

The Family in America

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From No-Fault Divorce to Same-Sex Marriage: The American Law Institute's Role in Deconstructing the Family

Ryan C. MacPherson, Ph.D.

LEGISLATIVE REFORMS that have prohibited American courts from finding fault when a man and a woman divorce are now leading the nation toward a situation in which no state would be permitted to deny a same-sex couple's application for marriage. This turn of events owes its course not so much to special-interest groups, legislators, or judges, but to the academic lawyers of the American Law Institute (ALI). Unlike other advocacy groups, the ALI usually has not submitted *amicus curiae* briefs to advocate for a progressive judicial ruling. Nor does the ALI have a strong lobbying force before state legislatures. Never has the ALI been party to a case involving family policy. The media seldom reports its activities.

Nevertheless, the contribution of the ALI to public policy debates has powerfully swayed family and marriage law. Many of its recommendations have been codified into law throughout the United States. Many of its other suggestions have served as surrogates for binding precedents in cases where judges have turned to the ALI rather than, or in addition to, actual case law for guidance. The results of the organization's relatively quiet and academically secluded advocacy for public-policy transformation include the solidification of no-fault divorce reform during the 1970s and 1980s, the ascendancy of same-sex couples as publicly recognized partners and state-approved adoptive parents in the 1990s, and the experimentation with same-sex "marriage" laws currently underway.

The history of the institute's work and influence will reveal how no-fault divorce legislation paved the way for academic elites to urge state-creation of same-sex marriage. Indeed, the origins of the ALI, its philosophical foundations, and its success in segregating public policy from private morality not only laid the groundwork for the institute's central role in the no-fault divorce revolution, but also its powerful presence in the current agitation for legal recognition of same-sex marriage.

Since its founding in 1923, the American Law Institute has promoted legal realism, a philosophy which construes of jurisprudence as a sociological phenomenon, properly adapting itself to the empirically discovered conditions of the time. The self-defining professional class of legal experts who established the ALI—predominately Ivy League law professors—pioneered a juristic methodology that would not merely recognize the changing needs of contemporary society, but also “restate” the law in such a way as to accommodate those social realities—hence, legal “realism.”¹ The organization's Restatements (a series of publications summarizing case law pertinent to particular subjects) embody a progressive-pragmatist agenda for change, with implications for both the legal profession and the broader political economy.²

William Draper Lewis, who served as director of the ALI for its first twenty-four years, forecasted at the institute's founding meeting that its formulation of Restatements would simplify and clarify the law, but he did not stop there. He proposed that the ALI would also promote a “better adaptation of the details of the law to the accomplishment of ends generally admitted to be desirable [by] promot[ing] those changes which will tend better to adapt the laws to the needs of life.”³ The institute's founders spoke the language of progressive reform fluently. New York attorney Elihu Root had served as Theodore Roosevelt's Secretary of State and was a trustee of the Carnegie Corporation, which bankrolled the

founding activities. Astronomer Henry S. Pritchett, a former president of the Massachusetts Institute for Technology, served as current president of the Carnegie Foundation for the Advancement of Teaching as well as a trustee of the Carnegie Corporation.

Benjamin N. Cardozo, who served as vice president from 1923 until 1932, had solidified support for the organization's establishment when he spoke at the 1921 meeting of the Association of American Law Schools. He later succeeded Oliver Wendell Holmes Jr. on the Supreme Court.⁴ Moreover, the principles Justice Cardozo set forth in *Palko v. Connecticut* (1938) initiated the gradual incorporation of the Bill of Rights into the Fourteenth Amendment, making those rights enforceable upon the states by federal courts—a key plank in national progressivism.⁵ Although Cardozo, writing the opinion of the Court, ruled against incorporation of the Fifth Amendment's double jeopardy clause in this particular case, he established a doctrine of “selective incorporation” whereby the protection of any rights “implicit in the concept of ordered liberty” must be enforceable upon the states through the Fourteenth Amendment. Later rulings would expand this doctrine into a fuller incorporation, broadening the reach of the federal judiciary.⁶ Federal appellate judge Learned Hand, who also supported national progressivism (he had championed Roosevelt's “Bull Moose” party in the prewar era), served as vice president from 1935 to 1947.⁷ By that time, the institute's work had been thoroughly infused with the progressive notion that supposedly impartial experts should re-engineer society in the name of the common good.

The American Law Institute sought to shift power from judges, as the establishers and interpreters of case law, to the law professors who drafted its Restatements. The goal was for the Restatements to acquire legitimacy of their own, if not by legislative enactment, then at least by a new juristic methodology: reliance upon the Restatements as the definitive

1. G. Edward White, “The American Law Institute and the Triumph of Modernist Jurisprudence,” *Law and History Review* 15.1 (Spring 1997): 1–47.

2. N. E. H. Hull, “Restatement and Reform: A New Perspective on the Origins of the American Law Institute,” *Law and History Review* 8.1 (Spring 1990): 55–96.

3. Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute, February 23, 1923, as quoted in Hull, “Restatement and Reform,” p. 83.

4. Hull, “Restatement and Reform,” pp. 72–73. American Law Institute, “Officers, 1923–2010,” <www.ali.org/index.cfm?fuseaction=about.officers>.

5. *Palko v. Connecticut*, 302 U.S. 319 (1938).

6. Michael Les Benedict, *The Blessings of Liberty: A Concise History of the Constitution of the United States*, 2d ed. (Boston: Houghton Mifflin, 2006), pp. 293–95.

7. American Law Institute, “Officers 1923–2010.”

simplifiers and clarifiers (not to mention reformers) of the complicated history of actual case law.⁸ Little wonder, then, that the ALI expanded its project of “restating” the law into an explicit proposal for nationalizing the law through a series of model codes that could be presented to state legislatures for enactment. The organization partnered with the National Conference of Commissioners on Uniform State Laws to promulgate the Uniform Commercial Code (1952), standardizing the way Americans would conduct business. The institute’s Model Penal Code (1962) had similar influence over even broader experiences of life, both public and private. Indeed, the institute’s model redrew the line between public and private, eventually transforming family law beyond recognition.

The Privatization of Immorality: The ALI Meets Kinsey

Just as the American Law Institute’s legal realists were applying sociological methodology to the law—no longer seeking to discover transcendent principles of justice, but instead seeking provisional generalizations that could be adapted to fit a changing society—so also Alfred Kinsey, an Indiana University biology professor, donned the uniform of a value-neutral empiricist seeking to reveal human sexual behavior as it really is. With funding from the Rockefeller Foundation, Kinsey produced *Sexual Behavior in the Human Male* (1948), which advanced the startling claims that homosexual acts, masturbation, and bestiality were not only common among American men, but also physiologically and psychologically harmless. Insofar as such acts were common, Kinsey could argue that moral regulation would be hypocritical. Insofar as such acts were harmless, he could argue that moral regulation would be unnecessary. But Kinsey’s book had another implication, even more far-reaching: by excluding from his analysis *public* sexual expression (e.g., pornography, prostitution, or rape) he had presented sexuality as a *private* dimension of human behavior.⁹

8. Mitchell Franklin, “The Historic Function of the American Law Institute: Restatement as Transitional to Codification,” *Harvard Law Review* 47.8 (June 1934): 1367–94, esp. 1371–76, quoting 1376.

9. David Allyn, “Private Acts/Public Policy: Alfred Kinsey, the American Law Institute and the Privatization of American Sexual Morality,” *Journal of American Studies* 30.3 (1996): 405–28, at 410, 417–18.

Also supported by Rockefeller funding, the ALI applied Kinsey’s framework to the law, recommending that all *private* sexual acts between consenting adults be decriminalized. Judge Learned Hand, who served on the drafting committee for the institute’s Model Penal Code, initially hesitated to support the model’s chief architect, Louis Schwartz, for fear that a clarion call for decriminalizing homosexual acts would discredit the remainder of the model. But ultimately he capitulated to the logic of the private/public distinction, admitting, “I think it is a matter of morals, a matter very largely of taste, and not something people should be put in prison about.”¹⁰ The Illinois legislature agreed, becoming in 1962 the first state to enact the Model Penal Code’s decriminalization of all private sexual conduct between consenting adults.

The institute’s wedge between *public* policy and *private* morality had now been set in place; all it awaited was for legislators and judges to pound it deeper and deeper. Many would answer the call. In fact, some already had. The Supreme Court adopted the private/public distinction from even a tentative draft of the Modern Penal Code in a 1957 case concerning the censorship of obscene materials, although the justices disagreed over exactly where to draw the line.¹¹ Justice William O. Douglas’s more permissive privatization of morality would attain majority support in subsequent cases, such as the 1965 ruling that contraception, because of the intimately *private* nature of its use, qualifies for protection under the First Amendment’s “penumbra where privacy is protected from government intrusion.”¹²

Schwartz expounded the Model Penal Code’s liberalization of sex statutes in a 1963 article for *Columbia Law Review*. He explained that the code would penalize prostitution, but not noncommercial illicit sexual relations, because the former were “a serious affront to public sensitivities” whereas the latter were largely hidden from public view and, in the wake of Kinsey’s study, so widely practiced as to not genuinely offend the

10. Learned Hand, quoted in Allyn, “Private Acts/Public Policy,” p. 426.

11. *Roth v. United States*, 354 U.S. 476, 487n20 (1957) (Brennan, J.); compare with *ibid.* at 499–500 (Harlan, J., dissenting in part).

12. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (Douglas, J.).

public.¹³ In other words, the private/public distinction did not have to do merely with *where* an act occurred, but with whether it offended the public.

That last criterion fit well with the sociological turn in jurisprudence: Schwartz even suggested that blasphemy rightly was criminalized in Puritan Massachusetts, but rightly left to First Amendment free expression in contemporary society. He then suggested that anti-abortion statutes likewise should be amended to track changing sensitivities within the community. Recognizing widely divergent opinions on abortion, the drafters of the code recommended moderate liberalization. Schwartz frankly admitted that they had wanted to go even further, but pragmatic concerns forced them to compromise their own principles: “any effort to introduce additional justifications [for abortion] would be so offensive to Catholic opinion as to impair seriously the legislative prospects of the Code as a whole.”¹⁴ Even so, a course had been set for Justice Harry Blackmun to cite the institute’s Model Penal Code in his majority opinion for *Roe v. Wade* (1973): by that time, a third of the states had followed the organization’s advice to loosen their restrictions on abortion, relegating the matter increasingly to private choice amid a public that no longer was so uniformly offended.¹⁵

The institute’s abortion strategy reveals that the privatization of morality by elite reformers does not require public approval, but merely a sufficient lack of public disapproval. The ALI did not have to win the Catholic vote to proceed, but simply gain enough momentum in places where the Catholic vote would have less influence either way. Such places could even include states with substantial constituencies opposed to the institute’s agenda, so long as those constituencies had neither a voice nor even a pair of eyes or ears in the process. The no-fault divorce revolution would occur in such a passive setting.

Disguising Social Engineering as Policy Simplification

Contrary to popular perceptions, the feminist movement had little to no impact on the enactment of no-fault divorce legislation during the late 1960s and early 1970s. Rather, the shift from fault (adultery, desertion, abuse, etc.) to no-fault (unilateral assertion of irreconcilable differences) resulted from predominately male lawyers and lawmakers seeking to reduce fraud, ameliorate husbands’ alimony burdens, and streamline the divorce process into a less controversial, more perfunctory proceeding.¹⁶ No-fault divorce no doubt also ran on the coattails of the institute’s successful campaign for separating private morality from public policy. “Before no-fault divorce, a court discussed a petition for divorce in moral terms [who was at fault? to what extent?]; after no-fault divorce, such a petition did not have to be discussed in moral terms.”¹⁷

Beginning with California in 1969, all but five states adopted no-fault divorce by 1974, with relatively little public debate. Lawmakers framed their proceedings in terms of routine policy refinement, rather than controversial social reform, and they may have been sincere. In bypassing faultfinding, the new laws eliminated fraudulent claims of fault and kept legitimate faults in the privacy of the home, promising the government increased efficiency in administering family law. The National Conference of Commissioners on Uniform State Laws, with funding from the Ford Foundation, led an effort toward nationwide simplification, drawing expertise from New York University’s Henry H. Foster, a prominent member of the American Bar Association (ABA), and Professor Robert J. Levy of the University of Minnesota, who was affiliated with ALI. The ABA stalled the project by withholding its support in 1970, due largely to internal politics. Nevertheless, the 1974 promulgation of the Uniform Marriage and Divorce Act, now with the bar association’s endorsement, lent national legitimacy to a process that had occurred piecemeal

13. Louis B. Schwartz, “Moral Offenses and the Model Penal Code,” *Columbia Law Review* 63.4 (April 1963): 669–86, at 681 (quotation), 680 (Kinsey).

14. Schwartz, “Moral Offenses and the Model Penal Code,” pp. 672, 685, 686.

15. *Roe v. Wade*, 410 U.S. 313, 140 (1973); the Court reprinted the institute’s model abortion code in the companion case, *Doe v. Bolton*, 410 U.S. 179, 205–207 (1973).

16. Katharine T. Bartlett, “Feminism and Family Law,” *Family Law Quarterly* 33.3 (Fall 1999): 475–500, at 478–79.

17. Carl E. Schneider, “Moral Discourse and the Transformation of American Family Law,” *Michigan Law Review* 83.8 (August 1985): 1803–79, at 1810.

throughout the states.¹⁸

With no-fault now in place, feminists mobilized to improve women's post-divorce lot. Local networks of activists lobbied for refinements of no-fault divorce statutes, calling for equitable distribution of property and a primary caretaker presumption for child custody. Their efforts resulted in significant state legislative changes during the late 1970s and 1980s, but lacked national coherence.¹⁹ Ironically, the agitation for formal equality by "liberal legal feminists" at state legislatures only exacerbated women's material inequality with men, since the new gender-neutral policies still had to be applied to a gendered marital culture.²⁰ A more radical overhaul of divorce procedures would come from the scholarly pens of four legal academics affiliated with the ALI: Ira Mark Ellman (Arizona State University College of Law), Marygold S. Melli (University of Wisconsin Law School), Katharine T. Bartlett (Duke University School of Law), and Grace Ganz Blumberg (UCLA School of Law).

In 1989, the ALI launched a plan to unify the diverse state reforms, "consolidat[ing] the no-fault divorce revolution,"²¹ although in doing so, according to Chief Reporter Ira Ellman, its scholars consciously avoided consideration of fault when preparing what they otherwise called a "comprehensive examination of dissolution law."²² The resulting *Principles of the Law of Family Dissolution* (2002), authored by the four professors mentioned in the preceding paragraph, provided more than a national unification of recent state legislation. An astute observer quickly realized that the "draft is not a restatement at all. This is an attempt to really change the way we think about things, to change what we think of as fair,

and to give concrete examples of how we might get there."²³ Supporters have touted *Principles* as an exemplar of progressive gender-neutrality for explicitly excluding gender and sexual orientation from consideration in child custody arrangements.²⁴ Feminist scholars, for example, have acclaimed the ALI for removing double standards that formerly penalized custodial mothers for non-marital sexual relations while permitting noncustodial fathers to engage in such behaviors without question.²⁵ However, critics have detected a feminist "gender slant" for replacing the "best interest of the child" presumption (tending to balance maternal and paternal custody claims) with a "primary caretaker" presumption (tending to favor maternal custody).²⁶ The ALI also urged a shift from statutory parental-rights doctrine (privileging biological and adoptive parents as legal decision-makers) toward a functional definition of parenthood that empowers other players—including same-sex ex-partners—to claim rights over children in divorce proceedings.

This "utilitarian metamorphosis" toward "operational parenthood" extends parental rights to a host of surrogates, elevating de-facto parents and parents by estoppel to a status on par with, and potentially superior to, biological and legally adoptive parents.²⁷ For example, a homosexual partner to a child's legal and biological parent may have standing in court as a de-facto parent based on prior exercise of childrearing responsibilities toward that child.²⁸ Similarly, another adult who invested significant time with the child may be recognized as a parent by estoppel, so long as a legal parent either encouraged the relationship or at least acquiesced to

18. Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago: University of Chicago Press, 1988), esp. ch. 5.

19. Katharine T. Bartlett, "Feminism and Family Law," pp. 479-87; Mary Ann Glendon, *The Transformation of Family Law* (Chicago: University of Chicago Press, 1989), pp. 188-91.

20. Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991).

21. James Herbie DiFonzo, "Toward a Unified Field Theory of the Family: The American Law Institute's *Principles of the Law of Family Dissolution*," *Brigham Young University Law Review* 2001.3 (2001): 923-60, at 925.

22. As quoted in *Ibid.*, p. 956.

23. J. Thomas Oldham, "The American Law Institute's *Principles of the Law of Family Dissolution: Its Impact on Family Law*," *Texas Journal of Women and the Law* 7 (1998): 161-68.

24. Kathy T. Graham, "How ALI Child Custody Principles Help Eliminate Gender and Sexual Orientation Bias from Child Custody Determinations," *Duke Journal of Gender Law and Policy* 8 (2001): 323-31.

25. Margaret F. Brining, "Feminism and Child Custody under Chapter Two of the American Law Institute's *Principles of the Law of Family Dissolution*," *Duke Journal of Gender Law and Policy* 8.87 (2001): 301-21.

26. Oldham, "The American Law Institute's *Principles of the Law of Family Dissolution*," pp. 163-64.

27. DiFonzo, "Toward a Unified Field Theory of the Family," pp. 925, 930.

28. Graham, "ALI Child Custody Principles," p. 328.

its development.²⁹ Beginning with a 1992 New Mexico Appellate Court case, numerous state courts deployed a “functional” view of parenthood to award visitation rights, or even shared custody, to the former same-sex partner of a child’s biological (and legal) parent, with a willingness to favor the visitation-seeking ex-partner even in the absence of a prior co-parenting agreement, oral or written.³⁰ The proposed codification of these innovations in Chapter 2 of *Principles* dovetails with Chapter 6’s creation of a domestic-partnership status—a non-marital relationship that makes same- or opposite-sex couples eligible for marriage-like legal benefits even while one or both of them may be legally married to a third (or fourth) person.³¹

The correlation is far from accidental. As institute member Mary Coombs has explained, *Principles* has paved the way for same-sex “marriage” by first approximating a common-law foundation for same-sex divorce. That is, insofar as the ALI would recognize de-facto and “by estoppel” parents as co-parents with legal standing on par with biological or adoptive parents, a same-sex couple cohabitating and jointly raising a child would, by sociological fiat, have created a joint parenting relationship that the court must recognize if ever the couple decides to separate. Furthermore, just as contract law regards as valid non-written agreements so long as the behavior of both parties sufficiently evidences their consent to a common understanding, so also the practice of cohabitating and jointly raising a child by a same-sex couple could be construed as a contract to live as if married, and hence to be protected by divorce law in the event of their separation.³² The scaffolding erected by the ALI for state recognition of same-sex relationships already has significantly influenced

the development of both statutory and case law. West Virginia’s legislature, for example, has enacted ALI’s “past caretaking standard” for determining post-marital custody of children.³³ In Massachusetts, the judicial imposition of same-sex marriage relied considerably upon the longstanding practices of determining child custody and other post-marital conditions irrespective of sexual orientation.³⁴

Case Law Surrogates: The Institute’s Drafts of Principles

Principles squarely fits the founding vision of the American Law Institute: to bring administrative efficiency and judicial consistency to the law, grounded in sociological realism and progressive politics. Supporters of the *Principles* claim that the ALI fulfills the first aspect of that vision by limiting judicial discretion through a shift toward joint parental decision-making regarding post-marital childcare. During the twentieth century, judges generally awarded child custody on the basis of either the “tender years” doctrine (favoring maternal custody, under the assumption that young children need the nurturing of their mother) or the “child’s best interest” doctrine (weighing a variety of factors, including the strength of parent-child emotional bonds, parental cooperation for visitations, and absence of abuse). Critics of the old order charge the “tender years” model with sexism and the “best interest” model with vagueness that leaves too much open for cultural or personal bias under the guise of judicial discretion.

The ALI, therefore, privileges the parents’ decision-making over the judge’s: if the parents can agree to a child-custody plan, then the judge should approve of their plan; if not, then the judge should make a plan for them based upon what each parent contributed to parenting prior to divorce. In this way, the ALI fulfills the second aspect of its founding vision: sociological realism. Supporters call this “an objective standard for determining caretaking responsibility that is based on the circumstances that existed before the separation and that takes the court out of the business of making a determination of which of the two parents

29. DiFonzo, “Toward a Unified Field Theory of the Family,” p. 934; David D. Meyer, “Partners, Care Givers, and the Constitutional Substance of Parenthood,” in *Reconceiving the Family: Critique on the American Law Institute’s Principles of the Law of Family Dissolution*, ed. Robin Fretwell Wilson (Cambridge: Cambridge University Press, 2006), pp. 47–66, at p. 51.

30. William C. Duncan, “Don’t Ever Take a Fence Down’: The ‘Functional’ Definition of Family—Displacing Marriage in Family Law,” *Journal of Law and Policy* 3.1 (2001): 57–78, at 65–74.

31. Duncan, “Don’t Ever Take a Fence Down,” p. 74.

32. Mary Coombs, “Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families,” *Duke Journal of Gender Law and Policy* 8.87 (2001): 87–106. For proposed contract law analogies, see Barbara Stark, “Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law,” *California Law Review* 89.5 (Oct. 2001): 1479–1548.

33. Robin Fretwell Wilson, “Introduction,” in *Reconceiving the Family*, pp. 1–7, at p. 3.

34. *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941 (Mass. 2003).

would create the home that would, hypothetically, provide the child with the best circumstances.”³⁵ However, as demonstrated above, the ALI has not simply endorsed parental rights but broadened the definition of parenthood to the potential elevation of one biological parent’s same-sex partner above the other biological parent, or even above them both.

Both tentative and finalized drafts of *Principles* (spanning 1997 through 2002) have supplemented, and at times even substituted for, actual statutory and case law in the crafting of judicial opinions. For example, the Supreme Judicial Court of Connecticut in 2007 accepted a plaintiff’s argument to apply an institute guideline for calculating a parent’s investment income for purposes of determining child support, in the absence of controlling case law.³⁶ Similarly, two years before the ALI promulgated its final draft, the Supreme Court of Maine noted favorably, “The American Law Institute (ALI) has suggested that being a *de facto* parent may create a lawful basis to grant court-ordered visitation.”³⁷ In 2010, the Supreme Court of Alaska also relied on the organization’s definition of de-facto parenthood to determine a child custody case.³⁸

These examples should not, however, be construed to suggest that courts have incorporated *Principles* without exception. In *Hoover Letourneau v. Hoover* (2000), the Vermont Supreme Court affirmed a lower court’s modification from joint custody to sole paternal custody in a case involving a mother who relocated to another state and sought to take the children with her. The majority opinion disregarded the 1998 draft of *Principles*, which urged a more balanced consideration of the relocating parent’s interests. However, two justices joined in a dissenting opinion that acclaimed *Principles* as “a touchstone that can inform our decision-making because it asks the right questions.” The dissenters provided a detailed analysis of how the institute’s draft proposed to inquire about de-facto arrangements, apply the “primary parent” and

“good faith” principles, and identify criteria for “legitimate purposes to relocate” in order to “bring some coherence and predictability to our jurisprudence.”³⁹

The Law Institute and the Supreme Court

The fact that the ALI has a voice in court, despite not being an official party to the case nor submitting an *amicus curiae* brief, testifies to its potential to influence judicial doctrine. In *Kamen v. Kemper Financial Services* (1991), the Supreme Court reversed an appellate court’s decision to “adopt as a rule of federal common law” a provision in Tentative Draft No. 8 of the institute’s *Principles of Corporate Governance* (1988). Significantly, the high court labeled the ALI as “an improper source” not because the organization is neither a court nor a legislature, but because the Court of Appeals had failed to fill the void in federal law first with relevant state law before turning to extra-governmental sources for guidance.⁴⁰ Had no contrary state law existed, the Supreme Court likely would have affirmed the appellate court’s application of *Principles*.

A decade later, in *Lawrence v. Texas* (2003), the Court adopted the organization’s position *against* state law, and *against* its own precedent in *Bowers v. Hardwick* (1986). Both cases involved persons charged under state anti-sodomy laws. In *Bowers*, the majority construed the proposal in the institute’s Model Penal Code, which sought to decriminalize all forms of consensual adult sexual relations, as an indication that homosexuals do *not* have a “fundamental right” to “engage in consensual acts of sodomy”; after all, all fifty states had outlawed such acts prior to 1961, and nearly half of the states still prohibited such acts at the time of this ruling. The ALI, therefore, was the exception that proved the rule. “To claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty,’” wrote Justice Byron White, “is, at best, facetious.”⁴¹

In *Lawrence*, however, the Court reconstrued the institute’s model as indicative of an “emerging recognition” that society increasingly accepts

35. Graham, “ALI Child Custody Principles,” p. 325.

36. *Weinstein v. Weinstein*, no. 17425, 280 Conn. Sup. 15 (2007), relying upon ALI, *Principles* (2002), § 3.14 (4) (b).

37. *Rideout v. Riendeau*, 761 A.2d 291, 307 (2000 ME 198) (2000), citing ALI, *Principles*, § 2.03(1) (c) (Tentative Draft No. 4, 2000).

38. *Osterkamp v. Stiles*, Nos. S-13297, S-13317, Sup. Ct. of Alaska (2010), n41, quoting ALI, *Principles*, § 2.03, comment c(iv).

39. *Hoover (Letourneau) v. Hoover*, 171 Vt. 256 (2000).

40. *Kamen v. Kemper Financial Services Inc.*, 500 U.S. 90, 95, 100 (1992).

41. *Bowers v. Hardwick*, 478 U.S. 186, 193, 193n7, 194 (1986) (internal citations omitted).

homosexual behavior.⁴² The *Lawrence* majority relied explicitly on an *amicus curiae* brief prepared by the libertarian Cato Institute, which identified the model as a key turning point in the development of state statutes and case law permissive of private, consensual homosexual acts.⁴³ Justice Antonin Scalia dissented, arguing 1) historically, that the adoption of the model by several states does not establish a fact of “emerging awareness” favorable to homosexual behavior, particularly in view of strong resistance among other states; and, 2) constitutionally, that “an ‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition[s],’ as we have said ‘fundamental right’ status requires.”⁴⁴

Scalia’s reliance on constitutional principles may slow the organization’s progress in having its sociological preferences shape public policy, particularly if he can garner enough colleagues to form a majority of the Court. Meanwhile, University of Illinois law professor David Meyer has drafted a counter-proposal: Rather than inquiring whether the ALI “ha[s] taken sufficient account of the constitutional terrain” he suggests “turning the question around to ask whether judges who craft evolving constitutional doctrines protecting family autonomy have taken sufficient account of ALI.” Meyer explains that “rather than steer families toward some preferred model of child rearing,” the institute’s sociological realism seeks “to ensure that [the] parenting practices the parties saw fit to establish for their children before a family rupture are preserved thereafter to the extent possible . . . ‘enabling’ families to chart their own course rather than ‘standardizing’ custody outcomes with reference to a fixed social norm.”⁴⁵ Unfortunately, Meyer’s clarion call for judicial restraint largely disregards the possibility that a family’s prior parenting practices may have contributed to the controversy that landed them in divorce court in the first place. As a proponent of sociological jurisprudence, the ALI has apparently succumbed to the naturalistic fallacy—inferring that

whatever is, ought to be. But might it be the case that a homosexual “co-parent” has contributed to the problem of family dissolution, rather than being the solution for post-dissolution custody?

Ironically, what happens to opposite-sex couples when they get divorced has come to determine whether same-sex couples should get married. But that is not the deepest irony. The ALI, in a concerted effort to limit judicial discretion and standardize the application of the law, also has drafted innovative principles of family dissolution that “open up a range of possibilities limited only by the imagination and creativity of lawyers and their clients.”⁴⁶ Academic elites have not so much eliminated the contrivances of litigation, but drafted new rules that invite new participants to appear in court with representation: de-facto parents and parents by estoppel claiming custody or visitation rights, and same-sex couples claiming the right to get married—or divorced. Indeed, a Texas appellate court recently rejected the plea of a man, who had married another man under Massachusetts law, to file for a divorce in Texas.⁴⁷

Meanwhile, marriage—that “pre-political social order” that formerly mediated its own disputes, often without need to enter a public judiciary⁴⁸—has suffered a debilitating redefinition. In its place, we find a “functionally” defined post-family institution in which the most traditionally honored private relationships—those between husband and wife, parent and child—must withstand public investigation at the risk of being displaced by competitors for spousal benefits and child custody:

The ALI proposal deeply intrudes into relational privacy. It dramatically expands state control over private life. Despite the liberal rhetoric that cloaks its illiberal character, the ALI proposal offers nothing more—or less—than a dramatic expansion of state paternalism and coercion.⁴⁹

42. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

43. *Ibid.*; Brief of the Cato Institute as *Amicus Curiae* in Support of the Petitioners for *Lawrence v. Texas*, January 16, 2003, <http://www.cato.org/pub_display.php?pub_id=4871>.

44. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (internal citations omitted).

45. David D. Meyer, “What Constitutional Law Can Learn from the ALI *Principles of Family Dissolution*,” *Brigham Young University Law Review* 2001.3 (2001): 1075-1104, at 1075, 1077, 1099.

46. Coombs, “Insiders and Outsiders,” p. 106.

47. *In the Matter of the Marriage of J. B. and H. B.*, No. 05-09-01170-CV (Tx. Ct. App. 5th Dist. 2010).

48. Seana Sugrue, “Soft Despotism and Same-Sex Marriage,” in *The Meaning of Marriage: Family, State, and Morals*, ed. Robert P. George and Jean Bethke Elshtain (Dallas: Spence, 2006), pp. 172–96, 176.

49. Marsha Garrison, “Marriage Matters: What’s Wrong with the ALI’s Domestic Partnership Proposal,” in *Reconceiving the Family*, pp. 305-30, at p. 328.

As with no-fault divorce, so also with same-sex marriage: the lesson of experience may well be that neither liberty nor equality can long endure when the state hollows out its natural foundation, namely, the lifelong union of a man and a woman.

Dr. MacPherson, who teaches American history at Bethany Lutheran College in Mankato, Minnesota, is founding president of the Hausvater Project (www.hausvater.org), which promotes the natural law of the family. He is writing a book on the same-sex marriage debate.