

The Family in America

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Waxing State, Waning Family: The Radical Agenda of the American Law Institute

William C. Duncan

*The one great principle of the English law,
is to make business for itself.*

—Charles Dickens, *Bleak House*

IN THE MODERN STATE, LAW—like nature—displays a marked distaste for a vacuum. Spurred by elites distrustful of independent social institutions and a cultural embrace of atomistic individualism, the United States in past decades has experienced a dramatic incursion of legal regulation into mediating institutions like the family. Institutions that had previously been considered outside the domain of state control in order to provide a check on the totalitarian temptation find themselves under increased scrutiny. As changes in family law have dovetailed with societal trends, family breakdown has become more common, triggering yet more legal changes thought to be justified by the parlous state of family life. More and more aspects of the family, ultimately to include the very definition of marriage, family, and parenthood, are thus subjected to the jurisdiction of courts and government agencies. Of the elites advocating invasive legal interventions, none is more exclusive than the American Law Institute; no proposals for the expansion of the state into the family domain better illustrate the expansive tendency of the law than its recent proposals for a revolutionary overhaul of American family law.

The American Law Institute is a small and highly selective group

of judges, practitioners and legal academics. Its first meeting, in 1923, was attended by three justices of the Supreme Court, five judges of the federal appeals court, and twenty-eight state high court judges, along with representatives of the American Bar Association and the National Conference of Commissioners on Uniform State Laws. It was initially funded by a large ten-year grant from the Carnegie Foundation. The institute's stated purpose was to address perceived confusion and complexity in the law precipitated by a flood of court decisions, statutory enactments, and administrative regulations. It thus compiled "restatements" of the law describing prevailing legal rules on various topics.¹

The ALI was not content to tally court decisions. At its inception, the institute's mission involved an implicit tension between the goals of describing the law as it stood and of suggesting changes that would make the law substantively "better"—to reform the law. Legal historian N. E. H. Hull notes: "The driving force behind the institute's founding was a cadre of progressive law professors who set its original reformist agenda." Indeed, its origins "lay in the vision of a group of 'progressive-pragmatic' legal academics, who wished to reform law," and its first leader, who had "committed himself to an active reformist role for academic scholars."²

In some areas, the Restatements of the Law are extremely influential, almost controlling.³ The more directly "reforming" work of the institute, such as the Model Penal Code, has also affected the law of many states. Indeed, the organization notes, presumably with some pride, that it ranks thirty-fourth in *Playboy's* honor role of "men and women who changed the face of sex" and called its members "unsung heroes of the sexual revolution" because of its recommendation in favor of decriminalizing sodomy and fornication.⁴

As Professor Carl Schneider has noted, the ALI "has long since ceased to regard itself as just a source of technical proficiency in the law

1. John P. Frank, *The American Law Institute 1923-1998* in *THE AMERICAN LAW INSTITUTE: SEVENTY-FIFTH ANNIVERSARY* 9, 20 (ALI 1998).

2. N. E. H. Hull, *Restatement and Reform* in *THE AMERICAN LAW INSTITUTE: SEVENTY-FIFTH ANNIVERSARY* 52 & 55 (ALI 1998).

3. *Playboy Pays Tribute to ALI*, *THE ALI REPORTER* (Fall 1999), <www.ali.org/ali_old/R2201_playboy.htm>.

4. Frank, *The American Law Institute 1923-1998* at 36; Hull, *Restatement and Reform* at 89.

and has come to value itself as a source of social policy.” Thus, in 2000, the organization adopted the *Principles of the Law of Family Dissolution*. The *Principles* are squarely in the “reform” arena and make no claim on representing the state of the law in matters of divorce as well as child custody and visitation. In fact, they propose radical changes that go to the root of the law’s understanding of the family. Professor Schneider notes that “professional incentives and inclinations drew the drafters away from the established and toward the fresh, the iconoclastic, and the radical.”⁵ In preparation for nearly a decade under the direction of prestigious law professors, the *Principles* project was monumental, with the final draft coming in at more than 1,100 pages, inclusive of formal recommendations and official commentary about how the proposed law would be applied in various contexts.⁶

The most novel aspects of the *Principles* include a dramatic reformulation of the legal definition of parenthood, a vociferous repudiation of any “fault” considerations in family law, and the creation of a new category of adult legal relationships to be treated as equivalent of marriage at dissolution. What would the adoption of these novel theories portend? The elements of the *Principles* would fundamentally and dramatically expand the jurisdiction of government. If adopted throughout the United States, the *Principles* would achieve, as Robert Nisbet feared in 1975, the treatment of “every relationship in society” as a “potentially legal relationship.”⁷ A whole bloc of relationships, representing a substantial group of people, would be swept into the jurisdiction of state courts if, for example, the domestic partnership proposal were widely enacted.

Deconstructing Marriage

Chapter 6 of the *Principles*, containing the domestic partnership proposal, may be the most novel recommendation. It is a forthright effort to efface the boundaries between married and unmarried relationships.

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5. Carl E. Schneider, *Afterword: Elite Principles: The ALI Proposals and the Politics of Law Reform* in Robin Fretwell Wilson, ed., *RECONCEIVING THE FAMILY* 491, 494 (Cambridge 2006).
 6. Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute’s Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles of Obligatory Footnote?* 42 *FAMILY LAW QUARTERLY* 573 (2008-2009).
 7. ROBERT NISBET, *TWILIGHT OF AUTHORITY* 240 (Liberty Fund 2000).

Here, the drafters relied heavily on foreign law since American law has not historically provided legal status on the basis of cohabitation. Chapter 6 governs property division and support-like payments for unmarried cohabitants designated by the *Principles* as “domestic partners.” Domestic partners are “two persons of the same or opposite-sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.” The official comments note that a couple can be designated as domestic partners even when they are married to other people and even when they know that one or the other is married to someone else. The *Principles* respond to the most egregious financial problem with such a rule by saying that a domestic partner’s claims will only be allowed “to the extent that they would not displace those of a spouse.” Neither do the *Principles* prevent an incestuous couple from being designated domestic partners if they have a child together.

Domestic partners have two choices: they may contract with one another to avoid the application of the *Principles*’ rules governing the financial consequences of their breakup; or they may do nothing and be covered by those rules without any action on their part. Cohabitants who want to avoid the legal status of domestic partners would only be able to do so by entering a legal contract, the effect and meaning of which will, of course, ultimately be determined by a government official. To assist a court in determining whether couples are domestic partners, the *Principles* provide guidelines. Thus, cohabitants are domestic partners if they live together with a child of which they are the parents—either legally or by “estoppel” (described below)—for a time period determined by statute; or if they live together for a time period determined by statute unless they can show they did not “share life together as a couple;” or if they can show they lived together as a couple for a “significant period of time.”

The *Principles* then provide thirteen factors the courts can use to determine that a couple “shared life together” for a “significant period of time.” These include promises exchanged, intermingling of finances or interdependence, division of responsibility, “community reputation,” and “the extent to which the relationship wrought change in the life of either or both parties.” If designated a domestic partnership, a couple

faces roughly the same legal consequences of breakup as a married couple does at divorce, without ever making a formal commitment to each other.⁸ As a family law practitioner noted during the adoption of the *Principles*, if the domestic partner chapter was adopted by the states, his “private practice will expand enormously because of the litigation that will be engendered as a result of its provisions.” He predicted “enormous litigation” and “millions of cases” involving these newly created domestic partnerships.⁹

The expansion is not merely logistical. The *Principles* overturn the very idea of limited state jurisdiction over the family, by effacing the distinctions between marriage and non-marriage. Professor Nancy Polikoff has praised the *Principles* for “making marriage matter less.”¹⁰ Under the regime proposed by the ALI, there would no longer be “a significant legal entity between the individual and the state,”¹¹ only a multiplicity of relationships that might or might not have legal consequences. The determination of whether legal consequences accrue, of course, would be the state’s prerogative. In the domestic partnership situation, a couple is automatically presumed to be subject to state regulation unless they “opt out” by signing a contract that is itself subject to legal regulation. Either way, the state involves itself in the couple’s relationship.

The courts, in particular, would extend their influence if ALI ideas gained currency, as the complex and discretionary nature of ALI rules would require significant judicial involvement. Professor Schneider points out that the *Principles* is “a wickedly complex document shot through with indeterminate phrases like ‘just’ and ‘equitable’ and ‘improper.’” The domestic partnership rules, for instance, calls on courts to determine whether a couple has “shared a life together” by examining

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8. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* page 34, §6.01, page 909, 911, §6.03 (2002); AMERICAN LAW INSTITUTE, 77TH ANNUAL MEETING: PROCEEDINGS 2000 at 30 (2001) (statement of Grace Ganz Blumberg) and at 34-35 (colloquy between Lynn Wardle and Grace Ganz Blumberg).
 9. AMERICAN LAW INSTITUTE, 77TH ANNUAL MEETING: PROCEEDINGS 2000 at 56 (2001).
 10. Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partnership Principles Are One Step in the Right Direction* 2004 UNIVERSITY OF CHICAGO LEGAL FORUM 347 (2000).
 11. Bruce C. Hafen, *Law, Custom and Mediating Structures: The Family as a Community of Memory in LAW AND THE ORDERING OF OUR LIFE TOGETHER* 100 (Richard John Neuhaus, ed. 1989).

thirteen factors, none of which “is defined with enough specificity to give it reliable meaning.”¹²

De Facto Parenthood

Not content with creating an entirely new quasi-marital status, the *Principles* also reconfigure the law of parenthood. Like the domestic partnership proposals, the parenting rules would efface the distinction between parents and unrelated adults. Chapter 2 of the *Principles* sets out the standards for allocating child custody and decision-making responsibilities when parents don't live together. By “parents,” the *Principles* mean not only a child's mother and father but also “a parent by estoppel” or a “de facto parent.” A parent by estoppel is someone who is obligated to pay child support; or who lived with the child for two years while acting as a parent and believing that he was the parent; or acted like a parent since a child's birth pursuant to an agreement to do so with the child's parent; or acted like a parent while living with a child for two years and agreeing with a parent (or parents if they are both legal parents) to do that if a court thinks the recognition would be in the child's best interest. A parent by estoppel can be a parent even if the other legal parents (or one of them) is married to someone else and if the person could have adopted but didn't.¹³

A “de facto” parent is an unrelated adult who lived with a child for two years and, “with the agreement of a legal parent” (or where a parent fails to do so), provides a majority of childcare or at least as much as the parent the child primarily lives with. Note that the agreement factor requires only agreement with “a legal parent.” Thus, one parent can allow another person to be a de facto parent without the knowledge or consent of the other parent.¹⁴

Any of these new kinds of parents can sue for time with the child.

12. Carl E. Schneider, *Afterword: Elite Principles: The ALI Proposals and the Politics of Law Reform* in Robin Fretwell Wilson, ed., *RECONCEIVING THE FAMILY* 491, 500 (Cambridge 2006).

13. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §2.03, page 114 (2002).

14. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §2.03 (2002); David Wagner, *Balancing “Parents Are” and “Parents Do” in the ALI Family Dissolution Draft* 2001 *BYU LAW REVIEW* 1175, 1183.

The de facto parent provisions would allow claims of unrelated adults for child visitation that would never have been considered justifiable beforehand to get a hearing. Nor do the *Principles* limit the number of adults who can do so. The *Principles* specifically do not limit parenthood statuses to opposite-sex couples that are either the actual or adopted mother and father. A child may have legal parents and de facto parents all vying for time with the child; the child may have neither a mother nor father or may have two or more of each. The only exception is where a judge may find that the allocating visitation is “impractical” given “the number of other individuals to be allocated responsibility.” Only “responsibility for making significant life decisions” for the child can be limited to two persons at the same time (unless, that is, the parents agree to involve more).¹⁵

Under the ALI’s proposals, parental status would no longer carry with it the presumption that the state ought to defer to parental decisions. Instead parental wishes could be subjected to the competing claims of unrelated adults, mediated, of course, by the courts. The *Principles* provide that “[i]n exceptional cases, a court should have discretion to grant permission to intervene, *under such terms as it establishes*, to other individuals or public agencies whose participation in the proceedings under this Chapter *it determines* is likely to serve the *child’s best interest*.”¹⁶ Again, the prerogatives of the court are potentially vast as the italicized portions make clear. The drafters admit the substitution of the traditional presumption in favor of parental authority with nearly unlimited judicial discretion: “Giving rights to de facto parents may serve to weaken the commitment society has to legal parents, on which the ideology of responsible parenting is based.” It justifies this weakening by arguing that “disregarding their connection to a child at the time of family dissolution ignores child-parent relationships that may be fundamental to the child’s sense of stability.”¹⁷

15. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.09 and §2.18 (2002).

16. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.04 (2002) (emphasis added).

17. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND

This reasoning makes sense only by accepting the institute's redefinition of "parent" to include unrelated adults with some involvement in a child's life and its implicit assumption that courts will be able to determine, better than would parents, whether a child's relationship with these adults is important to that child's "sense of stability." As more and more people are allowed to claim the prerogatives of parents, the potential role of courts will necessarily expand to sort out the competing claims of the child's best interests. By being diluted by courts and unrelated adults, parents' wishes will become less and less significant. This, in turn, dilutes the parents' socializing influence on their children while greatly increasing the state's, since the courts—not the parent—determine who will have access to the child. Having rejected biology, marriage, and adoption as clear determinants of parental status, the state itself will be deciding who a parent is based on highly discretionary and unpredictable factors.

A Morally Neutral Divorce Process

Ironically, when it comes to the matter of fault in divorce and ancillary matters, the *Principles* make an abrupt about-face. Here, the drafters claim they are rejecting fault grounds because they are too unpredictable in application.¹⁸ The assertion seems questionable at best. Which is more difficult for a judge to determine: whether one spouse committed adultery or abused the other, or whether a "relationship wrought change in the life of either or both parties" as the domestic partnership rules require?¹⁹

Legal scholar Brian Bix notes that the *Principles* "have a basic antagonism toward—or fear of—anything that seems to require a judicial finding of fault."²⁰ That antagonism is strong enough that the drafters specifically provide that if spouses enter an agreement including terms

RECOMMENDATIONS 5 (2002).

18. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* 797 (2002).

19. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §6.03(7)(d) (2002).

20. Brian Bix, *The ALI Principles and Agreements* in Robin Fretwell Wilson, ed., *RECONCEIVING THE FAMILY* 386, 377 (Cambridge 2006).

that would “limit or enlarge[] the grounds for divorce otherwise available under state law” or “penalize[] a party for initiating the legal action leading to a degree of divorce,” those terms will not be legally enforceable. In other words, the idea of marital fault is so alien to the *Principles* that spouses are to be prevented from making even a *private* arrangement to hold themselves to a higher standard of conduct.

The *Principles* work assiduously to delete any consideration of fault in the context of property division or spousal support at divorce. They suggest that extreme abuses of a spouse by another could be handled by criminal law or tort concepts, as if forcing people to seek redress in separate legal actions—with their attendant financial, emotional, and time costs for the behavior that led to the end of a marriage—is not a startling imposition. In chapters devoted to property division and support, official comments rule out taking into account “marital misconduct,” despite the retention of the concept in the laws of fifteen (property division) states and twenty-five (support) states. Thus, an adulterous spouse would receive the same property settlement or support order as a spouse who was totally faithful during the marriage. The same would be true for an abusive spouse, although he presumably could be prosecuted or subject to a civil action for battery or intentional infliction of emotional distress. The drafters are absolutely consistent in their endorsement of a morally neutral divorce process.²¹

Consonant with the *Principles*’ effort to expunge any consideration of fault in legally dissolving relationships, the rules specifically prohibit judges from considering “the extramarital sexual conduct of a parent” in custody and visitation decisions because to do so would constitute “overreliance on factors that are grounded in prejudice and bias.” The *Principles* make an exception where a party can show that the behavior “causes harm to the child.” The drafters include illustrations, however, that make clear that the bad example of a mother living with her lover is not harm. If this relationship were to result in the children getting poor grades in school or taking up shoplifting, however, the *Principles* would

21. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §7.08, pages 66-67, §4.09 comment e, §5.02 comment e, pages 749, 797 (2002).

allow the court to consider it.²²

This unique desire to limit judicial discretion is probably best understood by recognizing the psychic dependence the state creates on itself when it endeavors to assist a spouse in his or her quest to elude the moral consequences of a marital vow. Many seeming anomalies in the *Principles* can be explained in just this way—as the privileging of the state over the social institution of the family. As Professor Schneider has pointed out, the *Principles* “reflect the elite distrust of social institutions.”²³ Thus, it may seem puzzling that the drafters of the *Principles* explicitly intend to Europeanize American family law in creating the domestic partnership status. Indicators of family strength in Europe would hardly seem to justify its use as a model for the United States.²⁴ That is, unless one considers the much higher level of state involvement of family life in Europe. If the goal of the *Principles* is to dilute the independence of the family institution, then emulating Europe and Canada makes more sense.

This idea helps to explain the willingness of the *Principles* to interfere significantly in some adult relationships, between cohabiting couples, but to take a hands-off approach in others, such as by abandoning fault concepts in divorce. The ALI seems to be unable to accept the existence or validity of moral obligations with a source independent of the state. Thus, it favors interference that has the effect of redistributing wealth along lines beneficial to the state among couples who have entered relationships devoid of real commitment. It refuses, however, to countenance interference with adult choices to vindicate non-state goals like enforcing marital vows or faithfulness.

A Subtle but Strategic Impact

In light of the radical nature of its *Principles*, how serious is the threat posed by the American Law Institute? As Professor Robin Wilson, editor of *Reconceiving the Family*, points out, the publication of the *Principles*

22. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.12, page 283-284 (2002).

23. Carl E. Schneider, *Afterword: Elite Principles: The ALI Proposals and the Politics of Law Reform* in Robin Fretwell Wilson, ed., *RECONCEIVING THE FAMILY* 491, 505 (Cambridge 2006).

24. See INSTITUTE FOR FAMILY POLICIES, REPORT ON THE EVOLUTION OF THE FAMILY IN EUROPE 2008 (May 2008), <www.ipfe.org/Report_Evolution_of_Family_Europe_2008_-eng.pdf>.

was hailed in media and academic circles.²⁵ A *New York Times* article described the *Principles* as seeking “to update family law to reflect changes in society over the past 30 years” and predicted that it was “likely to have a major impact” on state laws.²⁶ Legislators and judges seem to have been less impressed. In a recent report, Professor Wilson and Michael Clisham found the *Principles* have exerted “scant legislative influence” and been cited very few times by courts. Where there has been citation, the “courts are rejecting the Principles by a ratio of 1.5 to 1.”²⁷

While the direct effect of the *Principles* may be limited, the concepts they endorse are nonetheless securing a foothold in the law of some states. In 2006, a group of activists and academics—including a President Obama nominee to the Equal Employment Opportunity Commission—endorsed a revolutionary program of family law change that echoes the foundational ideas of portions of the *Principles*. The group’s manifesto, “Beyond Same-Sex Marriage,” includes such principles as “Legal recognition for a wide range of relationships, households, and families, and for the children in all of those households and families, including same-sex marriage, domestic partner benefits, second-parent adoptions and others.”²⁸

A primary author of the manifesto has highlighted legal developments congruent with some of the *Principles* proposal. For instance, the Delaware legislature recently enacted legislation that gives state courts the ability to designate a non-parent as a “de facto” parent (with all the legal ramifications of parenthood), as long as the biological parent of a child “fosters” a “parent-like relationship” between the non-parent and the child, and as long as the non-parent has acted like a parent and bonded with the child in a way that is “parental in nature.”²⁹ Earlier, the District of Columbia Council passed legislation allowing registered

25. Robin Fretwell Wilson, ed., *RECONCEIVING THE FAMILY* (Cambridge 2006).

26. Robert Pear, *Legal Group Urges States to Update Their Family Law* *NEW YORK TIMES* A1 (Nov. 30, 2002).

27. Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute’s Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles of Obligatory Footnote?* 42 *FAMILY LAW QUARTERLY* 573, 612 (2008-2009).

28. “Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships,” July 26, 2006, <www.beyondmarriage.org/full_statement.html>.

29. 13 Delaware Code §8-201.

domestic partners of a biological parent to be presumed parents of the child and listed as parents on the child's birth certificates. The D.C. law also allows a person intending to be a "parent" to be legally designated as such if he or she consents in writing to the artificial insemination of a partner or by "holding out" the child as his or her own.³⁰

In addition, a recent court of appeals decision in Oregon said the state's presumption that a child born through artificial insemination is the child of the mother's husband is unconstitutional because it gave a benefit ("legal parentage by operation of law") to married couples that was not also available to same-sex couples.³¹ In fact, cases in which courts have ordered visitation for a same-sex partner of a child's biological or adoptive mother are becoming common in some states.³² Four states have adopted laws creating a legal status equivalent to marriage for same-sex couples.³³ More consistent with ALI's approach, Nevada last year passed a civil union law that allows both same- and opposite-sex couples to contract a legal status that would provide access to all the legal benefits of marriage.³⁴ The small but increasing acceptance of de facto parenthood and quasi-marital statuses therefore suggests that whatever the direct influence of the *Principles*, the ideologies underlying them will continue to "shuffle abroad" until they are effectively dispatched.³⁵

In the preface to the *Principles*, its Chief Reporter observed: "One expects a nation's family law to reflect its cultural values."³⁶ The values reflected in the "elite law reform" that is being pushed by the ALI privilege adult choices over children's needs, choice over obligation, and the state over the social institution of the family. The laws the *Principles* repudiate

30. D.C. Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, <www.dccouncil.us/images/00001/20090511122621.pdf>.

31. Shineovich v. Kemp, 2009 WL 2032113 (Or. App. 2009).

32. William C. Duncan, *Deconstructing Parenthood* THE FAMILY IN AMERICA (2008).

33. Cal. Fam. Code §297; N.J. Stat. Ann. §26:8A-2; Ch. 99, Oregon Laws 2007; 2009 Washington Senate Bill 5688.

34. 2009 Nevada Senate Bill 823.

35. Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

36. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS page xvii (2002).

embody age-old ideals that may be unfashionable among legal elites but are worth preserving and defending:

- *The ideal that each child will have an opportunity to be raised by his or her own mother and father, except where the direst necessity dictates otherwise.*
- *The ideal that the man and woman who create a child should take responsibility for the child.*
- *The ideal that parents will act in the best interests of their children and should be free to do so.*
- *The ideal that the family should stand between the individual and the state, buffering the former from the demands of the latter.*
- *The ideal that liberty is preserved and enhanced by vibrant social institutions that provide individuals with identity, purpose, security, and protection and that allow parents to transmit an inheritance to their children, independent of state control or coercion.*

The repudiation of these ideals may be accepted by legislatures (or more likely, judges) unduly influenced by the prominence of the American Law Institute with little or no input from those who would be affected. In those states where the concepts in the *Principles* have already been accepted, the steps were typically unaccompanied by fanfare or even notice. As Professor Schneider asks, quoting Juvenal, “*Quis Custodiet Ipsos Custodes?*” (roughly, “who guards the guardians?”)

Juvenal’s question is apt. Given what is at stake—the birthright of children and the liberty of the social sphere—the answer ought to be each one of us.

Mr. Duncan is the executive director of the Marriage Law Foundation, a non-profit, public interest law organization based in Lehi, Utah, that defends the legal definition of marriage as the union of husband and wife. He is a graduate of the J. Reuben Clark Law School at Brigham Young University and a regular contributor to National Review Online.