

## THE NORMATIVE VALUE OF LAW IN STRENGTHENING AND PROTECTING MARRIAGE

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I APPRECIATE THE OPPORTUNITY to address the topics of how the law impacts our understanding of marriage in society and how it can be used to strengthen and protect the marriage institution. It is my hope that we each might recognize that strong marriages provide the seedbed for a good and virtuous society.

At the American Bar Association Annual Meeting in 1993, a legal task force entitled the "American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families" issued its official report on this nation's "children at risk."<sup>1</sup> The report began with an interesting parable that went as follows:

Two men were fishing by a stream when an infant floated past. The first fisherman jumped in, rescued the child and handed him up to safety in the second fisherman's arms. No sooner had they settled the child down on the grass than a second infant floated along. Again, the fisherman jumped in and rescued the baby. A third baby floated along, a fourth, and so on. The fisherman saved each in turn. Finally, a whole group of babies came floating downstream. The first fisherman grabbed as many as he could and looked up to see his friend walking away. "Hey," he shouted, "what's wrong with you? Aren't you going to help me save these babies?" To which the second fisherman replied, "You save these babies, I am going upstream to see who's throwing all those babies in the river."<sup>2</sup>

The report went on to provide a set of recommendations for a legal action agenda to address the needs of children and families at risk. Several factors identified as critical in putting children at risk focused on marriage (or rather its absence) as a context for rearing children, including the growth of single-parent families, higher rates of out-of-wedlock or teen child-birth, and an increased divorce rate.<sup>3</sup> Children in all of these circumstances are put at greater risk of being raised in poverty. The report concluded with an ambitious set of legislative recommendations for its agenda, including income redistribution measures, availability of child care, adequate housing, equitable school financing, gun control legislation, universal health care, environmental safety, enforcement of child support, and so on.<sup>4</sup> Perhaps the most astonishing thing about the report was the fact that it accurately identified the weakened context of marriage as a factor in placing children at risk, even suggesting that society ought to focus its preventative efforts "upstream,"<sup>5</sup> and yet no single proposal or recommendation in the report targeted strengthening marriage itself through legal means as a proper item of attention. The

role of legal instruments in fashioning a society that upholds marriage thus seems to be a matter of some question.

Marriage is, in fact, ground zero in the debate that currently exists on the meaning and future of family life in contemporary society. Perhaps no arena of the debate engenders more passion, insight and controversy than the realm of legislative policy and judicial interpretation—the law. Among the critical issues affected by this process are perspectives on the nature and meaning of marriage. I would like to discuss how the law shapes our views on marriages, examine examples of change in the law that may weaken or strengthen marriage, and suggest several guidelines to consider prior to initiating legal changes that will impact views on the nature and meaning of marriage.

### How the Law Carries Normative Value in Shaping Social Dialogue

In modern society, political forces increasingly recognize that the law has tremendous influence in shaping social dialogue on critical issues. Those seeking an undertaking of social concerns such as abortion, parental rights, or family obligations look to powerful philosophical and legal arguments focusing on human rights, autonomy, and social justice. Those shaping social policy at the national and international level understand that the law can possess great "normative" power—in other words, the power to suggest what is legally recognized, and therefore acceptable, as a rule or standard of thought and behavior relating to a specific issue, like who can get married or what a father or mother's responsibilities ought to be. The law may be used to establish a recognized standard or norm in society to gain favor and acceptance of preciously controversial practices. It is important to understand this pattern.

The law can project a strong normative message that shapes social dialogue through several means: 1) by encouraging virtue over vice (its *persuasive* function), and 2) by its status as a visible symbol of particular social values (its *symbolic* function).

#### *Is It a Proper Function of Law to Encourage Public Virtue?*

Understanding the normative effect of the law upon society can appropriately begin by considering the function of law itself. Aristotle's view of the function of law has been summarized as follows:

The end of the state is not mere life; it is, rather, a good quality of life. . . . [Therefore any state] which is truly so called, and is not merely one in name, must *devote itself to the end of encouraging goodness*. . . . The law should be a rule

of life such as will make the members of a *polis* [state] good and just.<sup>6</sup>

In Aristotle's view, the first function of the law should be to "stimulate men to virtue and urge them forward by the by the motive of the noble; in other words, the first function of the law is persuasive."<sup>7</sup> If the law is to foster "a good quality of life" for citizens within a state, then its persuasive function will be oriented toward encouraging the virtues of goodness and justice among citizens. However, in today's society many become offended by the idea that public officials and citizens ought to pay any attention to the role of law in shaping public morality. They suggest that questions of how to live a virtuous life should be left to the individual.

I would like to borrow a definition of "law" articulated by U.S. Attorney General (later Chief Justice) Harlan F. Stone, who states that law is "defined as the sum total of all those rules of conduct for which there is a state sanction."<sup>8</sup> The law prescribes rules of conduct for society and also administers sanctions against clearly defined forms of misconduct. Thus it inevitably functions to encourage virtue and discourage vice, as it has been defined in the law.

While the threat of official sanctions of misconduct cannot, of itself, satisfy human needs, James Madison recognized that "[i]f men were angels, no government would be necessary."<sup>9</sup> The purpose of government is to protect the citizen from the deficits inherent in human nature. It is impossible to provide this protection through the law and avoid undue restraints on human freedom without a "high degree of civic virtue."<sup>10</sup> The pursuit of civic virtue by citizens helps to establish the stability and social order necessary for individual liberty to flourish.

American jurisprudence has a long tradition of recognizing the state's power to encourage "public health, public morals, [and] the public safety."<sup>11</sup> The imposition of sanctions according to the law is inseparably intertwined with moral considerations. Among these considerations is respect for what Tocqueville called:

[The] universal and permanent needs of mankind on which moral laws are based; if they are broken all men everywhere at all times have connected notions of guilt and shame with the breach. *To do wrong* meant to disregard them, *to do right* to obey them.<sup>12</sup>

Tocqueville believed that family stability and loyalty were among these "permanent needs of mankind" that make social responsibility possible.<sup>13</sup> At the heart of family stability and loyalty lies the institution of marriage itself. By imposing sanction for misconduct, the law recognized the importance of inculcating respect for those "universal and permanent needs of mankind" that must be fostered for individuals to experience a good quality life. If it is true that family stability and loyalty are among these needs (and we agree that they are), then the state's interest in reflecting a commitment

to these needs and upholding marriage in the law is a compelling one.

#### *The Law Carries Important Symbolic Meaning in Reflecting Social Values*

The symbolic value of the law is, perhaps, even more significant in communicating meaning to members of society. One of the most denigrated figures in modern society, for example, is the irresponsible father or "deadbeat dad." He is despised because he avoids legal obligations to provide economic and emotional support to his children.<sup>14</sup> The law requires payment of child support. However, it also acts as a powerful symbolic tool in conveying the importance of meeting legal and moral obligations to one's children. The "deadbeat dad" symbolizes the fugitive from justice who has not lived up to the social ideal of responsible fatherhood embodied in the law itself.<sup>15</sup> Harvard law professor Mary Ann Glendon has argued that the law is an important carrier of social meaning, and that it communicates powerful social messages about our public commitments and moral responsibilities.<sup>16</sup> We, therefore, ought to consider carefully what the law is symbolically communicating about who we are, what we value, and how we ought to conduct ourselves in our relationships and within society.

The meaning communicated about marital commitment and parental obligations in our modern society has undergone a dramatic transition. Mary Ann Glendon writes:

The American story of marriage, as told in the law and in much popular literature, goes like this: marriage is a relationship that exists primarily for the fulfillment of the individual spouses. If it ceases to perform this function, no one is to blame and either one may terminate it at will. After divorce, each spouse is expected to be self-sufficient.<sup>17</sup>

The perception that in the last half century law has begun to symbolically undermine family life, as in suggesting that marriage is a relationship "either one may terminate at will," has now resulted in a continuing social controversy about the normative message of the law as related to family life. A variety of groups now labor intensively to achieve legislative victories or judicial decisions concerning marriage and its functions so that they might point to a symbolic precedent for their particular social value, now reflected in the law. This symbolic power is why the law has become the great battleground that reflects the cultural transition in values and its implications for family life that has been occurring for the last century. This great debate now rages from the steps of local courthouses to the halls of the United Nations.

#### **How the Law Shapes Social Perspectives on Marriage**

The manner in which the law shapes and is shaped by social trends related to marriage is reflected in how law relates to social norms and conditions our understanding of marriage, how legal trends refashion family law, and how

legislation is used to send a social message.

#### *The Law and Social Expectations About Marriage*

While the beliefs held by individuals within society are closely tied to their expression of particular values, the behavior of individuals seems to more closely associated with the social expectations related to behavior that are held up as important in society.<sup>18</sup> Since the law is primarily concerned with behavior, or conduct, and it reflects “cues to appropriate and inappropriate behavior,”<sup>19</sup> it is not unlikely that changes in the law may be taken as a sign of shifting social norms. Marriage is a legal relationship,<sup>20</sup> and so the laws pertaining to it inevitably have an important bearing on how marriage is understood by the members of the affected society. For instance, in “traditional Hindu formulations [in India], marriage was sacred and therefore indissoluble.”<sup>21</sup> Although the Hindu marriage Act of 1955 granted the possibility of divorce to all of the Indian population, the legal grounds for divorce remained quite limited. A primary reason for this was that there was also a very strong prohibition against remarriage for widows in Hindu culture, and divorce tended to be seen “primarily as a possible escape from a difficult situation, rather than the chance to establish a new life because a given marriage had failed.”<sup>22</sup> The laws established regarding divorce in India reflected the understanding of marriage in the Hindu culture, and they continued to reinforce that social view of the sanctity of marriage. This example reinforces the larger point, that social views on such matters related to marriage are shaped within the normative influence of the law.

#### *Trends in Family Law Affecting Marriage*

The status of law related to marriage and family life in many countries, and particularly in the United States, has undergone a decided shift in the recent past, which has resulted in two countervailing legal trends.<sup>23</sup> The first trend has been exemplified by a withdrawal of many of the norm-setting laws surrounding marriage and family life. Harvard scholar Mary Ann Glendon has referred to this as the “dejuridification of marriage,” or the “withdrawal of much official regulation of marriage.”<sup>24</sup> In her views this trend has sent a strong social message that the state has a declining interest in the status of marriage and its continued success as an institution. At the same time that this trend in family law has occurred, the rise of autonomy theory in the law has made it much more likely for state intervention to proceed regarding family issues under pressure to protect individual rights. The composite message of these trends seems to be that marriage and the family sphere ought to be zones of privacy and that “personal choices about marriage, divorce, and decisions to bear children, are victimless lifestyle acts among consenting adults,”<sup>25</sup> but that the state increasingly has the right to intervene in family life where questions of individual rights are concerned.

#### *Legislation and Social Messages Concerning Marriage*

Since it can be reasonably argued that law has an important bearing on how marriage is understood in society, the question of what social message is being sent by a particular legislative statute or judicial decision becomes important. The changing nature of family life across the world has contributed to the development of legal approaches that attempt to maintain “legal neutrality” on such issues as the value of particular family forms or the arguably private behavior of individuals in family life.<sup>26</sup> But the rising tide of family dysfunction and negative child outcomes makes it difficult to avoid asking whether we are really sending the right message in attempting to avoid a message biased toward marriage and family obligation.<sup>27</sup> One scholar has observed:

If we adopt policies primarily to assist dysfunctional families, what is the impact of those policies on functional families? If we oppose parental notification (prior to abortion), for example, what message do we send to millions of teenagers from functional families? The answer is obvious: we tell them that their sexual and reproductive behavior is none of their parents’ business. Is this the right message? Is this the “story” of family life that we wish to see written in our laws and institutions? . . . Social policy should seek to meet the needs of these alternative family constellations. Yet if we go very far down this path, we unavoidably send a message to our children that all living arrangements are equally valid and equally desirable. We say to them that social norms are by definition invalid. Family values are a matter of personal taste. Moral decisions are questions of private preference. Again, do we really believe this message? Do we believe that such a message will help families to fulfill the expectations that society has placed upon them?<sup>28</sup>

This scholar’s concern about the social message being communicated through the law highlights the potential for undermining marriage if the meaning of the message is not carefully considered. The manner in which legal precedents can shape social views related to marriage suggests the need for care in crafting laws that impact marriage and family life.

#### **Examples of Change in the Law that Have Affected Social Perspectives on Marriage**

Because of the normative influence of the law in shaping views of marriage in society, changes that occur in laws affecting marriage have great potential for either reinforcing or undermining marital relationships and processes. Important legal precedents in modern society that are shaping current social perspectives on marriage include laws regarding preparation for marriage, the formation of marriage, the rights and responsibilities within marriage, and the dissolution of marriage. I would like to share brief examples that highlight the normative influence of the law in each of

these areas.

#### *Examples of the Law Related to Preparation for Marriage*

Historically, the law has recognized the importance of fostering some type of preparation for the responsibilities of family life. For example, statutes that establish a minimum age for marriage suggest that individuals need to attain a certain level of physical, cognitive, and emotional maturity before entering into marriage. But the norms that once guided courtship, sexual activity, and mate selection have shifted dramatically. In the United States alone, unmarried teenage girls (ages fifteen to nineteen) who engaged in premarital sexual activity has risen to nearly 75 percent, and births outside of marriage have gone from 5 percent in 1960 to nearly one of every three births today. Such changes have meant increased economic costs in providing welfare assistance and social costs for society, resulting in higher rates of negative child outcomes for children born, particularly to teenage parents.<sup>29</sup> Legal efforts to place sexuality within the marital relationship and encourage preparation for marital responsibility provide examples designed to enhance preparation for marriage.

#### *Efforts to Reduce Teen Pregnancy*

A recent example of legislation in the United States Congress demonstrates how law may be enacted with the intent to strengthen family commitment. The Congress recognized the importance of marriage in family life when enacting the 1996 welfare reform legislation. The Congress makes the following findings:

- 1) Marriage is the foundation of a successful society.
- 2) Marriage is an essential institution of a successful society which promotes the interests of children.
- 3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well being of children.<sup>30</sup>

Although these findings do not set out any specific policy, they do reveal the objectives of Congress in passing the legislation. One purpose of this legislative effort was to communicate the importance of stable family structures for the welfare of children. A particularly important normative message of the widely publicized debate surrounding this legislation was the disapproval of teenage pregnancy and other out-of-wedlock pregnancies.<sup>31</sup> The U.S. Congress sent an unequivocal message when it allocated \$50 million for promoting abstinence education. The definition for abstinence education included the injunction that "a mutually faithful and monogamous relationship in the context of marriage is the expected standard of human sexual activity." This shows an effort to send a clear message that youth ought to prepare for marriage by reserving sexual activity for that context.

#### *Support for Premarital Preparedness and Education*

Concern about increasing rates of divorce has recently led some nations to consider means for encouraging education about marriage and relationship success prior to entering a legal marriage relationship. Early in the twentieth century, many Arab nations began to establish laws that required a minimum age prior to marriage. By the early 1960s, Egypt, Algeria, Syria, and Tunisia all had legal codes requiring a young man to be eighteen years of age and a young woman to be at least fifteen or sixteen years of age before marriage. These laws suggest increased attention to the challenges in a youthful marriage, but they also preserved parental approval of a person's specific choice of a mate, as is consistent with the tradition of arranged marriages in many Middle Eastern and North African countries.<sup>32</sup> The laws establish a guiding standard related to age for marriage within a particular cultural context that includes strong parental involvement.

Premarital education has also been targeted as a potentially helpful strategy for bettering rates of marital success, because a large percentage of divorces occur in the early years of marriage. It has been suggested that nearly 50 percent of all divorces in the United States take place during the first three to five years of marriage. In Australia, beginning in 1996, the Liberal/National government doubled grants for funding premarital and marriage education efforts for a continuing three-year period.<sup>33</sup> These efforts are positive examples of utilizing the law in ways that could help to reverse the trends undermining marriage in society today.

#### *Examples of the Law Related to Formation of Marriage*

The legal recognition of marriage is one factor that distinguishes it as a relationship given special interest by the state. When individuals enter into the marriage contract, they bind themselves to a relationship that embodies commitment to one another and to the community at large. Scholar Bruce Hafen has noted, "Marrying makes a public commitment that one accepts responsibility to the community and its values."<sup>34</sup> Although the law historically gave preferred status to marriage in the law, this preferred status has faced increasing challenges in the last few decades. One change in the laws related to formation of marriage that is currently being pursued worldwide is recognition of so-called "same-sex marriage."

#### *The Struggle for "Same-Sex Marriage"*

All around the world, there are protracted legal battles occurring over whether the law should expand the traditional definition of marriage to include partners of the same sex. These battles have taken place in such nations as France, Denmark, and the United States. The question might reasonably be asked why so much energy and money is being expended on the issue of whether two persons of the same sex can form a legally recognized marital relationship. Again, this may be due to the recognized power of the law in its normative effect on social perceptions of marriage. First, prece-

dents in the law may not only allow but protect a particular lifestyle choice if it receives a constitutional guarantee of protection as a specified right.<sup>35</sup> Second, precedents in the law may act as visible symbols of social “consensus” that are often believed to reflect commonly held social values and norms (though such “consensus” is less valid when the precedent is based on a court decision rather than a legislative statute). The actual or intended effect of making such changes in the law is often normative recognition and/or approval of what the law now makes possible. Although it may be argued that the public generally makes a distinction between the tolerance of homosexual conduct and active public endorsement of it, the normative effect of granting marital status to same-sex relationships in the law may well be to signal the clear acceptance of such a practice.<sup>36</sup>

*Examples of the Law Related to Rights and Responsibilities within Marriage*

The rights and responsibilities borne by individuals who join the marriage contract include commitments to what is produced as a result of the marriage. For example, parents who have children become morally and legally responsible for the welfare of those children, whether or not the marital relationship continues successfully. In this context, marriage produces family responsibilities and commitments that go beyond the scope of the marriage itself, an indicator that marriage is indeed a relationship that involves responsibility to the community. Although numerous examples might be discussed, I would like to briefly address the normative message of laws related to child abuse.

*The Normative Value of Child Sexual Abuse Laws*

A constitutional right held by parents to direct the upbringing of their children has been long-established by the U.S. Supreme Court.<sup>37</sup> This same parental right is recognized in most countries throughout the world. The responsibility associated with this parental right comes into being when children are born to a mother and father. One of the recognized violations of this responsibility to care for and nurture children produced within a marriage is when a child is sexually abused. Laws that prohibit child abuse suggest not only the boundaries of appropriate behavior for parties to a marriage who have children together, but also make clear that a person cannot violate a child (the product of a marriage) without also violating the marriage itself.

Laws that criminalize child sexual abuse, such as incest, possess a strong normative value intended to foster respect for responsibilities in family life and care for children. A recent firestorm of controversy erupted when a research article entitled “A Meta-analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples” was published in a leading journal of the American Psychological Association in July 1998.<sup>38</sup> The article made

suggestions that child sexual abuse is not necessarily harmful to children under certain circumstances. The legal implications of such a position struck fear into the hearts of child protection advocates and parents, because as one scientist noted, the study “has the potential of being used by pedophile advocates to promote decriminalization of adult-child sexual contact.”<sup>39</sup>

After receiving pressure from legislative academic and public sources, the American Psychological Association took the step of asking its general counsel to prepare “friend-of-the-court” brief materials that could be adapted for use in legal circles to challenge any efforts to use the data from this or other studies to normalize sexual interactions between children and adults.<sup>40</sup>

The point to be drawn from this affair is the focus on the legal implications of this issue and the recognition that the law might potentially be used as a powerful tool to convey a normative message about previously condemned behavior. Scholar Jean Elshtain writes persuasively of the danger of giving way to attempts to eliminate legal restrictions on such behavior:

[Some special critics] would liberate children from paternalistic despotism and parents from ancient superstition. Chafing at restrictions of sexual exploration, these antiauthoritarians celebrate total freedom of sexuality. Their mistake . . . [is] their insistence that such recognition requires elimination of the rules in question. . . . They would open up social life to more, rather than less, brutalization, including targeting children as acceptable resources for adult sexual manipulation. Yes, acceptance of the incest taboo implicates one in a conventional normative standard. But that standard sustains a social good—protecting children from abuse by the more powerful. We punish abusive parents precisely because we accept the idea that adult power must be limited. Adult power, shorn of the internal moral limits of, for example, the incest taboo, would become more generalized, less accountable, and dangerously unlimited.<sup>41</sup>

Preserving and strengthening laws that send a strong normative message about condemnation of child sexual abuse may help individuals to develop the “internal moral limits” that are critical for fulfilling the responsibilities of marriage and family life.

*Examples of the Law Related to the Dissolution of Marriage*

The decline of marriage as a social institution is closely linked with the dramatic rise in divorce that has occurred in the last fifty years. The Council on Families in America has noted gloomily, “For the average American, the probability that a marriage taking place today will end in divorce or permanent separation is calculated to be a staggering 60 percent.”<sup>42</sup> This pattern is being replicated in many countries across the world. Many scholars suggest that legal trends

such as no-fault divorce have contributed to weakening the normative value of law in strengthening marriage.

#### *No-Fault Divorce and the Future of Marriage*

The dissolution of a marital relationship is a difficult experience, often resulting in emotional strain and economic dislocation. It was because of such negative consequences that, in most countries for much of history, the legal system tried to limit divorce and assign fault for the dissolution of the relationship.<sup>43</sup> The pattern in the United States began to change in the 1960s, when the state of California led the way by changing its divorce laws to a “no-fault” system of divorce, thereby disabling the legal preference in favor of marriage.<sup>44</sup> What has been the effect of such a change on marriage? Family scholars debate the effect and whether it has influenced rates of divorce at all, but a recent analysis has suggested that “for most of the states that implemented no-fault divorce during the divorce boom (1965–74) . . . our results support the interpretation that no-fault laws resulted in a substantial number of divorces that would not have occurred otherwise.”<sup>45</sup> One researcher estimated the impact of no-fault divorce legislation may have accelerated state divorce rates upward by 20 to 25 percent.<sup>46</sup> It may well be that some of this impact was due to a shift in the normative message accompanying changes in the law of divorce.

The key issue in questioning the impact of no-fault divorce legislation may not be how it shapes our understanding of divorce, but rather how it shapes our understanding of marriage. When the British government moved to consider total abandonment of the “fault” concept for divorce proceedings in recent years, critics were quick to point out that “what was once viewed as a binding commitment . . . has tended to become a provisional agreement, to be terminated at the whim of both or either of two parties.”<sup>47</sup> The potential contribution of the law to this shifting view is critical and perhaps significant. The concept of fault allowed for the designation of responsibility for actions that impacted the dissolution of marriage, but with its disappearance, any imposition of social or legal sanction for irresponsibility has declined. A British legal scholar has thus noted:

The changes in matrimonial law, both in common law and statute, that have occurred were specifically designed to remove the notion of moral responsibility for action in marriage. It is, then, the institutions of the state that have been the trailblazers in the rise of permissiveness.<sup>48</sup>

No-fault divorce suggests that there is no social stigma or other social consequence for ignoring or violating the obligations of marriage, because there is no penalty for conduct that deliberately puts the marriage at risk of failure. The social message of the law may well suggest that the law has no interest in fostering the sense of obligation that sustains marriage, or at least not through the means of legal enforcement of accountability for marital conduct. It might be argued (and

has been) that it is not the intent of no-fault divorce as a legal standard to compromise the social message that parties in the marital relationship ought to conduct themselves responsibly. However, the efficacy of standards in public policy and law cannot be judged solely on the basis of legislative intent. Rather, they must also be evaluated by the practical effects that they have on the perspectives and behavior of citizens who live under the law.

#### **Recommendations Related to Legal Changes Regarding Marriage**

Based upon our argument that the law inevitably will have a normative effect in shaping social perspectives related to marriage—and thus the success or failure of marriage itself—we conclude with some observations related to the role of the law in this process. Marriage is critical to the welfare of children and acts as the cornerstone of healthy civilization. We suggest that prior to making changes in the law that might affect marriage, it would be appropriate to consider the following questions: 1) What is the change in the law that will affect marriage? 2) What is the normative message that is being sent? And 3) what might be the actual effect of the legal change on the perspectives and behavior of citizens regarding marriage? Some possible questions and recommendations that may assist this process are outlined below.

#### *Questions and Recommendations*

1) Does the proposed change in the law understand the contribution of marriage to the well being of society by providing a foundation for social order and the responsible expression of liberty?

Without social order within society it is impossible to maintain liberty under the law. If the law should encourage an atmosphere wherein both private and public virtue can flourish, then it must address itself to the question of what fosters such an atmosphere. For thousands of years, and in every known society, the answer has been that the institution of marriage is the most durable, necessary, and productive institution for fostering such an atmosphere. Social order within society is impossible without public virtue, and the law itself is the guardian of public virtue. However, marriage is the seedbed of public virtue. Marriage can and should be a safe harbor that promotes moral development in children and adults, and thereby establishes and supports social order, protects liberty, and produces productive, law-abiding citizens. The law ought to understand the contribution of marriage to society and uphold its role in that process.

The U.S. Supreme Court pronounced marriage as “the most important relation in life . . . having more to do with the morals and civilization of a people than any other institution.”<sup>49</sup> It is certainly not the intent of many changes

in the law to weaken marriage, but it is nevertheless incumbent upon the state to assess whether a proposed change in the law will enhance or undermine the foundations of marriage. Maggie Gallagher has pointed out that no social program or legal mandate can give back to children, adults, and society as a whole the benefits and virtues of marriage, once they have been squandered by weakening the institution of marriage.<sup>50</sup> The welfare of each citizen ought to be at the heart of the state's interest, and in encouraging marital commitment and responsibility, the state acts in the interest of all citizens and their well being.

2) Does the proposed change in the law place the state in a preventive role regarding family breakdown, or does it merely position the state in a corrective role, to be assumed when the family has already broken down?

Former President Jimmy Carter once state that "the family was the first government" and suggested that "if we want less government, we must have stronger families, for government steps in by necessity when families have failed."<sup>51</sup> The statement both highlights the need for strong families in society and suggests that governmental efforts to regulate family affairs tend to increase "by necessity" as families break down or exhibit unhealthy patterns. While the caring, respect, and dedication needed in family relationships cannot be inculcated by law itself, appropriate laws and policies can serve to restrain human impulses and provide clear expectations, guiding individuals toward positive family relationships of long-lasting commitment.<sup>52</sup> There is need for family policy to take a preventive and not just a corrective role, *i.e.*, stepping into the picture once the family has broken down or society has been forced to deal with the burdens and negative consequences of unchecked social behavior.

3) What is the influence of prevailing social trends on the development of the law related to marriage? Do these developments foster respect for and maintenance of marriage as a fundamental institution, or do they contribute to a devaluation of marriage and its possible decline?

The quest for greater individual choice to pursue lifestyles conflicting with stabilizing social norms has ultimately led many to believe that issues of how to live and with whom to live are matters of individual choice, not to be governed by restrictive norms. This has contributed to the normative message that decisions pertaining to family life are private and not within the purview of government. The effort to make divorce more amiable has simply made it easier and less shameful. The idea that it is none of the state's business whether a couple remains married or why one partner wants a dissolution has delivered a normative message that marriage exists only for the personal fulfillment of each of the partners. Future policy initiatives

should be formed around the idea of defining the family and carefully articulating serious expectations of married couples, rather than focusing solely on the doctrine of autonomy at the expense of other considerations.

4) What is the proposed intent of the law, versus the potential and/or practical effect of the law as it pertains to marriage?

No-fault divorce was instituted to make it easier for persons to escape abusive marriages without having to relive their painful experiences in public. However, the result was a message that it is now acceptable to leave a nonabusive but troubled marriage, rather than working to repair it. Family planning programs have been instituted to discourage teenage pregnancy. However, the effort to distribute birth control to teenagers has sent the message that teen sex is the norm, rather than the exception. This has served to weaken the cultural taboos and sense of shame that formerly surrounded unmarried sex, which has contributed to increasing teenage pregnancy and abortion.

Policymakers should be conscious of the fact that treating the results of irresponsible behavior as merely social problems can weaken cultural taboos that have discouraged such conduct throughout the history of civilization. Policymakers should also realize that every change in the law carries a normative message, which may or may not square with the intention of the policymaker. Accordingly, policymakers ought to consider changes to the law with the normative effect in mind, and not just the intent alone.

5) Are the grounds for consideration of change in the law related to marriage rational and balanced/ Does the change potentially privilege one exception or case at the expense of society as a whole?

The law has powerful symbolic properties. In a democratic society, the public views the law as a manifestation of the collective will. When that collective will is expressed, "friends and enemies alike seem to make for the bandwagon."<sup>53</sup> Special interest groups understand this and often attempt to gain social acceptance for practices and lifestyles at odds with the mainstream culture by winning victories in the political or judicial arena.

When exceptions to the normative message of legal support for family stability become the pattern for legal adjustments in family law, it becomes difficult to maintain the social expectation that family life is to be respected and upheld. Family law should not be changed merely in order to gain social acceptance for formerly unacceptable practices and lifestyles. Changes in family law are appropriate when they encourage adherence to time-honored values, such as family loyalty, group responsibility, and mutual respect.

## Conclusion

In any society, the laws that are created put forward a view of the moral order that ought to prevail within that society and directive standards that individuals are supposed to abide by in their own conduct and relationships. While it is certainly possible to disagree with the social and moral perspective that is promoted by the law within a given culture or society, it is nevertheless true that the law in any culture or society still represents an attempt to promote normative values that undergird a moral view of the world. The law thus functions as a tool of social and moral persuasion. Many of the ideas and ideologies that have swept through our culture and family life in the twentieth century challenge the normative values of the past. Some philosophies have taken issue with the idea of law as the symbol of those values and norms that foster public virtue, and thus we have taken consideration of the normative value of law out of our public policy initiatives and legislative efforts. Indeed, very often we confront the question posed at the beginning of this paper—whether the normative element of law ought to be considered at all.

When we consider this question as it relates to the fundamental relations in human existence, marriage, and family life, we might do well to consider the following remembrance:

The spirit of emancipation has . . . touched deep nerves of truth [but it also reflects] the blind side of our age. [We are witnessing] the transformation of our society from one that strengthens the bonds between people to one that, at best, is indifferent to them. . . . We are coming to look upon life as a lone adventure, a great personal odyssey, but we seem to be carrying it to such an extreme that if each of us is an Odysseus, he is an Odysseus with no Telemachus to pursue him, with no Ithaca to long for, with no Penelope to return to—an Odysseus on a journey that has been rendered pointless by becoming limitless.<sup>54</sup>

The driving metaphor of the modern age has become the individual quest, the striving freedom of the lone soul, but we must not forget that to preserve freedom we must prepare ourselves for freedom. And it is within the limits of the home, the family, and the marital union, all reflected in the law, that we learn those boundaries and commitments that make genuine freedom and human happiness possible.

#### NOTES

1. See generally, The American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families, "America's Children at Risk: A National Agenda for Legal Action," 27(3) *Family Law Quarterly*, 1993.

2. *Ibid.* p. 433.

3. *Ibid.* pp. 435–36.

4. *Ibid.* pp. 444–46.

5. See *supra* note 2.

6. Hamburger, M. *Morals and the Law: the Growth of Aristotle's Legal Theory*, quoting Aristotle, *Politics* III. 9–13; V.1; VI.3, p. 178, emphasis added, 1951.

7. *Ibid.* p. 176.

8. Stone, Harlan F. *Law and Its Administration*, Columbia University Press. In adopting this definition we do not exclude effects of the law beyond imposing official state sanctions.

9. Madison, James. *The Federalist Papers*, No. 51.

10. *Ibid.*

11. E.g. *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing and Manufacturing Co.*, 115 U.S. pp. 650, 661, 666–672, 1885 (citing *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat 203, 1824; *Mugler v. Kansas*, 123 U.S. pp. 623, 658–59, 661–65, 668–69, 1887).

12. De Tocqueville, Alexis. *Democracy in America*, Lawrence ed., p. 616, 1969.

13. *Ibid.* pp. 291–92.

14. Christensen, B. "Deadbeat Dads or Fleeced Fathers? The Strange Politics of Child Support," 12 *The Family in America*, pp. 1–2, January 2000.

15. *Ibid.* pp. 3–4.

16. Glendon, Mary Ann. *Abortion and Divorce in Western Law*, Harvard University Press, pp. 63–64, 1987.

17. *Ibid.* pp. 104–105.

18. Orthner, D. "The Family in Transition," in D. Blankenhorn, et al., *Rebuilding the Nest: A New Commitment to the American Family*, pp. 100–01, 1990.

19. *Ibid.* p. 101.

20. The authors recognize that marriage is more than merely a legal relationship. However, the legal commitments accompanying marriage vows are among the most important differences distinguishing marriages from other sexual and nonsexual relationships experienced in life. Therefore, the views of people within a society concerning marriage will be guided, to a significant degree, by what they believe the society expects of them in fulfillment of their vows.

21. Goode, W.J. *World Revolution and Family Patterns*, The Free Press, p. 362, 1970.

22. *Ibid.* pp. 263–64.

23. Hafen, Bruce. "Bridle Your Passions, That Ye May Be Filled With Love: How Modern Law Can Protect the Family," *The Australian Family*, p. 5, August 1997.

24. See *supra* note 16, p. 63.

25. See *supra* note 23, p. 11.

26. Glendon, Mary Ann. *The Transformation of Family Law*, 1989.

27. The Council on Families in America, *Marriage in America: A Report to the Nation*, New York: Institute for American Values, 1995, pp. 293–298. The Council Report concludes, rather bluntly, that "the steady displacement of a marriage culture by a culture of divorce and unwed parenthood has created terrible hardships for children" and that "evidence of failure is overwhelming."

28. Bayme, S. "The Jewish Family in American Culture," in Blankenhorn, p. 147. Ironically, at the same time we are creating a greater zone of legal privacy around family decisions regarding marriage and reproductive behavior, it is also becoming more likely that the state will intervene in family relationships to protect the rights of children.

29. Popenoe, D. "Family Decline in America," in Blankenhorn, pp. 41–46.

30. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93 § 101 (1)–(3), 110 Stat. 2106, 2110, 1996 (uncodified).

31. See, e.g., H.R. Rep. 651, 104th Cong., 2d Sess., at 3–6, 1996 (Report of House Budget Committee on Welfare and Medicaid Reform Act of 1996); H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. pp. 261–263, 268, 1996 (Conference Committee Report on Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

32. See *supra* note 21, pp. 106–7.

33. The liberal/national coalition is Australia's conservative party.

34. See *supra* note 23, p. 12.

35. Hafen, Bruce. "Individualism in Family Law," in Blankenhorn, p. 166.

36. See *supra* note 23, pp. 9–10.

37. *Meyer v. Nebraska*, 262 U.S., pp. 390, 399, 1923.

38. Rind, M. *et al.*, "A Meta-analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples," 124, *Psychological Bulletin*, 22 July 1999.

39. Fink, P. "Mental Health Leaders Suggest Flawed Research May Promote Pedophilia," News release by the Leadership Council for Mental Health, Justice, and the Media, 24 May 1999.

40. "APA Admits Error in Publishing Highly Criticized 'Adult-Child Sex' Study," News Release by the Family Research Council, 9 June 1999.

41. Elshtain, Jean B. "The Family and Civic Life," in Blankenhorn, p. 130.

42. The Council on Families in America, *Marriage in America: A Report of the Nation*, 299, Institute for American Values, 1995.

43. See *supra* note 16.

44. See *supra* note 26.

45. Rogers, J. *et al.*, "Did No-Fault Divorce Legislation Matter? Definitely Yes and Sometimes No," 61 *Journal of Marriage and the Family*, p. 801, 1999.

46. Marvell, T. "Divorce Rates and the Fault Requirement," 23 *Law and Society Review*, p. 544, 1989.

47. Barry, N. "Justice and Liberty in Marriage and Divorce," in *Just a Piece of Paper/Divorce Reform and the Undermining of Marriage*, p. 39, 1995 (Report by the IEA Health and Welfare Unit, 1995).

48. *Ibid.* p. 47.

49. *Maynard v. Hill* 8 S. Ct. pp. 723, 726, 1888.

50. Gallagher, Maggie. "Re-creating Marriage," in D. Popenoe, *et al.*, *Promises to Keep*, 1996.

51. Government Printing Office. "A Statement in New Hampshire, August 3, 1976," In *The Presidential Campaign, 1976. Volume I: Jimmy Carter*, p. 463, 1978.

52. Hafen Bruce and J. Hafen. "Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child," *Harvard International Law Journal*, p. 37, 1996.

53. See *supra* note 12, p. 254.

54. "Talk of the Town," the *New Yorker*, pp. 21-22, 30 August 1976.