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Progress and Progression in Family Law

Martha Albertson Fineman†

Three years ago, Justice O'Connor noted that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”¹ This observation lends authority to the statement I make at the commencement of each class I teach on family law: “This is an area of the law in which the whole world is being rewritten.” The trick to comprehending this dynamic area of the law is to try and follow the plot inherent in the ongoing rewriting project by understanding both the scripts and the motivations of all the various characters.

Things have changed so much over the past few decades with regard to family formation and functioning; our traditional historic expectations and aspirations for the family have been shaken and challenged. In reviewing the implications of such changes, Mary Ann Glendon refers to three characteristics of today’s families that differentiate them from families of the past: (1) increased fluidity, detachability, and interchangeability of family relationships; (2) increased instances of “family behavior” occurring outside of formal, legal family structures; and (3) changes within the family—changes in lines of authority and changes in attitudes about roles.²

† Robert W. Woodruff Professor, Emory University, School of Law and Director of the Feminism and Legal Theory Project. This Article is based on a keynote address delivered at The University of Chicago Legal Forum Symposium in October 2003. I would like to thank Cornell Law School student Luke Zachary Fenchel, who provided valuable research assistance, as well as comments on this final draft.

¹ Troxel v Granville, 530 US 57, 63 (2000).
These differences reflect more flexibility and less state control over the ways in which people live their intimate and family lives today. There is more room for private decisionmaking about familial structures and less imposition of rigid consequences for failing to conform to the familial norm. These changes reflect a repositioning of the line between “public” and “private” in the context of the family, its formation, and its functions.

Historically, the term “family” was assumed to be synonymous with the traditional unit of husband, wife, and their biological children. Defined initially through religious precepts in ecclesiastical courts in England, this traditional family had certain defining characteristics. First, it was based on the primary connection of marriage (the legal joining of man with wife). Second, marriage was presumed to be a life-long commitment. Third, the sexes had distinct and well-defined gender roles: husbands were economic providers, disciplinarians, and the heads of families, while wives were nurturers, caretakers, and subservient to their husbands. This family unit was protected by criminal and civil laws, which punished intimate entities that failed to conform to the marital norm. Criminal penalties for nonmarital cohabitation, adultery, and fornication were common, as were legal disadvantages attached to illegitimacy. Today such laws are considered by many to be outdated and inappropriate.

3 See id at 7 (stating that “legal ties among family members are becoming attenuated and the legal structure of the family is becoming looser”).


Such shifts in attitude reflect an accommodation of changing patterns of intimate behavior. The practice of family formation has certainly changed: the traditional nuclear family model represents less than a quarter of the family units described in the most recent census data. The number of cohabiting couples, both heterosexual and homosexual, continues to rise and these couples have become more visible than in the past. It seems we are surrounded by new, different types of families, and many of them are raising children.

But the pressure on the system presented by shifts in family formation and functioning has not only given rise to accommodation. It has also spawned a backlash. In particular, many politicians and policymakers have addressed the challenges raised by these changes with cynical and ineffective appeals for the resurrection of the traditional family. Beginning with an insistence that the marriage of their parents will cure many, if not most of the disadvantages children suffer, and pandering to a conservative and fundamentalist religiosity, politicians resort to the traditional family as a panacea. From poverty to school attent-

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10 See, for example, Katherine Shaw Spaht, Revolution and Counter-Revolution: The Future of Marriage in the Law, 49 Loyola L Rev 1 (2003) (arguing that recent cultural revolutions have negatively affected the institution of marriage). See also Eric P. Voigt, Note, Reconsidering the Mythical Advantages of Cohabitation: Why Marriage Is More Efficient than Cohabitation, 78 Ind L J 1069 (2003) (arguing that cohabitating couples produce and consume less goods, and thus provide less social utility, than married couples). Also on the rise is the so-called “marriage promotion” movement, which allocates government funding to encourage and foster marriage among single women on welfare. See, for example, Gwendolyn Mink, Violating Women: Rights Abuses in the Welfare State, 577 Annals Am Acad Pol & Soc Sci 79, 88 (2001) (describing interest group efforts to enact marriage promotion laws).

11 For example, recently President George W. Bush unveiled a 1.5 billion dollar initiative to foster and support “healthy marriages.” In February of this year, Bush announced that he would support a constitutional amendment limiting unions to heterosexual couples. See Robert Pear and David D. Kirkpatrick, Bush Plans $1.5 Billion Drive for Promotion of Marriage, NY Times A1 (Jan 14, 2004).

12 See, for example, Bridget Remington, It Takes a Father?: Conforming with Traditional Family Values as a Condition of Receiving Welfare: Morals Reform and the Price of Privacy, 32 Stetson L Rev 205, 215 (2002) (noting that welfare reform “seems to reflect the government’s idea that all children are better off with a legally recognized father, regardless of the mother’s wishes”).
dance, from crime to teenage pregnancy, the culprit is assumed to be the “crisis” in the family. This crisis was initially defined by never married motherhood and single motherhood as a result of divorce. The sense of crisis has now expanded to include same-sex marriage within a domestic axis of evil.

The process and nature of change in our family formation seems unlikely to be derailed. The policy question for those concerned with the institution of the family in today’s world should not be how we can resuscitate marriage and thus save society, but rather how we can support all individuals who create intimate, caring relationships, regardless of the form of those relationships. Continued inattention to the social and economic dislocations and the emerging family needs produced in the wake of changes in family formation can be disastrous, not only to individual families, but also to society.

Of particular importance for policymakers should be family units that are caring for children, the elderly, or the ill. In our family ideology it is the marital family that is assigned responsibility for the caretaking of dependant individuals. This family is the way we “privatize” dependency.

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13 See Karl Zinsmeister, Raising Hiroko: The Child-Centered Culture of Japan, The American Enterprise 52, 53 (1990) (“We talk about the drug crisis, the education crisis, and the problems of teen pregnancy and juvenile crime. But all these ills trace back predominantly to one source: broken families.”).

14 See Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies 101–02 (Routledge 1995) (noting the traditional view that single mothers are “deviant” and “pathological”). See also Anna Marie Smith, The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview, 8 Mich J Gender & L 121, 128 (2002) (noting that eligibility rules for pensions in the 1930’s “were so restrictive that unmarried women received virtually no assistance whatsoever, while deserted and divorced women made up a very small proportion of the recipients” because these groups were not the “most ‘worthy’ of the female-headed families”).

15 See Nick Schulz, Pat Moynihan’s Legacy, National Review Online, March 27, 2003, available online at <http://www.nationalreview.com> (visited May 12, 2003) (noting that former New York Senator Daniel Patrick Moynihan’s studies of urban America made it “impossible not to conclude that in some significant way broken families were driving a tangle of social pathologies in the inner city—a kind of domestic axis of evil”). See also Kenneth L. Karst, Cultural Conflict, and the Socialization of Children, 91 Cal L Rev 967, 977 (2003) (noting that opponents of gay adoption often invoke the “authority of religion” to “call for a presumption against allowing adoption by gay or lesbian parents”); Margaret F. Brinig, Promoting Children’s Interests Through a Responsible Research Agenda, 14 U Fla J L & Pub Pol 137 (2003) (providing a cursory overview of recent empirical studies on the “effect” of divorce and same-sex households on children).

16 See Martha Albertson Fineman, Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, 8 Am U J Gender Soc Pol & L 13, 14 (2000) (“The assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend that it is not a public problem.”).
If changes in family form reveal different sets of problems and unmet needs, thereby making caretaking and managing dependency more difficult, policymakers should ask what institutional and other adjustments are necessary in order to help these new forms of family meet their responsibilities. A policy that focuses primarily on extolling the benefits of marriage and designates non-conforming family units “deviant” does not address such questions.

I. TRANSFORMATIONS AND TRANSITIONS

The traditional understanding of the family, as well as agreement about the need for punitive measures directed at alternative forms, have been challenged by three significant (and irreversible) revolutions that shook traditional American society during the mid-twentieth century. These three revolutions have altered our perceptions and our aspirations, reshaping the very concept of family in American culture and law. First, the no-fault divorce revolution has demonstrated that marriage can no longer be presumed to be a life-long commitment. In many states, one partner can determine that the marriage is over and initiate divorce proceedings without having to demonstrate that her or his partner has been “at fault.”

Second, the sexual revolution has decoupled sex and reproduction from marriage, resulting in increased instances of nonmarital motherhood. There also is growing visibility and increased acceptability of same-sex relationships.

Third, the gender equality revolution has altered women’s aspirations, both inside and outside of the family. This has created tension and conflict as new egalitarian aspirations clash with old gendered expectations.

In response to these shifts in thinking about intimacy and family, formal “Family Law” has altered its rules and regulations concerning the marital family. For example, distinctions between the economic consequences of nonmarital cohabitation and marriage are blurring; the American Law Institute urges that the law should treat nonmarital partners (including same-sex couples) living together in a committed household relationship as married for purposes of dividing property accumulated during

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17 See Part I B.
18 See Part I B.
19 See Part I A.
the relationship.\textsuperscript{20} In addition, loosened marriage laws have reduced or eliminated many substantive, and most formal, restrictions on entry into marriage for heterosexuals.\textsuperscript{21} Moreover, some state courts have insisted that legislatures grant more protections for same-sex partners who wish to form formal committed partnerships akin to marriage.\textsuperscript{22} Meanwhile, the same legislatures, as well as most other legislatures, have enacted laws making the power to exit traditional marriage virtually unlimited.\textsuperscript{23} And, for those who desire the formal title of marriage, but reject the traditional implications of the institution, it is increasingly possible for a couple to tamper with the legal consequences of marriage. The use of a premarital contract in most states allows couples to individualize the terms of a marriage, thus escaping virtually all of the default economic rules imposed by the state on spouses at divorce.\textsuperscript{24} The widespread acceptance of such diversity in the nature and consequences of regulatory schemes is itself a clear indication that we simply do not think of marriage in the same terms as we did even a few decades ago.

A. Gender Equality and Family Law: Defining the Partners

The gender equality revolution has been of particular importance in shaping our understanding of marriage and, consequently, divorce. In a study of feminism's effect on family law, Katherine Bartlett, Dean of the Duke University Law School, suggests that gender equality principles have reached into the


\textsuperscript{21} See Elizabeth S. Scott, \textit{Rational Decisionmaking About Marriage and Divorce}, 76 Va L Rev 9, 15 n 12 (1990) (noting that the general requirements for heterosexual marriage are filing for a marriage license and passing basic medical tests).

\textsuperscript{22} See, for example, \textit{Goodridge v Department of Public Health}, 798 NE2d 941, 969–70 (Mass 2003) (declaring that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution," and giving the legislature 180 days to change the state marriage laws accordingly). For a complete listing of states' same-sex partnership restrictions, see Human Rights Campaign Foundation, \textit{The Family: Laws and Legislation Affecting Gay, Lesbian, Bisexual, and Transgender Families} (2002), available online at <http://www.hrc.org/templateRedirect.cfm?template=/ContentManagement/ContentDisplay.cfm&contentFileID=379> (visited May 13, 2004).


\textsuperscript{24} See \textit{Developments in the Law: The Law of Marriage and Family}, 116 Harv L Rev 1996, 2075 (2003) (noting that couples' antenuptial agreements work "either as protection for assets accumulated during their now-longer pre-marriage working years" or to avoid "potential uncertainty associated with judicial division of marital assets").
very workings of the family as a functioning institution. She states that feminism’s influence on the law of the family has been “to open up that institution to critical scrutiny and question[ing] the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others.”

Bartlett characterizes the contributions of feminist family law scholars and practitioners as largely a success. Feminists challenged the public/private divide and made visible abuses within the family. In addition, feminist theory has had a far-reaching impact on the laws governing the distribution of property, assignment of spousal maintenance obligations, and child custody decisions upon divorce. Feminist ideals and arguments generated instability in, and subsequent reform of, “traditional” patriarchal family law. The use of powerful legal concepts such as “equality” led to the recasting of marriage as a relationship between equal partners. Divorce rules changed to reflect the perception that wages and income result from family labor, not just individual efforts. The legal relationship between husband and wife has been completely rewritten in gender neutral, equality aspiring terms. In addition, so-called “domestic” violence is now subject to some of the criminal and civil sanctions that would occur in non-domestic assaults, and “marital rape” is no longer considered an oxymoron. Most women, indeed most peo-

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26 Id at 475.
27 Id.
28 See, for example, Fineman, *The Neutered Mother* at 213 (cited in note 14) (noting that forcing mothers to rely on private resources for aid makes mothers dependent upon men for financial support).
31 See, for example, Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago 1991). This is also evident of a legal understanding of marriage as contract. See Uniform Marriage & Divorce Act §201 at 8 (NCCUSL 1970) (“A marriage between a man and a woman licensed, solemnized, and registered as provided in this Act is valid in this state.”); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 Cal L Rev 204 (1982).
32 See Fineman, *The Illusion of Equality* at 48 (cited in note 31) (noting that the “equality conceptualization of marriage” evident in divorce law has “the concept of contribution supplying the distribution standard”).
33 Id at 46-48.
34 See Ertman, 73 Denver U L Rev at 1113 n 15 (1996) (cited in note 4) (noting that
people, whether they identify themselves as feminist or not, benefit from and generally approve of such manifestations of gender equality.\textsuperscript{35}

To many, such successes make sense and constitute part of a natural progression in the law.\textsuperscript{36} After all, expanding the reach of equality to cover more and more groups in more and more circumstances is to a large extent the history of twentieth century law in the United States. A general adherence to the ideal of equality reinforces arguments that equality reform in gender relations is both appropriate and desirable. As a result, laws governing the economic consequences of divorce, sex and reproduction, and domestic violence were transformed in the name of furthering the goal of gender equality.\textsuperscript{37} These laws address areas in which feminism’s influence has helped shape citizens’ beliefs regarding the proper treatment of women.

In making this claim about the stability of the gender equality paradigm, I am not forgetting about the religious right and the conservative backlash to feminism’s advances. Nor am I ignoring the fact that within communities that generally support contemporary policies as important for women’s equality there are nuanced debates that still exist, such as those concerning late-term abortion in pro-choice feminist circles.\textsuperscript{38} My assertion is merely that the majority of American society (feminist and not): (1) seems settled on policies mandating that relatively liberal divorce laws be coupled with a partnership model for doing economic justice between spouses; (2) has settled into a basic recognition of the significance for women’s equality of the right to “choice” in reproductive matters;\textsuperscript{39} and (3) believes that perpetra-

\textsuperscript{35} See Joan W. Howarth, \textit{Executing White Masculinities: Learning from Karla Faye Tucker}, 81 Or L Rev 183, 227 (2002) (noting that “we live in an era in which formal equality between men and women—no special treatment—is a dominant, controlling construct, both in law and in popular consciousness”).

\textsuperscript{36} See, for example, Bartlett, 33 Fam L Q at 475 (cited in note 25) (noting that changes in the laws governing divorce, reproduction and domestic violence have “exposed the hypocrisy of a construct that purports to be neutral”).

\textsuperscript{37} See Fineman, \textit{The Illusion of Equality} at 46–48 (cited in note 31).

\textsuperscript{38} For a general discussion, see Rigel C. Oliveri, \textit{Crossing the Line: The Political and Moral Battle Over Late-Term Abortion}, 10 Yale J L & Feminism 397 (1998).

tors of domestic violence should be punished and that society should provide support and protection for victims of domestic violence.\textsuperscript{40}

I also recognize that a wide difference exists between the aspirational ideal of gender equality and the actual implementation of the norm of gender equality. A lot would have to change in the day-to-day behavior of real-life marital families in order to make the implementation of true equality possible.\textsuperscript{41} Nonetheless, it is certainly significant that on a rhetorical and formal legal level, the gender equality revolution has been accepted and actualized.

B. Dependency, Caretaking, and the Family: Defining Responsibility

1. One Revolution at the Expense of the Others.

The legal and political responses to the other two revolutions have not been as positive as that associated with the gender equality revolution. While the gender equality paradigm enjoys broad-based support, at least on a rhetorical level, there are more visible struggles over the changes associated with the sexual revolution and the no-fault divorce revolution. These struggles evidence a growing resistance to the implications of these particular revolutions for American society. In contrast to what happened with gender equality, a significant backlash by conservative and religious groups has impeded the successful incorporation of changes in sexual and divorcing behavior into the developing pattern of progressive legal reforms.

This is not to assert that there have been no changes in attitudes and responses to sexuality and divorce. The sexual revolution has ushered in a transformation in the way society responds to premarital sexuality and same-sex relationships. Criminal laws regarding nonmarital cohabitation, fornication, and sodomy have been replaced or struck down by state and federal courts in many jurisdictions.\textsuperscript{42} Even some of the “protective” legislation

\textsuperscript{40} Martha Albertson Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv L Rev 727 (1988).

\textsuperscript{41} Martha Albertson Fineman, Why Marriage?, 9 Va J Soc Pol & L 239, 271 (2001) (contending that transcending traditional concepts of marriage may require “a radical reconfiguration of how we think about the family”).

\textsuperscript{42} See, for example, \textit{Lawrence v Texas}, 539 US 558 (2003) (striking down Texas’s homosexual anti-sodomy law as violative of the Due Process Clause of the Fourteenth Amendment). Carlos Ball states in Sexual Ethics and Postmodernism in Gay Rights Phi-
surrounding marriage is expanding to include nonmarital sexual relationships through state and municipal antidiscrimination policies. It is also true that no-fault divorce is now available in some form in every state in the United States.

However, these changes in attitude and in law continue to generate insistent negative commentary and provoke heated calls for a retreat to an earlier, more traditional time. This is particularly true in regard to the detachment of reproduction from the institution of marriage. This decoupling (pun intended) brings the vulnerability of the child, historically masked by its placement within the traditional marital family, into focus as an explicit policy matter. What are we as a society to do with children if we can’t neatly ideologically tuck them away in the traditional marital family, relying on it for their care and provision?

2. Equality and Poverty.

I think that this concern with the nonmarital child provides the backdrop for a politics of marriage in which the institution is perceived as much more than a legal category and certainly not only as a matter for private concern. In particular, there have been political attacks on recent changes in family law, charging that divorce is too “easy.” Accompanying this is a renewed emphasis on the importance of the institution of traditional (monogamous, life-long, heterosexual, reproductive) marriage to the very well-being of society. Publicly and symbolically, marriage is reconfigured into a mantle of morality from both a societal and


See, for example, Harry V. Jaffa, Original Intent and the Framers of the Constitution: A Disputed Question 263–64 (Regnery 1994) (arguing that marriage requires “the possibility of generation”).

See id.
an individual standpoint.47 Marriage is presented as the path to personal and familial (and therefore, societal) salvation.48

A shift in emphasis has occurred in the discourse associating marriage with morality, however. Today, there is much less discussion regarding the purity of women or the evils of sexuality than there was in centuries past. The major concern in contemporary morality rhetoric seems to be to ensure that reproduction remains within the institution of marriage.49 The projected needs and well-being of children have become the rhetorical engines that drive much of the marriage discourse.50 Children represent the future and we are told that the marital family is essential to that future; the marital family alone is the foundational institution for society—the "cradle of citizenship."51 The marital family is the institution that teaches children "standards of personal conduct that cannot be enforced by law, but which are indispensable traits for democratic civil society."52

Even feminist theory seems to falter when asked to stand up to the asserted superior moral authority of appeals to the well-being of children. Perhaps this is because feminist theory has been tentative in its approach to the dilemmas presented by children. With its focus on gender equality, the dominant form of feminist legal theory has been much less engaged with considering the implications of motherhood in regard to women's relationship to children than it has been in defining the appropriate egalitarian relationship between women and men, as wives and husbands.53 Certainly a partial explanation for this lack of success lies in the fact that motherhood can be, and often is, a threat

47 See, for example, Harry V. Jaffa, Sodomy and the Academy: The Assault on the Family and Morality by "Liberation" Ethics, in Harry V. Jaffa, ed, American Conservatism and the American Founding 263, 276–77 (Carolina Acad Press 1984) ("To release [homosexual behavior] from such social restraints as still surround it . . . would be to adopt a neutral attitude toward the family and ultimately toward all morality.").

48 See, for example, Katherine Boo, The Marriage Cure: Is Wedlock Really a Way Out of Poverty?, The New Yorker 105 (Aug 18, 2003) ("Traditionally, singleness has been viewed as a symptom of poverty. Today, however, a politically heterodox cadre of academics is arguing that singleness—and, particularly, single parenthood—is one of poverty's primary causes, for which matrimony might be a plausible tonic.").

49 See note 57.

50 See Fineman, The Illusion of Equality at 31 (cited in note 31).


53 For a general discussion, see Fineman, The Neutered Mother at 34–54 (cited in note 14).
to the realization of gender equality in non-family arenas. But it is also the case that the concept of equality, as we understand it in liberal American legal culture, is inadequate to help with the dilemma of dependencies that motherhood has historically represented.

The feminist legal theorists who have built their theories upon the American ideal of formal equality find it a foundation too narrow to support the weight of the societal, cultural, and economic implications imposed upon the mother-child relationship. Perhaps this is why when confronting the implications of motherhood, many formal equality advocates slip so quickly into policies seeking to monitor the equalization of responsibility for children between mothers and fathers.

The wider academic and policy communities share with feminists a seeming inability to look at the mother-child relationship (or other versions of the caretaker-dependent relationship) without reflexively refocusing the discussion back to the dynamics of marriage and the interactive responsibility of the marital couple.

For example, William Galston made a “liberal-democratic case for the two-parent family” in a widely quoted and influential article in his book, The Responsive Community. Rather than invoking religious imagery, Galston applies public opinion and statistics to conclude “that America is in the grip of ‘moral decay.’” He asserts that there is a consensus that this moral decay is related to the “breakdown” of the family. Galston justifies state policies supporting intact two-parent families and disad-

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54 Id at 38-39.
55 Id at 8-9. I introduce two different types of dependency: “inevitable dependency” describes the status of need for care on the part of the young and many elderly or ill persons; “derivative dependency” reflects the fact that the caretaker of an inevitably dependent person also is dependent, although not in a biological or inevitable way. Rather, a caretaker is dependent upon the provision of material resources and societal structures to allow her to undertake care work. Id.
56 See id.
57 I have written extensively on the implications of both the “illusion” of gender equality and the crisis in support for caretaking and caretakers that has arisen because responsibility for dependency is located primarily in the private family. See Fineman, The Illusion of Equality (cited in note 31); Fineman, The Neutered Mother (cited in note 14).
59 Id at 16.
60 Id. See also William A. Galston, Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State 283 (Cambridge 1991) (noting that a 1990 nationwide study found that the “public’s prime explanation for moral decay” was “the breakdown of the family”).
vantaging other families by proclaiming that there are psychological, monetary, and structural harms to children as a result of single parenting.  

The economic effects of single parenthood are well documented. Single-parent families are generally poorer than two-parent families. But does it follow, as Galston suggests, that “it is no exaggeration to say that the best antipoverty program for children is a stable intact family”? One must wonder if he is unaware of the many poor working two-parent families in the United States. While having two parents may increase the likelihood that a child will not be poor, it certainly does not guarantee it. Therefore, to label the intact family “the best” program to prevent childhood poverty seems glib and insufficient.

Of course, if the problems confronting children were only economic, one solution would be obvious—transfer monetary resources to the childrearing unit (from one parent to the other or from the state to the caretaking parent). But Galston identifies other consequences for children living in one-parent homes that he would assert are less susceptible to economic measures. By quoting Karl Zinsmeister, he argues that there are inevitable non-economic consequences of divorce:

There is a mountain of scientific evidence showing that when families disintegrate, children often end up with intellectual, physical, and emotional scars that persist for life. . . . We talk about the drug crisis, the education crisis, and the problems of teen pregnancy and juvenile crime. But all these ills trace back predominantly to one source: broken families.

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61 Galston, A Liberal-Democratic Case at 15 (cited in note 58).
62 Henry N. Ricciuti, Single Parenthood and School Readiness in White, Black, and Hispanic 6- and 7-Year-Olds, 13 J Fam Psych 450, 450 (1999) (noting a study that found “reduced income levels may be seen as a consequence, and thus a part of single parenthood”).
63 Galston, Liberal Purposes at 284 (cited in note 60).
65 Galston, Liberal Purposes at 284 (cited in note 60).
66 Id, quoting Zinsmeister, Raising Hiroko at 53 (cited in note 13).
Galston explicitly recognizes that his general preference for an intact two-parent family does not mean that this always serves as the preferable alternative or that all single-parent families are “dysfunctional.”\textsuperscript{67} I presume he would also recognize that quite often, two-parent families are chaotic. Nonetheless, Galston labels as abuses parental behavior, such as the failure to marry or the rush to divorce, that he posits have a negative effect on children.

To combat these abuses, Galston advocates changes in law and policy and more public regulation of the family, including a braking mechanism on divorce and serious efforts to collect child support.\textsuperscript{68} As mundane as these suggestions seem in light of current policies, the logic of his argument lays the groundwork for more coercive rules, such as the denial of public housing to unmarried couples and their children, or the removal of children from single parent homes under loosened standards of neglect.

In Galston's rendition of this reality, family form is not only a predictor of economic well-being, but unmarried motherhood is a proxy for poor organizational skills that place children at risk. But this description of the American family is questionable at best. Many commentators have challenged, clarified, or elaborated on the empirical findings of economic and non-economic consequences of family form on children.\textsuperscript{69}

For instance, \textit{The Journal of Economic Literature} in December 2002, evaluated, among other issues, income, poverty, and well-being in relation to the family, as well as marriage and fertility changes in light of recent welfare reform.\textsuperscript{70} Rebecca Blank noted that measures of well-being, other than income, are potentially helpful and relatively unexplored. Blank suggests that one might consider the effects of the “quality of housing, food intake and nutrition, crime victimization, mental health, health insurance access, or access to good public education” upon two-parent and single-parent families.\textsuperscript{71}

Blank suggests that a focus on economic consequences of single-parent households might overlook the way in which wel-

\textsuperscript{67} Galston, \textit{Liberal Purposes} at 284 (cited in note 60) (stating that “a general preference for the intact two-parent family does not mean that this is the best option in every case”).
\textsuperscript{68} Id at 286.
\textsuperscript{70} Id.
\textsuperscript{71} Id at 1143.
fare reforms may change child well-being by affecting parental oversight and other economic indicators. Further, Blank notes that because “a major impetus of welfare reform within the United States has been ongoing concerns about rises in out-of-wedlock births and declining marriage rates, especially among low income women and men,” it may be unproductive to explore economic consequences of single motherhood if state policy has been designed specifically to negatively impact these types of families.

In another large study of nearly 1,400 families and over 2,500 children conducted over three decades, Professor Mavis Hetherington concluded that the “negative long-term effects [of divorce on children] have been exaggerated to the point where we now have created a self-fulfilling prophecy.” Hetherington questions the mantra that divorce always harms children, pointing out that studies have failed to examine long-term effects of divorce, focusing instead on only the consequences of the initial one or two years after a divorce. She asserts that looking at a longer timeframe, the majority of children from divorced homes “looked a lot like their contemporaries from non-divorced homes.” An earlier study conducted by Cornell University indicated that single motherhood does not necessarily compromise preparedness for school, suggesting that what mattered most were the mothers’ coping abilities and educational levels.

Those questioning the underlying claims for the superiority of the two-parent family have a valid basis for that skepticism. Conflicting evidence about the success of single-parent families, as well as inconvenient evidence about the shortcomings of traditional families, seems to get lost in too smooth a transition from observations about the need for action to help children to laying blame on parents living in non-traditional family forms.

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72 Id.
73 Blank writes, “indeed, the major stated goals of the 1996 legislation included reducing out-of-wedlock births and increasing marriage.” Blank, J Economic Lit, Vol XL at 1153.
75 E. Mavis Hetherington and John Kelly, For Better or For Worse: Divorce Reconsidered 7 (Norton 2002).
76 Id at 5.
77 Id.
78 Ricciuti, 13 J Fam Psych at 458 (cited in note 62) (finding that the “minimal and inconsistent relationships between single parenthood and the child outcomes contrast sharply with the substantially higher correlations obtained for mother’s education and general ability level”).
Yet when we turn to policy, what we see is the idea of the marital couple and the concept of the marital family used in a very public and manipulative manner by conservative politicians. In a non-ideologically driven world, a rational approach would be to consider non-judgmental reform. If the family is changing and its emerging forms are generating pressure on a system of rules and regulations developed with the traditional marital model in mind, we should alter those rules to adapt to and reflect the evolving forms of intimate connection. Far from experiments in adaptation or exercises in reflection, too many of our politicians and policymakers have responded to the challenges new family forms present with punitive and punishing policies, making cynical and doomed to be ineffective appeals for the resurrection of the traditional family. Private marriage has become our primary public family policy.

II. MARRIAGE AND THE STATE

In the first place, those who foster a crisis mentality about changes in the family should be reminded that the term “family” is susceptible to a variety of definitions—not just the one historically preferred by some religious or legal traditions. The very use of the term “breakdown” to epitomize changes in family structure indicates an ideologically driven analysis. One could choose a less loaded word, such as “transformation” or “evolution,” to talk about changes in family forms. From a political perspective, using the term “breakdown” to describe changes in patterns of intimate behavior is manipulative—it generates in the minds of the listeners a sense of societal crisis. Through this manipulation, demographic information is transformed into a societal problem, a problem inherent in the language and the image it portrays.

A. The Harm in Focusing on Marriage

A focus on marriage when analyzing social ills narrows our attention and fosters the belief that marriage is unique—that it is essential to the success and future of the family. Furthermore, it does so without discussion of some of the problems inherent in

that position. For example, resort to marriage as a universal cure for social ills fails to confront the fact that marriage is and always has been an exclusionary institution. Enslaved African Americans were not allowed to marry,\textsuperscript{82} thus the legal institution of marriage violated the norm of equality until the Civil War. Until well into the second half of the twentieth century, many states prohibited Caucasian Americans from marrying members of a different race.\textsuperscript{83} Today, in spite of some court and legislative victories conferring on same-sex couples some of the same rights that heterosexual couples enjoy, gay men and lesbians are still legally precluded from marrying partners of the same sex under federal law\textsuperscript{84} and in all states, except Massachusetts.\textsuperscript{85}

Related, but even more significant than the exclusion point, is the fact that attention to marriage is also restricting effective responses to the contemporary needs of families. Beating the marriage drums focuses our attention on the actions of individuals and individual lack of moral direction as the source of the problems that we, and our children, face. In fact, an emphasis on the decline of the two-parent family has operated to eclipse concern about evolving social and economic forces that are truly destructive to families and to children within families, regardless of the familial form. There is little hospitable space left for claims that society is complicit in the problems associated with the decline of marriage, such as child poverty, crime, school drop-out rates, or teenage pregnancies. Nor is there even a response to the moral claim that the collective bears some responsibility for remedies to the current impoverished situation in which so many families find themselves. Politicians conveniently forget that changes in non-family societal institutions, particularly the changes wrought by unfettered market and global capitalism,

\textsuperscript{82} See, for example, \textit{Frank v Denham's Administrator}, 15 Ky 330 (1824) (noting that while "in a state of slavery, we admit that persons of color are incapable of contracting marriage, for any legal purpose").

\textsuperscript{83} See Randall Kennedy, \textit{Interracial Intimacies: Sex, Marriage, Identity, and Adoption} 18 (Pantheon 2003) (noting that between "the 1660s and the 1960s, forty-one colonies or states enacted racial laws regulating sex or marriage," and blacks "were targeted in every instance in which authorities imposed racial bans").

\textsuperscript{84} See Human Rights Campaign Foundation, \textit{The Family} (cited in note 22).

\textsuperscript{85} \textit{Goodridge v Department of Public Health}, 798 NE2d 941 (Mass 2003). As this Article was going to press, many municipalities were issuing marriage licenses to same-sex couples, thereby challenging the constitutionality of marital restrictions. Such municipalities included, as of March 2004: San Francisco, California; New Paltz, New York; and Portland, Oregon.
can affect the family, as well as the general health and well-being of our society.\textsuperscript{86}

Families may be conceptualized as separate from the state and the market, but they cannot be viewed as either independent or unaffected by them. This should be a significant insight, but it seems mostly ignored; perhaps it is too threatening to our existing patterns of privilege, which are legitimated by myths of equality of access and opportunity for all individuals, further spun out in the pretense that successful families are self-sufficient and can provide for their members needs without governmental assistance or marketplace accommodation.

What would be the implications for our system if we were to recognize that the policies and practices of both the state and the market shape and limit the possibilities of parents? What if we conceded that it is far more than the marital status of parents that determines the material circumstances and well-being of families? What would we have to do if we came to terms with the fact that the moral state of the family and individuals within it both reflect and are profoundly affected by what some would label as the immoral or amoral state of the nation and its other institutions?

B. Focusing on Societal Harm to Children

I want to make the argument that even if divorce and single parenthood produce harmful results for children in the United States today (a point I concede here only for purposes of argument), our efforts to help children should not stop at simply laying blame at the feet of parents. The state must also bear some responsibility for the well-being of children. Single parenthood occurs in a particular and unique social and economic context in the United States—one not found in other industrialized democracies.\textsuperscript{87}

What would we discover if we took a different approach to assessing what expectations should be placed on parents, given the role assigned to them and the role of the family in American society? In particular, what issues would be revealed if we looked

\textsuperscript{86} See Fineman, \textit{Cracking the Foundational Myths}, 8 Am U J Gender Soc Pol & L at 21 (cited in note 16) (noting that capitalism and patriarchy “function at an unconscious \ldots level, and channel our beliefs and feelings about what is considered natural and what are appropriate institutional arrangements”).

at the effects that other social institutions have on the ability of the family in America to perform its assigned task of raising healthy and happy children? What if our primary concern was the pressures placed on the family (however constituted) by significant trends or changes in non-family institutions?

At a minimum, taking this focus would change the political discourse surrounding the concept of families. Perhaps we would begin to think more about the necessity of imposing some “public responsibility” for the well-being of children. This would complement the personal responsibility already so effectively wrapped around parents by existing law and policy. We might begin to define how our society should hold non-family institutions accountable for the family breakdown and crisis. This would appropriately pierce the illusory public/private veil that places the family on one side of society, separated from the state and the market.

My point is that the pressures generated by uncontrolled market institutions are at least as relevant to the health and well-being of children and families as are uncontrolled mothers and fathers. The irresponsibility of the state in not regulating or mediating the excesses of market activities is at least as devastating to a child as the irresponsibility of any unwed or divorced parent. We must count the costs to the family and its children of increased income disparity, wage stagnation for middle- and lower-income wage earners, and persistent impoverishment for too many of our nation’s families.

Too many American families live lives of increasing economic insecurity. If we assess the well-being of the family in the light of poverty statistics and relative wealth inequality, it seems clear that many families are handicapped. Far too many parents and children find themselves impoverished or severely economically compromised, and this is true even if they are operating within the context of a marital family.

For example, Suzanne Helburn and Barbara Bergman in America’s Childcare Problem: The Way Out,88 demonstrate that two parents working full-time at minimum wage are unable to pay the cost of licensed childcare, after they have paid for necessary household expenditures calculated at the poverty level.89 As

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88 Suzanne W. Helburn and Barbara R. Bergmann, America’s Childcare Problem: The Way Out 27 (Palgrave 2002).
89 See id. Table 2.1 illustrates that the average poverty-level family has insufficient discretionary funds to pay for licensed childcare.
expected, low-wage single mothers have an even more difficult time maintaining a household and providing for childcare.90

William O'Hare and Joseph Schwartz conclude that the minimum wage no longer keeps a three-person family above the poverty line.91 Not only do working-poor families face monumental problems concerning childcare and its costs, but they also face the challenge of finding affordable health insurance. In 1996, for example, 26 percent of children in working-poor families lacked health insurance.92

For many households, divorce or the death of a primary wage earner can prompt an economic freefall into poverty. Moreover, even families that "conform" (those that are both intact and economically self-sufficient) often suffer a crisis either in caretaking or in meeting the demands of work. Most likely, many families suffer from a combination of both manifestations of the work/family crisis.93 If a two-parent household must send both parents into the workforce in order to earn the income necessary to sustain a household, it comes at the cost of time spent with children.

Is it not plausible that economic policy—coupled with a lack of vigorous positive social welfare policies—is responsible for at least some of the problems seen in today's families?94 The statistics illuminate the government's failings regarding the elimination of poverty, equalization of opportunity, and distribution of resources for families and children. The United States has a 20.3 percent child poverty rate—almost double the rate found in Western Europe.95 In one study, the authors attribute this phe-

90 Id.
91 William O'Hare and Joseph Schwartz, One Step Forward, Two Steps Back, 19 Am Demographics 53, 53–54 (1997) ("By 1995, someone working full-time all year at minimum wage brought in an income 30 percent below the three-person poverty line.").
92 Id at 54.
94 Lee Rainwater and Timothy M. Smeeding, Doing Poorly: The Real Income of American Children in a Comparative Perspective 20 Luxembourg Income Study (1995) ("While social policy in Europe, Scandinavia, and even Canada, has worked hard to keep child poverty low, or to reduce it further, the United States is sounding a social policy retreat.") (internal citations omitted).
PONENOMENON TO AMERICA’S RELATIVE LACK OF GOVERNMENT TAX AND MONEY TRANSFER BENEFITS TO FAMILIES BELOW THE POVERTY LINE, AS COMPARED WITH THOSE IN EUROPEAN COUNTRIES. For example, in Europe single parents enjoy a guaranteed minimum level of child support when the absent parent cannot or will not pay child support. The study further notes that meager attempts to relieve child poverty in the United States have failed. For example, the recent five hundred dollars per-child tax credit does nothing to aid families who have no federal income liability because of their low annual incomes. The authors suggest that these two solutions—guaranteed child support and child allowances for every family—would produce better results in fighting child poverty in the United States.

Far from instituting such policies, however, during the last several decades of the twentieth century, we saw the government withdraw from progressive economic reform. During the same time, we can track a general decline in wages for many Americans and a contraction of responsibility for the provision of basic social goods, such as insurance, by employers. We have also seen a withdrawal of the federal government’s safety net, most notably in the elimination of entitlement to welfare benefits. These changes and others have increased economic inequality—inequalities arguably more significant in understanding the decline of the well-being of families than either the rising divorce rate or the increase in never married motherhood.

Even during the 1990s, an era of strong economic growth, poverty persisted. In an article in The New York Times, Nina Bernstein detailed how the poverty rate in New York City re-

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97 Rainwater and Smeeding, Doing Poorly at 21 (cited in note 94).
98 Id.
99 See id at 20–21 (noting that “for about the same cost as the added $500 per child credit” Congress could “substitute a refundable $750 per child tax credit for all children, regardless of their parents’ income level”).
100 Id at 22.
103 Id.
104 Id at 255-56.
105 Consider Iceland, 40 Demographics 499 (cited in note 101).
mained fairly constant, despite the strongest economy in years.\textsuperscript{106} At the close of the twentieth century, nearly one in four New York City residents had an income below the poverty threshold.\textsuperscript{107}

Of course, when considering family poverty, the effects on children raise particular concerns. In recent years, approximately one in five American children (twelve to fourteen million children) lived in families with incomes below the poverty line.\textsuperscript{108} Family income, aside from those eligible to receive welfare assistance, derives from family labor, unsupplemented by the state. The United States is the only Western industrialized nation that does not have some form of universal cash benefit for families raising children.\textsuperscript{109} This helps to explain why child poverty rates are higher in the United States than in sixteen other industrialized countries.\textsuperscript{110}

In fact, the failure of government and the excesses of market institutions have themselves provoked a sort of restructuring of the family—a restructuring that presents a real threat to the well-being of many families. Look at what happens to families (regardless of form) whose economic well-being is threatened: families are now entering poverty at larger rates than at any time in recent history.\textsuperscript{111} In 1977, 7.7 percent of families lived below the poverty line.\textsuperscript{112} By 2001, that statistic had climbed to 11.7 percent.\textsuperscript{113} Poverty has both short-term and long-term consequences for children. Evidence supports the conclusion that family income can substantially influence child and adolescent well-being, specifically physical health, cognitive ability, school

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\textsuperscript{106} Nina Bernstein, \textit{Family Needs Far Exceed the Official Poverty Line; Study Lays Out Costs for Getting By in City }\textit{NY Times B1} (Sept 13, 2000) (noting that, despite higher costs of living in New York, the poverty line is constant nationwide).


\textsuperscript{109} Id.

\textsuperscript{110} See Vleminckx and Smeeding, \textit{Child Well-Being} at 10–16 (cited in note 95).


\textsuperscript{112} Id.

\textsuperscript{113} Id.
achievement, emotional and behavioral outcomes, and teenage out-of-wedlock childbearing.\textsuperscript{114}

David R. Morgan and Kenneth Kickham asked if “state policies matter” with regard to children in poverty.\textsuperscript{115} They found the answer to be a resounding yes.\textsuperscript{116} Though they concluded that unemployment rates for females, the percentage of births to unmarried mothers, and the percentage of single-parent families negatively impact child poverty, “the state or federal minimum wage, Aid to Families with Dependent Children/food stamp payments” and “the Earned Income Tax Credit” support the effort.\textsuperscript{117} Though at times controversial, the authors conclude that action or inaction by the states and federal government has a definite impact on child poverty in the United States.\textsuperscript{118}

Even in families well above the poverty line, falling economic fortunes create a scramble to stay ahead. Certainly wage and job instability produce stress, encourage longer hours, and necessitate the participation of more family members in the workplace. In this regard, although families enter poverty at increasing rates, more married women with young children are entering the labor force. In 1975, 55 percent of married women with young children were in the labor force. In 1996, 77 percent of married women with young children were in the labor force.\textsuperscript{119}

A study by Ellen Galinsky of the Families and Work Institute indicates that children’s interaction with their parents is affected by parental job-related stress.\textsuperscript{120} Additionally, economic necessity means that both parents are working longer hours. Over the last two decades, American fathers’ time at work increased by 3.1 hours per week, while mothers added 5.2 hours to their work weeks. Employed fathers with children younger than eighteen years old now work an average of 50.9 hours per week and working mothers average 41.4 hours per week.\textsuperscript{121}

\textsuperscript{114}See Blank, 40 J Economic Lit at 1117-18 (cited in note 69).


\textsuperscript{116}Id.

\textsuperscript{117}Id at 478.

\textsuperscript{118}Id at 491 (“No doubt the states . . . are critical partners in the overall effort to move poor families toward economic self-sufficiency.”).


\textsuperscript{121}Id.
Americans surpass every other industrialized nation in time spent on the job—working the equivalent of two weeks more per year than the Japanese. In addition to having a negative effect on parent-child interaction, this increase in hours and the stress it generates affects the marriage relationship and leaves little time or energy for indulgence in voluntary civic activities. For example, a series of articles by Sara Rimer in the *New York Times* investigated the effects of the “downsizing of America” on community life. Rimer found people too exhausted and too busy to participate in their communities—all of this to the detriment of children and families. Perhaps the real danger to civic society is the runaway nature of contemporary American capitalism and the inequities it has generated. Stagnant wages and income inequality are major factors contributing to a diminished American dream. The experience of inequality must certainly contribute to suspicion and mistrust on the part of those who see others getting further and further ahead. Inability to provide one’s children with minimal goods and services can lead to frustration and despair.

**CONCLUSION**

The real danger of a narrow focus on marriage and the labeling of some family forms as harmful or deviant when analyzing the harms that children suffer is that such a misguided focus deflects attention away from the more serious problems that the current political and economic milieu presents for the family. Many different types of families can succeed in their assigned societal tasks. However, it seems clear that a certain level of material resources is necessary to facilitate families in accomplishing those tasks successfully. In recent years, these resources have become less available to many families. This is not the fault of those families, but the result of changes in attitude and in the scope of governmental safeguards and market practices.

How should society respond to this situation, which constitutes the real crisis for the family? Focusing on family form will not lead to coherent and effective policy. We might begin to ponder the basis of effective reform by asking the following ques-

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122 Id.
124 Id (“But across Dayton, scores of . . . people are too exhausted, or frustrated, or just too plain busy to keep in touch.”).
tions: First, given the uncertain status of marriage in this society—where the divorce rate remains approximately 50 percent and women are expected to be wage earners, as well as wives and mothers—how can politicians press for a traditional model of the family as the solution for poverty? Second, shouldn't the richest country in the history of the world have a family policy that goes beyond marriage as the solution for dependency? Specifically, doesn't the family, as it exists today, require substantial assistance from other societal institutions? Third, what should be the role of religion and morality in shaping this debate? Specifically, shouldn't religious communities and moral leaders focus our attention on the justice and morality of our current global market economy, which is driven, as it seems to be, by greed, selfishness, materialism, and individualism? These are the questions to which I would urge those concerned with the welfare of children to turn their attention. The problem with society is not that marriage is in trouble. The real crisis is that we expect marriage to be able to compensate for the inequalities created by and within our other institutions.