

CHILDREN AND THE FUTURE OF MARRIAGE

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I. INTRODUCTION: OF HEROES, CHILDREN, AND THE FUTURE OF MARRIAGE

A. In Honor of David Orgon Coolidge

Before addressing the topic I was invited to discuss, I want to pay tribute to David Orgon Coolidge, in whose memory this Symposium has been dedicated. David is one of the few genuine heroes I have known in my short, cynical life as a lawyer and law professor. David Orgon Coolidge—brilliant lawyer, scholar, and expert, as well as dedicated believer, husband, and parent—was heroic in his personal life and in his professional career. He was one of the brightest, most determined advocates of marriage I have ever known, and also one of the most meek, considerate, and gentle in his tenacious advocacy. He did not take cheap shots, he treated all others with dignity and respect, and he did more to advance the cause of defense of marriage in his lifetime than any other person I know. He worked tirelessly, conscientiously, and consistently, studying and searching to get information accurately, then analyzing it using all the great skill and intellect with which he was blessed, reaching out first to understand, then to try to enlighten and edify. Out of the lessons of his own suffering, he was a true friend to me at a special time when his friendship was very dear.

I am very grateful that the organizers of this Symposium have chosen to dedicate it to one of the greatest and most humble servants and dedicated defenders of the institution of marriage that I have known, and I add my praise in honor and respect for the wonderful memory of David Orgon Coolidge. I express my immense respect for his widow, Joan Coolidge, whose faith and nurturing care in the face of the most daunting dilemma of mortality—the terminal suffering and death of a loved one—is an example to us all. Joanie preserves the legacy of

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David as she raises their young children with faith, courage, and dignity. It seems that heroes come in pairs in the Coolidge family.

B. Outline of the Interdependence of Children and the Future of Marriage

I was invited to this Symposium to address the topic of “Children and the Future of Marriage.” This article does not merely address a uni-dimensional relationship with children as the independent variable and the future of marriage as the dependent variable. Rather, several different dimensions of the reciprocal relationship between children and the future of marriage are examined herein. The reciprocal relationships between children and the future of marriage are truly interdependent. Children need the stable marriage of their mother and father to enjoy the best opportunities and preparations for life success and happiness; likewise, the future of marriage needs children, not only to fulfill the greatest yearnings of men and women and societies for love and generativity, but also to perpetuate the constitutional system that protects our lives, liberties, and way of life. Children are not just related to the future of marriage, they are the future of marriage.

Part II of this article reviews how important marriage is for the well-being of children. There is a huge volume of social science literature that confirms unequivocally the importance and great value of marriage for children’s health, happiness, security, and optimal life opportunities. The question of why marriage produces such positive impacts for children is also briefly considered. The dilemma of the negative impact of parental divorce on children is examined, as well as how that dilemma in turn impacts the future of marriage. Part III considers the inverse relationship of how children are important for marriages and how they impact the future of marriage. This Part also explains how the breakdown of marriage in one generation appears to be transmitted to the next generation.

Part IV considers the importance of marital families for society. In particular, it reviews how the institutions of marriage and the marital family form the substructure upon which our constitutional system of rights and liberties is based. The marital family “constitutes” the foundation of the Constitution, and if that foundation is changed, the Constitution itself will be altered as well. Part V concludes with a suggestion about how to strengthen marriage for the sake of children, the future of society, and marriage itself. Developing the skills of other-interestedness and marital living in a world in which individualism and self-interest reign supreme is the principal challenge. It is important for our laws to provide incentives to support the institution of marriage and to gently discourage “free-riders.” It is essential that our generation rediscover for itself the value and importance of marriage.

C. Is There Really A Renaissance in Marriage?

The title of this Symposium invites us to consider an important question: Are we really experiencing a “renaissance” of traditional marriage in the United States today? There is evidence supporting both the affirmative and the negative answers to that question.

On the one hand, there is strong evidence of the beginnings of a renaissance of marriage in both the public sector and private life. There is already a significant and growing government-encouraged marriage revitalization movement in the United States,¹ and a growing trend in social service agencies in communities, states, and even the national government “toward offering families access to services to address their underlying problems, such as domestic violence, substance abuse, mental health issues, bring[ing] a host of service providers into the dispute.”² During the past decade, every American state has engaged in at least one government activity or made at least one policy change intended to strengthen marriage or two-parent families.³ These programs include: (1) marriage education in high schools; (2) incentives for pre-marriage counseling; (3) free or low-cost marriage-preparation programs for low-income couples; (4) free or low-cost marriage skill-development programs for low-income couples; (5) revision of social-security laws to reduce the “marriage penalty” for low income couples who marry (some welfare programs encourage couples not to marry by reducing the level of public assistance available to a couple if they are married, but not reducing the amount of assistance if they cohabit without marriage); (6) providing low-cost or no-cost counseling for married couples; (7) encouraging participation of nonmarital fathers in the rearing of their children; and (8) education of nonmarital fathers and mothers about the advantages for children whose fathers and mothers are married. Additionally, three path-breaking states have enacted “covenant marriage” laws that

¹ See, e.g., Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783, 788-91 (1999) [hereinafter Wardle, *Divorce*]. See generally Lynn D. Wardle, *The Symbiotic Relationship Between Human Rights and Family Law*, in FAMILY LIFE AND HUMAN RIGHTS 873 (Peter Lodrup & Eva Modvar eds., 2004); Lynn D. Wardle, *Threats and Challenges to the Family in the Twenty-first Century*, in THE FAMILY: AT THE CENTER OF HUMAN DEVELOPMENT 41 (2001) [hereinafter Wardle, *Threats*]; Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189 (2003).

² Karen Oehme & Sharon Maxwell, *Florida's Supervised Visitation Programs: The Next Phase*, 78 FLA. B.J. 44, 48 (Jan. 2004).

³ Theodora Ooms et al., *Beyond Marriage Licenses: Efforts to Strengthen Marriage and Two-Parent Families, A State-by-State Snapshot*, Center for Law and Social Policy (“CLASP”), at http://www.clasp.org/publications/beyond_marr.pdf (Apr. 2004); Center for Law and Social Policy, *New State-by-State Report Describes Efforts to Strengthen Marriage and Two-Parent Families*, at http://www.clasp.org/publications/beyond_pr_042604.pdf (Apr. 2004).

provide official recognition for the marriage vows of persons who want to make stronger public commitments to marriage.⁴

A recent statement by over 100 noted academic, government, and private leaders of the Marriage Movement in America notes that today there are literally hundreds of “grassroots efforts aimed at strengthening marriage” in hundreds of “communities across the country.”⁵ These experts note that

recent research suggests that these community-based marriage education and renewal programs are achieving measurable gains in reducing divorce and strengthening marriage. For example, a recent independent evaluation of clergy-led Community Marriage Policies, presently active in 186 U.S. cities [compared to 50 in 1996 and 120 in 2000], found that, while divorce rates in matched counties without CMPs declined by an average of 9.4 percent over the course of seven years, divorce rates in counties with CMPs declined by an average of about 17.5 percent over the same period of time.⁶

The federal government has also begun to support marriage-strengthening programs as part of welfare reform. In 1996, Congress passed, and President Clinton signed, the first significant “marriage initiative” in federal welfare program reform.⁷ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”) contained what one commentator called “the most radical welfare reforms in the history of welfare and child support enforcement.”⁸ PRWORA repealed the Aid to Families with Dependent Children (“AFDC”) program of “welfare entitlement” and replaced it with Temporary Assistance to Needy Families (“TANF”) block grants, given to

⁴ Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U. ARK. LITTLE ROCK L. REV. 261, 262 (2003).

⁵ Institute for American Values, *What Next for the Marriage Movement?* 3, at <http://www.marriagemovement.org/WhatNext.pdf> (Dec. 16, 2004) [hereinafter *What Next*].

⁶ *Id.* at 3; see also Marriage Savers, *Divorce Rates Fall 14% Lower in Community Marriage Policy Cities*, at <http://www.marriagesavers.org/public/divorcerates.htm> (last visited Jan. 21, 2005) (reporting that Community Marriage Policies (CMPs) in 114 cities/counties sparked a decline of their divorce rate). Compared to similar cities/counties in the same state, CMP divorce rates fell 2% per year more than expected, or 14% over seven years. Marriage Savers, *supra*. The Institute for Research and Evaluation found that the divorce rate declined 1.4% per year for five years before signing the CMP. *Id.* After clergy pledged reforms, the divorce decline accelerated to 2.3% per year. *Id.*; see also Paul James Birch et al., *Assessing the Impact of Community Marriage Policies on U.S. County Divorce Rates*, at <http://www.marriagesavers.org/Executive%20Summary.htm> (last visited Jan. 19, 2005) (reporting that the dissolution rate in counties with community marriage programs is significantly lower than in matched counties without them, and the rate of decline of divorce is significantly greater).

⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601 (1996) [hereinafter Reconciliation Act].

⁸ Ann Marie Rotondo, Comment, *Helping Families Help Themselves: Using Child Support Enforcement to Reform Our Welfare System*, 33 CAL. W. L. REV. 281, 305 (1997) (citing Reconciliation Act, *supra* note 7).

the states. TANF grants are intended to give states more flexibility in designing work-oriented, transitional welfare assistance programs for low-income families.⁹ TANF authorizes “performance” bonuses for states meeting employment related goals and “illegitimacy reduction” bonuses for states that reduced the number of non-marital births without increasing the number of abortions.¹⁰ All four legislative objectives for TANF involve strengthening families, and three of them specifically involve strengthening marriages to reduce welfare burdens.¹¹

President George W. Bush has continued and expanded those marriage initiatives. Strengthening and supporting marriage is a highlight of President Bush’s welfare reform “marriage initiatives.” For example, in a Presidential Proclamation on October 3, 2003, President Bush declared that protection of marriage “is essential to the continued strength of our society,” and that his administration is committed to “working to support the institution of marriage by helping couples build successful marriages and be good parents.”¹² In January 2004, President Bush asked Congress to authorize a \$1 billion spending increase for programs that promote marriage as a way to bring stability and prosperity to low-income couples.¹³ Pending legislation proposes hundreds of millions of dollars in welfare funding for healthy-marriage education, including matching grants for high school marriage and relationship skills programs, marriage education skill development programs, pre-marital education for engaged couples, marriage-enhancement programs, divorce reduction, and marriage mentoring.¹⁴

The spectacular public support for the state marriage amendments (SMAs) in the 2004 elections provides more evidence of the renaissance both of interest in and support for the institution of marriage. The state marriage amendments were carried by huge majorities (from 58% to

⁹ Martha C. Nguyen, *Welfare Reauthorization: President Bush’s Agenda*, 9 GEO. J. ON POVERTY L. & POL’Y 489, 489 (2002).

¹⁰ *Id.* at 490 (citing MARTHA COVEN, AN INTRODUCTION TO TANF (revised 2002)).

¹¹ Reconciliation Act, *supra* note 7. The goals are to:

(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.

Id.

¹² Proclamation No. 7714, 68 Fed. Reg. 58,257 (Oct. 3, 2003).

¹³ National Public Radio, *Morning Edition: Bush Seeks \$1 Billion to Promote Marriage*, at <http://www.npr.org/features/feature.php?wfId=1599045> (Jan. 15, 2004).

¹⁴ U.S. Department of Health and Human Services, The Administration for Children and Families, *Healthy Marriage Matters to ACF*, at http://www.acf.hhs.gov/programs/region5/program_info/aahmi_marriage_matters.html (last visited Jan. 22, 2005).

86%), both in red states (those electing Bush) and blue states (those electing Kerry). The marriage amendments gained a greater margin of victory than the winning presidential candidate in twelve of the thirteen states where SMAs were on the ballot in 2004.¹⁵ Even in Oregon, where gay marriage advocates from across the nation concentrated their intense campaign efforts, the ordinary voters of both parties stood up for the institution of marriage as the union of one man and one woman.¹⁶

The Marriage Movement Statement notes another indication of interdisciplinary renaissance of marriage.

Only a few years ago, the number of grassroots efforts aimed at strengthening marriage was extremely small. Today, there are hundreds of such efforts, in communities across the country. One sign of this growth is that the first Smart Marriages conference for marriage educators and leaders, held in 1997, drew about 400 participants. The 2000 conference drew about 1,200 participants. The 2004 conference drew more than 1,800 participants from all over the globe.¹⁷

There also is substantial evidence that ordinary men and women in America, not just a growing minority in the trained professions, support the revitalization of marriage. The divorce rate topped out more than fifteen years ago, and since then, divorce rates have been slowly

¹⁵ State marriage amendments gained a greater percentage of votes than the winning presidential contestant in 12 of 13 states.

State	For Amend.	Bush	Kerry (%)
Arkansas	75	47	52
Georgia	77	63	36
Kentucky	75	60	39
Michigan	59	48	51
Mississippi	86	59	40
Montana	66	59	39
North Dakota	73	59	39
Ohio	62	51	49
Oklahoma	76	66	34
Oregon	58	47	52
Utah	66	71	27
Louisiana (Sept. 2004)	78	57	42
Missouri (Aug. 2004)	71	53	46

E-mail from Margaret Nell, Marriage Law Project, to Lynn D. Wardle (Nov. 4, 2004) (citing MSNBC (Nov. 3, 2004)) (on file with author); see also Alliance Defense Fund, *Landslide Victory for Marriage*, at <http://www.alliancedefensefund.org/news/default.aspx?mid=800&cid=2899> (Nov. 3, 2004); *Moral Values, an Election Ploy*, at <http://deanmundy.tripod.com/blog/index.blog?from=20041113> (Nov. 11, 2004); Dr. Warren Throckmorton, *Voters 13, Gay Marriage 0, What Now?*, GROVE CITY COLLEGE NEWS, at http://www.gcc.edu/news/faculty/editorials/throck_11_03_04_voters13.htm (Nov. 3, 2004).

¹⁶ See generally Robert H. Knight, *Marriage Amendments Sweep America*, at <http://www.cwfa.org/articles/6669/CWA/family/index.htm> (Nov. 3, 2004) (“Even Oregon, the only state said to be ‘in play’ on the issue, was heading toward passage, with 56 percent of voters approving it.”).

¹⁷ *What Next*, supra note 5, at 3.

decreasing or leveling. Also, survey after survey of public opinion reports that Americans believe that divorces are too easy to obtain, especially for couples with children. For example, a noted survey by the Washington Post, Kaiser, and the Harvard Survey Project, *American Values: 1998 National Survey of Americans on Values*, asked whether obtaining a divorce should be easier, harder, or remain at the same difficulty level as it presently is. Those who responded saying that divorce should be harder to obtain outnumbered those believing it should be easier nearly three-to-one, and outnumbered those thinking it should be either the same or easier nearly two-to-one; this was the highest percentage in a poll to say that divorce is too easy since the pollsters began charting responses to that question thirty years earlier in 1968.¹⁸ A Time/CNN survey of May 7-8, 1999, by Yankelovich Partners Inc., also reported that fifty percent of those surveyed agreed that “it should be harder than it is now for married couples to get a divorce,” while 61% agreed that it should “be harder than it is now for couples with young children to get a divorce,” and 64% agreed that people “should . . . be required to take a marriage-education course before they can get a marriage license.”¹⁹ Even scholars that are not generally considered “conservative” acknowledge that there is “widespread dissatisfaction with the current social and legal landscape of marriage and divorce, and a sense that marriage itself is threatened under no-fault divorce.”²⁰

So, there is some good news, some indications of a stirring that may develop into a real renaissance of marriage. But that is only half of the story. There is a lot of bad news for those working for a renaissance of marriage. By some measures, marriage seems more unstable and unpopular today than ever before. For example:

(1) There was a 72% increase in the number of unmarried individuals living together between 1990 and 2000.²¹ The number of unmarried couples has increased by over 300 percent in the last twenty years, bringing the total of unmarried cohabiting couples to 5.5 million.²²

¹⁸ See Washington Post, Kaiser, & Harvard Survey Project, *American Values: 1998 National Survey of Americans on Values*, at 7 (Question 12) at <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14655> (last visited Jan. 22, 2005). The survey asked whether divorce should be easier, harder, or remain at the same difficulty level. *Id.* See generally Wardle, *Divorce*, *supra* note 1, at 788-89.

¹⁹ Time & CNN, *Poll: Divorce*, at <http://patriot.net/~crouch/wash/timetable.html> (last visited Jan. 22, 2005).

²⁰ Elizabeth Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1227 (1998).

²¹ Genaro C. Armas, *Cohabitation on the Rise: Unmarried-Partner Households Increase by 72%*, LAFAYETTE J. & COURIER, May 15, 2001, available at <http://www.lafayettejc.com/Census/0520104.shtml>.

²² U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999 67, tbl.83 (119th ed.).

In 2000, nonmarital cohabitation households accounted for 5% of all homes, up from 3% a decade earlier.²³ Since 1985, approximately half of all couples that have married lived together prior to their marriage.²⁴

(2) The marriage rate has fallen. In 2000, the rate of marriage was 8.7 per 1,000 people; it has fallen rather steadily since 1982 when the marriage rate was 10.6 per 1,000 people.²⁵ While the overall population continues to increase in the United States, the proportion of the population that is married continues to drop. Likewise, the median age of first marriage has risen. In 2000, the median age was 25.1 years for women and 26.8 years for men; the median marriage age has risen steadily since 1960 when it was 22.8 for men and 20.3 for women.²⁶

(3) The divorce rate in the United States has stabilized at an extremely high level. Based on current divorce rates of 4.1 per 1,000 people in 2000, up from 2.5 in 1965, it is estimated that nearly one-half of all American marriages now end in divorce.²⁷ The ratio of divorced persons to married persons living with spouses quadrupled between

²³ *Id.*

²⁴ Hilda Rodriguez, *Cohabitation: A Snapshot*, Center for Law and Social Policy, at http://www.clasp.org/publications/cohabitation_snapshot.pdf (May 1998).

²⁵ Centers for Disease Control and Prevention, National Center for Health Statistics, *Births, Marriages, Divorces and Deaths: Provisional Data for September 2001*, in 50 NAT'L VITAL STAT. REP., No. 8 (May 24, 2002), available at http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_08.pdf [hereinafter Centers, *Data*]; Sally C. Clarke, *Advance Report of Final Marriage Statistics, 1989 and 1990*, in 43 MONTHLY VITAL STAT. REP., No. 12(S) (July 14, 1995), available at http://www.cdc.gov/nchs/data/mvstr/supp/mv43_12s.pdf.

²⁶ See U.S. Census Bureau, *America's Families and Living Arrangements, Current Population Reports*, 9 (June 2001), available at <http://www.census.gov/prod/2001pubs/p20-537.pdf>; U.S. Census Bureau, *Estimated Median Age at First Marriage, by Sex: 1890 to the Present* (Jan. 7, 1999), available at <http://www.census.gov/population/socdemo/ms-la/tabms-2.txt>.

²⁷ Centers, *Data*, *supra* note 25; see also ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 44 (1992) (discussing the dramatic increase in divorce during the 1960s and 1970s); Stephen J. Bahr, *Social Science Research on Family Dissolution: What it Shows and How it Might be of Interest to Family Law Reformers*, 4 J.L. & FAM. STUD. 5, 5-6 (2002) (reporting that the divorce rate in America rose dramatically from 1965-1980, but since 1980, it has declined nearly 14%; about 50% of all marriages are predicted to end in divorce); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 141 (reporting that, in 1965, there were 479,000 divorces and the rate of divorce per 1,000 population was 2.5; in 1985 there were 1,190,000 divorces and the rate of divorce was 5.0) [hereinafter Wardle, *Conundrum*]; Centers for Disease Control and Prevention, National Center for Health Statistics, *Table 1. Divorces and Annulments and Rates, 1940-1990*, in 43 MONTHLY VITAL STAT. REP. 9, No. 9(S) (Mar. 22, 1995), available at http://www.cdc.gov/nchs/data/mvstr/supp/mv43_09s.pdf.

1960 and 1990.²⁸ Despite plummeting birth rates, one million children experience parental divorce each year.²⁹

(4) By 2000, one-third of all children born in the United States were born out of wedlock. That figure represents a thirteen-fold increase in the number of nonmarital births in just over fifty years.³⁰

(5) The birthrate in the United States has dropped below replacement level. Data from the National Center for Health Statistics indicate that fertility rates have fluctuated sharply since the peak of the Baby Boom in the late 1950s, when women were having children at a rate of more than 3.5 births per married woman. During the past decade, fertility rates have fluctuated between 2.0 and 2.1 births per woman, a rate below the level required for the natural replacement of the population (about 2.1 births per woman).³¹

In short, it is the best of times and the worst of times for a marriage renaissance.³² A battle for the hearts and minds of the American people is being waged, and the battleground is marriage. The good news is that many people are waking up to realize the value of marriage and the importance of preserving and revitalizing traditional, conjugal marriage. The bad news is that many have decided that marriage is not really all that it is cracked up to be (or, as a lesbian friend with whom I have debated same-sex marriage puts it, “marriage is a great institution—if you want to spend your life in an institution”).

A separation of wheat and tares is occurring. The most sobering news is that many people in America have not yet decided, and others who previously decided are free to change their minds. In other words, there is much work yet to be done before we (or, more likely, our children or grandchildren) will be able to say that we really did succeed in generating a renaissance of marriage. The marriage revitalization movement is not for seasonal harvesters or the short-sighted, those who are looking to invest a few weeks or months of their lives. It is for people

²⁸ NIJOLE V. BENOKRAITIS, *MARRIAGES AND FAMILIES* 19 (1993).

²⁹ For example, in 1990 there were 1,075,000 children involved in divorces. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1996* 195, tbl.150 (116th ed.).

³⁰ Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940-1999*, in 48 NAT'L VITAL STAT. REP., No. 16 (Oct. 18, 2000), available at http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf. This report indicates that the rate of children born out of wedlock rose dramatically from 1940 to 1990, nonmarital births increased 1,300% from 1940 to 1994, and the birth rate for unmarried women rose 600% during that time. *Id.* These rates have leveled off since 1990 due partly to an increase in the number of single women and their increased birthrate. *Id.*

³¹ U.S. Census Bureau, *Table H1: Percent Childless and Births per 1,000 Women in the Last Year: Selected Years, 1976 to Present* (Oct. 23, 2003), available at <http://www.census.gov/population/socdemo/fertility/tabH1.pdf>.

³² Apologies to CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (Oxford Press 1998) (1859).

like David Orgon Coolidge who are willing to give their lives in service to the cause, lighting one match at a time until a fire is ignited across America revealing the importance and value of marriage, a fire that will blaze through this nation to the blessing and benefit of generations yet unborn.

II. HOW MARRIAGE BENEFITS CHILDREN

A. Marriage Provides the Best Opportunities for Children and Their Future

Reviewing the evidence of the impact that family form has on children, and the benefits to children of marital parenting, at a Symposium that includes scholars that have done some of the most compelling research compilations in the field is like talking about how bad the rain was last year when the storm drains in your town backed up to an audience that includes Noah.³³ Yet it is important to review that evidence, if only briefly.

Empirical research strongly supports the immense value of marital childrearing generally. Professor Linda Waite has noted that “the positive effect of marriage on well-being is strong and consistent, and the selection of the psychologically healthy in the marriage or the psychologically unhappy out of marriage [and other variables] cannot explain the effect.”³⁴ Another commentator has stated, “[t]he most important causal factor of [recent declines in American] child well-being is the remarkable collapse of marriage, leading to growing family instability and decreasing parental investment in children.”³⁵

On average, children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings. Children with married parents are also more likely to escape some of the more common disasters of late-twentieth-century childhood and adolescence.³⁶

Children of divorce and those without fathers in the home are at the greatest risk of crime, child abuse, premarital sex, premarital pregnancy, poverty, lower education and have poorer performance in

³³ Maggie Gallagher and Linda Waite have co-authored one of most carefully researched and written compilations of data about the benefits of marriage for adults and children. See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* (2000). Mary Ann Glendon, Kathryn Spaht, Rick Duncan, Teresa Collett, Eve Tushnet, Josh Baker, Bill Duncan, Peter Swisher, George Gilder, Lynne Marie Kohm and David Wagner know it as well if not better than I do.

³⁴ Linda J. Waite, *Does Marriage Matter?* 32 *DEMOGRAPHY* 483, 497-98 (1995), available at <http://www.jstor.org/view/00703370/di973888/97p00046/0>.

³⁵ Bruce C. Hafen, *Bridle Your Passions: How Modern Law Can Protect the Family*, 63 *VITAL SPEECHES*, No. 20, at 5 (Aug. 1, 1997).

³⁶ WAITE & GALLAGHER, *supra* note 33, at 124.

school and less career success.³⁷ “Compared with children with continuously married parents, children with divorced parents continued to score significantly lower on measures of academic achievement, conduct, psychological adjustment, self-concept, and social relations.”³⁸ A great number of studies show this in so many ways; it is safe to say that the evidence is simply irrefutable.

Marriage is called the fundamental social unit. The marriage-based family is the fundamental unit for socialization of the next generations and the primary care-provider for aging generations as well. The family is the first social service agency in any nation or society. Children raised by only one parent are semi-orphans, and their quality of life and life opportunities are statistically curtailed compared to children born of married parents and raised with a mother and a father. For example, child poverty is more directly caused by nonmarital parenting than by any other factor. More than half of the increase in child poverty in the United States “between 1980 and 1988 was accounted for by changes in family structure during the 1980s.”³⁹ The United States Government reports that children who grow up without a father at home are “five times more likely to live in poverty, compared to children living with both parents.”⁴⁰ William Galston, who served as a Domestic Policy Advisor to President Clinton, said simply that the “two-parent family is an American child’s best protection against poverty.”⁴¹

However, the harm to children raised without both parents is not merely attributable to lower income. A recent study notes that, in Sweden, the social welfare system provides equally for children, regardless of their family structure, and lone mothers do not suffer the poverty that accompanies single parenting in many other countries. However, even when controlling for the economic variable, the study found that:

Swedish children of lone parents have more than double the risk of psychiatric disease, suicide or attempted suicide, and alcohol-related

³⁷ *Id.* at 124-34; see also E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (2002); JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000).

³⁸ Paul R. Amato, *Children of Divorce in the 1990's: An Update of the Amato & Keith (1991) Meta-Analysis*, 15 J. FAM. PSYCHOL. 355, 370 (2001).

³⁹ David J. Eggebeen & Daniel T. Lichter, *Race, Family Structure, and Changing Poverty Among American Children*, 56 AM. SOC. REV. 801, 806 (1991). The study further indicated that, “[a]ccording to William Galston . . . child poverty rates today would be one-third lower if family structure had not changed so dramatically since 1960. Fifty-one percent of the increase in child poverty observed during the 1980’s is attributable to changes in family structure during that period.” *Id.*

⁴⁰ U.S. Dept. of Health and Human Services, National Center for Health Statistics, *Survey on Child Health* (1993).

⁴¹ ELAINE CIULLA KAMARCK & WILLIAM A. GALSTON, PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990S 12 (1990).

disease; and more than three times the risk of drug-related disease compared with their counterparts in two-parent households. Boys in lone-parent families also had increased risk of all-cause mortality.⁴²

Eminent researcher Dr. Urie Bronfenbrenner reported that, even after controlling for such factors as low income, “children growing up in [single-parent] households are at a greater risk for experiencing a variety of behavioral and educational problems, including . . . smoking, drinking, early and frequent sexual experience . . . and in the more extreme cases, drugs, suicide, vandalism, violence, and criminal acts.”⁴³ Separation of children from their fathers is “the engine driving our most urgent social problems, from crimes to adolescent pregnancy to child abuse to domestic violence against women.”⁴⁴ For instance, children whose parents divorce exhibit higher rates of teenage sexual activity and have higher teen pregnancy and childbirth rates.⁴⁵ Children growing up in single-parent households are at a significantly increased risk of drug abuse as teenagers.⁴⁶

The relationship between adolescent (especially male) criminal behavior and family structure has long been known. One study reported that the “relationship between crime and one-parent families” is “so strong that controlling for family configuration erases the relationships between race and crime and between low income and crime.”⁴⁷ Another recent study confirmed that the “presence of a residential and biological

⁴² Margaret Whitehead & Paula Holland, *What Puts Children of Lone Parents at a Health Disadvantage?*, 361 THE LANCET, No. 9354, 271 (Jan. 25, 2003), available at <http://www.thelancet.com>; see also Anna L. Christopoulos, *Relationships Between Parent's Marital Status and University Students' Mental Health, Views of Mothers and Views of Father: A Study in Bulgaria*, 34 J. DIVORCE & REMARRIAGE 179, 179-80 (2001). This study found that

Students from divorced homes reported significantly more psychological difficulties in general than their peers from intact homes. [They also reported] significantly more somatic complaints and problems of depression than students whose parents were married. . . . [S]tudents from divorced homes reported significantly more negative attitudes toward their fathers than students from intact homes [and also similarly] views of mothers.

Christopoulos, *supra*.

⁴³ Urie Bronfenbrenner, *Discovering What Families Can Do*, in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY 34 (David Blankenhorn et al. eds., 1990).

⁴⁴ DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1 (1995).

⁴⁵ See Clifford Hill, *Underage Sex and Parent/Adolescent Relationships*, International Conference on Adolescence, at <http://www.familymatters.org.uk/iaoa.htm> (Apr. 2002).

⁴⁶ See Rhonda E. Denton & Charlene M. Kampfe, *The Relationship Between Family Variables and Adolescent Substance Abuse: A Literature Review*, 114 ADOLESCENCE 475, 480 (1994).

⁴⁷ BLANKENHORN, *supra* note 44, at 31 (citing KAMARCK & GALSTON, *supra* note 41, at 14).

father reduces the likelihood of violent behavior by his sons grown to adulthood,” and “data analyzed across the U.S. indicate that father absence, rather than poverty, [is] the stronger predictor of young men’s violent behavior.”⁴⁸ The likelihood that a young male “will engage in criminal activity doubles if he is raised without a father, and triples if he lives in a neighborhood with a high concentration of single-parent families.”⁴⁹ A recent statement of family experts noted:

Even after controlling for factors such as race, mother’s education, neighborhood quality, and cognitive ability, boys raised in single-parent homes are about twice as likely (and boys raised in stepfamilies are three times as likely) to have committed a crime that leads to incarceration by the time they reach their early thirties.⁵⁰

Many surveys show that children living apart from their fathers are far more likely than other children to be expelled or suspended from school, to display emotional and behavioral problems, to have difficulty getting along with their peers, and to get in trouble with the police.⁵¹ “They perform less successfully in educational activities, [and] have more social adjustment problems.”⁵² Children raised by two parents have much higher rates of very good student performance, and are less likely to quit high school or to drop out of college than children raised in other family structures.⁵³ In comparing high school students from different family structures, a 2003 survey that controlled for other significant variables (gender, ethnicity, family size, mother’s education, father’s

⁴⁸ Wade C. Mackey & Ronald S. Immerman, *The Presence of the Social Father in Inhibiting Young Men’s Violence*, 44 MANKIND Q. 339, 339 (2004).

⁴⁹ M. ANNE HILL & JUNE O’NEILL, UNDERCLASS BEHAVIORS IN THE UNITED STATES: MEASUREMENT AND ANALYSIS OF DETERMINANTS (1993), cited in Dave Bydalek, *Father Knows Best?: The Alarming Rise in Fatherless Nebraska* (June 2000), available at <http://www.familyfirst.org/capitolwatch/0600.pdf>.

⁵⁰ Center of the American Experiment et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences*, 15-16, at <http://www.marriagemovement.org/pdfs/WhyMarriageMatters.pdf> (Oct. 2003).

⁵¹ See generally James Q. Wilson, *The Decline of Marriage*, SAN DIEGO UNION-TRIBUNE, at G1 (Feb. 17, 2002) (“children in mother-only homes . . . are more likely than those in two-parent families to be suspended from school, have emotional problems, become delinquent, suffer from abuse, and take drugs.”).

⁵² Paul R. Amato, *Children’s Adjustment to Divorce: Theories, Hypothesis, and Empirical Support*, 55 J. MARRIAGE & FAM. 23, 66 (1993).

⁵³ See generally Urie Bronfenbrenner, *supra* note 43, at 66; Joan B. Kelly, *Children’s Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 963, 967 (2000); Louis W. Sullivan, *The Doctor’s Rx for America’s Troubled Children . . . Strengthen the American Family*, 2 KAN. J.L. & PUB. POL’Y 5 (1992); Coalition for Marriage, Family, and Couples Education et al., *The Marriage Movement: A Statement of Principles*, available at http://www.marriagemovement.org/mms_2000/mms_2000.php (June 2000) (citing Nicholas Zill, *Understanding Why Children in Stepfamilies Have More Learning and Behavior Problems than Children in Nuclear Families*, in STEPFAMILIES: WHO BENEFITS? WHO DOES NOT? 97-106 (Alan Booth & Judy Dunn eds., 1994)).

education, and age at time of divorce) found that students from intact family structures outperformed students from non-intact family structures in terms of grades and attendance.⁵⁴ Likewise, “students from disrupted families [are] less likely to apply to, be admitted to, . . . or ever attend a four-year college. They were also less likely to choose a selective college.”⁵⁵ Indeed, it appears that “family environment plays a key and possibly irreversible role in shaping a child’s intelligence.”⁵⁶

Alternative relationships are sometimes proposed as equivalent to marital families, but the data does not support those claims. There is abundant evidence that even the most promising alternative family form, step-families (which may come the closest to intact families in terms of structure), provides a demonstrably less favorable environment for childrearing than the intact family.⁵⁷ For example, we do not know the full effects of homosexual parenting on children.⁵⁸ The evidence is just beginning to be assembled, and it is far from reliable or complete. Most of the studies done so far suffer from significant methodological flaws because of defects of design, sample bias, sample size, very poor (or no) control groups, inappropriate measures, misuse of measures, or misinterpretation of data.⁵⁹ It may take another twenty to twenty-five years before substantial, reliable data about the effects of homosexual parenting on children is available, just as it took over twenty years (time for a generation of children to reach maturity and begin to speak out) before social scientists began to accumulate significant data showing that children suffer significant harm, and sometimes permanent disadvantage, from their parents’ divorce; this evidence contradicted the

⁵⁴ Barry D. Ham, *The Effects of Divorce on the Academic Achievement of High School Seniors*, 38 J. DIVORCE & REMARRIAGE 167, 176-81 (2003).

⁵⁵ Dean Lillard & Jennifer Gerner, *Getting to the Ivy League: How Family Composition Affects College Choice*, 70 J. HIGHER EDUC. 706, 721 (Nov./Dec. 1999).

⁵⁶ DAVID J. ARMO, MAXIMIZING INTELLIGENCE ix (2003); see also *id.* at 92-103, 184-89.

⁵⁷ See, e.g., Amato, *supra* note 38, at 355; Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 100 PSYCHOL. BULL. 26 (1991); Debra L. Foley et al., *Risks for Conduct Disorder Symptoms Associated with Parental Alcoholism in Stepfather Families Versus Intact Families From a Community Sample*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 687 (2004); Frank F. Furstenberg, Jr., *The New Extended Family: The Experience of Parents and Children after Remarriage*, in REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY 42, 59 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1987); IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN (E. Mavis Hetherington & Josephine D. Arasteh eds., 1988); Marilyn Coleman & Lawrence H. Ganong, *Remarriage and Stepfamily Research in the 1980s: Increased Interest in an Old Family Form*, 52 J. MARRIAGE & FAM. 925 (1990).

⁵⁸ See ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES DON’T TELL US ABOUT SAME SEX PARENTING (2001).

⁵⁹ Judith Stacey & Timothy J. Biblarz, *(How) Does Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 164-76 (2001).

general expectations of psychologists in the 1970s that divorce usually caused only a minor, temporary setback for children.⁶⁰

Two notable surveys have recently been published that acknowledge the methodological flaws in the social science studies of “lesbigay” parenting. In the *American Sociological Review*, researchers Judith Stacey and Timothy Biblarz, sympathetic to lesbigay parenting, examined the social science literature that had found “no difference” between heterosexual and lesbigay parents.⁶¹ They conducted a thorough examination of one meta-analysis and twenty-one other studies that found “no difference” and revealed significant flaws in study design, sample groups, controls, methodologies, and matching the data reported with the conclusions reached.⁶² Particularly, they found significant differences between children raised by lesbigay parents and those raised by heterosexual parents relating to sexual orientation, gender-appropriate activities, and homoerotic behaviors.⁶³

Likewise, social scientists Robert Lerner and Althea Nagai, who did research for an organization critical of lesbigay parenting, carefully examined forty-nine published articles concerning the impact that homosexual parents have on the rearing of their children, most of which claim that there is no difference in child outcomes based on the sexual orientation of the parents.⁶⁴ They found that the scientific methods in all of them were seriously flawed. Lerner and Nagai conclude: “[T]hese studies display an unreflective, rote-like application of statistical methods. The researchers seem to have spent no time reflecting upon what these statistical tests and methods mean. . . . [T]hese small studies claiming non-significant results must be treated as entirely inconclusive.”⁶⁵

Several other studies have reached the same conclusion about the flawed social science. Richard E. Redding of the University of Virginia has cited the research used by advocates of the policy “that parental sexual orientation should be irrelevant in child custody decisions . . . [a]s an example of liberal bias effecting research interpretation and its use in advocacy”⁶⁶ Redding’s colleague, Professor Stephen Nock, “a leading scholar of marriage at the University of Virginia, wrote in March 2001 . . . that every study on this question ‘contained at least one fatal flaw’ and

⁶⁰ See generally WAITE & GALLAGHER, *supra* note 33, at 1-12, 124-140; BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 45-107 (1996).

⁶¹ Stacey & Biblarz, *supra* note 59.

⁶² *Id.*

⁶³ *Id.* at 164-69.

⁶⁴ See generally LERNER & NAGAI, *supra* note 58.

⁶⁵ *Id.* at 108.

⁶⁶ Richard E. Redding, *Sociopolitical Diversity in Psychology: The Case for Pluralism*, 56 AM. PSYCHOL. 205, 207 (2001).

‘not a single one was conducted according to generally accepted standards of scientific research.’⁶⁷ In a court affidavit, Dr. Nock declared that all of the research offered in support of the “no differences” claim in that case, “including the study considered the most rigorous, cannot be taken as establishing the claim that scientific research shows no differences between the children of gay parents and the children of heterosexual parents in terms of gender identity or sexual orientation.”⁶⁸

Richard N. Williams and Marvin Wiggins conducted a literature review of the studies of the effects that parents’ sexual orientation has on children. Through 1996, they found more than 100 studies. However, only nine of the studies met three “elementary scientific criteria,” namely that the qualitative data be reported, that the data be actually collected from children, and that there be a comparison group of children from heterosexual households.⁶⁹ Reviewing the nine studies that met the minimal standards of scientific methodology, they found that all nine studies had other serious methodological flaws including sample sizes of thirty or fewer parents and fifty or fewer children, there was a lack of adequate control of potentially influential variables, significant effects were often ignored or not reported, and the studies mainly involved very young children (ages 4-9).⁷⁰ From 1996-2003, the authors found forty-five additional abstracts that studied how lesbian parenting may affect children; only five of these met the minimum three methodological criteria.⁷¹ However even those five involved no significant improvement in design over the pre-1996 studies.⁷² Again, sample sizes in the five studies were small (typically thirty to thirty-eight families), and few children were interviewed.⁷³

Given the unreliable state of the social science literature, perhaps the best thing that can be said is that “[s]tudies linked to conservative political and religious groups show negative effects on children of gay and lesbian parents[,] while, studies which support homosexual parenting are said to reflect the bias of those who are themselves gay or who support gay rights.”⁷⁴

⁶⁷ Don Browning & Elizabeth Marquardt, Editorial, *A Marriage Made in History?*, N.Y. TIMES, Mar. 9, 2004, at A25.

⁶⁸ *Halpern v. Attorney General of Canada*, No. 684/00, Aff. of Stephen Lowell Nock at ¶ 140 (Ontario Super. Ct. of Justice Mar. 2001).

⁶⁹ Richard N. Williams & Marvin Wiggins, *Studies on Same-Sex Parenting* (Oct. 2003) (unpublished study on file with author).

⁷⁰ *Id.* at 11-15.

⁷¹ *Id.* at 20.

⁷² *Id.* at 21.

⁷³ *Id.* at 20-24.

⁷⁴ National Adoption Information Clearinghouse, *Gay and Lesbian Adoptive Parents: Resources for Professionals and Parents*, at http://naic.acf.hhs.gov/pubs/f_gay/f_gay.pdf (Apr. 2000).

One of the biggest problems with the research that has been done about the effects of lesbian parenting on children is that it mostly looks at sentimental things and does not address the hard questions. It does not examine the most significant potential concerns about the long-term impacts on children. What are the long-term effects on the children with regard to: Inter-gender relations? Courtship? Personal intimacy? Physical and mental health? Entering marriage? Sustaining marriage? Spousal interactions in marriage? Childbearing? Childrearing? Their children? Their relations to their parents? Their Grandchildren? The researchers have not even begun to ask the hard questions.

Moreover, the social science that purports to show “no difference” defies every known theory of child development. As Stacey and Biblarz admitted:

[v]irtually all of the published research claims to find no differences of the sexuality of children raised by lesbian parents and those raised by nongay parents—but none of the studies that report this finding attempts to theorize about such an implausible outcome. Yet it is difficult to conceive of a credible theory of sexual development that would not expect the adult children of lesbian parents to display a somewhat higher incidence of homoerotic desire, behavior, and identity than children of heterosexual parents.⁷⁵

Parents’ behaviors are known to have a powerful influence upon children because children grow up imitating their parents; if parents smoke or drink, their children are more likely to do the same. Yet, when it comes to homosexual attraction, ideation, and behavior, the advocates of lesbian parenting would have us believe that there is no difference between children raised by same-sex parents and those raised by their married mother and father. The cognitive dissonance is embarrassing.

B. Why the Marital Family Works Best

When reviewing the voluminous evidence that marriage provides the best environment for children to grow up in, one question emerges—why? What explains the tremendous advantages for children raised by their married mother and father? There are several theories which may apply in different situations; not one but a combination of these theories may explain why marital parenting works best.

1. Childhood socialization—women who grow up without a father are socialized in a way that results in greater premarital births.⁷⁶

⁷⁵ Stacey & Biblarz, *supra* note 59, at 163.

⁷⁶ Lawrence L. Wu & Brian C. Martinson, *Family Structure and the Risk of a Premarital Birth*, 58 AM. SOC. REV. 210, 210 (1993) (supporting conflict theory and childhood socialization theory, but not social control theory, to explain why teens of married parents have fewer pregnancies out of wedlock).

2. Social control—supervision of teens is more difficult in a single-parent household.⁷⁷

3. Instability and change—premarital birth is a response to the stress of a change in a woman's situation.⁷⁸

4. Greater resources.⁷⁹

5. Attachment or closeness between teen and parents.⁸⁰

6. Experience with a child or children generally.⁸¹

7. Pre-existing interest, or selection.⁸²

These different social science theories suggest a reason that may cut across several of them. A story from a major newspaper twenty-five years ago introduces this approach:

In a story making the rounds among child welfare workers, Billy, who is 12, has run away at least twice from the foster home where he was placed by the [Massachusetts] Department of Youth Services. Each time he went back to his home—to his alcoholic mother and to his father who routinely beats him. After he was picked up the second time and asked why he keeps returning to those dreadful conditions, he replied: "Why, they love me. You should have seen what they gave me for Christmas."

It turns out that the boy's Christmas present was a \$3 pair of sneakers, and the story is being told to explain the growing feeling among child welfare professionals that their efforts should be redirected toward families and away from the traditional near-exclusive concentration on children. The argument is that even in

⁷⁷ *Id.*

⁷⁸ *Id.* at 210-11.

⁷⁹ Yongmin Sun, *The Well-Being of Adolescents in Households with No Biological Parents*, 65 J. MARRIAGE & FAM. 894, 894 (2003) (arguing that some differences between non-biological parent and other family structures may be accounted for by differences in family resources).

⁸⁰ See Paul R. Amato & Joan Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557 (1999) (arguing that children do better when a nonresident father is close to a child and authoritatively participates in parenting). See generally Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876 (2003) (finding that the closeness of a teen's relationship to his/her parents is a better predictor of well-being than parental monitoring, religious teens are more likely to do better than non-religious teens, and the attachment theory provides a better explanation of child development than the social control theory).

⁸¹ Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 213 (2003) (arguing that married, biological fathers are more likely to be more involved with a child than a cohabiting biological father, and examining three theories why children growing up in a household in which a man other than their biological father is married to their mother are worse off: (1) the non-biological father or biological cohabiting father will be less involved and more interested in his relationship with their mother; (2) these fathers lack the experience with children that is necessary to be effective; and (3) selectivity—men who choose to enter such relationships are selected because of a lack of alternatives).

⁸² *Id.*

families usually written off as hopeless, there may be shreds of love upon which to build; the result of that care and attention could be a stronger and healthier society.

....
 [The former Massachusetts State Commissioner of Youth Services said:] "We have loaded our kids down with helpers but we have done little to help their parents."

There is some small amount of evidence that work with families is more cost-effective, and certainly cheaper, than working with a child alone. But even if it were not, it is a challenge that a caring society should accept.⁸³

Family relations are better and more aptly described in spiritual/poetic terms than in legal terms, in terms that suggest union and identification rather than separation. As parents, we share ourselves with our children, and as spouses, we learn to share ourselves with each other. Ferdinand Schoeman wrote:

We typically pay attention to the rights of individuals in order to stress their moral independence . . . [T]he language of rights typically helps us to sharpen our appreciation of the moral boundaries which separate people. . . .

We *share our selves* with those with whom we are intimate and are aware that they do the same with us. . . . The danger of talk about rights of children is that it may encourage people to think that the proper relationship between themselves and their children is the abstract one that the language of rights is forged to suit. So, rather than encouraging . . . parents to feel more intimate with their children, it may cause parents . . . to question their consciousness of a profound sense of identification with, and commitment toward, their families.⁸⁴

Most parents willingly sacrifice for their children, yearn for their welfare, work continuously for their success, and encourage, love, nurture, comfort, teach, protect, and promote them without giving any thought to the "rights" of their children or the "returns" they can expect, other than to see the happiness and success of their loved ones. Parents sacrifice for their children out of love for them, not because their children have "rights."

What happens when parents' relationships with their children are reduced to "rights?" Divorce provides a sobering example. The relationship between noncustodial parents (mostly fathers) and their children is revealing. While some noncustodial parents maintain very strong relationships with their children despite the pains and obstacles of divorce, many noncustodial parents tend to drift away (or are driven away) after divorce. Within a short time, they no longer actively seek the

⁸³ Editorial, *'They Love Me'*, CHRISTIAN SCI. MONITOR, Nov. 8, 1979, at 28.

⁸⁴ Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 6, 8-9 (1980).

welfare of their children, often even neglecting to make consistent child support payments.⁸⁵ After divorce, a non-custodial parent's relationship with his children is reduced to one of "rights." Children of divorce have rights galore; most of them would rather have both of their parents.

Whenever we infuse the language of rights into a controversy, we invite some form of government to become involved in that controversy because we look to the government to protect our rights; this weakens the family and strengthens the state. As anthropologist Stanley Diamond observed, "We live in a law-ridden society; law has cannibalized the institutions which it presumably reinforces or with which it interacts."⁸⁶ Aleksandr Solzhenitsyn understood the limits of "rights" when, in his celebrated commencement address at Harvard University, he declared:

I have spent all my life under a Communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society based on the letter of the law and never reaching any higher fails to take full advantage of the full range of human possibilities. . . . Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses.⁸⁷

⁸⁵ Barbara Dafoe Whitehead, *Dan Quayle Was Right*, THE ATLANTIC, Apr. 1993, at 65 (describing the alienating effects that divorce has on children's relationships with their non-custodial fathers). Whitehead reported:

The father-child bond is severely, often irreparably, damaged in disrupted families. In a situation without historical precedent, an astonishing and disheartening number of American fathers are failing to provide financial support to their children. Often, more than the father's support check is missing. Increasingly, children are bereft of any contact with their fathers. According to the National Survey of Children, in disrupted families only one child in six, on average, saw his or her father as often as once a week in the past year. Close to half did not see their father at all in the past year. As time goes on, contact becomes even more infrequent. Ten years after a marriage breaks up, more than two thirds of children report not having seen their father for a year. . . . [W]hen asked to name the "adults you look up to and admire," only 20 percent of children in single-parent families named their father, as compared with 52 percent of children in two-parent families.

Id.

⁸⁶ Stanley Diamond, *The Rule of Law Versus the Order of Custom*, 38 SOC. RES. 42, 44 (1971).

⁸⁷ Aleksandr Solzhenitsyn, *A World Split Apart*, Address at the Harvard University Commencement (June 8, 1978) available at <http://www.nationalreview.com/document/document060603.asp>.

III. HOW CHILDREN INFLUENCE, AND ARE INFLUENCED BY, THE PRESENT REALITY AND FUTURE OF MARRIAGE

A. Adult Moral Maturation, Marital Satisfaction, and Children

The impact of children on marriage is both immediate and long-term. In the immediate sense, raising one's children not only satisfies the universal yearning for posterity, but also contributes to the health, happiness, security, and fulfillment of adults. This does not refer to the incentive effects of childrearing on children (such as reducing the parties' incentive to divorce and increasing their socio-economic gains, as in the days of agrarian economies).⁸⁸ Rather, the benefits are much wider and deeper. "There is broad support for the generist intuition that intergenerational responsibility confers very real benefits at many levels."⁸⁹ Having children increases parents' moral development capacity for love, service, generosity, selflessness, and "generativity" which benefits their marriages and marriage partners as well.⁹⁰

Generativity means taking an interest in guiding the next generation, a concern that can be funneled through one's children or through other forms of creativity and altruism. Erikson argues that generativity is the opposite of stagnation and that unless an adult achieves this stage, he or she becomes emotionally stuck in place, with a sense of impoverishment.⁹¹

Just as generativity has a "procreative essence,"⁹² nurturing one's children heightens an adult's sensitivity to interpersonal caring and enhances moral maturation in ways that benefit spouses and marriages specifically, and neighbors, customers, employers, employees, and society generally.

B. Children of Divorce and Nonmarital Birth and the Acceptance or Rejection of Marriage

Children also have a long-term impact on marriage because their marriages create the future of marriage. They go into marriage with the

⁸⁸ See RICHARD A. POSNER, *SEX AND REASON* 268-69 (1992) (comparing the potential positive and negative economic effects of contraception upon marriage stability).

⁸⁹ Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *CARDOZO L. REV.* 1747, 1818 n.320 (1993).

⁹⁰ See generally ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 266-68 (2d ed. 1963); Erik H. Erikson, *Growth and Crisis of the Healthy Personality*, in *PSYCHOLOGICAL ISSUES, IDENTITY & THE LIFE CYCLE* 95-105 (1959) (describing "generativity" and the seventh stage of human moral development in which the pulls of generativity and stagnation create developmental tension).

⁹¹ JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 143 (1989).

⁹² Erik H. Erikson, *Reflections on Dr. Borg's Life Cycle*, in *ADULTHOOD* 1, 7 (Erik H. Erikson ed., 1978).

values, fears, and expectations they acquired growing up and observing up-close the marriage of their parents. If their parents' marriage fails, the risk that their own marriage will fail increases.⁹³ Divorce appears to be an intergenerationally transmitted social behavior.⁹⁴ Thus, it does not come as a surprise that the movement in the United States for broad legal equivalence of alternative adult intimate relations, including same-sex marriage, began in earnest a generation after the legalization of unilateral no-fault divorce in America. Beginning in 1969, a divorce "revolution" swept the United States resulting in the adoption of no-fault divorce laws by all states, and the implementation of unilateral no-fault divorce procedures by most states de jure, and de facto in all others.⁹⁵ Those law reforms made divorce easily obtainable on demand by either party to the marriage. The rate of divorce and number of divorces increased dramatically—it quickly doubled—in the wake of those legal reforms, and the number of children whose childhood lives were disrupted by divorce increased proportionally.⁹⁶ Despite plummeting birthrates, one million children experience parental divorce each year.⁹⁷

Likewise, the number of children born out of wedlock in the United States has quadrupled in the last forty years, now accounting for nearly one-third of all childbirths annually in the United States.⁹⁸ It is estimated that more than one-half of all American children spend part or all of their childhood years living separated from at least one of their parents.⁹⁹

The first generation of children having grown up in an era of no-fault divorce and socially-accepted out-of-wedlock childbearing has now come of age. Approximately twenty million children in America have experienced the divorce of their parents in the last quarter-century, and a similar number of children have been born out of wedlock. Divorce is extremely painful for children, and very difficult for them to understand. Children often blame themselves for their parents' divorce, and before they can understand the real causes of their parents' breakup, intense feelings sear their souls and leave perceptions that are hard to change by

⁹³ See generally Paul R. Amato, *What Children Learn from Divorce*, 29 POPULATION TODAY 1 (2001).

⁹⁴ See generally Nicholas H. Wolfinger, *Beyond the Intergenerational Transmission of Divorce*, 21 J. FAM. ISSUES 1061, 1061-64 (2000).

⁹⁵ See Wardle, *Conundrum*, *supra* note 27, at 83-88.

⁹⁶ *Id.* at 141 (stating that in 1965 there were 479,000 divorces and the rate of divorce per 1,000 population was 2.5; in 1985 there were 1,190,000 divorces and the rate of divorce was 5.0).

⁹⁷ *Id.* at 142 (stating that in 1985 an estimated 1,091,000 children were involved in divorce, compared to 630,000 in 1965).

⁹⁸ See UNITED STATES DEPT. OF HEALTH AND HUMAN SERVICES, VITAL STATISTICS OF THE UNITED STATES: 1989, Vol. 1, 190, tbls.1-76.

⁹⁹ See BENOKRAITIS, *supra* note 28, at 19, 20.

reason alone. One of the most common consequences of divorce is to deprive children of regular association with their fathers. Many children of divorce are, as a practical matter, abandoned by or withheld from their noncustodial fathers, and most children of divorce are to some extent distanced from their fathers. Children raised without either their father or mother due to divorce are socially abandoned and partially parentless.

Many of children of divorce are now of marriage age. The failure (with or without divorce) of traditional marriage may be associated with these painful memories such that some of the children of this generation are determined to find better alternatives. Alternative relationships, including nonmarital cohabitation and same-sex marriage, convey a symbolic message of rejection of the family form—marriage—that caused them such pain, and a determination to prove that other relationships can be better than those they grew up with. The idea that heterosexual marriage is linked to interpersonal happiness and parenthood seems to be rejected by a growing number of young people. In some cases, that rejection reflects their own experience and their anger against or fear of the institution of marriage and the traditional family which failed them and hurt them when they were children.

Unhappy marriage and family life seem to have made a strong impression on the prevailing culture of an entire generation. Many of this generation are seeking alternatives to marriage and demanding the chance to become couples and parents on their own terms—outside of traditional marriage. They are determined to be better partners and parents outside of marriage than some of their own parents were inside marriage. Sadly, however, many of them will inflict on themselves and their own children the same kind of pain and sorrow their own parents inflicted on them because they are building their own family relationships upon the same tragically flawed foundation that was the chief defect of their parents' marriage: putting their own interests above those of their children and spouse, and seeking their own immediate happiness and satisfaction at the expense of the long-term happiness, stability, and welfare of their family. It seems that many of this generation are more concerned with rejecting the institution of marriage than they are with establishing the strongest foundations for their own commitment to a companion and providing the best setting for raising their own children (which, ironically, is traditional marriage).

Yet, it is said that many young people who have grown up in broken homes value marriage more and are more committed to trying to make marriage work than many in their parents' generation.¹⁰⁰ Because they

¹⁰⁰ See generally Wolfinger, *supra* note 94 (stating that the divorce rate gap between children of divorce and children of intact families is closing).

have not seen modeled how to cope successfully with the stresses and strains of marriages, they will have to work harder than children that were raised in stable homes. While many young adults today have shown great moral integrity and strength to resist cheap carnal enticements, the world they live in remains inundated with unwanted and unprecedented sexual pressures and stimuli. The increase in sexual stimuli may have caused the increase in sexual behavior, and the resulting increase in related tragic social phenomena such as out-of-wedlock childbirth and nonmarital cohabitation. Thus, these social phenomena may have little to do with changing values about marriage or marriage obsolescence. In fact, most participants in these behaviors and situations do not view either their behavior or their relationships as marital. They want to preserve (for later, for marriage) the ideal of love, commitment, and generosity while temporarily sampling the pleasures of lust, exploitation, and selfishness.

Nevertheless, these situations indirectly undermine marriage. We cannot ignore the corrosive effects on character, expectations, and relationships that result from significant involvement with pornography or sexual activity outside of marriage. These behaviors have a detrimental effect on relationships, corrupt individual expectations, and degrade chastity and fidelity. The current generation of young people will undoubtedly produce many couples who will have the courage to initiate a renaissance of marriage and to invent new (or rediscover old) ways that will make marriage work in the new world in which they will live. Many children of divorce will lead the renaissance of marriage because they know for themselves, first-hand, the price that young people pay when excessive self-interest causes a family to break up.

IV. MARRIAGE AND THE FOUNDATION AND FUTURE OF THE CONSTITUTION

The marital family is the essential social substructure upon which our Constitution and constitutional system of government and liberties rest. In her book, *Public Vows*, Yale Historian Nancy Cott writes: "In the beginning of the United States, the founders had a political theory of marriage. So deeply embedded in political assumptions that it was rarely voiced as a theory, it was all the more important. It occupied the place where political theory overlapped with common sense."¹⁰¹ Allan Carlson agrees that

the family was deeply embodied in the unwritten constitution of the United States, in the social views that the Founders held. Indeed, I would argue that their work rested on assumptions about the social order that need underlie a free republic, assumptions about the sort of

¹⁰¹ NANCY F. COTT, *PUBLIC VOWS, A HISTORY OF MARRIAGE AND THE NATION* 9 (2000). "The republican theory of the United States . . . g[a]ve marriage a political reason for being." *Id.* at 10.

people they were dealing with, and about the way that we citizens would live.¹⁰²

Civic virtue was believed by the Founders to be the critical pre-constitutional foundation for any “republican” (representative democracy) form of government, and the marital family was where virtue was nurtured first and best. The Founders considered Americans’ “domestic habits” (or, as Tocqueville later called them, “habits of the heart”) as necessary “preconditions” for maintaining the constitutional Republic.¹⁰³ They believed those habits or virtues were cultivated in the home and by religion.

The idea of virtue was central to the political thought of the Founders of the American republic. Every body of thought they encountered, every intellectual tradition they consulted, every major theory of republican government by which they were influenced emphasized the importance of personal and public virtue. It was understood by the Founders to be the *precondition* for republican government, the base upon which the structure of government would be built.¹⁰⁴

For example, Benjamin Franklin said that “only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”¹⁰⁵ James Madison likewise declared: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”¹⁰⁶ Samuel Adams believed that “neither the wisest constitution nor the wisest laws will secure the liberty and happiness of a people whose manners are universally corrupt.”¹⁰⁷ John Adams acknowledged: “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”¹⁰⁸ George Washington, in his Farewell

¹⁰² Allan Carlson, *The Family and the Constitution*, in *DERAILING THE CONSTITUTION: THE UNDERMINING OF AMERICAN FEDERALISM* 128, 128-29 (Edward B. McLean ed., 1995). Professor Anne C. Dailey adds: “Implicit in the design of the Constitution is the understanding that the states [not the federal government] have responsibility for developing a shared moral vision of the good family life.” Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1825 (1995).

¹⁰³ FRANCIS J. GRUND, *THE AMERICANS, IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS* 171 (1837) [hereinafter *POLITICAL RELATIONS*]. See generally FRANCIS J. GRUND, *ARISTOCRACY IN AMERICA* 212-13 (1837) [hereinafter *ARISTOCRACY*]; ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 288 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (referring to the “habits of the heart” as the American character traits which form the foundation for American democracy).

¹⁰⁴ RICHARD VETTERLI & GARY BRYNER, *IN SEARCH OF THE REPUBLIC, PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT* 1 (1966).

¹⁰⁵ *THE WRITINGS OF BENJAMIN FRANKLIN* 569 (Albert H. Smyth ed., 1970).

¹⁰⁶ *5 THE WRITINGS OF JAMES MADISON* 223 (Gaillard Hunt ed., 1904).

¹⁰⁷ *THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS* 22-23 (William V. Wells ed., 1865).

¹⁰⁸ See Junto Society Presidents, *John Adams*, at <http://www.juntosociety.com/uspresidents/jadams.html> (2002).

Address, stated: "Tis substantially true, that virtue or morality is a necessary spring of popular government."¹⁰⁹ Thus, virtue was the substructure upon which the superstructure of constitutional rights and government was built. If that foundation slipped, the government and the liberties it protects would not survive. And this virtue was generated and guarded first and foremost in the home.

The fostering of virtue was believed to be beyond the ability and competence of the national government.¹¹⁰ Nancy Cott's political history of marriage in the United States concurs that the Founders saw what she calls "Christian marriage" as the essential seedbed of republican virtue.¹¹¹ "American revolutionaries' concern with virtue as the spring of their new government motivated [their] attention to marriage."¹¹² "Virtue,' the political catchword of the Revolution, meant not only moral integrity but public-spiritedness. . . . How would the nation make sure that republican citizens would appear and be suitably virtuous? Marriage supplied an important part of the answer . . ." ¹¹³ American republicans saw "marriage as a training ground of citizenly virtue."¹¹⁴ Likewise, "it served as a 'school of affection' where citizens would learn to care about others."¹¹⁵ One founding era writer noted that, "by marriage, 'man feels a growing attachment to human nature, and love to his country.'"¹¹⁶ John Adams concluded that

the foundations of national Morality must be laid in private Families. In vain are Schools, [academies] and universities instituted, if loose Principles and licentious habits are impressed upon Children in their earliest years How is it possible that Children can have any just Sense of the sacred Obligations of Morality or Religion if, from their earliest Infancy, they learn that their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers.¹¹⁷

¹⁰⁹ George Washington, *Washington's Farewell Address: 1796*, available at <http://www.yale.edu/lawweb/avalon/washing.htm> (1996).

¹¹⁰ Dailey, *supra* note 102, at 1826-35.

¹¹¹ COTT, *supra* note 101, at 9-23; see also Dailey, *supra* note 102, at 1871-72 (stating that families were seen by Founders as the primary cultivators of civic virtue); Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 941 (1995) (stating that the Founding generation believed that virtue would be cultivated in local communities and that "the main task of government was to foster and protect the multitude of associations in which proper character was formed.").

¹¹² COTT, *supra* note 101, at 18.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 19.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 21.

Adams was not alone in this belief. Professor Cott notes that, for many “Revolutionary-era leaders, marriage had several levels of political relevance, as the prime metaphor for consensual union and voluntary allegiance, as the necessary school of affection, and as the foundation of national morality.”¹¹⁸ Compared to other forms of marriage, Christian “[m]onogamy . . . stood for a government of consent, moderation, and political liberty.”¹¹⁹

Other scholars have confirmed that America’s Founders understood marriage and the family to be “schools of republican virtue.”¹²⁰ The family was one of the “pillars of republican virtue.”¹²¹ Like Edmund Burke, they believed “that ‘to be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affection.’”¹²² Thus,

George Mason argued that republican government was based on affection ‘for altars and firesides.’ Only good men could be free; men learned how to be good in a variety of local institutions—by the firesides as well as at the altar. . . . Individuals learned virtue in their families, churches, and schools.¹²³

Marriage also provided the Founders with “a model of consensual juncture, voluntary allegiance, and mutual benefit.”¹²⁴ Professor Cott notes that

European political theorizing had long noted that legal monogamy benefited social order, by harnessing the vagaries of sexual desire and by supplying predictable care and support for the young and the dependent. The republican theory of the new United States assumed this kind of utilitarian reasoning and went beyond it, to give marriage a political reason for being. From the French enlightenment author the Baron de Montesquieu, whose *Spirit of the Laws* influenced central tenants of American republicanism, the founders learned to think of marriage in the form of government as mirroring each other.¹²⁵

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 22.

¹²⁰ Mary Lyndon Shanley, *Public Values and Private Lives: Cott, Davis, and Hartog on the History of Marriage Law in the United States*, 27 LAW & SOC. INQUIRY 923, 926 (2002); see also COTT, *supra* note 101, at 10.

¹²¹ Gerald J. Russello, *Liberal Ends and Republican Means*, 28 SETON HALL L. REV. 740, 755-56 (1997) (reviewing PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997) (stating that two pillars of republican virtue were religion and family)). See generally Dailey, *supra* note 102 at 1796, 1835-51 (linking state control of family matters to nurturing republican virtue).

¹²² RAOUL BERGER, *FEDERALISM: THE FOUNDERS DESIGN* 55 n.37 (1987) (quoting EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 195 (1909)).

¹²³ Frohnen, *supra* note 111, at 946-47 (quoting George Mason, *Opposition to a Unitary Executive* (June 4, 1787), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL DEBATES* 47 (Ralph Ketcham ed., 1986)).

¹²⁴ COTT, *supra* note 101, at 18.

¹²⁵ *Id.* at 10.

Francis Grund, an Austrian immigrant and contemporary of Alexis de Tocqueville, emphasized the importance of preserving our domestic virtue in words that are very sobering in light of the challenges to marriage and family today. He wrote:

I consider the domestic virtue of the Americans as the principal source of all their other qualities. . . . No government could be established on the same principle as that of the United States, with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.¹²⁶

Thus, if the Founders got it right, and the extraordinary success in perpetuating unprecedented liberty and stability for the past two and a quarter centuries gives us some reasonable basis to believe that they did, the future of not only marriage as an institution, but the future of our Constitution and its system of ordered liberties as well, depends upon whether we and our children succeed in preserving traditional marriage and the institution of the marital family, the “Republican family.”

V. CONCLUSION: TOWARD A RENAISSANCE OF MARRIAGE

A. Balancing the Quest for Self-Interest and for Family-Other-Interestedness

In the United States and many other affluent nations in North America and Western Europe, family relationships have been disintegrating, struggling, and suffering for several decades. While there have been some bright spots in recent years giving us hope, we have reason to be seriously concerned about marriage and marital families. The twentieth century was a period of wonderful progress in external conditions that have greatly blessed families throughout the world. During no other comparable period of time in recorded human history have there been as many beneficial economic, educational, medical, social, and political developments that have contributed so much to the external welfare of families. For instance, internationally, infant mortality rates have dropped considerably in most countries, and life expectancy continues to increase in nearly every country. Literacy and enrollment rates for primary, secondary, and higher education have

¹²⁶ POLITICAL RELATIONS, *supra* note 103, at 171. See generally ARISTOCRACY, *supra* note 103, at 212-13.

risen globally.¹²⁷ Overall wealth, GNP, and standards of living have increased in most countries. Greater political freedom and economic and social opportunities have been afforded more persons, especially women and minorities, than ever before. While there are still great disparities in these external conditions in nearly all the world, these conditions are much better today than they were one hundred years ago.¹²⁸

Paradoxically, while external conditions have never been better for families in the world, internal conditions for families in many parts of the world, especially in the affluent west, have seriously degenerated. The infrastructure of the family has begun to deteriorate severely in many countries, especially (and ironically) in the nations in which the external conditions (health, education, wealth, etc.) are the very best. Family formation, stability, continuity, and integrity have experienced severe declines in the most affluent nations of the world. The flight from the family has been stunning and the prospects for stability and happiness in family life in many nations are grimmer than ever before. For example, rates of marriage have been falling in many of the most affluent countries, while rates of out-of-wedlock childbearing have risen, rates of abortion have skyrocketed, and rates of non-marital cohabitation have reached unprecedented levels. Same-sex partnership, lesbian parenting and other alternative family styles unheard of fifty years ago are common and are growing in popularity. The abandonment of marital and parental childrearing is increasing. The rate of divorce has dramatically heightened in many countries, most noticeably the United States.¹²⁹

Why is this so? What is it in human nature that seems to make it impossible for human beings to enjoy the external conditions of education, health, freedom, and prosperity while simultaneously retaining internal conditions of deep, stable, nurturing, fulfilling, and happy marriages and parent child relationships? Perhaps one key to understanding this phenomenon is that the external conditions primarily involve the acquisition of individual skills and independence, and require the successful exercise of individual self-interest, while marriage and family happiness are matters of joint-interest and mutuality that require sharing and the voluntary subordination of self-interest to the interests and welfare of spouse, children, parents, and extended family members. In focusing on and improving the skills of individual autonomy necessary to achieve progress in external conditions, we may have neglected or forgotten the skills of mutuality,

¹²⁷ See generally Wilson, *supra* note 51 (stating “[d]ivorce is more common among the affluent than the poor. The latter, who can’t afford divorce, deal with unhappy marriages by not getting married in the first place.”).

¹²⁸ Wardle, *Threats*, *supra* note 1.

¹²⁹ *Id.*

sharing, and commitment that are necessary to establish and preserve happy and successful marriage and family relationships.

The first point, then, is that the future of marriage depends upon transmitting to our children, and to generations after them, the skills, values, and priorities of sharing, mutuality, bonding, other-interestedness, selflessness, sacrifice, and love, in a world where skills and values that are socially promoted, celebrated, and rewarded are those of individualism, autonomy, and self-interest. Those family-protecting values and skills are best conveyed in marital families where children are raised by their mother and father. This point should have special meaning for law students who are often at the beginning of their productive lives. They need to pay as much attention to acquiring and refining the interpersonal and family skills that will make them patient, kind, gentle, meek, long-suffering, loving, committed, enduring, and endurable husbands, wives, parents, and children as they do to acquiring and refining the skills that may bring them professional and material success.

B. Free-Riders

Free-riding is the phenomenon of people taking the benefits of a relationship or opportunity without undertaking any of the correlative responsibilities. Free-riding occurs when people act like the barnyard animals in the children's fable of the "Little Red Hen," trying to get the benefits of eating the harvest baked bread without contributing to the work of planting, watering, tending, weeding, fertilizing, or harvesting the wheat; it is a variation of the age-old story of people trying to get "something for nothing."

Free-riding in society can produce harmful consequences. While society can function tolerably well with some marginal amount of deviation from social forms that provide stability, when free-riding is encouraged in matters of family law and policy, disintegration of the family results. Garrett Hardin referred to this phenomenon as "the tragedy of the commons,"¹³⁰ a phrase that would aptly apply to what happens when socially non-constructive, less-effective relationships are legally endorsed and traditional marriage is "leveled."

One important reason why the law historically has given benefits and incentives to enter constructive relationships that contribute to society, and has discouraged relationships that contribute less or involve greater danger to individuals and to society, is to discourage free-riding. Change in legal rules regulating dissolution of family relations, making it easier to "free-ride" by copping out, has already had serious "unexpected" consequences because of changed behavioral incentives

¹³⁰ Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243 (1968).

that have weakened marital stability.¹³¹ Likewise, by redefining marriage and giving equivalent benefits to alternative relationships, we risk skewing relational incentives in a way that will undermine the institution of marriage. Thus, the future of marriage depends to some degree upon the extent to which social incentives encourage the next generation to develop the skills, values, and commitments that produce, strengthen, and stabilize healthy and constructive marriages, and that discourage relational “free-riding” by declining to extend unnecessary and irrational incentives to alternative relationships. Our family laws can provide incentives, or disincentives, to free-ride.

C. Rediscovering the Value and Importance of Marriage

It is said that we come into possession of our public institutions and values the same way we come into possession of public buildings and monuments—someone else builds them and we simply inherit them. And like public buildings and monuments, our public institutions and values tend to deteriorate and wear out if they are neglected or not maintained. Unless our children and grandchildren learn to understand the value of marriage and marital families, that institution will fall into disrepair and neglect and disintegrate. The cost of neglecting structures like historic buildings and monuments is paid in dollars and cents that buy mortar, bricks, shingles, and paint. The cost of neglecting marriage is paid in human suffering, in lost generations, and in years (sometimes lifetimes) of sorrow, pain, and regret. Many in our society are paying that price already. Thus, it is critical for us to rediscover the foundational principles upon which our constitutional system is built, and by which it operates and is preserved.

When marriage is taken for granted and devalued by society generally, in our laws and social policies, the consequences can transform, even destroy, society. The consequences are then manifest in wide-spread social distress resulting from alienated, semi-orphaned youth and damaged, discarded former husbands and wives, who overwhelm our courts, burden our remedial classes, swamp our clinics, and overwhelm the feeble capacity of our welfare systems. Because of our neglect and marginalization of marriage and family in our laws and public policies, we now find ourselves in a precarious condition as a society. If we do not rediscover the fundamental significance of marriage and families, and the connection between marital well-being and social well-being, we may exacerbate the problem by pursuing policies that

¹³¹ See, e.g., MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 173-77 (2000) (arguing that marriage laws create incentives, which affect how couples live in or leave marriage); ALLEN M. PARKMAN, GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY (2000) (stating no-fault divorce laws give incentive to divorce).

actually increase the pressures toward marital instability and family disintegration.

Our task requires a major cultural transformation. It calls for a renaissance of a forgotten part of our culture. It is primarily a task of re-educating the public. Thus, it will require the combined efforts of political leaders, religious leaders, teachers, journalists, scholars, novelists, play-writers, film-makers, entertainers, entrepreneurs, and ordinary moms, dads, children, grandparents, aunts, and uncles. Already we are seeing some manifestations of growing recognition by some groups of the importance of rediscovering the value of marriage and families, as noted in Part I.C., above.

Among the most important educators in society is the law because it performs important teaching and expressive functions. Our laws teach us what society expects of us (and what we can expect of others), convey messages about what is safe and what is dangerous, express and reinforce our basic values, transmit our cultural understanding, and articulate our social aspirations. By their message as well as their regulation, laws influence family relations and family structures. We must work to insure that our laws communicate a true image of marriage and family life, and that they do not downgrade the institution or value of marriage. We must promote laws that protect marriage, and reject laws or legal doctrines that devalue or discriminate against marriage-based family life. Our laws must express the value we place on marriage and marital parenting, and expose the risks of counterfeit alternatives to the marriage-based family.

For too long, our societies have taken marriage and the family for granted. It is time to call upon our leaders and ourselves to rediscover and revive the worth of this most common but most essential and beneficial unit of society. Marriage matters. It matters profoundly for children and for the society in which they will live; we must make it matter now in our laws, and in our own homes. We must promote laws, policies, and social practices that preserve, foster, and strengthen marriage and the marriage-based family for the sake of our selves, our nation, and our liberties, and for the sake of our children and grandchildren, who will become the future generations of Americans and whose lives will be either enriched or impoverished by the legacy of marriage that we leave to them.