

Human Rights and the Family

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The conjugal family seems to be under assault from the rights revolution. Rights claims have relentlessly sliced into the family from diverse angles: divorce rights, reproductive rights, gender rights, sexual orientation rights, marriage rights, children's rights, birth rights, affiliational rights, parental rights, de facto parenting rights, custody rights, families of choice rights, and so on. Some lament that this historic institution is dying under the trauma of these rights assaults. Others see this trauma as the creative turmoil of renewal, rebirth, and re-creation.

In *The Rights Revolution*, Michael Ignatieff, former director of Harvard's Carr Center for Human Rights Policy and current leader of Canada's federal Liberal party, points out that the last thirty years have been marked by new conflicts over the status of marriage and the family in liberal democracies.¹ According to Ignatieff, the "rights revolution" aims at transforming society's most basic conjugal and kinship relationships (85). Its "central idea" is that each individual has "the right to choose the life we lead and that we must fight to exercise this right against all comers" (99).

Whether this passion for rights means the death of the traditional family or its radical metamorphosis into new forms, nevertheless it is evident that this revolution has set itself against the historic institution of marriage. Ignatieff denounces as "downright tyranny" political attempts to sustain a public ethos protective of the traditional conjugal family (102). Claims that the historic

¹Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2001), chap. 4. Subsequent references to this work will be cited within the text.

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conjugal family promotes social well-being are met with dismissive cynicism:

We need to understand that the essential moral needs of any child can be met by family arrangements that run the gamut from arranged marriages right through to same-sex parenting. Nature and natural instinct are poor guides in these matters. If good parenting were a matter of instinct, families wouldn't be the destructive institutions they so often are. It is frequently the case that perfect strangers turn out to be better parents or step-parents than natural ones. (103)

Law and public policy must foster a new culture of intimacy grounded in rights and dedicated to fostering an increasing diversity of family forms in order to maximize the full range of freedoms in this domain of social life. Ignatieff acknowledges that the impact of this revolution has some troublesome social outcomes. Its "ledger" of achievements includes more marital instability and divorce, more sexual freedom, more abortion, more family diversity, and more ongoing anxiety about sexual identity and relationships (90). He concedes that current culture is marked by increasing "anguish and disarray" over the fate of the family, but he concludes that citizens must bear these burdens as the price for the freedoms bestowed on us by this rights revolution (112).

Former Canadian Liberal leader and prime minister Pierre Elliot Trudeau once quipped that "there is no place for the state in the bedrooms of the nation."² However, in a sense the new rights revolution has brought the state and its courts back into the bedroom. Rights have become a sword directed against the historic institution of marriage, rather than a shield protecting it. The family is no longer a safe haven protected by rights, but an open site for the warring strife of rights claims.

Given the current climate it is hardly surprising that those sectors of liberal democratic society dismayed by the corrosive impact of the rights revolution on the family instinctively retreat from rights talk as a trustworthy vehicle for addressing their concerns.³ However, running from rights may not be the best

²Comment made to reporters December 21, 1967. CBC Television clip available at http://archives.cbc.ca/politics/rights_freedoms/clips/2671/.

³For critical assessments of the impact of atomizing "rights talk" on family law, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 121–30, and Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), chap. 4, "Privacy Rights and Family Law," 91–119.

strategy for citizens dedicated to the defence of the conjugal family. Historically, defenders of the family, like defenders of religion, have appealed to rights as one of the central instruments for defending this critical domain of human life. In short, those concerned with the fate of the historic conjugal family might discover some surprising allies in the rights tradition.

The Original International Consensus on Rights and Family

The first major international consensus on human rights and the family can be traced to the most celebrated global instrument for the rights revolution, the Universal Declaration of Human Rights (UDHR). Eleanor Roosevelt chaired the United Nations committee that drafted the declaration and navigated it through the shoals of post-war international diplomacy to its successful ratification on December 10, 1948. In her speech to the General Assembly on the eve of its ratification, Mrs. Roosevelt hailed the UDHR as an “international Magna Carta” that opened up a bold new chapter in the human rights tradition.⁴

Her optimism has not been widely shared. With the ink barely dry, the first generation of detractors were busy knocking the declaration as a feel-good statement of pious platitudes deliberately crafted to be devoid of any real legal force. Sixty years later critics on the left condemn the document as an arrogant ethnocentric attempt to impose Western values on non-Western cultures and societies. Critics on the right react with instinctive suspicion to the Declaration, viewing it as a convenient tool for promoting radical liberal, feminist, anti-Western, and anti-family agendas. However, experts on the origins and development of the UDHR argue that the allegations of ethnocentrism or impotence badly miss the mark. The drafting process did represent a unique global dialogue resulting in a remarkable international consensus and the UDHR has become a pillar of an evolving human rights revolution that has spearheaded considerable social and political change across the world.⁵

⁴Eleanor Roosevelt, “Adoption of the United Nations Declaration,” speech to the General Assembly, December 9, 1948, available at <http://www.udhr.org/history/frbioer.htm>.

⁵See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 2000). See also, Mary Anne Glendon, “Introduction: The Declaration at Fifty” and chapter 12 of *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

Mary Ann Glendon, former Harvard Law professor and current US ambassador to the Vatican, explores the UDHR's journey towards ratification through the lens of her sparkling study of Mrs. Roosevelt's role in this historic project.⁶ The declaration was forged in a period of incredible international turmoil: the chaotic aftermath of the most cataclysmic war in history, the beginning of the cold war, the beginning of Middle East conflicts over the new state of Israel, the independence and partition of India and Pakistan, the rise of Maoist China, to name but a few. In the midst of this tumultuous period of global conflict, Mrs. Roosevelt was commissioned to lead an unruly crew of highly gifted diplomats in this quixotic venture of navigating the rough seas of global cultural, religious, and ideological conflict to reach an international consensus on basic human rights.

John Humphrey, former dean of McGill University's Faculty of Law, was the secretary for the Commission. His first task was to comb through existing human rights documents and produce a first working draft of the Declaration.⁷ Both Mrs. Roosevelt and Humphrey came to the table with that classic profile so despised by left-wing critics of the UDHR—white, Western, Anglo-Saxon, Protestant, elite. Mrs. Roosevelt's gender was the one significant crack in this traditional mold.

The cracks multiplied as the eighteen-member team assembled. The chief architects of the UDHR were men and women marked by a bewildering array of cultural, religious, national, and ideological perspectives. Two leading figures in the drafting process were Charles Malik and René Cassin. Malik was a Lebanese statesman, a distinguished philosopher, a devout Christian, and a leader in the Arab League. During the 1930s, Malik had studied under Alfred North Whitehead at Harvard and under Heidegger at Freiburg. He had firsthand experience of the brutality of Nazi hatred when, mistaken for a Jew, he was attacked and beaten up while walking the streets of Freiburg. One of the intellectual heavyweights in the committee, Malik played a critical role in formulating the articles relating to marriage and family. He pressed for a declaration that would confront the destructive force of modern state

⁶Glendon, *A World Made New*.

⁷The traditional claim for Cassin's authorship has been soundly debunked by A.J. Hobbins, "René Cassin and the Daughter of Time: The First Draft of the Universal Declaration of Human Rights," *Fontanus 2* (1989): 7–26, http://digital.library.mcgill.ca/fontanus/search/issue.php?issue=Fontanus_Vol_02_1989. See also, Morsink, *Declaration of Human Rights*, 5–6.

collectivism and protect the family as one of the crucial social bulwarks against state power.

Nobel laureate René Cassin was a French Jew, a prominent European jurist, and de Gaulle's legal consigliere during French war resistance. Cassin lost over twenty relatives in German concentration camps and became a fervent advocate for a Jewish homeland. His concerns for fundamental human dignity, the unique place of maternity, and protection for children would find expression in the UDHR. Malik the Arab and Cassin the Jew worked shoulder to shoulder on the human rights declaration while representing passionately opposed positions in the heated debates over the Partition of Palestine and the establishment of a Jewish state.

Chinese philosopher, playwright, and diplomat Peng-Chun Chang brought the intellectual resources of the Asian traditions to bear on the proceedings. Chang made sure that the UDHR was enriched by a Confucian appreciation for the social or fraternal nature of the human person. Chang joined the Latin American delegates in arguing for the recognition of fundamental "duties" as well as fundamental rights.⁸ Hansa Mehta, a prominent Indian public intellectual and feminist, carefully monitored discussions relating to marriage and family to ensure that women's equality rights were addressed.

There were many other distinguished players in this drama. However, it was the Latin American delegates who may have played one of the most critical roles in the development of the UDHR. During the late 1930s and 1940s, most Latin American countries were going through an intense period of political ferment and democratic reform. By the mid-1940s Latin American countries were drafting their own international declaration of human rights while participating in the UN deliberations. Their zealous interest in the development of protocols for human rights bore fruit in the ratification of the first major international human rights document, the American Declaration of the Rights and Duties of Man, adopted on April 30, 1948, in Bogota, Columbia.

Glendon argues that the UDHR bears "unmistakable marks" of the strong influence of the Latin American approach to human rights and freedoms reflected in the Bogota declaration. Both Morsink and Glendon argue that the

⁸Chang expressed some hesitation about the UDHR articles relating to the marriage and the family. In part this seems to be due to his sensitivity to the convoluted and complex characteristics of the extended feudal family system in China and the immense challenges of social transformation that it faced in the process of modernization. See Peng-Chun Chang, *China at the Crossroads: The Chinese Situation in Perspective* (London: Evans Brothers, 1936), 136–38.

social and economic rights enshrined in the UDHR derive primarily from Latin American traditions, not Soviet influence. Morsink attributes this contribution to Mexican traditions of socialism.⁹ However, Glendon argues that the Latin American emphasis on the social dimension of human rights is more accurately traced to the impact of Catholic traditions of social thought reaching back to Spanish natural law theory and twentieth-century Catholic social teaching.¹⁰ The principal advocate for social and economic rights on the Human Rights Commission was Chilean delegate Hernán Santa Cruz. In the literature on the UDHR participants, Santa Cruz is commonly characterized as a Chilean “socialist.” However, his profile is more complex. For example, Santa Cruz tried unsuccessfully to include an amendment that would recognize “unborn children” in the UDHR article on the right to life. Left-leaning social Catholicism might be the more accurate descriptor for this ideological stance. It was this form of social Catholicism that came to bat for a thicker conception of the nature of the family and its place in the human rights tradition.¹¹

In short, one of the largely overlooked aspects of the development of the UDHR is the indispensable leading role played by delegates from non-Western states in the drafting process. Glendon points out that the response of the Yalta Big Three—the United States, the Soviet Union, and Great Britain—to the idea of an international bill of human rights ranged from indifference to outright hostility.¹² The Big Three’s coolness to the human rights project created a vacuum that was filled in by a fascinating team of collaborators who helped create a global conversation on human rights.

How was consensus achieved? Jacques Maritain, one of the leading Christian philosophers of the twentieth century, was commissioned by the United Nations Educational, Scientific and Cultural Organization (UNESCO) to develop an international conversation on “the theoretical bases” of human rights with a blue-ribbon team of Muslim, Marxist, Hindu, Confucian, and

⁹Morsink, *Universal Declaration of Human Rights*, 130.

¹⁰Mary Ann Glendon, “The Forgotten Crucible: The Latin American Influence on the Universal Rights Idea” *Harvard Human Rights Journal* 16 (2003): 35.

¹¹The delegate from Uruguay was an exception to the rule. He argued against enshrining a conception of the family as “natural and fundamental” in the UDHR. Commission on Human Rights, Third Session, June 16, 1948, E/CN.SR.58, 13.

¹²Glendon, “The Forgotten Crucible,” 29.

Christian scholars from around the world. Surveying the contributions, Maritain arrived at a Rawlsian conclusion: there was considerable overlapping agreement on a substantive set of fundamental human rights despite the fact that there was fundamental disagreement on the theoretical foundations of those rights.¹³ Secondly, consensus was achieved through the development of a thicker rather than thinner conception of human rights. The original drafts clearly represented a narrower Western conception of human rights that needed to be enriched by a number of key concerns brought to the table by non-Western partners. The global conversation produced more robust conceptions of the family, the social nature of the person, the critical place of duties as well as rights, and the “inherent dignity” of the human person than might have been the case if narrower Western views of human rights had prevailed.

From a Thin to a Thick Vision of the Family

The final version of the UDHR article on marriage and the family (Article 16) reads as follows:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.¹⁴

Examining the journey to this particular formulation sheds light on the foundational issues that were being debated in the Commission concerning the place of the family in human rights.

The original Humphrey draft contained forty-eight articles with only one article relating specifically to marriage and family. Article 13 offered this curt statement on marriage and family rights: “Everyone has the right to contract

¹³The results were published in a book-length study, UNESCO, *Human Rights: Documents and Interpretations*, Paris, 1948, <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>, 59.

¹⁴Universal Declaration of Human Rights, art.16, <http://www.un.org/Overview/rights.html>.

a marriage in accordance with the laws of the state.”¹⁵ This formulation defined marriage as a juridical contract controlled and defined by state law. Furthermore, the absence of any content, including any reference to sex difference, left the article open to a wide variety of interpretations.

René Cassin’s revision pared the Humphrey draft to forty-six articles organized into a preamble and eight chapters: (1) general principles; (2) right to life; (3) personal freedom; (4) legal status; (5) public freedoms; (6) political rights; (7) nationality; and (8) social, economic, and cultural rights. The Cassin draft moved the marriage clause to Article 17 under a section entitled “Legal Status,” and tightened it up by eliminating the redundant reference to the state: “Every person has the right to contract marriage in accordance with the laws.”¹⁶

This stripped-down conception of marriage rights continues to have considerable appeal in contemporary Western jurisprudence. The concept that marriage is “an institution created by the state” is a central principle guiding the *Goodridge* decision redefining marriage as a union of two persons.¹⁷ Viewing marriage and family as creatures of the state situates them in a vulnerable place, since family relations are viewed as legal constructs with little or no protection from other rights claims.

A prominent legal theorist, Martha Nussbaum, presses this point home in her exploration of the nature of the family in relation to gender equality claims. Nussbaum argues that family is “the artifact of state action” in a much more “direct sense” than other voluntary institutions of society such as the university or religious communities.¹⁸ Marriage and the family are constituted by state law:

The state constitutes the family structure through its laws, defining which groups of people can count as families, defining the privileges and rights of family members, defining what marriage and divorce are,

¹⁵The Humphrey draft is included as appendix 1 in Glendon’s *A World Made New*, 271–74. Article 41 of the Humphrey draft did add a reference to the family stating that “everyone has the right to such public help as may be necessary to make it possible for him to support his family.” This article seemed to be an allusion to the “living wage” principle of Catholic social thought; however, the reference to “public help” rather than salaried remuneration created some confusion.

¹⁶Glendon, appendix 2, “The Cassin Draft,” *A World Made New*, 277. Cassin also clarified Humphrey’s allusion to a “living wage” by stating that labour must be “justly remunerated...and must yield a decent standard of living to the worker and his family” (Article 37).

¹⁷*Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁸Martha C. Nussbaum, *Women and Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 161–62.

what legitimacy and parental responsibility are, and so forth...[T]he state is present in the family from the start...it is the state that says what this thing *is* and controls how one becomes a member of it....All human associations are shaped by laws and institutions...But the family is shaped by law in a yet deeper and more thoroughgoing way, in the sense that its very definition is legal and political.”¹⁹

Nussbaum rejects the notion that the family can be defined as a “natural” institution fundamentally distinct from the political order. She argues that the family exhibits “no particular form” that could be considered to be “uniquely founded on biological tendencies.” The diverse forms and functions of the family reflect the pervasive influence of culture, history, and politics endlessly constituting and reconstituting this domain of human care and intimacy.²⁰

Humphrey’s formulation of the place of the family in human rights fits with the approach advanced by rights theorists such as Nussbaum or Ignatieff. However, this thin account of the family did not survive the test of the global conversation on human rights that produced the UDHR. Most non-Western Commission members judged the Humphrey-Cassin versions of marriage to be deeply unsatisfactory. Beginning with Malik’s famous intervention at the first session of the Human Rights Commission (Lake Success, New York, January-February 1947), commissioners underscored the human and societal devastation caused by collectivist ideologies of the state.²¹ They were profoundly critical of any proposal suggesting that a social institution as fundamental as the family could be construed as mere creature of state law.

During the second session (December 1947) Charles Malik tabled a motion that made radical amendments to the article on marriage. His proposal abolished any suggestion that state law had a critical role in defining marriage. In contrast, it highlighted the significance of the family as the “natural and fundamental” basis for human community. Malik argued that the family must be given more “prominence” in the UDHR since it was the “circle” in which

¹⁹Ibid., 262–63.

²⁰Ibid., 252–61.

²¹See Glendon’s discussion in *A World Transformed*, 38–40.

“fundamental freedoms and rights were originally nurtured.” His proposed amendment read as follows:

The family deriving from marriage is the natural and fundamental unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and society.²²

The delegate for the USSR, Alexander Bogomolov, initially spoke up against the substance of Malik’s amendment. In addition to his objections to the theological component, he dismissed Malik’s proposed definition of the family as a “natural” dimension of society. He argued that the family was a contingent and constructed social entity: “various forms of marriage and family existed in the world, each form corresponding to the special economic conditions of the people concerned.”²³

By the third session Malik’s proposal was openly challenged by the Big Three as Great Britain and the United States joined the Soviet Union in arguing against his amendments. The US and the UK argued that the article on the family should be dropped, since the rights concerns relevant to the family were adequately covered in the rights to privacy and freedom of association. Great Britain brought the Indian delegate on side by directly addressing her equality concerns and stripping the article down to: “Men and women are entitled to equal rights as to marriage.”²⁴ The United States was “strongly in favour” of this leaner approach.²⁵

The Big Three failed in the attempt to derail Malik’s proposal and retain a formulation closer to Humphrey’s original article. Malik’s proposal did undergo revisions; however, it marked a turning point in the Commission’s deliberations on the marriage/family article. The commissioners decided to craft the human rights language in a way that would build a strong shield around the family rather than leave it open as a politically vulnerable target for the state and other rights claims.

How did Malik arrive at his particular formulation of the nature of the family? In an essay on the UDHR written for the twentieth anniversary of the declaration, Malik offers some clues. First, he notes the important influence

²²Commission on Human Rights, December 13, 1947, E/CN.R/SR.37, 11. See Morsink, *Declaration of Human Rights*, 254–55.

²³Commission on Human Rights, May 24, 1948, E/CN.4/99, 4.

²⁴Commission on Human Rights, June 16, 1948, E/CN.R/SR.58, 9.

²⁵Commission on Human Rights, December 13, 1947, E/CN.R/SR.37. See Morsink, *Declaration of Human Rights*, 254–55.

of the various non-governmental organization (NGO) contributions on the Commission's work. He also notes that among the various NGOs, a variety of religious organizations (Christian and Jewish) showed the most sustained interest and involvement in the drafting process.²⁶ The representatives of the various religious NGOs could be called on to address the Commission, but they could not directly propose or move specific wording for the draft document. However, any of their substantive recommendations could find their way into the discussion if they were sponsored by a representative sitting on the Commission.

Second, Malik reveals that the UDHR article on the rights of the family "owes much of its inspiration to Catholic sources."²⁷ The language of his proposal does echo Catholic social teaching.²⁸ In fact, a direct source for Malik's proposal can be found in a NGO memorandum circulated at the beginning of the second session of the Commission hearings. The memorandum (December 3, 1947) was prepared by the International Federation of Christian Trade Unions (IFCTU).²⁹

The IFCTU was a Catholic trade union movement anchored in Catholic social teaching. During the 1930s, the IFCTU opposed fascism and fought valiantly for fundamental human rights. German and Italian authorities banned the organization, arrested its leaders and sent them to Nazi concentration camps. Despite the near extermination of the union during World War II, it reorganized and reappeared as an active NGO participant in the Human Rights Commission. The IFCTU memorandum offered this thick formulation of the rights associated with marriage and the family:

The free development of the human personality implies that man has a right to marry and to raise a family. The family is the natural, primary and fundamental unit of society; it is older than society itself and has unalienable rights antecedent and superior to positive law. The family must therefore be protected by society and have its free development and its security of life ensured. The family has the right to give its children an education in conformity with their religion and convictions. The

²⁶Charles Habib Malik, "The Universal Declaration of Human Rights" in *Free and Equal: Human Rights in Ecumenical Perspective*, by O. Frederick Nolde (Geneva: World Council of Churches, 1968), 10.

²⁷*Ibid.*, 11.

²⁸Jane Adolphe, "The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family," *Ave Maria Law Review* 4, no. 2 (Summer 2006): 343–84.

²⁹P.J.S. Serrarens, Memorandum on Human Rights Presented for the International Federation of Christian Trade Unions, Human Rights Commission, December 3, 1947, E/CN.4/45.

family has the right to be assisted by state services in the education of its children. The family has the right to maternity protection. Mothers shall not be compelled by economic necessity to engage in labour to the neglect of their duties in the family's home. The family has the right to be protected by society against all influences that undermine a sound family life. The family has a right to adequate housing which is a necessity for the good development of the family.³⁰

Given the chronology of events in the second session, it is clear that Malik himself was the delegate who brought the IFCTU proposal on family rights to the table for discussion. The only substantive difference between Malik's more concise version of the IFCTU memorandum was a phrase he added stating that the family was "endowed by the Creator" with inalienable rights. Curiously, the original IFCTU formulation felt no need to validate the family by anchoring it to a theological foundation. Malik's theological addition caused heated debate and was eventually rejected. However, the substance of his proposal "finally stood its ground."³¹

The second session of Commission proposed the following wording:

1. The family deriving from marriage is the natural and fundamental unit of society. Men and women shall have the same freedom to contract marriage in accordance with the law.
2. Marriage and the family shall be protected by the State and Society."³²

Other significant adjustments were to appear in the third session of the Commission.

First, Malik's proposal included the phrase "the family deriving from marriage." This wording seems to imply that families only come into being on the basis of the prior existence of marital relationships. Some delegates felt that this formulation was too unequivocal.³³ A softer version of the link between marriage and family was affirmed in the final draft, which speaks of the "the right to marry and to found a family."

³⁰Ibid., 3–4. Malik pressed for the wording "the natural and fundamental" as "the most essential part" of this proposal. Commission on Human Rights, June 16, 1948, E/CN.SR.58, 11.

³¹In a public address six months before ratification Malik confirmed that consensus on the article dealing with marriage and family had been reached. He noted that the approach was "vigorously combated" but it "finally stood its ground." Habib C. Malik, ed., *The Challenge of Human Rights: Charles Malik and the Universal Declaration* (Oxford: Centre for Lebanese Studies, 2000), 100.

³²Commission on Human Rights Report to the ESC, Geneva, December 2–17, 1947, Doc. E/600, 16, John P. Humphrey United Nations Collection, Faculty of Law, McGill University.

³³Morsink, *Universal Declaration of Human Rights*, 256.

Second, Indian and Latin American delegates pressed for explicit mention of gender difference (“men and women”) together with stronger language on non-discrimination and equality. Reference to gender difference only appears twice in the UDHR: once in the preamble (“equal rights of men and women”) and once in the article on marriage and the family. The language concerning “equal rights...to marriage, during marriage and at its dissolution” was a subject of heated discussion. There seemed to be wide agreement on equality rights; however, some delegates (Catholics) objected to proposals that would enshrine a “right to divorce.” The wording of the final formulation negotiated around this concern and received wide agreement.³⁴ Another equality concern, the right to marry “without any limitation due to race, nationality or religion,” was added by Campos Ortiz, the delegate from Mexico.³⁵

Third, the language of contract (“right to contract a marriage”) was dropped. Conceptions of legal or religious significance of marriage varied greatly. Within the West alone, one can identify major variations: contractual, covenantal, sacramental.³⁶ Specifying a “right to contract” could be interpreted as an affirmation of a contractual conception of marriage. The reformulation (“men and women...have the right to marry”) left the article open and responsive to a variety of philosophical and religious positions.³⁷

Fourth, the family was not only defined as the “natural and fundamental group unit of society” it was also given the unique privilege of being the only social dimension of human life “entitled to protection by society and the State.”³⁸ The final version placed society before the state—delegates emphasized the role of religions in defending the family. It also eliminated a potentially paternalistic reading of this relationship by specifying that the family was “entitled to protection” rather than the earlier formulation, which simply states that the family “shall be protected by the State and Society.”³⁹

³⁴Ibid., 124–25.

³⁵Ibid., 123.

³⁶See John Witte, Jr., *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition* (Louisville, KY: Westminster John Knox Press, 1997).

³⁷Universal Declaration of Human Rights, art.16/a. A number of issues relating to the articles on the family were resolved in a way that attempted to leave the Declaration open to a variety of philosophical perspectives. See the extensive discussions on the definition of the family, Human Rights Commission, June 16, 1948, E/CN.R/SR.48.

³⁸Universal Declaration of Human Rights, art. 16/c.

³⁹Commission on Human Rights Report to the ESC, Geneva, December 2–17, 1947, Doc. E/600, 16, John P. Humphrey United Nations Collection, Faculty of Law, McGill University.

Fifth, all references to entry into marriage “in accordance with the law of the state” or “in accordance with the law” were completely dropped from the final version. The validity of marriage was solely determined by “the free and full consent of the intending spouses.”⁴⁰ In the final version the family stands as a natural and fundamental association of society free from any hint of subordination to or contingency upon the state for its life and identity. The integrity and autonomy of the family are “entitled” to protection by the state and society.

Finally, this fight for an independent clause on the family highlighted an important feature of the UDHR approach to family that is often obscured by communitarian accounts of the critical role of civil society. The British and Americans had hoped to deal with the family by placing it under the umbrella of privacy and freedom of association. However, by giving separate treatment to religion and the family, the UDHR, like many other human rights documents, implies that there are fundamental differences between these two domains of social life and other forms of social life that are the focus of the right to freedom of association. Family and religion represent more enduring and primordial forms of social life than the more voluntary and transient communities that constitute civil society. Accordingly, family and religion carry their own distinctive rights claims.

In short, the thick vision of the family proposed in the IFCTU memorandum became the guiding vision for the UDHR. Even the memorandum’s concern for special protection for mothers was met by the addition of Article 25/2, which states that “motherhood and childhood are entitled to special care and assistance.” Malik notes that the vision of the family “enshrined” in the declaration was “vigorously combated.”⁴¹ Despite the attraction of Humphrey’s thinner legal conception of marriage in certain circles, the international consensus gravitated toward Malik’s deep conception of the family as the “natural and fundamental” basis of society.⁴² This vision became the foundation for the UDHR’s approach to marriage and family rights.

⁴⁰Universal Declaration of Human Rights, art.16/b.

⁴¹Malik, *Challenge of Human Rights*, 100.

⁴²C.T. Curle argues that there is a more profound philosophical divide that accounts for the tensions between Malik and Humphrey. He portrays the Greek Orthodox Charles Malik as a Latinized neo-Thomist, while the Protestant Humphrey turns out to be a closet Bergsonian sensitive to the philosophical instincts of the patristic Byzantine tradition of Christianity. See Clinton Timothy Curle, *Humanité: John Humphrey’s Alternative Account of Human Rights* (Toronto: University of Toronto Press, 2007).

The vision of the family embedded in Article 16 has not proved to be a dead letter in the evolving international rights tradition. It has been strongly reaffirmed and developed in a number of major United Nations rights documents, including the International Covenant on Economic Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966).⁴³ The International Covenant on Economic, Social and Cultural Rights asserts with even more force that the family must be accorded “the *widest possible* protection and *assistance*” (Article 10, emphasis added). UDHR language reappears in the major international rights declarations by the African and the Organization of American States. One exception is the European Union’s recent Charter of Fundamental Rights (2000). Article 9 of the European Union charter offers this stripped down conception of the right to marriage and family: “the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”⁴⁴ This formulation abandons the UDHR’s insistence that the family is “natural” and “fundamental.” It also effectively rejects the UDHR’s deliberate repudiation of any attempt to view marriage and family as a function of state law. The European Union Charter retreats back to the thin political conception of marriage and the family advanced in the original Humphrey draft.

What are the lessons of the UDHR achievement? Achieving international consensus requires moving towards a richer and more inclusive vision of human rights, not thinner more minimalistic conceptions. The international participants in this conversation wanted more in the UDHR document, not less. That was their price for a global consensus and it turned out to be a priceless demand. They wanted a firm affirmation of the inherent dignity of the human person, a strong affirmation of the social nature of human flourishing, an affirmation of the critical importance of duties as well as rights, and a robust recognition of the fundamental significance of the natural family. A truly global conception of human rights, they argued, must open itself to richer conceptions of human dignity, fraternity, duty, and the family

⁴³See Adolphe’s discussion of the influence of Article 16 on international rights documents in “The Holy See.” The UN recently approved the Doha Declaration on the Family (December 6, 2004), which offers a very robust elaboration of the UDHR conception of the family. It received the consensus support of 149 countries. The European Union and Canada dissented.

⁴⁴Charter of Fundamental Rights of the European Union, art. 9, http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

than many Western proponents of the “rights revolution” were prepared to accept.

Today Western academics and legal theorists often react with visceral moral and intellectual indignation whenever they encounter the adjective “natural” added to the family. However, in the light of this international consensus, the fluid conceptions of the family promoted in sectors of Western society stand out as vocal, but somewhat narrow and sectarian views. The UDHR vision of the family represents an international consensus that is clearly in tension with the constructed conceptions of family currently in vogue in most Western academies and courts. This consensus repudiates the notion that the family is a function of the state or of state law. It affirms the family as a “natural and fundamental” dimension of human life that pre-exists the state, a dimension of human life that needs to be treasured and protected. That vision continues to inspire the major cultures and religions of the world and continues to enrich UN deliberations on the family and human rights. The fact that this vision is withering away in many sectors of Western society signals that it might be time for those seeking renewal to reach beyond their borders and reengage the historic global conversation on human rights.⁴⁵

⁴⁵Developing a renewed discourse on the “natural” dimension of the family will be a daunting challenge. Don Browning’s “critical familism” is one example of an interdisciplinary approach that breaks free of the limits of strict social constructivist accounts of the family. See Don Browning, *Marriage and Modernization: How Globalization Threatens Marriage and What to Do About It* (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2003). Browning explores Charles Malik’s contribution to the UDHR’s approach to the family in “World Modernization, the Family, and the Universal Declaration of Human Rights,” <http://www.law2.byu.edu/wfpc/forum/2007/Browning.pdf>.