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NOTE

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SYMPOSIUM: MORAL REALISM AND THE RENAISSANCE OF TRADITIONAL MARRIAGE

KEYNOTE ADDRESS: THE CASE FOR THE FUTURE OF MARRIAGE

*Maggie Gallagher**

I. INTRODUCTION

Thanks. It's wonderful to be here. I can tell you, this is one of the warmer and more welcoming audiences that I've spoken to this year on the subject. The subject today is a renaissance of marriage. What are the reasons to be optimistic, other than, of course, most of us are coming off the high of an election in which the issue of marriage emerged as an important issue in the presidential election and in which Americans in widely varying geographic regions expressed their support for the traditional vision of marriage as the union of husband and wife?

There are now, seventeen states that have passed state constitutional amendments[1] defining marriage as the union of husband and wife. And the margin of victory has ranged from Mississippi, where it passed 86% to 14%, to the tighter race in my home state, my native state, of Oregon where it passed by a margin of 57% to 43%. The latter is, I think, extremely significant, not only because Oregon is a reasonably liberal state, a blue state, but because it's also one of the most secular states in the United States. It has one of the highest

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* President, Institute for Marriage and Public Policy. The following is an edited transcript of Maggie Gallagher's symposium keynote address given at Regent University on Nov. 8, 2004.

[1] In April 2005, Kansas became the eighteenth state to pass a state marriage amendment.

proportion of individuals who are unchurched and have no particular religious affiliation.

The victory for marriage in Oregon is even more remarkable because the advocates of gay marriage, recognizing the impossibility of victory in most places, conceded eleven states and concentrated their financial and political resources on defeating the state marriage amendment in Oregon, which has a history of defeating state referendums that are considered anti-gay.

And so I can tell you, a few weeks ago I was pretty worried. I was getting phone calls. Marriage supporters "went dark" three weeks before the election. They basically ran out of money in Oregon, and were being outspent radically.

But it turns out that, even under those circumstances, in a secular, blue liberal state, a relatively cheap media market where advocates of gay marriage massed their support, gay marriage still lost and lost badly, by a measure of 57% to 43%. That's about the best that same-sex marriage advocates can do at the polls.

We're here today to reflect on some other reasons to be hopeful about marriage. I guess I want to offer you, let's call it, seven other reasons to be optimistic about the future of marriage in this country.

II. SCIENTIFIC EVIDENCE.

I'm a person who has spent, not the last year or the last five years, but the last fifteen years engaging in a marriage debate in this country. It had nothing to do with gays and lesbians. This debate is about a marriage crisis in America, one that wasn't caused by gays and lesbians: our high rates of family fragmentation, divorce, and unmarried child bearing, which have led to really astonishing proportions of children who are raised in fatherless homes, generally without close and warm relationships with their fathers.

These profound social shifts triggered a marriage debate, not only among politicians and the general public, but among social scientists and family scholars. There is now a veritable mountain of social science research evaluating the effects of this vast social experiment with family structure on child well-being.

So, reason number one to be optimistic about the future of marriage is that, as we go to make a marriage argument in the public square, in addition to common sense, our religious traditions, and the natural law, we now have an enormous body of scientific evidence.[2] We now have not dozens, not hundreds, but literally thousands of studies across different

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[2] Much of the information that is referred to throughout this address can be found in LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF (2000).

disciplines, psychology, epidemiology, communications, sociology, and economics, among others. To sum up this vast literature: in every way that the social science knows how to measure, men, women, adults, and communities are better off if parents get and stay married, provided those marriages are not high conflict or violent.

When it comes to adult well-being, men and women who marry live longer, they're physically healthier, they have better mental health, fewer signs of mental illness and distress, less anxiety, less depression, less hostility, they're happier than people who aren't married, they make more money than otherwise similar workers who are single, and at the same income levels, married couples acquire more wealth than otherwise similar couples or singles who are not married. To top it off, adults who are married even have better sex more often than people who are single, over the long run.

When it comes to children, the results are similarly clear: every bad thing that can happen to a child happens more often when men and women don't get and stay married. We're talking about a wide range of indicators such as poverty, physical illness, infant mortality, mental illness, teen suicide, substance abuse, and school failure. Children whose parents don't get and stay married, for example, are more likely to be held back a grade, more likely to drop out of high school, and more likely to be in special education. If they graduate from high school, they are less likely to go on to college, and if they go to college, they are less likely to graduate from college.

Years later, one can tell the difference in terms of the likelihood of attaining a high-status job, or any job at all, between people who had the good luck to have parents who got and stayed married versus children who, through no fault of their own, were deprived of this important form of emotional, psychological, financial, human, and social capital.

Children whose parents did not get and stay married have higher rates of premature and promiscuous sexual activity, higher rates of sexually transmitted diseases, higher rates of unmarried pregnancy and childbirth, and as they go on to marry they have higher rates of divorce themselves. So they are less likely as adults, again on average, to enjoy the enormous benefits of a stable, happy, satisfying marriage themselves.

Children raised outside of marriage also have higher rates of juvenile delinquency, conduct disorders, and adult criminal behavior. In fact, one of the better studies looks at 6,000 boys from their early teens and follows them until their early thirties and finds that, even after you control for things like race and income and family background, boys who are living without their fathers, either through divorce or unmarried childbearing, are two to three times more likely to commit a crime that leads them to end up in jail.

But let me pause and say—because no doubt there are some of you in this room who are children of divorce—that most children of divorce do not experience any one of these "social science" pathologies. The fact that your parents did not get and stay married is a risk factor, not a sentence of doom. But most children of divorce come to all the tasks of life with an additional level of difficulty that is not of their own making. Yes, children of divorce can and routinely do overcome difficulties and go on to live successful, satisfying lives. It is important to remember that. But we don't ordinarily consider it to be the job of parents to burden their own children with additional difficulties and suffering on the grounds that the human spirit is resilient and able to overcome difficulties.

It is important to remember that, even when children of divorce don't fall into one these social science pathologies (which the majority of children do not), they still do face an additional level of difficulty and suffering. Even among advantaged, middle class, white children of divorce, the majority of children raised outside of a marriage report as adults that they do not have a close, warm relationship with their father. They're about twice as likely as other children to lose their dads.

Children of divorce are also only half as likely to have a close, warm relationship with their mother, by the way, which is probably due to the enormous additional stresses of single mothering. The mother-child bond is more durable, so the absolute levels of "mother-loss" are much lower.

So, if you want to turn the bad news into the good news, think of it this way: whereas before we had common sense, the wisdom of our religious traditions, and the experience of individual children, we now have the additional power of social science on our side to tell us that, yes, marriage really does matter and whether parents do this thing of getting and staying married for their children is extremely important.

III. CONSENSUS IN FAVOR OF THE INTACT MARRIED FAMILY STRUCTURE

On top of the actual social science evidence, we have other good news that was certainly not true when I started into this other marriage debate in the late 1980s and the early 1990s. We now have a broad consensus across ideological lines (putting aside the gay marriage debate) that marriage really does matter, that family structure matters, and that fathers and mothers are important for children.

Take, for example, the recent research brief by Child Trends, which is about as mainstream a child research organization as one can find. Child Trends summed up the social science evidence this way:

> Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two-biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and

> children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.[3]

Let me pause, because this goes to the heart of the public argument about same-sex marriage. When we talk about the benefits of marriage for children, it's important to realize that these marriage benefits are not conferred in any direct, immediate way by the legal status of marriage. The marriage benefits documented by social science are the indirect result of marriage's capacity to unite the child's own mother and father in a permanent, reasonably harmonious union.

I think that, as a direct result of the gay marriage debate, there has been a real misconception promoted about the idea of marriage benefits. Whereas ten years ago we understood there were significant marriage penalties in our tax and welfare structure, I think most Americans have been persuaded that there's something called benefits attached to marriage. And if one defines benefits in any way that's consistent with ordinary language, i.e. something that looks like a check or financial incentive and that exists for, if not for every single married couple, for at least one person in every single married couple—something that's never a penalty and is always a benefit for at least one person in the married couple—then there are almost no legal benefits to marriage.

The legal incidents of marriage are mostly responsibilities, not benefits. Even the ones that are commonly cited as marriage benefits, health insurance for example, are not universal. Marriage can bring a person access to his spouse's medical plan, but marriage can also cut off a person's access to a variety of government-sponsored health benefits.

California has just moved to a full civil-unions regime where same-sex couples get all the state's legal incidents of marriage if they sign up to be registered partners. And as always happens when this happens, there are suddenly stories in the press about nice young gay couples who are considering de-registering because they fear their medical or other benefits may be reduced as a result of marriage:

> But Randy Cupp of San Francisco has decided not to register with his partner: "If you're going to give us the responsibilities, you need to give us the benefits as well," said Cupp. Cupp and his partner Jeff Tarvin are both HIV positive and on disability. If the law were to treat them like a married couple, they would risk losing their Medi-Cal health insurance and/or lose income from California's disability

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[3] Kristin Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, Child Trends (2002), at 1, *available at* http://www.childtrends.org/PDF/MarriageRB602.pdf. This research brief on family structure does not compare outcomes for children in same-sex couple households to children in other types of families. *Id.*

income program because their combined incomes and assets would be used to determine their eligibility for government benefits.[4]

When a couple marries, their income and assets become treated jointly by the law; the couple usually gets tossed up into a higher income bracket, and with their new higher joint income and assets, they may easily be taxed at higher rates and also disqualified for many government benefits as a result, including state Medicaid and disability benefits.

There certainly are individual cases in which a couple would be better-off financially because of some legal consequences of marriage. But overall, let's put it this way: if you're thinking of getting married because you imagine that the government is going to send you something that feels like a check as a result, think again and do something else. It just isn't there.

Which is not to say that the law doesn't play an important role in sustaining marriage, because I believe it does, just like the law plays an important role in sustaining the telecommunications industry, even though it doesn't create the telecommunications industry by offering financial incentives to enter it. Getting the law of economics right matters a lot because a market-based society needs the right legal structure in order to function well. The same is true of marriage.

Nonetheless, the benefits of marriage that have been documented from social science are not a consequence of the legal structure of marriage in a direct way. Otherwise, children in remarried families would benefit just as much. The way the law helps benefit children and the way marriage benefits children is by holding together the two people who make the baby into one family system where they love each other and the baby, too. That's the heart of how marriage benefits children.

IV. THE UNIVERSALITY OF MARRIAGE AS A SOCIAL INSTITUTION

The third reason to be optimistic about the future of marriage is that marriage is a virtually universal human social institution. Let me say that again. *Marriage is a virtually universal social institution.* There are really not that many human universals.

Now, I have to pause and say that marriage as a universal social institution doesn't look very much like our own marriage tradition, which is deeply rooted in Jewish, Christian, and I think Roman ideas about marriage. But everywhere, in wildly disconnected societies, people have something called marriage. And it's always about bringing together a man and a woman into a public, not just a private, sexual union so that the socially valued children of these unions have both a mother and a

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[4] Rona Marech, *Gays Cautious About New Partners Law: Some Opt Out, Fearing Legal or Financial Troubles*, S.F. CHRON., Sept. 20, 2004, at A1.

father, so that the rights and responsibilities of the mother and the father towards each other and their children are publicly and not just privately or personally defined.

Now, I'm not arguing that just because marriage has always been this way, it cannot be changed; that would be un-American. What I want to say is something different: there aren't very many human universals. So one has to ask oneself, why is it in all these wildly different societies, small tribal mountain societies and jungle societies and desert societies, and across human history in cultures completely disconnected from each other, why does this idea of marriage arise again and again?

I think the answer is rooted in three ideas that together form the heart of marriage as a universal human idea. The first is that sex between men and women makes babies. Every society has to have a social institution that grapples with sexual relationships between men and women, that tries to discourage childbearing in contexts where children are likely to be harmed.

The second reason is that a society can't just be antinatalist. Societies need babies. Every society needs to wrestle not only with discouraging babies in contexts where they are unlikely to flourish, they need a place where men and women can be encouraged to come together to make the future happen, to make the next generation. A culture that doesn't attempt this, in some form, is simply unlikely to survive over the long-term, or compete with societies that do. The second reason that marriage is a universal human idea is that societies need babies.

The third is that those babies need their father as well as their mother. They need them both. They have the right to the love, care, and attention of both their mother and their father. Marriage is the word for the institution that attempts to link sexual love between men and women with the love between children and parents. The third reason marriage is a universal human institution is that children need mothers and fathers.

Now, it's interesting that all of these core marriage ideas are now contested in the public square. There are many, many people who will tell you that, because we have contraception and/or abortion, it's no longer true that sex makes babies. I sometimes wonder about my intellectual career. I spend my time grinding out in great detail the social science evidence for things that everybody used to know.

And I can tell you, in the last twenty years I've attended numerous conferences where men with Ph.D's who were formerly middle-aged, but now that I'm middle-aged must be getting pretty old, have announced that we've separated sex from reproduction. And, yet, my experience as somebody who came of age in Yale's class of '82, at the height of the post-*Roe*, post-Pill sexual revolution, is that girls just keep getting pregnant anyway. The men with Ph.D's keep announcing we've separated sex from

reproduction, but the pregnancies just keep on happening. And, in fact, if one goes to the social science literature, one finds the enormous confirmation of this basic truth.

For example, *Family Planning Perspectives*, which is one of the premier journals, published a study analyzing rates of contraceptive failure and found shocking news that unintended pregnancy is not rare; in fact, it is extremely common. Consider these statistics from an analysis of the 1995 National Survey of Family Growth, based on a nationally representative sample of 10,847 women between the ages of fifteen and forty-four: almost a third of all births between 1990 and 1995 were unintended. Three-fourths of births to unmarried couples were unintended by at least one of the parents.[5] By their late thirties, according to another study, 60% of American women had had at least one unintended pregnancy. Almost four in ten women aged 40-44 had had at least one unplanned birth.[6]

Another analysis of the 1995 National Survey of Family Growth concluded:

> The risk of failure during typical use of reversible contraceptives in the United States is not low—overall, 9 percent of women become pregnant within one year of starting use. The typical woman who uses reversible methods of contraception continuously from her 15th to her 45th birthday will experience 1.8 contraceptive failures.[7]

Now, it's certainly true that contraceptive technology has reduced the likelihood that any given act of sex will result in a baby. But people who engage in extended non-marital sexual careers frequently get pregnant. And that means, to put it back in the perspective of the marriage debate, that it is perfectly rational for society to prefer the marital unions between men and women to other kinds, because virtually every child that is conceived by a married couple will begin its life with a mother and father already committed to caring for it, and the vast majority of children born to other sexual unions will not.

V. SOCIETIES NEED BABIES TO SURVIVE

Does society still need babies? At the same time that we had a sexual revolution, we experienced enormous fears of a population explosion. And it's taken a while for the news to settle in that, among the

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[5] J. Abma et al., *Fertility, Family Planning, and Women's Health: New Data From the 1995 National Survey of Family Growth*, Nat'l Ctr. for Health Statistics, VITAL HEALTH STAT. 23(19) (1997).

[6] Stanley K. Henshaw, *Unintended Pregnancies in the United States*, 30 FAM. PLAN. PERSP. 24 (1998).

[7] James Trussell & Barbara Vaughan, *Contraceptive Failure, Method-Related Discontinuation and Resumption of Use: Results from the 1995 National Survey of Family Growth*, 31 FAM. PLAN. PERSP. 64, 71 (1999).

developed world, the real problem we now face is the threat of depopulation.

This is not true in America, interestingly enough. We are the only developed democracy that has replacement level birth rates, with the exception I think of Israel, and perhaps Ireland. The European Union as a whole now has birth rates of 1.42 children per woman; 2.1 is the birthrate needed to replace the population in modern economic conditions. The United Nations defines very low fertility as less than 1.5 children per woman. So, Europe as an average has very low fertility, and many of the nation states are towards a low one child per woman, which implies cutting a country's population in half with every generation. And a number of them, Spain, Italy, Portugal, and Greece, are already very close to one child per woman, 1.2 or 1.3 children per woman.

There is now a booming literature among scholars of the consequences of very low fertility for the military, for the economy, and for the creation of the welfare state.[8] The Japanese health minister two years ago issued a warning that, if things don't change there, the Japanese people are going to become extinct. It's pretty clear that, although making the case that higher birth rates are always better than lower birth rates may be difficult, every society needs to reproduce if it's going to survive. And the fact that child bearing is now more optional provides, I think, a stronger argument for the need for a social institution which actively encourages childbearing.

VI. THE DANGER OF SAME-SEX MARRIAGE

I'm not worried that 200 years from now we'll see all around the globe, in the progressive vision, a regime of gay marriage, because I think it's inconsistent with human nature and with what is necessary for human civilizations to perpetuate and transmit themselves. I'm a little more worried about the legal and social consequences for religious groups that try to hang onto, and transmit to the next generation, their marriage traditions under a legal same-sex marriage regime. But speaking as a Roman Catholic, I know that God has promised the Church will survive.

I can't be similarly sure that American civilization is going to end up, despite all its other virtues, being one of those civilizations that is still around, still transmitting itself 200 years from now. I'm pretty sure that, unless we win this marriage debate and strengthen marriage as a social institution, it won't be. Let me tell you why.

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[8] For a review of this literature, see, for example, Maggie Gallagher, *Does Sex Make Babies? Legal Justification for the Regulation of Intimacy in a Post-*Lawrence *World*, 23 QUINNIPIAC L. REV. 447 (2004).

What does it mean to go to same-sex marriage? What does it mean for marriage as a legal, public, shared institution? What does it mean to do it in particular on the grounds that restricting marriage to opposite sex couples is a violation of the civil rights of people who want to have same-sex couple relationships? I don't run away from that argument anymore; I really pull it out because I think it's really important. What it means is that people like me who think that children need mothers and fathers are like bigots, like the people who used to be opposed to interracial marriages. That's what it means.

How are we going to transmit to the next generation the idea that it's really important for boys to be raised to be good family men? How are we going to tell our daughters that it's really important to value a man and to look for good fathers for their children in a culture in which the idea that children need mothers and fathers is now privatized? Clearly, if we have gay marriage, I can't go into a room and say "children need mothers and fathers and marriage is how we get there," because the laws of the state are going to tell us, at a minimum, that marriage has nothing to do with that particular mission.

So this conjugal view of marriage is certainly going to be privatized under same-sex marriage legal regimes. But if we do move to gay marriage as part of the civil rights campaign, this conjugal view of marriage is also going to be *stigmatized* by the state. I think the *Loving v. Virginia*[9] analogy, if one thinks through what it really means for civil society, is not very comforting. Because of *Loving v. Virginia*, we now don't allow bigots who oppose interracial marriage to have radio broadcasting licenses. The law does not allow such bigots to obtain tax-exempt status for their organizations. We don't allow schools that teach this kind of bigotry to accredit professionals, counselors, or teachers.

So, if as advocates say, opposition to gay marriage represents a similar kind of bigotry, at a minimum, the soft power of the state is going to be used to repress people who disagree. And, again, I don't understand how we are going to create a shared public culture committed to the idea that children need moms and dads if the law is actively stigmatizing this idea. I think you will find it takes relatively little legal pressure to get religious organizations to downplay the marriage message because religious organizations have broad multiple missions that can be put at risk.

Groups like Focus on the Family in Canada are facing a delicate balancing act. If they stand up on these issues and speak clearly on them, a whole bunch of other ministries are going to be in danger, right? So, good people in that situation find it hard to make a case for inviting legal persecution and the shutting down of the other good work they do.

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[9] Loving v. Virginia, 388 U.S. 1 (1967).

On the other hand, back to the positive side of the register. One of the most hopeful signs to me as someone who believes that intellect matters, that ideas matter a great deal, is that in the last year when I've been taking this strong marriage argument for our marriage laws to colleges, to law schools, to major media, to political figures, and to private scholars meetings, what I've found is there has been virtually no serious response to this argument by the advocates of same-sex marriage. It's an argument they have to ignore, sweep under the rug, or refuse to take seriously, and I think that's a sign of ultimate success.

I think 2003 may end up being the high-water mark of support for gay marriage. Advocates for gay marriage spent twenty-five years working out highly sophisticated arguments that ordinary people have found hard to rebut. Custom and tradition is always less articulate than novelty, at least at first. But as we've begun to put the marriage argument forward more strongly in the public square, what I have found among intellectual elites is either silence or an increased intensity of name-calling, which is a real sign of inability to engage in a rational argument. I think that's a very good sign.

VII. THE NEXT GENERATION

Reason number six to be optimistic about marriage—and, again, I'm going to be countertype here—is the next generation. The most powerful argument gay marriage advocates now make is that same-sex marriage is inevitable because the young people are for it: if necessary, all we have to do is wait for you old fogies to die off and then we win.

I wish Josh Baker, who is going to be on the panel tomorrow, was here, because he's just completed a very careful analysis of next generation opinions on gay marriage.[10] We find that among the young adults, the most neutrally worded polls suggest the majority are currently opposed to same-sex marriage. I suspect that, even among these young adults, as more of them move through the life-cycle, getting married and having children, their opinion will continue to shift in more "traditional" directions.

Finally, I think the best news about the next generation has gone utterly unreported. It's what's happening to the "next" next generation, which is teenagers, thirteen to seventeen-year-olds. Since about 2000, there's been a sharp increase, a sharp and steady trend of increasing opposition to same-sex marriage among the next generation to the point where currently sixty-three percent of teenagers oppose same-sex marriage. That's about the same as the population as a whole.

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[10] Maggie Gallagher & Joshua K. Baker, *Same-Sex Marriage: What Does the Next Generation Think?*, iMAPP (Nov. 23, 2004), *available at* http://www.marriagedebate.com.

Now, I'd be happier if that opposition to same-sex marriage were the same as the levels opposition to polygamy and adultery is, which is around the ninety percent level, but it's a good start. It shows you what happens when people begin to seriously engage the marriage issue and also what will fail to happen if we fail to seriously engage the issue.

VIII. THE OPPORTUNITY TO WIN THE MARRIAGE DEBATE

Finally, reason number seven to be optimistic about marriage. Fundamentally, this is what I believe about the gay marriage debate. There's only one way to win it, and that is to win the larger marriage debate about the meaning and purpose of marriage in our society. Winning the marriage debate requires reconnecting up marriage to its great historic task of channeling the desires of people attracted to the opposite sex into the kinds of unions that aren't damaging to themselves or to their children.

So the bad news represents as well a great historic opportunity. The short-term outlook is, I think, still seriously grave, by which I mean that it's quite possible that, in two years, a third of the country will be living under a gay marriage regime (for example if New Jersey, New York, and California join Massachusetts in judicially-imposed gay marriage regimes).

As serious as the risks of the same-sex marriage debate are, there is also an immense new opportunity here in bringing to the fore, to the burning front and center, this question of what marriage is, what it's for, and why we care about it.

We can win this marriage debate ultimately, but we cannot win it if we are only *against* something. The only way to win the marriage debate is for the same churches, parents, families, and community groups who are frantically organizing against same-sex marriage to exhibit through this process the same commitment to strengthening marriage as a whole, as a social institution, so that more and more children, not fewer of them, are raised by their own mother and father united in a decent, good enough, average, loving marriage.

Thank you.

QUESTIONS AND ANSWERS

UNIDENTIFIED SPEAKER: I teach in high school, and one thing I do see is that if we don't control the indoctrination of sex to our children, those children will be taught any kind of sexual immorality. Even the State of Virginia, which is a red state, has "comprehensive" sex education. I just moved to Virginia from Maryland, and the county that I moved from requires all incoming freshmen to put condoms on models. A lot of Christian families and other families send their kids to public

school, but if we don't separate sex and the State, we're still going to have problems down the road.

MS. GALLAGHER: There are a lot of sources of problems, and I think that schools are one of them. I think probably the worst problem with the schools is the way they tend to demoralize parents and clergy. I actually believe that parents are more influential than any other person and that actual people are more influential than the media, not that I wouldn't do something about the media if I could, too. But the worst problem is when we have these global problems that we need to solve and we end up demoralizing people from doing the things that they actively need to do.

My favorite study on this looked at abstinence among children who most of us would say have hardly a shot, the parents that you think would be least influential, mostly poor, single mothers in Philadelphia, mostly black. And this study found that there were three variables that influenced whether the teenagers were virgins: one was having a close, warm relationship with their mother, the second was having the teenager being clearly aware that the mother disapproved of sexual activity, and the third is not discussing contraceptives.

And each of these individually doubled the likelihood that these poor black teenagers would be virgins. If you had all three of them, you had a close, warm relationship with a mother who strongly communicated that she expected her child not have sex and did not discuss contraceptives, they were twelve times more likely to be virgins.

So even if parents do everything they can do, there are going to be a lot of problems left. But part of solving the problems means getting everyone who can do something to do it. That means schools need to do their part, that means parents need to do their part, that means clergy I think need to be standing up a lot stronger, that means that public policy has to do its part, because I think there's a role for all those things.

UNIDENTIFIED SPEAKER: Do you find in your study a difference between single mother families as opposed to the remarriage kind of family where there's a stepparent?

MS. GALLAGHER: Children in remarried families have higher family income, but they do not do any better on average than children raised by single mothers. And I suspect this reflects an averaging, you know. If you think about the problem with remarriage, sometimes it adds another adult who's committed and helpful, but it can also do a lot of other things. It can pull the mother away from the child, it can create loyalty conflicts in the child, either between the mother and stepparent or stepparent and original father.

In remarriage, the child is often placed into an additional cycle. There's the step-siblings, which, again, is just kind of weird. Your

mother falls in love with someone and all of a sudden you have new family members appearing out of nowhere.

Sometimes people make it work and it's a benefit for the child, but particularly I think if it incites loyalty conflicts with the child or pulls the mother away from her relationship with the child, then it's a detriment. There is some evidence that single mothers who do not cohabit or marry do reasonably well. –But, basically you're asking a lot of a mother to really have no social life for eighteen years while she raises her children. One of the advantages of marriage is it combines romantic life and your family life in a way that makes them kind of reinforcing to one another, whereas, if outside of an intact marriage, these things pull apart and they cause potential damage.

UNIDENTIFIED SPEAKER: Is there a relationship between strengthening individual marriages by making each marriage a profound commitment, and strengthening marriage as an institution by having many marriages? Is there a strategy in harmonizing or somehow working with that which seems to make a relationship?

MS. GALLAGHER: Well, I think that it is an interesting question. I think the answer is ultimately no. I think that the importance of increasing commitment and support in society for the commitment warps any effect of finding exactly the right partner to marry, but there are limits to this. One of the advantages of marriage for children is that it introduces certain selection effects into who has children with whom at what point in their life. And this is not to be joked. I mean, having a child with someone that you've picked out as a keeper for the rest of your life and who's promised to stay with you is a better sort of thing than someone who you thought was attractive enough for Saturday night, or even to live with on a temporary basis but you're not sure if he's a keeper. So, I think that's important.

But we have a higher than ever age of first marriages, unprecedented since we've been keeping records. My impression is people know each other for longer, particularly because they've often been living together.

None of this appears to be very significant for divorce, again, with reason. I mean, there's pretty strong evidence that teenage marriages are really too fragile to be a good idea, which means you have the social problem of getting people to abstain from sex longer than in some points in history. But the research suggests that there's no advantage, in terms of reducing your divorce risk, to postponing marriage past your early twenties if you're a woman or around twenty-five if you're a man. And even in the early twenties, the majority of those marriages appear to last.

So I really put a lot of emphasis on marriage education. I spoke to Kings College recently in New York, a small Bible evangelical college

associated with Campus Crusade for Christ. And the question was, "How do you avoid divorce?" And they said, "you just don't go down to the divorce court."

In research that I did with a group of scholars on people who were unhappily married that didn't divorce, and what turned their marriage around, one of the big answers which we didn't really expect but which people just told us in these focus groups was, "we just kept putting one foot in front of another. After a while, the kids got older, he made more money, and I got tired of being mad all the time so I gave it up." If you're really committed to permanence, you work things out because there isn't a good alternative to loving each other well.

UNIDENTIFIED SPEAKER: Some people suggest that, since there is adoption among homosexual couples, they should be allowed to marry each other because there's no reason for them not to have marriages, and heterosexual people have children in or outside of marriage. How do you answer that?

MS. GALLAGHER: I know exactly what you mean. Let me answer in two ways. The first question is whether ideas matter. I think you have to take seriously the idea that the law embodies certain social norms. Moreover, the advocates of same-sex marriage know this because that's precisely what they want. The argument about benefits is really a side effect, and the firm rejection of the offer of civil unions shows that advocates of gay marriage are highly aware of the symbolic educational importance of the law.

Most intimate personal relationships are totally unregulated by law, right? The more intimate, the more personal, the more intrinsically valued, the less likely the law is to have anything to do with that relationship. The question to be explained is, why is marriage the great exception among adult relationships? And I think the answer is that sex makes babies, that society needs babies, and children need mothers and fathers. In every society, people who are attracted to the opposite sex need a social institution that is directed at managing this phenomenon, which you can call procreativity.

But everything is different between sex with men and women making babies on an irregular basis. The moral nature of the sexual act changes and the social consequences of the sexual act change. I gave a version of this in a Boston Federalist Society meeting on a panel with Mary Bonauto, who is a very impressive speaker, by the way. I was very impressed by her. She stood up and said, "children need mothers and fathers and I'm sure we have lots of ways to accomplish that." I looked at her and I said, "no, no, this is it. If marriage is not the social institution directed towards this end, what is?" And the answer is, "there isn't any." So, that's the longer argument.

The second argument is a reprise, which is to say, what does it mean to say there's going to be something called gay marriage that affects gay people and then something else called straight marriage or traditional marriage that affects straight people. I don't believe this. Evan Wolfson doesn't believe this. There's going to be one thing called marriage, and it's going to be something different. It will no longer be related to the idea that children need mothers and fathers or creating the next generation. Now, how do I know that? I know it because of the logic of language; in fact, ideas do have consequences and you have to make them take responsibility for the idea they're advocating, which is that there's no difference between two men or two women raising children and a husband and wife.

If there's no difference between two fathers and two mothers, and they're all just as good, distinguishing between these is an act of discrimination. If you have the law and society committed to this norm, it's going to have consequences. And it's going to particularly have consequences because the long arm of the law is going to be used. We're making a promise to gay couples that their marriages are going to be treated to the extent of the law just like anyone else's marriage. And since the vast majority of the American people do not believe this, the law is going to have to work really hard to re-educate Americans through its institutions in order to deliver on this promise to same-sex couples.

It won't happen all at once. It took many years, twenty or thirty, before *Loving v. Virginia*[11] led Oral Roberts University to end its ban on interracial dating, which it did primarily because of the tax-exempt status. It didn't take an actual case. You've got a whole functioning university and that one totally immoral rule; you don't threaten your whole big enterprise in defense of this one rule. So, the law will be very affected on this idea.

The third reason I know it's true is: what do you have to do to get to same-sex marriage? Every court decision that gets to it first says marriage doesn't have anything to do with procreation, and then says that the law doesn't care about family structure.

Now, one of the ways they say that is the other issue you raised of adoption, and I think this is just a simple category error. Marriage is about trying to manage this phenomenon of opposite sex attraction towards a social ideal. Adoption is one of the ways you cope with the fact that life isn't always ideal. In adoption, you have a child who not only doesn't have two parents committed to caring for it, the child doesn't even have one parent committed to caring for it. And the state may make a variety of judgments about what's the best for that child because it's obligated to act in the best interest of that individual child. And if the

[11] Loving v. Virginia, 388 U.S. 1 (1967).

state decides it's better for a child to have a gay parent than to be in a foster home, you or I may disagree, but to make that statement has nothing to do with undermining the idea that there's a special importance on marriage. And that's why it's really the only adult relationship—intimate relationship—that has this kind of special status.

DOMA AND MARRIAGE

William C. Duncan[*]

I. INTRODUCTION

Past decades have witnessed a dizzying series of legal developments calling into question foundational social institutions such as the family. The family, valued as perhaps the archetypal mediating institution,[1] has been subjected to increasingly deep and profound challenges to its nature and purpose. Such challenges are not without precedent. A certain revolutionary temperament has always seen the family as a significant rival because of its claims to human loyalty independent of the State.[2] Totalitarian societies, for instance, have been long characterized by attempts to deconstruct (and reconstruct) the family.[3] Dystopian literature routinely portrays societies that have destroyed or dramatically reconceptualized the ties between mothers and fathers, parents and children, husbands and wives.[4]

Recent challenges to existing family norms have been directed at the institution's core concepts such as permanence, fidelity, and most recently, complementarity.[5] No-fault divorce enlists the state as an ally to a spouse seeking to end a marriage.[6] The increasing prevalence of non-marital cohabitation, with its significantly different norms of duration and exclusivity, has resulted in legal recognition of marriage substitutes.[7] Most recently, court decisions have attempted to remove any vestige of sex difference from marriage, with the inevitable

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1 *See generally* RICHARD JOHN NEUHAUS & PETER BERGER, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY (1977) (describing the family as one of four principle mediating institutions).

2 *See* ROBERT NISBET, TWILIGHT OF AUTHORITY 217 (1975).

3 ROBERT NISBET, THE QUEST FOR COMMUNITY 203 (1953).

4 *See generally* ANTHONY BURGESS, THE WANTING SEED (1962); LOIS LOWRY, THE GIVER (1993); GEORGE ORWELL, 1984 (1948); YEVGENY ZAMYATIN, WE (1972).

5 William C. Duncan, *Family as the Fundamental Unit in Marriage and Divorce, in* FAVORING THE FAMILY 77 (Carrie Burton ed., 2003) [hereinafter *Family*]; *see also* William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119 (2003).

6 *Family, supra* note 5, at 79.

7 *See generally* William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2004) (discussing the statistics of non-marital cohabitation and associated legal trends).

elimination of the natural link between marriage, procreation and child-rearing.[8]

While attempts to redefine or weaken marriage and family are not new, the pace of recent changes, accompanied by relatively few apparent misgivings (at least at the official level), is unprecedentedly unsettling. However, the ease with which other major changes in family law have been accepted may not extend to the current trend in favor of redefining marriage to include same-sex couples. This article will survey popular responses to this novel definition of marriage. It will then discuss prospects for the long-term success of the effort to reaffirm the legal definition of marriage as the union of one man and one woman.

II. REAFFIRMING MARRIAGE

After the Hawaii Supreme Court held in 1993 that marriage was a form of sex discrimination,[9] it seemed eminently plausible that other states would soon be faced with claims by their citizens that same-sex marriages they contracted in Hawaii should be recognized. In response to this possibility, two states introduced legislation in 1995 to prevent their courts from granting recognition to same-sex marriages contracted in another state.[10] When Utah's proposal was enacted, it became the nation's first "Defense of Marriage Act."[11] This designation was actually created in 1996 for federal legislation that defined marriage as the union of a man and a woman for purposes of federal law and provided, pursuant to the United States Constitution's Full Faith and Credit Clause, that a state could not be *required* to recognize a same-sex marriage contracted in another state.[12] That same year, fourteen states

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[8] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (holding that the definition of marriage violates the state constitution's due process and equal protection provisions); Li v. State, No. 0403-03057, 2004 WL 1258167, at *10 (Or. Cir. Ct. Apr. 20, 2004) (holding that the definition of marriage violates the state constitution's privileges and immunities clause); Castle v. State, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004) (holding that the definition of marriage violates the state privileges and immunities provisions); Andersen v. King County, No. 04-2-04964-4 SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004) (holding that the definition of marriage violates the state constitution's due process and privileges and immunities provisions and relying almost exclusively on federal precedent).

[9] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (Levinson, J., plurality) (holding that marriage statutes require strict scrutiny because they discriminate on the basis of sex and remanding the case for Hawaii to prove that the statutes furthered a compelling interest).

[10] David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the 'Same-Sex Marriage' Debate*, 32 CREIGHTON L. REV. 3, 6-7 (1998).

[11] UTAH CODE ANN. § 30-1-4 (Supp. 1998); Coolidge & Duncan, *supra* note 10, at 7.

[12] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1997)); *see also* U.S. CONST. art. IV, § 1.

enacted legislation to prevent such recognition.[13] The momentum of these legislative developments came from the trial on remand of the Hawaii case and the subsequent decision that the state had failed to meet its burden of providing a compelling justification for the state's marriage law.[14]

While the Hawaii case was pending on appeal, six more states enacted marriage recognition laws in 1997 and 1998.[15] In 1998, the Hawaii decision,[16] and a similar one from an Alaska trial court,[17] precipitated the legislatures of both states to propose state constitutional amendments defining marriage. Both proposed amendments were approved in November 1998.[18]

While the momentum of the effort to enact marriage recognition laws seemed to slow for a time, some laws were still enacted. Perhaps most well known is California's experience. After repeated attempts had failed to secure legislation in the state Assembly, a petition drive put a marriage definition proposition on the March 2000 ballot.[19] The measure, Proposition 22, was approved by an overwhelming margin.[20] Unresponsive legislatures led to popularly proposed and enacted state amendments in Nevada and Nebraska as well.[21] By this time, legislative and popular efforts had begun to take notice of the creation of civil unions in Vermont, a marriage equivalent status for same-sex couples which had been required by court order.[22]

By the time the Massachusetts Supreme Judicial Court (SJC) ruled on a case challenging the Commonwealth's definition of marriage in 2003,[23] thirty-eight states had laws prohibiting the recognition of same-

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[13] The Heritage Found., *Assessment of the Language used in State Statutes*, *at* http://www.heritage.org/Research/Family/Dataforall50States.cfm (last visited Jan. 31, 2005) [hereinafter *Assessment*].

[14] Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *16 (Haw. Cir. Ct. Dec. 3, 1996).

[15] *Assessment*, *supra* note 13.

[16] *Miike*, 1996 WL 694235, at *16.

[17] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

[18] David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 628 (2001).

[19] *Id.* at 631-32.

[20] Evelyn Nieves, *The 2000 Campaign: Those Opposed to 2 Initiatives Had Little Chance from Start*, N.Y. TIMES, Mar. 9, 2000, at A27.

[21] Coolidge & Duncan, *supra* note 18, at 632 n.39.

[22] Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (holding that the state constitution required the benefits of marriage to be extended to same-sex couples); 1999 Vt. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15 §§ 1201-1207 (1999)); VT. STAT. ANN. tit. 18 §§ 5160-5169 (1999) (creating civil unions).

[23] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

sex marriages.[24] In its decision, the SJC stated that the state constitution mandated a new definition of marriage: "the voluntary union of two persons, as spouses, to the exclusion of all others."[25] The ruling in that case led to a renewed effort to clarify state laws. Within a short time, thirteen states proposed (by legislation or petition) state constitutional amendments related to marriage in order to prevent similar rulings in their own states and to bolster their expressed policy of refusing to recognize out of state same-sex marriages.[26] All thirteen were approved in the 2004 elections, eleven on November 2.[27] Although most were enacted in states that already had statutes to the same effect, Oregon was an important exception. There, a trial court decision had called the state's marriage law into question[28] and other precedent suggested that it might not survive judicial review.[29] The approval of the Oregon amendment brought the total number of states with legal affirmations of marriage to forty (New Hampshire enacted a statute after the Massachusetts decision).[30] As of January 2005, forty-two states have legal affirmations of marriage, and others are likely to follow.[31]

III. PROSPECTS FOR DOMA AND MARRIAGE

Proponents of redefining marriage are unlikely to cease their efforts, even in the face of overwhelming popular support for marriage as currently understood. Their efforts are bolstered by at least two major factors illustrated by the public debates over the most recent set of state amendments: elite hostility and legal supremacy.

A. Elite Hostility

The current iteration of elite opinion favors a view of marriage and family that is at odds with traditional understandings but extremely sympathetic to the claims of those who would redefine marriage. This

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[24] ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Relationships*, 38 FAM. L. Q. 339, 397 (2004).

[25] *Goodridge*, 798 N.E.2d at 969.

[26] Jonathan Rauch, *Saying No to 'I Do'*, WALL ST. J., Dec. 27, 2004, at A8.

[27] *Id.*

[28] Li v. State, No. 0403-03057, 2004 WL 1258167, at *10 (Or. Cir. Ct. Apr. 20, 2004).

[29] *See generally* William C. Duncan & David Orgon Coolidge, *Marriage and Democracy in Oregon: The Meaning and Implications of* Tanner v. Oregon Health Sciences University, 36 WILLAMETTE L. REV. 503 (2000).

[30] N.H. REV. STAT. ANN. § 457.3 (2004).

[31] Nat'l Conference of State Legislatures, *Same Sex Marriage*, *at* http://www.ncsl.org/programs/cyf/samesex.htm#DOMA (last modified Jan. 25, 2005); Kavan Peterson, *50 State Rundown on Gay Marriage Laws*, *at* http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=true (Nov. 3, 2004).

view holds that what is key to defining family is not formalistic structure based on natural relationships, but rather the process of intimate interactions that occur among autonomous individuals.[32] Thus, family is defined by what it does (provide companionship or child care) rather than by what it is (a husband and wife with children). Since this view exalts chosen behavior over naturally occurring obligations, it is necessarily adult-centered and hostile to constraints.

While not likely embraced by a majority of the public, this view is firmly entrenched in certain elite circles such as academia, journalism, and the legal profession. Within these circles, and among those influenced by them, adherence to a more traditional understanding of marriage and family has been effectively stigmatized as mere nostalgia at best or mean-spirited animus at worst. Thus, even policymakers who nominally oppose redefining marriage are often tepid or outright hostile to enacting marriage definitions into law. For instance, Ohio's United States Senators, who claim to support the traditional marriage structure, initially opposed a proposed federal marriage amendment for timing reasons[33] and also opposed a proposed state marriage amendment for being too broad.[34] Opposition to Utah's proposed amendment was led by the state's Attorney General (a Republican).[35] Major newspapers were overwhelmingly hostile to the recent state amendments.[36] In Utah, where two-thirds of voters supported the amendment,[37] not one daily newspaper endorsed the amendment.[38]

This hostility allows for a broad dissemination of the arguments in favor of redefining marriage as these views are widely held and expressed by the elite in influential positions.

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[32] *See* William C. Duncan, *"Don't Ever Take a Fence Down": The "Functional" Definition of Family–Displacing Marriage in Family Law*, 3 J.L. & FAM. STUD. 57 (2001).

[33] Jonathan Riskind, *Ohio's Senators Took No Comfort in Amendment Fight*, THE COLUMBUS DISPATCH, July 18, 2004, at 05C.

[34] Laura A. Bischoff, *Ohio Senators Oppose Issue 1*, DAYTON DAILY NEWS, Oct. 7, 2004, at B3.

[35] David Crary, *Voters in 11 States Will Consider Bans on Same-sex Marriage*, STAR LEDGER, Oct. 31, 2004, at 4.

[36] LifeSite, *Voters in Eleven States Ban Homosexual "Marriage" Despite Massive Media Bias*, *at* http://www.lifesite.net/ldn/2004/nov/04110304.html (last visited Jan. 25, 2005); *see also* Gay & Lesbian Alliance Against Defamation (GLAAD), *Pro/Anti-Amendment Endorsement Counts by State*, *at* http://www.glaad.org/publications/resource_doc_detail.php?id=3747 (last visited Jan. 25, 2005) [herinafter GLAAD].

[37] *State Constitutional Amendments Defining Marriage*, *at* http://www.washingtonpost.com/wp-srv/elections/2004/stateinitiatives/ (last visited Jan. 25, 2005).

[38] GLAAD, *supra* note 36 (listing state newspapers that have endorsed or opposed state marriage amendments).

B. Legal Supremacy

The other crucial factor militating in favor of a redefinition of marriage has been the success of the proponents in the courts. A number of state courts have not hesitated to overturn statutes or common law to redefine marriage. Thus, even though the state of Washington enacted a marriage statute in 1998, two trial courts in the state have ruled the law unconstitutional.[39] When Nebraska enacted a marriage amendment, the amendment's opponents found a court sympathetic to their claim that the amendment violated the federal constitution.[40] In the recent campaign season, legal threats to proposed amendments played a major role in many of the state elections, with lawsuits in eleven states and threatened lawsuits in Georgia, Ohio, Oklahoma, and Utah.[41] As long as same-sex marriage advocates have recourse to sympathetic courts to annul legislation or popular enactments, they have the upper hand in the long-term.

Obviously, this could be alleviated by courts and advocates deciding to defer to majority wisdom on this question. There are reasons to doubt this will happen. Having framed their claims for redefinition in the language of civil rights, advocates can see their opponents as retrograde or bigoted. Many courts have accepted a relentless logic that looks skeptically at restrictions of individual choice, no matter how dramatic the ramifications of abandoning those restrictions. This has produced a revolutionary zeal that would do away with traditional institutions and their defenders. Supported by a powerful ideology of egalitarianism that cannot allow for compromise, the movement for same-sex marriage is not likely to be stopped by natural realities such as sex difference and male-female procreation.

IV. VOICE OF THE PEOPLE

There is a countervailing reason for optimism in the face of these challenges—the optimism that marriage might enjoy a renaissance.

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[39] Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *16 (Wash. Super. Ct. Sept. 7, 2004); Andersen v. King County, No. 04-2-04964-4 SEA, 2004 WL 1738447, at *11 (Wash. Super. Ct. Aug. 4, 2004).

[40] *See* Citizens for Equal Prot., Inc. v. Bruning, 290 F. Supp. 2d 1004 (D. Neb. 2003) (rejecting the state's motion to dismiss challenge to Nebraska's marriage amendment and holding that plaintiffs had made cognizable equal protection and bill of attainder claims).

[41] Kavan Peterson, *50 State Rundown on Gay Marriage Laws*, Stateline.org, *at* http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=true (Nov. 3, 2004); Cara Weiser, *Same-Sex Marriage Ban Creates Bump in the Road for Utah Couple*, THE DAILY UTAH CHRON., *at* http://www.dailyutahchronicle.com/main.cfm?include=subApplication&subApplicationName=quickRegister&fuse=registrationOrLoginRequired&thereferer=http%3A//www.dailyutahchronicle.com/news/2004/03/04/News/SameSex.Marriage.Ban.Creates.Bump.In.The.Road.For.U.Couple-626257.shtml (last visited Jan. 31, 2005).

Although past changes in family structure have been accepted without heavy resistance, it is increasingly clear that those changes have not always equated with progress. This may lead to caution before accepting the next "Great Leap Forward."[42] Indeed, the enactment of defense of marriage laws in forty-two states within a ten-year period[43] signals that majorities may now be willing to draw the line against further family deconstruction.

The fact that the "voice of the people" still supports marriage in overwhelming numbers suggests that the collective wisdom of humanity may be beginning to get its due. Although the future is still uncertain, there is reason for hope.

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[42] *See generally Great Leap Forward*, THE COLUMBIA ELECTRONIC ENCYCLOPEDIA (6th ed. 2004), *at* http://www.infoplease.com/ce6/history/A0821672.html (last visited Jan. 31, 2005) (summarizing the failure of Communist China's "Great Leap Forward").

[43] Nat'l Conference of State Legislatures, *Same Sex Marriage*, *at* http://www.ncsl.org/programs/cyf/samesex.htm#DOMA (last modified Jan. 25, 2005).

THE NECESSITY OF A FEDERAL MARRIAGE AMENDMENT

*Vincent P. McCarthy**

I have been involved in several cases dealing with civil unions, same-sex partners and domestic partnerships. I brought the suit in *Connors v. City of Boston*,[1] which successfully overturned Boston's domestic partners law, and also the *Catavalo*[2] case that overturned the Cambridge domestic partners law. I argued then, and still consider today, civil unions and domestic partnerships to be Trojan Horses for marriage. Additionally, I brought a lawsuit seeking to overturn the *Goodridge*[3] decision in Massachusetts.[4] I am also involved in several other same–sex marriage lawsuits such as *Kerrigan*[5] in Connecticut, *Harris*[6] in New Jersey, and *Bruning*[7] in Nebraska.

Today, I am speaking in support of the Federal Marriage Amendment (FMA) which states:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.[8]

This bill does not create any new rights and it takes away no rights that we all share today. In fact, very few rights held by married couples are held solely by married partners because they are married. What this bill does do is reserve to the people the right to decide to keep marriage between one man and one woman, unchanged for the future. It would deny to the courts the power to radically alter the nature of marriage any time a new group comes along to change its gender, number, or any of the other traditional criteria for marriage. It would prevent a court

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1 Connors v. City of Boston, 714 N.E.2d 335 (Mass. 1999).

2 Catavolo v. Cambridge, No. 00-1319 (Mass. Super. Ct. Oct. 30, 2000) (order enjoining defendants from providing insurance benefits to "domestic partners").

3 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

4 Largess v. Supreme Judicial Court of Mass., 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 618.

5 Kerrigan v. State (Conn. Super. Ct. filed Aug. 25, 2004).

6 Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003).

7 Citizens for Equal Prot. v. Bruning, No. 4:03CV3155 (D. Neb. filed Apr. 2003), *complaint available at* http://www.domawatch.org/cases/nebraska/citizensforequalprotectionvag/complaint.pdf (last visited Mar. 2, 2005).

8 S.J. Res. 30, 108th Cong. (2004).

from allowing brothers and sisters to marry, adults and children to marry, more than two persons to marry and persons of the same sex to marry. It would have stopped *Goodridge*[9] in its tracks.

I cannot think of any reason to deny to the people their power to preserve marriage as proposed by the Federal Marriage Amendment. This is not a situation in which a discrete and powerless group seeks to win freedom from an oppressive majority. The power of the homosexual lobby far exceeds its numbers due to its affluence, intelligence and placement in the positions of the cultural elite. Their political progress should not have surprised anyone given its powerful base.

This Amendment does not change the well-established historic traditions and understanding of marriage, but preserves the unique legal status of marriage as it has been received and understood in the states since their very founding. It closes loopholes in existing law and expresses in constitutional text the unique value of marriage in the legal system. As a legal institution of the state, marriage dates back to the earliest known legal code, that of Hammurabi ca. 1780 B.C., and contracts exclusively non-incestuous adult unions of men and women; this is exactly its present form in the United States, with respect to age of consent, consanguinity, and sex of the spouses, without change for nearly 4,000 years.[10]

The greatest threat to our nation, including the people of Massachusetts, is the growing threat to the integrity of our families. The consequences of the disintegration, redefinition, and devaluation of marriage and of marital parenting are very detrimental, not only to adults who are hurt in demonstrable ways (economic, social, educational, health, and well being) but especially to children. Children are deeply disadvantaged by the devaluation, marginalization, and disintegration of marriage and marital parenting. Marriage is the foundation and the core of the family, and as marriages are appreciated, valued, strengthened, and successful (or devalued, dissolved, and destabilized), the environment in which children are raised is healthy, functionally effective, and supportive (or dysfunctional, dangerous, and disadvantaged). As go the marriages and the families of Massachusetts and America, so go the state and the nation. Yet in many ways we seem to have forgotten this. There is a great need to re-establish basic principles.

Marriage is unique and uniquely important to society and to families. Other relationships do not contribute as much to the well-being of individuals or society. Men and women are different, and the

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9 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

10 M.E.J. RICHARDSON, HAMMURABI'S LAWS: TEXT, TRANSLATION AND GLOSSARY 81-91 (M.E.J. Richardson trans., 2000).

union of a man and a woman is different from the union of two men or two women. The institution of marriage—understood as the union of a man and a woman—is one of the foundational institutions of our society; it forms the bedrock and substructure upon which the superstructure of constitutional rights and government are founded. The FMA will protect that bedrock and preserve that foundation.

Social science confirms that children suffer when biological families do not persevere across generations, that is, when children's own households lack a capacity to reproduce themselves by raising biological children who then raise children themselves, going on to establish stable, harmonious families. The stable, harmonious, multi-generational family therefore arises in direct proportion as one man marries one woman who then stay married, and raise biological children who in turn do likewise. Every departure from this standard therefore reduces the likelihood of multi-generational stability. Furthermore, the stability of a society is directly dependent upon the degree to which such multi-generational families are present within that society.

Several years ago, the Vermont Supreme Court ruled in favor of three same-sex couples that had filed a lawsuit seeking marriage licenses in Vermont.[11] The state supreme court ruled that there is no difference between traditional marriages between man and woman and same-sex unions of two gay men or two lesbian women.[12] The court then directed the state legislature to "craft an appropriate means" of either legalized same-sex marriage or registered same-sex domestic partnership laws, "which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing scheme, and extend all or most of the same rights and obligations provided by the law to married partners."[13] The Vermont Legislature complied with the judicial demand and enacted civil unions for same-sex couples with the same legal status and rights as marriage.[14] *Baker* was the third case in four years where a state court had either ordered the legalization of same-sex marriage or entered a preliminary ruling in favor of same-sex marriage. In the earlier Hawaii and Alaska cases, the people of the states were able to overturn the radical judicial decisions by enacting constitutional amendments protecting the institution of marriage against demands for same-sex marriage.[15] But in Massachusetts, the procedure for amending

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11 Baker v. State, 744 A.2d 864 (Vt. 1999).

12 *Id.* at 886.

13 *Id.*

14 VT. STATS. ANN. tit. 15, § 1201 (Michie 2001).

15 *See* ALASKA CONST. art. I, § 25; HAW. CONST. art. I, § 23. Both amendments were passed following court decisions favorable to homosexual unions. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998)

the state constitution is so restrictive and anti-populist that it will take a long time to get an amendment there.[16]

In *Goodridge*, the Massachusetts Supreme Judicial Court voted by a slim majority of four to three to strike down Massachusetts's law which prohibited same-sex marriage.[17] The *Goodridge* court did so without the constitutional jurisdiction to decide marital issues, which is given by the state constitution only to the governor and legislature.[18] The court decided that the legislature—the governmental body with constitutional authority to decide this issue or delegate such a decision to the court—lacked even a rational basis to deny same-sex partners the right to marry, despite overwhelming evidence that the prohibition of same-sex marriage is not only rational but overwhelmingly required for the health, welfare, and general well-being of children.[19]

It does not take a world class psychologist or a sociologist to conclude that children are better off in a family with a father and a mother. What same-sex marriage endorses is fatherless and motherless families. Groupings of two men deny a mother to any child adopted by that coupling. Similarly, a relationship of two women denies a father to any child adopted by the women. Mothers and fathers are indispensable to the optimum family in which to raise children. Studies documenting the harm to children raised without a father or a mother are voluminous.[20]

Some say that the federal Defense of Marriage Act (DOMA) by itself will protect families and children.[21] To protect children, we need more than just DOMA. DOMAs—either federal or state—are not a fail-safe system. DOMA will be attacked under federal and state law, and some courts will begin to uphold those challenges. For example, in a case that I am working on in Nebraska[22] which attacks a state constitutional DOMA passed by the people of Nebraska,[23] the trial court upheld, in the

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(holding that a marriage statute violated the right to privacy provision in the Alaska Constitution); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that a marriage statute implicated the Hawaii Constitution's equal protection clause).

16 *See* MASS. CONST. amend. art. XLVIII, ch. 4.

17 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that limiting marriage to heterosexual couples violates the Massachusetts Constitution).

18 MASS. CONST. pt. 2, ch. 3, art. V.

19 *Goodridge*, 798 N.E.2d at 961.

20 *See infra* notes 27-40 and accompanying text.

21 *See* Defense of Marriage Act, 1 U.S.C. § 7 (Supp. 2004); 28 U.S.C. § 1738C (2003).

22 Citizens for Equal Prot. v. Bruning, No. 4:03CV3155 (D. Neb. filed Apr. 2003).

23 NEB. CONST. art. I, § 29. This section provides: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." *Id.*

face of a motion to dismiss, a ridiculous theory of bill of attainder.[24] This proves that courts will do any foolish thing to uphold the "right" to same-sex marriage. Without the protection of the FMA, this wave of momentary boutique philosophy will pass right over us.[25] Those that think that DOMA will not be struck down by some federal or state judge who is hell-bent on changing the law of marriage to conform to the latest same-sex marriage fad are foolish. Despite the overwhelming evidence of the rationality of preferring opposite-sex marriage over same-sex marriage, the judges in Massachusetts went ahead and struck down their laws in favor of an untested theory of same-sex marriage anyway.[26]

Turning back to the effect of same-sex marriage on children, the salient feature of a female union is its *fatherlessness*. *Fatherlessness* presents a host of difficulties. Children fare best when raised by their own father and mother. *Fatherlessness* is such a salient feature of a female coupling because research has overwhelmingly demonstrated that any and every departure from the standard, often unattainable, ideal of a biological father and mother married for an entire lifetime, raising their own children, is associated with quantifiable problems for children at every stage of the life cycle, persisting not only into the adulthood of the child but even into the next generation.

For example, 90% of all homeless and runaway children, 85% of all children with behavioral problems, 85% of all youth in prison, 71% of all high school dropouts, 63% of all youth suicide, and well over 50% of all teen mothers come from fatherless homes.[27] Not all these problems can be caused by *fatherlessness alone*, but it would be foolish to deliberately design a social structure that institutionalizes it. The same is true with respect to male unions and *motherlessness*, but the proportion of male unions with children is much smaller than female unions with children.[28] In addition, only recently has it occurred to anyone to question whether children actually need mothers, so that the research confirming they indeed do, convincing as it is, is smaller than for fathers whose necessity was first questioned some forty years ago.

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[24] Complaint at 14, *Citizens for Equal Prot.* (No. 4:03CV3155).

[25] Consider the (as of now) hypothetical situation where a lesbian couple from Pennsylvania flies to Massachusetts, obtains a marriage license, returns to Pennsylvania, and sues the United States or the Commonwealth of Pennsylvania to have the federal DOMA struck down.

[26] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[27] *U.S. Divorce Statistics*, *at* http://www.divorcemag.com/statistics/statsUS.shtml (last visited Mar. 2, 2005) (compiling statistics from the U.S. Census Bureau, National Center for Health Statistics, Institute for Equality and Marriage, and other organizations).

[28] G.C. Mireault et al., *Maternal Identity Among Motherless Mothers and Psychological Symptoms in Their Firstborn Children*, 11 J. CHILD & FAM. STUD. 287, 297 (Sept. 2002).

With respect to *fatherlessness*, quantifiable deficits occur in literally every area of development—socially,[29] psychologically,[30] educationally,[31] emotionally,[32] relationally,[33] medically,[34] even with respect to longevity,[35]

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[29] *See, e.g.*, Greg J. Duncan et al., *Economic Deprivation and Early Childhood Development*, 65 CHILD DEV. 296 (1994) (finding that female-headed households were a predictor of behavior problems even after adjusting for differences in family income); Abbie K. Frost & Bilge Pakiz, *The Effects of Marital Disruption on Adolescents: Time as a Dynamic*, 60 AM. J. ORTHOPSYCHIATRY 544 (1990) (finding that, in a study of white 15-year-olds, girls and boys from "disrupted" families engaged in more delinquent behavior, with the impact more profound among girls); M. Eileen Matlack et al., *Family Correlates of Social Skill Deficits in Incarcerated and Non-incarcerated Adolescents*, 29 ADOLESCENCE 117 (1994) (finding improved attainment of social skills and decreased delinquent or criminal behavior among adolescents from traditional families).

[30] *See, e.g.*, John Beer, *Relation of Divorce to Self-Concepts and Grade Point Averages of Fifth Grade School Children*, 65 PSYCHOL. REP. 104 (1989) (discovering lower scores on self concept for children from divorced homes); Virginia Smith Harvey, *Characteristics of Children Referred to School Psychologists: A Discriminant Analysis*, 28 PSYCHOL. IN SCHOOLS 209 (1991) (finding that family background was among "the variables that best discriminated" between those elementary school children referred to the psychologist and those not referred); Beverly Raphael et al., *The Impact of Parental Loss on Adolescents' Psychological Characteristics*, 25 ADOLESCENCE 689 (1990) (finding that adolescents from "disrupted" families reported more neuroticism, less extroversion and poorer perceptions of their bodies).

[31] *See, e.g.*, EDWARD W. BEAL & GLORIA HOCHMAN, ADULT CHILDREN OF DIVORCE: BREAKING THE CYCLE AND FINDING FULFILLMENT IN LOVE, MARRIAGE, AND FAMILY (1991) (finding that even a parent's death does not bring as much disruption to a family as divorce, which leads to lower educational attainment and less prestigious jobs); Paul R. Amato & Bruce Keith, *Parental Divorce and Adult Well-being: A Meta-Analysis*, 53 J. MARRIAGE & THE FAMILY 43 (1991) (finding that, in a study of over 81,000 individuals, one of the effects of fatherless homes was lower educational attainment for children); Donna Goldberg et al., *Which Newborns in New York City Are at Risk for Special Education Placement?*, 82 AM. J. PUB. HEALTH 438 (1992) (noting a strong link between the marital status of parents and the special education status of their children among black male third graders, with an even stronger link among other groups).

[32] *See, e.g.*, Darin R. Featherstone et al., *Differences in School Behavior and Achievement Between Children From Intact, Reconstituted and Single-Parent Families*, 27 ADOLESCENCE 1 (1992) (finding that, for young adolescents, living with both parents "clearly appears advantageous for social-emotional development"); Raphael et al., *supra* note 30 (finding that Australian adolescents in disrupted families were more likely to have consulted a health professional regarding emotional problems).

[33] *See, e.g.*, Angela K. Baker et al., *The Relation Between Fifth and Sixth Graders' Peer Related Classroom Social Status and Their Perceptions of Family and Neighborhood Factors*, 14 J. APPLIED DEVELOPMENTAL PSYCHOL. 547 (1993) (finding that "children who were rejected by their peers were more likely than average children to have experienced parental divorce"); Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, 106 POL. SCI. Q. 617 (1992) (stating that the trend toward divorce, single-parent families and out-of-wedlock births "leaves too many children with . . . fewer alternatives for establishing intergenerational relationships, and fewer adult role models"); Stephanie Schamess, *The Search for Love: Unmarried Adolescent Mothers' View of and Relationships With Men*, 28 ADOLESCENCE 425 (1993) (noting that "paternal unavailability" makes adolescent girls "particularly vulnerable to involvement with men who would treat them badly").

sexuality,[36] likelihood of cigarette use,[37] drug and alcohol abuse,[38] age of onset of sexual activity,[39] and likelihood of teen or earlier pregnancy.[40] *Fatherlessness* produces problems throughout the life cycle and into the following generation. Associated with fatherlessness in the teen years

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[34] *See, e.g.*, BEAL & HOCHMAN, *supra* note 31 (linking poorer physical health with adult children of divorce); Amato & Keith, *supra* note 31 (showing that, in comparison to adults from intact families, those from disrupted families experienced more problems with physical health); Claudia J. Coulton & Shanta Pandey, *Geographic Concentration of Poverty and Risk to Children in Urban Neighborhoods*, 35 AM. BEHAV. SCIENTIST 238 (1992) (finding that the greatest predictor for problems in health and development for children was illegitimate birth).

[35] *See, e.g.*, James O. Mason, *Reducing Infant Mortality in the United States Through 'Healthy Start'*, 106 PUB. HEALTH REP. 479 (1991) (showing that "the presence of both a mother and a father greatly enhances the life chances of infants and children"); Anders Romelsjö et al., *Protective Factors and Social Risk Factors for Hospitalization and Mortality Among Young Men*, 135 AM. J. EPIDEMIOLOGY 649 (1992) (finding, in a 14-year longitudinal study of Swedish men, that "relative hazards of hospitalization and death were significantly increased" among those who came from a disrupted family).

[36] *See, e.g.*, Jennifer Glass, *Housewives and Employed Wives: Demographic and Attitudinal Change, 1986*, 54 J. MARRIAGE & THE FAMILY 559 (1992) (finding that housewives and wives employed full-time have a pronounced attitudinal gap on questions "directly related to appropriate gender roles in the family and the impact of mother's employment on children"); Audrey E. Tolman et al., *Social Connectedness and Mothering: Effects of Maternal Employment and Maternal Absence*, 56 J. PERSONALITY & SOC. PSYCHOL. 942 (1989) (finding that college age daughters of mothers employed early in their lives regard themselves as "less feminine" than other young women); Katherine Trent & Scott J. South, *Sociodemographic Status, Parental Background, Childhood Family Structure, and Attitudes Toward Family Formation*, 54 J. MARRIAGE & THE FAMILY 427 (1992) (finding that adults who never lived with their fathers were likely to reject social norms, compared with those adults who had lived part or all their childhood with their fathers).

[37] *See, e.g.*, Hillevi M. Aro & Ula K. Palosaari, *Parental Divorce, Adolescence, and Transition to Young Adulthood: A Follow up Study*, 63 AM. J. ORTHOPSYCHIATRY 421 (1992) (finding a distinct propensity toward heavy drinking and smoking persisting among young adults from disrupted families); Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Abuse and Sexual Intercourse in Early Adolescence*, 52 J. MARRIAGE & THE FAMILY 171 (1990) (finding that adolescents from disrupted families are more likely to be involved in sexual activity, marijuana use, smoking and drinking).

[38] *See id.*

[39] *See, e.g.*, Flewelling & Bauman, *supra* note 37; Schamess, *supra* note 33 (noting that "girls reared by single mothers are significantly more likely to become sexually active in their teens than are those raised by two parents").

[40] *See, e.g.*, John O. G. Billy & David E. Moore, *A Multilevel Analysis of Marital and Nonmarital Fertility in the U.S.*, 76 SOC. FORCES 977 (1992) (finding that unmarried women are especially likely to bear children if they live in an area where a relatively high proportion of the women are separated or divorced); Lawrence L. Wu & Brian C. Martinson, *Family Structure and the Risk of a Premarital Birth*, 58 AM. SOC. REV. 210 (1993) (finding that "being in a non-intact family at age 14 significantly increases the risk of a premarital birth" for whites, blacks and Hispanics).

are an increased likelihood of every sexual activity, drug use, delinquency, and much more; drug use often persists into adulthood.

In 2004, a Federal Marriage Amendment to the United States Constitution was procedurally rejected by the Senate.[41] The FMA would have prohibited federal and state judges from making decisions about marriage in place of the voters of the fifty states. The United States Supreme Court in *Lawrence v. Texas*,[42] and the Massachusetts Supreme Judicial Court in *Goodridge*,[43] made it clear that the federal and state courts are ready to usurp the power to decide the definition of marriage which has been held by the citizens of the states for hundreds of years.

In *Lawrence*,[44] the United States Supreme Court decided to legitimize sodomy, which has been legislatively proscribed throughout the United States for hundreds of years; the Court had itself only recently upheld the constitutionality of a sodomy statute.[45]

These decisions are way outside the mainstream of legal thought and are disconnected from our common law and legislative traditions. They also ignore the facts before these courts. It is important to note that men and women are more unlike by a factor of 2.5 than the number of differences between the human genome and the chimpanzee genome. The sexes are not fungible. A community made up exclusively of one sex is different than a community composed exclusively of the other sex. All of this must be taken into consideration in making a decision about tearing down some 4,000 years of our most important human tradition.

Neither male homosexuals nor female lesbians have a tradition of monogamy which, again, makes their claims of stability disingenuous and adversely affects any children that they have in their care. One study of male homosexual couples showed that homosexuals had sex with someone other than their partner in 66% of their relationships, rising to 90% if the relationship endured over five years.[46] These differences between male and female relationships and homosexual and heterosexual relationships were never considered by the court in *Goodridge*, which was patently ignorant of all of these important facts mentioned above.[47] Courts are not bodies set up to hear sociological, moral, and medical evidence regarding the best interests of children or

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41 *See* 150 CONG. REC. S8150 (daily ed. July 15, 2004).

42 Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas statute criminalizing deviate sexual intercourse was unconstitutional).

43 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

44 *Lawrence*, 539 U.S. at 558.

45 Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 558.

46 *See, e.g.*, JOSEPH HARRY, GAY COUPLES (1984).

47 The *Goodridge* dissent criticizes the majority on this basis. *Goodridge*, 798 N.E.2d at 998-1000 (Spina, J., dissenting).

the importance of maintaining an institution that has held us in such good stead for over 4,000 years. Only the legislatures can hold hearings to obtain and organize these materials. Only the legislatures can make these very important decisions regarding the institution of marriage.

The FMA is essential to shore up and work together with DOMA to hold marriage together. Without it, the courts will eventually overrun a 4,000-year-old institution that has brought stability, growth, love, culture, and education to adults and children alike. Without the FMA, it is clear that the attempt to destroy marriage as we have known it will ultimately be successful. If we want to maintain our families, we must be willing to fight for them. Those seeking to deconstruct marriage will surely fight, and without our opposition, will be successful.

STATUS, SUBSTANCE, AND STRUCTURE: AN INTERPRETIVE FRAMEWORK FOR UNDERSTANDING THE STATE MARRIAGE AMENDMENTS

*Joshua K. Baker**

I. INTRODUCTION

In November 2003, the Massachusetts Supreme Judicial Court put the nation on notice when it ruled that Massachusetts marriage laws were "rooted in persistent prejudices against persons who are . . . homosexual," and that, while the state constitution "cannot control such prejudices [,] . . . neither can it tolerate them."[1] Within a year of the Massachusetts court's four to three decision in *Goodridge v. Department of Public Health*,[2] Congressional leaders were seriously discussing a marriage amendment to the United States Constitution[3] and voters in thirteen states responded by overwhelmingly approving state constitutional amendments that define marriage as the union of husband and wife, bringing the national total of state marriage amendments to seventeen.[4] Additional states appear likely to do so in 2005 and 2006.[5]

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* Institute for Marriage and Public Policy.

1 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

2 *Id.*

3 *See, e.g.*, S.J. Res. 40, 108th Cong. (2004).

4 Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, *at* http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=true (Nov. 3, 2004). Overall, state marriage amendments were considered in at least thirty-one states in 2004 (including legislative proposals in twenty-six states and initiative petitions in six). *Id.* Thirteen of those amendments appeared on the ballot, while three additional measures were given initial approval but require approval again in the next legislative session before being placed on the ballot. *Id.* In each of these states, the amendments passed by wide margins, ranging from 12% (56% to 44% in Oregon) to 72% (86% to 14% in Mississippi). Cheryl Wetzstein, *Eleven States Uphold Traditional Marriage*, WASH. TIMES, Nov. 3, 2004, at A01. The National Gay and Lesbian Task Force calculates that 20.6 million Americans voted on a marriage amendment on Nov. 3, 2004, roughly one in five American voters, and cumulatively, the amendments passed by a two to one margin (67% to 33%), with nearly fourteen million Americans voting in favor. Press Release, National Gay and Lesbian Task Force, *Anti-Gay Marriage Amendments Pass in 11 States*, *at* http://www.thetaskforce.org/media/release.cfm?releaseID=756 (Nov. 3, 2004).

5 Brad Knickerbocker, *Political Battles Over Gay Marriage Still Spreading*, CHRISTIAN SCI. MONITOR, Nov. 29, 2004, at 01; Peterson, *supra* note 4.

Despite the breadth and diversity of support for state marriage amendments, the amendment process was often contentious. With twelve different texts among the thirteen amendments adopted in 2004, debate often swirled around the meaning (and legal consequences) of the amendments. *The New York Times*, in language reminiscent of the *Goodridge* decision, lumped all the amendments together, condemning them collectively as "mean-spirited measures," and "sweeping bursts of bigotry," aimed only at "enshrining discrimination in . . . state constitutions."[6] Others raised more specific concerns about the scope of particular amendment texts, suggesting that they might work to cut off hospital visitation rights, private employee benefits, or medical decision-making authority.[7]

A definitive interpretation of each amendment is beyond the scope of this essay, especially in light of the fact that none of the interpretive questions raised in political debate have yet been considered in litigation. This essay, rather, analyzes the language of the seventeen state marriage amendment texts, making a preliminary attempt to classify them based on likely interpretation and consequences. My goal is to clarify the options available to policymakers while offering some specific recommendations.

The marriage amendments come in three broad categories: status (or definitional) amendments, substantive amendments, and structural amendments. The status amendments are largely one-sentence amendments, defining marriage as the union of a man and woman without specifically addressing the legal incidents ("benefits") of marriage. These amendments state, for example, "only a marriage between one man and one woman is valid or recognized as a marriage in this state,"[8] and have been adopted in six states (Alaska, Mississippi, Missouri, Montana Nevada, and Oregon).

The ten substantive amendments also define marital status, but then add a second sentence protecting (to varying degrees) the unique legal position of marriage by limiting the extension of marital rights and obligations to unmarried couples. For example, the Kentucky amendment states:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status

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[6] Editorial, *Marriage and Politics*, N.Y. TIMES, Oct. 29, 2004, at A24.

[7] *See, e.g.*, Jim Siegel, *Partner Benefits Could be Curtailed*, CINCINNATI ENQUIRER, Oct. 9, 2004, at 1B (citing Ohio Attorney General Jim Petro and Capital University Law Professor Mark Strasser).

[8] MONT. CONST. art. XIII, § 7.

> identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.[9]

Unlike the status amendments, these substantive amendments vary widely in scope and text from state to state. These variations in text suggest substantive differences in the degree of protection (and likely effectiveness) these amendments offer.

The structural amendment, adopted only in Hawaii, is directed to the separation of powers: "The Legislature shall have the power to reserve marriage to opposite-sex couples."[10] It does not adopt any particular definition of marriage. Rather, the structural amendment specifically grants the legislature authority to recognize marriage as the union of man and woman.[11]

II. STATUS AMENDMENTS

Six states have adopted status amendments, defining marriage as the union of a man and woman with relatively minor variations in text or effect from state to state.[12] Each contains a reference both to validity (of in-state marriages) and recognition (of foreign marriages). The Alaska amendment language is typical of these texts, adding just nineteen words to the Constitution: "To be valid or recognized in this State, a marriage may exist only between one man and one woman."[13] Other amendments were patterned after the Alaska text.

A. Textual Variations

Distinctions among the six status amendments are minor, such as the substitution of "shall" for "may,"[14] "a man and a woman" or "a male and female person" in place of "one man and one woman,"[15] and "recognized or given effect" instead of "valid or recognized."[16] Three of the amendments reverse the syntax, giving added emphasis to the

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9 KY. CONST. § 233a.

10 HAW. CONST. art. I, § 23.

11 Peterson, *supra* note 4.

12 These states include Alaska, Mississippi, Missouri, Montana, Nevada, and Oregon. *See* ALASKA CONST. art. I, § 25; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEV. CONST. art. I, § 21; 2004 Miss. Ballot Measure 1; 2004 Or. Ballot Measure 36.

13 ALASKA CONST. art. I, § 25.

14 Although some amendments use the permissive "may" rather than the imperative "shall," when limited by the word "only," the two variations ("may . . . only" and "shall . . . only") are virtually indistinguishable. If any distinction were to be made between the two, it would be the argument that the use of "shall" creates an affirmative duty to recognize opposite-sex marriages in the state, while the permissive "may" is meant to leave the legislature authority not to recognize marriage at all.

15 MO. CONST. art. I, § 33 ("a man and a woman"); NEV. CONST. art. I, § 21 ("a male and female person"); 2004 Miss. Ballot Measure 1 ("a man and a woman").

16 NEV. CONST. art. I, § 21.

marriage idea by stating "only a marriage" between one man and one woman shall be valid or recognized.[17]

The insertion of "one man and one woman" instead of "a man and a woman" may indicate a desire to also preclude polygamy. Other vehicles should be considered, however, to address the question of polygamy. While both wordings would likely preclude polyamorous (group) marriages, it is unclear that either would prevent an individual from entering multiple marriages.[18]

The Mississippi amendment is distinctive due to its length, spelling out the details of interstate-marriage recognition.[19] Whereas the other states combine the issues of in-state validity and interstate recognition, the Mississippi Legislature separated the two issues, drafting a two-sentence amendment in which the first sentence addresses the validity of in-state marriage licenses ("Marriage may take place and may be valid under the laws of this state only between a man and a woman."), while the second sentence addresses interstate recognition ("A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state."). The shorter and more common "valid or recognized" appears sufficient to reach the same result.[20]

Prior to the adoption of the Oregon amendment, Oregon law did not contain an explicit policy regarding the interstate recognition of same-sex unions. Invoking the "public policy exception" to the general rule requiring that full faith and credit be given to marriages contracted in sister states, the drafters of the Oregon amendment inserted a reference

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[17] The three amendments that lead with the idea of marriage before speaking of its validity or recognition include Montana, Nevada, and Oregon. MONT. CONST. art. XIII, § 7; NEV. CONST. art. I, § 21; 2004 Or. Ballot Measure 36.

[18] Historically, polygamous marriages have involved one man entering into separate marriages with each of several women. *See, e.g.,* Reynolds v. United States, 98 U.S. 145 (1878). Although one man may have taken several wives, the wives were not deemed married to one another. It is unlikely that the text of any of the marriage amendments would prevent one man from entering into multiple marriages simultaneously.

[19] H. Con. Res. 56 (Miss. 2004) (2004 Miss. Ballot Measure 1).

> Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.

Id.

[20] *Id.*

to the public policy of Oregon.[21] The Oregon text also includes a reference to the political subdivisions of the state—a response to the actions of county officials who, in the spring of 2004, began issuing marriage licenses to same-sex couples.[22] The reference to political subdivisions sent a clear message to local politicians in the state, but likely added little by way of legal effect because marriage is already governed by state law and not subject to patchwork redefinition at the local level.[23]

B. Legal Effects

What do the status amendments do? The six status amendments have three primary legal effects: (1) they define marriage for all purposes of state law; (2) they insulate that definition from both judicial and legislative revision; and (3) they establish policy with respect to interstate marriage recognition. As a secondary matter, the status amendments also reduce (but do not eliminate) the potential for state courts to require the extension of marital benefits to unmarried couples as the Vermont Supreme Court did in *Baker v. State*.[24]

1. Defining marriage

Each of the status amendments requires that, to be valid under state law, marriage must be between a man and a woman. That is, only the union of a man and a woman is eligible for a marriage license issued under the law of the state, and licenses issued to two men or to two women are not valid. In this respect, the status amendments do not create new marriage policy, but rather restate existing policy recognizing marriage as the union of a man and a woman.

2. Protecting marriage

Because the definition of marriage contained in the marriage amendment merely restates existing law, the significance of the status amendments is found in the procedural protections that these amendments place around existing marriage policy. Whereas a common law or statutory understanding of marriage is subject to revision by

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[21] 2004 Or. Ballot Measure 36 ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."); *see also* NEV. CONST. art. I, § 21.

[22] David Austin & Laura Gunderson, *Same-Sex Weddings Begin*, OREGONIAN, Mar. 3, 2004, at A01.

[23] The reference to political subdivisions is likely more significant when addressing the legal incidents of marriage, and may be used to preclude recognition of domestic partnerships at the county and municipal level. *See, e.g.*, OHIO CONST. art. XV, § 11 ("This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.").

[24] Baker v. State, 744 A.2d 864 (Vt. 1999).

either legislative action or (of greater concern to many proponents) judicial decision,[25] a constitutional definition of marriage insulates that definition from both judicial and legislative review. By inserting a definition of marriage into the state constitution, the people of a state ensure that definition will not be repealed without their active participation via a subsequent statewide referendum.[26]

3. Recognizing foreign marriages

Each status amendment also addresses the question of foreign marriage recognition such that same-sex marriages, even if validly contracted in a foreign jurisdiction, are not recognized within the state. Only in Oregon did this constitute a new policy statement; in the other five states, the same policy had already been expressed by statute. The right of states to decline recognition of foreign marriages contrary to the public policy of the forum state is well established.[27] In setting its marriage recognition policy into the state constitution, the people of the state both clearly articulate public policy on the issue and again insulate that policy from both legislative and judicial revision, requiring the statewide referendum of a subsequent constitutional amendment to repeal the policy.[28]

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[25] In Alaska and Oregon, the status amendments were in direct response to pending litigation threatening to overturn the statutory understanding of marriage, while the other status amendments were in response to the perceived threat of future litigation. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); Li v. State, No. 0403-03057, 2004 WL 1258167 (Multnomah Co. Or. Cir. Ct. Apr. 20, 2004).

[26] Throughout this article, when I refer to the insulation of state marriage policy from judicial review, it should be noted that this is a reference to review on state constitutional grounds. The inability of a state constitutional amendment to insulate state law from federal constitutional (or statutory) review highlights the additional need for some form of federal constitutional amendment in order to completely safeguard the power of states to retain a traditional definition of marriage.

[27] *See, e.g.*, *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts* Goodridge *Decision and the Judicial Invalidation of Traditional Marriage Laws: Hearing Before the Constitution, Civil Rights, and Prop. Rights Subcomm. of the S. Judiciary Comm.*, 108th Cong., 2004 WL 406849 (Mar. 3, 2004) (testimony of Lea Brilmayer); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 37 (1998) ("The public policy exception, which protects states against the application of foreign laws that are repugnant to the principles upon which the forum state is grounded, is rooted in the principles of federalism and the protection of sovereignty which inheres in the Tenth Amendment.").

[28] This does not preclude the possibility of a finding that recognition is mandated by the Full Faith and Credit Clause of the U.S. Constitution, but rather prevents state courts from recognizing foreign same-sex marriages as a matter of state law or policy.

4. Courts requiring extension of marital benefits

Status amendments also mitigate (and arguably eliminate) the legal basis for imposition of a marriage-like status for unmarried couples by judicial ruling, at least insofar as that ruling rests on the premise that same-sex couples are unconstitutionally denied access to marriage. In *Baker v. State*, the Vermont Supreme Court ruled that

> the laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts.[29]

As a remedy, the court gave the legislature the option of rewriting the marriage laws to include same-sex couples or creating a parallel status for same-sex couples with all the rights, benefits, and obligations of marriage.[30] While the legislature ultimately chose the latter option,[31] the judicial mandate was premised on the unconstitutionality of the Vermont marriage laws. Without such a finding of unconstitutionality, there would have been no finding of an injury and thus no need for civil unions to remedy that injury.

This precise question has been raised recently in Oregon and Montana. Prior to the November 2004 elections, in which Oregon and Montana voters approved status amendments, parties in pending litigation sought to require the extension of spousal benefits to unmarried couples. In Oregon, this took the form of a direct challenge to the Oregon marriage law, after county officials in Multnomah County (Portland) began issuing marriage licenses to same-sex couples in March of 2004.[32] The trial judge found the marriage law to "impermissibly classify on the basis of sexual orientation, the repercussions of which deny same-sex couples certain substantive benefits."[33] Explicitly adopting the path of the Vermont Supreme Court, the Oregon circuit court stayed its decision, giving the legislature ninety days after the start of the next legislative session in which to adopt a comprehensive system of marital benefits and responsibilities for same-sex couples.[34] At the time of publication, and following the approval of the Oregon

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[29] *Baker*, 744 A.2d at 884.

[30] *Id.* at 886.

[31] VT. STAT. ANN. tit. 15, §§ 1201-07 (2002).

[32] Li v. State, No. 0403-03057, 2004 WL 1258167, at *1 (Multnomah Co. Or. Cir. Ct. Apr. 20, 2004).

[33] *Id.* at *7.

[34] *Id.* at *8.

marriage amendment, the case is pending before the Oregon Supreme Court.[35]

In Montana, the plaintiffs were state university system employees seeking access to employee-spouse benefits.[36] Unlike the Oregon litigation, the Montana plaintiffs explicitly disavowed any intent to challenge the marriage law.[37] Following the adoption of the Montana amendment, the Montana Supreme Court issued a narrow ruling requiring the extension of marital benefits to unmarried same-sex couples as long as there existed a process by which unmarried opposite-sex couples could obtain the benefits by simply signing an affidavit.[38]

Some have argued that a status amendment goes further, also preventing the state *legislature* from enacting a new marriage-like status for same-sex couples (e.g., "civil unions") which would entitle (or subject) them to the legal benefits and obligations of marriage.[39] In other states, proponents of the status amendments have explicitly disavowed this intent. To the extent that such interpretation hinges on the intent of the people, it is possible that the voters in Alaska may have intended such a result.[40] Conversely, in the other status amendment states, where the amendments were adopted after the creation of civil unions in Vermont, such an intent is doubtful.[41]

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[35] Li v. State, 95 P.3d 730 (Or. 2004).

[36] Snetsinger v. Mont. Univ. Sys., 104 P.3d 445, 448 (Mont. 2004).

[37] *See id.* at 449.

[38] *Id.* at 453. The court construed the University System's affidavit of common law marriage as a means by which unmarried opposite-sex couples could (falsely) swear to their marital status, thereby obtaining benefits. *Id.* at 451. In the absence of such an affidavit procedure, or if the affidavit were more narrowly drawn so as to clearly encompass only married couples, the court did not suggest the restriction of spousal benefits to married couples would suffer any constitutional defect. *Id.* at 453.

[39] This is essentially the argument being made in California, where an initiative statute defining marriage as the union of a man and a woman was adopted prior to the creation of Vermont civil unions. *See* Lee Romney, *Judge Backs Partner Rights Law*, L.A. TIMES, Sept. 9, 2004, at B4. Plaintiffs in the case argue that, while the legislature may extend benefits to unmarried couples, it cannot create a legal status identical to marriage in all but name. *Id.* A trial judge rejected this argument, and the case is currently pending on appeal. *Id.*

[40] At the time the Alaska marriage amendment was adopted (November 3, 1998), "civil unions" had not yet been created in Vermont, and there was not yet a public debate over the separation of marital status and marital benefits.

[41] Prior to the Vermont Supreme Court decision in *Baker*, there had been no legal segregation of marital status from marital benefits. Thus, when Alaska voters defined "marriage" as the union of a man and woman, it is likely that they intended to include both marital status and the legal incidents of marriage because they did so prior to *Baker*. Because of the way the public debate evolved after *Baker*, however, the 2004 marriage debate clearly reflected the separation of questions of status and legal incidents, such that the four states adopting status amendments in 2004 should be understood as addressing only the status of marriage while leaving the question of legal incidents to the legislature.

With only minor variation from state to state, any of the status amendments are likely to fulfill the same basic functions of marriage definition and recognition. With little substantive difference, there is much to be said for simplicity: "Only marriage between a man and a woman is valid or recognized in this state."

III. SUBSTANCE AMENDMENTS

In late 1999, the Vermont Supreme Court ruled that the Vermont Constitution required the benefits of marriage be extended to same-sex couples.[42] In response to the Court's order, the Vermont Legislature created the new legal relationship of "civil union" for same-sex couples, ascribing to that union all the legal incidents (rights, benefits, and responsibilities) of marriage.[43] Commentators on both sides of the marriage debate described these new civil unions as "same-sex marriage by another name,"[44] or "marriage lite,"[45] as the Legislature maintained a nominal distinction between civil unions and marriage.[46]

When Vermont formally segregated the legal status of marriage and the legal incidents of marriage, those drafting marriage amendments began seeking ways to address this new development. As a spokesman for the Nebraska amendment campaign told *The New York Times*, "Because of the action in Vermont, we really feel we've been forced to adopt this language to close this loophole."[47] In 2000, Nebraska became the first state to consider and approve a marriage amendment which both defines marriage and explicitly limits the marriage-like recognition of other relationships.[48]

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[42] Baker v. State, 744 A.2d 864 (Vt. 1999).

[43] VT. STAT. ANN. tit. 15, § 1201 (2002).

[44] David Orgon Coolidge, *The Civil Truth About "Civil Unions"*, THE WKLY. STANDARD, June 26, 2000, at 26.

[45] Julie Deardorff, *Vermont is Front Line of Gay Marriage Fight*, CHI. TRIB., Apr. 3, 2000, at N1.

[46] VT. STAT. ANN. tit. 15, § 1201 (2002) ("'Marriage' means the legally recognized union of one man and one woman.").

[47] Pam Belluck, *Nebraskans to Vote on Most Sweeping Ban on Gay Unions*, N.Y. TIMES, Oct. 21, 2000, at A9. Various state legislatures have considered legislation to insert "civil unions" into their marriage protection statutes, though no court has required recognition of civil unions where same-sex marriage recognition is precluded. Similarly, no court has held that unmarried couples are entitled to the incidents of marriage where a constitutional amendment already defines marriage. In Vermont, civil unions were the remedy to a marriage statute the court found to be underinclusive and discriminatory. In the absence of a constitutional defect in the marriage statute, however, there was no independent requirement that the state provide the incidents of marriage to unmarried couples.

[48] Apart from the equal protection concerns, which have already been raised in litigation, the Nebraska amendment presents a good example of the difficulty facing

By 2004, nine of the thirteen marriage amendments on the ballot linked the status and legal incidents of marriage, limiting (to varying degrees) the scope of marital benefits to which courts or legislatures could extend to unmarried couples.[49] Unlike the status amendments, there is no single approach or text that has become standard among these substance amendments. While each of the ten substance amendments contains a first sentence defining marriage as the union of a man and a woman, and thus affords the same procedural protections as the status amendments, the substance amendments diverge widely with respect to the second sentence.

A. Textual Variations

The first of the substance amendments, the Nebraska amendment, followed a "relationship model" describing (and naming) specific relationships which would be denied recognition in Nebraska. The Nebraska amendment states in part: "The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."[50] This approach, which singled out same-sex relationships, has been recently challenged on equal protection grounds in federal court, not because same-sex relationships are denied the protections of marriage, but under an argument that the amendment treats them differently than other (heterosexual) non-marital relationships.[51]

Most of the recently adopted substance amendments have instead followed a "recognition model," imposing recognition limitations which apply equally to all forms of non-marital unions. For example, the Louisiana amendment reads in part: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall

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amendment drafters who seek to address the various names under which the incidents of marriage could be assigned to another relationship.

[49] *See* GA. CONST. art. I, § IV, para. I; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; UTAH CONST. art. I, § 29; 2004 Ark. Ballot Measure 3, *available at* http://www.sos.arkansas.gov/elections/elections_pdfs/2004/amendments/04amendsforballot3.pdf [hereinafter Ark. Ballot]; 2004 N.D. Ballot Measure 1. In addition, each of the three amendments which were given initial approval in 2004 fall within this category of substance amendments. *See* 2004 Mass. H. 3190; 2004 Tenn. H.J.R. 990; 2004 Wis. A.J.R. 66. Of these, the Massachusetts amendment is unique in that, while the other substance amendments seek to preserve the connection between the status of marriage and its legal incidents, the Massachusetts amendment formalizes the segregation of status and legal incidents, creating a separate legal status of "civil union" entitled to all the legal rights, benefits, and responsibilities of marriage. 2004 Mass. H. 3190.

[50] NEB. CONST. art. I, § 29.

[51] Citizens for Equal Prot. v. Bruning, No. 4:03CV3155 (D. Neb. filed Apr. 2003), *complaint available at* http://www.domawatch.org/cases/nebraska/citizensforequalprotectionvag/complaint.pdf (last visited Mar. 2, 2005).

not be valid or recognized."[52] Of the nine substance amendments adopted in 2004, eight followed the recognition model while the Georgia amendment adopted something of a hybrid approach, combining elements of both the relationship and recognition models.[53]

1. The Relationship Model

The relationship model, adopted in Nebraska in 2000, defines a category of relationships and then declares that any relationship within that category will not be recognized for any purpose under state law. In Nebraska, the amendment drafters defined the relationship as "[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationships," and declared that such relationships "shall not be valid or recognized in Nebraska."[54]

2. The Recognition Model

In contrast to the relationship model, the "recognition model" establishes a definition of marriage and then limits the scope or nature of recognition that may be extended to any other (*i.e.*, any non-marital) relationship. For example, the North Dakota amendment states, "Marriage consists only of the legal union between a man and a woman. No other domestic relationship, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."[55] This approach, adopted in eight states (Arkansas, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, and Utah) in 2004, preserves the unique status of marriage in the law by regulating the degree of recognition (varying from state to state) to which other relationships may be entitled on their own merits. In regulating the recognition of non-marital relationships, some states have prohibited the creation of a new legal status which is "identical or substantially similar to that of marriage,"[56] while other states have focused on the legal treatment of non-marital relationships, stating that non-marital relationships may not be given "the same or substantially equivalent legal effect" as marriage.[57] Two states specifically address the "legal incidents of marriage," reserving those legal incidents to the marital relationship.[58]

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52 LA. CONST. art. 12, § 15.

53 GA. CONST. art. I, § IV, para. I.

54 NEB. CONST. art. I, § 29.

55 2004 N.D. Ballot Measure 1. The Utah amendment is identical. Utah Const. art. I, § 29.

56 KY. CONST. § 233a; LA. CONST. art. 12, § 15.

57 2004 N.D. Ballot Measure 1; UTAH CONST. art. I, § 29..

58 GA. CONST. art. I, § IV, para. I; OKLA. CONST. art. II, § 35.

3. The Hybrid Model

Although no other state has adopted Nebraska's relationship model in full, the Georgia amendment is something of a hybrid between the relationship and recognition models. The Georgia amendment states in part, "No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage," and singles out unions between persons of the same sex; however, rather than denying recognition across the board as the Nebraska amendment did, the Georgia amendment simply states that such unions are not "entitled to the benefits of marriage."[59] By contrast, a hybrid amendment proposed (but not yet adopted) in Massachusetts singles out same-sex relationships for recognition in a "civil union," and declares that parties to a civil union are entitled to *all* the legal incidents of marriage.[60]

B. Legal Effects

Like the status amendments, each of the substance amendments defines marriage and protects it from both judicial and legislative redefinition. They also establish a clear policy with respect to the recognition of foreign same-sex marriages, usually employing the phrase "valid or recognized." The substance amendments differ in that they also establish greater limitations on the capacity of courts and legislatures to create a marriage-like alternative status for unmarried couples.

1. Spousal benefits and recognition for unmarried couples

The core distinctive of the substance amendments is their explicit treatment of spousal status, benefits, or recognition for unmarried couples. Among the various amendments, there is a spectrum of recognition to which non-marital relationships may be entitled. At one end of the spectrum is an amendment denying unmarried couples *any* of the legal status, benefits, or obligations of marriage (*i.e.*, unmarried couples may receive none of the legal incidents of marriage). At the opposite end is an amendment denying unmarried couples *all* of the legal status, benefits, and obligations of marriage (*i.e.,* unmarried couples cannot receive every incident of marriage). Most of the marriage

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[59] GA. CONST. art. I, § IV, para. I. This begs the question of what benefits are "benefits of marriage." Many benefits that attach to marriage are not unique to marriage (*e.g.*, joint property ownership, medical decision making). *See infra* Part III.B.3. Nor are such benefits static over time. *Id.* Thus, the most plausible reading of this amendment is that it protects the unique nature of marital benefits, but leaves the definition and regulation of marital benefits in the hands of the legislature, which in turn means that the legislature has authority to expand (or contract) a particular benefit such that it is no longer a unique benefit of marriage. *Id.*

[60] 2004 Mass. H. 3190.

amendments adopted to date fall somewhere between these two ends of the spectrum.

The Nebraska amendment is perhaps the broadest of the substance amendments. It denies all legal recognition of marriage-like status to same-sex couples, including "civil union, domestic partnership or other similar same-sex relationship[s]."[61] A number of status amendment states adopted a narrower approach, declaring that non-marital relationships are not entitled to status (legal recognition) or treatment (benefits and obligations) which is "identical or substantially similar" (Kentucky, Louisiana, and Arkansas)[62] or "the same or substantially equivalent" (Utah and North Dakota)[63] to that of marriage. Each of these five recognition amendments permit some (likely significant) form of recognition for same-sex relationships if the legislature should so choose, yet they preclude the recognition of full spousal status for unmarried couples such as that created by Vermont-style "civil unions" or California-style "domestic partnerships."[64]

Other amendments in the recognition model draw the benefit boundaries differently. Whereas the Louisiana and Utah approaches state that non-marital relationships are not entitled to *all* (or almost all) the incidents of marriage, and the Nebraska amendment denies same-sex relationships *any* legal recognition or marital benefits, the amendments adopted in Ohio, Michigan, Oklahoma and Georgia are more nuanced.

The Ohio amendment precludes the state (and its political subdivisions) from creating a "legal status . . . that intends to approximate the design, qualities, significance, or effect of marriage,"[65] while the Michigan text states that no other relationship is to be "recognized as a marriage or similar union for any purpose."[66] The Ohio

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61 NEB. CONST. art. I, § 29.

62 KY. CONST. § 233a; LA. CONST. art. XII, § 15; 2004 Ark. Ballot Measure 3.

63 UTAH CONST. art. I, § 29; 2004 N.D. Ballot Measure 1.

64 It would remain for the courts to determine at what point a legal status acquires a level of recognition making it "identical or substantially similar" to marriage. Local domestic partnership ordinances would likely not run afoul of the amendments since the scope of recognition is both local (as opposed to statewide) and limited to specific legal incidents (as opposed to invoking the full panoply of domestic relations law).

65 OHIO CONST. art. XV, § 11. It has been suggested that the Ohio amendment more properly falls within the relationship model since it precludes recognition of any legal status for non-marital relationships which "intends to approximate the design, qualities, significance, or effect of marriage." *Id.* Any ambiguity should be resolved, however, in favor of the recognition model, in that the verb "intends" must relate to the singular noun "status" rather than the plural "relationships." *See id.* Thus, the Ohio amendment should be read to preclude recognition of a legal status that approximates marriage, rather than precluding recognition of relationships which approximate marriage.

66 MICH. CONST. art. I, § 25.

text clearly bars the creation of any new legal status patterned after marriage, including not only civil unions but also domestic partnerships and other marriage-like relationships. It says nothing, however, with respect to specific benefits, ostensibly allowing the legislature to allocate benefits on the basis of household or other relevant characteristics. The Michigan text simply states that no relationship (other than marriage) is to be recognized as a "marriage or similar union" for any purposes of state law.[67] Both proponents and opponents of the Michigan measure agree that "similar union" precludes not only civil unions, but also domestic partnership recognition by state and local governments, a view with which Michigan Attorney General Steve Cox recently concurred.[68]

The amendments adopted in Georgia and Oklahoma focus on the benefits of marriage. If a particular benefit can be described as a "legal incident of marriage," unmarried couples have no legal right to that benefit. Rather than lock in place a particular definition of marital benefits, however, the amendments leave that question untouched, implicitly leaving that authority with the legislature. Thus, these amendments fall between the two extremes on the recognition spectrum, reserving the incidents of marriage to married couples, but leaving the legislature authority to expand or contract the scope of a particular benefit (*e.g.*, health insurance) such that it is no longer a uniquely marital benefit and applies equally to other relationships.

2. Impact on private actors

One of the most significant political concerns surrounding the substance amendments is that the amendments would impinge upon the ability of individuals to enter into private employment contracts, estate planning documents, and other legal agreements. The simplest way to address this concern is to specifically limit the amendment to state actors.[69] For example, the Georgia text applies only to recognition "by

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[67] *Id.*

[68] Dawson Bell, *Questions, Answers on Michigan Gay Marriage Issue*, DETROIT FREE PRESS, Sept. 13, 2004, *at* http://www.freep.com/news/mich/gaymarriage13e_20040913.htm (last visited Mar. 2, 2005); Mich. Att'y Gen. Op. 1717 (March 16, 2005) (concluding that the Kalamazoo domestic partnership benefits ordinance "accords 'domestic partnerships' a 'marriage-like' status," contravening the recently adopted provisions of article I, section 25 of the Michigan Constitution). The Michigan Attorney General also noted that "[t]he provisions of benefits itself does not violate the amendment, but the benefits cannot be given based on the similarity of the union or domestic partnership agreement to a legal marriage." Mich. Att'y Gen. Op. 1717.

[69] Potential ambiguity over the scope of the amendment can arise from passive sentence construction. To illustrate, compare "no other relationship shall be recognized as the legal equivalent of a marriage" with "this state shall not recognize any other relationship as a marriage or its legal equivalent." The second example is clearly limited, by its terms, to state actors, eliminating the potential ambiguity which could arise with the first example.

this state," while the Ohio amendment reaches "[t]his state and its political subdivisions."[70] The Louisiana and Oklahoma texts deal only with the interpretation of "this constitution or any state law," leaving private actions untouched.[71] Amendment drafters in several other states mitigated these concerns by focusing on the recognition of a "legal status," in place of terms such as "union" or "relationship."

Even in the handful of states where the language is not specifically limited to state action, courts are unlikely to interpret any ambiguity as an expansive intrusion upon private actors.[72] The Utah and North Dakota amendments, in referring to the treatment of non-marital "domestic unions," speak of their "legal effect," apparently reflecting the intent of the drafters to address only the governmental recognition of such unions.[73] In Michigan, a recent attorney general opinion advises that the amendment should not be construed as reaching private actors: "Its placement in Article 1 of Michigan's Constitution is legally significant, however, in that Article 1, entitled "Declaration of Rights," generally articulates limits on *government* conduct."[74]

3. Equal protection challenges

Perhaps the most significant concern of state amendment drafters is the possibility that a marriage amendment, after having been approved by the voters, would later be ruled to be a violation of the United States Constitution. The Equal Protection Clause has to date been the most common source of federal constitutional challenge to state marriage laws.[75] Federal lawsuits challenging the Nebraska and Oklahoma amendments are currently pending in district court, with the plaintiffs in both cases claiming equal protection violations.[76]

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[70] GA. CONST. art. I, § IV, para. I; OHIO CONST. art. XV, § 11.

[71] LA. CONST. art. XII, § 15; OKLA. CONST. art. II, § 35.

[72] In an analogous case, the United States Supreme Court rejected the government's attempt to prosecute private actors for an infringement of Second Amendment rights to "keep and bear arms for a lawful purpose." United States v. Cruikshank, 92 U.S. 542, 553 (1875). Although not explicitly limited to governmental action, the Supreme Court ruled that the Second Amendment is to be interpreted as a limitation on Congressional power. *Id.*

[73] UTAH CONST. Art. I, § 29; 2004 N.D. Ballot Measure 1.

[74] Mich. Att'y Gen. Op. 7171 (March 16, 2005) (emphasis in original) (also quoting Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337, 344 (Mich. 1985) ("The Michigan Constitution's Declaration of Rights provisions have never been interpreted as extending to purely private conduct; these provisions have consistently been interpreted as limited to protection against state action.")).

[75] *See, e.g.*, Citizens for Equal Prot. v. Bruning, No. 4:03CV3155 (D. Neb. filed Apr. 2003), *complaint available at* http://www.domawatch.org/cases/nebraska/citizensforequalprotectionvag/complaint.pdf (last visited Mar. 2, 2005).

[76] *Id.*; Curtis Killman, *Lawsuit Challenges State Marriage Amendment*, TULSA WORLD, Nov. 4, 2004, at A13.

The equal protection claims against the Nebraska amendment are unique to the text of that amendment. In Nebraska, the American Civil Liberties Union has argued that the amendment, with its specific reference only to relationships between "two persons of the same sex," targets individuals on the basis of their sexual orientation and denies them full participation in the political process.[77] The lawsuit argues that, while the amendment prohibits all recognition of same-sex domestic partnerships, it contains no similar provision banning opposite-sex domestic partnerships, imposing a higher hurdle for same-sex couples than for opposite-sex couples seeking the same right.[78] If the court were to accept this claim, holding that the Nebraska amendment discriminates on the basis of sexual orientation regarding political access to domestic partnership legislation, the state would then be in the difficult position of justifying a preference for opposite-sex unmarried partnerships over same-sex partnerships.[79]

The Georgia amendment is potentially open to a similar claim, although to a lesser extent than the Nebraska amendment. Whereas the Nebraska amendment flatly denies all recognition of same-sex marriage-like relationships, the Georgia amendment states only that relationships "between persons of the same sex" are not "entitled to the benefits of marriage."[80] Thus, while facially singling out same-sex relationships, the Georgia amendment is more narrowly tailored to its purpose of protecting the unique benefits of marriage, and thus less vulnerable to an equal protection challenge.

The recognition amendments avoid these concerns altogether, making no effort to single out specific relationships, but rather preserving the unique status of marriage by limiting the recognition of all other relationships. In this way, the recognition amendments are preferable, in that they avoid equal protection claims arising from the drafting of the amendment and keep the focus on the underlying issue: Does the Equal Protection Clause require legal recognition of unisex marriages? If federal courts, and ultimately the Supreme Court, begin to answer this question in the affirmative, all of the state amendments will fall. The object of state amendment drafting is to avoid raising additional equal protection concerns due to the particular language being employed.

Of the substance amendments, a recognition approach focused on the unique status (as opposed to particular legal incidents) of marriage

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[77] Complaint at 5, *Citizens for Equal Prot.* (No. 4:03CV3155).

[78] Neither same-sex nor opposite-sex domestic partnerships are recognized under current Nebraska law.

[79] *See generally* Romer v. Evans, 517 U.S. 620 (1996).

[80] GA. CONST. art. I, § IV, para. I.

provides a good model: "Marriage in this state consists only of the union of a man and a woman. No other relationship shall be recognized as a marriage by this state, or given a substantially equivalent legal status."

IV. STRUCTURE AMENDMENTS

Unlike the status and substance amendments, both of which insert a definition of marriage into the state constitution, Hawaii's structural amendment is a more narrow, separation of powers approach, protecting the power of the legislature to recognize marriage as the union of husband and wife free from court interference.

The Hawaii marriage amendment is the only example to date of a structural marriage amendment,[81] and was adopted only after a status amendment failed to garner majority support in the legislature. In effect, the Hawaii structure amendment has been much the same as that of the status amendments adopted elsewhere, protecting the definition of marriage from litigation threatening to rewrite it.[82] At the same time, however, by virtue of the grant of power "to reserve marriage to opposite-sex couples," the legislature implicitly carries the authority *not* to reserve marriage to opposite-sex couples.[83]

The legal impact of the structural amendment is much the same as that of a status amendment, except that it is binding only upon the courts and permits the legislature to redefine marriage to include same-sex couples should it desire to do so. Like the status amendment, the structural amendment both takes the definition of marriage out of the hands of the state courts and, in protecting the constitutionality of state marriage laws, removes the basis for a constitutional challenge and subsequent decision requiring the creation of a marriage-like status for same-sex couples. Although the structural approach has garnered little attention in the eight years since the Hawaii amendment was adopted, the structural approach is likely to see renewed interest in states where legislators have been unable to pass a stronger amendment and are seeking a compromise to preserve the status quo (and their own legislative authority) in the face of a judicial challenge to a state's marriage laws. The structural approach might even prove to be of

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[81] The Arkansas amendment includes elements of a structural amendment, granting the legislature specific authority to determine the legal incidents of marriage: "The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage." 2004 Ark. Ballot Measure 3.

[82] *See* Baehr v. Miike, 994 P.2d 566 (Haw. 1999); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

[83] HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

interest at the federal level, where most of the debate has thus far been focused on various forms of a status amendment.[84]

A structural amendment today should reflect the separation of marital status and legal incidents which occurred with the adoption of civil unions in Vermont: "The legislature shall have power to reserve marriage and its legal incidents to the union of a man and a woman." This approach offers a broad appeal both to those concerned about preserving the institution of marriage and to those concerned about preserving legislative authority and the separation of powers.

V. CONCLUSION

For those who support government policies which continue to recognize marriage as the union of husband and wife, state marriage amendments have proven a necessary (though not sufficient) response to judicial encroachment. In the absence of a federal marriage amendment, state amendments provide the broadest measure of protection available to the people of an individual state.

While the majority of same-sex marriage lawsuits to date have been based on state constitutional claims, a (growing) minority have turned their attention to provisions of the United States Constitution. These cases, based on the Full Faith and Credit Clause of Article IV, and more significantly, on the Due Process and Equal Protection Clauses of the 14th Amendment, would circumvent even the broadest protections contained in a state constitutional amendment.[85] This highlights the additional need for a federal constitutional amendment.

The two approaches are complementary. In the absence of a federal amendment, the state amendments remain vulnerable. Even with a federal amendment, the state amendments would continue to play a significant role in settling the law and policy of an individual state. Many of the state measures would still provide unique protections, or (as some commentators have suggested) would dovetail with an amendment

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[84] An important consideration with a structural amendment at the federal level would be to tailor it narrowly so as not to interfere with existing Supreme Court decisions governing marriage. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967). Patterning an amendment after the Hawaii model, the amendment might read: "The power to reserve marriage and its legal incidents to the union of a man and a woman shall be reserved to the legislatures of the several states, and directly to the people in referendum when so designated by state law." Alternatively, a text might be framed in terms of preserving the preexisting authority of the people and their elected representatives: "The right of the people of the several states to reserve marriage to the union of a man and a woman, and to attach unique legal benefits and obligations because of marriage, shall not be infringed."

[85] This threat is not limited to the federal courts because a sympathetic state court, limited by a state constitutional amendment, could instead rule on federal constitutional grounds.

that leaves the definition of marriage to the people of the individual states.

The process of drafting state marriage amendments necessarily involves a number of considerations. There is the obvious question of legislative efficacy with which this article has primarily dealt. Does the text of the amendment do what the proponents intend for it to do, and conversely, does it avoid the pitfalls of unintended consequences? Beyond this, however, drafters must also consider the political expediency, and their ability to get the measure passed, both in the legislature and at the ballot box. Finally, there is the question of the measure's legal enforceability once passed. Each of these three considerations is weighed differently from state to state, producing what are now sixteen different amendment texts in seventeen states. With additional amendments being considered in the 2005 and 2006 legislative sessions, the number of textual variations is likely to continue to grow as the people of various states take steps to protect the definition of marriage.

MARRIAGE AMENDMENT MODELS

I. STATUS AMENDMENT

"Only marriage between a man and a woman is valid or recognized in this state."

II. SUBSTANCE AMENDMENT

"Marriage in this state consists only of the union of a man and a woman. No other relationship shall be recognized as a marriage by this state or its political subdivisions, or given a substantially equivalent legal status."

III. STRUCTURE AMENDMENT

"The legislature shall have power to reserve marriage and its legal incidents to the union of a man and a woman."

STATE MARRIAGE AMENDMENT TEXTS

STATUS AMENDMENTS

State	Yes	No	Text
Alaska (1998)	68.1% (152,965)	31.9% (71,631)	To be valid or recognized in this State, a marriage may exist only between one man and one woman.
Mississippi	86%	14%	Marriage may take place and may be valid under

(2004)	(924,540)	(149,867)	the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.
Missouri (2004)	70.6% (1,055,771)	29.4% (439,529)	To be valid and recognized in this state a marriage shall exist only between a man and a woman.
Montana (2004)	67% (294,056)	33% (147,927)	Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.
Nevada (2002)	67.2% (337,197)	32.8% (164,573)	Only a marriage between a male and female person shall be recognized and given effect in this state.
Oregon (2004)	57% (979,049)	43% (742,442)	It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.

SUBSTANCE AMENDMENTS

State	Yes	No	Text
Arkansas (2004)[a]	75% (746,382)	25% (248,827)	Marriage consists only of the union of one man and one woman. Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman. The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

Georgia (2004)	76% (2,317,981)	24% (729,705)	(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.
Kentucky (2004)	75% (1,222,240)	25% (417,087)	Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.
Louisiana (2004)	78% (619,908)	22% (177,067)	Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.
Michigan (2004)	59% (2,686,132)	41% (1,902,133)	To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.
Nebraska (2000)	70.1% (477,571)	29.9% (203,667)	Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

North Dakota (2004)	73% (222,899)	27% (81,396)	Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.
Ohio (2004)	62% (3,249,157)	38% (2,011,168)	Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.
Oklahoma (2004)	76% (1,075,079)	24% (347,246)	A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups. B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage. C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.
Utah (2004)	66% (562,619)	34% (286,697)	Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

STRUCTURE AMENDMENT

State	Yes	No	Text
Hawaii (1998)	69.2% (285,384)	28.6% (117,827)	The Legislature shall have the power to reserve marriage to opposite-sex couples.

MARRIAGE AND SOME TROUBLING ISSUES WITH NO-FAULT DIVORCE

*Peter Nash Swisher**

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which the parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects on the property rights of both [parties], present and prospective, and the acts which may constitute grounds for its dissolution.
>
> - *Maynard v. Hill*, 125 U.S. 190, 205 (1888)

I. INTRODUCTION

Marriage, according to the United States Supreme Court, creates "the most important relation in life, as having more to do with the morals and civilization of a people than any other institution."[1] Thus, despite recent academic and judicial support for various nontraditional family alternatives,[2] a substantial majority of Americans "still marry in

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[1] Maynard v. Hill, 125 U.S. 190, 205 (1888).

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (stating that marriage is "one of the basic civil rights of man" and "fundamental to our very existence and survival").

[2] *See, e.g.*, June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991); Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201 (2003); Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982); Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974); *see also* Symposium, *A More Perfect Union: Marriage and Marriage-Like Relationships in Family Law*, 30 N.M. L. REV. 1 (2000).

The author is not opposed to some nontraditional alternatives to marriage, when appropriate, but *not* to the exclusion of traditional marriage. *See* JOHN DEWITT GREGORY, PETER N. SWISHER & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW 29 (2d ed. 2001).

the traditional way, and continue to regard marriage as the most important relationship in their lives."[3] Moreover, increasing criticism of marriage in contemporary American society has generated a serious reevaluation of the major moral, legal, social, and economic premises underlying traditional marriage. This reassessment of marriage has led to a number of strong endorsements for a rededicated commitment to strengthening marriage and the nuclear family in America.[4]

Like marriage, divorce or dissolution of marriage is regulated by the state legislatures.[5] Since marriage still continues to serve valuable social, legal, economic, and institutional functions,[6] the underlying public policy in most states continues to promote marriage and discourage divorce unless the parties strictly comply with the statutory requirements for divorce.[7] Since the so-called "no-fault divorce

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> A better reasoned approach would be for more state legislatures and courts to recognize and protect the legal rights and obligations of *both* traditional *and* nontraditional families, as they currently coexist in American society today, by providing alternative legal rights and remedies for each social structure, according to the public policy of each state, and based upon the present and future needs of all its citizens.

Id.

[3] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 26 (2d ed. 1988).

[4] *See, e.g.*, COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 1 (Mar. 1995) (non-partisan council stating "[t]he time has come to shift the focus of national attention from divorce to marriage, and to rebuild a family culture based on enduring marital relationships"); NAT'L COMM'N ON CHILDREN: BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 251 (1991) (bipartisan commission concluding that "[f]amilies formed by marriage—where two caring adults are committed to one another and to their children—provide the best environment for bringing children into the world and supporting their growth and development."); *see also* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER-OFF FINANCIALLY (2000); David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623 (2001); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL'Y 581 (1999); Lynne D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 (2003) (arguing that marriage is based upon a number of fundamental core institutions within our constitutional democracy, rather than being based on mere contractual arrangements).

[5] *See, e.g.*, Simms v. Simms, 175 U.S. 162, 167 (1899) (stating "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of [each] State, and not to the laws of the United States"); *see also* Boddie v. Connecticut, 401 U.S. 371, 376 (1971); *Maynard,* 125 U.S. at 205.

[6] *See supra* note 4 and accompanying text.

[7] For example, an overwhelming number of American courts still attempt to validate the parties' marital expectations whenever possible. *See, e.g.*, Leonard v. Leonard, 560 So. 2d 1080 (Ala. Civ. App. 1990); Panzer v. Panzer, 528 P.2d 888 (N.M. 1974); CLARK, *supra* note 3, at 70-75. Divorce, on the other hand, is in derogation of the common law and divorce statutes therefore must be strictly complied with. *See, e.g.*, Johnson v. Johnson, 299 S.E.2d 351 (Va. 1983); *see also* CLARK, *supra* note 3, at 405-12; JOYCE HENS GREEN ET AL., DISSOLUTION OF MARRIAGE 4-53 (1986).

revolution" of the 1970s, however, a growing number of commentators have largely discounted the role of fault in American divorce law,[8] as well as a spouse's non-economic contributions to the well-being of the family in determining spousal support on divorce, the equitable distribution of marital property on divorce, or both.[9]

The purpose of this Article is to challenge these erroneous assumptions, that fault is "no longer an issue" in modern American divorce law, and that a spouse on divorce should not be compensated for his or her non-economic contributions to the marriage and to the well-being of the family.

II. NO-FAULT DIVORCE AND FAULT-BASED DIVORCE ALTERNATIVES

A. The No-Fault Divorce "Revolution" and Its Unexpected Consequences

Divorce reform in America is currently at a crossroads.[10] Prior to California's landmark 1969 no-fault divorce legislation, a growing number of lawyers, judges, sociologists, and legislators had been dissatisfied with various perceived defects in America's fault-based divorce system. They argued that divorce should not be based solely on traditional fault grounds such as adultery, cruelty, and desertion, but instead divorce should be viewed as a regrettable, but necessary, legal definition of marital failure where often the factors leading to the marriage breakdown were caused by the parties' incompatibility and irreconcilable differences.[11] Moreover, under a fault-based divorce system, couples in unhappy marriages might have to fabricate the necessary fault grounds for divorce and resort to perjury,[12] or attempt to use questionable migratory divorces from sister state "divorce mills."[13]

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[8] *See, e.g.*, Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719; Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Norman B. Lichenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. REV. 1 (1985).

[9] *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000) [hereinafter PRINCIPLES] (proposing a purely financially-based "true" no-fault divorce regime); Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989) (same).

[10] *See, e.g.*, DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kay eds., 1990); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989).

[11] *See, e.g.*, MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW (1972).

[12] *See, e.g.*, Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

[13] *See generally* NELSON BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES (1962).

No-fault divorce legislation in the United States,[14] therefore, was originally intended to be a good faith remedy to many of these perceived evils and shortcomings inherent in a fault-based divorce regime.[15]

Yet America's no-fault divorce "revolution" over the past thirty-five years has developed some very serious shortcomings of its own. In addition to a soaring divorce rate in the 1970s when no-fault divorce was first introduced in most states,[16] a disturbing number of courts have failed to provide adequate financial protection to many women and children of divorce.[17] Additionally, many children of divorce have suffered long-lasting psychological and economic damage resulting from divorce.[18] Indeed, some commentators have concluded that the no-fault

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[14] Section 302(a)(2) of the Uniform Marriage and Divorce Act provides that a court shall enter a divorce or dissolution of marriage whenever

> the court finds that a marriage is irretrievably broken, if the finding is supported by evidence that (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the [divorce] proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage.

UNIF. MARRIAGE AND DIVORCE ACT § 302, 9A U.L.A. 200 (1987).

Currently, all fifty states have some sort of no-fault divorce alternative, either based upon the parties' separation for a specified period of time or upon their irreconcilable differences or incompatibility. *See generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Remain the Focus*, 37 FAM. L.Q. 527, 580 (2004).

[15] *See generally* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270-76 (1997).

[16] *See, e.g.*, CLARK, *supra* note 3, at 410. "The social change of greatest importance has been the sharp growth in the divorce rate, which reached its highest point in 1979, and which has fluctuated somewhat since then." *Id.*

[17] *See, e.g.*, James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 405 (1987) ("An end to the systemized impoverishment of women and children by the divorce regime must be one of the foremost items on the nation's new agenda."); *see also* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141 (1980). Although the accuracy of Professor Weitzman's statistical studies has been questioned, other studies have corroborated this "feminization of poverty" resulting from divorce. For example, according to 1996 data from the Social Science Research Council in New York City, a woman's standard of living declines by 30% on average the first year after a divorce, while a man's standard of living rises by 10%. Elizabeth Gleick, *Hell Hath No Fury*, TIME, Oct. 7, 1996, at 84.

[18] *See, e.g.*, Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 29 (1990) ("There is substantial evidence that the process of going through their parents' divorce and resulting changes in their lives are psychologically costly for most children"); *see generally* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) (discussing the negative long-term effects of divorce on children); JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000) (same).

divorce revolution in America "has failed."[19] Consequently, a growing number of courts and commentators have been reassessing whether fault-based factors may still serve a legitimate function and purpose in contemporary American divorce law.[20] Likewise, a growing number of state legislatures have been reassessing the role of fault in contemporary divorce law as they provide for the concurrent goals of protecting, promoting, and "reinstitutionalizing" traditional marriage.[21]

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[19] *See, e.g.*, COUNCIL ON FAMILIES IN AMERICA, *supra* note 4, at 1.

> The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed parenthood—has failed. It has created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.

Id.

[20] *See, e.g.*, Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379 (2001); Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119 (1997); Peter Nash Swisher, *The ALI Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213 (2001); Swisher, *supra* note 15; Lynne D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79; Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525 (1994); Adriaen M. Morse, Jr., Comment, *Fault: A Viable Means of Re-injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605 (1996); *see also* Harvey J. Golden & J. Michael Taylor, *Fault Enforces Accountability*, FAM. ADVOC. Fall 1987, at 11; R. Michael Redman, *Coming Down Hard on No-Fault Divorce*, FAM. ADVOC. Fall 1987, at 6.

[21] *See, e.g.*, SCOTT M. STANLEY & HOWARD J. MARKMAN, UNIV. OF DENVER CTR. FOR MARITAL & FAMILY STUDIES, CAN GOVERNMENT RESCUE MARRIAGE? 1-2 (June 1997), *available at* http://www.aamft.org/Press_Room/Press_releases/viewpoints.asp (last visited Feb. 19, 2005).

> There is a trend sweeping the country to make changes in legal codes to strengthen and stabilize marriages. There are two key thrusts emerging in state legislatures: the first involves changes in laws that would make it harder for couples to divorce; the second involves efforts to encourage or mandate couples to participate in premarital counseling.
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> While strange bedfellows, there is a growing consensus among both liberal and conservative political and religious leaders that something must be done.

Id. Examples of such legislation include "covenant marriage" statutes in Arizona and Louisiana where the parties consensually agree not to obtain a no-fault divorce, and to only dissolve their marriage based upon traditional fault grounds or separation for a period of time. The couple also agrees to obtain premarital counseling prior to marriage. *See* ARIZ. REV. STAT. § 25-901 (2000); LA. REV. STAT. ANN. § 9-224 (West 2000). The Florida legislature also passed the sweeping bipartisan Marriage Preparation and Preservation Act, providing that: (1) all Florida high school students are required to take a course in "marriage and relationship skill-based education"; (2) engaged couples are encouraged, but not required, to take a "premarital education course"; (3) couples applying for a marriage license will receive a handbook prepared by the Florida State Bar Association informing them of "the rights and responsibilities under Florida law of marital partners to each other and to their children, both during marriage and upon dissolution"; and (4) couples filing for divorce that have children must take a "Parent Education and Family Stabilization

B. Fault-Based Alternatives in Contemporary American Divorce Law

When no-fault divorce legislation was enacted in all fifty states during the 1970s and 1980s, a number of commentators were perhaps too quick to bid their final, not-so-fond farewell to fault-based divorce factors.[22] Professor Homer Clark, for example, stated in 1988 that

> [t]oday, the non-fault grounds of marriage breakdown, incompatibility and living separate and apart, have been enacted in almost all states. It is thus fair to say that there is now wide agreement that fault no longer should be relevant in determining whether or not a marriage should be dissolved, even though the fault grounds continue to exist in some states. Since most of the traditional defenses to divorce are logically related to fault in some way, it is also true that they have been largely abolished or ignored today in those states in which the non-fault grounds for divorce prevail.[23]

Other commentators, including Professor Ira Mark Ellman, continue to erroneously state that fault factors on divorce are only considered in a "small minority" of states today.[24] But to paraphrase Mark Twain, rumors of the demise of fault-based divorce law in America have been greatly exaggerated. In fact, a *majority* of states today still *retain* fault-based divorce alternatives *in addition* to enacting no-fault divorce legislation.[25] Today, a *majority* of states—approximately twenty-eight—*still* consider marital fault factors in determining spousal support and the distribution of marital property.[26] And a *majority* of states—approximately thirty-two—*still* retain alternative fault grounds for dissolving the marital relationship.[27] Indeed, the number of states that have adopted fault-based statutory factors for divorce has *increased*

Course" that covers the legal and emotional impact of divorce on both adults and children, financial responsibility, laws regarding child abuse and neglect, and conflict resolution skills. Mike McManus, *Florida Passes Nation's Most Sweeping Reform of Marriage Law*, ETHICS & RELIGION, May 16, 1998, *available at* http://www.smartmarriages.com/mcmanusflorida.html (last visited Feb. 19, 2005) (predicting that the statute would inspire many other states to pass similar legislation).

22 *See, e.g.*, *supra* note 8, and accompanying text.

23 CLARK, *supra* note 3, at 496.

24 Ira Mark Ellman, *Should the Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. REV. 259, 262.

25 *See, e.g.*, Golden & Taylor, *supra* note 20, at 12.

> [Various] critics . . . mistakenly believe that the adoption of no-fault [divorce] grounds by every state in the union heralds a beneficial end to the fault system. This is simply not true because most states have *incorporated* no-fault grounds into their traditional framework, not *substituted* one system for the other.

Id.

26 *See, e.g.*, Elrod & Spector, *supra* note 14, at 576, 581.

27 *Id.* at 580.

rather than decreased over the past ten years.[28] Thus, as Adriaen Morse Jr. observes:

> Dismissing fault from consideration [in American divorce law] because it is a factor in only a "small minority" of states seems almost ludicrous in view of the facts [since] many legislatures have not been so overcome by the charms of no-fault [divorce] as to wish to repeal the fault remedies entirely. Thus, in this area, Professor Ellman has failed to honestly consider whether moral relations should be factored into alimony [and factored into other important aspects of American divorce law]. A shrug is not an argument.[29]

This same criticism can be leveled at the American Law Institute's (ALI) *Principles of the Law of Family Dissolution* (*Principles*) and its rather curt and unpersuasive dismissal of the role of marital fault in the dissolution of marriage. For example, Comment e to Section 4:09 of the *Principles* excludes marital misconduct factors in the distribution of marital property and spousal support, purportedly justifying the rule as being "consistent with the prevailing trend in the law since the 1970 approval of the Uniform Marriage and Divorce Act."[30] However, only a small *minority* of states have adopted the Uniform Marriage and Divorce Act to date, and only a *minority* of states—about fifteen—are "true" no-fault divorce jurisdictions.[31] Thus, if there is an arguable majority "trend" today, it is to *retain* fault factors in divorce as one of many statutory factors that state courts will still consider in determining spousal support rights, the division of marital property, or both.

Why this strong and continuing legislative and judicial recognition of fault-based divorce factors, despite the general abandonment and premature dismissal of nonfinancial fault factors by many academic scholars and the ALI *Principles of the Law of Family Dissolution*? This may be explained by the strong public policy rationale underlying marriage and divorce in a majority of states today—that moral issues still *do* matter in a family law context,[32] and state legislatures and courts still *do* take into account the responsibility and accountability of the

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[28] For example, Elrod and Walker reported in 1994 that twenty-four states still considered marital fault in awarding alimony, and thirty states retained alternative fault grounds for dissolving a marriage. *See* Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 534, 661 (1994). Currently, these figures are twenty-eight states and thirty-two states respectively. *See supra* notes 26-27 and accompanying text.

[29] Morse, *supra* note 20, at 638.

[30] PRINCIPLES, *supra* note 9, at § 4.09 cmt. e.

[31] *See* Elrod & Spector, *supra* note 14, at 580.

[32] *See, e.g.*, Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

respective spouses, especially when one spouse is guilty of serious and egregious marital misconduct.[33] Again, as Adriaen Morse Jr. aptly notes:

> The whole notion of fault proves to be a stumbling block for many scholars writing about the current pursuit of equitable ways of dealing with alimony [and with the division of marital property on divorce]. However, as noted earlier, fault provides an excellent tool to encourage the type of behavior society believes to be appropriate in marriage, and to discourage that behavior which society deems to be inappropriate. It seems that most people would at least agree that engaging in adultery, cruelty, or desertion is not the sort of sharing behavior which marriage should have to endure. In order to provide a disincentive for such behavior, there should be concomitant, post-divorce financial consequences for engaging in inappropriate behavior.[34]

Accordingly, as will be discussed in more detail below, fault factors in contemporary American divorce law still serve a legitimate purpose for the following three reasons: (1) other no-fault laws, including no-fault workers compensation, automobile insurance, and strict liability tort laws, all have incorporated a number of fault-based remedies within their no-fault statutory framework for serious and egregious conduct, and American divorce law likewise should retain fault-based remedies for serious and egregious marital misconduct; (2) a substantial number of states continue to recognize and use a number of fault-based statutory factors on divorce for determining spousal support and the division of marital property, and state court judges generally have applied these fault-based statutory remedies in a realistic and responsible manner; and (3) alternative tort or criminal law remedies for serious and egregious marital misconduct have proven to be inadequate in theory and practice.

C. Arguments for Retaining Fault Factors in American Divorce Law

Various commentators,[35] and the American Law Institute's *Principles of the Law of Family Dissolution*[36] have argued for "consistent and predictable" no-fault family law principles relating to compensatory spousal support and the division of marital property on divorce.[37] They have argued that these should be based *solely* on no-fault financial principles and objectives, to the exclusion of any nonfinancial spousal

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[33] *See, e.g.*, Golden & Taylor, *supra* note 20, at 12 ("Very few states totally ignore fault [in divorce proceedings]. That is because we are brought up to believe that people should be held accountable for their actions, and that courts should establish such accountability and consider it."); *see also infra* notes 49-52 and accompanying text.

[34] *See* Morse, *supra* note 20, at 640-41.

[35] *See supra* note 8 and accompanying text.

[36] *See supra* note 9 and accompanying text.

[37] *See* PRINCIPLES, *supra* note 9, at 23-25.

contributions to the marriage and the well-being of the family, and to the exclusion of any fault-based factors such as marital misconduct.[38]

For example, in his article, *The Theory of Alimony*,[39] the *Principles*' Chief Reporter, Professor Ira Mark Ellman, argued for a purely financial and compensatory no-fault approach to spousal support or alimony. Basically, Ellman's theory of alimony conceptualized spousal support as compensation earned by the economically disadvantaged spouse (normally the wife) through marital investments and as a means to eliminate distorting financial incentives in marriage, rather than as a way to relieve financial need as current alimony law generally allows.[40] However, Ellman's theory of alimony has been criticized by other commentators for not recognizing important nonfinancial losses of divorce as well. Professor June Carbone faults Ellman for ignoring larger noneconomic societal interests such as child-rearing, married women's participation in the work force, a return of appropriate benefits that the other spouse retains on divorce, and sex-equality issues.[41] Professor Carl Schneider criticizes Ellman for his refusal to acknowledge any moral discourse on the subject of awarding alimony on divorce.[42] Schneider also disagrees with Ellman's reasoning that the modern divorce reform movement in America has allegedly "rejected" all fault-based divorce standards by noting that fault is still taken into account in many jurisdictions in awarding alimony,[43] and that a broader view of alimony still requires a great deal of traditional judicial discretion by the courts.[44]

Similar criticism has been leveled at the ALI *Principles'* no-fault approach to alimony, its no-fault approach to the division of marital property, and its failure to take into account many other important non-economic societal interests on divorce.[45] In spite of explicit arguments and proposals made in the *Principles* to the contrary, forty-two states today continue to recognize a spouse's non-economic contributions to the marriage and to the well-being of the family in determining spousal support and the division of marital property.[46] Indeed, if contemporary

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[38] *See id.*

[39] Ellman, *supra* note 9, at 3.

[40] *Id.* at 50-52.

[41] June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990).

[42] Carl E. Schneider, *Rethinking Alimony: Marital Decision and Moral Discourse*, 1991 BYU L. REV. 197.

[43] *Id.* at 249-50.

[44] *Id.* at 252-53.

[45] *See, e.g.*, Katherine Silbaugh, *Gender and Nonfinancial Matters in the ALI Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 203 (2001); Swisher, *supra* note 20; *see also* Francis J. Canania, Jr., *Learning From the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 857.

[46] *See, e.g.*, Elrod & Spector, *supra* note 14, at 580.

marriage is viewed today as a shared partnership with important economic *and* non-economic expectations,[47] then a "true" no-fault divorce regime, as proposed in the *Principles*, reduces marriage on dissolution to nothing more than impersonal and unrealistic economic calculations, and refuses to consider the many important nonmonetary marital contributions of a spouse to the well-being of the family.[48]

In sum, a majority of state legislatures and state courts still *do* continue to recognize that under Anglo-American law, morality, social custom, and Benjamin Cardozo's "accepted standards of right conduct," one is still held to the standard of being legally responsible and accountable for one's actions,[49] whether such actions arise under criminal law,[50] tort law,[51] or family law[52] principles.

1. Other no-fault laws offer fault-based remedies

It is true that, beginning in the 1920s with no-fault workers compensation laws, and followed in the 1970s and 1980s by no-fault automobile insurance, products liability, and divorce laws, remedial no-fault legislation in a substantial number of states provided certain economic benefits to an injured or wronged party by partially alleviating the traditional burden of proof to demonstrate the other party's fault or unreasonable conduct. However, *none* of these remedial no-fault laws

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[47] *See, e.g.*, Joan Krauskopf & Rhonda Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Marcia O'Kelly, *Entitlements to Spousal Support After Divorce*, 61 N.D. L. REV. 225 (1985).

[48] *See, e.g.*, Carbone, *supra* note 41; Woodhouse, *supra* note 20, at 2567; *see also* KAREN WINNER, DIVORCED FROM JUSTICE 30-31 (1996).

[49] *See, e.g.*, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921) ("[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."); OLIVER WENDELL HOLMES, THE COMMON LAW 37 (1923) (observing that the various forms of legal liability started from a moral basis, and from the concept that someone was legally responsible and accountable for his or her conduct).

[50] *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW §§ 1.2(d)–1.3(c) (4th ed. 2003).

[51] *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 1, at 5-7 (5th ed. 1984).

[52] *See, e.g.*, GREEN ET AL., *supra* note 7, at 15-27.

> In tort, the law provides a remedy for intentional actions which cause harm, for negligent actions which result in harm, and even for some activities where no proof of negligence is necessary, such as product liability. Only in the dissolution of marriage does the law currently seem to ignore even the most egregious of actions by a person toward his or her spouse and provide no compensation for the action. . . . Marriage is the only relationship in which a party may blithely wreak havoc upon another's life only to have the law shield the behavior through no-fault divorce rather than deter the behavior as it did in the past. Where there is fault, there should be consequence.

Morse, *supra* note 20, at 641-42.

totally abolished or abrogated a defendant's legal responsibility and accountability for *serious and egregious misconduct*.

For example, although a majority of states have adopted some form of no-fault automobile insurance legislation, these statutes are *not* completely no-fault in nature. Up to a statutory threshold, which is often quite low, an insured automobile driver or passenger cannot sue another driver for personal injuries resulting from a motor vehicle accident. Rather, an injured party must look to his or her own insurance company for compensation. However, certain statutorily-prescribed injuries, including death, disfigurement, permanent loss of a bodily function, and property damage normally are exempt from this no-fault cap.[53] Indeed, some commentators now refer to no-fault automobile insurance statutes as "partial tort exemption statutes."[54]

Moreover, under no-fault workers compensation statutes, intentional self-injuries will *still* bar a worker's claim, while egregious employer conduct can lead to an enhanced compensation award, or the right to sue the employer for an intentional tort in addition to obtaining a workers' compensation award.[55] Also, in products liability litigation, the strict tort liability actions that were formerly embraced by many American jurisdictions in the 1970s now approximate a negligence foreseeability standard with regard to defective design and defective warning cases,[56] with the conduct of the consumer always being relevant.[57]

2. States still use fault when determining spousal support and property division

Likewise, the no-fault divorce laws in a substantial number of American states are *not* truly no-fault in nature, since approximately thirty-two states currently retain various fault-based grounds for divorce while also affording no-fault alternatives. Additionally, marital fault is

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[53] *See, e.g.*, EMERIC FISCHER & PETER SWISHER, PRINCIPLES OF INSURANCE LAW § 5.03, at 511-16 (2d ed. 1994); ROBERT KEETON & ALAN WIDISS, INSURANCE LAW § 4.10 (1988).

[54] KEETON & WIDISS, *supra* note 53, at 421-25.

[55] *See generally* Jean C. Love, *Punishment and Deterrence: A Comparative Study of Tort Liability for Punitive Damages Under No-Fault Compensation Legislation*, 16 U.C. DAVIS L. REV. 231 (1983).

[56] *See, e.g.*, Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Peter Nash Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402A, Restatement (Second) of Torts*, 27 U. RICH. L. REV. 857 (1993); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

[57] *See, e.g.*, HENRY WOODS, COMPARATIVE FAULT § 1:11 (2d ed. 1987).

still a relevant statutory factor in at least twenty-eight states for determining alimony and the division of marital property on divorce.[58]

3. Neither tort nor criminal law provides an adequate remedy for egregious marital misconduct

Finally, the absence of any fault-based statutory relief for egregious marital misconduct may place an almost insurmountable burden on an abused spouse to obtain compensatory relief from an abusive spouse. This serious problem is illustrated in a number of cases in a minority of states that have adopted a "pure" or "true" no-fault regime,[59] where non-financial marital fault no longer plays any significant role in determining divorce grounds and defenses, spousal support awards, or the equitable distribution of marital property.[60] For example, in the case of *In re Koch*,[61] the Oregon Court of Appeals rejected a wife's claim for support based upon injuries that she sustained in a severe physical altercation with her husband. The court stated that, under Oregon law, fault could not be considered as a factor in dividing the parties' marital property or in awarding spousal support.[62] Two other "pure" or "true" no-fault states also have held that the murder or attempted murder of one spouse by the other spouse would have no effect whatsoever on the division of the parties' marital property, or any spousal support award, since such awards can only be based on the financial needs of the parties, regardless of fault.[63]

A better-reasoned approach would recognize fault-based exceptions in both "pure" or "true" no-fault divorce regimes *and* in "modified" or "alternative" no-fault divorce regimes for serious and egregious marital misconduct, in order to protect and compensate an abused spouse for the egregious acts of an abusive spouse. For example, in *Stover v. Stover*,[64] the Arkansas Supreme Court allowed an unequal division of marital property where the wife was found guilty of conspiring to kill her husband. Similarly, in *Brabac v. Brabac*,[65] the Wisconsin Court of

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[58] *See supra* notes 25-31 and accompanying text.

[59] Approximately fifteen states have taken this approach. However, thirty-five years after the so-called no-fault divorce "revolution," this is *not* a significant majority of states, in spite of many erroneous claims to the contrary.

[60] *See, e.g.*, Boseman v. Boseman, 107 Cal. Rptr. 232 (Ct. App. 1973); Erlandson v. Erlandson, 318 N.W.2d 36 (Minn. 1982). These courts are only able to take into account "economic fault" such as dissipation, concealment, or waste of marital assets. *See, e.g.*, Ivancovich v. Ivancovich, 540 P.2d 718 (Ariz. Ct. App. 1975).

[61] *In re* Koch, 648 P.2d 406 (Or. Ct. App. 1982).

[62] *Id.* at 408.

[63] *See* Mosbarger v. Mosbarger, 547 So. 2d 188 (Fla. Dist. Ct. App. 1989); *In re* Marriage of Cihak, 416 N.E.2d 701 (Ill. App. Ct. 1981).

[64] Stover v. Stover, 696 S.W.2d 750 (Ark. 1985).

[65] Brabac v. Brabac, 510 N.W.2d 762 (Wis. Ct. App. 1993).

Appeals held that marital fault might still be considered in a murder-for-hire scheme during the pendency of a divorce. Of course, fault-based divorce factors are not limited only to murder-for-hire schemes, and would apply to any serious and egregious marital misconduct.[66] Thus, in cases involving flagrant adultery or cruelty, the wife (or husband) may still receive a greater share of the marital property. This way, egregious marital fault would give a less empowered wife greater leverage to negotiate a more equitable divorce settlement and would also give additional means of adequately providing for herself and her children.[67]

A second criticism of contemporary fault-based divorce factors is that the imposition of fault-based behavioral standards on divorce "must rely upon trial court discretion" and "the moral standards by which blameworthy conduct will be identified and punished will vary from judge to judge, as each judge necessarily relies on his or her own version of appropriate behavior in intimate relationships."[68] Therefore, such judicial discretion "seems inherently limitless if no finding of economic harm to the claimant is required to justify the award or its amount."[69] This erroneous and largely unsubstantiated argument can be questioned on three major grounds. First, family court judges, from their equity heritage as triers of both fact and law, have *always* possessed broad—and necessary—judicial discretion in adjudicating family law disputes.[70] Second, judicial discretion is *not* "inherently limitless" because judges are constrained by various enumerated statutory factors on divorce,[71] as

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[66] *See, e.g.*, Woodhouse, *supra* note 20, at 2550.

> My colleague, Professor Demie Kurz, interviewed 129 women of many races, ages, and classes, investigating their stories about why their marriages ended in divorce for her forthcoming book on divorce, *For Richer, For Poorer*. Over half of the women in Kurz's study, and up to eighty percent of those in working class and lower class marriages, told narratives of husbands who abused alcohol and drugs, slept with other women, beat and raped their wives and children, and actually or constructively abandoned the home. . . . In the terminology of fault and no-fault [divorce], the typical woman in Kurz's study stated a prima facie case for a fault-based divorce. . . . How many of these women nevertheless see their marriages end with a judgment that forces the sale of the [marital] home for "equitable" distribution to their abusers?

Id.

[67] *See* WEITZMAN, *supra* note 17, at 14; WINNER, *supra* note 48, at 31-34.

[68] PRINCIPLES, *supra* note 9, at 25, 50.

[69] *Id.*

[70] *See, e.g.*, CLARK, *supra* note 3, at 644 ("It is axiomatic that the trial courts have wide discretion in determining the propriety and the amount of alimony."). This judicial discretion also applies to the classification, valuation, and distribution of marital property on divorce, *id.* at 589-94, and to child custody determinations, where parental conduct and fitness are always relevant factors in any child custody dispute. *Id.* at 796-806.

[71] One of the strongest arguments against the *Principles*' concern regarding "inherently limitless" judicial discretion is the fact that most fault-sensitive jurisdictions

well as by appellate review for any abuse of judicial discretion.[72] Third, the current trend in many state courts is to ignore or severely limit the effect of any fault-based divorce factors, except in serious and egregious circumstances.[73]

Thus, it is fair to say that a substantial number of states *still* continue to recognize and use a number of fault-based statutory factors for serious and egregious marital misconduct, and that state court judges generally have applied these fault-based remedies in a realistic and responsible manner. As Professor Barbara Bennett Woodhouse aptly observes:

> I agree with the ALI's Draft description of the complexities and challenges of the judging process, but not with the faint-hearted conclusion that judges are incapable of trying cases that depend on assessing the reasonableness of conduct in a given context or on calculating intangibles. We have learned to calculate "goodwill" in a business enterprise, to place a dollar value on an accident victim's pain, to judge corporate directors' fidelity in complex takeover negotiations, and to calibrate punitive damages to deter misconduct in many spheres. There is no reason why courts cannot undertake similar inquiries in the area of marital fault.[74]

Finally, Professor Ellman[75] and the ALI *Principles*[76] both argue that any compensation for nonfinancial loss arising from the other spouse's egregious marital misconduct is "better left" to a separate criminal law or tort remedy, and that there "is no reason to reinvent compensation principles under the rubric of fault adjudication, nor to incorporate tort principles into divorce adjudications."[77]

Professor Ellman and the *Principles* are correct in asserting that there is no reason to "reinvent compensation principles" under the rubric of fault adjudication, but for an entirely different reason. Fault adjudication in divorce *already* exists in a majority of American

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now recognize marital fault as only *one* of *many* statutory factors that must be taken into consideration by the trial court judge in determining appropriate spousal support and marital property division on divorce. *See, e.g.*, Sparks v. Sparks, 485 N.W.2d 893 (Mich. 1992) (holding that marital misconduct is only *one* of *many* statutory factors that a court must properly consider in awarding spousal support or a division of marital property); *accord* Tarro v. Tarro, 485 A.2d 558 (R.I. 1984); Rexrode v. Rexrode, 339 S.E.2d 544 (Va. Ct. App. 1986).

[72] *See, e.g.*, Clark v. Clark, 696 P.2d 1386 (Kan. 1985); Blank v. Blank, 389 S.E.2d 723 (Va. Ct. App. 1990); Paul v. Paul, 616 P.2d 707 (Wyo. 1980).

[73] *See, e.g.*, Anderson v. Anderson, 230 S.E.2d 272 (Ga. 1976); Platt v. Platt, 728 S.W.2d 542 (Ky. Ct. App. 1987); Thames v. Thames, 477 N.W.2d 496 (Mich. Ct. App. 1991); Perlberger v. Perlberger, 626 A.2d 1186 (Pa. Super. Ct. 1993); Williams v. Williams, 415 S.E.2d 252 (Va. Ct. App. 1992).

[74] Woodhouse, *supra* note 20, at 2560.

[75] *See* Ellman, *supra* note 8, at 807-08.

[76] PRINCIPLES, *supra* note 9, at 57-66.

[77] *Id.* at 53.

jurisdictions today, based upon a number of strong underlying public policy reasons, so fault adjudication in divorce, in a majority of states, need *not* be "reinvented." The *Principles*, however, incorrectly attempts to characterize nonfinancial fault-based compensatory remedies only in terms of assault and battery, or tortuous infliction of emotional distress.[78] While serious and egregious marital misconduct may well include these acts as well as spousal abuse, domestic violence, and attempted murder,[79] it is not limited solely to physical or mental cruelty; adultery that substantially contributes to the dissolution of a marriage is also recognized as a relevant fault-based factor in a substantial majority of jurisdictions.[80] Yet, as the *Principles* concedes, emotional distress actions based upon the other spouse's adultery are generally *not* actionable as an independent tort action,[81] nor have many independent tort cases been deemed "outrageous" enough to qualify as intentional infliction of emotional distress.[82]

Although appellate opinions "may suggest that there are a vast number of tort cases associated with divorce, in practice there are relatively few cases that are actually brought, and even fewer when there has been an actual recovery."[83] Thus, as Barbara Bennett Woodhouse observes:

> Tort claims for marital misconduct have severe drawbacks. . . . Because they are treated with suspicion as neither divorce claims nor classic forms of tort, tort remedies for spousal misconduct are often denied or restricted by courts accustomed to no-fault ideology of marriage dissolution. They [also] raise tricky questions of *res judicata* and collateral estoppel, the right to a jury trial, overlapping recoveries, and limitations on damages. These issues . . . currently must be

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[78] *Id.* at 54-64.

[79] *See, e.g.*, Marriage of Sommers, 792 P.2d 1005 (Kan. 1990); Brancovenau v. Brancovenau, 535 N.Y.S.2d 86 (App. Div. 1988); Brabec v. Brabec, 510 N.W.2d 762 (Wis. Ct. App. 1993).

[80] *See, e.g.*, GA. CODE ANN. § 19-6-1 (2004); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1998); 23 PA. CONS. STAT. ANN. § 3701(b)(14) (West 2001).

[81] PRINCIPLES, *supra* note 9, at 56; *see, e.g.*, Strauss v. Cilek, 418 N.W.2d 378 (Iowa Ct. App. 1987); Poston v. Poston, 436 S.E.2d 854 (N.C. Ct. App. 1993); Alexander v. Inman, 825 S.W.2d 102 (Tenn. Ct. App. 1991).

[82] *See, e.g.*, Hetfeld v. Bostwick, 901 P.2d 986 (Or. Ct. App. 1995); Dye v. Gainey, 463 S.E.2d 97 (S.C. Ct. App. 1995).

[83] Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 FAM. L.Q. 745, 762 (1999). Among the reasons for not bringing such marital tort cases are that "practically all clients show a distaste for the prolonging of a process that a civil case would entail" and "homeowner insurance policies no longer cover intentional torts. Therefore only where the tort defendant has sufficient assets to satisfy the judgment is a case viable." Finally, "the family law bar is rather inexperienced in the personal injury area." *Id.* at 762-63.

> resolved by judges addressing individual cases in a piecemeal fashion and confined to the analytical structure of tort laws.[84]

The *Principles* therefore advocate an independent tort action for serious and egregious marital misconduct that is both costly and duplicative, rarely used by the spouses in a successful manner, and does not provide an adequate or realistic remedy for serious and egregious marital misconduct. It also raises a number of largely unresolved procedural issues as to exactly *how* such an independent tort action should be brought. The better-reasoned approach, used in the majority of states today, is to retain and utilize economic *and* noneconomic fault factors on divorce in order to determine fair and adequate spousal support awards, and the equitable distribution of marital property on divorce, whenever a spouse has been guilty of serious and egregious marital misconduct.

III. CONCLUSION

Since the so-called no-fault divorce "revolution" of the 1970s, a number of commentators have largely discounted the role of fault in contemporary American divorce law. Likewise, the American Law Institute's proposed *Principles of the Law of Family Dissolution* (2000) dismisses the role of marital fault in the dissolution of marriage, as well as any other noneconomic contribution of a spouse to the marriage and the well-being of the family.

What these commentators largely ignore, however, is that thirty-five years after the so-called no-fault divorce "revolution," only a small minority of states—about fifteen—are "true" no-fault jurisdictions, while a majority of states *still* retain alternative fault grounds for divorce, and *still* consider marital fault factors in determining spousal support and the distribution of marital property on divorce.[85] Indeed, forty-two states *still* continue to evaluate a spouse's noneconomic contributions to the marriage and the well-being of the family, in spite of the *Principles*' arguments to the contrary.[86] This continuing legislative and judicial recognition of fault-based divorce factors may be explained by the strong public policy rationale underlying marriage and divorce in a majority of states—that moral issues still *do* matter in family law, and that states still *do* take into account the actions of the respective spouses on divorce, especially when one spouse is guilty of serious and egregious marital misconduct.

Accordingly, fault factors in contemporary American divorce law still *do* serve a legitimate purpose and function for three reasons. First, other no-fault laws such as workers compensation, automobile

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[84] Woodhouse, *supra* note 20, at 2566.

[85] *See* Elrod & Spector, *supra* note 14, at 580.

[86] *Id.*

insurance, and strict liability torts have incorporated fault-based remedies within their no-fault statutory framework for serious and egregious conduct, and American divorce law should continue to do the same. Second, a substantial number of states continue to recognize and use a number of fault-based statutory factors on divorce for determining spousal support and the division of marital property, and state courts have generally applied these fault-based statutory remedies in a responsible manner. Finally, alternative tort or criminal law remedies for serious and egregious marital misconduct have proven to be inadequate in theory and practice.

COHABITATION AND THE FUTURE OF MARRIAGE

Lynne Marie Kohm and Karen M. Groen***

I. INTRODUCTION

The 2000 United States Census sent a signal about marriage on its short form data survey: marriage doesn't really matter enough to even ask about it.[1] In a culture where marriage doesn't matter enough to be counted by the federal bureaucracy, cohabitation may be equally unimportant – or is it? "Marriage may or may not be an 'antiquated institution,' but it is undeniable that non-marital cohabitation has increased dramatically."[2] The correlation between cohabitation and marriage has received much attention in sociological studies.[3] Often considered an alternative family form, cohabitation is among several family structures that are increasing in frequency in American society.[4]

This article considers cohabitation, in light of the future of marriage, from a legal and cultural framework by examining the demographic context, legal structure, and future speculation on the issue of unmarried individuals living together. We submit that the cycle of legal protection for unmarried cohabitation could actually result in a renaissance of marriage.

Part II analyzes the impact of demographic trends nationally and internationally on the marriage (or non-marriage) culture. Part III reviews the case law and statutory schemes that have sought to deal with the issue of non-marital cohabitation as well as academic literature on cohabitation. Part IV considers the analysis from Part II in light of the legal rules outlined in Part III and examines why marriage is preferred legally over rights of cohabitants. Additionally, it evaluates the benefits and costs of cohabitation in light of the benefits and costs of

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1 Gene Edward Veith, *New Census Consensus? Marriage Doesn't Matter*, WORLD, Aug. 28, 1999, at 24.

2 HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 219 (4th ed. 1998).

3 DAVID POPENOE & BARBARA DAFOE WHITEHEAD, SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE: A COMPREHENSIVE REVIEW OF RECENT RESEARCH (2d ed. 2002), *available at* http://marriage.rutgers.edu/Publications/swlt2.pdf (last visited Mar. 31, 2004).

4 *See, e.g.*, Jay D. Teachman et al., *The Changing Demography of America's Families*, 62 J. MARRIAGE & FAM. 1234 (2000).

marriage. Finally, this article reflects upon the deepest marital desires of most single adults.

Cohabitation has been regulated to such an extent that, in many statutory circumstances, it looks much like marriage. Its own entangled web of regulation, however, reveals the weakness of threads spun by cohabitation as compared to the strength of those provided by marital bonds. The difference becomes clearer when the cultural phenomenon of cohabitation is stripped of the cobwebs of legal regulation, revealing that individuals authentically desire marriage even in the face of social and legal acceptance of non-marital status. Some legal scholars have attempted to accomplish the objective of treating all family forms equally by offering the most radical view: abolishing marriage as a sanctioned legal institution altogether.[5] Other scholars, however, "see too many problems with cohabitation defined as an alternative to marriage to believe that law and social policy should actively support this emerging family form."[6]

This article contends that, although regulation has allowed cohabitation to come to look very much like marriage, marriage is still the preferred status – both statutorily and personally. It reveals that the differences between the two are more cultural than legal, and that the future of marriage appears even stronger, precisely because the law has made cohabitation look so much like marriage. In other words, attempts at regulation of unmarried cohabitation have not served to change people's desires. A happy marriage—not a happy cohabitation—is still the American dream.

II. DEMOGRAPHICS AND LEGAL TRENDS

In the United States, unmarried cohabitation has been on the rise since 1970. In 1996, there were 4 million cohabiting couples, an almost eight-fold increase from 1970.[7] "In 1970 there was one cohabiting couple for every one hundred married-couple households. Now there are eight couples living together for every one hundred married couples."[8] These statistics "suggest the likelihood that a majority of people will be in an unmarried domestic relationship before marriage."[9] Since at least one generation has passed between 1960 and 1995, the intergenerational

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[5] *See* MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998).

[6] Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 406-07 (2004).

[7] Paige D Martin et al., *Adolescent Premarital Sexual Activity, Cohabitation, and Attitudes Toward Marriage*, 36 ADOLESCENCE 601, 601 (2001).

[8] LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 36 (2000).

[9] Martin et al., *supra* note 7, at 601.

effects of cohabitation are worth considering. Children whose parents cohabit after a divorce are more likely to accept cohabitation "as an alternative to marriage" themselves.[10] "[T]he continued presence of a married father in the home strongly predicts the happy marriage of the child."[11] However, children spend significantly less time with their father figure if he is a stepfather or a cohabiting father figure rather than a married biological father.[12]

Despite the statistical reality of a rise in cohabitation, women and men, regardless of whether they cohabit, still say that marriage is most important to them. Eighty percent of women and seventy percent of men "believe that a good marriage is 'extremely important,'" and an even higher percentage of men "believe that marriage is for a lifetime."[13]

Social science studies have consistently found a positive correlation between cohabitation before marriage and divorce.[14] The two main interpretations of this correlation are that cohabitation actually changes people's attitudes and encourages divorce, or that those who choose cohabitation are more susceptible to choosing divorce to begin with.[15] Regardless of which interpretation is correct, non-marital cohabitation is "one of the most robust predictors of marital dissolution that has appeared in the literature."[16]

Social science studies have also consistently found a positive correlation between cohabitation and child abuse. "Linda Waite's review of the National Survey of Families and Households data revealed that when cohabiting couples argue they are more than three times as likely to resort to physical violence than are married couples."[17] There are also "far higher levels of child abuse" in cohabiting families than in marital

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[10] *Id.* at 602.

[11] Sandra L Hofferth & Kermyt G. Anderson, *Are All Dad's Equal? Biology Versus Marriage as a Basis for Paternal Involvement*, 65 J. MARRIAGE & FAM. 213, 223 (2003) ("children spend significantly more time with a married biological father than with a non-biological father, either stepfather or mother's partner.").

[12] *Id.*

[13] Helen M. Alvare, *Saying "Yes" Before Saying "I Do": Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 13 n.25 (2004) (quoting Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE & FAM. 1009, 1020 (2001)).

[14] Renata Forste, *Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S.*, 4 J.L. FAM. STUD. 91, 93 (2002).

[15] *Id.*

[16] Alvare, *supra* note 13, at 28-29 (quoting Jay Teachman, *Premarital Sex, Cohabitation, and the Risk of Subsequent Marital Dissolution Among Women*, 65 J. MARRIAGE & FAM. 444, 445 (2003)).

[17] Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1225.

families.[18] "Children whose biological parent or parents are only cohabiting rather than married" have higher rates of sexual abuse as well.[19] In 1996, the poverty rate for children of cohabiting parents was more than five times greater than for children of married parents.[20] Additionally, "[t]hree quarters of children born to cohabiting parents will see their parents split up before they reach age sixteen, whereas only about a third of children born to married parents face a similar fate."[21]

In many Western societies, the stigma once associated with unmarried cohabitation has virtually vanished. A dramatic increase in cohabitation has occurred particularly throughout Scandinavian nations.[22] These rising rates of cohabitation have also given rise to higher rates of out-of-wedlock births, all of which in turn "stand as proxy for rising rates of family dissolution."[23] "The rise of fragile families based on cohabitation and out-of-wedlock childbearing means that during the nineties, the total rate of family dissolution in Scandinavia significantly increased."[24]

Reforms in Sweden provide a reference point for developments elsewhere. A comprehensive secularization of family law occurred in the early 1970s, and in 1973 the Swedish Parliament endorsed the proposition that "from society's point of view, cohabitation between two persons of the same sex is a perfectly acceptable form of family life."[25] "Swedes themselves link the decline in marriage with secularism. . . . [S]tudies confirm . . . religiosity is associated with . . . strong marriages, while heightened secularism is correlated with [weak marriages]."[26] The work of a Danish sociologist confirms that there is an "increased risk of family dissolution to children of unmarried parents."[27] A recent study by a Swedish social scientist "found that children of single parents in

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[18] *Id.*; *see also* William C. Duncan, *Domestic Partnership Law in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 991-92 ("[L]iving together outside of marriage increases the risk of domestic violence for women, and the risk of physical and sexual abuse for children.").

[19] Wardle, *supra* note 17, at 1225. In 1996, 6% of children in marital families were below the poverty line while that number was 31% for children in cohabiting households. *Id.*

[20] *Id.*

[21] *Id.*

[22] Stanley Kurtz, *The End of Marriage in Scandinavia*, THE WKLY. STANDARD, Feb. 2, 2004, at 27.

[23] *Id.*

[24] *Id.*

[25] David Bradley, *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, 4 GLOBAL JURIST FRONTIERS 7 (2003) (quoting Hans Ytterberg, *From Society's Point of View*, *in* ROBERT WINTEMUTE & MADS ANDENAES, LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 427, 428 (2001)).

[26] Kurtz, *supra* note 22, at 28.

[27] *Id.*

Sweden have more than double the rates of mortality, severe morbidity, and injury than do children in two parent married households."[28]

Without formal legal trappings, these relationships often gain many pseudonyms. New Zealanders tend to use terms like *de facto* relationships, or *de facto* marriage to distinguish cohabitation from *de jure* marriage or legal marriage.[29]

> [W]ith the passage of a package of legislative reforms that place married and unmarried couples (heterosexual and homosexual) on much the same basis for property and succession matters[, it] is suggested that these reforms come close to creating a new status, the incidents of which are very similar to the status of marriage.[30]

The more liberal the regulations are, the more *de facto* relationships will tend to look like marriage. Since the rules are applicable to all sorts of associations, problems also arise when determining what rules to apply to which relationship and when to do so.[31] Lawmakers in New Zealand have attempted to solve these problems with a list of factors meant to determine which non-marital relationships deserve marriage-like protection.[32] This list resembles a list of factors for judicial determination of spousal support, or standards for equitable distribution.[33]

Other global frontiers examining cohabitation protections generally do so in the context of same-sex relationship recognition. While Spain and Italy have moved in that direction with certainty, Ireland's attempts at enhancing same-sex cohabitation are "unpromising."[34] Even though Britain has moved toward greater protection of unmarried cohabitation both for heterosexual and homosexual couples, "marriage is still the surest foundation for raising children and remains the choice of the majority of people in Britain."[35] That nation's Labour Party itself has stated in policy form: "We want to strengthen the institution of marriage."[36]

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[28] *Id.* (citing Gunilla Ringback Weitoft et al., *Mortality, Severe Morbidity, and Injury in Children Living with Single Parents in Sweden: A Population-Based Study*, 361 LANCET 289 (Jan. 2003)).

[29] Bill Atkin, *The Challenge of Unmarried Cohabitation: The New Zealand Response*, 37 FAM. L. Q. 303, 304 (2003).

[30] *Id.*

[31] *Id.* at 312.

[32] *Id.* at 314-15.

[33] *Id.*

[34] Bradley, *supra* note 25, at 28.

[35] *Id.* (quoting HOME OFFICE, SUPPORTING FAMILIES: A CONSULTATION DOCUMENT 5 (1998)).

[36] *Id.*

Throughout western Europe, cohabitation without marriage was the least stable arrangement of the options for human pair bonding.[37] Cohabitation as an alternative to marriage is not a sound strategy for stability, longevity, mate selection or a mechanism to test marriage.[38] In fact, much of the law on cohabitation is built around judicial decisions and the politics of domestic partner legislation without regard for aggregate social detriment or long-term personal or societal consequence.

III. CASE LAW, STATUTORY SCHEMES, AND A REVIEW OF THE LITERATURE

A. Judicial Awards of Cohabitation Rights

"The doctrine of common law marriage[39] . . . increased the percentage of couples considered legally married who were unmarried and living together."[40] Equitable remedies for cohabitants increased through the use of constructive trusts imposed by courts that saw a detrimental reliance on the part of one of the parties to the cohabitation. *Marvin v. Marvin* is the landmark case in this regard; it arose in California, a state that had abolished the doctrine of common law marriage.[41] That court concluded that family law regulations did not govern the distribution of assets acquired during a non-marital relationship, but that living together under an oral agreement created an implied contract where the plaintiff's expectations of payment were reasonable.[42] Many states followed this example,[43] while others stated their outright disdain for such a contractual concept applied to non-legal and non-marital relationships.

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[37] Kathleen Kiernan, *Cohabitation in Western Europe: Trends, Issues, and Implications*, *in* JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN AND SOCIAL POLICY (Alan Booth & Ann C. Crouter eds., 2002).

[38] *See* discussion *infra* Part IV.

[39] The doctrine of common law marriage is the concept that a man and a woman agree to live together exclusive of all others and hold themselves out as married, though without the legal, formal or religious solemnization of a marriage. They are thereby treated by the law as married for all state and federal purposes. *See* HOMER CLARK, DOMESTIC RELATIONS 48, 50 (2d ed. 1988).

[40] KRAUSE, *supra* note 2, at 220.

[41] Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

[42] *Id.* at 122-23.

[43] Included among the states which have followed the *Marvin* approach are Minnesota (Carlson v. Olson, 256 N.W.2d 249 (1977)) and New Jersey (Koslowski v. Koslowski, 403 A.2d 902 (1979)). Other states have accepted some, but not all of the grounds for recovery sanctioned by *Marvin*. *See, e.g.*, Marone v. Marone, 50 N.Y.2d 481 (1980); Tapley v. Tapley, 122 N.H. 727 (1982). Some states follow minimal aspects of Marvin. *See, e.g.*, MINN. STAT. § 513.075 (2004); TEX. FAM. CODE ANN. § 1.108 (Vernon 1998).

Opposing *Marvin* was the Illinois case of *Hewitt v. Hewitt*.[44] In *Hewitt*, an unmarried family-like relationship that did include an element of detrimental reliance did not constitute a contract for purposes of property distribution or the payment of spousal support.[45] States that follow the *Hewitt* approach refuse to grant legal status to a private relationship that substitutes itself for the state-sanctioned institution of marriage.[46] Although such rulings are criticized because cohabitation may disadvantage one of the parties, states adhere to this logic because they do not wish to sanction unmarried cohabitation in any way. Frankly, allowing domestic partnerships to be treated as if they were equal to marriage encourages people to cohabitate rather than marry.[47] Without domestic partnerships, however, we find two extremes: cohabitants have little or no rights, or they have duties imposed upon and imputed to them as if they are married, when they have chosen not to marry.[48] From this perspective, cohabitation appears to be a lose-lose situation. Even in the face of such evidence, cohabitation is increasingly being proposed as a functional substitute for marriage, as opposed to a testing ground for marriage.[49]

B. Domestic Partner Legislation

Domestic partner legislation has made great strides in conferring legal status to cohabitation. This trend, however, has weakened both marriage and cohabitation by adding marriage-like duties without the benefits of marriage.

Some domestic partnership statutes set up cohabitants' rights based on status. Status-based regimes exist, either by statute or judicial order, in six jurisdictions: Washington (meretricious relationships);[50] Vermont (civil unions);[51] Massachusetts (same-sex marriage);[52] and in Hawaii,[53]

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[44] Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979).

[45] *Id.* at 1205, 1211.

[46] *Id.* at 1211.

[47] Linda J. Waite, Foreword, *Marriage Myths and Revitalizing Marriage*, *in* REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY ix (Alan J. Hawkins et al. eds., 2002). "Cohabiting couples get most of the same economies of scale as married couples. But cohabiting couples almost always marry or split up within a few years, economies of scale notwithstanding." *Id.*

[48] *See generally* Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 L. & POL'Y 119 (2004).

[49] Brinig & Nock, *supra* note 6, at 407. "The trend in family law and scholarship in Europe and Canada is to treat married and cohabiting couples similarly, or even identically." *Id.* at 403.

[50] In *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995), the term "meretricious relationship" was defined as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."

[51] VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2000).

[52] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

New Jersey,[54] and California[55] as pure domestic partnerships.[56] Other domestic partnership legislation varies by county, city, and state, but none confers any particular status upon partners. Private contracts for benefits between cohabitants is another method for conferring benefits upon partners, though without state sanction.

> The result of all this activity is a rather confusing legal situation, in which cohabitants' rights are based upon a mixture of remedies that not only vary from state to state, but also result in intrastate legal regimes based on different legal theories and offering a patchwork of remedies from a variety of sources. An additional result is that same-sex couples are better protected in many areas than are heterosexual cohabitants.
>
> The system as it now exists is clearly unstable.[57]

The different approaches to cohabitants' rights go from the extreme of cohabitants having essentially no rights, to cohabitants being treated as though they were married. There has been no federalization of this area of law. The result is that cohabitation laws begin to look very much like marriage when imposed statewide. A review of the literature makes it apparent that legal academics, rather than sociologists or family policy makers, have provided much of the impetus for encouraging laws that set cohabitation on a par with marriage.

C. A Review of the Literature

Cohabitation has been the subject of scholarly writing over the years, especially since *Marvin*[58] and *Hewitt*[59] were decided. At the time of this writing, twenty-seven law review articles contain some derivative of "cohabit" in their title.[60] Of these twenty-seven, fifteen favor

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[53] Reciprocal Beneficiaries Act, HAW. REV. STAT. §§ 572C-1-C-7 (Supp. 2003).

[54] The New Jersey Domestic Partnership Act, N.J. AB 3743 (2004) (codified at N.J. STAT. ANN. § 2A:34-2 (West 2000)).

[55] Domestic Partner Registration Act, CAL. FAM. CODE § 297 (West 2000). The Domestic Partner Rights and Responsibilities Act [AB 205] is effective January 2005, but still under judicial review at the time of this publication.

[56] Bowman, *supra* note 48, at 129.

[57] *Id.* at 146.

[58] Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

[59] Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979).

[60] *See* Alvare, *supra* note 13; Frank S. Berall, *Tax Consequences Of Unmarried Cohabitation*, 23 QUINNIPIAC L. REV. 395 (2004); Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001); Katharina Boele-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe*, 60 LA. L. REV. 1053 (2000); Brinig & Nock, *supra* note 6; G. Garcia Cantero, *Spain: Cohabitation in the Courts*, 33 U. LOUISVILLE J. FAM. L. 507 (1995); Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699 (1998); David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-*

cohabitation, or more generally take the view that marriage is inadequate, and offer as a solution either to abolish or lessen the significance of marriage, or to create alternatives to marriage such as cohabitation or partner registration.[61] The topics of these articles range

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Law Marriage, 49 TENN. L. REV. 537 (1982); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001); Forste, *supra* note 14; Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114 (2000); Delia B. Inigo, *Argentina: Cohabitation and Assisted Human Fertilization*, 33 U. LOUISVILLE J. FAM. L. 267 (1995); Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829 (1987); Brooke Oliver, *Contracting For Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay or Unmarried Heterosexual Couples*, 23 GOLDEN GATE U. L. REV. 899 (1993); Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163 (1985); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001); Carol Smart, *Stories of Family Life: Cohabitation, Marriage and Social Change*, 17 CAN. J. FAM. L. 20 (2000); Eric P. Voigt, *Reconsidering the Mythical Advantages of Cohabitation: Why Marriage Is More Efficient Than Cohabitation*, 78 IND. L.J. 1069 (2003); Barbara Freedman Wand, *The Relevance of Premarital Cohabitation to Property Division Awards in Divorce Proceedings: An Evaluation of Present Trends and a Proposal for Legislative Reform*, 63 B.U. L. REV. 105 (1983); Brandon Campbell, Comment, *Cohabitation Agreements in Massachusetts:* Wilcox v. Trautz *Changes the Rules but Not the Results*, 34 NEW ENG. L. REV. 485 (2000); Barbara Endoy, Note, *Irreconcilable Cohabitation Statutes and Statutory Proscriptions Against Marital Status Discrimination:* McCready v. Hoffius *and the Unworkable Status-Conduct Distinction*, 44 WAYNE L. REV. 1809 (1999); Katherine C. Gordon, Note, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them–A State Survey*, 37 BRANDEIS L.J. 245 (1998-99); Irma S. Jurado, Note, Anderson v. Edwards*: Can Two Live More Cheaply Than One? The Effect of Cohabitation on AFDC Grants*, 26 GOLDEN GATE U. L. REV. 301 (1996); Philip M. Longmeyer, Note, *Look on the Bright Side: The Prospect of Modifying or Terminating Maintenance Obligations Upon the Homosexual Cohabitation of Your Former Spouse*, 36 J. FAM. L. 53 (1997-98); Jennifer Mara, Note, *Living with the Consequences: The New Jersey Supreme Court Finds Cohabitation Provisions Enforceable*, 30 SETON HALL L. REV. 1255 (2000); Carolyn Sievers Reed, Note, *Alimony Modification and Cohabitation in North Carolina*, 63 N.C. L. REV. 794 (1985); Rebecca A. Wistner, Note, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071 (1996). The purpose of grouping these articles together as to their positions on marriage is not to minimize the unique perspective that each offers, but rather to get a "forest" rather than a "tree" picture of the cohabitation literature landscape.

[61] *See* Boele-Woelki, *supra* note 60 (arguing for an international harmonization of cohabitation law in Europe); Caudill, *supra* note 60 (proposing a reintroduction of common law marriage); Christensen, *supra* note 60 (arguing that same-sex marriage should be sought rather than a civil union type alternative); Estin, *supra* note 60; Holland, *supra* note 60, at 20 (arguing for an extension of spousal status to cohabitants); Kandoian, *supra* note 60, at 1870-72 (advocating a move toward a partnership theory of marriage defined as "An association of two persons to carry on a shared life"); Oliver, *supra* note 60 (advocating life partnership contracts); Prince, *supra* note 60 (arguing against application of public policy exception to enforcement of cohabitation agreements); Regan, *supra* note 60; Smart, *supra* note 60; Wand, *supra* note 60, at 107-08 (arguing that property allocation in divorce proceedings should take premarital cohabitation into consideration); Campbell, *supra* note 60 (arguing in favor of offering contractual and equitable remedies to cohabiting couples); Endoy, *supra* note 60 (arguing that landlords should not be able to discriminate between

from whether landlords should be able to deny rental housing to cohabiting couples based on the landlord's religious beliefs[62] to the inequities that result when cohabiting partners rely to their detriment on each other.[63] These articles take a micro perspective to cohabitation, reasoning from specific instances that inequity will result on a broader societal level if cohabitation is not favored.[64] They often do so by using specific cases and stories of cohabiting couples who were disadvantaged because they were not given rights as married couples.[65]

Eight articles of the twenty-seven are neutral or objective toward cohabitation, limiting themselves to reporting the law as it is.[66] Just four of the twenty-seven articles take the position that marriage is preferable to cohabitation or that laws should be designed to strengthen marriage and disincentivize cohabitation.[67] These articles examine cohabitation from a macro perspective, focusing on the broader policy

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married and cohabiting couples because of their religious beliefs); Gordon, *supra* note 60, at 246 (asserting that cohabitation agreements are both valid and necessary); Wistner, *supra* note 60, at 1073-74 (arguing that, under RFRA, "landlords should not be granted religious exemptions from fair housing laws in order to discriminate against unmarried couples").

62 Endoy, *supra* note 60; Wistner, *supra* note 60.

63 Prince, *supra* note 60 (arguing for enforcement of cohabitation agreements); Wand, *supra* note 60 (arguing that property allocation in divorce proceedings should take premarital cohabitation into consideration); Campbell, *supra* note 60 (arguing in favor of contractual and equitable remedies for cohabiting couples upon separation).

64 Lynn D. Wardle, *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 CATH. U. L. REV. 81, 124 (2002) (citing JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980)); *see generally* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) (arguing that many adults are angry many years after their divorce and children of divorced parents often suffer socially and personally as a result of the trauma of divorce).

65 *Id.*

66 Berral, *supra* note 60 (survey of tax law implications of *Goodridge v. Massachusetts*); Blumberg, *supra* note 60; Cantero, *supra* note 60 (review of the history of the legal treatment of cohabitation in Spain); Inigo, *supra* note 60 (history and current status of cohabitation law in Argentina as it relates to assisted human fertilization); Jurado, *supra* note 60 (arguing for an AFDC rule that treats non-siblings living together as if they were siblings); Longmeyer, *supra* note 60 (arguing in favor of recognizing homosexual cohabitation as grounds to terminate spousal support payments); Mara, *supra* note 60 (arguing that cohabitation should create rebuttable presumption that spousal support is no longer needed); Reed, *supra* note 60 (arguing that cohabitation should terminate spousal support for supported spouse as re-marriage does).

67 Alvare, *supra* note 13 (analyzing statistics indicating that premarital sex and cohabitation are positive indicators of divorce); Brinig & Nock, *supra* note 6 (arguing that the law should distinguish between cohabitation as an alternative to marriage and as a trial or prelude to marriage, favoring the latter because there are fewer negative consequences); Forste, *supra* note 14 (presenting cohabitation as a prelude and an alternative to marriage and describing consequences as negative); Voight, *supra* note 60 (advocating that State legislatures take into consideration that marriage is more efficient than cohabitation for purposes of AFDC and TANF legislation).

behind cohabitation and its possible result both across society and over several generations.

This survey of the literature shows that a focus on the equity of particular situations can lead to an acceptance of cohabitation and a desire to regulate it like marriage. However, a global consideration of the statistics reflecting how marriage is a good, how most people desire marriage, and how cohabitation and premarital sex sabotage marriage, should prompt an effort to strengthen marriage. Divorce has been a large-scale social experiment based in part upon particular heart-wrenching situations where a denial of no-fault divorce appeared cruel and unfair. On a macro scale, however, divorce has produced devastating results for adults and children alike.[68] To build a cohabitation policy around the narrow focus of the inequities of particular relationships is likely to produce the same devastating result. Perhaps the "hard facts make bad law" cliché rings true in the policy arena as well.

This article fits into the spectrum of cohabitation literature by taking a step back to observe the relationship between cohabitation and marriage on a societal level. Its purpose is to raise concerns regarding cohabitation that are generally not analyzed by looking beyond legal regimes and focusing on differences between cohabitation and marriage. We believe that this analysis demonstrates very clearly that marriage (and not cohabitation) is a social, legal and personal good. While opposing the idea that cohabitation should be treated like marriage, we submit that efforts toward raising cohabitation to the level of marriage will actually serve to bolster a renaissance of marriage.

IV. ACTUAL (AND LEGAL) ADVANTAGES OF MARRIAGE OVER COHABITATION

A. The Paradox

A paradox exists in our culture which reveals that, even though unmarried cohabitation offers marriage-like protections, marriage remains very important to American adults. The paradox is that, while people want to be married, and the likelihood of marital success is negatively correlated with cohabitation, people still cohabitate. The work of researcher and sociologist Norval Glenn has caused him to surmise that, "[t]his paradox can be resolved by assuming that the decline in the probability of marital success has resulted from forces external to values, attitudes, and feelings concerning marriage."[69] There has been a steady decline in the commitment to marriage accompanied by a steady rise in

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[68] *See supra* note 64.

[69] Norval D. Glenn, *Values, Attitudes and the State of American Marriage*, *in* PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (David Popenoe et al. eds., 1996), *reprinted in* MARGARET F. BRINIG ET AL., FAMILY LAW IN ACTION: A READER 11 (1999).

the expectations of marriage. Glenn says, "[h]aving a good marriage could remain a salient goal while the values and norms conducive to attainment of that goal become weaker. People could want and expect more from marriage while they become less willing to make the sacrifices and 'investments' needed for marital success."[70]

So it appears that the paradox is actually rather consistent. Marriage is preferred over cohabitants' rights, but people cohabit because they fear failure of a marriage, or they fear the work that marriage requires. Indeed, marriage is a relationship that in some ways surrenders self to seek a greater good, while cohabitation is a relationship that serves individuals alone who may indeed fear the surrender of self. Marriage is based on concepts of selflessness. It is also based on the security that a lifelong relationship provides. The freedom and safety for full self-giving is found in the context of marriage alone. So our paradox can actually result in a sort of twisted self-sabotage. The marriage bargain stands in contrast to the cohabitation bargain, not only in rights and duties, but in investment and return.

B. Costs of Cohabitation

In their book, *The Case for Marriage*, Linda Waite and Maggie Gallagher spend an entire chapter discussing what they term "The Cohabitation Deal."[71] They suggest that there is a sharp distinction between marriage and cohabitation,[72] that the lines are not as blurred as legislation may seem to indicate, and that the costs of cohabitation are surprisingly similar to those of divorce.

> The prime difference between marriage and cohabitation in contemporary American culture has to do with time horizons and commitment. What makes marriage unique among emotional and financial relationships is the vow of permanence. With marriage, partners publicly promise each other that neither one will be alone any longer: Whatever else happens in life, someone will care about and take care of you. Even spouses who choose divorce hang on, with surprising persistence, to the ideal of marital permanence, preferring to see their own marriages as "a lie" rather than to reimagine marriage as a less-than-permanent union. Eighty-one percent of divorced and separated Americans still believe marriage should be for life.

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[70] *Id.*

[71] LINDA J. WAITE & MAGGIE GALLAGHER, *supra* note 8, at 36-46 (discussing the myths of the cohabitation bargain).

[72] *Id.* at 37. "Cohabitation is not 'just like marriage' but rather an emerging social lifestyle with a different set of social meanings, which generally serves different purposes. Contemporary cohabitations do not take on the protective coloration of marriage but flaunt their differences." *Id.*

> Cohabitation, by contrast, is seen by partners and society as a temporary arrangement. The majority of cohabitors either break up or marry within two years.[73]

Cohabitation and domestic partnerships tend to eliminate sexual mores and legal responsibility,[74] which is what people find attractive about the cohabitation bargain. "For many cohabitors, the idea of relatively easy exit with no well-defined responsibilities constitutes cohabitation's biggest attraction . . . . Even when Cohabitors have been together for long periods of time, they do not feel obligated to remain with this partner forever."[75] This concept of lesser commitment extends to all aspects of the lives of cohabitants, particularly in the area of sexual fidelity, where research shows that cohabitants are less faithful to their partners; even when sexual faithfulness is kept, there is less of a commitment to the idea of sexual fidelity.[76] Whether motivated by the fear of fidelity or the principle of sexual openness, liberty to be free to be faithful or unfaithful is never satisfactorily grasped.

Couples who cohabit may enjoy short term benefits, but those benefits come at a high price.[77] Perhaps most importantly, however, is that the greatest cost of cohabitation can be found in the diminution of the potential for a good marriage in the future.[78] When couples use cohabitation as a sort of marriage search, or even a form of courtship, "engagement occurs when the expected utility from getting married outweighs the expected utility of remaining single and continuing the search."[79] Even when cohabitation is used as a method of searching for a mate, it is a poor substitute for marriage, not because of its lack of legally binding ties, but because partners can never fully know each other until the freedom of complete commitment allows them to do so.

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[73] *Id.* at 37-38.

[74] *Id.* at 116.

[75] *Id.* at 38.

[76] *Id.* at 39. "Even if they are currently monogamous, many cohabitors say they are unwilling to say their partner will be the only person they ever sleep with for the rest of their lives." *Id.* Waite and Gallagher offer the example of one man:

> Stewart, for example, has no plans to have sex with any other woman but his live-in partner. "I don't think it is a good idea if I were to get sexually involved with another woman." And yet he has told his live-in lover, "I'm not going to tell you that I'm not going to be sexually involved with anyone [else] because of our relationship . . . I want to make that decision because of how I feel – not because of how you feel . . . ."

Id. His statement reveals the sharp contrast between being self-centered and other-centered.

[77] *Id.* at 46.

[78] *See* Brinig & Nock, *supra* note 6, at 417-18.

[79] *Id.* at 412 (citing Gary S. Becker, *A Theory of Marriage, in* ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN AND HUMAN CAPITAL (Theodore W. Schultz ed., 1974) and GARY S. BECKER, A TREATISE ON THE FAMILY 324-27 (2d ed. 1991)).

"[E]ven when the couple becomes engaged, there are 'secrets' that can only, if ever, be revealed after marriage."[80] When those "secrets" make staying in the marriage less desirable than resuming the single state, divorce occurs.[81] Expecting all those secrets to be revealed during cohabitation is unrealistic because cohabitation does not mimic marriage in all its trappings.

Professors Brinig and Nock have thoroughly analyzed the current empirical evidence available on the subject of cohabitation, theoretically and practically, and its rates of success and failure.[82] They discuss in depth the costs of a failed search for marriage made through cohabitation and discern the consequences for not only that failed relationship, but for all future relationships thereafter, whether cohabitation or marriage.

> Like a divorce, a "failed cohabitation" increases the risk of future relationship failure. For the next relationship, the partner who came from the failed cohabitation would already have cohabited prior to marriage even if this new relationship proceeded directly to marriage. The marriage would therefore have a lower rather than a higher chance of success. To our knowledge, this pattern has not been studied in the West European context. However, in repeated studies in the United States, a history of cohabitation (with another person or persons) that did *not conclude* in marriage is associated with higher rates of divorce.[83]

The data they discuss suggests there are indeed more longitudinal consequences that scan the relationship spectrum that have not been analyzed and considered by the law in policy making.

Conversely, "good family life . . . encourages self-sacrificing love" to those who are different from you, and discourages "rampant individualism."[84] As Helen Alvare states:

> Marriage brings ever-changing mutual dependencies—physically, emotionally, and financially—requiring each spouse to learn to give and to take, to sacrifice, and to receive sacrificial gifts. Lived according to social hopes and ideals, therefore, marriage is an important source of, and witness to, virtues widely desired in American society and beyond.[85]

When cohabiting partners make decisions that affect only themselves or affect only the cohabitation bargain, one set of issues is presented. Those decisions, however, quickly begin to affect other family members.

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[80] Brinig & Nock, *supra* note 6, at 418.

[81] *See* Gary Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977).

[82] *See generally* Brinig & Nock, *supra* note 6.

[83] *Id.* at 422.

[84] Alvare, *supra* note 13, at 16.

[85] *Id.* at 17.

"People who cohabit not only tend to value marriage less, they are more likely to value all familial relationships less."[86] This concept becomes critical when considered in light of the best interests of children.

C. The Effects of Cohabitation on Children

Many studies have been done over the past thirty years evaluating the consequences of marriage for children. "Given the increasing presence of social science evidence in a variety of legal debates, the current state of evidence on family structure and child well-being is important."[87]

Twelve of the nation's leading family scholars have summarized the research literature with one statement: "Marriage is an important social good associated with an impressively broad array of positive outcomes for children and adults alike . . . ."[88] These scholars arrived at some important conclusions. Cohabitation is not the functional equivalent of marriage.[89] Children raised by married parents are healthier, on average, than children in other family forms,[90] and have sharply lower rates of substance abuse.[91] Children raised outside a marital home are more likely to divorce, become unwed parents themselves,[92] and experience significantly elevated risks of child abuse.[93] "In recent years, this scholarly consensus on the importance of marriage for child well-being has broadened and deepened, extending across ideological lines to become the conventional wisdom among mainstream child welfare organizations."[94]

The statistics, however, show that many children are not born and raised in intact marital families. Births to cohabiting women now account for 39% of all births to unmarried women.[95] This means that from birth more than one in every three children born to an unmarried

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[86] WAITE & GALLAGHER, *supra* note 8, at 42 (citing Martin Clarkberg et al., *Attitudes, Values and Entrance into Cohabitational Versus Marital Unions*, 74 SOC. FORCES 623 (1995)).

[87] Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter?*, 4 MARGINS 161, 171 (2004).

[88] WILLIAM J. DOUGHERTY ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 6 (2002).

[89] *Id.* at 7-8.

[90] *Id.* at 11-12.

[91] *Id.* at 12-13. Marriage also reduces child poverty, and boys from intact married homes are less likely to commit crimes. *Id.* at 9, 15-16.

[92] *Id.* at 8.

[93] *Id.* at 17.

[94] Gallagher & Baker, *supra* note 87, at 173.

[95] Brinig & Nock, *supra* note 6, at 404 (citing Larry L. Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contacts in the United States*, 54 POPULATION STUD. 29 (2000)).

mother is likely to be raised in a cohabiting household. That fact presents a significant measure of instability for the children from the outset. Children of divorce more readily move toward cohabitation. "They are two to three times as likely to cohabit and to cohabit earlier."[96] "The less happiness there is in their parents' marriage, the earlier children leave their parents' home to move out on their own, cohabit, or get married."[97]

Children are generally negatively affected by their parents' cohabitation.[98] While cohabitation decreases the time that children spend in single-parent households, it also "increases the number of family disruptions experience[d] by children."[99] The "better vs. best" problem can be seen here: it may be better for children to be raised by an unmarried parent living with a cohabiting partner rather than being raised in a single-parent home. However, given that marriage is the ultimate best for a child, and given the negative correlation between cohabitation and marital success, a parent's cohabitation, while maybe providing a small benefit, is the very thing that is sabotaging the child's ultimate best for the long run: being raised in a married family.

D. Authentic Desires

"[A]ll the relevant data over the past thirty or so years shows that adults of all ages say that having a 'happy marriage' is one of their most important goals in life."[100] This data is clearly inconsistent with the anecdotal hypothesis that there has been a psychological retreat from marriage. Despite this desire for "happy marriage," cohabitation, which sabotages marriage, is on the rise. If the hope for a happy marriage is genuine, then what would cause people to settle for cohabitation when that very thing destroys their chances of realizing their hope? The complete self-sacrifice required to make marriage successful runs counter to the American culture of autonomy and self-conscious individualism. Some may perceive that the stakes are too high, and that to sacrifice themselves for the good of another with no guarantee of return is too great a risk to take. Yet the truth remains that, without this risk, there is no possibility of winning. Although there are no guarantees in life, the great risk of putting another before yourself, of truly loving another, gives the only possibility of achieving even a glimpse of that for which most adults long.

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96 Fagan & Rector, *supra* note 10, at 25.

97 *Id.* at 24.

98 Forste, *supra* note 14, at 94.

99 *Id.*

100 Glenn, *supra* note 69, at 13.

This evidence leads to the greatest paradox of all in the discussion of why marriage is still so important: "The very importance that people place on marriage as a source of gratification has contributed to the decline of marriage as an institution."[101] This sense of entitlement on the rise in American society, coupled with a decline in a sense of duty, has led to the drastic and dramatic effects we see in our culture today.

V. CONCLUSION AND FUTURE SPECULATION

This cultural and moral weakening is evident in the current state of family breakdown. "To explain these changes, conservatives emphasize the breakdown of individual and cultural commitment to marriage . . . . They understand both trends to be the result of greater emphasis on the short-term gratification and on adults, personal desires rather than on what is good for children."[102] A climate of selfishness and individuality has apparently led to the present moral decline. Cohabitation is a direct result of our national individuality. It is indeed well represented in the present state of American culture. Yet even in the midst of that moral decline, individuals who cohabit still desire to marry at some point in the future, possibly because the benefits of one over the other are intrinsically apparent to all.

> In matters of the heart, no less than the market, a bigger investment means better returns. The benefits that marriage (but not cohabitation) brings are not small: . . . marriage for most people is the means to health, happiness, wealth, sex, and long life. In love, victory goes not to the half-hearted but to the brave: to those ordinary people who dare to take on the extraordinary commitment marriage represents.[103]

This analysis is soundly supported by the concept that marriage is a basic, intrinsic good rather than a functional, instrumental good. The law cannot regulate happiness; it can only promote stability and the welfare of its citizens. "Marriage is more than a private emotional relationship. It is also a social good."[104]

The key to success in a renaissance of marriage will be a renewed commitment to a lasting relationship that overcomes selfish desires for satisfaction. A sense of entitlement must be replaced by an intentional sense of seeking something greater than oneself to fully appreciate and experience the strength and joy of marriage.

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[101] *Id.* at 17.

[102] Janet Z. Giele, *Decline of the Family: Conservative, Liberal, and Feminist Views*, *in* PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (David Popenoe et al. eds., 1996) *reprinted in* BRINIG ET AL., *supra* note 69, at 19-20.

[103] WAITE & GALLAGHER, *supra* note 8, at 46.

[104] DOUGHERTY ET AL., *supra* note 88, at 18.

CHILDREN AND THE FUTURE OF MARRIAGE

*Lynn D. Wardle**

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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* Professor of Law, J. Reuben Clark Law School, Brigham Young University. The valuable research assistance of Eliza Cicotti and secretarial assistance of Marcene Mason are gratefully acknowledged. This article was presented at *Moral Realism and the Renaissance of Traditional Marriage*, a Symposium held at the Regent University School of Law, November 8-9, 2004. I express my thanks to Professor Lynne Marie Kohm and the Regent University Law Review for sponsoring this timely symposium, and for the many courtesies that Lynne Marie and the Regent University Law Review staff have extended, including the graciousness of Mr. William Hart of the Law Review who picked me up at the airport and provided gracious assistance.

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 unidimensional 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

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[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

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[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

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[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

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[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]

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[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

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[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/mvsr/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/mvsr/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

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[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

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[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

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[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

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[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

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[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

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[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

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[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 lesbigay 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]

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[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 lesbigay 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 lesbigay 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 lesbigay 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 lesbigay 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]

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[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

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[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

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[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]

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[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

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[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

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[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

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[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

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[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]

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[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]

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[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

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[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, lesbigay 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,

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[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

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[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

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[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.

DEFENDING THE PARENTAL RIGHT TO DIRECT EDUCATION: *MEYER* AND *PIERCE* AS BULWARKS AGAINST STATE INDOCTRINATION

I. INTRODUCTION

> While conservative political forces push for an extension of parental rights, a number of voices in academia have called for parental rights to be curtailed. Many scholars propose legal regimes focused on identifying and satisfying the interests and rights of children.[1]

The family is, and has always been, the foundation of American society.[2] One of the most important functions of the family is the education of children; this is especially true for families with deeply held religious beliefs. The right of parents to direct the education of their children has existed for centuries under the common law[3] and has been a firmly established part of the American constitutional landscape for over eighty years.[4] In the 1920s cases of *Meyer v. Nebraska*[5] and *Pierce v. Society of Sisters*,[6] the Supreme Court held that, while the State[7] has a valid interest in ensuring that children receive some form of education, it cannot seize the parents' primary duty to direct that education.[8] The recognition that parents and the State both have an interest in the education of children has led to a persistent tension between the two, which underlies several key educational issues. For example, parents of public school children often confront school officials concerning "health education" curricula and other issues of control over the values their children are taught.[9] From time to time, States seek to exert more

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1 David Fisher, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 422 (1997).

2 *See infra* Part II.

3 *Id.*

4 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

5 *Meyer*, 262 U.S. 390.

6 *Pierce*, 268 U.S. 510.

7 The term "State" as used throughout this note refers to all levels of American civil government, whether federal, state, or local.

8 *See infra* Part II.B.1 and 2.

9 *See generally* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995); Michael J. Fucci, *Educating Our Future: An Analysis of Sex Education in the Classroom*, 2000 BYU EDUC. & L.J. 91; Roger J.R. Levesque, *Sexuality Education: What Adolescents' Educational Rights Require*, 6 PSYCHOL., PUB. POL'Y & L. 953 (2000); Jeffrey F. Caruso, Note, *Sex Education and Condom Distribution: John, Susan, Parents, and Schools*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 663 (1996); Miranda Perry, Comment, *Kids and Condoms: Parental Involvement in School Condom-Distribution Programs*, 63 U. CHI. L. REV. 727 (1996).

influence over the substance of curricula and manner of instruction used by homeschooling parents.[10] Heated debate has taken place over the wisdom and constitutionality of voucher programs that provide public funds to defray the cost of attending private schools.[11]

Like other time-honored family values, the parental right to direct education has recently come under fire from critics who endorse radical change. While some in the legal and academic communities have pushed for far-reaching changes to the definition of marriage and the framework of divorce, others have promoted weakening or eliminating the parental right to direct education. Advocates of a so-called "Children's Rights" doctrine have questioned whether the law should still consider parents to be the best child-rearers. Although they speak of the rights of children, these scholars actually seek to transfer child-rearing authority from parents to the State by allowing judges, social workers, or other public officials to decide the type of education that children should receive.

This note will defend the parental right to direct education by confronting its challengers. Part II will trace how the law defining the relationship between parent, child, and State in the area of education has changed from the common law to the present day. Part III will detail the arguments made by two prominent critics of parental rights, Barbara Bennett Woodhouse and James G. Dwyer. Woodhouse asserts that parental rights reinforce the treatment of children as property,[12] and Dwyer contends that parental rights should be abolished because religious parents use them as a pretext to indoctrinate their children.[13] Part IV will challenge the assumptions these critics rely upon and examine how a world without the parental right to direct education would look. This note concludes that abolishing parental rights would

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[10] *See generally* Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971 (1987); Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75 (2002); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913 (1996).

[11] *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2001); Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?*, 32 J.L. & EDUC. 139 (2003); Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697 (1997); Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363; Sean T. McLaughlin, *Some Strings Attached? Federal Private School Vouchers and the Regulation Carousel*, 24 WHITTIER L. REV. 857 (2003); Molly O'Brien, *Free at Last? Charter Schools and the 'Deregulated' Curriculum*, 34 AKRON L. REV. 137 (2000); Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503 (2002).

[12] *See infra* Part III.A.

[13] *See infra* Part III.B.

lead to the rebirth of compulsory public education and suggests that the current system should be left as is.

II. THE PENDULUM OF EDUCATIONAL CONTROL

> Education, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision. Only gradually did control of education pass largely to public officials.[14]

Meyer and *Pierce* have been the subject of much scholarly research and debate in that they have shaped the relationship between parent, child, and State in the United States for over seventy-five years. These cases marked a critical moment in American history, as they rebuffed attempts by the State to take complete control over the educational system. The first section of this Part discusses the right of parents to direct their children's education as it existed at common law and then its gradual weakening by State regulation prior to *Meyer* and *Pierce*. The second section describes how this parental right was partially restored by *Meyer* and *Pierce*. The final section details how the parental right has now become fully entrenched in American law.

A. The Demise of the Parental Right

> [By the early 1920s] the family citadel was crumbling under assaults from common schooling, child welfare, juvenile justice, child labor laws, and a host of government assumptions of paternal prerogatives designed to standardize child-rearing and make it responsive to community values.[15]

The historical background of *Meyer* and *Pierce* is well documented.[16] The purpose of briefly discussing the legal history leading up to those cases is to show that the Supreme Court did not create the parental right to direct education in those decisions. Rather, the Court simply affirmed that the long-standing, common law parental right was among the liberties protected from unreasonable governmental interference by the Fourteenth Amendment's Due Process Clause.[17]

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[14] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 238-39 (1963) (Brennan, J., concurring).

[15] Barbara Bennett Woodhouse, *'Who Owns the Child?': Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1090 (1992).

[16] *See, e.g.*, Edward McGlynn Gaffney, Jr., Pierce *and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491 (2001); William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125 (1988); Woodhouse, *supra* note 15.

[17] *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing The Individual and Social Interests*, 81 MICH. L. REV. 463, 572 (1983).

1. The Common Law Parental Right

Several key features of the common law's treatment of the relationship between parent, child, and State in the area of education impacted *Meyer* and *Pierce* and still affect this area of law today. First and foremost, parents held the sole right and duty to educate their children. Over 125 years ago, the Illinois Supreme Court stated, "the policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated."[18] The same court previously held that leaving the education and nurturing of children in the hands of parents "is, and has ever been, the spirit of our free institutions."[19] Before World War I, the Oklahoma Supreme Court noted that one of the principal duties of parents at common law was the education of their children,[20] and the Georgia Supreme Court held that the parental duty to educate was "of far the greatest importance of any."[21]

The parental duty to direct education reflected the common law view of the family as the foundation of society and government.[22] An

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> When the Court in 1923 first recognized that the right of parents to direct the upbringing of their children was part of the substantive liberty protected by the due process clause, it did not create a new legal right out of whole constitutional cloth. It merely acknowledged in constitutional language the traditions . . . that predated the Constitution.

Id.

[18] Tr. of Sch. v. People, 87 Ill. 303, 308 (1877).

[19] Rulison v. Post, 79 Ill. 567, 573 (1875). The court stated:

> Parents and guardians are under the responsibility of preparing children intrusted [sic] to their care and nurture, for the discharge of their duties in after life. Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions.

Id.

[20] Sch. Bd. Dist. v. Thompson, 103 P. 578, 578-79 (Okla. 1909); *see also* Sheridan Rd. Baptist Church v. Mich. Dep't of Educ., 396 N.W.2d 373, 407-08 n.30 (Mich. 1986) (Riley, J., dissenting) (stating that the parental "fundamental freedom of controlling the education and socialization of their children" that was discussed in *Pierce* was a right "recognized at common law") (citing *Thompson*, 103 P. at 578-79); Abrego v. Abrego, 812 P.2d 806, 811 n.21 (Okla. 1991) ("At common law the principal duties of parents to their legitimate children consisted of providing maintenance, protection, and education.") (citing *Thompson*, 103 P. at 578-79).

[21] Bd. of Educ. v. Purse, 28 S.E. 896, 898 (Ga. 1897) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *450); *see also Thompson*, 103 P. at 581 ("Blackstone says that the greatest duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any.").

[22] *See* Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); F.C.C. v. Pacifica Found., 438 U.S. 726, 769 (1978)

essential principle of this viewpoint is that parents, more than anyone else, have a natural inclination to further the best interests of their children.[23] The law has wisely presumed that children lack sufficient capacity to make important decisions for themselves and need adult guidance.[24] Parents were deemed the logical choice to provide guidance in education because of their desire to further their children's best

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(Brennan, J., dissenting) ("[There is a] time-honored right of a parent to raise his child as he sees fit – a right this Court has consistently been vigilant to protect."); Moore v. E. Cleveland, 431 U.S. 494, 503-04 (1977) ("[T]he institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); Gordon v. Bd. of Educ., 178 P.2d 488, 498 (Cal. Ct. App. 1947) (White, J., concurring) ("Under our system of government the family is the foundation of the social order, it does not spring from the state but the state springs from the family."); *Thompson*, 103 P. at 581 ("Under our form of government, and at common law, the home is considered the keystone of the governmental structure.").

[23] *See Parham*, 442 U.S. at 602 ("[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.") (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447 & 2 J. KENT, COMMENTARIES ON AMERICAN LAW *190); State *ex rel.* Sheibley v. Sch. Dist. No. 1 Dixon County, 48 N.W. 393, 395 (Neb. 1891) ("Now who is to determine what studies [a student] shall pursue in school: a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child?").

> [Parental] duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world. It is true the municipal law took care to enforce these duties, though Providence has done it more effectually than any law by implanting in the breast of every parent that natural insuperable degree of affection which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress, or extinguish.
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> There are certain virtues that may safely be attributed to the generality of mankind, among which are love of country and love of offspring. . . . [I]t would be a reversal of the natural order of things to presume that a parent would arbitrarily and without cause or reason insist on dictating the course of study of his child in opposition to the course established by the school authorities.

Thompson, 103 P. at 581-82.

[24] *See* Schall v. Martin, 467 U.S. 253, 265 (1984) ("Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*."); *id.* at 265 n.15 ("Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified.") (quoting People *ex rel.* Wayburn v. Schupf, 350 N.E.2d 906, 908-09 (N.Y. 1976)); *Parham*, 442 U.S. at 602 ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.").

interests and their unique opportunity to know their children's abilities and traits.[25] Courts acknowledged that education is often most effective when tailored to a child's individual talents and shortcomings.[26]

2. The Rise of Compulsory Common Schools

The common law parental right gave parents complete control to answer two questions. First, *should* my child be educated? Second, if so, *how* should he or she be educated? A harsh reality of the common law was that the answer to both questions was heavily influenced by the parents' economic status.[27] Families often needed their children to work in order to survive, and many parents who tried to educate their children were limited by their economic resources.[28] Indeed, one of the many reasons why public schools were created was to allow needy families to educate their children at public expense.[29] During the early days of

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[25] *See* Tr. of Sch. v. People, 87 Ill. 303, 308 (1877) ("[T]he policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated, during minority, presuming that his natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectually promote the child's welfare."); *Sheibley*, 48 N.W. at 395; Morrow v. Wood, 35 Wis. 59, 64 (1874) ("[W]e can see no reason whatever for denying to the father the right to direct what studies . . . his child shall take. He is as likely to know the health, temperament, aptitude and deficiencies of his child as the teacher, and how long he can send him to school.").

[26] *See Tr. of Sch*, 87 Ill. at 308 ("In most primary schools it would be both absurd and impracticable to require every pupil to pursue the same study at the same time. Discrimination and preference between different branches of study, until some degree of advancement is attained, is inevitable."); *Morrow*, 35 Wis. at 65 ("It is unreasonable to suppose any scholar who attends school, can or will study all the branches taught in them. From the nature of the case some choice must be made and some discretion be exercised as to the studies which the different pupils shall pursue.").

[27] Bd. of Educ. v. Purse, 28 S.E. 896, 900 (Ga. 1897) ("At common law the child's right to an education was dependent, not only upon the will, but upon the pecuniary ability of the parent.").

[28] *See* Woodhouse, *supra* note 15, at 1059 ("Children have always worked. In colonial times, children had jobs on family farms and as apprentices. The Industrial Revolution, however, with urban factories and textile mills ushering in a new mechanized age, altered the context and rhythm of child labor.").

[29] *See Purse*, 28 S.E. at 900 ("Under the present law in this State[, which provides for public schools,] the right of the child to an education is still dependent upon the will of the parent, but no longer dependent upon his pecuniary ability."); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 892 (1998) ("In New Jersey, as in many other states, the education of children originally was a family or private responsibility. The first 'public' schools were established in communities where some residents were unable to provide for their own children's education.").

The first public schools also sought to instill and reinforce religious beliefs in the students. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 720 (2001) (Breyer, J., dissenting) ("[H]istorians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant

American public schools, parents could send their children to a public or private school if they wanted to, but there were no compulsory education requirements.[30] Parents opting to send their children to a public school held a large degree of control over curricular decisions; they usually won court battles with teachers unless school operations would be disrupted.[31]

States eventually enacted compulsory education laws that required parents to either send their children to a public school or provide for an

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religious ideals."); M.G. "Pat" Robertson, *Religion in the Classroom*, 4 WM. & MARY BILL RTS. J. 595, 600 (1995) ("The Massachusetts School Law of 1647 enacted the first public school system in America. It was expressly intended to teach children to read and write so they could understand the Scriptures. In fact, the Bible was their textbook."); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 499 (1991) ("The first public schools and universities had mandatory courses in religion and theology and compulsory attendance in daily chapel and Sunday worship services.").

Champions of the public school movement of the early 1800s had other motives. *See* O'Brien, *supra* note 11, at 169-70 ("The 'melting' of American youth into one people was a concept favored by the earliest public school advocates."); Gia Fonte, Note, Zelman v. Simmons-Harris: *Authorizing School Vouchers, Education's Winning Lottery Ticket*, 34 LOY. U. CHI. L.J. 479, 493-94 (2003) ("[Horace Mann] termed his newly created schools 'common schools.' The purpose of these common schools was not simply to teach reading and math to American school children; the purpose was to create a youth with common values, morals, and loyalties.").

[30] *Purse*, 28 S.E. at 900 ("If the parent in Georgia, notwithstanding the fund provided for the purpose of educating his children, is not willing to discharge the duty, even at the expense of the State, there is no power under the law to compel him to discharge it."). Public education did not gain much support in the United States until the second quarter of the nineteenth century. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (Brennan, J., concurring) ("Public education was, of course, virtually nonexistent when the Constitution was adopted."); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 238-39 n.7 (1963) (Brennan, J., concurring) ("It was not until the 1820's and 1830's, under the impetus of Jacksonian democracy, that a system of public education really took root in the United States.").

[31] *See Tr. of Sch*, 87 Ill. at 308-09 ("[W]e are unable to perceive how it can, in anywise, prejudice the school, if one branch rather than another be omitted from the course of study of a particular pupil. . . . [I]t is for the parent, not the trustees, to direct the branches of education he shall pursue."); State *ex rel.* Sheibley v. Sch. Dist. No. 1 Dixon County, 48 N.W. 393, 395 (Neb. 1891) ("The right of the parent, therefore, to determine what studies his child shall pursue, is paramount to that of the trustees or teacher. . . . [N]o pupil attending the [public] school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch."); Sch. Bd. Dist. v. Thompson, 103 P. 578, 581 (Okla. 1909) ("Our laws pertaining to the school system of the state are so framed that the parent may exercise the fullest authority over the child without in any wise impairing the efficiency of the system."); *Morrow*, 35 Wis. at 64 ("We do not really understand that there is any recognized principle of law, nor do we think there is any rule of morals or social usage, which gives the teacher an absolute right to prescribe and dictate what studies a child shall pursue, regardless of the wishes or views of the parent.").

equivalent education.[32] While previous laws sought to assist willing parents who were unable to educate their children, the new statutes were aimed at parents who did not want their children to be educated at all.[33] As a result, states took from parents the common law right to determine *whether* their children would be educated; parents, however, retained the authority to decide *how* their children would be educated. The purpose of these statutes was to ensure that all children would receive a basic education, not that all would receive a *public* education.[34]

Not long after states enacted compulsory education laws, they began to limit parents' ability to determine the type of education their children would have. Mainly because of the intense nativism that arose during World War I, states sought to "Americanize" the ethnic groups that had emigrated to the United States.[35] The states feared that these groups would retain foreign ideas and sympathies instead of adopting

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[32] *See* Wisconsin v. Yoder, 406 U.S. 205, 226 (1972) ("The requirement for compulsory education beyond the eighth grade is a relatively recent development in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by completion of the elementary grades, at least where the child was regularly and lawfully employed."); Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's 'Little Blaine Amendment' and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 555 (2002) ("In 1852, Massachusetts adopted the first compulsory education law in the United States; other states followed after the Civil War.").

[33] *See* Roemhild v. State, 308 S.E.2d 154, 159 (Ga. 1983) (Weltner, J., dissenting) ("The child at the will of the parent could be allowed to grow up in ignorance and become a more than useless member of society.") (quoting *Purse*, 28 S.E. at 900); People v. Levisen, 90 N.E.2d 213, 215 (Ill. 1950) ("The [compulsory education] law is not made to punish those who provide their children with instruction equal or superior to that obtainable in the public schools. It is made for the parent who fails or refuses to properly educate his child."); State v. Peterman, 70 N.E. 550, 552 (Ind. Ct. App. 1904) ("The [compulsory education] law was made for the parent who does not educate his child, and not for the parent who employs a teacher and pays him out of his private purse."). These statutes sought to address a consequence of the common law rule. *See Purse*, 28 S.E. at 900 ("[W]hile the duty rested upon the parent to educate his child [at common-law], the law would not attempt to force him to discharge this duty, the child, so far as education is concerned, [was] completely at the mercy of the parent.").

[34] *See Yoder*, 406 U.S. at 227 ("[C]ompulsory education and child labor laws find their historical origin in common humanitarian instincts."); *Levisen*, 90 N.E.2d at 215 ("The object [of compulsory education laws] is that all children shall be educated, not that they shall be educated in any particular manner or place."); *Peterman*, 70 N.E. at 552 ("[The State's] purpose is 'to secure to the child the opportunity to acquire an education,' which the welfare of the child and the best interests of society demand. The result to be obtained, and not the means or manner of obtaining it, was the goal which the lawmakers were attempting to reach."); Commonwealth v. Roberts, 34 N.E. 402, 403 (Mass. 1893) ("The great object of these provisions of the statutes has been that all the children shall be educated, not that they shall be educated in any particular way. To this end public schools are established, so that all children may be sent to them unless other sufficient means of education are provided for them.").

[35] *See* discussion *infra* Part II.B.

American values.[36] Because many groups continued to use and teach their native languages, states enacted laws requiring that all instruction in public and private schools be given in English only.[37] The states sought to prevent foreign-born American parents, and the private schools they utilized, from teaching children "un-American" languages and ideas.

While the English-only laws severely *limited* parental control over education, the parental right was virtually *annihilated* by the states' next endeavor. In an effort to save the nation from the perceived perils of alien beliefs, states banned private and home schooling altogether and enacted a system of compulsory public education.[38] While states had previously been content to regulate school curricula, they realized they could convey an official State message much more efficiently by appropriating the entire educational system. In one half-century, parents' ability to make educational decisions for their children went from being absolute to being almost non-existent. It was in this context that *Meyer* and *Pierce* arose.

B. The New Balance: Meyer *and* Pierce

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[39]

Meyer and *Pierce* came at a time when the ability of parents to educate their children was less than at any other time in American history, before or since. In the wake of the fears and attitudes caused by World War I, states seized educational control in an attempt to "Americanize" children. While immigrants and religious groups felt the brunt of this action, it struck a serious blow to parental rights in general.

1. *Meyer v. Nebraska*

Meyer involved a challenge to a Nebraska law that required all instruction in public, private, and parochial schools to be given in English.[40] While the legislature viewed the statute as addressing an "emergency," schools were allowed to teach other languages as a

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[36] *Id.*

[37] *Id.*

[38] *See* Bybee & Newton, *supra* note 32, at 555 ("The public education movement reached its apex in the 1920s in state laws requiring a public education.").

[39] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[40] Meyer v. Nebraska, 262 U.S. 390, 397 (1923). "[Nebraska] Laws 1919, ch. 249, 'Section 1 provided, No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.'" *Id.*

separate subject to students that had completed the eighth grade.[41] Meyer, an instructor at a Lutheran parochial school, was convicted under the statute for teaching ten-year-old Raymond Parpart to read the Bible in German.[42]

The Nebraska Supreme Court affirmed Meyer's conviction.[43] The court held that the legislature had reasonably exercised its police power because it "had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land."[44] The court held that, even when a person's actions are motivated by religious belief, if they "either disturb the public peace, or corrupt the public morals, or otherwise become inimical to the public welfare of the state, the law may prohibit them."[45] According to the court, the religious teaching of Lutheran children could "be as fully and adequately done in the English as in the German

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[41] *Id.*

[42] *Id.* at 396-97. Raymond had not completed the eighth grade. *Id.*

[43] Meyer v. Nebraska, 187 N.W. 100, 104 (Neb. 1922).

[44] *Id.* at 102. The court continued:

> The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language.

Id.

The statute, and the court's defense of its purpose, was mainly the product of the intense nativism resulting from World War I. *Id.* at 104 (Letton, J., dissenting) ("It is patent, obvious, and a matter of common knowledge that this restriction was the result of crowd psychology; that it is a product of the passions engendered by the World War, which had not had time to cool."). Other states took similar actions at the end of the war. *See* Neb. Dist. of Evangelical Lutheran Synod v. McKelvie, 175 N.W. 531, 533 (Neb. 1919) ("In 1919 the legislatures of Iowa, Kansas, Maine, Arkansas, Indiana, Washington, Wisconsin, and New Hampshire passed measures more or less drastic with regard to compulsory education in English, and the prohibition of the use of foreign languages in elementary schools."); Brief for Appellee at 23, Meyer v. Nebraska, 262 U.S. 390 (No. 325), *in* 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 723 (Philip B. Kurland & Gerhard Casper eds., 1975) ("The recognized general necessity for legislation similar to the Nebraska foreign language act, the recognition of the threatened menace and the proper remedy is shown by the fact that twenty-one states besides Nebraska have enacted similar foreign language laws.").

[45] *Meyer*, 187 N.W. at 103.

language," since the Lutheran faith did not require that services be conducted in German.[46]

Judge Letton dissented from the court's grant of broad legislative discretion.[47] Less than three years earlier, the Nebraska Supreme Court upheld the same foreign language statute in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*.[48] There, Judge Letton stated that the law had a legitimate purpose of ensuring that the teaching of foreign languages did not take time away from the teaching of the "elementary branches" dealing with democracy and American government.[49] However, when *Meyer* came before the Nebraska Supreme Court, the rationale offered in defense of the statute was that the teaching of foreign languages is itself harmful.[50] Judge Letton's dissent stressed the importance of the parental rights at stake[51] and the danger of unchecked legislative action.[52]

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[46] *Id.* at 101-02. The court stated that the burden on the Lutheran religion was acceptable because the statute "in no way attempts to restrict religious teachings, nor to mold beliefs, nor interfere with the entire freedom of religious worship." *Id.* This is a questionable proposition because, arguably, the only thing more central to an ethnic group's identity than its language is its religion, and the two are often thoroughly intertwined.

[47] *Id.* at 104 (Letton, J., dissenting) ("I am unable to agree with the doctrine that the legislature may arbitrarily, through the exercise of the police power, interfere with the fundamental right of every American parent to control, in a degree not harmful to the state, the education of his child.").

[48] *McKelvie*, 175 N.W. at 531.

[49] *Id.* at 534. The court held:

> The ultimate object and end of the state in thus assuming control of the education of its people is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded, to imbue the alien child with the tradition of our past, to give him the knowledge of the lives of Washington, Franklin, Adams, Lincoln, and other men who lived in accordance with such ideals, and to teach love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man, or class of men. . . . The intent evidently is that none of the time necessarily employed in teaching the elementary branches forming the public school curriculum shall be consumed in teaching the child a foreign language.

Id.; *see also Meyer*, 187 N.W. at 104 (Letton, J., dissenting) ("As was pointed out in [*McKelvie*], the legitimate object of the statute has been accomplished when the basic and fundamental education of every child in the state has been acquired in the English language, instead of in the language of a foreign country.").

[50] *Meyer*, 187 N.W. at 104 (Letton, J., dissenting) ("The supposition that this restriction in the statute might have been inserted in the interest of the health of the child is evidently an after-thought. . . . The idea that the legislature had in mind the protection of the child from over study, or lack of recreation, seems far-fetched.").

[51] *Id.* ("Every parent has the fundamental right, after he has complied with all proper requirements by the state as to education, to give his child such further education in proper subjects as he desires and can afford. . . . [The state] has no right to prevent parents from bestowing upon their children a full measure of education in addition to the

On appeal, the United States Supreme Court held, in a landmark decision, that the Nebraska law violated the Due Process Clause of the Fourteenth Amendment.[53] Justice McReynolds, writing for the majority, stated that the statute violated the right of foreign language teachers to contract their services.[54] More important, the Court also held that the statute infringed upon the parental right to direct education.[55] The Court

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state required branches."). Judge Letton quoted a passage of a case decided less than a decade earlier:

> The public school is one of the main bulwarks of our nation, and we would not knowingly do anything to undermine it; but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as all in all and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children.

Id. (quoting State v. Ferguson, 144 N.W. 1039, 1043 (Neb. 1914)) (alteration in original).

[52] *Id.* at 104-05 ("[T]he legislature cannot, under the guise of police regulation, arbitrarily invade personal rights . . . . Resistance to the arbitrary power of kings was necessary in days gone by. It seems now to be necessary to resist encroachments by the legislature upon the liberty of the citizen protected by the Constitution.").

[53] *Meyer*, 262 U.S. at 403. The Fourteenth Amendment provides in relevant part that, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Long before *Meyer*, the Court viewed the Due Process clause as a guarantee that "liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Meyer*, 262 U.S. at 399-400. The *Meyer* Court stated that the "liberty" guaranteed by the Fourteenth Amendment included:

> [T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. For a discussion of the parental right to educate children as it existed at common law, see *supra* Part II.A.

[54] *Meyer*, 262 U.S. at 400, 403. The economic due process cases upon which this statement was based were later overruled. Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992) (O'Connor, J., plurality) ("[The] line of cases identified with *Lochner* . . . imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation . . . *West Coast Hotel Co. v. Parrish* . . . signaled the demise of *Lochner*."). According to Justice Powell, the fact that *Meyer* and *Pierce* were built upon a long-standing American practice "explains why *Meyer* and *Pierce* have survived and enjoyed frequent reaffirmance, while other substantive due process cases of the same era have been repudiated." Moore v. E. Cleveland, 431 U.S. 494, 501 n.8 (1977) (Powell, J., plurality). More recently, Justice Scalia remarked in a dissenting opinion that *Meyer* and *Pierce* came "from an era rich in substantive due process holdings that have since been repudiated." Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting). However, as Justice Souter said of *Meyer* and *Pierce* three years earlier, "Even before the deviant economic due process cases had been repudiated, however, the more durable precursors of modern substantive due process were reaffirming this Court's obligation to conduct arbitrariness review." Washington v. Glucksberg, 521 U.S. 702, 761-62 (1997) (Souter, J., concurring).

[55] *Meyer*, 262 U.S. at 400-01.

characterized the parental interest in a child's education in strong terms, referring to it as a "right of control" and a "natural duty."[56] While the Court acknowledged that the State has an important interest in ensuring a well-educated citizenry,[57] it underscored that "a desirable end cannot be promoted by prohibited means."[58] The Court compared Nebraska's attempt to standardize its children to the communal raising of children advocated by Plato[59] and rejected the concept as unconstitutional and un-American.[60]

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[56] The Court stated:

> Corresponding to the *right of control*, it is the *natural duty* of the parent to give his children education suitable to their station in life.
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> . . . .
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> [T]he *right of parents* to engage [a German language teacher is] within the liberty of the Amendment.
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> . . . .
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> Evidently the legislature has attempted materially to interfere with . . . *the power of parents to control* the education of their own.

Id. (emphasis added).

[57] *Id.* at 401-02. The Court acknowledged that "the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally," and that "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate." *Id.*

[58] *Id.* at 401. The Court added, "Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution," and "the means adopted, we think, exceed the limitations upon the power of the State." *Id.* at 401-02.

[59] The Court stated:

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians.

Id.

[60] The Court remarked that Plato's "ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution." *Id.* at 402; *see also* Gordon v. Bd. of Educ., 178 P.2d 488, 498 (Cal. Ct. App. 1947) (White, J., concurring) ("[There is a] long established doctrine in the United States that 'the alien philosophy that the child is the creature of the state finds no countenance in the American system of government.'") (quoting Boens v. Bennett, 67 P.2d 715, 717-18) (Cal. Ct. App. 1937)).

2. *Pierce v. Society of Sisters*

Pierce arose in the same context of post-War nativism as *Meyer*. *Pierce* involved a challenge to an Oregon statute enacted by public initiative that created a system of compulsory public education.[61] The law required all children between eight and sixteen years of age to attend public school,[62] with exceptions for children that were disabled, had completed the eighth grade, or lived too far from the nearest public school.[63] The statute was challenged by two groups that operated private elementary schools: Hill Military Academy and the Roman Catholic Society of Sisters.[64] They claimed that the law infringed upon their economic rights as well as the rights of parents, children, and teachers.[65]

The United States District Court for the District of Oregon held that the law violated the Fourteenth Amendment's Due Process Clause.[66] Specifically, the court stated that the law violated the economic rights of schools and teachers to participate in a vocation not harmful to the public.[67] Relying on *McKelvie* and *Meyer*, the court also held that the statute violated the parents' right to control their children's education.[68] Parents, the court said, have a "natural and inherent right to the

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[61] Pierce v. Soc'y of Sisters, 268 U.S. 510, 530 (1925).

[62] *Id.*

[63] *Id.* at 530-31. Parents and private instructors teaching children at the time the statute was enacted could obtain permission to complete the current school year. *Id.*

[64] *Id.* at 531-33.

[65] *Id.* at 532-33. The Society claimed that the statute was unconstitutional because it "conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, [and] the right of schools and teachers therein to engage in a useful business or profession." *Id.* at 532.

[66] Soc'y of Sisters v. Pierce, 296 F. 928, 937-38 (D. Or. 1924).

[67] *Id.* at 936. The court also remarked:

> Compulsory education being the paramount policy of the state, can it be said, with reason and justice, that the right and privilege of parochial and private schools to teach in the common school grades is inimical or detrimental to, or destructive of, that policy? Such schools and their patrons have the same interest in fostering primary education as the state, and appropriate regulation will place them under supervision of school authorities so they will not escape the duty of proper primary instruction. No one has advanced the argument that teaching by these schools is harmful, or that their existence with the privilege of teaching in the grammar grades is a menace, or of vicious potency, to the state or the community at large, and there appears no plausible or sound reason why they should be eliminated from taking part in the primary education of the youth. It would seem that the act in question is neither necessary nor essential for the proper enforcement of the state's school policy.

Id. at 937.

[68] *Id.* ("[T]he right of the parents to engage [private grammar schools] to instruct their children, we think, is within the liberty of the Fourteenth Amendment.").

nurture, control, and tutorship of their offspring," and the State cannot abridge that right in seeking to further its own educational interests.[69] The court examined the long history of private schooling and repeated *Meyer*'s statement that the Due Process Clause protects long-standing common law rights.[70]

The United States Supreme Court affirmed.[71] While recognizing that states have a valid interest in overseeing the functioning of schools, the Court held that the State has no authority to usurp the role of parents as the primary educator of children under a system of government that protects individual liberty.[72] The Court held that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[73] In one of its best-known passages, the Court proclaimed: "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[74]

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[69] *Id.* at 936 ("[P]arents possess a natural and inherent right to the nurture, control, and tutorship of their offspring, that they may be brought up according to the parents' conception of what is right and just, decent, and respectable, and manly and noble in life," which is "primordial and long-established."). While the court acknowledged "[t]he right of the state to establish as its school policy compulsory education within its boundaries," which is effective "for reducing illiteracy and raising the standard of citizenship," it held that the State had "in the means adopted, exceeded the limitations of its power." *Id.* at 937-38.

[70] *Id.* at 936 ("It cannot be successfully combated that parochial and private schools have existed almost from time immemorial—so long, at least, that [the private schools'] privilege and right to teach the grammar grades must be regarded as natural and inherent, as much so as the privilege and right of a tutor to teach the German language with the grammar grades, as was held in *Meyer*."). The court also said, "The court in the *Meyer* Case, in stating some things that are without doubt included by the term 'liberty' as guaranteed by the Constitution, concludes, 'And generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Id.* at 937 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[71] Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925).

[72] *Id.* at 534. The Court said:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. The Court added that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

[73] *Id.* at 534-35.

[74] *Id.* at 535.

C. *Affirmation of the Parental Right*

> [I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the *fundamental right of parents* to make decisions concerning the care, custody, and control of their children.[75]

Over the past seventy-five years, the holdings of *Meyer* and *Pierce* have become a widely accepted part of the American legal landscape. The Supreme Court has cited both cases on dozens of occasions, in various contexts, in support of the constitutionally protected parental right to direct the education of children.[76] It can be argued that *Meyer* and *Pierce* are such an integral part of the Court's elaborate substantive due process doctrine that an attack on the parental right to educate necessarily constitutes an attack on substantive due process itself.

The Supreme Court has routinely reaffirmed and extended the constitutional protections set out in *Meyer* and *Pierce*. Just two years after *Pierce*, the Court applied both cases to strike down a law in the

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[75] Troxel v. Granville, 530 U.S. 57, 66 (2000) (O'Connor, J., plurality) (emphasis added).

[76] The Court and its Justices have described the parental liberty recognized in *Meyer*, *Pierce*, and their progeny in a variety of ways. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring) ("fundamental liberty to choose how and in what manner to educate their children"); *Troxel*, 530 U.S. at 65 (O'Connor, J., plurality) ("interest of parents in the care, custody, and control of their children"); *id.* at 77 (Souter, J., concurring) ("parent's interests in the nurture, upbringing, companionship, care, and custody of children"); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (right "to direct the education and upbringing of one's children"); Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (O'Connor, J., plurality) (right to make "basic decisions about family and parenthood"); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 341 (1990) (Stevens, J., dissenting) ("liberty to make the decisions and choices constitutive of private life"); Michael H. v. Gerald D., 491 U.S. 110, 141-42 (1989) (Brennan, J., dissenting) (interest "of a parent and child in their relationship with each other"); Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("fundamental liberty interest of natural parents in the care, custody, and management of their child"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (interest in the "relationship between parent and child"); Moore v. E. Cleveland, 431 U.S. 494, 501 (1977) (Powell, J., plurality) ("traditional parental authority in matters of child rearing and education"); *id.* at 505 ("[d]ecisions concerning child rearing"); Roe v. Wade, 410 U.S. 113, 169 (1973) (Stewart, J., concurring) ("freedom of personal choice in matters of marriage and family life"); *id.* at 170 ("right to send a child to private school"); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("right of parents to provide an equivalent education in a privately operated system"); *id.* at 213 ("interest of parents in directing the rearing of their offspring"); *id.* at 214 ("traditional interest of parents with respect to the religious upbringing of their children"); *id.* at 233 ("duty to prepare the child for 'additional obligations'"); *id.* (right "of parents to direct the religious upbringing of their children"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (right "to conceive and to raise one's children"); *id.* ("integrity of the family unit"); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("right to educate a child in a school of the parents' choice"); *id.* ("right to educate one's children as one chooses"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("parent's authority to provide religious with secular schooling").

Hawaiian territory that required all schools to pay a per-student fee if they taught in a language other than English or Hawaiian.[77] The Court said, "The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."[78] In *Prince v. Massachusetts*,[79] a case decided during World War II, the Court discussed *Meyer* and *Pierce* in the following terms: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[80] The Court held that "these decisions have respected the private realm of family life which the state cannot enter."[81]

In *Griswold v. Connecticut*,[82] decided in 1965, the Court discussed the "peripheral rights" that it had previously recognized in cases such as *Meyer* and *Pierce* and said, "we reaffirm the principle of the *Pierce* and the *Meyer* cases."[83] Eight years later, the Court relied heavily upon *Griswold* and similar cases in *Roe v. Wade*.[84] The *Roe* decision stated that "a right of personal privacy, or a guarantee of certain areas or zones of privacy," has been recognized in a line of decisions including *Meyer* and *Pierce*.[85] When the Court reexamined *Roe* in 1992, a plurality cited cases including *Meyer*, *Pierce*, and *Griswold* for the proposition that, "[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere

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[77] Farrington v. Tokushige, 273 U.S. 284, 291-92 (1927). Similar to the statute struck down in *Meyer*, the statute in *Farrington* sought to ensure that teachers were "possessed of the ideals of democracy," that the "Americanism of the pupils" would be promoted, and that teachers would "so direct the minds and studies of pupils in such schools as will tend to make them good and loyal American citizens." *See id.* at 293-94.

[78] *Id.* at 298.

[79] *Prince*, 321 U.S. at 166.

[80] *Id.* This language has been quoted in numerous Supreme Court opinions in more recent cases. *See Troxel*, 530 U.S. at 65-66 (O'Connor, J., plurality); Hodgson v. Minnesota, 497 U.S. 417, 447 (1990) (quoting *Stanley*, 405 U.S. at 651); *id.* at 483-84 (Kennedy, J., concurring); H.L. v. Matheson, 450 U.S. 398, 410 (1981) (quoting *Quilloin*, 434 U.S. at 255); Bellotti v. Baird, 443 U.S. 622, 638 (1979); Parham v. J.R., 442 U.S. 584, 621 n.1 (1979) (Stewart, J., concurring); F.C.C. v. Pacifica Found., 438 U.S. 726, 758 (1978) (Powell, J., concurring); *Quilloin*, 434 U.S. at 255; Carey v. Population Serv., 431 U.S. 678, 708 (1977) (Powell, J., concurring) (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)); Smith v. Org. of Foster Families, 431 U.S. 816, 843 (1977); Olff v. E. Side Union High Sch. Dist., 404 U.S. 1042, 1043 (1972) (Douglas, J., dissenting) *denying cert. to* 445 F.2d 932 (9th Cir. 1971); *Stanley*, 405 U.S. at 651; *Ginsberg*, 390 U.S. at 639.

[81] *Prince*, 321 U.S. at 166.

[82] Griswold v. Connecticut, 381 U.S. 479 (1965).

[83] *Id.* at 482-83.

[84] Roe v. Wade, 410 U.S. 113 (1973).

[85] *Id.* at 152-53. The *Roe* court read *Meyer* and *Pierce* to mean that the privacy right "has some extension to activities relating to . . . child rearing and education." *Id.*

with a person's most basic decisions about family and parenthood."[86] Chief Justice Rehnquist noted in his dissent that the Court was "building on" *Meyer* and *Pierce* when it decided several other important cases as well.[87]

In his concurring opinion in the 1997 case of *Washington v. Glucksberg*,[88] Justice Souter called *Meyer* and *Pierce* two of "the more durable precursors of modern substantive due process."[89] In 2000, a plurality of four Justices began its review of the doctrine of parental rights by citing *Meyer* and *Pierce* and stating, "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[90] In his concurring opinion, Justice Thomas emphasized that *Pierce* held that "parents have a *fundamental* constitutional right to rear their children, including the right to determine who shall educate and socialize them."[91] In 2003, the Court again stated that *Meyer* and *Pierce* provided "broad statements of the substantive reach of liberty under the Due Process Clause."[92]

Perhaps the Court's strongest affirmation of *Meyer* and *Pierce* came in its 1972 decision *Wisconsin v. Yoder*.[93] In *Yoder*, a Wisconsin statute requiring all children between seven and sixteen years of age to attend school was challenged by Amish parents who, for religious reasons, did not want their children to attend a formal school after they completed the eighth grade.[94] The Court ruled for the parents, affirming that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."[95] The Court suggested that, if the State's asserted *parens*

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86 Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).

87 *Id.* at 951 (Rehnquist, C.J., dissenting). In *Skinner v. Oklahoma*, the Court held that a law allowing sterilization of habitual criminals "involves one of the basic civil rights of man," and added, "[m]arriage and procreation are fundamental to the very existence and survival of the race." 316 U.S. 535, 541 (1942). In *Loving v. Virginia*, the Court struck down a statute which banned interracial marriage and stated that, in light of *Meyer* and *Skinner*, "the State [could] not contend . . . that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment." 388 U.S. 1, 9 (1967). In *Eisenstadt v. Baird*, the Court declared, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. 438, 453 (1972).

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

89 *Id.* at 761-62 (Souter, J., concurring).

90 Troxel v. Granville, 530 U.S. 57, 65 (2000) (O'Connor, J., plurality).

91 *Id.* at 80 (emphasis added).

92 Lawrence v. Texas, 539 U.S. 558, 564 (2003).

93 Wisconsin v. Yoder, 406 U.S. 205 (1972).

94 *Id.* at 207.

95 *Id.* at 213-14.

patriae interest could defeat the wishes of the parents, "the State [would] in large measure influence, if not determine, the religious future of the child."[96] The Court stated, "*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."[97]

III. MODERN CRITICISM OF PARENTAL RIGHTS

> [W]e confront an interest—that of a parent and child in their relationship with each other—that was among the first that this Court acknowledged in its cases defining the "liberty" protected by the Constitution, *see, e. g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and I think I am safe in saying that *no one doubts the wisdom or validity of those decisions*.[98]

While Justice Brennan correctly noted in the above passage that a substantial part of the American legal community accepts "the wisdom or validity" of *Meyer*, his assertion that "no one" questions the decision's soundness was an overstatement. Within legal academia, *Meyer* and *Pierce* have come under fire on several grounds. This Part presents an overview of two of the main critiques of the parental right to direct education, as well as the proposals offered to change the current state of the law.

A. The "Children's Rights" Argument

> I hope to bring into view the dark side of *Meyer* and *Pierce*. *Meyer* announced a dangerous form of liberty, the right to control another human being. Stamped on the reverse side of the coinage of family

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[96] *Id.* at 232. The Court remarked:

> Indeed it seems clear that if the State is empowered, as *parens patriae*, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.

Id.

[97] *Id.* at 233. The Court added:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Id. at 232. The Court acknowledged, "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Id.* at 233-34.

[98] Michael H. v. Gerald D., 491 U.S. 110, 142-43 (1989) (Brennan, J., dissenting) (emphasis added).

> privacy and parental rights are the child's voicelessness, objectification, and isolation from the community.[99]

Perhaps the most vocal critics of *Meyer* and *Pierce*, and parental rights in general, are advocates of the "Children's Rights" movement. Barbara Bennett Woodhouse's "'*Who Owns the Child?*': Meyer *and* Pierce *and the Child as Property*" best exemplifies this viewpoint.[100] In her review of *Meyer* and *Pierce*, Woodhouse admittedly conducts "a revisionist history of two liberal icons."[101] Her thesis is that "*Meyer* and *Pierce* constitutionalized a narrow, tradition-bound vision of the child as essentially private property."[102] She frames the question posed by those cases as, "Who owns the child?," and the Court's answer was "the traditional owner, the parent."[103] She claims that the Court, in so holding, rejected "the Progressive vision of the child as public resource and public ward, entitled both to make claims upon the community and to be claimed by the community."[104]

The Woodhouse article contains themes that appear throughout arguments commonly made by Children's Rights advocates. One of these themes is that the parental right to direct a child's education is an indefensible vestige of the patriarchal common law, analogous to private property ownership, slavery, and the common law's treatment of women. For example, Woodhouse says, "At the time of *Meyer* and *Pierce,* ownership of humans was a legal fact within living memory. Ironically,

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[99] Woodhouse, *supra* note 15, at 1000-01.

[100] *See generally id.* Other works by Woodhouse include: *Child Abuse, the Constitution, and the Legacy of* Pierce v. Society of Sisters, 78 U. DET. MERCY L. REV. 479 (2001); *Children's Rights: The Destruction and Promise of Family*, 1993 BYU L. REV. 497 (1993); *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON POVERTY L. & POL'Y 313 (1998); *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); *'Out of Children's Needs, Children's Rights': The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994).

[101] Woodhouse, *supra* note 15, at 996.

[102] *Id.* at 997, 1002 (asserting that this view of children "cuts off a more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family"); *see also id.* at 1042 ("Property and ownership were indeed a powerful subtext of parental rights rhetoric in the era of *Pierce* and *Meyer*."); *id.* at 1114 ("[T]he property theory latent in *Meyer* and *Pierce* adversely affects the way the law views children."); *id.* ("Children are often used as instruments, as in *Meyer* and *Pierce*. The child is denied her own voice and identity and becomes a conduit for the parents' religious expression, cultural identity, and class aspirations."); *id.* at 1115 ("The minor child is a key tool of the parents' free exercise but has no independent free exercise protections. Even when *Meyer* and *Pierce* lead to the vindication of First Amendment liberties, it is thus the parent's voice and choice that we hear and not the child's."); *id.* at 1113 ("By constitutionalizing a patriarchal notion of parental rights, *Meyer* and *Pierce* interrupted the trend of family law moving toward children's rights and revitalized the notion of rights of possession.").

[103] *Id.* at 1036-37.

[104] *Id.* at 1091.

the Court in *Meyer* and *Pierce* chose to hang parental control of children on the branch of Fourteenth Amendment 'liberty,'"—ironically, she explains, because that Amendment "was unambiguously designed to guarantee liberty to enslaved persons formerly owned as chattels."[105] Woodhouse discusses "the complex linkage of slavery with commodification of women and children,"[106] and states that the Children's Rights concepts articulated by supporters of the laws struck down in *Meyer* and *Pierce* "echoed the women's and abolitionist movements of the 1800s."[107]

Another common Children's Rights argument is that the State sometimes needs to "save" children from their parents because parents may abuse their duty to care for their children.[108] A comparison is often made between compulsory education schemes, child labor laws, and child abuse proceedings, all instances where the State has intervened to

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[105] *Id.* at 1041-42 n.207; *see also id.* at 1037 ("The Court's elastic construction of Fourteenth Amendment liberty to include parental control of the child served—just as in the economic due process cases—to defend traditions of private ownership, hierarchical structures, and individualist values against claims of collective governance."); *id.* at 1099 ("As in *Lochner*, the Justices' arsenal for confronting the novel and shocking [in *Meyer*] was the Due Process Clause and the discovery of a 'liberty' that seems closer to the Thirteenth than the Fourteenth Amendment."); *id.* at 1110 ("Especially in family law, which deals with collective organisms, liberty is a difficult concept: one individual's liberty can spell another's suppression or defeat."); *id.* at 1113 ("I have flipped the coin of family autonomy to show its underside, stamped with 'liberty' but standing for the power to own another human being and to cast social regulation of this power as an assault on freedom."); *id.* at 1046 ("A final element of property ownership is the right to security or immunity from expropriation—the right that Oregon parents invoked when they accused government of Bolshevism in taking their children, and the most jealously guarded right under modern constitutional law.").

[106] *Id.* at 1043 n.222; *see also id.* at 1043 ("The Greek philosophers also accentuated male procreativity as proof of the natural correctness of male dominance over women, slaves, and children.").

[107] *Id.* at 1056; *see also id.* at 1062 ("By the turn of the century, reformers described children as the last disenfranchised class. Observing that men had been given civil rights in the eighteenth century, and women and blacks in the nineteenth, they dubbed the twentieth 'The Century of the Child.'"); *id.* at 1065 ("[Opponents of child labor regulation] minimized the furor over parents' abuse of their children, comparing it to the antebellum furor over the slaveholder's abuse of his human property.").

[108] *See id.* at 1115 ("Obviously, good reasons exist for presuming that the parent speaks for the child. . . . [O]rdinarily, the best guardian of the child's intellectual liberty and welfare is the parent. But constitutionalizing this presumption as the parents' 'right' to speak, choose, and live through the child has led to its being too often invoked in situations in which it is, at best, unnecessary or, at worst, oppressive."); *id.* at 1060 ("[T]he emergence in family theory of a new model challenging the patriarchal family model—that of a family composed of individuals—undercut the established family hierarchy and the presumed unity of interests between parent and child that had served as a theoretical justification for paternal authority freely to exploit the child as a family asset."); *id.* at 1044 ("[A] common justification offered by parents who physically or sexually abuse their children [is:] the child is mine and it is nobody's business what I do with it.").

override parental decisions regarding their children.[109] Woodhouse described the language used by Children's Rights reformers during the era of *Meyer* and *Pierce* as "a natural offshoot of a prior movement, self described as 'child-saving,' which dated back to at least the 1850s."[110] The "child-savers" of the late nineteenth century "took jurisdiction over" abused children, and the concept of Children's Rights was the justification "articulated for their seizure."[111] This group "began the assault on parental rights by dismissing them as a thinly disguised cover for paternal brutality."[112] By the early 1920s, "the family citadel was crumbling under assaults from common schooling, child welfare, juvenile justice, child labor laws, and a host of government assumptions of paternal prerogatives designed to standardize child-rearing and make it responsive to community values."[113]

While it is clear that Woodhouse and others would like to replace parental rights with "Children's Rights," they do not always clearly state

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[109] *See id.* at 1051 ("[Both] the children's rights movement and the movement to outlaw child labor . . . illustrate the competition between concepts of the child as parental property and as a collective resource, and both pit the emerging rights of children against the ancient rights of parents."); *id.* at 1062 ("The progressive 'childsavers' viewed child labor legislation and compulsory education laws as integral parts in a unified campaign to improve the lot of children."); *id.* at 1063 ("Functionally and historically, child labor regulation and compulsory education laws were intimately related."); *id.* at 1065 ("Echoing arguments raised against the school laws, opponents of child labor regulation predicted that it would undermine parental authority and ultimately result in the downfall of the Republic, if not a revolution.").

[110] *Id.* at 1052. The laudable efforts of these reformers included "providing lodging houses, foster homes, and industrial schools" for immigrant children in urban areas. *See id.* Woodhouse cites a passage written by the Reverend Hastings H. Hart as representative of "both the collective ethos of the [child-saving] movement and the dual principles of children's claims on society and society's stake in children," in which he says, "[t]he first principle underlying the child-saving movement is this: The great mother state is responsible for the welfare of the dependent and neglected child." *Id.* at 1054-55 n.292 (quoting Hastings H. Hart, *The Child-Saving Movement*, 58 BIBLIOTHECA SACRA 520, 520 (1901)).

[111] *Id.* at 1052; *see id.* at 1051 ("[I]n magazines and meetings, opinionmakers and activists were beginning to talk of children's rights. . . . The community, for its part, asserted claims upon the child, contending that the child's highest duty was no longer obedience to parents, but preparation for citizenship."); *id.* at 1052 ("In place of patriarchal control, child-savers raised the notion of community control and justified the assault on parental rights by invoking the child's rights. Children's rights, when set up against parents' rights, operated both as standards for parental behavior and as limitations on parental power."); *id.* at 1054 ("These articulations of children's collective rights reflected a sense of the child not as private property of his parent, nor of himself, but as belonging to the community, the collective family.").

[112] *Id.* at 1053.

[113] *Id.* at 1090; *see also id.* at 1068 ("Although still viewed as belonging to their parents, children [in the era of *Meyer* and *Pierce*] were reconceptualized both as public treasure, belonging to and having claims upon the larger community, and as free individuals, possessors of individual rights actualized through parents or judges.").

what this would mean in practical terms. Would compulsory *public* education be revived? Would private and home schooling be abolished or weakened? Or would the current educational system remain largely intact? Although Woodhouse does not expressly state that compulsory public education should be re-enacted, she makes many open-ended statements that could reasonably be read to imply that conclusion.[114] For example, she describes James Liebman's argument for public education, which he believes should be compulsory, as "persuasive."[115] She expresses concerns about the ramifications of "wholesale choice" and adds that the ballot in *Pierce*, which proposed compulsory education, "reads like an index to the modern arguments against choice."[116]

B. The Religious Education as Oppression Argument

> Courts should acknowledge the illegitimacy of the parents' rights doctrine and decline to recognize claims of parental rights in the future. The evolution of our social attitudes toward, and legal treatment of, children in recent decades would afford the Supreme Court an adequate rationale for departing from the rule of stare decisis and for overruling *Yoder* and *Pierce* to abolish parental child-rearing rights.[117]

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[114] *See, e.g.*, *id.* at 1111-12 ("We can only hope that our system is still sufficiently vital that some new age of reformers will appear to walk the same road as the Populists and Progressives. How will they be received? Will they find their way barred by the dead hand of tradition . . . calling itself family liberty?"); *id.* at 1118 ("In our national discourse, the idea of nationalizing the American child as a precious resource seems like a Populist pipe dream."); *id.* ("This has been a difficult era for the public child, and it is disturbing to see threatened the one area in which the public child's claim has seemed most secure—the public schools."); *id.* at 1119 ("[M]y journey through *Meyer* and *Pierce* and their relation to children's rights and compulsory schooling highlights the critical role that free public schools have played in giving meaning to children's membership in the community. . . . Public schools have been a place in which all children were equally entitled, as the community's children, to be."); *id.* at 1104 ("No Justices dissented [in *Pierce*]. Perhaps Brandeis had persuaded Holmes that exclusive state control of all organs of education and the closing of all religious schools would be a frontal assault on the existence of an independent, informed electorate and on the constitutionally explicit rights of free speech. It was also an assault on a certain way of life."); *id.* at 1111 ("It seems improbable that the Court will provide a forum for creating new family forms. Individuals and groups who believe traditional law fails to serve or forecloses their visions of family will have to take their fight to the legislatures.").

[115] *Id.* at 1119-20 n.674 (citing James S. Liebman, *Desegregating Politics: 'All-Out' School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990)).

[116] *Id.* at 1120. These arguments include "that it would sharpen divisions of class and ethnicity, create enclaves of exclusiveness, foster schools run by groups more intent on political indoctrination than education, and destroy civic commitment to public schools." *Id.*

[117] James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1447 (1994).

Another facet of the attack on *Meyer* and *Pierce* comes from writers who object to the wide-ranging ability that those cases afford parents to instruct their children in the teachings of a religious faith. James G. Dwyer's, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*,[118] illustrates this position.[119] Dwyer asks "at a fundamental level what it means to say that individuals have rights as parents, and whether it is legitimate to do so."[120] He concludes that "parental child-rearing rights are illegitimate" and proposes what he calls a "substantial revision" in child-rearing law.[121] This "revision" would be "that children's rights, rather than parents' rights, be the legal basis for protecting the interests of children," and "that the law confer on parents simply a child-rearing privilege, limited in its scope to actions and decisions not inconsistent with the child's temporal interests."[122]

Dwyer's arguments are based on "the proposition that, as a general rule, our legal system does not recognize or bestow on individuals rights to control the lives of other persons."[123] He begins his defense of this proposition by noting that it is difficult to prove, even when it is limited to control over the lives of *adults*, "due to the lack of clear statements by the judiciary that this is in fact a controlling principle of law."[124] Dwyer attributes this judicial silence to "the self-evident nature of the proposition" or to the fact that "people simply do not claim a right to direct the lives of others," which may reflect "widespread recognition that other people have a right to personal autonomy."[125] He then argues

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[118] *Id.*

[119] *See id.* at 1377 ("This Article focuses in the first instance on parental rights in religious contexts—that is, in situations where parents' religious beliefs shape their child-rearing preferences. It is in this context that the principal aspects of parent-state conflicts over child-rearing take on their most extreme form."). Other works by Dwyer include: RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS (1998); VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM (2001); *School Vouchers: Inviting the Public Into the Religious Square*, 42 WM. & MARY L. REV. 963 (2001).

[120] Dwyer, *supra* note 117, at 1373.

[121] *Id.* at 1374, 1447.

[122] *Id.* at 1374.

[123] *Id.* at 1405.

> [T]here is an in-principle limitation on legal rights that confines them to protection of a right-holder's personal integrity and self-determining activities. As such, it is illegitimate to construe an individual's rights to include an entitlement to exercise extensive control over another person, or any control over a non-consenting person apart from self-defensive measures.

Id. "[There is a] moral precept that no individual is entitled to control the life of another person, free from outside interference, no matter how intimate the relationship between them, and particularly not in ways inimical to the other person's temporal interests." *Id.* at 1373.

[124] *Id.* at 1406.

[125] *Id.*

that various legal doctrines, taken in the aggregate, establish his proposition.[126]

Like Woodhouse, Dwyer uses slavery and the law's past treatment of women to support his argument.[127] He cites the Thirteenth Amendment's prohibition of slavery as "the strongest and most obvious embodiment of the principle that no person should have a right to control the life of another person."[128] While conceding that "[p]arental control over the lives of children certainly differs in important respects from the institution of slavery," he states, "it nevertheless can manifest some of the 'badges and incidents' of slavery."[129] Dwyer cites an article which calls the abuse of parental rights "state-enforced slavery," and adds that parental free exercise rights "ensure parents the freedom to exercise nearly complete domination over their children," and "arguably come closer to this understanding of slavery than to a legitimate custody privilege."[130] He asserts that parental rights "amount to legally sanctioned domination."[131]

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[126] *See generally id.* at 1406-23. Some of the areas of law Dwyer discusses are free exercise of religion, civil divorce, free speech, due process, and abortion. *Id.* Dwyer makes the following inference after reviewing these areas of law:

> Of course, the foregoing survey of Supreme Court rhetoric regarding rights outside of the parenting context does not amount to a conclusive demonstration that the Court subscribes to the proposition that rights are inherently limited to self-determining choices and activities. It is, however, entirely consistent with that proposition, and thus provides support by way of negative inference for finding the proposition to be true.

Id. at 1411.

[127] *See id.* at 1373 ("[W]e might be forced to conclude that parents' rights, like the plenary rights of husbands over their wives in an earlier age, ultimately rest on nothing more than the ability of a politically more powerful class of persons to enshrine in the law their domination of a politically less powerful class."). Dwyer also notes that the

> subordination of African Americans under the formal institution of slavery represents one, admittedly imperfect, analogy to the control parents exercise by legal right over their children. Women, particularly when they have entered into marriage, have also been subjected to legally sanctioned domination by [men] for much of our nation's history.

Id. at 1413. "[I]n the area of husband/wife relations, as in slave-holder/slave relations, the rights of some persons to control and dominate the lives of certain other persons rested on a characterization of the subordinated persons as 'property,' on a denial of their very personhood." *Id.* at 1415.

[128] *Id.* at 1411. In support of this statement, Dwyer cites to "the refusal of courts to order specific performance of personal service contracts," "rules limiting a creditor's right to the future income of a debtor who defaults on a loan," and "rules giving bankrupts a 'fresh start' free from the prior claims of creditors." *Id.* at 1411-12.

[129] *Id.* at 1413.

[130] *Id.* (citing Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1364 (1992)).

[131] Dwyer, *supra* note 117, at 1416. He adds, "as in the case of the slave or wife of old, parental rights today appear to rest on an assumption of ownership or on a denial of the child's separate existence." *Id.*

Dwyer then asserts that parental rights are an "anomaly," and "[u]nless there is some rational justification for this anomaly, the extensive set of other-determining rights held by parents is indefensible."[132] He articulates several possible defenses for parental rights and rejects them all. First, he discards "the main rationale the courts have offered" for parental rights, which is "that parents have traditionally held such rights."[133] He cites the trite axiom that an ancient tradition does not "mean that a practice or rule is just," and uses slavery and past treatment of women as examples to prove his point.[134] Then he dismisses the rationale that parental rights are necessary to serve parents' interests in the upbringing of children, concluding that this "ultimately depends either on a suspect understanding of the interests of parents and a morally unacceptable, instrumental view of children, or on an aberrant and unsupported notion of fairness."[135]

Dwyer further rejects the proposition that parental rights are necessary to protect the rights and interests of children. He begins by challenging the "[c]onventional wisdom" that "parents are in the best position to know what is best for their children and are likely to care more than any other adult about their children's well-being."[136] He states that, even if these ideas have some truth to them, "it simply does not follow from them that parents should have child-rearing rights, including plenary rights to effectuate their own ideologically-based judgment concerning how a child's life should proceed."[137]

One problem that Dwyer sees with the "children's interests" justification of parental rights is that parents have greater control over the upbringing of their children when they act upon religious beliefs.[138]

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[132] *Id.* at 1423.

[133] *Id.* at 1424.

[134] *Id.*; *see also id.* at 1426 ("[P]arental rights of control may be no more just than was the centuries-old institution of slavery or the longstanding legal sanction of marital rape.").

[135] *Id.* at 1442; *see also id.* at 1440-41:

> [T]o show that it is rational for parents to demand child-rearing rights, one must argue that it is in parents' interests to be able to treat their children in ways contrary to their children's temporal interests. To show that parental rights are just, one must also argue that these parental interests are legitimate and outweigh any competing interests or considerations against creating those rights.

[136] *Id.* at 1427. He adds, "These beliefs are not entirely uncontroversial. There is disagreement, for example, about the age at which children become competent to make certain decisions for themselves and to engage responsibly in certain activities. Some writers also dispute the presumption that parents know what is best for their children." *Id.*

[137] *Id.*

[138] *Id.* A critic of one of Dwyer's more recent works has noted, "[i]n the eyes of James G. Dwyer, conservative religious schools compose a vast Gulag peopled by children

He claims that, because "[i]t is not self-evident that a connection exists between parents' religious beliefs and children's interests," defenders of parental rights must "show that the very fact of adhering to a religion—any religion—whose tenets include preferred modes of parenting makes a parent better able or more disposed to further the temporal interests of the child."[139] He makes this deduction from the premise that the Establishment Clause mandates that "temporal interests are the only interests which the State can properly concern itself in carrying its responsibility to protect the well-being of children."[140] Dwyer concludes that parental rights cannot be justified on this basis since those who promulgate religious teachings about child-rearing do not have "concern for the temporal well being of children" as their primary motive.[141]

While much of Dwyer's reasoning to this point merely implies that he views religion as an evil to be contained, his discussion of the societal rationale for parental rights leaves no doubt that this is so. According to Dwyer, the societal rationale asserts that parental rights are necessary to ensure that our society as a whole remains religiously diverse.[142] He suggests that "[w]e should not so readily accept promotion of religious diversity as an aim of social policy."[143] There are, he opines, "quite obvious costs to religious diversity; religious difference gives us yet another reason for distrusting and doing violence to one another."[144]

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unfortunate enough to be born into traditionalist religious families." Stephen G. Gilles, *Hey Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 150 (1999) (reviewing JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS (1998)). The position advocated in this note is quite similar to what Gilles has previously argued. *See id.* at 154 ("Rather than abolishing parental rights and subjecting the decisions of religious parents to extensive regulation and oversight, I have argued that it is in children's best interests to preserve—and even expand—parents' traditional constitutional rights to direct and control the education of their children.").

139 Dwyer, *supra* note 117, at 1427-28.

140 *Id.* at 1428. Dwyer remarks, "For the State to take account of children's supposed spiritual interests would require it to assume the truth of particular religious beliefs," and adds "[i]t would therefore require the state to endorse a particular religious view, which the State may not do." *Id.* He claims that any reasonable interpretation of the Establishment Clause would "preclude the State from assuming that the parents' belief is true and from weighing the child's alleged spiritual interests against her temporal interests based on that assumption." *Id.*

141 *Id.* at 1428-29.

142 *See id.* at 1443-46. "This argument states that giving parents the right to direct the upbringing of their children in accordance with the parents' religious beliefs allows different religious communities to survive and thus fosters cultural and religious diversity in our country." *Id.* at 1444.

143 *Id.* at 1445. It appears obvious that the Free Exercise Clause mandates at least some respect for religious diversity.

144 *Id.* at 1444-45. Dwyer also states his belief that "[i]t is not unreasonable to ask whether diversity of ethnic backgrounds, languages, occupations, political beliefs, hobbies, and tastes is not itself sufficient to prevent tyrannical majorities from forming." *Id.* at 1445.

Rejecting the argument that "a uniform, state-imposed education or list of proscribed parenting behaviors would standardize this nation's citizens," he asserts that "the standardizing effect of public schooling is grossly overstated."[145] He also claims that religious groups which defend parental rights are not motivated by "a desire for cultural diversity," but rather their "aim is to standardize children in their own way."[146]

The practical implications of Dwyer's proposed legal regime are clearer than the regime proposed by Woodhouse. Dwyer acknowledges that, "in a world without parents' rights but with an appropriate set of children's rights, the law could recognize parents as their children's agents."[147] Under this system, courts would resolve conflicts between parent and State over child-rearing practices by choosing which side's proposal best suits the child's temporal interests.[148] The law would impute to children a preference to receive certain things, including what Dwyer calls "an education that develops in them independence of thought, keeps open for them a substantial range of alternative careers, lifestyles, and conceptions of the good, and is sensitive to their

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[145] *Id.* at 1444. He makes this claim because "there does not appear to be any want of diversity in our society today, despite the fact that for many decades now the vast majority of children in this country have attended public schools." *Id.* He also asserts that "parental rights are not necessary to preserve the institution of the family, which many people believe is necessary to the maintenance of a free society. Instead, a limited parental privilege coupled with appropriate claim-rights for children would be sufficient for that end." *Id.* at 1443. He adds, "Even if states were to make public school attendance compulsory, however, parents of different religious faiths could continue to model and teach their beliefs to their children at home." *Id.* at 1444.

[146] *Id.* at 1445-46. He takes special exception with "the efforts of some religious groups today to reintroduce Christian teaching into the public school curriculum," and he adds, "if they could, they would standardize everyone's children in their way." *Id.* at 1446.

[147] *Id.* at 1429; *see id.* at 1440 ("At bottom, parental rights are necessary only to ensure that parents can treat their children in a manner that is contrary to the children's temporal interests.").

[148] *Id.* at 1429-30. By eliminating parental rights, the State would remove an "obstacle" in the way of its ability to exert control over child-rearing and educational decisions:

> For those who would have the State use its power and resources to improve the lives of children, parental rights constitute the greatest legal obstacle to government intervention to protect children from harmful parenting practices and to state efforts to assume greater authority over the care and education of children.
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> . . . .
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> Under this approach, a community seeking to restrict parents' child-rearing freedom or authority would not need to argue that the interests of the child and of the rest of society outweigh the rights of the parents in a given case. Rather, the State would need only to argue that the harm to the child that non-intervention would allow is greater than the harm to the child that intervention would cause.

Id. at 1372, 1377.

developing, individual inclinations as they gain maturity."[149] Despite the radical shift in the allocation of child-rearing authority that Dwyer advocates, he promises that "eliminating parents' rights would not in itself permit or encourage an increased level of state regulation or intrusion into the family."[150]

IV. THE CASE FOR PARENTAL RIGHTS

> The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.[151]

In theory, the arguments raised by Woodhouse, Dwyer, and other opponents of parental rights may have a modicum of truth. However, several of the logical assumptions underpinning those arguments are severely flawed, and the proposed regimes to replace the current one would have serious, adverse effects on the American family. This Part will provide a two-part defense of the parental right to direct education by addressing the arguments made by its critics. First, it will challenge some of the main express and implied assumptions that critics of the parental right rely upon. Second, it will argue that the practical implications of abandoning parental rights are much more far-reaching, and detrimental to family and society, than the critics admit.

A. Theoretical Foundations

> [T]he tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.[152]

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[149] *Id.* at 1433. Dwyer argues that this type of education is "an aspect of a child's welfare interests," which it would "be rational for any child to want." *Id.*

[150] *Id.* at 1438. Dwyer attempts to support this claim by arguing:

> Because the child has an interest in the parent deriving satisfaction from parenting, adopting this approach would be unlikely to result in a drastic increase in the level of state regulation. Rather, the likely result would be a significant, but limited, lowering of the threshold of harm necessary to justify state intervention to protect a child.

Id. Dwyer also urges:

> It is important to recognize that this alternative approach would not entail doing away with the institution of the family in favor of collectivized child-rearing. Nor would it transfer to the State vastly greater control over child-rearing or enable the State to intervene whenever social workers think a parent is performing less than optimally.

Id. at 1376.

[151] Parham v. J.R., 442 U.S. 584, 603 (1979).

[152] Bellotti v. Baird, 443 U.S. 622, 638 (1979) (Powell, J., plurality).

Of all the arguments put forth by opponents of the parental right to direct education, perhaps the weakest claim—and the most absurd—is that the parental right is analogous to slavery or the law's past treatment of women.[153] First, at a general level, the institution of slavery embodied the abhorrent side of humanity. Among other things, it treated human beings as property, fostered racial hatred and animosity, and encouraged greed. Virtually no one in modern America could argue, in good conscience, that slavery was good. On the other hand, the institution of the family is, and always has been, viewed as the foundation of American society.[154] The family represents the noble side of humanity; it encourages positive traits such as love, fidelity, and selflessness. Among the many wrongs caused by slavery, one of the most tragic was the destruction of the family unit, as wives were torn from husbands and children separated from parents. To cast an essential aspect of the functioning of the family in the same light as slavery is to disrespect those who suffered from the actual institution of slavery and to denigrate the institution of the family.

The most compelling argument why parental rights are vastly different from slavery and the law's past treatment of women is also the simplest: children are fundamentally different in many respects from adults. The truth of this statement may be so obvious that it appears bizarre to challenge or attempt to support it. However, opponents of parental rights essentially ignore this fact by arguing that parental rights are immoral because they give one person (a parent) the right to control the actions and life of another (a child). Woodhouse, for example, characterizes parental rights as property rights, while Dwyer asserts that parental rights violate a basic principle of our legal system.[155] If children were the same in most respects as adults, then parental rights would seem to be unjust since one adult would be allowed to direct the actions of another "adult-like" person. Likewise, if our legal system gave the parents of a 44-year-old the same ability to direct their child's life as the parents of a 4-year-old, the system would indeed be illogical.

Our legal system sensibly and legitimately recognizes the key differences between adults and children.[156] For example, there are

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[153] *See supra* Part II.

[154] *See supra* note 22.

[155] *See supra* text accompanying notes 102, 123.

[156] *See, e.g., Bellotti*, 443 U.S. at 633 (Powell, J., plurality) ("The Court long has recognized that the status of minors under the law is unique in many respects."); *id.* at 637 ("[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) ("[T]he mere fact a state could not wholly prohibit this form of adult activity . . . does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose

separate adult and juvenile criminal systems, and whether a particular activity is considered a crime often depends upon the age of the perpetrator or victim.[157] There are many things that minors cannot do that emancipated minors and adults can do, including vote, give consent to sexual activity, marry, contract, consume alcohol, smoke cigarettes, and gamble.[158] These legal disabilities, and countless others like them, illustrate the notion that children generally lack the kind of intellectual capacity adults have to fully appreciate the risks associated with certain forms of conduct, and to make responsible choices when faced with difficult decisions.[159] While it is possible to debate the precise age at

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no greater limitation upon child labor than upon adult labor."); *id.* at 168-69 ("The state's authority over children's activities is broader than over like actions of adults. . . . What may be wholly permissible for adults therefore may not be so for children.").

[157] *See Bellotti*, 443 U.S. at 635 (Powell, J., plurality) ("[O]ur acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults."); *id.* ("Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs."); *Prince*, 321 U.S. at 168-69.

[158] *See generally* Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part) ("Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent."); 42 AM. JUR. 2D *Infants* §§ 37, 40 (2000) (describing limitations on activity by minors); *see also* Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring):

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.

[159] *See Bellotti*, 443 U.S. at 634 (Powell, J., plurality) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."); *id.* at 635 ("[T]he Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."); *id.* ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."); *id.* at 638-39 ("Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."); Parham v. J.R., 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."); *see also* 42 AM. JUR. 2D *Infants* § 37 (2000):

> Infancy, since common law times and most likely long before, is a legal disability, and an infant, in the absence of evidence to the contrary, is universally considered to be lacking in judgment, since his or her normal

which the law should assume a child has acquired sufficient capacity to make decisions for himself, it would be absurd to suggest that the law draw no such line at all. Although Woodhouse cited a reference to children as the "last disenfranchised class,"[160] it is unlikely that she would advocate the passage of a constitutional amendment giving children of all ages the right to vote.

While most people would agree that legal distinctions made between adults and children should not be discarded, the opponents of parental rights essentially argue that the law should treat children the same as adults with respect to education. If it is illegitimate in all instances for one person to control another's educational future, as Dwyer asserts, then it follows that every person should have the right to control his or her own educational future. Thus, in Dwyer's view, adults and children alike should have personal autonomy to make their own educational decisions, and the parental right to direct education violates this autonomy. He essentially concludes that the parental right to direct education is as illegitimate as if the law allowed one adult to direct another adult's education, which explains why he compares the parental right to educate to slavery. If this reasoning were valid, the State itself should no sooner direct a child's education than it would an adult's.

The *illegitimacy* of the distinctions drawn between whites and blacks under the slave system, and between men and women under past legal regimes, affirms the *legitimacy* of the distinctions the law currently draws between adults and children. The slave system and the "separate but equal" system of discrimination operated under the erroneous assumption that blacks were inferior to whites.[161] Similarly, our legal system often subjected women to legal disabilities due to the flawed notion that men were superior to women.[162] These race and sex-based disparities violated basic concepts of human dignity; they were illegitimate because they treated two groups of people that had the same capacities as though they did not. Conversely, the notion that adults

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condition is that of incompetency. Because of their lack of mature judgment, infants are under recognized disabilities in many respects, and their activities and conduct may be regulated and restricted to a far greater extent than those of others.

[160] *See supra* note 107.

[161] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.").

[162] Our legal system has discarded aspects of the common law that were inconsistent with an understanding of women as full members of the legal and political community. *See* Planned Parenthood v. Casey, 505 U.S. 833, 896-97 (1992) (O'Connor, J., plurality). This, of course, does not weaken the vitality that the common law itself continues to hold.

have capacities superior to those of children is unassailable.[163] While a person's race and sex do not change throughout his or her life, all adults were children once. This fact, and common sense along with it, suggests that adults do not exert control over the activities of children because of animosity toward or bias against them. Decisions by lawmakers to treat children differently from adults stems from reasonable judgment, not prejudice or chauvinism.

Another faulty assumption that opponents of parental rights rely upon is that the law should not assume that parents generally act in a manner that they believe furthers their children's best interests. As discussed previously, the law has traditionally based parental rights upon the theory that parents have a natural inclination to care for their children. The law has assumed that parents are in the best position to know their children's traits and to determine the course of action best suited to their needs.[164] These ideas are questioned directly by some, and a challenge to them may be implied from Woodhouse's claim that parental rights are a shield for abusive parents and from Dwyer's allegation that parents use their rights to further their own goals.

Regardless of whether the criticism of the best interests assumption has any merit on its own, it is simply unavailing to argue that a right or power should be rescinded because it could potentially be abused. Litigants in various contexts have raised this argument in vain. For example, in the seminal case of *Martin v. Hunter's Lessee*,[165] one basis for the argument that the Supreme Court lacked the power to review the decisions of state courts was that the Court could easily abuse this "revising" power.[166] Justice Story addressed this claim directly: "[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse."[167] He acknowledged that "[f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse."[168]

In like manner, in *Near v. Minnesota*,[169] it was argued that a statute authorizing courts to enjoin the publication of "malicious, scandalous and defamatory" materials was necessary to prevent those who abuse

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[163] Woodhouse acknowledges this by noting that children generally lack the capacity to articulate their own interests. *See* Woodhouse, *supra* note 15, at 1051-52 ("Historically, children's rights have been severely limited in practice because they depend upon adults for articulation, assertion, and enforcement.").

[164] *See supra* note 25.

[165] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[166] *Id.* at 344.

[167] *Id.*

[168] *Id.* at 345.

[169] Near v. Minnesota, 283 U.S. 697 (1931).

their rights of free speech and press from publishing such materials.[170] Justice Hughes responded to this assertion by stating, "[t]he fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."[171] He added that "[s]ubsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."[172] *Martin*, *Near*, and other cases show that the existence of a right is not subject to attack on the ground that it may be abused by the one holding it.[173]

Even assuming that Woodhouse and Dwyer are correct in asserting that parental rights are abused by some parents who do not act in furtherance of their children's best interests, the appropriate remedy would be to punish the abusers, not to abolish the rights. Those who abuse their rights should be punished for doing so. It seems odd, however, to take away the rights of the vast majority who exercise them lawfully in an effort to prevent the abuse of those rights by a few.[174]

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[170] *Id.* at 702, 719-20.

[171] *Id.* at 720. Incidentally, Justices Holmes and Brandeis joined Justice Hughes's opinion. *Id.* at 701.

[172] *Id.* at 720.

[173] Similarly, courts will not take away the rights of some in an effort to enhance the ability of others to exercise that same right. *See generally* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam):

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

[174] Parham v. J.R., 442 U.S. 584, 602-03 (1979) (Stewart, J., concurring).

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests.

Id. "To be sure, the presumption that a parent is acting in the best interests of his child must be a rebuttable one, since certainly not all parents are actuated by the unselfish motive the law presumes." *Id.* at 624.

Another example of this point comes from Whitney v. California, 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969), where the Court upheld California's Criminal Syndicalism Act. The Act prohibited the organization of a group that advocates the use of crime or violence to effectuate political change. *Whitney*, 274 U.S. at 359, 371. Justice Brandeis wrote a concurring opinion in which he said, "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." *Id.* at 378. When *Whitney* was overruled by *Brandenburg*, the Court's reasoning was similar to that of Justice Brandeis. The Court held that laws that treat the abstract teaching of the moral necessity for a resort to violence (protected activity) the same as the preparation of a group for violent action (unprotected activity) intrude upon constitutional rights. *Brandenburg*,

The justifications offered to support the attack on the presumption that parents act in their children's best interests are not persuasive. As Dwyer recognizes, the law assumes that parents take on parenting responsibilities willingly.[175] In light of the significant investment of time, money, and energy required to raise children, it is logical to assume that there is some set of impulses that motivates people to have children. The possible motives are endless, but some make more sense than others. Among the most plausible are: the natural human drive to procreate and nurture, the desire of a man and woman to commemorate their devotion to each other through the creation of a person that represents their union, and the hope that one's beliefs and memory will live on after one's death. Examining the parent-child relationship in light of any of these motivations, and virtually all others, supports the contention that parents generally act in their children's best interests. The law has always recognized this fact, and there is no reason to suggest that the age-old concept of the parent-child relationship should be discarded in favor of a "progressive," pessimistic view.

The attack on the view that parents act in their children's best interests is part of a much larger legal debate: how much weight, if any, should "tradition" be given in considering whether the law should continue to recognize a legal right?[176] This debate is especially relevant in the substantive due process context, where the Court must wrestle with the role of history and tradition in each case. If the Court decided cases based on tradition alone, parental rights would be among the safest substantive due process rights.[177] Even if the Court weighed tradition as one of several factors, parental rights would certainly be protected. The tradition factor would weigh heavily in favor of parental rights, and it is difficult to list *any* sensible factor that would counsel in favor of abandoning those rights, let alone one that would tip the scales in favor of abolishing them.

A final assumption underlying the attacks upon the parental right to educate is central to Dwyer's arguments against religious education. Dwyer clearly believes that there is one "best" way to educate a child (in public schools), and that allowing parents to educate their children from

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395 U.S. at 448-49. Simply put, courts will not take away the rights of some in an effort to prevent others from abusing that right.

[175] Dwyer, *supra* note 117, at 1423 ("[T]he adults who bear the duties corresponding to children's claim-rights have, as far as the law is concerned, undertaken these duties voluntarily.").

[176] "Tradition" in at least one form is an essential aspect of our legal system, as *stare decisis* commands deference to past decisions in all but the most extraordinary circumstances.

[177] Marriage, procreation, and child-rearing rights are necessarily intertwined, have existed throughout human history, and were among the first to receive substantive due process protection.

a religious perspective sacrifices the child's secular interests to satisfy the parents' religious obligations.[178] He characterized *Wisconsin v. Yoder* as recognizing a Free Exercise right "to control the lives and minds of one's children, to keep them to oneself, isolated from outside influences, and to make them the type of persons one wants them to be in light of one's own religious beliefs."[179] This, of course, violates the child's ability to receive Dwyer's preferred type of education.[180]

In opposition to Dwyer's view is the theory that reasonable people often disagree when asked what is "best" for a child. Realizing their limited capacity, courts often rely upon this assumption when asked to determine whether a certain practice is contrary to the best interests of the child.[181] Dwyer and others implicitly challenge this theory when they opine on the question of whether public schools generally provide an education that is superior, inferior, or equivalent to an education provided by private or home schooling. Two propositions seem clear. First, it is virtually impossible to make accurate generalizations about the relative merits of such enormous and vastly different educational systems. There are some excellent public schools, some average public schools, and some poor public schools. The same can be said of private schools, and the quality of home schooling certainly varies with the skill, dedication, and resources of parents. While one can reasonably argue that public school A is better than private school B or home school C, an argument that public schools *in general* are better than private or home schooling *in general* is difficult to support.

Second, asking whether public, private, or home schooling provides the "best" education is simply the wrong question. The better question is whether the various educational systems really differ in *quality*, or are

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[178] *See supra* note 136.

[179] Dwyer, *supra* note 117, at 1386.

[180] This type of education is one "that develops in them independence of thought, keeps open for them a substantial range of alternative careers, lifestyles, and conceptions of the good, and is sensitive to their developing, individual inclinations as they gain maturity." *Id.* at 1433. While Dwyer contends that an objective education is possible, Woodhouse acknowledges that education in any form transmits the values of the teacher. *See* Woodhouse, *supra* note 15, at 1119 ("Any school can become an agent of repression, whether dictating the parents' orthodoxy or the dogma of the state.").

[181] The Supreme Court has recognized that there is not one "right" way to raise a child:

> Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children.

Bellotti v. Baird, 443 U.S. 622, 638 (1979) (Powell, J., plurality).

merely different in *kind*. One of the many reasons why the parental right to direct education is appropriate is that none of the educational systems is necessarily "better" or "worse" for every child. Each educational system has its strengths and weaknesses, and allowing parents to choose does not deprive children of any "right."[182] Rather, it allows parents to decide what type of education best suits the interests of their child based on numerous factors, including the child's talents and interests, the family's religious and political beliefs, and the quality and expense of the available options. If public, private, and home schooling are all valid ways to educate a child, and the quality of each type of education may vary from community to community, then why do Children's Rights advocates attack the parental right to direct education so robustly? To answer this question, it is necessary to examine the real consequences of eliminating the parental right to direct education.

B. Practical Concerns

> [*Meyer* and *Pierce*] must remain controversial in the absence of pure communism or pure libertarianism, for there is no obvious or perfect way to balance the competing interests of the parents and the state in matters of education in a free, but statist, society.[183]

At the beginning of his article, Dwyer assures his readers that converting parental rights into a parental "privilege" would not "transfer to the State vastly greater control over child-rearing or enable the State to intervene whenever social workers think a parent is performing less than optimally."[184] He adds that his proposed regime "would not entail doing away with the institution of the family in favor of collectivized

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[182] For example, public schools tend to expose students to a larger, more diverse student population. They also provide a "non-religious" education for students whose parents desire one, although it is certainly not "objective" and it can be argued that public education is even hostile to religion. *See* Cheng, *supra* note 11. On the other hand, the smaller class sizes of private and home schools tend to afford students more individual instruction and attention, which cannot be underestimated especially during a child's younger, more formative years. Most of them also provide a religiously-based standard of moral ethics which challenges the notion of "moral relativism" prevalent in society at large and posits that there are certain absolute truths. This is often viewed as a vice by opponents of non-public schools, while supporters of private and home schooling champion this as one of its main virtues. *See generally id.*

[183] William G. Ross, *Contemporary Significance of* Meyer *and* Pierce *For Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 207 (2000).

[184] Dwyer, *supra* note 117, at 1376. This is likely an attempt to make Dwyer's proposed legal regime appear to offer only a slight change from the current one. *See* Parham v. J.R., 442 U.S. 584, 638 (1979) (Brennan, J., dissenting) ("The social worker-child relationship is not deserving of the special protection and deference accorded to the parent-child relationship, and state officials acting *in loco parentis* cannot be equated with parents.").

child-rearing."[185] In fact, however, abolishing parental rights would radically and detrimentally alter American legal and family structures. Although *social workers* might not have much increased power to override parenting decisions, *courts* certainly would. And, while child-rearing would not be "collectivized" in the sense of Plato's concept of separating all children from their parents, child-rearing would be collectivized in the sense that the "great mother state" would decide what control parents retained over their children's lives.

Dwyer's own arguments show that his proposed system would indeed give the State much more authority than it now has to interfere with child-rearing decisions. For example, he defines the word "privilege" as "the absence of any duty to refrain from a given activity."[186] Dwyer illustrates what he means by this term: "[i]f, for example, I allow my neighbor to borrow my shovel, she then enjoys a privilege to take and use it; she is no longer under a duty to me not to take and use my shovel."[187] But what if Dwyer and his neighbor have a dispute over how the shovel should be used? Dwyer explains that his neighbor's privilege "does not entail any claim against me should I interfere in her use of the shovel or take it away from her."[188]

Under Dwyer's legal regime, the State is analogous to the owner of the shovel, the parent is analogous to the neighbor who has a privilege to use the shovel, and the child is analogous to the shovel.[189] Accordingly, a parental privilege "would merely legally permit parents to engage in the types of behavior normally associated with child-rearing, e.g., housing, feeding, clothing, teaching, or disciplining a child," although it "would not give parents themselves any legal claims against state efforts to restrict their behavior or decision-making authority."[190] Thus, to modify Dwyer's description of the parental "privilege," it would not entail any claim against the State should it interfere in the parents' child-rearing decisions or take the child from them.[191] The very notion of a privilege implies that its holder has no authority with respect to the subject of the privilege that is not somehow derived from the one granting it.

Even putting the shovel analogy aside, the logical result of abandoning parental rights in favor of "Children's Rights" would be to shift decisional authority in matters of child-rearing from parents to the

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185 Dwyer, *supra* note 117, at 1376.

186 *Id.* at 1375.

187 *Id.*

188 *Id.*

189 Woodhouse and others may dislike the use of a child-as-property analogy, but this note is simply exposing the true consequences of the analogy that Dwyer proposed.

190 Dwyer, *supra* note 117, at 1375-76.

191 *See id.* at 1375 (arguing that the neighbor's privilege "does not entail any claim against me should I interfere in her use of the shovel or take it away from her").

State, and to the courts in particular. As previously discussed, the law assumes that children lack the capacity to make important decisions for themselves. If this assumption is true, then it follows that some adult, or group of adults, must make such decisions for them. Under the current legal system, parents have the primary authority to make child-rearing decisions. If parental prerogatives are eliminated, then parental authority to decide educational questions would certainly be lessened. While parents would still make decisions in the first instance, courts would have much greater leeway to review and override them. As Justice Story said in *Martin v. Hunter's Lessee*, "[f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere,"[192] and courts are not reluctant to declare their authority to decide all sorts of questions.

That courts would take on the role of child-rearer under a Children's Rights regime is evident from the fact that courts define themselves as having the authority to "say what the law is."[193] The creation of a right requires interpretation of the scope of that right, and courts would naturally be asked to construe the breadth of Children's Rights. What level of education does this right guarantee? What type of governmental interest will be required for the State to justify an incidental burden upon this right? Most important, what *kind* of education does this right guarantee? Will children be deemed entitled to what Dwyer calls an education that leaves open "a substantial range of alternative careers, lifestyles, and conceptions of the good?"[194] Will courts declare that children have a right to receive an education free from "ideological bias?" One representative of a diverse set of philosophical, religious, and moral views? One free from "indoctrination?" Every person's description of the kind of education children should receive is likely to differ, and the courts would ultimately decide the question under a Children's Rights regime.

If our legal system replaced parental rights with a child's right to receive a court-defined type of education, the rebirth of compulsory public education would likely follow. This would likely occur either through legislation similar to that rejected in *Pierce* or through a judicial interpretation of the children's educational right that virtually bans private and home schooling. A regime without parental rights could only come about by overruling or ignoring *Meyer*, *Pierce*, and *Yoder*, as well as the numerous other cases that reaffirm the parental rights delineated in those decisions. Without parental rights, what legal interest could be

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192 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 345 (1816).

193 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

194 Dwyer, *supra* note 117, at 1433. This appears to forbid religious education, which arguably does not keep open "a substantial range of . . . conceptions of the good." *Id.*

asserted that would defeat an attempt to reinstall compulsory public education? Imagine the outcome of a modern day *Pierce v. Society of Sisters* if the parents could not assert their right to direct their child's education. They would have no interest of their own in the litigation, as they would be relegated to act merely as their child's custodians. The school could not assert its own interests without either relying on economic due process or arguing that it should be able to maintain a stake in the child's educational future although the parents no longer do.

The only possible obstacle to compulsory public education would be the child's newly-minted educational right itself. But this right would only block compulsory public education if it was interpreted in a way that prevented the State from cutting off the child's educational options. However, if the Supreme Court were actually persuaded to abandon parental rights in favor of Children's Rights, it is much more likely that the right would be interpreted to *require* or *allow* compulsory public education than it would to *prohibit* it. For the Court to discard the parental right to direct education, it would have to determine that the best interests of children would be better served by greater judicial oversight of child-rearing.

Upon what basis would the Court conclude that children's educational interests are not being adequately served by the parental right to direct education? If the Court adopted the views of Woodhouse and Dwyer, it would reject parental rights because they allow parents to treat children as private property or an extension of their own religious free exercise. To remedy these perceived wrongs, the Court would likely shape the child's educational right in a manner that precluded parents from basing educational decisions solely on religious grounds. Since most private and home schooling is conducted from a religious perspective, and parents often choose to forgo the use of public schools for religious reasons, a regime without parental rights would likely be one without private or home schooling.[195]

While this note has shown that an attack on the parental right to direct education constitutes an endorsement of compulsory public education, it has not thoroughly discussed whether the reincarnation of

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[195] This result would probably occur even in the unlikely event that the courts or legislatures did not expressly require all children to attend public schools. For example, if a trial court allowed parents to send a child to a religious school under a Children's Rights regime, its decision could be assailed on Establishment Clause grounds. The legal question in such a case would be what form of education best serves the child's (judicially defined) educational rights, and the parents would not have any interests of their own to assert. Since trial courts would be the nation's primary child-rearers under a Children's Rights regime, it would not be surprising if some appellate courts (including the Supreme Court) held that a trial court's approval of attendance at a religious school constituted an "endorsement" of the particular religion involved, or had the primary purpose or effect of advancing religion.

compulsory public education is wise from a policy perspective. Needless to say, a full discussion of that topic would require another article. However, it is clear that the religious groups that encourage and rely upon alternatives to public education would be severely harmed by compulsory public education.[196] Also, compulsory public education would severely limit the "marketplace of ideas" as well as the interests of minority groups and the democratic process as a whole.[197] We do not need compulsory *public* education to ensure that future generations of Americans share our devotion to democracy and other "American" ideas. Non-public schools are equally capable of achieving this goal, and true acceptance of an idea comes from a person's realization of its inherent value, not from State-controlled education.[198]

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[196] This is true not because some religious groups cannot hold their own without "indoctrination," as Dwyer suggests, but because it is difficult for these groups to combat the secularism and moral relativism that pervades public education. *See generally* Cheng, *supra* note 11. Public and religious schools approach the educating process from entirely different perspectives, and it is not enough to say that religious groups can teach children during evenings, weekends, and summers. Parents should be able to reinforce what their children learn at school instead of having to contradict what they are being taught.

[197] *See* Hafen, *supra* note 17, at 480-81 ("Monolithic control of the value transmission system is 'a hallmark of totalitarianism'; thus, 'for obvious reasons, the state nursery is the paradigm for a totalitarian society.' An essential element in maintaining a system of limited government is to deny state control over childrearing, simply because childrearing has such power."); *id.* ("Even if the system remains democratic, massive state involvement with childrearing would invest the government 'with the capacity to influence powerfully, through socialization, the future outcomes of democratic political processes.'"); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 665 (1998).

> [M]aintaining a government monopoly over [imparting and nourishing the civic values that bolster a healthy democracy] presents certain risks in a free society, especially in a democratic order that purports to value social, political, and religious pluralism. These hazards are painfully evident in the history of the American common school.
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> The history of the common-school movement is a telling story of the risks incurred when a ruling majority is allowed to establish a monopoly over the educational process and to impose its values upon everyone else's children. . . . Under these conditions, the rights and concerns of minorities become easily dismissed, ignored, or trampled upon—often unknowingly, sometimes intentionally—but always with severe consequences. Without alternatives for the education of their children, minorities must frequently accept the majority's worldview.

Id. at 665, 668-69.

If all children were "Americanized" by a uniform school system, as the proponents of the law in *Pierce* sought to do, would there be any room left for political, social, religious, or moral dissent? "The existence of dual (or multiple) educational systems is understood to be a safeguard against intrusive governmental power in the upbringing of children; the right to choose is cherished as an essential feature of self-government." *Id.* at 665.

[198] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead

Finally, consider these questions: What legitimacy, if any, would the doctrine of substantive due process retain if *Meyer* and *Pierce* were overruled? How could the Supreme Court overrule the two cases that form the foundation of substantive due process without jeopardizing the rights that have been recognized in subsequent cases? If the parental right to direct education may be abolished, what prevents marriage, procreation, contraception, abortion, and other substantive due process rights from suffering the same fate? While Woodhouse laments that "substantive due process can be a conservative as well as a liberating force,"[199] this should be expected if the Court is really attempting to render a valid interpretation of the Constitution. If the Court is merely using substantive due process to enact its policy preferences into law, as some suspect, and "[i]f the Justices are just pulling our leg, let them say so."[200]

V. CONCLUSION

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[201]

At the heart of the dispute over the parental right to direct education is the idea that parents typically act in their children's best interests. This note has shown that the law continues to rely upon this age-old presumption. Part II of this note examined the development of the legal relationship between parent and State in the context of education over the past few centuries. Part III presented the arguments of two opponents of parental rights, Barbara Bennett Woodhouse and James G. Dwyer, who suggest that such rights should be weakened or abolished because they allow children to be treated like property or be indoctrinated by religious parents. Part IV provided a defense of the parental right to direct education by confronting the critics' arguments and revealing the negative consequences of creating a legal system with no parental rights. The note concluded that abandoning parental rights would severely weaken American families and religious heritage by

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of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."); Viteritti, *supra* note 197, at 665 ("Although schools play a crucial role in imparting and nourishing the civic values that bolster a healthy democracy, most free societies do not accept the premise that only government-owned and -operated schools are capable of fostering these essential values.").

[199] Woodhouse, *supra* note 15, at 1110.

[200] *See* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992).

[201] Troxel v. Granville, 530 U.S. 57, 68-69 (2000) (O'Connor, J., plurality).

shifting primary child-rearing authority to the State and opening the door to the rebirth of compulsory public education.

The attack on the parental right to direct education comes at a time when the American family is experiencing crisis. At the same time, the American public school seems to be falling apart due to problems from within and competition from without. While the public school is a noble institution, the family is one of the few institutions more valuable to individuals and society. By decreasing parental control over education, acceptance of the Children's Rights doctrine would exacerbate, not lessen, the troubles of the family. The law has traditionally and rightfully recognized that, in all but the most extraordinary circumstances, children's interests are best served by *encouraging* parents to be thoroughly involved in their lives. Even if "[t]he cry of 'Fire!' has been heard in the institution of public education,"[202] we should not discard parental rights as a way to put out the fire.

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[202] *See* Note, *The Hazards of Making Public Schools a Private Business*, 112 HARV. L. REV. 695, 712 (1999) ("The cry of 'Fire!' has been heard in the institution of public education. Exit should not be the only option. Instead of devoting all resources to finding an exit, the public should find a way to extinguish the fire.").