

What is Marriage For? The Public Purposes of Marriage Law

*Maggie Gallagher**

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I. INTRODUCTION

A. *What is Marriage For?*¹

Every known human society has some form of marriage. In every complex society governed by law, marriage exists as a public legal act and not merely a private romantic declaration or religious rite.²

As Kingsley Davis summed up the anthropological evidence: “Although the details of getting married—who chooses the mates, what are the ceremonies and exchanges, how old are the parties—vary from group to group, the principle of marriage is everywhere embodied in practice”³

As a practically universal human idea, marriage is about regulating the reproduction of children, families, society. While marriage systems differ, marriage across societies is a public sexual union that creates kinship obligations and sharing of resources between men, women, and the children their sexual union may produce.

B. *Why? What is the State’s Interest in the Sexual Unions in General, and This Kind of Sexual Union in Particular of its Citizens?*

Family law has become in recent years mired in and enlarged by controversial public debates over sexuality, autonomy, responsibility and the law. From the new reproductive technology to no-fault divorce to civil unions, Americans have been questioning the proper role of law in

1. With gratitude to E.J. Graff for posing the question so clearly. See E. J. Graff, *What is Marriage For?* (1999).

2. Although prior to the clear separation of church and state, church law interpreted by ecclesiastical courts governed in most parts of Europe. See, e.g., Lloyd Bonfield, *Developments in European Family Law*, in *Family Life in Early Modern Times 1500-1789*, at 87 (David I. Kertzer & Marzio Barbagli eds., 2001); Jeffrey R. Watt, *The Impact of the Reformation and Counter-Reformation*, in *Family Life in Early Modern Times 1500-1789*, at 125-54 (David I. Kertzer & Marzio Barbagli eds., 2001).

3. Kingsley Davis, *Contemporary Marriage: Comparative Perspectives on a Changing Institution* 5 (1985). See also George P. Murdock, *Social Structure* (1949).

regulating or facilitating intimate partnerships, which requires rethinking the once-axiomatic relationship between sex, parenting and marriage. Before we can decide whether, say, gender is irrelevant to the public purposes of marriage, we have to decide what those public purposes are. Why does the state get involved in the intimate lives of its citizens at all?

There are two broad views of marriage currently competing in the public square. They are not mutually exclusive, in the sense that most Americans today draw our understanding of marriage from both streams. But ultimately these two competing visions of what marriage is for lead the law in dramatically opposing directions.

II. MODELS OF MARRIAGE LAW: THE RELATIONSHIP VIEW

Here is one view: Marriage is an essentially private, intimate, emotional relationship created by two people for their own personal reasons to enhance their own personal well-being. Marriage is created by the couple, for the couple.

It is wrong, discriminatory, as well as counterproductive, therefore, for the state to favor certain kinds of intimate relations over others. Marriage has a legal form but no specific content. Each person has the right to express socially his or her own inner vision of family, sexuality and intimacy, on an equal basis.

Sometimes this argument is made in its purest possible form. As Rutgers law professor Drucilla Cornell put it:

The state should have no right to privilege or impose one form of family structure or sexuality over another. This would mean that some adults could choose *consensual* polygamy. Mormon men could have more than one wife. Four women who worship the mother goddess could also recognize and form a unity and call their relationship a marriage. There would be no state-enforced single relationship—not monogamy, heterosexuality, polygamy, or polyandry . . . [Legislating] love and [conscripting] men is a sign of the fear of, not a solution to, the crisis of families. Intimate associations are different undertakings. They always have been so. The freedom to form families opens up the possibility of people creating their own families in the way most suitable to them.⁴

More often, the argument is tempered with an acknowledgment that the state does have a potential interest in regulating intimate relations,

4. Drucilla Cornell, *Fatherhood and Its Discontents: Men, Patriarchy, and Freedom*, in *Lost Fathers: The Politics of Fatherlessness in America* 199, 200 (Cynthia R. Daniels ed., 1998).

including marriage, but it is limited to the protection of existing dependents. To the extent marriage protects the weak (children), the state may prefer marriage. But it makes no sense in this view for the state to deny the benefits of marriage to any two people, especially any two people with children. The only goods of marriage that the state confers are a small number of practical advantages in inheritance, social security and health insurance law. There is no rational reason, therefore, to withhold these benefits from any couple, cohabiting, same-sex, or other, who wishes to claim them on behalf of themselves or (especially) their dependents.

A. Implications for Legal Equality of Informal Unions

So this view of marriage as primarily an emotional good created by the private couple leads to calls (and in countries outside the United States to judicial rulings and legislation) to abolish any distinction between cohabitation and marriage, between what some call formal and informal unions. In the Summer of 2000, writing in *Family Law Quarterly*, distinguished family law scholar Harry D. Krause put it this way:

[A]n irrational, sentimental cocoon . . . has clouded logical discussion and intelligent debate . . . Today's sexual and associational lifestyles differ so much that the state should not continue to deal with them as though they were one: the old role-divided, procreative marriage of history. That marriage may not yet be history, but it should be seen for what it has become: one lifestyle choice among many.

A pragmatic, rational approach would ask what social functions of a particular association justify extending what social benefits and privileges. Marriage, qua marriage, would not be the one event that brings into play a whole panoply of legal consequences. Instead, legal benefits and obligations would be tailored according to the realities—speak social value—of the parties' relationship.⁵

Addressing tax laws that treat married and cohabiting couples differently, Professor Krause concludes: "The rational answer seems clear: Married and unmarried couples who are in the same *factual* positions should be treated alike."⁶

What difference does the fact of marriage make in this relational view? None because marriage is just a word for a relationship actually created by and for the couple.

5. Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex, or Not At All?*, 34 Fam. L.Q. 271, 276 (2000).

6. *Id.* at 278.

B. Are Informal Unions Marriage Equivalents? Evidence from the Social Sciences

A burgeoning body of social science literature on cohabitation in this country shows that cohabitation is not in fact the functional equivalent of marriage. Cohabitors more closely resemble singles than married people.⁷

Children with cohabiting parents have outcomes more similar to the children of single parents than children from intact married families.⁸ Adult cohabitors are more similar to singles than to married couples in terms of rates of physical health and disability,⁹ emotional well-being and mental health,¹⁰ as well as assets and earnings.¹¹

People who live together also, on average, report relationships of lower quality—with cohabitors reporting more conflict, more violence, and lower levels of satisfaction and commitment than married couples.¹² Even

7. Steven Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. Fam. Issues 53 (1995); Ronald R. Rindfuss & Audrey VandenHeuvel, *Cohabitation: A Precursor to Marriage or an Alternative to Being Single?*, 16 Population & Dev. R. 703 (1990).

8. William H. Jeynes, *The Effects of Several of the Most Common Family Structures on the Academic Achievement of Eighth Graders*, 30 Marriage and Family Review 73 (2000); Donna Ruane Morrison & Amy Ritualo, *Routes to Children's Economic Recovery After Divorce: Are Cohabitation and Remarriage Equivalent?*, 65 Am. Sociological R. 560 (2000); Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 Social Forces 269 (1996); Wendy D. Manning & Daniel T. Lichter, *Parental Cohabitation and Children's Economic Well-Being*, 58 J. Marriage & Fam. 998 (1996).

9. Amy M. Pienta et. al., *Health Consequences of Marriage for the Retirement Years*, 21 J. Fam. Issues 559 (2000).

10. Susan L. Brown, *The Effect of Union Type on Psychological Well-Being: Depression Among Cohabitors Versus Marrieds*, 41 J. Health & Soc. Behav. 241 (2000); Allan V. Horwitz & Helene Raskin, *The Relationship of Cohabitation and Mental Health: A Study of a Young Adult Cohort*, 60 J. Marriage & Fam. 505 (1998); Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 J. Marriage & Fam. 527 (1998); Arne Mastekaasa, *The Subjective Well-Being of the Previously Married: The Importance of Unmarried Cohabitation and Time Since Widowhood or Divorce*, 73 Social Forces 665 (1994).

11. Lingxin Hao, *Family Structure, Parental Input, and Child Development*, Paper Presented at the Meetings of the Population Association of America, Washington D.C. (Mar. 1997) (on file with author). See also Kermit Daniel, *The Marriage Premium*, in *The New Economics of Human Behavior* 113 (Mariano Tommasi & Kathryn Ierulli eds., 1996).

12. S.L. Brown & A. Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. Marriage & Fam. 668 (1996); R. Forste & K. Tanfer, *Sexual Exclusivity Among Dating, Cohabiting and Married Women*, 58 J. Marriage & Fam. 33 (1996); Nock, *supra* note 7; LL. Bumpass et. al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. Marriage & Fam. 913 (1991); J.E. Straus & M.A. Stets, *The Marriage License as Hitting License: A Comparison of*

biological parents who cohabit have poorer quality relationships and are more likely to part than parents who marry.¹³ Cohabitation differs from marriage in part because it selects for partners with lesser commitment to the relationship. The public nature of the marriage partnership, with its long time-horizon, formal entry and exits, and relatively well-developed socially supported enforced norms of behavior, also affect the returns of marriage vis-à-vis more informal unions.¹⁴

Yet a distinguished legal scholar in a major family law journal simply assumed that the functional equivalence of cohabitation and marriage was self-evident, once the cocoon of sentiment was stripped away by a hard-headed rationalist like himself—so deeply ingrained in certain circles has the idea become that marriage is no more than a piece of paper that delivers certain legal benefits.¹⁵

In the larger sweep of history, despite significant countercurrents,¹⁶ this view of marriage-as-emotional intimacy is gaining ground.¹⁷ One view of marriage is that it is a personal right of the individual, created by the individual, for purposes which the individual alone defines. When two individuals happen to have desires and tastes for each other that coincide for a lifetime, that is beautiful. If not, it is simply no one else's business.

C. *The Limits of Intimacy as a Rationale for Marriage Law*

Of course if this is what marriage is for, many things about the state's traditional regulation of marriage become difficult to understand. It is difficult to understand in this scheme why the state would be involved in marriage at all, or why marriage must be confined to the couple—at the

Assaults in Dating, Cohabiting and Married Couples, 4 J. Fam. Violence 161 (1989).

13. Thomas G. O'Connor et. al., *Frequency and Predictors of Relationship Dissolution in a Community Sample in England*, 13 J. Fam. Psych. 436 (1999); Brown & Booth, *supra* note 12.

14. For a discussion of marriage as a signalling and norm-bundling device, see Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va.L. Rev. 1901 (2000). For a more general discussion of how marriage and cohabitation differ, see Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better-Off Financially* (2000).

15. In fact, social science evidence indicates that cohabitation in this country does not produce similar outcomes as marriage, in terms of the benefits it provides to children and adults. In general, cohabitators resemble singles more than married people, and children of cohabiting parents resemble children of single mothers rather than children from intact marriages. This reflects in part selection effects. For an overview, see Waite & Gallagher, *supra* note 14.

16. See, e.g., *The Marriage Movement: A Statement of Principles* (2000), available at <http://www.marriagemovement.org>.

17. See for example, Arland Thornton & Linda DeMarco Young, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. Marriage & Fam. 4 (2001).

most basic level, why the word marriage requires intimacy at all. If fairness is the issue, why can a worker give his health insurance benefits only to someone he or she is sleeping with? Why must they live together? Why not allow business partners to declare their relationship a marriage and save on the insurance premiums?

Drucilla Cornell is correct, but she does not see far enough. If marriage is just another word for an intimate union, then the state has no legitimate reason to insist that it even be intimate, unless the couple, or the quartet, want it so. For the individual to be truly free to make unconstrained relationship choices, marriage itself must be deconstructed.

D. The Consequences for Effective Fatherhood

What about the children? There the state will, as Cornell puts it, separate the parenting alliance from the sexual alliance. Adults will still have obligations to children, but any obligations will be severed from their newly unfettered intimate adult lives. What then is the source of adult obligation to specific children? Once we sever, conceptually, the sexual alliance and the parenting alliance, we sever children from their uncontested claim to their parents'—especially their fathers'—care and protection.

And of course it is the fathers who disappear, because while fathers and mothers are equally beloved and important to their children, fatherhood and motherhood are not equally inevitable. Far more than mothers, reliable fathers are cultural creations, products of specific ideals, norms, rituals, mating and parenting practices. Today after thirty years of sexual revolution, only sixty percent of American children now live with their own two married parents.¹⁸ Of the remaining 40 percent, the overwhelming majority live with their single or remarried mothers.¹⁹

Marriage leads to more effective parenting by both mothers and fathers. In one nationally representative study, for example, thirty percent of young adults whose parents divorced reported poor relationships with their mothers, compared to sixteen percent of children whose parents stayed married.²⁰ But outside of marriage, children's relationships with

18. Sharon Vandivere et. al., *Children's Family Environments: Findings from the National Survey of Americas Families* (2001). The data on the proportion of children living with their own two married parents are from unpublished analyses provided to David Blankenhorn.

19. In 1997, twenty-three percent of family households were headed by a female single parent, while five percent were headed by a male single-parent. U.S. Bureau of the Census, *Statistical Abstract of the United States*: 1998, at 68 (1998).

20. Nicholas Zill et. al., *Long-Term Effects of Parental Divorce on Parent-Child Relationships, Adjustment, and Achievement in Young Adulthood*, 7 *J. Fam. Psych.* 91 (1993) [hereinafter Zill].

their fathers are at even greater risk. Sixty-five percent of young adults whose parents divorced had poor relationships with their fathers, compared to twenty-nine percent from nondivorced families.²¹ On average, children whose parents divorce or never marry see their fathers less frequently,²² and have less close and warm relations with their fathers,²³ than children whose parents got and stayed married. About half of children with nonresident fathers see their fathers once a year or never.²⁴ Divorce appears to have an even greater negative effect on relationships with fathers than remaining in an unhappy marriage.²⁵

Good fathers are made, not born. When family and sexual norms are weakened, it is generally children's access to effective fathers, not mothers, that is most at risk. When we tell adults that parenting obligations are created by free choices of adults, and when the law's role is limited to sanctioning and affirming all adults choices equally, the well-being of children is put at risk.

Can a society or culture reliably make men into good fathers while at the same time affirming in its governing family law that children do not need mothers and fathers, i.e., that all intimate sexual unions are equally valuable, regardless of their effects on child and social well-being? Will a society that adopts the set of ideas and ideals driving the post-modern family over the long march of generations ultimately even survive?

III. MODELS OF MARRIAGE LAW: A NORMATIVE SOCIAL INSTITUTION

What is the alternate view of marriage? Some might call it traditional, but that is really not the right term, because this broad view of marriage is not the product of a specific tradition—custom, religion, or culture. The specific contours of our own inherited marriage tradition, deeply rooted in

21. *Id.* E. Mavis Hetherington, in a study of largely white middle-class children, reports that two-thirds of young men and three-quarters of young women whose parents divorce do not have close relationships with either their father or a stepfather. E. Mavis Hetherington & John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002).

22. J.A. Seltzer & S.M. Bianchi, *Children's Contact with Absent Parents*, 50 *J. Marriage & Fam.* 663 (1988).

23. Paul R. Amato & Alan Booth, *A Generation At Risk: Growing Up in an Era of Family Upheaval* (1997); William S. Aquilino, *Impact of Childhood Family Disruption on Young Adults' Relationships with Parents*, 56 *J. Marriage & Fam.* 295 (1994); Teresa M. Cooney, *Young Adults' Relations with Parents: The Influence of Recent Parental Divorce*, 56 *J. Marriage & Fam.* 45 (1994).

24. While only twenty-one percent of children with nonresident fathers see their fathers as often as once a week. *See, e.g.,* Valerie King, *Variations in the Consequences of Nonresident Father Involvement for Children's Well-Being*, 56 *J. Marriage & Fam.* 963 (1994).

25. Amato & Booth, *supra* note 23.

Judeo-Christian culture, which include reciprocal pledges of lifelong monogamy and fidelity, are not of course universal.

But what every known human society calls marriage shares certain basic, recognizable features, including most especially the privileges accorded to the reproductive couple in order to protect both the interests of children and the interests of the society. As Kingsley Davis sums up the anthropological impulse of marriage: “The unique trait of what is commonly called marriage is social recognition and approval . . . of a couple's engaging in sexual intercourse and bearing and rearing offspring.”²⁶

Marriage is everywhere the word we use to describe a publicly acknowledged and supported sexual union between a man and woman which creates rights and obligations between the couple and any children the union may produce. Marriage as a public tie obligates not only fathers, but fathers' kin to recognize the children of this union. In every society, marriage is the sexual union where childbearing and raising is not only tolerated but applauded and encouraged. Marriage is the way in which every society attempts to channel the erotic energies of men and women into a relatively narrow but highly fruitful channel—to give every child the father his or her heart desires. Above all—normal marriage is normative. Marriage is not primarily a way of expressing approval for infinite variety of human affectional or sexual ties; it consists, by definition, of isolating and preferring certain types of unions over others. By socially defining and supporting a particular kind of sexual union, the society defines for its young what the preferred relationship is and what purposes it serves.

Successful societies do this first of all because children need and deserve fathers as well as mothers. The public legal union of a man and woman is designed first and foremost to protect the children that their sexual union (and that type of sexual union alone) regularly produces. A large body of social science evidence now confirms what the preferences for marriage embedded in law (more strongly in the past than now) suggested: children do better when raised by their own two married mothers and fathers.²⁷

26. Davis, *supra* note 3.

27. What about the literature on same sex parenting? As a body of social science literature these studies are preliminary, at best. Many same-sex parenting studies actually compare children of single heterosexual mothers to children of lesbian mothers. They may be relevant to other legal questions, such as custody, but they do not show, as some advocates claim, that same-sex unions are the functional equivalent of mother-father unions. In addition, they are plagued by numerous technical deficiencies (poor study design, lack of random sampling, inadequate controls, etc.) that make it inappropriate to use these results as a guide to public policy. See A. Nagai & R. Lerner, *No Basis: What the Studies Don't Tell Us about Same-Sex Parenting* (2001), available at <http://www.eppc.org>. For a critique of Nagai and Lerner, see Judith Stacey & Timothy J. Biblarz, (*How Does the Sexual Orientation of Parents Matter?*, 66 *Am. Sociological Rev.* 159 (2001)). Stacey & Biblarz, however, largely ignore the technical flaws pointed to by Lerner and Nagai and focus instead on possible advantages of same-sex parenting in

A. *Marriage and Child Well-Being*

Why prefer marriage?²⁸ Here is one reason: Children raised outside of intact marriages are at greater risk for a large number of serious personal and social problems, even after controlling for race, income, and family background. The breadth and depth of this burgeoning social science literature is perhaps not well known to many family lawyers and legal scholars. It is worth recapitulating in some detail.²⁹

1. *Psychological Adjustment*

Overall, children who grow up outside of intact marriages have higher rates of mental illness, even after controlling for pre-divorce characteristics. The “marriage gap” in mental health is not a consequence of temporary divorce trauma, but persists long into adulthood. Even twenty years later, white middle-class children whose parents divorced were twice as likely to experience serious social, emotional or psychological problems. One out of four children of divorce, as opposed to one out of ten children from intact marriages, experienced such lasting psychological damage.³⁰ A large Swedish study found that as adults, children raised in single parent families were fifty-six percent more likely to show signs of mental illness than children from intact married homes.³¹ One important study following more than 11,000 British children from birth through age thirty-three concluded that “a parental divorce during childhood or adolescence continues to have a negative effect when a person is in his or her twenties and early

encouraging gender androgyny and sexual freedom. However, if Lerner and Nagai are correct, these studies are inadequate (due to sample and design flaws) to support *any* conclusion. For the clearest and best technical critique of existing social science literature on same-sex parenting, see the sworn affidavit of University of Virginia sociologist Steven Lowell Nock, requested by the attorney general of Canada, filed in *Halpern v. Attorney General of Canada*, [2000] O.J. No. 684/00 (Div. Ct.) (unpublished case).

28. For a summary by a number of leading family scholars of social science, see Norval Glenn et al., *Why Marriage Matters: 21 Conclusions From the Social Sciences* (2002), available at <http://www.americanvalues.org>.

29. For some recent reviews, see Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 *J. Marriage & Fam.* 1269 (2000); Waite & Gallagher, *supra* note 14; Amato & Booth, *supra* note 23; Sara McLanahan & Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* (1994).

30. Hetherington & Kelly, *supra* note 21.

31. Olle Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood*, 36 *Soc. Sci. & Med.* 1047 (1993).

thirties.’³² A study of 534 Iowa families found that divorce increased the risk of depression in children, especially boys.³³ Remarriage does not improve the psychological well-being of children, on average.³⁴ Children in cohabiting couples also show poorer emotional health than children from married, two-parent families, closely resembling children in remarried and single-parent families.³⁵ When it comes to suicide, the single “most important explanatory variable,” according to an important new study for the increasing suicide rates among teen and young adults, “is the increased share of youths living in homes with a divorced parent.” The effect, note the researchers “is largely” explaining “as much as two-thirds of the increase in youth suicides” over time.³⁶

When there is high conflict in the married home, children get some psychological benefit from divorce. But the majority of divorces today appear to take place in low-conflict marriages, and the psychological damage to children from these divorces is significant.³⁷

2. *Physical Health and Longevity*

Divorce and unmarried childbearing also has important negative effects on children’s physical health and life expectancy. Babies born to married parents have lower rates of infant mortality. On average, having an unmarried mother is associated with an increase in the risk of infant mortality of about fifty percent.³⁸ While parental marital status predicts infant mortality in both blacks and whites, the increased risk due to mothers’ marital status is largest among the most advantaged: white mothers over the age of twenty.³⁹ Even after controlling for age, race, and

32. Andrew Cherlin et. al., *Effects of Parental Divorce on Mental Health Throughout the Life Course*, 63 *Am. Sociological Rev.* 239 (1998).

33. Ronald L. Simons et. al., *Explaining the Higher Incidence of Adjustment Problems Among Children of Divorce Compared with Those in Two-Parent Families*, 61 *J. Marriage & Fam.* 1020 (1999).

34. Zill, *supra* note 20.

35. Hao, *supra* note 11.

36. David M. Cutler et. al., *Explaining the Rise in Youth Suicide*, National Bureau of Economic Research Working Paper No. w 7713 (May 2000), available at <http://papers.nber.org/papers/w7713.pdf>.

37. Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 *J. Marriage & Fam.* 197 (2001).

38. Relative odds range from 1.44 to 1.7. J.A. Gaudino, Jr. et. al., *No Fathers’ Names: A Risk Factor for Infant Mortality in the State of Georgia*, 48 *Soc. Sci. Med.* 253 (1999); C.D. Siegel et. al., *Mortality from Intentional and Unintentional Injury Among Infants of Young Mothers in Colorado, 1986 to 1992*, 150 *Archives of Ped. & Adolescent Med.* 1077 (1996) [hereinafter Segel]; Trude Bennett & Paula Braveman, *Maternal Marital Status as a Risk Factor for Infant Mortality*, 26 *Fam. Plan. Persp.* 252 (1994).

39. Trude Bennett, *Marital Status and Infant Health Outcomes*, 35 *Soc. Sci.*

education, children born to unwed mothers generally have higher rates of infant mortality.⁴⁰ Unmarried mothers are also less likely to get early prenatal care, but infant mortality rates are higher not only in the neonatal period, but through infancy⁴¹ and even early childhood.⁴² Children born to unmarried mothers have an increased incidence of both intentional and unintentional fatal injuries.⁴³ Marital status remains a powerful predictor of infant mortality even in countries such as Sweden with nationalized health care systems and strong supports for single mothers.⁴⁴

One study which used the National Health Interview Survey to track changes in children's health found that divorce increased the incidence of health problems in children by fifty percent.⁴⁵ The health advantage of married homes for children remains even after taking into account socioeconomic status.⁴⁶ The negative health effects of parental non-marriage and divorce linger long into their children's adult lives. This health gap cannot be explained entirely by lower incomes or reduced access to medical care. Even in Sweden, a country with extensive supports for single mothers and a nationalized health care system, one recent study found that adults raised in single-parent homes were about one-third more likely to die over the study period.⁴⁷

Parental divorce appears to reduce a child's life expectancy by an average of four years, even after controlling for childhood health status and family background, as well as personality characteristics such as impulsivity and emotional instability.⁴⁸ Another analysis of this same data found that

Med. 1179 (1992).

40. In general, marriage appears to confer the strongest benefits on children of mothers who are already advantaged: older, white, and better educated. Marital status does not appear to reduce the infant mortality rates of children born to teen mothers, or to college graduates. Bennett & Braveman, *supra* note 38.

41. Bennett, *supra* note 39.

42. Jeremy Schuman, *Childhood, Infant and Perinatal Mortality*, (1996): *Social and Biological Factors in Deaths of Children Aged Under 3*, 92 *Population Trends* 5, 5-14 (1998).

43. Siegel, *supra* note 38.

44. In Sweden: A. Armtzen et. al., *Marital Status as a Risk Factor for Fetal and Infant Mortality*, 24 *Scand. J. Soc. Med.* 36 (1996). In Finland: E. Frossas et. al., *Maternal Predictors of Perinatal Mortality: The Role of Birthweight*, 28 *Int'l. J. Epidemiology* 475 (1999).

45. Jane Mauldon, *The Effects of Marital Disruption on Children's Health*, 27 *Demography* 431 (1990).

46. Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health*, 29 *J. Health & Soc. Behav.* 38 (1988). Because remarriage does not appear to have the same benefits for children as an intact marriage, the true impact of family fragmentation on children's health may be larger, and the racial gap smaller.

47. Lundberg, *supra* note 31.

48. J.E. Schwartz et. al., *Childhood Sociodemographic and Psychosocial Factors as Predictors of Mortality Across the Life-Span*, 85 *Am. J. Pub. Health* 1237 (1995).

forty year old men whose parents had divorced were three times more likely to die than forty year old men whose parents stayed married: [I]t does appear that parental divorce sets off a negative chain of events, which contribute to a higher mortality risk among individuals from divorced homes . . . It seems less likely that a simple selection artifact could explain the all-cause mortality risk in children who have experienced parental divorce. More likely, behavioral or psychological consequences of parental divorce that have health-damaging effects are involved.⁴⁹

3. *Crime and Delinquency*

Divorce and non-marriage appears to increase the likelihood that boys will engage in crime and other conduct disorders. Even after controlling for factors such as race, mother's education, neighborhood quality and cognitive ability, boys raised in single-parent homes are about twice as likely (and boys raised in stepfamilies three times as likely) to have committed a crime that leads to incarceration by the time they reach their early thirties.⁵⁰ Teens in both one-parent and remarried homes display more deviant behavior and commit more delinquent acts than teens whose parents stayed married.⁵¹ Teens in one-parent families are on average less attached to their parents' opinions and more attached to their peer groups. Combined with lower levels of parental supervision, these attitudes appear to set the stage for delinquent behavior.⁵² The effects of parental marriage on delinquency may be stronger for whites than for African-Americans.⁵³

4. *Child Abuse*

49. Joan S. Tucker et. al., *Parental Divorce: Effects on Individual Behavior and Longevity*, 73 J. Personality & Soc. Psych. 381 (1997).

50. Cynthia Harper & Sara McLanahan, *Father Absence and Youth Incarceration*, Paper Presented at the Annual Meeting of the American Sociological Association, San Francisco, California (Aug. 21-25, 1998), available at <http://ryder.princeton.edu/crcw/publist/workingpapers/WP99-03-Harper.pdf>.

51. Chris Coughlin & Samuel Vuchinich, *Family Experience in Preadolescence and the Development of Male Delinquency*, 58 J. Marriage & Fam. 491 (1996); R.J. Sampson & J.H. Laub, *Urban Poverty and the Family Context of Delinquency: A New Look at Structure and Process in a Classic Study*, 65 Child Dev. 523 (1994); Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 Am. J. Sociology 348 (1987).

52. Ross L. Matsueda & Karen Heimer, *Race, Family Structure and Delinquency: A Test of Differential Association and Social Control Theories*, 52 Am. Sociological Rev. 171 (1987).

53. See, e.g., George Thomas & Michael P. Farrell, *The Effects of Single-Mother Families and Nonresident Fathers on Delinquency and Substance Abuse in Black and White Adolescents*, 58 J. Marriage & Fam. 884 (1996).

Children living with single mothers, stepfathers or mothers' boyfriends are also more likely to become victims of child abuse. Children living in single mother homes have increased rate of deaths from intentional injuries.⁵⁴ As Martin Daly and Margo Wilson put it, "Living with a stepparent has turned out to be the most powerful predictor of severe child abuse yet."⁵⁵ One study found that a preschooler living with a stepfather was forty times more likely to be sexually abused than one living with both of his or her biological parents.⁵⁶ Another study found that although boyfriends contribute less than two percent of nonparental child care, they commit half of all reported child abuse by nonparents. The researcher concludes that "a young child left alone with a mother's boyfriend experiences elevated risk of physical abuse."⁵⁷

5. *Education and Socieconomic Attainment*

Divorce and nonmarriage also have significant, long-term impact on children's educational attainment. Children of divorced or unwed parents have lower grades and other measures of academic achievement, are more likely to be held back and less likely to finish high school.⁵⁸ They are less likely to attend both four year colleges and highly selective colleges, even after controlling for family income and background and student academic and extracurricular achievements.⁵⁹ The effects of parental divorce or nonmarriage on children's educational attainment remain significant even after controlling for race and family background. Children whose parents divorce have significantly lower levels of education than children in single-mother families created by the death of the father.⁶⁰ Children whose parents remarry do no better, on average, than children who live with

54. Siegel, *supra* note 38.

55. Martin Daly & Margo Wilson, *Evolutionary Psychology and Marital Conflict: The Relevance of Stepchildren*, in Sex, Power, Conflict: Evolutionary and Feminist Perspectives 9 (David M Buss & Neil M. Malamuth eds., 1996).

56. Martin Daly & Margo Wilson, *Child Abuse and Other Risks of Not Living with Both Parents*, 6 *Ethology and Sociobiology* 197 (1985).

57. Leslie Margolin, *Child Abuse by Mothers' Boyfriends: Why the Overrepresentation?*, 16 *Child Abuse & Neglect* 541, 546 (1992).

58. Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 *J. Fam. Psych.* 355 (2000); Jeynes, *supra* note 8; Catherine E. Ross & John Mirowsky, *Parental Divorce, Life-Course Disruption, and Adult Depression*, 61 *J. Marriage & Fam.* 1034 (1999); McLanahan & Sandefur, *supra* note 29.

59. Dean Lillard & Jennifer Gerner, *Getting to the Ivy League*, 70 *J. Higher Education* 706 (1996).

60. Timothy J. Biblarz & Greg Gottainer, *Family Structure and Children's Success: A Comparison of Widowed and Divorced Single-Mother Families*, 62 *J. Marriage & Fam.* 533 (2000).

single mothers.⁶¹

6. *Family Formation*

Children whose parents divorce or fail to marry are more likely themselves to become young unwed parents, to divorce or to have unhappy marriages and other relationship difficulties.⁶² Daughters raised outside of intact marriages are approximately three times more likely to end up young, unwed mothers than children whose parents married and stayed married.⁶³ Parental divorce approximately doubles the odds that adult children will also divorce. Divorce appears to most likely to be transmitted across the generations when parents in relatively low-conflict marriages divorced.⁶⁴

B. *Marriage Law as a Family System*

Marriage law is part of a family system that is designed to reinforce certain key norms necessary for the protection of children and the reproduction of the family system and society across generations. The first essential public purpose of marriage, then, is to encourage the people who make the baby to stick together and take care of each other and the baby together, as a family unit. Alternate arrangements, such as adoption, arise not primarily in deference to the emotional needs or sexual choices of adults, but to meet the needs of children whose biological parents fail in their parenting role. Adoption exists as a legal alternative to the normal rule—the people who make the baby care for each other and their baby—not because adult homes need children, but because children need homes with functioning adults.

Marriage law is at its heart not simply a cluster of benefits given to

61. William H. Jeynes, *Effects of Remarriage Following Divorce on the Academic Achievement of Children*, 28 *J. Youth & Adolescence* 385 (1999); Zill, *supra* note 20.

62. Hetherington & Kelly, *supra* note 21; Ross & Mirowsky, *supra* note 59; Paul R. Amato, *Explaining the Intergenerational Transmission of Divorce*, 58 *J. Marriage & Fam.* 628 (1996); J.I. McLeod, *Childhood Parental Loss and Adult Depression*, 32 *J. Health & Soc. Behav.* 205 (1991); N.D. Glenn & K.B. Kramer, *The Marriages and Divorces of the Children of Divorce*, 49 *J. Marriage & Fam.* 811 (1987).

63. Andrew J. Cherlin et al., *Parental Divorce in Childhood and Demographic Outcomes in Young Adulthood*, 32 *Demography* 299 (1995).

64. Paul R. Amato & Danelle D. DeBoer, *The Transmission of Marital Instability Across Generations: Relationship Skills or Commitment to Marriage*, 63 *J. Marriage & Fam.* 1038 (2001).

people whose taste in sex or lifestyle we happen to personally approve; it is a set of obligations and rewards that serve important social, not merely personal, goals. Marriage serves a pointing function, elevating a certain type of relationship—permanent, exclusive, normally procreative—above all others. But marriage exists not only to support desirable behaviors, but also to actively discourage people from doing things they may wish to do, such as leaving the union, or even having sex, and potentially making a competing family, with a married person.

The restrictions and supports at the heart of marriage law are not absolute; nor do the public purposes of marriage law necessarily require punitive legal sanctions to have an effect. The tort of alienation of affections, as well as the inclusion of adultery as a fault ground of divorce, were once used to reinforce the social norm that extramarital sex is discouraged. But even absent such particular legal recourse, marriage law can also function by demarcating certain public boundaries, which social norms can then use to impose informal rewards or sanctions. Without a clear category of marriage, there is no adultery, for example. Cheating on a wife is different than cheating on a girlfriend, socially speaking, because the law of marriage helps create a certain public bundle of raised expectations for sexual fidelity.⁶⁵

C. Marriage and the Successful Reproduction of Society

Protecting existing children is only one part of what marriage law attempts to do. Successful societies support and prefer marriage not only because children need mothers and fathers, but also because societies need babies. It is a truism frequently forgotten by large complex societies: only societies that reproduce survive.

In the context of the contemporary western family system, this point is not as academic as many perhaps think. In addition to the direct pain and suffering caused by family breakdown, the evidence of reproductive dysfunction in all societies that adopt these postmodern family ideas is, at this point, overwhelming. For two generations every Western, industrialized nation has had sub-replacement birth rates. Here in America, the crisis is still many generations off, as our birthrates are closer to replacement and our social tolerance of immigration higher. But many European nations are, absent dramatic changes in reproductive patterns, on the road to dying out. By the year 2050, Italy's population is projected to decline by more than a quarter. The political, economic, and cultural

65. And married couples are more faithful than cohabiting couples. *See, e.g.,* R. Forste & K. Tanfer, *supra* note 12.

implications of European depopulation are likely to be profound.⁶⁶

Normal marriage is normative. Marriage does not merely reflect individual desire, it shapes and channels it. Marriage as a social institution communicates that a certain kind of sexual union is, in fact, our shared ideal: one where a man and a woman join not only their bodies, but also their hearts and their bank accounts, in a context where children are welcome. Of course not everybody wants or achieves this social ideal. In important ways marriage regulates the relationships and sexual conduct even of people who are not married and may never marry. Its social and legal prominence informs young lovers of the end towards which they aspire, the outward meaning of their most urgent, personal impulses. Its existence signals to cohabitators the limitations of their own, as well as their partners', commitment.

Marriage as a universal human idea does not require the ruthless or puritanical suppression of alternatives. It is consistent with a variety of attitudes towards alternate forms of sexual expression, from stigma to acceptance. But it is not consistent with an understanding of marriage law such as that suggested by the Vermont court: that there is no rational relation between the law of marriage and children, fatherhood, or procreation. Because some infertile people marry, and assisted reproductive technology is more common now, the court argued, marriage in Vermont now has nothing to do with its great universal anthropological imperative: family-making in a way that encourages ties between fathers, mothers and their children—and the successful reproduction of society.⁶⁷

Marriage as a universal human institution is, as I have stated, consistent with a variety of attitudes towards alternative intimate and sexual relations, from stigma to tolerance. But if we lose the idea that marriage is, at some basic level, about the reproduction of children and society, if our law rejects the presumptions that children need mothers and fathers, and that marriage is the most practical way to get them for children, then we cannot expect private tastes and opinions alone to sustain the marriage idea.

Nor should the law of marriage focus only on the well-being of individual children of individual unions, but on the broader social impact that legal presumptions of marriage and parenthood have on the conduct of all parents and potential parents, and therefore all children. When the law assumes and promulgates the idea that either mothers or fathers are dispensable, and that marriage is an essentially private matter whose form is determined by private adult desires, marriage in general, and children in particular, will inevitably suffer.

66. See, e.g., Population Division of the Department of Economic and Social Affairs, United Nations, *Replacement Migration: Is it a Solution to Declining and Aging Populations?* (2000), available at <http://www.un.org/esa/population/publications/migration.htm>.

67. *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999).

IV. CONCLUSION

Acknowledging that the purpose of marriage is inherently normative—to foster a certain kind of sexual union between men and women characterized by caretaking, sharing of resources, procreation, and long-term commitment in order to encourage the protection of children and the reproduction of society—does not of course resolve the most difficult contested legal questions in family law or policy. If the larger purpose of marriage is to encourage the behavior that gives fathers to children and male support to mothers, then how the law can best achieve these objectives, consistent with prudence and justice in contemporary contexts, is not necessarily an easy question. But a proper understanding of the objectives of marriage law is a prerequisite to achieving them.

Marriage is an institution in crisis. Close to half of new marriages end in divorce. A third of our children are born out of wedlock. The majority of children, at current estimates, will experience a fatherless or motherless household. Making substantial progress in reversing the trend toward family fragmentation will require that law and society reject the deepest presumptions driving postmodern family as an ideological and legal construct: the idea that marriage is essentially a private choice created by and for the couple; that children do just fine in whatever family forms their parents choose to create; that babies are irrelevant to the public purposes of marriage.