

F I V E

Marriage
and
Family

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Throughout the many perspectives in this volume is the seeming tension between the pursuit of virtue and freedom. Harvey Mansfield locates this tension in the philosophical principles embraced at the American founding. Stanley Kurtz posits that it is revealed to this day in the ongoing competition between the world-views of genuine religious faith that underlie the cardinal virtues of justice, temperance, fortitude, and prudence and the pseudofaith of individualism. David Davenport and Hanna Skandera find the ascent of individualism to be aided and abetted by thin forms of association that are bought and paid for with federal dollars. Chester Finn sees the nourishment of virtuous and competent character in education advanced by the individuality of school choice, but candidly admits that the path of choice over serious civic education entails its own risk of balkanization. We no longer come together to enliven and entertain the human spirit so much as to lobby as an NGO for specific political outcomes.

From the perspective of this chapter, none of this—how ever insightfully catalogued—should be surprising. Since the Genesis story, men and women have found the reconciliation of freedom and virtue to be difficult. This chapter finds the same to be true with respect to marriage and family. Families form because men and women are not intended to live alone. By nature, we are intended to live *in* society, not apart from it. The most basic society, the family, consists in husband and wife forming a marital union separate and distinct from their individual personalities. Millennia of religious instruction of every type and denomination holds out this marital union as an end in itself; as a positive, virtuous good. But how can that be when it requires the submission of individual freedom?

This chapter inquires into whether American marriage and the family built upon it—with or without the presence of children—is understood to be an end. Is it an end worthy of the seeming loss of individual liberty to pursue separate interests, ambitions, and pleasures in exchange for the wholeness and interconnected love of another? Or is marriage in twenty-first-century America merely a quaint formalism that is complacently indulged by individuals with little thought or expectation of its required mutual self-giving? And from the standpoint of the larger polity, if marriage is neither appreciated as an end nor consciously recognized and supported by law and public policy as an essential means of fostering its most important consequential good—the nurturing and formation of children—will it long survive?

Good questions. As elsewhere, the answers, I believe, will require us to navigate a religious perspective built on the paradox that we find individual freedom through obedience to our human natures. Less abstractly, that we find ourselves by freely giving ourselves to others. This generic religious principle has special relevance for marriage. But these religious sentiments are dimly heard because they are often weakly voiced in parish, church, or

synagogue. Modern ears have a difficult time being told that we are to love, honor, and obey our spouses and that in those actions, we become more than we could ever hope to be alone. A world immersed in alluring electronic images of freedom through indulgence easily displaces the stuffy, Sabbath-day admonitions that we should submit to the truth of our natures in order to free them from addictions of self-centered lust or materialism or the trivial. The individualist vision will insist, of course, that we can have both freedom and commitment—though to most of us, it is never quite clear how. Instead, the path of individualism leads to half-formed marriages that are more contract than covenant; whose members in daily routine prefer work over family; and that because of their growing numbers even build entire neighborhoods and cities that are unmindful of the view of marriage as end or family as cultural educator.

As a matter of personal decision, which conception of marriage and family we affirm is indeed a matter of freedom. No religious view can or should be legislated. True faith depends on a change of heart, not the force of law, even as law and policy will inevitably be informed by faith of some sort. The limits of the law in the enactment of virtue and the prohibition of vice is conceded by even the most profound of moral philosophers, Thomas Aquinas. Tocqueville marveled in the early nineteenth century at how well Americans appreciated that the dogmatic beliefs of faith were far superior to the blunt edge of the law in the maintenance of virtue. Do Americans in the twenty-first century still agree, or is Stanley Kurtz right that progressive liberalism or individualism has become a pseudoreligion using the law to rule off-limits genuine religious perspectives?

This is not a chapter of despair, however, but of hope. So long as we hold fast to the notion that we are a nation that governs by consent, we make the law and can adopt the views we think fitting. If the public law of marriage and family is uncongenial to a full

understanding of the importance of this institution, it is our own very solvable problem, no one else's. Indeed, given that it is still possible to see the family as its own legislator, at least for the small civilization within it, we need not wait for more favorable public law or policy in order to follow the path of virtue in our own lives.

After exploring how we understand marriage as either mutually covenantal or contractually individualist, this chapter identifies the cultural influences that pull us toward one view over the other. Along the way the chapter considers whether alternative legal or policy perspectives might more strongly support marriage and the families built upon it. The chapter concludes with a summary of these ideas.

Marriage As Mutual Covenant

The mutually covenantal conception of marriage is religious in origin. God is said to be the "author" of marriage, defining it as an indissoluble completion of two otherwise incomplete individuals. Indissolubility is conveyed in the language of covenant. Covenant is not mere promise. Neither is it legalistic. Thus, the covenantal idea of marriage stands in opposition to marriage in commercial or bargained-for terms as the exchange of consideration. In marriage, man and wife come to this covenant without their particular duties fully elaborated. Yet, duties do exist, though not found within a checklist or accomplished with the expectation of exact equivalent in return. The words "for better or for worse" are part of the common parlance of marriage, and they concisely and adequately express the Divine servanthood that marriage represents.

The covenantal view of marriage rejects the "what's in it for me" talk of contemporary culture. Thus, Linda J. Waite and Maggie Gallagher argue strongly against an individualized and privatized view of marriage. "[A]fter a decade of research, [they are con-

vinced] that this . . . view of marriage is objectively wrong. Wrong in the sense that deep down, it is not the way, despite how we sometimes talk, most of us in America really look at marriage. And wrong in the sense that if we did adopt this view of marriage, marriage would lose its unique power. Agree to privatize marriage, in other words, and you do not expand people's choices—you effectively eliminate the choice to marry, for marriage means [raising] . . . your commitment to each other”¹ beyond the purely emotional, or as discussed below, the mundanely contractual.

Not surprisingly, the mutual covenant view of marriage has a unique understanding of sexual relations within marriage. Sexual intercourse is not just for individual pleasure, but it is “something fraught with emotional risks, fraught indeed with serious responsibilities. . . . [It] has [a] twofold natural purpose that must be respected—the purpose of bringing forth new lives and the purpose of uniting men and women together[.] [W]hoever participates in sexual activity must do so in a way that protects these natural goods. . . .”² The sexual relationship is an inclination toward the good, expanding the “opportunities for humans to love—not only to love one's sexual partner without qualification but also to love the offspring they may have. It allows spouses to build a family together and to have a meaningful life.”³

Marriage: The Individualist or Consequentialist View

Modern American experience is, of course, not singularly religious. Because of this, there is less overt instruction on the reasons.

1. Linda J. Waite and Maggie Gallagher, *The Case for Marriage* (New York: Doubleday, 2000), 16–17.

2. Janet E. Smith, “Natural Law and Sexual Ethics,” in *Common Truths: New Perspectives on Natural Law*, ed. Edward McLean (Wilmington, Del.: Intercollegiate Studies Institute, 2000), 205.

3. *Ibid.*, 204.

According to census data, some 4 million Americans do not trouble themselves with discerning marriage's purpose at all, choosing simply to live together. Still, when a majority of Americans do reach a given age or stage of life experience, marriage remains culturally expected, even if it is tepidly welcomed with the uninformed shrug of "well, why not marry?" If the marital state is contemplated much beyond this in the competing secular or individualist view, marriage is a *means* to individual economic and social fulfillment, not a Divinely-ordained *end*. Seen as a means to individual fulfillment or status, it can, and given prevalent divorce rates, often is, set aside when the arrangement is found to be less than *individually* fulfilling. By design, therefore, a consequentialist, individualist conception of marriage is incapable of surpassing difficulty when life takes an unexpected turn not for better, but for worse.

Sexual intercourse within an individualist conception of marriage also differs markedly from the covenantal perspective. The individualist mentality, taking its cue from the media, emphasizes the physical, with little contemplation of the emotional or spiritual side of this physical unity. Yet, this separation of spirit from body is intellectually perilous because it allows the human body to be seen merely as "raw material" for the pleasure or satisfaction of others. Such separation is thus related to pornography (seeing the human body as object for pleasure, not as the sharing of a spiritually based sexual union in marriage), abortion (seeing the human body of the innocent child as an impediment to economic or social well-being), and cloning or fetal experimentation (seeing the human body of the unborn child as a resource for medical science). Similarly, Jennifer Morse observes: "It is easy to see how a woman in today's world could conclude that sexuality, intimacy, and child-bearing could be and perhaps should be placed into distinct cubbyholes of one's life. We all received plenty of cultural messages telling us that sexual activity has no necessary connection with

either procreation or deep personal intimacy. The organic connection that naturally exists between sex, procreation, and intimacy is almost hidden from public view and excluded from discourse.”⁴

What cannot be hidden from view are the consequences of this course. The widespread availability and acceptance of contraceptive use did not reduce illegitimate births; it fomented it. “One might have thought that the increased availability of contraception would have offset the effects of increased sexual activity outside of marriage. But more children are born outside of marriage than ever before.”⁵ As Professor Janet Smith notes, this disconnect between law and morality does not seem to be working. Smith asks rhetorically: “What does the fact that 68 percent of African-American babies are born out of wedlock suggest? The figure is now 22 percent in the white community and rapidly growing. This figure, of course, would be higher if it were not for the one and a half million abortions a year. One of two marriages is going to end in divorce. AIDS is decimating some portions of our population. Are there any hints here that we are violating nature, acting irrationally, failing to live in accord with reality?”⁶

Marriage Conceptions and Family

Covenantal and individualist conceptions of marriage do not depend on the presence of children. Those seeing marriage as a mutual covenant of self-giving do have an easier time welcoming children, but even if a marriage is anchored in individualism, the physical and emotional needs of children have a way—sometimes a very insistent way—of getting us past self-interest. Once children

4. Jennifer Roback Morse, *Love and Economics—Why the Laissez-Faire Family Doesn't Work* (Dallas: Spence Pub. Co., 2001), 108.

5. *Ibid.*, 111.

6. Smith, “Natural Law and Sexual Ethics,” 203.

are present within a marriage, it is hard to understate the positive consequences for the larger society of committed marital partners serving as cultural educators. As one writer succinctly observed: “The loving family is surely the foundation of the moral and cultural leg of a free society, just as property rights and contract law are the foundations of the economic leg, and constitutionally limited government and freely elected rulers are of the political leg. . . . The moral and cultural tools of a free people include persuasion based upon reason and evidence, as well as the cultivation of appropriate ‘habits of the heart’ from birth to adulthood.”⁷ The point was seldom better put than the words of John Stuart Mill in his observation that “[t]o bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime.”⁸

Given the importance of the family as cultural educator, many, like Janet Smith and Jennifer Morse, have pointed out troubling sociological data related to the instability of the individualist conception of marriage. “Data from the general social surveys indicate that 39 percent of all first marriages (which are more stable than remarriages) entered into during the 1970s . . . ended in divorce or separation before their fifteenth anniversary.”⁹ Indeed, in the last thirty years, America has witnessed a 400 percent increase in illegitimate births,¹⁰ a quadrupling of the divorce rate,¹¹ and a tripling of the number of children living in single-parent house-

7. Morse, *Love and Economics*, 229.

8. John Stuart Mill, *On Liberty* (New York: Appleton-Century-Crofts, 1947).

9. Morse, *Love and Economics*.

10. In 1997, 32.4 percent of all births were to unwed mothers (“National Bureau of Vital Statistics Report,” vol. 47 [April 29, 1999]).

11. In 1970, 3.2 percent of the nation’s population over age eighteen was divorced; by 1996, the percentage had increased to 9.4 percent (Statistical Abstract of the United States [1993] 53; [1997] 57).

holds.¹² The percentage of children living with both their biological parents was 70 percent in 1950, whereas in the 1990s, it was less than 50 percent.¹³ Single parenting continues on the upsurge: increasing from 16 percent of all families to 18 percent just since 1990.¹⁴ Most of these single-parent households are headed by women (41 percent).¹⁵ And again, the number of Americans who live with someone of the opposite sex to whom they are not married has risen from 523,000 in 1970 to close to 4 million.¹⁶

Influences Affecting the View of Marriage

If a less covenantal, individualistic view of marriage can lessen the ill effects of the above statistics—be they school or societal violence, lesser educational achievement or poorer health¹⁷—what influ-

12. William J. Bennett, *The Index of Leading Cultural Indicators* (Washington, D.C.: Heritage Foundation, March 1993).

13. Richard Morin, "Unconventional Wisdom: New Facts and Hot Stats from the Social Sciences," *The Washington Post* (March 8, 1998), C5.

14. Barbara Vobejda, "Traditional Families Hold On; Statistics Show a Slackening of 1970s, '80s," *The Washington Post* (May 28, 1998), A2.

15. *Ibid.*

16. Thomas Hargrove and Guido H. Stempel III, "Poll Finds Most Would Marry Same Person Again," *Minneapolis Star-Tribune* (February 12, 1998), 14E.

17. The negative effects of divorce, including especially the negative effects on the children of divorce, have been studied comprehensively. See Barbara Dafoe Whitehead, *The Divorce Culture* (New York: Alfred A. Knopf, 1997); Paul Amata and Alan Booth, *A Generation At Risk: Growing Up in an Era of Family Upheaval* (Cambridge, Mass.: Harvard University Press, 1997); Mary Ann Glendon, *Divorce and Abortion in Western Law* (Cambridge, Mass.: Harvard University Press, 1987). Waite and Gallagher write: "Do we have any evidence that the divorce itself causes problems for children? The answer is simple: Yes, a great deal. In a snapshot, the risks of divorce and unwed childbearing look like this: Children raised in single-parent households are, on average, more likely to be poor, to have health problems and psychological disorders, to commit crimes and exhibit other conduct disorders, have somewhat poorer relationships with both family and peers, and as adults eventually get fewer years of education and enjoy less stable marriages and lower occupational statuses than children whose parents got and stayed married." Waite and Gallagher, *The Case for Marriage*, 125.

ences the culturally accepted view of marriage? There are many sources of influence—let’s look at a few of them.

School Textbooks

School textbooks take a decidedly individualistic perspective. In the public school texts, for example, marriage is portrayed as “just one of many equally acceptable and equally productive adult relationships. These various relationships include cohabiting couples, divorced noncouples, stepfamilies, and gay and lesbian families.”¹⁸

Sometimes textbook instruction is less cosmopolitan, choosing to see marriage as a patriarchal tool of oppression.¹⁹ For example, Judy Root Aulette states that: “[m]arriage is an institution that exists in some societies but not in others and varies greatly from one society to the next, [but its essential purpose is] to control women and children.”²⁰

Other American textbook writers explicitly or implicitly mock the mutual self-giving the religious or covenantal perspective invites. To illustrate, John Scanzoni, in his *Contemporary Families and Relationships: Reinventing Responsibility*, posits that people in “fixed” (presumably, committed) marriages deprive themselves of necessary investments for self-fulfillment. As one reviewer put it, “a main goal of this book appears to be to persuade students not to be overly committed, not to love too much, and to be especially careful not to ‘give’ more than they ‘get’ in marriage and in other

18. Institute for American Values, *Closed Hearts, Closed Minds: The Textbook Story of Marriage*, ed. Norval Glenn (New York: Institute for American Values, 1997), 5.

19. Judy Root Aulette, *Changing Families* (Belmont, Calif.: Wadsworth, 1994).

20. *Ibid.*, 273.

family relationships.”²¹ Of course, the idea of “loving [another] too much” is the antithesis of the religious understanding.

When the marital relationship is not caricatured, it is omitted from modern instructional tools dealing with sex, pregnancy, and child-rearing. As Linda Waite and Maggie Gallagher, in their groundbreaking work *The Case for Marriage*, observe, instructional texts on pregnancy and the like “[don’t] even mention the word *marriage*. The closest reference to it is in the vague phrase: ‘There are kids whose mothers and fathers live together.’ A U.S. textbook salesman, explaining why *marriage* seldom appears anymore in the titles of college textbooks on marriage and the family said, the word sounds too ‘old-fashioned’ and ‘preachy’ to students.”²²

The Law of the Constitution

Another direct influence on how we understand marriage is the law. Given that the covenantal view of marriage is anchored in religious tradition, those that (mis)read constitutional history as mandating the separation of church and state, rather than freedom of religion,²³ heavy-handedly favor the individualist view by the expedient of making discussion of the religious or covenantal one difficult, if not impossible, in public instructional settings.

As a matter of original understanding, this favoritism of the individualist conception of marriage is certainly odd. The founders of the American republic premised our philosophical origin in the Declaration of Independence upon the “truth” that men and women are created by God and that natural rights, including the

21. Institute for American Values, *Closed Hearts, Closed Minds*, 8, discussing the Scanzoni text along with others.

22. Waite and Gallagher, *The Case for Marriage*, 8.

23. See Philip Hamburger, *The Separation of Church and State* (Cambridge, Mass.: Harvard University Press, 2003), documenting how the strict separationist idea was largely the product of anti-Catholic and anti-immigrant hatred of the nineteenth century, aided and abetted by the Ku Klux Klan.

natural right to marry, are part of an inalienable right to “pursue happiness.” Not surprisingly, given this well-conceived beginning, state case law reflected, in appropriately nondenominational terms, religious values. Nowhere was this more apparent than in the laws pertaining to matrimony. The U.S. Supreme Court wrote in 1888 that marriage was far more than mere contract. “It is not so much the result of private agreement,” said the Court, “as of public ordination.²⁴ In every enlightened government, [marriage] is preeminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.”²⁵

Religion remains important to the individual American citizen, with more than 90 percent expressing a belief in God.²⁶ Nevertheless, the Supreme Court, especially in the period from 1960 to 1985, took some curious and religiously exclusionary turns. The high court’s cases in this period exhibit the peculiar view that a nation founded on the belief in God could somehow maintain a legal system wherein the law must remain neutral between religion and irreligion. The acclaimed, historically and philosophically correct, view of freedom of religion became under these cases the flawed view of freedom *from* religion. One lower court, the Ninth Circuit, even proclaimed the pledge of allegiance, by virtue of its historically unassailable reference to “one nation under God,” to

24. Notice the use of even religious terminology.

25. *Maynard v. Hill*, 125 U.S. 190, 213 (1888), referencing *Noel v. Ewing*, 9 Ind. 37, 50 (1857).

26. See generally Patrick Glynn, *God—The Evidence* (Rocklin, Calif.: Forum, 1997); see also Douglas W. Kmiec, *Cease-fire on the Family* (Notre Dame: Crisis Books, 1995) for an extended perspective on the relationship between marriage, family, and American culture.

be unconstitutional.²⁷ That the framers could easily reconcile a corporate or sovereign acknowledgment of transcendent authority (as both a source and security for unalienable liberty) with the Constitution's textual pledge of religious freedom seems to elude the appellate mind of some federal judges and many academics.

Not surprisingly, the Supreme Court's erroneous interpretations occurred at the zenith of the American cultural embrace of individual autonomy and challenge to civil institution generally. The 1960s and 1970s in America accepted notions of liberty without obligation that would have been rejected outright by those who guided America in its first century and a half. In approving access to artificial contraceptives by unmarried couples, the Supreme Court of the United States wrote: "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."²⁸ It is questionable how many individual Americans would describe their marriages in the same way, but it is evident that this undisturbed precedent remains the view of the highest court in the land and certainly has some influence on the perception of marriage as either mutual or individualistic.

The Law of the States— Property Devices That Favor Individualism

At the state level, the American legal practice of prenuptial or premarital agreement reduces marriage to cost-benefit terms. Until 1970, prenuptial agreements in the United States were unenforceable if their intent was solely focused on the division of assets at the time of divorce. Prenuptial agreements were primarily intended to provide for the untimely death of a spouse. The judicial

27. *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), rehearing en banc denied, 321 F.3d 772 (9th Cir. 2003).

28. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

rationale for voiding prenuptial accords prior to 1970 coincided reasonably well with the religious or mutual covenant perspective on marriage. Thus, it was not uncommon to find courts condemning such agreements because they were contrary “to the concept of marriage” or to marital “dignity and sacredness.” In *Brooks v. Brooks*,²⁹ the Alaska Supreme Court summarized this earlier thinking: “[T]he traditional common law view was that prenuptial agreements in contemplation of divorce . . . were inconsistent with the sanctity of marriage and the state’s interest in preserving marriage. . . . Courts uniformly viewed these agreements as inherently conducive to divorce and as allowing a husband to circumvent his legal duty to support his wife.”³⁰

In the last three decades, there has been a significant, and unfortunate, change of judicial course. In the Florida case of *Posner v. Posner*,³¹ for example, the Florida Supreme Court opened the door for marriage to be treated like other forms of economic negotiation. Mocking the mystery of marriage, a court wrote: “[n]o longer will the courts in viewing antenuptial contracts invariably begin ‘with the realization that between persons in the prematrimonial state there is a mystical, confidential relationship which anesthetizes the senses. . . .’”³² After these decisions, “lawmakers in many states began making premarital agreements more readily enforceable. . . .”³³ Under the Uniform Premarital Agreements Act adopted in more than half of the states, neither nondisclosure nor unconscionability will void a prenuptial agreement.³⁴ It is fair to surmise that when everything from housework allocations to the number of children each spouse will accept becomes a matter for

29. 733 P. 2d 1044, 1048 (Alaska 1987).

30. *Ibid.*, 1079.

31. 233 So. 2d 381 (Fla. 1970).

32. *Potter v. Collin*, 321 So. 2d 128, 132 (Fla. Dist. Ct. App. 1975).

33. Gail Frommer Brod, “Premarital Agreements and Gender Justice,” *Yale L. J. & Feminism* 6 (1994), 229, 256–59.

34. 9B Uniform Laws Annotated 69 (1996) and Section 6.

advance negotiation (or subsequent litigation), mutual self-giving has taken second place.

Although prenuptial bargaining still occurs predominately among the affluent, a similar economic ethic has infiltrated the American common law, or default property devices, that affect the marital unit and lean it toward impermanence. Consider in this regard the community property system that dominates the heavily populated U.S. West. Nominally premised upon equality, the community property system supposes that all (or almost all) property acquired during marriage shall be owned not 100 percent by the marital unit, but 50/50 as distinct community shares that are capable of separate transfer, devise, and inheritance. The prescribed division thus keeps the “asset” bags of the spouses packed at all times.

There are property concepts that favor the mutuality of the marital unit. However, gaining acceptance for them is hindered by the historical mistreatment of married women in matters of property and civil rights, especially in English common law doctrines that were transplanted to America. In this context, responsible feminist literature in the United States does have historical truth on its side. That said, were the covenantal view of marriage to be favored, the closest property device to that conception would be the tenancy by the entirety, which in its strongest form precludes individual spouses from alienating marital property unilaterally and safeguards the marital home against the economic misadventures of husband or wife alone.³⁵ The tenancy by the entirety is little used, except in a handful of heartland states, such as Indiana. Instead, states have been mimicking the California experience by adopting community property–like principles derived from the

35. See *Sawada v. Endo*, 561 P.2d 1291 (Hawaii 1977), describing the tenancy by the entirety and its support of the family unit.

Uniform Marriage and Divorce Act of 1973. This has bad consequence. As an essayist has written poignantly:

The modern efforts of married women [and I would add men] to remain pointedly independent, financially and intellectually and emotionally, from their partners, as a cushion against failure, are inimical to marriage. Either they “succeed” by preventing a genuine marriage from forming or they provoke a crisis fatal to the marriage. . . .

To try to cheat the process, to try to hedge one’s bets, is to deny the meaning of what one does on the wedding day. There must be a submission not perhaps of the will but of mere willfulness, a relegating of your obstreperous private preferences, not to second place behind your mate, but to second place behind the unity the two of you are achieving or have pledged to achieve.³⁶

Work over Family

The American attitude of marital individualism, rather than the covenantal mutualism, is also present in the desire of both spouses to pursue market careers simultaneously, thereby creating increased tension in the performance of parenting and family duty. In 1999, the White House Council of Economic Advisors (CEA) released a report highlighting that American parents have twenty-two fewer hours each week to spend at home compared with the average in 1969.³⁷ According to the accompanying commentary, “U.S. workers now spend more time on the job than workers in any other developed country, creating a ‘parenting deficit’ which many fear may be related to youth problems of violence and sexual experimentation in even younger children.”³⁸ The dramatic

36. Ellen Wilson Fielding, *Common Wisdom*, “Won’t You Be My Valentine?” *Crisis* 43 (February 1991).

37. Council of Economic Advisors (CEA), “The Parenting Deficit,” available online at www.newecon.org/parentingdeficitcea-may99.html.

38. *Ibid.*, commentary by Brian Robertson.

increase is attributable mostly to the hours worked by better educated married mothers. Even more surprising, the rate of increase is higher for mothers with children under the age of five.³⁹

Why is this occurring? It is apparently not wage-driven. The CEA report notes that over the thirty-year period of the study, wages were largely stagnant for college-educated men. They increased in nominal terms for married women. However, the report commentary notes that “in comparison to the sharp increases in working hours, [real] wage gains were extremely modest (only about 4%).”⁴⁰ One analyst opined: “Many parents could reasonably ask themselves whether a second income is worth the price of a drastically reduced amount of time available for their kids.”⁴¹

That working more means less time for family is a most unhappy situation, yet Americans rarely permit themselves to see why. Long ago, Aristotle described work as properly directed to an end beyond itself; namely, toward leisure. Of course, by this, Aristotle did not mean endless hours at the shopping mall or the mindless watching of television sports channels. Instead, men and women were to pursue a form of leisure that invited the development of virtue, in themselves and others, and the performance of civic duty. That this is not contemporary reality is evidenced by the fact that many in the United States would have difficulty describing exactly what such noble aspirations mean. As David Davenport and Hanna Skandera point out in their chapter, the legal concept of association is a greatly underdeveloped one. Despite bemoaning the loss of intermediate or voluntary association activity, Robert Putnam continues to bowl alone.⁴²

39. Ibid., part III.

40. Ibid.

41. Ibid.

42. Robert D. Putnam, *Bowling Alone* (New York: Simon and Schuster, 2000). Putnam was the first to identify the loss in modern America of active partici-

Of course, the possibility that work has become the modern form of association beyond marriage cannot be overlooked. Frances Olsen, a feminist thinker, helps us see how this might be when she bemoans the dualism that is thrust upon both men and women by having identity defined in one place [work] and personality in another [home].⁴³ Candidly, Olsen writes: “Antidiscrimination law does not end the actual subordination of women in the market but instead mainly benefits a small percentage of women who adopt ‘male’ roles.”⁴⁴ Even more intriguing, Olsen observes:

The dualism between life in the market and life in the family is [pronounced]. . . . We expect the market to achieve the efficient production of goods and services; it is not the arena in which we are supposed to develop our personalities or satisfy human relational wants. Pervasive hierarchy in the market is imposed and justified on grounds of efficiency. The market is the realm of alienated labor. The expression of the desires to develop personality and to interact with others is relegated to the family and simultaneously glorified and devalued. We see the market as a means to an end, whereas we see the family as an end in itself. The market is the arena for work and the production of goods; the family is the arena for most forms of play and consumption. Dividing life between market and family compartmentalizes human experience in a way that prevents us from realizing the range of choices actually available to us. Much of social and productive life seems effectively beyond our control.⁴⁵

At the moment, men are still more likely to find happiness, or as Aristotle described it, a whole life well lived, because the dualism

pation in voluntary association and the yearning in modern Americans for community.

43. See Frances Olsen, “The Family and the Market: A Study of Ideology and Legal Reform,” *Harv. L. Rev.* 96 (1983), 1497, 1571.

44. *Ibid.*, 1552.

45. *Ibid.*, 1564.

of market and family affects them less. The market readily gives men roles in which they can develop their individuality, use their intellect, and exercise authority. As a complement, home provides men an opportunity to express gentleness; to allow weakness and compassion to be uppermost—if only for brief periods in the evening. In love of wife and children, men thus gain some semblance of wholeness that the life of commerce denies them. But the situation for women is undeniably different. Whether by nature or biology,⁴⁶ it seems foolish to deny the fact that most women readily demonstrate talents that far exceed that of most men in sustaining the equilibrium of a home. For women, the resolution and smoothing of difficulty does indeed seem second nature. As Suzanna Sherry observed, “the cliché that women are more cooperative and less competitive than men may have some basis in fact.”⁴⁷ Of course, it is true that women entering the marketplace “as employee or manager may more acceptably display traits that are considered masculine.”⁴⁸ Yet, as Carolyn Graglia demonstrates, the entrance fee remains high because such entry seldom unites, or even harmonizes, the two worlds. Rather, it necessitates a sacrifice of one for the other, which, apparently, is seldom a choice fully wanted by either gender.⁴⁹

46. Much literature supports nurture. In particular, the fact that ego development occurs at a young age and that girls are usually raised by someone of the same gender means that the inclination toward attachment is greater than that in males. See generally Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley: University of California Press, 1978).

47. See Suzanna Sherry, “Civic Virtue and the Feminine Voice in Constitutional Adjudication,” *Va. L. Rev.* 72 (1986), 543, 585.

48. See Olsen, “The Family and the Market,” 1565.

49. Perhaps not surprisingly, this appears to be especially true of mothers because upward of 80 percent still state that they would prefer to stay at home with their own children if they could afford to do so. “Opinion Roundup,” *Public Opinion*, July–August, 1988, page 36, found agreement with this sentiment from 88 percent of mothers surveyed in 1987. Indeed, a California poll of parents found 69 percent agreement with the statement “It is much better for a family

To avoid losing the personal fulfillment of either market or home, marital partners have turned to extended day care as a parental substitute. However, empirical research suggests that the quality of day care in the United States is quite low, with effects on child behavior and capability that are poor or adverse. As several researchers noted: “Minimally regulated private-child-care arrangements provide uneven and generally low-quality care. A research team for the National Institute of Child Health and Human Development recently estimated that only 11 percent of child care settings for children age three and younger meet standards for ‘excellent’ care. In part, quality is poor because the care is provided by a minimally educated and inadequately trained work force, some 22 percent to 34 percent of teachers in regulated child care centers and family child care settings do not have a high school diploma; . . .”⁵⁰ In addition, Dr. Nicholi of the Harvard Medical School testified before Congress that: “The studies confirm that child care relegated to agencies outside the home, regardless of the quality of the facilities and the training of the staff, can never substitute for the care of a parent who loves the child more than anything else on Earth.”⁵¹

Dr. Nicholi has not been heard by the present generation of

if the father works outside the home and the mother takes care of the children.” See Cathleen Decker, “Parents Tell of Decisions, Struggles in Child-Rearing,” *Los Angeles Times* (June 13, 1999), A1, citing a *Los Angeles Times* poll. The same poll found 81 percent of mothers wished to stay home with their children, and affluent women (those with incomes above \$60,000) were the ones most likely to say that children interfere with a career. A Public Agenda Poll from June 2000 found 62 percent of parents with children under the age of five preferring policies that would make it easier for one parent to stay at home during a child’s initial years over improving child care. Of course, culturally, men are seldom asked the question directly as they should be.

50. Janet C. Gornick and Marcia K. Meyers, “Support for Working Families,” *The American Prospect* 12 (January 2001), 6.

51. Armand M. Nicholi Jr., M.D., Harvard Medical School, hearing before the United States Senate, Subcommittee on Children and Families, “Caring for America’s Children” (February 23, 1998).

working Americans or public or corporate decision makers. Indeed, the implications of vastly expanded substitute child care may be adverse not only for the child placed within that care, but also for the typically underpaid (and often foreign migrant) who acts as caregiver. Arlie Hochschild, a Berkeley sociologist, has dubbed this the “nanny chain,” explaining how low-paid migrant workers typically leave their own children in the third world in dire poverty and without supervision. Not surprisingly, some of these children grow up with little or no cultural responsibility. Some, it might well be hypothesized, are snipers or terrorists in waiting. Hochschild writes: “Just as global capitalism helps create a third world supply of mothering, it creates a first world demand for it.”⁵²

As discussed next, even if the work-family balance could be seriously rethought, the place left abandoned by an ever-more demanding workplace—the family home and neighborhood—also needs redesign.

The Lost American Neighborhood

Another less obvious influence favoring the individualist conception of marriage is the physical environment in which we live. Modern land development in the United States runs against the interests of a fulfilled and connected family life. As one writer put it, “American communities are strikingly unfit for children.”⁵³ It is that way by design. The organizing principle is exclusion and the segregation of uses, nominally for the protection of health and safety, but as it turns out, practically aggravating both. Residents

52. Arlie Russell Hochschild, “The Nanny Chain,” *The American Prospect* 11 (January 3, 2000), 35.

53. David Popenoe, “The Roots of Declining Social Virtue: Family, Community, and the Need for a ‘Natural Communities Policy,’” chap. 4 in *Seedbeds of Virtue*, ed. Mary Ann Glendon and David Blankenhorn (Lanham, Md.: Madison Books, 1995), 87.

are consigned by legally imposed planning and zoning requirements to live largely isolated lives in close proximity only to an attached multicar garage.

Curiously, this American development pattern is marketed by sales brochures inspiring thoughts of children playing in wide yards, neighbors worshipping together nearby, grandparents close at hand, and leisurely evening walks inviting pleasant conversation with friends on their front walk or at a corner store. In other words, the marketing tries to coincide with a covenantal understanding of marriage that seemingly inspires both strong extended families and civic association. The reality is often far different. The wide yards are frequently empty because the children are in extended day-care or after-school programs waiting for late-arriving and exhausted parents to exit a clogged highway. By design, home and office are kept in far distant “zones.” Neighbors may worship, but seldom nearby. Local churches, and the important spiritual and charitable community-building they supply, are miles away, situated by regulatory edict along arterial roads.

No handy grandparents either. In-law or accessory dwellings compatible with a fixed, retirement income are out of the question. A leisurely walk is a possibility, but to where? Sidewalks, if they exist, are narrow and treeless, circling cul-de-sacs. And heaven forbid there should actually be a store down on the corner. The American land-use planning and zoning model is one of strict use segregation. In addition, the prevalence of divorce and the weakened interest in marriage has meant an increasing amount of singles housing, or at best, houses for nuclear—not extended—families in one place; businesses in another; stores in a third; and churches still somewhere else. This creates a nice, neat, everything-in-its-place appearance, but the design has serious problems.

For years, environmental engineers have recognized that this type of land-use arrangement aggravates the problem of the automobile—most notably, air pollution. Urban planners estimate that

many households make up to 10 separate automobile trips a day. These excursions exact a heavy toll, not only on the family budget, but also on the sanity of mothers and fathers sentenced by an unsound physical layout to drive *everywhere*—school, store, church, library, park, office.

Even as 40 percent of working Americans will soon face making care arrangements for elderly family members, zoning laws keep Grandma and Grandpa—or even a newly married son or daughter struggling to get on their feet—from moving into an easily created “granny flat,” or separate apartment on one’s own property. The same restrictions evict benign computer and faxed-based home businesses. Convenience stores and retail shops, even those with well-appointed signage and façades, are unthinkable. Youngsters are thus deprived of the responsibility of doing family shopping and of the opportunity for an after-school or summer job.

This segregated land-use pattern still appeals to some, but there seems little reason to uniformly and complacently chisel it into local law. Private developers only make matters worse by adding the imposed microdetail of private restrictive covenants that control everything from house siding color to pet size. These specifications are touted as maintaining property values, and sometimes they do, but the cumulative effect of such public and private use restrictions is a sterile living environment that breeds juvenile boredom and separates, rather than unifies, families.

American architects are just beginning to realize the shortcomings of all this and that alternative—more marriage- and family-promotive—forms of development are possible. For example, the San Francisco-based Congress for the New Urbanism has advanced the methodology of neotraditional planning, promoting the construction, or reconstruction, of village centers.⁵⁴ Village

54. See the Congress for New Urbanism’s Web site at www.cnu.org for a set of design principles as well as a bibliography of materials expanding these thoughts.

centers are what, years ago, we less elegantly called neighborhoods. Neighborhoods have a sense of place. Street patterns intersect and define it. There are walkable distances to the needs of daily life. Commercial uses are reasonably integrated with residential dwellings of all types. In short, the neotraditional prescription is a simple common sense one: neighborhoods require housing, schools, and parks to be placed within walking distance of shops, civic buildings, and jobs.

No physical environment is beyond redemption—not even so-called big-box retail outlets or discount stores. For example, accessory units and apartments can be inserted in, around, and sometimes even over such stores. Residential over retail was once commonplace in New York, Chicago, and other large cities. By reviving this pattern, architecturally undistinguished structures engulfed by dark, forbidding islands of asphalt can become inviting, attractive centers of activity. Parking is reoriented out back or on the street. Human needs are given preference over the automobile.

Neotraditional developments are now being planned or built across the country on a small scale. It remains to be seen whether these locations will have more than the look of community. They hold the promise of vibrant physical locations, but in order to flourish they need to consist of married couples who understand marriage as the foundation of community and not merely an economic convenience or a place to park the car when not at work.⁵⁵

55. James S. Coleman, "Social Capital in the Creation of Human Capital," *American Journal of Sociology* 94 (1988), 95. The importance of establishing neighborhoods correlates with the late James Coleman's work on "social capital"—or the web of family networks that encourage as well as discipline or monitor children within it. Where families are strong and interconnected through local church or school, achievement soars, even when controlled for the socioeconomic status of the families.

**Meeting the Challenges Ahead—
Possible Public and Private Policy Alternatives**

Thus far we have examined the competing covenantal and individualistic conceptions of marriage and some of the influences that lead our cultural understanding in one direction or the other. As suggested throughout, not only has individualism obscured a full understanding of the spiritual side of marriage, but it also has yielded troubling divorce and illegitimacy rates and the numerous cultural dysfunctions that follow from this. Marriage and family relationships are intimate, and thankfully, outside the purview of most secular law. Although the legal and policy proposals that follow each have merit, they also readily reveal why the law, without personal commitment, is likely incapable of shoring up the mutual covenant understanding of marriage. That said, the most obvious step would be to make marital exit less commonplace.

*Reforming No-Fault Divorce—
The Covenant Marriage Option*

There is a nationwide movement in its infancy in America to reaffirm the importance of marriage by reforming divorce. State divorce laws were made uniformly “no fault” in the early 1970s. This effectively meant that either spouse could petition and obtain a divorce, even against the wishes of the other spouse, by pleading nominal “irreconcilable differences.” Academic research confirms that divorce rates skyrocketed thereafter—in some places, by as much as 25 percent.⁵⁶ Reformers want divorce procedures to incorporate waiting or cooling-off periods at a minimum. But change does not come easy. A mandatory mediation measure died in May

56. Thomas B. Marvell, “Divorce Rates and Fault Requirement,” *Law and Society Review* 23 (1989), 544.

1998 in Iowa, for example, and dozens of like-minded bills in thirty or more states have thus far gone nowhere.

The exception: voluntary covenant marriage, enacted first in Louisiana and Arizona. These states give couples a choice between: “well, I guess I do” and “I really do.” A couple can choose the standard marriage, of course, but explaining such choice to one’s true love is bound to be sticky. Covenant marriages, by contrast, require premarital counseling, an agreement to additional counseling if problems develop during the marriage, and a two-year waiting period before any divorce is granted, absent physical abuse, substance abuse, adultery, or abandonment.

It is entirely fitting that covenant marriage statutes have an exception for abusive relationships, but the exception should be realistically construed with a presumption in favor of preserving a marriage relationship. Were abuse to be liberally interpreted to include emotional distress, the exception would easily swallow the rule. Of course, some will argue that no distinction should be drawn and that a single mother in an emotionally troubled marriage ought to seek independence from her spouse. But as Jennifer Morse writes: “Granted, . . . the single mother is more independent of her child’s father. But she is more dependent on the good graces of her employer, the competence of her child care provider, and the energy of her blood relatives.”⁵⁷ Even worse than these heightened dependencies outside the family, which are far less stable than a marital partner,⁵⁸ is the greater likelihood of separation and divorce being followed by cohabitation and physical abuse. “According to a British study of child abuse, a cohabiting boyfriend

57. Morse, *Love and Economics*, 91.

58. After all, since the concept of family wage is not engrained in the market economy, an employer’s interests are not in the support of the family, but on an employee’s utility to the employer. Similarly, welfare, or governmental assistance, is governed by political choice, not the needs of mother and child. All of this is quite impersonal and, for that reason, a poor substitute for marriage and intact family.

is thirty-three times more likely to abuse a child than a married father who lives with the mother.”⁵⁹

*Reviving Common Law Causes
of Action to Deter Divorce*

Beyond covenant marriage, divorce might also be discouraged by making third parties liable in civil damages for actions that harm marriages. Under existing practice, criminal prosecution is seldom brought under fornication or adultery prohibitions, though these laws remain on the books in many states. When adultery leads to the break-up of a marriage, dissolution proceedings, including awards of maintenance and child support, can be thought to “punish” the wrongdoing spouse for illicit behavior. But what of the meretricious third party? The common law provided a civil action to a wronged husband whenever a third party intentionally enticed a wife to leave her home.⁶⁰ And in the late nineteenth century, the tort of alienation of affections was recognized: Facts demonstrated that the marriage was a happy one; that love and affection were destroyed; and that the wrongful or malicious acts of a third party resulted in the loss of love and affection.⁶¹

Is it far-fetched to reinvigorate such causes of action in the twenty-first century? Perhaps. Certainly, the abuses of the trial bar in other areas of litigation gives pause in itself. Nevertheless, if we are serious about conveying the cultural importance of marriage

59. Morse, *Love and Economics*, 92, citing Michael Gordon and Susan Creighton, “Natal and Non-natal Fathers as Sexual Abusers in the United Kingdom: A Comparative Analysis,” *Journal of Marriage and the Family* 50 (February 1988), 99–105, and other works finding similar results in the United States.

60. See, for example, *Hyde v. Scysson*, 79 Eng. Rep. 462 (1620); *Moullin v. Montleone*, 115 S. 447 (La. 1927).

61. *Heermance v. James*, 47 Barb. 120 (N.Y. App. Div. 1866); see also William Prosser and W. Page Keeton, *The Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984), Sec. 124, 929.

and family, perhaps it is not too much to ask that the destruction of a marriage by an intentional tort be put on par with other intentional injuries. As the North Carolina Assembly legislatively explained in contemplating updating this civil provision, “This tort is designed to protect marriages from third-party intrusion and to create accountability and penalties for third parties who pursue a relationship with a married person and alienate the affections of the married person from their spouse. Some argue that there is no way to measure how strong a deterrent this law is. . . . [However,] jury verdicts in favor of aggrieved spouses over the past several years have provided continued publicity and awareness of the law.”⁶²

Deterring Divorce by Putting Children First

Another legal step urged to discourage divorce is the “children first” principle. First articulated by Mary Ann Glendon of the Harvard Law School,⁶³ this principle would place the equivalent of a lien on all marital assets in favor of the maintenance and education of the children. The children’s interests, in other words, have priority over any property claim or formal title of either spouse, or both of them, in a divorce. Professor Katherine Shaw Spaht has proposed model legislation based on this principle, the Family As Community Act, which would apply existing property concepts and intestate distribution to recognize in the children of a marriage an “inchoate right in property acquired at any time during the marriage which matures into a legal interest at divorce.

62. John Rustin and Jere Z. Royall, “Protecting Marriage,” North Carolina Family Council Pamphlet (June 2002).

63. See, for example, Mary Ann Glendon, *New Family, New Property* (1981), and “Fixed Rules and Discretion in Contemporary Family Law and Succession Law,” *Tulane Law Review* 60 (1986), 1165.

. . .”⁶⁴ Thus, any thing—houses, cars, clothing, artwork, bank accounts—acquired during marriage (regardless of how titled) is “family property.” Upon divorce, family property is applied first to meet parental obligations, such as education, and any net property residual is then equally divided among all family members. Portions given to the children are held in trust and effectively managed by the “residential,” or custodial, parent.

Like any legal solution to a social problem, the remedy is surely incomplete and insufficient to rectify fully the harm of divorce. Nevertheless, Professor Spaht is correct that “the fulfillment of parental obligations [under the proposed model] may [fairly] be characterized as an award of divorce compensation. That is, given the volume of information concerning the negative effects of divorce on children, this award could attempt to compensate for (uncompensable) damage done to the child by the divorce.”⁶⁵

*More Effective and Comprehensive
Premarital Counseling and Materials*

This discussion of divorce deterrence should not obscure the positive steps that can be taken to strengthen the marriage bond and the family—for example, increased emphasis upon marital preparation. Canon 1063 in the Catholic tradition obligates pastors to provide “personal preparation for entering marriage so that through these means the Christian faithful may be instructed concerning the meaning of Christian marriage and the duty of Christian spouses and parents.”⁶⁶ Similarly, Pepperdine University in California, an interdenominational Christian school affiliated with

64. The concept also applies at death of a spouse. See Professor Spaht’s proposed model Family As Community Act on the Communitarian Network’s Web site at www.gwu.edu/~ccps/.

65. *Ibid.*, n. 59 within Professor Spaht’s article.

66. Bernard A. Siegle, *Marriage: According to the New Code of Canon Law* (New York: Alba House, 1986), 27, citing and discussing the code.

the Church of Christ, has been a leader in marriage preparation and sustenance, through its Marriage and Family Institute. Michael McManus, a religious and ethics writer, has spearheaded a campaign, called Marriage Savers, that has drastically reduced the divorce rate in dozens of cities. Finally, Dr. James Dobson, an evangelical Protestant counselor who has a nationwide radio audience, heads a pro-marriage, pro-family organization called Focus on the Family, based in Colorado.

Since 1982, there has been a fourfold increase in the number of couples receiving marriage preparation.⁶⁷ These counseling sessions frequently involve religious leaders and mentor couples as well as a testing or inventory of the couple's personal dispositions to identify possible areas of conflict. Places where programs like Marriage Savers or the Catholic equivalent, Retrouville, exist have had divorce rates well below the national average. For example, in one of the counseling sites, Modesto, California, during a period when the national divorce rate was fairly stable or falling only slightly, the divorce rate plummeted locally by 35 percent.⁶⁸ The counseling efforts seem to have most effect on two of the most troubling predictors of divorce, namely youth (getting married under the age of 20) and cohabitation. Counselors make good use of a University of Wisconsin study that found couples who lived together before marriage have an 85 percent failure rate. As one counselor tells his couples, "Living together is the absolute worst thing you can do if your goal is a successful marriage."⁶⁹

67. James A. Fussell, "Great Expectations, Surprise Revelations—More Couples Are Turning to Premarital Counseling," *The Kansas City Star* (May 31, 1998), H1.

68. *Ibid.*

69. *Ibid.*

*Grasping the Significance of Marriage and
the Family's Moral Responsibilities*

A family is often referenced as “the first vital cell of civilization.” Quite literally, the family structure introduces us to one another. As one author put it well: “Traditional society is composed of only two kinds of people—relatives and strangers. The social world centers around kinship identities, and relatives are those with whom you work, worship, ally, sleep, play, and die. Kinsmen bear you, nurse you in illness, initiate you into adulthood, protect you from injustice, and bury you into the order of the ancestors.”⁷⁰ Looking at that list, it is quickly evident that in traditional society every critical activity in life is performed with, through, or for the family. Things are different today, but the family still needs to perform care functions.

As noted, a religious or covenantal understanding of marriage is built upon the giving of the total self. Nurturing this conception is vital if the American family is to meet internal and external expectations. Inside the family, we envision the family as a source of “love and emotional support, respect for others, and taking responsibility for actions.”⁷¹ Behind the description of love or caring is the idea of constancy, family ritual. In other words, true emotional support is thought to be derived from being together for both important and unimportant times. The notion of “quality time,” fashionable in American family literature in the 1980s to rationalize husband’s *and* wife’s preference for work over family, is fraudulent.

70. David W. Murray, “Poor Suffering Bastards,” *Policy Review* 73 (spring 1994), 74.

71. Mark Mellman, Edward Lazarus, and Allan Rivlin, “Family Time, Family Values,” in *Rebuilding the Nest*, ed. David Blankenhorn, Steven Bayne, Jean Bethke Elshtain (Milwaukee, Wisc.: Family Service America, 1990), 73.

Outside the family, our expectation is that parents instill “respect for others,” underscoring the importance of the pursuit of virtue that can only meaningfully begin within a family. Perhaps, today, the terminology of prudence, fortitude, temperance, and justice is not as well-known to American families as it should be, but there is a clear expectation that families build respect for people in authority, between parent and child, and for others generally. Despite an ever-greater off-loading of responsibility upon teachers, the community still largely expects families to form the moral character of their children. The consequence of failing in these tasks is reflected in troubling increases in violent crime and declines in educational achievement and general levels of civility. One family researcher describes what is being lost as the family’s unique capability “of keeping alive that combination of obligation and duty, freedom and dissent, that is the heart of democratic life.”⁷²

Society also counts on families to produce a level of personal contentment necessary for social order. Happiness is something of an art. It requires a willingness to live in the present, rather than to worry over the past or the future. Families are the best source of this perspective because both spouses and children emphasize the element of *now* to a larger degree than does business, government, and investment activity.⁷³ “While differing on many things,

72. Jean Bethke Elshtain, “The Family and Civic Life,” in *Rebuilding the Nest*, 128.

73. At the World Family Policy Forum in January 1999, Dr. Alan Carlson made note of the following: (1) A seventeen-nation study of marital status and happiness, showing “perhaps the most sweeping and strongest evidence to date in support of the relationship between marital status and happiness.” The results, reported in the summer 1998 issue of the *Journal of Marriage and Family*, are consistent across countries and equally positive for both genders. (2) By contrast, single-mother households “experience an 85 percent increased risk of dying of heart disease” according to the *Journal of Health and Social Behavior* (1998). (3) Same-sex partners have a greater risk of violence at the hands of a partner by a multiple of four. On the web, Dr. Carlson’s paper can be located at www.fww.org/articles/wfpforum/acarlson.htm. Waite and Gallagher, in *The Case for Marriage*, 67, similarly conclude that “married men and women report less depression, less

the great faiths show that the deepest meanings and the greatest satisfactions for humankind are to be found in family living.”⁷⁴

A Family Wage

To ameliorate the work-family “time crunch” and counter the overreliance upon day care, some have proposed a variant of the family wage. This idea, once championed by the Catholic Church, argues that there is a corporate social responsibility to provide a wage sufficient for an employee to sustain his or her children and a stay-at-home spouse. The idea of an imposed wage cuts against the grain of market reality, but enhanced family allowances to permit one of the spouses to reduce hours worked or child tax deductions⁷⁵ might be alternative approaches for capturing the desire to have a better work-family balance while respecting the fact that often women and men alike desire the fulfillment of both home and workplace.

Conclusion

Americans are united in anxiety since 9/11. Yet, if these basic security concerns could somehow be set aside, the prevalent American culture would remain highly individualistic even as there are

anxiety, and lower levels of other types of psychological distress than do those who are single, divorced, or widowed. . . . When it comes to happiness, the married have a similarly powerful advantage. One survey of 14,000 adults over a ten-year period, for example, found that marital status was one of the most important predictors of happiness.”

74. Waite and Gallagher, *The Case for Marriage*, 5.

75. A Public Agenda online poll in June 2000 found that 64 percent of parents with children under age five would support giving “a much bigger tax break to parents who stay at home to care for their children. This was the preferred policy, over requiring employers to give paid parental leave, which is now law in California, increasing funds for Head Start, or extensions of after-school programs. Public Agenda describes itself as a “nonpartisan, nonprofit public opinion research and citizen education organization,” founded in 1975 by social scientist Daniel Yankelovich and former Secretary of State Cyrus Vance.

provocative academic conferences on communitarianism and a subtle yearning for authentic community in the larger population.⁷⁶ One empirical Communitarian Network study found that when “asked specifically about the role of the government in legislative changes that might affect the rate of divorce, respondents overwhelmingly supported the individualist position of leaving it to the couple themselves to decide. . . . [T]here is still significant support for the individualist position. Respondents tended toward nonintervention, at least in matters that affect them directly.”⁷⁷ As another writer puts it: “The goal seems to be to find the minimal set of human relationships that a child can have and still turn out tolerably well. . . . People from across the political spectrum seem to be saying, ‘What do I have to do in order to maintain my position that divorce or single parenthood is not harmful to children? How much money does society have to spend to make up for the loss of the relationship so that I will not have to give up my belief that parents are entitled to any lifestyle choices they want?’”⁷⁸

We thus persist in going our separate ways as spouses. And in the face of this, policy proposal after policy proposal unrealistically asks stepfathers and cohabiting boyfriends or same-sex partners to behave like biological fathers or mothers. Others demand the law to crack down on “deadbeat dads.” No one has a brief for any parent forfeiting responsibility, but how realistic is it “to expect that a father who has been expelled from his home in a nasty divorce will contribute the same amount of money that he would if he were part of a functioning family”?⁷⁹ Yes, divorce laws can be reformed to make separation more difficult or, in the event of divorce, to put the children’s economic interests first, but the law

76. See David Karp, “Americans as Communitarians: An Empirical Study,” *The Responsive Community* 7 (winter 1996–97), 42.

77. *Ibid.*, 46.

78. Morse, *Love and Economics*, 102–103.

79. *Ibid.*

cannot substitute for the emotional loss and the loss of support that the dissolution not just of a marriage, but of a family entails. The law in a free society cannot prevent bad choices without denying freedom, but it can force us to think clearly and to address the consequences of our errant choices when we make them.

It is time for red herrings to be discarded. Parents' interests in lifelong happiness and children's in emotional stability and direction actually coincide. Neither interest is advanced by a ready embrace of autonomy—the doctrine that each individual is his own law—either in the preference of work over family or divorce over marriage. Thinking otherwise is *learned* behavior. It can be *unlearned*. To summarize some of the public and private policies that could advance this reeducation in favor of marriage and family:

1. Encourage religious leaders and communities to more overtly and consistently articulate the cultural value of a covenantal over individualistic view of marriage.
2. Apply this covenantal view of marriage to the evaluation of the suitability of textbooks in educational settings.
3. Encourage states, through model legislation and amicus intervention before state common law courts, to revive or perpetuate forms of marital property ownership that do not keep “marital bags” packed and facilitate divorce—for example, preferring the tenancy by entirety over community property.
4. Attribute greater value to time with family by reducing the number of hours worked in marketplace activity. Explore cultural or policy means for instructing that “work is for man; man is not for work.” At the same, time acknowledge that home and work facilitate the development of the whole human personality.
 - a. Promote and defend the legality of gender-neutral com-

pensation schedules that supply workplace bonuses for head of household responsibility; relatedly, favor enhancement of child allowances under the tax code.⁸⁰

b. Be skeptical of third-party child care, recognizing it for what it is—a lesser quality substitute for family-provided care and instruction.

c. Mitigate land-use segregation, which compounds the difficulty of striking a reasonable work-family balance and prevents the formation of genuine neighborhood or community.

5. Forthrightly question sexual license. In particular, work against legal or cultural acceptance, if not affirmation, of cohabiting or nonmarital relationships. “Cohabitation is not just like marriage. On average, cohabiting couples are less sexually faithful, lead less settled lives, are less likely to have children, are more likely to be violent, make less money, and are less happy—and less committed—than married couples.”⁸¹
6. Enhance strong marital formation and commitment through the enactment of covenant marriage laws as well as the encouragement of religious consortiums that premise marital rites upon adequate instruction.⁸²

80. Dependent allowances for children should more accurately reflect the true out-of-pocket cost of raising a child and should reflect the value of a parent at home providing care. In short, the tax code needs to be oriented toward the family. Ironically, the recent reform to eliminate the so-called marriage penalty, in fact, encourages both spouses to prefer market compensation over family responsibility. C. Eugene Steurele, “The Effects of Tax and Welfare Policies on Family Formation,” in *Strategies for Strengthening Marriage: What Do We Know? What Do We Need to Know?* (Washington, D.C.: Family Impact Seminar, 1998), 153–62.

81. Waite and Gallagher, *The Case for Marriage*, 201.

82. “In 1998, Florida passed the Marriage Preparation and Preservation Act. Under the Florida law, engaged couples who complete a marriage-preparation course pay reduced marriage-license fees” (Waite and Gallagher, *The Case for Marriage*, 197). A small incentive, to be sure, but one that substantively makes

7. Repeal no-fault divorce, substituting a model that precludes divorce until after a significant waiting period of one year or more after applying for divorce,⁸³ and the completion of marital dispute resolution through either public or faith-based organizations.
8. Deter divorce through the revival or maintenance of common-law actions for “alienation of affection” against third parties who, under present law, bear little, if any, damage liability for the break-up of a marital union. Relatedly, factor fault into marital property division to increase the disincentive against infidelity.⁸⁴
9. In the event divorce is unavoidable, preclude any division of marital property between the divorcing spouses until after the adequate vesting of property in the children to secure education and care needs.
10. Recognize that public policy and legal refinement is always secondary to personal commitment.

The unlearning of anti-marriage attitudes and the avoidance

an important statement and that invites religious communities to be more active and explicit instructors as well. Indeed, the private effectiveness of such instruction begs scholarly examination because more than 80 municipalities now have community marriage policies that involve the taking of marital inventories and meetings with trained mentoring couples (198).

83. “Before no-fault, waiting periods of two or three years were common in the United States and five-to-seven-year waiting periods were typical in Europe. . . . [Today,] [m]ost states have no waiting period at all” (Waite and Gallagher, *The Case for Marriage*, 196).

84. Milton C. Regan Jr., “Postmodern Family Law: Toward a New Model of Status,” in *Promises to Keep: Decline and Renewal of Marriage in America*, ed. David Popenoe, Jean Bethke Elshtain, and David Blankenhorn (Lanham, Md.: Rowman & Littlefield, 1996), 157–85.

of culturally destructive behavior best occurs one family at a time.⁸⁵ And when it does, “[w]hen people are able to discover that the intertwining of [marital sex, procreation, and intimacy] deepens and enriches every aspect of their lives [and anchors the cultural instruction upon a stable family], it is as though they have stumbled onto a great secret unknown to any other member of the human race.”⁸⁶

Indeed, understanding the subtle and important relationship between marriage and family is a tremendous revelation, but no culture that wants to prosper morally or economically can long keep the benefits of marriage and family a secret.⁸⁷ Each generation depends on the one previous to identify that which must be treasured in life. Show me the objects that the people love, said Saint Augustine, and I will tell you their character.

85. This was the premise of my book, *Cease-fire on the Family* (1995), in which I argued individual families are fully capable of overcoming cultural dysfunction or antagonism. The aspiration of purpose I held out for the family included: conquering the isolation and anonymity of a life alone; welcoming children out of a loving desire to cooperate with God’s creative plan; nurturing the physical, intellectual, moral, and spiritual formation of children, unashamedly and clearly transferring to them the mega-virtues of belief in God and a knowable truth and the personal, cardinal virtues of prudence, fortitude, temperance, and justice; understanding that schools are extensions of responsible parenting, not replacements for it; encouraging the continued presence of an extended family in the lives of children, as in family elders connecting the past with the present; making one’s family a part of a network of families united by faith, active in church, and open to its moral instruction; and uniting one’s family with other families joined by a sense of place and local community.

86. Morse, *Love and Economics*, 108.

87. Waite and Gallagher (*The Case for Marriage*) write: “We need to place marriage in a prominent place on the public agenda. We need to discuss the foundational importance of marriage to family life, its importance to society as a whole, and its importance to individuals” (188).