

A Call to the Nation  
from Family and Legal Scholars

# **Marriage and the Law**

## A Statement of Principles



**Institute for American Values**  
**Institute for Marriage and Public Policy**

This “Call to the Nation” stems in part from several consultations on marriage and the law held at the Harvard Law School in 2004 and 2005. For their leadership and hard work, the sponsors are grateful to Mary Ann Glendon of the Harvard Law School and the other members of the Council on Family Law, and to the many family and legal scholars across the country who contributed to the Statement.

The sponsors are also grateful to the Achelis and Bodman Foundations, the William H. Donner Foundation, the JM Foundation, the Maclellan Foundation, Arthur and Joann Rasmussen, and the William E. Simon Foundation for their generous financial support. The research, editorial, and administrative contributions of Joshua Baker and Dr. Bonnie Robbins are also deeply appreciated.

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*ISBN: 1-931764-11-5*

*ISBN-13: 978-1-931764-11-7*

*For more information or additional copies, contact:*

**Institute for American Values**

*1841 Broadway, Suite 211*

*New York, NY 10023*

*Tel: (212) 246-3942*

*Fax: (212) 541-6665*

*Email: [info@americanvalues.org](mailto:info@americanvalues.org)*

*Web: [www.americanvalues.org](http://www.americanvalues.org)*

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# Marriage and the Law

## A Statement of Principles

### Executive Summary

**H**OW SHOULD family law treat marriage? In this report, a group of family scholars and legal scholars come together to acknowledge some key propositions about marriage and family law in the United States.

Marriage is a key social institution, with profound material, emotional, and social consequences for children, adults, and society. As marriage weakens, fewer men are committed to family life, more women are saddled with the unfair burdens of parenting alone, and children's ties to both their parents (especially fathers) are weakened. Communities face increasing social and economic problems.

The most important benefits of marriage are not the sole creation of law. Social science evidence strongly suggests the prime way that marriage as a legal institution protects children is by increasing the likelihood that children will be raised by their mother and father in lasting, loving (or at least reasonably harmonious) family unions. Marriage in any important sense is not a creation of the State, not a mere creature of statute.

For marriage to create these benefits, it must be more than a legal construct. Creating a marriage culture that actually does protect children requires the combined resources of civil society—families, faith communities, schools, and neighborhoods—public policy, and the law in order to channel men and women towards loving, lasting marital unions. In recent years more Americans, and more family scholars, are taking marriage seriously.

Unfortunately, the recent trend in family law as a discipline and practice has been just the opposite. Family law as a discipline has increasingly tended to commit two serious errors with regard to marriage: (a) to reduce marriage to a creature of statute, a set of legal benefits created by the law, and (b) to imagine marriage as just one of many equally valid lifestyles. This model of marriage is based on demonstrably false and therefore destructive premises. Adopting it in family law as a practice or as an academic discipline will likely make it harder for civil society in the United States to strengthen marriage as a social institution.

As scholars and as citizens, we recognize a shared moral commitment to the basic human dignity of all our fellow citizens, black or white, straight or gay, married or



unmarried, religious and non-religious, as well as a moral duty to care about the well-being of children in all family forms. But sympathy and fairness cannot blind us to the importance of the basic sexual facts that give rise to marriage in virtually every known society: The vast majority of human children are created through acts of passion between men and women. Connecting children to their mother and father requires a social and legal institution called “marriage” with sufficient power, weight, and social support to influence the erotic behavior of young men and women.

We do not all agree on individual issues, from the best way to reform unilateral divorce to whether and how the law should be altered to benefit same-sex couples. We do agree that the conceptual models of marriage used by many advocates are inadequate and thus contribute to the erosion of a marriage culture in the United States. We seek to work together across the divisive issue of gay marriage to affirm the basic importance of marriage to our children and to our society. We call on all the makers of family law—legislators, judges, the family law bar, and legal scholars who create the climate in which other players operate—to develop a deeper understanding of and commitment to marriage as a social institution.

A prime goal of marriage and family law should be to identify new ways to support marriage as a social institution, so that each year more children are protected by the loving marital unions of their mother and father.

## I. Why We Come Together

[Marriage] is something more than a mere contract.... It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

—Justice Stephen Johnson Field, *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888)

What if statements like these, which to modern ears sometimes sound like mere platitudes, turn out to be true? What if marriage really is an essential core institution of American society, a close kin in importance to private property, free speech and free enterprise, public education, equal protection of the law, and a democratic form of government?

How then should law and society treat marriage?

We are legal scholars, family scholars, lawyers, and reformers who come together to affirm a large and serious vision of the significance of marriage in American society and in American law.

Many of us have devoted substantial parts of our professional and public lives to addressing the consequences of family fragmentation and fatherlessness for children, for adults, and for the larger community. We are deeply committed to the moral principle of equal regard between men and women, and of marriage reforms that are consistent with the equal dignity of both genders. We are especially concerned with protecting adults and children threatened by family violence, and with reducing destructive conflict between parents. We gladly acknowledge the importance of additional social and legal institutions for protecting children, such as adoption, and the obligations of a good society to care about children in all family forms, traditional or non-traditional. We come together to affirm seven great truths about marriage and the law:

**1. Marriage and family law is fundamentally oriented towards creating and protecting the next generation.** Marriage serves many social purposes, including meeting adult needs for love and intimacy. The classic goods and goals of marriage include love, fidelity, sexual satisfaction, and mutual support, as well as the creation and care of children.<sup>1</sup> Marriage is an important institution for adults, satisfying the yearning for companionship and creating a social ecology that helps men and women bridge the sex divide. Equality, intimacy, and benefits for adults are all important. But these adult needs cannot displace marriage's central role in creating children who are connected to and loved by the mother and father who made them.

2. **The primary way that marriage protects children is by increasing the likelihood that a child will know and be known by, love and be loved by, his or her mother and father in a single family union.** The primary benefits of marriage for children, therefore, are not a set of legal incidents that the law can confer upon other family structures by court order or legislative decree. The law of marriage protects children to the extent that it succeeds in getting men and women to have and raise their children together. Because women are connected to their children naturally, through the process of gestation and birth, marriage is especially important for effectively connecting children to fathers, not only satisfying more children’s longing for a loving father, but creating more equal distribution of parenting burdens between men and women.
3. **Marriage is first and foremost a social institution, created and sustained by civil society.** Law sometimes *creates* institutions (the corporation is a prime modern example). But sometimes the law *recognizes* an institution that it does not and cannot meaningfully create. No laws, and no set of lawyers, legislators, or judges, can summon a social institution like marriage into being merely by legal fiat. Marriage and family therefore can never be reduced to a legal construct, a mere creature of the state. Faith communities play a particularly powerful role in sustaining marriage as a social institution. The attempt to cut off “civil marriage” from “religious marriage”—to sever our understanding of the law of marriage from the traditions, norms, images, and aspirations of civil society that give marriage real power and meaning—is in itself destructive to marriage as a social institution.
4. **The law’s understanding of marriage is powerful.** Legal meanings have unusually powerful social impacts. People who care about the common good, therefore, need to take seriously the potential consequences of dramatic legal changes in marriage and family law.<sup>2</sup> “Neutrality” is rarely an option.<sup>3</sup> When government intervenes in important social debates, from no-fault divorce to same-sex marriage, the law privileges its own viewpoint and has the power to affect the culture of marriage as a whole, often in ways few intend or foresee.
5. **Marriage is an irreplaceable social good.** Marriage is more than a values issue. Irreplaceable goods—equality of opportunity, the prevention of poverty, the well-being of children, the equal dignity of men and women, and the transmission of American civilization into the future—are at stake in the marriage debate. The well-being of society and children depends on the health of our marriage culture.
6. **High rates of divorce, unmarried childbearing, as well as violent or high-conflict marriages, hurt children.** An abundance of social science evidence shows that all three of these forms of family breakdown hurt children. One key purpose of marriage is to prevent the damage that occurs to children when their mothers and fathers fail to build decent, average, good-enough, lasting, loving unions.

**7. A good society cares about the suffering of children.** Children are resilient and can become functioning, loving, successful adults in a number of family forms. But the resilience of children is no good excuse for moral callousness on the part of parents or society. A good society does not ignore conditions that create unnecessary suffering for children on the grounds that children can overcome difficulties. In a good society, adults seek to shield children from damaging threats, pain, and suffering, even when doing so requires assuming greater burdens and making significant sacrifices for the adults themselves.

Out of these seven truths comes our shared commitment:

**8. A major goal of marriage and family law should be supporting civil society's efforts to strengthen marriage, so that more children are raised by their own married mother and father in loving, lasting unions.**<sup>4</sup>

## **II. The Failing "Family Diversity" Model**

**M**ANY RESPECTED and influential voices in family law, as we lay out below, reject the idea that law and society should support and affirm marriage, arguing instead for a family diversity model in family law.

What is the family diversity model? It is a normative moral commitment to the idea that no family form is superior to any other family form. The family diversity model transforms family fragmentation from a social problem into a sign of progress. Its advocates say that neither law nor society should prefer any one kind of family structure over any others. In the family diversity model, marriage is not the preferred context for childraising, but one of many possible, equally approved family forms adults ought to choose freely, without social support or censure.

Professor Katherine Bartlett, for example, one of the "reporters" (or drafters) of the American Law Institute's *Principles of the Law of Family Dissolution*, distills the moral and social argument made by family diversity advocates in a recent essay entitled *Saving the Family from the Reformers*.<sup>5</sup> Her work in family law, she says, is driven by "the value I place on family diversity and on the freedom of individuals to choose from a variety of family forms..."<sup>6</sup>

But what happens to children when adults claim the right to choose for themselves from a variety of family forms? Two generations ago, Americans advocating the family diversity model as a moral ideal may not have known the consequences of increasing family fragmentation. But forty years of social experimentation has demonstrated conclusively: *the "family diversity" experiment has failed.*



This is not merely our personal view. An abundance of objective social science evidence now shows that marriage is not just one of many equally protective family forms. When marriages fail, or fail to take place, children, women, men, and society suffer.

**When men and women fail to get and stay married, children are placed at risk.**

Children raised outside of intact marriages have higher rates of poverty, mental illness, teen suicide, conduct disorders, infant mortality, physical illness, juvenile delinquency, and adult criminality. They are more likely to drop out of school, be held back a grade, and launch into early and promiscuous sexual activity, leading to higher rates of sexually transmitted diseases and early, unwed parenthood. After a broad and vigorous scientific debate we now know that, as the nonpartisan child-research organization Child Trends recently put it, “Research clearly demonstrates that family structure matters for children.” Of the family structures that have been well-studied:<sup>7</sup> “the family structure that helps children 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.”<sup>8</sup>

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**The retreat from marriage hurts women, as well as children.** As marriage weakens, the practical result is not greater egalitarianism, but widespread gender inequality, as women disproportionately shoulder the costs and burdens of raising children alone.<sup>9</sup> Divorce or legal separation can provide important protections for women, as well.<sup>10</sup> Adequate child support and other appropriate supports for single mothers are important. But neither a government check nor a child support check offers children or their mothers the same benefits as an intact, loving family.

**High rates of family fragmentation contribute to a broad array of social problems for communities and taxpayers,** including increasing rates of poverty, crime, juvenile delinquency, substance abuse, teen pregnancy, and other social problems.<sup>11</sup> We are concerned first about the suffering and risk to children whose parents part. But because marriage is an important generator of human and social capital, we are also concerned with the ways that adults as well as whole communities suffer when a marriage culture frays.

**The decline of marriage creates serious inequalities of opportunity,** affecting poor children and racial minorities disproportionately. Marriage is a wealth-building institution, a profound source of social and human capital.<sup>12</sup> Today many American children, through no fault of their own, are deprived of the significant social, educational, economic, spiritual, emotional, and psychological advantages of functioning, intact married families.

**A growing acceptance of fatherlessness as “normal” promotes a dehumanized vision of men and masculinity.** Children long for their fathers as well as their mothers. This longing emerges so early, and for many children with such intensity, that it is hard to dismiss as a mere “social construct.” Men also need and want a vision of masculinity that affirms the indispensable role of good family men in protecting, providing for, and nurturing children, as well as in caring for and about their children’s mother. A culture that no longer expects most men to become reliable fathers and husbands promotes a degraded vision of masculinity to men and about men, one deeply at odds with the human dignity of men and women and with the needs of children.

**The marriage gap promotes racial and class inequities in America.** In America today, the risks and burdens of fatherlessness and family fragmentation are not evenly distributed across the spectrum of class and race, but are disproportionately experienced by our least-advantaged children and communities. In a good society, the vast majority of children will receive the love and care of their own mother and father, regardless of race, income, or social class. Discrimination, unequal employment opportunities, gender mistrust, and any other cultural, social, or economic barriers to strengthening marriage in particular ethnic or socioeconomic communities are important social problems to be remedied, not diversities to be celebrated.

**When men and women fail to build decent marriages in which to rear their children together, children suffer.** Even when children are not “permanently damaged” in ways that social scientists are equipped to measure, most children find the separation of their mother and father from each other to be extremely painful, and many find it has lasting consequences for their own experience of family and personal identity.<sup>13</sup> (High conflict and violent marriages are also extremely damaging to children.) Thus a marriage-supportive culture must find ways to reduce not only divorce and unmarried childbearing, but also destructive conflict and family violence.

### **Respect for Pluralism as a Moral Value**

Let us be clear on what we mean (and do not mean) by this critique of family diversity. Respect for pluralism as a moral value is widely shared in America. It has multiple and overlapping meanings reflecting (a) the deep value Americans place on personal liberty; (b) our commitment to democratic dialogue that finds value in listening to others’ perspectives even where we disagree; (c) the right of minorities to equal protection of the laws; and (d) compassion for those whose disadvantaged circumstances require special accommodation in order to participate fully in American life.

This rich array of meanings is not the subject of our criticism here. We agree with family diversity advocates that all parents struggling to raise responsible children should be respected for their efforts. We agree with family diversity advocates that

single mothers and their children need special help from families, neighbors, and the wider community to help overcome the difficulties they face when men fail to become responsible fathers.

But when family diversity comes to mean that society must equally affirm all the choices adults make about family forms, regardless of how they affect children or others, then we must respectfully, but forcefully, disagree. Breaking up a family, for example, is not an immutable characteristic, like race or gender; it is a choice made by at least one adult. A call to reflection about when and under what circumstances that choice is appropriate is not a threat to equality but part and parcel of human dignity. Adults who make choices that affect their children (as well as themselves and others) have a right to more than “happy talk” that uncritically supports their choice, whatever they choose to do. They, like all of us, deserve to live in a society which engages in compassionate, morally serious, and intellectually credible discussion about when and how adults’ choice to divorce or have children outside of marriage can hurt children, men and women, and communities.

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*Compassion for adult feelings cannot trump the needs of children or the demands of truth.*

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Family diversity advocates sometimes imply that we may not speak about the better performance of some family forms than others for children because hearing that truth may make some of us uncomfortable with choices we have made. When family diversity moves from a principle of compassion for those in difficult circumstances, to positioning itself as a core moral ideal for family life, it fundamentally asks law and society to take the side of unencumbered adult individualism over the needs of our own children. Compassion for adult feelings cannot trump the needs of children or the demands of truth.

The good society reaches out to children in all family forms. A good society protects children from the consequences of parental irresponsibility and seeks positive means (including adoption) to provide for children whose biological parents fail them. But a good society equally never seeks deliberately to create conditions that deprive a child of his or her natural mother and father, or licenses adult irresponsibility towards the children men and women make.

We recognize that one or both adults can conduct their marriages so badly that children are better off if parents part. We recognize, too, that human beings are resilient, that children raised outside of intact marriages sometimes can and do surmount the difficulties and grow to become loving, functional, and successful adults. But the alleged resilience of children is no good excuse for moral callousness on the part of parents or society. Adults in a good society have and feel a powerful moral obligation to protect their own children from damaging suffering and risk, even when doing so requires assuming additional risks, deprivations, and burdens themselves.

When it comes to marriage, we are hopeful that truth and compassion can both prevail. We can respect all families struggling to raise decent children, even while acknowledging and striving towards an ideal in which each year more children are born to and raised by their own mother and father joined in a lasting, loving marital union, one that is premised in the first instance on innate human dignity, one that is safe from family violence and marked by equal regard between husbands and wives.

### **III. The Emerging Consensus on Marriage**

**I**N THE LAST DECADE we have witnessed many promising signs of a cultural renewal around marriage. Americans have responded to the growing awareness of the social problems created by rising rates of family fragmentation in a characteristically American way: by social learning, reform, and renewal.

These hopeful signs include: a broad consensus of scholars across ideological lines acknowledging the important role marriage plays in protecting the well-being of children;<sup>14</sup> modest declines in divorce over the last twenty years;<sup>15</sup> increasing disapproval of divorce among young people (many of whom are intimately familiar with its effects on children);<sup>16</sup> an increase in the number of African American children living with married parents;<sup>17</sup> an increase in the number of children living with both biological parents;<sup>18</sup> and an increased commitment among married couples to permanence (and greater happiness) than found among married people 20 years ago.<sup>19</sup>

We recognize that many factors besides attitudes and values affect family formation behavior. We know these hopeful signs for marriage renewal are only preliminary and may prove fleeting. We know that other indicators suggest that the marriage crisis is far from over.<sup>20</sup> But as Americans have increasingly recognized the importance of lasting marriages, more Americans are also making renewed efforts to strengthen marriage.

To succeed in this great task, all the custodians of our marriage traditions—families, faith communities, marriage experts, educators, therapists, and other parts of civil society—must work together to transmit a deeper, richer, and more effective marriage culture to the next generation. Among these important custodians of our marriage tradition we include the makers of family law: judges, legislators, the family law bar, and the academy.

### **IV. The Failure of Family Law**

**I**N THE MIDST of these hopeful signs of social renewal, we call attention to an increasingly disturbing trend: As scholars in other disciplines come to shed increasing light on the importance of marriage as a key social institution, family law as a discipline is moving in the opposite direction, embracing family diversity as

the moral ideal which should undergird family law. Even as American society in general begins to refocus on how marriage can better serve the needs of children, much of family law as a discipline and practice remains preoccupied with the sexual choices and rights of adults.

This embrace of family diversity as our core social and legal ideal make it increasingly likely that family law, as a practice, will make it harder for Americans to do the critical task of protecting children by strengthening marriage.

We seek in this statement to investigate the reasons for this failure of family law, to analyze why so few of the legal custodians of marriage have integrated new scholarly evidence on the importance of marriage into their work, and to forge a new consensus about the basic conceptual principles that underlie marriage and family law.

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We do so recognizing that basic principles are but one tool used in evaluating specific family laws and possible family law reforms. We do not mean to foreclose important debates on how family law can best address unilateral divorce, encourage marriage, support ties between parents and children, reduce domestic abuse, or address the new issue of same-sex unions. We do not all necessarily agree on the specifics of various proposed legal reforms. But we do agree that the conceptual framework being promoted by the official custodians of family law—in the academy, the bar, and in many recent judicial decisions—is an impoverished one that needs to be changed if the law is going to support families and children, rather than undermine society’s ongoing efforts to help children and strengthen marriage.

We gather together in particular to call attention to two large and important ideas:

**1. Marriage is fundamentally a social institution, shaped by civil society.**

Marriage cannot be created by government. Marriage is not merely a legal construct, and the authors of family law go wrong when they speak, act, and legislate as if marriage were a creature of the state, no more than the sum of its legal incidents. Marriage is in the first instance a moral bond between two individuals. As a social institution, it is profoundly a product of civil society, rooted in and responding to persistent facets of human biology, in which government and law play a crucial, but only a supporting role.

*Our social safety net is primarily social.* Marriage’s existence in anything but a nominal sense depends on the combined efforts of families, friends, and faith communities, and on the efforts of the “custodians” of the marriage tradition, old and new: clergy, therapists, counselors, and family scholars. One cannot create a social institution like marriage simply by passing laws or ordering it into being.



Yet the mere fact that the law alone cannot create marriage does not make family law irrelevant or negligible. Good family law does play a role in helping civil society to sustain marriage. Bad law can surely undermine these efforts. Getting the law wrong has real consequences for marriage (as in other areas of civil society or the economy that are touched by law). In order to do their job properly, makers of family law must become more knowledgeable about and respectful toward the underlying social institution that they are attempting to regulate. The law must view itself as a collaborative player rather than a dominant hegemon in marriage and family life.

- 2. In family law, the interests of children should come first.** Why? Partly because children are vulnerable dependents whose protection by government and third-parties should trump adult agendas of right or left.

But children's interests come first in family law for another key reason as well. Family, as a social institution, is in a basic sense profoundly "about" (though not limited to) children. Families are the means through which we make the next generation, transmitting our society to the future. Marriage transforms biologically unrelated adults into kin, jointly committed to caring for any children they have (or adopt). If the law is to fulfill its crucial role in helping sustain this social institution, the custodians of marriage and family law (judges, scholars, lawyers, and legislators) cannot lose sight of the one crucial and irreplaceable *social* function of marriage and family: encouraging men and women to come together to give themselves to the next generation.

## **V. What's Missing? Dependency, Generativity, and Responsibility**

**I**N RECENT YEARS, the story of the law has changed in ways profoundly destructive to the interests of children, of women who care for them, and of men who wish to be dependable family men. (For examples, see "Evidence of Troubling Trends in Family Law," Section VI, *infra*.) Although there are dissenters (and arguably an increasing number),<sup>21</sup> the story of marriage currently embedded in our family law is largely of two rights-bearing individuals seeking personal satisfaction and making private choices.

What's missing from this current legal story of marriage? Three large human realities: dependency, generativity, and responsibility.

### **Dependency**

The problem of dependency (for both the old and young) is particularly acute today. Changes in demography and social roles mean that there are large increases in

dependency needs at precisely the same time that supportive institutions (such as marriage) are weakening. An aging population (an increase in the proportion of older people to younger people in society), in particular, threatens to challenge the capacity of other institutions—the neighborhood, faith communities, and the state—to support dependency.

Re-imagining family law as the story of rights-bearing individuals making choices removes from family law the very core of family life, with the obligations to connection and caring that arise from relatedness, not merely personal choice. Not all familial obligations are also legal ones. But legal discourse that directly or indirectly seeks to imagine the family as a series of close personal relationships collapses the distinction between elective affinities and family obligations, between friends and family, between those we help because we want to, and those we want to help because they belong to us.<sup>22</sup>

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*One cannot create a social institution like marriage simply by passing laws or ordering it into being.*

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### **Generativity**

When men and women enter sexual unions, one potential result is children. Crafting marriage and family as the story of adult rights to diverse choices radically subordinates the well-being of children to the needs, desires, and tastes of rights-bearing adults.<sup>23</sup>

Marriage emerged in virtually every known society to wrestle with the problematic of fatherhood, the biologically based sexual asymmetry in which men and women jointly have sex, but women alone bear children. The process of gestation and birth ensures that at a minimum, the mother is around when the baby is born. But no identical biological imperative connects the father to his child, or to the mother of his children. Marriage emerges out of the child's need for a father and the mother's need for a mate. It emerges, too, out of a deep-seated longing among men to uncover a masculine role in the drama of creating and nurturing human life, to become the kind of husband that women want and the kind of father that children look up to. Marriage thus helps create a greater equality between parents than nature alone can sustain.

### **Responsibility**

As family law moves towards embracing a family diversity ethic as its core goal, it begins to tell a story about marriage and family life that is radically divorced not only from lived experience, but also from the aspirations of young people. With the advent of unilateral divorce, for example, the story the law tells about marriage is this: Marriage is the temporary union of two independent adults who stay together for their own private purposes, so long as it happens to suit the interests of both adults. The aspiration to marriage, on the other hand, includes a desire to become the kind of human being who can be counted on by one's spouse and by one's

children. A family law based on a “thin” ethic of justice, in which unisex rights-bearing individuals make choices about lifestyles, cannot serve the fullness of adult capacities or desires, much less the needs of children whose consent is not asked or required. Of course, such a trend in legal thinking is not universal. As the conventional wisdom in family law increasingly embraces family diversity and adult sexual liberty as core goals, many family law scholars across the ideological spectrum are demonstrating increasing unease with the consequences for children and society, and a renewed search for a better model for marriage and family law.<sup>24</sup>

## **VI. Evidence of Troubling Trends in Family Law**

### **Exhibit A: The 70s Divorce Revolution**

In the 1970s and early 1980s, nearly every state in the union moved towards some form of unilateral no-fault divorce, and they did so with very little public debate, or attention to the consequences for children. At the 1970 meeting of the National Conference of Commissioners on Uniform State Laws, in an extended discussion of divorce law, the commissioners quickly batted aside the idea that children’s interests might differ from adults’ desires:

At this point, the Chairman consulted an expert Reporter...who added summarily: “[W]hile the studies are fairly recent and there aren’t a great many of them, what studies there are which have followed up children of divorce suggest that children of divorced parents make out better on every relevant criterion...than do the children of undivorced parents who label their parents’ marriages as unhappy.”<sup>25</sup>

With the passage of time, more experience, and better social science evidence, these sanguine views of divorce as generally beneficial to children (whenever one partner wants out) have been replaced by more realistic views, supported by more extensive scientific evidence, that acknowledge that when it comes to divorce the desires of adults and the interests of children often diverge.<sup>26</sup> What an adult chooses is not necessarily best for children, especially in the absence of strong social norms guiding parents’ understanding of the consequences, advising when it is “okay” to choose to divorce.<sup>27</sup>

As William A. Galston has pointed out:

The benefits of no-fault divorce were immediate, especially for men seeking an easier exit from long-established marriages. An understanding of the costs emerged more slowly, through painful experience and the gradual accretion of research.<sup>28</sup>

Yet many current debates in marriage and family law disturbingly recapitulate this easy equation of the interests and desires of adults and the needs of children. The assumption that all family forms adults may choose are equally protective of children has proven dangerously false. The same mistake ought not be repeated in contemporary family law debates.

### **Exhibit B: ALI and Family Law Scholarship**

The assumption that marriage is just one of many equally affirmed family forms now permeates much family law scholarship.<sup>29</sup>

In the summer of 2000, writing in *Family Law Quarterly*, distinguished family law scholar Harry D. Krause put it this way: “A pragmatic, rational approach would ask what social functions of a particular association justify extending what social benefits and privileges. Marriage, *qua* marriage, would not be the one event that brings into play a whole panoply of legal consequences.”<sup>30</sup> Speaking about tax laws that treat married and cohabiting couples differently, he concludes: “The rational answer seems clear: Married and unmarried couples who are in the same *factual* positions should be treated alike.”<sup>31</sup>

Similarly, in the *Principles of the Law of Family Dissolution*, the American Law Institute declares that our society has a fundamental commitment to “family diversity.”<sup>32</sup> People live in a variety of ways. The way they live is what gives rise to legal and moral obligations. The ALI’s report also argues that the fact that a marriage has or has not taken place should have minimal, if any, legal or social implications. In the ALI report’s view, a legal marriage vow, a public pledge by the couple to lifelong mutual care, sexual fidelity, financial support, and a shared family life, gives rise to no unique expectations or obligations fundamental to the principle of social justice in family life:

*[T]he absence of formal marriage may have little or no bearing on the character of the parties’ domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.*<sup>33</sup>

This view of marriage as a formal relationship, rather than a social institution that changes people and their relationships, leads the ALI to advocate for treating cohabiting couples, at least in some instances, as if they were married.<sup>34</sup>

### **Exhibit C: Trends in Canadian and European Law—Equating Marriage and Cohabitation**

Several European nations and Canada, as well as Australia and New Zealand, have recently adopted policies whereby cohabiting couples (“de facto couples”) are given

the same (or similar) legal treatment as married couples simply by virtue of having lived together for a specified period of time.<sup>35</sup> Unlike earlier common law marriages, such spousal status does not depend upon a couple having held themselves out as a married couple, or even having made a private marriage commitment, but instead arises simply out of the extended cohabitation.<sup>36</sup> Blurring the legal boundaries between the committed and less committed relations makes it harder for the community to recognize who is married, and for married couples to signal to one another their own commitment.<sup>37</sup>

#### **Exhibit D: The Legal Debate about Marriage and Same-Sex Unions**

We do not all agree substantively on the issue of whether the legal definition of marriage should be altered to include same-gender couples. Some of us are inclined to favor it, others to oppose it. Some of us are uncertain and concerned about how to weigh or balance the interests involved, from the well-being of children to the legitimate needs of gay and lesbian people.

We do agree, however, that the basic understanding of marriage underlying much of the current same-sex marriage discourse is seriously flawed, reflecting all the worst trends in marriage and family law generally. It is adult-centric, turning on the rights of adults to make choices. It does not take institutional effects of law seriously, failing to treat with intellectual seriousness any potential consequences that changing the basic legal definition of marriage may have for the children of society. In many cases it directly or indirectly seeks to disconnect marriage from its historic connection to procreation. Sadly, an attack on the idea that family structure matters now forms a part of some advocates' case for same-sex marriage in both the courts and the public square.<sup>38</sup> We invite advocates of same-sex marriage who genuinely believe that two parents are better than one to develop public arguments for same-sex marriage that do not disparage connecting mothers and fathers to their children as an important social norm.<sup>39</sup>

In the very first U.S. court decision favoring same-sex marriage (*Baehr v. Lewin*), for example, the high court of Hawaii declared, "This court construes marriage as "a partnership to which both partners bring their financial resources as well as their individual energies and efforts."” *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993). The highest judicial authority in the state thus produced a definition of marriage which, as one legal scholar has noticed, “is virtually indistinguishable from the definition one might accord a business partnership. . . . Indeed, it could embrace nearly all forms of collaborative enterprise.”<sup>40</sup> The Hawaii Supreme Court is not, of course, alone. Numerous legal scholars in recent times have advanced or assumed this view of marriage.<sup>41</sup>

Courts that have moved to same-sex marriage display a distressing tendency to first reduce marriage to a legal construct, unrelated to any natural, biological, or sexual realities, such as the generation of children or the gender asymmetry in parenting. In the Massachusetts same-sex marriage ruling, *Goodridge v. Department of Public*



*Health*, the Court began its constitutional analysis with the statement, “We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage.”<sup>42</sup> Similarly a recent federal trial court opinion striking down Nebraska’s state marriage amendment described marriage baldly as a “creature of statute.”<sup>43</sup>

Courts have by no means uniformly accepted this relatively novel view of marriage, or rejected the importance of procreation and family structure to the intrinsic purposes of marriage.<sup>44</sup> Indeed, supreme court decisions in Washington and New York demonstrate renewed respect for this understanding.<sup>45</sup>

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*The basic understanding of marriage underlying much of the current same-sex marriage discourse is seriously flawed.*

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To frame the same-gender marriage issue as exclusively about gay and lesbian civil rights fails to take seriously the issues at stake. Many of us believe that same-sex marriage may offer important potential goods, from increasing stability for children raised by parents in same-sex partnerships, to greater social attention toward the legitimate needs of gay and lesbian people. But we recognize that the question of whether and how altering the legal meaning of marriage from the union of male and female to a unisex union of any two persons will change the meaning of marriage itself is a critical question, which serious people must take seriously, and about which Americans of good will may and do disagree.

## **VII. Why are Marriage and Family Law Headed in the Wrong Direction?**

**A** S AMERICA IN GENERAL and other scholarly and intellectual disciplines in particular have moved towards a deeper understanding of and support for marriage as a social institution, why has much of family law moved in the opposite direction?

### **A. “Building a House in a Hurricane”**

One reason that trends in marriage and family law have been less than ideal is that it is hard to build a house in a hurricane. The last forty years have seen dramatic changes in social, sexual, and family mores. When social mores are changing rapidly, it may be particularly difficult for experts to perceive, much less enact, the kind of legal reforms that would be most supportive of the interests of children and society as a whole.

The law must adapt to social change. But the judges and legislators who make family law, and the legal scholars who create the climate of legal opinion which influences judges and legislators, must exercise more caution about building houses in hurricanes,

lest they inadvertently institutionalize and thereby perpetuate potentially harmful social change.

Today, as the hurricane subsides (i.e., as the divorce rate declines and unmarried childbearing has stopped accelerating as rapidly as it did in the 1970s and 1980s), is a particularly apt moment to survey the damage, and to reassess the goals of family law, and the means available at law to support these goals.<sup>46</sup>

### **B. “Too Few Players at the Table”**

“U.S. law is not handed down from on high even at the U.S. Supreme Court,” U.S. Supreme Court Justice Stephen Breyer said recently, “The law emerges from a conversation with judges, lawyers, professors and law students. . . .”<sup>47</sup>

There is much truth in this claim. But one of the troubles with marriage and family law is that, when it comes to understanding and making wise law for our most basic social institution for protecting children, *it is not good enough to have a conversation that takes place only between lawyers, judges, professors, and law students*. The conversation from which the law emerges needs to include many more players, who are far more knowledgeable about the social institution called marriage that the law is regulating.

In particular, the legal discourse surrounding marriage and family law needs to incorporate the knowledge and insights of other custodians of the marriage tradition, including the emerging consensus among family scholars on the importance of marriage for child well-being.

### **C. “The Skewed Perspective of the Big Divorce Bar”**

There is nothing nefarious or unethical about high-powered divorce lawyers becoming involved in crafting legal proposals. But there is something extremely limiting—intellectually, morally, and socially—when family law discourse begins to be dominated by the unrepresentative experience of the big divorce bar.

In the first place, highly paid divorce lawyers are paid to represent the interests of adults, not children. Second, the big divorce bar represents primarily clients with high incomes and major assets. In this way, the divorces they handle are extremely unrepresentative. Most adults who divorce have limited incomes and few assets.

When the big divorce bar dominates family law, the law begins to be shaped by the most unrepresentative experience of the extremely affluent. The laws thus shaped are then used to regulate the lives of the vast majority of Americans, who are not rich, and of children, who are unrepresented at the bar.

Even with the best of intentions, and a broader client base, making law based on broken and disrupted families without considering or acknowledging the effects on all marriages represents a limited perspective. Family law today is like “Gray’s Pathology” when it should be “Gray’s Anatomy.”

#### **D. “The Myth of Mutual Consent”**

For many years, legal debates about divorce law were informed (or misinformed) by the “myth of mutual consent.” Legal experts talked about no-fault divorce as if it took place ordinarily by mutual consent, merely enabling couples who wished to divorce to do so with a minimum of acrimony or outside interference.

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*Today is a particularly apt moment to survey the damage, and to reassess the goals of family law.*

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The reality of divorce in America today is that in the majority of divorces, only one spouse wants to divorce.<sup>48</sup> For the law to unilaterally take the side of this spouse is not government “neutrality.” It is to reduce, as one commentator recently noted, the obligations of the marriage contract to the same status as gambling debts (that is, to mere “debts of honor” unenforceable at law).<sup>49</sup>

Divorce or separation can provide an escape hatch from truly horrific relationships. But it also often breaks up families in situations where both spouses can acknowledge many personal and emotional benefits of the marriage for themselves and their children.<sup>50</sup>

If two people are determined to break up their marriage, there is little the law can do to make them live together as a family. But the myth of mutual consent underwriting the unilateral divorce revolution wrongly suggests that most or all divorces today are driven by such an inexorable determination on the part of the couple. Instead, the evidence suggests that many divorced people are deeply ambivalent about the decision to divorce, and can imagine other outcomes that might have been better for themselves and their children.<sup>51</sup> Part of the goal of family law should be to encourage such imaginings when they still can do some good, to support both spouses, not merely the one who wishes to divorce, and to therefore find concrete ways to encourage reconciliations, where appropriate and possible, in the majority of distressed marriages that are not violent.

### **VIII. Can We Go Back?**

**G**IVEN THIS CRITIQUE of current family law, should American society merely “go back” to early forms of family law? No. We cannot “go back” and we do not want to. Many of the changes in the culture of marriage have been good for women, children, and society, including increasing respect for the equal dignity of

men and women, increased protections for victims of domestic violence committed inside or outside of marital relationships, and greater legal protections for children born outside of marriage.

But if we cannot go back to the mythical past, before law and culture responded to women's aspirations for equality, and before children were raised in large numbers in alternative family forms, neither can we indulge in nostalgia for the 1970s, when many educated Americans viewed anything sexually new or nontraditional as intrinsically progressive or life-enhancing. Having painfully learned how children, adults, and communities suffer when marriages fall apart, or fail to take place, we cannot go back and pretend that our current high rates of fragmented families and fatherless children represent progress, rather than a social problem to be solved.

## **IX. Is There a Better Way? Toward a New Working Model in Family Law**

**H**OW DO WE move law towards a legal theory of marriage that is more respectful toward and supportive of marriage as a social institution? We propose three general insights:

### **1. Marriage Is Not Merely a Legal Construct.**

When it comes to economics, courts, legal scholars, judges, legislators, and other thoughtful observers have no trouble recognizing the gap between “the law” and the underlying social phenomenon that the law attempts to regulate. No court in America would preface an important decision in telecom law, for example, by flatly declaring, “Government creates the telecommunications industry,” even though the development of this or any other industry is in part dependent on the proper structuring of laws governing that industry. American legal minds understand that there is a gap between the thing economic law regulates (e.g., productive activity) and the law itself. Despite many disagreements about particulars, American legal minds also understand that in the realm of economics getting the structure of law right matters.

Similarly, it is hard (as yet) to imagine a court of law declaring that it creates “civil motherhood,”<sup>52</sup> even though there are important laws regulating who the parent is, and what the rights of parents are, and even though adoption can transfer the status of motherhood to non-biological parents. The state understands very well that a phenomenon as large and significant as motherhood cannot be reduced to a legal construct or a creature of statute. In making laws about parenthood, the state is regulating a key set of productive relationships that it does not and cannot create.

What does this mean in the context of the current marriage debates? A government that understands that it does not create markets or motherhood needs to understand

that marriage cannot be reduced to a legal construct either. Marriage as a meaningful social institution—one that makes a difference in the hearts and minds and behavior of mothers and fathers and the wider society—is necessarily the product of civil society: of families, faith communities, songwriters, storytellers, neighbors, and friends, who together create a vision of what marriage means in our shared public culture. It is family, friends, and faith communities who do the necessary and hard work of raising children to become young men and women who respect the marriage bond and at least try to live up to its demands.

This is not work that the law, alone, can do. Because marriage is so intimately related to the generation of and the protection of children, government has always been seen to have a legitimate role in regulating the “civil effects” of marriage.<sup>53</sup> The law also plays an important role in sustaining the shared meanings and consequences of marriage. Getting the law of marriage right therefore matters a great deal.

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*Government needs to understand that marriage cannot be reduced to a legal construct.*

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Part of getting marriage law right requires a renewed modesty and realism on the part of the state, including our courts. The state cannot by itself create a marriage that matters, one capable of constraining or channeling erotic drives of adults in the interests of children and society. The state therefore must exercise special care not to undermine this web of meanings sustaining our increasingly fragile marriage culture.

The law must recognize that it is only one of many players—albeit an important one—that together help create and sustain a marriage culture. “Civil marriage,” absent the support of civil society, is unlikely to mean much for children or society. Only when marriage is broadly supported by law and civil society, including but not limited to faith communities, does it remain a powerful social institution, capable of directing the behavior of men and women in the interests of children and society.

## **2. Human Nature Exists and Places Limits on What Law Can Accomplish.**

Human nature exists and sets limits on what law can accomplish by fiat alone. In the economic domain, it is well understood that, for example, while we may *wish* that people would protect others’ property as assiduously as they protect their own, if we make legislation based on this assumption, bad things will happen, *because it is not true*.<sup>54</sup> (Explaining why, as one university president famously puts it, “Nobody washes rental cars.”<sup>55</sup>)

When it comes to marriage, law must respect the reality of the ways in which human biology, human nature, and social relationships are intertwined. We may wish men to be, say, equally committed fathers outside of marriage as inside of



it. We may even legally declare that children will have the same rights to their fathers' care and support inside and outside of marriage, but the law's commands alone will not make it so.<sup>56</sup> Mother and child are intimately connected by the bonds of pregnancy and birth. Father and child are not so linked, unless culture, law, and society conspire to transform sperm donors into true lovers and good husbands, and thereby into reliable fathers. A good society consciously seeks to raise boys who aspire to be good family men. The principal vehicle in our society, and virtually every known human society, for linking fathers to their children is marriage.

We support laws requiring unmarried fathers, as well as married fathers, to support their children, financially and in other ways. We also know, from 40 years of social experimentation, that child-support payments do not replace a loving, hands-on dad. If we want our children to know and be loved by their fathers, law and culture must acknowledge and respond to human sexual realities by supporting a marriage culture.

### **3. Social Institutions Matter and They Matter a Great Deal.**

A new respect for the idea that institutions matter permeates the field of economics and its relationship to law. As two prominent scholars argued recently, "The central message of the New Institutional Economics is that institutions matter for economic performance."<sup>57</sup>

Economic institutions are not created by law, although they are deeply affected by it. Firms, markets, and contracts exist first as institutions of civil society. Their legal treatment, however, profoundly affects the extent to which these (mostly) privately ordered relations succeed in achieving their (partly) public goals.

Sophisticated economic thinking recognizes that contracts, for example, are not just legal constructs, supported by legal sanctions; they are also social understandings supported by social norms. Business people believe that, by and large, contracts are to be honored, not only because the law will extract punishments for failing to do so, but also because this is how honorable business people behave. These internalized ideals, as well as the reputational consequences of violating business norms, affect the way business people behave with respect to contracts. The law plays an indispensable role in maintaining these social expectations by enforcing contracts. But the shared understanding of the contract, and the social (and not just legal) consequences of being perceived to deal in good faith, are important mechanisms for bringing the benefits of contract to life.<sup>58</sup>

Whereas many once believed that withdrawing legal regulation was all that was necessary for the economy to flourish, the post-Soviet experience has taught economists to realize that goods like the market depend on social institutions, such as social trust

and respect for the rule of law. As Furubotn and Richter conclude, “The invisible hand, if unaided by supporting institutions, tends to work slowly and at high cost.”<sup>59</sup>

If this insight is true for a purely economic institution, how much more must it be for something as primarily and primordially social as marriage?

Judges, legislators, family law scholars, and other influential legal thinkers need to take seriously the “institutional” effects of law on the culture of marriage.

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*The law must recognize that it is only one of many players that together help create and sustain a marriage culture.*

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## **X. How Does Family Law Matter?**

**W**HY DOES the law matter? Historically in the United States, legal scholars have focused on explaining the power of law “from the perspective of the bad man.”<sup>60</sup> In these models, the law shapes individuals’ actions by changing the structure of incentives—imposing punishments (criminal sanctions, civil liability or penalties for marital misconduct, for example), or offering benefits. These are of course extremely important functions of law and public policy.

But it is equally important to consider the consequences of law and legal institutions “from the perspective of the good man,” from the role the law plays in shaping norms, expectations, and therefore behaviors among the law-abiding. Laws do more than punish, as Mary Ann Glendon has pointed out: “In England and the United States the view that law is no more or less than a command backed up by organized coercion has been widely accepted. The idea that law might be educational, either in purpose or technique, is not popular among us. . . . [L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things.”<sup>61</sup> It is “part of a distinctive manner of imagining the real.”<sup>62</sup>

Professor Carl Schneider points to the “channeling function” of law:

By and large, then, the channeling function does not primarily use direct legal coercion. People are not forced to marry. One can contract out (formally or informally) of many of the rules underlying marriage. One need not have children, and one is not forced to treat them lovingly. Rather, the function forms and reinforces institutions which have significant social support and which, optimally, come to seem so natural that people use them almost unreflectively. It relies centrally but not exclusively on social approval of the institution, on social rewards for its use, and on social disfavor of its alternatives.<sup>63</sup>

As another family scholar recently put it, “Laws do more than distribute rights, responsibilities, and punishments. Laws help to shape the public meanings of important institutions, including marriage and family.”<sup>64</sup>

Scholars who have adopted behavioral law and economics perspectives have already explored some of the many ways that the social signals sent by law affect generally prevailing social norms. For example, the law’s choice of default rules affects the parties’ own perceptions of what is “fair” or “normal” when they negotiate contracts.<sup>65</sup>

The law sends “social signals” that affect individuals and communities that are distinct from any cost-benefit analysis individuals make about incentives or punishments imposed by the law. Legal scholars widely acknowledge this phenomenon in other contexts. For example, changes in law may trigger “informational” or “reputational” cascades, in which Americans adopt certain beliefs because they perceive others to acknowledge them as true, or because they perceive their social standing will be negatively affected because of what others believe to be true and good. The social changes in racial attitudes and values triggered by civil rights laws, for example, represent one such phenomenon. As two scholars note: “Laws that have produced compliance with little or no enforcement, such as those that relegate smoking to designated areas and those that require people to clean up after their dog, have much to do with the informational and reputational mechanisms....”<sup>66</sup>

Same-sex marriage supporters are acknowledging this same privileged power of the law to affect social meaning when, for example, they argue (as the *Goodridge* court did) that the creation of separate legal status for same-sex couples would not be the same as marriage, even if the legal benefit structure was identical.<sup>67</sup>

We may agree or disagree about the message the law would send in such instances, but we cannot credibly act or reason as if such social signals do not exist, or are not significant. The law’s understanding of a social institution is a privileged and powerful one. The public, shared understanding of a basic social institution like marriage is affected by how the law describes, understands, and enacts marriage. Because social institutions are cognitive—they direct human behavior by shaping shared perceptions—changing the public meaning of marriage will change what marriage is and how it is experienced by every member of the larger society.

One may see these kinds of social consequences of legal change as good, or as questionable, or as both. But to argue that these kinds of cultural effects of law do not exist, and need not be taken into account when contemplating major changes in family law, is to demonstrate a fundamental lack of intellectual seriousness about the power of law in American society.

## **XI. Principles of Pro-Marriage Legal Reform: Six Criteria**

**LAW AND PUBLIC POLICY** have many legitimate goals, from protecting children in alternate family forms, to promoting civility and respect for rights of individuals in the public square, to encouraging equal regard between men and women. Support for sustaining marriage is, in our view, a critical value and social need, but we do not mean to suggest that it is the only one, or a trump card that should settle all important conflicts of goods, or clashes of values in the public square.

At the same time, if supporting marriage is a purported goal of a proposed legal change, it is important to develop principles that help us to distinguish when and what kinds of legal and policy changes are likely to support marriage as a social institution, and what kinds of legal changes are likely to make it more difficult for civil society to sustain a marriage culture. In that spirit we offer the following six criteria for thinking through proposals intended to support marriage.

A legal or policy reform strengthens marriage as a social institution when it:

- a. Protects the boundaries of marriage, clearly distinguishing married couples from other personal relations,** so that people and communities can tell who is married, and who is not.<sup>68</sup> The harder it is to distinguish married couples from other kinds of unions, the harder it is for communities to reinforce norms of marital behavior and the more difficult it is for marriage to fulfill its function as a social institution.<sup>69</sup>
- b. Treats the married couple as a social, legal, and financial unit.** When the law, through the tax code or other means, disaggregates the family and treats married men and women as if they were single, this does not represent “neutrality.” Because marriage is in fact a real economic, emotional, social, parenting, and sexual union, the law must in justice treat married couples as a unit, rather than as unrelated individuals.
- c. Reinforces norms of responsible marital behavior,** such as encouraging permanence, fidelity, financial responsibility, and mutual support and discouraging violence or destructive conflict, for example. Marriage is not merely an expressive ceremony. It is a real public commitment that has content: a substantive purpose and strong social norms. While civil society must do the heavy lifting in establishing social norms surrounding marriage, law and public policy should reinforce and support efforts to do so.
- d. Seeks to reduce divorce, unmarried childbearing, and/or violence and destructive conflict in marriage.** The best single indicator for how well marriage is faring in American society is: What proportion of American children are

being born to and raised by their own married mom and dad in a reasonably harmonious union?<sup>70</sup>

**e. Does not discourage childbearing (or adoption<sup>71</sup>) by married couples.**

Children are one of the prime social goods created by marriage. Marriage as a social and legal institution is dedicated in part to encouraging men and women who want them to have children and raise them together.

**f. Communicates a preference for marriage (provided it is not high-conflict or violent) as the preferred context for childrearing,**

particularly to young people who will be making the choices that affect the next generation's well-being. Legal changes intended to celebrate family diversity as a social ideal are necessarily at odds with a marriage culture. Not every child has had or will ever have the protection of a mom and dad joined in a reasonably harmonious marital union. Support for all children is essential to a decent and just society, regardless of whether their parents are married. But coping with family fragmentation in law and culture is different from celebrating it. A pro-marriage reform envisions marriage as a preferred social ideal, and not just one of many equally promising lifestyles, especially for parents of children.

## **XII. Conclusion**

**S**TRENGTHENING MARRIAGE in American society is an important social goal. As twelve family scholars recently put it:

“Marriage is an important social good, associated with an impressively broad array of positive outcomes for children and adults alike. Family structure and processes are of course only one factor contributing to child and social well-being.... But whether American society succeeds or fails in building a healthy marriage culture is clearly a matter of legitimate public concern.”<sup>72</sup>

The law is only one tool in this larger effort at cultural renewal, but it is an important one. Americans are a forward-looking and optimistic people. We look forward to a broader discussion of ways that family law, as a discipline and practice, can support Americans' marriage dreams, so that more children are raised by their own mothers and fathers joined in loving, lasting marriages.

## **Appendix: Strengthening Marriage in Family Law: Proposals**

**T**HIS IS A LIST of proposals intended to generate new discussion among state legislators and family lawyers about ways law and public policy might strengthen marriage in law and in society. As signers of this document, we do not all endorse each of these reforms. We realize that the law, which has concrete impact on real people, cannot be reduced to a “values” discussion. People of good will who support marriage can and do disagree profoundly about particular policies and legal approaches, including the suggestions outlined below. Continued reflection, input, and practical experience with consequences will lead many legal and family scholars in different directions regarding these and other pro-marriage suggestions. We do hope, through offering concrete examples like these, to generate new attention to the need and discussion of the best means for strengthening marriage in law and culture, and of possible strategies for doing so.

**Establish a preference for married couples in adoption law.** While it may not always be possible, and therefore should not be legally mandatory, the best interests of a child are generally served by being raised by a married mother and father, at least in the case of nonfamilial adoptions. Adoption exists to serve the needs of children, not to promote adult rights to choose diverse family forms.

**Offer (or mandate) a remarriage and stepfamily education workshop for couples where one or both parties have a child from a previous relationship.** Stepfamilies pose unique challenges for married couples and their children, as well as great opportunities when they succeed. Encourage community groups (faith-based and civic) to offer targeted help to new families in the process of blending.

**Require a substantial waiting period for unilateral divorce.** Create a one- or two-year waiting period before a spouse can obtain a no-fault divorce without mutual consent, in nonviolent marriages. Require spouses to show “good faith” efforts or “due diligence” to save their marriages, by taking responsible steps to reconcile (in the absence of violence).<sup>73</sup>

**Codify the basic obligations of marriage by statute.** Marriage is created by the freely given consent of a man and woman, witnessed by church and/or state, to enter into a permanent sexual, financial, emotional, and parenting union. Its basic obligations include sexual fidelity, permanence, mutual care and support of each other and any children of their union. Require couples to sign an affidavit upon getting a marriage license that they have read and understood these basic obligations.

**Add a new goal to court-connected divorce education programs: Facilitating reconciliations in nonviolent marriages.** Half of all counties have court-connected divorce education programs. These typically have just two goals: reducing litigation



and reducing parental acrimony. Adding a third goal of facilitating reconciliations where possible would allow state and federal governments to work with marriage education experts and family scholars to establish the “best practices” for programs that achieve all three goals. Even when reconciliation is not reached, teaching relationship skills will help co-parenting relationships and help the parties’ next marriages.

**Add a marriage message to teen pregnancy prevention programs.** Programs using federal or state government funds should teach the next generation that, ideally, you should be grown, educated, and *married* before deliberately seeking to get pregnant.

**Offer marriage education, and divorce interventions, to low-income couples.** The current administration has proposed a marriage initiative that primarily offers relationship skills and education to low-income couples who want to marry.<sup>74</sup> Congress should expand such legislation to offer divorce interventions designed to reduce conflict and encourage reconciliations to low-income couples, and provide the money necessary to evaluate such programs and establish “best practices.” But even in the absence of federal legislation, faith communities, state and local government, and community groups should look for new ways to offer effective marriage education and divorce interventions to low-income married couples, in order to reduce unmarried childbearing, divorce, and high-conflict or violent marriages.

## Endnotes

1. John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001).
2. “The idea that legal rules may influence social norms is hardly new.” June Carbone, *Back to the Future: The Perils and Promise of a Backward-Looking Jurisprudence*, in RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 209, 230 n.137 (Robin Fretwell Wilson ed., 2006); see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).
3. For example, “‘Rights talk’ can obscure as much as it reveals. In particular, the portrayal of certain legal reforms as advancing state ‘neutrality’ between the moral positions of individuals, or as increasing individual liberty in a straightforward way, obscures the reality of what is being proposed: a new substantive model of marriage endorsed and promoted by law. The shift to unilateral divorce, for example, does not merely make the state more ‘neutral’ regarding divorce, nor does it merely increase individual liberty. Unilateral divorce, as a legal institution, increases the freedom of individuals to divorce by reducing their capacity to make enforceable marriage contracts with each other; it shifts legal power in divorce negotiations from the spouse who clings to the marriage vow to the spouse who wishes to end it. Some of us may view changes such as unilateral divorce as necessary accommodations to social change. Some of us may view them negatively, and as ripe for reform. But we all must recognize that such changes are not neutral or merely freedom-enhancing. They are powerful interventions by government into a key social institution and thus worthy of sustained and intelligent public debate.” DAN CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 10 (New York: Institute for American Values) (2005).
4. “More children” does not mean *all* children. Nor do we mean to imply that marriage as a social ideal justifies or requires undermining the rights of parents who are not married. Supporting marriage does not mean legally mandating marriage for all.
5. Katherine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809 (1998) (Brigitte M. Bodenheimer Memorial Lecture on the Family).
6. *Id.* at 817.
7. The family structures compared in the Child Trends brief include intact married families, step-families, cohabiting families, and single-parent families. They do not include children raised by same-sex couples.
8. 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 RESEARCH BRIEF (Child Trends, Washington, D.C.), June 2002, at 6 (available at <http://www.childtrends.org/Files/MarriageRB602.pdf>).
9. See, e.g., Suzanne M. Bianchi et al., *The Gender Gap in the Economic Well-Being of Nonresident Fathers and Custodial Mothers*, 36 DEMOGRAPHY 195 (1999); Mary Naifeh, *Dynamics of Economic Well-Being, Poverty 1993-94: Trap Door? Revolving Door? Or Both?* CURRENT POPULATION REPORTS: HOUSEHOLD ECONOMIC STUDIES, P70-63 (U.S. Bureau of the Census, Washington, D.C.), July 1998; Ross Finnie, *Women, Men, and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data*, 30(2) CANADIAN REV. OF SOC. AND ANTHROPOLOGY 205 (MAY 1993).
10. Margaret Brinig & Douglas Allen note that, despite the benefits of marriage for women (and reciprocal costs of divorce), the majority of divorces are initiated by women. Margaret F. Brinig and Douglas W. Allen, *These Boots Are Made for Walking: Why Most Divorce Filers are Women*, 2 AMER. L. & ECON. REV. 126, 126-27, 129 (2000) (“Throughout most of American history, wives rather than husbands have filed for divorce. The proportion of wife-filed cases has ranged from around 60% for most of the 19th century to, immediately after the introduction of no-fault divorce, more than 70% in some states.... What makes the high filing rate for women most puzzling, however, is that it is generally assumed that overall husbands should be the ones most wanting out of marriage—particularly since the introduction of no-fault divorce. This understanding results from the focus on post-divorce *financial* status. Even by the most conservative accounts, the average divorced woman’s standard of living declines from the one she enjoyed during marriage, and it declines relatively more than does the average husband’s.... Yet *women* file for divorce more often than men. Not only do they *file* more often, but some evidence suggests they are more likely to *instigate* separation, despite a deep attachment to their children, and the evidence that many divorces harm children.”) (citations omitted).

11. See, e.g., W. BRADFORD WILCOX ET AL., *WHY MARRIAGE MATTERS*, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (New York: Institute for American Values) (2005); *THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 11* (New York: Institute for American Values) (2000) and cites therein: “Divorce and unwed childbearing create substantial public costs, paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditure; increased remedial and special education expenses; higher day-care subsidies; additional child-support collection costs; a range of increased direct court administration cost incurred in regulating post-divorce or unwed families; higher foster care and child protection services; increased Medicaid and Medicare costs; increasingly expensive and harsh crime-control measures to compensate for formerly private regulation of adolescent and young-adult behaviors; and many other similar costs.... [C]urrent research suggests that these costs are likely to be quite extensive.”
12. LINDA J. WAITE AND MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER-OFF FINANCIALLY* (2000).
13. See, e.g., JUDITH WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000); ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005).
14. Twelve leading family scholars recently summarized the research literature this way: “Marriage is an important social good associated with an impressively broad array of positive outcomes for children and adults alike.... [W]hether American society succeeds or fails in building a healthy marriage culture is clearly a matter of legitimate public concern.” WILLIAM J. DOHERTY ET AL., *WHY MARRIAGE MATTERS: 21 CONCLUSIONS FROM THE SOCIAL SCIENCES 6* (New York: Institute for American Values) (2002); see also 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 RESEARCH BRIEF (Child Trends, Washington, D.C.), June 2002, at 6 (available at <http://www.childtrends.org/Files/MarriageRB602.pdf>).
15. Joshua R. Goldstein, *The Leveling of Divorce in the United States*, 36(3) DEMOGRAPHY 409-414 (Aug. 1999).
16. In 1977, a Gallup poll of 13 to 17 year olds found that 55 percent of teens felt it was “too easy” to get a divorce. By 2003, the proportion had jumped to 77 percent. Heather Mason, “What Does D-I-V-O-R-C-E Spell for Teens?” GALLUP POLL TUESDAY BRIEFING, June 17, 2003.
17. Associated Press, *Married Households Rise Again Among Blacks, Census Finds*, N.Y. TIMES, April 26, 2003, at A15.
18. Perhaps the most important indicator of marriage’s health, from a child-centered standpoint, is the proportion of children living with both biological parents in an intact, low-conflict marriage. Between 1991 and 2001 (after years of decreases), the proportion of American children living with both biological parents rose slightly from 61.7% in 1991 to 62.2% in 2001. Stacy Furukawa, *The Diverse Living Arrangements of Children: Summer 1991*, CURRENT POPULATION REPORTS P70-38 (U.S. Bureau of the Census, Washington, D.C.), Sept. 1994, at 3-4 (Tables 1-2); Rose M. Krieder & Jason Fields, *Living Arrangements of Children: 2001*, CURRENT POPULATION REPORTS P70-104 (U.S. Bureau of the Census, Washington, D.C.), July 2005, at 3 (Table 1).
19. Paul R. Amato et al., *Continuity and Change in Marital Quality Between 1980 and 2000*, 65(1) J. MARRIAGE & FAM. 1 (2003).
20. Recent reductions in divorce have been concentrated among the college educated (Steven P. Martin, *Growing Evidence for a Divorce Divide? Education and Marital Dissolution Rates in the U.S. Since the 1970’s* (Md. Population Res. Center Working Paper, available at [http://www.popcenter.umd.edu/people/martin\\_steven/papers/marital\\_dissolutions.doc](http://www.popcenter.umd.edu/people/martin_steven/papers/marital_dissolutions.doc)); and the latest Census data shows that unwed childbearing, which appeared to be leveling off in the late 90s and early 21st century, has resumed its rise. Joyce A. Martin et al., *Births: Final Data for 2003*, 54(2) NATIONAL VITAL STATISTICS REPORTS 10 (Table D) (Sept 8, 2005).
21. Scholars who have become increasingly disturbed by this tendency to understand family law through the lens of “rights-bearing adults” span the ideological spectrum. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).
22. See DAN CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* (New York: Institute for American Values) (2005); Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not At All?*, 34 FAM. L.Q. 271 (2000); Martha Minow, *Redefining Families:*

*Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991); Ira M. Ellman, *Unmarried Partners and the Legacy of Marvin v. Marvin: "Contract Thinking" Was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1373-74 (2001).

23. Adoption in our society, for example, emerged as an important institution whose purpose is to serve children's needs, not adult interests or desires.

24. See, e.g., Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, in RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006); Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH L. REV. 129 (2003); Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95 (2001); Robert F. Cochran, Jr. & Paul C. Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327 (1983).

25. Helen M. Alvare, *The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage and its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 152 (2005) (quoting 2 THE DIVORCE LAW DEBATES, TRANSCRIPTS FROM THE 1965-1973 ANNUAL MEETINGS OF THE UNIFORM LAW COMMISSION 139 (Judy Parejko ed.) (Aug. 3, 1970) (emphasis added)).

26. As Frank Furstenberg described the evolution of scholarly thinking on this issue:

It is probably true that most children who live in a household filled with continual conflict between angry, embittered spouses would be better off if their parents split up—assuming that the level of conflict is lowered by the separation. And there is no doubt that the rise in divorce has liberated some children (and their custodial parents) from families marked by physical abuse, alcoholism, drugs, and violence. But we doubt that such clearly pathological descriptions apply to most families that disrupt. Rather, we think there are many more cases in which there is little open conflict, but one or both partners finds the marriage personally unsatisfying.... A generation ago, when marriage was thought of as a moral and social obligation, most husbands and wives in families such as this stayed together. Today, when marriage is thought of increasingly as a means of achieving personal fulfillment, many more will divorce. Under these circumstances, divorce may well make one or both spouses happier; but we strongly doubt that it improves the psychological well-being of the children.

FRANK F. FURSTENBERG, JR., & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 71-72 (1991).

See also Andrew J. Cherlin, *Going to Extremes: Family Structure, Children's Well-Being, and Social Science*, 36 DEMOGRAPHY 421, 427 (1999):

[T]he evidence suggests that genetic inheritance and its interaction with the environment are part of the story but far from the whole story. Thus the lesson I draw is that the actual effect of family structure lies between the extremes. Whether a child grows up with two biological parents, I conclude, makes a difference in his or her life; it is not merely an epiphenomenon. Not having two parents at home sometimes leads to short- and long-term problems, but not all the differences we see in outcomes are the results of family structure. Some of the differences would have occurred anyway. Moreover, parental divorce or being born to unmarried parents does not automatically lead to problems. Many (perhaps most) children who grow up in single-parent families or in stepfamilies will not be harmed seriously in the long term.... Growing up in single-parent family is not a sentence to life at emotional hard labor, but it sometimes has consequences that parents would not wish upon their children."

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 RESEARCH BRIEF (Child Trends, Washington, D.C.), June 2002, at 6 (available at <http://www.childtrends.org/Files/MarriageRB602.pdf>):

Research clearly demonstrates that family structure matters for children, and the family structure that helps children 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.

27. As Andrew Cherlin notes, the social norms surrounding marriage have significantly weakened in recent decades: “[W]hat has occurred over the past few decades is the deinstitutionalization of marriage.... By deinstitutionalization I mean the weakening of the social norms that define people’s behavior in a social institution such as marriage. In times of social stability, the taken-for-granted nature of norms allows people to go about their lives without having to question their actions or the actions of others. But when social changes produces situations outside the reach of established norms, individuals can no longer rely on shared understandings of how to act.” Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66(4) J. MARR. & FAM. 848, 848 (2004).

28. William A. Galston, *Divorce American Style*, 124 THE PUBLIC INTEREST 12, 13 (Summer 1996).

29. For an analysis of these trends see DAN CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* (New York: Institute for American Values) (2005).

30. Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not At All?*, 34 FAM. L.Q. 271, 276 (2000).

31. *Id.* at 278 (emphasis in original).

32. American Law Institute, *Introduction*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002). For example, certain custody rules “run counter to the commitment that this society avows towards family diversity.” (Overview of Chapter 2, *I. The Current Legal Context*); Parents have rights because in part, “Society, in turn, benefits from the diverse social fabric that is created by the decentralized manner in which [children’s] care is provided.” (Overview of Chapter 2, *I. The Current Legal Context*); One of the “principles of Chapter 2” is to “preserve the diversity of parenting arrangements within families,” (Overview of Chapter 2, *II. An Overview of the Principles of Chapter 2*); These proposed changes “help[ ] to move beyond the terms of public policy debates that posit a ‘best’ way of dividing up responsibility for children...to a legal framework focusing on the diverse circumstances and possibilities of each individual family.” (Overview of Chapter 2, *II. An Overview of the Principles of Chapter 2*).

33. *Id.* at § 6.02 cmt. a (emphasis added).

34. *Id.* at §§ 6.01–6.06.

35. For example, the Ontario Family Law Act of 1990 defines “spouse” for purposes of support obligations to include (in addition to the parties to a marriage) “either of two persons who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.” R.S.O. 1990, ch. F.3, § 29. *See also* Nicholas Bala, *Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships*, 29 QUEEN’S L.J. 41, 45-59 (2003) (describing Canadian provincial support rules); 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) (describing legal status of nonmarital cohabitation in Europe); Bill Atkin, *The Challenge of Unmarried Cohabitation—The New Zealand Response*, 37 FAM. L.Q. 303 (2003); Lindy Willmott et al., *De Facto Relationships Property Adjustment Law—A National Direction*, 17 AUSTL. J. FAM. L. 1, 2-5 (2003) (describing differences in state rules).

36. One commentator refers to this as a “conscriptive approach” to marriage-like relationships. Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005).

37. But for a dissenting view on this particular point, see ROBERT E. RODES, JR., ON LAW AND CHASTITY 125-27 (2006).

38. *See, e.g.*, Mary L. Bonauto, *Civil Marriage as a Locus of Civil Rights Struggles*, 30 HUMAN RIGHTS 3, 7 (Summer 2003) (“[C]hild-rearing experts in the American Academy of Pediatrics, the American Psychiatric Association, and the American Psychological Association insist that the love and commitment of two parents is most critical for children—not the parents’ sex or sexual orientation.”); MICHAEL S. WALD, SAME-SEX COUPLES: MARRIAGE, FAMILIES, AND CHILDREN: AN ANALYSIS OF PROPOSITION 22—THE KNIGHT INITIATIVE 11 (Stanford, CA: The Stanford Institute for Research on Women and Gender & The Stanford Center on Adolescence) (1999) (Assessing the claim that “it is better for children to be raised by two opposite-sex married parents,” Stanford University Law Professor Michael Wald points to social



science research and concludes baldly, “[T]he evidence does not support these claims.”); Editorial, *Not Fair, Governor*, BOSTON GLOBE, March 3, 2005 (“Romney has taken a page from President Bush’s illogic by insisting that every child ‘has a right to a mother and a father,’ implying that two women or two men could not possibly do the job. But many studies have shown that, while children fare better having two parents, the sexual orientation of those parents is inconsequential.”).

39. Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41(6) SOCIETY 25 (Sept./Oct. 2004).

40. Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. 449, 473-474 (2004).

41. See, e.g., Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2089 (2000); Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251 (1998); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413 (1996); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990); Katherine Spaht, *Solidifying the ‘No-Fault’ Revolution: Postmodern Marriage as Seen Through the Lens of ALI’s ‘Compensatory Payments,’* in RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 249 (Robin Fretwell Wilson ed., 2006).

42. *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

43. *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980, 999 (D. Neb. 2005), *rev’d* No. 05-2604, 2006 U.S. App. LEXIS 17723 (8th Cir. July 14, 2006).

44. See, e.g., *Hernandez v. Robles*, 805 N.Y.S. 2d 354 (N.Y. App. 2005), *aff’d* Nos. 86-89, 2006 N.Y. LEXIS 1836 (July 6, 2006). (“The law...sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depends on a healthy marriage culture for this latter, critical, but presently undervalued, benefit. Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision.”); *Lewis v. Harris*, 875 A.2d 259, 269 n.2 (N.J. App. 2005) (“We...note that the historical and prevailing contemporary conception of marriage as solely a union between a single man and a single woman is based partly on society’s view that this institution plays an essential role in propagating the species and child rearing.”); *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. App. 2005) (“The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from ‘casual’ intercourse.”); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005) (“The Court finds it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents. Because procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government. The argument is not legally helpful that children raised by same-sex couples may also enjoy benefits, possibly different, but equal to those experienced by children raised by opposite-sex couples. It is for Congress, not the Court, to weigh the evidence.”); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (“[T]his court...is bound by the Eleventh Circuit’s holding that encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest.... DOMA is rationally related to this interest.”)(internal citations omitted); *In re Kandu*, 315 B.R. 123, 146 (Bankr. W.D. Wash. 2004) (“Authority exists [*sic*] that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern.”); *Standhardt v. Superior Court*, 77 P.3d 451, 463-64 (Ariz. App. 2003) (“We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest.”); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. App. 1995) (“[I]t appears that the Supreme Court has seen marriage as having a traditional principal purpose: to regulate and legitimize the procreation of children. See *Zablocki v. Redbail*, 434 U.S. 374, 385-86 (1978); *Skinner v. Oklaboma*, 316 U.S. 535, 541 (1942)].... I believe that this central purpose of the marriage statute—this emphasis on child-bearing—provides the kind of rational basis defined in *Heller*, 113 S. Ct. at 2642-43, permitting limitation of marriage to heterosexual couples.”).



45. *Andersen v. King County*, Nos. 75934-1, 75956-1, 2006 Wash. LEXIS 598 (July 26, 2006); *Hernandez v. Robles*, Nos. 86-89, 2006 N.Y. LEXIS 1836 (July 6, 2006).

46. For an assessment of such ongoing efforts in law and public policy to strengthen marriage, see THEODORA OOMS ET AL., *BEYOND MARRIAGE LICENSES: EFFORTS TO STRENGTHEN MARRIAGE AND TWO-PARENT FAMILIES, A STATE-BY-STATE SNAPSHOT* (Washington, D.C.: Center for Law and Social Policy) (April 2004).

47. Associated Press, *Justices Debate International Law on TV*, N.Y. TIMES, January 13, 2005.

48. Sanford L. Braver et al., *Who Divorced Whom? Methodological and Theoretical Issues*, 20 (1/2) J. DIVORCE & REMARRIAGE 1, 7 (1993) (In a study of divorcing couples responding to the question “Which one of you was the first to want out of the marriage?” less than 10% of respondents indicated that it was a mutual decision); FRANK F. FURSTENBERG, JR., & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 22 (1991) (“Four out of five marriages ended unilaterally, usually at the wife’s insistence.”); Joseph Hopper, *The Rhetoric of Motive in Divorce*, 55(4) J. MARR & FAM 801, 805 (1993) (“[S]tudies have noted that most divorcing people describe their divorces as non-mutual and that they have no difficulty specifying who decided on a divorce and who did not”).

49. “When the law declared that it couldn’t judge matrimonial disputes and would henceforth treat spouses who kept their marriage vows the same as those who repudiated them, it put a once-sacramental institution on the legal footing of a gambling debt.” George Jonas, *The Window Was Broken in the 1960s*, NATIONAL POST (CANADA), February 7, 2005.

50. Joseph Hopper, *The Rhetoric of Motive in Divorce*, 55(4) J. MARR & FAM 801 (1993).

51. See, e.g., Joseph Hopper, *The Rhetoric of Motive in Divorce*, 55(4) J. MARR & FAM 801 (1993). E. Mavis Hetherington found that 20 percent of adults who divorced had “enhanced” lives as a result; 10 percent were “competent loners”; 40 percent had “different partners and different marriages, but usually the same problems”; the remaining 30 percent were judged worse off because of the divorce. E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 6-7 (2002). Several state-wide polls of divorced adults show that many wish they had tried harder to make their marriage work. GLENN T. STANTON, 1998 SOUTH CAROLINA MARITAL HEALTH INDEX 38-42 (1998) (62% of divorced South Carolinians wished they had tried harder to keep their marriage together); NEW JERSEY FAMILY POLICY COUNCIL, *NEW JERSEY MARRIAGE REPORT: AN INDEX OF MARITAL HEALTH* (1999) (46% of divorced New Jersey adults wish they had tried harder to work through differences before divorcing); MINNESOTA FAMILY INSTITUTE, *MINNESOTA MARRIAGE REPORT* (1998) (66% of divorced Minnesotans responded affirmatively to the question “Looking back, do you wish you and your ex-spouse had tried harder to work through your differences?”). See also PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* 220 (1997) (noting that only “30% [of parents who divorced] reported more than two serious quarrels in the last month, and 23% reported that they disagreed ‘often’ or ‘very often’ with their spouses”).

52. Although there are signs of interest in deconstructing parenthood in this way, as well. See, e.g., *Civil Marriage Act*, Consequential Amendments, Bill C-38, 38th Parliament (Can) (1st Sess. 2005); LAW COMMISSION OF CANADA, *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* xxiv (2001), (referring to parent-child relationships as “intergenerational relationships that involved the rearing of children.”); AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.03(1) (2002) (describing three categories of parents: “unless otherwise specified, a parent is either a legal parent, a parent by estoppel, or a de facto parent.”) In comments, the ALI reporters note that the category of “legal parent” will “ordinarily include biological parents, whether or not they are or ever have been married to each other, and adoptive parents.” *Id.* § 2.03, cmt. a. See also RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES (Sarah Franklin & Susan McKinnon, eds., 2001); JUDITH BUTLER, *UNDOING GENDER* 102-130 (2004) (Chapter 5, “Is Kinship Always Already Heterosexual?”); Helen Rhoades, *The Rise and Rise of Shared Parenting Laws: A Critical Perspective*, 19 CAN. J. FAM. L. 75, 107-108 (2002); JONATHAN HERRING, *FAMILY LAW* 264, 305ff (2001) (suggesting 5 distinct varieties of parenthood: “genetic parenthood,” “coital parenthood,” “gestational parenthood,” “post-natal (social or psychological) parenthood,” and “intentional parenthood”); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Conference Description, *Task Force Roundtable, “Parentage Reform Conference,”* William and Mary Law School, Sept. 29-30, 2005 (“What would be an ideal set of rules for assigning newborn children to parents?”).

53. See, e.g., Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL’Y 771 (2001).

54. Recent advances in behavioral law and economics, pointing to systematic irrational biases in human cognition and behavior, which some argue give rise to a need for a more active role by government in managing markets, are another example of taking human nature, and the limits it imposes, seriously. See, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000).

55. Thomas L. Friedman, *Iraqis at the Wheel*, N.Y. TIMES, Nov. 6, 2003, at A33 (“I repeat, yet again, Lawrence Summers’ dictum: ‘In the history of the world, no one has ever washed a rented car.’”).

56. Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARR & FAM. 213, 213 (2003); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847 (2005).

57. EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTIONS OF THE NEW INSTITUTIONAL ECONOMICS 1 (2d ed. 2005).

58. For example, “The mechanism design literature focuses on the *ex ante* (or incentive alignment) side of contract and assumes that disputes are routinely referred to and that justice is effectively (indeed, costlessly) dispensed by the courts. In contrast, transaction cost economics maintains that *the governance of contractual relations is primarily effected through the institutions of private ordering rather than through legal centralism.*” OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM xii (1985).

59. EIRIK G. FURUBOTN AND RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTIONS OF THE NEW INSTITUTIONAL ECONOMICS 20 (2d ed. 2005).

60. See Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).

61. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 7-8 (1987).

62. *Id.* at 8 (quoting CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 175 (1983)).

63. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 504 (1992).

64. DAN CERE, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 10 (New York: Institute for American Values) (2005).

65. For example, “The most fundamental insight for contract theory provided by evidence of the status quo bias is that the choice of default rules is always relevant, not just in situations of high transaction costs or asymmetric information. *If lawmakers’ choice of default terms alters parties’ preferences for contract terms—causing an increase in the strength of their preferences for the default term and a decrease in the strength of their preferences for alternative terms—the choice of default terms has the potential to affect any private contract.*” Russell Korobkin, *Behavior Economics, Contract Formation, and Contract Law*, in BEHAVIORAL LAW AND ECONOMICS 116, 137 (Cass R. Sunstein ed., 2000) (emphasis added). See also Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998); Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation be the (Legal) Default Option?* 64 LA. L. REV. 403 (2004).

66. Timur Kuran & Cass R. Sunstein, *Controlling Availability Cascades*, in BEHAVIORAL LAW AND ECONOMICS 374, 395 (Cass R. Sunstein ed., 2000).

67. So the Massachusetts Supreme Judicial Court concluded with respect to a “civil unions” bill, “The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.” Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).

68. Giving special recognition to marriage does not imply support for punitive discrimination against other family forms, which we reject as harmful and unjust to children.

69. See note 35, *supra*.

70. Encouraging adoption by married couples, where a child lacks even one biological parent capable of raising him or her, is another important goal for public policy.

71. At least for children who are involved in nonfamilial adoptions. There is some evidence that kinship care may be better for children, at least in communities where the extended family is a cultural tradition. Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449 (2002).

72. WILLIAM J. DOHERTY, ET AL, WHY MARRIAGE MATTERS: 21 CONCLUSIONS FROM THE SOCIAL SCIENCES 6 (New York: Institute for American Values) (2002).

73. A similar idea was proposed by Elizabeth S. Scott and Robert E. Scott, *Marriage As Relational Contract*, 84 VA. L. REV. 1225 (1998). See also John Crouch, *No-Fault Divorce Laws and Divorce Rates in the United States and Europe: Variations and Correlations*, in THE FAMILY IN THE NEW MILLENNIUM: PROTECTING THE NATURAL AND FUNDAMENTAL GROUP UNIT OF SOCIETY (Scott A. Loveless & Thomas B. Holman eds., forthcoming 2006).

A model for such legislation might be found by amending the Virginia rule.

Va. Code Ann. § 20-91 (2006) (Grounds for divorce; other grounds include adultery, felony conviction with confinement for more than one year with no subsequent cohabitation, and cruelty or desertion after a year):

A. A divorce from the bond of matrimony may be decreed:...(9)(a) On the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year. In any case where the parties have entered into a separation agreement and there are no minor children either born of the parties, born of either party and adopted by the other or adopted by both parties, a divorce may be decreed on application if and when the husband and wife have lived separately and apart without cohabitation and without interruption for six months....; as follows:

Proposed revision:

A. A divorce from the bond of matrimony may be decreed:... (9)(a) On the application of [both parties] if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year, [or by either party when the husband and wife have lived separate and apart without any cohabitation and without interruption for two years]. In any case where the parties have entered into a separation agreement and there are no minor children either born of the parties, born of either party and adopted by the other or adopted by both parties, a divorce may be decreed on application if and when the husband and wife have lived separately and apart without cohabitation and without interruption for six months....”

74. With the passage of the administration’s Healthy Marriage Initiative, federal funds are now available for exactly this kind of intervention. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7103, 120 Stat. 138 (to be codified at 42 U.S.C. 603(a)(2)).

## Signatories

*Affiliations listed for identification purposes only.*

Lawrence A. Alexander, *Warren Distinguished Professor of Law, University of San Diego School of Law*

Douglas W. Allen, *Burnaby Mountain Professor, Department of Economics, Simon Fraser University*

Helen M. Alvare, *Associate Professor of Law, Columbus School of Law, The Catholic University of America*

Eric G. Andersen, *Associate Dean and Professor of Law, University of Iowa College of Law*

Ralph C. Anzivino, *Professor of Law, Marquette University Law School*

Matthew J. Astle, *Associate, Wiley Rein & Fielding (Washington, DC)*

John S. Baker, Jr., *George M. Armstrong, Jr. Professor of Law, Louisiana State University Law Center*

Iain T. Benson, *Executive Director, Centre for Cultural Renewal (Ottawa, Ontario)*

Thomas C. Berg, *Professor of Law, University of St. Thomas School of Law (Minnesota)*

G. Robert Blakey, *William J. & Dorothy K. O'Neill Professor of Law, Notre Dame Law School*

David Blankenhorn, *Founder and President, Institute for American Values (New York, NY)*

Lackland H. Bloom, Jr., *Professor of Law, Dedman School of Law, Southern Methodist University*

Thomas G. Bost, *Professor of Law, Pepperdine University School of Law*

William S. Brewbaker III, *Professor of Law, University of Alabama School of Law*

Lester Brickman, *Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University*

Margaret F. Brinig, *Sorin Professor of Law, Notre Dame Law School*

Kingsley R. Browne, *Professor of Law, Wayne State University Law School*

Don Browning, *Alexander Campbell Professor Emeritus of Ethics and the Social Sciences, University of Chicago Divinity School*

Ernest Caparros, *Professor of Law Emeritus, University of Ottawa*

Dan Cere, *Director, Institute for the Study of Marriage, Law and Culture (Montreal, Quebec)*

Ellen T. Charry, *Harmon Associate Professor of Systematic Theology, Princeton Theological Seminary*

Robert F. Cochran, Jr., *Louis D. Brandeis Professor of Law, Pepperdine University School of Law*

Lloyd Cohen, *Professor of Law, George Mason University School of Law*

John E. Coons, *Robert L. Bridges Professor of Law Emeritus, University of California, Berkeley School of Law*

Rev. John J. Coughlin, O.F.M., *Professor of Law, Notre Dame Law School*

John Coverdale, *Professor of Law, Seton Hall Law School*

John Crouch, *family law attorney, Crouch & Crouch Law Offices (Arlington, VA)*

Craig W. Dallon, *Associate Dean and Professor of Law, Creighton University School of Law*

Joseph W. Dellapenna, *Professor of Law, Villanova University School of Law*

George W. Dent, Jr., *Schott - van den Eynden Professor of Law, Case Western Reserve University School of Law*

David K. DeWolf, *Professor of Law, Gonzaga University School of Law*

William J. Doherty, *Professor of Family Social Science and Director of the Marriage and Family Therapy Program, University of Minnesota*

Richard F. Duncan, *Welpton Professor of Constitutional Law, University of Nebraska College of Law*

John E. Dunsford, *Chester A. Meyers Professor of Law, Saint Louis University School of Law*

John C. Eastman, *Henry Salvatori Professor of Law & Community Service, Chapman University School of Law and Director, The Claremont Institute Center for Constitutional Jurisprudence*

Jean Bethke Elshtain, *Laura Spelman Rockefeller Professor of Social and Political Ethics, University of Chicago Divinity School*

John Fee, *Professor of Law, J. Reuben Clark Law School, Brigham Young University*

Scott FitzGibbon, *Professor of Law, Boston College Law School*

Maggie Gallagher, *President, Institute for Marriage and Public Policy (Manassas, VA)*

William A. Galston, *Senior Fellow, The Brookings Institution*

Richard W. Garnett, *Lilly Endowment Associate Professor of Law, Notre Dame Law School*

George E. Garvey, *Vice Provost and Dean of Graduate Studies, The Catholic University of America*

James A. Gash, *Associate Professor of Law and Associate Dean for Student Life, Pepperdine University School of Law*

Robert P. George, *McCormick Professor of Jurisprudence, Princeton University*

Stephen Gilles, *Professor of Law, Quinnipiac University School of Law*

Mary Ann Glendon, *Learned Hand Professor of Law, Harvard Law School*

Norval Glenn, *Ashbel Smith Professor of Sociology, University of Texas, Austin*

Lino A. Graglia, *A. Dalton Cross Professor of Law, University of Texas School of Law*

Christopher B. Gray, *Professor and Chair, Department of Philosophy, Concordia University*

Timothy L. Hall, *Associate Provost and Professor of Law, University of Mississippi School of Law*

Scott C. Idleman, *Professor of Law, Marquette University Law School*

Arthur J. Jacobson, *Max Freund Professor of Litigation and Advocacy, Benjamin N. Cardozo School of Law, Yeshiva University*

William H. Jeynes, *Professor of Education, California State University, Long Beach*

Kris W. Kobach, *Daniel L. Brenner/UMKC Scholar and Professor of Law, UMKC School of Law*

Thomas C. Kohler, *Professor of Law, Boston College Law School*

Michael I. Krauss, *Professor of Law, George Mason University School of Law*

Michael G. Lawler, *Director, Center for Marriage and Family, Creighton University*

Randy Lee, *Professor of Law, Widener School of Law*

Leonard J. Long, *Professor of Law, Quinnipiac University School of Law*

Daniel H. Lowenstein, *Professor of Law, University of California, Los Angeles*

Calvin R. Massey, *Professor of Law, Hastings College of the Law, University of California*

Phillip L. McIntosh, *Associate Dean and Professor of Law, Mississippi College School of Law*

Pamela Rogers Melton, *Associate Director for Administration, Coleman Karesb Law Library, University of South Carolina*

Geoffrey P. Miller, *Stuyvesant P. Comfort Professor of Law, New York University School of Law*

Stephen Monsma, *Professor of Political Science Emeritus, Pepperdine University*



John E. Murray, Jr., *Chancellor and Professor of Law, Duquesne University*

Robert F. Nagel, *Rothgerber Professor of Constitutional Law, University of Colorado School of Law*

John Nagle, *John N. Matthews Professor and Associate Dean for Faculty Research, Notre Dame Law School*

Grant Nelson, *Professor of Law, University of California, Los Angeles*

Leonard Nelson, *Professor of Law, Cumberland Law School, Samford University*

Joel A. Nichols, *Associate Professor of Law, Pepperdine University School of Law*

Steven L. Nock, *Commonwealth Professor of Sociology, University of Virginia*

Laurence C. Nolan, *Professor of Law, Howard University School of Law*

Gregory Ogden, *Professor of Law, Pepperdine University School of Law*

David Popenoe, *Professor of Sociology and Co-Director, National Marriage Project, Rutgers University*

Stephen G. Post, *Professor of Bioethics, Case Western Reserve University School of Medicine*

Stephen B. Presser, *Raoul Berger Professor of Legal History, Northwestern University School of Law*

Charles J. Reid, Jr., *Associate Professor of Law, University of St. Thomas School of Law (Minnesota)*

Thurston H. Reynolds, *Professor of Law, Thomas Goode Jones School of Law, Faulkner University*

Robert E. Rodes, Jr., *Paul J. Schierl/Fort Howard Corporation Professor of Legal Ethics, Notre Dame Law School*

Paul H. Rubin, *Samuel Candler Dobbs Professor of Economics and Law, Emory University*

Ronald J. Rychlak, *MDLA Professor of Law and Associate Dean for Academic Affairs, University of Mississippi School of Law*

Mark S. Scarberry, *Professor of Law, Pepperdine University School of Law*

Susan Shell, *Professor and Chair, Department of Political Science, Boston College*

Peter Skerry, *Professor of Political Science, Boston College and Nonresident Senior Fellow, Brookings Institution*

Stephen F. Smith, *Professor of Law and John V. Ray Research Professor, University of Virginia School of Law*

Steven D. Smith, *Warren Distinguished Professor of Law, University of San Diego School of Law*

David M. Smolin, *Professor of Law, Cumberland Law School, Samford University*

Katherine Shaw Spaht, *Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center*

Andrew C. Spiropoulos, *Professor of Law and Director, Center for the Study of State Constitutional Law and Government, Oklahoma City University School of Law*

John Randall Trahan, *James Carville Associate Professor of Law, Louisiana State University Law Center*

J. David Velleman, *Professor of Philosophy, New York University*

Robert K. Vischer, *Associate Professor of Law, University of St. Thomas School of Law (Minnesota)*

David M. Wagner, *Associate Professor, Regent University School of Law*

Linda J. Waite, *Lucy Flower Professor in Urban Sociology, University of Chicago*

Lynn D. Wardle, *Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University*

Amy Wax, *Robert Mundheim Professor of Law, University of Pennsylvania Law School*

Margaret J. Weber, *Professor and Dean, Graduate School of Education and Psychology, Pepperdine University*

Barbara Dafoe Whitehead, *Co-Director, National Marriage Project, Rutgers University*

Robin Fretwell Wilson, *Professor of Law, University of Maryland School of Law*

John Witte, Jr., *Jonas Robitscher Professor of Law and Ethics and Director, Center for the Study of Law and Religion, Emory University School of Law*

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### **Institute for American Values**

1841 Broadway, Suite 211  
New York, NY 10023

Tel: (212) 246-3942  
Fax: (212) 541-6665

[info@americanvalues.org](mailto:info@americanvalues.org)  
[www.americanvalues.org](http://www.americanvalues.org)

### **Institute for Marriage and Public Policy**

P.O. Box 1231  
Manassas, VA 20108

Tel: (202) 216-9430

[info@imapp.org](mailto:info@imapp.org)  
[www.imapp.org](http://www.imapp.org)