

EXHIBIT 46

THE GOOD SOCIETY

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Authors of the bestselling
Habits of the Heart

"A passionate inquiry about the struggle for America's soul...
The Good Society comes at a crucial moment."
—*The New York Times Book Review*

THE GOOD SOCIETY

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III. WHY AMERICANS HAVE TROUBLE UNDERSTANDING INSTITUTIONS

We need to understand why the very idea of institutions is so intimidating to Americans and why it is so important to overcome this anxiety and think creatively about institutions. In its formal sociological definition, an institution is a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative. For example, institutions may be such simple customs as the confirming handshake in a social situation,¹⁶ where the refusal to respond to an outstretched hand might cause embarrassment and some need for an explanation; or they may be highly formal institutions such as taxation upon which social services depend, where refusal to pay may be punished by fines and imprisonment. Institutions always have a moral element. A handshake is a sign of social solidarity, at least a minimal recognition of the personhood of the other. Taxation, especially in a democracy, is for the purpose of attaining agreed-upon common aims and is supposed to be fair in its assessment.

Individualistic Americans fear that institutions impinge on their freedom. In the case of the handshake this impingement may give rise only to a very occasional qualm. More powerful institutions seem more directly to threaten our freedom. For just this reason, the classical liberal view held that institutions ought to be as far as possible neutral mechanisms for individuals to use to attain their separate ends—a view so persuasive that most Americans take it for granted, sharing with liberalism the fear that institutions that are not properly limited and neutral may be oppressive. This belief leads us to think of institutions as efficient or inefficient mechanisms, like the Department of Motor Vehicles, that we learn to use for our own purposes, or as malevolent “bureaucracies” that may crush us under their impersonal wheels. It is not that either of these beliefs is wholly mistaken. In modern society we do indeed need to learn how to manipulate institutions. And all of us, particularly but not only the poor and the powerless, find ourselves at the mercy of institutions that control our lives in ways we often do not fully understand. Yet if this is our only conception of institutions we have a very impoverished idea of our common life, an idea that cannot effectively help us deal with our problems but only worsens them.

There is an ambiguity about the idea of institutions that it is hard to avoid but that we will try to be clear about. Institutions are nor-

native patterns embedded in and enforced by laws and mores (informal customs and practices). In common usage the term is also used to apply to concrete organizations. Organizations certainly loom large in our lives, but if we think only of organizations and not of institutions we may greatly oversimplify our problems. The corporation is a central institution in American life about which we will have much to say in this book. As an institution it is a particular historical pattern of rights and duties, of powers and responsibilities, that make it a major force in our lives. Individual corporations are organizations that operate within the legal and other patterns that define what a corporation is. If we do not distinguish between institution and organization, we may think that our only problem with corporations is to make them more efficient or more responsible. But there are problems with how corporations are institutionalized in American society, with the underlying pattern of power and responsibility, and we cannot solve the problems of corporate life simply by improving individual organizations: we have to reform the institution itself. If we confuse organizations and institutions, then when we believe we are being treated unfairly we may retreat into private life or flee from one organization to another—a different company or a new marriage—hoping that the next one will treat us better. But changes in how organizations are conceived, changes in the norms by which they operate—institutional changes—are the only way to get at the source of our difficulties.

The same logic applies throughout our social life. There are certainly better families and worse, happier and more caring families and ones that are less so. But the very way Americans institutionalize family life, the very pressures and temptations that American society presents to all families, are themselves the source of serious problems, so just asking individual families to behave better, important though that is, will not get to the root of the difficulties. Indeed, there is a kind of reductionism in our traditional way of thinking about society. We think in the first place that the problem is probably with the individual; if not, then with the organization. This pattern of thinking hides from us the power of institutions and their great possibilities for good and for evil.

What is missing in this American view of society? Just the idea that in our life with other people we are engaged continuously, through words and actions, in creating and re-creating the institutions that make that life possible. This process is never neutral but is always ethical and political, since institutions (even such an intimate institution as the family) live or die by ideas of right and wrong and

conceptions of the good. Conversely, while we in concert with others create institutions, they also create us: they educate us and form us—especially through the socially enacted metaphors they give us, metaphors that provide normative interpretations of situations and actions. The metaphors may be appropriate or inappropriate, but they are inescapable. A local congregation may think of itself as a “family.” A corporate CEO may speak of management and workers all being “team players.” Democracy itself is not so much a specific institution as a metaphoric way of thinking about an aspect of many institutions.

In short, we are not self-created atoms manipulating or being manipulated by objective institutions. We form institutions and they form us every time we engage in a conversation that matters, and certainly every time we act as parent or child, student or teacher, citizen or official, in each case calling on models and metaphors for the rightness and wrongness of action. Institutions are not only constraining but also enabling. They are the substantial forms through which we understand our own identity and the identity of others as we seek cooperatively to achieve a decent society.

The idea that institutions are objective mechanisms that are essentially separate from the lives of the individuals who inhabit them is an ideology that exacts a high moral and political price. The classical liberal view has elevated one virtue, autonomy, as almost the only good, but has failed to recognize that even autonomy depends on a particular kind of institutional structure and is not an escape from institutions altogether. By imagining a world in which individuals can be autonomous not only from institutions but from each other, it has forgotten that autonomy, valuable as it is in itself, is only one virtue among others and that without such virtues as responsibility and care, which can be exercised only through institutions, autonomy itself becomes, as we argued in *Habits of the Heart*, an empty form without substance.

IV. INSTITUTIONAL RESPONSIBILITY IN PRACTICE

The policy analyst David Kirp, in his book *Learning by Heart*,¹⁷ gives moving examples of a richer conception of institutions. He and his associates studied a number of public school systems faced with the challenge of admitting children with AIDS. In a situation of extraordinary anxiety superintendents, principals, teachers, and parents were called upon to decide what kind of school and what kind of community they wanted to have. The speech and behavior of institutional au-

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EXHIBIT 47

*Peter L. Berger
and Thomas Luckmann*

The Social Construction of Reality

*A Treatise in the Sociology
of Knowledge*



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Part Two

**Society as
Objective Reality**

I. Institutionalization

Organism and Activity

Man occupies a peculiar position in the animal kingdom.¹ Unlike the other higher mammals, he has no species-specific environment,² no environment firmly structured by his own instinctual organization. There is no man-world in the sense that one may speak of a dog-world or a horse-world. Despite an area of individual learning and accumulation, the individual dog or the individual horse has a largely fixed relationship to its environment, which it shares with all other members of its respective species. One obvious implication of this is that dogs and horses, as compared with man, are much more restricted to a specific geographical distribution. The specificity of these animals' environment, however, is much more than a geographical delimitation. It refers to the biologically fixed character of their relationship to the environment, even if geographical variation is introduced. In this sense, all non-human animals, as species and as individuals, live in closed worlds whose structures are predetermined by the biological equipment of the several animal species.

By contrast, man's relationship to his environment is characterized by world-openness.³ Not only has man succeeded in establishing himself over the greater part of the earth's surface, his relationship to the surrounding environment is everywhere very imperfectly structured by his own biological constitution. The latter, to be sure, permits man to engage in different activities. But the fact that he continued to live a nomadic existence in one place and turned to agriculture in another cannot be explained in terms of biological processes. This does not mean, of course, that there are no biologically determined limitations to man's relations with his environment; his species-specific sensory and motor equipment imposes obvious limitations on his range of possibilities. The peculiarity of man's

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biological constitution lies rather in its instinctual component.

Man's instinctual organization may be described as underdeveloped, compared with that of the other higher mammals. Man does have drives, of course. But these drives are highly unspecialized and undirected. This means that the human organism is capable of applying its constitutionally given equipment to a very wide and, in addition, constantly variable and varying range of activities. This peculiarity of the human organism is grounded in its ontogenetic development.⁴ Indeed, if one looks at the matter in terms of organismic development, it is possible to say that the foetal period in the human being extends through about the first year after birth.⁵ Important organismic developments, which in the animal are completed in the mother's body, take place in the human infant after its separation from the womb. At this time, however, the human infant is not only *in* the outside world, but interrelating with it in a number of complex ways.

The human organism is thus still developing biologically while already standing in a relationship to its environment. In other words, the process of becoming man takes place in an interrelationship with an environment. This statement gains significance if one reflects that this environment is both a natural and a human one. That is, the developing human being not only interrelates with a particular natural environment, but with a specific cultural and social order, which is mediated to him by the significant others who have charge of him.⁶ Not only is the survival of the human infant dependent upon certain social arrangements, the direction of his organismic development is socially determined. From the moment of birth, man's organismic development, and indeed a large part of his biological being as such, are subjected to continuing socially determined interference.

Despite the obvious physiological limits to the range of possible and different ways of becoming man in this double environmental interrelationship, the human organism manifests an immense plasticity in its response to the environmental forces at work on it. This is particularly clear when one observes the flexibility of man's biological constitution as it is subjected to a variety of socio-cultural determinations. It is an ethnological commonplace that the ways of becoming and being

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human are as numerous as man's cultures. Humanness is socio-culturally variable. In other words, there is no human nature in the sense of a biologically fixed substratum determining the variability of socio-cultural formations. There is only human nature in the sense of anthropological constants (for example, world-openness and plasticity of instinctual structure) that delimit and permit man's socio-cultural formations. But the specific shape into which this humanness is moulded is determined by those socio-cultural formations and is relative to their numerous variations. While it is possible to say that man has a nature, it is more significant to say that man constructs his own nature, or more simply, that man produces himself.⁷

The plasticity of the human organism and its susceptibility to socially determined interference is best illustrated by the ethnological evidence concerning sexuality.⁸ While man possesses sexual drives that are comparable to those of the other higher mammals, human sexuality is characterized by a very high degree of pliability. It is not only relatively independent of temporal rhythms, it is pliable both in the objects towards which it may be directed and in its modalities of expression. Ethnological evidence shows that, in sexual matters, man is capable of almost anything. One may stimulate one's sexual imagination to a pitch of feverish lust, but it is unlikely that one can conjure up any image that will not correspond to what in some other culture is an established norm, or at least an occurrence to be taken in stride. If the term 'normality' is to refer either to what is anthropologically fundamental or to what is culturally universal, then neither it nor its antonym can be meaningfully applied to the varying forms of human sexuality. At the same time, of course, human sexuality is directed, sometimes rigidly structured, in every particular culture. Every culture has a distinctive sexual configuration, with its own specialized patterns of sexual conduct and its own 'anthropological' assumptions in the sexual area. The empirical relativity of these configurations, their immense variety and luxurious inventiveness, indicate that they are the product of man's own socio-cultural formations rather than of a biologically fixed human nature.⁹

The period during which the human organism develops

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towards its completion in interrelationship with its environment is also the period during which the human self is formed. The formation of the self, then, must also be understood in relation to both the ongoing organismic development and the social process in which the natural and the human environment are mediated through the significant others.¹⁰ The genetic presuppositions for the self are, of course, given at birth. But the self, as it is experienced later as a subjectively and objectively recognizable identity, is not. The same social processes that determine the completion of the organism produce the self in its particular, culturally relative form. The character of the self as a social product is not limited to the particular configuration the individual identifies as himself (for instance, as 'a man', in the particular way in which this identity is defined and formed in the culture in question), but to the comprehensive psychological equipment that serves as an appendage to the particular configuration (for instance, 'manly' emotions, attitudes and even somatic reactions). It goes without saying, then, that the organism and, even more, the self cannot be adequately understood apart from the particular social context in which they were shaped.

The common development of the human organism and the human self in a socially determined environment is related to the peculiarly human relationship between organism and self. This relationship is an eccentric one.¹¹ On the one hand, man *is* a body, in the same way that this may be said of every other animal organism. On the other hand, man *has* a body. That is, man experiences himself as an entity that is not identical with his body, but that, on the contrary, has that body at its disposal. In other words, man's experience of himself always hovers in a balance between being and having a body, a balance that must be redressed again and again. This eccentricity of man's experience of his own body has certain consequences for the analysis of human activity as conduct in the material environment and as externalization of subjective meanings. An adequate understanding of any human phenomenon will have to take both these aspects into consideration, for reasons that are grounded in fundamental anthropological facts.

It should be clear from the foregoing that the statement that man produces himself in no way implies some sort of Prome-

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thean vision of the solitary individual.¹² Man's self-production is always, and of necessity, a social enterprise. Men *together* produce a human environment, with the totality of its socio-cultural and psychological formations. None of these formations may be understood as products of man's biological constitution, which, as indicated, provides only the outer limits for human productive activity. Just as it is impossible for man to develop as man in isolation, so it is impossible for man in isolation to produce a human environment. Solitary human being is being on the animal level (which, of course, man shares with other animals). As soon as one observes phenomena that are specifically human, one enters the realm of the social. Man's specific humanity and his sociality are inextricably intertwined. *Homo sapiens* is always, and in the same measure, *homo socius*.¹³

The human organism lacks the necessary biological means to provide stability for human conduct. Human existence, if it were thrown back on its organismic resources by themselves, would be existence in some sort of chaos. Such chaos is, however, empirically unavailable, even though one may theoretically conceive of it. Empirically, human existence takes place in a context of order, direction, stability. The question then arises: From what does the empirically existing stability of human order derive? An answer may be given on two levels. One may first point to the obvious fact that a given social order precedes any individual organismic development. That is, world-openness, while intrinsic to man's biological make-up, is always pre-empted by social order. One may say that the biologically intrinsic world-openness of human existence is always, and indeed must be, transformed by social order into a relative world-closedness. While this reclosure can never approximate the closedness of animal existence, if only because of its humanly produced and thus 'artificial' character, it is nevertheless capable, most of the time, of providing direction and stability for the greater part of human conduct. The question may then be pushed to another level. One may ask in what manner social order itself arises.

The most general answer to this question is that social order is a human product, or, more precisely, an ongoing human production. It is produced by man in the course of his ongoing

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externalization. Social order is not biologically given or derived from any biological *data* in its empirical manifestations. Social order, needless to add, is also not given in man's natural environment, though particular features of this may be factors in determining certain features of a social order (for example, its economic or technological arrangements). Social order is not part of the 'nature of things', and it cannot be derived from the 'laws of nature'.¹⁴ Social order exists *only* as a product of human activity. No other ontological status may be ascribed to it without hopelessly obfuscating its empirical manifestations. Both in its genesis (social order is the result of past human activity) and its existence in any instant of time (social order exists only and in so far as human activity continues to produce it) it is a human product.

While the social products of human externalization have a character *sui generis* as against both their organismic and their environmental context, it is important to stress that externalization as such is an anthropological necessity.¹⁵ Human being is impossible in a closed sphere of quiescent interiority. Human being must ongoingly externalize itself in activity. This anthropological necessity is grounded in man's biological equipment.¹⁶ The inherent instability of the human organism makes it imperative that man himself provide a stable environment for his conduct. Man himself must specialize and direct his drives. These biological facts serve as a necessary presupposition for the production of social order. In other words, although no existing social order can be derived from biological *data*, the necessity for social order as such stems from man's biological equipment.

To understand the causes, other than those posited by the biological constants, for the emergence, maintenance and transmission of a social order one must undertake an analysis that eventuates in a theory of institutionalization.

Origins of Institutionalization



All human activity is subject to habitualization. Any action that is repeated frequently becomes cast into a pattern, which

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can then be reproduced with an economy of effort and which, *ipso facto*, is apprehended by its performer *as* that pattern. Habitualization further implies that the action in question may be performed again in the future in the same manner and with the same economical effort. This is true of non-social as well as of social activity. Even the solitary individual on the proverbial desert island habitualizes his activity. When he wakes up in the morning and resumes his attempts to construct a canoe out of matchsticks, he may mumble to himself, 'There I go again', as he starts on step one of an operating procedure consisting of, say, ten steps. In other words, even solitary man has at least the company of his operating procedures.

Habitualized actions, of course, retain their meaningful character for the individual although the meanings involved become embedded as routines in his general stock of knowledge, taken for granted by him and at hand for his projects into the future.¹⁷ Habitualization carries with it the important psychological gain that choices are narrowed. While in theory there may be a hundred ways to go about the project of building a canoe out of matchsticks, habitualization narrows these down to one. This frees the individual from the burden of 'all those decisions', providing a psychological relief that has its basis in man's undirected instinctual structure. Habitualization provides the direction and the specialization of activity that is lacking in man's biological equipment, thus relieving the accumulation of tensions that result from undirected drives.¹⁸ And by providing a stable background in which human activity may proceed with a minimum of decision-making most of the time, it frees energy for such decisions as may be necessary on certain occasions. In other words, the background of habitualized activity opens up a foreground for deliberation and innovation.¹⁹

In terms of the meanings bestowed by man upon his activity, habitualization makes it unnecessary for each situation to be defined anew, step by step.²⁰ A large variety of situations may be subsumed under its predefinitions. The activity to be undertaken in these situations can then be anticipated. Even alternatives of conduct can be assigned standard weights.

These processes of habitualization precede any institutionalization, indeed can be made to apply to a hypothetical

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solitary individual detached from any social interaction. The fact that even such a solitary individual, assuming that he has been formed as a self (as we would have to assume in the case of our matchstick-canoe builder), will habitualize his activity in accordance with biographical experience of a world of social institutions preceding his solitude need not concern us at the moment. Empirically, the more important part of the habitualization of human activity is coextensive with the latter's institutionalization. The question then becomes how do institutions arise.

Institutionalization occurs whenever there is a reciprocal typification of habitualized actions by types of actors. Put differently, any such typification is an institution.²¹ What must be stressed is the reciprocity of institutional typifications and the typicality of not only the actions but also the actors in institutions. The typifications of habitualized actions that constitute institutions are always shared ones. They are *available* to all members of the particular social group in question, and the institution itself typifies individual actors as well as individual actions. The institution posits that actions of type *X* will be performed by actors of type *X*. For example, the institution of the law posits that heads shall be chopped off in specific ways under specific circumstances, and that specific types of individuals shall do the chopping (executioners, say, or members of an impure caste, or virgins under a certain age, or those who have been designated by an oracle).

Institutions further imply historicity and control. Reciprocal typifications of actions are built up in the course of a shared history. They cannot be created instantaneously. Institutions always have a history, of which they are the products. It is impossible to understand an institution adequately without an understanding of the historical process in which it was produced. Institutions also, by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible. It is important to stress that this controlling character is inherent in institutionalization as such, prior to or apart from any mechanisms of sanctions specifically set up to support an institution. These mechanisms (the sum of which constitute

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what is generally called a system of social control) do, of course, exist in many institutions and in all the agglomerations of institutions that we call societies. Their controlling efficacy, however, is of a secondary or supplementary kind. As we shall see again later, the primary social control is given in the existence of an institution as such. To say that a segment of human activity has been institutionalized is already to say that this segment of human activity has been subsumed under social control. Additional control mechanisms are required only in so far as the processes of institutionalization are less than completely successful. Thus, for instance, the law may provide that anyone who breaks the incest taboo will have his head chopped off. This provision may be necessary because there have been cases when individuals offended against the taboo. It is unlikely that this sanction will have to be invoked continuously (unless the institution delineate^d by the incest taboo is itself in the course of disintegration, a special case that we need not elaborate here). It makes little sense, therefore, to say that human sexuality is socially controlled by beheading certain individuals. Rather, human sexuality is socially controlled by its institutionalization in the course of the particular history in question. One may add, of course, that the incest taboo itself is nothing but the negative side of an assemblage of typifications, which define in the first place which sexual conduct is incestuous and which is not.

In actual experience institutions generally manifest themselves in collectivities containing considerable numbers of people. It is theoretically important, however, to emphasize that the institutionalizing process of reciprocal typification would occur even if two individuals began to interact *de novo*. Institutionalization is incipient in every social situation continuing in time. Let us assume that two persons from entirely different social worlds begin to interact. By saying 'persons' we presuppose that the two individuals have formed selves, something that could, of course, have occurred only in a social process. We are thus for the moment excluding the cases of Adam and Eve, or of two 'feral' children meeting in a clearing of a primeval jungle. But we are assuming that the two individuals arrive at their meeting place from social worlds that have been historically produced in segregation from each other, and

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that the interaction therefore takes place in a situation that has not been institutionally defined for either of the participants. It may be possible to imagine a Man Friday joining our matchstick-canoë builder on his desert island, and to imagine the former as a Papuan and the latter as an American. In that case, however, it is likely that the American will have read or at least have heard about the story of Robinson Crusoe, which will introduce a measure of predefinition of the situation at least for him. Let us, then, simply call our two persons *A* and *B*.

As *A* and *B* interact, in whatever manner, typifications will be produced quite quickly. *A* watches *B* perform. He attributes motives to *B*'s actions and, seeing the actions recur, typifies the motives as recurrent. As *B* goes on performing, *A* is soon able to say to himself, 'Aha, there he goes again.' At the same time, *A* may assume that *B* is doing the same thing with regard to him. From the beginning, both *A* and *B* assume this reciprocity of typification. In the course of their interaction these typifications will be expressed in specific patterns of conduct. That is, *A* and *B* will begin to play roles *vis-à-vis* each other. This will occur even if each continues to perform actions different from those of the other. The possibility of taking the role of the other will appear with regard to the same actions performed by both. That is, *A* will inwardly appropriate *B*'s reiterated roles and make them the models for his own role-playing. For example, *B*'s role in the activity of preparing food is not only typified as such by *A*, but enters as a constitutive element into *A*'s own food-preparation role. Thus a collection of reciprocally typified actions will emerge, habitualized for each in roles, some of which will be performed separately and some in common.²² While this reciprocal typification is not yet institutionalization (since, there only being two individuals, there is no possibility of a typology of actors), it is clear that institutionalization is already present *in nucleo*.

At this stage one may ask what gains accrue to the two individuals from this development. The most important gain is that each will be able to predict the other's actions. Concomitantly, the interaction of both becomes predictable. The 'There he goes again' becomes a 'There *we* go again'. This relieves both individuals of a considerable amount of tension.

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They save time and effort, not only in whatever external tasks they might be engaged in separately or jointly, but in terms of their respective psychological economies. Their life together is now defined by a widening sphere of taken-for-granted routines. Many actions are possible on a low level of attention. Each action of one is no longer a source of astonishment and potential danger to the other. Instead, much of what goes on takes on the triviality of what, to both, will be everyday life. This means that the two individuals are constructing a background, in the sense discussed before, which will serve to stabilize both their separate actions and their interaction. The construction of this background of routine in turn makes possible a division of labour between them, opening the way for innovations, which demand a higher level of attention. The division of labour and the innovations will lead to new habituations, further widening the background common to both individuals. In other words, a social world will be in process of construction, containing within it the roots of an expanding institutional order.

Generally, all actions repeated once or more tend to be habitualized to some degree, just as all actions observed by another necessarily involve some typification on his part. However, for the kind of reciprocal typification just described to occur there must be a continuing social situation in which the habitualized actions of two or more individuals interlock. Which actions are likely to be reciprocally typified in this manner?

The general answer is, those actions that are relevant to both *A* and *B* within their common situation. The areas likely to be relevant in this way will, of course, vary in different situations. Some will be those facing *A* and *B* in terms of their previous biographies, others may be the result of the natural, pre-social circumstances of the situation. What will in all cases have to be habitualized is the communication process between *A* and *B*. Labour, sexuality and territoriality are other likely foci of typification and habitualization. In these various areas the situation of *A* and *B* is paradigmatic of the institutionalization occurring in larger societies.

Let us push our paradigm one step further and imagine that *A* and *B* have children. At this point the situation changes

EXHIBIT 48

STRUCTURE AND FUNCTION
IN PRIMITIVE SOCIETY

STRUCTURE AND FUNCTION
IN PRIMITIVE SOCIETY

Essays and Addresses

by

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1952

with their wings, the maintenance of temperature in the winter by clustering together. Spencer uses the term 'co-operation' to refer to this feature of social life. Social life and social adaptation therefore involve the adjustment of the behaviour of individual organisms to the requirements of the process by which the social life continues.

When we examine a form of social life amongst human beings as an adaptational system it is useful to distinguish three aspects of the total system. There is the way in which the social life is adjusted to the physical environment, and we can, if we wish, speak of this as the *œcological* adaptation. Secondly, there are the institutional arrangements by which an orderly social life is maintained, so that what Spencer calls co-operation is provided for and conflict is restrained or regulated. This we might call, if we wished, the institutional aspect of social adaptation. Thirdly, there is the social process by which an individual acquires habits and mental characteristics that fit him for a place in the social life and enable him to participate in its activities. This, if we wish, could be called cultural adaptation, in accordance with the earlier definition of cultural tradition as process. What must be emphasised is that these modes of adaptation are only different aspects from which the total adaptational system can be looked at for convenience of analysis and comparison.

The theory of social evolution therefore makes it a part of our scheme of interpretation of social systems to examine any given system as an adaptational system. The stability of the system, and therefore its continuance over a certain period, depends on the effectiveness of the adaptation.

Social Structure

The theory of evolution is one of a trend of development by which more complex types of structure come into existence by derivation from less complex ones. An address on Social Structure is included in this volume, but it was delivered in war time and was printed in abbreviated form, so that it is not as clear as it might be. When we use the term structure we are referring to some sort of ordered arrangement of parts or components. A musical composition has a structure, and so does a sentence. A building has a structure, so does a molecule or an animal. The components or units of social structure are *persons*, and a person is a human

being considered not as an organism but as occupying position in a social structure.

One of the fundamental theoretical problems of sociology is that of the nature of social continuity. Continuity in forms of social life depends on structural continuity, that is, some sort of continuity in the arrangements of persons in relation to one another. At the present day there is an arrangement of persons into nations, and the fact that for seventy years I have belonged to the English nation, although I have lived much of my life in other countries, is a fact of social structure. A nation, a tribe, a clan, a body such as the French Academy, or such as the Roman Church, can continue in existence as an arrangement of persons though the personnel, the units of which each is composed, changes from time to time. There is continuity of the structure, just as a human body, of which the components are molecules, preserves a continuity of structure though the actual molecules, of which the body consists, are continually changing. In the political structure of the United States there must always be a President; at one time it is Herbert Hoover, at another time Franklin Roosevelt, but the structure as an arrangement remains continuous.

The social relationships, of which the continuing network constitute social structure, are not haphazard conjunctions of individuals, but are determined by the social process, and any relationship is one in which the conduct of persons in their interactions with each other is controlled by norms, rules or patterns. So that in any relationship within a social structure a person knows that he is expected to behave according to these norms and is justified in expecting that other persons should do the same. The established norms of conduct of a particular form of social life it is usual to refer to as *institutions*. An institution is an established norm of conduct recognised as such by a distinguishable social group or class of which therefore it is an institution. The institutions refer to a distinguishable type or class of social relationships and interactions. Thus in a given locally defined society we find that there are accepted rules for the way a man is expected to behave towards his wife and children. The relation of institutions to social structure is therefore twofold. On the one side there is the social structure, such as the family in this instance, for the constituent relationships of which the institutions provide

the norms; on the other there is the group, the local society in this instance, in which the norm is established by the general recognition of it as defining proper behaviour. Institutions, if that term is used to refer to the ordering by society of the interactions of persons in social relationships, have this double connection with structure, with a group or class of which it can be said to be an institution, and with those relationships within the structural system to which the norms apply. In a social system there may be institutions which set up norms of behaviour for a king, for judges in the fulfilment of the duties of their office, for policemen, for fathers of families, and so on, and also norms of behaviour relating to persons who come into casual contact within the social life.

A brief mention may be made of the term *organisation*. The concept is clearly closely related to the concept of social structure, but it is desirable not to treat the two terms as synonymous. A convenient use, which does not depart from common usage in English, is to define social structure as an arrangement of persons in institutionally controlled or defined relationships, such as the relationship of king and subject, or that of husband and wife, and to use organisation as referring to an arrangement of activities. The organisation of a factory is the arrangement of the various activities of manager, foremen, workmen within the total activity of the factory. The structure of a family household of parents, children and servants is institutionally controlled. The activities of the various members of the persons of the household will probably be subject to some regular arrangement, and the organisation of the life of the household in this sense may be different in different families in the same society. The structure of a modern army consists, in the first place, of an arrangement into groups—regiments, divisions, army corps, etc., and in the second place an arrangement into ranks—generals, colonels, majors, corporals, etc. The organisation of the army consists of the arrangement of the activities of its personnel whether in time of peace or in time of war. Within an organisation each person may be said to have a *role*. Thus we may say that when we are dealing with a structural system we are concerned with a system of social *positions*, while in an organisation we deal with a system of *roles*.

Social Function

The term function has a very great number of different meanings in different contexts. In mathematics the word, as introduced by Euler in the eighteenth century, refers to an expression or symbol which can be written on paper, such as 'log. x ', and has no relation whatever to the same word as used in such a science as physiology. In physiology the concept of function is of fundamental importance as enabling us to deal with the continuing relation of structure and process in organic life. A complex organism, such as a human body, has a structure as an arrangement of organs and tissues and fluids. Even an organism that consists of a single cell has a structure as an arrangement of molecules. An organism also has a life, and by this we refer to a process. The concept of organic function is one that is used to refer to the connection between the structure of an organism and the life process of that organism. The processes that go on within a human body while it is living are dependent on the organic structure. It is the function of the heart to pump blood through the body. The organic structure, as a living structure, depends for its continued existence on the processes that make up the total life processes. If the heart ceases to perform its function the life process comes to an end and the structure as a living structure also comes to an end. Thus process is dependent on structure and continuity of structure is dependent on process.

In reference to social systems and their theoretical understanding one way of using the concept of function is the same as its scientific use in physiology. It can be used to refer to the interconnection between the social structure and the process of social life. It is this use of the word function that seems to me to make it a useful term in comparative sociology. The three concepts of process, structure and function are thus components of a single theory as a scheme of interpretation of human social systems. The three concepts are logically interconnected, since 'function' is used to refer to the relations of process and structure. The theory is one that we can apply to the study both of continuity in forms of social life and also to processes of change in those forms.

If we consider such a feature of social life as the punishment of crime, or in other words the application, by some organised procedure, of penal sanctions for certain kinds of behaviour, and

EXHIBIT 49

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THE CHANNELLING FUNCTION IN FAMILY LAW

*Carl E. Schneider**

Every culture has two main functions: (1) to organize the moral demands men make upon themselves into a system of symbols that make men intelligible and trustworthy to each other, thus rendering also the world intelligible and trustworthy; (2) to organize the expressive remissions by which men release themselves, in some degree, from the strain of conforming to the controlling symbolic, internalized variant readings of culture that constitute individual character.

PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC

* Professor of Law, University of Michigan. This essay is an expanded version of the Sidney & Walter Siben Distinguished Professorship Lecture, delivered April 1, 1992, at the Hofstra University School of Law. A version of this essay directed to some constitutional aspects of the channelling function was presented at the Conference on Compelling State Interests at the Albany Law School. Another version was presented at a faculty workshop at St. Mary's University School of Law faculty workshop. I am grateful to participants at all these sessions and to Edward H. Cooper, Stephen Gottlieb, Richard O. Lempert, Victoria Mather, Milton C. Regan, Jr., Joseph L. Sax, Kent Syverud, and Carol Weisbrod for their helpful comments.

The paradoxes are familiar. Society moulds and makes the individual; but individuals are and mould society. Law is a going whole we are born into; but law is a changing something we help remodel. Law decides cases; but cases make law. Law deflects society; but society is reflected in the law.

Karl Llewellyn, *Behind the Law of Divorce*

I. THE THEORY OF THE CHANNELLING FUNCTION

A. *What is the Channelling Function?*

On an occasion such as this, we are called to step back from our daily work to seek what Justice Holmes called a “liberal view” of our subject.¹ Today, I propose to do so by exploring a function of family law that I believe is basic, that underlies much of family law, that resonates with the deepest purposes of culture but that is rarely addressed expressly—namely, what I call the “channelling function.” As I will soon explain at length, in the channelling function the law recruits, builds, shapes, sustains, and promotes social institutions.²

My exploration of this topic will have several stages. First, I will define what I mean by “channelling function” and try to convince you that, rightly or wrongly, for good or ill, it has played a weighty role in family law. I will do so because I believe that our failure to recognize the function regularly causes courts and scholars to misunderstand the regulation of families and the work of the law.³ In addi-

1. Oliver Wendell Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 197 (1920). For an argument for such a view of family law, see Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039 (1985).

2. As the reader will soon see, “channelling” does not fully capture all I mean in talking about the law’s role in promoting social institutions and their use. However, I have failed to devise a more precise and equally economic phrase. As the reader may already have noticed, I am not the first to employ the term “channelling function.” Lon Fuller memorably used it in describing the functions legal formalities perform. *Consideration and Form*, 41 COLUM. L. REV. 799, 801-03 (1941). Fuller, however, was referring to ways in which such formalities offer “channels for the legally effective expression of intention,” channels which serve (to change the image) as a language which parties may use to communicate with each other and with judges who might later interpret their communications. *Id.* at 801.

3. For a discussion of how the Supreme Court’s failure to comprehend the channelling function’s role leads the Court to misunderstand the interests states advance to justify statutes

tion, one of my purposes in this essay is to urge an appreciation of and deference to the complexity of the social and legal world in which we live. The temper of academic thought in recent decades has been to demonstrate the undoubted risks and deficiencies of social institutions. I believe it is now time to remind ourselves that in our painfully and implacably complicated world, there is another side of the ledger.

In the second stage of my paper I will examine some of the factors that constrain the channelling function's effectiveness and moderate its attractions. I will try to show that the function's power is limited, that that power may be used both wisely and foolishly, and that its use exacts costs. Finally, I will seek to make my discussion of the channelling function more concrete by exploring a recent case—*Michael H. v. Gerald D.*⁴—in channelling terms.

But let me begin at the beginning. Family law has, I think, five functions.⁵ The first is the protective function. One of law's most basic duties is to protect citizens against harms done them by other citizens. This means protecting people from physical harm, as the law of spouse and child abuse attempts to do, and from non-physical harms, especially economic wrongs and psychological injuries. Law's second function is to help people organize their lives and affairs in the ways they prefer. Family law performs this "facilitative" function by offering people the law's services in entering and enforcing contracts, by giving legal effect to their private arrangements. Family law's third function is to help people resolve disputes. The law of divorce exemplifies family law's "arbitral" function, since today's divorce courts primarily adjudicate conflicting claims to marital property, alimony, and child custody.

Instinct in each of these first three functions of family law lies a relatively commonplace idea: There are people (particularly children) the law is widely expected to protect, contracts it is widely expected to facilitate, and disputes it is widely expected to arbitrate. However,

against Fourteenth Amendment challenges, see Carl E. Schneider, *State-Interest Analysis and the Channelling Function in Privacy Law*, in *PUBLIC VALUES IN CONSTITUTIONAL LAW* (forthcoming, Stephen Gottlieb ed. 1993).

4. 491 U.S. 110 (1989).

5. I discuss these functions at length in *CARL E. SCHNEIDER, FAMILY LAW: CASES AND MATERIALS* (forthcoming). The functions of law which I posit are, of course, primarily analytic constructs. Legislators may not think in terms of them when they write statutes. Nor does any crystalline line divide them. On the contrary, they may often overlap and even conflict. Further, a statute may and often does serve more than one function.

the last two functions of family law are less self-evident and more controversial. The first of these is the expressive function.⁶ It works by deploying the law's power to impart ideas through words and symbols. It has two (related) aspects: Law's expressive abilities may be used, first, to provide a voice in which citizens may speak and, second, to alter the behavior of people the law addresses. The ERA exemplifies both aspects. Its proponents had (among other things) two kinds of expressive purposes in mind. They proposed it partly because they wanted the law of their country—their law—to make a symbolic statement about the relationship between men and women. And they also believed that such symbolic statements can promote changes in social sentiment which in turn may promote a reformation of social behavior.

Finally, in the channelling function the law creates or (more often) supports social institutions which are thought to serve desirable ends. "Social institution" I intend broadly: "In its formal sociological definition, an institution is a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative."⁷ Social institutions arise, Berger and Luckmann tell us, "whenever there is a reciprocal typification of habitualized actions by types of actors."⁸ Generally, the channelling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channelled into them. As Berger and Luckmann write, "Institutions . . . , by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible."⁹ Or as James Fitzjames Stephen wrote with characteristic vigor and vividness, "The life of the great mass of men, to a great extent the life of all men, is like a watercourse guided this way or

6. Family law's expressive function has recently attracted growing attention. Three exemplary pieces are MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 *YALE L.J.* 293 (1988); and Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 *U.C. DAVIS L. REV.* 991 (1989).

7. ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 10 (1991).

8. PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 51 (1966).

9. *Id.* at 52.

that by a system of dams, sluices, weirs, and embankments [I]t is by these works—that is to say, by their various customs and institutions—that men's lives are regulated.”¹⁰

Business law offers usefully clear examples of such institutions—the corporation and the partnership. Consider the corporation. People have long united to invest in and run businesses. To encourage such activity, governments give legal recognition to a particular business form—the corporation. They also endow it with special advantages—particularly, limited liability and unlimited life. By now, this form has become familiar, natural, and comfortable. It is habitualized, it is institutionalized.

I have used the example of business institutions because the law's role in forming and supporting them and channelling people into them is particularly evident. In addition, it is probably easier for us to appreciate the channelling function in the relatively uncontroversial context of business life. But how might family law be said to support social institutions and to channel people into them? Here we encounter some difficulty. It must always be hard to define any social institution. “Society” has no voice in which to identify and describe its institutions. Lawmakers do not always speak explicitly and exactly about social institutions, even though they may be much concerned for them. Different people would define the same institution in different ways, and the same institution will affect different people differently. What is more, institutional patterns in a modern society are elaborately complex: Any institution will have both normative and behavioral aspects, and behavior within institutions will rarely live up to the institution's normative aspirations. One institution may take many forms, forms which can, further, vary from place to place and can change over time. A single institution can serve competing functions.¹¹ Few if any institutions will be unambivalently and unambiguously embraced, and the multiplicity of social goals may interfere with the nurture of the most warmly embraced institution. An institution may encounter competing and even conflicting institutions.¹² And, worse, there is a sense in which institutions do

10. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 63-64 (1967).

11. “And where functions are many, functions tend to conflict. That portion of the structure which is geared to serve the one is likely to bother the performance of another. In marriage the functions seem to have no end.” Karl N. Llewellyn, *Behind the Law of Divorce: I*, 32 *COLUM. L. REV.* 1281, 1288 (1932).

12. The institution of marriage, for instance, may have to contend with competing and possibly conflicting institutions like non-marital cohabitation and prostitution.

not “exist,” but are merely analytic constructs.¹³

None of this, however, makes it pointless to talk about social institutions. Institutions may be analytic constructs, but those constructs can still be useful attempts to describe patterns of attitudes and behavior. That those patterns will always be complex and those attempts will always be imprecise does not mean that the patterns are not there or that the attempts will be pointless.

One other point about the channelling function needs to be made before we explore specific examples of its use in family law. In one important (if limited) sense, the channelling function is normatively neutral: It can be employed to serve all kinds of normative ends. It has been put to many uses, it could be put to many more. Central to any evaluation of a specific example of the channelling function will be an assessment of the particular goals to which it has been put. To illustrate the workings of the function in family law, I have selected two institutions which I think the law can plausibly be said to use in channelling terms. But there are certainly other ways in which the channelling function has been deployed in family law, and there may well be ways in which it would be better deployed.

Having acknowledged the difficulty and asserted the importance of my enterprise, I will now try to describe two broad social institutions which I will use to illustrate the working of family law’s channelling function.¹⁴ These two institutions are “marriage” and “parenthood.” These are, obviously, quite broadly defined institutions, and my descriptions of them are thus subject to all the difficulties I described above. I have no doubt that both these institutions have somewhat different meanings for different people, that they have changed over time and are still changing, and that they do not monopolize intimate life in modern America. However, a legislator might plausibly identify a core of ideas which have enough social support to justify the term “institution” and which the legislator might conclude the law should try to support, to shape, and to channel people into.

Our legislator might, then, posit a normative model of “marriage” with several fundamental characteristics. It is monogamous, heterosex-

13. For a thoughtful and suggestive account of some of the often-analogous difficulties of analyzing family law’s expressive function, see Weisbrod, *supra* note 6.

14. As I say, I use these institutions for illustrative purposes, not because I endorse them in all their aspects. As I define them, I find much to like in them. But I am not arguing that these definitions state all that we might want from those institutions, that they might not be and have not been defined differently, or that all the means the law uses to promote them are desirable.

ual, and permanent. It rests on love. Husbands and wives are to treat each other affectionately, considerately, and fairly. They should be animated by mutual concern and willing to sacrifice for each other. In short, they ought to assent to the old question: "Wilt thou love her, comfort her, honour, and keep her in sickness and in health; and, forsaking all others, keep thee only unto her, so long as ye both shall live?"¹⁵

Of course, as Karl Llewellyn warned, too much can be "thought and written as if we had a pattern of ways that ma[k]e up marriage."¹⁶ Of course, as Llewellyn knew, "'The' norm is none too uniform."¹⁷ But as he also knew, "major features are observed, are 'recognized,' are made the measure of the 'right.' Right in such matters is most powerfully felt: these are compacted patterns, backed by unreasoning tradition, built around interests that lie deep and close."¹⁸

In the same way, our legislator might posit an institution of "parenthood" with several key normative characteristics. Parents should be married to each other. They are preferably the biological father and mother of their child. They have authority over their children and can make decisions for them. However, like spouses, parents are expected to love their children and to be affectionate, considerate, and fair. They should support and nurture their children during their minority. They should assure them a stable home, particularly by staying married to each other, so that the child lives with both parents and knows the comforts of security.

15. The marriage institution once centrally specified gender roles. To an uncertain but surely significant extent, those roles retain a good deal of social power. However, I do not include them as part of our legislator's channelling program for two reasons. First, they have lost an important part of their social force. Too many people wholly and explicitly reject them, and too many more at least partially and implicitly do so. Second, the law now professes to have rejected those roles. The Supreme Court has overturned gender distinctions in family law, e.g., *Orr v. Orr*, 440 U.S. 268 (1979), and has condemned them in a variety of other situations, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973). Further, a good deal of legislative and judicial reform of family-law areas like child custody, alimony, and marital property has attempted to establish gender-neutral rules. Legal efforts along these lines may be incomplete, unsatisfactory, and even counter-productive, but they are substantial enough to make it hard to see the maintenance of traditional gender roles as a plausible or, I would suppose, desirable legislative goal.

16. Llewellyn, *supra* note 11, at 1285. Or as Ruth Dixon puts the point: "Most cultures have a certain notional family form that is regarded as the norm, but even when this is the most common form, there will inevitably be many variants." *THE ROMAN FAMILY* 11 (1992).

17. Llewellyn, *supra* note 11, at 1286.

18. *Id.*

Obviously, these two normative models are not and never were descriptions of any universal empirical reality, and I will soon examine recent changes in social practice that might affect them. Nor are they the only models the channelling function might be recruited to serve. Nevertheless, they do describe ideals which have won and retained substantial allegiance in American life. I will thus use these models to illustrate how the channelling function can work. How, then, might our legislator interpret the law as supporting these two institutions and channelling people into them?

Our legislator might see family law as setting a framework of rules, one of whose effects is to shape, sponsor, and sustain the model of marriage I described above: It writes standards for entry into marriage, standards which prohibit polygamous, incestuous, and homosexual unions. It seeks to encourage marital stability by inhibiting divorce (although it pursues this goal much less vigorously than it once did). It tries to improve marital behavior both directly and indirectly: It imposes a few direct obligations during marriage, like the duty of support. Less directly, it has invented special categories of property (like estates by the entirety and rights of dower and curtesy) to reflect and reinforce the special relationship of marriage. It indirectly sets some standards for marital behavior through the law of divorce. Fault-based divorce does so by describing behavior so egregious that it justifies divorce. Marital-property law implicitly sets standards for the financial conduct of spouses. Finally, prohibitions against non-marital sexual activity and discouragements against quasi-marital arrangements in principle confine sexual life to marriage. "What is all this," James Fitzjames Stephen emphatically asked, "except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favour marriage in every possible manner as the foundation of civilized society?"¹⁹

Similarly, our legislator might see a framework of laws molding and promoting the institution of parenthood. Laws criminalizing fornication, cohabitation, adultery, and bigamy in principle limit parenthood to married couples, and those legal disadvantages that still attach to illegitimacy make it wise to confine parenthood to marriage. Laws restricting divorce make it likelier that a child will be raised by both parents. The law buttresses parents' authority over children. Parents may use reasonable force in disciplining their children. They

19. STEPHEN, *supra* note 10, at 156.

may decide whether their children should have medical treatment. They may choose their child's school. Parents of "children in need of supervision" can summon up the state's coercive power. However, the law also tries, directly and indirectly, to shape parental behavior. It requires parents to support their children. It penalizes the "abuse" or "neglect" of children and obliges many kinds of people to report evidence of it. It obliges parents to send their children to school. Custody law obliquely sets standards for parental behavior and emphasizes the centrality of children's interests. Finally, some states further elaborate the relationship between parent and child by obliging adult children to support their indigent parents.

These sketches suggest how the law can be seen as performing the first task of the channelling function, namely, to create—or more often, to recruit—social institutions and to mold and sustain them. The function's second task is to channel people into institutions. It can perform these two tasks in several ways. First, it does so simply by recognizing and endorsing institutions, thus giving them some aura of legitimacy and permanence. Recognition may be extended, for instance, through formalized, routinized, and regulated entry and exit to an institution, as with marriage: "By the authority vested in me by the State of Michigan, I now pronounce you man and wife."

A second channelling technique is to reward participation in an institution. Tax law, for instance, may offer advantages—like the marital deduction—to married couples that it denies the unmarried. Similarly, Social Security offers spouses benefits it refuses lovers. These advantages are enhanced if private entities consult the legal institution in allocating benefits, as when private employers offer medical insurance only to "family members" as the law defines that term. In a somewhat different vein, the law of alimony and marital property offers spouses—but generally not "cohabitants"—protections on divorce.

Third, the law can channel by disfavoring competing institutions. Sometimes competitors are flatly outlawed, as by laws prohibiting sodomy, bigamy, adultery, and prostitution. Bans on fornication and cohabitation mean (in principle) that, to have sexual relations, one must marry. Sometimes competing institutions are merely disadvantaged. For instance, the rule making contracts for meretricious consideration unenforceable traditionally denied unmarried couples the law's help in resolving some disputes. Similarly, non-parents are presump-

tively disadvantaged in custody disputes with parents.²⁰ Finally, restrictive divorce laws impede re-entry to the alternative institution of singleness.

Fourth, in principle people can be channelled into an institution by directly penalizing its non-use. One might, for instance, say that school taxes penalize childlessness, since non-parents get a good deal less out of those taxes than parents. However, the weakness of this example suggests the difficulty of finding really good instances in American law of direct penalties for not marrying or not having children.

By and large, then, the channelling function does not primarily use direct legal coercion. People are not forced to marry. One can contract out (formally or informally) of many of the rules underlying marriage. One need not have children, and one is not forced to treat them lovingly. Rather, the function forms and reinforces institutions which have significant social support and which, optimally, come to seem so natural that people use them almost unreflectively. It relies centrally but not exclusively on social approval of the institution, on social rewards for its use, and on social disfavor of its alternatives. Some aspects of it may be highly legalized, as divorce is. Some alternatives may, at least formally, be legally prohibited. The law may buttress an institution here and harry its competitors there. But, Berger and Luckmann explain, "the primary social control is given in the existence of an institution as such Additional control mechanisms are required only insofar as the processes of institutionalization are less than completely successful."²¹ They suggest "institutions are *there*, external to [the individual], persistent in their reality They have coercive power over him, both in themselves, by the sheer force of their facticity, and through the control mechanisms that are usually attached to the most important of them."²² And as Llewellyn, thinking more particularly about marriage, wrote, "One vital element in the fact-pattern thus made right is (this needs repetition) its recognition by the group [O]nce conceived, once accepted, the oversimple norm-concept maintains itself stubbornly, despite all changes in conditions; it becomes the socially given, right, ideal-type of

20. As the reader will have noticed, it can sometimes be hard to tell the difference between channelling by advantaging an institution and channelling by disadvantaging its competitors.

21. BERGER & LUCKMANN, *supra* note 8, at 52.

22. *Id.* at 57 (emphasis in original).

'marriage': the *connubium honestum* of the *vir honestus*."²³ In short, as Philip Rieff observes, "[A] culture survives principally . . . by the power of its institutions to bind and loose men in the conduct of their affairs with reasons which sink so deep into the self that they become common and implicitly understood"²⁴ Channelling's reliance on social institutions, then, is both its strength and its weakness, its harshness and its gentleness, its importance and its peril.

B. *What Purposes Does the Channelling Function Serve?*

The channelling function, I have said, fosters social institutions and channels people into them. But why might the state want to do so? To answer that question, let us revisit the example of the corporation as a "channelling" institution. First, the corporation serves law's three core functions. For example, it serves the protective function by allowing people to invest in enterprises without risking their whole fortunes, by protecting minority shareholders, and by directing economic activity into an institution whose public nature makes it easier to regulate. The corporation serves the facilitative function by giving people a convenient and efficient way of organizing themselves into enterprises. It serves the arbitral function by providing mechanisms for resolving disputes among entrepreneurs and for winding up their affairs.

But the corporate form does more than promote law's core functions. More centrally and obviously, it serves some broad social purposes. Primarily, it promotes the accumulation of large agglomerations of capital and the organization of many people into a single and productive enterprise. In other words, the corporate form makes possible the extensive and complex economic institutions on which rest industrialization, social wealth, and modernity. Less grandly, more specifically, and more subtly, the corporation serves what might be called "efficiency" functions. For instance, it relieves prospective entrepreneurs of the need to figure out *de novo* how to organize their ventures. Much of that work will already have been done by earlier generations and been embodied in the corporate form and in the law, literature, and lore that surround it. Because that form is neither monolithic nor exclusive, entrepreneurs will have important choices to make and considerable flexibility in making them. But the energy

23. Llewellyn, *supra* note 11, at 1286.

24. PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* 2 (1966).

EXHIBIT 50

GAY MARRIAGE: *For Better or for Worse?*



What We've Learned from the Evidence



William N. Eskridge, Jr. / Darren R. Spedale

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attorney general who addressed this issue agreed that states could exclude same-sex couples from civil marriage, and several states enacted laws making it clear that civil marriage was limited to one-man, one-woman couples.¹⁹ This string of defeats ended the initial gay-liberal movement for same-sex marriage. Activists turned to other issues, including antigay violence, job discrimination, and the AIDS epidemic.²⁰

In 1981, San Francisco gay rights attorney Matt Coles and his colleagues proposed a new and genuinely secular institution for state recognition of intimate relationships that they called “domestic partnership.” Starting with Berkeley in 1984–85, municipalities in at least nineteen states have established registries where same-sex (and usually different-sex) couples can declare their domestic partnership. Such a declaration entitles the partners to fringe benefits from local governmental and (often) private employers and perhaps hospital visitation rights. Although Jack Baker rejected this as a small crumb, most gay-liberals supported domestic partnerships because they reduced the formal inequality of lesbian and gay couples; gay-radicals supported or acquiesced in them because they represented a novel, nonmarriage family form. Coles’s hope was that the gay rights movement would focus on the achievable goal of domestic partnership recognition from cities with large LGBT populations; the next step would be to add more legal rights and benefits to such partnerships, probably through state laws.²¹

And then along came Denmark.

After Denmark: The Renewed Debate and the (Strategic) Triumph of the Gay-Liberals

By 1989, same-sex marriage seemed all but dead as a goal of the American LGBT rights movement. In May of that year, the Danish Parliament voted to enact the Registered Partnership Act, which accorded almost all the same rights and duties of marriage to registered same-sex partners (see chapter 2). American gay rights leaders started to rethink their priorities. In the autumn of 1989, the two top lawyers at Lambda Legal Defense and Education Fund, the leading LGBT litigation group, debated the issue in print. Tom Stoddard, Lambda’s executive director, took the gay-liberal position that the desirability of formal equality required the gay rights movement to press for same-sex marriage. Paula Ettelbrick, Lambda’s legal director, took the gay-radical position that same-sex marriage would associate gay rights with a patriarchal institution that most gay men and (especially) lesbians do not want to join. The Stoddard–Ettelbrick exchange revived the liberal-radical conversation about marriage from the 1970s, and updated it with new arguments.²²

Pressing the point of view Baker and McConnell had propounded almost twenty years earlier, Stoddard credited the radical critique of marriage and offered a response appealing to the radical notion of transformational equality: “marriage may be unattractive and even oppressive as it is currently structured and practiced, but enlarging the concept to embrace same-sex couples would necessarily transform it into something new.” As former ACLU attorney Nan Hunter would later argue in detail, same-sex marriage would remove the last gendered feature of marriage law and would also create a model in law for a more egalitarian kind of interpersonal relationship. (Same-sex marriage, in our view, would also automatically undermine the gendered roles associated with patriarchal marriage, where only the husband works outside the home. Even if one of the women in a lesbian marriage stayed at home to keep house and take care of the children, the traditional “woman’s role,” the female partner working outside the home would be following the traditional “man’s role.”) Hunter and Stoddard suggested that this lived experience, multiplied by thousands of couples, would contribute to the feminist project of undermining the sexist features of marriage.²³

Ettelbrick, for her part, deepened the radical critique of formal equality. Not only was access to marriage not sufficient for the needs of most LGBT people but it would as a practical matter harm most sexual and gender minorities. Same-sex marriage, she argued, “would be perpetuating the elevation of married relationships and of ‘couples’ in general, and further eclipsing other relationships of choice.” This critique suggested the coercive power of liberal reform. In the United States, marriage is the norm, and those not joining that norm are marginalized and denigrated. Ettelbrick’s fear was that state recognition of same-sex marriages not only would reinforce the normalization of marriage, bad in itself, but also would be detrimental to the interests of LGBT people who do not want to marry. They would be further marginalized.²⁴

While leaders debated, lesbian and gay couples voted with their feet, as they started a new march to the marriage license bureau. Craig Dean and Patrick Gill, a District of Columbia couple, wanted to get hitched after the Danish breakthrough, and they brought a test case in the District. Although Lambda Legal and the ACLU felt their effort was premature, the Gay and Lesbian Attorneys of Washington (GAYLAW) agreed to assist after they filed their lawsuit in December 1990. In May 1991, Ninia Baehr and Genora Dancel and two other couples filed a similar lawsuit in Hawaii, also without ACLU or Lambda support.²⁵

Gay-liberals such as academic Cheshire Calhoun have responded to Ettelbrick that same-sex marriage would normalize homosexuality more

than it would normalize marriage.²⁶ And this is the way the same-sex marriage issue played out in the 1990s. In *Baehr v. Lewin* (1993), the Hawaii Supreme Court ruled that state refusal to issue marriage licenses to same-sex couples is a suspicious sex discrimination that must be justified by a compelling state interest. The Court remanded the case to the trial court, so that the state could make out its case—but the country as a whole woke up to the possibility of *gay* marriage.²⁷

And the country didn't like that one bit. Americans of various ethnicities, religions, and political orientations united in opposition to extending the valued institution of marriage to *homosexuals*. Between 1995 and 2005, forty-three states adopted statutes or constitutional amendments barring their judges from recognizing same-sex marriages in their jurisdictions.²⁸ States have a fair amount of discretion to refuse to recognize out-of-state marriages, but Congress enacted the Defense of Marriage Act (DOMA) in 1996 to make doubly certain the states would not have to recognize such marriages. Moreover, DOMA mandated that more than eleven hundred federal statutory and regulatory provisions using the terms "marriage" or "spouse" could never include same-sex couples married under state law. Heading off same-sex marriage and overriding the trial judge's injunction in *Baehr*, Hawaii in 1998 adopted a state constitutional amendment allowing the state to limit marriage to different-sex couples.²⁹

Ironically, the backlash against gay marriage paved the way for the triumph of the gay-liberal position within the LGBT community. Virtually no one in the mass media or American public life assailed *Baehr* for reinforcing marriage as the norm in this country. Almost every public objection to *Baehr* condemned it for undermining marriage or normalizing homosexuality or condoning unnatural lifestyles. Once the public debate was framed as a referendum on homosexuality, gay-radicals were substantially silenced. Although theorists such as Ettelbrick still considered gay marriage a queer error, they were among the staunchest in support of *Baehr* and Dancel's ongoing claims of homo equality. The backlash has not permanently silenced gay-radicals, but it has imposed a united front upon LGBT leaders in support of the gay-liberal demand for formal equality.

The Evolving Opposition to Same-Sex Marriage

For most of the twentieth century, homosexuals were unmentionable, and homosexual marriage was inconceivable to most Americans. When Tracy Knight and Marjorie Jones asked for a marriage license in 1970, Jefferson County clerk James Hallahan was speechless. So he asked for guidance from

EXHIBIT 51

Retying the Knot

The right wing gets it: Same-sex marriage is a breathtakingly subversive idea. So it's weirdly dissonant when gay neocons and feminist lesbians publicly insist—the former with enthusiasm, the latter with distaste—that same-sex marriage would be a conservative move, confining sexual free radicals inside some legal cellblock. It's almost as odd (although more understandable) when pro-marriage liberals ply the rhetoric of fairness and love, as if no one will notice that for thousands of years marriage has meant Boy+Girl=Babies. But same-sex marriage seems fair only if you accept a philosophy of marriage that, although it's gained ground in the past several centuries, still strikes many as radical: the idea that marriage (and therefore sex) is justified not by reproduction but by love.

Sound like old news? Not if you're the Christian Coalition, the Pope or the Orthodox rabbinate, or if you simply live in one of many pre-industrial countries. Same-sex marriage will be a direct hit against the religious right's goal of re-enshrining biology as destiny. Marriage is an institution that towers on our social horizon, defining how we think about one another, formalizing contact with our families, neighborhoods, employers, insurers, hospitals, governments. Allowing two people of the same sex to marry shifts that institution's message.

That's why the family-values crowd has trained its guns on us, from a new hate video called *The Ultimate Target of the Gay Agenda: Same Sex Marriages* to the apocalyptically named Defense of Marriage Act. The right wing would much rather see outré urban queers throwing drunken kisses off bar floats than have two nice married girls move in next door, with or without papoose, demonstrating to every neighborhood kid that a good marriage is defined from the inside out, that sodomy is a sin only in the mind of the beholder.

Chilled by that coming shift, antimarriage conservatives have also been disingenuous in their arguments, which basically come down to crying "tradition!" like a Tevye chorus. Even a quick glance at social history shows what conservatives pretend isn't so: Very little about marriage is historically consistent enough to be "traditional." That it involves two people? Then forget the patriarch Jacob, whose two wives and two concubines produced the heads of the twelve tribes. That it involves a religious blessing? Not early Christian marriages, before marriage was a sacrament. That it is recognized by law? Forget centuries of European prole "marriages" conducted outside the law, in which no property was involved. That it's about love, not money? So much for centuries of negotiation about medieval estates, bride-price, morning gift and dowry (not to mention bride-burnings in today's India). Those who tsk away such variety, insisting that everyone knows what marriage *really* is, miss the point. Marriage is—marriage always has been—variations on a theme. Each era's marriage institutionalizes the sexual bond in a way that makes sense for that society, that economy, that class.

So what makes sense in ours? Or, to put it another way, what is contemporary marriage for? That's the question underlying the debate as right-wing and gay activists prepare for Hawaii's

aftermath. Its answer has to fit our economic lives. In a G.N.P. based on how well each of us plumbs our talents and desires in deciding what to make, buy or sell, we can hardly instruct those same innards to shut up about our sexual lives—as people could in a pre-industrial society where job, home and religion were all dictated by history. The right wants it both ways: Adam Smith's economy *and* feudal sexual codes. If same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers.

Ah, but it already does. Formally, U.S. marriage hasn't been justified solely by reproduction since 1965, when the Supreme Court batted down the last laws forbidding birth control's sale to married couples. In Margaret Sanger's era, contraception was charged with "perversion of natural functions," "immorality" and "fostering egotism and enervating self-indulgence." Dire diseases were predicted for those who indulged. Those are, almost word for word, the charges hurled by every critic of homosexuality—and for the same reasons. Once their ideologies are economically outdated, what can conservatives invoke except the threat of divine judgment?

All of which is why same-sex marriage is being considered in every postindustrial country, and why it seems simply "fair" to so many, including Hawaii's Supreme Court. That sense of fairness also draws on the liberal idea that a pluralist democracy's institutions should be capacious, that civic marriage should be one-size-fits-all. But same-sex marriage does more than just fit; it announces that marriage has changed shape.

As with any social change, there will be more consequences, which look pretty progressive to me. There are practical benefits: the ability to share insurance and pension benefits, care for our ill partners, inherit automatically, protect our children from desperate custody battles. And marriage will end a negative: Our sexual lives can no longer be considered felonious, which stings us in fights ranging from child custody to civil rights.

A more notable progressive shift is that, since same-sex couples will enter the existing institution, not some back-of-the-bus version called "domestic partnership" or "queer marriage," marriage law will have to become gender-blind. Once we can marry, jurists will have to decide every marriage, divorce and custody question (theoretically at least) for equal partners, neither having more historical authority. Our entrance might thus rock marriage more toward its egalitarian shore.

Some progressives, feminists and queer nationalists nevertheless complain that instead of demanding access to the institution as it is, we should be dismantling marriage entirely. But lasting social change evolves within and alters society's existing institutions. No one will force same-sex couples to darken the institution's doors; we'll merely gain the choices available to heterosexual pairs. None of this will alter a hard fact of contemporary life: Every commitment—to job, spouse, community, religion—must be invented from the inside out. Making lesbians and gay men more visible legally will insist that there is no traditional escape: that our society survives not by rote but by heart.

E.J. GRAFF

E.J. Graff is working on a book, What Is Marriage For?

EXHIBIT 52

ETHICS IN THE PUBLIC DOMAIN

*Essays in the Morality of
Law and Politics*

REVISED EDITION

JOSEPH RAZ

CLARENDON



PAPERBACKS

ETHICS IN THE
PUBLIC DOMAIN

*Essays in the Morality
of Law and Politics*

REVISED EDITION

JOSEPH RAZ

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This, it seems to me, is the main theoretical objection to a No-Extraneous-Limitations-to-Access principle. The distinction between external and intrinsic limitations on access, while serviceable for many purposes, is theoretically inadequate to our task.²⁵

The principle we should uphold is simply that every person should have access to an adequate range of options to enable him to have a successful life. Satisfaction of this principle does not recognize the distinction between inherent and external limitation of access, and is not limited to eliminating external limitations. While, as noted, it is not hostile to all external limitations, it may require a change in inherent limitations, i.e. transformation of the goods one has access to. Just as the Basic-Capacities Principle, i.e. the principle about the capacities necessary for one to have a successful life, is part and parcel of a consideration of the nature of the valuable options which should be available for people in a society, so the Principle of Adequate Access is not independent of but is inseparable from an argument about which valuable options should be available in a society. When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For there can be no doubt that the recognition of gay marriages will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.

The case of gay marriages differs from the example considered above (section 3) of the impossibility of a duty to reciprocate love. For whereas those who desire that their love be reciprocated desire a spontaneous love based on liking and not on duty, those who ask for gay marriages to be recognised ask that committed unions of gay men or of lesbians be legally and socially recognised on the same footing as committed unions of people of differing genders. That goal is not at all impossible. It merely requires the passing away of the current type of marriage, which is exclusive to people of differing genders.

Here we can see the degree to which the approach I am advocating is conservative, and the limits on that conservatism. In the background is the thought that there are many valuable options, many routes to a good life. The fact that any one society makes realization of only a small fraction of them possible is inevitable. The fact that other societies have options not sustainable in ours is no cause for moral concern. Likewise, the fact that people living in one country at the same time do not have all the same options available to them is no cause for moral concern. The only thing

²⁵ How can one draw a principled divide between inherent and extrinsic limitations on an activity? Should steroids be banned from athletics? It depends on what sort of competition the branch of the entertainment industry known as athletics is thought to be. The question is the same as the problem whether dance with speaking dancers is still dance, or theatre, or some unholy hybrid. Tradition and people's desires for the future development of such activities are the only relevant factors. No conceptual distinction between what is inherent to the activity and what is extrinsic to it will solve the problem.