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MORALITY, PUBLIC POLICY AND THE FAMILY: THE ROLE OF MARRIAGE AND THE PUBLIC/PRIVATE DIVIDE

June Carbone*

I. AN OVERVIEW

In thinking about our images of the family, I find that the source of at least some of our apparent disagreement about family values, ethics, and public policy stems from the location of these issues in the classically liberal divide between public and private.¹ At the same time that the demarcation between public and private has been used to mark the limits of state power, American family policy has depended on consensus in the realm clearly designated as private. To the extent that the United States can ever be said to have had a national family policy, it is one that insists on marriage as the sole legitimate locus for childrearing. Yet, as Martha Fineman observes, marriage, as the defining element of the family and the primary means of providing for children, has not so much been legislated as assumed.² It has been assumed as a central and permanent feature of society synonymous with civilization itself.³ The moral justification for marriage as the sole appropriate forum for the expression of sexuality and the children who result has also been assumed as much as legislated largely on the basis of deeply held beliefs, often religious in origin, that are rarely examined directly in public debate. At least in the modern era, the mechanisms that have made marriage nearly universal have been a set of less visible, and essentially private mechanisms that,

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1. See, e.g., JEREMY WALDRON, *Mill and the Value of Moral Distress*, in *LIBERAL RIGHTS: COLLECTED PAPERS, 1981-1993*, 115, 115-33 (1993) (discussing John Stuart Mill).

2. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

3. See discussion *infra* text accompanying notes 30, 32.

until recently, made childrearing outside of marriage untenable while tying the promise of economic security to those who remained within.

Almost all of the discussion in this symposium, and much of the contemporary debate about the family, can be characterized as a discussion of the appropriate societal responses to the breakdown of the universality of marriage. The statistics are becoming familiar ones. Whereas in 1960, nine of ten children were being raised in two-parent families, today no more than three out of four are, and the percentage is continuing to drop.⁴ Half of all marriages, and sixty percent of second marriages end in divorce.⁵ Thirty percent of all births now occur outside of marriage, and single parenthood has been correlated (with heated debates about causation) to every conceivable childhood ill from murder to obesity.⁶ It is tempting, in listening to this debate, to group the opposite sides in terms of their positions on marriage. Such a characterization would term the "family values" position as one that favors putting the genie back in the bottle, or at least the church hall, and using the power of the state to reinforce the traditional morality that obliged parents to marry and stay married.⁷ The other pole of the debate would characterize the developments away from universal insistence on marriage as a needed and inevitable response to changes in the organization of the economy and the greater independence of women.⁸

In considering the papers presented at this symposium, however, I would like to suggest that we resist the temptation to group responses solely in these terms. For complicating the discussion are not just differences about the role of marriage, but differences about the appropriate role of the state. Many of those who find the percentage of children being raised in single-parent families destructive would oppose

4. Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, in *DIVORCE REFORM AT THE CROSSROADS* 166, 177 (Stephen D. Sugarman & Herma H. Kay eds., 1990) (quoting a 1986 essay by Sen. Daniel Moynihan).

5. SUSAN M. OKIN, *JUSTICE, GENDER AND THE FAMILY* 160 (1989).

6. VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 104-10 (1988).

7. See, e.g., Charles Murray, *No Point Fiddling with Welfare at the Margin*, *LONDON TIMES*, July 11, 1993, at 1-13; Barbara D. Whitehead, *Dan Quayle Was Right*, *ATLANTIC MONTHLY*, Apr. 1993, at 47.

8. See generally FINEMAN, *supra* note 2.

state efforts to restrict the availability of divorce or to stigmatize nonmarital births. Others who would like to provide greater recognition and support for nontraditional families are nonetheless critical of the role state policies have played in undermining traditional families.⁹ Many of the differences between Martha Fineman, who would leave more of the determination of family structure and less of the need for financial provision to the private sphere, and William Galston, who would use state policy to encourage traditional family structure by placing a larger portion of the financial responsibility for children directly on parents, are differences about the appropriate role of the state as much as they are differences about family values.

In introducing this symposium, I would like to focus on the relationship between our private value systems toward marriage, sex, and children and the appropriate direction of state policy. Should public policy seek to regulate sexuality, promote traditional two-parent families, protect the well-being of children independent of family structure, and advance gender equality and/or individual liberty? Or should public policy instead seek to remain neutral in the face of widespread and deeply held differences about all of these issues? Should state policy proceed from a broad-based religious, philosophical or moral commitment to particular forms of family organization, or should it reflect utilitarian concerns for the well-being of children and their importance to society? Inspired by the Passover season in which this conference occurred, I would like to attempt to clarify some of the relationships between public and private by asking four questions that I find central to thinking about the family and public policy.

The first question is whether the United States has, or, indeed, has ever had a family policy as such. The reflexive answer is "no." Compared to Western Europe, the United States has never adopted a comprehensive system of provi-

9. For a discussion of the different responses to divorce and an evaluation of the possible alternatives, see Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 *THE FUTURE OF CHILDREN* 29 (1994) (concluding that neither moral suasion nor public policy efforts were likely to have much impact on rates of family dissolution).

sion for children.¹⁰ Recast in terms of the divide between public and private, however, this "no" becomes no more than a statement that the United States has never acknowledged a public responsibility to provide directly for families or for children. For when the public and private spheres are considered together, a fairly clear family policy does emerge, at least in hindsight. U.S. law, policy, and social mores have long focused on an overwhelming, some would argue exclusive, emphasis on traditional marriage as the only legitimate locus of childrearing.¹¹ Within this system, the state has regulated marriage, divorce, the status of children, and the financial consequences of these relationships, but state responsibility for children's well-being has been largely discharged with the creation and maintenance of the marital union.¹²

Exact identification of marriage as a matter of national family policy, even as a starting point for discussion, is nonetheless problematic. Historically, such a policy emerges from a hodgepodge of federal, state, and private sources. Nonetheless, the public policy elements that arguably comprise family policy consist of some combination of the following:

(1) a set of moral codes criminalizing fornication, adultery, and sodomy;¹³

(2) regulation of marriage, and reliance on the parents' marital bond to define family relationships, including, for example, a father's differing ties to marital and nonmarital children;¹⁴

(3) regulation of the grounds for, and financial consequences of divorce;¹⁵

(4) regulation and sometimes prohibition of birth control, abortion, and adoption;¹⁶

10. See generally MARY A. GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 137 (1989).

11. See FINEMAN, *supra* note 2, at 145-76.

12. On the use of the public/private distinction to block state intervention into ongoing marriages, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501-13 (1983) [hereinafter Olsen, *The Family and the Market*]. See also Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985) [hereinafter Olsen, *The Myth of State Intervention*].

13. See FINEMAN, *supra* note 2, at 146-47. Fineman observes, however, that in recent years many states have repealed such legislation. *Id.*

14. *Id.* at 148.

15. See generally Sanford N. Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4 THE FUTURE OF CHILDREN 44 (1994).

16. See, e.g., FINEMAN, *supra* note 2, at 181-86.

(5) policies such as minimum wage and maximum hour provisions, restrictions on the role of women in the workplace, and labor laws justified, at least in part, on the importance of securing the availability of a family wage;¹⁷

(6) social security provisions designed to insure against loss of the primary wage-earner;¹⁸

(7) AFDC assistance premised on the role of the government in providing a safety net for dependent children;¹⁹

(8) tax and other policies written to subsidize traditional families;²⁰

(9) the separate spheres ideology that combines state regulation of family creation and dissolution with barriers to intervention in the affairs of ongoing families.²¹

Taken together, these provisions embrace a recognition of marriage as the only sanctioned form of sexual expression; state support, both symbolic and financial, for marriage as a gendered division of labor designed to accommodate childrearing; and state subsidization of marriage as a source of financial security sufficient to raise a family. Recent changes, however, have called all of these elements into question.

First, although some of the laws regulating sexuality remain on the books, many have been repealed or remain unenforced. The line of privacy cases that starts with *Griswold v. Connecticut*,²² together with the controversy surrounding the Supreme Court's five to four decision in *Bowers v. Hardwick*,²³ suggests considerable support for treating matters of sexual expression, if not necessarily childrearing itself, as

17. See Joan C. Williams, *Women and Property*, in A PROPERTY ANTHOLOGY 182, 183 (Richard H. Chused ed., 1993).

18. Steven D. Sugarman, *Reforming Welfare Through Social Security*, 23 U. MICH. J.L. REF. 817 (1993).

19. *Id.*

20. See, e.g., Anne L. Alsott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reforms*, 108 HARV. L. REV. 533, 559-64, 576-79 (1995); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Bias in the Code*, 40 UCLA L. REV. 983 (1993); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

21. See, e.g., Olsen, *The Family and the Market*, *supra* note 12; Olsen, *Myth of State Intervention*, *supra* note 12.

22. 381 U.S. 479 (1965).

23. 478 U.S. 479 (1986).

within a private realm that should be free from state intervention.²⁴

Second, state regulation of family creation and dissolution has moved away from insistence on marriage as the exclusive source of family ties. The universal adoption of no-fault grounds for divorce has effectively eliminated the legal recognition of marriage as a lifelong commitment, and the dismantling of the distinction between marital and nonmarital children has abolished much of the role of marriage as a defining element in parental (and particularly paternal) relationships.²⁵

Third, the wholesale movement of married women into the labor market has rendered untenable the breadwinner/homemaker family upon which much of family tax and other financial policies are based. Finally, labor market changes have rendered illusory the promise of financial security once associated with stable marriages.²⁶

While it is difficult to identify an American family policy independent of reliance on marriage, the result of these changes is to call into question the coherence and viability of a policy that continues to rely exclusively on marriage to secure children's well-being.

The second question concerns the source of authority for state regulation of marriage and the family. There are two main justifications. The first equates an insistence on marriage with regulation of sexual morality. The second proceeds on utilitarian grounds to link marriage to a form of economic organization designed to provide for children, and, Fineman argues, other dependent members of society.²⁷ Because state insistence on marriage, as opposed to the terms of its creation and dissolution, has so rarely been examined, the different justifications are intertwined, and both lie on the fault lines between consideration of family issues as matters of "public" or "private" concern.

24. See generally FINEMAN, *supra* note 2, at 147 n.9.

25. *Id.* at 147; see also Katz, *supra* note 15, at 45-49.

26. See generally FUCHS, *supra* note 6; see also PAULA ENGLAND & GEORGE FARKAS, HOUSEHOLDS, EMPLOYMENT, AND GENDER 54-63 (1986); CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN (1990).

27. FINEMAN, *supra* note 2, at 161-64.

The first issue involves the degree to which the centrality of marriage to regulation of the family proceeds from, or necessarily involves, regulation of sexual morality. The historical answer is unequivocal. Review of the origins of American family law reveals an almost seamless integration of social, legal, and religious strictures regulating sexuality and the family.²⁸ Grossberg describes colonial family legislation and custom, which prescribed the death penalty for "adulterie" and "sodomie," as a "blend of Calvinism, Anglicanism, and English ecclesiastical law."²⁹ Even with the adoption of the First Amendment, the Supreme Court, faced with a challenge late in the nineteenth century to the ban on polygamy in the Utah territories, had no trouble declaring that "[t]he organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."³⁰ Early American family law was marked by a clear identification of sexual morality as fundamental to the importance of marriage, and was religious, if not necessarily sectarian, in origin.

With time, American law has nonetheless moved away from religious justifications of marriage without abandoning

28. Fineman describes this as the "[m]erger of [s]acred and [s]ecular." FINEMAN, *supra* note 2, at 150. This merger reached its height in the small New England communities with religious origins. In these communities, there was no clear separation of Church and State, or of secular law enforcement from religious orthodoxy. See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 19 (1985); THE LAWS AND LIBERTIES OF MASSACHUSETTS 5 (Max Farrand ed., 1929).

Looking at the relationship between religious and secular over a longer period, however, discloses a much more complex relationship. Both the rise of Islam in the Middle East and of Christianity in Europe involved efforts to control what was often perceived as destructive licentiousness. The priests and mullahs then institutionalized religious victories in organizations that regulated, among other things, family structure. Lawrence Stone describes a lengthy period of struggle in England in which the Catholic Church sought to insure that the validity of marriage, and the corresponding inheritance rights, depended on compliance with Church precepts. Given the importance of inherited wealth, control of family creation and dissolution was a source of considerable power. Henry VIII's break with Rome was triggered by the Pope's refusal to annul his marriage, and, in the centuries that followed, the English sought to transfer jurisdiction of the civil consequences of marriages not to the Episcopal Church, but to secular courts.

29. GROSSBERG, *supra* note 28, at 19; THE LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 28, at 5.

30. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 48-49 (1890).

the connection to sexual morality.³¹ In another of the nineteenth century cases dealing with polygamy, the Court held out marriage as the "foundation of the family and of society, without which there would be neither civilization nor progress."³² In 1967, without reference either to Christianity or to direct support from constitutional text, the Supreme Court found that marriage was one of the basic rights, "fundamental to our very existence and survival."³³ Control of sexuality, rather than the celebration of private contract, has long been integral to the explanation of marriage's role in promoting "civilization." The Supreme Court could, after all, deem marriage fundamental to "our very existence" only with insistence on marriage as a precondition to reproduction. Grossberg writes, in tracing the nineteenth century regulation of marriage, that "[i]rregular or clandestine marriages faced an uncertain reception because, as American legal authority David Hoffman suggested in 1836, the end of marriage could not be achieved 'unless promiscuous intercourse be restrained.'³⁴ Connecticut judges, as recently as 1964, had no hesitancy in declaring that "the standards of society are such that sexual relations or lascivious actions by persons who do not have the benefit of marriage to one another are regarded as obscene, unchaste and immoral."³⁵ At least part of the historical emphasis on marriage has stemmed from the desire to provide a clear line of demarcation between licit and illicit

31. Sandra Day O'Connor, writing for the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), recently reaffirmed the role of marriage as "an exercise of religious faith as well as an expression of personal dedication." Nonetheless, as early as 1816, Connecticut judge Tapping Reeve set out to secure the civil nature of marriage in order to wrest it from exclusively religious governance, explaining that:

There is nothing in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person in holy orders, or that it should be solemnized in a church. Every idea of this kind, entertained by any person, has arisen solely from the usurpation of the Church of Rome on the rights of the civilian.

TAPPING REEVE, *LAW OF BARON AND FEMME* 307 (1816).

32. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

33. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

34. GROSSBERG, *supra* note 28, at 64 (citing DAVID HOFFMAN, *LEGAL OUTLINES* 147 (1836)).

35. *State v. Jones*, 205 A.2d 507, 509 (Conn. Cir. Ct. 1964).

sexual relations; in short, to reinforce and police conventional morality.³⁶

Nonetheless, an economic justification has long coexisted, implicitly or explicitly, with the moral one. The second half of the *Loving* reference, which goes beyond mere procreation to describe marriage as fundamental to our very existence "and survival," illustrates the point. This reference to survival suggests that, in addition to the link to reproduction, marriage contributes to the prospects for children's well-being and perhaps beyond that to the orderly organization of society. The statement is undoubtedly true; indeed, it is almost axiomatic. It is also open to the charge of being endlessly circular. So long as society privileged marital unions and punished and stigmatized "illegitimate" offspring, so long as full market access was limited to those in a breadwinning role and caregiving outside of marriage was unstable or expensive, and so long as family ties were central to the transmission of wealth in society, marriage was the most promising route for securing the well-being of children. Society, starting with an image of the family as a given, has constructed institutions premised on its stability. This analysis, however, begs the question of whether marriage *should* be the primary vehicle for accomplishing these ends. In an era in which the family, and the relationship between the family and the market, are undergoing transformation, the question becomes more than an academic one.

The fact that the role of marriage has been assumed rather than legislated, and that the importance of marriage has rested on deeply held, but diverse and essentially private beliefs, complicates the effort to consider what role marriage should continue to play. Only the polar ends of the modern debate are clear because only at polar ends of the debate is there agreement on the relationship between private morality and state policy. The Christian Coalition and secular groups that would champion traditional family values believe that the state should play a major role in reinforcing the type of sexual mores that have historically defined marriage as the

36. GROSSBERG, *supra* note 28, at 68. Grossberg, in considering the divisions between public and private in the nineteenth century, emphasizes the increasing importance of private choice in the selection of spouses and in the choice of forums in which to express commitment while nonetheless affirming state power to validate and regulate sexual unions. *Id.*

only appropriate form of sexual expression.³⁷ These groups tend to support continued restrictions on fornication, sodomy and abortion, a role for considerations of fault in the divorce process, and state efforts to deter divorce and nonmarital births. They would justify a state policy of insistence on the importance of marriage either directly on religious principles or on broadly based philosophical grounds.³⁸

The other pole of the debate is represented by those who would disestablish marriage as a societal institution. They would treat the decision to marry or not marry, to engage or not engage in sexual relationships, to bear children within a relationship with a parental partner, without a partner, or not at all, as matters of private choice in which the state should not intrude.³⁹ These groups would characterize state insistence on marriage as the only sanctioned locus for child-rearing, and any policy that would directly restrict the availability of divorce or the ability of single parents to raise their children, as unwarranted and oppressive.

This pole of the debate further divides into two philosophically opposed camps based on their attitudes toward the state's economic role. The first is the libertarian wing that casts such issues in terms of the right to be free from government dictation of private morality. Libertarians would insist on the right to choose or not choose marriage, and assign the state no responsibility for the consequences of their decisions or the well-being of the resulting children.⁴⁰

The other wing embraces a feminist critique of traditional marriage as an instrument of patriarchy that perpetuates a gendered division of labor and locks the partners into inherently unequal roles. The feminist left would eschew the

37. See FUCHS, *supra* note 6.

38. Immanuel Kant, for example, justifies marriage in terms of notions of reciprocity he finds fundamental to respect for persons. JEREMY WALDRON, *When Justice Replaces Affection: The Need for Rights*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, 370, 370-73 (1993).

39. For a discussion of the liberal position see JEREMY WALDRON, *John Rawls and the Social Minimum*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, 250, 268-69 (1993); see also FINEMAN, *supra* note 2, at 180-93.

40. See generally JEREMY WALDRON, *Welfare and the Images of Charity*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, 225, 226-30, 296-97, 457 (1993). The new right argues, as they have in the debate on welfare reform, that the existence of a safety net, including one that provides for children, encourages parents to make riskier decisions than they would otherwise, and thus worsens conditions in the long run. *Id.* at 296-97.

rights language of libertarians and charge the government directly with responsibility for remedying the gendered nature of wage labor that limits parental ability to participate in the labor market, and for insuring the well-being of children irrespective of their parents' relationship.⁴¹

In between the two poles are those who would rely on a utilitarian cost-benefit analysis, concluding that (1) the well-being of children concerns society as a whole; (2) given the current constitution of society, children are better off in two-parent families; and (3) the state should therefore do what it can to reinforce marriage, and deter divorce and nonmarital births. This analysis differs from that of the family values coalition in that it leaves the judgment as to the morality of the underlying conduct to the private sphere. It differs from the libertarian and feminist critiques in that it does not regard the failure to pass judgment in the public sphere as a barrier to state action. Nonetheless, the premises of the utilitarian calculus are offset by concern that the benefits from any action the government could take to encourage family stability would be more than offset by the difficulties of enforcement, and the potential for injustice. Galston justifies the Clinton administration's initial welfare reform proposals in these terms, emphasizing the importance of encouraging two-parent families and the symbolic role of welfare reform as one of the few instruments of government policy that might be used to serve such ends.

Divisions along these lines are hardly new. Nineteenth century discussions of the family included many of the same disagreements and challenges to the use of state power to reinforce conventional morality, but there are at least two changes that significantly reshape the debate. First, the overwhelming consensus that equated nonmarital sexual activity with license rather than with liberty has dissolved into deep-seated disagreement.⁴² Second, the empirical question of the causal link between children's well-being and the sta-

41. See, e.g., FINEMAN, *supra* note 2, at 226-36.

42. See, e.g., STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 201 (1992) (noting that in 1984, 60% of people aged 23-38 approved of casual sex, compared to only 28% of those older than age 38). Coontz also reports that an anthropological study concerning sexual behavior in over 250 societies found that only three shared a "generalized sex taboo" on sexual behavior of any type outside of marriage. *Id.* at 184.

bility of marriage is being debated rather than assumed.⁴³ The result of these changes is to call into question not only the wisdom, but the authority, and ultimately the practicality, of a policy that relies exclusively on marriage for the well-being of families.

The third question concerns the viability of a family policy that depends exclusively, or even primarily, on marriage to provide for children's well-being. If the issue were simply a matter of predicting the response to a public opinion poll that asked: "Are children generally better off raised by two biological parents, and should individuals have an obligation to do what they can to insure such a result?" the question might have a simple answer. Instead, the answer overwhelmingly focuses on what role the state should play when a majority of parents bring children into the world under circumstances in which they are unlikely to remain with both biological parents through their minority. The answer to this question, like the other answers, lies in the divide between public and private as it depends largely on whether any public response can compensate for the atrophy of private mechanisms of control.

To the extent that, in earlier eras, children were more likely to be raised in two-parent households, private coercion was a major factor. Control of sexuality has almost always been a matter of concern for human society and, in practice, much of the concern has focused on the supervision of young women. The ideal in many societies has been for girls to move from their father's house to their husband's at an age sufficiently close to the onset of sexual maturity to remove much of the temptation for sexual experimentation. Once safely married, the couple's relationship might change over time, but the marriage was forever, and the couple's resources tied to the product of their union.⁴⁴

43. See, e.g., Paul R. Amato, *Life-Span Adjustment of Children to Their Parent's Divorce*, 4 *THE FUTURE OF CHILDREN* 142-64 (1994); Sara McLanahan, *Intergenerational Consequences of Divorce: The United States Perspective*, in *ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE* 285 (Lenore J. Weitzman & Mavic Maclean eds., 1992).

44. For discussions of the family and changes over time, see generally EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* (1975); EDWARD SHORTER, *THE FAMILY IN HISTORY* (Charles E. Rosenberg ed., 1975).

While many societies overtly attempt to enforce chastity (public whippings, the scarlet letter), the more common mechanisms are a combination of adoption, abortion, shotgun marriages and the stigmatization of illegitimacy that effectively prevent single mothers from raising children on their own. In the late eighteenth century, one third of all New England brides were pregnant at the time of marriage.⁴⁵ During the fifties, the rate of teenage childbearing soared, reaching highs not equaled since, but only fifteen percent of the births were to unmarried mothers. Rather, adoptions increased by eighty percent between 1944 and 1955, while the average age of marriage dropped, and the percentage of pregnant brides doubled.⁴⁶

Marriage, however, insures two-parent households only so long as the parents remain married, and shotgun marriages work as instruments of social control only in societies in which divorce is difficult. Earlier eras stigmatized divorce even in circumstances in which it was legally available, and women's economic dependence made divorce impractical, if not impossible. As a result, divorce tended to serve as a solution of last resort, and a much higher percentage of couples remained married even if they effectively lived separate lives.⁴⁷

All of these instruments of social control have atrophied, many as part of long term changes in the organization of family life. First, despite our tendency to think of recent changes as a sexual revolution, Victorian sexual rectitude, if it ever fully existed, ended with the Victorian age, not the sixties. At the turn of the century, New York City reported a fifty percent decline in prostitution, reportedly in response to the greater availability of other women. The fifties, not the eighties, witnessed the greatest recent increase in teenage births. The decades since the advent of the pill have been characterized more by deferred childbearing, attenuation of the double standard, and greater openness toward, and acceptance of

45. Sylvia A. Law, *Abortion in America: A Tangled History, Opponents' Emphasis on Protecting Fetus Obscures Earlier Goals*, ATLANTA CONST., May 7, 1989, at D1.

46. COONTZ, *supra* note 42, at 3, 39.

47. For accounts of the history of divorce in the United States, see generally MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* (1972); NELSON M. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* (1962); MARY A. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

nonmarital sexuality than by increases in fertility.⁴⁸ Nonetheless, the increased independence of women, and the importance of deferred childbearing to the acquisition of human capital for both men and women, make it likely that the changes in attitudes toward sexuality, particularly those that stem from the separation of sexuality and fertility, are long-term ones.

Second is the increase in divorce rates. Although marriages may not on average have lasted much longer in earlier eras, the major cause of termination was death, not divorce. Between 1960 and 1982, the divorce rate tripled, leveling off at a rate in which one of every two first marriages, and sixty percent of second marriages end in divorce.⁴⁹

Third, the response to unplanned pregnancies is continuing to change. In the fifties, pregnant teenagers, in the face of parental insistence and societal stigma, overwhelmingly elected marriage or adoption. With the greater accessibility of abortion following *Roe v. Wade*, white women increasingly chose abortion over marriage, and fertility decreased across the board.⁵⁰ In the last five years, younger women, particularly whites, have become more likely to choose single parenthood over adoption, abortion or a potentially shaky marriage. The result is that nonmarital births now account for thirty percent of the total, with higher percentages farther down the socio-economic ladder. In the African-American community, marriage has never been as promising as in the white community, and the resistance to abortion has been greater. As a result, while overall fertility rates have declined, particularly for married women, the proportion of nonmarital births has increased to over sixty percent of the total.⁵¹

48. Law, *supra* note 45, at D8 (noting that in 1787, the average white American woman bore seven children; by the late 1870's, the average was fewer than five; by 1900, it was 3.56). American fertility rates reached a record low of approximately two children per family in 1976, and were below the replacement rate for white middle class women. Phillip Longman, *Justice Between Generations*, ATLANTIC MONTHLY, June 1985, at 73, 79.

For a review of more recent changes, see COONTZ, *supra* note 42.

49. COONTZ, *supra* note 42, at 3.

50. The figures for African-Americans show a continuation, rather than an acceleration, of previous trends. See generally COONTZ, *supra* note 42, at 232-54.

51. See Furstenberg, *supra* note 9, at 29-43.

This combination of factors effectively means that the private controls that insured birth within marriage are no longer so effective. The older pattern of young women who moved from their father's to their husband's supervision is gone.⁵² The stigma that once attended nonmarital sexuality and childbearing is no longer as strong, and in some communities it is largely nonexistent. Women's greater economic independence, along with general economic uncertainty and hardship, increase rates of divorce and make young relationships less stable. While the mix of abortion, adoption, marriage, and single-parent births is likely to change over time, class and race, the forces that once made marriage the universal locus of childrearing are no longer so reliable.

In the face of such changes in the private realm, the earlier mechanisms of state policy, and most of the proposed reforms, appear ineffective or irrelevant. There seems to be little sentiment for a return to fault-based divorce or stigmatizing illegitimacy, much less for the pillory or the scarlet letter. Public reaffirmation of the importance of marriage is unlikely to affect those for whom marriage is not an attractive or realistic option.⁵³ Such efforts will succeed only to the extent they make single parenthood impossible. The effectiveness of welfare reform, whether of the Clinton or the Gingrich persuasions, is premised on creating the specter of parents giving up children they are unable to feed. Even then it is unclear how much impact such policies will have without greater support for abortion or marriage.

The fourth question is, What are the alternatives? If state policy depends on consensus in the private realm, what avenues are open in an era of disagreement? To the extent that there is a remaining consensus about family matters, it is likely to be an insistence on the importance of, and obligation to children. Amidst disagreement about almost everything else, the overwhelming majority of Americans would agree that children matter, and that private notions of responsibility include an obligation to provide for the well-being

52. *Id.* at 31. Women's average age of marriage increased from 20 in the mid-fifties to 24.4 in 1992.

53. Fifty-five percent of a survey of 16-year-old girls indicated that they would consider becoming single parents if they did not marry. FINEMAN, *supra* note 2, at 150.

of our children. The law reviews, the courts, and the halls of Congress ring with calls to put children first, to make children's concerns more visible, and to have parents act more responsibly.⁵⁴ The disagreements concern the definitions of children's interests, and the articulation of the corresponding rights and responsibilities that attend such relationships.

In bringing this conference together, much of the effort to consider different images of the family involves an effort to reexamine our relationships with children — both private and public, individual and institutional. We have different perspectives on how these relationships are formed, maintained, and governed. The experiences of those outside the mainstream of American society, and, indeed, outside of American society altogether, provide different lenses that facilitate our examination of the family. In considering the obligations and opportunities for public policy toward the family, we need to start by examining the private mores that emerge from different communities and ask, in a fundamental way, whether there is remaining common ground. I believe that the most fruitful area for potential agreement is likely to be premised on the importance of children.

Within the legal world, this process is well under way. Marriage, as a lifelong commitment with corresponding legal obligations between husband and wife, may be dead, but it has been replaced by a renewed insistence on permanent ties between parent and child.⁵⁵ Marriage may no longer be a defining element in recognition of fathers' relationships with their children, but it has been supplanted by recognition of a biological tie that can only be intentionally severed.⁵⁶ The parents' relationship to each other, once governed exclusively by marriage, is now being redefined by joint custody, support orders, visitation agreements, temporary restraining orders and adoption rights. In other countries, it has been divorce rather than nonmarital births that has forced reconsideration of the relationship between the state and the family.⁵⁷ In the

54. See, e.g., FUCHS, *supra* note 6; SYLVIA A. HEWLETT, *WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN* (1991); Richard T. Gill, *For the Sake of the Children*, 108 *PUB. INTEREST* 81 (1992); Mary A. Glendon, *Family Law Reform in the 1980's*, 44 *LA. L. REV.* 1553, 1557-65 (1984).

55. See FINEMAN, *supra* note 2, at 228-36.

56. See *id.* at 81-87.

57. See, e.g., JOHN EEKELAAR, *REGULATING DIVORCE* (1991).

United States, the relationship between private obligation and state responsibility has yet to be redefined.

II. THE SYMPOSIUM

The papers in this symposium begin by examining the premises from which societal provision for childrearing should proceed. In *The Nature of Dependencies and Welfare "Reform,"* Martha Fineman links two observations that set her conclusions apart from more conventional analyses of the family. First, she explains that dependency — the dependence of children, the elderly, and the infirm on caretakers, and the corresponding dependence of caretakers on others for their financial sufficiency — is an ordinary and inevitable part of life. Second, Fineman argues that caretaking benefits not only those for whom the care is provided, but society generally, and that caretakers should not be marginalized because of their efforts. Fineman concludes that the only way to prevent such a result is for society to assume much greater direct responsibility for caretaking.

In *Public Morality and Public Policy: The Case of Children and Family Policy*, William Galston agrees that the consequences of caretaking, of both its successes and failures, are borne by society as a whole. He differs from Fineman in his insistence that "the intact two-parent family is best suited" to the task of childrearing, psychologically as well as financially. Galston would therefore discharge government responsibility for caretaking through job creation, tax policy, health care and other benefits designed to promote the traditional family's economic stability, and through moral leadership reinforcing biologically-based parental responsibility for children.

The second set of papers examines family structure within the context of African-American, lesbian, and international communities that fail to conform to Galston's definition of the ideal. Two themes unite these presentations. First, for systemic societal reasons, many women do not enjoy the option of childrearing within a nuclear two-parent family; yet, the efforts to promote more traditional "family values" disproportionately penalize them. Second, the characterization of the debate in terms of "two-parent" versus "one-parent" families trivializes or ignores the contributions of other adults. The heterosexual, middle-class, white, American discussion

of divorce and nonmarital births cannot, therefore, fully capture the importance of these issues for other communities.

Jane Mauldon introduces these papers with a presentation of the demographic data underlying recent changes in family composition. She documents the increase in nonmarital births and men's "flight from the family" as a smaller percentage of adult males live in families "of their own." She links these changes to a general decline in marriage rates for young adults, the lengthened period of nonmarital sexual activity, poorer employment prospects for young men, fewer shotgun marriages, and the lesser stigma associated with nonmarital childrearing. Mauldon concludes that given the large scale nature of these changes, and their relationship to long-term cultural and economic forces, welfare changes are unlikely to have much effect on the overall picture.

Twila Perry, in *Family Values, Race, Feminism and Public Policy*, discusses the role of race in family values rhetoric. She observes that white society has historically undermined black families, whether by refusing to grant legal status to slave marriages or through modern practices that restrict the employment prospects of black men. She concludes that acceptance of single motherhood, under circumstances in which the larger community simultaneously stigmatizes it and promotes it among African-Americans, is an example of the ways in which black families and communities create independent moral meaning.

Nancy Polikoff addresses *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?* She argues that the law should respect women's right to form families without fathers, and that the construction of parenthood should not rest exclusively on biology. Polikoff embraces private ordering as the cornerstone of her approach, albeit with concern that the overriding American emphasis on private support may leave many women with few real choices.

Nicole Sault brings an anthropological perspective to the construction of family in *Many Mothers, Many Fathers: The Meaning of Parenting Around the World*. She observes that the United States is unusual in its emphasis on the nuclear family, and that other societies recognize a broader array of family relationships. As a result, a larger community of

adults participates in, and assumes responsibility for childrearing.

In commenting on these papers, Michael Meyer, in *Family Virtues and the Common Good*, discusses the role philosophical concepts such as "virtue" and the "common good" can play in the discussion of the family. Meyer argues that liberals make a mistake in conceding the concept of virtue to conservatives; that much of the discussion in the conference can be recast in terms of the importance of the virtue of "nurturing," and the best ways to promote it. He similarly argues that the American emphasis on individualism, and on the divisions between rich and poor, black and white, traditional and nontraditional families often obscure society's collective interest in family and children.

The final set of papers returns to the importance of family structure to children's well-being. In *The State of the Family and the Family Policy Debate*, David Blankenhorn argues that the evidence is overwhelming that children's well-being is declining, and that the leading cause is "family fragmentation, or the steady break-up of the mother-father child-raising unit." He insists that family break-up produces not just the lower income experienced by single-parent families, but that father absence contributes to a host of behavioral problems from male violence to psychiatric illness to problems in girls' sexual development. He advocates policies that promote "the idea that unwed childbearing is wrong, that our divorce rate is far too high, and that every child deserves a father."

Willemsen and Marcel, in *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, examine the social science literature on attachment and conclude that empirical evidence strongly supports the importance of continuity in children's relationships with their caretakers. The data they develop suggests that we should re-examine the growing legal emphasis on biology in custody decisions in favor of greater attention to the child's existing attachments.

The symposium ends with Willemsen and Willemsen's review essay, *Martha Fineman's The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies: She Threw Out the Baby with the Old Feminism*. The essay takes issue with Fineman's call for a "winner take all" primary caretaker custody standard, and advocates a "best interests"

standard that would make “parental rights subordinate to the child’s right to be nurtured and to continue nurturing relationships.”