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Mistaking Marriage for Social Policy

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This Article examines the role of marriage in society, focusing on the state's use of marriage as a proxy for desirable outcomes in social policy. Its analytical point of departure is the normative vision of modern marriage embraced by many of its proponents. From there, the idealized marriage is analyzed, not as a monolithic, opaque institution, but as one whose functional components may be identified and examined. The Article identifies the following as the primary functions of the normative marital family: expression; companionship; sex/procreation; caretaking; and economic support or redistribution. Analyzing the roles in society of each of these functions, it concludes that: (1) the expressive and companionate functions of marriage provide no societal benefit sufficient to justify state interference in those functions; (2) its purely sexual and procreative functions merit privacy and should, in all respects, be treated no differently than nonmarital sex and procreation; but (3) its caretaking and economic support functions benefit society significantly. Indeed, here the state's interest is at its apex. Accordingly, direct support of these two closely related functions, rather than the crude proxy of marriage in its entirety, should be the focus of state social policy in this area.

I. INTRODUCTION

We are at a crossroads. The Supreme Court’s decision in Lawrence v. Texas has cast further doubt on the already-questioned Defense of
Marriage Act ("DOMA"), \(^3\) as well as the laws of every state excluding same-sex couples from marrying. Debate about a possible constitutional amendment to ban gay marriage has led to President Bush throwing his support behind the idea.\(^4\) The argument, of course, rages on. On one side, there are impassioned defenses of marriage as it currently exists in the U.S.; on the other, equally impassioned attacks on the institution as traditionally conceived. Yet the history and laws of the United States reflect a national commitment to heterosexual monogamy.\(^5\) And this commitment is about more than just favoring one type of marriage over alternative forms. Marriage itself is seen as a tool to ensure the well-being of families and children, and federal and state family policies continue to rely heavily on it to do so.\(^6\) That social policy is expressed

intimate sexual conduct was unconstitutional as applied to adult males who had engaged in consensual acts of sodomy in the privacy of the home. Overruling Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that the U.S. Constitution provides no fundamental right to engage in homosexual sodomy), the Court acknowledged that individual decisions concerning the intimacies of physical relationships are a form of liberty, and hence, the Texas statute impinged on the exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment. 123 S.Ct. at 2484. In its rationale, the Court cited an "emerging awareness" in the Nation’s laws and traditions over the past half century that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. Id. at 2480.

\(^3\) 1 U.S.C.A. § 7 (2004). DOMA defines marriage for purposes of federal law to include “only a legal union between one man and one woman as husband and wife” and defines "spouse" as “only a person of the opposite sex who is a husband or a wife.” It seeks to relieve states of the obligation to recognize same-sex marriages contracted in any other state. Even before the Supreme Court’s decision in Lawrence, the Act’s constitutionality was the subject of vigorous debate. For articles attacking the constitutionality of the Act, see, e.g., James M. Donovan, DOMA: An Unconstitutional Establishment of Fundamentalist Christianity. 4 MICH. J. GENDER & L. 335 (1997); Andrew Koppelman, Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional, 83 IOWA L. REV. 1 (1997); Scott Ruskay-Kidd, The Defense of Marriage Act and the Overextension of Congressional Authority, 97 COLUM. L. REV. 1435 (1997). For articles defending the Act, see, e.g. David Orgon Coolidge & William C. Duncan, Reaffirming Marriage: A Presidential Priority, 24 HARV. J.L. & PUB. POL’Y 623 (2001); Daniel Crane, The Original Understanding of the “Effects Clause” of Article IV, Section 1, and Implications for the Defense of Marriage Act, 5 GEO. MASON L. REV. 307 (1998); Ralph U. Whitten, The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act, 32 CREIGHTON L. REV. 255 (1998).


\(^6\) See, e.g., Carbone, supra note 5, at 269-70:
through legislation. Marriage is proposed and accepted (so to speak) by lawmakers as a proxy for socially desirable outcomes. The federal

The first question is whether the United States has, or, indeed, has ever had a family policy as such... [W]hen the public and private spheres are considered together, a fairly clear family policy does emerge, at least in hindsight. U.S. law, policy, and social mores have long focused on an overwhelming, some would argue exclusive, emphasis on traditional marriage as the only legitimate locus of childrearing. Within this system, the state has regulated marriage, divorce, the status of children, and the financial consequences of these relationships, but state responsibility for children’s well-being has been largely discharged with the creation and maintenance of the marital union.

Id. at 269 (internal citations omitted). See also Libby S. Adler, Federalism and Family, 8 COLUM. J. GENDER & L. 197, 197-99 (1999) (“Under our federalist system, the axiom has it, family law resides within the province of the states... As a factual matter, however, the federal government exerts tremendous power over family.”).

7 See infra notes 187-194 and accompanying text for a discussion of the myriad benefits that accompany married status. The federal income tax system, however, is one of the few places where marriage is only inconsistently rewarded. William Galston notes that currently, joint returns for married couples combine with progressive marginal rates to reduce the income tax liability of some married couples but increase the tax liability of others. William Galston, Observations on Some Proposals to Help Parents: A Progressive Perspective, in TAKING PARENTING PUBLIC: THE CASE FOR A NEW SOCIAL MOVEMENT 155, 162 (Hewlett, Rankin, & West, eds., 2002). Nonetheless, slightly more couples receive a marriage bonus than pay a marriage penalty. See CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 1 (1997). The Congressional Budget Office study found that in 1996, 25 million married couples had their income tax liabilities reduced by $33 billion, while more than 21 million couples paid $29 billion more in federal income tax than they would if they were unmarried. Id. But as the proportion of two-earner couples with comparable incomes increases, so too will the proportion of married couples paying a marriage penalty. See Lawrence Zelenak, Doing Something About Marriage Penalties: A Guide for the Perplexed, 54 TAX L. REV. 1, 6-7 (2000).

The joint return system treats married couples as single economic units, combining their income in the joint return. But because the joint return rate schedule consists of brackets that are wider than the brackets for single taxpayers but less than twice as wide, some couples receive marriage bonuses while others pay marriage penalties. See Lawrence Zelenak, Marriage and the Income Tax, 67 S. CAL. L. REV. 339, 340-42 (1994). Two-earner couples with comparable incomes suffer a marriage penalty because they are pushed into tax brackets higher than they would be in if they were filing separately. Married workers with nonearning spouses (or spouses with significantly lower earnings), on the other hand, receive a marriage bonus and have lower tax liability than single, equal earning workers. The current system thus arguably creates an incentive for couples to conform to the single- or primary-earner family model. See EDWARD J. McCAFFERY, TAXING WOMEN 11-28 (1997); Zelenak, Marriage and the Income Tax, supra at 343. For a concise and accessible explanation of the marriage “penalty” and “bonus”, see Richard B. Malamud, Allocation of the Joint Return Marriage Penalty and Bonus, 15 VA. TAX REV. 489, 491-93 (1996).

Some argue that the penalty that affects some couples dissuades couples from marrying. See, e.g., id. at 493; MICHAEL J. GRAETZ, THE DECLINE (AND FALL?) OF THE INCOME TAX
government explicitly embraced marriage as a facet of antipoverty policy when it enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). PRWORA, among other things, designates public monies to encourage poor women to marry. That same year, congressional enactment of DOMA allowed for the policing of public morality with respect to marriage by permitting states to refuse to give legal effect to same-sex marriages recognized by other states.

This is clearly a time of legislative and cultural ferment on the issue of marriage and the state’s use of it as a tool of social policy, so it is appropriate to evaluate both. In doing so, I operate from the premise that bare public morality ought not be the sole justification for public policy or state action. Public morality, without more, is not necessarily connected to the public welfare. Peter Cicchino, echoing and elaborating on the work of John Stuart Mill, argues that the state should not prohibit private conduct that does not injure third parties solely

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29-40 (1997). But the existence of a marriage penalty for some couples seems to have had little or no effect on the marriage rate. See, e.g., David L. Sjoquist & Mary Beth Walker, *The Marriage Tax and the Rate and Timing of Marriage*, 48 Nat’l Tax J. 547 (1995) (reporting no effect of the marriage penalty on female marriage rates); James Alm & Leslie A. Whittington, *Does the Income Tax Affect Marital Decisions?* 48 Nat’l Tax J. 565 (1995) (reporting that the marriage penalty has an impact, albeit a small one, on marriage rates). The likely reason is that other economic, legal, and social benefits of marriage far outweigh the costs imposed by an income tax penalty. See, e.g., Robert S. McIntyre & Michael J. McIntyre, *Fixing the “Marriage Penalty” Problem*, 33 Val. U.L. Rev. 907, 912 (1999). McIntyre & McIntyre surmise that “[t]he collateral effects of marriage and divorce apparently are sufficiently important to married couples that they are unwilling to change their marital status simply to gain . . . tax benefits.” Id.


9 1 U.S.C.A. § 7. See supra note 3 and accompanying text.
because that conduct violates majoritarian morality. I extend that argument. Not only should the state refrain from prohibiting such conduct, but it also should avoid promoting certain sorts of private conduct based largely on moral considerations—particularly, conduct that goes to the core of self-definition and identity. Within this core reside the proper nature and structure of intimate relationships between adults. State involvement in these areas distorts preferences; the more "private" the area, the more the state should be aware of and restrain—or entirely abstain from using—its coercive power.

This Article explores the role of marriage and the marital family in society by dismantling the normative marital relationship into its functional parts and examining each separately. When government promotes marriage through legislation, it promotes all that the institution entails, suggesting that marriage itself promotes the public welfare. I argue that the institution of marriage is not monolithic; instead, the normative marital relationship can be viewed as a composite whose primary functions may be identified and systematically analyzed.

Litigants and academics have employed functional approaches to the family in order to obtain for alternative families benefits usually reserved for marital families. A functional approach typically questions whether an unconventional relationship shares the essential characteristics of a traditionally accepted relationship; if so, the

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10 See Peter M. Cicchino, Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review? 87 GEO. L.J. 139 (1998). Cicchino focuses on governmental laws that discriminate against people on the basis of their sexual orientation. His analysis is grounded in constitutional equal protection jurisprudence, and he argues that "a bare assertion of public morality provides no 'rational basis' for a law because such assertions, unsupported by any observable connection to the public welfare, are not themselves rational." Id. at 142. See also, Lawrence v. Texas, 123 S.Ct. 2472, 2480 (2003), quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) ("The issue is whether the majority may use the power of the State to enforce [the view that homosexuality is wrong] on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"); Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (J. Stevens, dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."); JOHN STUART MILL, ON LIBERTY 80-81 (David Bromnich & George Kateb eds., 2003).

11 By this, I mean the idealized vision of the marital family espoused by many of its proponents. See infra notes 17-30 and accompanying text.
argument goes, the unconventional relationship should receive equivalent benefits or privileges. This Article, however, will use this approach differently. Just as it is useful in the contexts of litigation and academia to unbundle marriage, this unbundling could also be an apt tool in the creation of policy and legislation. I suggest that makers of social policy use the diffracting lens of a functional approach to examine marriage and the marital family to disaggregate and then better understand its various components before adopting marriage as a solution to social ills.

Part II of this Article briefly reviews several prominent theories of modern marriage. First, it describes what is often referred to as the "traditional" family—the two-parent household where the partners' roles complement each other. The husband focuses on his career and providing income to the household, the wife subordinates her career (or abandons the workplace altogether) to become the family's primary caretaker and otherwise meet the household's needs. Second, it discusses the liberal feminist vision of the 'egalitarian' family—where the husband and wife share income earning, childrearing, and household chores. This part concludes by discussing a feminist critique, led by Martha Fineman, of the modern and liberal feminist visions of the egalitarian family. That critique takes the view that it is not enough to examine inequality within the family. Instead, Fineman urges reexamination of the centrality in society of the nuclear family itself.

Part III attempts the sort of reexamination that Fineman favors by exploring the marital family's dominant role in society. It proposes a diffracting functional approach as a framework through which a

12 Note, Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family, 104 Harv. L. Rev. 1640, 1646-47 (1991). Several commentators have identified problems with adopting an approach that uses the 'traditional' family as a reference point; I discuss this and other limitations of the functional approach in Part II.A. See infra notes 17-30 and accompanying text.
13 See infra notes 17-46 and accompanying text.
14 Historians have noted that the "popular image of what families were supposed to be like [is] by no means a correct recollection of any actual 'traditional' family." Judith Stacey, In the Name of the Family: Rethinking Family Values in the Postmodern Age 6 (1996) (internal citations omitted). They and others who write about the family thus use "the concept of the modern family to designate a family form that most Americans now consider to be traditional... [T]he term postmodern family instead... signal[s] the contested, ambivalent, and undecided character of our contemporary family cultures." Id. at 6-7 (emphasis added). For accuracy, I will use the term "modern family" when discussing that family form. For clarity, I will occasionally call it the "so-called traditional family".
reexamination of marriage and the marital family's role in society should occur. First, the more familiar functional form of analysis is discussed. This familiar form presumes that social regulation of the family arises from the state's interest in the various functions the family performs in society. Indeed, those who have relied on this approach have urged that nontraditional intimate groupings be recognized as "families" when they perform functions analogous to those of the so-called traditional family.

Part III then proceeds to describe a revised functional theory that dissects the functions performed by normative marriage—that idealized vision of matrimony imagined by its proponents, the most prominent of whom may be Nobel laureate economist Gary Becker. Through the diffracting lens of this revised functional approach, normative marriage is seen to perform the following primary societal tasks: expression, companionship, sex and procreation, caretaking, and economic support/redistribution. An examination of state marital activism ought not focus solely on marriage as an imagined monolith, but instead on this more complicated, unbundled view of the institution as composed of numerous functional elements that contribute in multiple ways to its ultimate operation.

I then analyze each of marriage's functions separately. The analyses seek to reconcile a rights-based approach that recognizes individuals' privacy, autonomy, and/or dependency, with an overarching approach to social policy that acknowledges a greater societal interest in and responsibility for ensuring the social welfare.

I conclude that its expressive and companionate functions do not benefit society sufficiently to justify state involvement. The purely sexual/procreative function, like the sexual and procreative decisions of unmarried adults, merits privacy. State involvement in these familial functions may unnecessarily dictate the content of individuals' expression, distort their freedom to choose the nature of their intimate associations and personal commitments, and excessively involve the state in private sexual and procreative decisions.

On the other hand, two of marriage's functions—dependent caretaking and economic support and redistribution—provide tremendous societal benefit. Indeed, the state's interest in and

15 See infra notes 54-250 and accompanying text.
16 See infra notes 17-30 and accompanying text.
responsibility for ensuring the public welfare not only merit state support of these functions, they require it. But caregiving and economic support benefit society whether performed within or outside of the marital relationship. Government should therefore refrain from promoting marriage and instead enact better-targeted and more efficient policies to directly support these important societal functions.

II. THEORIES OF MODERN AND POSTMODERN MARRIAGE

A. The Modern Family

As mentioned above, the classic theory of the modern family has been expressed most prominently by economist Gary Becker. Although he initially published *A Treatise on the Family* more than twenty years ago, his vision of the specialized two-parent family continues to be both cited explicitly and relied upon implicitly by modern proponents of this family structure. In his treatise, Becker argues that the division of labor by gender within marriage is efficient and thus properly the central feature of family life. He posits a series of theorems to describe the two types of activity—market work and household production—that largely make up family life. One theorem provides that, “if all members of an efficient household have different comparative advantages, no more than one member would allocate time to both the market and the household sectors.” Another of his theorems states that “if commodity production functions have constant or increasing returns to scale, all members of efficient households would specialize completely in the market or household sectors and would invest only in market or household capital.”

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17 See STACEY, *supra* note 14, at 10, for a definition and discussion of “modern” and “postmodern” families.
20 BECKER, *supra* note 18, at 14-37.
21 *Id.* at 17.
22 *Id.* at 19 (emphasis added).
Becker argues that a division of labor would still be efficient even between “intrinsically identical” spouses. However, he suggests that women have a “comparative advantage” when it comes to both childbearing and childrearing. Because even small differences along gender lines result in a rational gendered division of labor, women should “specialize” in household activities while men “specialize” in the market. Becker concludes that this division of labor most benefits families, suggesting that wives either devote their time entirely to caretaking and homemaking, or at least limit their workforce participation so that they are able to take on the lion’s share of caretaking and household responsibilities.

Modern family theory thus views the division of labor by gender as the central advantage of the family, and codependence between husband and wife (their “complementarity,” as opposed to equality) as a necessary corollary.

24 Even if a husband and wife are intrinsically identical, they gain from a division of labor between market and household activities... The gain comes from increasing returns to investments in sector-specific human capital that raise productivity mainly in either the market or the nonmarket sectors. Therefore, even small differences between men and women—presumably related at least partially to the advantages of women in the birth and rearing of children—would cause a division of labor by gender, with wives more specialized to household activities and husbands more specialized to other work.” Id. at 3-4. See also Richard A. Posner, Economic Analysis of Law 155-58 (1992).
26 Other theorists who endorsed role specialization as the central feature of marriage nonetheless acknowledge that such specialization can lead to opportunistic behavior. Investments made by each partner are not symmetrical. Investment in market capital is portable; investment in caretaking and the household is not—it is “marriage specific”. See Lloyd Cohen, Divorce and Quasi Rents: Or, I Gave Him the Best Years of My Life, in 16 J. Legal Stud. 267 (1987). Cohen argues that men benefit from marriage the most during the childrearing years that tend to come early in the relationship. During that period in their lives, wives’ performing the bulk of the childrearing and household tasks enables their husbands to concentrate their efforts on developing their careers. Women enjoy the greatest benefits once their children are older and their husbands’ earning capacity has reached its peak. Id. at 287.
Specialization of tasks, such as the division of labor between men and women, implies a dependence on others for certain tasks. Women have traditionally relied on men for provision of food, shelter, and protection, and men have traditionally relied on women for the bearing and rearing of children and the maintenance of the home. Consequently, both men and women have been made better off by a 'marriage'...27

Other proponents of the modern family envision a modified version of the modern nuclear family—still characterized by a market/household division of labor, but somewhat less circumscribed by the biologism of Becker's analysis. David Popenoe, for example, envisions a family in many ways indistinguishable from Becker's "efficient" family, at least during the childrearing years. 28 In Popenoe's ideal world, mothers would care for children full-time in their infancy. Once children have reached twelve to eighteen months of age, mothers could resume working part-time, but preferably not return to full-time work until their children have reached their teen years. Popenoe does suggest that fathers could stay home part-time to care for non-infant children while mothers resume full-time work; but during infancy, he claims that children cared for by their mothers "appear to have distinct advantages over those reared apart from their mothers." 29 This modified vision of the modern marital family acknowledges both the importance "for women [of being] able to achieve the economic, social, and psychic

When a marriage breaks down, the spouse who has specialized in the domestic aspects of the marriage will suffer a disproportionate loss. Ira Ellman agrees that specialization is a rational choice for married couples with different earning capacities. He argues that legal rules should encourage participation in such rational sharing by ensuring that a spouse who sacrifices her own earning capacity in the marketplace to increase the income and efficiency of the marital unit as a whole is not penalized when the marriage ends. Ira Ellman, The Theory of Alimony, 77 CAL. L. Rev. 1, 46-51 (1989). Accordingly, Ellman proposes that states adopt systems of alimony based on compensating divorcing spouses for marriage-related economic losses as an attempt to "reallocate the post-divorce financial consequences of marriage in order to prevent distorting incentives" from affecting individuals' choices during a marriage. Id. at 50.

27 BECKER, supra note 18, at 27 (emphasis added).
29 Id. at 264.
rewards of the workplace" and the reality that economic necessity may require that both husband and wife work.

B. Feminist Critiques and Postmodern Marriage

Feminists have voiced multiple objections to this modern vision of family, critiquing both the marital relationship itself and inequities caused by the privileging of the marital family in society. Feminists have criticized marriage as it has actually been experienced by many couples and have illustrated the many ways in which the institution fails. Indeed, the liberal feminist view, characterized by the work of Susan Moller Okin, criticizes the very specialization that Becker praises. Okin draws on studies of power within families that demonstrate that "the amount of money a person earns—in comparison with a partner's income—establishes relative power." Women's historic economic vulnerability reinforces and perpetuates the historically hierarchical social arrangement within marriage. In this arrangement, husbands are heads of household, and wives owe them domestic and sexual services and obedience. The marital family has thus contributed to social and economic marginalization of women and perpetuated male dominance and patriarchy. Okin instead envisions the egalitarian family as the solution to the problem of women's subordination and economic vulnerability. Such a family would "encourage and facilitate the equal sharing by men and women of paid and unpaid work, of productive and reproductive labor."

Yet unlike Okin and the liberal feminists, other feminist thinkers believe that the gendered nature of the nuclear marital family will be resistant to all but the most radical transformations. Like the liberal

30 Id. at 262. See also Vicki Schultz, Life's Work, 100 COLUM. L. REV. 1881 (2000).
31 Popenoe, supra note 28 at 264.
35 OKIN, supra note 33, at 171.
36 Id.
feminists, they reject the classic conception of the modern marital family form. But this group, led by Martha Fineman, also criticizes the ideal of the egalitarian family as fundamentally insufficient to overcome the gendered and unequal nature of the marital family. 37 Fineman acknowledges that attaining equality in the marketplace, one of the goals of the egalitarian couple, potentially leaves the family without available caretakers. 38 “Shared” caretaking between parents has remained illusory—whether or not both partners work, women perform the majority of domestic work. 39 Furthermore, when couples must inevitably compromise one partner’s career to provide caretaking, both economic considerations and social conditioning drive the choice. Unless they are able to hire others to perform caretaking functions, it is women who typically give up their aspirations of market equality and either abandon the marketplace or limit their market activities to enable them to become primary caretakers. These dilemmas underscore the gendered core of the modern family. 40

Fineman argues that so long as society allocates the responsibility for caretaking solely to the nuclear family, women’s inequality will continue. She further asserts that society has an interest in providing for its dependents and that mothering 41 should be recognized as a socially beneficial caretaking function. She recommends giving primacy and privacy to the mother-child relationship, as opposed to the husband-wife relationship. This would include de-privileging the marital family, discontinuing the subsidies it receives, and abolishing legal recognition of marriage altogether. In its place, the mother-child dyad should be considered the central family relationship, entitled to state support and subsidy. 42

37 FINEMAN, supra note 32, at 27, 70-89, 157-66.
38 Id. at 164-66.
39 Id.
40 Id.
41 Fineman views “mothering” as a gendered activity different in quality from “fathering”. She argues that:
   [I]t is the Mother/Child metaphor represents a specific practice of social and emotional responsibility ... [M]en can and should be Mothers. In fact, if men are interested in acquiring legal rights of access to children (or other dependents), I argue they must be Mothers in the stereotypical nurturing sense of that term—that is, engaged in caretaking.
FINEMAN, supra note 32, at 234-35 (emphasis in the original).
42 FINEMAN, supra note 32, at 230-36.
Fineman criticizes feminist family theorists for limiting their focus to explorations of inequities and injustices within the family. She considers it a mistake to concentrate exclusively on the unequal relationships inside the family unit and instead urges feminists to “look to what work the idea of a marital family does in society, and the ways in which public and private institutions rely on that work getting done.” The work of feminist theorists, then, should include examining the institution of the family itself within a larger societal context.

The analysis of marriage and the marital family below attempts such an examination. Part III separates out the component functions of marriage, starting with an idealized vision of marriage derived from conceptions of the modern marital family discussed above. Parsing the marital family and analyzing its primary functions helps clarify how each of those functions relates to society and how (and whether) each furthers societal goals.

C. A Functional Approach

A functional approach to marital and family theory has been employed by family law scholars and practitioners in the recent past. That approach seeks first to identify the essential characteristics of or functions performed by the conventionally accepted relationship, i.e., the

43 Martha A. Fineman, Why Marriage?, 9 VA. J. SOC. POL’L & L. 239, 252-53 (2001). For example, Katharine Bartlett has suggested that feminism’s principal contribution to family law “has been to open up that institution to critical scrutiny and question the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others.” Katharine T. Bartlett, Feminism and Family Law, 33 FAM. L.Q. 475, 475 (1999). Fineman suggests that Bartlett’s observations reflect feminist family law’s too-limited focus. Feminists have indeed made gains by challenging traditional patriarchal family law and have helped in the attainment of formal gender equality. But feminism’s efforts stopped short of challenging the very meaning of marriage and the marital family in the societal context. Fineman, supra at 252-53.

44 Id. at 253.

45 Roscoe Pound, for example, sought to have individual and societal interests, such as the family and marriage as social institutions, “compared on the same plane”. See generally Roscoe Pound, A Survey of Social Interests, 57 HARV. L. REV. 1, 2, 20-22 (1943). Pound believed the family and marriage to be so central to society’s well-being that its preservation alone was an important societal interest. According to Pound, the societal interest comprised, “on the one hand a social interest in the maintenance of the family as a social institution and on the other hand a social interest in the protection of dependent persons, in securing to all individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future.” Roscoe Pound, Individual Interests in Domestic Relations, 14 MICH. L. REV. 177, 182 (1916). A feminist critique, on the other hand, refuses to take as given the inherent superiority of the marital family form, or the inevitability of this societal role for the marital family.
nuclear marital family. It then inquires whether an alternative relationship or set of relationships shares those characteristics. If so, then the alternative relationship ought also to receive the benefits accorded the conventionally recognized relationship. The primary goal of this approach has been to gain inclusion of non-conventional family forms in the definition of "family" so that they may receive benefits enjoyed by modern marital families. Yet although the functional approach continues to be argued by litigants and implemented in family cases including, for example, custody, visitation and adoption, it has

46 See, e.g., Paula Ettelbrick, Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law, 10 N.Y.L. SCH. J. HUM. RTS. 513, 514-15 (1993); Nancy Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 471-73 (1990); Mary Patricia Treuthart, Adopting a More Realistic Definition of "Family", 26 GONZ. L. REV. 91, 92 (1990/1991); supra note 12 at 1641. See also Braschi v. Stahl Associates, 74 N.Y.2d 201 (1989). The New York Court of Appeals' decision in Braschi is an important manifestation of the functional view of the family in the courts. The question in the case was whether the same-sex partner of a deceased man could inherit a rent-controlled apartment after the death of his partner, whose name was on the lease. In order for him to do so, the couple had to be considered a "family" under New York's rent-control laws (under the governing law, a landlord could not evict either the surviving spouse or some other member of the deceased tenant's family who has been living with the tenant "in the housing accommodation as a primary residence who can prove emotional and financial commitment, and interdependence between such person and the tenant."

Rent and Eviction Regulations - New York City, 9 N.Y. COMP. CODES R. & REGS § 2204.6 (d) (3) (2003)). The Court found that the relationship between the two men properly constituted a family because they had lived together for more than ten years, shared social lives, domestic responsibilities, and financial obligations. It held that "the term family as used in 9 NYCRR 2204.6 (d), should not be rigidly restricted to those people who have formalized their relationship", but should instead reflect "the reality of family life." Braschi, 74 N.Y.2d at 211. The Court reasoned that a functional approach was justified since the policy rationales underlying the regulations were equally served by protecting committed cohabitants as they were by protecting marital families. The Court announced that "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." 

since lost favor with legal scholars. These theorists have identified significant problems with relying on this theory to extend recognition to alternative families.

Arguably the most significant drawback to using a functional theory to gain legal recognition of nontraditional families is that doing so implicitly concedes the marital nuclear family as the paradigmatic family form. The unmodified "family" is understood as describing a grouping that originates with and centers around a marital union. Nonmarital intimate relationships continue to be measured against that norm, and those relationships receive recognition only to the extent that they resemble and reference the marital nuclear family.


See, e.g., Ann Shalleck, Foundational Myths and the Reality of Dependency: The Role of Marriage, 8 AM. U. J. GENDER SOC. POL'y & L. 197, 201-02 (1999) ("[E]fforts to analogize other relationships to marriage, in order to achieve for those units the privileges of marriage, serve primarily to reinforce, rather than challenge, the primacy of the marriage relationship.") (citations omitted); Note, Looking for a Family Resemblance, supra note 12, at 1641 ("The functional approach acknowledges the paradigm of the nuclear family but also legitimizes non-nuclear relationships that share the essential characteristics of traditional relationships.").

Language is an important indicator of (and contributor to) societal norms. The unmodified "family" is commonly used to describe the nuclear marital family. Family forms that differ from this model are frequently modified so as to identify the manner in which they differ from the norm—thus, they are "single-parent families" and "same-sex couples". See, e.g., FINEMAN, supra note 46, at 1-9 (1995).
Nonmarital families seeking to be recognized as families, moreover, have in some cases been held to a higher standard than marital nuclear families. For example, marital relationships that deviate in some way from the norm (e.g., the husband and wife who live in different cities and see each other only on weekends; or the couple that keeps financial affairs separate) nonetheless receive the benefits of marriage.51

The law presumes the validity of the marital relationship. Nonmarital intimate relationships, on the other hand, have been denied legal recognition when the relationships do not comprise one or more of the features traditionally associated with the conventional marital family.52

The normalizing of the nuclear marital family form is thus a significant—and perhaps fatal—drawback of the functional approach. And the approach suffers from another, closely related weakness: requisite identification of whose “conventional” modern family achieves norm status. The functional approach requires, moreover, that the norm—the prototypical family—be defined. Once that norm is articulated, it becomes the reference point against which other relationships can be compared. The norm (here, the marital nuclear family) becomes defined even more narrowly. The result is that even those families who fall within the broad category of “marital family” can be nonetheless effectively defined out of that category. Their family form becomes one that law does not necessarily want to perpetuate. Explicit norm definition risks essentializing that which we think we know and can define (here, the “marital family”), without acknowledging or recognizing that our conceptions are colored by our own biases and experiences. The approach risks failing to recognize the diversity within the modern family, and by not acknowledging the

51 See, e.g., Treuthart, supra note 39, at 98. Treuthart observes that: Neither permanence, procreation, economic interdependence nor even sexual exclusivity is currently required for a valid marriage. Indeed, marriage partners could reside separate and apart from one another without sharing any aspects of their lives and still reap all the legal benefits of marriage unless their coupling could be deemed a sham.

52 See, e.g., In re Guardianship of Kowalski, 382 N.W.2d 861 (Minn. Ct. App.), cert. denied, 475 U.S. 1085 (1986). The judge who inquired into the nature of the relationship between Sharon Kowalski and her partner placed as much importance on evidence that Kowalski had recently closed the couple’s joint bank account as on other evidence of the couple’s commitment within the relationship. See id. at 863.
legitimacy (or existence) of other experiences, it renders them inferior or invisible.

The functional approach, finally, can lead to unpredictability. It is not always clear which feature or features will be sufficient for a nonmarital relationship to be considered a family. Further, judges may express their personal views about what sorts of relationships should count as a family by emphasizing certain functions over others—under the guise of exercising their discretion.53

Despite this litany of problems with functional analysis of marriage, Part III draws from this approach. But I aim to avoid the pitfalls of the standard approach. Unlike earlier functional analyses, my approach does not dismantle the marital family in order to identify those “essential” components that nontraditional families ought to mimic in order to receive the same benefits. Instead, this revised functional approach offers a method to those who promote marriage as social policy and privilege it in law for doing what I believe is essential: subjecting the institution itself—and the roles it plays in society—to more rigorous analysis.

III. FUNCTIONALISM REDUX: DISMANTLING MODERN MARRIAGE

Policymakers currently treat marriage as a private and all-but-inscrutable relationship,54 yet a revised functional approach challenges

54 That is, at least until its dissolution, at which time the state may intervene and decide economic distribution, ongoing financial obligations between the parties, and rights of child custody and visitation.

There are a number of exceptions to state respect for marital privacy. One relatively recent exception is the refusal of law to tolerate violence within families. See, e.g., Warren v. State, 336 S.E.2d 221, 222 (Ga. 1985) (rejecting the spousal rape exception, which made it legally impossible for a husband to be guilty of raping his wife); State ex rel. Williams v. Marsh, 626 S.W.2d 223, 227 (Mo. 1982) (upholding the constitutionality of a state statute that permits any adult abused by a household member or former household member to obtain an ex parte order of protection).

Another exception is the common law requirement that some minimum level of support be provided within marriage. See, e.g., Sharpe Furniture, Inc. v. Buchstaff, 299 N.W.2d 219, 220 (Wis. 1980). The Court in Sharpe held a husband liable under the doctrine of necessaries for the cost of a sofa purchased on credit by his wife. The doctrine of necessaries provides that, “when an item or service is obtained for the benefit of the family which is necessary and no payment for that item or service has been made...
the perception of marriage as a benevolent monolith. It instead allows for more precise identification of the ways in which marriage may further social goals and lays bare those aspects of marriage that may not contribute to any identifiable social good.

I take as a starting point a vision of the idealized marriage, derived from conceptions of the modern marital family discussed in Part II above. I consciously use as a framework a normative vision of marriage—not necessarily marriage as it is actually experienced, but rather an idealized conception of marriage embraced by its proponents. I adopt this approach for two reasons: First, using a paradigm that presumes a marriage that functions in society the way it is “supposed to” can illustrate more powerfully that serious problems exist with the use of marriage as state policy. Second, there is no “every-marriage”. As Barbara Stark has pointed out, “[t]here are innumerable marriages, ... and most of them go through different phases.” It is not the purpose of this Article to describe the many manifestations of the marital relationship or illustrate the myriad ways in which marriages fail. The Article maintains instead that, given the functions performed by even the most successful marriages, state privileging and promoting of the institution as a whole is both indefensible as ideology and inefficient as policy.

I next dissect this idealized vision of marriage into its component functions, analyzing each individually. These separate analyses depart somewhat from the normative in order to descriptively address each component, and to consider the theoretical basis for state involvement in

husband is primarily liable.” Id. The Court found the sofa to be a necessary item benefiting the family. But cf. Cheshire Medical Center v. Holbrook, 663 A.2d 1344, 1347 (N.H. 1995) (finding the gender bias of doctrine of necessaries unconstitutional, and instead imposing a reciprocal obligation of support on both partners to a marriage). See also McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) (denying wife’s petition for maintenance and support when husband and wife lived together and husband provided minimally for her maintenance—“[t]he living standard of a family are a matter of concern to the household, and not for the courts to determine.”). As these cases illustrate, a spouse must take piecemeal steps to assure her level of support (for example, buying on credit, getting sued, and then obtaining her partner’s contribution), but she is not permitted to bring a support action to secure that right through a single overall remedy.

In virtually all other respects, however, the state recognizes the privacy of the intact marital relationship. See Fineman, supra note 32, at 177-93. 55 See discussion infra Part II.A.

each. After examining each of the primary functional components of marriage, I conclude that active state involvement is independently justified in only two of the primary functional components of the marital family, dependent caretaking and the provision of economic support. The implications of this argument are discussed in Part IV.

Some may object to the notion that marriage can be broken down and analyzed according to its various functions, arguing that the whole is more than the sum of its parts and that marriage is in some respects inscrutable. For instance, Bruce Hafen contemplates that an unidentifiable "something about the combined permanence, authority, and love that characterize the formal family uniquely makes possible" the work of teaching children moral and civic duty. It is difficult to address such arguments. One surmises that their often-unspoken origin rests simply in the relative prevalence and success of the marital family in society. Because this is the conventional family form and the one that has been exclusively supported and subsidized throughout this country's history, it is unsurprising that it is also the family form that feels natural and right to the majority of us. I argue that if we are going to embrace a social policy that favors marital families over others, we must be able to articulate a reasoned justification for it. A romantic ideal of the marital relationship and family is insufficient ground upon which to rest public policy.

A. "We Are Gathered Here": The Expressive Function of Marriage

Cass Sunstein has described the "expressive dimension" of conduct as being, "very simply, the attitudes and commitments that the conduct signals." Conduct that may not have a consciously or explicitly expressive purpose (and thus might not be considered "expressive conduct" or "symbolic speech" under First Amendment analysis)
nonetheless frequently has an expressive effect. An actor's conduct may thus communicate to observers certain attitudes or beliefs, regardless of whether the actor intends, or is even aware of, the message or messages conveyed.61 Those who marry, by committing that very act, convey a very particular set of messages—for example, love for and commitment to another, but also implicit approval of the privileging of heterosexual norms—the communication of which the state should neither promote nor discourage.62

The expressive component of marriage has much power, and thus importance, for a number of reasons. First, the sheer number of people who marry magnifies the act's communicative effect. Some 90 percent of all Americans will marry during their lifetimes, and more than 70 percent of people who divorce remarry.63 Second, because the state requires that the commitment be made publicly, the communicative effect is necessarily more significant than it is for non-public forms of conduct. In fact, for many people, their engagement and wedding announcements, wedding invitations, and the actual declaration of marriage vows in the wedding ceremony are among the most public statements they ever make. Both legal requirements and extralegal norms, which are inextricably linked,64 have historically operated together to make this so.

Since colonial times, the state has encouraged couples to formalize their relationships by marrying in accordance with nuptial laws.65 All of the colonial provinces enacted marriage codes based on British law. These codes set forth procedures with which couples were required to
comply in order to legally marry. Many of these procedures highlighted the public aspect of marriage, and the community’s interest and involvement in marital relationships. For example, couples were required to publicize their intention to marry. The posting of marriage announcements, or “banns,” as they were known, informed the community of the couple’s intentions to marry and so ensured that anyone who objected to the union might come forward and intervene. 66

While no longer legally required, public announcement of engagements and weddings, frequently in local newspapers, remains a common practice today. State regulations continue in other ways to require that entry into marriage—in many ways an intimate and private relationship—be a public act. Couples must obtain state-issued (and publicly-recorded) licenses and conduct ceremonies in compliance with state regulations in order for their marriages to be valid. 67 Furthermore, while most state regulations merely require the presence of a witness or witnesses to the marriage ceremony, it is customary for the couple’s community of kinfolk and friends (as many as can attend or be accommodated) to attend and celebrate a couple’s nuptials.

In the face of this relentless institutionalization of matrimony, common law marriage, which requires no state act or involvement for its validation, is a rapidly disappearing example of a privatized domestic relationship. 68 For a marriage to be valid at common law, parties must simply have the legal capacity to marry, agree to marry, cohabit, and consistently hold themselves out as married. 69 No state-sanctioned official need to officiate, nor must there be a wedding or marriage

66 Id. at 67-69. Engaged couples were required to post notice of their pending nuptials in a conspicuous place for a specified period of time prior to their wedding. Id. at 67. In an alternate procedure, known as licensing, a magistrate conveyed upon the couple the community’s blessing of their union. Id. Banns were replaced, beginning in the mid-19th century, by advance notice requirements. Id. at 93. These requirements imposed waiting periods before a couple would be permitted to marry. Id.


69 See, Cahn, Moral Complexities, supra note 68. See also, e.g., Tex. Fam. Code Ann. § 2.401 (Vernon 2004) (declaring common law marriage valid if proven by evidence indicating parties to relationship agreed to be married, cohabited as man and wife, and represented themselves to others as married). A minority of states continue to recognize common law marriage. See infra note 72.
license. In the early twentieth century, two-thirds of the states recognized common law marriage. It has since been abolished in all but eleven states and the District of Columbia. Its decline assures that entry into marriage will continue to be a public, as opposed to private, act.

What messages are communicated by those who marry? Typically, the most intentional and visible message is the public expression of love for and lifelong commitment to another. Indeed, in Turner v. Safley, the Supreme Court explicitly recognized this aspect of marriage in the process of protecting prisoners' right to marry while incarcerated. The Court reasoned that even if one spouse were physically absent from the marriage, there were other important elements of the marital relationship

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70 See Cahn, Moral Complexities, supra note 59, at 256.
73 Cahn notes this:

. . . [T]he virtual abolition of common law marriage has made entry into marriage less private, thus reinforcing the public nature of marriage . . . A common law marriage does not require any official state involvement for its validation: no 'wedding,' no marriage license, and no state-sanctioned person to declare the parties 'husband and wife.' As such, common law marriage is a wonderful example of privatized domestic relations, yet it is disappearing.

Cahn, Moral Complexities at 256.
that remained deserving of constitutional protection.\textsuperscript{74} The first element discussed by the Court was the expressive component of marriage. Justice O'Connor, writing for the Court, described marriages as comprising “expressions of emotional support and public commitment.”\textsuperscript{75}

Many Americans consider marriage a religious ceremony and institution, even though the religious (or cultural) and civil elements of marriages are conceptually and effectively distinct.\textsuperscript{76} The state recognizes and gives legal effect only to marriages entered into in accordance with civil regulations.\textsuperscript{77} While many marriage ceremonies combine both religious or cultural aspects and compliance with civil requirements, a religious component is unnecessary for a valid civil marriage. Yet despite the formal separation of church and state, Christian tenets are reflected through legislation and in case law governing marriage.\textsuperscript{78} Anglo-American marriage laws were derived from the Christian tradition of indissolubility and followed canon law.\textsuperscript{79}

\textsuperscript{74} Turner v. Safley, 482 U.S. 78, 95 (1987).

\textsuperscript{75} Id. at 95-96.

\textsuperscript{76} This widespread sentiment has found its way into law. The D.C. Code provides an example:

For the purpose of preserving the evidence of marriages in the District of Columbia, every minister of any religious society approved or ordained according to the ceremonies of his religious society, whether his residence is in the District of Columbia or elsewhere . . . may be authorized by any judge of the Superior Court of the District of Columbia to celebrate marriages in the District of Columbia. 2001 D.C. STAT. § 46-406. The statute goes on to permit only one other group—“any judge or justice of any court of record”—to celebrate marriages in the District of Columbia. Id. President George W. Bush, at a recent press conference expressed his belief that “[m]arriage cannot be severed from its cultural, religious, and natural roots without weakening [its] good influence on society.”

\textsuperscript{77} See generally Peter J. Riga, Residue of Romano-Canonical Marriage Law in Modern American Law, 5 WHITTIER L. REV. 37 (1983) (tracing the historical and cultural
The Turner Court noted that "the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." The opposite-sex requirement—a constant, of course, of marriage-related legislation at the federal and state levels—also has its origins in the Christian biblical tradition. Historically, and even today, judicial decisions in the United States—especially those concerning marriage and family law—are replete with expressions and applications of Christian ideals and values. While the Christian imperative has been less explicitly invoked in recent court decisions (for example, those involving same-sex unions), it continues to inform legal outcomes.

genealogy of our modern legal system of marriage). In the country’s earlier days, the Supreme Court acknowledged the primacy of Christianity in the United States. See Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) (referring to the United States as a “Christian nation”); United States v. Macintosh, 283 U.S. 605, 625 (1931) (referring to Church of the Holy Trinity for the proposition that the citizens of the United States are a “Christian people”).

80 Turner v. Safley, 482 U.S. at 96.
81 See Leviticus 18:22 (Revised Standard Version) (“You shall not lie with a male as with a woman; it is an abomination.”). See also Leviticus 20:13 (Revised Standard Version) (“If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them.”).
82 For example, in an early case deciding that only monogamous marriages would remain legal, the Supreme Court stated that “polygamy is ... contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world.” Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890). Christian morality and value systems have provided the underpinning for how the state conceives of monogamous marriage. See, e.g., Davis v. Beason, 113 U.S. 333 (1890). The Court justified the suppression of polygamy with reference to Christian values and “the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation.” Id. at 343. See also In re Siveke, 441 N.Y.S.2d 631, 634 (N.Y. Sup. Ct. 1981) (“Of course, the proposition that the relationship of husband and wife is special and unique finds support in scripture as well, wherein we are told, ‘Therefore a man leaves his father and mother and cleaves to his wife, and they become one flesh.’”) (citing Genesis 2:24); Dan S. Browning, Biology, Ethics, and Narrative in Christian Family Theory, 119, 119-56, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (Popceno, et al., eds. 1996); Scott C. Idleman, Note, The Role of Religious Values in Judicial Decision Making, 68 IND. L.J. 433, 474-477 (1993).
83 See Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (upholding a State Attorney General’s revocation of a job offer to the plaintiff because the plaintiff had married her same-sex partner in a religious ceremony). In Shahar, the plaintiff argued that her marriage was a protected exercise of her religion. The court disagreed, reasoning that, “[g]iven especially that Plaintiff’s religion requires a woman neither to ‘marry’ another female—even in the case of lesbian couples—nor to marry at all, considerable doubt also exists that she has a constitutionally protected federal right to be ‘married’ to another woman to engage in her religion.” Id. at 1099. See also, Mark Strasser, Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees, 33 LOY. U. CHI. L.J. 597 (2002). According to Strasser, the court’s decision
Given this tradition and the continued linking of marriage and religion, marriage can symbolize acceptance by the marrying couple of both the moral and religious conventions of society.

Those who marry also communicate that they possess the maturity and responsibility necessary to fulfill the legal responsibilities of marriage. Public expression of these personal relationship traits can be vital to an individual's conception and construction of personal identity. The state protects and facilitates this personal expression. As illustrated by the Court's opinion in *Turner*, the civil status of marriage lends additional credibility and weight to the individual's statements of marital commitment. But arguably less benign (and sometimes unintended) messages are necessarily conveyed as well when couples marry.

One such message is approval of societal privileging of monogamous, heterosexual norms. Through the wedding ceremony, and by its very entry into the marital institution, a couple expresses its intention to conform to those norms. This is true even of married

in *Shahar* directly violates Supreme Court right-to-marry jurisprudence as articulated in *Turner*. He argues that

[t]he *Turner* Court did not suggest that marriage would have religious significance only if a duty to marry had been imposed by that religion, and *Turner* makes clear that the state would be remiss for imposing unnecessary burdens on marriage even without an explicit religious duty to tie a marital knot.

*Id.* at 616.

As one might expect, with the right to marry becoming more fundamental in recent years, courts addressing the constitutionality of many marriage restrictions have generally avoided overt expressions of Christian tenets. See generally *Strasser*, *supra*. Since marriage has been held to constitute a fundamental right, courts now attempt to examine whether a restriction on marriage—such as the prohibition of polygamy—is narrowly tailored to promote a compelling state interest. See *Potter v. Murray City*, 585 F.Supp. 1126, 1140 (D. Utah 1984) ("There appear to the court to be no reasonable alternatives to the prohibition of the practice of polygamy to meet the compelling state interest found in the maintenance of the system of monogamy upon which its social order is now based.").

*84* Martha L. Fineman, *Images of Mothers in Poverty Discourses*. 1991 DUKE L.J. 274, 290-91 (1991). In discussing her view of the ideology of patriarchy, Fineman has described the "heterosexual expression traditionally realized through marriage" as portraying within popular culture the "quintessential indication of maturity, completeness, success, and power." *Id.*

*85* *Turner v. Safley*, 482 U.S. at 95-96. See also David B. Cruz, "Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource, 74 S. CAL. L. REV. 925, 933-34 (2001).

*86* One sociologist has described weddings as "one of the major events that signal[s] readiness and prepare[s] heterosexuals for membership in marriage as an organized
individuals who in fact disapprove of the exclusion of same-sex couples (or other excluded groupings) from civil marriage. Voluntary membership in an organization or institution suggests approval of its goals, as well as its rules—i.e., the means, in part, by which those goals are furthered. A white person’s membership in a country club that excludes African Americans, for example, communicates something about that person’s feelings about racial privileging. At best, it communicates that the white member doesn’t feel strongly enough about the exclusion of African Americans to refuse on principled grounds to participate in the institution him or herself. At worst, it communicates agreement with the exclusionary policy.

Too often, those of us with certain privileges are oblivious of the benefits they confer upon us. Yet exercising privilege can perpetuate the systematic oppression of those to whom the privilege is denied. Unlike overt acts of cruelty, which may be readily identified as oppression, the role of subtler systems of privilege in conferring dominance upon certain groups while oppressing others is easily overlooked. As Jane Aiken has argued, “[t]he invisibility of privilege allows us to reinforce dominance without any moral accountability for our actions . . . [but] one’s exercise of privilege indirectly causes pain to

practice for the institution of heterosexuality.”


Frye argues that the combined privileges conferred on individuals or groups possessing a favored characteristic construct invisible systems of oppression for those denied such privileges. She offers the analogy of a bird in a cage to illustrate:

Consider a birdcage. If you look very closely at just one wire in the cage, you cannot see the other wires . . . It is only when you step back, stop looking at the wires one by one, microscopically, and take a macroscopic view of the whole cage, that you see why the bird does not go anywhere . . . It is perfectly obvious that the bird is surrounded by a network of systematically related barriers, no one of which would be the least hindrance to its flight, but which, by their relations to each other, are as confining as the solid walls of a dungeon.

Civil marriage is, and has always been, an exclusive institution. It is exclusively heterosexual—all states currently prohibit same-sex couples from entering into civil marriage. The mixed-sex requirement is so ingrained that many who argue for its retention consider a tautological argument—that homosexuals should be prohibited from marrying because marriage is by definition a heterosexual relationship—convincing.

Couples who marry thus implicitly communicate approval (or, at best, lack of principled disapproval) of the institutionalized heterosexual privileging that is marriage—whether they intend to communicate this approval or not. Conversely, same-sex couples and others who cannot

89 Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality”*, 4 CLINICAL L. REV. 1, 18 (1997) (internal citation omitted).
90 Vermont has enacted a “civil union” statute that provides gay couples with the tangible benefits of marriage. 15 VT. STAT. ANN. § 1201 (2003). But the statute stops short of permitting them to marry. Id. at §1201 (4) (defining “marriage” as the “union of one man and one woman.”). Vermont does “[go] beyond existing ‘domestic partnership’ and ‘reciprocal beneficiaries’ laws that exist in California and Hawaii and in many localities in the U.S. today.” National Conference of State Legislatures, Same Sex Marriage, NATIONAL CONFERENCE OF STATE LEGISLATURES WEB SITE, last visited April 9, 2004, at http://www.ncsl.org/programs/cyf/samesex.htm#DOMA.

In November 2003, the Massachusetts Supreme Judicial Court ruled that prohibiting same-sex marriage violates the state constitution. Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003). The court stayed the decision for 180 days to allow the legislature to “take such action as it may deem appropriate in light of this opinion.” Id. at 970.


92 Indeed, one might conceivably argue that, in order for a couple to enjoy the benefits of marriage, they must subject themselves, in the words of Chief Justice Burger, to a:

state measure which forces an individual as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State “invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.

Woolley v. Maynard, 430 U.S. 705 (1977) (internal citations omitted). The U.S. Supreme Court in *Woolley* held unconstitutional a New Hampshire law that required most automobiles to bear license plates with the state motto, “Live Free or Die”. The Court found that the law in effect required motorists to use their private property as “mobile billboard[s]” for the State’s ideological message. Chief Justice Burger emphasized that the First Amendment protected “the right to refrain from speaking at all.” Id. at 714-715.
marry ⁹³ are deprived of what David Cruz calls "the unique expressive resource that is civil marriage." ⁹⁴ Those whose religious or cultural belief systems embrace different forms of marriage (e.g., Mormon and Muslim polygamy and Native American complex marriage ⁹⁵) are not only denied the expressive resource that is marriage, but instead their family forms are also outlawed. ⁹⁶ While these individuals may possess sentiments of love for and commitment to each other quite indistinguishable from those of mixed-sex couples, those sentiments are denied both the public expression and validation that is bestowed upon married couples. ⁹⁷ Cruz argues that:

Marital commitment is expressed not simply by ceremonies, rings, and gifts. It is also expressed by the act of undertaking and continuing to live under the responsibilities of civil marriage, and by letting it be known that one is living as a part of a civil marriage. One's statements of marital commitment gain additional credibility from the civil status. A proposition of (civil) marriage is an invitation to a partner to join a publicly valued institution, not simply to maintain a relationship in the realm of the private. ⁹⁸

Their exclusion from the marital institution conveys to same-sex couples and other excluded individuals that their families are not equally valued participants in society. ⁹⁹ Heterosexuals' continuing entry into

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⁹³ For example, couples who may want to enter committed, non-conjugal relationships cannot enter valid marriages. See discussion infra Part III.C (noting that unconsummated marriages are considered void and may be annulled). Similarly, those who wish to form committed (conjugal or non-conjugal) relationships comprising more than two individuals may not marry. See supra note 83 and accompanying text (noting the illegality of polygamous marriages).

⁹⁴ Cruz, supra note 85, at 928-929.


⁹⁶ See Church of Jesus Christ of Latter-Day Saints, 136 U.S. 1 (1890); Potter v. Murray City, 585 F. Supp. 1126, 1140 (D. Utah 1984); COTT, PUBLIC VOWS, at 24-28.

⁹⁷ Marriage is so woven into the fabric of our culture that its meaning is universally understood and receives public affirmation and approbation. Upon entry into marriage, an individual's status in society is fundamentally transformed. The couple's community bestows on the couple approval and esteem that is obtainable by no other discernible means. NEWMAN & GRAUERHOLZ, supra note 86, at 268.

⁹⁸ Cruz, supra note 85, at 933.

⁹⁹ Several legal scholars argue that laws have communicative impact and have put forward expressive theories of law. The communicative impact of laws can lead to the altering of social norms. See Cass Sunstein, On the Expressive Function of Law, 144 U. PA. L. REV. 2021, 2029-44 (1996). See also, e.g., Dan M. Kahan, What do Alternative Sanctions Mean?, 63 U. CHI. L. REV. 591 (1996) (developing an expressivist approach to
Marriage in the face of homosexuals' continued exclusion implicitly validates this exclusion, whether heterosexuals actually approve of that continued exclusion or not.

Marriage is thus a status that has come to have a definite, preordained meaning. That meaning is widely- and well-understood: marriage has become a state-sponsored shorthand through which certain individuals may publicly express their love for and commitment to each other. Those individuals also express their membership in, and conformity with, mainstream morality and moral traditions. Only heterosexual, monogamous couples may participate in these traditions—many other members of society are necessarily excluded both from participating in the ceremonies and from benefiting from the legal implications of marriage. By publicly exercising their marital privilege, marrying couples reinforce the dominance of certain religious and moral traditions over others. In order to receive the benefits of marriage, couples must thus participate in the systematic oppression of those for whom marriage is not an option.

I argue that the state's interest in expressions of intimate commitment is limited to protecting individuals' freedom to express their commitments in the manner they see fit and to protecting individuals' rights to exercise their religious beliefs without undue interference. But the state has little interest in the content and form of individuals' expressions of intimate commitment. And it should certainly not dictate the content and meaning of that expression. Yet, through current marriage regulations that define who may and may not marry, specify certain terms of the relationship, and require that couples' entrance into the institution be a public act, the state does just that.

B. "Till Death Do Us Part": The Companionate Function of Marriage

[T]he value of commitment is fully realizable only in an atmosphere of freedom to choose whether a particular association will be fleeting or enduring... What begins to matter more for the husband is not that his wife was once...
ready to bind herself to him by ties enforceable by the state, but that she remains committed to him day by day—not because the law commands it but because she chooses the commitment... [O]nce the act of marriage recedes into the past, the freedom to leave gives added meaning to the decision to stay. 100

When people marry, they affirm that they and their spouses will be lifelong companions. Companionship, mutual affection, and commitment between two adults are generally considered primary purposes of modern marriage. 101 Even the Roman Catholic Church, which has long focused on procreation as the primary purpose of marriage, now emphasizes the importance of commitment and companionship. 102

In the past, the law treated the marriage commitment differently than other commitments or contracts between individuals. 103 Laws governing contracts for personal services, for example, required that breach be remedied by the payment of damages. But laws governing marriage

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101 One of many examples of this: Goodridge, supra note 90 at 948.

But marriage is not merely for the procreation of children: its nature as an indissoluble compact between two people and the good of the children demand that the mutual love of the partners be properly shown, that it should grow and mature. Even in cases where despite the intense desire of the spouses there are no children, marriage still retains its character of being a whole manner and communion of life and preserves its value and indissolubility.

Id. at 954. See also, June Carbone, From Partners to Parents: The Second Revolution in Family Law 135-36 (2000) (citing Fred J. Parrella, Same-Sex Marriage, November 6, 1998 (unpublished manuscript on file with author)).
103 For a discussion of the ways in which marriages differ from other contracts, see, e.g., Richard A. Posner, Economic Analysis of Law 159-160 (5th ed. 1998). Posner discusses several distinctions between marriages and other contracts, noting that married couples: (1) are not free to set the terms of the contract; (2) are more severely sanctioned for breach; (3) cannot generally seek court intervention to help them settle disputes; and (4) are more likely to engage in conduct affecting third parties. Id. See also Darren Bush, Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage, 22 Women’s Rts. L. Rep. 115, 124 (2001). Bush argues that, “from an economic perspective, marriage appears no different than any other contract, having the same potential for efficiency (and inefficiency) as a contract between two corporations.” Id.
enforced its indissolubility, requiring specific performance of marriage contracts. The state moved away from enforcing the indissolubility of marriage with the adoption of judicial divorce in the nineteenth century and no-fault divorce in the twentieth. Popular pressure led to the development of these rules, and there is little chance that states will revert even to fault-based divorce rules. Nonetheless examine the nature of the state’s interest in marital commitment, and whether that interest justifies intervention to enforce or reinforce couples’ commitment to each other.

Marriage and the nuclear family moved to the center of social and emotional life beginning in the nineteenth century. Some point to rising expectations of the companionate aspects of marriage as ironically having contributed to increases in the divorce rate. In his history of law and the family in the nineteenth century, Michael Grossberg writes that:

"The surging demand for divorce reflected the increasingly intimate, emotional nature of marriage. No longer a mere partnership, over the course of the nineteenth century it became a bond based primarily on affection and thus one that would all the more easily disintegrate as feelings changed. By officially dissolving a marriage rather than informally separating, the parties freed themselves, in most states, to enter another union formally..."

104 GROSSBERG, supra note 5, at 34-35.
105 Id. at 238.
107 See Carbone, supra note 5, at 281. Carbone observes that there "seems to be little sentiment for a return to fault-based divorce... Public reaffirmation of the importance of marriage is unlikely to affect those for whom marriage is not an attractive or realistic option." [internal citations omitted].
108 I am speaking of lifelong marital commitment itself. The economic sharing and support, for example, that many have come to associate with lifelong commitment (but that can characterize many other relationships) is discussed infra.
110 GROSSBERG, supra note 5, at 251.
111 Id. (internal citation omitted). William O’Neill, whom Grossberg cites in his discussion of divorce and custody law, wrote that the need for divorce arises when "families become the center of social organization." When that happens, "their intimacy can become suffocating, their demands unbearable, and their expectations too high to be easily realizable. Divorce then becomes the safety valve that makes the system workable." WILLIAM L. O’NEILL, DIVORCE IN THE PROGRESSIVE ERA 6-7 (1967).
In the colonies, as in England, the virtual unavailability of divorce reflected state acceptance of the church's view of marriage as a sacred, lifelong commitment. The colonial states initially followed the English practice of permitting divorce only by legislative act. Such divorces were expensive, difficult to obtain and, unsurprisingly, rare. In his History of American Law, Lawrence Friedman noted that such a legal system essentially resulted in two laws of divorce—one for the rich, and one for the poor. Many unhappy, poor married couples simply began living apart; some entered into separation agreements, while others simply remarried. Indeed, bigamy, in the form of serial monogamy without divorce or death, was common. But despite the presence in the United States, as in England, of income inequality, vast numbers of people in the U.S. (unlike in England) owned property and thus had a greater stake in society. This large American middle class demanded easier divorce methods to enable them to change and legitimize family relationships and clarify ownership of property.

Judicial divorces became available towards the end of the eighteenth century, beginning with the New England states. By 1867, thirty-

112 GROSSBERG, supra note 5, at 238. See also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 179-84 (1973). 113 See June Carbone & Margaret F. Brinig, Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform, 65 TUL. L. REV. 953, 971-72 (1991). See also, NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 31-32 (1962). Blake notes that, like the English Parliament, early state legislatures granted special Acts of divorce only to those with wealth and power. Id. at 31. 114 FRIEDMAN, supra note 112, at 179-84. 115 HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 86-87 (2000). Hartog, in his legal history of marriage in the U.S. from 1790 to 1950, emphasizes that many husbands and wives worked outside the law to end their marriages. First, many entered into separation agreements, which, he argues, were not merely a private contractual form of divorce. Instead, separation agreements resolved conflict within marriages by providing a mechanism that allowed a married couple to live apart. Second, one (or both) of the partners would simply move away and remarry. See id. at 76-92. Hartog notes that “[b]igamy or, rather, serial monogamy (without divorce or death) was a common social experience in early America.” Id. at 87. Many who ended marriages in this way were poor people, for whom the property rights allocated at formal divorce held little concern. Id. 116 See FRIEDMAN, supra note 112, at 182-84. 117 See id. at 182. “Pennsylvania passed a general divorce law in 1785, Massachusetts one year later. Every New England state had a divorce law before 1800, along with New York, New Jersey, and Tennessee.” Id. The southern states, and some of their neighbors, were slower to eliminate legislative divorce. Both Virginia and Maryland did away with the practice in 1851; Delaware was the last state to do away with legislative divorce in
three of thirty-seven American jurisdictions provided for judicial divorce.\textsuperscript{118} With this increased availability, the divorce rate began to rise steeply in the mid-nineteenth century. This rising pattern of divorce continued into the twentieth century.\textsuperscript{119}

Despite its increased accessibility, it wasn’t until the mid-twentieth century that divorce by simple consent of the parties became available.\textsuperscript{120} Before then, all states required a showing of significant misbehavior by one of the parties before a court would permit a couple to divorce.\textsuperscript{121} Only an “innocent” spouse whose partner had committed adultery, abuse, or some other grave malfeasance would be granted a divorce. Unhappy couples who both wanted divorce, or who had simply given up on their marriages, frequently colluded to present divorce suits as the fault of one or the other of them in order to terminate their marriages. By the end of the nineteenth century, collusive divorces became the norm.\textsuperscript{122} A different “dual law of divorce” has thus been described by Max Rheinstein as existing in the U.S. at that time: a formal statutory law that granted divorce only as punishment for serious

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\item\textsuperscript{118} GROSSBERG, supra note 5, at 251.
\item\textsuperscript{119} See Max Rheinstein, The Law of Divorce and the Problem of Marriage Stability, 9 VAND. L. REV. 633, 633 n.2 (1956). In 1867, the number of divorces per 100 marriages was approximately 2.8; in 1890, 5.8; in 1910, 8.8; in 1930, 17.4; and in 1949, 25.1. Id. See also, Naomi Cahn, Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law, 2002 U. ILL. L. REV. 651, 659 (2002) (“A history of divorce shows that the transition to our ‘divorce culture’ began during the nineteenth century, rather than during the 1960’s...”). During the period between 1870 and 1880, the rate of divorce increased by approximately 80%; in the following decade, the divorce rate grew by 66.6%. Id. at 659 n.42. See also, BLAKE, supra note 113, at 134-36.
\item\textsuperscript{120} See Kay, supra note 106 at 56.
\item\textsuperscript{121} Permissible grounds for divorcing one’s spouse included adultery, bigamy, desertion, extreme cruelty, habitual drunkenness, and conviction of a felony. BLAKE, supra note 113, at 141-42. In addition, judges were permitted to take guilt or fault into account when granting divorce and ordering property division and alimony. Id. at 237; J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 44-45 (1997).
\item\textsuperscript{122} See, e.g., Friedman, Rights of Passage, supra note 117, at 659 (declaring that, in virtually every state, the “main element [of its divorce court] was simply collusion, between husband and wife, lawyers, and judges”). See also Herma Hill Kay, An Appraisal of California’s No-Fault Divorce Law, 75 CAL. L. REV. 291, 299 (1987) (arguing that the adoption of no-fault grounds for divorce reflected a desire to “free the administration of justice...from the hypocrisy and perjury that had resulted from the use of marital fault as a controlling consideration in divorce proceedings.”).
\end{itemize}
marital misconduct and a liberal law that in practice amounted to divorce by consent.\(^{123}\)

In 1969, California became the first state to replace its fault-based system with no-fault divorce.\(^{124}\) All states have since followed suit and have adopted some version of the no-fault regime.\(^{125}\) The current availability in all states of no-fault divorce rules now ensures a relatively facile exit from the bonds of marriage should either party so desire.

Critics blame the no-fault regimes for having cheapened and destabilized marital commitment, making marriages "practically terminable at will."\(^{126}\) Some family theorists see the adoption of no-fault divorce as having contributed to, if not precipitated, contemporary marital instability.\(^{127}\) Echoing the economic conception of family by Gary Becker, Allen Parkman has argued that some barrier to exit is necessary in order for the gains from specialization within marriage to be realized. Those gains will not be realized, for instance, if a wife

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\(^{125}\) South Dakota was the last state to change its laws, adding no-fault grounds to its divorce laws in 1985. S.D. Codified laws § 25-4-2(7). See also Friedman, Rights of Passage, supra note 117, at 659, describing the total triumph of no-fault divorce over fault-based systems: “[S]uddenly, the dam seemed to burst in divorce law. Twenty years ago, consensual divorce was a radical idea. Today, it is unquestioned fact. The old system collapsed completely; no-fault rushed into the vacuum. California was a pioneer state, but no-fault is now the rule almost everywhere.”


holds up her part of the bargain and thus becomes more vulnerable, yet her husband is free to walk away and benefit from doing so. 128

Rather than causing them, adoption of no-fault regimes primarily reflected changing social norms that viewed lifelong marriage as merely aspirational and divorce as a real option available to those whose marriages were, for whatever reason, no longer functional. 129 Evidence shows that, while Americans continue to take marital commitment seriously, they also remain wary of legislative efforts designed to reinforce that commitment. 130 Historical experience with first legislative and then fault-based judicial divorce illustrates that unhappy couples will resort to non-legal means, or manipulate available legal mechanisms, to end dysfunctional unions. The higher the state places the bar, the higher people will jump.

By putting the decision to terminate a marriage in the hands of individuals, the state has reduced its involvement in the companionate function of marriage. In doing so, it has arguably signaled the increasingly limited scope of its interest in this function. There are other indications of limited state involvement in the companionate function of marriage. For instance, other than the imposition (in some states) of a nominal waiting period between obtaining a license to marry and the marriage ceremony, the state remains uninvolved in assuring the compatibility of the marrying couple. 131 Although there continues to be significant state intervention in and regulation of the economic consequences of divorce (as well as its effect on dependent children), there is currently no serious effort to restrict an individual’s right to separate from or divorce her spouse. Indeed, as with other contracts for

128 ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 78 (1992). Parkman believes that, without requiring mutual consent as a minimal prerequisite for divorce, no-fault regimes would lead to women refusing to make the “efficient” choice of staying home to rear their children. Id. 129 June Carbone argues that “so potentially radical a set of reforms could sweep the fifty states in such a short time only because the conception of marriage on which fault was based had been obsolete for at least half a century.” June Carbone, Income Sharing: Redefining the Family in Terms of Community, 31 Hous. L. Rev. 359, 367 (1994). See also, Laurence Drew Borten, Note, Sex. Procreation, and the State Interest in Marriage, 102 Colum. L. Rev. 1089, 1091-92 (2002) (highlighting shifting cultural attitudes toward state regulation of marriage as a means of ordering individual sexual activity). 130 Scott, supra note 59, at 1902-03. 131 As discussed in Part III.A above, states no longer require publication of a couple’s intent to marry, a requirement that facilitated community policing of individuals’ entry into marriage. See supra notes 58-99 and accompanying text.
services that are not specifically enforced, there is real discomfort with the idea of state enforcement of an intimate relationship against either or both parties’ will.\footnote{In the two states that have enacted covenant marriage statutes, compliance with those acts is optional—couples may elect to enter into covenant or non-covenant marriage. \textit{Ariz. Rev. Stat.} § 25-901 (2003); \textit{La. Rev. Stat. Ann.} § 9:272 (West 1998).}

The normative question remains: \textit{should} the state more actively enforce—or reinforce—a couple’s commitment to remain together? Is there a connection between lifelong companionship and the public welfare? In theory, states could impose any number of additional barriers to divorce, including extending waiting (or “cooling off”) periods; requiring couples to undergo counseling or mediation,\footnote{Florida, for example, passed and then repealed legislation in the 1990s that required divorcing couples to undergo counseling and pursue mediation alternatives. \textit{See Fla. Stat.} ch. 39.428 (repealed 1996).} or reimpousing fault-based divorce or otherwise limiting the grounds upon which divorce will be granted.

Milton Regan and Elizabeth Scott are among the few legal scholars who have directly addressed the state’s interest and role in the purely companionate aspects of the marital relationship. They both see the preservation of marital commitment—even among couples with no children and with comparable financial resources—as a societal good in and of itself.\footnote{See, e.g., Regan, \textit{supra} note 127 at 130 (“[C]ommitment is a good that society should actively promote because of its essential role in realizing the deeply-rooted aspiration that individuals lead lives that they can call their own.”).} They argue that individuals have a “natural” preference for long-term commitment, which can be thwarted by short-term pressures.\footnote{See Regan, \textit{supra} note 127; Scott, \textit{supra} note 59.} Regan believes that the ability to make and keep commitments is critical to the “unity of the self,” but because of societal pressures, individuals’ ability to keep commitments becomes more tenuous and weakens over time.\footnote{The primary societal pressures which Regan discusses are: (1) time-space compression (i.e., pervasive and rapidly-changing stimuli in entertainment and other areas of life move us from one context to another; and technologies like cell phones and e-mail result in individuals’ being, in a sense, in more than one place at a time while engaging simultaneously in multiple activities); 2) an ethos of mass consumer society; and 3) the ascendance of flexible production methods designed to respond rapidly to changes in consumer demand but which also introduce more risk and impermanence in workplace relationships. \textit{See Regan, supra} note 127, at 132-40.} The state should thus help individuals realize their preferences by “shaping the payoff matrices for
different types of behavior" and thus enhancing individuals' ability to resist these influences. State intervention that makes exit from marriage more difficult, according to Regan, furthers the general happiness and well-being of the citizenry.137

This approach to family policy, however, has serious drawbacks. Not only does such a proposal smack of paternalism, but the assumption that people have “natural” preferences for long-term commitment is a troubling one in which to ground a policy decision. Such a proposal relies on a conception of individuals’ preferences that is too narrow and uncertain to justify state action. Regan’s proposal gives too little consideration to the powerful forces that create and shape preferences. For example, to the extent that the observation may be descriptively accurate, it is impossible to identify how much of that preference is truly innate and universal, and how much reflects individuals’ internalization of legal and majority social norms that trumpet the propriety and “naturalness” of that preference.138 Second, “long-term” itself can be variable: for one individual, “long-term” may be a commitment of five or seven years; for another, it may indeed be lifelong processes. Finally, even if individuals “prefer” long-term commitment, measures that attempt to enforce such commitments ignore the fact that individuals’ development of identity and autonomy may be lifelong. Because an individual may change and develop over time, it is not clear why an individuals’ stated preference at year one should outweigh her preference, informed by time and experience, at year five, ten, or twenty. Such a change of heart should be insufficient to invalidate a commercial contract, of course. But allowing easy exit from unhappy marriage does not preclude the state from enforcing other commitments made by couples (e.g., economic commitments made by couples to each other, economic and caretaking commitments made to third party dependents, and so on.).

It may indeed be true that we are social beings and most of us crave companionship and some type of stability in our intimate relationships.

137  See id. at 123-24.
138  It is arguably not possible to identify the extent to which social ideologies shape law, or vice versa. As Nancy Cott points out in the introduction to her recent book on the history of marriage, “[l]aw and society stand in a circular relation: social demands put pressure on legal practices, while at the same time the law’s public authority frames what people can envision for themselves...” NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 8 (2000) [hereinafter COTT, PUBLIC VOWS].
Nevertheless, I wonder whether most of us would agree *ex ante* to the state's intervening to 'save' our marital relationships at some future date, should our current commitment to remain with our chosen partner falter. I think not. Such intervention violates deeply-imbedded principles of autonomy and self-determination.

Scott also proposes legal reforms that explicitly link spousal commitment with parental commitment, reinforcing spouses' commitment to stay together 'for the sake of the children.' Scott questions why "legal commitment [is] associated with choice in contract, but with coercion in marriage;" she might simply be answered thus: enforcement of the marriage contract forces continued intimacy, cohabitation, affection, and sex. It is also worth noting that enforcement of many contracts, including contracts for services, calls for the payment of damages rather than specific performance of the contract. When adults no longer wish to be intimately associated with each other, principles of privacy and self-determination require that the state not force their continued association.

Scott grounds her proposal on "accumulating evidence" demonstrating the harmful impact of divorce on children. That evidence, however, is more ambiguous than Scott and others would

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139 Scott, *supra* note 59, at 1962-66. According to Scott, strong historic associations between spousal commitment norms and "unpopular" gender norms have rendered legal reforms enforcing spousal commitment norms politically unfeasible. She argues that linking spousal commitment instead with parental commitment might avoid the negative "bundling" effect. *Id.*

140 *Id.* at 1903.

141 *See* RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. a (1981) (noting that refusal to resort to specific performance is based in part upon a reluctance to compel the continuance of personal association after disputes have arisen and relationships have likely deteriorated; also upon the reluctance to compel what might have the appearance of involuntary servitude).

Sociological data suggest that factors other than parents’ divorce (including parents’ continuing high-conflict marriages) hurt children. Studies have shown that children’s well-being is more dependent on the level of family conflict than on the type of family structure. Sociologists have also found that children can develop successfully in a variety of family structures, and that a number of other factors pose more serious threats to the well-being of adults and children than does marital instability, including poverty, abuse, neglect, poorly funded schools, and a lack of government services. We should reject such approaches, which detract from alternative measures that should be implemented to strengthen parental and societal support for all children, regardless of the marital status of their parents.

C. “To Forsake All Others”: Sex and Procreation

Historically, legal and extralegal norms dictated that sex and procreation take place exclusively within the marital relationship. The state considers sex to be both essential and—ideally—exclusive to the marital contract. As recently as 1964, one court declared that the “standards of society are such that sexual relations or lascivious actions by persons who do not have the benefit of marriage to one another are regarded as obscene, unchaste and immoral.” Sexual intercourse is an implied term of the marriage contract; most states’ statutory or common

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143 For instance, one sociologist has pointed out that, in order to more accurately examine the impact of divorce on children, researchers should compare children of divorce not with children of all married parents, but with children of unhappily married parents who do not divorce. JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 60 (1996).
144 Id.
145 See generally STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 207-231 (2d ed. 2000). In her introduction to the 2nd edition of her book, Coontz notes the drop in recent years in violent crime and teen pregnancy and observes that, “[t]he causes of crime and teen pregnancy, then these certainly would not have decreased in recent years, since the number of children raised in one-parent homes have continued to rise.” Id. at xxvii. See also, Paul R. Amato, Diversity Within Single-Parent Families, in THE HANDBOOK OF FAMILY DIVERSITY 149-172 (David H. Demo, Katherine R. Allen, & Mark A. Fine, eds., 2000); JUDITH STACEY, supra note 142, at 60. Stacey discusses “statistical tricks” used by some researchers “to exaggerate advantages some children from two-parent families enjoy over their single-parented peers.” Id.
146 The issues concerning marriage and the caretaking of dependents will be taken up in Part III.D., infra.
147 See GROSSBERG, supra note 5, at 64-152; Carbone, supra note 5, at 269-70.
law grants annulment of a marriage upon showing of one party's impotence, provided that the condition was unknown to the other party at the time of marriage. Some states also consider impotence a ground for divorce. Notably, marriage is one of exceedingly few contracts where the state permits sex to be an essential term. Indeed, most contracts in which sex is an essential term are void on public policy grounds.

Nevertheless, the pervasive and widespread contemporary acceptance of nonmarital sex strongly indicates that the public's notion of marriage as a necessary prerequisite to sex has eroded. Even more compelling than shifting public opinion, though, are developing notions of individuals' right to privacy, evident most recently in the Supreme Court's decision in Lawrence v. Texas. In Lawrence, the U.S. Supreme Court held that a Texas statute that made it a crime for two persons of the same sex to engage in intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in a consensual act of sodomy in the privacy of the home. In its opinion, the Court cited an "emerging awareness" over the past half century that

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149 Annulment is a judgment that a marriage is invalid due to the existence of some impediment at its formation. Because of state policy encouraging the permanence of marriage, annulments are not easily granted. Bigamous marriages and marriages between couples sharing an impermissible degree of consanguinity are generally considered void (never valid). Marriages that include fraud, physical incapacity, absence of legal capacity to consent (due to age or mental incapacity) or force or duress are generally considered voidable (able to be invalidated). See Albert Momjian, Annulment, in FAMILY LAW AND PRACTICE §§ 5.02, 5.03 (Arnold H. Rutkin ed., 2003).

150 E.g., CAL. FAM. CODE § 2210(f) (West 1994) (permitting annulment where one spouse is "physically incapable of entering the marriage state"); 750 ILL. COMP. STAT. ANN. 5/301(2) (West 1999) (permitting annulment where spouse "lacks the physical capacity to consummate the marriage"); N.J. STAT. ANN. § 2A:34-1 (West 2000) (permitting annulment upon showing that spouse is "incurably impotent"); N.Y. DOM. REL. LAW §§ 7(3), 140(d) (McKinney 1999) (permitting annulment where one spouse is "incapable of entering into the married state from physical causes"); TEX. FAM. CODE ANN. § 6.106 (Vernon 1998) (permitting annulment upon a showing of "[i]mpotency").

151 E.g., MASS. ANN. LAWS ch. 208, § 1 (Law. Co-op. 1994); MISS. CODE ANN. § 93-5-1 (1994).


154 Id. Overruling Bowers v. Hardwick, 478 U.S. 186 (1986), the Lawrence Court acknowledged that individual decisions concerning the intimacies of physical relationships are a form of liberty and hence, the Texas statute impinging on the exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment.
the liberty interest affords substantial protection through the nation’s laws and traditions to adult persons in deciding how to conduct their private lives in matters pertaining to sex.

Constitutional privacy doctrine thus dictates state noninterference with adults’ consensual sexual relationships, whether or not those relationships have been formalized through marriage. The repeal or non-enforcement of criminal statutes prohibiting consensual sex acts between adults that began in the late twentieth century and continued through the decision in Lawrence illustrates the state’s gradual retreat from its historical role of policing and enforcing sexuality. The prevalence of nonmarital sex coupled with explicit judicial and

155 Eight states continue to have sodomy laws in effect that apply to both opposite-sex and same-sex acts: Alabama, Florida, Idaho, Louisiana, North Carolina, South Carolina, Utah and Virginia. Also, only three states had same-sex sodomy statutes that had not been abolished either legislatively or by judicial pronouncement: Kansas, Oklahoma and Texas. See, William N. Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender, and the Law 9-11 (2001 Supp.).


The Court’s decision in Lawrence, then, rather than breaking with majority popular opinion, reflects an extant belief in the privacy due adult sexual acts. As noted by Supreme Court Justice O’Connor in a collection of essays published shortly before the Court’s decision in Lawrence came down, “rare indeed is the legal victory—in court or legislature—that is not a careful byproduct of an emerging social consensus.” Sandra Day O’Connor, The Majesty of the Law 166 (Craig Joyce, ed. 2003).

156 In his concurring opinion in Jegley v. Picado, 349 Ark. 600, 641 (2002), Justice Robert L. Brown, joined by Justice Jim Hannah, emphasized his agreement with the national trend “to curtail government intrusions at the threshold of one’s door and most definitely at the threshold of one’s bedroom.” Id.
legislative recognition of sexual privacy threatens the privileging of marital sex and mitigates societal attempts to control sexuality.157

Like sex, procreation has long been considered to be one of the primary purposes of marriage.158 The Supreme Court has described marriage as "basic to the perpetuation of a race"159 and "fundamental to our very existence and survival."160 June Carbone notes that marriage could only be considered fundamental to our very existence if it were viewed as a necessary precondition to procreation.161 But, as with sex, there has been a growing acknowledgement of the notion that individuals should make procreative decisions free of government intervention.

The state's role in policing procreation was more explicit in the past than it is today. Indeed, evidence suggests that prior to the second half of the 1900s, there was intense public and private pressure not to bear or

157 This is not to imply, of course, that state recognition of sexual and procreative privacy is either complete or necessarily permanent. See, e.g., Partial-Birth Abortion Ban Act of 2003 18 U.S.C.A. §1531(b)(1)(A) (2003) (prohibiting intact dilation and extraction abortions); Editorial, The War Against Women, N.Y. TIMES, Jan. 12, 2003, § 4, at 14 (arguing that Bush administration’s "anti-choice crusade"—its attempts to block women’s access to contraceptives—constitutes an assault on reproductive rights that threatens women’s constitutional liberty and denies them essential reproductive health care); Robin Toner, At a Distance, Bush Joins Abortion Protest, N.Y. TIMES, Jan. 23, 2003, at A16 (quoting President George W. Bush as telling thousands of abortion protesters that he shared their commitment to "protect the lives of innocent children waiting to be born.").

158 Unlike state treatment of impotence, however, no state permits annulment of a marriage based on a spouse’s infertility. See 24 AM. JUR. 2D Divorce & Separation § 122 (2003) (“Inability to beget or bear children, if associated with complete power of copulation, is not a ground for dissolving a marriage.”).


160 Loving v. Virginia, 388 U.S. 1, 12 (1967). Until the mid-twentieth century, courts tended to treat marriage, sex, and procreation as virtually interchangeable. The courts knew, of course, that procreation was possible outside marriage. But these opinions illustrate the deeply-held social aversion to having children born to unmarried parents. A New York Court in 1926 stated, for example:

[T]he refusal of husband or wife without any adequate excuse to have ordinary marriage relations with the other party to the contract strikes at the basic obligations springing from the marriage contract, when viewed from the standpoint of the State and of society at large. However much this relationship may be debased at times it nevertheless is the foundation upon which must rest the perpetuation of society and civilization. If it is not to be maintained we have the alternatives either of no children or of illegitimate children, and the State abhors either result.

Mirizio v. Mirizio, 150 N.E. 605, 607 (N.Y. 1926).

161 Carbone, supra note 5, at 274.
raise children outside of marriage. In the late eighteenth century, common mechanisms of control included not only the legal impediments imposed on illegitimate children, but also "shotgun" marriages, adoption, and even abortion. During this period, reports indicate that one out of three New England brides was pregnant at the time of marriage. These notions of state control of and regulation of the procreative process were briefly challenged in the mid-nineteenth century, when communitarian and "free-love" alternatives were perceived to threaten traditional monogamy, as was the social instability caused by the massive casualties and upheaval of the Civil War. Such rebellion was short-lived, however. The late nineteenth century witnessed a reactionary "moral panic" over family life, which led to concerted efforts to reinforce traditional marital mores.

The mid-twentieth century saw the beginnings of a heightened respect for reproductive privacy. In the first decision to explicitly articulate a fundamental right to privacy, the Supreme Court held in *Griswold v. Connecticut* that government had no place in the procreative decisions of married couples, invalidating a state law that criminalized the use of contraceptive devices. Justice Douglas, writing for the Court, considered hypothetical enforcement measures under the law and found that "[t]he very idea is repulsive to the notions of privacy surrounding the marriage relationship." A few years later in *Eisenstadt v. Baird*, the Court extended *Griswold* to protect the

162 GROSSBERG, supra note 5, at 196-201.
163 Id.
164 See Sylvia A. Law, supra note 145, at 184.
165 COTT, supra note 78, at 105-31 ("Traditional monogamy appeared to need bolstering after the Civil War. Communitarian and free love alternatives had bedeviled the institution in the 1850s; then wartime disasters threatened known ways of life.").
166 See, e.g., GROSSBERG, supra note 5, at 83-84 ("In nineteenth-century American domestic relations, panics over family life led to persistent efforts to compel deviant couples to adhere to orthodox republican matrimonial practices."). Passage of the Comstock Act in 1873, for example, arose from a desire to confine sexuality to the marital relationship. The Act criminalized the use of the mails to circulate "obscene, lewd or lascivious" materials, which included articles intended "for preventing conception or producing abortion, or for indecent or immoral use." The law was interpreted to apply to the marketing of birth control devices. XVII U.S. STATUTES AT LARGE, 598-600 (George P. Sanger ed., 1873). Following the passage of the Comstock Act, approximately half of the states passed "little Comstock laws" making contraceptive devices illegal. See, GROSSBERG, supra note 5, at 175-78; COTT, PUBLIC VOWS, supra note 78, at 124-25.
168 Id. at 486.
procreative privacy of unmarried persons as well as married couples. In Eisenstadt^{169}, the Court invalidated a Massachusetts law that made it a felony for anyone other than a physician or pharmacist to dispense contraceptives to unmarried persons. Justice Brennan, writing for the Court, reasoned simply that "whatever the rights of the individual to contraception may be, the rights must be the same for the married and unmarried alike."^{170} Thus, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."^{171}

The state has therefore taken a number of steps to extricate itself from individuals' procreative decisions, within and outside of marriage. The elimination of legal distinctions between marital and nonmarital children,^{172} the availability of contraceptives,^{173} and access to abortion^{174} all illustrate both the separation of procreation from marriage and the limited nature of the state's interest in those decisions.^{175}

^{170} Id. at 453.
^{171} Id.
^{172} See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (permitting child of unmarried parents to inherit from father as well as mother, once paternity proven); Gomez v. Perez, 409 U.S. 535 (1973) (imposing duty to support child on both unmarried parents, once paternity proven); Levy v. Louisiana, 391 U.S. 68 (1968) (holding unconstitutional a state's creating a cause of action in favor of a child of married parents for the wrongful death of a parent but excluding from the same cause of action a child born of unmarried parents). Beginning with Levy, the Supreme Court established an intermediate scrutiny standard to determine the constitutionality of statutes distinguishing between children of married and unmarried parents. See id.
^{173} See, Griswold, 381 U.S. at 479 (striking down a Connecticut law criminalizing the distribution of contraceptives to married individuals); Eisenstadt, 405 U.S. at 454-55 (striking down a Massachusetts law criminalizing the distribution of contraceptives to unmarried individuals).
^{174} See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (extending the right to privacy to include a woman's decision whether or not to terminate her pregnancy); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (holding unconstitutional the Pennsylvania requirement that a married woman seeking an abortion inform her husband of her intent and produce a signed statement that she has done so, but upholding a state's imposition of a 24-hour waiting period and parental notification provision with judicial bypass in same statute); Stenberg v. Carhart, 530 U.S. 914 (2000) (holding unconstitutional a state statute prohibiting both dilation and evacuation and dilation and extraction abortion procedures).

The federal government refuses to include abortion among the procedures covered by Medicaid, the federally subsidized health insurance program for the poor. See, e.g., Harris v. McRae, 448 U.S. 297 (1980) (permitting an amendment to the federal Medicaid Act prohibiting use of Medicaid payments for non-therapeutic abortions); Webster v.
But some of the privacy guarantees afforded by constitutional privacy doctrine can be waived, and poor people who receive certain types of government assistance—the vast majority of whom are women—must do just that. The Supreme Court has held, for instance, that because families do not have a per se entitlement to government assistance, the government may require families receiving assistance to submit to inspection and state intervention in many intimate aspects of their family and private lives in order to qualify for benefits.

The 1996 Welfare legislation introduced a number of measures designed to modify poor women’s sexual and reproductive behavior. Reproductive Health Services, 492 U.S. 490 (1989) (upholding a state statute prohibiting any public employee from assisting in any abortion not necessary to save the mother’s life).

See Eisenstadt, 405 U.S. 454-55.


See, e.g., Bowen v. Gilliard, 483 U.S. 587 (1987) (upholding regulation under Aid to Families with Dependent Children welfare program determining families’ eligibility for benefits despite negative effects on families’ chosen living arrangements); Lyng v. Castillo, 477 U.S. 635 (1986) (rejecting a constitutional challenge to a provision in the federal food stamp program that presumed certain household members functioned as a single economic unit); Wyman v. James, 400 U.S. 309 (1971) (rejecting a welfare recipient’s right to refuse a state home inspection as a condition of welfare eligibility).

See generally Wendy Chavkin et al., Sex, Reproduction, and Welfare Reform, 7 GEO. J. ON POVERTY L. & POL’Y 379 (2000), for review and criticism of the 1996 Act’s efforts to modify sexual and reproductive behaviors through a series of economic disincentives. The authors argue that Family Cap Provisions (which prevent increases in assistance to mothers who bear additional children while already receiving welfare benefits) have no significant effect on childbearing. Other such policies have been similarly ineffective, including family planning mandates, abstinence education, and other policies aimed at decreasing nonmarital births. Instead of addressing the problem of poverty, the authors posit that these sorts of policies focus on individual sexual and reproductive behaviors in a manner that is both unethical and ineffective.

In addition, in all states, women must identify the father (or potential father/fathers) of her children and cooperate with state child support collection efforts in order to establish or maintain eligibility for benefits. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C.A. §§ 601-617 (2004), Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2135 (1996). Every state, in order to comply with federal law, must enact legislation that makes cooperation with paternity identification and child support enforcement a condition of eligibility. Any state that fails to enact and enforce this requirement will lose up to five percent of its total block grant. Id. Sixteen states require that welfare recipients be given information to promote family planning (initiated by the state agency rather than the participant) or require that they attend family planning counseling sessions. IOWA CODE ANN. § 239B.10 (6) (West 2000); LA. REV. STAT. ANN. § 46:447.1 (West 2000); ME. REV. STAT. ANN. tit. 22, § 3788 (14) (West 2000); Md. CODE ANN. Art. 88A § 49(a)(4)(ii) (2000); MASS. ANN. LAWS ch. 118 § 1 (110)(1)(4)(i)-
For example, to discourage poor women from having additional children, twenty-three states subject families to “family cap” measures. These measures reduce or eliminate any benefit increase for mothers who have additional children while on welfare.\(^{179}\)

The principles underlying constitutional privacy doctrine require that individuals be permitted to make procreative decisions free from government interference or coercion. Without the modest increase provided for additional family members, however, government implicitly regulates procreation among those receiving assistance because parents who do have additional children are forced to support their families at a level even further below the poverty line (at which the level of support is, by definition, inadequate).\(^{180}\) The family cap threatens women who have additional children with even deeper

\(^{179}\) In addition, Dorothy Roberts argues that these laws reflect “the view that childbearing by poor women is pathological and should be deterred through social policy.” Dorothy Roberts, *Welfare’s Ban on Poor Motherhood*, 152, 153, in *WHOSE WELFARE?* (Gwendolyn Mink ed. 1999).
poverty; its very purpose is to affect women’s decisions to procreate. And only the poor are sanctioned in this manner. ¹⁸¹

The state’s focus on reducing nonmarital childbearing by women receiving public assistance is wrongheaded at best, unlawful at worst. The Supreme Court has extended constitutional protection to individuals’ procreative decisions, and that protection should not be contingent on parents’ and would-be parents’ economic status. Efforts to reduce poor women’s fertility subjects them, because of their poverty, to state intrusion that most of us would consider a violation of our privacy.

In 1994, the United States, along with 179 other countries, signed the Programme of Action at the International Conference on Population and Development in Cairo, Egypt.¹⁸² That document states that reproductive rights include the individual’s “right to make decisions concerning reproduction free of discrimination, coercion and violence.”¹⁸³ Yet the family cap and other measures instituted through welfare reform are nothing if not coercive. Dorothy Roberts has criticized many of the measures adopted as part of state welfare programs, noting that “[t]his degree of government control over reproductive decision-making would surely amount to a violation of citizens’ procreative liberty if imposed directly by law. Protection from government intrusion of such deeply personal matters is ‘[a]t the heart of liberty.’”¹⁸⁴

¹⁸¹ See, e.g., Anna Marie Smith, The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview, 8 MICH. J. GENDER & L. 121, 175-76 (2002). Smith canvases the states’ family cap provisions and concludes that: Welfare recipients are the only citizens who are penalized by the government on the basis of the number of their children . . . In other programs and taxation schemes, either the size and structure of the family is ignored altogether—as it is in the Social Security program—or parents are given additional benefits—such as taxation credits and tuition assistance packages—when they have more children.


¹⁸³ Id. at 43.

Second, attempts to reduce nonmarital childbearing are not only wrongheaded, but also may well be doomed to fail.\textsuperscript{185} Other policies aimed at decreasing nonmarital births have been feckless, including family planning mandates and abstinence education.\textsuperscript{186} The question of effectiveness may remain open—one researcher acknowledges that family cap programs have so far eluded evaluation because of the complexities that come with the fact that they "were implemented at the same time as a broad set of other changes, any number of which could impact on fertility behavior."\textsuperscript{187} But there appears to be little reason to expect that such policies will be effective in any significant way.

In general, while there has been some improvement in reducing nonmarital births in the 1990s, little of it can be attributed to welfare reform. Among African-Americans (who are disproportionately represented among welfare recipients), for instance, non-marital births dropped from 90.5 per thousand in 1990 to 73.3 per thousand in 1998, a decline of 19 percent. Almost all of the improvement, however, predated the 1996 legislation.\textsuperscript{188}

Government efforts to reduce childbearing by poor and unmarried women bespeaks a distrust of the poor and a hostility to deviant family forms, \textit{i.e.}, those without a male head of household. As Nancy Polikoff has observed:

The imperative to find a legal father for every child provides a convenient smokescreen, a diversion of energy and resources from the possible solutions to children’s real problems. Targeting single motherhood, therefore, serves the dual purpose of perpetuating patriarchal ideology and exonerating the state from its obligation to provide children\textsuperscript{...} of preserving cultural traditions under assault by the dominant society." Dorothy E. Roberts, \textit{Spiritual and Menial Housework}, 9 \textit{Yale J.L. & Feminism} 51, 69-70 (1997).

\textsuperscript{185} See, \textit{e.g.}, Chavkin et. al., \textit{supra} note 178, (reviewing and criticizing the 1996 Act’s efforts to modify sexual and reproductive behaviors through a series of economic disincentives). The authors argue that family cap provisions have no significant effect on childbearing. Instead of addressing the problem of poverty, the authors posit that these sorts of policies focus on individual sexual and reproductive behaviors in a manner that is both unethical and ineffective. \textit{Id.} at 379.

\textsuperscript{186} See, \textit{e.g.}, \textit{Id.} at 380.


\textsuperscript{188} \textit{Id.} at 149.
with at least minimally adequate financial well-being, health
care, education and physical safety.\(^{189}\)

The trend in constitutional jurisprudence that treats individuals’
sexual relationships and procreative decisions—within and outside of
marriage—as deserving privacy is a correct one. For poor families,
ensuring procreative freedom and privacy means assuring them that their
procreative decisions will not have dire financial consequences for their
families. Legislative policy that rolls back those protections for poor
people runs counter to that goal. A better social policy would be one
that respects adult sexual and procreative privacy and is grounded in the
notion of civic responsibility for ensuring the welfare of all citizens.

D. "In Sickness and in Health": The Caretaking Function of Marriage

Society currently designates the nuclear, preferably marital, family
as the social structure that supports child caretaking.\(^{190}\) Yet caretaking
benefits not only those for whom care is provided, but also society
generally.\(^{191}\) Our political system aspires that its citizens be capable of
participating in the political process. Similarly, our economic
institutions require capable workers. The sick and elderly require care,
and we expect that today’s young people will provide physical care to us
once we are elderly. We expect that they will be the future workers who
will fund our social security accounts, produce the goods to which we
have become accustomed, and fuel the economy upon which we rely.\(^{192}\)

Children can meet society’s high expectations of them only if they
have been cared for while dependent; they must have received an
appropriate upbringing, as well as an adequate education.\(^{193}\) The

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\(^{190}\) See, e.g., June Carbone, A Feminist Perspective on Divorce, 4 CHILD. & DIVORCE 186 (1994).


\(^{192}\) See Katharine B. Silbaugh, Accounting for Family Change, 89 GEO. L.J. 923, 968-69 (2001) (reviewing JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000)).

\(^{193}\) Dependents require caretaking. Martha Fineman has observed that “dependency is both inevitable and universal... [I]t is inevitably associated with infancy and often accompanies old age, illness, and many disabilities. Dependency is, therefore, a natural part of all human experience.” Fineman, supra note 191, at 292. Society thus requires caretakers. And, to the extent that a caretaker is not paid (e.g., a mother taking care of
successes and failures of child caretaking thus redound to society as a whole.

Despite the tremendous public interest in dependents' care and upbringing, the state's efforts to directly support dependent caretaking, irrespective of the family structure within which it occurs, have been anemic. The rhetorical importance placed on child caretaking in the U.S. stands in stark contrast to family support policies that are the stingiest in the industrial world. The state countenances the virtual nonexistence of subsidized child care, the absence of mandated paid parental leave, and unsupportive or inflexible work schedules that threaten parents and other caretakers with job loss, thus jeopardizing their families' economic security. Other supportive programs, like those that would increase the length of the school day and year—both offering children additional educational opportunities and providing additional supervision for children during caretakers' work hours—have not been widely implemented.

her child full-time), caretakers themselves (or, as Fineman calls them, "derivative dependents") require support. See FINEMAN, supra note 32, at 161-163.


195 The absence of universal childcare and early childhood education programs forces families, especially poor families, to spend an inordinately high percentage of their earnings on often inadequate childcare. Families with incomes below the poverty line spend a full 25% of their incomes on childcare. Families with incomes between 100% and 125% of the poverty line spend 16% of their incomes on childcare. And non-poor families spend, on average, 6% of their incomes on childcare. See JODY HEYMANN, THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 130 (2000). See also HEDIEH RAHMANOU, INST. FOR WOMEN'S POLICY RESEARCH, THE WIDENING GAP: A NEW BOOK ON THE STRUGGLE TO BALANCE WORK AND CAREGIVING, RESEARCH- IN BRIEF 3 (2001).

196 The Family Medical Leave Act [hereinafter FMLA] requires that only employers with 50 or more workers provide them up to twelve weeks of unpaid leave upon the birth or adoption of a child. 29 U.S.C. §§ 2611, 2612(a) (2004). Approximately half of workers in the U.S. are not covered under FMLA because they work for employers with fewer than 50 workers, are part-time workers, or have recently changed jobs. COMM'N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES, app. E, Table 5.H, 5.R (1996). Many families cannot afford to lose twelve (or even fewer) weeks of income. Only 2 percent of workers have paid family leave. See BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, 4 (1999). See generally, HEYMANN, supra note 195.

197 Many workers in the U.S., especially low-income workers, do not have workforce benefits like paid leave or flexible work schedules that can make it economically feasible for workers to meet their caretaking obligations. Only 32 percent of low-income employees can choose their starting and quitting times. In that same group of low-income employees, 71 percent are unable to take days off to care for sick children. See HEYMANN, supra note 195, at 116.
In contrast, other countries consistently do more to assist caretakers. France and the Scandinavian countries are among those that have implemented family support policies that directly support caretaking. These policies include subsidized day care, paid parental leave, universal health care, and income supplements to low-earning caretakers. At least in part because of these measures, the child poverty rate in France, for example, is just over five percent, compared to nearly twenty percent in the U.S. As Barbara Bergmann argues:

What is different [between the U.S. and France] is not children's needs, but the sense of public responsibility for the welfare of the nation's children, the feelings of generosity toward those who are poor, the willingness to pay taxes . . . . [T]he United States is an extremely wealthy country, and one of the least taxed in the developed world . . . . A costly and activist program is the only way we will be able to make progress against child poverty.

Certainly, some families in the U.S. may receive different types of support, depending on their family and caretaking structures. The state supports some dependents indirectly through the subsidies and supports provided to marital families, support that comes without stigmatization. Married couples receive more protections and benefits

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199 Bergmann, supra note 198, at 6.
200 Bergmann, supra note 199, at 118, 151.
201 Despite its receipt of state subsidies, the myth of the “self-sufficient” and “independent” marital family is pervasive. When these families perform more successfully than other (unsubsidized) family forms, the myth is perpetuated. The fiction of the independent family “masks or distorts the universal and extensive nature of dependency in society. [These families'] subsidized existence solidifies the notion that successful families manage dependency without resorting to the state.” Martha Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 Va. L. Rev. 2181, 2213 (1995).

In response to a request from Congress to “identify federal laws in which benefits, rights and privileges are contingent on marital status,” the General Accounting Office conducted a search and identified “1049 federal laws classified to the United States Code in which marital status is a factor.” General Accounting Office, Office of General Counsel, GAO/OGC-97-16, Defense of Marriage Act 1-2 (1997).

Married couples benefit from favorable tax and inheritance laws and may receive pension benefits, derivative social security benefits (which provide income to surviving spouses of workers and veterans upon their deaths), derivative health insurance benefits, and Medicare benefits (which ensure the availability of health care to spouses of insured
than do nonmarital couples—social security, pension, and health insurance benefits are among the measures that assist marital families. While federal income tax laws currently require some two-earner marital families to pay higher taxes than if they were to file singly, they do benefit the family with one primary wage-earner and a stay-at-home dependent spouse (or secondary wage-earner). Thus, while all marital individuals once the insured individuals reach age 62), as well as decision-making authority in the case of their spouse’s disability. Upon marrying, couples also acquire, *inter alia*, property and inheritance rights, the right to spousal support, and the right to preserve the confidentiality of marital communications. See Baehr v. Lewin, 852 P.2d 44, 59 (Hawaii 1993) (offering a partial list of marital rights and benefits). See also 38 U.S.C. §1311 (Westlaw 2003); 42 U.S.C. §402 (Westlaw 2003); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 130-139, 143-184 (1998). See generally infra notes 202-208 and accompanying text. Couples excluded from marriage rank the ability to file joint federal income tax returns as one of the most significant benefits denied them; in “a same-sex couple where one partner has considerably more income than the other, the inability to file jointly will result in greater tax liability than a similarly situated married couple.” Knauer, supra, at 165. See also I.R.C. § 6013 (Westlaw 2003). Other tax benefits provided to marital couples include employer-provided fringe benefits, including health insurance, and group-term life insurance; these are doubly tax-advantaged because of their exclusion from an employee’s gross income. Knauer, supra, at 169. See also I.R.C. §§ 106, 152 (Westlaw 2003). Married taxpayers also receive an unlimited deduction for inter vivos and testamentary transfers to a spouse. I.R.C. §§ 2053, 2056 (Westlaw 2003). This gives married taxpayers a way to escape transfer tax liability and allows married couples to engage in non-tax estate planning without transfer tax consequences. See Knauer, supra, at 173. But see supra note 7 for discussion of marriage penalty that affects some married couples. See also Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?*, 33 IND. L. REV. 991, 991-995 (2000); William V. Vetter, *Restrictions on Equal Treatment of Unmarried Domestic Partners*, 5 B.U. PUB. INT. L.J. 1, 1-9 (1995); Christine Jax, *Same-Sex Marriage—Why Not?*, 4 WIDENER J. PUB. L. 461, 463-465 (1995). See generally Unmarried America, *Unmarried Americans Question Unfairness in Federal Tax Laws*, available at http://www.unmarriedamerica.com/taxes/brochure1.htm (last visited March 17, 2004), (describing many of the same tax and social security benefits extended to married taxpayers, but not to singles or same-sex or unmarried couples).
families arguably receive significant net benefits by marrying, the so-called traditional family is rewarded further. Society also privileges and supports marital families in numerous direct and indirect ways.  

Across the United States, unmarried men and women who live together are almost as likely to be raising children as are married couples. But because they have chosen not to formalize their relationships, they must manage caretaking without many of the benefits accorded marital families. Also, social support for single-parent families, the vast majority of which are headed by women, can vary dramatically based on the way in which those families were originally formed. Widows, for example, typically received generous and non-stigmatized social security benefits. Divorced and never-married mothers must depend instead on the vicissitudes of the uncertain child support and welfare systems. Not only are these families affected materially, but they also suffer from a social stigma that is reinforced by the existing legal structure.

Some commentators retort that two-parent marital families are best for children, so it is therefore appropriate for the state to subsidize or privilege this family form over others. There are several problems

204 See FINEMAN, supra note 32, at 226.

205 Forty-three percent of unmarried, cohabiting couples are raising children, just slightly less than the 46 percent of married couples raising children. And while the trend is rising for unmarried couples, it is becoming less common for married couples to have children living with them. D’Vera Cohn, Live-Ins Almost as Likely as Marrieds to be Parents; Census Also Looks at Gay Households, WASH. POST, Mar. 13, 2003, at A1.

206 The surviving spouse of an insured worker caring for a child under 16 may receive 75 percent of the amount the worker would have received had he or she retired. Once the surviving spouse turns 60, he or she may receive 100 percent of the amount the worker would have received through the Social Security system. See Mary E. O’Connell, On the Fringe: Rethinking the Link Between Wages and Benefits, 67 TUL. L. REV. 1421, 1481 (1993).

207 Just over half of eligible caretakers receive orders of support, most of them are divorced mothers. A significant proportion of those who have such orders do not receive payments or only receive partial payments. See Irvin Garfinkel & Patrick Wong, Child Support and Public Policy, in LONE-PARENT FAMILIES: THE ECONOMIC CHALLENGE 101, 102-03 (Elizabeth Duskin ed., 1990).

208 Most states provide welfare benefits (combining cash benefits, Medicaid and food stamps) that add up to only 70 percent of the federal poverty level. Yet a minimum wage job is insufficient to replace welfare benefits and involves associated expenses (transportation, clothing, etc.). See STAFF OF HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS, 636-37 (Comm. Print 1992).

with this argument. First, the empirical data is often more complicated than these advocates suggest. Well-regarded sociologist Sara McLanahan\(^{210}\) has found that data does not support the conclusion that what harms children is the absence of one parent. Instead, McLanahan says, single parenting currently leads to certain types of instability that can harm children.\(^{211}\) Much of the link between single parenting and negative child outcomes can thus be attributed to low income, less-stable adult presence, and residential mobility after divorce. Other researchers have conducted subsequent studies that have refined McLanahan’s findings further; these studies suggest that a decline in parenting begins pre-divorce in intact, but conflicted families, and may continue for a period of time post-divorce.\(^{212}\) Other commentators, moreover, have highlighted the danger in isolating a single variable to identify the cause of social phenomena.\(^{213}\) Single parenthood, for example, is not evenly distributed across society, but instead correlates with other socioeconomic factors. It is therefore difficult to pinpoint the effects of single parenthood on children.\(^{214}\)

civic functions performed by the two-parent family, as well as the economic, cultural and legal factors necessary to foster and encourage that species of familial organization. See generally David Blankenhorn, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1-5 (1995) (describing “fatherlessness” as the most harmful demographic trend confronting the current generation).

210 See Katharine B. Silbaugh, Accounting for Family Change, 89 GEO. L.J. 923, 942 (2001).


213 See, e.g., Carbone, supra note 19, at 111-122 (surveying contemporary research). Carbone notes that nonmarital births occur disproportionately among those already disadvantaged by income and race. See id. at 119.

214 See, e.g., id. at 80-84. Those who are single parents tend to come from groups already disadvantaged economically and in other ways (age, race, etc.). Id. at 119-122. Furthermore, poverty negatively affects parents’ psychological well-being and the
The bottom line is that the data supporting arguments that two-parent families are inherently superior to others is not overwhelming. Moreover, even if children derive some benefits from being reared in two-parent families, privileging those families is the wrong governmental response for several reasons. First, it is not at all clear that the marginal benefits to children from living in two-parent families outweigh the intrusion into adults’ private intimate lives wrought by pro-marriage policies. Second, prior to resorting to such intrusions, the state should attempt to neutralize any disadvantages of the single-parent household by implementing programs that directly support caretaking efforts.

Another consideration is that policies that privilege marital families over others ignore some of the negative consequences that the traditional family form has had on many women. Within most families, women do the lion’s share of the caretaking work, whether they work outside the home or not. Childrearing has been viewed as a female occupation since the mid-nineteenth century. While much of the overt rhetoric of domesticity and of the separate spheres of home and market has faded, the idealization of the mother-child bond continues. Pregnancy, childbearing, and nursing are biological functions that may be distinguished from childrearing. But their mystification helps perpetuate what some argue is a stubborn dual myth: women are ‘naturally’ suited for caretaking or childrearing, while men are not. Lifelong socialization and explicit external influences have together pressured

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Studies comparing the amount of time that men and women spend parenting consistently show that women perform more hours of childcare than men, although the data conflict on how large the differential actually is. For analysis and discussion of the data, see Amy L. Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage? 84 VA. L. REV. 509, 519-24 (1998). In addition, men take less parental leave from the workplace (even when flexible work and leave policies are available and men are equally entitled to take leave to care for family members) to spend time with their families. ARLENE R. HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 131 (1997). It remains the case that women are much more likely than men to interrupt their work to care for children. See Naomi Cahn, The Power of Caretaking, 12 YALE J.L. & FEMINISM 177, 185-86 (2000). See also Bianchi, supra note 211; Karen Czapanskiy, Volunteers and Draftees: The Struggle for Parental Equality, 38 UCLA L. REV. 1415 (1991).

See also Cahn, supra note 215, at 189.

See, e.g., Id. at 198 (arguing that because women’s only dominion has historically been over children, they have become associated with this power).
mothers to shoulder a disproportionate share of the burdens (as well as receive a disproportionate share of the joys and benefits) of childrearing. For example, despite data suggesting that children in good daycare thrive, a majority of people polled believe nonetheless that preschool-aged children suffer when their mothers work outside the home. In part because this idealized caretaking structure presumes a male primary breadwinner to financially support the household, its continued support by government perpetuates patriarchal familial norms.

As discussed elsewhere in this Article, there are compelling reasons for the state to refrain from intervening in or distorting the expressive, companionate, and sexual/procreative aspects of adults’ intimate choices. The nature of the public interest in dependent caretaking, however, is quite distinct. Given society’s overwhelming interest in the well-being and development of all child dependents, a better policy than one that promotes marriage is one that directly supports all children. Since we should value all children equally, it is irrational for policies to privilege some and stigmatize others based on the structure of the family in which they are raised. We must take public responsibility for ensuring caretaking, and this responsibility does require government intervention.

E. “For Richer, For Poorer”: The Economic Function of Marriage

In addition to being a relationship premised on affection and emotional commitment between partners, marriage is also an economic institution. Marriages are the locus for economic support of dependents in what is can be seen as a privatized system of wealth redistribution. The family’s caretaking and economic functions are thus closely related. Economic support is essential to caretaking; the economic well-being of all its child dependents, therefore, should be of primary concern to the state.

The normative modern marriage is an economic partnership built on sharing principles. The couple jointly makes investment decisions in career assets and human capital that ultimately benefit the marital family

219 See supra Parts III.A., III.B., and III.C.
as a whole. In its most conventional manifestation, of course, the economic vision of marriage is one in which the husband earns a wage outside the home that is sufficient to support himself, his wife (who does not earn a wage outside the home), and their children. Gary Becker and other economists have attempted to justify this model of marriage by arguing that positive efficiencies result from this sort of specialization of labor.

The normative vision of the economic function of marriage in the U.S. can be traced to the colonial period. American colonists brought with them from England marital and property systems that were feudal in origin. English marriage law, consistent with property rules, treated married couples as a single legal entity; under the doctrine of coverture, a woman ceased to exist as a distinct legal person upon marrying and her legal persona became subsumed into that of her husband. The legal unity of husband and wife suited early American

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221 See Jana B. Singer, Divorce Reform and Gender Justice, 67 N.C. L. REV. 1103, 1115 (1989). Much economic analysis examines family life as a process of exchange. Exchange theory presumes that members of a household will interact the way that strangers do in the marketplace—contracting around allocations of resources, negotiating and making deals to increase one’s own personal utility or happiness. Yet economists have begun to examine the role of altruism, considered a distinctive characteristic of family economic behavior. Nonetheless, while altruism complicates models of exchange within the family, Ann Estin argues that it does not replace the exchange theory of behavior, which is ultimately rational and self-interested. See Ann Laquer Estin, Love and Obligation: Family Law and the Romance of Economics, 36 WM. & MARY L. REV. 989, 1013-1016 (1995).

222 See supra notes 18-27 and accompanying text.

223 See discussion supra, Part II.A., and text accompanying notes 18-30. June Carbone has suggested that Becker’s theories be updated to reflect the fact that women’s workforce participation actually leads to greater specialization among women. CARBONE, supra note 102, at 16, 17. This specialization not only increases overall wealth but also may give women greater ability to choose family forms, including more egalitarian marriages or no marriage at all.

224 These systems arose from the need in thirteenth-century feudal England to keep landed estates intact under the authority of a single member of the next generation. See generally Lee E. Teitelbaum, Family History and Family Law, 1985 WIS. L. REV. 1135 (discussing interpretations of nineteenth-century family history); See also Charles Donohue, What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century. 78 MICH. L. REV. 59, 60 (1979).

225 Unmarried women had limited rights of inheritance and could not vote, serve on juries, or hold public office. They nonetheless had some legal capacity: women could hold property, enter into contracts, and sue or be sued. However, upon marrying, women lost these privileges, and could no longer enter into contracts, sue or be sued, or make wills. During their marriage, a woman’s husband had legal authority to control his wife’s land and to use any profits accruing from the property. See Homer H. Clark, Jr.,
agrarian society, as farming made marriage an economic enterprise in which husband and wife were interdependent. But while, married couples lived and worked together, the husband was the undisputed head of both the domestic and commercial spheres. This hierarchy was justified both by the ideology of the inherent inferiority of women and the economic reality of the husband’s control of the family’s income-producing assets. Industrialization, the effects of which were being felt in the eastern United States in the early part of the nineteenth century, severed the commercial and domestic spheres and precipitated a redefinition of gender roles. Men joined the sphere of the marketplace and the factory, while women were assigned almost exclusively to the domestic sphere.

During World War II, when large numbers of men were deployed overseas, many women took up their places in factories across America. The post-World War II years saw the end of the Industrial Age and the beginning of a “post-industrial” economy, when the heavy manufacturing and agricultural production that characterized industrialism were displaced by service and light industry employment. With men nearly fully employed, many middle-class women supplied labor to meet the increased demand. But even when both the husband and wife worked outside the house, they typically


The family household as a whole—not the primary or exclusive wage-earner—was the basic unit of economic production. Eli Zaretsky, Capitalism, the Family, & Personal Life 28-29 (1976).


assigned only one partner (usually the husband) to focus on the workplace and maximize his income.231 The second partner (usually the wife) took primary responsibility for dependent caretaking and subordinated her work obligations to meet the needs of her family and children.232 Even today, most couples continue to give higher priority to the husband’s career, while women remain far more likely than men to sacrifice their market potential in order to benefit their children and families.233 Research has shown that much of the pay gap between men and women can be attributed to their different caregiving roles.234 Joan Williams has concluded that:

[the key gender shift between the domesticity/wage labor gender system and the contemporary system is not . . . a shift from dependent to independent wives. Instead, the key shift is from wives totally cut off from market resources to wives who are secondary workers with careers subordinated to both their husbands’ and their children’s . . . needs.235

As their earning capacity decreases, many married women become increasingly dependent on their husbands. Intact marriages can mask this dependency. When marriages fail (as nearly half of all marriages do), however, those women frequently must become primary earners in an economy where a single wage-earner with few market skills frequently cannot earn enough to support herself and two children. Former husbands are often unwilling or unable to support two households.236 Thus, while nearly eighty percent of single mothers work, their employment often does not translate into economic self-sufficiency. Barriers to single-parent families’ economic well-being include low wages and continuing job segregation,237 expensive childcare, and lack of employer-provided health insurance and other benefits.238 Many women and their children transfer their dependency from their husbands and fathers (while marriages are intact) to the state

231 See Singer, supra note 221, at 1115.
232 Id.
233 See Singer, supra note 221, at 1115.
234 See HEYMANN, supra note 195, at 147-159.
236 STAFF OF HOUSE COMMITTEE ON WAYS AND MEANS, supra note 208, at 725.
238 See also Smith, supra note 181, at 135 n. 62.
(after dissolution of their marriages). More than a third of all welfare recipients are divorced mothers and their children.\textsuperscript{239}

Encouraging marriage is suggested as good economic policy\textsuperscript{240} based in part on statistics that demonstrate that married couples are less likely to be poor than are single parents.\textsuperscript{241} It nearly goes without saying that correlation does not necessarily imply causation, but some researchers nonetheless turn the covariation of female-headed families and poverty into a causal relationship by ignoring the other social forces that contribute to this phenomenon. Marriage promotion measures fail to address economic circumstances that result in poverty. Faced with data that the U.S. has more poverty than any other major advanced nation,\textsuperscript{242} rather than attempting to limit the number of children born to women receiving aid, government should focus instead on addressing the extreme income inequality and poverty in the country.\textsuperscript{243}

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\textsuperscript{239} Loprest & Zedlewski, supra note 176 at 3.
\textsuperscript{240} See, e.g., Adam Thomas & Isabel Sawhill, \textit{For Richer or for Poorer: Marriage as an Antipoverty Strategy}, 21-4 J. POL. ANALYSIS & MGMT. 587, 597 (2002) ("[O]ur analyses suggest that policies designed to engender marriage among single parents could have a considerable impact on child poverty."); Wade F. Horn, \textit{Wedding Bell Blues: Marriage and Welfare Reform}, 19-3 BROOKINGS REV. 39, 39-42 (2001) ("Why haven't states made more progress in encouraging marriage as one way to reduce welfare dependency?"); Galston, supra note 209, at 275 ("These data suggest that the best anti-poverty program for America's children is a stable, intact family.").
\textsuperscript{243} See also, Edward N. Wolff, \textit{The Economic Status of Parents in Postwar America}, 59, 81, in \textit{TAKING PARENTING PUBLIC: THE CASE FOR A NEW SOCIAL MOVEMENT} (Hewlett, Rankin, & West, eds. 2002) ("[I]n comparison with other advanced economies, the United States has by far the highest poverty incidence among children after the effects of government transfer programs are accounted for.").
\end{flushleft}
Government’s efforts to have poor women marry men to help support them presumes that there is a pool of marriageable (i.e., employed, financially stable) men available to them.\textsuperscript{244} Studies have shown, however, that even if they were to marry and work in the marketplace, most poor women would remain poor or near-poor.\textsuperscript{245} In fact, marriage can actually reduce the well-being of low-income mothers if a potential spouse cannot contribute to the economic viability of the household.\textsuperscript{246} Indeed, declining labor opportunities for low-skilled men have mirrored decreases in marriage rates in low-income communities.\textsuperscript{247} In the words of one low-income woman:

[After the baby was born,] everything started blowing up. I didn’t [want to] be with him no more ‘cause he wasn’t working and he was getting on my nerves . . . He just never gave me no money. I would tell him, you know, ‘Well, the baby needs diapers.’ ‘Well, I don’t have no money.’ ‘The baby needs milk.’ ‘Well, I don’t have no money.’ I just started getting mad. I had to buy milk and diapers so I just told him to leave me alone.\textsuperscript{248}

\textsuperscript{244} But see Michael Tanner, Editorial, \textit{Wedded to Poverty}, N.Y. TIMES, July 29, 2003, at A23. Tanner reports studies that have shown that there are relatively few “marriageable” men in high-poverty areas of the country. One such study found that more than one-third of fathers of nonmarital children lacked a high school degree; 28 percent were unemployed; 20 percent had annual incomes under $6,000; and roughly 38 percent had criminal records. \textit{Id.} Tanner suggests that “many single mothers are single because they find their unemployed and under-educated potential partners to be unattractive marriage material. Do we really want to encourage them to marry unsuitable partners?” \textit{Id.}


\textsuperscript{248} An African-American mother living in the Philadelphia metropolitan area, interview excerpted in Edin, \textit{supra} note 246.
It is not at all certain that marriage is the antidote to poverty for many families. Moreover, the state’s focus on marriage as the ultimate solution permits society, at least to a degree, to comfortably blame poverty on the poor—specifically poor unmarried women. The focus on the red herring of marriage creates a culture of decreasing public responsibility and diverts attention from the state’s failures in helping to ensure that dependents are cared for. Rather than focusing attention of marriage as the solution, what is needed are programs that lessen some of the most significant barriers to families’ economic well-being.

**CONCLUSION**

Dependent caretaking is critical to the development of an educated, productive populace. Economic support and well-being is essential to dependent caretaking. The public interest in those functions—as they are performed both within and outside of marriage—therefore compels some degree of government involvement. However, using marriage as a proxy for these two, closely related functions is ham-handed. Regulating marriage means regulating areas in which the state should remain uninvolved—namely, the expressive, companionate, and sexual and procreative aspects of the marital and other intimate relationships. Rather than emphasizing the importance of marriage, government should instead enact more carefully targeted policies to support caretaking and the economic well-being of its citizenry.

249 See, e.g., Alex Kotlowitz, Editorial, *It Takes a Wedding*, N.Y. Times, Nov. 13, 2002, at A29. In an anecdotal report, Kotlowitz writes about eight unmarried couples who lived in public housing in Chicago. The couples were offered all-expenses-paid weddings and honeymoons. Most of the couples subsequently split up. Kotlowitz writes:

> The stress of not having money, of living in decrepit housing, of sending children to poorly funded schools would take its toll on even the most committed relationship. So how then might we help get couples to the altar? By pushing marriage? Or by helping ease the strains in people’s lives?

250 Studies have shown that mothers’ increased market work has not decreased the quality, and perhaps not even the quantity, of time women spend with their children. See Suzanne M. Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?*, 37 Demography, 401, 403 (2000). Bianchi argues that we have overestimated the amount of maternal time spent with children in the past and failed to appreciate how much working mothers do to protect the time spent with children.
What would this look like in practice? First, the state would deemphasize family form. It would eliminate government-sanctioned privileges that currently accompany heterosexual monogamous marriage and that devalue and stigmatize other family structures. It would also introduce programs that directly bolster dependent caretaking and the economic supports that make such caretaking possible. Of course, some of these programs would be costly. Yet it is lack of political will, rather than economic inability, that currently prevents these programs from being adopted in the U.S.\footnote{Matthew Miller, a former budget aide in the Clinton White House, has recently proposed that government devote 2\% of the U.S. gross domestic product, approximately $220 billion, to alleviate some of the country’s most entrenched social problems. Miller suggests reprioritizing budget expenditures to provide universal health coverage, stabilize the Social Security system, better fund public education systems in inner cities, and ensure a living wage for the working poor. \textit{Matthew Miller, The Two Percent Solution: Fixing America’s Problems in Ways That Liberals and Conservatives Can Love}, ix-xv, 69-219 (2003). I note Miller’s proposal to illustrate the potential economic feasibility of even ambitious social programs.} Possible programs could include subsidized or public day care, longer school days and school years, more affordable health care,\footnote{See, e.g., Ted Halstead, Editorial, \textit{To Guarantee Universal Coverage, Require It}, N.Y. TIMES, Jan. 31, 2003, at A29. Halstead proposes that the federal government implement mandatory self-insurance to provide fully portable coverage to all Americans. Those who could not afford to self-insure would be subsidized, and the separate Medicaid system for those who are poor would be eliminated. Halstead argues that such a system would lower insurance costs, raise the quality of care, maintain a private insurance market, and offer citizens more choice. \textit{Id.}} and workplace protections (including paid family leave policies and flexible schedules\footnote{Studies in other countries have shown that leave policies covering childbirth and infant care significantly increase mothers’ return to work. \textit{See Marit Rønsen & Marianne Sundstrom, Marital Employment in Scandinavia: A Comparison of the After-Birth Employment Activity of Norwegian and Swedish Women}, 9 J. OF POPULATION ECONOMICS 267 (1996) (finding the right to paid maternity leave, coupled with job security, accelerated the return to work for Norwegian and Swedish mothers).}). To further ensure the economic security of dependents, the state should also make modifications to the welfare, social security, and tax systems. These could include combining the welfare and social security systems into a single system that ensures that dependents and their caretakers receive an level of support and increasing child tax credits for caretakers.\footnote{See, e.g., William A. Galston, \textit{Public Morality and Public Policy: The Case of Children and Family Policy}, 36 SANTA CLARA L. REV. 313, 318-10 (1996) (discussing Clinton administration proposals to increase the per child tax credit).} In reviewing these proposals, it should be kept in mind that while they may sound
dramatic and interventionist, they have been implemented successfully in countries less wealthy than ours.255

Some might suggest that it is incongruous to demand privacy from government intervention in certain aspects of family life but seek its intervention in other aspects. But incongruity appears only if the marital family is viewed as an indivisible unit. Dissecting that unit into its functional parts brings into sharp relief and permits examination of its different components. Once family life has been dissected, the question becomes not how one can justify treating certain aspects of the family differently, but instead how one can justify treating such radically different aspects of the family the same. Why should government privilege marriage as an exclusive instrument of expression (especially when the content of that expression is largely predetermined)? Why should it privilege one form of companionate relationship over others that may serve the same societal functions? Why should sexual and procreative freedom be contingent either upon one’s marital or economic status? Why shouldn’t the state do more to provide economic support for caretaking—the aspect of family functioning most crucial to its own future well-being?256

Some modern family theorists ignore the power of current norms in shaping majoritarian views of and preferences for what is deemed “natural.” With respect to the family, “natural” has come to refer to Westernized ideals of intimate commitment that have stamped out or obscured alternative family practices seen in much of the world.257

255 See Krugman, supra note 242; Wolff, supra note 242.
256 Arguably, one of the current benefits of marriage is that it puts in place a system of default rules which apply in the event of its dissolution. These default rules attempt to recognize that marriages frequently involve joint determinations that affect the financial positions of the spouses upon divorce. Couples can sometimes contract out through prenuptial agreements, but are generally bound by the property division systems of their jurisdictions. De-privileging marriage in law would require a new system—one that centers not on a particular status, but instead on those functions that we care about. This system might have broader application than the current one and is a topic for continued thought and discussion.
257 In her history of marriage in the United States, Nancy Cott notes that during the colonial period:

Christian common sense took for granted the rightness of monogamous marriage ... Learned knowledge deemed monogamy a God-given but also a civilized practice, a natural right that stemmed from a subterranean basis in natural law. Yet at that time, Christian monogamists composed a minority in the world ... Most of the peoples and cultures around the globe ... held no brief for strict monogamy. The belief systems of Asia,
Those who embrace these ideals elide other possible manifestations of intimate relationships, lifelong and otherwise, that have the potential for individual realization and also fulfill the socially useful caretaking and support functions.

Because of the current maelstrom surrounding the issue of gay marriage, it is worth noting that the Article has clear implications on how it should be treated. Again, there are aspects of family life whose boundaries the state ought to respect, and there are aspects whose societal importance calls for state support. Since gay families and so-called traditional families are identical with respect to these aspects, it is both foolhardy and counterproductive for the state to treat gay families any differently.

Majority American culture has not only rejected alternative family forms, it has labeled them "unnatural" and in some cases, even unlawful. Too much of what seems to underlie these arguments is a belief that lifelong marital commitment is a good and moral thing. But we must beware of "public morality" arguments in "public welfare" clothes.

Put simply, the approach suggested in this Article promotes the public welfare. It safeguards individual liberty, advances gender equality, and protects the well-being of children and other dependents. It is not anti-marriage. It is pro-family.

Africa, and Australia, of the Moslems around the Mediterranean, and the natives of North and South America all countenanced polygamy and other complex marriage practices.

COTTI, PUBLIC VOWS, supra note 78, at 9-10.

258 Eliminating public consequences of marriage would not preclude couples from marrying in private ceremonies. Individuals should remain free to marry, and religious and other organizations can define and solemnize marriages however they see fit.