

## THE DISINTEGRATION OF FAMILIES AND CHILDREN'S RIGHT TO THEIR PARENTS

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### I. INTRODUCTION: BEST OF TIMES AND WORST OF TIMES

In *A Tale of Two Cities*, Charles Dickens famously describes the age of the French Revolution as the best of times and the worst of times.<sup>1</sup> Dickens writes:

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of light, it was the season of darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us . . . .<sup>2</sup>

The same duality exists today; it is both the best of times and the worst of times—for families, marriage, and especially for children. Living side-by-side in the same country, same city, and same generation are children who do and will enjoy unprecedented advantages and opportunities—superior health, education, financial support, stable families, safety, minimal risk of crime and at-risk behaviors, love, nurture, guidance, relationship satisfaction, job prospects, and socialization—and children who are and will be significantly disadvantaged comparatively in terms of their health, education, financial support, family instability, victimization, at-risk behaviors, prospects for criminal behavior and incarceration, deprivation or impaired love, nurture, guidance, reduced relationship satisfaction, job prospects, and socialization. One factor, more than any other (perhaps more than most others combined) separates those two

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1. CHARLES DICKENS, *A TALE OF TWO CITIES* 3 (James Nisbet & Co. 1902) (1859).  
2. *Id.*

groups of children. That is whether the children are raised by their married parents.

As Baroness Deech (former law professor and Principal of St. Anne's College, Oxford) recently declared in a debate in the House of Lords: "It is marriage that makes all the difference . . . ."<sup>3</sup> In that same debate, Chief Rabbi Lord Sacks noted:

Children lucky enough to be born into strong families are advantaged in almost every area for the rest of their lives: school attendance, educational achievement, getting and keeping a job. They will earn more. They will be healthier. They will be more likely to form strong marriages of their own. Children who do not have that good fortune will be disadvantaged for the rest of their lives.<sup>4</sup>

Likewise, the late distinguished University of Chicago Professor Don Browning summarized the research and noted that

there is convincing evidence that children raised by their married natural parents on average do significantly better in their school work, are less likely to have children out-of-wedlock, are more likely to have stable marriages themselves, are less likely to become involved in criminal behavior, and are more likely to have stable employment as adults.<sup>5</sup>

These comments about the importance of marriage to the well-being of children implicate a variety of contemporary family lifestyles and practices and family law policies relating to them, including how children are procreated (including Assisted Reproductive Technology ("ART") and non-marital childbearing), by whom they are raised when they are born (including cohabitation and adoption by un-married and same-sex adults, and single-parenting), marital integrity and stability (including high-conflict marriages, and marital dissolution), and post-divorce parenting (including stepparenting, single-parenting, and cohabitation).

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3. 725 PARL. DEB., H.L. (6th ser.) (2011) 374 (U.K.), available at <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110210-0001.htm>. Baroness Deech added: "Statistics show that the best thing for children is to live with two married parents." *Id.*

4. *Id.* column 366 (internal quotations omitted); accord William Rees-Mogg, *Reward Marriage and Rescue British Society*, TIMES (London), Feb. 18, 2011, at 27.

5. Don Browning, *The Meaning of Family in the Universal Declaration of Human Rights*, in 1 THE FAMILY IN THE NEW MILLENNIUM 50 (A. Scott Loveless & Thomas B. Holman eds., 2007). "In addition, there is significant evidence, as Aristotle predicted, that in those families where children are raised by nonbiological parents, children are far more subject to violence, physical harm, and sexual molestation." *Id.*

This Article will address those subjects from the perspective of their impact upon children's lives and well-being. Parts II and III focus on the disintegration of the family and its consequences, especially for children. Part II begins with a brief review of the evidence of the disintegration of families in America in the first dozen years of the twenty-first century. Part III links those specific indicators of family disintegration to separation of children from their parents and the detrimental consequences to society in general, and to children in particular, of separation of children from their parents. Parts IV and V focus on the practical and legal "right" of children to enjoy a parental relationship with both their mother and their father. Part IV discusses the practical significance of children's "right" to a relationship with both of their parents. It notes and critiques the growing practice and popularity of the deliberate, planned, intentional, structured separation of children from their parents. This includes intentional single parenting and parenting by same-sex couples, two recent popular relationship lifestyle trends. Additionally noted are some qualitative distinctions between that and accidental or unplanned separation of children from their parents, but this Article also notes that the practical detrimental consequences for children are not entirely ameliorated by planned parentlessness. Part V turns to the law and examines whether children have in any significant sense a legal right to have a parental relationship with their parents. It examines fundamental constitutional and human rights, legal policy, and the role and ability of law to remedy the problems of disintegration of marital families and parentlessness. Part VI concludes, reiterating that one of the most troubling harmful consequences of the continued disintegration of families is the growing problem of the deprivation of children of parental relationships with both of their parents, and suggesting that scholars should speak up to support the right of children to have a real parental relationship with both their mother and father. The law should respect, protect, and promote the ability of children to have parental relationships with both of their parents.

## II. THE WORST OF TIMES—THE DISINTEGRATION OF MARRIAGE AND FAMILIES

While there are many factors that shape life's fortunes and contribute to the gap between these two contrasting classes of children, the most critical difference between them is one factor—whether they are raised in a stable, healthy home by their own biological or adoptive parents.

Another name for that factor—a single word and single criterion that is the single largest discriminating factor between advantaged and disadvantaged children—is *marriage*.<sup>6</sup> The legally-recognized intact marital union of their biological or adoptive mother and father is the greatest predictor of children being raised in a stable, healthy, advantaged life; while the non-marital status of their parents (whether due to divorce, separation, or non-marriage) is the greatest predictor of a disadvantaged life and prospects for children.

There are many aspects of the disintegration of families. Five points of disintegration highlight some of the major areas of concern.

*First*, there has been a dramatic increase in cohabitation without marriage. In 1960, just one percent of all couples living together were unmarried.<sup>7</sup> Today, over eleven percent of all couples are living together or cohabiting without marriage, as shown in *Figure A*.<sup>8</sup>

FIGURE A.  
PERCENTAGE OF COUPLES COHABITING WITHOUT MARRIAGE<sup>9</sup>



1960                      1970                      1980                      1990                      2000                      2010

By 2010, 7.5 million opposite-sex American couples were cohabiting without marriage, according to a 2010 Census report,<sup>10</sup> up from only 523,000 in 1970.<sup>11</sup>

TABLE 1.  
UNMARRIED COHABITANTS IN U.S., 1970–2010<sup>12</sup>

Year	Unmarried-Partner Households	% Households
1970	523,000	0.8%
1980	1,589,000	2.0%
1990	2,856,000	3.1%
2000	5,475,768	5.2%
2006	6,017,462	5.3%
2010	7,500,000	10.2%

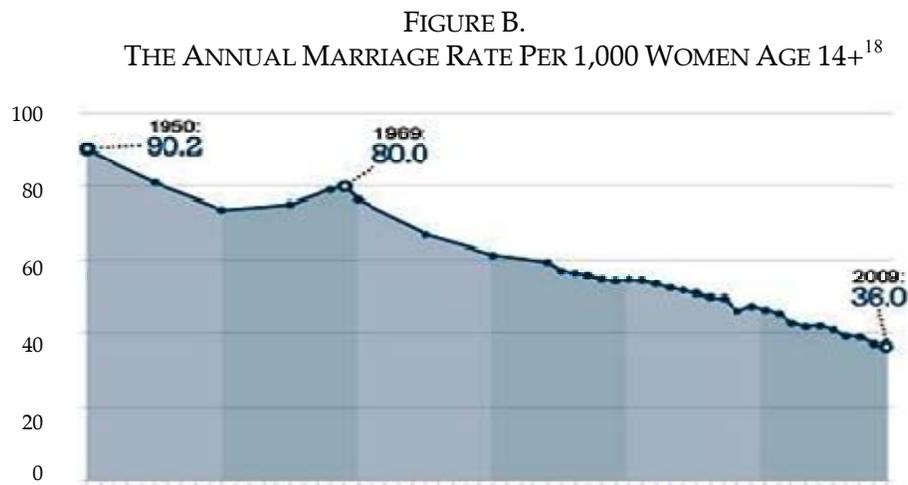
10. Rose M. Kreider, *Increase in Opposite-Sex Cohabiting Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS) 1* (U.S. Census Bureau, Hous. & Household Econ. Statistics Div., Working Paper, 2010), <http://www.census.gov/population/www/socdemo/Inc-Opp-sex-2009-to-2010.pdf>; Sharon Jayson, *Cohabitation Numbers Jump 13%, Linked to Job Losses*, USA TODAY (Jan. 27, 2011, 5:13 PM), [http://www.usatoday.com/news/nation/census/2010-09-24-cohabitation24ONLINE\\_ST\\_N.htm](http://www.usatoday.com/news/nation/census/2010-09-24-cohabitation24ONLINE_ST_N.htm).

11. See Table 1.

12. Table 1 is comprised of data from the U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES for the years 1994, 2002, 2008, and 2009, and the 2010 figures are taken from Kreider, *supra* note 10. For the number of unmarried-partner households in 1970, 1980, and 1990 as compared with the total number of households for those years, see U.S. CENSUS BUREAU, *supra*, tbls.61, 66 (1994). For the number of unmarried-partner households in 2000 as compared with the total number of households for that year, see *id.* tbls.49, 50 (2002). For the number of unmarried-partner households in 2006 as compared with the total number of households for that year, see *id.* tbl.62 (2009) and *id.* tbl.58 (2008). For the 2010 figures, see Kreider, *supra* note 10.

The U.S. National Center for Family and Marriage Research reported in 2010 that the percentage of women 19–44 years old who have cohabited increased by seventy-five percent between 1987 (33%) and 2006–2008, with over half (58%) now reporting cohabitation.<sup>13</sup> Two-thirds of all women 19–44 years old cohabit prior to their first marriage. Nearly one-fifth of all current unions involving American women in this age group are non-marital cohabitations.<sup>14</sup> The National Center also reveals that the more education women have the less likely they are to cohabit: in 2006–2008, only forty-seven percent of women with four or more years of college had ever cohabited; fifty-two percent of women with 1–3 years of college; sixty-nine percent of women who completed high school, and seventy-three percent of women who did not complete high school.<sup>15</sup> The Pew Research Center reports that over one-third of Americans who have cohabited do not view cohabitation as a step toward marriage, and one-quarter of those who are currently cohabiting say they do not expect to marry the person with whom they are living.<sup>16</sup>

*Second*, the social value of, desirability of, and status of marriage has plummeted, and this is reflected in many statistical reports. The annual marriage rate for women has fallen from 90.2 per 1,000 women fourteen and older in 1950 to just thirty-six in 2009, as shown in *Figure B*.<sup>17</sup>



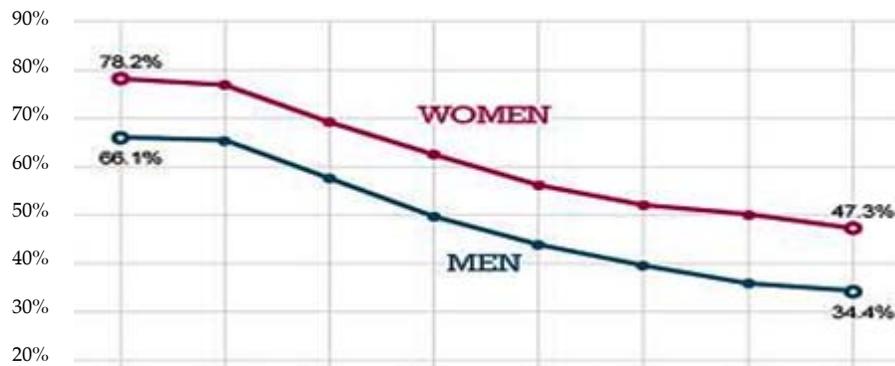
THE UNITED STATES, NATIONAL VITAL STATISTICS REPORTS).

18. *Id.* Note that figures for 1950 and 1960 are for individuals age 14 and older, and the data for 2009 are provisional.

1950            1960            1970            1980            1990            2000            2009

The proportion of adults (age 14 and older) who are married has fallen from about seventy percent for men and sixty-five percent for women in 1960 to fifty-five percent for men (a drop of 15%) and fifty-two percent for women (a drop of 13%).<sup>19</sup> As *Figure C* illustrates, the percentage of ever-married adults at age twenty-five has dropped from 66.1% of men born 1940–1944 to 34.4% of those born 1975–1979, and from 78.2% of women born in 1940–1944 to 47.3% of women born 1975–1979.<sup>20</sup>

FIGURE C.  
PERCENT OF EVER-MARRIED ADULTS AGE 25<sup>21</sup>



<http://familyfacts.org/charts/150/the-proportion-of-married-adults-has-decreased> (last visited Jan. 18, 2012) (citing U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (2010)).

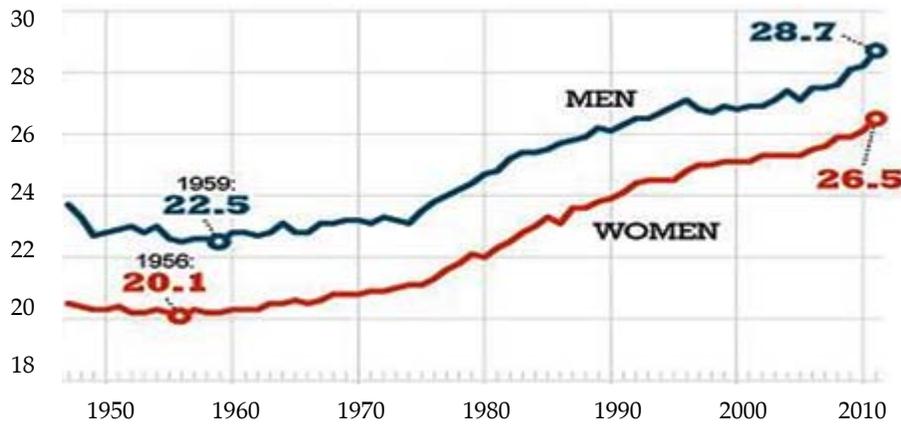
20. *Both Men and Women Are Less Likely to Marry in Their Twenties*, THE HERITAGE FOUND., <http://familyfacts.org/charts/155/both-men-and-women-are-less-likely-to-marry-in-their-twenties> (last visited Jan. 18, 2012) (citing U.S. CENSUS BUREAU, SURVEY OF INCOME AND PROGRAM PARTICIPATION (2008)).

21. *Id.*

1940– 1944	1945– 1949	1950– 1954	1955– 1959	1960– 1964	1965– 1969	1970– 1974	1975– 1979
Birth Year							

Additionally, both men and women are putting off marriage. In 1960, the median age at marriage for men was just above 22.5 years old, and for women 20.1 years old.<sup>22</sup> In 2010, the median age at marriage for men was 28.7 years old, and for women 26.5 years old, as shown in *Figure D*.<sup>23</sup>

FIGURE D.  
THE MEDIAN AGE AT FIRST MARRIAGE FOR MEN AND WOMEN  
HAS RISEN<sup>24</sup>



This alone would not be disturbing, as many factors, including increased enrollment in college and graduate education, longer educational careers, and cohabitation, may explain the delay in

22. *Men and Women Are Marrying Later*, THE HERITAGE FOUND., <http://familyfacts.org/charts/102/men-and-women-are-marrying-later> (last visited Jan. 18, 2012) (citing U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (2011)).

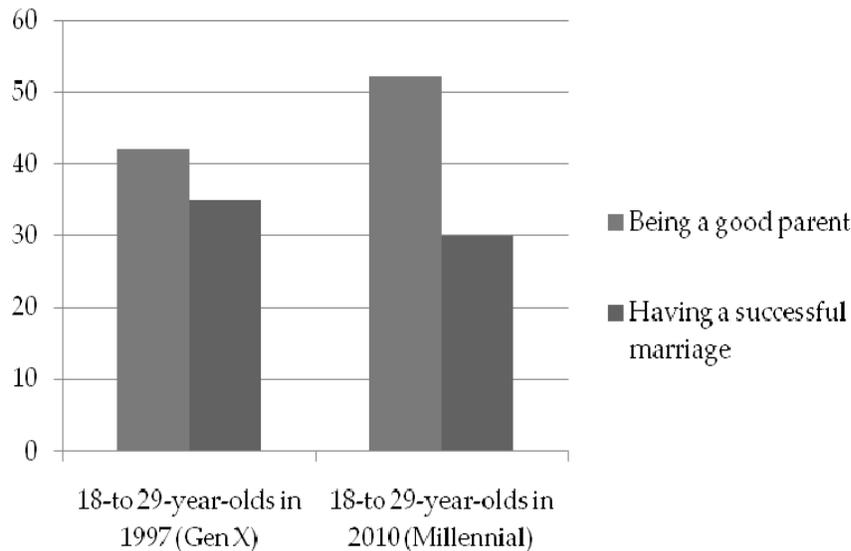
23. *Id.*

24. *Id.*

marriage. But combined with the overall drop in marriage rates and reduced presence of marriage in society, it spells trouble.<sup>25</sup>

A very significant report for the social status of marriage was released by the Pew Research Center on March 9, 2011. As *Figure E* shows, it found that “millennials” (those born 1981–1992) rated being a good parent as being one of the most important things in their life, ten percentage points higher (at 52%) than their Generation-X older siblings, but they rated having a successful marriage five percentage points lower (only 30%) than the Generation-X cohort only a few years earlier.<sup>26</sup> In other words, less than one-third of persons who were aged 18–29 in 2010 considered having a successful marriage as “one of the most important things in their life.”<sup>27</sup>

FIGURE E.  
MARRIAGE DROPS IN IMPORTANCE FOR YOUNG ADULTS IN U.S.<sup>28</sup>  
*Millennials and Gen Xers Assess Marriage and Parenthood*  
*% saying each is one of the most important things in their life*



25. See *supra* Figure B and Figure C.

26. WENDY WANG & PAUL TAYLOR, PEW RESEARCH CTR., FOR MILLENNIALS, PARENTHOOD TRUMPS MARRIAGE 1 (2011), available at <http://pewresearch.org/pubs/1920/millennials-value-parenthood-over-marriage>.

27. See *id.*

28. *Id.*

The same study found that five percent of millennials reported that they do not want to marry and another twenty-five percent were not sure they wanted to marry.<sup>29</sup> Moreover, this report comes close on the heels of another Pew Research Center Report which, in November 2010, found that thirty-nine percent of Americans surveyed believe that marriage is becoming obsolete.<sup>30</sup> These reports point to an increased likelihood of avoidance of marriage which, when coupled with the high value placed on raising children, portends more childbearing out of wedlock.

*Third*, the number and percentage of children born out of wedlock in the United States has dramatically skyrocketed in recent decades, and is now at historically-high levels. In 1940, there were fewer than 90,000 children born to unmarried women in the United States; in 2007, there were approximately 1.7 million children born to unmarried women in the United States—a twenty-fold increase in about two generations.<sup>31</sup> In 1940, less than four percent of all births were to unmarried women.<sup>32</sup> As can be seen in *Table 2*, today, forty-one percent of all children born in the United States are born to unmarried women, more than a ten-fold increase from 1940.<sup>33</sup>

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29. *Id.* at 3.

30. PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 25 (2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>; see also WANG & TAYLOR, *supra* note 26, at 3 (summarizing a 2011 Pew survey which found that “[m]ore than four-in-ten (44%) of Millennials say that the institution of marriage is becoming obsolete, compared with 37% of those ages 30 and older”).

31. See Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 55 (2010) (citing CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RL34756, NONMARITAL CHILDBEARING: TRENDS, REASONS, AND PUBLIC POLICY INTERVENTIONS 56 tbl.A-1 (2008)).

32. See SOLOMON-FEARS, *supra* note 31.

33. GRETCHEN LIVINGSTON & D’VERA COHN, PEW RESEARCH CTR., THE NEW DEMOGRAPHY OF AMERICAN MOTHERHOOD 1 (2010), available at <http://pewsocialtrends.org/files/2010/10/754-new-demography-of-motherhood.pdf>.

TABLE 2.  
U.S. CHILDREN BORN OUT OF WEDLOCK 1980–2009<sup>34</sup>

<u>Year</u>	<u>Number</u>	<u>Births to Unmarried Women</u>		
		<u>Rate(1)</u>	<u>Percent(2)</u>	<u>Married Women(3)</u>
2009	1,693,658	50.5	41.0	85.7
2008	1,726,566	52.5	40.6	86.8
2007	1,715,047	52.3	39.7	88.7
2006	1,641,546	50.6	38.5	88.0
2005	1,527,034	47.5	36.9	87.3
2004	1,470,189	46.1	35.8	87.6
2003	1,415,995	44.9	34.6	88.1
2002	1,365,966	43.7	34.0	86.3
2001	1,349,249	43.8	33.5	86.7
2000	1,347,043	44.1	33.2	87.4
1999	1,308,560	43.3	33.0	84.8
1998	1,293,567	43.3	32.8	84.2
1997	1,257,444	42.9	32.4	82.7
1996	1,260,306	43.8	32.4	82.3
1995	1,253,976	44.3	32.2	82.6
1994	1,289,592	46.2	32.6	82.9
1993	1,240,172	44.8	31.0	86.1
1992	1,224,876	44.9	30.1	88.5
1991	1,213,769	45.0	29.5	89.6
1990	1,165,384	43.8	28.0	93.2
1985	828,174	32.8	22.0	93.3
1980	665,747	29.4	18.4	97.0

(1) Births to unmarried women per 1,000 unmarried women aged 15–44 years

(2) Percent of all births to unmarried women

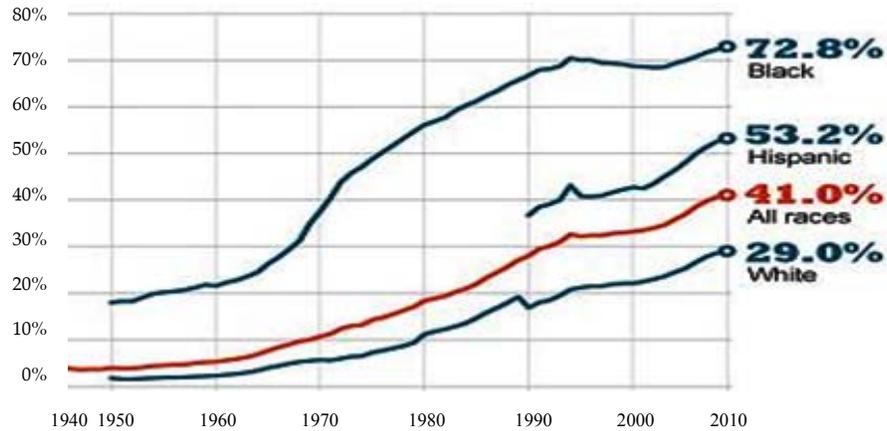
(3) Births to married women per 1,000 married women aged 15–44 years

There has been a six-fold increase in the percentage of children born to unmarried women since 1960, as *Figure F* shows.<sup>35</sup>

34 JOYCE A. MARTIN ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, NAT'L VITAL STATISTICS REPORTS, BIRTHS: FINAL DATA FOR 2009, at 10–11, 47 (2011), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf). See also Figure 1 and Table 1 in CHILD TRENDS DATABANK, PERCENTAGE OF BIRTHS TO UNMARRIED WOMEN (2010), available at [http://www.childtrendsdatbank.org/sites/default/files/75\\_Births\\_to\\_Unmarried\\_Women.pdf](http://www.childtrendsdatbank.org/sites/default/files/75_Births_to_Unmarried_Women.pdf).

35. *More Than Four in 10 Children Are Born to Unwed Mothers*, THE HERITAGE FOUND., <http://familyfacts.org/charts/205/more-than-four-in-10-children-are-born-to-unwed-mothers> (last visited Jan. 18, 2012) (citing U.S. CENSUS BUREAU, NATIONAL CENTER FOR HEALTH

FIGURE F.  
 PERCENTAGE OF CHILDREN BORN TO UNMARRIED MOTHERS IN THE U.S.,  
 1940–2009<sup>36</sup>



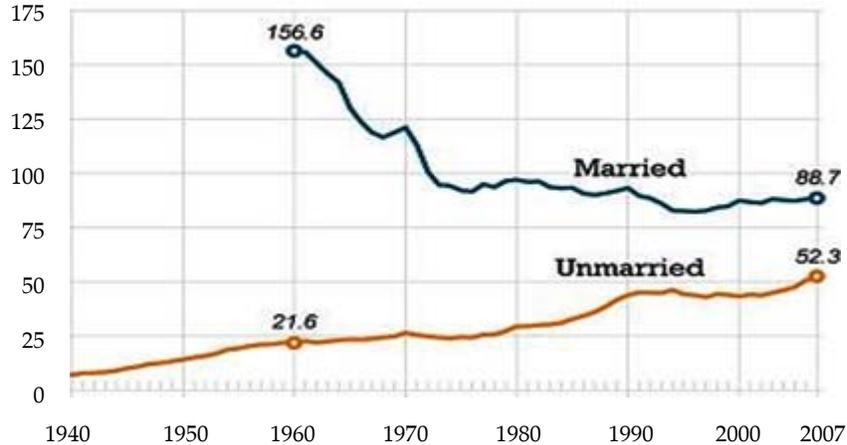
As *Figure G* shows, the birth rate for married women has dropped nearly fifty percent since 1960, while the birth rate for unmarried women has risen nearly 150% in the same time period, and the gap between the birth rates per 1,000 women of married and unmarried women has closed from 135 (156.6 to 21.6) to only thirty-six births per 1,000 (88.7 to 52.3).<sup>37</sup>

STATISTICS (2010)) ("Currently, the figure is highest among blacks, but the rate of increase is highest among whites and Hispanics.").

36. *Id.*

37. *The Gap Between Married and Unmarried Birth Rates Has Narrowed*, THE HERITAGE FOUND., <http://familyfacts.org/charts/213/the-gap-between-married-and-unmarried-birth-rates-has-narrowed> (last visited Jan. 18, 2012) (citing NAT'L CTR. FOR HEALTH STATISTICS, NATIONAL VITAL STATISTICS REPORT (2010)).

FIGURE G.  
BIRTH RATE FOR UNMARRIED NEARLY RATE FOR MARRIED WOMEN<sup>38</sup>



Related to this, the value of parenthood as assessed by high school seniors has remained almost the same for more than thirty years (since 1976, consistently seventy percent of all high school seniors agreed that being a father and raising children is one of the most fulfilling experiences a man can have, and about sixty percent of all high school seniors agreed that being a mother and raising children is one of the most fulfilling experiences a woman can have).<sup>39</sup> However, attitudes about marriage have fallen dramatically, resulting in some social pressure to have children without marriage, as discussed above.

*Fourth*, divorce rates in the United States have peaked but remain at extremely high levels, showing very dangerous signs of social-class separation. Cohort studies comparing the percentage of American adults divorced by age fifty-five show increasing percentages of divorce with every passing cohort for every age-of-life period, as *Figure H* shows.<sup>40</sup> The rate of divorce by age fifty-five has risen from

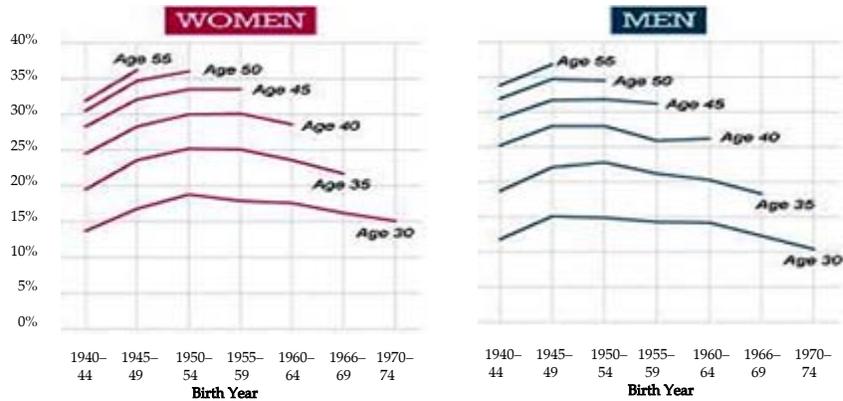
38. *Id.*

39. NAT'L CTR. FOR FAMILY & MARRIAGE RESEARCH, FP 10-04, THIRTY YEARS OF CHANGE IN FAMILY ROLES AND PARENTHOOD ATTITUDES, 1976-2008 (2010), [http://ncfmr.bgsu.edu/pdf/family\\_profiles/file83690.pdf](http://ncfmr.bgsu.edu/pdf/family_profiles/file83690.pdf).

40. *By Age 45, About One in Three Americans Born in the 1950s Had Divorced*, THE HERITAGE FOUND., <http://familyfacts.org/charts/165/by-age-45-about-one-in-three-americans-born-in-the-1950s-had-divorced> (last visited Jan. 18, 2012) (citing U.S. CENSUS BUREAU, SURVEY OF INCOME AND PROGRAM PARTICIPATION (SIPP) (2008)).

thirty percent for both men and women born in 1935 to forty-two percent for women born in 1945, and nearly forty percent for men born in 1945.<sup>41</sup>

FIGURE H.  
PERCENT OF ADULTS EVER-DIVORCED BY GENDER AND AGE<sup>42</sup>



While over eighty-two percent of couples married in the early 1960s remained married for at least ten years, less than seventy-five percent of couples married in the early 1990s remain married for at least ten years.<sup>43</sup>

On the other hand, the percentage of first marriages that end in divorce has remained relatively stable (even dropping slightly) for more than two decades, after nearly two decades of sharp annual increases in the divorce rate.<sup>44</sup> “In 2008, there were more first marriages than first divorces, and the ratio of first marriages to first divorces in the U.S. was 1.74,” (1.74 first marriages for every first divorce), and the overall ratio of marriage to divorce was 1.83.<sup>45</sup> As

41. *Id.*

42. *Id.*

43. *Recent Marriages Are Lasting Longer*, THE HERITAGE FOUND., <http://familyfacts.org/charts/160/recent-marriages-are-lasting-longer> (last visited Jan. 18, 2012) (citing U.S. CENSUS BUREAU, SURVEY OF INCOME AND PROGRAM PARTICIPATION (SIPP) (2008)) (displaying a deceiving title for a graph that shows a slight increase in ten-year marriages that began in the early 1990s as compared to the 1980s, but an overall decline in those numbers from the early 1960s).

44. NAT’L CTR. FOR FAMILY & MARRIAGE RESEARCH, FP-09-02, DIVORCE RATE IN THE U.S., 2008 (2009), [http://ncfmr.bgsu.edu/pdf/family\\_profiles/file78753.pdf](http://ncfmr.bgsu.edu/pdf/family_profiles/file78753.pdf).

45. NAT’L CTR. FOR FAMILY & MARRIAGE RESEARCH, FP-10-06, FIRST DIVORCES IN THE U.S., 2008 (2010), [http://ncfmr.bgsu.edu/pdf/family\\_profiles/file84440.pdf](http://ncfmr.bgsu.edu/pdf/family_profiles/file84440.pdf).

Figure I shows, the number of divorces per 1,000 married women rose from 9.2 in 1960 to 22.6 in 1980, and now has dropped back to 16.4.<sup>46</sup>



However, that may be due to the fact that more first unions are pre-marital cohabitations than ever before, many of which break-up before the parties ever marry, so that “selection” factor produces an apparent drop in the divorce rate (but not a drop in the couple-break-up rate).

*Fifth*, as a result of several of the above trends, there has been a dramatic increase in the number of children being raised by single parents, mostly their mothers. The 2007 Census revealed that “25.8% of approximately seventy-four million [American] children under eighteen (or about nineteen million children) were living in lone-parent households. . . . [A]pproximately sixteen and one-half million lived with their mothers alone.”<sup>48</sup> By 2010, that percentage had risen

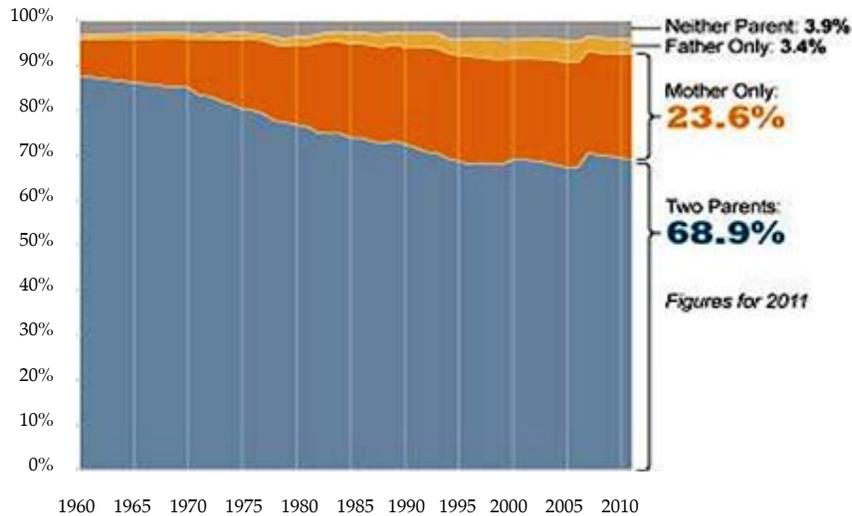
46. *The Divorce Rate Is Declining but Still High*, THE HERITAGE FOUND., <http://familyfacts.org/charts/120/the-divorce-rate-is-declining-but-still-high> (last visited Jan. 19, 2012) [hereinafter *Divorce Rate*] (citing CTR. FOR DISEASE CONTROL & PREVENTION, NATIONAL VITAL STATISTICS REPORT (2010); see also THE NAT’L MARRIAGE PROJECT, UNIV. OF VA., STATE OF OUR UNIONS: WHEN MARRIAGE DISAPPEARS (2010); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (2011), available at <http://www.stateofourunions.org/2010/SOOU2010.pdf> [hereinafter STATE OF OUR UNIONS]).

47. *Divorce Rate*, *supra* note 46. Note that data after 1997 excludes multiple states.

48. Helen M. Alvaré, *Father-Absence, Social Equality, and Social Progress*, 29 QUINNIPIAC L. REV. 123, 123–24 (2011) (citing U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2007, at 6 fig.3 (2009)).

to twenty-seven percent; 23.6% in mother-only homes, and 3.4% in father-only homes, as shown in *Figure J*.<sup>49</sup>

FIGURE J.  
AMERICAN CHILDREN UNDER EIGHTEEN YEARS-OLD LIVING WITH A  
SINGLE PARENT<sup>50</sup>



The percentage of children not being raised by two parents has nearly tripled since 1960.<sup>51</sup> By 2010, only sixty-one percent of American children were living with both biological or adoptive parents.<sup>52</sup> Nearly six percent of all U.S. children under age eighteen are being raised by one or both parents in a non-marital cohabitation relationship.<sup>53</sup> Nearly half of children in single-mother homes (45.8%) are being raised by never-married mothers.<sup>54</sup>

49. *More than One in Four Children Live in a Single-Parent Home*, THE HERITAGE FOUND., <http://familyfacts.org/charts/135/more-than-one-in-four-children-live-in-a-single-parent-home> (last visited Jan. 19, 2012) (citing U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (2011)).

50. *Id.*

51. *See id.*

52. *Despite Recent Decline, Two-Thirds of Children Live with Married Parent*, THE HERITAGE FOUND., <http://familyfacts.org/charts/140/despite-recent-decline-two-thirds-of-children-live-with-married-parents> (last visited Jan. 19, 2012) (citing U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (2011)).

53. *Id.*

54. *Almost Half of Children in Single-Mother Homes Live with Never-Married Mothers*, THE HERITAGE FOUND., <http://familyfacts.org/charts/145/almost-half-of-children-in-single-mother-homes-live-with-never-married-mothers> (last visited Jan. 19, 2012) (citing U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (2011)).

Thus, the non-formation and break-up of marriage and consequent child-bearing and child-rearing by unmarried parents are the major continuing drivers and manifestations of the disintegration of the family. These phenomena create a widening gulf between advantaged children who are raised by and have parental relationships with both their mother and their father (by birth or adoption) and disadvantaged children who are deprived of a real parental relationship with *both* of their parents—both their mother *and* their father. Separation of children from at least one of their parents during a substantial period of their childhood is the major scourge of the disintegration of the family in this generation.

### III. THE PUBLIC COSTS AND PRIVATE HARMS OF THE DISINTEGRATION OF MARITAL FAMILIES

#### A. *The Social Costs of the Disintegration of Marital Families*

The social costs of non-marital child-bearing and divorce are enormous. Data compiled by the National Fatherhood Initiative in 2008 reported that the federal government alone spends nearly \$100 billion per year for “fourteen federal social welfare programs directed to father-absent families.”<sup>55</sup> Another, more conservative, estimate in a 2008 study reported that the public costs of divorce and child-bearing out of wedlock in the United States total at least \$112 billion in tax dollars every year for identifiable national, state, and local governments.<sup>56</sup>

Children born out of wedlock or with divorced parents are legally entitled to financial support from both of their parents, but this is often illusory. According to the Office of Child Support Enforcement in the U.S. Department of Health and Human Services, in fiscal year 2007, “[n]early \$25 billion [in unpaid child support] was collected at a combined State/Federal cost of \$5.6 billion.”<sup>57</sup>

For decades, lawmakers (including the U.S. Congress) have sought to increase child support by absent fathers through a variety

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55. Alvaré, *supra* note 6, at 169. (citing STEVEN L. NOCK & CHRISTOPHER J. EINOLF, THE NAT’L FATHERHOOD INITIATIVE, THE ONE HUNDRED BILLION DOLLAR MAN: THE ANNUAL PUBLIC COSTS OF FATHER ABSENCE 3 (2008), available at <http://www.fatherhood.org/Document.Doc?id=136>).

56. BENJAMIN SCAFIDI, INST. FOR AM. VALUES, THE TAXPAYER COSTS OF DIVORCE AND UNWED CHILDBEARING 5–6, 20–21 (2008).

57. *Fact Sheet*, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., [http://www.acf.hhs.gov/opa/fact\\_sheets/cse\\_factsheet.pdf](http://www.acf.hhs.gov/opa/fact_sheets/cse_factsheet.pdf) (last visited Jan. 19, 2012); accord Alvaré, *supra* note 6, at 169.

of legal enforcement mechanisms, including requiring states to adopt child-support guidelines,<sup>58</sup> stretching the time in which child-support claims and collections can be filed in court,<sup>59</sup> and adopting uniform acts to facilitate enforcement of child support.<sup>60</sup> Lawmakers have also mandated methods to “improve and increase the use of state paternity-establishment mechanisms, in large part to facilitate increased child-support payments by fathers of children aided by [Temporary Assistance to Needy Families],”<sup>61</sup> requiring states to establish a simple process for voluntarily acknowledging paternity,<sup>62</sup> and requiring “that states must consider a signed acknowledgement to be a legal finding of paternity,”<sup>63</sup> etc.

Yet unpaid child support remains a huge problem. As of 2006, uncollected child support arrearages totaled over \$105 billion dollars, according to the federal Office of Child Support Enforcement.<sup>64</sup> The

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58. Beginning in 1975, Congress began passing laws requiring states to tighten efforts to ascertain paternity and establish and enforce collection of child support. LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 903–04 (2d ed. 2006). The Family Support Act of 1988 made child support guidelines a presumption. *Id.* at 923. The Uniform Civil Liability for Support Act (“UCLSA”) has been widely adopted and codified by many states. *Id.* at 904. The Uniform Interstate Family Support Act (“UIFSA”) provides that the original state has continuing exclusive jurisdiction. *Id.* at 928.

59. In *Moss v. Ortiz*, 950 P.2d 59 (Cal. 1998), the court held that there is no constitutional impediment to imposing contempt sanctions when a person’s inability to pay child support is from a willful failure to seek and accept available employment. WARDLE & NOLAN, *supra* note 58, at 936. In *Edwards v. Lowry*, 348 S.E.2d 259 (Va. 1986), the court held that a decrease in income that is a direct consequence of one’s own voluntary, wrongful acts that decreases ability to pay child support is not considered in calculating child support. WARDLE & NOLAN, *supra* note 58, at 923–24. In *Feltman v. Feltman*, 434 N.W.2d 590 (S.D. 1989), the court held that subsequent children are not a change in circumstances for custody or child support. WARDLE & NOLAN, *supra* note 58, at 925–28. The Child Support Recovery Act of 1992 (“CSRA”) makes it a federal crime to intentionally fail to pay child support for a child living in a different state from the obligor. *Id.* at 939.

60. See, e.g., WARDLE & NOLAN, *supra* note 58, at 903–04 (discussing the Uniform Reciprocal Enforcement of Support Act); *id.* at 942 (discussing the Uniform Interstate Family Support Act).

61. Parness & Townsend, *supra* note 31, at 57.

62. *Id.*

63. *Id.* at 60.

64. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., *CHILD SUPPORT ENFORCEMENT, FY 2006 PRELIMINARY REPORT* tbl.5 (2007), [http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary\\_report/table\\_5.html](http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary_report/table_5.html); see also Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1030 (2007) (citing the report and discussing the government’s interest in recouping the arrearages).

annual deficit in collection of ordered child support rose thirty percent from \$10 billion in 1993 to \$13 billion in 2001.<sup>65</sup>

Divorce takes a high cost in tax dollars in all Western societies. Recently, it was reported in the United Kingdom's House of Lords that: "The overall cost of family breakdown has been variously estimated at between £24 billion to £40 billion. As a society, we cannot afford serial marriage breakdown and cohabitation on this scale."<sup>66</sup>

B. *The Detrimental Consequences for Children of Deprivation of Parenting by Both Parents*

The disintegration of the family is a tragedy causing great personal harm to individuals, including children. The detrimental consequences of divorce for children have been studied and documented consistently for decades. The most recent news, sadly consistent with the sorrow of earlier studies, concerns impact on the mortality of children whose parents divorce. "The Longevity Project," based on data compiled for nearly ninety years, identifies factors associated with a shorter or longer life-span. One author remarks that the latest report, in 2011, noted that:

Parental divorce during childhood emerged as the single strongest predictor of early death in adulthood. The grown children of divorced parents died almost five years earlier, on average, than children from intact families. The causes of death ranged from accidents and violence to cancer, heart attack and stroke. Parental break-ups remain, the authors say, among the most traumatic and harmful events for children.<sup>67</sup>

Divorce takes a terrible toll on the educational attainment of children of divorce. The children of divorced parents are less likely to graduate from college or attain advanced post-graduate degrees. In a cyclical effect, lower education correlates to their greater likelihood of divorce. "By the 1990s, the divorce rate for highly educated Americans dropped from 22 percent to 19 percent. For those with

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65. Monica Hof Wallace, *Child Support Savings Accounts: An Innovative Approach to Child Support Enforcement*, 85 N.C. L. REV. 1155, 1165 (2007) (citing U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CHILD SUPPORT: 2001, at 2 tbl.1).

66. 725 PARL. DEB., *supra* note 3, column 374; *see also* Rees-Mogg, *supra* note 4 ("Married people do often feel that the State gives far too little support to marriage, yet . . . research suggest[s] that the breakdown of marriages, including cohabiting partnerships, costs the State the extraordinary figure of £40 billion.").

67. Laura Landro, *How to Keep Going and Going*, WALL ST. J., Mar. 9, 2011, at A15.

only a high school diploma, the divorce rate rose from 34 percent to 42 percent,” and for those without a high school diploma, it rose to forty-five percent.<sup>68</sup> Thus, divorce leads to lower educational attainment for children of divorce, which leads to more divorce, etc.

The risks of juvenile delinquency, criminal behavior, and incarceration are much greater for children raised apart from their fathers.<sup>69</sup> More than two decades ago, Dr. Urie Bronfenbrenner reported that, even after controlling for such factors as low income, “children growing up in [single-parent] households are at greater risk for experiencing a variety of behavioral and educational problems, including . . . criminal acts.”<sup>70</sup> The National Report on Juvenile Offenders and Victims from the U.S. Department of Justice has noted that “juveniles who lived with both biological parents had lower lifetime prevalence of law-violating behaviors than did juveniles who lived in other family types.”<sup>71</sup> Sara McLanahan of Princeton University has shown that “[b]oys raised outside of intact marriages are two to three times more likely to commit a crime leading to incarceration by the time they are in their early thirties, even after controlling for race, family background, neighborhood quality, and cognitive ability.”<sup>72</sup> The “percentage of households headed by women” is statistically one of “the most powerful predictors of crime rates.”<sup>73</sup> Moreover, separation and divorce are even “more strongly associated with delinquency than are single-parent households per se.”<sup>74</sup> “[T]he prevalence of delinquency in

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68. Charles A. Donovan, *As Marriage Fades, American Society Suffers*, ONLINEATHENS (Jan. 23, 2011), [http://onlineathens.com/stories/012311/opi\\_774793474.shtml](http://onlineathens.com/stories/012311/opi_774793474.shtml) (citing Bradford Wilcox, *When Marriage Disappears: The Retreat from Marriage in Middle America* (2010), in STATE OF OUR UNIONS, *supra* note 46, at 13).

69. The empirical evidence of the strong connection between juvenile delinquency, single-parent child-rearing, and divorce are reviewed in Lynn D. Wardle, *The Fall of Marital Family Stability and the Rise of Juvenile Delinquency*, 10 J. L. & FAM. STUD. 83 (2007), from which some of the data noted herein is taken.

70. Urie Bronfenbrenner, *Discovering What Families Do*, in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY 34 (David Blankenhorn et al. eds., 1990).

71. HOWARD M. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 72 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

72. INST. FOR AM. VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 11 (2000) (citing Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ADOLESCENCE 369, 380–84 (2004)); see also SARAH MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 137 (1994) (noting that crime is higher in communities with higher proportions of single-mother families).

73. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 103 (1990).

74. Cesar J. Rebellon, *Reconsidering the Broken Homes/Delinquency Relationship and Exploring Its Mediating Mechanism(s)*, 40 CRIMINOLOGY 103, 103 (2002). Rebellon also

broken homes is 10–15 percent higher than in intact homes.”<sup>75</sup> The correlation of single-parenting, especially divorce, and delinquency is constant across cultures. A 2001 British study reported that boys living in permanently disrupted families on their fifteenth birthdays had significantly higher rates of delinquency, whether measured by delinquency convictions, self-reported juvenile delinquency, or adult convictions.<sup>76</sup>

One major consequence of child-bearing out of marriage and of marital dissolution is poverty for the child. Single-mother parenting dominates the poverty class. “[A]pproximately 40 percent of children in households earning less than \$50,000 annually live with their mother alone.”<sup>77</sup>

Cohabitation is fraught with heightened risk and disadvantages for children and adults. Children living with non-marital cohabiting parents are at a significantly heightened risk of experiencing the break-up of their parents than children of married parents. Statistics published in 2005 by the British Office of National Statistics revealed that while less than sixteen percent of all couples with children in the United Kingdom were cohabiting without marriage (59% married; 11% unmarried), more than seventy-two percent of children under age five who suffer the separation of their parents were children of non-marital, cohabiting parents.<sup>78</sup> Baroness Deech recently reported that “only 8 per cent of married parents split up before their child is five compared with 43 per cent of the unmarried.”<sup>79</sup>

Research has consistently shown that sexual relations before marriage, including cohabitation before marriage, has a detrimental impact upon the quality, integrity, and stability of the subsequent marriage. Research published in December 2010 in the *Journal of Family Psychology*, based on 2,035 married persons who participated in the RELATE online marital assessment program, found that, compared to persons who engaged in sex before marriage, married

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interestingly concludes that “recent remarriage has a robust longitudinal effect on status offending, but not on more severe forms of offending.” *Id.* at 129.

75. L. Edward Wells & Joseph H. Rankin, *Families and Delinquency: A Meta-Analysis of the Impact of Broken Homes*, 38 SOC. PROBS. 71, 87 (1991) (reviewing extensive literature and meta-analysis of fifty studies).

76. Heather Juby & David P. Farrington, *Disentangling the Link Between Disrupted Families and Delinquency*, 41 BRIT. J. CRIMINOLOGY 22, 22 (2001) (examining the difference in rates of delinquency between boys living in intact, disrupted, and high-conflict families).

77. Alvaré, *supra* note 48, at 124.

78. See Alexandra Fread, *Unmarried Families are More Likely to Fall Apart*, TIMES (London) (Feb. 5, 2005), <http://www.timesonline.co.uk/tol/news/uk/article510817.ece>.

79. 725 PARL. DEB., *supra* note 3, column 374.

persons who had not had sex before marriage had twenty-two percent higher relationship stability, twenty percent higher relationship satisfaction, fifteen percent higher quality of marital relationship, and twelve percent better-rated spousal communication.<sup>80</sup> Another recent Centers for Disease Control and Prevention (“CDC”) study reports that about one-third of couples who cohabit will break-up without marriage before their third anniversary, and that another one-third of those who cohabit-then-marry will break-up before their tenth anniversary—leading to a fifty percent higher break-up rate before their tenth anniversary for couples who begin with cohabitation compared to those who marry without prior cohabitation.<sup>81</sup> At least five published studies between 1991 and 2011 documented “that premarital sexual activity seems to be associated with a significant elevated risk of divorce.”<sup>82</sup> Additionally, it has been estimated that forty percent of all non-marital births in the United States are to women who are cohabitating.<sup>83</sup>

The seriously negative consequences of divorce for adults, children, and society are well-documented.<sup>84</sup> As former Brigham Young

80. Dean M. Busby et al., *Compatibility or Restraint? The Effects of Sexual Timing on Marriage Relationships*, 24 J. FAM. PSYCH. 766, 768, 772 tbl.3 (2010).

81. CTRS FOR DISEASE CONTROL & PREVENTION, MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 13 (2010), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_028.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf).

82. Glenn T. Stanton, *Premarital Sex & Divorce—Is There a Link?*, BAPTIST PRESS (May 3, 2011), <http://www.bpnews.net/BPFirstPerson.asp?ID=35210>; see also EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 503–05 (1994); Tim B. Heaton, *Factors Contributing to Increasing Marital Stability in the United States*, 23 J. FAM. ISSUES 392, 401–07 (2002); Joan R. Kahn & Kathryn A. London, *Premarital Sex and the Risk of Divorce*, 53 J. MARRIAGE & FAM. 845, 845 (1991); Anthony Paik, *Adolescent Sexuality and the Risk of Marital Dissolution*, 73 J. MARRIAGE & FAM. 472, 483–84 (2011); Jay Teachman, *Premarital Sex, Premarital Cohabitation, and the Risk of Subsequent Marital Dissolution Among Women*, 65 J. MARRIAGE & FAM. 444, 453–54 (2003).

83. Parness & Townsend, *supra* note 31, at 89 (citing STEPHANIE J. VENTURA, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES 6 (2009), available at <http://www.cdc.gov/nchs/data/databriefs/db18.pdf>).

84. See, e.g., JUDY PAREJKO, STOLEN VOWS: THE ILLUSION OF NO-FAULT DIVORCE AND THE RISE OF THE AMERICAN DIVORCE INDUSTRY 15–25, 141–65 (2002) (showing that the divorce system is broken and divorce weakens the links that hold society together); PATRICK PARKINSON, FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD 121–48 (2011) (discussing violence and abuse upon separation and divorce); *id.* at 238–67 (displaying the financial consequences of divorce and the feminization of poverty); LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000) (giving a comprehensive review of the physical, financial, emotional, social, and familial detriment of divorce in America); JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE, at xxv (2000) (“We have not fully appreciated how divorce continues to shape the lives of young people after they reach *full adulthood*.”); *id.* at xxiv (“[M]any [older

University Law School Dean Bruce C. Hafen noted years ago: “The most important causal factor of [recent declines in American] child well-being is the remarkable collapse of marriage, leading to growing family instability and decreasing parental investment in children.”<sup>85</sup> Family structure and form are associated with the economic, parental, and community resources available to children, as well as their overall well-being. “On average, living with two parents who are married to each other is associated with more favorable outcomes for children both through, and independent of, the higher income that characterizes these families.”<sup>86</sup>

High rates of marital break-up are common in all Western nations. Yet we take that for granted and ignore the traumatic impact upon children. A simple but poignant comment from British children about divorce was reported in the British newspaper, *The Telegraph*. The quote, as taken directly from the Parliamentary debates, was, “[I]n response to a survey conducted in 2008, children under 10 revealed that if they could make a new rule, they would ban divorce. Marital splits were named by the children as the second worst thing in the world after being fat.”<sup>87</sup> Thus, the public costs of divorce, child-

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adolescent and young adult] children of divorce were caught in an intense inner conflict—afraid of repeating their parents’ mistakes while searching for lasting love. Many were either avoiding commitment or jumping impulsively into relationships with troubled people they hardly knew.”).

National studies show that children from divorced and remarried families are more aggressive toward their parents and teachers. They experience more depression, have more learning difficulties, and suffer from more problems with peers than children from intact families. Children from divorced and remarried families are two to three times more likely to be referred for psychological help at school than peers from intact families. More of them end up in mental health clinics and hospital settings. There is earlier sexual activity, more children born out of wedlock, less marriage, and more divorce [among children whose parents got divorced]. Numerous studies show that adult children of divorce have more psychological problems than those raised in intact marriages.

*Id.* at xxix. “Not one of the men or women from divorced families whose lives I report on in this book [25 years after their parents divorced] wanted their children to repeat their childhood experiences. . . . They envied friends who grew up in intact families.” *Id.* at xxxi. See also Wardle, *supra* note 69, at 89–100 (summarizing social science research documenting impact of divorce, cohabitation, family structure, and family stability upon juvenile delinquency).

85. Bruce C. Hafen, *Bridle Your Passions: How Modern Law Can Protect the Family*, in 63 VITAL SPEECHES OF THE DAY 633, 635 (1997) (alteration in original).

86. FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA’S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING, 2004, at 4 (2004) (emphasis added), available at [http://www.childstats.gov/pdf/ac2004/ac\\_04.pdf](http://www.childstats.gov/pdf/ac2004/ac_04.pdf).

87. 725 PARL. DEB., *supra* note 3, column 374.

bearing out of wedlock, and non-marital parenting are profound—in terms of both financial costs and social consequences.

#### IV. THE EXCLUSIVENESS OF MOTHERHOOD AND FATHERHOOD AND THE PROBLEMS OF PLANNED PARTIAL PARENTLESSNESS

##### A. *The Exclusiveness of Biological and Adoptive Motherhood and Fatherhood*

As used in this Article, the term “parent” means the biological or adoptive mother and father of a child, and “parental relationship” means a real, significant, associational relationship between the child and his biological or adoptive mother and father, both of whom have co-responsibility for the child and participate in the parental functions of providing support for, loving, caring for, teaching, and training their child. These definitions do not include as “parents” or as eligible for a “parental relationship” categories of adults who have some supervisory, familial, or quasi-familial relationship with minor children, such as non-marital cohabitants and others in the categories of “de-facto” parents and “parents by estoppel” approved by the American Law Institute’s *Principles of the Law of Family Dissolution*.<sup>88</sup> Nor do these terms as used herein include multiple same-gender adult caretakers (such as two fathers or multiple mothers as in adoption of a child by same-sex partners); fatherhood and motherhood are deemed to be not only interdependent roles but each is a singular, exclusive, co-equal legal status.

By historic practice, the exclusivity of fatherhood and motherhood has been the common (and remains the prevailing) understanding. The “rule of two,” traditionally has limited parenthood to two adults at any one time—one mother and one father.<sup>89</sup> For reasons relating to unique complexities and conflicts, the extension of full legal “parental” status to two or more men as “fathers” and two or more women as “mothers” should be rejected, and the use of Assisted Reproductive Technology should be carefully regulated to avoid undermining the important legal status and institution of parenthood. Multiple-fatherhood and multiple-motherhood should not be recognized for several reasons. First, those forms of parenting are still quite uncommon in the world; even in the Western world, the

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88. See AM. LAW. INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.03 (2002).

89. See Elizabeth Marquardt, Op-Ed., *When 3 Really is a Crowd*, N.Y. TIMES, July 16, 2007, at A13.

overwhelming practice and preference remains for exclusive one-mother/one-father parenthood. Second, multiple-fatherhood and multiple-motherhood involve significant conceptual differences and challenges for youth that distinguish it from exclusive dual-gender parenthood, and those novel relationships deserve thorough, separate examination and analysis. The arguments for such positions thus far (including those in the American Law Institute's *Principles of the Law of Family Dissolution*) have been superficial and ideological rather than thorough and consistent.

Modern ART such as in-vitro fertilization, sperm donation, and surrogacy, also present significant complications because they make it possible for multiple men to assert some claim to fatherhood and multiple women to assert some claim to motherhood. For example, more than a dozen men and women might assert plausible claims as potential legal parents in the following hypothetical involving an infertile husband and wife who divorce and remarry, and whose ART providers divorce and remarry while in the process of using common ART procedures.

Consider the number of potential parents in the following hypothetical: Husband and Wife ("H&W") want a child but they are both infertile. They contract with a married Sperm Donor ("SD") for SD to donate sperm, and they contract with Egg Donor ("ED") for ED to donate an egg. Both ED and SD are married to EDH1 and SDW1, respectively. H&W also contract with a Gestational Surrogate ("GS") to carry the embryo/fetus to birth. GS also is married to GSH1. After the contracts are signed and the child is conceived and implanted in the GS, all four couples involved (H&W, SD and SDW1, ED and EDH1, and GS and GSH1) divorce and all eight of the adults remarry other persons before the child is born. At the time of birth there are thirteen persons who seem to have plausible legal claims of parentage to the child. They are shown in *Table 3*.

TABLE 3.  
ART HYPOTHETICAL: THIRTEEN POTENTIAL PARENTS

At the time of birth there are thirteen persons who seem to have plausible legal claims of parentage to the child. They are:

H	Contract-intent claim—intended/initiating father
HW2	Wife of H at the time the child was born
W	Contract-intent claim—intended/initiating mother
WH2	Husband of W at the time the child was born
SD	Donor of the sperm that combined with egg and became child; genetic father
SDW1	Wife of SD at the time he donated sperm in which she, as his wife, claims spouse's interest in her husband's fertilized sperm and the child

TABLE 3 (CONTINUED)

EDH2	Husband of ED at the time child was born; claims under husband-at-time-of-birth rule
GS	Birth mother
GSH1	Husband of birth mother when she became pregnant; claims under 300-day rule
GSH2	Husband of birth mother when she gave birth; claims under husband-at-time-of-birth rule

It is unlikely but not inconceivable that the new husband of SDW1, and the new wives of EDH1 and GSH1, as spouses at the time of the child's birth of persons claiming a parental relationship with the child, might also be able to assert some parental claim under a version of, or analogy to, the spouse-at-time-of-birth rule.

Good parenting requires both teamwork and freedom. It requires enough teamwork to ensure not merely the support and back-up of another adult caregiver, but, more importantly, the benefits to the child of the contributions, skills, insights, and perspectives of both human genders—male and female. Ideally (and usually), it involves the dedicated parental attention, affection, training, and protection of the particular man and woman who are the biological parents of the child.<sup>90</sup>

Parenting also requires reasonable freedom and privacy; room to develop, exercise, and respect the still-learning parents' styles of loving, teaching, providing, modeling, and care-giving; and the opportunity for each parent to provide meaningful individual and individualized parenting—not merely parenting by commune or committee. Thus, the parenting dyad of one father and one mother has proven throughout history to be the most effective and beneficial structure for procreating and raising children. As Rutgers Professor Dr. David Popenoe noted when he summarized the social science research: "In my many years as a sociologist I have found few other bodies of evidence that lean so much in one direction as this one: On the whole two parents—a father and a mother—are better for a child than one parent."<sup>91</sup>

The supplemental support of other adults, such as grandparents, uncles, aunts, and stepparents is often valuable and helpful to both children and their parents, when it is subject to and supportive of the

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90. See David Popenoe, Op-Ed., *The Controversial Truth: Two Parent Families Are Better*, N.Y. TIMES, Dec. 26, 1992, at 21.

91. David Popenoe, *Life Without Father*, MENSIGHT, <http://mensightmagazine.com/articles/popenoe/nofathers.htm> (last visited Jan. 19, 2012).

There are, to be sure, many factors that complicate this simple proposition. We all know of a two-parent family that is truly dysfunctional—the proverbial family from hell. A child can certainly be raised to a fulfilling adulthood by one loving parent who is wholly devoted to the child's well-being. But such exceptions do not invalidate the rule.

*Id.* (paraphrasing similar statements from his book, DAVID POPENOE, *LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY* 8 (1996)). Likewise, University of Chicago demographer Linda Waite wrote: "On average, children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings. Children with married parents are also more likely to escape some of the more common disasters of late-twentieth-century childhood and adolescence." WAITE & GALLAGHER, *supra* note 84, at 124. See generally Linda J. Waite, *Does Marriage Matter?*, 32 *DEMOGRAPHY* 483, 497–98 (1995) (discounting the theory that selectivity, rather than marriage, is responsible for all the positive benefits of marriage).

decisions of the mother and/or father of the child. On the other hand, the experience of generations has shown that attempts at multiple parenting with two or more persons trying to fill the role of mother or father—whether due to intermeddling of overly-controlling (albeit often well-intentioned) grandparents, or to actions by aunts and uncles, stepparents, or the non-marital partners of a parent—usually result in creating increased conflict, inefficiencies, and parenting struggles that estrange the adults from each other and from the children, and that create negative risks of harm for the children and for their human development.<sup>92</sup>

There is growing recognition that depriving children of relationships with their parents is harmful to the children. In May 2011, the British Columbia Supreme Court declared invalid provincial legislation that protected the anonymity of sperm donors; the court also ordered preservation of existing records, and directed the province to draw up new legislation providing access by donor-gamete children consistent with the Charter of Rights.<sup>93</sup> Comparing the rights of donor-gamete children to the rights of adopted children to discover their biological parentage, the court declared: “I conclude, based on the whole of the evidence, that assisted reproduction using an anonymous gamete donor is harmful to the child, and it is not in the best interests of donor offspring.”<sup>94</sup>

The British Columbia decision cited an influential American study. Analyzing results of a survey of three groups of approximately 500 young adults—each conceived by sperm donors, adopted as infants, and raised by their biological parents—researchers

learned that, on average, young adults conceived through sperm donation are hurting more, are more confused, and feel more

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92. Cf. *Troxel v. Granville*, 530 U.S. 57, 71–72 (2000); *Sharon S. v. Super. Ct. of San Diego Cnty.*, 73 P.3d 554, 585–87 (Cal. 2003) (Brown, J., dissenting); see also Kay Pasley, *Relationships Across Generations: The Complications of Divorce and Remarriage*, FLYING SOLO, <http://www.lifemanagement.com/fsa11.1.1030> (last visited Jan. 19, 2012); Anthony Santiago, *How Important Is the Role of Grandparents?*, WEBARTICLES, [http://www.webarticles.com/How-Important-Is-The-Role-Of-Grandparents/a3310\\_1](http://www.webarticles.com/How-Important-Is-The-Role-Of-Grandparents/a3310_1) (last visited Jan. 19, 2012) (discussing “interfering grandparents”); Trisha Thompson, *Reality Check: Meddling Mom*, PARENTING, <http://www.parenting.com/article/reality-check-meddling-mom> (last visited Jan. 19, 2012); *The Law Report: Grandparents and the Family Law System* (ABC television broadcast Apr. 5, 2005).

93. *Pratten v. British Columbia (Attorney General)* (2011), 2011 B.C.S.C. 656 (Can. B.C. S.C.).

94. *Id.* ¶ 215; see also *Sperm Donor Anonymity Overturned by B.C. Court*, CBC NEWS (May 19, 2011, 7:45 PM), <http://www.cbc.ca/news/canada/british-columbia/story/2011/05/19/bc-sperm-donor-ruling.html?ref=rss>.

isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse.<sup>95</sup>

#### About one-half of the sperm-donor children

say they have feared being attracted to or having sexual relations with someone to whom they are unknowingly related. Approximately two-thirds affirm the right of donor offspring to know the truth about their origins. And about half of donor offspring have concerns about or serious objections to donor conception itself, even when parents tell their children the truth.<sup>96</sup>

Young adults conceived through sperm donation “experience profound struggles with their origins and identities,” and their family relationships “are more often characterized by confusion, tension, and loss.”<sup>97</sup> They also are “more likely to have experienced divorce or multiple family transitions in their families of origin,” and they also “are significantly more likely than those raised by their biological parents to struggle with serious, negative outcomes such as delinquency, substance abuse, and depression, even when controlling for socio-economic and other factors.”<sup>98</sup>

[E]ven with controls, the offspring of single mothers who used a sperm donor to conceive are almost 2.5 times as likely as those raised by biological parents to report problems with the law before age 25. Similarly, even with controls, the offspring of single mothers who used a sperm donor to conceive are more than 2.5 times as likely as those raise [sic] by biological parents to report struggling with substance abuse.<sup>99</sup>

In fact, the researchers found that “[a]bout half of donor offspring have concerns about or serious objections to donor conception itself, even when parents tell the children the truth about their origins.”<sup>100</sup> Thus, elective deprivation of children of knowledge of and association

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95. ELIZABETH MARQUARDT ET AL., INST. FOR AM. VALUES, MY DADDY’S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 5 (2010).

96. *Id.* at 6.

97. *Id.* at 7.

98. *Id.* at 8–9.

99. *Id.* at 11.

100. *Id.* at 12.

with their biological parents raises grave concerns for the welfare of children.

Ironically, however, some American courts have begun to embrace the notion of plural fatherhood and/or motherhood. The California Supreme Court in *Sharon S. v. Superior Court of San Diego County*,<sup>101</sup> held that a woman legally should be allowed to adopt as a second mother the biological child of another woman who has sole custody of her own child, who is fit to parent, and who opposes the adoption by her former live-in partner (but who had earlier signed and not timely withdrawn her consent to the adoption).<sup>102</sup> The four-judge majority found that the number of parents was not germane to adoption and held that a biological parent may allow her child to be adopted by other co-parents, not limited to a total of two parents.<sup>103</sup> Three judges disagreed. Two dissenters argued that only having two parents, not more, is best for children, and that California statutory and case law contemplate a child having not more than two parents.<sup>104</sup> The third dissenter, Judge Janice Rogers Brown (now on the U.S. Court of Appeals for the D.C. Circuit) criticized the majority for “trivializ[ing] family bonds” and “import[ing] the principles of the marketplace into the realm of home and family.”<sup>105</sup> She read the adoption statutes as authorizing adoption only when “the birth parent and adopting parent have formally joined together to forge a common future.”<sup>106</sup> She reminded the majority that all of “[s]ociety has a considerable stake in the health and stability of families, . . . [which] provide the seed beds of civic virtue required for citizenship in a self-governing community,”<sup>107</sup> and she refuted what she called the majority’s “the-more-parents-the-merrier view of parenthood.”<sup>108</sup> “The law permits single individuals to adopt a child on their own because one parent is better than none. It does not follow, however, that two unrelated parents are better than one.”<sup>109</sup> Single parent

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101. 73 P.3d 554 (Cal. 2003). For a more detailed review and critique of this case, see Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169 (2005).

102. *Sharon S.*, 73 P.3d at 554. The error of this decision is exacerbated by the fact that the guardian ad litem or attorney for the child opposed the adoption, and the woman petitioning to adopt had a domestic violence restraining order against her to protect the biological mother.

103. *Id.* at 561.

104. *Id.* at 578–79.

105. *Id.* at 586.

106. *Id.* at 585.

107. *Id.* at 586.

108. *Id.*

109. *Id.* at 587.

adoption presents a “choice . . . between adoption and foster care,” whereas “if the birth parent has a relationship with a second parent, and then a third, and then a fourth, the child may be worse off than if the birth parent had simply raised the child alone.”<sup>110</sup> That dissenting opinion seemed to grasp more completely and analyze more insightfully the scope of the issue and the value to children of the dual-gender dyadic parenting than did the majority opinion.

Under the concept of exclusive motherhood and fatherhood, two adults of the same gender would not both have full legal parenthood rights. The child legally should have only one father and one mother with full co-parental rights. However, if the same-sex partners are in a demonstrably stable, legally-committed relationship, and the best interests of the child are clearly shown to be advanced by the creation of a legal relationship, a legal relationship should be recognized, but it should not be deemed a parental relationship that is equivalent in legal status, benefits, and responsibilities to motherhood or fatherhood. For the reasons noted above (relating to the benefits to children of dual-gender parenting) and for public policy reasons relating to bright lines protecting the “gold standard” of dual-gender responsible procreation and parenting, the same-sex partner could be given a legal status similar to that of a grandfather or grandmother, or an uncle or aunt, or a stepparent, or another relative with some degree of secondary legal guardianship. That would provide the same-sex partner with recognition of a legal relationship with and to the child, which would provide protection for both in case of death or disability of the parent (biological or adoptive), but would also preserve the clear priority and primary responsibility of the biological (or adoptive) parent, and would establish the secondary and supportive legal relationship, rights, responsibilities, and duties of the partner under the control and direction of the biological or adoptive parent. In cases in which the same-sex partners later separate, this arrangement also would reduce the tendency for divisive litigation over custody and visitation by establishing the parental priority of the biological or adoptive parent in the absence of evidence of actual or likely harm to the child. The law would not prohibit or decline to recognize the *relationship* between the child and the non-biological second parent (second mom or dad), but would give it a different, customized, supportive bundle of rights and responsibilities, subordinate to and supplemental of those held by the biological/legal mother or father (parent of the same gender).

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110. *Id.*

B. *The Growing Phenomenon and Risks of Planned Partial Parentlessness*

Planned partial parentlessness is a growing phenomenon in many affluent countries.<sup>111</sup> There are three principal forms of this phenomenon: (1) deliberate conception by a woman of a child outside of marriage which she intends to raise as a single mother,<sup>112</sup> (2) use of ART by both single men and single women to create a child that they intend to raise alone, and (3) use of both ART and adoption by same-sex partners (both gay and lesbian) to create or obtain a child which they intend to raise without a parent of the opposite sex.<sup>113</sup> Children in all three family forms are intentionally deprived of either a father or a mother.

Use of assisted procreation by same-sex couples is experiencing a mini-boom,<sup>114</sup> and the most recent calculations using reliable Census data indicate that between 300,000 and 400,000 children are being raised by about 160,000 same-sex couples.<sup>115</sup> Adoption by same-sex parents is not only increasing,<sup>116</sup> but is a subject of ongoing legal policy debate and controversy.<sup>117</sup> The deprivation and disadvantage

111. Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD. & FAM. ADVOC. 323, 324 (2005).

112. This is to be distinguished from the phenomenon of accidental pregnancy with resulting childbirth to an unmarried woman. In our sex-saturated society, sexual relations may occur on the spur of the moment, or planned by persons using contraceptives to avoid pregnancy and both result in unplanned pregnancies, and often result in unintended single-parenthood. That is not the social problem discussed in this section.

113. Adoption of parentless children by unmarried adults is not considered in this section because the children are already alive, and not created or intended to be raised without a parent of the opposite-sex, but are adopted to provide for the needs of the child. That is much like a widow or widower raising a child without the other parent.

114. See Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 15 (2009) ("In the United States 27.5% of same-sex couple households are raising children . . . . Thirty-five percent of lesbians aged eighteen to forty-four have given birth . . . . Sixteen percent of gay men have a biological or adopted child living with them . . . ."); Nadine A. Gartner, *Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 LAW & SEXUALITY REV. 45, 48 (2007) (recognizing the "surge of lesbian motherhood" as part of the "gayby boom").

115. Lynn D. Wardle, *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J.L. & FAM. STUD. 59, 66 (2004).

116. *Id.* at 66–67 (estimating based on 2000 Census records that about 6,350 adopted children of same-sex couples among the 57,693 adopted children living with unmarried partners).

117. See Paul Royal, *The Right to Say "I Do": The Legality of Same-Sex Marriage*, 20 LAW & PSYCHOL. REV. 245, 255 (1996) ("[T]here is great controversy surrounding [the issue of same-sex marriage]."); Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 4 J.L. & FAM. STUD. 345, 345 (2003); Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV.

experienced by the child, and the impact of co-parental loss upon future generations is not insignificant.

This kind of parentlessness results from

deliberate decisions made by at least one parent, sometimes both parents, to separate the child from the consistent, daily, parental influence of the other parent, to make one parent an absent, or infrequent parent, in some respects it is an even more poignant form of parentlessness than the parentlessness of war orphans, AIDS orphans, and the orphans left by famine [and pestilence]. It connotes a form of direct parental rejection by the absent parent, or indirect parental rejection by the excluding parent (whose choice deprives the child without his or her consent of the [ongoing, regular] parental [influence] of the other parent). Thus, social-choice parentlessness may wound and undermine a child more deeply than the terrible forms of involuntary parentlessness that plague third-world countries.<sup>118</sup>

Deliberate choice of partial parentlessness reflects a prioritizing of adult autonomy over responsible parenting. The implications are as potentially staggering for society as they are potentially tragic for the children involved.<sup>119</sup>

Thus, the deprivation of parental association with both mother and father is associated with significant risks and disadvantages for children. As a matter of developmental reality, children have a practical need for, deserve, and have a moral right to be raised by, and enjoy ongoing parental association with both their mother and their father.

Among the health risks for children of parental absence is the risk of higher incidence of homosexual behavior. Absence or separation from a parent appears to correlate to some extent with greater likelihood that children will be attracted to homosexual identity and behavior.<sup>120</sup>

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2038, 2052 (1996) (“[J]udges will probably hesitate to introduce and apply [choice-of-law regimes] in an area as controversial as same-sex marriages.”); Craig A. Sloane, Note, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT’L & COMP. L. 189, 190 (1997) (“The potential within the institution of marriage to change and evolve has, in recent years, brought controversial changes to the legal landscape.”); see also MARK STRASSER, SAME-SEX UNIONS ACROSS THE UNITED STATES 12–15 (2011) (noting conflict and legislative battles over adoptions by same-sex partners).

118. Wardle, *supra* note 111, at 334.

119. See *id.*

120. See JEFFREY SATINOVER, *HOMOSEXUALITY AND THE POLITICS OF TRUTH* 104–08 (1996). One study found children separated from one or both parents were overrepresented by a factor of 1.5 to 2.0 in the population of youth being treated for gender disturbances. *Id.* at 108. See also

Thus, it could be more than a mere coincidence that the emergence of the gay, lesbian, and bisexual lifestyles, the lesbian, gay, bisexual, and transgender (“LGBT”) rights movement, and the push for legalization of same-sex marriages in the 1990s and the first decade of the twenty-first century occurred at the time of the coming of age of the first generation of children of no-fault divorce in the United States.<sup>121</sup>

Children raised by same-sex couples have even higher rates of engaging in homosexual behaviors.<sup>122</sup> In addition to the influence of parental absence (partial-parentless) that they share in common with children born out-of-wedlock and children of divorce, they also are exposed to the influence of parental sexual behavior examples. It is well-known that children tend to imitate their parents;<sup>123</sup> even renowned advocates of gay and lesbian parenting Judith Stacey and Timothy Biblarz concluded that “it is difficult to conceive of a credible theory of sexual development that would not expect the adult children of lesbian parents to display a somewhat higher incidence of homoerotic desire, behavior, and identity than children of heterosexual parents.”<sup>124</sup>

### C. *Special Health Risks for Adolescents Who Engage in*

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A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J.L. & FAM. STUD. 213, 218–19 (2004).

121. See generally Lynn D. Wardle, *Legal Claims for Same Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 762–66 (1998) [hereinafter Wardle, *Legal Claims*] (discussing the liberalization of divorce and its potential correlation with the recent increase in the open expression of homosexual coupling and claims for same-sex marriage). No-fault divorce reforms were adopted *de jure* or *de facto* or became effective in nearly all states in the 1970s, followed by a significant rise in the divorce rate. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 118–19. The gay-rights push began in 1990s, when the children of those early no-fault divorces became young adults. See Wardle, *Legal Claims, supra*, at 762.

122. See Wardle, *supra* note 101, at 173–75; Wardle, *supra* note 111, at 366; Wardle, *supra* note 115, at 98; Wardle, *supra* note 117, at 361–67; Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners*, 63 ARK. L. REV. 31, 78–89 (2010); Lynn D. Wardle, *Considering the Impacts on Children and Society of “Lesbigay” Parenting*, 23 QUINNIPIAC L. REV. 541, 558–66 (2004) [hereinafter Wardle, *Considering the Impacts*]; Lynn D. Wardle, *Fighting with Phantoms: A Reply to Warring with Wardle*, 1998 U. ILL. L. REV. 629, 636–40; Lynn D. Wardle, *The “Inner Lives” of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 525 (2005); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852–57 [hereinafter Wardle, *Potential Impact*]; see also Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561, 594–97 (2005).

123. See, e.g., Wardle, *Considering the Impacts, supra* note 122, at 561–63; Wardle, *Potential Impact, supra* note 122, at 853–57.

124. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 163 (2001).

*Homosexual Behaviors*

Youth who engage in homosexual behavior are exposed to substantial health risks in much higher rates than teens who do not engage in homosexual behaviors. Many studies that support childrearing by same-sex couples agree that children raised by same-sex parents are more likely to develop homosexual identification, experience early and more frequent sexual behavior, and engage in more high-risk sexual behaviors.<sup>125</sup> In some studies, it appears that children raised by same-sex couples are more likely than children raised by heterosexual parents to be drawn to a homosexual self-identity, homo-erotic attraction, and earlier, riskier sexual behavior. The leading pro-lesbigay parenting study of Golombok and Tasker reveals, in the words of one reviewer, that “there is a statistically significant difference between [children with heterosexual parents and children with homosexual parents] when one compares ratings of same sex attraction.”<sup>126</sup> Other “no-difference” studies also have produced data indicating some significant differences between children raised by lesbian mothers versus heterosexual mothers in their family relationships, gender identity, and gender behavior.<sup>127</sup>

The health risks of engaging in homosexual behaviors are well known. The risks to adults of contracting HIV/AIDS and other sexually-transmitted diseases are well known, and youth who engage in homosexual conduct encounter and expose others to those serious public health risks, also. For example, at least fifteen health afflictions besides HIV/AIDS are *common* in the gay community that are uncommon for heterosexual men.<sup>128</sup> One study, taking into account that throughout the 1970s and early 1980s homosexual men were known to be at high risk of acquiring sexually transmitted diseases (“STDs”) and that in the 1980 Annual Summary Report from the

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125. See, e.g., Wardle, *Considering the Impacts*, *supra* note 122, at 558–60; Wardle, *Potential Impact*, *supra* note 122, at 853–58.

126. Warren Throckmorton, *Do Parents Influence the Sexual Preference of Children?*, DRTHROCKMORTON.COM (Feb. 19, 2004), <http://www.drthrockmorton.com/article.asp?id=39>; see also Philip A. Belcastro et al., *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 J. DIVORCE & REMARRIAGE 105, 119 (1993) (discussing small study that reports significant sexual orientation difference); Paul Cameron & Kirk Cameron, *Children of Homosexual Parents Report Childhood Difficulties*, 90 PSYCHOL. REP. 71 (2002) (examining narratives of children raised by lesbian parents, twenty-seven percent of older daughters and twenty percent of older sons described themselves as homosexual or bisexual).

127. Belcastro et al., *supra* note 126, at 108, 114.

128. THOMAS E. SCHMIDT, STRAIGHT & NARROW?: COMPASSION & CLARITY IN THE HOMOSEXUALITY DEBATE 116 (1995).

Centers for Disease Control over half of the reported cases of infectious syphilis occurred in homosexual men, gives this succinct summary of the situation:

Gonorrhea, hepatitis A and B, cytomegalovirus (CMV) infection, and anorectal warts also occur more commonly in homosexual men than in heterosexual men or women. Intestinal or rectal infections with *Shigella* species, *Entamoeba histolytica*, *Giardia lamblia*, and other enteric pathogens are hyperendemic among homosexual men in many communities.<sup>129</sup>

Since the discovery of AIDS, the rate of many of these STDs has declined. Homosexual men reported fewer partners and less frequent sexual exposure for a time. Despite these behavior changes and increased counseling about safer sexual practices, STDs remain a major health problem among homosexual men, and, according to the CDC, "Sexually Transmitted Diseases (STDs) have been increasing among gay and bisexual men."<sup>130</sup>

Additionally, youth who engage in homosexual behaviors face some very severe additional risks that can stunt or distort their development as stable, responsible, healthy, human beings. Three scholars who reviewed the literature and did their own study reported in 2007:

Recent studies have shown that youth who report same-sex or both-sex romantic attractions or sexual behavior (sexual minority youth) are at elevated risk for negative health outcomes, such as high rates of suicide attempts, victimization in school violence, drug and alcohol abuse, early onset of sexual behavior, eating disorders, and teenage pregnancy, compared to heterosexual peers.<sup>131</sup>

Other recent studies of youth who engage in gay, lesbian, and bisexual behaviors indicate that they are at heightened risk for

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129. Anne Rompalo & H. Hunter Handsfield, *Overview of Sexually Transmitted Diseases in Homosexual Men*, in *THE ACQUIRED IMMUNE DEFICIENCY SYNDROME AND INFECTIONS OF HOMOSEXUAL MEN 3* (Pearl Ma & Donald Armstrong eds., 1984).

130. Ctrs. for Disease Control & Prevention, Gay and Bisexual Men's Health, *Sexually Transmitted Diseases*, <http://www.cdc.gov/msmhealth/STD.htm> (last updated Sept. 23, 2010); see also Lynn D. Wardle, *The Morality of Marriage and the Transformative Power of Inclusion*, in *WHAT'S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY?* 207, 221–25 (Lynn D. Wardle ed., 2008) (reviewing some promiscuous gay lifestyle health risks).

131. Martha W. Moon et al., *Risk Comparison Among Youth Who Report Sex with Same-Sex Versus Both-Sex Partners*, 38 *YOUTH & SOC'Y* 267, 267 (2007).

increased substance abuse, earlier sexual activity, more dangerous sexual practices, multiple sexual partners, aggressive behavior, and suicide ideation compared to comparable heterosexual youth.<sup>132</sup> The earlier youth identify as being homosexual the more likely they were to have experienced negative health outcomes.<sup>133</sup> One recent study reported that gay, lesbian, and bisexual youth were, on average, 190% more likely to engage in substance abuse than heterosexual youth; the risk was 340% higher for bisexual youth, 400% higher for females.<sup>134</sup> Substance abuse is associated with increased risks of dangerous sexual practices.<sup>135</sup> Recent studies have confirmed that male youth who engage in sex with other males engage in sex earlier and are more likely to have multiple sexual partners and more dangerous sexual habits than heterosexual boys.<sup>136</sup> A 2011 CDC report based on surveys of over 150,000 U.S. high school students found that “[g]ay and bisexual high school students are more likely than their heterosexual classmates to smoke, drink alcohol or do other risky things.”<sup>137</sup> The gay and bisexual teens attempted suicide more often, were more than twice as likely as other teens to smoke, and three to four times more likely to throw up or use laxatives to be thin.<sup>138</sup>

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132. See *infra* notes 133–142.

133. Mark S. Friedman et al., *Gay-Related Development, Early Abuse and Adult Health Outcomes Among Gay Males*, 12 AIDS BEHAV. 891, 891 (2008).

134. Michael P. Marshall et al., *Sexual Orientation and Adolescent Substance Use: A Meta-Analysis and Methodological Review*, 103 ADDICTION 546, 546 (2008). Another study found the risk of young men aged 13–21 who have sex with men was twice as high as for the heterosexual population. M.G. Dudley et al., *Correlates of High-Risk Sexual Behavior Among Young Men Who Have Sex with Men*, 16 AIDS EDUC. & PREVENTION 328, 328–29 (2004). See also Robert H. DuRant et al., *Victimization, Use of Violence, and Drug Use at School Among Male Adolescents Who Engage in Same-Sex Sexual Behavior*, 133 J. PEDIATRICS 113, 113 (1998) (number of male sexual partners for young males is a predictor of increased drug use); Anne H. Faulkner & Kevin Cranston, *Correlates of Same-Sex Sexual Behavior in a Random Sample of Massachusetts High School Students*, 88 AM. J. PUB. HEALTH 262, 263 (1998) (reporting that homosexual youth have increased risk of alcohol and drug use).

135. Dudley et al., *supra* note 134, at 329.

136. *Id.* A recent study in Thailand corroborates this finding. It reports that 15-to-21-year-old vocational students who engaged in homosexual or bisexual activities had an earlier mean age at sexual debut (14.7 years) and a higher mean number of lifetime sexual partners (7.9) than did heterosexual males (16.8 years and 5.8 partners, respectively). Frits van Griensven et al., *The Prevalence of Bisexual and Homosexual Orientation and Related Health Risks Among Adolescents in Northern Thailand*, 33 ARCHIVES SEXUAL BEHAV. 137, 137 (2004). Both homosexual and bisexual males (25.9%) and females (32.2%) were sexually coerced more often than were heterosexual males (4.6%) and females (19.6%). *Id.*

137. Mike Stobbe, *CDC Study: Gay, Bisexual Teens Do Riskier Things*, ABCNEWS (June 6, 2011), <http://abcnews.go.com/Health/wireStory?id=13771753>.

138. *Id.*

Compared to boys with opposite-sex-only partners, boys with same-sex-only partners were at higher risk for emotional problems,<sup>139</sup> including depression,<sup>140</sup> and suicidal behavior.<sup>141</sup> The 2011 CDC report based on extensive study of U.S. high school teens found that gay and bisexual students were three-to-five times more likely to have attempted suicide in the previous year than other teens.<sup>142</sup> Thus, homosexual behavior is associated with a host of serious health and welfare issues for youth.

#### V. CHILDREN'S LEGAL RIGHT TO A PARENTAL RELATIONSHIP WITH BOTH PARENTS

##### A. *The Child's Fundamental Right to a Parental Relationship with Both Parents*

The principle that children have a legally-cognizable right to a parental relationship is embodied in or underlies many international treaties and conventions. For example, seventy-six nations, including the United States, have ratified, adopted, or acceded to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.<sup>143</sup> The Abduction Convention was designed to deter or remedy the wrongful removal by one parent of children from the place where they have resided with the other parent.<sup>144</sup> A parent who has custody of a child who is removed from that jurisdiction is entitled to the return of the child.<sup>145</sup>

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139. J. Richard Udry & Kim Chantala, *Risk Assessment of Adolescents with Same-Sex Relationships*, 31 J. ADOLESCENT HEALTH 84, 84 (2002).

140. van Griensven et al., *supra* note 136.

141. Robert Garofalo et al., *Sexual Orientation and Risk of Suicide Attempts Among a Representative Sample of Youth*, 153 ARCHIVE PEDIATRIC ADOLESCENT MED. 487, 487 (1999); see also DuRant et al., *supra* note 134; Faulkner & Cranston, *supra* note 134, at 264.

142. Stobbe, *supra* note 137.

143. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89; see also U.S. DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2011), available at <http://travel.state.gov/pdf/2011HagueComplianceReport.pdf>. As of March 26, 2011, twenty-four nations had ratified the Convention and another fifty-two countries had acceded to the Convention. HAGUE CONFERENCE ON PRIVATE INT'L LAW, STATUS TABLE tbl.28 (2011), available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24).

144. The federal implementing legislation governs proceedings in the United States for return of the child in accordance with a foreign custody decree of any signatory country. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (2006). See, e.g., Deborah M. Zawadzki, Note, *The Role of Courts in Preventing International Child Abduction*, 13 CARDOZO J. INT'L & COMP. L. 353, 353 n.1 (2005).

145. See, e.g., *Abbott v. Abbott*, 130 S. Ct. 1983 (2010).

The Universal Declaration of Human Rights explicitly protects family, which undeniably includes parent-child relations. In language that has been repeated and expanded in many other basic human rights documents, it declares: "The family is the *natural* and *fundamental* group unit of society and is *entitled to protection* by society and the State."<sup>146</sup>

The Convention on the Rights of the Child ("CRC") likewise embodies the principle that children have a right to a parental relationship with both of their parents. Article 7 specifically recognizes the right of every child, "as far as possible, . . . to know and be cared for by his or her parents."<sup>147</sup> Article 8 of the Convention further protects "the right of the child to preserve his or her identity, . . . including family relations."<sup>148</sup> Article 16 of the CRC also guarantees to children "the right to the protection of the law" against any "arbitrary or unlawful interference with his or her privacy, family, [or] home."<sup>149</sup>

For European nations, the European Convention for the Protection of Human Rights and Fundamental Freedoms also gives important protection to the right of children to enjoy a parental relationship with their parents. Article 8 of that convention provides explicit protection of "private . . . family life,"<sup>150</sup> which has been interpreted to include the right of children to know their family origins and identity.<sup>151</sup>

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146. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), art. 16 (Dec. 10, 1948) (emphasis added).

147. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess. Supp. No. 49, U.N. Doc. A/44/49, art. 7 (Nov. 20, 1989). Of course, the United States, one of the few nations to treat such treaties as "hard law" as distinct from merely aspiration and hortatory, has not acceded to the CRC. See *Status Table: Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTIONS, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last updated Jan. 23, 2012) (listing that the United States has not acceded to the CRC).

148. G.A. Res. 44/25, *supra* note 147, art. 8.

149. *Id.* art. 16.

150. Convention for the Protection of Human Rights and Fundamental Freedoms, § 1 art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

151. See Jacqueline A. Laing & David S. Oderberg, *Artificial Reproduction, the 'Welfare Principle', and the Common Good*, 13 MED. L. REV. 328, 339 n.28 (2005); but see David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1135 (2003); Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 INT'L J.L. POL'Y & FAM. 147, 159-60 (2004) (stating "it is unclear what the child's right to family life implies"). A similar proscription of arbitrary or unlawful interference with privacy, family, or home is contained in Article 17 of the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966). One hundred forty-eight nations, including the United States, have acceded to the International Covenant on Civil and Political Rights ("ICCPR"). See *Status Table: International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY

Family and parent-child relations also are given special constitutional protection in many of the nations of the world. Generally, at least 156 (of the 192) sovereign nations today have constitutional provisions that protect in some form families and family relations.<sup>152</sup> Many incorporate specifically familial relationship terms such as “mother,” “child,” “motherhood,” “childhood,” and extend protections not just to individuals as a matter of anonymous individual rights, but to the relationships enjoyed by the parties to those relations. For example, the Afghan Constitution provides: “The state adopts [as] necessary measures to ensure [the] physical and psychological well being of [the] family, especially of [the] child and mother, upbringing of children . . . .”<sup>153</sup> The Algerian Constitution ensures “the protection of the family, the youth and childhood.”<sup>154</sup> The Constitution of Armenia provides: “Parents shall have both the right and the obligation to take care of the education, health of as well as the full and harmonious development of their children.”<sup>155</sup> The Constitution of Azerbaijan provides: “Parents shall have both the right and the obligation to take care of Children and to raise them.”<sup>156</sup> The Constitution of Belarus provides: “Parents or persons in loco parentis are entitled and required to raise their children and to take care of their health, development, and education.”<sup>157</sup> Bolivia’s Constitution specifically recognizes a right to reunification: “The State shall attend in a positive, humanitarian, and efficient manner to requests for family reunification presented by parents or children who are given asylum or refuge.”<sup>158</sup> Brazil extends special protection to the family and provides, *inter alia*, that: “The community formed by either parent and their descendants is also considered as a family entity.”<sup>159</sup> The Burkina Faso Constitution provides that “parents have

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COLLECTIONS, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last updated Jan. 23, 2012) (listing the ratification status of the ICCPR as of January 23, 2012). See generally D. Marianne Blair, *The Influence of International Conventions on Municipal Adoption Law: The Disclosure Debate*, 96 AM. SOC’Y INT’L L. 193, 195 (2002) (acknowledging the recognition and importance that European courts have placed on the right to identifying information).

152. See Lynn D. Wardle, *Fundamentals of the Jurisprudence of the Family: Building on Rock or Sand?*, 1 INT’L J. JURISPRUDENCE FAM. 223, app. 1 (2010).

153. 2004 CONST. art. 54 (Afg.) (unofficial translation).

154. Art. 63, CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE [CONSTITUTION] (Alg.).

155. 1995 CONST. art. 36 (Arm.) (unofficial translation).

156. Art. 34, AZERBAIJAN REPUBLIKASI KONSTITUSIYA [CONSTITUTION] (Azer).

157. 2004 CONST art. 32 (Belr.) (unofficial translation).

158. 2008 CONST. art. 29 (Bol.).

159. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 226 (Braz.).

the natural right and the duty to bring up and to educate their children.”<sup>160</sup> The Central African Republic Constitution provides: “Parents have the natural right and primordial duty to raise and educate their children with the end to develop in them good physical, intellectual and moral aptitudes.”<sup>161</sup> The Constitution of Ecuador provides: “The State shall protect mothers, fathers and those who are the heads of family, in the exercise of their obligations. . . . [It] shall promote the joint responsibility of both mother and father and shall monitor fulfillment of the mutual duties and rights between mothers, fathers, and children.”<sup>162</sup> The Basic Law of Germany provides:

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty.

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.<sup>163</sup>

These are just a few examples from nations around the world of explicit constitutional protection for the relationship between parents and children. Ironically, lifestyles in many of those same countries, including child-bearing out-of-wedlock, permissive (on-demand) divorce, and use of adoption and ART by single adults or same-sex couples deprives children, at least, of the parent-child relationship which the constitutional provisions are intended to insulate and protect.

*B. Protection of a Child’s Relationship with Both Parents Is Deeply Imbedded in American Legal Policy*

While there may not be a positive constitutional right for children to have a meaningful parental relationship with both of their parents, that certainly has been and is a strong policy in both international and American family law, and it is based on strong, clear moral

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160. 1991 CONST. art. 23 (Burk. Faso).

161. 1994 CONST. art. 6 (Cent. Afr. Rep.).

162. 2008 CONST. art. 69 (Ecuador).

163. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 1 at art. 6 (Ger.).

principles.<sup>164</sup> In American law, unilateral efforts by one parent to deprive a child of a relationship with the other parent are clearly against public policy of the national government and of every American state. Concern about parents depriving children of a relationship with the other parent was a major part of the motivation behind enactment of the federal Parental Kidnapping Prevention Act of 1980 (“PKPA”)<sup>165</sup> and the Uniform Child Custody Jurisdiction (and Enforcement) Act and subsequent versions adopted in one form or another by every state.<sup>166</sup> The federal PKPA denies interstate full-faith-and-credit recognition to custody decrees obtained by a parent who has abducted his or her child to another state.<sup>167</sup>

Likewise, interference by the custodial parent with visitation by the noncustodial parent, or vice versa, is taken very seriously. For example, the attempt by one parent to alienate the child from the other parent provokes very forceful responses from the courts, including modifying and changing custody.<sup>168</sup> Likewise, physical and other kinds of interference with the child’s relationship with the other

164. See Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 413 (2006).

165. 28 U.S.C. § 1738A (2006).

166. UNIFORM LAW COMMISSION, *Legislative Fact Sheet—Child Custody Jurisdiction and Enforcement Act*, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Jan. 14, 2012). By 1981 the Uniform Child Custody Jurisdiction Act (“UCCJA”) was in effect in every state. UNIFORM LAW COMMISSION, *Child Custody Jurisdiction and Enforcement Act Summary*, <http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Jan. 24, 2012). It was recently updated, revised, and renamed the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), which is currently in effect in fifty-two jurisdictions.

167. 28 U.S.C. § 1738A.

168. See, e.g., *Sharp v. Keeler*, 256 S.W.3d 528 (Ark. Ct. App. 2007) (affirming change of custody due to mother’s efforts to alienate child from father); *Doe v. Doe*, 239 P.3d 774 (Idaho 2010) (granting father’s motion to change custody to give him sole custody due to mother’s denial of visitation and other efforts to alienate son from father); *Noland-Vance v. Vance*, 321 S.W.3d 398, 419 (Mo. Ct. App. 2010) (“Alienation of a child’s affection and interference with visitation are grounds for a major custody change . . .”) (omission in original) (quoting *Ellis v. Ellis*, 747 S.W.2d 711, 715 (Mo. Ct. App. 1988)); Daniel M. Fraidstern, *Croll v. Croll and the Unfortunate Irony of the Hague Convention on the Civil Aspects of International Child Abduction: Parents with “Rights of Access” Get No Rights to Access Courts*, 30 BROOK. J. INT’L L. 641, 678 (2005) (“[I]t is enough [for contempt] to engage in behavior that undermines or alienates a child’s relationship with his or her noncustodial parent.”); see Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers’ Rights*, 40 FAM. L. Q. 315 (2006); Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173 (2008); see also Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10 (2010) (reviewing Canadian cases).

parent has been grounds for courts to modify custody, changing custody from the interfering parent to the parent who will not interfere with the right of the child to have a parental relationship with the non-custodial parent.<sup>169</sup> Courts can and sometimes do impose contempt sanctions for interference with visitation or custody.<sup>170</sup> Various tort claims also have been recognized to provide relief against one parent interfering with the other parent's parent-child relationship.<sup>171</sup> For more than forty years, the *Restatement (Second) of Torts* has recognized the tort of interference with parent-child relations due to improper removal or withholding.<sup>172</sup>

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169. In many American states, interference with visitation is grounds for such a modification of custody. Edward B. Borris, *Interference with Parental Rights of Noncustodial Parent as Grounds for Modification of Child Custody*, 8 DIVORCE LITIG. 1, 1-2 (1997) (reviewing cases and finding that most states consider interference with visitation appropriate grounds for a change in primary custody); see, e.g., IOWA CODE ANN. § 598.41(1)(c) (West 2001) (“[T]he denial by one parent of the child’s opportunity for maximum continuing contact with the other parent, without just cause, [shall be considered] a significant factor in determining the proper custody arrangement.”); KAN. STAT. ANN. § 60-1616(e) (2005) (“Repeated unreasonable denial of or interference with visitation rights . . . may be considered a material change of circumstances which justifies modification of a prior order of legal custody . . .”); Hogge v. Hogge, 649 P.2d 51, 51-55 (Utah 1982) (reasoning that the change of circumstances test must be met before considering the best interest of the child in modifying the custody arrangement).

170. See, e.g., MO. ANN. STAT. § 452.400.7 (West 2003) (providing for application of court’s powers of contempt when a parent interferes with custody or visitation); Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. PITT. L. REV. 835, 836 (2007) (discussing that the court will fashion a variety of contempt remedies such as fines or jail sentences for violation of child custody orders); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 981 n.300 (2005) (“Sanctions imposed to punish violation of a family court’s visitation orders can include fines, forfeiture of child support, and sometimes incarceration.”) (citing JEFFERY M. LEVING, FATHERS’ RIGHTS: HARD-HITTING AND FAIR ADVICE FOR EVERY FATHER INVOLVED IN A CUSTODY DISPUTE 7 (1997)).

171. See, e.g., Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 508 (2000); Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIMONIAL LAW. 271, 275, 278 (1994); Celia Guzaldo Gamrath, *Visitation Abuse v. Unlawful Visitation Interference—Is There Comfort for Noncustodial Parents?*, 91 ILL. B.J. 450, 450 (2003); William L. Hill, *Tort Recovery for Intentional Interference with Visitation Rights: A Necessary Alternative*, 32 U. LOUISVILLE J. FAM. L. 657, 657-58 (1993-1994); Eve Kahao Gonzalez, Note, *Intentional Interference with Visitation Rights: Is This a Tort?*; Owens v. Owens, 47 LA. L. REV. 217, 221-23 (1986-1987); Jesse E. Weisshaar, Note, *Does Loss of Custody of a Child Resulting from Attorney Negligence Cause Damage?*, 70 MO. L. REV. 1333, 1351 (2005); Recent Case, *Family Law—Child Support Orders—Court May Terminate Child Support Order if Custodial Parent Intentionally Interferes with Visitation Rights* (In re Marriage of Boudreaux, *Cal. Ct. App. 1988*), 102 HARV. L. REV. 920, 920 (1989).

172. RESTATEMENT (SECOND) OF TORTS § 700 (1977) (“One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.”).

If the non-custodial parent interferes with custody or visitation by keeping the children longer than allowed or absconding with the child, the law takes those behaviors very seriously, and criminal prosecution may result because our laws recognize how important it is for the child to have the opportunity to develop a parental relationship with both of his or her parents.<sup>173</sup> “[A]lmost every state criminally forbids custodial interference by parents or relatives of the child.”<sup>174</sup> Moreover, one specific form of interference with parenting, “[p]arental kidnapping[,] is a crime, recognized as such in the United States by every state, the District of Columbia, and the federal government.”<sup>175</sup> So serious is our concern about depriving the child of the chance to develop a filial relationship with the other parent, that if a parent crosses state lines, federal criminal and civil laws as well as many state laws may come into play.<sup>176</sup> Congress also amended the Fugitive Felon Act<sup>177</sup> to make it applicable to parents who abduct or retain their children in violation of state law<sup>178</sup> and extended the Federal Parent Locator Service to abducted children.<sup>179</sup> Congress additionally enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (“PROTECT Act”),<sup>180</sup> which establishes criminal liability for attempting

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173. See, e.g., FLA. STAT. ANN. § 787.03 (West 2000) (interfering with custody is a felony offense); GA. CODE ANN. § 16-5-45 (2003) (making custodial interference a criminal offense); 720 ILL. COMP. STAT. ANN. 5/10-5(d) (West 2002) (stating child abduction is a felony offense); IND. CODE ANN. § 35-42-3-4 (West 2004) (criminalizing violations of custody orders by hiding, kidnapping, or taking a child out of state); VA. CODE ANN. § 18.2-49.1(B) (2004) (making willful violations of custody and visitation orders a class III misdemeanor and the second conviction within twenty-four months a class I misdemeanor); see also MODEL PENAL CODE § 212.4 (2001); see generally Nancy Levit, *Matrimonial Torts and Crimes: An Annotated Bibliography*, 19 J. AM. ACAD. MATRIMONIAL L. 117, 181 (2004) (listing articles on matrimonial torts, including interference with custody and child abduction, from 1993–2003).

174. Catherine F. Klein et al., *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with Their Children*, 39 FAM. L.Q. 109, 117 (2005).

175. Susan Kreston, *Prosecuting International Parental Kidnapping*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 533, 533 (2001).

176. See, e.g., Klein et al., *supra* note 174, at 112 (noting that the UCCJA, the UCCJEA, the federal PKPA, state criminal custody or visitation interference laws, and state civil custody or visitation interference statutes may all be implicated); Kreston, *supra* note 175, at 537–40 (describing role of the Federal Bureau of Investigation in responding to domestic parental kidnapping and the role of the Office of Children’s Issues of the Department of State in dealing with international parental kidnapping).

177. 18 U.S.C. § 1073 (2000).

178. *Id.*

179. 42 U.S.C. § 663(a) (2000).

180. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (codified in scattered sections of 18, 28, and 42 U.S.C.).

to remove a child from the United States with the intent to interfere with another person's legal custody of the child.<sup>181</sup>

All of these, and many other state, federal, and international laws embody the message of the importance of preserving the right of the child to develop and enjoy a real parental relationship with both her mother and father. Yet in the context of ART and adoption of children by single and same-sex partners, we seem to forget all of this. In this respect, the policies of our laws are incoherent and schizophrenic.

However, the seeds of the right of children to a relationship with both parents are germinating. A long line of Supreme Court cases recognizes the constitutional status of the relationship between parents and children as a fundamental right or interest entitled to special protection.<sup>182</sup> The liberty interest in parents and children in the parent-child relationship "is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court."<sup>183</sup> The right to "establish a home and bring up children" is a fundamental right.<sup>184</sup> Parental priority over the state in exercising "custody, care and nurture of the child" has long been recognized.<sup>185</sup> While the Supreme Court has "never had occasion to decide whether a child has a liberty interest, *symmetrical with that of her parent*, in maintaining her filial

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181. 18 U.S.C. § 1204 (2006).

182. See *Troxel v. Granville*, 530 U.S. 57 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 309–30 (2010); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1085–94.

183. *Troxel*, 530 U.S. at 65; see also *id.* at 93 n.2 (Scalia, J., dissenting) (declining to consider whether, and under what circumstances, a parent could assert First Amendment rights of association or free exercise on behalf of her child).

184. *Meyer*, 262 U.S. at 399.

185. *Prince*, 321 U.S. at 166.

relationship,”<sup>186</sup> the constitutional right of children to the relationship with their parents has been recognized in various contexts.<sup>187</sup>

### C. *The Role of the Law in Remediating the Disintegration of Families*

The causes of and remedies for the disintegration of marital families in the United States are complex. Legal reforms are certainly an essential part of the solution, but are not (alone) a sufficient solution. One example of this is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”).<sup>188</sup> Fifteen years ago, Congress passed PRWORA, which one commentator called “the most radical welfare reforms in the history of welfare and child support enforcement.”<sup>189</sup> It established four policy goals, all of

186. *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (emphasis added).

[E]ven if we were to construe [the child] Victoria’s argument as forwarding the lesser proposition that, whatever her status vis-a-vis Gerald [her mother’s husband at the time of her birth], she has a liberty interest in maintaining a filial relationship with her natural father, Michael, we find that, at best, her claim is the obverse of Michael’s and fails for the same reasons.

*Id.* at 131.

187. See *Santosky*, 455 U.S. at 758–59; *Moore v. East Cleveland*, 431 U.S. 494 (1977); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 79 (1957) (Douglas, J., dissenting).

This case, on its face, seems to be an instance of a deportation which would “result in serious economic detriment to a citizen,” as those words are used in § 19(c) of the Immigration Act of 1917. The citizen is a five-year-old boy who was born here and who, therefore, is entitled to all the rights, privileges, and immunities which the Fourteenth Amendment bestows on every citizen. A five-year-old boy cannot enjoy the educational, spiritual, and economic benefits which our society affords unless he is with his parents. His parents are law-abiding and self-supporting. From this record it appears that they are good members of the community. They do not seem to have done anything illegal or antisocial that should penalize their American son. It would seem, therefore, that the maintenance of this young American citizen in a home in America is the way to effectuate the policy of the 1917 Act.

*Id.* at 79–80. See generally *In re S.L.H.*, 342 N.W.2d 672, 681 (S.D. 1983) (Henderson, J., concurring in part and dissenting in part) (quoting Gabriela Mistral, Nobel Laureate of Chile); Chesa Boudin, *Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994).

188. The Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110 (1996) (codified in scattered sections especially in title 42 U.S.C.).

189. Anne Marie Rotondo, Comment, *Helping Families Help Themselves: Using Child Support Enforcement to Reform Our Welfare System*, 33 CAL. W. L. REV. 281, 305 (1997). PRWORA repealed the Aid to Families with Dependent Children (“AFDC”) program of “welfare entitlement” and replaced it with Temporary Assistance to Needy Families (“TANF”) which blocks grants to the states that are intended to give states more flexibility in designing

which relate to strengthening families, and three of which emphasize encouraging and strengthening marriages—i.e., to

(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.<sup>190</sup>

Yet, in the fifteen years since PRWORA was enacted, the percentage of children born out of wedlock has continued to rise (overall it has risen about thirty percent in the last fifteen years).<sup>191</sup> The percentage and number of couples cohabiting without marriage also has continued to rise, steeply.<sup>192</sup> The annual rate of marriage has continued to decline (with a brief blip); the overall percentage of married adults has continued to drop at about the same rate as before; and positive attitudes of young adults toward marriage have continued to decline.<sup>193</sup> Clearly, PRWORA has not been a magical cure for the disintegration of families and the resultant denial of the right of children to a parental relationship with both their mother and their father.

However, since 1996 there have been some inklings of good news: the divorce rate has slowly dropped—about fifty percent faster—than during the previous fifteen years;<sup>194</sup> the birth rate for married women has ceased to drop and for unmarried women seems to have risen more slowly;<sup>195</sup> and the rise in median age at first marriage has moderated.<sup>196</sup> These are small indicators that perhaps some cultural influences are changing. To what extent the federal welfare legislation promoting marriage may have caused or influenced these developments is not clear.

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work-oriented, transitional welfare assistance programs for low-income families. See Martha C. Nguyen, *Welfare Reauthorization: President Bush's Agenda*, 9 GEO. J. ON POVERTY L. & POL'Y 489, 489 (2002).

190. 42 U.S.C. § 601 (2000).

191. See *supra* Table 2 and Figures F–G.

192. See *supra* Figure A and Table 1.

193. See *supra* Figures B–E.

194. See *supra* Figure H–I.

195. See *supra* Table 2.

196. See Figure D (increasing until 2010).

Another body of law that can influence the disintegration of families is the law of marriage and divorce. For example, divorce laws clearly have some impact upon the increased practice of divorce. "Research across 18 European countries indicates that 20 per cent of the increase in divorce rates during the past 40 years is due to legal reforms."<sup>197</sup> Similarly, "[t]he construction of a forced-indeed, illiberal-law of cohabitation may deter even more men from making any commitment, let alone marriage."<sup>198</sup> Other legal changes also may influence the disintegration of marital families. For example, while it is hard to quantify, it is logical and not unlikely that the promotion and growing acceptance of same-sex marriage in the past decade may have contributed to a decline in the social status, perceived importance, and individual desirability of marriage.<sup>199</sup> Clearly, serious consideration by law-makers of the impact of particular legislation on family integrity and stability is needed.<sup>200</sup>

In the late 1970s, Senate hearings sparked the idea of family impact statements for the development and assessment of public policies. The suggestion languished until 1987, when President Reagan issued Executive Order 12606 requiring executive departments and agencies to "identify proposed regulatory and statutory provisions that may have significant potential negative impact on the family's well-being and provide adequate rationale on why such a proposal should be submitted."<sup>201</sup>

Several states adopted similar requirements. However, Executive Order 12,606 was not intended to create any substantive or procedural rights. "[N]umerous problems plagued the implementation of family impact assessments,"<sup>202</sup> and "[s]cholars and advocates

197. 725 PARL. DEB., *supra* note 3, column 374.

198. *Id.* column 375.

199. *See supra* pp. 109–10 and Figure E.

200. *See* Diann Dawson, Comment, *The Evolution of a Federal Family Law Policy Under Title IV-A of the Social Security Act—The Aid to Families with Dependent Children Program*, 36 CATH. U. L. REV. 197, 197 (1986). Social scientists have been attempting to do this after-the-fact for many years. *See, e.g.,* Vincent Eagan, Recent Publication, *Welfare Policy for the 1990s*. Edited by Phoebe Cottingham & David Ellwood. Cambridge, Mass.: Harvard University Press, 1989. Pp. vii, 349, References, Notes, Contributors, Index. \$30.00 Cloth, 27 HARV. J. ON LEGIS. 285, 286 (1990).

201. Lesley Wexler, *Human Rights Impact Statements: An Immigration Case Study*, 22 GEO. IMMIGR. L. J. 285, 299 (2008) (quoting Exec. Order No. 12,606, 52 Fed. Reg. 34,188 (Sept. 2, 1987)).

202. Wexler, *supra* note 201, at 300. "These hurdles included: difficulties in developing a consensus on the definition of 'family,' the lack of clear criteria to identify which regulations

deemed both the federal and state level review processes a failure."<sup>203</sup> Ten years after it was enacted, Executive Order 12,606 was revoked by President Bill Clinton.<sup>204</sup> Given the persistent evidence of the disintegration of families in America, it would be prudent to revive and improve Executive Order 12,606, or one like it, and to implement an effective family impact review policy.

## VI. CONCLUSION

Throughout history, a common goal of beneficent civilizations has been to build for the future—for parents and the adult generation of a society to give their children better opportunities and a better world than they (the adults) received. That goal is in jeopardy today because the disintegration of the family, especially of marriage, and the resulting separation of some children from one or more of their biological parents has created two classes of children: those privileged to grow up in families where they enjoy association and parenting from their mother and their father, and those that are deprived of association and parental relationship with one or both of those parents. The latter are unlikely to enjoy the quality of life and standard of living that their peers being raised by both of their parents enjoy.

"[T]he State does not have the physical or financial resources to replace the work done inside marriage for the benefit of family."<sup>205</sup> In theory, other organizations, such as the state, could provide some of the technical services provided for children by parents, but overall such contributions do not come close to compensating in social services alone for the loss of a parent. "The State is a blunt instrument of social welfare; it is always short of money and lacks the personal warmth that is an essential element of sensitive support."<sup>206</sup>

Recognition of the legal rights of children to enjoy a substantial parental association with both mother and father is mixed. There is a

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should be subject to a family impact statement, and disagreements over whether agencies or independent administrators should conduct assessments." *Id.* at 300–01.

203. *Id.* at 301.

204. Protection of Children from Environmental Health Risks and Safety Risks, Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 21, 1997), *amended by* Amendment to Executive Order 13,045, Extending the Task Force on Environmental Health Risks and Safety Risks to Children, Exec. Order No. 13,229, 66 Fed. Reg. 52,013 (Oct. 9, 2001), *amended by* Amendments to Executive Order 13,045, Protection of Children from Environmental Health Risks and Safety Risks, Exec. Order No. 13,296, 68 Fed. Reg. 19,931 (Apr. 18, 2003).

205. Rees-Mogg, *supra* note 4.

206. *Id.*

lot of rhetoric, but the enforceable policies and rules are inconsistent. Policies strongly supporting children's rights to parental relationships in the context of custody, visitation, interference, and abduction are many and clear. Inconsistently, however, policies allowing the creation of children (by ART) for and the unnecessary-and-avoidable placement of children (by adoption) with single and same-sex partners clearly deprive some children of their relationship with one or both of their parents—a child who has only two mothers does not have a father, and a child who has only two fathers does not have a mother.

“Marriage is a cultural institution that depends on the moral support of society . . . .”<sup>207</sup> That support has been waning. But that clearly is one influential cultural factor that can be changed. Speaking up and speaking out on important issues is an area of activity in which scholars, academics, and intellectuals have the capacity and experience to excel. Members of the academic community need to overcome their shyness and speak up about the importance of marriage. As Baroness Deech perceptively noted, leaders of society should

speaking of marriage with as much enthusiasm as they show in discussions about, for example, the environment—and please may we drop the word “partner,” which should be confined to tennis and solicitors’ firms, and be less shy about marital status? After all, being married is the most public way that men and women have been able to invent over thousands of years of showing a permanent bond with each other and with their families. There can be no family tree without public recognition and preservation of its roots.<sup>208</sup>

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207. *Id.*

208. 725 PARL. DEB., *supra* note 3, column 375.