

FLIGHT FROM OBLIGATION

William C. Duncan[†]

“It is time, in the West, to defend not so much human rights as human obligations.”¹

I. STATUS AND CONTRACT

Wrenched from their context, the concepts in Sir Henry Maine’s famous thesis that the movement of the law in progressive societies is from status to contract can provide a way of highlighting important themes in family law.²

The laws related to marriage and family create significant statuses, such as husband and wife or parent and child. More than merely labeling, the law couples the designation with important rights and duties. Thus, it is inherent in the status of a legal parent that he or she may direct the upbringing of his or her child. A parent owes a child a duty of support and may even incur liabilities if the child takes actions which the law considers attributable to a lack of appropriate oversight. Spouses, too, incur obligations because of their legal status. They have duties of support, and the law assumes that they will share property, leave their estate to the surviving spouse, and make medical and other decisions on behalf of one another. To the degree that family law assigns rights and responsibilities—and even, to some degree, identity—to individuals because of who they are (parents, spouses, etc.), it reflects the idea of status.

The element of status, however, provides only an incomplete account of family law. Being a parent, a husband, or wife does mean obligations inherent in that status, but the status is not inherited or even precisely assigned. There is still some act of volition either direct (as with marriage) or at a remove (as with parenthood) by which the individual assumes the status. Thus, marriage is sometimes described as a civil contract. Indeed, its validity is dependent on its being freely chosen.

[†] Director, Marriage Law Foundation.

1. Alexander Solzhenitsyn, Harvard Address (June 8, 1978), in *THE SOLZHENITSYN READER: NEW AND ESSENTIAL WRITINGS 1947–2005*, 561, 566 (Edward E. Ericson, Jr. & Daniel J. Mahoney eds., 2006).

2. See R.H. Graveson, *The Movement from Status to Contract*, 4 *MOD. L. REV.* 261, 263 (1941).

It is clear, however, that marriage and parenthood partake of elements of both status and contract, neither entirely exclusive of the other. Thus, having consented to marry, the terms of the marriage cannot be characterized entirely as freely chosen. One cannot, for instance, simply end the marriage without complying with formal exit requirements (no matter how permissive they have become of late). Even the choice to exit may not end the obligations flowing from the spousal status. For example, one may still have obligations of spousal support. Parenthood is an even more dramatic example as the status of a legal parent can make far-reaching demands on individuals far beyond what they might have ever “chosen” in the sense of a dickered bargain.

II. “MORE THAN A MERE CONTRACT”

Perhaps it is well to begin with an obligatory reference to *Maynard v. Hill*.³ *Maynard* involved a complicated dispute over a land grant in Oregon Territory.⁴ At its most basic, the dispute turned on the validity of a legislative divorce to David Maynard who owned one tract of land. If his ex-wife could establish that the divorce was invalid, their two children (Lydia Maynard died in 1879) might be able to claim an adjoining tract.⁵

Mr. Maynard had married in Vermont, moved to Ohio with his wife, but after a series of financial problems, left her and their grown children in Ohio and traveled to the Oregon Territory.⁶ On the trip he met Catherine Broshears (her husband died on the trail) whom he married a month after his divorce to his previous wife had been granted.⁷

Acting decades after the divorce and remarriage, the Supreme Court concluded that the legislative divorce was valid.⁸ The majority felt legislative power over the validity of marriage was not in much doubt:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates,

3. *Maynard v. Hill*, 125 U.S. 190 (1888).

4. See Steven H. Hobbs, *Love on the Oregon Trail: What the Story of Maynard v. Hill Teaches Us About Marriage and Democratic Self-Governance*, 32 HOFSTRA L. REV. 111 (2003) (a fascinating account of the case).

5. See *id.*

6. *Id.* at 117–18.

7. *Id.* at 119.

8. *Maynard*, 125 U.S. at 190.

its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.⁹

In this passage, the Court provides more than a mere statement of the dispositive principle (at the end of the first sentence)—that the legislature has the power to grant a divorce—and examples of the uses of that power (in the second sentence). It also offers an explanation of why marriage is a matter of legislative concern. It creates “the most important relation in life” which has “more to do with the morals and civilization of a people than any other institution.”¹⁰

The question of legislative power to grant a divorce had been addressed in an earlier Supreme Court case in which the Court used divorce as an example of a matter within the competence of the legislature as opposed to a contract the legislatures would be foreclosed from interfering with under the Contracts Clause of Article I, Section 10.¹¹ In other words, marriage is not like the kinds of contracts “which respect property, or some other object of value.”¹² It is a matter of broader social significance, as contrasted with something like a dickered bargain between two private parties. Thus, some discussion of the nature of marriage is not entirely superfluous as it highlights the distinctive nature of marriage that contrasts it with a purchase contract.

In fact, the *Maynard* Court opines on this matter at some length. In perhaps the most well-known passage, Justice Stephen Field wrote:

It is also to be observed that, while marriage is often termed by text writers and in decisions of courts a civil contract . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.¹³

9. *Id.* at 205.

10. *Id.*

11. *See* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 625 (1819).

12. *Id.* at 630.

13. *Maynard*, 125 U.S. at 211.

Further, the opinion marshals some other cases to buttress this point. It quotes a decision from the Supreme Court of Maine that stresses the status nature of legal marriage:

When the contracting parties have entered into the married state, they have not so much entered into a contract as into a *new relation*, the rights, duties, and obligations of which *rest not upon their agreement*, but upon the general law of the State, statutory or common, which *defines and prescribes those rights, duties, and obligations*. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They *can neither be modified nor changed by any agreement of parties*. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other. . . . It is not, then, a contract within the meaning of the clause of the Constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress.¹⁴

Along these same lines, the Court quoted Rhode Island's Supreme Court:

[M]arriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than "fatherhood" or "sonship" is a contract.¹⁵

The analogy to parenthood is particularly striking here. All of these passages are pithily summed up in F. H. Bradley's admirable phrase: "Marriage is a contract, a contract to pass out of the sphere of contract."¹⁶ It is fair to say that these passages ably frame an understanding of marriage that

14. *Id.* at 211–12 (emphasis added) (quoting *Adams v. Palmer*, 51 Me. 481, 483–85 (Me. 1863)).

15. *Id.* at 212 (quoting *Ditson v. Ditson*, 4 R.I. 87, 101 (R.I. 1856)).

16. F. H. BRADLEY, *in* CONSERVATIVE TEXTS: AN ANTHOLOGY 40–58 (Roger Scruton ed., 1991).

prevailed for most of this nation's history and which was accepted virtually universally across time and varying cultures preceding the last few decades, an understanding which highlighted the elements of status inherent in legal marriage and family relationships.

III. CONTRACTUALISM ASCENDANT

A. *Marriage*

In the *Dartmouth College* case, Chief Justice John Marshall's approval of legislative divorce was not entirely unqualified.¹⁷ In fact, he characterized such acts as "enable[ing] some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other."¹⁸ Chief Justice Marshall speculated that there might be some legislative actions which would go too far: "When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire, whether such an act be constitutional."¹⁹

Notwithstanding that cautionary note, this precise thing happened when California pioneered no-fault divorce in 1969. In doing so, it dramatically emphasized the contractual elements of marriage at the expense of the status elements.

As Professor Herbert Jacob notes, "the impetus for reform came from a small band of self-appointed experts who elevated the discrepancies between black-letter law and the law-in-action to the status of a performance gap and formulated the solution."²⁰ This group "consisted of a small group of elite matrimonial lawyers in the San Francisco Bay area who had long regretted the bitterness engendered by the adversarial divorce process."²¹ Members of this group testified at 1964 hearings of the California Assembly's Judiciary Committee, and one introduced the no-fault concept. Interestingly, during the October hearing that year, the committee chairman responded to the proposal to eliminate fault grounds by saying, "I can't subscribe to that. You will have to exclude me from that. I think it is possible for a woman to be wrong or a man to be wrong and break up a marriage."²² The breakthrough

17. *Woodward*, 17 U.S. at 629.

18. *Id.*

19. *Id.*

20. HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 50 (1988).

21. *Id.*

22. *Id.* at 52.

for the concept came when Governor Edmund Brown appointed a commission on the family in 1966, the idea for which “seems to have come from the Bay [A]rea group, which had a conduit to the governor’s office through a former law student” of one of the members.²³ Some members of the Bay Area group were on the commission and “formulated many of its recommendations.”²⁴ The commission held no public hearings, and “few persons even knew that such recommendations had been made” while “the liberals who had drafted the commission’s proposals remained discreetly in the background” during the legislative debate over the recommendations.²⁵ The bill was approved in the legislature in June 1969.

The idea then spread to other states facilitated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), whose members are appointed by governors “from the ranks of law professors, prestigious attorneys, and well-placed legislators” and funded by public and private grants.²⁶ Professor Jacob notes that the concept of no-fault divorce was “familiar to legal scholars acquainted with the law as it had already been adopted in a few East European countries.”²⁷ The NCCUSL considerations began independently of the California experience and “occurred in even greater obscurity and under more control of experts than had been the case in California.”²⁸ The NCCUSL appointed a committee funded by a large grant from the Ford Foundation and a small grant from the U.S. Department of Health Education and Welfare.²⁹ In 1968, one of the principals from California became a co-drafter of the commission’s recommendation, the Uniform Marriage and Divorce Act (UMDA). Interestingly, the American Bar Association (ABA) rejected the act in 1970. The chair of the ABA’s Family Law Section noted that “the only legal precedent for an exclusive breakdown ground was that of Soviet Russia,” and the committee “feared that the UMDA would encourage unilateral divorce actions where the simple allegation of marital breakdown by one partner would inevitably lead to divorce.”³⁰ After some minor revisions, however, the ABA accepted the proposal in 1974, and the concept of “[n]o-fault divorce spread like prairie fire” through the states.³¹

23. *Id.* at 53.

24. *Id.* at 54.

25. *Id.* at 56, 59.

26. *Id.* at 63.

27. *Id.* at 65.

28. *Id.* at 69.

29. *Id.*

30. *Id.* at 76–77.

31. *Id.* at 80.

Surprisingly, throughout the momentous process of adoption in various states, the change was not made after significant debate but, rather, was treated by legislators as “routine” and a matter to be left to “experts” since, as the argument went, “only professionals ha[d] sufficient understanding to design a proper bill” on the issue.³²

It is important to stress that this revolution “was not the result of a massive social movement” because “no massive public support existed for tinkering with divorce laws, and [] public opinion polls provided no mandate for adopting no-fault divorce.”³³ Rather, “the new divorce laws were largely the product of the legal profession.”³⁴ The legislatures considering the bills that dramatically shifted their marriage policies treated the issue as a “routine policy refinement, rather than controversial social reform.”³⁵ As Maggie Gallagher says, “It was not an anguished public, chained by marriage vows, that demanded divorce as a right. The revolution was made by the determined whine of lawyers, judges, psychiatrists, marriage counselors, academics, and goo-goo-eyed reformers who objected to, of all things, the amount of hypocrisy contained in the law.”³⁶ Thus, “[i]n a single generation, marriage ha[d] been demoted from a covenant, to a contract, to a private wish in which *caveat emptor* is the prevailing legal rule.”³⁷

With the spread of no-fault divorce, other legal changes began to seem more plausible. Though not linking the two developments, one commentator notes that:

[u]ntil the mid-1970s, most American courts held that premarital agreements and other contracts made ‘in contemplation of divorce’ were unenforceable as against public policy . . . either (1) because they purported to alter the state-imposed terms of the status of marriage, which were not subject to individual alteration, or (2) because they tended to encourage divorce.³⁸

32. *Id.* at 12.

33. *Id.* at 83, 85 (alteration in original).

34. *Id.* at 169.

35. Ryan MacPherson, *From No Fault Divorce to Same-Sex Marriage: The American Law Institute’s Role in Destructing the Family*, 2011 THE FAM. IN AM. 125, 131.

36. MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE*, 146–47 (1996).

37. *Id.* at 146.

38. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 150 (1998).

He also notes “in the 1970s and early 1980s, the public policy argument began to lose its persuasiveness, or at least became insufficiently weighty for making premarital agreements per se invalid.”³⁹

More recently, the divorce process is also characterized by a greater degree of private ordering, with many jurisdictions favoring mediation as the way for divorce incidents to be determined.⁴⁰

Perhaps related to the more contingent nature of marriage, cohabitation rose precipitously. For instance, in 1960 there were 439,000 opposite-sex couples cohabiting in the United States. That number rose only slightly in the next decade but then began growing dramatically so that in 2011 it was 7,599,000 (with the number nearly doubling from 2000 to 2011).⁴¹

The legal change that most starkly illustrates the rise of contractualism is the redefinition of a marriage to include same-sex couples. Indeed, this development can be seen as the codification of the idea that marriage is primarily about private ordering. Launched in the aftermath of *Loving v. Virginia*,⁴² the first same-sex marriage case was dismissed for want of a substantial federal question in 1972, indicating that the Supreme Court did not believe that the due process and equal protection rationales for striking down anti-miscegenation laws were implicated.⁴³ Dormant for two decades, the litigation to redefine marriage took off again in the 1990s⁴⁴ although the first wholly successful case had to wait until 2003 when the Massachusetts Supreme Judicial Court interpreted that state’s constitution to require same-sex marriage.⁴⁵

From there, the litigation record was mixed, with a series of high profile losses in 2006.⁴⁶ In 2008, California and Connecticut both had court decisions requiring redefinition⁴⁷ although California voters reversed that decision by enacting Proposition 8, a state constitutional amendment defining

39. *Id.* at 153.

40. See Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22 (2005).

41. THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2012, NAT’L MARRIAGE PROJECT, SOCIAL INDICATORS OF MARITAL HEALTH & WELL-BEING 77 fig.8, available at <http://nationalmarriageproject.org/wp-content/uploads/2012/12/SOOU2012.pdf>.

42. *Loving v. Virginia*, 388 U.S. 1 (1967).

43. See *Baker v. Nelson*, 409 U.S. 810 (1972).

44. See *Behr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993).

45. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

46. See *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006); see also *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006); *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006).

47. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); see also *Kerrigan v. Dep’t of Pub. Health*, 957 A.2d 407, 481–82 (Conn. 2008).

marriage as the union of husband and wife, later that year.⁴⁸ Although the majority of states adopted marriage amendments similar to California's between 1998 and 2012,⁴⁹ the small set of states with same-sex marriage began to increase in 2009 when Vermont's legislature became the first to enact such a law.⁵⁰

In the aftermath of Proposition 8, high profile litigators launched a well-funded⁵¹ lawsuit to overturn that law, but this time they argued that the U.S. Constitution mandated redefinition of marriage.⁵² While this case was making its way to the Supreme Court, the Obama Administration signaled that it was no longer interested in defending the Federal Defense of Marriage Act (DOMA), which had defined marriage as the union of a man and a woman for federal law purposes. At that time, several cases were filed challenging that law.⁵³ One of these cases and the challenge to Proposition 8 arrived at the Supreme Court at the same time. In a blow to the hopes of those who thought the latter challenge would result in nationwide same-sex marriage, the Court declined to rule on the merits for reasons of standing.⁵⁴ While California got same-sex marriage as a result of the lawsuit, the question of whether the other states could continue to retain their marriage laws was unanswered. On the same day, however, the Court issued its decision in the DOMA challenge, and this decision was far more momentous.⁵⁵ The Court invalidated the federal marriage definition but sent mixed signals on the impact of that holding on future challenges to state laws. On the one hand, the Court spoke at length about the uniqueness of DOMA's imposition on traditional state authority to define marriage.⁵⁶ On

48. CAL. CONST. art. I, § 7.5.

49. See, e.g., ALA. CONST. amend. 774, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA CONST. art. I, § 4; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST., § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

50. VT. STAT. ANN. tit. 12, § 8 (2009).

51. See JO BECKER, FORCING THE SPRING 264 (2014).

52. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928, 931 (N.D. Cal. 2010).

53. See Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376 (N.D. Mass. 2010); *In re Balas*, 449 B.R. 567, 571 (Bankr. C.D. Cal. 2011); *Golinski v. Office of Per. Mgmt.*, 824 F. Supp. 2d 968, 974, 978–79 (N.D. Cal. 2012); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 297–98 (D. Conn. 2012); *United States v. Windsor*, 133 S. Ct. 2675, 2679 (2013).

54. *Hollingsworth v. Perry*, 133 U.S. 2652, 2668 (2013).

55. *Windsor*, 133 S. Ct. at 2675.

56. *Id.* at 2689–93.

the other, it found that Congress could have had no motive other than animus for enacting the law.⁵⁷

A flood of litigation followed to convince federal (and some state) courts that the *Windsor* reasoning should be extended to invalidate every state's marriage law. Within a year, every state was facing a challenge to their marriage law.⁵⁸ Some states quickly acquiesced by accepting lower court decisions that their laws were unconstitutional. Nearly all of the lower court decisions were unfavorable to the state laws, and four circuits affirmed these decisions before the first of the state cases reached the Supreme Court.⁵⁹

The first two post-*Windsor* circuit court decisions illustrated the degree to which contractual attitudes toward marriage had prevailed in the law. Both decisions marked a departure from the previous same-sex marriage decisions, resting their holdings on a substantive due process right to marry.⁶⁰ This had seemed an unlikely rationale for such a holding given the Supreme Court's reining in of substantive due process claims in *Washington v. Glucksberg*.⁶¹ Since that decision required a narrow statement of any proposed fundamental right and a showing that the asserted right was deeply rooted in the history and tradition of the nation,⁶² the extremely novel idea of same-sex marriage, emerging internationally only in 2001,⁶³ seemed an unlikely candidate for recognition.

The Tenth and Fourth Circuits circumvented this conceptual problem by saying that the right to marry previously applied by the Court⁶⁴ had to be understood to enshrine the concept of marriage as choice. Thus, the Tenth Circuit said that they must understand the right to marry cases "at a broad[er] level of generality" and scolded the state for "downplay[ing]" the "personal aspects" of marriage "including the 'expression[] of emotional support and public commitment.'"⁶⁵ Interestingly, the court pointed to Utah's adoption of no-fault divorce as evidence of "a message of indifference to marital

57. *Id.* at 2693–94.

58. See FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation> (last visited Apr. 15, 2015).

59. *Bostic v. Schaefer*, 760 F.3d 352, 368 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014); *Latta v. Otter*, F. Supp. 3d 1054, 1086 (D. Idaho 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1209 (10th Cir. 2014); *Bishop v. Oklahoma*, 760 F.3d 1070, 1093–94 (10th Cir. 2014).

60. See *Bostic*, 760 F.3d at 378, 384; *Kitchen*, 755 F.3d at 1217–18.

61. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

62. *Id.* at 720–21.

63. Stb. 2001, nr. 9.

64. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 92 (1987).

65. *Kitchen*, 755 F.3d at 1211 (alteration in original) (quoting *Turner*, 482 U.S. at 95–96).

longevity” that undercut the state’s concern with the channeling function of marriage as it relates to sexual difference.⁶⁶

Similarly, the Fourth Circuit said that the “right to marry is an expansive liberty that may stretch to accommodate changing societal norms” and is “a matter of choice” and “the right to make decisions regarding personal relationships.”⁶⁷ The court said “civil marriage . . . allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual’s life.”⁶⁸

Both cases relied on dicta in *Griswold* describing marriage as a “coming together for better or for worse, *hopefully* enduring, and intimate to the degree of being sacred.”⁶⁹

For these courts then, the element of choice, previously identified as primarily essential to the initial formation of the relationship, was actually all there was to marriage. In order for same-sex marriage to be a fundamental right, marriage had to be nothing more than a private choice the government must recognize for purposes of enhancing the dignity of the spouses. As a corollary, any residual elements of marital status, any sense that it carried inherent meaning and obligations not chosen by the parties, had to be deemphasized or excised entirely.

The outlier district court decision from Louisiana sensed this implication of the decisions. In commenting on the argument that marriage redefinition is inevitable, Judge Martin L. C. Feldman noted:

Perhaps, in the wake of today’s blurry notion of evolving understanding, the result is ordained. Perhaps in a new established point of view, marriage will be reduced to contract law, and, by contract, anyone will be able to claim marriage. Perhaps that is the next frontier, the next phase of some “evolving understanding of equality,” where what is marriage will be explored.⁷⁰

Contrary to expectation, the Supreme Court allowed the circuit court decisions to stand, thus importing their views of marriage into the law applied in eleven states.

66. *Id.* at 1224.

67. *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014).

68. *Id.* at 384.

69. *Id.* at 380 (emphasis added); *Kitchen*, 755 F.3d at 1209.

70. *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 925–26 (E.D. La. 2014).

A. Parenting

As noted above, in *Dartmouth College*, the Court used the analogy of parenthood to stress the degree that marriage was a legal status and not a mere contract.⁷¹ The implication is obvious—the status of parent or child is the strongest referent of a legal status the Court could think of (“no more a contract than ‘fatherhood’ or ‘sonship’ is a contract.”).⁷² Whatever its application to marriage, the Court’s analysis of legal parenthood largely holds now, but some significant fraying is evident.

The earliest significant statement was in *Eisenstadt* where the Court identified a core privacy right “of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁷³ It did not take long for the Court to take this to the logical extreme and hold that whether an unborn child was allowed to live was a matter of choice because that right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁷⁴ For the period of gestation, parenthood would no longer be a legal status imposing obligations, but a unilateral choice of whether it would continue.⁷⁵

Interestingly, when the Supreme Court upheld *Roe* in 1992, they employed the *Eisenstadt* passage as an accurate statement of “the basic nature of marriage.”⁷⁶ The concern here is to prevent a husband from preventing his wife from aborting their child. The opinion invokes the bad old days of coverture and suggests “a view of marriage” which accords both spouses a say over the life of their unborn child is “repugnant to our present understanding of marriage.”⁷⁷

Given the shrinking significance of marriage, it is not unexpected that it would become increasingly separated from parenthood. In turn, legal doctrines like legitimacy, which had linked the statuses of marriage and parenthood seemed irrelevant and unfair.⁷⁸

The movement was not totally unidirectional. When the Supreme Court began to extend constitutional protection to unwed fathers, it was on the

71. Trs. of *Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629 (1819).

72. *Maynard v. Hill*, 125 U.S. 190, 212 (1888) (quoting *Ditson v. Ditson*, 4 R.I. 87, 101 (R.I. 1856)).

73. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis omitted).

74. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

75. *Id.*

76. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 896 (1992).

77. *Id.* at 898.

78. *See Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968).

understanding that those fathers would have accepted the obligations associated with the status.⁷⁹ Notwithstanding these decisions, unwed fathers can increasingly object to adoption placements sought by the mother even though they are not willing to support the mother. They may also object to the adoption even if they are not necessarily willing to accept child support obligations (since establishment of such obligations is not a prerequisite for standing to contest the adoption).

The most obvious illustration of the transformation of parenthood into yet another manifestation of choice is the increasing legal facilitation of assisted reproductive technology. Since when one contracts for the eggs, sperm, or gestational surrogacy of another, one seeks the status of legal parenthood of the resulting child, the rules of legal parenthood devised to recognize the intended parents are crucial in facilitating the use of the new technologies.⁸⁰ Thus, all states will automatically terminate the parental status of a biological father who donates his sperm to create a child.⁸¹ Crucially, they also excuse him from the duty to support the child—creating an entire class of biological fathers whose support obligations are merely a matter of choice, easily extinguished.

So, too, with surrogacy. Though not as widely accepted because of lingering concerns with the exploitive nature of a contract to take on the risks of pregnancy and relinquish the resulting child for a fee, the arrangements are becoming common.⁸²

A related development is the increasing acceptance of the idea of de facto parenthood (or an equivalent like psychological parenting or parenting by estoppel).⁸³ These legal doctrines provide that a nonparent (or nonparents) can be considered a legal parent if they take on some of the functions a parent would perform.⁸⁴ Key requirements for establishing the status emphasize adult choice to the exclusion of factors like biological connection or legal status—specifically, the requirements that the child's parent treat the prospective de facto parent as if he or she were the parent and that the nonparent have held out the child as his or her own.⁸⁵

79. See *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972).

80. See William C. Duncan, *Redefining Marriage, Redefining Parenthood*, 6 REGENT J.L. & PUB. POL'Y. 157, 158, 162, 175 (2014).

81. See William C. Duncan, *Deconstructing Parenthood*, THE FAM. IN AM. (July 2008), <http://profam.org/pub/fia/fia.2204.htm>.

82. Duncan, *supra* note 80, at 164–65, 176.

83. See William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263, 263–64 (2010).

84. *Id.*

85. Duncan, *supra* note 80, at 164–65.

Each of these instances (assisted reproduction and de facto parenthood), whether one is a parent or not, whether there will be another co-parent or not, and whom, is a matter to be established through an adult choice rather than arising from one's status as a biological or adoptive parent or spouse.

In a convergence of legal trends, the acceptance of same-sex marriage greatly facilitates parenthood by choice since the presumptions of parentage still tied to marriage will operate in a same-sex relationship to extinguish the parental rights and obligations of at least one parent if the other (or the commissioning couple) are in a same-sex marriage.⁸⁶ Same-sex marriage also hardens the prioritization of adult choices over the traditional obligations of parenthood as when the *Windsor* majority claims that defining marriage as the union of a husband and wife will humiliate the children of same-sex couples, as if children are meant only to be trickle-down beneficiaries of the state-conferred dignity of the adults raising them.⁸⁷

Since the legal effort of past decades to create a set of legally enforceable rights for minors to exercise independent of parental authority seems to have foundered on the shoals of reality—specifically the reality of children's dependence—the status of child seems to have been unaffected by these trends, but perhaps that too may change.⁸⁸

IV. FAMILY DIS-INTEGRATION

Returning to F. H. Bradley's observation, while the law has long balanced the elements of status and contract in regulations affecting the family, the element of choice was important at the outset to avoid coercion; however, the choice to enter a legal status (explicitly as with marriage, or implicitly when engaging in the conduct that could result in childbirth) was the choice to enter a status that imposed obligations necessary for the fulfillment of the very purposes of family regulation—protecting parties, particularly children, made vulnerable by those family choices. Traditional family law rules integrated choice and responsibility, providing accountability for individual choices that profoundly affect other family members.

As the role of choice in family law has swollen, choice and responsibility in family law are being pried apart. This dis-integration contributes to a dis-integration of family as the law increasingly treats family members as

86. *Id.* at 165.

87. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

88. *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting) (noting law has typically not protected a right of sellers to solicit children directly, as opposed to soliciting them through their parents).

independent rights-bearing individuals revolving loosely around one another until propelled out of orbit by dissatisfaction, that is, with the exception of children who are increasingly treated almost the opposite—as subjects of adult choice.

There are two probable corollaries of this dis-integration of the family in family law: (1) promotion of a type of family life *à la carte*, and (2) the creation of a vacuum which government, particularly courts, will fill as they are called upon to negotiate disputes between family members without default rules.

A. *Family Life À La Carte*

In the world of family life *à la carte*, spouses and parents have wide latitude to pick and choose between possible duties and obligations. A man may create a child through sperm donation but not support that child financially. In fact, he may choose to give some helpful advice, welcome occasional visits, send gifts, or have little or nothing to do with his child. In fact, he may do all or none of these things. Perhaps he may be constrained by contract but not by any sense of what a father is and what a father must do. The same would be true of an egg donor or a surrogate—contractual responsibilities but no family obligations inherent in the fact of begetting or bearing a child.

Something similar is already the case for spouses who may walk away from their marriage unilaterally and even with diminishing consequences (given the declining importance of spousal support awards and the preferences for joint custody) for any or no reason.

Beyond the practical impact of the legal endorsement of family life *à la carte*, the law's teaching function further undercuts the ethic of unchosen obligation—that there are some things one must or must not do, not because he or she has chosen that in a strict sense, but because fulfilling those obligations is what it means to be a parent or spouse.

Without a widespread appreciation of the virtue of unchosen obligation, some may make heroic sacrifices for the good of a family, but that would be a mark of individual character, perhaps an idiosyncratic choice, not the fulfillment of obligation. It is not belonging and all the bonds such belonging entails that demand this, and we can do more than admire the individual choice, certainly not expect it of others.

B. *Flooding the Zone*

“Families” made up of strictly autonomous individuals with few or no set obligations will, of course, still experience conflicts. In fact, with each aspect of family life potentially negotiable, conflicts may be more likely. Thus, spouses may walk away from a marriage without any showing of wrongdoing that might guide courts in appropriate decisions of support, custody, or property division. But these decisions will still need to be made, and the courts are called upon to settle more and more of them. Since the illusion of no-fault must be maintained, each element of a marriage’s unraveling must be approached *de novo*.

Similarly, with a greater number of potential parents, and a multiplicity of mix and match rights and duties for each, child custody disputes become complex litigation. This, too, has no substantive content but is merely a constitutionally protected individual choice. On what logical basis can the courts cabin that protection?

CONCLUSION

What all of this portends is a headlong, possibly accelerating, flight from obligation. With choice and responsibility no longer integrated, family law treats family members as rights holders who may make demands without reciprocal responsibilities.

Human flourishing is unlikely to grow from the soil of expressive individualism. The law may desperately try to valorize adult choices, but government-bestowed dignity is no substitute for real belonging, for the stable, protective structure of a family built on a sense of duty and obligation, not the shifting vagaries of choice. Only bonds that are unlikely to be broken can foster the sense of security and well-being that children, wives, and husbands deserve.

Rights and obligations, not contracts and individual choices, provide this protection. The latter need to be restored to appropriate proportion to make room for the former to flourish.