

## **Family, social construction or natural phenomenon?**

by Brenda Almond

### **Introduction**

In my book, the *Fragmenting Family*, I offer a defence of the traditional family, understood as a natural biological phenomenon. I also argue in favour of marriage as an institution that is important, if not essential, for the welfare and continuity of families. But first let me say that in presenting this analysis, I aimed to avoid arguments that depend on religious views because I wanted to avoid the kind of controversy religion always seems to provoke and to offer a philosophical perspective based simply on reason and morality. I also believe that people should be able to recognize the social value of solid family life, even if they don't manage to make their own personal lives conform to that model - the personal lives of politicians are strictly irrelevant to the formulation of public policy. Of course, talking about the social value of the family necessarily involves making some empirical claims, and I am not a social scientist myself. But I have looked at the social science research and found weighty support for the view that married parents do offer youngsters the best opportunity for a happy childhood – standard measures are health, how they do at school, contact or not with crime or drugs, likelihood of suffering abuse or violence, or even a simple measure like their chance of being excluded from school.<sup>1</sup> And this, it seems to me is the right way to look at the issue of the 'te family' – that is to say, to look at things from the point of view of children, rather than focusing just on what adults might feel entitled to, or want for themselves.

### **Philosophical aspects**

There is no single explanation for the disintegration of the family. It has been brought about by a whole range of contributory causes, legal, social, scientific and economic - from changes in marriage and family law and government economic and welfare policies, to scientific and medical advance, especially in the area of the new reproductive technologies. There are also more deeply philosophical influences. Indeed, it is possible to find the roots of some of today's personal struggles in to the ancient philosophical tension between permanence and flux. For it is that same tension that lies behind the life-style choices people make today – some people seeking continuity in their personal lives, others opting for change. For those people

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<sup>1</sup> Samantha Callan of the Centre for Social Justice has supplied the following figures for children involved in family breakdown. They are: 75% more likely to fail at school; 70% more likely to be involved with drugs; 50% more likely to have alcohol problems. Samantha Callan, London, Centre for Social Justice, July, 2007. These children also constitute the majority in refuges for children who have run away from home. According to the sociologist Patricia Morgan, a survey of seven major British cities and four inner-London boroughs in the 1990s found that in some areas five per cent of the 16-19 age group were classified as homeless. Morgan, P. *Farewell to the Family*, London, Institute of Economic Affairs, 1999. p. 163. Her claim is based on research by Smith, J. et al. *The Family Backgrounds of Homeless Young People*, London, Family Policy Studies Centre, 1998 and Strathdee, R. *No Way Back*, London, Centrepoint, 1992.

for whom stability in relationships is a central need, the family is one of the few ways they have to break down the solitude, the pure atomicity, of an individual life. Often, though, people find their lives disrupted sometimes by their own choices, sometimes by the decisions of other people whom they trusted, or by natural intrusions such as illness or death. The result of this can be loneliness, mental breakdown, or illness brought on by the collapse of the network of dependency.

But there is, these days, an unconscious drift towards accepting the inevitability of flux and change as a condition of modern living. Some people try to deal with that by cultivating the kind of emotional detachment the ancient Stoics recommended. In practical terms, they may say that it's better not to try to hold on to a relationship that has gone stale. This response is reflected in changing short-term partnerships and a casual attitude to divorce. But while the wisdom of 'moving on' has become almost an article of faith for some, where relationships between adults are concerned, people still look for something constant in their lives; hence the parent-child relationship has become more intense and unconditional than ever. So when adult relationships break down, children can become pawns in a post-marital gender war. It is a war, though, that in the end neither sex can win and this may explain the rise of organisations that offer separate help to the various parties involved: 'fathers for justice' defending rights to contact with their children after separation or divorce, groups providing refuges for women fleeing male violence, and charities like Childline offering children an independent voice to apply in their own right for help and advice.

### **Just living together - the cohabitation option**

Whatever the reason, however, it is clear that marriage, seen as the basis of the traditional family, now competes with other alternatives in the way people choose to live their lives, so that in many Western countries, the traditional, two-parent, one-earner family, has become a dwindling phenomenon. The decline of marriage, however, has been counter-balanced by a vast expansion of cohabitation – living together without marrying.<sup>2</sup>

Not everyone regards the increase in cohabiting in entirely negative terms. Indeed, it can be seen as a positive aspect that having children outside marriage does not necessarily mean that mothers and children are living alone, or even that there is a lack of parental involvement on the part of the father.<sup>3</sup>

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<sup>2</sup> The legal theorist Antony Dnes describes the move towards cohabitation common to many European countries and North America over the forty years from 1960 to 2000 as a hugely significant shift in social behaviour. He reports that in England first marriages fell from approximately 70 per 1,000 to 30 per 1,000 of the male population, while the proportion of women aged between 20 and 50 who were cohabiting trebled. See Antony W. Dnes, 'Cohabitation and marriage' in *The Law and Economics of Marriage and Divorce*, ed. Anthony W. Dnes and Robert Rowthorn, Cambridge, Cambridge University Press, 2002. pp. 118-131.

<sup>3</sup> The authors of a United States study of what were termed 'fragile families' regarded the high rate of cohabitation among unmarried parents as one of their most striking findings. They reported that at the time of birth, half of unmarried mothers were living with the fathers of their children. Another third were romantically involved with the fathers, but living apart in what they called "visiting relationships." Of the remainder, some described their relationships as "just friends" or said they had little or no contact. Sara

However, this is to take a fairly short-term view of such situations and it offers no guarantee as to how the longer term might work out. While policy makers and opinion-leaders seem ineluctably drawn to using the term ‘stable relationships’ as a synonym for cohabitation, cohabiting relationships are statistically more unstable than married ones. For there has been a change in what cohabitation actually means to couples. In some cases, and in some cultural settings, it would have been regarded as a prelude to marriage and within that pattern of expectations, the birth of a child would have led to the sealing of the relationship with marriage. But the pattern today is different: whether people choose to cohabit because they actually prefer more flexible relationships, or whether it is simply the case that marriage itself creates a more stable framework, the fact is that cohabiting couples are more likely to separate than those who marry.<sup>4</sup> As a result, a succession of short-term cohabitations is not unusual and the birth of a child or children may well lead to the end of the relationship rather than its continuation in the form of marriage.<sup>5</sup>

For those who value a free society, other things being equal, personal life is a matter for the individual. However, when social costs are incurred, some aspects of personal life become a legitimate matter of public concern. The trauma following divorce has been well-documented, less so the effect of changing short-term cohabitations. It is reasonable to ask, then, why it is that people choose to cohabit. One obvious answer is that they prefer to be free to move out or move on without legal hassle or interference. And indeed there is some evidence to suggest that cohabiters do in fact behave more like single people than married people in the way they live their individual lives and some, at least, will interpret the terms of the relationship to exclude a commitment to fidelity as well as to long term continuity.<sup>6</sup> But these are very theoretical ways of construing choices about personal relationships, and not everyone makes such decisions on the basis of weighing up their lives in quite such explicit terms.

The philosophical case for marriage, on the other hand, can be made in terms of both Kantian and utilitarian ethics. First, as far as the Kantian argument is concerned, marriage is based on a promise, and the marriage promise, even if it is not in law treated in its formation or its enforcement as a contract, is recognisably an

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McLanahan, Irwin Garfinkel, and Ronald B. Mincy, ‘Fragile Families, Welfare Reform, and Marriage’ Washington: The Brookings Institution, *Welfare Reform and Beyond*, Policy Brief No. 10, December 2001.

<sup>4</sup> 1 in 2 unmarried couples split up before their child is 5 years old, while only 1 in 12 married couples do so. Office for National Statistics figures from 2004 for the United Kingdom showed that three quarters of all family breakdowns affecting young children involved unmarried parents.

<sup>5</sup> This point is supported by the family theorist Robert Whelan, who writes: ‘Cohabiting relationships are always more likely to fracture than marriages entered into at the same time, regardless of age and income. It is no longer true that people cohabit until children come along and then tie the knot. Cohabitations with children are more likely to fragment than childless ones.’ Whelan, R., Foreword to *Marriage-Lite: the rise of cohabitation and its consequences*, by Patricia Morgan, London, Civitas, 2000, p. vii. For some American perspectives, see Booth, Alan and Ann C. Crouter, eds, *Just Living Together: implications of cohabitation for children, families, and public policy*, Hillsdale, NJ, Lawrence Erlbaum Associates, 2002.

<sup>6</sup> See Nock, Steven ‘A comparison of marriages and cohabiting relationships’ *Journal of Family Issues*, vol. 16, Jan. 1995. pp. 53-76. Using data from the National Survey of Families and Households, Nock identified significant differences in the way people viewed their experience of cohabiting or married relationships.

agreement by the parties to create a legal relation between them.<sup>7</sup> The German philosopher Kant's valuable, and much misunderstood, claim in relation to promising was that promises made on the understanding that they can be broken if, later on, that becomes convenient are not so much morally wrong as logically incoherent. The institution of promising, Kant argued, would collapse under such an understanding. It seems to me that the collapse of marriage as an institution is simply a striking illustration of the validity of Kant's argument. Secondly, looked at from a utilitarian perspective, marriage does have a role in promoting the public good. This is an area in which many people's interests are involved, both directly and indirectly. Most obviously the interests of children need to be protected, but also the interests of the wider community, since these are threatened by the power of family fragmentation to produce social instability.

Often it is the fear of being 'judgmental' that leads law-makers to exclude family matters from social or political decision-making, and this reluctance to appear moralistic or judgmental has become a driving force in policy-making. But the behaviour of adults has inevitable repercussions for children and this makes marriage a justifiable concern from even the most objective and morally neutral perspective. The Canadian ethical theorist Dan Cere identifies the changed view of the primary relationship as the cause of the practical morass of often irresolvable claims concerning parenthood that is now encountered in family law. He writes: 'The ongoing disputes in family law are centrally about competing visions of marriage. While at the far ends of a conceptual divide lie a bewildering variety of specific new proposals (same-sex marriage, covenant marriage, de facto parenting, cohabitation, constitutional amendments to define marriage, and more), these disputes begin with and are fuelled by dramatically different concepts of marriage and of the role of the state in making family law.'<sup>8</sup>

This shift in the contemporary understanding of marriage may be more influential in practice than changing economic strategies, important though these are, for these are unlikely in themselves to shake family structure. Poverty and hardship, after all, have been a common experience of human beings and families have faced them together. But when legal interventions combine with economic strategies that are prejudicial to the traditional family, the tree begins to shake. Legal changes have contributed to the process of structural disintegration in two ways: first, changes in divorce law, and second and more drastically, by promoting changes in the public understanding of the family that risk overturning that original framework altogether.

#### **455 No-fault divorce**

In the first context it is the shifts that have taken place in family law in relation to divorce in most Western

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<sup>7</sup> For the case for seeing marriage in contractual terms, see Lloyd R. Cohen, 'Marriage: the long-term contract' in Dnes and Rowthorn, op. cit. pp. 10-25. Also by this author: 'Marriage as Contract' in P. Newman, ed. *The New Palgrave Dictionary of Economics and the Law*, London, Macmillan, 1998 and 'Marriage, Divorce and Quasi-Rents; or, "I gave him the best years of my life"', *Journal of Legal Studies*, 16, 267-303.

<sup>8</sup> Cere, Dan, *The Future of Family Law: law and the marriage crisis in North America*, New York, Institute for American Values, p. 9.

countries, in particular, the move to no-fault divorce, that have been significant. Removing fault from divorce can be seen as one aspect of an increasing willingness to discount technical and formal requirements in personal matters and to recognise what exists *de facto*.

But marriage is a good mechanism for supporting long-term family investments and, as the British economist Robert Rowthorn argues, by weakening the notion of marriage and the security it offered in the past, no-fault divorce has undermined marriage as a trust-creating institution - as things stand, the marriage contract has been diluted to the point that it is now much less binding than the average business deal. Rowthorn believes that if opportunism by either sex is to be avoided, fault must be seen as relevant not only to divorce settlements but also to decisions about the custody of children.<sup>9</sup>

But the debate about no-fault divorce is more deeply ideological than this. As the legal scholar Michael Freeman observes: 'A fault-based divorce law was a reflection of a particular view of marriage. But of what is a no-fault divorce a reflection? What is left of the ideology of marriage? Is it a surprise that a new ideology had to be constructed to take its place, one which emphasized the responsibilities of parenthood?'<sup>10</sup>

#### **'New families'**

Perhaps it is not surprising, then, that people have begun to look for solutions in radical new ways of conceiving of the family, and that the simple conception of the biological triad, mother, father, and their joint offspring – the common meaning of 'family' in the case of most other mammalian species – now finds itself under serious challenge, while the idea has taken root that human families can be constructed, or put together, in any way that people want. A necessary implication of this is that biology counts for little or even nothing: that neither the mother-child relationship, nor the father-child relationship, understood in biological terms, have any significance. All that matters is what adults want and what they set out to achieve, and children can be expected to adapt to it, however it works out in practice.

In contrast to this, I believe that not only the pair-bond, but also the maternal tie and the bond between father and child are powerful factors in human life. To take the mother bond first, there is no reason to doubt the widely held view that a child who lacks the warm physical bond of mother-love has lost

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<sup>9</sup> Rowthorn comments: 'The fact that individuals can now exit easily, and unilaterally, from a relationship makes it difficult for couples to make credible commitments to each other. They can promise anything they want, but most of these promises are no longer legally enforceable, and many are undermined by social policies which reward those who break their promises. By eroding the ability of couples to make credible commitments to each other, modern reforms have deprived them of an important facility which, for all its defects, the old system provided.' Rowthorn, Robert, 'Marriage and Trust: Some Lessons from Economics', *Cambridge Journal of Economics*, 23, 1999, pp. 661-691. p. 661. See also See Dnes, *op. cit.* p. 119.

<sup>10</sup> Freeman, M. ed. *srsid3242455 Family, State and Law*, Dartmouth, Ashgate, 1999. Freeman points to two legislative initiatives in England based on this new principle: the Children Act 1989 and the Child Support Act 1991.

something which can only be partially compensated for by others, if at all. A wealth of empirical research exists concerning that relationship. This ranges from Harlow's sad experiments on monkeys to test the effects of maternal deprivation to John Bowlby's observations about the importance of the mother-infant bond for child development. There are also more recent studies following up the lives of mothers who have been in care themselves that show they often have difficulty in handling relationships with their own children later on.<sup>11</sup> There are, then, convincing practical reasons for the old-fashioned idea that mothers and children need each other.

Feminists have often been prominent in defending the cause of women as mothers, but the overall impact of some recent feminist thinking has been on the whole negative as far as the traditional family is concerned. It is often linked to an analysis of the family that sees it as a source of women's repression. But there is a new wave of feminism that is more sympathetic to the family. For example, while Betty Friedan's book *The Feminine Mystique* had a seminal influence on the feminist movement of the 1970s, a decade later she was prepared to set out a new vision of the family as 'that last area where one has any hope of individual control over one's destiny, of meeting one's basic human needs, of nourishing that core of personhood threatened by vast impersonal institutions.'<sup>12</sup> There is also a more thoughtful appreciation of the root idea of the *natural* family amongst some feminists, although there is still a powerful lobby that supports a gender-neutral perspective.<sup>13</sup>

### **Fathers**

But there is something paradoxical about seeking gender-neutrality in what is, after all, the ultimate sexually defined relationship of procreation – especially when this is done from a gender-defined perspective. The philosopher Mary Warnock, who has greatly influenced practice in the area of assisted reproduction, talking about her own early life, has said that she had a happy and comfortably secure childhood, despite the fact that her father had died before she was born. She seemed to draw from this the conclusion that the absence of a father is not crucial to a child. Of course, in a sense, *nothing* is crucial – children are very resilient. But my own case was the other way round. Having lost my mother in infancy, I always knew how important, indeed essential, to me my father was. And even if young children might not seem troubled by the loss or absence of a male parent, fathers are generally acknowledged to have an important role with older children. It is also clear that for some grown-up children who have been adopted or otherwise cut off from them, the desire for contact with an unknown parent can be overwhelming.<sup>14</sup>

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<sup>11</sup> See Hughes, Claire, 'Making and Breaking Relationships: children and their families' in *Children and their Families: contact, rights and welfare*, ed. A. Bainham, B. Lindley, M. Richards and L. Trinder, Hart, Oxford-Portland Oregon, 2003, pp. 33-46. p.41.

<sup>12</sup> B. Friedan, *The Second Stage*, New York, Summit Books, 1982, p.229.

<sup>13</sup> I discuss broader aspects of the feminist contribution to the debate in Ch.4 of *The Fragmenting Family*, 'Feminist aims, family consequences.'

<sup>14</sup> Joanna Rose took her case to the House of Lords in Britain, seeking to establish her right to the identity of her natural father. *Rose v. Sec. of State for Health and the HFEA*, [2002] EWHC 1593.

For this reason, I was disappointed when, in July 2007, Professor Ann Buchanan, having given important evidence about her own research which effectively demonstrates the importance of fathers to a Committee of the British Parliament that was scrutinising the draft Human Tissues and Embryos Bill, added that she now thought that perhaps her research just showed that it was important to have two parents.<sup>15</sup> This surprising shift was not, though, something she had tried to evaluate scientifically – she presented it simply as a subsequent personal reflection. It has, however, become one of the recommendations of the Joint Committee in its Report relating to the forthcoming legislation.<sup>16</sup>

### **Fertility treatment and assisted reproduction**

This recent and ongoing debate about the role of fathers was one aspect of another area that concerns the family: the new reproductive technologies, and especially fertility treatment involving donation of gametes. In practice, it has been found that people seeking assisted reproduction overwhelmingly do prefer, where possible, to have children who are genetically related to them. But sometimes a couple who desperately want a child will have no alternative but to use donated gametes if they are to fulfill that wish. For example, this might be the only way they can avoid passing on a serious genetic condition. But the fertility industry is a highly lucrative business and it has spread its net far beyond modest medical aims of this sort, while the *demand* for assistance has gone much further too, pushing through the natural barriers of age, sex and even death. It may well be time to pause in this rush for self-fulfillment by procreation, and think about what it means to cut a child off from its genetic heritage and its own genetic relatives.

In the case of same-sex couples or single people, there is, in addition, the fact that the decision necessarily involves creating a child who will not have the experience of a mother's care, or else not have the experience of a father's care. And, as another philosopher has pointed out: 'Creating children with the intention that they not have a custodial father, or alternatively a custodial mother, is potentially just as problematic as creating children divorced from their biological origins.'<sup>17</sup> Whatever compensation may be implicit in the situation, the remarkable fact is that what those who are often called 'children of choice' are deprived of is something that, for the entire history of humankind, has been taken as a good and has so far not needed to be proclaimed as a right - in the one case to a father /male parent, in the other to a mother/ female parent. And yet, as Jonathan Glover has observed: 'The normal state for a child is to have one parent of each sex. It is surely right to be very cautious about tampering with something so fundamental.'<sup>18</sup>

Now I don't want to deny that sometimes alternative arrangements of these various kinds can be rewarding for those involved, All the same, we still have to ask how far it is reasonable to build them into a new conception of family, to be widely imitated and promoted, rather than recognising them as exceptional

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<sup>15</sup> Human Tissues and Embryos (draft) Bill, Evidence Session 2006-07, TSO 2007.

<sup>16</sup> Human Tissues and Embryos (draft) Bill, Report, August 2007, TSO 2007.

<sup>17</sup> J. David Velleman, 'Family History' *Philosophical Papers*, vol. 34, no. 3, November 2005, pp. 357-378. p. 360.

<sup>18</sup> Glover, J. *Fertility and the Family*, p. 59.

situations that necessarily involve some loss for the child. The kind of loss I have in mind is the loss bound up in the insecurities, both personal and legal, of their situation. For the fact is that, for whatever reason, same-sex relationships tend to be shorter than heterosexual ones and, when there have been joint procreative ventures, they can – and often do - unwind disastrously into their original constituents in the law courts.

### **Civil unions**

These procreative issues are inextricably linked with the recent introduction of civil unions in a number of countries. So it may be worth thinking more carefully about what a civil union is intended to do. Unlike the historical approach to heterosexual marriage, civil unions tend not to be entered into in order to form a procreative unit. Instead, the emphasis is on two people wanting to be with each other and to demonstrate their personal commitment to each other to the world.

A reluctance to see such unions as the place for creating ‘new families’ via assisted reproduction is not necessarily bound up with a belief that the state should place unreasonable obstacles in the path of same-sex relationships, nor even that it should rule out in advance any particular caring arrangements for existing children. But it would justify a slower pace of change and a more cautionary approach to the ‘new families’ ideology. For whatever view one takes of it, it is surely undeniable that we need more time to evaluate this untested experiment with ways of first creating and then bringing up children.

My own view is that, while much public discussion is based on the assumption that there is a popular demand for new modes of family formation, most people do in fact continue to favour the security of the kind of family relationships provided by nature rather than the law-courts - the traditional, heterosexual family defined by marriage and blood relationships. There remains, for many people, a deep intuitive conviction that, as the Scottish philosopher David Hume put it, the relation of blood ‘creates the strongest tie the mind is capable of in the love of parents for their children.’<sup>19</sup>

Powerful lobby groups, however, think otherwise and are influential in pressing their views. There is a move in many Western countries to pursue change in line with the new ideology which seeks to replace the concept of the biological family with the concept of ‘family’ as a social and legal construction. Nor is this simply a harmless matter of concept-creation. The new ideology is designed to use conceptual change to replace, in law and practice, biological claims to family relationships with social and legal criteria.

### **Birth Certificates**

But whatever way people go about having or bringing up their babies, there is an ancillary issue which is, to my mind, even more important. It is the claim that people are at least entitled to *know* about their own

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<sup>19</sup> Hume, D. *A Treatise of Human Nature (1739-40)*, ed. Ernest C. Mossner, Harmondsworth, Penguin, 1985. Bk II, ‘Of the Passions’, Sect. 4. p. 401.

origins, something now almost universally accepted in the case of adoption. They have a right not to be deliberately deceived about their ancestry by a medico-legal conspiracy designed explicitly to conceal it from them.

So what are we to say about the unreflective stampede in various Western countries, including potentially Britain, to change the nature of birth certificates altogether so that they no longer record biological or genetic origins? New Zealand is considering allowing five people to be named on a person's birth certificate, Canada and Spain have already legislated for non-related same sex partners to be listed in place of a genetic parent – and Canada has moved, indeed, to exclude recognition of the category of biological parent and any indication of sex or gender from the whole field of family law.<sup>20</sup>

Even apart from any psychological or emotional need a person may have to know their biological origins, there is a medical aspect. If accompanied by medical and legal secrecy, both genetic research and the care of people with genetically-related medical conditions could be seriously adversely affected. Faced with these possibilities, some clauses in the United Nations Convention on the Rights of the Child take on a new contemporary relevance: Article 7 specifies that: 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.' And, according to Article 8: quote States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.<sup>21</sup>

### **The genetic chain: identity and culture**

Why does genetic ancestry matter so much? One answer to this is that children who are deprived of knowledge of, or contact with, their genetic origins are exiles from the kinship network – they are orphans in a sense previously unknown to human beings. They may in fact have unknown half-siblings, cousins, aunts, grandparents, but they will never meet them. Of course, there is every chance that they will be provided with an alternative family network that will provide love and security, but the subtle similarities of genetic relationships may come to haunt them in the future, particularly when they have children of their own and start to look for such things as shared resemblances, attitudes, interests, tendencies, qualities of character and physical features in their own offspring.

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<sup>20</sup> Canada, Civil Marriage Act, 1<sup>st</sup> sess., 38<sup>th</sup> Parliament (2005), 'Consequential Amendments'. See also, Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada, 2001).

<sup>21</sup> On this, see Bainham, A. 'Parentage, Parenthood and Parental Responsibility' in Bainham, A. Day Schlater, S. and Richards, M. eds. *What is a parent? A socio-legal analysis*, Oxford, Oregon, 1999. pp. 25-46. p. 37. See also Fortin, J. *Children's Rights and the Developing Law*, London, Edinburgh and Dublin, Butterworths, 1998 and Le Blanc, L. J. *The Convention on the Rights of the Child*, Lincoln and London, University of Nebraska Press, 1995.

There is something very powerful about this desire to look back – to understand your own past. As a wise Chinese proverb says: ‘To forget one’s ancestors is to be a brook without a source, a tree without a root.’ So it is the attack on biology that is, perhaps the most recent and most damaging development in the story of the family. This was publicly acknowledged by the President of the International Society of Family Law, Marie-Thérèse Meulders when she said: ‘One of the main contemporary issues is the choice between the biological or the sociological truth as the legal basis of parenthood, and this is true not only for children born from assisted procreation, but also for adoption, fostering, step-parentage, and so on.’<sup>22</sup>

### **State versus Family**

I have touched here on a wide range of family issues, but there are some related key issues which I have not been able to discuss. For example, I said earlier that there can be bad parents, but I did not raise the issue of how far this can justify giving enforcement powers to the state. The argument for being extremely sparing in intervention of this sort is this: you can nearly always point to a better way for any particular child to be brought up. So unless you acknowledge the primacy of the biological parent, you are providing a justification for the state to remove any child to what it deems to be a good or better care situation. Of course, parents can make mistakes, but this is not as much of a disaster as it is when the state makes a mistake, since the state’s mistakes are ubiquitous – they affect everyone. When state and family conflict, then, it would only be in extreme circumstances that I would choose the state.

I mention this in order to stress that mine is an essentially libertarian message. This may sound surprising, for this is not how libertarianism in relation to the family is usually interpreted. The libertarian is, of course, the friend of the minimal state. But even the minimal state must fulfil two functions:

- a) it must make it possible for adults to enter into contracts with each other and I have argued that marriage is at least a quasi-contract, and one that has been devalued to the point where it is easier to get out of a marriage than out of a mortgage.
- b) it must protect the vulnerable. Children are vulnerable and, as I have argued, they can be deprived of important rights, not only in childhood, but even at the embryonic stage, when they can be deprived of *future* rights. Later on in childhood, they are vulnerable to parental separation decisions and to the decisions those parents make about their care and custody. The life of a child bargained over and split in two by judicial decree is seldom trouble-free and ‘new families’ may not be as good for children as their advocates often suppose.

### **Summing up**

I hope I have said enough here to indicate the way in which, in *The Fragmenting Family*, I sought to build a philosophy of the family, to assemble the fragments of argument from various sources, from philosophy itself, from social research, from economic analysis and legal judgement, from feminism, science and

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<sup>22</sup> Marie-Thérèse Meulders, President of the International Society of Family Law, in her Introduction to Eekelaar, J. and Petar Sarcevic, *Parenthood in Modern Society: legal and social issues for the twenty-first century*, Dordrecht, Holland, Marinus Nijhoff, 1993. p xii.

bioethics. I took on that task because I could see that the challenge to the family was coming from this multiplicity of diverse sources, usually looked at only separately and independently. So I decided to start at the beginning of the debate about the family, to locate its basic premises, and to follow the argument where it led.

I ended by challenging some of the cherished ‘idols’ or dogmas of our day: the belief that whatever the personal evidence of shattered lives, divorce or parting doesn’t hurt, that deep attachments can be unilaterally shattered; that what adults in their personal lives do cannot seriously harm their children; that not making a commitment in the first place can solve the problem – that cohabiting is better than, or at least as good as, marrying; that genetic relationships don’t matter – that genetic ancestry is available for sale or transfer; that populations and cultures in decline can ultimately survive; that ‘family’ can mean whatever we want it to mean. And it is these, it seems to me, that must count as the serious mistakes of the last half century.

ENDS

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