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Light Thoughts and Night Thoughts on the American Family

Judith T. Younger*

I take my theme today from two recent events—one from art and one from life. The artistic event happened last Labor Day. Blondie Bumstead, wife of Dagwood, mother of Cookie and Alexander, and mistress of Daisy, the family dog, made a startling announcement. In the two thousand newspapers and fifty-five languages in which her comic strip appears,¹ she told her readers that she was worn out from cooking and cleaning and was thinking of getting a job.² After considering a number of possibilities, Blondie did, in fact, go to work—in her own catering business.³ She has thus joined the increasing number of real mothers entering the paid labor force in search of a supplement to the family income and a measure of independence and equality which they did not enjoy as housewives.

Like her real life counterparts, Blondie was responding, albeit belatedly, to the early message of the women's movement. The message was critical of the then prevailing family ideology which told people to marry young, have several children, and define themselves "first and foremost" as "homemakers" if they were female and as "breadwinners" if they were male.⁴ As Betty Freidan put it in 1963 in her book, *The Feminine Mystique*:⁵ Women should have fulfillment outside their homes; they should not have to sacrifice education and careers just because they marry and have children.⁶ Women could and should

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1. *Blonde Ambition*, N.Y. TIMES, Sept. 1, 1991, at E7.

2. *E.g., Blondie*, MINNEAPOLIS STAR TRIB., Sept. 2, 1991, at E5.

3. Ellen Goodman, *Work-world tips for Blondie*, MINNEAPOLIS STAR TRIB., Sept. 10, 1991, at A14.

4. Elaine Tyler May, *Myths and Realities of the American Family*, in A HISTORY OF PRIVATE LIFE: RIDDLES OF IDENTITY IN MODERN TIMES 539, 581 (Antoine Prost & Gérard Vincent eds., Arthur Goldhammer trans., 1991).

5. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

6. *Id.* at 338-78.

escape domesticity by a combination of self-help and legal reform. They should join men in the workplace while inviting men to share power with them at home. At the same time, they should urge repeal of laws shoring up the traditional family and casting spouses in sex-based roles. This program, if followed, would yield the ideal: happy individuals in egalitarian families. Women responded. They went to work in droves.

The proportion of mothers with children under age six who were working or looking for work outside the home rose from thirty-two percent in 1970 to fifty-eight percent in 1990.⁷ There are now about 10.9 million children under six years old who have mothers in the paid labor force, including 1.7 million babies under one year of age and 9.2 million toddlers and preschoolers.⁸ Mothers of school-age children are even more likely to be working. In 1990, more than seventy-four percent of women whose youngest child was between six and thirteen years old were working or looking for paid work.⁹ Approximately 17.4 million children—more than sixty-five percent of all children in that six to thirteen year old age group—had working mothers in 1990.¹⁰ Among employed mothers, nearly seventy percent whose youngest child is under six and more than seventy-four percent whose youngest child is school-age work full-time.¹¹

Courts and legislatures responded to the Freidan message as well. They effected substantial reforms. Laws which shored up the traditional family by casting husbands as breadwinners, obligated to support their wives and children, and wives as economic dependents and providers of domestic services virtually disappeared from the books.¹² Marriage began to look more like a partnership than a patriarchy. Husbands and wives are now cast as equals, obligated to support each other¹³ and their

7. NATIONAL COMMISSION ON CHILDREN, FINAL REPORT, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 21 (1991) [hereinafter COMMISSION REPORT].

8. *Id.* at 21-22.

9. *Id.* at 22.

10. *Id.*

11. *Id.*

12. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455, 459-61 (1981) (striking down a statute that gave a husband the unilateral right to dispose of community property without his wife's consent); *Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (stating that statutes that make gender-based classifications resting upon outdated concepts of the proper roles of husband (breadwinner) and wife (homemaker) are invalid).

13. See, e.g., N.Y. DOM. REL. LAW § 32 (McKinney 1988).

children.¹⁴ They can dissolve their marital partnerships without a showing of fault,¹⁵ and, on dissolution, each is entitled to a return of contribution in the form of an equitable¹⁶ or equal¹⁷ share of the family's community or marital assets, depending on the jurisdiction. What is more, if spouses do not like any of these incidents of the marital regime they have a good deal of freedom to change them by making their own contracts.¹⁸

Thus, Blondie is not alone in the work world, nor is her conduct inconsistent with the law's current view of what women should do. We will, nevertheless, have to wait to see how she likes her new role and what effect it has on her family. Many women before her have been gravely disappointed: because they received lower pay than male coworkers; because they had fewer opportunities for advancement than men; because they were in lower-paying, female-segregated occupations; because although they were working they were still responsible for household chores, child- and dog-care; because they did not have the institutional supports, such as daycare and family leave, that other industrialized western nations provide for working mothers;¹⁹ because when their need for flexibility impelled them, like Blondie, to become owners of their own small businesses, they lost the benefits of working for someone else—vacations, pensions, and health insurance, for example.²⁰ Some women had second thoughts and retreated into their old roles. Many divorced, and along with an increasing number of mothers who never married their children's fathers, became heads of poor, single-parent families.²¹

I do not mean to be harsh with, or pessimistic about, Blondie or her real-life counterparts because I have followed

14. *Id.*

15. See Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 24 FAM. L.Q. 309, 328-29, tbl. I (1991).

16. *E.g.*, MINN. STAT. § 518.58 (1992); N.Y. DOM. REL. LAW § 236(B)(5)(c)-(d) (McKinney 1986).

17. *E.g.*, CAL. CIV. CODE § 4800 (West 1992); LA. CIV. CODE ANN. art. 159 (West 1992).

18. *E.g.*, LA. CIV. CODE ANN. art. 2331 (West 1985); N.Y. DOM. REL. LAW § 236 B(3) (McKinney 1986).

19. See generally SYLVIA A. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* 91-100 (1986) (comparing United States maternity leave and child care policies to those of other industrialized nations).

20. See Goodman, *supra* note 3, at A14.

21. See COMMISSION REPORT, *supra* note 7, at 24. The Commission noted that "[c]hildren living only with their mothers are especially likely to be poor. Approximately 43 percent of mother-only families are poor, compared to only about 7 percent of two-parent families." *Id.*

the same path. My oldest daughter was born in the year *The Feminine Mystique* was published. I read it and, accordingly, did not waste a single day at home with the baby. I have been in the work force ever since, preaching about the importance for women of law reform, of equality, of independence, and of egalitarian families. In a colossal act of denial, or perhaps because I was too busy or too tired to do it, I never examined my own family or my status in it. It dawned on me, as I worked on this talk, that, despite my job, I was neither equal with, nor independent of, my husband. Nor was my family egalitarian; it was patriarchal. But it was stable.

This brings me, in a roundabout way, to the second event that provides my theme for this talk—the one from life. It happened a few weeks before Blondie made her announcement. The bipartisan National Commission on Children issued its final report. The report, optimistically entitled “Beyond Rhetoric,”²² is a sleek, 519-page document, replete with photographs and tables. It is remarkable for its unanimous conclusion that the nation’s children are in trouble—increasingly at risk from poverty, suicide, drugs, risky sex, dropping out of school, and family violence.²³ What American children need but do not have, it seems, are stable families,²⁴ and what the nation needs, but does not have, is a national policy which encourages their formation.²⁵

Both Blondie’s announcement and the Commission Report received lots of news coverage, but none of the commentators made what I think is an obvious connection between the two. As American women, and particularly mothers, have joined the work force, thus gaining a greater measure of equality and independence, American families have declined, losing stability and strength.

To see what has happened we need only look around us. Today, only twenty-two percent of married couple households

22. COMMISSION REPORT, *supra* note 7.

23. *See id.* at vii-viii (chairman’s preface). In the first two chapters of its report, the Commission describes the changing American family and links the changes, including the increase in single-parent families, to the troubles facing American children. *Id.* at 3-37. In chapter nine, the Commission says “[r]esearch on the effects of single parenthood confirms that children who grow up without the support and personal involvement of both parents are more vulnerable to problems throughout childhood and into their adult lives.” *Id.* at 251.

24. *Id.* at 251-55.

25. *Id.* at xix-xx.

have a male breadwinner and a female homemaker.²⁶ In 1960 the figure was sixty-one percent.²⁷ Men are contributing less to family finances and women are contributing more.²⁸ The effect on the family is an increase in the number of divorces and single-parent families.²⁹ If they are working, unmarried mothers have less incentive to marry the fathers of their children and married women have less incentive to stay in their marriages.³⁰ As women's earnings increase both husbands and wives report less satisfaction with their marriages,³¹ and change in the relative economic position of spouses is a prime factor in many cases of divorce.³² Similarly, remarriages are more likely to fail when both partners have economic resources.³³ Sadly, people who can support themselves and their children have less need to depend on one another.

It is significant, I think, that in Sweden, where women lead the world in terms of their economic independence from and equality with men, the family is in a similar decline.³⁴ A very high percentage of working-age Swedish women are in the labor force;³⁵ a very small percentage of Swedish women are full-time housewives.³⁶ The gap between men's and women's earnings is very small—only ten percent.³⁷ In other words, Swedish women earn ninety percent as much as Swedish men. The comparable figure in the United States is just under seventy

26. Martha Farnsworth Riche, *The Future of the Family*, AMERICAN DEMOGRAPHICS, Mar. 1991, at 44.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. DAVID POPENOE, DISTURBING THE NEST: FAMILY CHANGE AND DECLINE IN MODERN SOCIETIES 187-258 (1988) (discussing the decline of the Swedish family as an institution); David Popenoe, *Family Decline in the Swedish Welfare State*, 102 THE PUB. INTEREST 65 (1991) [hereinafter Popenoe, *Family Decline*] (arguing that Sweden's status as a welfare state has contributed to the decline of the Swedish family). See generally Kristina Orfali, *The Rise and Fall of the Swedish Model*, in A HISTORY OF PRIVATE LIFE: RIDDLES OF IDENTITY IN MODERN TIMES 417, 426-32 (Antoine Prost & Gérard Vincent eds., Arthur Goldhammer trans., 1991) (discussing Swedish family mores).

35. See Popenoe, *Family Decline*, *supra* note 34, at 71 (stating 77%, one of the highest percentages of working-age women in the labor force of any Western nation).

36. *Id.* (stating 10%, "probably the smallest percentage . . . of any Western nation").

37. *Id.* at 72.

percent³⁸—a thirty percent gap. The family in Sweden is exhibiting the same unhealthy symptoms as is the family in the United States. As in the United States, people marry less frequently³⁹ and dissolve their relationships more frequently;⁴⁰ children are more often raised by a single parent;⁴¹ and families do fewer things together.⁴² Swedish children are not as poor as American children only because the Swedish welfare state foots the bill, but the signs of trouble are there. Juvenile delinquency is up and depression, alcoholism, and suicide are increasing.⁴³ A welfare state, it seems, is just as dangerous to families as is a market economy.

“So what?” you may ask. If the family is so fragile that it cannot thrive in either a market economy or a welfare state, why worry about it? We can always assign the child-raising task to strangers instead of parents. This suggestion has been made often enough by sociologists⁴⁴ and feminists⁴⁵ and, indeed, has been tried—notably in the Israeli kibbutzim of the sixties.⁴⁶ Not only child-raising but all traditionally female work was communalized.⁴⁷ Kibbutzim had communal kitchens, communal laundries and communal babies’ houses where a professional provided most of the care.⁴⁸ The idea was to take the burdens out of being a woman.⁴⁹ In the second generation of kibbutzim, when the number of women in the kibbutz popula-

38. Helaine Olen, *Wage Equity Concept Wanes as Women Slowly Close Pay Gap*, L.A. TIMES, Aug. 28, 1991, at A5; see also Mary Kane, *Women Narrow Wage Gap, But They Still Trail Men*, MINNEAPOLIS STAR TRIB., Oct. 6, 1991, at J1 (stating also that the earnings gap is larger than the wage gap (women earn 78% of men’s hourly wages and 75% of men’s average weekly earnings) because women tend to work fewer hours per year than men).

39. See Popenoe, *Family Decline*, *supra* note 34, at 66 (stating that Sweden has the lowest marriage rate of any industrialized nation).

40. *Id.* at 75.

41. *Id.*

42. *Id.*

43. *Id.* at 76.

44. *E.g.*, Kingsley Davis, *The American Family in Relation to Demographic Change*, in 1 THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE RESEARCH REPORTS 241 (1972).

45. *E.g.*, GERMAINE GREER, THE FEMALE EUNUCH 231-33 (1971) (hypothesizing “an organic family” in a “farmhouse in Italy” worked “by a local family,” and that the real parents could come and go and children “need not know” who their “womb-mother[s]” were).

46. LIONEL TIGER & JOSEPH SHEPHER, WOMEN IN THE KIBBUTZ 26-33 (1975).

47. *Id.* at 29-30.

48. *Id.*

49. *Id.* at 30.

tion had become about equal with the number of men, women began to resist this way of living.⁵⁰ They wanted more time with their children and a return to traditional family life.⁵¹ By the 1970s, marriage and family were central.⁵² The kibbutz experiment in child-raising failed because women did not like it.⁵³ In any event, current wisdom warns against such a reassignment of responsibility.

The National Center for Health Statistics reports that children's troubles are tied to their living arrangements; children who live with both natural parents have fewer emotional problems and less academic difficulties than others.⁵⁴ As Urie Bronfenbrenner, my former colleague at Cornell University, would probably explain this, such children do better than others because they have two parents with whom they have developed "strong, mutual, irrational emotional attachment and who [are] committed to the [children's] well-being and development . . . for life."⁵⁵ The National Commission on Children agrees and gingerly endorses the two-married-parent nuclear family as the most hospitable environment for children.⁵⁶ This is a brave but politically difficult position in view of the growing number of single-parent, step-parent, unmarried cohabiting heterosexual and homosexual, and polygamous families.⁵⁷ To say that the two-married-parent family is good is bound to make other families feel bad and, understandably, the Commission does not follow through with its endorsement. Its recommendations apply to all families, regardless of structure. Foremost among the recommendations is that Congress enact a tax credit of \$1000 per child.⁵⁸ If a family had no tax liability it would receive the amount in cash.⁵⁹ The Commission's goal,

50. *Id.* at 226-27.

51. *Id.*

52. *Id.*

53. *Id.*

54. Nicholas Zill & Charlotte A. Schoenborn, *Developmental, Learning, and Emotional Problems*, ADVANCE DATA (FROM VITAL AND HEALTH STATISTICS OF THE NATIONAL CENTER FOR HEALTH STATISTICS), Nov. 16, 1990, at 8.

55. Urie Bronfenbrenner, *What Do Families Do?*, FAMILY AFFAIRS (INSTITUTE FOR AMERICAN VALUES), Winter-Spring 1991, at 2.

56. COMMISSION REPORT, *supra* note 7, at xix, 66, 255.

57. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991); see also Dirk Johnson, *Polygamists Emerge from Secrecy, Seeking Not Just Peace but Respect*, N.Y. TIMES, Apr. 9, 1991, at A8.

58. COMMISSION REPORT, *supra* note 7, at xxi, 94-95.

59. *Id.* at 95.

namely, to alleviate the poverty of families with children,⁶⁰ is laudable, but there is no guarantee, of course, that a family receiving the credit would spend its extra dollars on its children. Moreover, the credit's universal application to all families, two-parent, one-parent, stable or not, might encourage the wrong people to have children for the wrong reasons. A more direct approach would be to use tax policy in an affirmative way to give preferential treatment to the two-married-parent family so that people would choose it over other living arrangements.⁶¹ The Commission did not come up with such a plan but did recognize that some provisions of tax law, including the marriage penalty, cut against the establishment and continuation of stable families. It therefore recommended repeal.⁶²

Aside from these alterations in tax policy, is there anything else the law might do to encourage the formation and continuation of stable families for raising children? I think so, but before I get to it let me provide reassurance about two things. First, I do not think that women should abandon the workplace and go back home to domestic endeavors; nor should they give up the benefits they have gained from the women's movement or success in the work force. I think what we need, rather, is heightened individual and societal awareness of some sad facts of life. Raising children makes the primary caretaker, or caretakers, dependent—dependent on family, strangers, or government, or some combination of the three for however long it takes the children to grow up. Moreover, a cultural emphasis on self-fulfillment inhibits the creation of stable families. To people who are interested in self-fulfillment, personal interests come first; to people who are concerned with family stability, the interests of the family as a unit are primary. If, as it seems, children need stable families, people whose main interest is self-fulfillment should not have children. In other words, I am suggesting more responsible parenthood by both women and men. Personally I do not care who is responsible for child-care within any particular family. The ideal may be that the task is

60. *Id.* at 93.

61. *See, e.g.*, Allan Carlson, *A Pro-Family Income Tax*, 94 THE PUB. INTEREST 69, 70 (1989) (stating that people respond to tax incentives which are intended to promote families).

62. COMMISSION REPORT, *supra* note 7, at 255. The Commission recognizes that certain tax policies, notably the "marriage penalty" under which "a married couple pays higher taxes than two single adults with the same income who live together," *id.* at 252, discourage individuals from marrying and contribute to divorce. *Id.* at 252-53.

shared, although my experience tells me that is rarely the case. I think women do and will probably continue to do more child care than men for a number of reasons—because they like it, because they are better at it, because they have the instinct built in,⁶³ and because our culture expects them to do it.⁶⁴ If I am right, responsible parenthood is even more important for women because when things go wrong they are likely to face the child-raising task alone. That is a risk any woman who gets pregnant or who adopts a child must be prepared to accept.

The second reassurance I want to give has to do with the law's ability to make people responsible parents. I am as skeptical about that as anybody. People generally ignore the law when they make living arrangements and become aware of it only when those arrangements fall apart. Nevertheless, the law should try to influence people to stay in their families until their children are grown. One of the law's most important functions is to act as a teacher.⁶⁵ When the law teaches, of course, it ought to teach the right lesson. The right lesson is that marriage and parenthood are not suitable activities for everyone but are only for those who are willing to sacrifice personal interests to familial interests for the time necessary to raise their children. The lesson now embodied in the law is just the opposite. The Supreme Court has lodged both the right to marry⁶⁶ and the right to procreate⁶⁷ squarely in the Constitution and labelled them "fundamental rights." The implication is that both are essential to happiness, that both are suitable activities for everyone to engage in, and that life without either is

63. See Christine Gorman, *Sizing Up The Sexes*, TIME, Jan. 20, 1992, at 42 *passim*.

64. See Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in DIVORCE REFORM AT THE CROSSROADS 6, 30 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

65. As Edmond Cahn, one of my great law school teachers, explained: In ancient days, there was a vision that appeared almost simultaneously to the best minds of the Hellenic and Hebraic worlds. Great sages voiced the hope that the law could serve as a pedagogue to the people, instructing them in the maxims of enlightenment, righteousness, and self-rule. No less than the Psalmist in the Bible, Plato and Aristotle believed that the law should be employed as a "lamp unto the feet and a light unto the path."

EDMOND CAHN, THE MORAL DECISION 5 (1955).

66. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

67. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (holding that married and unmarried individuals entitled to same access to contraceptives); *Griswold*, 381 U.S. at 479 (striking down a statute forbidding the use of contraceptives).

wanting. Constitutionalizing these activities helps to strip away the selectivity people should and might otherwise display before deciding to marry or procreate. State law completes this misleading lesson by allowing parents of minor children to divorce without any inquiry into the effect the divorce is likely to have on the children.⁶⁸ The message is that personal interests of the parents take precedence over those of the family. One obvious method of correction would be to deconstitutionalize both the right to marry and the right to procreate, leaving the states freer to experiment with methods of encouraging responsible parenthood. Because this would endanger related fundamental rights, notably the right to abortion,⁶⁹ I do *not* suggest it.

A better, more direct approach would be to change state law to create what I call "the marriage for the benefit of minor children." This would be a special status for people who have or who want to have children. Couples could choose it as one available form of marriage. In addition, the law would impose the status on all families with minor children, whatever the sexes of the adults and whether they were actually married or not, so long as they were engaged in what I call "married conduct." This is a modification of a proposal I made in a very long law review article ten years ago.⁷⁰ Then it appealed only to me; now the basic idea is picking up a little support.⁷¹ Although it has not been enacted by any state legislature, I still believe in the concept.

The "marriage for the benefit of minor children," whether chosen or imposed, would be the antithesis of what most modern marriages have become—nothing more than vehicles for self-fulfillment of the spouses. The special marriage status, on the other hand, would be designed, as far as the law can accomplish such a purpose, to encourage living arrangements which are good for raising children. It would differ from other mar-

68. See Freed & Walker, *supra* note 15, at 328-29 (listing by table the grounds for divorce in every state).

69. See *Roe v. Wade*, 410 U.S. 113, 154 (1973).

70. Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981).

71. See COMMISSION REPORT, *supra* note 7, at 256; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 90-91 (1990); *Second Thoughts on Divorce*, THE ECONOMIST, Aug. 17, 1991, at 23, 23-24.

riages in two major respects: the grounds for divorce and the rules governing the roles and duties of family members.

Before I discuss these two ways in which the "marriage for the benefit of minor children" differs from other marriages, let me address for a moment, the implications of imposing the status on all families in which there are minor children and the content of "married conduct." First, I realize that imposing this status on same-sex couples who are not now permitted to marry, heterosexual unmarried cohabiting couples, and polygamous families, would legitimate them. I suggest it with that intention. These groups now form "a permanent and influential subculture outside the law," adding to the "insecurity and instability" of American family life.⁷² The law *should* legitimate them.

Second, the "marriage for the benefit of minor children" would attach only to those families who had minor children and who were engaged in "married conduct." Its reach, therefore, would be narrower than that of common law marriage, which applies to childless couples as well as to those with minor and adult children. Common law marriage, of course, has a consensual aspect, not so clearly present in the imposed "marriage for the benefit of minor children." To be declared common law spouses, parties must prove an agreement to enter into the relationship.⁷³ The consensual aspect of the imposed "marriage for the benefit of minor children," on the other hand, is negative; it lies in the opportunity to avoid the status by refraining from bearing or adopting children or engaging in married conduct.⁷⁴

Proving the agreement to marry in common law marriage

72. Thomas C. Grey, *Eros, Civilization and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83, 97.

73. See *In Re Estate of Dallman*, 228 N.W.2d 187, 189 (Iowa 1975); *Estate of Gavula*, 417 A.2d 168, 171 (Pa. 1980).

74. It might be argued that, under current constitutional doctrine, imposing this status on people who have not voluntarily chosen it just because they have children and are engaged in married conduct may be an impermissible infringement of the fundamental rights to marry and procreate. My hope would be that the courts, in assessing the validity of the proposal, would find that the state's compelling interest in assuring the emotional and financial well-being of minor children justifies this invasion of the liberty interest in choosing to marry or procreate. If not, I would have to take a fall-back position. Instead of imposing the status on those who didn't choose it, we could make the status so attractive that few could refuse it—by offering tax benefits or other incentives for entering it. Such legislation would be constitutionally permissible because, in the language of *Harris v. McRae*, 448 U.S. 297 (1980), it

cases too often boils down to a "swearing match"⁷⁵ between the parties. To avoid that, the test of what constitutes married conduct and thus a "marriage for the benefit of minor children" is objective, and, therefore susceptible of more reliable proof. First, the family must have a common life together of substantial duration. The very fact that a family had children would be some evidence of their common life. Second, during their common life together the family members must have exhibited commitment to each other—attitudes of mutual obligation, assistance, and support. My idea here is to exclude casual living arrangements—affairs as opposed to truly committed relationships. Third, during their common life together the family must have lived as an economic unit, exhibiting financial interdependence. I would want to confine this status to family members who support and are supported by each other, and who thus need its protection. The three elements can be proven by testimony from the family's friends, coworkers, landlords, neighbors, doctors, and dentists, and by documents such as the family's banking and other financial records.

I now return to the differences between the "marriage for the benefit of minor children" and current law. Under current law parents of minor children can divorce without any inquiry into the effects of the divorce on the children. By contrast, in order to divorce during the minority of their children, the

would merely encourage "alternative activity deemed in the public interest," *id.* at 315, rather than infringe upon fundamental liberties.

The "marriage for the benefit of minor children" is even less vulnerable to an equal protection attack. The Equal Protection Clause protects against statutory discrimination through unreasonable, arbitrary classifications. Legal distinctions between families with minor children, whether their parents are married or not, and families without minor children are already embedded in the law. Families with minor children have to support and educate their children and are subject to greater risk of state intrusion into their privacy on behalf of the children. They also may enjoy benefits that others do not have based on their children's dependency: income tax deductions and draft deferments, for example. Families with minor children are not a suspect class and strict judicial scrutiny does not apply to legislation regulating them. Even if they could be considered a suspect class, the state's long-term compelling interest in protecting the welfare of minors should be enough to sustain the legislation, including the more onerous divorce standard and an immutable trust relationship, discussed *infra* notes 82-111. Under a rational basis test, the more stringent divorce standard and the immutable trust relationship are surely rationally related to the legitimate governmental objective of assuring the well-being of dependent, minor children, and are as well tailored to that goal as are current laws imposing support and other parental obligations.

75. *Johnson v. Green*, 309 S.E.2d 362, 364 (Ga. 1983) (Weltner, J., concurring).

adults in the "marriage for the benefit of minor children" would have to establish two things: that continuing the marriage would cause one or more of them exceptional hardship and that continuing the marriage would harm their children more than divorce. I see the new divorce grounds as raising a presumption that no divorce should be granted to parents of minor children during the children's minority. To rebut the presumption, a parent or parents who want a divorce would have to convince the trial court, by a preponderance of the evidence, that continuing the marriage would cause one or both of them exceptional hardship and would harm the children more than divorce.

In determining exceptional hardship, a trial court would focus on past acts and facts, examining the relationship between the parents and their physical and emotional well-being and ability to function during the marriage. In assessing harm to the children, however, the court would have to predict, on the basis of the past, what is likely to happen to the children in the future, just as it does in determining a child's best interests in disputed custody cases. The "harm" inquiry, however, is narrower than that for "best interests."⁷⁶ It is linked to only two events: continuing or ending the marriage. In making this inquiry, a court would consider both the short- and long-term effects of each alternative on the children. The court would draw on general studies⁷⁷ about parents and children, as well as individualized ones on the particular parents and children. It would consider the nature of each child and its relationship with each parent. In addition, it would consider the parents' ability to place the children's needs before their own, communicate with each other, share decisions, and minimize any bad effects of the tensions between them on the children in a continued marriage and after divorce. In the unlikely event that a parent or parents made out exceptional hardship in continuing the marriage and a court found the interests of the children divided—that is, that continuing the marriage would harm some, but not all, of the children more than divorce, a simple head count could resolve the matter. The court, in such a case, should decide in favor of the greatest good for the greatest

76. For a typical list of factors the courts consider in assessing the "best interests" of children, see MINN. STAT. § 518.17, subd. 1 (1990).

77. For some of these and their conclusions, see Barbara Kantrowitz et al., *Breaking the Divorce Cycle*, NEWSWEEK, Jan. 13, 1992, at 48, 49.

number of family members, including parents as well as children.

As I see it, proof that a spouse or spouses in a "marriage for the benefit of minor children" abused each other or the children should satisfy the new grounds. To continue such relationships would not only cause spouses exceptional hardship either from being abused or witnessing the other abusing the children but would harm the children more than divorce even if the children themselves were not the subjects of abuse. Such abusive families fail to perform the all important function of providing children with a permanent sense of well-being and the lasting emotional security to make healthy adults. By this failure they perpetrate their own destructiveness to succeeding generations—children who grow up in abusive families are likely to be abusive in turn. Thus, such families should be allowed to dissolve.

The new divorce grounds would have two functions, one deterrent and one remedial. The new grounds would discourage people from engaging in uncommitted marriage or procreation by sounding a warning that the law considers both very serious business. They would encourage those already married and already parents to settle their differences in the interests of their children, but would not continue marriages in which parental discord damages the children more than divorce. Courts would be able to explore the likely effects of divorce on children, an inquiry they do not make under current law, and children's interests would become a crucial factor in deciding parents' rights to divorce.

At a time when "private ordering"—that is the notion that divorcing parents should be free to negotiate their own arrangements—is in fashion,⁷⁸ it may seem anomalous to suggest that courts take on this expanded role. What justifies it is the sad fact that family breakdown is bad for children. This is a modest attempt to save them. Courts are already deciding what custody arrangements are in the best interests of children after divorce when parents cannot agree,⁷⁹ and are rubber-stamping

78. See Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 64, at 37, 37; Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 950 (1979); Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 *RUTGERS L. REV.* 1059, 1060 (1988).

79. See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Func-*

agreed-upon parental custody arrangements.⁸⁰ It would be better to involve the court earlier in both contested and uncontested divorce proceedings while there is still a status quo to preserve. If the court is not convinced that a parent or parents have made out the more stringent divorce grounds, it then has a fallback position available—that is, to continue the marriage. In these cases, minor children may need independent representation, especially if both parents want to divorce. The courts should, therefore, be empowered to provide it.⁸¹

The second way in which the “marriage for the benefit of minor children” would differ from other relationships is in the rules governing the roles and duties of family members. Currently the law treats spouses like partners.⁸² It entrusts child-raising to parents and protects their privacy in performing it as a fundamental constitutional right.⁸³ As to expected parental performance, it says only three things: support your children,⁸⁴ send them to school,⁸⁵ and do not abuse them.⁸⁶ When I first proposed the “marriage for the benefit of minor children” I thought that the partnership model, virtual parental autonomy with respect to children, and the more difficult divorce grounds for leaving the status would be adequate to fix the parameters of family behavior. I have now changed my mind. Based on principles of contract, the partnership model works well for

tions in the Face of Indeterminacy, LAW & CONTEMP. PROBS., Summer 1975, at 226, 226-27.

80. Mnookin & Kornhauser, *supra* note 78, at 951.

81. For a discussion of representation of children in child-custody disputes, see *Veazey v. Veazey*, 560 P.2d 382, 385-90 (Alaska 1977) (describing the role of one representing a child in a child-custody case); Mnookin, *supra* note 79, at 254-55.

82. Bea A. Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 696 & n.39 (1990).

83. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

84. See, e.g., LA. REV. STAT. ANN. § 14:74 (West 1986) (making it a crime to refuse to support one's minor child or spouse if the means to do so are available); N.Y. PENAL LAW § 260.05 (McKinney 1989) (making it a crime for a parent or legal guardian to refuse to support a child under age 16 without a lawful excuse).

85. See, e.g., LA. REV. STAT. ANN. § 17:221 (West Supp. 1992) (imposing a fine of not more than \$15 per day on parents who prevent their child from attending school); N.Y. EDUC. LAW § 3212(2)(b) (McKinney 1981) (imposing a duty on those in a “parental relation” to a child to compel the child's attendance in school).

86. See, e.g., LA. REV. STAT. ANN. § 14:403(C)(1) (West Supp. 1992) (requiring certain persons responsible for the care of a child, such as medical workers, who suspect child abuse to report the abuse to the state so that protective proceedings may be initiated).

parties of equal strength and independence. People like Donald and Ivana Trump, perhaps, can handle it. In the course of their courtship and marriage, the Trumps signed four or more agreements,⁸⁷ each negotiated by their attorneys and each enhancing Ivana's position. The Trumps, of course, are not an ordinary couple. Ordinary couples are less equal, and ordinary parents are less trustworthy than current law assumes.

Instead of treating spouses as equal partners capable of continually renegotiating their roles in a marriage-long bargaining session, and leaving parents to care for minor children with so little guidance, the law should recognize the inequality and dependence of family members and the inadequacies of parents. It should take a less permissive, more protective attitude toward them. What I am suggesting is that in "marriages for the benefit of minor children" the law should treat the adults as trustees for the benefit of each other and for their children. In other words, I would put the 500-year-old common law trust, the "greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence,"⁸⁸ to work for the American family. Frederic W. Maitland tells us in *The Unincorporate Body*, one of his collected papers, that "[f]irst and last the trust has been a most powerful instrument of social experimentation."⁸⁹ Historically, the trust has acted by prodding the legislature and forcing it to change the law.⁹⁰ There is no reason why legislatures have to follow this historic pattern. Instead of lagging behind, they can take the offensive by picking up the trust and sending it forth on a new social experiment—an attempt to shape and stabilize our floundering families. This trust by operation of statute⁹¹ would be immutable and would apply to all dealings between or among family members until

87. Raoul L. Felder, *Look Out Donald*, NEWSWEEK, Mar. 19, 1990, at 9.

88. Frederic W. Maitland, *The Unincorporate Body*, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 271, 272 (H.A.L. Fisher ed., 1911).

89. *Id.* at 278.

90. Maitland gives us:

some well-known instances:—It (in effect) enabled the landowner to devise his land by will until at length the legislature had to give way, though not until a rebellion had been caused and crushed. It (in effect) enabled a married woman to have property that was all her own until at length the legislature had to give way. It (in effect) enabled men to form joint stock companies with limited liability, until at length the legislature had to give way.

Id. at 278-79.

91. For a discussion of trusts by operation of statute, see Judith T. Younger, *Trusts by Operation of Statute*, 25 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 407 (1970).

the children were grown. By that I mean that family members could not contract to opt out of or limit the common law rules which would apply to them as trustees and trust beneficiaries.⁹² Moreover, on divorce, a court could order continuation of the trust relationship between ex-spouses and children, delaying termination and ultimate property distribution until the children are grown.⁹³

I should tell you that, like it or not, venerable common law trust principles are already edging into family law. I detect them in three places. First, they are appearing in proceedings involving distribution or division of marital or community assets as couples divorce. Typically in these cases, one spouse accuses the other of misconduct with regard to marital or community assets. Enabling statutes in some jurisdictions permit courts to use equitable principles to protect spouses from such misconduct by their mates. In Minnesota, for example, the Legislature has made spouses fiduciaries with respect to each other for profit or loss from the use of marital assets without the other's consent in contemplation of commencing or during the pendency of a divorce, annulment, or separation action.⁹⁴ Similarly, in making equitable distribution of marital assets on divorce, the New York Legislature has directed the courts to consider both any wasteful dissipation of assets by a spouse during the marriage⁹⁵ and "any transfer or encumbrance [of assets] made in contemplation of a matrimonial action without fair consideration."⁹⁶ Both Arizona and California

92. See 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP app. A § 21, at 103 (Supp. 1989) (stating that partners are fiduciaries with respect to the partnership but can change their fiduciary duties by contract). Some jurisdictions now recognize spouses as fiduciaries for the benefit of each other, but only for limited purposes. See, e.g., Elkaim v. Elkaim, 574 N.Y.S.2d 2, 5 (N.Y. App. Div. 1991) (holding certain assets in constructive trust to benefit the wife when husband attempted to place marital property beyond wife's reach); Charlton v. Charlton, 1991 WL 258812, at *5 (W. Va. Dec. 6, 1991) ("In the domestic relations area, we have recognized that there exists a fiduciary relationship between husband and wife with regard to dealing with each other's property."). But see Zack Co. v. Sims, 438 N.E.2d 663, 674 (Ill. App. Ct. 1982) ("The marital status alone does not establish a fiduciary relationship.").

93. Currently, courts have continuing power to modify child support and maintenance awards on the basis of changed circumstances, see UNIF. MARRIAGE AND DIVORCE ACT § 316(a), 9A U.L.A. 489-90 (1987), but beyond this, the courts' power to make economic adjustments ends on divorce.

94. MINN. STAT. § 518.58, subd. 1a (Supp. 1992).

95. N.Y. DOM. REL. LAW § 236(B)(5)(d)(11) (McKinney 1986).

96. N.Y. DOM. REL. LAW § 236(B)(5)(d)(12) (McKinney 1986); see also Louis Becker, *Conduct of a Spouse that Dissipates Property Available for Eq-*

allow courts, in dividing community property, to consider "abnormal expenditures, destruction, concealment or fraudulent disposition of assets."⁹⁷

Second, trust notions are emerging in custody and other cases involving children. For example, in 1991 the Florida Supreme Court upheld an order treating the custodial mother as if she were a trustee of the children's feelings for the benefit of the noncustodial father.⁹⁸ The trial court found that the custodial mother "breached every duty she owed as the custodial parent to the noncustodial parent of instilling love, respect and feeling in the children for their father."⁹⁹ It ordered her "to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father . . . [and] to convince the children that it is the mother's desire that they see their father and love their father."¹⁰⁰ If the mother breached her duty again, the court warned, it "would result in the severest penalties . . . , including contempt, imprisonment, loss of residential custody or any combination thereof."¹⁰¹ In two other cases, one from California¹⁰² and one from New York,¹⁰³ courts treated mothers as if they were trustees of the children's physical well-being, ordering the mothers to refrain from smoking in the children's presence because it was detrimental to the children's health.¹⁰⁴

Third, courts are actually imposing constructive trusts on spouses or their estates to effect justice in a variety of situations. A recent example comes from New Jersey. In *Carr v. Carr*,¹⁰⁵ Mr. Carr left his wife after seventeen years of mar-

uitable Property Distribution: A Suggested Analysis, 52 OHIO ST. L.J. 95 (1991).

97. ARIZ. REV. STAT. ANN. § 25-318 (1991); CAL. CIV. CODE § 4800 (b)(2) (West 1983 & Supp. 1992).

98. *Schutz v. Schutz*, 581 So. 2d 1290, 1292-93 (Fla. 1991).

99. *Id.* at 1292.

100. *Id.*

101. *Id.*

102. *DeBeni Souza v. Kallweit*, 16 Fam. L. Rep. (BNA) 1496 (Cal. Super. Ct. 1990).

103. *Roofeh v. Roofeh*, 525 N.Y.S.2d 765, 769 (N.Y. Sup. Ct. 1988).

104. Courts similarly take into account parents' smoking habits in custody and visitation cases. Albert Momjian & Natalie Finkelman, *When Custodial Rights Go Up In Smoke*, MATRIMONIAL STRATEGIST, Dec. 1991, at 3.

105. 576 A.2d 872 (N.J. 1990). For other examples of courts imposing constructive trusts on spouses, see *Scull v. Scull*, 462 N.Y.S.2d 890, 893 (N.Y. App. Div. 1983), *aff'd*, 493 N.E.2d 238 (N.Y. 1986); *Tidball v. Tidball*, 463 N.Y.S.2d 287 (N.Y. App. Div. 1983).

riage.¹⁰⁶ Mrs. Carr sued for divorce but Mr. Carr died during the pendency of the action.¹⁰⁷ Mrs. Carr faced an unusual dilemma. She was not entitled to an elective share of Mr. Carr's estate under the applicable New Jersey statute because she and he were not living together at the time of his death.¹⁰⁸ Neither was she entitled to an equitable distribution of marital assets because Mr. Carr's death ended the divorce proceeding.¹⁰⁹ The court came to her rescue by imposing a constructive trust on marital property which was under the control of Mr. Carr's executor.¹¹⁰ The court acted "in order to ensure that one party has not been unjustly enriched, and the other unjustly impoverished, on account of their dealings."¹¹¹

Suppose the Minnesota Legislature adopted the new status, the "marriage for the benefit of minor children," with different divorce grounds during the children's minority and the immutable trustee-beneficiary relationship among family members. Would it make a difference and, if so, how? Take three much discussed Minnesota decisions for examples. All three involved married couples with children. Two arose in the context of divorce; one arose in an ongoing marriage.

First, consider *McKee-Johnson v. Johnson*.¹¹² The issue in that case was whether the couple's antenuptial agreement could be enforced against the wife on divorce.¹¹³ To enforce it would mean she would take no share of marital assets.¹¹⁴ Each spouse was well educated and engaged in an established independent career.¹¹⁵ In the "marriage for the benefit of minor children," even if the couple could have established their entitlement to divorce, they would not have been able to contract out of their trustee-beneficiary relationship by either antenuptial or postnuptial agreement; their antenuptial agreement would therefore have been invalid. As trustee, the husband

106. *Carr*, 576 A.2d at 874.

107. *Id.*

108. *Id.* at 875.

109. *Id.*

110. *Id.* at 880.

111. *Id.*

112. 444 N.W.2d 259 (Minn. 1989).

113. *Id.* at 261.

114. *Id.* at 262.

115. *Id.* at 261. Lance Johnson was a lawyer undergoing a career change from private practice to a career with an emphasis on real estate development and investment. *Id.* Mary McKee-Johnson earned B.S. and M.S. degrees in nursing and was a director of nursing programs at two community colleges. *Id.* Her duties as an administrator required that she have familiarity with contracts and similar business documents. *Id.*

would have had the immutable fiduciary duty to make the family assets productive for his wife and child. The only possible questions to litigate would have been whether to defer termination of the trust relationship and division of marital property to the child's majority and, if division was to be immediate, what would be the exact amount of the wife's share. After a great deal of judicial effort the *Johnson* case was correctly decided,¹¹⁶ but the task would have been much easier if the "marriage for the benefit of minor children" had been in effect.

Next, consider *Maxfield v. Maxfield*,¹¹⁷ a custody dispute between divorced parents. The trial court awarded custody of the four children to the father.¹¹⁸ The Minnesota Court of Appeals reversed, awarding custody of the three youngest children to the mother and remanding the issue of the oldest child's custody to the trial court for redetermination.¹¹⁹ The Minnesota Supreme Court affirmed.¹²⁰ It did so despite Mrs. Maxfield's less than exemplary conduct.¹²¹ Before the divorce, she took the children from Minnesota to Pennsylvania, telling her husband, who contributed to the airfare, that it was just for a visit.¹²² In fact, she did not intend to come back.¹²³ When she and the children arrived in Pennsylvania, she tried to cut off all contact with the father.¹²⁴ In the "marriage for the benefit of minor children," Mrs. Maxfield's actions would have been considered a breach of her fiduciary duty as a trustee. The breach would have precluded an award of custody to her and kept the Court of Appeals and the Supreme Court from reaching what I think were wrong decisions.

The third case is *Minnesota v. McKown*.¹²⁵ In *McKown*,

116. The trial court and intermediate appellate court held the antenuptial agreement invalid because it dealt with marital property. *McKee-Johnson v. Johnson*, 429 N.W.2d 689, 692-94 (Minn. App. 1988), *rev'd*, 444 N.W.2d 259 (Minn. 1989). The Supreme Court of Minnesota reversed, holding that Mr. Johnson had proved the procedural fairness of the agreement at the agreement's inception. 444 N.W.2d at 266. The Supreme Court remanded for a review of the substantive fairness of the agreement at inception and enforcement. *Id.* at 268.

117. 452 N.W.2d 219 (Minn. 1990).

118. *Id.* at 219.

119. *Id.*

120. *Id.*

121. *See id.* at 223 (stating that conduct denying contact with children could not be condoned).

122. *Id.* at 219-20.

123. *Id.* at 220.

124. *Id.*

125. 475 N.W.2d 63 (Minn. 1991).

parents who were Christian Scientists failed to provide medical treatment for their son.¹²⁶ As a result, the child died of diabetes.¹²⁷ In their defense against an indictment for second degree manslaughter, the parents relied on the Minnesota child neglect statute¹²⁸ which says that if a parent, in good faith, selects prayer for treatment of a child, the prayer constitutes health care.¹²⁹ The parents argued that because of this statute they did not have fair notice of the possibility that their actions could result in criminal prosecution.¹³⁰ The Minnesota Supreme Court agreed.¹³¹ The parents' personal interests—their religious beliefs—were thus allowed to override the interests of the child and the family. Had the "marriage for the benefit of minor children" been the law of Minnesota, the parents would have been trustees for the child's benefit and their failure to provide medical care would have been a clear breach of their fiduciary duties. In view of their breach, the Minnesota Supreme Court would have been hard pressed to conclude either that the parents acted in good faith or that they did not have fair notice of the possible consequences of their actions.

My next suggestion is aimed directly at discouraging single-parent families.¹³² What I am suggesting has nothing to do with the law. It is rather a sales effort—a national advertising

126. *Id.* at 64.

127. *Id.*

128. MINN. STAT. § 609.378 (1988).

129. *McKown*, 475 N.W.2d at 67.

130. *Id.* at 65.

131. *Id.* at 68-69.

132. One strictly legal approach to this problem would be to reform the welfare system's penalties for work and marriage. The National Commission on Children was very critical of the welfare system, saying:

In almost all cases under current law, a low-income mother receiving AFDC and related welfare benefits would pay a substantial penalty if she married a man working in a minimum wage job (especially if his employer does not provide health insurance). Even if her prospective new husband earns \$15,000 annually and receives health benefits from his employer, their marriage would cause a substantial income decline. In effect, the low-income couple who choose to marry are also forced to choose a much less secure life for their children.

Of even greater concern is the fact that AFDC typically pays more to a family abandoned by the father than it does to one whose father remains at home and provides some or all of the necessary support. As a consequence, many low-income fathers leave their families and are discouraged from assuming financial responsibility for their children. The Commission concurs with many critics who have concluded that U.S. welfare policy often unwittingly undermines the formation and maintenance of stable nuclear families.

COMMISSION REPORT, *supra* note 7, at 91-92.

or educational campaign, if you prefer. In the United States, advertising successfully sells cars, credit cards, Coke and Pepsi Cola, deodorants, hair-sprays, frankfurters, shampoos, as well as a host of other products. Advertising taught the American public to smoke cigarettes; now it has taught them to stop smoking. Why not employ advertising to convince more Americans to be more responsible parents or in the alternative not to have children?¹³³ The message would be simple: Enjoy sex, of course, but do not have children without marrying and making the commitment to stay married until the children grow up. I am put in mind of Aldous Huxley's novel, *Island*,¹³⁴ about a country in which the government distributes contraceptives and teaches its children this very lesson. Instead of calling it "responsible parenthood," Islanders call it "the yoga of love."¹³⁵ All children learn it and remember it when they grow up.¹³⁶ Of course, *Island* is a utopian novel about a utopian society, but it could happen here and it should.

Another aspect of Huxley's utopian society bears copying. The Islanders all belong to MACs, that is an acronym for Mutual Adoption Clubs.¹³⁷ Every MAC consists of from fifteen to twenty-five assorted couples.¹³⁸ As described by one of Huxley's characters:

Newly elected brides and bridegrooms, old timers with growing children, grandparents and great-grandparents—everybody in the club adopts everyone else. Besides our own blood relations, we all have our quota of deputy mothers, deputy fathers, deputy aunts and uncles, deputy brothers and sisters, deputy babies and toddlers and teenagers.¹³⁹

MACs operate to give children additional parents and the parents additional children.¹⁴⁰ The idea is to give children and adults a greater degree of freedom instead of locking them into single nuclear families.¹⁴¹ Children can leave home and go to deputy parents or grandparents in their MAC.¹⁴² Frazzled parents can have new, more satisfactory children for a while or

133. This sort of a campaign has been waged before. Examples are C. Everett Koop's efforts against smoking and AIDS. See C. EVERETT KOOP, *THE MEMOIRS OF AMERICA'S FAMILY DOCTOR* (1991).

134. ALDOUS HUXLEY, *ISLAND* (Perennial Classic ed. 1972) (1962).

135. This is also called "maithuna." *Id.* at 75.

136. *Id.* at 78.

137. *Id.* at 89.

138. *Id.*

139. *Id.*

140. *Id.* at 90.

141. *Id.* at 90-91.

142. *Id.* at 89, 92.

take a complete respite from children while seeking advice from other parents in their MAC.¹⁴³

Perhaps this is an idea whose time has come, and it brings me to my last suggestion. The law should recognize the possibility that a child might have more than one mother and one father. Certainly the notion of more than one set of parents per child has to be taken seriously in light of modern technology. It is now possible for two women to have a biological connection with a child—one can furnish the ovum and another can furnish the womb. The law could, but does not, recognize them both as mothers.¹⁴⁴ Similarly, the law should recognize that more than one father is possible. Although to date only one man can have a biological connection with each child, others can be presumed fathers, either because of a relationship like marriage with the child's mother or a relationship with the child.¹⁴⁵ Only Louisiana accepts the possibility of dual paternity, recognizing both the biological and the presumed father. In *Smith v. Cole*,¹⁴⁶ the Louisiana Supreme Court allowed a child who had a presumed father to bring suit to establish another man as her biological father.¹⁴⁷ The law is exclusive

143. *Id.* at 92. The National Commission on Children recognizes the importance of this kind of help for families. See COMMISSION REPORT, *supra* note 7, at 255.

144. See, e.g., VA. CODE ANN. §§ 20-156, 158 (Michie Supp. 1991) (effective July 1, 1993) (deeming gestational mother to be child's mother regardless of biological connection to child, unless valid surrogacy agreement exists); see also *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 381 (Cal. Ct. App. 1991) (surrogate mother held not to be natural or legal mother), *review granted*, 822 P.2d 1317 (Cal. 1992). But see *In re L.S. and V.L. for Adoption of Minors (T.) and (L.)*, Adoption Nos. A-269-90 and A-269-90 (Super. Ct. D.C., Fam. Div., 1991), reprinted in WALTER WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 100 (Supp. 1992). In *L.S. and V.L.*, two women shared a household with two children. One child was the biological child of one woman and the other child was the adopted child of the other woman. *Id.* at 100-01. The court allowed each woman to adopt the other's child, *id.* at 104, so, while in a sense, each child had two mothers, there were only two parents in the family.

145. *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (holding that a California law creating a presumption that a child born to a married woman living with her husband is a child of the marriage did not violate due process rights of man claiming to be father); see also UNIF. PARENTAGE ACT § 4, 9B U.L.A. 298-99 (1973).

146. 553 So. 2d 847 (La. 1989).

147. The court said:

In summary, Louisiana law may provide the presumption that the husband of the mother is the legal father of her child while it recognizes a biological father's actual paternity. . . . A filiation action brought on behalf of the child, then, merely establishes the biological fact of paternity. . . . [I]t does not bastardize the child.

Id. at 854-55.

everywhere else, limiting each child to only one father. Instead of excluding all but one each of these potential mothers and fathers, the law might do better to recognize all in the interests of both parents and children. The more willing hands there are to perform a difficult task, the more likely it is to be done.¹⁴⁸ Ultimately, when the scientists succeed in creating a full-term baby by ectogenesis (that is, completely outside the womb), a development which I am told is just around the corner, there will be a whole new group of potential parents to share the child-raising task—the lab technicians and others who participated in the birth.

A national family policy embodied in federal and state laws, teaching the lessons of responsible parenthood, would be

148. This explains the success of polygamous families. A female member of one such family, who happens to be a lawyer, recently described the advantages of life in a polygamous family for both parents and children. Here is what she said:

I married a married man.

In fact, he had six wives when I married him 17 years ago. Today he has nine. . . .

Polygamy, or plural marriage, as practiced by my family is a paradox. At first blush, it sounds like the ideal situation for the man and an oppressive one for the women. For me, the opposite is true. While polygamists believe that the Old Testament mandates the practice of plural marriage, compelling social reasons make the life style attractive to the modern career woman. . . .

When I leave for the 60-mile commute to court at 7 a.m., my 2-year-old daughter London is happily asleep in the bed of my husband's wife, Diane. London adores Diane. When London awakes, about the time I'm arriving at the courthouse, she is surrounded by family members who are as familiar to her as the toys in her nursery.

Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31.

The author goes on to explain that she lives in a house with another wife. Most nights they have a simple dinner with their children. On Mondays their husband eats with them. The wives make appointments with their husband when they want private time with him.

In sum, she says:

Plural marriage . . . is the lifestyle for me. . . . It offers men the chance to escape from the traditional, confining roles that often isolate them from the surrounding world. More important, it enables women, who live in a society full of obstacles, to fully meet their career, mothering, and marriage obligations. Polygamy provides a whole solution. I believe American women would have invented it if it didn't already exist.

Id.; see also David Sarasohn, *Two-income Families May Need to Take the Next Step: Polygamy*, MINNEAPOLIS STAR TRIB., Dec. 2, 1991, at A13. This is different from the original child-care structure in the Israeli kibbutzim. See *supra* notes 46-53 and accompanying text. Child-care in the polygamous family is the responsibility of family members; in the early Kibbutzim, child-care was performed by strangers.

comforting at least and helpful at most in attempting to solve the problems of American families. Competing interests among different families and between parents and children in individual families may make it impossible to forge a coherent national policy.¹⁴⁹ Even if it could be done, policy is not a panacea. There is no substitute for individual responsibility in matters of love, marriage, and family.¹⁵⁰

149. GILBERT Y. STEINER, *THE FUTILITY OF FAMILY POLICY* 214 (1981).

150. On these topics no one surpasses the English poet, Philip Larkin. Of "love" he says:

Not love you? Dear, I'd pay ten quid for you:
Five down, and five when I get rid of you.

Of "marriage" he says:

My wife and I—we're *pals*. Marriage is *fun*.
Yes: two can live as stupidly as one.

PHILIP LARKIN, *COLLECTED POEMS* xxi, xxii (Anthony Thwaite ed., 1988). For Larkin's views on "family," see *This Be The Verse*, in LARKIN, *supra*, at 180.

