

rites, rights, and social institutions: why and how should the law support marriage?

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Marriage is the subject of considerable political controversy and debate: from “covenant marriage” and other divorce law reforms, to President Bush’s efforts to add “marriage promotion” to the welfare reform law, to efforts to promote (or stop) same-sex marriage, and to the American Law Institute’s proposed new *Principles of the Law of Family Dissolution*.¹

Before we can evaluate specific legal proposals, however, we need a theory of the relationship between marriage and the law. We are living off inherited intellectual capital, ideas about the relationship between marriage and the state worked out during the Protestant Reformation.² In a modern multi-religious society should the law help sustain marriage at all? And if so, why, and how? What is the public purpose of marriage? Why do we have laws about it? What is the state’s interest in this intimate act?

I. WHAT IS MARRIAGE? EVOLVING JUDICIAL VIEWS

Courts in the United States have long recognized that there is a vital state interest in the institution of marriage. In recent years, however, they have been less confident and less articulate about what this vital state interest actually is. A century ago, the Supreme Court recognized in *Maynard v. Hill*³ that marriage “is the foundation of the family and of society, without which there would be neither civilization nor progress.”⁴ As late as 1942, in

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1. See generally PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

2. John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1045–59 (2001); see also Don Browning, *What is Marriage?: An Exploration*, in THE BOOK OF MARRIAGE: THE WISEST ANSWERS TO THE TOUGHEST QUESTIONS I (Dana Mack & David Blankenhorn eds., 2001); JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION (1997).

3. *Maynard v. Hill*, 125 U.S. 190 (1888).

4. *Id.* at 211.

Skinner v. Oklahoma,⁵ the Supreme Court recognized that marriage “and procreation are fundamental to the very existence and survival of the race.”⁶

But the relationship between marriage and progress (much less civilization or survival), once crystal clear to courts and other educated Americans, is no longer self-evident. More contemporary court rhetoric sounds increasingly platitudinous notes. For example, a 2002 Wisconsin appellate court described marriage as “the foundation of family and of society” which is “basic to morality and civilization, and of vital interest to society and the state.”⁷ A 2002 California appellate court similarly, if vaguely, agreed that the state has a “vital interest” in marriage.⁸

Contemporary courts are rather more eloquent about the individual interest in marriage, which is increasingly described almost wholly in emotional, psychological, and/or symbolic terms. In *Griswold v. Connecticut*,⁹ the Supreme Court described marriage as “intimate to the degree of being sacred”¹⁰ (without, however, concluding that legal marriage constituted an establishment of religion). In *Loving v. Virginia*,¹¹ the Supreme Court waxed eloquent about marriage as a personal right “essential to the orderly pursuit of happiness.”¹² By the eighties, the Court had, at least rhetorically, transformed marriage from an indispensable social institution to a useful tool in pursuit of individual happiness. The family as a whole was increasingly described as serving primarily individual interior, symbolic, and emotional functions, and the state’s interest was becoming correspondingly to promote individual liberty to define the mystery of existence for oneself in the realm of family law. “[I]ndividuals draw much of their emotional enrichment from close ties with others;”¹³ family helps protect “the ability . . . to define one’s identity,” which is “central to any concept of liberty.”¹⁴

Once marriage is seen as primarily as a form of individual self-expression, the Supreme Court and other legal elites have

5. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

6. *Id.* at 541.

7. *Xiong ex rel. Edmonson v. Xiong*, 648 N.W.2d 900, 906 (Wis. Ct. App. 2002) (citing Wis. STAT. § 765.01(2) (2003)).

8. *Estate of DePasse*, 118 Cal. Rptr. 2d 143, 148 (Cal. Ct. App. 2002).

9. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. *Id.* at 486.

11. *Loving v. Virginia*, 388 U.S. 1 (1967).

12. *Id.* at 12.

13. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

14. *Id.* Thanks to Mark Strasser for highlighting this series of court decisions in Mark Strasser, *Harvesting the Fruits of Gardiner: On Marriage, Public Policy and Fundamental Interests*, 71 GEO. WASH. L. REV. 179, 211–15 (2003).

not unnaturally increasingly emphasized marriage as an individual right. The role of the state in marriage is increasingly described as (a) conferring a title with certain symbolic value and/or (b) creating a vehicle for conveying a defined set of legal incidents. Marriage in this view consists of an individual right to access certain material legal benefits. So at the state level, the highest court of the State of Vermont ruled that the preamble to the Vermont Constitution, guaranteeing that government should be for the “common benefit” of all citizens, requires the legislature to either give access to marriage to same-sex couples or to create an alternative institution with the same legal “benefits.” To prefer one form of union to another was to deny an individual the equal protection of the laws. As the Vermont court put it:

The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned. Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law—protecting children and “furthering the link between procreation and child rearing”—the exclusion falls substantially short of this standard.¹⁵

This partial and incomplete transformation of marriage into an individual legal right is a relatively late development in the law.¹⁶ Glancingly, in *Loving v. Virginia*, the Supreme Court con-

15. *Baker v. State*, 744 A.2d 864, 884 (Vt. 1999).

16. Many state courts continue to recognize the traditional role of marriage in the creation of the next generation as primary. For example, the California Supreme Court blended the expressive and emotional value of marriage to the individual with its social function in *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (“[T]he structure of society itself largely depends upon the institution of marriage. . . . The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.”); *see also* *Goodridge v. Department of Pub. Health*, No. 20011647A, 2002 WL 1299135, at *13 (Mass. Super. Ct. May 7, 2002) (finding that “because same-sex couples are unable to procreate on their own and therefore must rely on inherently more cumbersome means of having children, it is also rational to assume that same-sex couples are less likely to have children or, at least, to have as many children as opposite-sex couples”); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”); *accord* *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (finding that the statute’s “central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples”) (Ferren, J., concurring in part and dissenting in part); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal.

sidered whether anti-miscegenation laws infringed on what it called the “vital *personal* right to marry.”¹⁷ More fully, in *Zablocki v. Redhail*¹⁸ (where the Court struck down a Wisconsin law preventing a parent in default of child support obligations from marrying again), the Supreme Court ruled that individuals having a new privacy right to procreate or not at will (embodied in *Eisenstadt v. Baird*¹⁹ and *Roe v. Wade*²⁰) must also have a personal and private right to marry multiple times, regardless of whether he or she lives up to the obligations of any previous marriage. This idea of marriage as an individual right reached full culmination in *Turner v. Safley*,²¹ in which the Supreme Court held unconstitutional a Missouri statute which prohibited prisoners from marrying. The fact that prisoners might not consummate a marriage (and could not support any children financially or emotionally) was held by the Supreme Court to be irrelevant, signaling once again the new judicial view of marriage as in essence a form of individual expressive conduct: “Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment.”²²

While many state courts continue to articulate an older understanding of the reasons for state involvement in marriage,²³ the concept that the law’s role in relation to marriage is essentially to create an individual right to (a) express certain emotions or values and (b) acquire certain legal benefits, now permeates family law scholarship. Among family law scholars, this view of marriage as primarily an emotional good created by the private couple leads to calls (and in countries outside the United States to judicial rulings and legislation) to abolish any distinction between cohabitation and marriage, between what

1980), *aff’d* 673 F.2d 1036 (9th Cir. 1982) (observing that a “state has a compelling interest in encouraging and fostering procreation of the race”).

17. 388 U.S. at 1, 12 (1967) (emphasis added).

18. *Zablocki v. Redhail*, 434 U.S. 374, 383–87 (1978).

19. 405 U.S. 438 (1972).

20. 410 U.S. 113 (1973).

21. 482 U.S. 78 (1986).

22. *Id.* at 95, *cited in* Lawrence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1121–22 (2002).

23. *See, e.g.*, *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003); Order on Motion to Dismiss, *Morrison v. Sadler*, No. 49D13-0211-PL-001946 (Marion Super. Ct. May 7, 2003), *available at* <http://www.marriagewatch.org/cases/in/morrison/trial/order.pdf> (last visited Oct. 31, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); *see also supra* note 16.

some call formal and informal unions. In the summer of 2000, writing in *Family Law Quarterly*, distinguished family law scholar Harry D. Krause put it this way:

[A]n irrational, sentimental cocoon . . . has clouded logical discussion and intelligent debate.

. . . .

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

A pragmatic, rational approach would ask what social functions of a particular association justify extending what social benefits and privileges. Marriage, qua marriage, would not be the one event that brings into play a whole panoply of legal consequences. Instead, legal benefits and obligations would be tailored according to the realities—speak social value—of the parties' relationship.²⁴

Speaking about tax laws that treat married and cohabiting couples differently, he concludes: "The rational answer seems clear: Married and unmarried couples who are in the same *factual* positions should be treated alike."²⁵

II. MARRIAGE AS A RITE, CONVEYING RIGHTS: THE CASE OF ALI

The American Law Institute's *Principles of the Law of Family Dissolution* builds upon this new view of marriage as primarily symbolic expressive conduct (marriage as "a rite") that creates certain legal "benefits" (marriage as a "right").²⁶ It is worth looking at in some detail, because of ALI's character as a mainstream legal body, and because the *Principles of the Law of Family Dissolution* represent the culmination of ten years of work by eminent family law scholars and divorce lawyers.

In *Principles of the Law of Family Dissolution*, the ALI argues explicitly what Harry Krause argued implicitly: the fundamental underlying social institution which gives rise to legal benefits is no longer marriage, but domestic partnership.²⁷ People live in a variety of ways. The way they live is what gives rise to legal and

24. Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not At All?*, 34 FAM. L.Q. 271, 272, 276 (2000).

25. *Id.* at 278.

26. See generally PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

27. *Id.* at §§ 6.01–6.06.

moral obligations. The fact that a marriage has or has not taken place should have minimal, if any, legal or social implications. In ALI's view, a marriage vow gives rise to no unique expectations or obligations fundamental to the principle of social justice in family life. In ALI's theoretical understanding, *marriage is a formal ceremony*—the underlying social reality is cohabitation or domestic partnership, some of which are registered and some of which are not:

Domestic partners fail to marry for diverse reasons. Among others, some have been unhappy in prior marriages and therefore wish to avoid the form of marriage even as they enjoy its substance with a domestic partner. Some begin a casual relationship that develops slowly into a durable union, by which time a formal marriage ceremony may seem awkward or even unnecessary. . . . Failure to marry may also reflect strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage. Finally there are domestic partners who are not allowed to marry each other under state law because they are of the same sex *In all these cases, the absence of formal marriage may have little or no bearing on the character of the parties' domestic relationship* and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.²⁸

ALI's *Principles of the Law of Family Dissolution* simultaneously endorses the theory that the relationship between law and marriage is simple: marriage in its public, legal form is the creation of the state, a set of benefits conveyed. *Marriage is merely the sum of its legal incidents*. Other views of marriage are described as religious, psychological, or symbolic. (Note that domestic partnership, by contrast, is consistently described in this document as an objective social fact to which the law must conform and adapt if it is to do justice.)

From the point of view of family law, the distinction between a full-blown domestic partnership, like Vermont's domestic union, and a lawful marriage is merely symbolic. In law, marriage is simply the sum of its legal incidents. However from the perspective of religion and social psychology, there are other dimensions to marriage. The maintenance of marriage as an exclusively heterosexual opportunity appears to have important symbolic meaning

28. *Id.* at § 6.02 cmt. a (emphasis added).

for many persons who are nevertheless hospitable to the notion of domestic partnership for same-sex couples.²⁹

In this way marriage is reduced from a social institution regulated by law in order to fulfill important public purposes, to an emotionally laden symbolic ceremony which confers certain legal benefits. Marriage is reduced to a rite, which carries rights.

There are many problems with this vision of marriage and its relationship to law. It reduces marriage to a creature of the state. By emphasizing the rights of adults, it intrinsically devalues the interest of children and the community in marriage. By reducing marriage to an individual right, it undermines the very norms of commitment it rhetorically upholds. It logically calls into question the notion of family law itself. If the purpose of marriage and family law is to affirm neutrally the multiplicity of adult emotional choices, because individual declarations of intimacy are sacred matters in which the state has no right to interfere, then the question becomes: why do we have laws about marriage at all?

At its core, the family diversity rationale for marriage and family law is conceptually incoherent. It implies that in a multicultural, pluralistic, interfaith society, marriage can and should be privatized. Individuals are free to marry, as they are free to declare eternal vows of love, exchange rings, leap over a broom, or to engage in any other expressive conduct. But if marriage is primarily emotional, personal, private, and expressive, the state has no reason, nor right, to interfere by preferring any form of marriage to no marriage.³⁰

In addition, this new legal theory of marriage suffers under a more fundamental conceptual inadequacy: it simply is not true.

III. MARRIAGE AS A SOCIAL INSTITUTION: THE COUNTER VIEW

Here is an alternative vision of the nature of marriage and its relationship to law. Marriage is neither merely a rite, nor a right. What is “older than the Bill of Rights,” to use the language of *Griswold*,³¹ is not a right to marry, but marriage itself as a social

29. *Id.* at § 6.03 reporter’s note cmt. g.

30. For an opposing view, see Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001).

31. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”).

institution. Marriage arises in every known society³² out of the need to manage the biological reality that sex between men and women produces children, the twin social realities that societies need babies in order to survive, and babies need mothers and fathers.

Cross-culturally marriage systems vary considerably from our own marriage tradition. But in virtually every known society, marriage is about getting men and women into recognized public sexual unions where the rights and responsibilities towards each other and their children are publicly, not merely privately defined. Marriage is everywhere the potential weak link in the family system, the place where biological strangers must be joined in some way that produces a new generation of family ties strong enough to perform the basic functions families play in any given society. That is one reason that marriage is never viewed as merely a private matter, but is everywhere publicly surrounded with legal, cultural, religious, moral, and familial supports all of which impinge on an individual's rights and choices, once the marriage is made.

By contrast the idea that there are many important and worthy intimate relationships outside of marriage is not a new discovery in human affairs. Human beings have never confined all important intimate relationships to the marriage bond: friendships, free loves, non-conjugal family relationships, political bonds, work-mates, etc.—many emotionally laden, symbolically important relationships such as these have been treasured by individuals. Yet, until quite recently, legislators understood quite clearly why, of all this panoply of important personal relationships, one particular kind of relation—the marriage bond—was singled out for public support. Because it is upon this bond, both relatively fragile and yet indispensable, on which families, clans, tribes, or societies depend on for their continued existence.

32. WILLIAM J. DOHERTY ET AL., *WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* 8–9 (Inst. for American Values 2002).

Marriage exists in virtually every known human society. . . . [A]t least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society. . . . [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.

Id.

Only societies that reproduce survive. Children do better when raised by their own two married parents.³³ Marriage is key to integrating men into family life and to reproducing not only children, but the family system itself. When parents do not get and stay married their children are less likely to confine childbearing to marriage and to avoid divorce, creating a downward intergenerational cycle of family fragmentation. Whole communities suffer when marriage is no longer the normal, usual, and generally reliable way to raise children.³⁴

Marriage serves many important private, emotional, and/or religious functions. But giving babies the mothers and fathers they need, so that society has the next generation *it* needs, is the fundamental *public* purpose of marriage.

IV. HOW CAN AND DOES THE LAW SUPPORT MARRIAGE AS A SOCIAL INSTITUTION?

A. *A Discarded Model: Punitive and Criminal Sanctions*

At one time, the public purposes of marriage law, for better and/or for worse, were etched with crystal clarity into the law. American law vigorously and with great articulateness promoted the relationship between sex, fertility, and marriage, by attempting to regulate virtually all sexual conduct in order (a) to minimize the possibility that children will be produced outside of

33. For a summary of the social science evidence, see DOHERTY ET AL., *supra* note 32. See also LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER-OFF FINANCIALLY* (2000).

34. See COALITION FOR MARRIAGE, FAMILY, AND COUPLES EDUCATION ET AL., *THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 3-4* (2000) (citations and emphasis omitted), available at <http://www.marriagemovement.org/html/report.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

Nostalgia for the high hopes of the 1970s should not blind us to the hard truths discovered over the past thirty years: When marriages fail, children suffer. For many, the suffering continues for years. For some, it never ends. Children suffer when marriages between parents do not take place, when parents divorce, and when spouses fail to create a "good-enough" family bond.

....

We come together because we value freedom and cherish our free society. We recognize that the decline of marriage weakens civil society and spreads social inequality. Americans of all social classes and ethnic groups value marriage. Yet, as society retreats from supporting marriage publicly, those who succeed in achieving this aspiration are increasingly likely to be the already highly advantaged: better educated, more affluent, and white.

Id.

marriage, and (at one time) (b) to maximize the likelihood that marriages will produce children. Criminal penalties imposed on fornication, adultery, prostitution, sodomy, and bestiality made it clear that the marriage license was the only sexual license granted by the state. At the same time, as contraceptive technology advanced, the state responded by banning this perceived threat to the social purposes of marriage. One need not approve of using the criminal code to regulate sexuality to note that the judicial role in striking down these laws had one perhaps largely inadvertent side-effect: it made the law increasingly inarticulate about the purpose of marriage law itself.

As criminal penalties for regulating sexual conduct fell into desuetude (and were eventually struck down by the Supreme Court as infringements on a new constitutional right to intimacy),³⁵ the burden of articulating in law the public purposes of marriage law fell increasingly, if implicitly, in divorce law. By defining what justified an annulment or a divorce, the state continued to define shared public norms about what marriage consists of, and what it is for. Failure to consummate a marriage sexually meant that the marriage, from the state's point of view, never took place.³⁶ While infertility did not invalidate a marriage or justify a divorce, a spouse's individual willful refusal to have any children at all rendered the marriage vow a species of fraud, from the state's point of view, from which the other spouse could be released.³⁷ Adultery was punished in divorce law because it violated the core purpose of marriage, both of creating intact families, and discouraging illegitimacy. But with the advent of unilateral divorce in the 1970s, most states have adopted a divorce process that is, in theory, procedural and non-judgmental. Whatever advantages of these changes in divorce law, they

35. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

36. See Borten, *supra* note 22, at 1111; Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?* 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729, 749 (2000) ("Physical defects and incapacities which render a party unable to consummate the marriage, existing at the time of the marriage, and which are incurable are, under most statutes, grounds for annulment."). See also ALASKA STAT. § 25.24.030 (Michie 2002); DEL. CODE ANN. tit. 13 § 1506(a)(2) (1999); 750 ILL. COMP. STAT. § 5/301(2) (West 1999); MINN. STAT. ANN. § 518.02(b) (West 1990); OHIO REV. CODE ANN. § 3105.31(F) (Anderson 2003); WIS. STAT. ANN. § 767.03(2) (West 2003) (including inability or failure to consummate among grounds for annulment, though several also require nondisclosure of inability to consummate).

37. Strasser, *supra* note 14, at 209, n.225 (noting that infertility alone is not grounds for annulment, but that deception as to willingness or ability to procreate has been held grounds for annulment); Borten, *supra* note 22, at 1111.

too inadvertently served to further muddle or obscure what the law considers the core public purposes of marriage.

What is clear is that we have moved away from a punitive model of regulating sexual conduct, including marriage. Does this necessarily mean the public purposes of marriage have disappeared? Are punishment and incentives the only ways in which the law regulates marriage?

Some legal scholars think so. Laurence Drew Borten, for example, argues:

The point here is that the conception of marriage as sexual, wherever found in the law, has outlived its usefulness. Unless and until we contemplate establishing meaningful legal penalties for fornication, the mere existence of marriage as a legal institution cannot realistically be looked upon as a means to control sex outside of marriage, and therefore control out-of-wedlock childbirth.³⁸

Is he right? Or can we explain how the law of marriage might continue to help sustain the social institution of marriage in a culture that has rejected criminal and punitive sanctions as a regulatory instrument for sexuality?

B. *Alternative Models for the Relation Between Law and Marriage*

Laws do more than punish, as Mary Ann Glendon has pointed out.³⁹ While she emphasized the role of law as educator, I would point to other non-punitive functions of law in defining the boundaries of certain kinds of social organizations, and in defining certain kinds of relations between people and between people and things.

One of the most basic ways that the law of marriage helps regulate out-of-wedlock births (to answer Borten), for example, is by defining a socially-shared category of married births, without which the very idea of unmarried childbearing disappears.

38. Borten, *supra* note 22, at 1123.

39. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987). Glendon notes, for example:

In England and the United States the view that law is no more or less than a command backed up by organized coercion has been widely accepted. The idea that law might be educational, either in purpose or technique, is not popular among us.

. . . [L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things. It is "part of the distinctive manner of imagining the real."

Id. at 7–8.

If we cannot tell who is married, we cannot tell who is an unwed parent. We therefore cannot, in any shared public fashion, teach our children that it is best to wait until marriage before having a child. One can see the importance of the law in defining the boundaries of marriage in the experience of Europe and Canada, which have legally collapsed the concept of cohabitation and marriage. By teaching that cohabitation is just the same as marriage, the law undermines marriage as a social institution. But at an even more basic level, collapsing marriage and cohabitation as legal categories makes it difficult to tell who is married. Researchers, for example, can no longer see the difference that marriage makes on adult or child well-being because the category of marriage has been collapsed into the category of “co-residential unions.”

Thus, one of the core ways the law of marriage protects marriage as a shared social institution is by defining its boundaries: clearly marked entry and clearly marked exits mean that the category of marriage is sharply defined and contrasted with non-marriage.

This basic step allows the law to serve two additional functions in sustaining marriage: the signaling function and the channeling function.

1. The Signaling Function

How does a young person know what his or her partner intends? One function of clearly defining marriage by law is to allow young men and women who do intend a permanent, committed parenting, financial, and sexual partnership to signal to one another their clear intentions in this regard. Of course, in an age of divorce, a mere willingness to marry is no guarantee of a lifetime relationship. But the absence of the intent to marry does still carry a clear signal, which, contrary to what ALL presumes, is that at least one partner does not intend a permanent, faithful partnership. The blurring of the lines between cohabitation and marriage already disadvantages young women in particular, who research shows are far more likely to believe they are in a permanent relationship than the men they live with. (This may be one reason for the growing trend toward childbearing in cohabiting relationships.)⁴⁰

40. See WAITE & GALLAGHER, *supra* note 33, at 87; Scott M. Stanley et al., *Maybe I Do: Interpersonal Commitment and Premarital or Nonmarital Cohabitation*, J. FAM. ISSUES (forthcoming 2004) (manuscript on file with the author).

2. The Channeling Function

Law has a communicative as well as a punitive function. Marriage is inherently a normative institution. It consists of preferring a certain type of relationship to others: one that is public, exclusive, and (in intention) permanent. This preference need not be ruthless: it is consistent with a wide variety of social and legal attitudes towards alternative unions, from stigma up through tolerance and compassion. But it is not consistent with the idea that it is unfair for the law to distinguish between nonmarital and marital relationships.

One purpose of defining marriage is to communicate to the young the essential, broad characteristics of the normative (or ideal) union: a permanent, faithful, parenting partnership, in which satisfying the intimacy and sexual needs of the adults is a goal, but not the entire substance of the relationship. Laws disfavoring adultery (such as alienation of affections torts, fault-based divorce requirements) are examples of ways in which the law helps reinforce social norms about the content of the marriage relationship, allowing marriage as a social ideal to shape and channel romantic expectations and energy of the young towards particular ends. We need not support these particular mechanisms to acknowledge the importance of having marriage law that actively reflects and communicates shared norms about marriage, that allows marriage to function as a social institution, changing the behavior of men and women in ways that benefit not only them, but their children and the larger community.⁴¹

3. An Analogy: Private Property

The law plays a similar role in defining the boundaries of other important institutions, such as the corporation. It defines the general purpose of a for-profit corporation (pooling resources for an economically productive enterprise); it creates special instruments that serve that purpose (limiting losses of shareholders to the value of the shares purchased, for example). We know what a corporation is, and who owns and controls it, because the law regulates and defines the boundaries of the institution and its core public or shared purpose.

Similarly, like marriage, private property is not the creature of the state. The idea and the reality of private property are far older than our nation or any nation now existing. But in com-

41. For a discussion of how marriage norms help change the attitudes, expectations and behavior of men and women towards each other, towards their children, and towards the future, see WAITE & GALLAGHER, *supra* note 33.

plex societies, the law plays a key role in sustaining private property as a social institution. If private property is to function as a social institution, we need to know who owns the property, what a person who owns property may do with it, and we need to raise our children to respect property rights. Likewise, if marriage is to function as a social institution, and not merely as a private act, we need to know who is married, what we expect of married people, and what the basic shared meaning of the marriage act is, and we need to raise our children to respect the institution of marriage.

V. MARRIAGE-SUPPORTIVE LEGAL REFORM: FOUR PRINCIPLES, FIVE PROPOSALS

So far I have argued that (1) the fundamental public purpose of law is to encourage men and women to enter and sustain the permanent public sexual union (“marriage”) that both creates and protects the children their sexual unions may produce, and that (2) laws do so in the current context primarily by defining who is married and what our basic, shared norms of marriage are, rather than by creating a set of legal incentives or punishments.

What are the implications of this view for law and public policy? To return to our original question, how can we distinguish laws and public policy that strengthen marriage from those that weaken or degrade it? I propose the following four principles, followed by five specific proposals for marriage law reforms.

A. *Four Principles:*

Law and public policies strengthen marriage only when they:

1. Protect the Boundaries of Marriage.

In order for marriage to function as a social institution, the community must know who is married. Pro-marriage laws and policies distinguish married couples from other family and friendship units, so that people and communities can tell who is married, and who is not. The harder it is to distinguish married couples from other kinds of relationships, the harder it is for communities to reinforce norms of marital behavior, the harder it is for couples to identify the meaning of their own relationship, and the more difficult it is for marriage to fulfill its function as a social institution.

2. Treat the Married Couple as a Social, Legal, and Financial Unit.

Legal and public policy reforms that either treat married couples as if they were unmarried individuals or treat unmarried couples as if they were married are likely to weaken marriage as a social institution.

3. Transmit and Reinforce Shared Norms of Responsible Marital Behavior.

Marriage changes behavior because it is more than a private relationship created by the couple for the couples' private purposes. Marriage changes behavior in healthy ways because marriage has shared social meanings. Marriage is inherently normative. Law and public policy help strengthen marriage when they reinforce (or at a minimum clearly communicate) social concerns surrounding basic norms of responsible marital behaviors, such as encouraging permanence, fidelity, financial responsibility, and mutual support and discouraging violence or destructive conflict, for example.

4. Communicate a Socially Shared Preference for Marriage as the Ideal Family Form, Particularly to Young People of Reproductive Age.

In reviewing marriage-strengthening public policies, I do not consider policies whose conceptual goal is to create marriage neutrality, or a level-playing field between married and unmarried individuals, unless there is substantial independent evidence that such a reform would reduce family fragmentation. Such policies, while they may further other legitimate public interests, are not likely to strengthen marriage as a social institution. A preference for marriage is not a public policy trump card. Any number of theoretical marital preferences may be imprudent or conflict with vital competing social values (such as protecting children in single-parent families). On the other hand, any law or public policy that explicitly operates on the principle that preferences for marriage are in themselves a form of discrimination against unmarried individuals cannot be viewed as a pro-marriage initiative. If marriage is a social good, and a key social institution, neutrality is not an appropriate goal for public policy.

B. *Five Brief Proposals*

Here are just a few brief examples of the legal reforms that meet these standards, offered in order to widen the public dis-

cussion of how law might better articulate and support the public purposes of marriage law.

1. Codify the Basic Obligations of Marriage by Statute.

Marriage is created by the freely-given consent of a man and woman, witnessed by church and/or state, to enter into a permanent sexual, financial, emotional, and parenting union. Its basic obligations include sexual fidelity, permanence, and mutual care and support of each other and any children of their union. Require couples to sign an affidavit upon getting a marriage license affirming that they have read and understood these basic obligations.

2. Establish a Preference for Married Couples in Adoption Law.

3. Refuse to Create Legally Fatherless Children.

If single people use donor insemination, biological fathers retain legal responsibility (unless another man is willing to assume legal fatherhood in a process analogous to adoption).

4. Revive Common-Law Marriage, by Statute, to Deal with Hard Cases.

A couple who has lived together for seven years and held themselves out as a married couple, will be viewed as having successfully created a marriage, even without the witness of church or state. Estop any partners who have claimed to be married before a government official or agency from later claiming they were not married, for the purposes of property distribution and alimony when the relationship ends.

5. Require a Spouse to Wait Two Years, and Show Due Diligence (Presumably Through Counseling) Before Obtaining a Non-Consensual, No-Fault Divorce.

Require a waiting period of one year (with a due diligence requirement) for no-fault divorce by mutual consent when there are children.

VI. THE FUTURE OF MARRIAGE LAW

Before we can decide what the proper legal structure for marriage is, we need a working theory of the relationship between marriage and law—an understanding of what marriage

law is and why we have laws only about this one kind of personal relationship as opposed to all other intimate relationships worthy of respect.

The proposition on the table is this: marriage exists in every known society, including ours, as a public act and not just a private vow, because sex between men and women produces babies on a regular basis. From a public, legal standpoint, marriage is the attempt to regulate, by a variety of means not limited to punishment or incentives, the relationships between men and women in order to maximize the likelihood that (a) children will have mothers and fathers and (b) society will get the well-nurtured next generation we all need.

Even in a culture that makes full use of contraceptive and abortion technology, half of all pregnancies are unintended and one-third of our children are born outside of marriage. The costs to children and society amply demonstrate that this view of marriage is not an outmoded institution.

The law is not the only, or the most important actor, in creating and sustaining the social institution of marriage. But by protecting the boundaries of marriage, by defining who is married and who is not, and by communicating basic norms of what marriage means, marriage law serves to enable other important private actors to do what is necessary to sustain the marriage idea in order to create and protect the next generation.

