a status of equivalent arrangements, (fearing that the creativity imputed to nontraditional arrangements would die if channeled into the quest of the law for regularity).[9] The Left also doubts the reality of choice in gendered family life. The feminist Left fears the "patriarchal" intrusion and, ironically, the constriction of future life-enhancing choice if connections are enforced.

Furthermore, identifying a liberty interest in robust choice and then in the resulting connections is no small task. The undertaking does not lend itself to the creation of a plan in which the state generously accords respect to private imagination when relationships are created, but then imposes obligations—limits—on personal transformation once the imagination takes flight once more. Planning for the protection of the connections brought about by abundant ungoverned choice would be challenging, even without the clash between the Left and the Right. These connections have potential foes from both the Left and Right, as well as from the individual preferences—of those wishing to escape the ties their words and deeds have made. The vir-

9. In the North American gay community, overenthusiastic rhetorical efforts to seem ordinary attract scorn. For example, gay celebrities may be perceived as portraying their being gay as "not a choice" and celebrating the claims that the heterosexual majority is superior. "Rosie has not bravely come out as a lesbian—a proudly fisting, dildo-wielding, fem-loving dyke. No . . . She came out as a self-congratulatory, pious, preening, pompous mother." Sky Gilbert, *Coming Out as a Pompous Careerist*, THE EYE, Mar. 28, 2002, *at* http://www.eye.net/eye/issue/issue_03.28.02/columns/pink.html (last visited Mar. 12, 2003).

tually inescapable result is that the law undervalues connection and particularly undervalues "non-traditional" connection.

The nontraditional connections of which the vulnerable suffer the loss most keenly result from the orphan liberty interests of our law and culture. As the unmappable results of individual choice in a culture mesmerized by a quest to be authentically oneself, nontraditional connections are given little forceful articulation. As the offspring of acts of individual imagination, these connections—and the individuals whose lives become embedded in them—do not prompt the social cohesion that is required for an effective claim on the making of policy. Losses as a result of severed connection accumulate. At any given point, however, most people have not yet encountered such a loss. Others have accepted that the connection in which they believed has vaporized and was too singular to form a basis for group demands on the making of policy.

Despite, but also consistent with, the lack of a systemic vision of the family's future, as individuals we move boldly to make new family shapes and thereby confirm individualism as our article of cultural and family faith.[10] Individually, we blithely form designer families in the teeth of warnings that unregulated autonomy, which blesses idiosyncratic formations and disdains to penalize deviations from a posited family idea, will damage the interests of children and of a healthy society. While law may lag, it does not veto our experimentation. Instead, however slowly, law moves to affirm the centrality of choice, even in our domestic lives.

If law is comparatively unruffled about choice, it is deeply uneasy about connection. The law's principle of laissez-faire family formation easily allows our traditions and our pervasive advice to "follow your bliss," or, for the religious, to "learn God's will and follow it," whatever the worldly consequences. Self-regulation of intimate choices is consistent with both secular and re-

10. It has been a long time since families had their Archie Bunker, yelling at them about their inclination to choose or lecturing them about obligation. Today's patriarchs, even conservative ones, are more likely to remember with nostalgia their own youthful experimentations and to recognize the cultural fragmentation implicated in the distinctive music, clothes, and preferred websites within and between generations. Our fragmentation in taste produces worries about democracy. *See* CASS SUNSTEIN, REPUBLIC.COM (2001). But it also renders us sophisticated about the ubiquitousness of choice and, by our shrugs about one another's interests and peculiar obsessions, tolerant. Autonomy in the smallest matters of taste sets our cultural tone.

ligious approaches to discovering one's truth. No one is stopped from forming a household, which is a repository for practical arrangements and an embodiment of refuge; we are granted permission to create a private way of life. The premises of liberty underpin the self-regulation[11] of the household and the market for sexual intimacy. It is no surprise then that, when claims about connection arise, the law lacks a real strategy, or even a big idea about experimental human connection. Indeed, the stronger utopian fantasies feed on our love of libertarian empowerment, free of the tie between self-expression in choosing forms of connection and practical links with the distribution of social goods. Critics of marriage imagine it at odds with both human liberty and sound societal welfare, because it binds such concrete needs as health coverage to the vagaries of personal connection and the limiting aspects of marital commitments. Moreover, in private, we reinforce choosing over connection, telling one another to pay the price of unhappy endings for the hopes we harbor for happy new beginnings: we tell one another to kiss a thousand frogs. The ease of being laissez-faire about choosing associations and associational freedom has no match in a comparable relaxation about human connection.

What results is a hands-off policy of passively enforcing connections that have a traditional template, despite a loss of social conviction about the good enhanced. In turn, the hands-off policy ignores connections for which there is no social template to provide a convenient, if wavering, rationale. We are at sea in giving substance to the connections made in our embrace of the liberty of choosing and improvising. The implications and obligations of connection are less accessible to our cultural imagination than the opportunities of choice.

II. AUTONOMY IN THE FAMILY: COMPLEXITY, NOVELTY, ASPIRATION, AND CONFUSION

As a simple fact, autonomy practiced in small matters underlies our family formation and functioning. We claim and put to vigorous uses the liberty to choose. Multiple marriages, gay marriages, children planned with sperm banks, surrogate mothers, travel agents, and fertility experts are examples of claimed liberty in action. With proliferating choices, unstoppable under our

11. *See* Robert C. Ellickson, *The Law and Economics of the Household*, *at* http://www.yale.edu/law/leo/papers/ellickson.pdf (last visited Aug. 14, 2002).

premises of liberty and our belief in self-expression and self-realization, we develop needs for a further liberty to protect the connections our choices create. We have broadened our family lives with individual acts of imagination and choice,[12] which create new needs, for both those doing the choosing and those woven without a choice[13] into the fabric of the "new" family.

Until quite recently, the term *family* evoked an image of a nuclear family with a mother and father who were married, whose marriage carried an expectation of duration, and who together bore responsibility for the welfare of their joint biological children.[14] American's family choices and connections are no longer simple or invariant (if they ever were).[15] Durability is not a realistic expectation, and our connections are more complicated than ever. Today we are familiar with other phenomena informing the notion of family: single mothers, custodial grandparents, single fathers, surrogacy arrangements and sperm banks, civil unions and gay marriage, blended families, step families, the lesbian baby boom, stay-at-home fathers, de facto parents, the ease of divorce, and so on.[16] On a less serious level, 46 percent

12. GILL, *supra* note 5, at 33-34 (conceding that the replacement of the traditional family with a multiplicity of families is a result of millions of individual choices).

13. *See id.* at 34 (describing children as "victims" of "family breakdown," and noting their lack of choice).

14. LYNNE M. CASPER & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY, at xvi (2002) (asserting that the idealized conception was that the father worked outside the home as a family provider and the mother cared for the children in the home).

15. Indeed, in enumerating family choice for gay families "considering having children," the American Academy of Pediatrics recites as a factor in family health the existence of a series of complex choices, such as "whether to conceive or adopt a child, obtain[ ] donor sperm or arrang[e] for a surrogate mother (if conceiving)" and the choice-laden challenge of "finding an accepting adoption agency (if adopting), making legally binding arrangements regarding parental relationships, creating a substantive role for the nonbiologic or nonadoptive parent," and minimizing the effects on the family of social prejudice and legal discrimination. Joseph F. Hagan, Jr. et al., *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339-40 (2002). The deep assumption of this professional group is that not only children but also the *forms* of their arrival are chosen, and thus the dimensions of choice must be mapped with sensitivity to nuances generated by an experimental and even imaginative collective family life. The acceptance of choice as the guiding value is unexamined, despite the existence of bodies of work arguing that children should be "accepted" rather than chosen. Our secular professional institutions speak in the language of choice and do not pause to debate its merits; choice about the basic methods of family formation is a social given in a culture capable, very deeply, of self-authorship.

16. See GILL, *supra* note 5, at 13 for a similar, but plainly exasperated, enumeration of variety.

of pet owners see themselves as their pet's mother or father, throwing their pets birthday parties and wrapping gifts for them at Christmas.[17] Laughable it may seem, but the forms of our lives now involve a new sense of civilized behavior that accords dignity and recognition to connections that once seemed only utilitarian or unimportant.[18]

As the culture of the family has changed during the decades since the 1950s, so has its implicit grammar and lexicon. In the broad sense of the term as fashioned by linguist Noam Chomsky, *grammar* means a "set of rules, internalized by members of a speech community."[19] A *lexicon* means a group of words that bear some relationship as part of a system of meaning with rules that connect them in a manner that differs from a raw list in a dictionary.[20] A *mental lexicon* is "a lexicon as assumed by psycholinguists to be represented in the minds of speakers."[21] These terms are used by linguists in relatively abstract treatments of the manner in which language functions. They also have a useful role in thinking about a set of meanings that functions in systems of communication about specific features of our lives.

The loosening of role expectations and a transformation of the marriage tradition from one practiced by men and women bonded for life inform the terms we need to describe our arrangements, thus creating the beginnings of, and the overwhelming need for, in our legal culture, a new grammar of the family. The *actual* family, right along with airlines, telephone service, and California power companies, has experienced a proliferation of choice and new terminology attendant on deregulation. By

17. Rebecca Jones, *At Most Homes, It's Reigning Cats and Dogs*, ROCKY MTN. NEWS, Feb. 28, 2002, at 5A (reporting a Colorado survey); *see also* Sandra Eckstein, *Santa Paws and Santa Claws are Busy Beavers at Christmas*, SEATTLE POST-INTELLIGENCER, Dec. 24, 2001, at D2 (reporting that 53 percent of dog owners will shop for their pets at Christmas); Joan Lowell Smith, *See Spot Sit Safely in the Sedan —Concerning Animals*, STAR-LEDGER (NEWARK, N.J.), June 24, 2001, at 8 (reporting a substantial increase in harness sales for pet safety and quoting spokeswoman for pet products association as saying, "[o]ur survey shows more and more owners treat pets like true family members").

18. Cultural critics might well argue that treating animals as though they were our children encourages us to trivialize the obligations we owe children. For example, some of the very same people who love their pets as family members are nonetheless capable of treating them as disposable when life circumstances change significantly.

19. PETER MATTHEWS, THE CONCISE OXFORD DICTIONARY OF LINGUISTICS 150 (1997).

20. *Id.* at 207-08.

21. *Id.* at 222.

contrast the language, or *lexicon*, of the family has remained static and unimaginative. At the same time as our family lexicon languishes relatively unrefreshed, novel phrases describe the enriched choices we have as consumers. Ma Bell, and communications law, had to accommodate the invasion of terms like *Baby Bells*, *calling plans*, and *long distance providers*. Stores like Best Buy have areas designated for PDAs. Any shopper who does not know what a PDA is need only go to the Webopedia, which can be found in the Google search engine with a search for Dictionary of Computer Terms.[22] The combination of text-writing features with telephone and fax capacity, as well as the availability of an easy-to-locate on-line dictionary of computing terms, came about as a result of the energy and experimentation released when the monopoly of one company and thus one idea about telecommunications was legally ended. The profit motive has helped to energize contributions to a burgeoning linguistic infrastructure, embedded in the very internet that demands the documentation of a new grammar of communications technology and new forms of access to terms for our inventions.

A similar evolution of the lexicon to catch up with concomitantly evolving choices (and our inventiveness) has not happened in the law of the family. A co-parent must vindicate parental rights by using a lexicon sloppily cobbled together in order to gain an adjectival legal entree to a relationship created in the nominative universe in which parents and children find one another. The legal language is therefore still suffering a shortfall in the linguistic resources for a successful family law. State courts, for instance, have recently begun to hold that lesbian co-parents come under the aegis of the common law concept of "de facto" parents.[23] Use of the concept is a somewhat helpful maneuver,

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22. There, the consumer can learn that a PDA is:

> short for *personal digital assistant,* a handheld device that combines computing, telephone/fax, Internet and networking features. A typical PDA can function as a cellular phone, fax sender, Web browser and personal organizer. Unlike portable computers, most PDAs began as pen-based, using a stylus rather than a keyboard for input. This means that they also incorporated handwriting recognition features. Some PDAs can also react to voice input by using voice recognition technologies. PDAs of today are available in either a stylus or keyboard version.

WEBPEDIA.COM, PDA, *at* http://www.Webopedia.com/TERM/P/PDA.html (last visited Oct. 24, 2002).

23. *See* V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996).

but it fails to expand our mental lexicon because it anchors our imagination to the terms of biology. Courts draw on the term's provenance in common law to insulate lesbian co-parents from constitutional arguments, which are based on an older lexicon that conferred on bio-parents special status as primary decision-maker about children's interests in relationships with third parties outside the "nuclear" family.[24] As the monopoly on our imagination about the family disintegrates, it is reasonable to expect that terms will come into use that better capture the relationship between a woman and the child she helped to plan and whose birth she attended than *de facto parent*. These terms will be adopted when their fit with the reality they describe is readily apparent.[25]

The expectation that a biological connection is the anchor for an idea of a liberty interest in the legal protection of a connection may have a limited future, as it increasingly fails to describe a world in which some *biological* progenitors are anonymous sperm donors and numerous *social* progenitors who planned and nurtured a child are legal strangers. Indeed, the world of law and social practice now conspires to subtract from the lexicon of care and duty provided to a newborn conceived with an anonymous sperm donor. The poverty of a lexicon that only subtracts from a vocabulary of legal connections for some children, or at best relies on clumsy terms drawn from a biological grammar treated as the touchstone for family law, will be increasingly evident. Children "imagined" either as infants or later in their development as enveloped by a protective shield of adult freedom to create (although not to name) connections outside the anchor of biology are due for a new round of adult inspiration. A richer vocabulary of family life would provide them with the sense of richness and lexical grandeur that the terms *mother* and *father* have provided those fortunate children whose circumstances matched the outer boundary of our family grammar. A richer set of terms for connection avoids the imposition of loss, both psychological and material, that inheres in a grammar of family life that contains no referents for the children caught in the web of our differing intensity of commitment to connection as compared with choice.

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24. *See* Troxel v. Granville, 530 U.S. 57 *passim* (2000).

25. The limits of the term de facto parent are manifest where applied to bio-parents or to heterosexual adoptive parents.

Yet even with its limited progress, our grammar of choice has outstripped our grammar of the moral duties attendant on choice or the honor due to the connections our liberty allows us to make. We have not developed a lexicon that enables us to counsel one another or to provide a legal framework for the connections brought about by our liberty and the resulting complexity in our family life.

Refereeing our messy lives is no small task for the law.[26] As a free people ever seeking a realization of the infinite possibilities of choice and connection, we nevertheless expect aid from the law in finding the deeper meanings of our commitment to one another, to ourselves, and most especially to children. Children are the most in need of a richly imagined and empirical palette of descriptions for the variations of our family life, as well as a generous expansion of the received legal meanings of terms such as *mother* and *father*.

III. IN PRAISE OF AUTONOMY

Theorists argue that the political system should encourage a norm of autonomy as a substantive value.[27] Arguments in praise of autonomy are made at a theoretical level, typically overlooking measures of social welfare. A claim that autonomy yields goods can nonetheless serve as a responsible critique of statistical proofs of decline, or social dislocation. The use of objective measures of social dislocation to discredit choice and complexity may be challenged on three grounds. First, the absence of autonomy may not produce measurable signs of social harm, but the existence of rigid roles may create barriers both to the attainment of human goods and to the disclosure of forms of disorder that, in the norms associated with family life determined by set roles, are confined to a private realm.[28]

Second, the harm to the human aspiration of self-realization may be deep, although not susceptible to any objective measure. The aspiration of American liberty to the "pursuit of happiness"

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26. *See* Siobhan Morrissey, *The New Neighbors: Domestic Relations Law Struggles to Catch Up with Changes in Family Life*, 88 A.B.A. J. 36 (2002).

27. Stephen Gardbaum, *Liberalism, Autonomy and Moral Conflict*, 48 STAN. L. REV. 385, 396 (1996).

28. *See, e.g.*, West, *supra* note 8, at 774 (describing the progressive point of view as locating the dangers of undue power in "unjust concentrations of *private* power" that involve "hierarchic relationships of mastery and subjection, of sovereignty and subordination").

suggests an intangible goal: the attainment of human richness derived from deep forms of self-determination[29] rather than from the achievement of social ordering that minimizes personal problems created by autonomy. The pursuit of happiness calls forth an individual quest for self-determination that inspires lives, even in circumstances that may seem distasteful, mean, or even farcical.[30] Our American ideal of liberty infuses our lives and our speech, and it may inform even our seemingly self-indulgent and adolescent forms of self-expression with a certain dignity. What appears in the individual case as a flight from duty

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29. *See* NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 21 (1999) ("In France even more conclusively than in the United States, the right to put an end to an unsatisfactory union was an integral part of the revolutionary order, a legal component of the quest for individual fulfillment though a reconfiguration of the family"). Norma Basch quotes a French deputy speaking in the National Constituent Assembly: "After having made man again free and happy in public life, it remains for you to assure his liberty and happiness in private life." *Id.* at 21. The French Revolution has been distinguished from the American as having more concern with the content of rights as compared with the concern for the process of government associated with the American Revolution. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 89 n.53 (1980) (citing HANNAH ARENDT, ON REVOLUTION 147 (1963)). Yet the notion of access to the court is connected to deep-rooted claims about personal as well as political autonomy and firmly situated in a cultural affinity for the right to end interference of all types with personal identity. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the U.S. Supreme Court held that filing fees could not constitutionally prevent a person from access to courts for purposes of having a marriage dissolved. *Id.* at 383. The Court specifically suggested that the state's monopoly on marriage dissolutions meant that being excluded from court was equivalent to exclusion from the only forum empowered to settle their disputes. *Id.* at 376. The dispute in question involved a claim to a private pursuit of happiness that was hampered by an indissoluble, state-mediated identity. *Id.* at 372. For a contemporary evocation of the private pursuit of human richness in need of the aid of state recognition of personal transition, in the context of gender ambiguity, see LESLIE FEINBERG, TRANSLIBERATION: BEYOND PINK OR BLUE 6 (1998), which states that:

> the defense of each individual's right to control their own body, and to explore the path of self-expression, enhances your own freedom to discover more about yourself and your potentialities. This movement will give you more room to breathe—to be yourself. To discover on a deeper level what it means to be your self.

The movement of transgendered people demands that the state create categories of gender and provide for the legal recognition of choices that liberate individuals from an identity mediated by the state. In practical effect, they demand access to a forum that will provide the mechanism for the enforcement of legal rights implicated by a changed, and changeable, identity, with a vocabulary sufficiently large to treat their claims to "liberty and happiness in private life" as comprehensible and legitimate.

30. *See infra* text accompanying notes 52-59 (describing Justice Antonin Scalia's treatment of a bi-coastal and adulterous woman's fluid family life as intended to sound farcical).

may serve as well as a hymn to our collective hopes to realize a transcendent destiny in which we find unity.[31]

Third, attempts to roll back the norm of choice would impose an unacceptable cost to our system of liberty.[32] People who make choices are often irritating, irresponsible, and loud. By contrast, those who, in the name of order, impose their will on others are fearsome. The social cost of turning away from our societal embrace of choice is prohibitively high—to individual lives and to the norm of liberty.[33]

Finally, social scientists emphasize that the period when the Ozzie and Harriet family flourished was a time when choice was not preeminent. The economy was healthy, but it discriminated against women.[34] Many men could command wages that would support a family, but few women could.[35] Women decided to marry and have sizeable families, because they had no choice. This theory suggests that the choices being made today are not what some critics would call "bad choices." They are instead the expression of an autonomy allowed to flower because the structure of the economy and the embrace of a norm of legal equality for women caused a loosening of a social grip on women's choices. The present ability of single women to support themselves makes marriage a chosen institution in a much deeper sense than were the idealized marriages of the 1950's. We did not change in our basic psychology by becoming fractious choosers. Rather, the environment allowed our citizens to gradually amass, one free choice at a time, a statistical portrait of choosers, drawn to connections but wary of dependency or

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31. *See* RALPH WALDO EMERSON, NATURE, ADDRESSES, AND LECTURES 43 (1983) ("When I behold a rich landscape, it is less to my purpose to recite correctly the order and superposition of the strata, than to know why all thought of multitude is lost in a tranquil sense of unity."); *see also id.* at 43-44 ("In a cabinet of natural history, we become sensible of a certain occult recognition and sympathy in regard to the most unwieldy and eccentric forms of beast, fish, and insect.").

32. Even the social critic and sometime Presidential candidate Patrick Buchanan has acknowledged as much in his recent book. PATRICK J. BUCHANAN, THE DEATH OF THE WEST: HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION (2002).

33. *See* Richard A. Posner, *The Moral Minority*, N.Y. TIMES, Dec. 19, 1999, § 7, at 14 ("Unless we want to go the way of Iran, we shall not be able to return to the era of premarital chastity, low divorce, stay-at-home moms, pornography-free media and the closeting of homosexuals and adulterers . . . .") (reviewing GERTRUDE HIMMELFARB, ONE NATION, TWO CULTURES: A SEARCHING EXAMINATION OF AMERICAN SOCIETY IN THE AFTERMATH OF OUR CULTURAL REVOLUTION (1999)).

34. *See* CASPER & BIANCHI, *supra* note 14, at xvi.

35. *Id.*

mandatory bonds. That environment of choice, and underlying structures that support the election to make a connection with a continuing array of choices, may well move us to alter the statistical portrait again, with connections created and maintained exclusively through the exercise of choice. Various unattractive features of the way we exercise choice are undeniable, but the fact of choice is as well. Choice imagined as autonomy is one of the blessings of liberty.

Particularly in view of our changeable ways, it is impossible to hold fast to an orderly view of the affective life or the exercise of liberty by Americans. Our hodgepodge of choices, fetishes, and creeds, high and low, illustrate the personal paradoxes that liberty helps to foster, and that we embrace with gusto. Some feminists who value autonomy, gay proponents of the family as a path to social acceptance and personal fulfillment,[36] and men who want to claim rights to a relationship with their children after divorce or as stay-at-home fathers—all insist that proliferating choices enrich lives and allow people to thrive within a framework of respect for individuality. The loosening of gender roles is explicitly linked to aspirational goals of the American system of political freedoms.

Our political freedoms, in turn, have an inarguable link to the individual projects of self-determination that have proliferated in American society in the last 40 years. Laying claim to norms of self-determination, feminists claim the right to be independent and argue that being alone is better than participating in a traditional marriage. The claim veers between distaste for tradition—itself oppressive—and personally based narratives suggesting that men do not make acceptable partners for an egalitarian union. In some cases, anti-marriage feminists later get married—to a male. Gay men and lesbians lay claim to the right to self-definition, some claiming the right to be exuberantly different and others the ultimate right of self-definition—the right to be average, indeed to be conservative.[37] And some men

36. BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY (1994).

37. Dale Carpenter states:

> For anyone who thinks gays should stand irredeemably apart from society—either because we ought to be outcasts or because we ought to be revolutionaries—the past decade must have been a frustrating one. The political causes that most defined our movement in the 1990s sought to weave gays into the larger fabric of American life. We fought to be Boy Scouts, to join the military, to worship God and

lay claim the right to be nurturing fathers—even stay-at-home dads who use the time to teach their sons to play football and their daughters to bake cookies. Our constitutional tradition of choice will increasingly demand a jurisprudence that avoids scorn[38] and aspires to aid rather than disdain our experimental family culture.

If nothing else, Americans seize the right to be contradictory, defeating without thought the hopes of pundits for orderly roles. Occasionally, well known gay activists lay the claim to fall in love with one another across gender lines—that is, gay men fall for gay women, the two of them run off and get married, and the gay community fumes. At the same time, "ex-Gays," who have announced their conversion to heterosexuality, are spotted frequenting gay bars. In general, the culture claims the right to make sharp turns, from "hip" to "square," and most likely back again.[39]

Indeed, the new practices and ways of relating to one another (and to other creatures) place front-and-center insistence on choice and the quest for connection. The two C's—choice and connection—are values that are both at odds and reinforcing. Choice may simultaneously undermine and demand connection. For example, parents divorce, choosing to end a connection of critical importance to vulnerable offspring. The law strives to maintain the connection that choice damages. Shared parenting, often preferred by statutes,[40] holds a parental unit together in

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> preach His word, to raise children, and yes, even to marry each other. We wanted to be a part of these traditional institutions, not apart from them. We wanted a place at the table.

Dale Carpenter, *A Book That Made a Difference*, INDEP. GAY FORUM, *at* http://www.indegayforum.org/articles/carpenter12.html (last visited June 19, 2003) (reviewing BAWER, *supra* note 36).

38. *See infra* text accompanying note 42.

39. Michael Kelly states:

> Can we be square again? We were last square half a century ago. Then, we were, more or less successively, hep, hip, cool, wild, beat, alienated, mod, groovy, radical, turned on, dropped out, camp, self-actualizing, meaningful, punk, greedy, ironic, Clintonian, and, finally, postmodern, which is to say exhausted—and who can blame us? In all these states we were, first and above all, not-square . . . . Now we are supposed to be square again.

Michael Kelly, Comment, *Getting Hip to Squareness: We Want Our Virginity Back*, ATLANTIC MONTHLY, Feb. 2002, at 20 (suggesting a cultural state of square values like courage, bravery, strength, and honesty can be attainable, "especially if we got to wear fedoras again").

40. *See* FLA. STAT. ANN. § 61.21 (West Supp. 2002); IOWA CODE ANN. § 598.1 (West 2001); KAN. STAT. ANN. § 60-1625 (Supp. 2001).

division. Gay people choose to make connections to one another that complicate their other connections—to their "families of origin," a novel but necessary term in our self-descriptions, and to civic life. Gay people increasingly ask the law for aid in maintaining connections—to children born into gay relationships and to their life partner in sickness and if death severs their life together. When parents are absent, either from choice or inability to cope, and relatives choose to provide a home, the children's connection to a stable home becomes contingent, vulnerable to renewed choices, or the life reversals of those substituting for the parent. Further complicating our connections is the extent to which personal taste, rather than community ties, affects our choices of mates and reduces the support for connection when strains arise. Many or even most choose mates as a personal matter, departing often from the ties of race,[41] religion, region, and class that have helped to anchor them to their families of origin. Renewed choice may seem a solution preferable to deepened connection. We are wedded to choice and show no sign of turning back to allowing our intimate lives to be set by predetermined plans arising from cultural needs or traditions.

Indeed, a record of our cultural and historic attachment to choice is found in the efforts throughout the history of the justices of the Supreme Court, even those regarded as both jurisprudentially and culturally conservative, to fashion nuanced and even poetic statements about the extent to which we equate choice in constructing our families with our traditions of liberty. Justices have rhetorically elevated the norm of choice in family life: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[42] In the context of freedom of expression, Justice

41. *See* Xuanning Fu et al., *Marital Happiness and Inter-racial Marriage: A Study in a Multi-ethnic Community in Hawaii*, 32 J. COMP. FAM. STUDS. 47, 60 (2001) (citing various social science studies and generalizing to a rapid increase in interracial marriages over the past three decades, from 310,000 to more than 1.1 million and proportionate increase from 0.7 percent of all marriages in 1970 to over 2.2 percent in the mid-1990's).

42. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (citing Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923)); *see also* Zablocki v. Redhail, 434 U.S. 378 (1978) (Stewart, J., concurring) (preferring a norm of choice to a fundamental right to marry); Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma *ex rel.*Williamson, 316 U.S. 535, 541 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). The attachment to choice is not confined to the United States. *See, e.g*, Tom Hundley, *Italians Take Pope to Task*

Harlan wrote a hymn to choice, particularized to a right to be vulgar and annoying. In holding there was a First Amendment right to wear clothing imprinted with the slogan, "Fuck the draft," Justice Harlan advanced the idea that "individual dignity and choice" requires placing in "our hands" the decision about what viewpoints to express, despite immediate effects of "tumult, discord, and even offensive utterance."[43] Linking "our fundamental societal values" to the right to be distasteful in our exercise of a privilege, the patrician Harlan stood strong for the deep significance to our "broader enduring values" of "one man's vulgarity."[44] Interestingly, he emphasized that there is "no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[45] While Justice Harlan was writing in the context of efforts to suppress the use of language to express a point of view, the principle resonates in the affirmative right to a public vocabulary of our actual family life, not cleansed to be palatable to the most squeamish among us, but conducive to providing meaningful access to the problem-solving resources of courts.

IV. THE LIMITS OF THE LEFT AND RIGHT CRITIQUES OF CHOICE

Choice is a central ideological feature of our culture, measured by what we do, what we advise another, and, what our judges say about our right to be different. As a result, the criticism of both the Left and the Right of our family lives is enfeebled. The basic cultural concerns, predilections, and projects of the Right and the Left drain their criticism of vitality. The Right is unwilling to acknowledge nontraditional connection for fear of undermining the tradition it seeks to bolster. The Left is simply afraid of connection as confining for the individual, particularly for women and children. Thus, the choice to build families around affectional ties between persons of the same sex receives less support than choice's predominance in our lives and in our constitutional tradition might lead us to expect.

Over Divorce, CHI. TRIB., Jan. 30, 2002, at 3 (describing the negative reaction in Italy to the Pope's suggestion to divorce lawyers that they "avoid personal involvement in what could be seen as cooperation with divorce" and citing a poll showing disagreement by 87.5 percent of those interviewed with the views of the Pope urging lawyers to abstain from handling divorce cases).

43. Cohen v. California, 403 U.S. 15, 24 (1971).

44. *Id.* at 25.

45. *Id.*

The same-sex family with children precipitates concerns about connection—from the conservatives' distaste for nontraditional families, arising from a view that connection cannot thrive in gay families, and from Left-leaning critics of the family as a private domain that tames the sexual drive and subjects children to forms of connection that oppress them. The extent of our experimentation, its range, and its unapologetic character unsettles conservatives and leads them to reject the claims to connection that arise from the messy set of facts presented by our way of life. While the concern for the potentially chaotic implications of our indulgence in what may seem either fanciful notions or moral laxness is understandable and worth our sober attention, there does not appear to be a conservative strategy for vindicating the values of connection in a society dominated by choice. In our family life enriched by the creativity allowed by choice, impoverished by the severed bonds imposed by choice, and confused by the sharp individual turns and large scale changes of a free society, the conservative point of view may be due for an adjustment that takes account of the implications for the core conservative principles of responsibility, accountability, and respect for others.

Likewise, the dreams of the Left to sever the link between sexual ties and the familial basis for distributing social goods, and to realign family life toward a truly communal regulation of the child and away from the domain of private choice, should be adjusted to recognize that the source of change in the family is the inventiveness of individuals striving to imagine and create new forms in which both adults and children may flourish. For both the Right and the Left, there is work to be done in the family. The strength of the American practice of individual choice makes a varied family the only outlet for the Left's hopes for welfare in an egalitarian society and the Right's only venue for reinforcing responsibility.

Both the Left and Right are critical of what we do, both individually and in our family law, and have aspirations for family life that causes them to be, respectively, unsentimental about choice and unenthusiastic about the connections created. The Left devalues autonomy for fear it only preserves tradition, and the Right devalues autonomy because it defeats tradition. Both the Left and Right fail to see how values they care about lose out if choice rules as a cultural force, untamed by claims of connection, and dishonored in polemics, while cherished in practice.

Critics on the Left—who critique autonomy as a shield for privately enforced hierarchy—should consider that autonomy is also a force for the unleashing of imagination and thus for the disruption of socially supported hierarchies. A society liberated from unfair private power is more likely to arise from individual experiment disciplined by a law striving to give substance to connection than from a large-scale decision to reconfigure family formation and family regulation in an idealized format. Children who learn that adult promises are worthless are unlikely to form the nucleus of a non-hierarchical, peaceful community. Reluctance to enforce connection may produce adults with an impoverished sense of social obligations.

Critics on the Right attribute the negative features of devolution of control over family forms to individual experimentation, in forms of irresponsibility and adult self-indulgence, but are blocked by the premises of liberty when they seek to impose social remedies. Indeed, conservative critics of the overvaluing of autonomy frequently concede the impossibility of disavowing the choices Americans have made or of freezing the social fluidity that energizes choice. The Right should allow its imagination to enter the forbidden zone of nontraditional connections so as to offer support for the moral claims created in the exercise of choice that is concededly a fact of our common life.

The aspiration of the Left to greater regulation of the family designed to disrupt hierarchy and sex inequality and of the Right to restrict legal recognition of nontraditional choices, subsidize traditional marriage, and discourage the severing of connection is unrealistic. Realism, as well as an appropriate legal sensitivity to basic needs as manifested in our culture, is found in a law that flexibly adapts to respond to the forms that our choices about intimate connections make.[46] Both the Left and the Right

46. Martha Fineman has argued that a choice to be a care-taker "occurs within the constraints of social conditions" and thus should not be seen as a manifestation of autonomy but rather as a decision that is funneled into prescribed channels and which benefits the entire society by addressing the universal human condition of dependency. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 18-19 (1999). While the form of her argument is to suggest choice is not real where care-taking is implicated and the form of her solution is to suggest a regulatory regime that would help to shape societal institutions, her argument has a degree of compatibility with the one here, in that she argues for recognition of the individual and collective obligations created by a "choice" to be a care-taker. *Id.* Despite her view that care-taking is not an autonomous choice and thus her jaundiced view of choice as a conceptual peg for analyzing the exchange involved, the assumption is

should strive to find tactics, compromises, and principles with which to overcome the policy stalemate created by a robust autonomy, which both scorn with ineffective critiques that provide little support for connection. Otherwise, the culture and the resulting family law will produce, at best, legal paralysis where family law makes only incremental change in a world that races ahead of tradition, embracing experiment with fervor and velocity. Cultural conservatives primarily lament the changes in the family,[47] and invariably resist the halting effort to build a renewed lexicon of choice and connection. The Right seeks support for its project of reversing the individual choices that have been building a new concept of family by citing statistics that point to signs of decline. Conservative thinkers cite evidence that social problems have proliferated as the old rules have given way.[48] Social science figures indicate stresses, such as greater poverty in families headed by females, social disorder created by crime and drug use, and a high rate of births among teenagers. A society with fractured gender roles and patterns of deprivation seemingly activated by unpredictable patterns of family formation may seem problematic when contrasted with a society with a stable and consistent social structure organizing family life around traditional gender roles, strong male control over young males, and high measures of family welfare. Indeed, many of our individual experiments can seem disheartening and even cruel in their effect on children.[49] Not all that we see, when we judge one

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nonetheless intact that a weak form of choice—unregulated apportionment of care-taking on the basis of consent within the existing framework that attributes consent to those who do care-taking in a family or a workplace—will allocate care-taking responsibilities from which certain connections and obligations arise. Fineman advocates a legal regime that recognizes the moral value of such pressured choices to provide care. In contrast to the approach here, she assigns the value *a priori* to a particular choice and argues for a broad approach giving it honor and compensation; but like the approach here, the choice is described very generally (though linked to an expectation that females will make the pressured choice) and associated with a view that obligations worthy of social enforcement result. Thus, the choice is not free but noble and thus valued post hoc. In this essay, choices are free and greatly varied in their moral content but valued as an expression of liberty. In both cases, the choices are seen as inevitable. Here, choice as a political value is idealized and the empirical form of choice potentially denigrated. In Fineman's article, choice as a political value is denigrated and the empirical form choice takes idealized.

47. *See* HIMMELFARB, *supra* note 33.

48. *See, e.g.*, JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES (2002); Popenoe, *supra* note 5.

49. *See, e.g.*, Andrew Hacker, *How are Women Doing?* N.Y. REV. BOOKS, Apr. 11, 2002, at 63. ("[A] number of . . . sources suggest that many adults are setting young lives in motion without much thought about being dependable parents . . . .

another, however, can enable us to make sweeping rules for human conduct. Only as individuals may we play Jane Austen, refining our moral sensibilities with our gathering observations of others' lives and hopefully amassing a better and more generous basis for our advice to one another about our experimentation. Nostalgia is appealing[50] and families as we once experienced them normatively were admirable. But the conservative view of family life based on evidence of bad social outcomes does not dislodge the imprint which liberty has placed on our family life.

V. ECCENTRICITY VERSUS TRADITION IN OUR CONSTITUTIONAL TRADITION

Constitutional jurisprudence celebrates our right of self-expression, a hardy American tradition that informs our literature and helps us to remember our most cherished characters.[51] The Supreme Court has added veneration for eccentricity to our constitutional commitments. This eccentricity is one manifestation of our robust embrace of choice. In celebrating our liberty to choose, the justices have had, however, little occasion to address whether there is a liberty interest in the nontraditional connections that result from these choices. The case of *Michael H. v. Gerald D.*[52] presented such an opportunity and revealed that the *grammar of choice* that makes difference a concern of the Court as the protector of our liberties was easier to master than a new *grammar of the family*, in which the connections created by choice ask for protection under the mantle of liberty.

[O]nly 60.4 percent of the nation's youngsters are living with the two people who created them.").

50. Large families headed by sweet men and strong women kept the movies well supplied with attractive characters and moving stories of family connections. In CHEAPER BY THE DOZEN (20th Century Fox 1950), Father called the twelve children into the living room to rebuke, by their cheerful presence, the family planning lady who came calling. The idea of a choice in family size, encouraged by a meddling female crusader for family planning, was laughed off the screen. *Cheaper by the Dozen* was reviewed by *The New York Times* as a "blissfully comforting display of the authority which a strongminded papa has over 12 respectful kids." Wolfgang Saxon, *Frank Gilbreth Jr., Author of "Cheaper by the Dozen,"* N.Y. TIMES, Feb. 20, 2001, at B8. Note that *Cheaper by the Dozen* featured actor Clifton Webb as "the rather eccentric father." *Id.*

51. For a book celebrating the American veneration for eccentricity, see DAVID ISAY & HARVEY WANG, HOLDING ON: DREAMERS, VISIONARIES, ECCENTRICS, AND OTHER AMERICAN HEROES (1996) (celebrating eccentrics, visionaries, dreamers, and believers).

52. 491 U.S. 110 (1989).

The case raised the question of the constitutionality of a California law that conclusively presumed the child of a woman living with her husband to be the child of the marriage. Neighbor, Michael H., fathered a child, Victoria, with Carole D. At various times, the mother lived alternately with her husband, Gerald, with Michael H., and with someone named Scott K. Although the husband, Gerald, was listed on the birth certificate as the father of Victoria and was held out as the father during her first three years and later, the mother also held out Michael at certain times as the father. Eventually, Carole D. chose the traditional family unit and apparently cut off contact between Michael H. and Victoria. Michael sought both to establish paternity and a right of visitation. Acting through a court-appointed attorney and guardian *ad litem*, Victoria filed court papers asserting that she had "more than one psychological father or de facto father . . . ."[53]

Speaking for the Court, Justice Scalia expressed the view that the need for connection and liberty could only be vindicated if one connection—that of a natural father to the child born into a marriage to which he was not a party—were severed. He suggested that the liberty of one required that the liberty of another, as a constitutional value, not be recognized.[54] Justice Scalia anchored his opinion and his language in tradition, according recognition only to the written record of the common law. In so doing, Justice Scalia drew a trench between our common cultural life and the function of law, backed by constitutional values, to facilitate our transactions with one another. He acknowledged that due process protects our fundamental liberties.[55] Nonetheless, he cut off access by judges to knowledge of those liberties we create in our continuing experiments in liberty—our quest for choice and connection.

Justice Scalia noted that Michael was at this stage merely seeking visitation, but if paternity were awarded, the right to seek custody would follow.[56] That possibility—dual fatherhood with two men contending for custody of one child—appeared en-

53. *Id.* at 114.

54. *Id.* at 118 ("California law, like nature itself, makes no provision for dual fatherhood.").

55. *Id.* at 141.

56. *Id.* at 113-118. On the theory that Michael could seek visitation even without being recognized as the father, Justice John Paul Stevens voted to deny relief and thus hold the California statute constitutional. *Id.* at 133-34.

tirely unsupportable to Justice Scalia.[57] The implicit grammar of the family, in Justice Scalia's treatment, renders contests, however wrenching to all concerned, between married heterosexual parents comprising a proven biological mother and a presumed biological father natural, or traditional anyway; contests between a (factually biological and psychological) father and a legally-presumed father, however, are unnatural and even incomprehensible. In effect, Justice Scalia's *mental lexicon* of the family is fixed upon a set of terms related to one another by the overlap of biology and an understanding of tradition. Biology dictates that your mother's male sexual partner is your father, and the lexicon of family dictates that her husband is her sexual partner and your father.

Regarding the parties' manifestations of choice as vacillation and whim, Justice Scalia scorned Victoria's constitutional claims for giving substance to the connection side of her parents' liberties. He described the facts of the family life of the "international model," the French oil company executive, and the "adulterous" neighbor in terms suggesting farce.

In his dissent, Justice Brennan celebrated American eccentricity, writing of the need to protect "our own idiosyncrasies," and, to Justice Scalia's great disdain, spoke of the "freedom not to conform."[58] Justice Brennan expressed the belief that both choice and connection could be served in the jurisprudence of the Court and in the practices of the family.[59] He accorded the dignity of the term *family* to the choices of the non-marital parents to live together in a common household and for the "adulterous" Michael to function as a father to their child in their some-time household.

The Court has more than once paired a reverence for the right to be eccentric with solicitude for the family. Chief Justice Burger, not ordinarily an avatar of eccentricity, celebrated that American lodestar in *Wisconsin v. Yoder*.[60] In *Yoder*, the Amish

57. It is not unknown, however, for two parents to lay claim to custody of a child and thereby to create the psychological harms to the child and to the parent that attend the introduction of uncertainty about their bond. Biology, in the classic understanding of the family, always subjects children to the potentially contending force of dual parents and thus to such stalemates and standoffs as the equal rights of mother and father can produce.

58. *Id.* at 141.

59. In a judicial version of a stage whisper, Justice Scalia expressed his hope that this family was "extraordinary."

60. 406 U.S. 205 (1972)(Burger, C.J.).

asserted a liberty interest, partly drawn from the Free Exercise Clause but also drawing on a more general liberty interest of parents to control the upbringing of their children, in having their children exempted from compulsory schooling through age fourteen and fifteen.[61] In granting their claim, Burger was eloquent regarding the American respect for odd ways of life: "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." Chief Justice Burger was speaking in a context of arrangements with a deep effect on children.[62]

The Court has also addressed family choices that assimilate children to a distinctive way of life, using terms of our propensity to respect the eccentric. In granting the claim of Jehovah's Witness children that they could not be compelled to salute the flag as a condition of attending public school, Justice Jackson named eccentricity as one of our protected values: "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."[63] Like Chief Justice Burger, Justice Jackson defended the eccentricity that inheres in the choices of parents to exercise their family beliefs in rearing their children. In these cases, connection was not an issue: parents chose odd or different ways of life and sought to enable their children to share in them without being coerced by the state to do otherwise. The Court protected the right of the whole family to be separate from the rest of the world, with the family's internal connection intact and unopposed.

Now, the constitutional lodestar of our protection for eccentricity demands a jurisprudence and a legislative evolution that enables newly-imagined families to build connections that are workable and durable, whatever the forms their choices may take. The instinct our judges have expressed to protect "different" families from outside pressures to conform should be broadened to protect the members of novel families from the centrifugal effect on connection that can be created by the novelty of their form.

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61. *Id.* at 406 (further arguing that "[e]ven [the Amish] idiosyncratic separateness exemplifies the diversity we profess to admire and encourage") .

62. Although the subject directed some attention to a separatist religion, the family as a refuge from standard patterns was the true topic.

63. W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943).

VI. SEEKING A PUBLIC GRAMMAR FOR AN EXPERIMENTAL FAMILY LIFE

The effect of American expression—of the always vital expressiveness in our culture and our lives—confounds any effort to catalogue the vocabulary, or lexicon, by which we conduct our lives. Furthermore, the effect taxes the resources of our public bodies to refresh the official language by linking it to the vitality of the language and lives we fashion for ourselves. While the official bodies that mediate our lives cannot infuse their texts and proceedings with our slang,[64] neither can they effectively meet the needs of a people in the always dynamic process of self-creation by mandating a vocabulary linked to pre-determined roles around which continuing experiments, inconsistencies, and new forms emerge. Our public lexicon will serve us if it facilitates the affirmative process of substantive autonomous discourse around our intimate choices. It will harm us if it tries to suppress public recognition of our forms of self-assessment and change. Indeed, the more our public lexicon edits out the renewed language that conveys changed patterns of living, the more it drives cultures underground, pushing them to resort to slangy interpretations of their alienation and superiority to the "certitudes" of public language.[65]

A grammar to express the multiplicity of American family life would enhance the law's ability to foster connection by allowing participants to perceive what is actually at stake and articulate their claims.[66] This need is particularly keen in nontraditional connections where children have been conscripted into a world utterly unsupported by a lexicon of obligation, an absence which makes their claims to connection imperceptible to

64. Slang is associated with subcultures, or even "undercultures" and can be thought of as transitory. Examples of groups that have produced slang include hoboes, gypsies, soldiers and sailors, police, drug users, gamblers, and cowboys. *See* AMERICAN SLANG, at xi (Robert L. Chapman ed., 2d ed. 1998). One function of slang is to differentiate oneself from the mainstream culture. *Id.* at xiii. The subculture validates itself with slang and assures conversant members that they are "different from, in conflict with, and superior to the main culture." *Id.* Slang in its pure form, then, cannot reasonably be expected to receive respect from the dominant culture, since its purpose is to disrespect "its assured rectitude and its pomp." *Id.*

65. *Id.* at xiii-xiv ("[S]lang is language that has little to do with the main aim of language, the connection of sounds with ideas in order to communicate ideas, but is rather an attitude, a feeling, and an act. Slang is the most nonlinguistic sort of language.").

66. I owe this formulation to a discussion with Daphne O'Regan, adjunct professor at Michigan State University-Detroit College of Law.

those who should enforce them and care about them. Particularly for children, choice as the only workable premise of our liberty without a counterbalancing vocabulary of connection, may well be a curse.

A. *Grammar of Family Life in Transition*

The grammar of our family lives is in transition, along with many basic assumptions about gender. Our mental lexicon about family is not what it was. Once, we had a television show that announced, "Father Knows Best." The title of the show was instantly comprehensible. It was a part of a lexicon of family life in which fathers functioned as presumptive authorities.[67] Some fathers called their wives *the wife*, or *the ball and chain*, or *the little woman*. These phrases still exist, but hearing them has become increasingly rare.

Now, the word *Father* provides only a hint of the lexical environs. He might be a *custodial parent* or a *non-custodial concerned parent* involved in the Fathers' Rights movement or a *deadbeat Dad*. He may be one of two men who have formed a family and adopted children. He may be the subject of a television advertisement about children who have no one with whom to play catch. Or, he may be the subject of a restraining order. We have families with two Fathers—*co-Dads*—and other families with two Mothers. Fortune 500 companies treat them as families, awarding them the benefits provided to workers and their families. We have *families of affinity*, a phrase that would leave Father as we once knew him frowning with puzzlement.

The *New York Public Library Desk Reference* offers without editorial comment four organizations under Single-Parent Families, itself listed under Daily Life. The first listed is America's Society of Separated and Divorced Men and the last is Single Mothers by Choice.[68] There are eleven Hot Lines and Information Services. Three relate to consumer safety. Two relate to family violence and one to drugs. One is for gay/lesbian youth, one for runaways, and one for parents who have kidnapped their children. The last two relate to forms of victimization.[69] Such a

67. Perhaps the phrase had a little bit of fun in it. Sure, Father Knows Best. Right. We might laugh a little, but we instantly knew whom we were talking about. The husband of a homemaker, with whom he fathered two or three children. A man who came home from work and asserted a claim to moral authority.

68. THE NEW YORK PUBLIC LIBRARY, THE NEW YORK PUBLIC LIBRARY DESK REFERENCE 674 (3d ed. 1998).

69. *Id.* at 675.

compilation of voluntary associations and salient forms of need reveals the working concerns of our domestic lives—the needs for connection associated with autonomy.

In the 1950's, the public lexicon appeared suited to the relative simplicity of our family lives (particularly if the invisibility of illegitimate children and gay people can be overlooked in idealizing the certitudes of the past). Women learned how to be wives, and men learned how to be husbands. The law understood our lives to be based on husbands as providers and wives as homemakers. Women who wanted to be independent were discouraged by a whole set of usages that situated them as dependent—women could be told they could not be borrowers, could not provide for a dependent spouse through government pensions, were not preferred if a man was available as administrator of an estate, and had to have their husband's permission for operations that would affect their reproductive capacity. Women who applied for jobs were quizzed about their family lives, their plans for children, and their husband's wishes. People who were gay, for purposes of any public lexicon, let alone that of family life, did not exist. *Perennial bachelors* and *old maids* were the phrases that explained the unmarried.

When the law that governed our lives began to change, as courts introduced intermediate scrutiny to challenge sex-based classifications that confined us to gender-based roles,[70] our lexicon necessarily changed, too. Women, married and single, routinely became *Borrowers*. Calling a grown woman a *girl* receded; a business law case that rejected the idea that a receptionist could be a partner and in the course of giving the facts called her a *girl*[71] became an archive of an older lexicon, a museum of a usage that may still be heard in private, but that is no longer acceptable in formal public language. After stout resistance, *Ms.* became a ubiquitous way of referring to women—a highly significant cultural concession that women had a persona that could be communicated independent of their marital status. Large numbers of women began to retain their names upon marriage rather than adopt the name of their husbands. The old reference to women who stayed at home evolved from *homemaker* or *housewife* to *stay-at-home Mom*, which subconsciously recognized that women's choices to be at home with their children had more to do

70. *See* United States v. Virginia, 518 U.S. 515 (1996); Craig v. Boren, 429 U.S. 190 (1976).

71. Fenwick v. Unemployment Comp. Comm'n, 44 A.2d 172 (N.J. 1945).

with a values-shaped choice about parenting than with a standard family arrangement or assigned gender roles. Stay-at-home Moms had counterparts in *stay-at-home Dads*. Some mothers were *Betty Crockers*, an iconic term with new layers of irony, fashion, and retro experiment. Others were *soccer moms*, buzzing by the soccer field in breaks from even faster paced lives as road warriors, keeping in touch with their little loved ones from airports, hotels, and conference rooms. Women lawyers began to place the term *Esquire* after their names, despite the origin of the term in knightly usage. There were many marriages with two esquires in the household. There were also new ways of giving children two parents—households with two adults of the same sex provided *co-parents* or two mothers or two Dads for children rather than Mother and Father. The terms mother and father took on qualifiers—*birth mother* or *bio-Dad*. Families came to be described as *families of affinity* as well as *families of biology*.

Public references to people attracted to persons of the same sex began gradually to change. The medicalized term *homosexual* gradually gave way to *gay*, *lesbian* and *bisexual*. In the gay press the term, *GBLT*, meaning gay, lesbian, bisexual, or transgendered, came into use. The word *partner* surfaced as a common reference to the intimate partner of a person of the same sex as his or her partner. Indeed (at least in California), some straight couples call their boy/girlfriend or spouse *partner* partly as a way of avoiding reference to sexual status. It has become sometimes puzzling to divine whether Bob's partner is his coventurer, his spouse, his girlfriend, or his boyfriend. It seems fair to conclude that the *grammar* and the *lexicon* of family life underwent a sea change, including references to children of unmarried mothers.[72]

Without our noticing, our grammars of basic life evolve in ways that alter the manner in which meaning is created and our lives shaped. The mental lexicon from which we fashion descriptions of the observed world and with which we then deploy the descriptions to make coherent statements undergoes changes that substantially revise the lexical rules. The fact that we speak casts in a dubious light the conventions of jurisprudence that call

72. "'Illegitimacy' is a word hardly heard nowadays, and 'bastardy' not at all. Even 'out of wedlock' is being joined by 'nonmarital' as if to suggest that having children within or outside marriage is an equally acceptable option." Andrew Hacker, *How are Women Doing?* N.Y. REV. BOOKS, Apr. 11, 2002, at 63, 64.

for resort to tradition to locate our judicially enforceable rights.[73] If the language we speak to describe ourselves is a new language, seeking guidance from a language about a former people is not merely a doomed quest; it is no quest at all. Paradoxically, we draw inspiration from a history as a free and experimental people and from a language infused with the spirit of experiment and autonomy, but we also necessarily view our forebears as a strange people, with a strange language, that is only of help when we provide analogues to the language of our renewed and renewing common life. Judicial obtuseness, accompanied by a protestation of incomprehension or amused superiority on reviewing the stories of the experimenters among us,[74] depletes our legacy of freedom and blocks access to needed resolutions for the stresses on connection that our experimental ways bring about.

B. *The Loneliness of the Indivisible Child*

Our eccentric culture produces affectingly American efforts to improvise a set of usages to correspond to the reality that language and law mis-describes. Much of it relates to adult improvisations to assign dignity to their own relationships.[75] We try to reverse social resistance, but the effort to rescue our adult arrangements from disrespect does not sufficiently confront the structure of thought that devalues connections. The manner in

73. *See* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990).

74. *See* Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).

75. The effort to delegitimize the official disauthorization of same-sex marriages creates not just a shadow family vocabulary created by such families, but an effort to construct a set of legal references that mirror the legal evolution of doctrines that delegitimized racial distinctions in family life formation and recognition. A website devoted to advancing the cause of "civil unions" in New Jersey features a prominent display and definition of the proposed word, *miscidemgenation*: "mis-sid&m-j&-'nA-sh&n n (fr Latin miscere-to mix + idem-same + genus-gender;sex) (2001, G. DeCarlo): of or relating to legal union between same-sex or -gender as in civil marriage or civil union." CIVIL UNION, DEFINITION OF MISCIDEMGENATION, *at* http://www.geocities.com/njcivilunion/index.html#definition (last modified May 5, 2002). The term evokes by its sound the word *miscegenation*, a word that describes racial intermarriage, but has as its main lexical association the now solid social consensus to reject laws prohibiting it. Thus, miscidemgenation is a linguistic effort to leapfrog the process of cultural change and infuse a current practice that suffers legal suppression with the sound of a historical disavowal of legal rejection of marriages stigmatized by their classification with a weighty label. The stigma terminology comes pre-shrunk, anticipating its own deligitimation as stigma and its impending re-designation as a cultural relic, self-stigmatizing and obsolete. The term stands for its own disavowal. As such, it illustrates the aspect of play implicated in our experimental way of personal life, in which we create words disapproving our choices but designed to self-destruct.

which the imagination fails is not related merely to a resistance to nontraditional families, but to a sense that a child is in some sense *indivisible*, except by the nature-decreed phenomenon of joint parentage by biological parents.[76] The Solomon parable exemplifies the instinct to make a child indivisible, illustrating the impossibility of sharing a claim to parentage by legal strangers. The instinct reflects nothing of human nobility, but rather of greed and acquisitiveness directed at a human child. The implications of such emotions are displayed in custody disputes arising from dissolved "legal" marriages between men and women, in which children are torn emotionally and damaged developmentally by fierce battles between adults: battles in which children are stranded for the duration of their childhood despite the efforts of courts. Our mental lexicon affirms the rightness of the claims that support such battles, but tellingly we devise few words to broaden and humanize claims of any other adult/child connection. Adults, who control formal language, work hardest to find terms for their choices and underimagine the connections children are given.[77] *Open adoption* is a relatively rare case of an improvised term to broaden connection for children, but perhaps it first serves adults by allowing choices to be made with room for change.

The fulcrum of judicial resistance, where it exists, to recognizing joint adoptions is the word *marriage*. Only *marriage* can explain to some judges the possibility of shared parentage over an indivisible child. Thus, there may be an emerging effort to bar co-parent adoptions on the ground that statutes known as "defense of marriage acts" express disfavor of non-traditional families,[78] such as those created by co-parent adoptions.[79] In the

76. Indeed Justice Scalia makes the view explicit. "California law, like nature itself, makes no provision for dual fatherhood." *Michael H.*, 491 U.S. at 118 (mocking the idea that a biological father should be recognized despite the presumption of California law that a child is the biological issue of an existing heterosexual marriage).

77. See Jennifer L. Saulina, *Notice, Are We Protecting the Wrong Rights?*, 99 MICH. L. REV. 1455, 1464 (2001) (arguing that children's plight is seen as subordinate to the rights of their parents and that "children's rights are ignored (or just not conceptualized)" by the legal academy); *id.* at 1468 (characterizing "lack of interest, political drive, and intellectual curiosity" as pervasive in law dealing with children).

78. *See In re* Adoption of R.B.F. & R.C.F., 762 A.2d 739 (Pa. Super. Ct. 2000) (holding that the "step-parent exception" allowing the spouse of a legal parent to adopt a child without terminating the legal parent's rights cannot be used in light of the passage of the state "Defense of Marriage Act" [hereinafter DOMA]); *In re*

usual case, an adoption, unless one by a legal spouse, must be preceded by the termination of parental rights. The idea of a child who will benefit from parenthood by two adults not tied in a legal bond of traditional heterosexual marriage challenges our law's imagination. Bias against same-sex families and a canon of construction deferring to the legislature for expansion of the terms that anchor statutes in past meanings also explain judicial reluctance to fashion solutions to the linguistic gap in adoption statutes. The poverty of the language in providing an adequate lexicon for the couple who plan a child together as co-parents—one biological and one a parent by choice and responsibility—causes some judges to pause before the power of the term "marriage" as a lexical glue for the adoption statutes and enables others to preempt linguistic space with an expansive application of a definition of marriage by state defense of marriage acts. In these instances, language is used to efface practical needs—the needs of children for legal security and economic protection, continuity in bonds, and daily reassurance about the commitment of adults to their emotional and physical nurturance. The ease of expanding the content of the word *family* in everyday usage and even in some legal decisions provides little assistance to our imagination when we think about the legal claim to custody of, or even parentage of, a minor, especially when opponents of family change attempt to limit the terms by which we assign legal connections to children.

Public language takes on a function of control rather than communication or expression; it becomes a closed system, in which a lexicon resists revision even if it refers to a decreasing proportion of the reality it purports to mediate. Thus, the state first defines marriage to restrict growth in its meaning. The purpose is initially said to be a lexical defense of the word itself; the claim is that allowing others to share in the term devalues it. Then, the definition of the word becomes the cornerstone of a lexical system that displaces all other terms used as building blocks in the construction of alternative families. The marriage of adults, now disposable, begins to occupy the entire lexical space that might be more helpfully structured by reference to the

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Adoption of C.C.G. & Z.C.G., 762 A.2d 724 (Pa. Super. Ct. 2000) (same). Both of these cases refer to the state's Adoption Act, not the DOMA.

79. Co-parent adoptions are adoptions by two people of the same sex, often where one person is already legally the parent of the child subject to the adoption proceeding.

speech that families actually employ to describe themselves. Now disposable, *marriage*'s predominance in circumscribing the lexical space of the family collides with the reality of families' self-descriptions and betrays the needs of children for a lexicon of *their* families.

VII. CONCLUSION

Social tolerance for and even encouragement of *two mommies* or *co-Dads*, or *families of affinity*, has collided with a set of rules in which legal marriage and the traditions of earlier family life foreclose a sympathetic concern for the way that our rich choices complicate our connections. This collision splits family law from family life. It creates a world in which the nontraditional connections created by choice and imposed on children find little support. Family law confronts social facts created by choices imagined large in a world of bold experiments and then reduced to the limited understanding of self-centered adults seeking escape in the gap between our choices and the law's plan for connection. Judges must deal with the consequences of births created by legal arrangements, formal or informal, between sperm donors and atomistic females. When the egg and the sperm meet without the surroundings of a mother and father conventionally embodied in their own skin and in pre-set gender roles, the court faces considerable work in re-embodying them in a socially comprehensible context for the resolution of their later legal issues, disputes, and routine requests.

In order to give a linguistic framework to the children of our modern selves, the courts need a language enriched by an organic growth tied to substantive choice-making. The courts do not need a language impoverished by the dictates of abstract perfectionism and pinched line-drawing. The wounds that fatherless children and even adopted children suffer are in part linguistic, because the language tells them they have no access to the rich world in which connections that matter are spoken. These are psychic wounds inflicted by the common failure of adults to describe the many shapes and textures that contemporary family life brings to our children in their origins, their family type, and their significant adults. Children suffer and are sacrificed to adult convenience in a culture in which a passion for choice, combined with a reluctance to support and build a grammar and lexicon for connection, leave numerous voids and needless losses in the emotional lives of children.

In addition, the children, who have made no choices, have a right to expect a public language that frames and embodies their lives in a manner that allows them to assign a legal, official meaning to their connections. These connections should form their enculturation into a political compact that provides social order in place of the brute will of persons in a state of nature unmediated by law. If children are born into families that do not have the features of *marriage* as defined in state codes, in certain respects they encounter a pre-legal world, made unusually harsh by being cast into a legal lexical void mandated by law. The Supreme Court established the principle that children may not be defined outside the norms of law and its protections.[80] In effect, the Court cast into obsolescence the lexicon—that of *bastardy*—that effaced some of human life; and, by applying equal protection principles, forced a new lexicon that incorporated once *bastard* children into a more general lexicon of the family. They became in a full sense *sons* and *daughters—children.*[81] In the years after the court disapproved the effects of a *mental lexicon* that called some children *bastards*, the word itself faded from our *public lexicon* and lost its place in our thoughts. The effects of linguistic effacement were lifted even as the Court retained an ability to look at cases of discrimination between non-marital children on a case-by-case basis,[82] in which a search for the social reality behind biology would guide the Court.

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80. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (declaring a law barring all non-marital children from suing for a mother's death unconstitutional); *see also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). *Weber* states:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relation to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parents.

Id. at 175. The U.S. Supreme Court announced a standard of scrutiny of intermediate review for classifications based on illegitimacy in *Clark v. Jeter*, 486 U.S. 456 (1988). For a brief treatment of the constitutional status of illegitimacy as a discriminatory classification, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW; PRINCIPLES AND POLICIES 685 (2001).

81. The existence of parents—anchored to heterosexuality and biology and thus to a lexicon attached to traditional marriage—created the lexical corollary of children and the legal vocabulary that goes with them, such as heir, dependent, and so on.

82. CHEMERINSKY, *supra* note 80, at 749.

Children created by new family forms need a similar expansion of the meaning of the term *parent*. Such expansion will fill out the legal lexicon of their lives so that, as sons and daughters, they may count upon the term *parent* to function for them. The child may count on their parents to remain legally *parents*. The Supreme Court has demonstrated that the lexicon for family can be expanded even when the forms that variety takes cannot be mapped beforehand.[83]

Choosing to change the family with new forms of combination and independence calls for a law capable of strengthening connections and recognizing endings, with always due regard for the interests of children in the context of the families given to them by the tide of human history and the choices of adults.[84] As our choices and changes wash through our lives, the cost of our individual abandonments of various arrangements that in retrospect were personal experiments should not be taxed to our children's meager holdings of personal connections and memories of family innovations. Children should not be left holding uncollectible promises of dignitary value in the novel family formations we give them. We should find the means to stick to the imaginative family worlds we inscribe on our children. The state, *in loco parentis*, owes a special duty to the children whose care has always been in part a function of the law, to support them in maintaining the family structures in which they must learn to flourish.

The family looks to the law to facilitate both choice and connection within a framework of liberty[85] and ever present change. Nostalgia about the law and language of family life can take the form of using a restrictive definition of basic family terms buttressed by a restrictive meaning for *marriage*. Nostalgia can anchor family law to the practices of a prior era, serving family and liberty poorly. The norms of choice and responsibility would

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83. *Id.* at 687.

84. Legalizing second-parent adoptions is in the best interest of children because it guarantees the same rights and protections to homosexual families that are routinely accorded to heterosexual parents and their children. Hagan et al., *supra* note 15.

85. *See* BASCH, *supra* note 29, at 21, 25 (referring to "the striking convergence of revolution and divorce in the last quarter of the eighteenth century" and describing independence as a symbolic prototype for divorce) (citing LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 10, 84 (1980), concerning the perceived symbolic connection in the eighteenth century between divorce and independence).

also fare poorly if the law of family life should not adjust to be responsive to the evolving domestic plans of the American people. Our American tradition demands that the sovereign make laws for the regulation of our lives in accord with personal liberty.[86] Our founding document equates tyranny with the refusal to assent to laws necessary for the public good—rhetoric penned by Thomas Jefferson and arguably connected to British refusal to provide for divorce in the colonies.[87] Notably, the example recited in this Essay's first paragraph is a contemporary echo of the refusal to permit law to mediate the ending to a connection: a Connecticut court of appeals in fact did refuse to hear a petition to dissolve a Vermont civil union, because civil unions neither exist in nor are recognized by the state of Connecticut.[88]

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86. The justices of the era of substantive economic due process captured the spirit of our deepest feelings about liberty as well as any expositors of the American spirit have:

> The 'liberty' mentioned in the [Fourteenth Amendment] means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways.

Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (Peckham, J.) (elaborating on freedom of contract as a critical form of liberty). The *Lochner* era justices located the spirit of liberty in the shape given to a life by a calling and by property, a location that may seem less inspiring today than it did to the justices celebrating that idea of liberty. They were, nonetheless, eloquent expositors of the continuing American insistence that the state regulate to enhance liberty and not to reduce it without the best of reasons.

87. *See* BASCH, *supra* note 29, at 22.

88. *See* Rosengarten v. Downes, No. 22253, 2002 WL 1644548 (Conn. App. Ct. July 30, 2002); *see also* Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002) (refusing to require Georgia to treat a civil union as the equivalent of marriage for purposes of enforcing a child visitation agreement). A contrary judicial disposition has surfaced in a family court in Texas, which accepted the parties' mutual request to recognize the Vermont civil union under the Full Faith and Credit Clause of the United States Constitution and then to grant a divorce. *See In re* Marriage of R.S. & J.A., No. F-185,063 (Tex. Dist. Ct. 2003). According to Professor Lynn Wardle, the judge was "asleep in his conflicts-of-law class" if the full-faith-and-credit argument persuaded him. Molly McConough, *Court OKs Divorce Without Recognizing 'Marriage': Gay Couple's Civil Union, Created in Vermont, Is Dissolved in Texas*, A.B.A.J. E-REPORT, Mar. 21, 2003, *at* http://www.abanet.org/journal/ereport/m21divorce.htm (last visited Mar. 21, 2003). The Texas Attorney General, who lacks authority over local courts, has nonetheless intervened to ask that the court reverse its decision. A spokesman for the Attorney General commented: "They [the couple] had no legal obligations to each other under Texas law, whether they remained together or split up." Patricia Wen, *Reversal Sought on Gay Couple's Divorce: Texas Case Eyes Vt. Civil Union*, BOSTON GLOBE, Mar. 28, 2003, *available at* http://www.boston.com/dailyglobe2/087/metro/Reversal_sought_on_gay_couple_s_divorce+.shtml (last visited Mar. 29, 2003).

The refusal of states outside Vermont to adjudicate petitions for dissolution of Vermont civil unions is doubly ironic: the refusal of Connecticut's court to accord the dignity of a legal dissolution provides serendipitous support to the bounder's view of creative or novel adult connections. Even though made in collaboration with state officialdom and community witnesses, the bounder believes at heart that novel promises lack the substance granted by state enforceability. In Connecticut's view, Vermont has aided the parties to create a vaporous tie, purportedly legal but vanished in the void of Connecticut law on civil unions. Moreover, where the law associated with civil unions develops and receives enforcement, Connecticut's refusal could damage the interests of children in their legal bonds with their parents and their parent's civil union partners. The court that refuses to adjudicate a legal tie created by the imagination of the adult participants and the Vermont judiciary asserts its total failure of official empathy and imagination and encourages a social escape route for those who scant the meaningful moral significance of connections held out to co-participants, dependents, and the community. A willingness by the state to preside over and memorialize the severing of a connection certifies the respect for its collateral effects on the community, including those vulnerable and dependent in both a moral and legal sense on declarations by adults of affectional and legal ties.

In this Essay, I have identified elements in our cultural and legal structure that restrict connection and impoverish its possibilities. Our devotion to liberty gives us a family life of untold variety. We must seek a means to address connection with a passion we usually reserve for choice, and support nontraditional bonds with the respect accorded traditional ones. The evolution of our attitudes about our most intimate connections has given all of us, but most especially children, a stake in a deepened legal imagination about family life. If the law fails to match chosen family arrangements to ideas about connection, it casts children into a void formed by a failure of legal imagination and empathy.[89] Many children will be caught between the uncontained imagination of parents conjuring a beautiful picture of creativity, connection, and autonomy, and the cramped imagination of the law, deaf and blind to those bold, pretty stories told to the chil-

89. Hagan et al., *supra* note 15, at 339-40 (concluding that, "Children deserve to know that their relationships with both of their parents are stable and legally recognized.")

dren.[90] A hobbled legal grammar of family life takes a toll on everyone, producing restrictive judicial holdings that impose concrete harms on children and many of their allies.[91] Our law should be capacious, fit to govern a people for whom experimentation and change are a given, indeed a defining characteristic,[92] to protect those for whom the choices of adults shape their world while placing connection at risk, and to affirm the moral seriousness of promises to children and those who try to keep their promises. Otherwise, children are left in the world of legal terms and moral expectations designed for a vanished standard family[93] while adults continue to claim their liberty of imagination, building castles of insubstantial words unconnected to the antiquarian legal premises that really govern children's prospects for connection.

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90. Cristina Nehring captures the family disorder brought about by Romantic writers of the nineteenth century, who disdained convention. "As Percy Shelley followed his high-minded bliss, corpses fell left and right." Nehring, *supra* note 1, at 64. Mary Shelley's hope for her son, after Percy's death, was for him to "think like other people." *Id.* Nehring concludes that "rigid adherence to ideal freedoms is as cruel as rigid adherence to stupid laws." *Id.* The combination of a widespread culture of personal "adherence to ideal freedoms" with public commitment to "stupid laws" as the touchstone of enforceable obligations is perhaps the most predictably cruel set of operating premises for those rendered vulnerable by the personal practices of freedom. Richard Gill poses the question of America's future in the hands of a generation "brought up in a state of personal and social disorganization often approaching actual chaos." GILL, *supra* note 5, at 1. The concern is valid, but the matter of whether there is a social capacity to bring the order implicated by respect for connection to our experimental family enterprise is given scant attention. Given the extent of Gill's acknowledgment of the built-in commitment to choice and its rich profusion, the surrender to disorder if ideal order cannot be restored seems like abdication.

91. Ellen C. Perrin et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341-44 (2002) (asserting that children living with divorced lesbian mothers have better outcomes when their fathers and other important adults accept their mother's lesbian identity).

92. *See* Michael Schaffer, *Stayin' Alive: How a Wonderfully Strange Decade Still Informs the National Psyche*, U.S. NEWS & WORLD REPORT, July 2, 2001, at 14, 14-20 (extolling the decade of the 1970's for progress and innovation, including the collapse of the old family order, and the turn to new social freedoms and away from state-dominated economics).

93. Richard Gill captures the conclusion of family "conservationists" who write off the possibilities of connection in nontraditional families: Seizing upon the Carter White House's substitution of the plural "families" for the prior "family," Gill asks: "Is the family already doomed? Are we already committed to those multiple, all-inclusive families, which are certain to survive since they have no real content and say nothing whatever about the ultimate relationships of wives and husbands and, perhaps especially, about the substance of the parent-child nexus?" GILL, *supra* note 5, at 32.