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Searching the Legacy of the Reformation for Lutheran Responses to Modern Family Law

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Abstract

This article builds upon historical work on changes in the law of marriage, divorce and the family after the Reformation, and describes how modern Lutheran theology, formed during the Reformation, evaluates modern trends in American family law. From the key Lutheran theological insight that God is creatively ordering human activity as a partner with human beings, the Lutheran tradition approaches issues such as no-fault divorce and same-sex marriage with both trust and challenge.

Keywords

Lutheran, Reformation, Catholicism, Family law, Marriage, Divorce

Disciplines

Family Law | Religion Law

SEARCHING THE LEGACY OF THE REFORMATION FOR LUTHERAN RESPONSES
TO MODERN FAMILY LAW

*Marie A. Failing**

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INTRODUCTION

The Lutheran tradition offers a distinct witness to American lawmakers as they attempt to respond to changing social mores about marriage, family structure, and divorce. Because Lutherans respect both the state and the family as critical creative orderings of God,¹ Lutherans can effectively engage the state about the ways in which family law can support or damage family structures and support or retard human flourishing.

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¹ Lutherans describe this concept variously as the orders of creation, orders of preservation, and Creator’s Ordainings (Edward Schroeder’s term). See Ed Schroeder, *Homosexuality and Reformation Theology*, CROSSINGS, <https://www.crossings.org/homosexuality-and-reformation-theology/> (last visited Feb. 10, 2019).

Building heavily on the Reformation history of John Witte, Jr., this Article will briefly trace the trajectory of the law of the family, most particularly, the law of marriage and divorce from the Reformation and consider its application to modern concerns.²

Recent American family law jurisprudence has produced a spectrum of views about the nature of the legal family and standards that should govern it. On one end of this spectrum, some scholars argue for a return to a family law that reinforces the legal privileging of the nuclear family of husband, wife, and children, citing natural law or the essential nature of the human community of marriage as based on gender differentiation to explain why this is the most effective family form.³ On the other end of the spectrum, some family law scholars argue that the mother-child or caretaker-dependent relationship is the core relationship around which family law should be built, while other relationships should be relegated to governance by religious or cultural communities or managed by spousal contracts.⁴

Many have also noted, some with dismay, contemporary trends in western nations to uncouple marriage from our concept of the family, though it is important to understand that this is not a novel moment in history or a cultural innovation. Legal historian Mary Ann Glendon reminds us that while family formation and marriage preceded modern legal institutions, “marriage,

² See generally JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION (1st ed. 1997). Admittedly, this story is necessarily oversimplified, because each state’s family law has its own idiosyncrasies, developed as legislatures and courts have responded to stories of family conflict and injustice.

³ One of the most interesting examples of an argument for traditional marriage is made by Lynn D. Wardle. See Lynn D. Wardle, *The Boundaries of Belonging: Allegiance, Purpose, and the Definition of Marriage*, 25 BYU J. PUB. L. 287, 287–88 (2011). In his article, he argues that given the deep human need for belonging, and the necessity of boundaries to confine human community to a form that meets that need, particularly the community of marriage, the protection and privileging of traditional heterosexual marriage is necessary to protect the valuing of humans’ opportunity to experience such belonging. *Id.* at 288–91.

⁴ See MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 134–38 (2004) (concluding that marriage should be abolished as a legal category and its prerequisites and privileges transferred to the caretaker-dependent relationship).

. . . in the sense of a highly individualized heterosexual relation, is said to be barely visible in some of the simplest human societies, and in others it is viewed as irrelevant to family formation.”⁵

I. THE CATHOLIC MODEL OF MARRIAGE

Indeed, the western law of marriage and divorce has been constantly changing from its first stirrings. Professor Witte has traced three major historical moments in the Western Christian history of marriage law.⁶ Witte describes the first movement toward the Catholic model of marriage, which came to flower in the mid-12th century.⁷ The Catholic model stresses the natural, contractual, and sacramental dimensions of marriage. As a “natural association,” Catholic theologians explained, marriage was “created by God to enable man and woman to ‘be fruitful and multiply’ and to raise children in the service and love of God.”⁸ In this dimension, marriage also served as a remedy for lust and a channel for natural passions. In the second contractual dimension of marriage, the marital parties created “a contractual unit, formed by the mutual consent of the parties” who thereby agreed to “a lifelong relation of love, service, and devotion to each other.”⁹ Third, Catholics held that marriage was a sacrament, symbolizing the “eternal union between Christ and His church,” and bestowing “sanctifying grace to the couple, the church, and the community.”¹⁰

II. REFORMATION MODELS OF MARRIAGE

The 16th century, the Reformation era, provided the second important movement in Christendom in the development of family law. Witte traces

⁵ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 5 (1989).

⁶ WITTE, *supra* note 2, at 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3–4.

¹⁰ *Id.* at 4.

three streams of marriage law that the Reformation gave rise to, streams which all rejected the sacramental understanding of marriage and the preference for celibacy over marriage but developed distinctive theologies to understand the nature of marriage and the way in which law should be shaped as a result.¹¹ Calvinists understood marriage as a sacred covenant of the couple's consent, ordained by God to be a lifelong union; God was a party to the agreement, and in some sense, so were the couple's family, witnesses, pastor, and magistrate.¹² Anglicans analogized marriage to a political commonwealth, holding "that it served and symbolized the common good of the couple, the children, the church, and the state all at once," thus metaphorically rationalizing the headship of the husband over the wife and parents over children.¹³ Lutherans developed their own "social model of marriage," on which this brief Article is focused.¹⁴

Finally, Witte describes an Enlightenment model that developed between the 18th and late 20th centuries, which was based on a "voluntary bargain struck between two parties who wanted to come together into an intimate association."¹⁵ This contractual approach imposed few social constraints or implications on the parties other than those governing other

¹¹ *See generally id.*

¹² *Id.* at 7. In the covenantal model, the marriage ceremony was an agreement between the spouses, God as a third-party witness, the couple's parents as "God's lieutenants for children" and "two witnesses, as God's priests to their peers." *Id.* Both the minister, who blessed and admonished the couple; and the magistrate, who registered and protected the marriage, also were "parties" to this marriage. *Id.* Calvinist theory suggested that there were two tracks of moral norms, one for persons of all faiths and none, to be enforced by the state; and a "higher morality of aspiration demanded of believers in order to reflect their faith," to be taught by the church. *Id.* Witte argues that Calvinists took the Lutheran social model and added a spiritual dimension to earthly marriage, one that permitted only innocent spouses to dissolve the covenant. *Id.* at 7–8.

¹³ *Id.* at 9. Although Anglicans embraced the covenantal aspect of marriage, the essential calling of the family was to foster love, service and security, and teach the entire commonwealth essential Christian norms. *Id.* at 8–9.

¹⁴ *Id.* at 5–6.

¹⁵ *Id.* at 10.

contractual endeavors, e.g., “respect for the life, liberty and property interests of other parties, and compliance with general standards of health, safety and welfare in the community.”¹⁶

III. THE LUTHERAN SOCIAL ESTATE

The Lutheran “social estate” of marriage law, developed between 1523 and 1559 in Germany,¹⁷ is familiar to American Lutherans. As one of several of God’s creative orderings, and following two-kingdoms theology, marriage is not a sacrament, though for Luther, the church has an important role in blessing, instructing, and supporting the family.¹⁸ Rather, the law of the family, including marriage and divorce, is a matter for state officials to construct to serve social values and human dignity for Christians and non-Christians alike.¹⁹

Witte notes that this Lutheran social model had a significant impact on the law of marriage and divorce.²⁰ In terms of entrance into marriage, the Reformers eliminated many sacramentally-based restrictions imposed by the Catholic Church. Catholic prohibitions against priests and nuns marrying others, and remarriage after divorce, are well known. However, at the time of the Reformation, Catholic doctrine also restricted many other marriages because of its sacramental nature. It prohibited marriages between a godparent and godchild, blood relatives to the fourth degree, Christians and non-Christians, persons related loosely by adoption, murderers and sexual criminals, and marriages of those who did public penance for mortal sins, all constraints that the Reformation narrowed or abandoned.²¹ Reformers continued to prohibit bigamy and polygamy, and permitted annulments

¹⁶ *Id.*

¹⁷ *Id.* at 55.

¹⁸ *Id.* at 51, 53.

¹⁹ *Id.* at 5–6.

²⁰ *Id.* at 64–65.

²¹ *Id.*

because of physical impediments such as impotence or the lack of real consent by one party in cases of coercion, fraud, or even a mistake about one spouse's virginity.²²

The Reformers also loosened sacramentally based Catholic restrictions on divorce. Reformers saw divorce, as instituted by Moses and Christ, as “a result of sin and a remedy against greater sin” and understood that over time, God had revealed new proper grounds for divorce.²³ Because the Protestants believed that the law of marriage and divorce was not divinely pronounced but humanly constructed according to the best human reason, post-Reformation family laws reflected widely disparate views about appropriate grounds for divorce. A few Reformers favored legal divorce only for adultery, while others permitted it for additional grounds; among them willful desertion, refusal to have sex, impotence, incompatibility, threats of death, deception, one spouse's felonies, defamation of or conspiracies against spouses, and even “frequenting of ‘public games’ or places of ill repute.”²⁴ Though Luther found himself among the more conservative in these discussions, even he acknowledged that marital brokenness and irreconcilable separation could be grounds for divorce, once noting that:

Certain queer, stubborn, and obstinate people, who have no capacity for toleration and are not suited for married life at all, should be permitted to get a divorce. Since people are as evil as they are, any other way of governing is impossible. Frequently, something must be tolerated, even though it is not a good thing to do, to prevent something even worse from happening.²⁵

While the Reformers did not shy away from acknowledging pedagogical

²² *Id.* at 62–63.

²³ *Id.* at 68.

²⁴ *Id.* at 68–69.

²⁵ *Id.* at 67 (quoting JAROSLAV PELIKAN AND HELMUT T. LEHMAN, trans., 21 LUTHER'S WORKS 94 (1955–86)).

functions of marriage,²⁶ Reformation marriage law focused on the role of marriage as a public institution, like the Church and the state. Consistent with that vision, Lutherans laid uncommon stress on the public nature of marriage formation. They particularly pressed the importance of young people seeking their parents' help in finding a spouse and their approval of a marriage, the desirability of having witnesses to attest to the marriage, and the need to memorialize the marriage before the entire community through a public registry.²⁷ As a public institution governed by secular public norms, marriage law imposed community responsibilities for the welfare of the couple and the family and, conversely, family responsibilities for the community. One of those responsibilities of married couples and their families, which society often does not think about as an aspect of modern marriage, was the family's calling to "take in and care for wayfarers, widows, and destitute persons" who were formerly cared for by the Church.²⁸

IV. MODERN TRANSFORMATIONS OF MARRIAGE LAW

While Witte, Glendon, and others have traced the dynamism of family law over these medieval and early modern centuries, the transformation of family law has not stopped in our time, even though modern American law still bears distinct traces of these Reformation changes. First, in the U.S. and modern western societies, marriage is considered a social institution

²⁶ For the Reformers, marriage served the theological function of revealing his sins to the sinner, including lust. WITTE, *supra* note 2, at 5. They also taught "the virtues of love, patient cooperation and altruism" to marital partners, and "Christian values, morals and mores" to children and others. *Id.* at 5, 49, 52.

²⁷ To be sure, Catholic tradition had been moving in this more public direction, albeit slowly. Prof. Glendon notes that the Church's position until the 16th century was that the consent of the parties alone constituted a valid marriage. Though priestly blessings on marriage were recorded as early as the second century, the custom of exchanging marriage vows before the church door only arose during the Middle Ages, then later a public ceremony was prescribed but not enforced. Finally, with the Council of Trent (1653), the Church required the marriage ceremony to be before a priest for the marriage to be valid. GLENDON, *supra* note 5, at 25.

²⁸ WITTE, *supra* note 2, at 49.

governed by the state for practical social ends. Given that marriage plays a vital role in organizing and sustaining social life, core Reformation legal impediments to marriage remain much the same. The law of most American states still voids, or makes voidable, bigamy and polygamy, incestuous marriages, or those among couples within a prescribed degree of consanguinity, marriages of young children, and marriages contracted by those without the capacity to consent or through fraud or duress.²⁹ Some states still require tests for diseases like syphilis or AIDS, though they are not usually absolute bars to marriage or grounds for annulment as they were in Reformation days, but rather used to inform marriage partners of what diseases the couple may carry.³⁰

Second, 20th and 21st century marriage laws have largely adopted the practices that reinforce the view that marriage is a social institution, requiring parents to consent to the marriage of older minors, solemnization of the marriage by a state-approved clergyman or public official, official witnesses to the marriage, and public permission and affirmation of a marriage through requirements of a marriage license and registration.³¹ The American law of divorce has also recognized the public character of

²⁹ Most American states have a range of ages at which marriage is absolutely prohibited, permitted with the approval of a parent, and permitted without anyone's consent (which is normally age 18). See IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* (5th ed., 2010). States also employ a range of family relationships which prohibit the parties from marrying. For example, the Uniform Marriage and Divorce Act, promulgated by the American Law Institute, prohibits ancestor-descendant, sibling, and uncle or aunt and niece/nephew marriages (except where tribal custom permits). J. THOMAS OLDHAM, *FAMILY LAW: UNIFORM LAWS AFFECTING THE FAMILY* 540 (2012). Bigamous and polygamous marriages are also prohibited in the Uniform Act. *Id.*

³⁰ DOUGLAS J. ABRAMS, ET AL., *CONTEMPORARY FAMILY LAW* 167 (3d ed. 2012); see also ELLMAN, *supra* note 29, at 122 (noting that most states require a physical examination which may be for venereal disease, tuberculosis, rubella, sickle cell anemia, and mental incompetence, and most recently, some states required AIDS testing). In some states, the results of some of these tests can be bars to marriage but not all.

³¹ Model Marriage and Divorce Act, OLDHAM, *supra* note 29, at 540–42 (describing formalities of marriage license, marriage certificate, solemnization and registration).

marriage.³² Until the 1960s, divorce was limited to those who could prove certain grounds to the satisfaction of judges required to issue formal orders of divorce as they do today.³³ Originally, statutory grounds included adultery, desertion, and sometimes physical cruelty. In the early 20th century, many states expanded that list to include grounds such as mental cruelty, drug addiction, or alcoholism.³⁴

Until recent decades, there were also families in the shadows of the law; families not formed by a legal marriage of a man and woman. They included children out of wedlock and their parents; men and women who lived together without marrying; and gay and lesbian couples whose relationship could not be admitted socially, much less receive legal protection from the state. Indeed, an infinite variety of family forms—grandparents raising their grandchildren, adult children living with their parents, unmarried sisters and brothers living together, and single parents who moved their families in together to save money—were not legally recognized or protected as families. Gradually, the law developed or used existing legal forms to provide some protection for these non-marital families. For example, non-parental relatives taking in children or disabled adults could obtain legal guardianships and gay and lesbian couples could use powers of attorney or wills to create rights similar to those that spouses have. However, these work-arounds were often complicated, time-consuming, and expensive to put in place.

Except for a handful of American states that have held on to common

³² WITTE, *supra* note 2, at 211.

³³ *Id.*

³⁴ *See id.* at 209 (noting that the Uniform Marriage and Divorce Act eliminated impediments such as inebriation, sterility, frigidity and incapacity, while making marriage voidable if parties could not contract due to alcohol or drugs, disability, or duress or fraud); ELLMAN, *supra* note 29, at 259 (noting state-by-state variation in fault-based grounds from adultery and desertion to physical and mental cruelty).

law marriage since its heyday in the late 19th century, adults in these non-marital families were, for the most part, beholden to each other legally, no matter how many years they had functioned as a de facto family. Until the last few decades, even explicit agreements made by unmarried couples to support each other or share assets were often unenforceable because these relationships were considered “meretricious,” i.e., linking money to sexual intercourse.³⁵ In rare cases, the courts would step in if one partner had taken financial advantage of the other through provably fraudulent promises of property or support that induced the other person to give up (usually) her life prospects to provide care or services for that partner.³⁶ Otherwise, those who lived as if they were families without marriage, loving and caring for others in their household, but generally had no legal protection if the party with income or assets chose to abandon them or died without a will naming their partner as beneficiary.

For most of the 20th century, states had mechanisms for protecting non-marital children, but they were tedious, clumsy, and often disrespectful to families. Just an example, the paternity cases I handled as a Legal Aid lawyer in the late 1970s and early 1980s required a mother to file a lawsuit against the father of the child. Then she had to prove by credible testimony or a relatively unsophisticated blood test that the defendant was the child’s father.³⁷ If the blood test was not conclusive, as it often was not, women would have to undergo a barrage of demeaning cross-examination questions from the father’s attorney designed to show that the mother was sleeping around and could have become pregnant by any number of men.

³⁵ See JOSEPH WILLIAM SINGER, PROPERTY 411 (3d ed. 2009) (discussing *Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989)).

³⁶ *Id.* at 413.

³⁷ The HLA test, the predecessor to today’s DNA testing, was expensive, and thus, not widely available. See generally *How DNA Testing Has Changed*, DNA DIAGNOSTICS CENTER (Sep. 2019), <https://dnacenter.com/blog/dna-testing-changed/>.

Women who needed to receive welfare for their children could not avoid this punishing experience because the federal government gave them no choice. Aid to Families with Dependent Children benefits were conditioned on the mother's cooperation in establishing paternity and support so the state could ensure that child support was flowing to reimburse the state for welfare benefits. Only if the mother could prove some serious harm to herself or her child was she exempt from this duty of cooperation, even if she did not think it would be in her child's or her best interest to maintain contact, since visitation rights almost always accompanied a paternity determination. Even worse, actual child support orders were measly, resting on outdated notions of the cost of supporting a child. Even when court support orders were entered on behalf of children, non-marital fathers found any number of ways to evade paying them, some even quitting their jobs to spite their former lovers or moving to another state out of the reach of the law.

True to its ever-evolving nature, over the past 30 or 40 years, family law in the United States has been undergoing even more transformation. When I was a Legal Services attorney, American family law had just settled into no-fault divorce as the norm, which itself was considered a sea-change for marriage. No-fault divorce became popular in part because one party to a marriage could exit without having to prove the other guilty of serious wrongdoing, such as adultery or physical cruelty, a process that made divorces difficult and encouraged courts to create artifices to permit warring couples to divorce.³⁸ No-fault divorce also put an end to collusive divorces in which both spouses who wanted out of the marriage would jointly manufacture evidence giving rise to grounds for divorce. As an example, in New York, women could be "hired out" to be the supposed "other woman"

³⁸ See generally ABRAMS, *supra* note 30, at 425 (noting that no-fault divorce was swiftly adopted in the decade after 1969 because fault-based divorce had become known, because of its "prying, perjury and collusion, as corrupt and inhumane").

in a fraudulent adultery. A few staged racy photos later, the colluding husband and wife could receive permission from the state to end their marriage.³⁹ With the advent of no-fault divorce, feminists and others rejoiced that they could leave marriages where their husbands were emotionally and physically abusive, spendthrifts, or neglected their families, but not quite enough to justify the limited fault grounds provided by the state. The combination of no-fault divorce and constitutionally protected access to contraceptives and abortion after *Roe v. Wade* gave American women more choices about both their financial circumstances and their personal happiness.

A second major consequence of no-fault divorce, however, was not so liberating. With no-fault divorce came the trend in many states of abolishing permanent alimony which supported stay-at-home wives and mothers, as well as those who worked for pay in part-time or low-paying jobs.⁴⁰ In theory, now that women were believed to be autonomous and on equal footing with men, many no-fault advocates argued that it was better to wind up all economic relationships between husbands and wives by splitting property assets once and for all at the time of divorce; other than child support which continued until the children of the marriage reached 18.⁴¹ For women in marriages with large assets who had aggressive divorce lawyers, this may not have resulted in dramatic harm. For an average middle- or working-class

³⁹ See ELLMAN, *supra* note 29, at 260–62 (citing Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUMBIA L. REV. 1121–33 (1936)); LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 434–38 (2002). Ellman notes that if the parties’ collusion was discovered, they would be denied a divorce. ELLMAN, *supra* note 29, at 260–61.

⁴⁰ ABRAMS, *supra* note 30, at 552–54 (citing Katharine K. Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2012 U. ILL. L. REV. 319 (2012)). Family law historians also note that permanent alimony substituted for dower, as well as accounting for fault in destroying the marriage, since only innocent spouses were entitled to it. *Id.* at 545 (citing Mary Kay Kisthardt, *Rethinking Alimony: the AAML’s Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW 61, 62, 65–73 (2008)).

⁴¹ See generally WITTE, *supra* note 2, at 212–13; ABRAMS, *supra* note 30, at 552.

mother of this era, when such families had little by way of accumulated assets except a house and car, and the husband brought home the paycheck, this innovation was disastrous. Saddled with the children and often the debts of the family, with few prospects for well-paying jobs, especially with child care responsibilities, and often insufficient child support orders that fathers could easily evade paying, single mothers struggled to survive.

Today's American family law looks much different than it did with these mid-20th century innovations, even though the nuclear family has held on as the paradigm for legal regulation of the family. For marital families, states have recognized that simply splitting up assets in a divorce by awarding property to the person who had the means to purchase it and to take title in his name, or even splitting accumulated property 50-50 with minimal child support payments, often results in a windfall to the husband who has most of the family wealth and earning opportunities. Lawmakers have devised ever more complex sets of criteria for splitting up the property of the marriage. As just one example, even where permanent alimony has largely disappeared, some states grant a period of rehabilitative alimony or maintenance to permit an unemployed or underemployed wife to get education or training for a decent-paying job.⁴²

For non-marital families, courts have been slowly recognizing claims of partners against each other where there were promises of support or the couple acted like partners. The case widely credited for changes in this area is *Marvin v. Marvin*, in which actor Lee Marvin's live-in girlfriend Michelle sued him for what was later termed "palimony" based on his alleged promise that Lee would share his assets with Michelle if she would perform the roles

⁴² For a discussion of the title and equitable division approaches to property division, and the many factors the courts take into consideration in determining what division is equitable, see ELLMAN, *supra* note 29, at 320–22, 336–42

of companion, homemaker, housekeeper, cook, and hostess.⁴³ Despite the fact that some states followed *Marvin* to create remedies for breakups in non-marital relationships, other states, like Minnesota, hold onto the rule that non-marital partners must produce written contracts of support to hold their partners liable for property or support upon dissolution of the relationship.⁴⁴

More dramatically, states have recognized the necessity of ensuring that children receive proper support when their parents do not live together as a couple sharing expenses and income. Many have simplified the process of identifying paternity, allowing fathers to acknowledge paternity immediately when a baby is born.⁴⁵ Virtually all states have established uniform child support guidelines at more realistic levels; many of these schemes take into consideration the incomes of both parties, not just the custodial parent.⁴⁶ States and the federal government have devised a panoply of methods of collecting support from deadbeat parents, including wage garnishments; tax refund captures; refusal of passports to obligors with \$2500 in delinquent support; revocation of driver's, hunting, and other licenses; and even the threat of prison to compel compliance.⁴⁷

Finally, and most recently, with the Supreme Court's decision in *Obergefell v. Hodges*, the right of gay and lesbian couples to marry has been recognized.⁴⁸ Prior to *Obergefell*, some states reacted to the growing clamor

⁴³ *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976); SINGER, *supra* note 35, at 411–12 (describing the cases that gave rise to these changes and theories that give rise to legal responsibility to share assets or support).

⁴⁴ MARTIN L. SWADEN & LINDA A. OLUP, 14 FAMILY LAW 12–13 (2008).

⁴⁵ See UNIF. PARENTAGE ACT § 302 (Nat'l Conference of Comm'rs on Unif. State Laws 2017); OLDHAM, *supra* note 29, at 604. The Act also presumes paternity if the child is born shortly after divorce or the father has lived with the child for at least his first two years and held the child out as his own. *Id.* at 603.

⁴⁶ ELLMAN, *supra* note 29, at 518–20 (noting, however, the wide disparities in support obligations between states).

⁴⁷ *Id.* at 580–89; see also Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 650 (2012).

⁴⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015).

for same-sex marriage by enacting civil union or domestic partnership statutes that would grant many or all of the legal protections of marriage to cohabiting couples who chose to sign legal registries indicating their intent to enter these legal relationships.⁴⁹ After *Obergefell*, whether such statutes will survive for couples who do not want to get married but who still want some of the legal protections of marriage is still unclear.

Thus, Professor Glendon's observation about the thin thread between marriage and family applies even in the modern nuclear family. In one legal relationship between the parent and child, the state is highly involved, arranging financial support, custody, and support, with joint custody being ordered more frequently.⁵⁰ The second legal relationship, the spouse-to-spouse or adult-to-adult (non-marital) relationship, is only loosely tied to the first.⁵¹

In this second legal relationship, as Witte notes, the reigning ideology posits that marriage is a contract of convenience between autonomous, independent partners on equal footing.⁵² The partners select marriage when each of them concludes that his or her best interests, including needs for love and belonging, will be satisfied by the contract and it is relatively easy to dissolve if these needs continue not to be satisfied.

However, it would be a mistake to suppose that this modern ideology about marriage actually governs the family in practice. The state still supplies most of the legal default rules for marriage: prohibiting certain marriages;

⁴⁹ ELLMAN, *supra* note 29, at 974–81.

⁵⁰ ABRAMS, *supra* note 30, at 754–55 (citing a 2008 ABA study concluding that 22 states and the District of Columbia favor joint custody).

⁵¹ For an interesting proposal for legal change, see Merle H. Weiner, *Regulating the Relationship Between Parents: Moving Beyond Marriage and Custody Law*, in THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 1561–62 (Robin Fretwell Wilson ed., 2018) (arguing that the state should create a new legal relationship between non-married parents parallel to marriage to recognize the importance of parental cooperation for the welfare of their nonmarital children).

⁵² WITTE, *supra* note 2, at 10.

imposing legal duties of support on spouses during marriage through the “necessities” doctrine; and supplying most of the rules for divorce on matters such as child custody, visitation, child and spousal support, as well as spousal division of property.⁵³ While more states are permitting couples to bargain over these aspects through agreements before, during, and even at the end of marriage, the law still imposes a heavy hand on agreements that are considered coercive, extremely unequal, or otherwise against public policy.⁵⁴ Just as an example, few, if any, states will permit a parent to bargain his way out of child support with the other parent’s agreement or a spouse to bargain his way out of supporting his indigent spouse.⁵⁵ So, society lives with some kind of amalgam of the Reformation paradigm and what John Witte calls the modern or contractarian paradigm.

V. LUTHERAN THEOLOGICAL VIEWS OF FAMILY

The assumptions of this modern ideology of family law, however, confound most of the lessons of Lutheran theology about the nature and role of the family. First among them is an understanding of the structural role of God’s creative orderings of marriage and family in the preservation of the world. Much of the current family law ideology is premised on the assumption that families are *sui generis* creations of the individuals who

⁵³ See Jill Hasday, *The Canon of Family Law*, 57 STANFORD L. REV. 825, 835–39 (2004) (describing some of the ways in which marriage continues to be a “status” relationship governed by law rather than a contractual undertaking, including the refusal of states to enforce a contract for domestic services, or a contractual waiver of a spouse’s duties to provide “necessities” for his or her spouse).

⁵⁴ See ELLMAN, *supra* note 29, at 809–10, 819–20, 885–86 (discussing the Uniform Premarital Agreement Act, secs. 4, preventing enforcement of premarital agreements that are not voluntary or are unconscionable; and describing rules that may void a separation agreement, including mistake, duress, fraud, undue influence, and unconscionability).

⁵⁵ See Richard G. Vogl, *Waiving Child Support*, 44 ORANGE COUNTY LAW., Apr. 2002 6, 8 (noting the state’s refusal to permit contractual waiver of child support); ABRAMS, *supra* note 30, at 624 (noting that states will not enforce parental agreements that prohibit modification of court support orders); *see also* Hasday, *supra* note 53, at 838–40 (noting the refusal of states to enforce a contract for domestic services, or a contractual waiver of a spouse’s duties to provide “necessities” for his or her spouse).

make them up, artifacts of human creativity much like a painting or a car design. While there is a case to be made that the nature and ethos of families is in part constituted by the creative work of those in each family, for Lutherans, the family itself, or more broadly the household of Luther's time,⁵⁶ has a more structural role to play in the social fabric.

Central to any understanding of the family's calling is the very real vulnerability of the human child, whose rearing in the fear and love of God, Luther thought, was the chief purpose of marriage.⁵⁷ Children are not only physically vulnerable to the threats that parents worry about such as being hurt by a car to being kidnapped and killed by a stranger. Especially in modern, mobile capitalist societies where a person is a member of many communities simultaneously and throughout their lifetime, children are economically vulnerable (how do they meet their basic needs when they can't get a job until they're 16?) and socially vulnerable (how will the communities in which they grow receive them?). Moreover, the Reformers, like us, recognized that children were educationally vulnerable: they needed the skills necessary to make their way in the world, and they needed the moral education that would allow them to fulfill their vocations to others in this secular age.⁵⁸

In the modern age, children are also religiously vulnerable, sometimes in very dramatic ways. Even in the mid-20th century, when I grew up in a household in which each of us pursued our individual interests and our family moved from state to state, our constants were table prayers and bedtime

⁵⁶ For an argument for returning to the use of the Reformation concept of household as the concept for providing most government benefits currently provided to nuclear families, see generally Marie A. Failinger, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195 (2004).

⁵⁷ WILLIAM H. LAZARETH, LUTHER ON THE CHRISTIAN HOME: AN APPLICATION OF THE SOCIAL ETHICS OF THE REFORMATION 154 (Literary Licensing 2011) (1960).

⁵⁸ *Id.* at 152–56.

prayers, Lutheran day school, Sunday worship, Sunday school, vacation Bible school, and the examples of parents and other adults to mold us as Christians. Today, most modern American children can count on only a few of these supports for their growth into religious maturity. The one-parent family, and even the two-parent family, is a structure too overloaded to support children as they travel through the challenges of childhood and adolescence.

It is easy to make a parallel, if not identical, argument about the vulnerability of adults in families, both marital and non-marital. To be sure, a family consisting of an intimate childless couple, or two brothers living together, has a history of experience that is different from a family in which parents are taking care of their children. Yet, the basic needs of human beings, from the need for human love and touch to the need for partnership in the tasks of survival, are universal. Most, though not all, human beings reach for communities of human intimacy, whether emotional or physical or spiritual, at some time in their lives.⁵⁹

Given that these different relationships create human vulnerabilities within each family, I would argue that Lutheran theology breaks with those who are arguing for a return to a more pristine version of the nuclear family as the paradigmatic, or only, family to be recognized for legal protection. As

⁵⁹ See Wardle, *supra* note 3, at 289. Wardle argues:

Humans are communal and seek (and flourish in) social associations, beginning with the family. We are born as the result of human sexual communion; most often and most desirably that intimate communion occurs in a special relational community called marriage. We are born into, or our birth creates, another type of community—a parent-child community, usually and most beneficially nested within the marital community. By nature, we generally also seek to associate outside of our families in social, business, commercial, religious, ethnic, civic, and other kinds of communities which enrich and broaden our lives and strengthen our society.

Id.

noted, the traditional Protestant approach to marriage would object to valorizing the family as an ultimate spiritual good or a sacrament. Even so, it is very easy for Protestants advocating for a return to tradition to come close to suggesting that the nuclear family is the DNA of human existence, without which it is impossible to imagine meaningful human community.

VI. THE CREATOR GOD REMAKES THE FAMILY

It is easy to understand this nostalgia for the nuclear family, since forming marriages and having children is one of the most recurring and consistent experiences of human communities, existing across cultures and history. But in valorizing the nuclear family as the ideal family, Lutherans see the potential seeds for idolatry. For Luther, marriage was not to be idolized as an oasis against the real world. It was an imperfect remedy (a “hospital for the sick,” he called it) for some of the real-world harms that result in conditions of sin.⁶⁰ Like all things co-created by God and humans, marriage and the family are social institutions that bring great joy and goodness; but they are all thoroughly infected with sin, incapable of perfection, and the site of continuing human tragedy. Failing to understand and acknowledge that there is no ideal family compared to which all other family forms are broken is a first step for Lutherans toward forgetting where not just their salvation, but also their flourishing really lies: in humans’ relationship with the Triune God. The family (real or ideal) is a false god, whether real or imagined, and a god that will betray its members every time.

Second, valorizing the nuclear family (or any family form, including the mother-child dyad) as the central and unchangeable form of human community gives the lie to the very essence of God as a continual Creator. While Lutherans understand all too keenly that God absconds from human

⁶⁰ LAZARETH, *supra* note 57, at 181.

attempts at such a definition, they can and must affirm that God is directly involved in always changing the family as an order of creation in God's continuing work to shape the creation so that human beings can flourish in their present circumstances. There is no reason to think that while Lutherans affirm the changes wrought by the creating hand of God all around our world, from our ever-taller and more colorful human race to the creation (and extinction) of new species, the family has been exempted from that continuously creating power.

Indeed, history and sociology tell us that the makeup of the family varies widely in diverse times and places, from the large household model of biologically related members, students, friends, and guests, to temporary households of two persons.⁶¹ So, as Lutherans reaffirm that the family is not our own personal creation but given by God's hand, they must also reaffirm the power and prerogative of God to change the created order, or orders, of the family to those that permit human beings to flourish and to be blessed.

From another angle of vision, Lutherans understand that membership in the family is one of their callings from God to serve their neighbor. Neighbor is not the opposite of family, a threatening outsider compared with the family imagined as an association in which we are safe, and to whom we owe our ultimate loyalty. In the Lutheran perspective, the neighbor is a more comprehensive term for the Other; and those in our family are a subset, albeit a distinctive subset, of those who are our neighbors. Three salient points worth repeating are contained in this Lutheran idea of callings in the family. First, God is continuously calling human beings, whether they acknowledge God or not, to their families. Families are not personal inventions. Second, people's roles in their own families are to serve each other, matching each one's distinctive gifts to the others' distinctive needs, rather than using or

⁶¹ See Failing, *supra* note 56, at 217–35.

misusing others toward one's own desired ends. Third, God's call to service is precisely aimed toward creating concrete conditions for human flourishing *in this life*, which will always, inevitably and tragically, be infected with human limitation and sin.

It also bears re-emphasis that God does not just call each of us human beings to our families, but that God calls each family, and each person in them, to the world. Remember the Reformers' expectation that families or households were called and were given the strengths and means to take in the widow, the wayfarer, and the destitute person. This was not an altruistic or supererogatory expectation, it was just as much a calling as the calling to their family members. The modern introspective view of the family, one that suggests that adult members should be spending all their time and wealth on children or spouses or turn their backs on others' problems to take care of those in our own families, has it exactly backwards. Taking in neighborhood children for pizza or showing up to pack meals for the poor is as much "family time," in the Lutheran understanding, as the family vacation or the nightly bedtime ritual.

What is the role of secular law, part of the political order of creation, in this construction? Secular law employs the power of the state to prevent, deter, and punish the evil that human sin causes, and to ameliorate it to the extent possible. It does so through both restraining and affirmative acts of government, which Lutheran doctrine has recognized from the beginning.⁶²

⁶² For example, one might note Luther's demand that government officials provide schooling for children whose parents cannot or will not do so, see MARTIN LUTHER, *To the Councilmen of All Cities in Germany That They Establish and Maintain Christian Schools* (1524), reprinted in MARTIN LUTHER'S BASIC THEOLOGICAL WRITINGS 704–16 (Timothy F. Lull ed., Fortress Press 1989). Similarly, the Book of Concord notes:

Therefore, it would be very proper to place in a coat-of-arms of every pious prince a loaf of bread instead of a lion, or a wreath of rue, or to stamp it upon the coin, to remind both them and their subjects that by their office

Thus, secular law is an important opportunity for citizens in a democratic society, and our legal representatives in government, to exercise our roles as co-creators with God in constructing law that will enable each family, no matter its composition, to flourish. First, we need to think collectively about what family forms are capable of producing trustworthy relationships of human flourishing shored up by a state that expects us to accept our callings as members of families. Treating the creation of families as simply a contractual matter between two adults who have children together does not respect the conditions of sin in which selfishness and power imbalances can distort the equity that healthy families require.

Certainly, citizens exercising their rational and moral faculties can have diverse political views about the benefits and problems with various forms of state intervention, whether they take the form of regulation and management of, or financial subsidies to, the family. But whatever the appropriate role of the state is, these legal protections and benefits need to be extended to all forms of family that provide this nurturance. Thus, for example, it makes sense that the state should recognize the duties of family members to provide basic economic support to each other, regardless of whether they are nuclear or not. Similarly, there is no reason, at least in theory, why siblings, grandparents, and grandchildren, or other configurations of family cannot receive the hundreds of state benefits and protections that married couple families currently receive: from Social Security death benefits, welfare payments, and medical assistance, to rights to visit family members in the hospital, or to receive property inheritances in

we have protection and peace, and without them we could not eat and retain our daily bread.

Lutheran Confessions, The Lord's Prayer, Fourth Petition, in THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH 202 (Theodore G. Tappert et al. eds., Fortress Press 1959) (1580).

death. The extension of marriage to same-sex couples in the United States has eliminated many of those problems for them, but not for the other kinds of families. Those “nontraditional” families still need to spend money and considerable time to even come close to replicating many of the legal protections and benefits taken for granted by the marital nuclear family.

To be sure, it may not always be easy to delineate the difference between a “real” family and a collection of people who temporarily live under the same roof. However, American courts have some experience trying to define these factors as some have attempted to extend some of the protections of married couples to informal families. For example, in *Braschi v. Stahl Associates*, the court was faced with deciding whether a gay life-partner should be allowed to stay in his partner’s rent-controlled apartment, a privilege granted only to family members under New York City law.⁶³ The court listed a number of factors in making the decision that the surviving partner was legally considered “family,” including the longevity of the couple’s relationship, how exclusive it was, and whether the couple held themselves out as a family to others and were treated as such by extended family members.⁶⁴ The Court also looked at whether the partners commingled their income and assets, held property together, jointly paid debts of the household, gave each other power of attorney, were listed as beneficiaries on life insurance, and so forth.⁶⁵ Similarly, states that have recognized common law marriages over time have had to identify and apply a number of factors to decide whether a couple that has not chosen to solemnize their marriage should nevertheless be treated as a legal family. Criteria for identifying which households are families and which are not families may vary from state to state, but they are not impossible to formulate.

⁶³ *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 204 (1989).

⁶⁴ *Id.* at 212.

⁶⁵ *Id.* at 213.

Alternatively, as noted, many states and countries have in recent years offered the opportunity for couples, or some others, to identify themselves as family by registering as domestic partners to obtain at least some of the rights and benefits automatically granted to married people.⁶⁶ This procedure recognizes families in situations in which partners agree to responsibilities to each other, but again, it does not go far enough; it does not resolve the rights of non-marital partners where one refuses to record a partnership or enter a marriage because he or she is too selfish to share his income and assets with his partner or a member of his family.

Second, we need to think about whether current American family law adequately holds even married persons accountable for sustaining relationships of reliance and trust that they have built over time with spouses. In the Lutheran view, our service to our neighbor is a demand by God that we cannot ignore, and no less when that neighbor is a member of our family. Three states, Louisiana, Arizona, and Arkansas, have attempted to recognize these responsibilities by co-mingling traditional religious and modern secular ideas about marriage in covenant marriage.⁶⁷ Couples must freely choose this form of marriage, but do not need to do so. If they make this choice, they are required to get premarital counseling before they can be legally wed and must show that they obtained marital counseling before they divorce. Covenant marriage waiting periods before divorces are final and generally longer than for no-fault divorces, and a person divorcing in a covenant marriage must show a listed “fault” as a basis for divorce, i.e., adultery, commission of a felony, or physical or sexual abuse of either the spouse or children. Separation over a lengthy period of time is another ground for divorce recognized in covenant marriage jurisdictions.⁶⁸

⁶⁶ See Failinger, *supra* note 56, at 206–13.

⁶⁷ *Id.* at 215.

⁶⁸ *Id.* at 216.

Whether covenant marriage is a salutary development in theory or not, only a small number of couples have opted for covenant marriage and there is no evidence that covenant marriage has slowed the rate of divorce in states where it is an option. Those who argue against a return to fault-based divorce note that there are downsides; not the least of which is the financial and emotional trauma that families face in a contested fault divorce. They point out that, while divorce rates rose when no-fault divorce was instituted, “domestic violence rates fell by approximately 20-30 percent and wives’ suicide rates fell by 8-13 percent.”⁶⁹

Even without a return to fault-based divorce, the requirements in some states that couples seek counseling intervention or attempt to mediate their divorce if reconciliation is not possible may be a welcome development if these requirements are managed effectively.⁷⁰ As an example, some states, such as Minnesota, give a financial break on marriage licenses to those who have obtained premarital counseling, as a way of incentivizing thoughtful entrance into marriage instead of restricting or preventing it.⁷¹

Just as importantly, for marriages that are indeed so broken that members of the family are being irreparably harmed by their continuation, secular law must ensure a just and adequate accounting on behalf of all parties. To be sure, clarity in the delineation of rights and duties, both about property and about things like custody, support, and visitation, is important to avoid further incidents of high conflict. And it may be true that a married couple’s emotional journey through divorce has to include some ritualized sense of the ending of the marriage. However, the modern concept of family law that the affairs of the family should, as much as possible, be wound up in

⁶⁹ Mark Baer, *The Problem With Covenant Marriage and Fault-Based Divorce*, HUFFPOST: LIFE (Nov. 6, 2014 6:05 PM), http://www.huffingtonpost.com/mark-baer/the-problem-with-covenant_b_6110600.html.

⁷⁰ *Id.*

⁷¹ SWADEN & OLUP, *supra* note 44, at 4.

the divorce decree belies the fact that most married or unmarried couples and their children are always in relationships, albeit different relationships, after divorce, so any “final decree” also needs to account for the past and the future as well as the moment of divorce.

In recent years, many states have moved in the direction of providing a more adequate accounting of the past of the couple in the division of assets and family income. For example, in recognition of the differing contributions of both husbands and wives to marriage, more states now use a strict 50-50 split, or equitable division rule, regardless of who earned the money for those assets or holds legal title to them, and even regardless of who may have been at fault in the divorce.⁷² More states have attempted to make more equitable property awards to spouses who have supported their husbands or wives through school, only to have the supported spouse desert them right at the time they would have reaped the rewards of the partnership.⁷³ Similarly, as mentioned, many states have accounted for the difficulties faced by long-time caregivers or disabled spouses by awarding larger property settlements, rehabilitative alimony, or even in some cases permanent alimony where the special needs of one spouse warrants it.⁷⁴

Even so, these awards often fall short of a just solution, whether they look backwards to acknowledge the contributions that each spouse made to the marriage, or forward to the ongoing needs of each member of the family and the relative ability of both spouses to earn a decent living and meet their children’s expenses. As just one example, there has been significant litigation over whether an objecting wealthy non-custodial father should be legally forced to pay for college for his children over 18, or whether the custodial

⁷² ABRAMS, *supra* note 30, at 473–74.

⁷³ ELLMAN, *supra* note 29, at 393–401 (describing the ways in which various states account for this contribution).

⁷⁴ ABRAMS, *supra* note 30, at 574–76.

parent is essentially stuck with the responsibility of making sure her children get a college education.⁷⁵

Lutheran theology would argue that justice and the needs of both spouses and children are more important considerations than autonomy in dividing family assets. Again, Lutherans would argue that it is not a supererogatory act of a saint when a parent goes beyond meeting his children's or ex-spouse's minimal needs. Rather, it is an expectation of that person's calling to one who has relied on him and who is vulnerable, and such an expectation can thus be legally imposed.

Perhaps the most critical issue that Lutherans face in the area of modern family law is to reconsider whether the law should spell out any relationship between sexuality, marriage, and family in an era in which social mores and the availability of contraception have uncoupled the relationship between sexuality, marriage, and children. One of the reasons the law has begun to respond to the needs of non-marital partners and their families is that there are so many more of them now. A 2014 Pew Center study found that the share of unmarried American adults is at a historic high, one in five adults ages 25 and older (and 23% of men), compared to half that percentage in 1960.⁷⁶ A quarter of these unmarried adults 25-34 live with a partner, and almost half of all married people cohabit before they get married.⁷⁷ In 2014, 40% of births were to unmarried mothers, a slight decline from the 41% share from 2008-2013.⁷⁸ For the most part, criminal law has abandoned enforcing any expectations about sexuality and reproduction, with the exception of

⁷⁵ See ABRAMS, *supra* note 30, at 601-02.

⁷⁶ Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/>.

⁷⁷ *Id.*

⁷⁸ Gretchen Livingston & D'Vera Cohn, *Share of births to unmarried women dips, reversing a long trend*, PEW RES. CTR. (June 17, 2015), <http://www.pewresearch.org/fact-tank/2015/06/17/share-of-births-to-unmarried-women-dips-reversing-a-long-trend/>.

children or disabled adults who are protected because they are not deemed capable of consent. As suggested, civil law too has moved in the direction of treating individuals who make sexual or reproductive choices outside of marriage more like marital partners in terms of rights and responsibilities, though at a slow pace. Given their theological presuppositions, Lutherans face a number of challenges as they consider whether society can accept, as an adaptation of God's creative ordering, a social structure in which sexuality and procreation are uncoupled from marriage. Lutherans, like many other Christians, continue to grapple with the question that still lingers after *Obergefell*, whether marriage is by its nature defined by biological complementarity, or whether God is doing a new thing in creating marriages not defined as heterosexual in essence. They must ask whether they can affirm a mother-child dyad, in which a father or second parent is either literally or essentially absent, as a socially and legally equivalent form of family that can provide the same security, pedagogy, and human community as families with two parents. They must ask whether, from the perspective of the state charged with protecting children, there is any essential legal difference between biological parents, or those adults now recognized by some courts to be psychological, or de facto, parents of the children they have raised, particularly in cases where psychological parents are fighting biological parents for custody.

CONCLUSION

All of these questions about families and family law push hard on Lutherans to confirm their original witness that God is creatively ordering human lives on this earth as a partner with human beings in human institutions. The Lutheran tradition calls for Christians to trust and challenge human institutions, acknowledging that they are a place of God's activity in the world, just as much as churches. That tradition reminds Lutherans that

Christians and non-Christians alike bear the mark of God's goodness in their ability to reason about the institutions that create trust and permit human flourishing in the world, and that the institution of secular law is also infected by human limitation and sin, no more or no less than God's other creative orderings, such as the Church and the family. That reality makes it possible for Lutheran citizens to go forth in resolving these very difficult issues with others from different religious traditions or none, from different communities, and nations, because they have faith that they can trust God's blessing on their labors.

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