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FOREWORD

MARRIAGE IS THE FOUNDATION OF THE FAMILY

JAMES C. DOBSON*

Those of us who are endeavoring to strengthen society's most vital and primary institution—the family, founded upon and nurtured by marriage—owe the editors of the respected *Notre Dame Journal of Law, Ethics & Public Policy* a substantial debt of gratitude. Here they have commissioned a timely and important volume addressing the myriad reasons why law must be a careful custodian of marriage. And they have delivered it to us at a moment when the battle rages red-hot.

Without a doubt, the institution of marriage is under severe legal and social assault. Fueled by an ugly and dangerous hubris, the courts have moved from being one of marriage's historical primary caretakers, to being its molder and master and, if some get their wish, its destroyer. Although the U.S. Supreme Court, less than thirty years ago, recognized that marriage transcends law as a “sacred” institution “older than the Bill of Rights,”¹ the Massachusetts Supreme Judicial Court, late last fall, declared civil marriage to be a mere *creation* of the State.² If we are willing to entertain the idea that marriage is a human creation, then we

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1. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

2. *See Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 954 (Mass. 2003).

must also accept the notion that it is subservient to and pliable by the State.

And so the State disfigures marriage, as it did in *Lawrence v. Texas*³ (which extended constitutional protection to not only sodomy, but to *all* non-marital sexual activity). Likewise, in *Goodridge v. Department of Public Health*, Massachusetts' highest court characterized the age-old and humanly universal definition of marriage as a union between male and female not as an important social function, but rather as a sign of animus toward homosexuals that is unconstitutional.⁴ These decisions are very disturbing cultural indicators. When a society can find no reason whatever to praise one expression of sexual activity or domestic relationship as legally and morally superior to another—due to its ability to provide necessary and good things for society—it has lost its ability to maintain a productive and humane culture.

But the serious threats to marriage and the family did not start with these radical court decisions. Our society has been redefining marriage for decades. Each change has systematically devolved marriage into an autonomous, self-expressive, self-satisfying relationship, rather than an institution that encourages service to the good of the family and society.

One of the most significant efforts to redefine marriage and family, although driven by the legal profession, came not from the courts, but from the legislature. The world's first no-fault divorce law, developed by leading radical family law theorists, moved through the California legislature and was signed into law by Governor Ronald Reagan in 1969.⁵ With the wisp of a pen, the "until death do us part" idea of marriage became optional. At that point, it was legally easier for a spouse to leave a thirty-year marriage than it was to break an annual pool-maintenance contract. In the years that followed, every state in the Union adopted some form of no-fault divorce. Suddenly, marriage was no longer marriage, because its understanding as a permanent social and spiritual contract no longer had any backing in law. Social science investigations over the intervening thirty years tell us conclusively that the fall-out from this fundamental tinkering with marriage, particularly in terms of declining human well being for adults and children, was far more severe than anyone imagined. It isn't difficult to see how heterosexuals' dismissal of the essential "as long as we both shall live" component of mar-

3. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

4. *See* 798 N.E.2d at 958.

5. Family Law Act of 1969, ch. 1608, 1969 Cal. Stat. 3312 (repealed 1994).

riage makes it easier for homosexuals to dismiss the fundamental “husband and wife” part.

While not a threat to marriage in and of itself, the birth control pill must also be considered for its role in shaping society’s view of the institution. Although Protestants have generally been more accepting of the use of contraception among married couples than our Catholic brothers and sisters, few Christians on either side of the Reformation can deny oral contraception’s social impact upon sexuality and marriage.

Another blow to marriage came with the humanly tragic *Roe v. Wade*⁶ decision, which was founded on *Griswold*’s expansive “right to privacy.”⁷ This decision turned not only the family, but traditional moral understandings, on its head, giving parents the constitutionally guaranteed right to kill their own pre-born child, thereby obliterating the very nature of parenthood and the human social contract. But *Roe* did more than simply corrupt the parent/child relationship; it created a rift between spouses as well. As Professor Gerard Bradley observes in his essay, “the abortion liberty means that one spouse—the wife—may unilaterally decide to destroy the unborn issue of the marriage, the child of the father/husband. . . . *Roe* is bad enough for giving our land legal abortion. But its destruction of the mutuality proper to spouses is monstrous, too.”⁸ While *Griswold* helped make marriage an expressive couple’s relationship, *Roe* made marriage’s reproductive imperative a matter of individual (and unilateral) expressiveness. Again, this development paves the way for same-sex unions that legitimize children not by the fact of their creation through biology, but through an act of will. Abortion and same-sex marriage both proclaim that “children are ours because we *want* them to be ours, regardless of what biology dictates.”

The growth and normalization of cohabitation—which our parents and past generations of parents referred to as “living in sin”—is also contributing to the relativization of all intimate domestic relationships. While divorced and single-parent families have leveled off after two decades of rocketing growth, cohabiting unions have emerged as America’s fastest growing family form. The incidence grew 850% from 1960 to 1990.⁹

6. 410 U.S. 179 (1973).

7. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

8. Gerard Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 189, 208 (2004).

9. Barbara Dafoe Whitehead & David Popenoe, The National Marriage Project, *The State of Our Unions: The Social Health of Marriage in America* (2003), at <http://marriage.rutgers.edu/Publications/SOOU/TEXTSOOU2003.htm> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

Consequently, there is a strong movement among some powerful and influential legal advocates to make socially and personally ambiguous cohabiting relationships equal with marriage. The Law Commission of Canada, in its 2001 report, *Beyond Conjuality: Recognizing and Supporting Close Personal Relationships*, advocates elevating *all* close personal relationships to the legal status of marriage, while at the same time eliminating marriage as a legal and domestic category altogether.¹⁰ Leading legal theorists at the world's most prestigious universities propose the same. American University Professor of Law Nancy Polikoff encourages gay and lesbian advocates to work toward "abolishing the legal status of marriage for everyone."¹¹ Writing in the *Family Law Quarterly*, Harry Krause says marriage "should be seen for what it has become: one lifestyle choice among many."¹² Thus, "[m]arried and unmarried couples who are in the same factual position should be treated alike."¹³ There are many others who strongly advocate marriage's legal redefinition.¹⁴

Such a radical move will without question result in increased harm to women and children, as evidenced by the conclusive social science data indicating that domestic violence against women and children skyrockets in the absence of marriage.¹⁵ This literature also informs us that *all* of the important measures of well being for adults and children decline when family rela-

10. LAW COMMISSION OF CANADA, *BEYOND CONJUALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* 7, 123–24 (2001). *See also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01–6.06 (2002) (creating a domestic partner category designed to provide a set of default rules to govern economic rights and responsibilities at the end of a nonmarital, cohabitating relationship).

11. Nancy D. Polikoff, *An End to All Marriage*, WASH. BLADE, July 25, 2003, at 39, available at http://www.washblade.com/2003/7-25/view/columns/end_marrige.cfm (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

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

13. *Id.* at 278.

14. *See* Stanley Kurtz, *Beyond Gay Marriage*, THE WKLY. STANDARD, Aug. 4, 2003, at 26.

15. *See, e.g.*, GLENN T. STANTON, *WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY*, 61–64 (Colorado Springs: Nav-Press, 1997); Jan Stets, *Cohabiting and Marital Aggression: The Role of Social Isolation*, 53 J. MARRIAGE & FAM., 669 (1991); Michael Stiffman, et al., *Household Composition and Risk of Fatal Child Maltreatment*, 109 PEDIATRICS 615 (2002); Bureau of Justice Statistics, U.S. Department of Justice, *Criminal Victimization in the United States, 2002*, Statistical Tables, NCJ 200561, tbl. 31 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus02.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

tionships are not grounded by marriage.¹⁶ Simply put, marriage changes us in ways that other close relationships don't. In his classic work, *Men and Marriage*, George Gilder reports that single men are more "disposed to criminality, drugs and violence" than others in the population at large.¹⁷ Furthermore, the single man is more likely to be irresponsible about debt, more prone to alcoholism, more likely to get into an accident, and is more susceptible to disease.¹⁸ Single men are 30% more likely than married

16. For research on how marriage enhances adult well-being, see ROBERT T. MICHAEL ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY*, 124-29 (1994); STANTON, *supra* note 15; LINDA WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY* (2000); Robert Coombs, *Marital Status and Personal Well-Being: A Literature Review*, 40 *FAM. REL.* 97 (1991); James Goodwin, et al., *The Effect of Marital Status on Stage, Treatment, and Survival of Cancer Patients*, 258 *JAMA* 3125 (1987); I.M. Joung, et al., *Differences in Self-Reported Morbidity by Marital Status and by Living Arrangement*, 23 *INT'L J. OF EPIDEMIOLOGY* 91 (1994); Benjamin Malzberg, *Marital Status in Relation to the Prevalence of Mental Disease*, 10 *PSYCHIATRIC Q.* 245 (1936); Randy Page & Galen Cole, *Demographic Predictors of Self-Reported Loneliness in Adults*, 68 *PSYCHOL. REP.* 939 (1991); Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 *J. MARRIAGE & FAM.*, 527 (1998); Linda Waite, *Does Marriage Matter?* 32 *DEMOGRAPHY* 483 (1995); David Williams et al., *Marital Status and Psychiatric Disorders Among Blacks and Whites*, 33 *J. OF HEALTH & SOC. BEHAV.* 140 (1992); Richard Rogers, *Marriage, Sex, and Mortality*, 57 *J. OF MARRIAGE & FAM.* 515 (1995).

For research on how marriage enhances child well-being, see DAVID T. ELLWOOD, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* 46 (1988); IRWIN GARFINKEL & SARA S. McLANAHAN, *SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA* 30-31 (1986); MICHAEL GOTTFREDSON & TRAVIS HIRSCHI, *A General Theory of Crime* 103 (1990); SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* (1994); DAVID POPENOE, *LIFE WITHOUT FATHER: COMPELLING EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSIBLE FOR THE GOOD OF CHILDREN* (1996); STANTON, *supra* note 15; JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* (1990); JUDITH WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000); Ronald Angel & Jacqueline Lowe Worobey, *Single Motherhood and Children's Health*, 29 *J. HEALTH & SOC. BEHAV.* 38 (1988); Deborah Dawson, *Family Structure and Children's Health and Well-Being: Data from the 1988 National Health Interview Survey on Child Health*, 53 *J. MARRIAGE & FAM.* 573 (1991); E. Mavis Hetherington, *Effects of Father Absence on Personality Development in Adolescent Daughters*, 7 *DEVELOPMENTAL PSYCHOL.* 313 (1972); Richard Koestner, et al., *The Family Origins of Empathic Concern: A Twenty-Six Year Longitudinal Study*, 58 *J. OF PERSONALITY & SOC. PSYCH.* 709 (1990); L. Remez, *Children Who Don't Live with Both Parents Face Behavioral Problems*, 24 *FAM. PLAN. PERSP.* 41 (1992); Michael N. Stiffman et al., *Household Composition and Risk of Fatal Child Maltreatment*, 109 *PEDIATRICS* 615 (2002); Nicholas Zill et al., *Long-Term Effects of Parental Divorce on Parent-Child Relationships, Adjustment, and Achievement in Young Adulthood*, 7 *J. FAM. PSYCHOL.* 91 (1993).

17. GEORGE GILDER, *MEN AND MARRIAGE* 62 (1986).

18. *Id.*

men or single women to be depressed, 30% more likely to have “phobic tendencies,” nearly twice as likely to show “severe neurotic symptoms,” and three times as prone to nervous breakdowns.¹⁹

Strong and stable marriages contribute significantly not only to the welfare of men, but to women and children as well. This is because, as Maggie Gallagher aptly concludes in her essay:

Marriage is key to integrating men into family life and to reproducing not only children, but the family system itself. When parents do not get and stay married their children are less likely to confine childbearing to marriage and to avoid divorce, creating a downward intergenerational cycle of family fragmentation. Whole communities suffer when marriage is no longer the normal, usual, and generally reliable way to raise children.²⁰

The good news is that we can avoid further damage to our own children and to the coming generations if we will only recognize that our slow and systematic dismantling of marriage has failed to deliver on its promises of enhancing human well-being and improving society. Given the undeniable and well-documented detriments inherent to abolishing traditional marriage, it is foolish to entertain the idea that we can go any further down that road. That is why the marriage preservation efforts that so many have been involved in over the years are so critical.

In the final analysis, marriage is an institution ordained by our wise and loving Creator for the benefit of all humankind, and as such, it cannot be undone or reasoned away through the workings of finite man. We attempt to do so at our peril. As Pope John Paul II teaches us in his encyclical, *Familiaris Consortio*, “[t]he future of humanity passes by way of the family.”²¹ And so our body of law must protect, rather than redefine, the family—a timeless institution that is established upon and nurtured by marriage.

19. *Id.* at 63.

20. Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 225, 233 (2004).

21. POPE JOHN PAUL II, *FAMILIARIS CONSORTIO: THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD* 129 (Pauline Books & Media 1999) (1981).