

**BRIGITTE M. BODENHEIMER
MEMORIAL LECTURE ON
THE FAMILY**

Saving the Family from the Reformers

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INTRODUCTION

In contemporary debates over family values and saving the family, I find two of my worlds crossing. I am a feminist, and much of my writing is aimed at showing how law and social institutions that we take for granted, including the family, structure gender subordination in this society.¹ But I have also written about the importance of tradition and values — the inevitability of values, the importance of getting the right ones, and the role of tradition, even for feminists, both in transmitting and reshaping values.²

I come by my traditionalism honestly, having grown up in an extended family on a small farm in New England, where family and tradition were steeped in the Yankee work ethic. I value the family and traditions I grew up with, even as I remember that gender roles were clear and not always in my favor. The dissonance between my attachment to tradition and my feminism creates the perspective from which I examine public debates about family and values.

The current debate over the family in this society centers on the significance of one of the oldest and most “noble” of U.S. traditions: marriage.³ On one side of this debate, family law reformers decry the collapse of marriage and family values, citing the rise in the rates of divorce and the number of children born out of wedlock, and the increase in delinquency, crime, school drop-out rates, drug abuse and even poverty.⁴ The family

¹ See, e.g., Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994) (describing how workplace rules perpetuate and hide gender subordination); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (describing feminist methods for uncovering hidden gender bias in law); Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986) (analyzing how custody rules work against women).

² See Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303; see also Katharine T. Bartlett, *Teaching Values: A Dilemma*, 37 J. LEGAL EDUC. 519 (1987) (discussing values in context of legal education).

³ See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (describing marital privacy as “older than the Bill of Rights” and marriage as “a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred” and “an association for as noble a purpose as any involved in our prior decisions”).

⁴ See MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 3-4 (1996) (contending that overthrow of marriage culture and its replacement by postmarital culture is driving force behind almost all of America's gravest problems, includ-

is disintegrating, it is said, because the law encourages people to give up too easily on marriage⁵ and because fathers are not sufficiently engaged in the upbringing of their children.⁶ One prescription urged by reformers is to make divorce more difficult by eliminating no-fault grounds, instituting longer waiting periods, or both.⁷ This solution has popular appeal, at least in the abstract. Half of the respondents in a 1997 Time/CNN poll believed that divorce should be harder to get, and 61% thought

ing crime, poverty, welfare dependence, homelessness, educational stagnation, and child abuse); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 189 (1997) (arguing that divorce was primary generator of new forms of inequality, disadvantage, and loss for American children, and that divorce has spawned generation of angry and bereaved children who have harder time learning, staying in school, and achieving at high levels; in addition, divorce contributed to welfare dependency, to tide of fatherless juveniles filling courts and jails, and to increased risks of unwed teen parenthood).

⁵ See GALLAGHER, *supra* note 4, at 148-52 (arguing that no-fault divorce made divorce matter of private preference leading individuals to get divorces too quickly without working hard enough to save their marriages); WHITEHEAD, *supra* note 4, at 66-73 (arguing that "divorce ethic" brought about by no-fault divorce law relieved divorcing couples of their commitments to work to preserve their marriages); see also Walter Kirn, *The Ties that Bind: Should Breaking Up Be Hard to Do? The Debate About Divorce Rages on*, TIME, Aug. 18, 1997, at 48, 49 (reporting that 45% of people surveyed in Time/CNN poll saw that main reason for increase in divorce is that couples do not take marriage seriously).

⁶ See generally DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995); DAVID POPENOE, *LIFE WITHOUT FATHER* (1996).

⁷ See, e.g., Lynn D. Wardle, *Divorce Violence and the No-fault Divorce Culture*, 1994 UTAH L. REV. 741 (1994); Christopher Lasch, *Who Owes What to Whom?*, HARPER'S, Feb. 1991, at 47-48 (proposing constitutional amendments prohibiting divorce to parents with children under age 21 and requiring that fathers marry mothers of their children); Barbara Dafoe Whitehead, *Dan Quayle Was Right: Harmful Effects on Divorce on Children*, ATLANTIC, Apr. 1993, at 47, 71 (suggesting two-tiered system of divorce law for couples with and without minor children and reintroduction of some measure of fault in divorce, at least in awarding alimony or dividing marital property).

The reintroduction of fault is also urged by some commentators representing a more progressive legal tradition. See, e.g., Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994) (arguing that no-fault divorce has increased incidence of domestic violence); Barbara Bennett Woodhouse, with comments by Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525 (1994) (debating benefits and risks to women of making fault relevant in divorce proceedings).

Some of those urging the institution of longer waiting periods also appeal to a more liberal tradition. See, e.g., William A. Galston, *Divorce American Style*, 124 PUB. INTEREST 12 (1996) (proposing one-year waiting period for mutual consent divorces and five-year waiting period for unilateral no-fault divorces); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990) (urging enforcement of voluntary precommitment agreements by parties to limit availability of divorce and mandatory rules making divorce less available when there are children).

divorce should be harder to get if the couple has children.⁸ Another prescription urged by reformers is a greater commitment to fatherhood. Some seek this commitment through strengthening the idea of a masculine, marriage-based fatherhood.⁹ Others wish to revive the stigma of out-of-wedlock birth.¹⁰ Still others stress the importance of fathers' rights at divorce to equal participation in their children's lives.¹¹ Reformers also argue that mothers must be more responsible, which for women with husbands usually means staying home and taking care of their children,¹² while for mothers who would otherwise be welfare-dependent it means getting out of the home and into the workforce.¹³

At the other end of the ideological spectrum, academic critics of the conservative family reform agenda dismiss efforts to revive the nuclear family as nostalgic yearnings toward some mythical time in the 1950s when it was supposed that most people lived

⁸ See Kirn, *supra* note 5, at 48.

⁹ See BLANKENHORN, *supra* note 6, at 167-70, 223 (critiquing notion of "better divorce" and arguing that "marriage constitutes an irreplaceable life-support system for effective fatherhood"); POPENOE, *supra* note 6 (stressing unique attributes of fathers and importance of marriage in sustaining fatherhood).

¹⁰ See CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980*, at 178-81 (1984) (describing how status differences among poor, including those based on illegitimacy, establish virtue and perform socially useful functions); William Bennett & Peter Wehner, *Shifting Targets in the Welfare Trenches*, WASH. TIMES, Jan. 25, 1994, at A14 (proposing end to all forms of public assistance for anyone having children out of wedlock, elimination of visitation rights for illegitimate fathers, and easier adoption rules as part of general strategy of increasing social stigma and economic penalties associated with illegitimate births); see also Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 MICH. J. RACE & L. 491, 527-30 (1996) (defending system of welfare in which benefits are extended selectively to intact, two-parent families and not to single mothers bearing children out of wedlock).

¹¹ See, e.g., Ronald K. Henry, "Primary Caretaker": *Is It a Ruse?*, 17 FAM. ADVOC. 53 (1994) (advocating post-divorce joint custody); DAVID L. LEVY, *THE BEST PARENT IS BOTH PARENTS* 12 (1993); DON CHAVEZ, *LET THE FATHERS RETURN*, MINORITY REPORT OF THE REPORT TO CONGRESS OF THE U.S. COMMISSION ON INTERSTATE CHILD SUPPORT 357 (1992); Jed H. Abraham, "The Divorce Revolution" Revisited: *A Counter Revolutionary Critique*, 9 N. ILL. U. L. REV. 251 (1989) (presenting economic argument for post-divorce joint custody).

¹² See Eileen McNamara, *Mother on Trial in Au Pair Case*, BOSTON GLOBE, Oct. 4, 1997, at B1 (describing accusations that mother whose child died while in care of au pair was interested in her career at expense of her child); see also Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 464-83 (1996) (reviewing rules, incentives, and restrictions that penalize working mothers).

¹³ See Charles Murray, *What to Do About Welfare*, COMMENTARY, Dec. 1994, at 26; William J. Bennett, *The Best Welfare Reform: End It*, WASH. POST, Mar. 30, 1994, at A19.

happily in nuclear families, but when in fact “stable” families masked family violence, fixed gender roles, isolation, and poverty.¹⁴ Rickie Solinger has described how during this same period poor, black, unmarried mothers were scapegoated for society’s moral ills.¹⁵ Some have criticized the long-standing conservative attack on unwed mothers as thinly veiled racism.¹⁶ Others criticize the structural features of the family that serve to subordinate women to men.¹⁷ Still others highlight the exclusivity of a reform agenda aimed at promoting the traditional nuclear family and the extent to which the agenda’s assault on single-parent families serves little purpose other than to further stigmatize these families and strengthen the self-fulfilling prophecy that they are inferior.¹⁸

Together these “progressive” critiques have fueled an alternative family reform agenda that seeks both to be realistic about the value and limits of family and to support families in their many different forms. While this is the agenda with which I generally associate myself, a minority of reformers within this circle that urges abandonment of the nuclear family as a societal ideal. Martha Fineman, for example, would eliminate special rules governing husband and wife relationships, including marriage and divorce rules, and treat adult sexual partners like any other adults who have business or intimate relationships accord-

¹⁴ See STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992); LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 3 (1988) (describing periods of anxiety about decline of family, which escalates in periods of social stress, even though “popular image of what families were supposed to be like” is “by no means a correct recollection of any ‘traditional family’”); see also JOHN R. GILLIS, *A WORLD OF THEIR OWN MAKING: MYTH, RITUAL, AND THE QUEST FOR FAMILY VALUES* 3 (1996) (“[O]ne thing that never seems to change is the notion that family is not what it used to be.”).

¹⁵ See RICKIE SOLINGER, *WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE* (1992).

¹⁶ See, e.g., JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994); LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *YALE L.J.* 1563 (1996) (book review).

¹⁷ See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 25-28 (1995) (discussing nuclear family as “a foundational patriarchal structure”); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); JUDITH STACEY, *BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH CENTURY AMERICA* 7-8, 269-70 (1990).

¹⁸ See, e.g., NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* (1997).

ing to the ordinary rules governing contracts, torts, crimes, and property.¹⁹

My view is that the family needs to be rescued from reformers at both ends of the spectrum. In this Lecture I will have the most to say about conservative family law reformers who seek to strengthen marriage through the revival of fault-based divorce and other strategies that I believe are doomed to failure and unlikely to help those whom reformers claim should most benefit — women and children. This Lecture also, however, defends marriage and the nuclear family, in its many varieties, as a positive institution to be valued and strengthened. To the extent that some reformers may seek to undermine marriage as a societal ideal, I resist these efforts. My reasons are pragmatic. Marriage in this society is still an important ideal. Marriage rates remain high²⁰ and most unmarried adults want, or expect, to marry.²¹ People in the United States also continue to believe in traditional marriage values, even though they do not always act on these values.²² The appeal of marriage makes it an important resource for transmitting and reinforcing the values of commitment and responsibility thought to be important to fami-

¹⁹ See FINEMAN, *supra* note 17, at 228-29; see also STACEY, *supra* note 17, at 269 (arguing that “all domestic people” should “work to hasten” demise of family as “ideological concept that imposes mythical homogeneity on the diverse means by which people organize their intimate relationships”).

²⁰ The marriage rate for the 12-month period ending June 1997 was up 2% from the previous year. See NATIONAL CTR. FOR HEALTH STAT., BIRTH, MARRIAGES, DIVORCES, AND DEATHS FOR JUNE 1997, MONTHLY VITAL STAT. REP. (NO. 6) 2 (1988) [hereinafter HEALTH STAT. FOR JUNE 1997]. The percentage of married adults declined from 66% in 1980 to 60% in 1996, however, in part because people are waiting longer to get married. See Thomas Hargrove & Guido H. Stempel III, *What an Institution? Poll: 89% Would Wed Again*, ARIZ. REPUBLIC, Feb. 14, 1998, at A1 (citing statistician from U.S. Census Bureau).

²¹ Polling data shows that of unmarried U.S. adults, half say they want to marry, a quarter say they want to remain single, and a quarter say they are uncertain or consider themselves too old to marry. See *id.*

²² For example, in a 1998 Wall Street Journal/NBC News poll of 2003 adults, nine out of 10 said that extra-marital affairs are “always wrong” or “almost always wrong.” See Jackie Calmes, *Ninety Percent Oppose Adultery; Divorce Criticized*, WALL ST. J., Mar. 5, 1998, at 12. Surveys have found this same margin for the past three decades. See *id.* “There is no gender gap; young and older Americans agree.” *Id.* Eighty-five percent of respondents to the poll believe that fidelity to a spouse is “very important,” which is slightly more than was registered in the 1970s. See *id.*

lies and children. It makes no sense to give up this valuable resource when the needs of individuals for family belonging and nurture are so great.

This Lecture is about marriage. That does not mean that I believe marriage is the only appropriate vehicle for raising children or nurturing adults; my view is, rather, that marriage is worth strengthening because its popularity and its associations with familial responsibility and commitment to others make it too beneficial a resource to abandon. At the same time, if the goal is to provide greater stability for families, marriage should not be the only concern. Fair rules for addressing nonmarital cohabitation and parenthood are as necessary as fair rules relating to marriage.

The emphasis of this Lecture on concepts of fairness and family welfare over morality is not intended to suggest that the law has no appropriate role to play in expressing and reinforcing the moral principles of the community. Family law is soaked in moral judgments that both reinforce the law and are reinforced by it. At some level, the question is not whether family law should reflect moral principles but what those principles will be. When it comes to the moral principles the state should be trying to reinforce, I favor respect or moral accommodation for a broad range of family forms that are capable of providing nurturing environments to its members. In today's debates over the family, however, speaking in moral terms is too readily associated with one set of specific, conservative values to the exclusion of other values. Since the moral principle I support accepts a broad range of family types, notwithstanding the deeply conflicting moral foundations of some of those types, I usually find moral terminology more confusing than helpful and try to avoid it.²³

²³ The debate over the appropriate role of the law in reinforcing a community's moral standards is well beyond the scope of this Lecture. The outlines of the debate in contemporary legal philosophy were set by Lord Devlin and H.L.A. Hart. Compare PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) (defending, in context of criminal proscriptions of homosexual behavior, use of law to uphold society's moral principles), with H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963) (arguing that simply because conduct is, by common standards, immoral is not sufficient basis for use of criminal law to prohibit it). For a discussion of the meaning of "moral accommodation," see AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 79 (1996).

It is important to note, however, that it is the value I place on family diversity and on the freedom of individuals to choose from a variety of family forms, rather than my commitment to avoiding value judgments, that drives the ideas set forth in this Lecture. This same value leads me to be generally opposed to efforts to standardize families into a certain type of nuclear family because a majority may believe this is the best kind of family or because it is the most deeply rooted ideologically in our traditions. I do not favor accommodation of all possible family forms. For example, I oppose families based on incestuous relationships because of the high risk such relationships raise for exploitation, and I oppose family relationships whose terms are set through violence and abuse.²⁴ Many nuclear and non-nuclear family forms exist in addition to the traditional nuclear family, however, that offer the possibility of healthy intimate relationships capable of nurturing its members. In my view, public policy should support all these forms, not just the one most favored by the majority.

Family-standardizing reform that stigmatizes or treats as inferior certain of these family forms is problematic in a number of different ways. First, a reform that favors one type of family by disfavoring another penalizes those who do not, and perhaps cannot, conform to the ideal. When those wounded are the children on whose general behalf family-standardizing reforms are most often said to be justified, this consequence seems especially indefensible.

Second, in reducing the power of individuals to make their own family decisions, family-standardizing reform reduces the capacity of individuals to develop as moral beings. Even those who would make the same moral choices without the state's legal coercion are diminished by it, since it deprives them of the opportunity to exercise responsibility without coercion.²⁵ In this sense, family-standardizing reform does not help shape moral individuals so much as moral-behaving individuals. The distinc-

²⁴ The issue of polygamy is somewhat more difficult. See David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997) (accepting that same arguments made on behalf of same-sex marriage might be applicable to polygamous families).

²⁵ See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 300 (1988) ("Authentic responsibility can develop only where a person is free to act virtuously or not.").

tion is important, given that the difference between a healthy, effective family and a dysfunctional one are often those day-to-day family behaviors that cannot be monitored by the state. In this regard, supporting families, even if a majority believes they are less-than-ideal in form, may contribute to higher levels of responsibility and commitment among family members than channeling individuals into ideal family norms they would not otherwise have chosen.

Most importantly, as mentioned above, family-standardizing reform threatens the very diversity and notions of individual freedom on which more robust notions of the community and family depend. These two values go hand in hand. Individual freedom is too often treated in debates over the family as the new culprit that threatens family, commitment, and community.²⁶ Individual freedom is better viewed as what defines us as a community, and enables the choices that give this society, for all of its problems, its texture and richness.²⁷ The family is important not because there exists one kind of family that will make us all into the same kind of moral beings, but because both as individuals and society, we are enriched by family cultures that support the many diverse ways in which people live their lives.²⁸

For all these reasons, I generally prefer family-enabling measures that protect and strengthen families as they exist, to family-standardizing reforms designed to make families conform to a set ideal.²⁹ Family-enabling measures seek to ensure fairness between individuals involved in relationships and protect those who need protection, rather than pressing individuals into certain versions of those relationships. Provisions to protect individuals from domestic violence fit this family-enabling model of reform, as do measures helping to accommodate work and family and to improve the economic security of economically vulner-

²⁶ See, e.g., WHITEHEAD, *supra* note 4, at 56-58.

²⁷ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (stating that basic reasons for protecting family under Fourteenth Amendment include fact that institution of family, which is "larger conception" than nuclear family, is "deeply rooted in this Nation's history and tradition"); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²⁸ See GILLIS, *supra* note 14, at 225-40 (observing and supporting evolution of new family cultures to support many diverse ways in which people live their lives).

²⁹ See Chambers, *supra* note 24, at 81 (advocating policy of "supportive tolerance").

able families. The American Law Institute ("ALI") has been developing principles for spousal support, property division,³⁰ child custody,³¹ and child support³² that also pursue this reform model. While I summarize some of these principles in this Lecture, its purpose is less to present a full agenda for such reforms than to defend family enabling reform as a better approach for strengthening families than family-standardizing reform.

I. WHY STRENGTHENING TWO-PARENT FAMILIES IS A VALID POLICY GOAL

That the two-parent family is in decline is not in serious dispute. The proportion of children under eighteen years of age living with both parents declined to 69% in 1995 from 85% in 1970 and 88% in 1960. Blacks have the highest rate of one-parent households; 56% of black children live with one parent, as compared to 21% of white children and 33% of Hispanic children.³³ It is often said that about half of all children born between 1970 and 1984 are likely to spend some time in a mother-only family.³⁴ Frank Furstenberg and Andrew Cherlin have estimated that if the divorce rate remains high and nonmarital childbearing continues its upward trend, the figure could reach 60%.³⁵

There is less consensus on the *consequences* of growing up in a single-parent family. Opinions range from gloomy accounts of

³⁰ See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft, Part I, Feb. 14, 1997) [hereinafter ALI Proposed Final Draft, Part I].

³¹ See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 3, Part I, Mar. 20, 1998) [hereinafter ALI Tentative Draft No. 3, Part I].

³² See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 3, Part II, Apr. 8, 1998) [hereinafter ALI Tentative Draft No. 3, Part II].

³³ See BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS SERIES P23-193, HOW WE'RE CHANGING 1 (1997).

³⁴ This claim is based on research by Larry Bumpass and James Sweet. See Larry L. Bumpass & James A. Sweet, *Children's Experience in Single-Parent Families: Implications of Cohabitation and Marital Transitions*, 21 FAM. PLAN. PERSP. 256 (1989).

³⁵ See FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 11 (1991).

the devastation of divorce to children³⁶ to reports that divorce can be liberating to children and give them certain psychological advantages, such as "greater insight and freedom as adults in deciding whether and when to marry," relief from "excessive dependency on their biological parents,"³⁷ and better relationships with their parents.³⁸

The truth, as usual in such matters, lies somewhere in between. Those who emphasize the negative effects of divorce on children rely on work by Sara McLanahan and Gary Sandefur that shows, in fact, that most children raised outside of traditional nuclear families do not appear to suffer as a result of it.³⁹ At the same time, however, children of divorced or never-married families as a group do worse on all measurable indicators than children living with both parents.⁴⁰ Children living in single-parent families are twice as likely to drop out of school, twice as likely to be teenage mothers, and one and a half times as likely to be chronically unemployed.⁴¹ Single parenthood also increases the risk that children will commit crimes as juveniles, experience a lower standard of living, and have problems in school.⁴² Whites are the most affected. "Family disruption in-

³⁶ See, e.g., GALLAGHER, *supra* note 4, at 34 ("The evidence is now overwhelming that the collapse of marriage is creating a whole generation of children less happy, less physically and mentally healthy, less equipped to deal with life or to produce at work, and more dangerous to themselves and others.").

³⁷ SUSAN GETTLEMAN & JANE MARKOWITZ, *THE COURAGE TO DIVORCE* 86-87 (1974).

³⁸ See *id.* at 94-95.

³⁹ See SARA MCLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* (1994). While McLanahan and Sandefur do find increased risks of high school drop-out, pregnancy, and other negative consequences from divorce, see *infra* notes 43-44, they also note that most children of family disruption do not experience these negative effects. See *id.* at 58, 61-62; see also Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 *THE FUTURE OF CHILDREN* 143, 146 (1994) (stating that while average well-being score of children of divorce is lower than average score of children whose parents have not divorced, large proportion of children in divorced group score higher than average score of children in nondivorced group).

⁴⁰ See MCLANAHAN & SANDEFUR, *supra* note 39, at 39-63.

⁴¹ See *id.* at 41, 53-54 (stating that risk of teenage pregnancy is doubled for women born after 1953); see also *id.* at 48-49 (comparing "idleness" between children of one- and two-parent families).

⁴² See *id.* at 137 (stating that juvenile homicide and robbery rates are more common in communities with high number of single-mother families); *id.* at 79-84 (finding that family disruption results in fewer economic resources available for children); *id.* at 144 (concluding that children who grow up with only one parent are more likely to have problems in school).

creases the chances of school failure by 2.5 for the average white child, 2.0 for the average Hispanic child, and 1.8 for the average black child.”⁴³ Some studies show that the impact on girls is greater than the impact on boys.⁴⁴

Until recently, the research did not tell us anything about cause and effect — whether the risks arise from divorce itself or from other factors that may be correlated with divorce, such as predivorce marital conflict between the parents, lower economic resources available to the family after divorce, or characteristics of the child that might strain the relationship of parents. Some newer research by Paul Amato and Alan Booth, however, suggests that the separation of the parents is itself a risk factor, at least in some families.⁴⁵ This research is based on telephone survey data that compared, among other things, the well-being of children whose parents divorced with the well-being of children whose parents did not divorce, according to the level of parental conflict in the home. Amato and Booth found that while children of parents in high conflict marriages who divorced showed higher levels of social integration and general happiness, children of parents in low-conflict marriages did better when their parents stayed together rather than divorced.⁴⁶

The economic deficits experienced by children of divorced or never-married parents can be corrected through stronger child support enforcement and public subsidies to mitigate the effects of single-parenthood. McLanahan and Sandefur estimate, however, that the income loss associated with divorce accounts for only about half of the disadvantages associated with living in a single-parent family; “too little supervision and parental involve-

⁴³ *Id.* at 58-59.

⁴⁴ *See id.* at 56-57 (describing one study showing 18% difference in dropout rates for girls in one- and two-parent families compared with 15% difference for boys, and discussing another study recording 11% difference for girls and 7% difference for boys).

⁴⁵ *See* PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (1997).

⁴⁶ *See id.* at 142-43, 200-02.

ment and too much residential mobility account for most of the remaining disadvantage."⁴⁷ Having two parents, they conclude, is a key dimension of these factors.

II. THE LIMITS OF FAMILY-STANDARDIZING REFORM

Even accepting that divorce is a risk factor for school dropout, teenage pregnancy, unemployment and various psychological adjustment difficulties, it is not clear what law and policy could reduce this risk. Reformers favoring family-standardizing reforms approach the problem by attempting to eliminate or reduce the number of families that do not conform to the nuclear family ideal. Proposals to tighten the grounds for divorce or to have most children in joint custody arrangements in the event of divorce are examples of family-standardizing reforms.

Advocates of family-enabling reforms, on the other hand, accept the fact of diverse family forms and attempt to secure the welfare of individuals regardless of the kind of family in which they live. Measures to ensure better social support systems for poor families, more adequate child support awards for children who do not live with both parents, and rules for spousal support and the division of property at divorce that take into account disproportionate sacrifices one party may make on behalf of the family exemplify this brand of reform.

In this Part, I explain some of the difficulties with family-standardizing reform by holding up for critical review the family-standardizing proposals that currently are receiving the most attention — namely, proposals to tighten the grounds for divorce. First, I examine the empirical and logical flaws in the arguments for these proposals. Then I explore the concept of a covenant marriage as a possible compromise that some argue would avoid some of the objections to stricter divorce laws while allowing greater public expression of the marriage ideal. I con-

⁴⁷ See MCLANAHAN & SANDEFUR, *supra* note 39, at 144. McLanahan and Sandefur estimate that residential mobility accounts for 25% of the increase in risk of dropping out of high school and nearly 30% of the increase in risk of a teen birth. *See id.* at 131. The average child from a two-parent family experiences approximately 1.4 moves, while the average child from a single-parent family experiences 2.7 moves, and the average child from a step-family experiences 3.4 moves. *See* Sara S. McLanahan, *The Consequences of Single Motherhood*, 18 AM. PROSPECT 48, 52 (1994).

clude with some thoughts on divorce reform from the perspective of those who are supposed to benefit most — women and children.

*A. What Is Missing from the
Case for Restricting Access to Divorce?*

While the rhetoric in support of divorce law reform is self-consciously moral in tone,⁴⁸ modern divorce reformers attempt to justify their proposals for restricting access to divorce not solely on moral grounds but also on the grounds that children are damaged by divorce and that they grow up healthier and more well-adjusted when their parents stay together.⁴⁹ There are, however, serious weaknesses in the instrumental case made for divorce reform. This section reviews these difficulties.

First, while the research shows that children who grow up in two-parent families do better than those who do not, it has not been shown that children benefit when the reason parents stay together is that the law makes them do so. The research showing that children do better when their low-conflict parents stay together studies families who are the product of the “divorce culture,” not the “marriage culture” reformers seek to revive.⁵⁰ If the critics are correct that the law offers no support to stay married, those who stay married must do so for other reasons. One possibility is that they have personal characteristics or live in circumstances that make it less likely they will divorce. They could be more understanding, accommodating persons than their divorced counterparts; they could enjoy better

⁴⁸ Indeed, a central theme in the family values movement has been the need to revive the vocabulary of morals and values. See, e.g., AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY* 32-38 (1993) (arguing for need to articulate and raise “moral voice”); GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES* 256-57 (1995) (calling for revival of moral and civic virtues); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985) (noting and criticizing decline in moral discourse in family law); see also CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 108 (1995) (arguing that “privatization of morality is one more indication of the collapse of the community”).

⁴⁹ See, e.g., GALLAGHER, *supra* note 4, at 31-37; POPENOE, *supra* note 6, at 57-59; WHITEHEAD, *supra* note 4, at 153-81.

⁵⁰ These terms were popularized by Barbara Dafoe Whitehead. See WHITEHEAD, *supra* note 4, at 182-95.

relationships with their children; they could be more self-sacrificing; they could live under less stress or be better able to handle it; or they could have less difficult children. It seems at least possible that these same factors that may make them less divorce-prone could also explain the favorable outcomes for their children. In other words, foregoing divorce may be correlated with other factors that forecast good outcomes for children without itself being a significant causal factor. To test this hypothesis, it would not be enough to compare the children whose parents stayed together with those who did not; it would be necessary to compare the children whose parents divorced with some set of hypothetical children whose parents would have divorced, but stayed together because the law told them they had to do so.

Second, even if children benefitted from the law making their parents stay together, it has not been demonstrated that tightening the rules allowing exit from marriage would actually keep parents together. The argument for tighter restrictions on divorce usually assumes that the rising divorce rate in this country has been due to the loosening of divorce law and; thus, that re-tightening the laws would reverse the trend.⁵¹ As others have noted, however, the big increase in divorce in this country began in the 1960s, well before the first complete no-fault divorce law came into effect in California in 1970.⁵² After virtually all states had some form of no-fault divorce, the divorce rate did not level off; it continued to rise, suggesting other factors were responsible, most especially the economic trends that brought women into the workforce and that worsened employment prospects for many men.⁵³ The relationship between divorce law

⁵¹ See, e.g., GALLAGHER, *supra* note 4, at 148 (noting that no-fault divorce laws increased divorce rate at least in some jurisdictions); WHITEHEAD, *supra* note 4, at 143 (linking no-fault divorce reform with abandonment of norm of marital permanence); see also ETZIONI, *supra* note 48, at 82 (arguing that no-fault divorce has had effect of sanctioning divorce).

⁵² See Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for No-Fault Divorce*, 1997 U. ILL. L. REV. 719, 724-25 (noting steady rise in American divorce rate since 1860 and steep climb since mid-1960s); Gerald C. Wright, Jr. & Dorothy M. Stetson, *The Impact of No-Fault Divorce Law Reform on Divorce in American States*, J. MARRIAGE & FAM. 575, 577 (1978) (noting increase in divorce rates after enactment of no-fault divorce was part of pattern beginning before no-fault divorce and cannot be attributed to change in law); Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1450-52 (1998).

⁵³ Several commentators have argued that the rise in divorce is due to numerous

and the divorce rate will be put in further question if the divorce rate begins to decline without substantial change in the law.⁵⁴

Just as looser divorce laws have not caused higher divorce rates, tighter divorce laws are not likely to keep couples together. It is noteworthy in this regard that although a significant majority of states retain fault grounds for divorce along with no-fault grounds,⁵⁵ and although in at least twenty-two states fault still plays some role in determining spousal support, the division of marital property, or both,⁵⁶ the presence of fault in a state's divorce regime has not appeared to make any difference in divorce rates. According to Ira Ellman, the states with the highest divorce rates do not necessarily have the easiest divorce grounds. He cites 1986 figures showing that the no-fault Western states and the fault-oriented Southern states had similar divorce rates of 5.6 and 5.5 per 1000; the divorce rate of Midwestern states, which tend to combine fault and no-fault divorce grounds, was 4.4, while the more fault-oriented Northeast had a rate of 3.6.⁵⁷ In New York, divorce is available only under fault

economic and social forces apart from divorce laws themselves. See, e.g., ANDREW CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 56 (rev'd ed. 1992) (arguing that increased labor force participation of young married women will ultimately be seen as most important stimulus to rise in divorce after 1960); STACEY, *supra* note 17, at 119, 120-21 (arguing that "[t]he losses in real earnings and in breadwinner jobs, the persistence of low-wage work for women and the corporate greed that has accompanied global economic restructuring have wreaked far more havoc on Ozzie and Harriet Land than have the combined effects of feminism, sexual revolution, gay liberation, the counterculture, narcissism and every other value flip of the past half-century"); McLanahan, *supra* note 47, at 54-55 (stating that three factors primarily responsible for rise in single motherhood are growing independence of women, decline in men's earning power relative to women's, and shift in social norms relating to nonmarital childbearing and individual freedom); Arlene Skolnick, *Family Values: The Sequel*, AM. PROSPECT, May/June 1997, at 86 (arguing that family change and increase in family stress is due to shift to postindustrial, globalized economy, which reversed gender-based division of labor and polarized population economically).

⁵⁴ It is a little early to tell whether this decline is in fact occurring, but the divorce rate for the 12-month period ending with June 1997 was 2% lower than the rate for the previous year (4.3 as compared with 4.4 per 1000 population). See HEALTH STAT. FOR JUNE 1997, *supra* note 20, at 1, 2.

⁵⁵ See Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 296 (1997) (citing 1987 sources; most jurisdictions retain fault grounds for divorce along with no-fault grounds).

⁵⁶ See Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 781-82 (1996) (cataloging states and finding that about half incorporates fault concepts in property division, alimony, or both).

⁵⁷ See Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers*

grounds or based on a separation agreement, which requires either mutual consent or, upon a showing of fault, a judicial separation order.⁵⁸ Yet the New York divorce rate is in line with that of other states in its region, slightly higher in fact than that of Massachusetts, New Jersey, and Pennsylvania, and the same as that of Connecticut.⁵⁹ Other states with more restrictive no-fault divorce rules also have not had significantly lower divorce rates.⁶⁰

Even if some connection could be established between divorce grounds and the divorce rate, there is reason to doubt whether the law's effects can be reversed. History makes clear that when divorce is limited to fault-based grounds, couples will collude in sham adulteries and other frauds, if necessary, to obtain their divorces. The practice of collusive divorce is well-documented in

Should Look Instead to the American Law Institute, 11 INT'L J. L., POL'Y, & FAM. 216, 239 n. 27 (1997). Ellman's analysis of regional patterns in divorce laws is set forth in Ellman & Lohr, *supra* note 52, at 753-54 and Ellman, *supra* note 56, at 776-82 (1996). He derives the divorce rate figures from NATIONAL CTR. FOR HEALTH STATISTICS, ADVANCE REPORT OF FINAL DIVORCE STATISTICS 1986, MONTHLY VITAL STAT. REP. (1989). Economists disagree about what the data shows. Compare H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437, 448, 452 (1986) (finding no role for changes in divorce law in explaining rising divorce rates, particularly when taking into account regional patterns); Douglas W. Allen, *Marriage and Divorce: Comment*, 82 AM. ECON. REV. 679 (1992) (disagreeing with some of Peters's methodologies including her use of regional dummies, and reworking her data to find some correlation between divorce grounds and divorce rate); H. Elizabeth Peters, *Marriage and Divorce: Reply*, 82 AM. ECON. REV. 686 (1992) (defending her study and reaffirming her conclusions); see also LEORA FRIEDBERG, DID UNILATERAL DIVORCE RAISE DIVORCE RATES? EVIDENCE FROM PANEL DATA (NBER Working Paper 6398, 1998) (adjusting for state fixed trends and finding that divorce grounds had effect on divorce rates and that stronger versions of unilateral divorce had greater effect than weaker versions did).

⁵⁸ See N.Y. DOM. REL. LAW § 170 (McKinney 1988).

⁵⁹ New York's and Connecticut's divorce rate was 3.7 per thousand from 1983 to 1988; the divorce rate was 3.2 in Massachusetts, 3.3 in Pennsylvania, and 3.6 in New Jersey. See FRIEDBERG, *supra* note 57, at tbl. 2.

⁶⁰ Until recently, no-fault divorce was not available in Mississippi, Tennessee, or Ohio without the mutual consent of the parties. The divorce rate of Mississippi was 7% lower than the regional average. The Tennessee rate was 8% higher than its regional average, and the Ohio rate was 12% higher. See Gordon, *supra* note 52, at 1452 n.118. Mississippi no-fault divorce law still requires mutual consent. See MISS. CODE ANN. §§ 93-5-1, -2 (1994) (allowing divorce only on fault grounds or on grounds of irreconcilable differences, which requires joint complaint of husband and wife). Ohio and Tennessee allow divorce on living separate and apart grounds without a mutual consent requirement. See OHIO REV. CODE ANN. § 3105.01(J) (Banks-Baldwin 1994) (allowing divorce after one year of separate living); TENN. CODE ANN. § 36-4-101 (allowing divorce after two years of separate living).

earlier fault-based divorce regimes.⁶¹ One scholar who documents the extensive fraud and collusion that accompanied fault-based divorce in the decade before the no-fault divorce revolution of the 1970s concludes that there were always ways around fault-divorce in the United States. Fault, this scholar writes, was “less a barrier and more a tunnel for divorce.”⁶² History also tells us that longer waiting periods or mutual consent rules do not mean fewer divorces but rather greater use of fault grounds for divorce. In the first half of the century, before modern no-fault statutes were enacted, many states allowed divorce based on separation periods ranging from two to ten years.⁶³ Few people obtained divorce based on these grounds, preferring instead a quicker divorce based on fault.⁶⁴ More recent experience tells the same story.⁶⁵

There is also reason to question whether the return of fault-only divorce or longer waiting period requirements would express a marriage-favorable message.⁶⁶ While a culture of no-fault may encourage behavior that is self-centered and self-gratifying — arguably inimical to marriage — a culture of fault encourages marriage partners to view marriage in terms of rights and wrongs — also arguably marriage-defeating.⁶⁷ Indeed, a culture

⁶¹ See J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 88-111 (1997); Lawrence M. Friedman & Robert V. Percival, *Who Suffers for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 66 (1976); Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303 (1950); Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121 (1936).

⁶² DIFONZO, *supra* note 61, at 111.

⁶³ See *id.* at 78-80.

⁶⁴ See *id.* at 80-81.

⁶⁵ See Ellman & Lohr, *supra* note 52, at 728 n.28 (citing Ohio experience under 1978 law requiring either two-year separation or fault, in which only 13% of divorcing couples used separation provision); see also JOHN EEKELAAR, *REGULATING DIVORCE* 37 (1991) (describing British experience with 1969 law requiring showing of fault, two-year separation based on mutual consent, or five-year separation without mutual consent, in which 73% used one of fault grounds).

⁶⁶ Making a stronger expression of society's commitment to marriage is a key justification for reform efforts to tighten divorce laws. See, e.g., MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* 63-111 (1987) (arguing for reforms in divorce law to reinforce idea of marriage as serious and durable commitment rather than idea of divorce as routine, normal process of transition and adjustment that occurs when marriage ceases to fulfill expectations of individual spouse); WHITEHEAD, *supra* note 4, at 182-95.

⁶⁷ I say “arguably” because here, as elsewhere noted in this Lecture, cause and effect

of blame is not necessarily any less individualistic and self-centered than a culture of no-fault. Domestic violence, for example, feeds on just this culture of blame and recrimination.⁶⁸ A husband who beats his wife because the vacuum marks in the carpet are not parallel, the children are too noisy, or dinner is too late may feel affirmed by the deepening moralization of marriage⁶⁹ rather than motivated to be more loving and responsible. His responses to a fault ideal are, to be sure, a perversion of it, but they are not the kind the state can hope to control through its divorce laws.

Domestic violence is an extreme example, but it is illustrative of a broader point. A marriage viewed as a balance sheet of rights and wrongs may be no better able, and perhaps even less able, to survive the modern stresses on marriage than one internalized as a series of accommodations and adaptations to the inevitable surprises and disappointments of married life that sometimes fails.⁷⁰ For one thing, if bad conduct is what it takes to qualify for a divorce, those who want divorce are encouraged to engage in it. Even no-fault rules requiring mutual consent may drive a party who wants a divorce to engage in marriage-destroying behavior in order to obtain the other spouse's consent.⁷¹

Furthermore, a fault-based system may discourage forgiveness or make it less acceptable to live with the transgressions of one's spouse. In this regard, Demie Kurz's study of 129 divorced women in Philadelphia is suggestive. The study found that the divorced women who seemed most sad about losing their husbands were those who had left them because their husbands had become involved with other women.⁷² Adultery is, of course,

are necessarily speculative; in addition, individuals respond in different ways to social cues and the definition of a good marriage varies by the preferences and personalities of the individuals involved.

⁶⁸ See CHARLOTTE FEDDERS & LAURA ELLIOT, SHATTERED DREAMS (1987), analyzed in Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2127 (1993) (describing dynamic of battery whereby husband abuses wife for infractions of his household rules).

⁶⁹ See *id.*

⁷⁰ For a debate on this and related points from feminist perspectives, see Woodhouse, *supra* note 7.

⁷¹ See Gordon, *supra* note 52, at 1457-58.

⁷² See DEMIE KURZ, FOR RICHER OR POORER: MOTHERS CONFRONT DIVORCE 192-93

the most significant marital "fault" recognized in our laws. Might some individuals, who under a less morally-charged system would prefer to keep their marriages intact, seek divorce because adultery is supposed to be unforgivable? If so, tighter divorce laws that are intended to produce more moral behavior in marriage might, in some cases, produce unnecessary divorce.

The fault message is also likely to backfire when it does not correspond to the standards by which a significant number of people actually live their lives. Although a majority of people say they think divorce laws should be more strict,⁷³ the continued high divorce rate, along with the history of rampant evasions of the law in the fault-divorce past,⁷⁴ suggest that such laws would not be widely followed in fact. In such a climate, disrespect for marriage, as well as for the law more generally, seems a more likely response to tighter divorce laws.⁷⁵

Critics of no-fault divorce charge that those supporting no-fault divorce "overvalu[e] the capacity of the law to engineer the 'happy' breakup of families."⁷⁶ The charge is unfounded. No-fault divorce does not presuppose the state can make divorces come out well — it only presupposes that it cannot maintain healthy marriages when one or both parties want out. It is those seeking to make divorce grounds more strict, rather than those favoring no-fault divorce, who are putting too much faith in the power of law. The reformers think that making divorce more difficult to obtain will make people behave better in marriage. This analysis ignores the variety of complex social factors and irrational human impulses over which the law has little control.⁷⁷ The notion that stricter divorce laws keep marriages to-

(1995).

⁷³ See Kirn, *supra* note 5, at 48.

⁷⁴ See *supra* notes 61-62 and accompanying text (chronicling evasion of law with fault-divorce).

⁷⁵ As one writer puts it, what respect is generated for marriage when to exit it, "grown adults . . . [must air] their personal grievances in public and concoct[] schemes to circumvent the law?" Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 632 (1997).

⁷⁶ See, e.g., BLANKENHORN, *supra* note 6, at 167; GALLAGHER, *supra* note 4, at 13-29; Wardle, *supra* note 7, at 755-58.

⁷⁷ See Gordon, *supra* note 52, at 1443-46, 1453-56 (arguing, based on work by Isaiah Berlin, Michael Oakeshott, and Judith Shklar, that social life is too complex, nonlegal influences too strong, and human nature too irrational for changes in divorce law to be successful in making people work harder to preserve their marriages).

gether also ignores the fact that people decide whether to marry as well as whether to divorce. If divorce is too difficult to get, or is perceived as unfair, marriage becomes less desirable and hence something to be avoided. Again, reforms intended to engineer more stable marriages may produce unintended effects: they may just engineer a higher rate of cohabitation and nonmarital births.⁷⁸

Some have suggested that the current high divorce rate is a product of a strong, not weak, view of marriage.⁷⁹ Margaret Talbot, for example, argues that the high divorce rate shows that people think marriage is so important to their lives that if their marriage is not a good one, they want the chance to try again.⁸⁰ Not only might a stronger view of marriage actually raise the divorce rate, it may also cause people to rush into marriage prematurely or without adequate investment in the search for a compatible mate. In attempting to strengthen the notion of marriage, reformers may inadvertently send the message that an unhappy marriage is better than no marriage at all. Ironically, perhaps what is most needed to strengthen marriage is not to convince people of the importance of marriage, but to encourage realism about marriage and consideration of alternatives to it.

Proposals to tighten divorce rules often longingly imagine a more involved, engaged community — one that might intercede to prevent ill-chosen marriages or to slow down couples contemplating a premature divorce.⁸¹ Inga Markovits's recent article telling of divorce in East Germany before reunion with the West

⁷⁸ See J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 820; see also Gary Wisby, *Divorce, Finding Fault with Breakups*, CHICAGO SUN-TIMES, Feb. 22, 1998, at 43 (quoting Professor Mary Becker as suggesting that if fault-based restrictions on divorce prevented divorce, husband would just move out and live with his girlfriend).

⁷⁹ See Margaret Talbot, *Love, American Style: What the Alarmists About Divorce Don't Get About Idealism in America*, NEW REPUBLIC, Apr. 14, 1997, at 30.

⁸⁰ See *id.*; see also GILLIS, *supra* note 14, at 133 (explaining that while institution of marriage seems to be in jeopardy, romantic love is more highly valued than ever before). J. Herbie DiFonzo makes this same point with respect to the rise in divorce rates in the 1940s: "The burgeoning divorce rate in the 1940s [from 2 to 3%] indicated . . . not a disparagement of marriage, but its opposite: 'modern couples demand more from marriage than their ancestors did.'" DIFONZO, *supra* note 61, at 93 (quoting Paul H. Landis, *Marriage Has Improved*, READER'S DIG., June 1953, at 13-15).

⁸¹ See, e.g., ETZIONI, *supra* note 48, at 32-34, 78-82.

should give proponents of these proposals second thoughts.⁸² There, the practice of divorce was based on the assumption that family morals could not be separated from civic morals.⁸³ Divorce involved audiences of colleagues and neighbors giving exhaustive testimony to establish whether a marriage had truly broken down enough to justify divorce, with the judicial ideal being one of active intervention and advice to help spouses stay together.⁸⁴ Convention encouraged a wife who wanted to preserve a marriage to approach her husband's superior at work and ask colleagues at the workplace to help save the marriage.⁸⁵ The process was filled with opportunities for judges and outside intervenors to give lectures to the couple seeking to divorce, and those who could not persuade the community that their marriage was beyond repair had their petitions suspended or denied.⁸⁶ Communitarians insist that the communitarian ideal is not an authoritarian state.⁸⁷ But it is difficult to imagine a family-standardizing, communitarian approach that does not pose a serious risk of the kind of intrusion and coercion that Markovits describes.

*B. Covenant Marriage: Contractual
Choice or Concealed Standardization?*

Some reformers have offered, as an alternative to a more general tightening of a state's divorce laws, the concept of contract or covenant marriage. Covenant or contract marriage permits couples a choice of divorce regimes. At the time of marriage, they may choose to subject themselves to the standard marriage package, or to a more rigorous set of rules making divorce less easily available. Such a choice means that those who want to preserve the divorce options available under the existing

⁸² See Inga Markovits, *The Road from "I" to "We": Family Law in the Communitarian State*, 1996 UTAH L. REV. 487 (discussing East German experience with "people's judges").

⁸³ See *id.* at 494.

⁸⁴ See *id.* at 492-508.

⁸⁵ See *id.* at 497.

⁸⁶ See *id.* at 498-500.

⁸⁷ See ETZIONI, *supra* note 48, at 12-13 (distinguishing Communitarians, who emphasize responsibility to family and community, from Authoritarians, who urge the imposition on all others of moral positions they believe in); see also *id.* at 47 (attempting to refute critique that communitarianism is authoritarian).

no-fault divorce regimes may do so while at the same time the state can legitimate and reinforce a more stable and enduring conception of marriage than no-fault divorce laws express. One state, Louisiana, now offers the covenant marriage option, allowing couples to bind themselves to a set of rules restricting divorce to one of the specified fault grounds or a separation period of two years⁸⁸ instead of the six months Louisiana otherwise requires.⁸⁹

In giving couples a choice, Louisiana's covenant marriage approach appears to enable rather than standardize families. What is not clear is whether couples faced with the option of a covenant marriage will find it a very meaningful choice. The problem is inherent in the dynamics of the marriage decision. Few people marry expecting to divorce.⁹⁰ To the extent divorce is unthinkable, individuals are likely to overvalue the positive message they are able to send to their intended spouse, their friends, and their families while undervaluing the importance of the potential divorce grounds they are giving up. If this occurs, covenant marriage, while it may strengthen the vows of the most committed, will also trap folks who have the weakest insights into the realities of married life.

Ironically, preserving covenant marriage as an authentic choice may depend upon its failure to catch on as the only "real" marriage worth having. So far, the option has not been widely exercised,⁹¹ in part because the churches have been slow to endorse it.⁹² In the first month, only 26% of 3000 marriage

⁸⁸ See LA. REV. STAT. ANN. § 9:307 (West Supp. 1998). This statute includes domestic violence as grounds for divorce; it is in this sense a "modern" fault alternative. See *id.*

⁸⁹ See LA. CIV. CODE ANN. art. 102 (West Supp. 1998).

⁹⁰ See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (reporting survey data showing that median response of marriage license applicants assessing likelihood that they would get divorced was 0%).

⁹¹ Nor has it caught on elsewhere. Efforts in other states to enact legislation allowing parties to choose a stricter form of marriage have not, as of yet anyway, been successful. See, e.g., Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, POL'Y REV., May/June 1996, at 8 (summarizing efforts to enact stricter form of marriage).

⁹² See Michael J. McManus, *Divorce is Difficult in "Covenant Marriage"*, FRESNO BEE, Nov. 29, 1997, at A13 (reporting that evangelicals were initially "quiet, fearing that the creation of a two-tiered marriage system might lead to a third tier permitting gay marriages," although they now strongly support it; that United Methodist bishop called law providing for covenant marriage "unnecessary, confusing and intrusive"; and that Episcopal bishop opposed reinstatement of option of fault-based system because we've been there, and it

licenses issued in Louisiana were for covenant marriages,⁹³ and several months later, the percentage had not yet increased.⁹⁴ This is an odd result in a society in which a majority of people think divorce should be harder to get,⁹⁵ but it suggests that covenant marriage is perceived, in fact, as a real option — one a couple is free to reject.

What happens, however, if churches do jump on board? What if churches will not perform marriage ceremonies except for parties willing to undertake the covenant option?⁹⁶ Other private associations will also have the power to extend and deny benefits based on the form of marriage one has chosen. Employers might extend certain family benefits only to families cemented by covenant marriage, much as many employers now distinguish between the married and unmarried. Private employers might even favor hiring employees who have entered covenant marriages on the theory they will be more stable employees.⁹⁷ Insurance rates or one's value in a wrongful death action

doesn't work); Bruce Nolan, *Bishops Back off Covenant and Marriage*, NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 1997, at A1, (reporting that Jewish and United Methodist leaders "have signaled little support for the new civil contract," that Louisiana's Roman Catholic bishops objected to requirements that premarital counseling explain higher standards for divorce since it would confuse or obscure church's teachings on permanence of marriage, and that Southern Baptist pastors, while generally disposed toward covenant marriage, have been slow to encourage it because they are unfamiliar with it). Also, the Catholic Church frowns on covenant marriages because the required precounseling mentions divorce. See *A Covenant for Couples*, WALL ST. J., Aug. 15, 1997, at A16.

⁹³ See *Covenant Gets Little Church Support*, DALLAS MORNING NEWS, Oct. 31, 1997, at 12D.

⁹⁴ See Leslie Zganjar, *Couple Making New Pledge in Marriage*, NEW ORLEANS TIMES-PICAYUNE, Feb. 15, 1998, at A4 (explaining that only 120 of 11,169 marriage licenses issued in Louisiana in first five months after covenant marriage was enacted were covenant licenses).

⁹⁵ See *supra* note 5 and accompanying text (reporting on attitudes of majority of public against divorce).

⁹⁶ See, e.g., Sandy Banisky, *Altering the Way to the Altar: Louisiana's New "Covenant Marriage" Option Forces Couples to Slow Down and Act Cautiously*, BALTIMORE SUN, Oct. 20, 1997, at 1A (describing Baptist minister who requires covenant marriage for all weddings); see also Jean Torkelson, *Pastors out to Toughen Marriage "Rules,"* ROCKY MOUNTAIN NEWS, Oct. 18, 1997, at 16D (discussing effort to get churches to agree to enforce minimum requirements for premarital counseling so that couples will find it difficult to get married without running into Christian counseling program).

⁹⁷ Almost half the states have nondiscrimination laws protecting marital status that could be interpreted to prohibit such a practice. See, e.g., CAL. GOV'T CODE § 12920 (West 1997); CAL. BUS. & PROF. CODE § 125.6 (West 1998); FLA. STAT. ANN. § 760.10 (West 1997); LA. REV. STAT. ANN. § 9:307 (West 1998).

may also come to depend upon one's marital sub-status. Maybe the state will get in on the act, using its tax laws to favor covenant marriages over noncovenant marriages, or providing higher social security benefits for widows of a covenant marriage.

Without safeguards to ensure that the covenant marriage option will not become easily subverted into a general tightening of divorce grounds, the stricter option must be examined and evaluated as if it were the only one available. Judged in this light, Louisiana's covenant marriage statute is not very troubling because the stricter covenant marriage divorce grounds are still reasonable, more liberal in fact than some states' existing divorce statutes.⁹⁸ The more popular covenant marriage proposals, however, would abolish no-fault divorce except when the parties agree to it.⁹⁹ These measures would constitute a significant and unjustified departure from existing law.

C. *Divorce Reform from the Perspective of Women and Children*

Whether tighter divorce laws are enacted directly or indirectly smuggled in through a contract or covenant marriage option, I have questioned whether they will have the desired effect of strengthening marriage. In this section, I suggest that not only are the anticipated benefits doubtful at best, but those most supposed to benefit from tightening divorce laws — women and children — may have, in fact, the most to lose from it.

⁹⁸ The laws of New York and Mississippi are the most strict, making no-fault divorce available only when the parties agree on the terms of the separation (New York) or on the existence of irreconcilable differences (Mississippi). *See supra* notes 58 & 60 and accompanying text. Several states require waiting periods of two years or longer to obtain a no-fault divorce. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/401 (West 1998) (requiring "in excess of two years" living separate and apart, plus showing of irreconcilable differences causing irretrievable breakdown of marriage and failure of reconciliation); MD. CODE ANN., FAM. LAW § 7-103 (1991) (two years, or one year if voluntary separation); MO. ANN. STAT. § 452.320 (West 1997) (two years, or one year if by mutual consent); 23 PA. CONS. STAT. § 3301 (1991) (two years plus showing of irretrievable breakdown, or 90 days if mutual consent); R.I. GEN. LAWS § 15-5-3 (1996) (three years).

⁹⁹ Proposals in Michigan, Virginia, Iowa, and Georgia, for example, would have abolished no-fault ground for divorce, as in New York and Mississippi, except where both parties agree to divorce. *See* H.B. 434, 144th G.A., reg. Sess. (Ga. 1997); H.B. 5217, 89th Leg., Reg. Sess. (Mich. 1997); S. File No. 2935, 80th Leg., Reg. Sess. (Mich. 1997); H.B. 2624, 1997 Sess. (Va. 1997); S.B. 6135, 55th Leg., Reg. Sess. (Wash. 1997); H.B. 740, 53rd Leg., 2nd Sess. (Idaho 1996); H.F. 2473, 76th G.A., 2d Sess. (Iowa 1996); *see also* Schoenfeld, *supra* note 91, at 8 (summarizing some of these bills).

The assumption that women and children have been the losers in no-fault divorce reform is nearly universal among the defenders of tighter divorce laws.¹⁰⁰ Among the evidence offered for this proposition is Lenore Weitzman's influential study published in 1985 claiming to show that as a result of no-fault divorce, divorced women and their children suffered a 73% decline in standard of living while divorced men experienced a 42% increase.¹⁰¹ Weitzman's figures have been discredited,¹⁰² although others have found significant, if lesser, standards of living discrepancies.¹⁰³ More to the point of this Lecture, the causal connection between no-fault divorce and the economic consequences of divorce for women and children has been widely disputed. Women's financial position after divorce was poor both before no-fault divorce became widely enacted and thereafter.¹⁰⁴ For some women, of course, the fault barriers to

¹⁰⁰ See ETZIONI, *supra* note 48, at 73-77 (summarizing costs of divorce, especially for children); GALLAGHER, *supra* note 4, at 31-37 (summarizing ways in which people are victimized by divorce, especially women and children); Galston, *supra* note 7, at 22; see also Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994) (arguing that no-fault divorce brought increase in spousal violence).

¹⁰¹ See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 338-39 (1985). The critic of no-fault divorce that relies especially heavily on these figures is Michael J. Sandel. See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 111 (1996).

¹⁰² One researcher who has reviewed Weitzman's data was unable to replicate her results. See Richard R. Peterson, *Statistical Errors, Faulty Conclusions, Misguided Policy: Reply to Weitzman*, 61 AM. SOCIO. REV. 539 (1996); Richard R. Peterson, *A Reevaluation of the Economic Consequences of Divorce*, 61 AM. SOCIO. REV. 528 (1996); see also Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641, 641-43 (1988) (finding internal inconsistencies in Weitzman's work). Weitzman has since conceded that her figures are inaccurate. See Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOCIO. REV. 537 (1996).

¹⁰³ See, e.g., BARBARA BAKER, *FAMILY EQUALITY AT ISSUE: A STUDY OF THE ECONOMIC CONSEQUENCES OF DIVORCE ON WOMEN AND CHILDREN* i (1987) (reporting Alaska study showing 33% decline in income for divorced women and children and 17% increase for divorced men); LESLIE J. BRETT ET AL., *WOMEN AND CHILDREN BEWARE: THE ECONOMIC CONSEQUENCES OF DIVORCE IN CONNECTICUT* 7 (1990) (describing Connecticut survey finding that mean per capita income of divorced wives fell by average of 16% while that of divorce husbands increased by 23%); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 97-98 (1986) (describing Vermont survey finding that divorced wives experienced 33% drop in per capita income and children 25% drop, while men experienced 120% increase).

¹⁰⁴ See, e.g., MARSHA GARRISON, *THE ECONOMICS OF DIVORCE: CHANGING RULES, CHANGING RESULTS, IN DIVORCE REFORM AT THE CROSSROADS* 75-101 (Stephen D. Sugarman

divorce may provide greater bargaining power to women whose husbands want a divorce when the women themselves do not; but for women who seek divorce, as women increasingly do,¹⁰⁵ fault barriers raise the cost of divorce to women.¹⁰⁶

One of the reasons it may often be assumed that women benefit from making divorce harder to get is that women appear to value marriage more than men. The usual explanation for women placing a higher value on marriage than men is that men can more readily obtain the things they value — “everything from sex to food preparation to old-age insurance”¹⁰⁷ — outside of marriage, while what women seek — “emotional security, financial support, prestige and power, a father’s authoritative help of ‘sponsorship’ for their children”¹⁰⁸ — is hard to obtain outside of marriage.¹⁰⁹ This explanation presupposes fundamental differences between men and women that some link to biology and processes of natural selection: men by nature, it is claimed, do not value monogamous unions and loyalty to family because their reproductive survival is maximized when they distribute their seed widely; women, in contrast, experience the greatest degree of reproductive success when they devote more time and energy to the relatively fewer offspring they are able to have.¹¹⁰ Men adapt to these conditions by preferring

& Herma Hill Kay eds., 1990) (describing New York study comparing 900 divorces before and 900 divorces after 1980 reform of alimony rules as demonstrating that no-fault is not necessary factor in decline in alimony awards); Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC’Y REV. 95, 111 (1989) (describing longitudinal study of 587 divorced young women over 15-year period as showing effects of no-fault divorce “either modestly benign or neutral”); Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 AM. B. FOUND. RES. J. 759, 768-72 (arguing that financial awards to women and children were inadequate both before and after no-fault divorce reform).

¹⁰⁵ See *infra* note 135 and accompanying text.

¹⁰⁶ See Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?* 29-30 (Aug. 1997) (unpublished manuscript, on file with author).

¹⁰⁷ See GARY BECKER, *A TREATISE ON THE FAMILY* 29-30 (1981), cited in Wax, *supra* note 106, at 29.

¹⁰⁸ See Wax, *supra* note 106, at 29.

¹⁰⁹ See *id.*

¹¹⁰ See RICHARD A. POSNER, *SEX AND REASON* 90-95 (1992); Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981, 993 (1992); Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 1001 (1995) (arguing that women “increase their reproductive success by devoting the bulk of their energies to investment in children rather than the acquisition of resources”).

serial monogamy or multiple sexual partners, the story goes, while women adapt by valuing monogamy and the nurturance of others.¹¹¹ This leads to the basic marital bargain: women negotiate commitments and loyalties from men that limit or “civilize” men’s natural proclivities in exchange for women’s agreement to assume a disproportionate share of the burdens of the relationship.¹¹² Women’s poorer options in paid market employment aggravate the disparity between women and men in the power they bring to the marital bargaining table since these poorer options mean that women have less valuable alternatives outside of marriage. Women’s tendency to devalue their own contributions to the family in relation to men’s further contributes to the cycle.¹¹³

However it is explained, the claim that women value marriage more than men seems to be evidenced by the larger share of the burdens of marriage women assume. Based on 1985 data, women spend over 80% as much time in the paid work force as men, and yet do almost twice as much housework.¹¹⁴ While there has been some increase in men’s contribution to household work, women’s share is still almost twice as great as men’s.¹¹⁵ The disparity for childcare duties is even greater. On

¹¹¹ See POSNER, *supra* note 110, at 90-91, 93-94; Browne, *supra* note 110, at 996-97 (explaining men’s preference for multiple partners and women’s preference for monogamous relationships in terms of successful reproductive strategies); *id.* at 1000-02, 1033-37 (explaining women’s greater exhibition of nurturing and allocentric behavior in terms of successful reproductive strategies).

¹¹² See, e.g., GEORGE GILDER, MEN AND MARRIAGE 15-16, 153 (1986) (discussing socialization of men through marriage); Michael E. Lamb et al., *A Biosocial Perspective on Paternal Behavior and Involvement*, in PARENTING ACROSS THE LIFE SPAN: BIOSOCIAL DIMENSIONS 111, 117-18 (stating that for men, marriage is trade-off in which “greater certainty regarding paternity is obtained in exchange for “the protection/provisioning of the family as well as reduced access to other females”).

¹¹³ See Wax, *supra* note 106, at 28-29, 54-61.

¹¹⁴ See BETH ANNE SHELTON, WOMEN, MEN AND TIME 39, 65-66 (1992); see also JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 100, 334 (1997) (reporting time-diary data from 1985 showing that employed women spend 25.6 hours per week on family care activities, including housework, shopping, and child care, as compared to 14.5 hours for employed men); Mary Clare Lennon & Sarah Rosenfield, *Relative Fairness and the Division of Housework: The Importance of Options*, 100 AM. J. SOC. 506, 517 (1994) (based on national survey data collected in 1987-1988, employed men do about 34.5% of housework and employed women about 68.2%).

¹¹⁵ Economist Francine Blau reports that between 1978 and 1988, the average weekly hours of housework performed by working women declined by 3.4 hours (from 24.3 to

average, mothers are available for their children twice as much as fathers and spend three times as much time interacting with their children (as opposed to passive babysitting).¹¹⁶ Mothers also spend much more time taking responsibility for children in the sense of arranging child care, making medical appointments, deciding on the child's clothing, staying home when the child is ill, and such matters.¹¹⁷ Women not only assume a disproportionate share of domestic tasks but most apparently do so willingly, at least for the time being. Only slightly more than one-third of working women see their arrangements as unfair to themselves.¹¹⁸

Even if it is true that women place a higher value on marriage than do men, however, they do not benefit from making divorce more difficult to get. Women would benefit from increased restrictions on divorce only if these restrictions actually prevented divorces women did not want and secured the kind of marriages they value — in other words, if happy marriages were the alternative to divorce. Realistically, however, the alternative to no-fault divorce is more likely a bad marriage or, as suggested above, fault-based divorce and delay. Women and children do not systematically benefit from these alternatives. While for some women a bad marriage may be better than no marriage at all, the benefits of preserving bad marriages, as a policy matter,

20.8) while the average weekly hours of housework performed by husbands of working women increased by 1.4 hours (from 6.4 to 7.8). See Francine D. Blau, *Trends in the Well-Being of American Women, 1970-1995*, 36 J. ECON. LIT. 112, 152-53 (1998). Blau concludes that the ratio of husbands' to wives' housework hours rose from 26% in 1978 to 38% in 1988. See *id.* at 153.

¹¹⁶ See Lamb, *supra* note 112, at 126-29. In a 1992 study based on hour-long telephone interviews, 67.6% of mothers and 61.4% of fathers reported that the mother assumed primary responsibility for minor children in the household. See Ellen Galinsky & James T. Bond, *Work and Family: The Experience of Mothers and Fathers in the Labor Force*, in AMERICAN WOMAN, 1996-1997, WHERE WE STAND: WOMEN AND WORK 79, 94 (Cynthia Costello & Barbara Kivimae Krimgold eds., 1996).

¹¹⁷ See Lamb, *supra* note 112, at 129.

¹¹⁸ See Lennon & Rosenfield, *supra* note 114, at 518 (finding that 35.3% of women think distribution of housework is unfair to them, 60.8% think it is fair to both); see also JOSEPH H. PLECK, WORKING WIVES/WORKING HUSBANDS 154 (1985) (summarizing research showing that only 36% of employed wives report that they want more help with housework and 42% want more help with child care). Twenty-eight percent of women think the distribution of household burdens is unfair to their husbands. See Lennon & Rosenfield, *supra* note 114, at 518. Four percent of men find the division of housework unfair to themselves; 28% see it as unfair to their wives. See *id.*

could hardly justify the costs of such a policy. It bears noting that some number of bad marriages become abusive marriages, which are more likely to victimize women and children than men.¹¹⁹ Since domestic violence is a marital fault, at least under modern fault statutes,¹²⁰ one might expect that fault divorce would offer greater protection for abused women than current no-fault laws. But domestic abuse is not always documented, and it can be difficult to prove. Under a no-fault divorce regime, women can leave marriage if their husbands abuse them without having to prove that abuse. Under a fault-based regime, an abused woman might prefer to take her chances remaining in the marriage rather than face her husband in court.¹²¹

Greater use of fault-based divorce also does not benefit women and children. As noted above,¹²² fault historically has not functioned as an effective barrier to divorce and even if it did, blocking divorce would harm women seeking divorce as well as men. While some seem to assume that women are more likely to be able to establish fault than men,¹²³ I have seen no evidence in support of that assumption. There is also no evidence that women benefit economically from fault-based divorce.¹²⁴

¹¹⁹ See Blau, *supra* note 115, at 155 (showing that women are 3.5 to 5.4 times more likely to be victims of domestic violence than men). According to the Demie Kurz study, 19% of women leave their marriages because of violence. See KURZ, *supra* note 72, at 45-46, 52-56. The figure is higher for women living at the poverty level (close to 30%) than it is for middle-class women (approximately 15%). See *id.* at 46, fig. 3-2; see also KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 561-64 (2d ed. 1998) (summarizing research findings on frequency and severity of domestic abuse committed by men as compared to that committed by women).

¹²⁰ See LA. REV. STAT. ANN. § 9:307(A)(4) (West Supp. 1998) (making divorce from covenant marriage available if other spouse has physically or sexually abused spouse seeking divorce).

¹²¹ See Wisby, *supra* note 78; see also Ellman & Lohr, *supra* note 52, at 737 (arguing that wives might be more likely to murder their husbands under fault divorce system because they would be more likely to feel trapped in marriage); Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys*, 48 J. MARRIAGE & FAM. 465, 474 (1986) (suggesting that increased acceptance of divorce has "probably" helped women end violent marriages).

¹²² See *supra* notes 61-62 and accompanying text.

¹²³ See Woodhouse, *supra* note 7, at 2556.

¹²⁴ A study done in New York indicates that restricting divorce to situations based on fault or mutual consent does not improve the ability of women to obtain better post-divorce economic arrangements. See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution on Divorce Outcomes*, 57 BROOKLYN L. REV. 621, 724 (1991).

Delay also does not benefit women and children. For children it is likely to mean not the preservation of intact, two-parent families, even temporarily, but rather more time with parents living apart, with family status unresolved, or with a parent who cannot remarry.¹²⁵ Women do not benefit from delay because their marriageability declines more rapidly than men's.¹²⁶ Amy Wax attributes this fact to "male preferences for young or younger women, and their aversion to partners of greater status, education, and ambition."¹²⁷ These preferences, whether or not by design, help to sustain male advantage in marital bargaining. Women also "lose value" in the marriage market because their investments in marriage, especially in childbearing and childrearing, tend to be more concentrated in the earlier years of the marriage.¹²⁸

Looking at divorce reform from the perspective of women and children reveals that making divorce more difficult is not likely to benefit those whom reformers claim should most benefit. This may be because in thinking about "saving marriage," marriage reformers, consciously or not, have been focused on keeping men in marriage, not women.¹²⁹ While this strategy may appear to be justified by the higher value women now place on marriage, it is short-sighted for it depends on women's con-

¹²⁵ See Ellman & Lohr, *supra* note 52, at 728; Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2529 (1995); see also POSNER, *supra* note 110, at 249 (stating "the main practical effect of barring divorce is merely to prevent remarriage").

¹²⁶ See Wax, *supra* note 106, at 29-34; see also Jane W. Ellis, *Surveying the Terrain: A Review of Divorce Reform at the Crossroads*, 44 STAN. L. REV. 471, 492 (1992) (arguing that older women's prospects for remarriage are often bleak).

¹²⁷ See Wax, *supra* note 106, at 29-30. The sociobiological explanation, again, is that these preferences are successful adaptations to biological and social circumstance. See POSNER, *supra* note 110, at 93; Browne, *supra* note 110, at 1000 (arguing that male attractiveness to women, based on social status, skills, strength, and bravery, and women's attractiveness to men, based on physical appearance, is consequence of differential reproductive strategies based in biology).

¹²⁸ See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents: Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 285-86, 303 (1986).

¹²⁹ See, e.g., BLANKENHORN, *supra* note 6, at 225-34 (setting forth numerous family reform proposals to entice men into greater participation as fathers by giving them more family and community responsibility and strengthening norm of good fatherhood) POPENOE, *supra* note 6, at 215 (arguing that one of best ways to reestablish marriage is "to make widely known to men of all ages . . . [that marriage] and fatherhood are enormously beneficial to the well-being of men").

tinued willingness to accept current levels of inequality in marriage.¹³⁰ Women's willingness to accept lop-sided marital bargains, however, has been based on factors that have been changing over time and will likely continue to change. For example women's economic independence, which many link with rising divorce rates,¹³¹ continues to improve.¹³² In addition, more egalitarian gender ideologies, which go hand in hand with economic independence,¹³³ are likely to increase the perception of unfairness in the distribution of household tasks that feeds marital dissatisfaction.¹³⁴

¹³⁰ See *supra* notes 114-18 and accompanying text (discussing unequal distribution of household and childcare work in marriage). The strategy is unfair to women. Cf. Karen Czapanskiy, *Volunteers and Drafts: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991) (criticizing efforts in child custody law to entice fathers to support and care for children while taking mothers' interest in their children and their willingness to act responsibly toward them for granted).

¹³¹ See *supra* note 53 and accompanying text; see also POSNER, *supra* note 110; at 252 (women's "increased economic independence, whether owing to greater market income or to greater social income, . . . reduces her willingness to work at improving a bad match").

¹³² Both labor force participation and real wages for women have been rising steadily in recent decades. Labor force participation rates by married women have risen from 49% in 1970 to 72% in 1995; the labor force participation rate by women with more than 12 years of education in 1995 was 77%. See Blau, *supra* note 115, at 125. Real wages for women rose 31% between 1969 and 1994. See *id.* at 131. The female-to-male weekly wage ratio for all women rose from 56% in 1969 to 72% in 1994; for women between the ages of 25 and 34, the ratio was 83% in 1994. See *id.* at 129. Among married couples, the female-to-male average hourly earnings ratio increased 21%, from 60% in 1979 to 73% in 1994. See *id.* at 149; see also Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 600 (1993) (stating that gender gap is "moving toward elimination" and that it "is, and always has been, largely explainable in terms of job market segregation").

¹³³ See Blau, *supra* note 115, at 154 (hypothesizing that reallocation of housework trends are due either to rising relative wage of women or to increase in bargaining power of women generally).

¹³⁴ See Lennon & Rosenfield, *supra* note 114, at 521-22, 525 (stating that women who see division of housework as unfair have more symptoms of depression or are less happy in their marriages).

Divorces are disproportionately initiated by women,¹³⁵ the majority of whom are satisfied with their decision to divorce.¹³⁶ As women place an increasing value on fairness in their marriages and their options outside of marriage strengthen, they will be less willing to remain in unequal marital arrangements.¹³⁷ Relatively small increases in economic bargaining power, or in their "taste for equity," heretofore subordinated to the value they have placed on relationships and intimacy, increasingly may make the difference between women's acquiescence in unequal marriage bargains and their rejection of them.¹³⁸ In short, if we are to "strengthen marriage" and thereby take advantage of its powerful, traditional associations to create stable, loving families, marriage has to be made more attractive to women as well as to men.

In their efforts to strengthen marriage, family law reformers have shown little recognition of the threat of continued gender inequality to the institution of marriage. They have worried about moral laxity, individualism, and other attitudes and expectations about marriage, and one that they believe weakens it, but they have worried little if at all about how to relieve the disproportionate burdens of marriage that fall upon women.

¹³⁵ Exact figures are hard to come by, but in one 1986 study of a representative sample of divorcing couples in Maricopa County, Arizona, husbands said that wives were the first to want divorce 62 to 63% of the time, husbands wanted divorce first 31 to 34% of the time, and the decision was "mutual" 4 to 6% of the time. The responses by wives were similar, with 62 to 67% saying that they were the first to want out of the marriage, 26 to 29% saying their husbands wanted out first, and 8 to 9% saying that the decision was mutual. See Sanford L. Braver et al., *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. DIVORCE & REMARRIAGE 1, 5-7 (1993).

¹³⁶ The Kurz study found that most women felt positive about the divorces they had obtained. See KURZ, *supra* note 72, at 187-188 (noting that 61% of divorced women in Philadelphia study felt positive about being divorced, 12% were ambivalent, and 26% were negative).

¹³⁷ See Lennon & Rosenfield, *supra* note 114, at 523 (linking women's perceptions about fairness of unequal allocations of household work with perceptions of their economic alternatives).

¹³⁸ In Wax's view, the prospects for more egalitarian models of marriage depend upon changes in bargaining differentials that affect the quality of the marriage "deals" women are able to negotiate; she is not optimistic that these changes will occur, and she does not think there are any realistic legal reforms that are likely to bring them about. Her assessment is that the dynamics of bargaining are not likely to correct themselves and, thus, that the fairness of marriage for women is not likely to improve. See Wax, *supra* note 106, at 96-122.

The law is not the primary source of solutions for these disproportionate burdens, just as it is not, in my view, the principle instrument by which individuals can be made to take their family commitments more seriously. But the fact that reformers have focused on a wide range of attitudinal factors that compromise marriage and yet failed to address those attitudes that support inequality in marriage reinforces the conclusion that these reformers are seeking to strengthen not just any marriage but a particular form of marriage, and one that women will increasingly find unattractive.

III. A FAMILY-ENABLING MODEL OF REFORM

Although the law cannot "save" marriage as an institution or "engineer" happy families, it has an appropriate role to play in ensuring that the rules under which parties enter and exit the relationships are fair. With fair rules, the law goes about as far as it can to make marriage strong and viable to women as well as to men without penalizing or failing to give appropriate protection to those whose needs arise from other, nonmarital types of relationships. Perhaps the clearest example of legal regulations that protect people in family relationships without dictating the type of families they form are those protecting victims of domestic violence. Laws providing for domestic violence restraining orders, requiring arrest of domestic offenders, taking domestic abuse into account in making child custody orders, prohibiting marital rape, and establishing other such legal protections improve the practice of marriage and express positive marriage ideals, yet do not prejudice persons in nonmarital relationships, to whom the same types of rules also apply. Curtailing domestic violence is likely to do more to strengthen marriage than reform of the legal grounds for divorce; the Philadelphia study found that 19% of divorcing women said their primary reason for divorce (whatever official reason, if any, may have been given) was domestic violence,¹³⁹ and 70% said they had experienced

¹³⁹ See KURZ, *supra* note 72, at 45, 52-53. This figure compares with 19% who left their marriages because their husbands were involved with other women, 19% who left because of personal dissatisfaction with the marriage (loss of love for their husbands, poor communication, tired of carrying emotional load of the marriage, etc.), 17% who left because of their husbands' "hard living" habits (heavy drinking, frequent absences from the family,

at least one incident of domestic violence.¹⁴⁰ Fault-based divorce statutes theoretically would not prevent divorce in such cases because modern fault proposals include domestic violence as a marital fault. As mentioned earlier, however, fault grounds limit the options of victims who may find it difficult to prove the abuse.¹⁴¹ Unlike other kinds of reforms designed to address domestic abuse, limiting the grounds for divorce, even if domestic abuse is among those grounds, contracts rather than expands the protection available to victims.

Legal incentives for employers to develop paid employment options that lower the penalty for combining family and work would also enable families to function better without standardizing them. Many have written of the "marriage penalty" for married secondary workers, whose income is taxed at a higher rate than if they were the family's sole breadwinner.¹⁴² Treating married couples as well as working couples who are not married are treated is a legitimate policy objective, although this would require eliminating the marriage reward for single-wage earner couples. Others have urged tax reforms that take better account of who is exercising caretaking responsibility for children.¹⁴³ The law could also encourage a richer set of part-time and flex-

etc.), and 26% who left for "other causes." *See id.* at 45, 47, 56. Seventy percent of women of all classes and races experienced violence at the hands of their husbands at least once, and 50% experienced violence at least two to three times. *See id.* at 52. Many women who left marriage because of violence did so after a particularly serious incident. *See id.* at 54.

¹⁴⁰ *See id.* at 52.

¹⁴¹ *See supra* notes 120-21 and accompanying text.

¹⁴² *See, e.g.*, Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); McCaffery, *supra* note 132, at 617-19. McCaffery would encourage women's market labor not by equalizing tax rates, but by imposing heavier taxes on primary wage earners, whose supply is relatively inelastic and lowering taxes on secondary workers. He criticizes the failure to impute income from self-supplied services in the home, the structure of social security contributions which provides benefits to a worker's spouse based on the worker's work history, and the structures of health, pension, and related benefits which encourage single-earner spouses to provide them to the entire family, all of which provide an incentive for secondary workers to stay at home. *See id.* at 619, 633.

¹⁴³ *See, e.g.*, Anne Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2034-37 (1996) (favoring direct assistance to caregivers since increased incentives to work would not increase compatibility of working conditions with child care); Marjorie Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 60 TEMP. L. REV. 1449 (1996) (favoring treatment of husbands and wives as separate taxable units and allocating tax preferences according to parents' likelihood of spending money on their children).

time opportunities that would help workers attempting to juggle work and family, without unfairly penalizing any sub-group of workers based on the kind of family they have.¹⁴⁴

Divorce laws are also important in how marriage is understood and upheld. Divorce reformers are not wrong to concentrate on divorce laws in attempting to strengthen marriage. They are simply misguided, in my view, in trying to strengthen marriage by restricting exit from it, rather than by making its consequences more fair and just. As I have argued above, divorce access restrictions do not work to stem the rise of divorce; they delay it, or channel its availability in ways that often reinforce marital inequities.

For the past several years, the ALI has been developing a set of principles to govern family dissolution that seeks to create higher ideals of fairness between divorcing parties without dictating or endorsing a particular norm of economic or childrearing arrangements within the family. Although a final draft of these principles has not yet been adopted, the ALI membership has approved tentative drafts setting forth principles governing property distribution, spousal support,¹⁴⁵ child custody,¹⁴⁶ and

¹⁴⁴ See McCaffery, *supra* note 132, at 617. Women constitute approximately two-thirds of the part-time workforce and also about two-thirds of the temporary or "contingent" working population. See Francois Carre, *Temporary Employment in the Eighties*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 58 (Virginia L. du Rivage ed., 1992); Chris Tilly, *Short Hours, Short Shrift: The Causes and Consequences of Part-Time Employment*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 15, 42 (Virginia L. du Rivage ed., 1992). Part-time and contingent workers receive few, if any, standard employee benefits, such as health care and pensions, earn lower average wages, and lack job security as well as opportunities for training and career advancement. See Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 STETSON L. REV. 1, 2 (1996). Contingent workers may also be left unprotected by antidiscrimination laws or other protective rules that are predicated upon a specified number of employees working for a specified number of weeks. See Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 574 (1996). Proposals to improve the status of part-time and contingent workers have not been adopted. Congress failed to pass the Part-Time and Temporary Workers Protection Act, which would have provided health and unemployment insurance and pension coverage for contingent workers. See Patricia Schroeder, *Does the Growth of the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731, 736 (1995). The Contingent Workforce Equity Act, designed to extend federal labor law protections to contingent workers, also failed. See Middleton, *supra*, at 584.

¹⁴⁵ See ALI Proposed Final Draft, Part I, *supra* note 30, chs. 4 & 5. Ira Ellman is Chief Reporter for the project and drafter of these chapters.

¹⁴⁶ See ALI Tentative Draft No. 3, Part I, *supra* note 31. Katharine T. Bartlett is the Re-

child support.¹⁴⁷ In each of these areas, the principles offer determinacy in decisionmaking without presupposing, or attempting to promote, a standard family scenario. While applying these principles may, in specific cases, leave one spouse or parent worse off in relation to where he or she would have been under a different divorce regime, the principles construct marriage in a way that, viewed *ex ante* from behind the veil of ignorance about one's marital role, is more fair and, thus, more desirable than the leading alternatives.

The ALI principles concerning spousal support provide perhaps the best example. Current trends in spousal support law are based on the "clean break" theory of divorce, which assumes that both members of the divorcing couple are better off if they can cut ties with another and start their lives afresh.¹⁴⁸ The clean break theory might be expected to promote an egalitarian view of marriage, insofar as it treats spouses as if they are, or should be, equally able to take care of themselves.¹⁴⁹ When practice does not correspond to theory, however, the consequences can be quite unjust.¹⁵⁰ In those many marriages in which one party is more heavily invested in home and family while the other specializes in outside paid employment, a clean economic break between them at divorce means that one party

porter on this project responsible for drafting the custody principles.

¹⁴⁷ See ALI Tentative Draft No. 3, Part II, *supra* note 32. Grace Blumberg is the Reporter on this project responsible for drafting the child support principles.

¹⁴⁸ See Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 313-14 (1987) (stating that no-fault divorce philosophy seeks clean break and should minimize continuing financial relationships); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2314 (1994) (summarizing partnership approach as "clean break" idea of divorce); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 108 (1993) (stating core concept of partnership model of marriage is clean emotional and financial break as ideal divorce outcome).

¹⁴⁹ See Regan, *supra* note 148, at 2314 (discussing theoretically equal status of spouses); Starnes, *supra* note 148, at 119 (discussing egalitarian appeal of normative partnership model for marriage).

¹⁵⁰ See Martha Albertson Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 265, 268-78 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 696-97 (1990).

keeps his investment in the marital bargain for himself, while the other suffers a disproportionate loss as a result of the divorce.

The significant innovation of the ALI principles relating to spousal support is that they treat any significant disproportionality in income-earning capacity that evolved during the marriage as a marriage-caused loss and require payments to reduce it in accordance with the length of the marriage.¹⁵¹ Even when the marriage is not a long one, the principles provide for payments to reduce substantial disproportionality when one party has left the workforce, curtailed her role in the workforce in order to invest time in the parties' children, or invested in the other spouse's acquisition of a professional degree or license from which great benefit is obtained. In thereby eliminating, or at least reducing, the costs of sacrifice during marriage — costs usually paid disproportionately by women — the ALI approach is not aimed at eliminating sacrifice during marriage, which can actually be quite beneficial to the family. To the contrary, it takes sacrifice seriously and encourages it by treating it fairly. It assumes that when different roles led to disproportionate individual earning capacities, it was expected that those shared roles were part of a shared enterprise rather than a lop-sided bargain favoring one partner over the other.

Child support is another area in which rules can be better keyed to the realities of families and, thus, achieve greater fairness based on these realities, especially between parents with significant disparities in wage-earning capacities. Almost all states now define the amount of a child support obligation based on guidelines intended to reflect the marginal expenditure of raising a child had the family remained intact.¹⁵² This measurement ensures that the nonresidential parent pays no more in

¹⁵¹ See ALI Proposed Final Draft, Part I, *supra* note 30, § 5.05, at 280-81; J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 807-08.

¹⁵² Some states do this by defining the child support obligation as a "fixed percentage" of the obligor's income, according to the number of children to be supported. Other states use an "income shares" approach in which parental incomes are totaled, the total amount of child support that can be expected from this total income is computed, and the nonresidential parent's obligation is determined in accordance with the percentage of total income that he or she earns. Regardless of the method used, the nonresidential parent's child support obligation is unaffected by the amount of income of the residential parent.

support than would have been paid had the family remained intact, but does not take account of economies of scale experienced when both parents live with the child or disparities in income-earning capacity developed while the family operated as a single economic unit. A marginal cost approach makes sense when both parents earn more or less equal incomes because in that circumstance, they are equally able to absorb the increased costs of two households. The more usual case, however, is that the mother has invested more heavily in childrearing and earns substantially less income; her earning potential will continue to lose ground in relation to the father's, even if she increases her working time at divorce, because of her disproportionate childrearing responsibilities as custodial parent. Accordingly, the studies consistently report that the standard of living of children and their residential mothers typically decreases at divorce, while the standard of living of nonresidential fathers typically increases.¹⁵³ Marginal cost models can also be unfair in the less common case of the poor nonresidential parent who earns substantially less than the residential parent and whose burden may be out of proportion to the benefits that an already comfortable residential household would receive from him.

Some reformers have urged an alternative child support approach that would equalize the standard of living of each household.¹⁵⁴ Such an approach would provide more adequate economic support for the child's residential household, but it is difficult to justify a child support scheme that so thoroughly discourages workforce participation and makes the nonresidential parent so fully responsible for the residential parent's standard of living, as well as the child's.

The ALI principles regarding child support attempt to move in the direction of more adequate child support awards, without requiring full equality between households that have gone their

¹⁵³ See *supra* note 103 and accompanying text (discussing discrepancies).

¹⁵⁴ See JUDITH CASSETTY ET AL., THE ELS (EQUAL LIVING STANDARDS) MODEL FOR CHILD SUPPORT AWARDS, in *ESSENTIALS OF CHILD SUPPORT GUIDELINES: ECONOMIC ISSUES AND POLICY CONSIDERATIONS* 329 (Proceedings of the Women's Legal Defense Fund's National Conference on the Development of Child Support Guidelines, Sept. 1986); see also Marianne Takas, *Improving Child Support Guidelines: Can Simple Formula Address Complex Families*, 26 *FAM. L.Q.* 171 (1992) (advocating mixed approaches that produce greater income equalization than either income shares or percentage formula methods).

separate ways. It does so by adding a supplement to the marginal expenditure amount specifically calculated to lessen the impact to the child of having parents with disparate standards of living.¹⁵⁵ As the residential parent's income rises, the amount of the supplement decreases until it is eliminated altogether when both parents' incomes are equal.¹⁵⁶ This approach is sensitive to differences in parental income that are entirely ignored by marginal expenditure models and, thus, produces fair results whether the parental incomes are roughly the same or grossly disproportionate. While the bottom line depends significantly on what figures are plugged into the formula, the approach is designed to more evenly distribute the losses associated with dividing the family into two households that typically fall disproportionately on residential parents and their children. The approach makes some adjustments when the residential parent's income is substantially higher than the nonresidential parent's, so that undue sacrifice is not required when the residential household is otherwise comfortably self-supporting.¹⁵⁷ Together, these principles seek to achieve basic fairness regardless of the particular family configuration and circumstances.

Greater coherence in the allocation of custodial responsibility for children at divorce is also important to the law's expression of fair ideals of marriage and family life. Although the prevailing best-interests-of-the-child standard expresses the right societal message about the responsibility of parents to put their children's interests first, the standard is not determinate enough to produce predictable results, yielding instead a process that is contentious, expensive, subjective, and unjust.¹⁵⁸ Much of the

¹⁵⁵ See ALI Tentative Draft No. 3, Part II, *supra* note 32, § 3.05.

¹⁵⁶ See *id.* § 3.05(4).

¹⁵⁷ See *id.* § 3.05(5).

¹⁵⁸ On the relationship between litigation rates and the indeterminacy of rules, see Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transaction Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279, 294 tbl. II (1993); John Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases*, 20 L. & SOC'Y REV. 135, 161 n.24 (1986); see also Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499-500 (1990) (stating that best interests standard "risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law"); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16

reform activity in this area of the law attempts to make this standard more concrete. Some advocates, for example, have urged adoption of a primary caretaker presumption, which would favor giving primary custody to the parent who had spent the greatest amount of time caring for the child.¹⁵⁹ Only West Virginia currently has such a presumption,¹⁶⁰ although other states designate primary caretaking a factor to consider in determining the child's best interests.¹⁶¹

Another presumption urged by family law reformers is a presumption in favor of equal sharing of residential responsibility.¹⁶² Approximately thirteen states have some form of statutory presumption in favor of joint custody, although it is ordinarily quite a weak presumption, applicable in some of the states only when the parents have agreed to joint custody.¹⁶³ In most of

(1987) ("[T]he best interest principle is usually indeterminate when both parents pass the threshold of absolute fitness."); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986) (noting that best interests standard "provides maximum incentive to those who are inclined to wrangle over custody"); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 969 (1979) (describing difficulty of predicting which parent will receive custody under best interest standard).

¹⁵⁹ See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291 (1992).

¹⁶⁰ See *Marilyn H. v. Roger Lee H.*, 455 S.E.2d 570 (W. Va. 1995); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). Minnesota applied a primary caretaker presumption from 1985 to 1989. See Crippen, *supra* note 158, at 434-36.

¹⁶¹ See, e.g., ARIZ. REV. STAT. ANN. § 25-33(A)(7) (West Supp. 1995); MINN. STAT. ANN. § 518.17 (1)(a)(3) (West Supp. 1996); see also LA. CIV. CODE ANN. art. 134 (12) (West Supp. 1996) (requiring consideration of "[t]he responsibility for the care and rearing of the child previously exercised by each party"); N.J. STAT. ANN. § 9:4(c) (West 1993) (requiring consideration of "extent and quality of time spent with the child prior to or subsequent to the separation"); VT. STAT. ANN. tit. 15, § 665(b)(6) (1989) (requiring consideration of "quality of the child's relationship with the primary care provider, if appropriate given the child's age and development"); VA. CODE ANN. § 20-124.3(5) (Michie 1995) (requiring consideration of "[t]he role each parent has played and will play in the future, in the upbringing and care of the child"); WASH. REV. CODE § 26.09.187 (1997) (giving greatest weight to "the relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child").

¹⁶² See *supra* note 11; see also Stephanie B. Goldberg, *In All Its Variations, the Fathers' Right Movement is Saying One Thing . . . Make Room for Daddy*, A.B.A. J., Feb. 1997, at 48 (describing father's rights groups' efforts to pass laws favoring joint custody); Thom Weidlich, *Dad's Rights Advocates Come of Age: Once Just an Angry Fringe, Now They Target Custody, Welfare and Child Support Laws*, NAT'L L.J., Mar. 13, 1995, at A1.

¹⁶³ See, e.g., CAL. FAM. CODE § 3080 (West 1994); CONN. GEN. STAT. § 46b-56a(b)

the other states, the presumption is rebuttable upon a showing that joint custody is not in the child's best interests.¹⁶⁴ Florida has the strongest joint custody presumption, requiring shared parenting responsibility whether or not the parties agree to it unless the court finds such an arrangement detrimental to the child.¹⁶⁵

Neither a true primary caretaker presumption nor a joint custody presumption has caught on despite the popularity of these measures among some reformers. Moreover, states that have enacted such presumptions have had considerable difficulty implementing them.¹⁶⁶ Some states that have tried these presumptions have abandoned them. Minnesota tried the primary caretaker presumption for only a short time,¹⁶⁷ and Montana recently abandoned its joint custody preference.¹⁶⁸ What accounts for the failure of these presumptions? An important reason, in my view, is that each rule assumes some ideal norm

(1995); ME. REV. STAT. ANN. tit. 19-A, § 1653(2)(A) (West Supp. 1998); MISS. CODE ANN. § 93-5-24(4) (1994); NEV. REV. STAT. § 125.490(1) (1993).

¹⁶⁴ See IDAHO CODE § 32-717B(1), (4) (Michie 1996) (providing statement of reasons required if primary physical custody ordered to one parent); IOWA CODE § 598.41(2) (Supp. 1994); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1993); MICH. COMP. LAWS ANN. § 722.26a(1) (Supp. 1995) (stating that findings are required if joint custody not awarded); N.M. STAT. ANN. § 40-4-9.1(A), (B) (Michie 1994); see also D.C. CODE ANN. § 16-911(a)(5) (1997) (stating that presumption is also rebutted by preponderance of evidence that intrafamily offense or child abuse has occurred). For a discussion of the new District of Columbia presumption, see Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767 (1997).

¹⁶⁵ See FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1996).

¹⁶⁶ In implementing the state's joint custody presumptions, Florida courts developed a presumption against rotating or divided custody that limited the effect of the statutory presumption in some cases. See *Garvie v. Garvie*, 659 So. 2d 394 (Fla. Dist. Ct. App. 1995); *Caraballo v. Hernandez*, 623 So. 2d 563 (Fla. Dist. Ct. App. 1993); see also *Sullivan v. Sullivan*, 604 So. 2d 878 (Fla. Dist. Ct. App. 1992) (finding that presumption was overcome). The Florida Legislature responded with a statute permitting rotating custody if the court finds that it is in the child's best interests. See FLA. STAT. ANN. § 61.121 (West Supp. 1998). A great deal of appellate litigation has also been generated by the West Virginia primary caretaker presumption. See Sack, *supra* note 159, at 300, 311-12; Mary Becker, *Maternal Feelings, Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 190-201 (1992).

¹⁶⁷ See Crippen, *supra* note 158, at 428.

¹⁶⁸ The former Montana statute created a requirement that if joint custody was denied, reasons must be provided. See MONT. CODE ANN. § 40-4-224(1). In addition, it created a rebuttable presumption that custody should be granted "to the parent who has provided most of the primary care during the child's life." See MONT. CODE ANN. § 40-4-212(3)(a) (1995). Neither rule exists under current Montana law.

for all post-divorce families. A primary caretaker presumption assumes that families have a primary caretaker and, furthermore, that having a primary caretaker is the best post-divorce arrangement. A joint custody presumption assumes shared parenting as the norm. Each of these presumptions projects a single empirical reality and a single normative standard on families when families, in fact and in ideal, are diverse.

The ALI principles on child custody use a default rule that avoids these kinds of empirical and normative assumptions about the family and is, accordingly, less family-standardizing. These principles provide that if parents do not agree otherwise, each parent should be allocated custodial responsibility in rough proportion to the predivorce share of responsibility that parent assumed.¹⁶⁹ If there was a clear primary caretaker during the marriage, the approximation standard would favor an arrangement at divorce in which that parent would have primary custodial responsibility; if the parents' roles were more or less equal, an equal sharing of post-divorce residential time would be favored. Other allocations of custodial responsibility would be called for when predivorce caretaking patterns followed other patterns.

The ALI standard has several benefits. It is more determinate than the best interests test because past caretaking involves questions of historical fact, which courts are competent to resolve, as contrasted with predictions about the future, which they are not.¹⁷⁰ Further, past caretaking tends to reflect factors about the parent-child relationship, such as the relative strength of each parent's emotional bond with the child and parental abilities, that are otherwise difficult to measure without experts, who tend to make custody decisionmaking more expensive and contentious.¹⁷¹ Past caretaking is also likely to reflect actual paren-

¹⁶⁹ See ALI Tentative Draft No. 3, Part I, *supra* note 31, § 2.09. The approximation concept was first proposed by Elizabeth Scott. See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 617 (1992).

¹⁷⁰ See Mnookin & Kornhauser, *supra* note 158, at 969.

¹⁷¹ Exceptions exist for certain specific circumstances in which past caretaking patterns are not likely to reflect the child's welfare. The exceptions include situations in which an older, mature child expresses a firm and reasonable preference for a custodial arrangement, not supported by past caretaking patterns, and circumstances in which a clear disparity in parenting abilities or in the quality of the emotional relationships of each parent to the child would make the arrangements otherwise warranted by past caretaking patterns

tal preferences, which means less distortion in the divorce bargaining process.¹⁷² In addition, a standard based on past caretaking renders irrelevant certain factors that are otherwise hard to eliminate from custody decisions, such as gender, religion, and sexual conduct.

The ALI principles solve the indeterminacy problem not with some prediscovered state prescription for families but rather on the basis of individual parents' own prior choices. It operates not from a state-determined, family-standardizing ideal but from where parents themselves left off. It is based not on empirical evidence of the experience of families in the aggregate but on the individual experiences of the family before the court.

While the ALI standards are justified based on the child's best interests alone, they also achieve a high level of fairness between the parties. Parents may reasonably expect their post-divorce level of caretaking responsibility to reflect roughly their predivorce level of responsibility. Parents who exercised just barely half of the parenting functions do not receive a large windfall as they might under a primary caretaker presumption; nor do parents who exercised very little responsibility in the past become suddenly entitled to half of the postdivorce custodial time as they would under a joint custody presumption. The principles create incentives that are appropriate to the circumstances and preferences of individual family members. Joint parenting during marriage is not the established norm in all cases, but a parent who expects an equal share of parenting time in the event of divorce will know that this share is likely only if parenting was also shared during the marriage. A strong joint custody preference, by contrast, is indifferent to predivorce caretaking patterns and, thus, does nothing to encourage shared parenting while the marriage is intact.

harmful to the child. *See* ALI Tentative Draft No. 3, Part I, *supra* note 31, § 2.09(1)(b) & (d). The ALI standard also ensures that each parent, including parents who have not exercised a significant proportion of caretaking responsibilities in the past, have sufficient custodial time with their children to maintain a meaningful relationship with them. *See id.* § 2.09(1)(a). Additional principles in the custody chapter seek to reduce conflict over children at divorce by requiring parenting plans, parenting education, and dispute resolution mechanisms for future disagreements that may arise after the final divorce. Protections for victims of domestic abuse are woven throughout the principles. *See id.* §§ 2.06, 2.07, 2.08, 2.11, 2.13, 2.22.

¹⁷² *See* Scott, *supra* note 169, at 663-37.

CONCLUSION

To say that the law should deal fairly with families in all of their diversity does not say what the law should be in the many areas in which it touches on family life. I have suggested some directions for reform on topics associated with traditional marriage and divorce as alternatives to the kinds of reforms I earlier criticized — alternatives that are debatable in their detail but compatible with the broad, family-enabling goals I have expressed. Many other legal reforms beyond the scope of this Lecture, such as gay and lesbian marriage, are also supportable within this broad model of reform.

The model of legal reform I have pursued in this Lecture understands that families are messy, that people are often irrational in their personal affairs, and that even well-intentioned law cannot always make them act in their own self-interest, never mind someone else's. It does not presume that the law can create or sustain relationships; it limits law to conflicts when individuals who have formed relationships fail at them and require an outside referee to set the terms of their disengagement. It does not use the law to standardize intimate relationships; within broad limits, it recognizes the legitimacy of a range of family forms and understands that the law's role in strengthening family is primarily that of treating fairly the individuals who form them. I would like to think that Professor Bodenheimer would have approved of such an approach.