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The Winding Road from Form to Function: A Brief History of Contemporary Marriage

by

J. Herbie DiFonzo and Ruth C. Stern*

Introduction

Consider this contrast: American marriage was once “rigid, work-centered, custom regulated, with well-defined roles for husband, wife, and children,” but now may be characterized as “flexible, pleasure-centered, co-operatively regulated, with loosely defined roles for husband, wife, and children.” The accuracy of this comparison between conjugal unions past and present may be debated, although on the whole the distinction it draws seems defensible. What might startle the reader, however, is that quoted contrast appeared in a 1955 college sociology text entitled “Making the Most of Marriage.”¹ The author, noted sociologist Paul H. Landis, celebrated the pliable, fun-loving marriage of his time by measuring it against its static predecessor from the early twentieth century. Historical accounts should beware the Panglossian fallacy, and recognize that contemporary marriages are never the best of all possible unions, because the family is always “in transition.”²

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¹ PAUL H. LANDIS, *MAKING THE MOST OF MARRIAGE* 13 (1955); *see also* ROBIN M. WILLIAMS, JR., *AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION* 76-77 (1951) (contrasting the modern family, “an almost purely consuming and affectional unit,” with the “old-style ‘trustee family’—practically a self-contained social system.”)

² *Compare* RAY E. BABER, *MARRIAGE AND THE FAMILY*, ch. 1 “The Family in Transition” (2d ed. 1953), *with* FAMILY IN TRANSITION (Arlene S. Skolnick & Jerome H. Skolnick, eds., 14th ed. 2006).

But what is the state of contemporary marriage, and what light can recent history shed on it? Since the 1950s, while some aspects of marriage have dramatically changed, others have stubbornly resisted alteration. This essay suggests one unifying principle to interpret the trends in the legal treatment of marriage and its alternatives. American society is currently in a transitional stage along the continuum from exclusively sanctioning families based on biological and adoptive bounds to legally recognizing functional families.

Part I offers a legal and cultural snapshot of American marriage in the middle of the twentieth century. It suggests that the apparent tranquility of the 1950s marriage, along with its pursuit of domestic perfection and culture of familial bliss, constituted a reaction to the turbulence which surrounded family life in World War II and the immediate postwar years. In fact, as the fear of Nazis mutated into dread of a Red mushroom cloud, marriages in the cold war era became models of family engineering, providing shelter against the omnipresent uncertainty of the world beyond the hearth. Marriage was wildly popular in this era, and represented the cultural norm: more than three-quarters of all households were married-couple ones.³ Divorce, despite its relative infrequency when compared with rates a generation later, was viewed with alarm.

The transition of conjugal institutions from form to function was in an embryonic stage. The marital union was largely regulated by common law rules, which viewed marriage as the *sine qua non* of family formation. But divorce had escaped the formalism of the legal structure: although fault grounds remained in place, divorce was operationally run on mutual consent principles. Couples desirous of dissolving their connubial bonds came to an agreement on the issues of children, support, and property. The actual grounds presented in court were, most often, not only fictional but choreographed—and nearly everyone knew it.

Part II explores how marriage has altered over the past half-century, and—significantly—how it has held against the tide. The legal regime governing domestic institutions has experienced a touch of entropy, the devolution of a considerable amount of

³ Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Re-thinking the "Beneficial Family" and Marriage-Centric Corporate Benefits Programs*, 14 COLUM. J. GENDER & L. 1, 28 (2005).

power from the State to the people it used to regulate. American culture has become a hothouse for domestic experimentation, and family law has struggled to retain coherence and control. The era which gave birth to the Baby Boomers could not have imagined *de facto* parents, adoption by same-sex couples, transitional alimony, the universal availability of effective contraception, or that unmarried adults and their dependents would some day comprise a majority of households. These developments reflect a pragmatic approach to marriage and its alternatives, and a distinct shift in legal norms from form to function. On the other hand, while the roles of wife and husband, mother and father have slipped out of their postwar casing, they have not slid very far away. Traditional gendered norms in beauty, intelligence, and education continue to hold sway in partner selection. And, in rearing children, the verb “mothering” still refers to the significant workload of women with children, while the verb “fathering” is often still limited to supplying economic sustenance, as well as the requisite male genetic material. Most importantly, men tend to retain their financial hegemony, both over women in general and over wives in particular.

The brief Epilogue to this historical essay suggests that the centrifugal pull of social experimentation is matched by the centripetal pressure of crafting effective legal rules to serve the multiplying number of alternative domestic unions. The drive from form to function in family law is strong and growing stronger, as theory strains to keep pace with the exuberant practice of living families.

I. Marriage in Mid-Twentieth Century America

The prelude to contemporary marriage occurred shortly before 1950. With amazing unanimity, postwar Americans subscribed to a rarefied vision of the nuclear family and bent their lives, hopes and energies to achieve it.⁴ Never before nor since has there been such concerted pursuit of domestic perfection. A

⁴ See generally ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* (1988); see Paul H. Landis, *Divorce in Our Time*, 105 *FORUM* 865 (1946) (observing that the “companionship family,” which “prizes romance and its ethereal happiness,” was replacing the “institutional family rooted in the traditions of child-bearing, joint economic activity and filial duty.”)

tailor-made target for the iconoclasm that followed, the period lasted little more than a decade before falling prey to the individualism it had sought to suppress. And although the 1950s was a transient, aberrational period in the culture of marriage, it conceived a standard of familial bliss that preoccupies us to this day. Succeeding generations have chosen either to embrace the nuclear family, to modify it, or reject it outright. They have tried to redefine it, reconceptualize and reinvent it. But the departure point for their analyses and explorations, and the yardstick by which alternatives are measured, is often still that one ideal. For a brief historical moment, Americans truly believed they had definitively solved the riddle of marriage.⁵

A. *Cold War Families*

The years immediately following the end of World War II were not conducive to marital stability. Millions of returning G.I.'s, many of them absent husbands and absent fathers, found they had to "elbow their way back into their families."⁶ Their reassertion of domestic authority often met with the resistance of their wives and children. Further, these men had to readjust to the workplace, find jobs, resume careers, or take on years of schooling under the generous terms of the G.I. Bill.⁷ Working women were displaced by returning soldiers and the closing of munitions plants, forced by the millions "out of the factory and into the home."⁸ Faced with a severe housing shortage, families moved in with friends and relatives, fraying tempers and strain-

⁵ The 1950s marriage was not at all "traditional." To the contrary, family life in this era "was the first wholehearted effort to create a home that would fulfill virtually all its members' personal needs through an energized and expressive personal life." MAY, *supra* note 4, at 11. See also STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 25-41 (1992) (describing the 1950s family as "a qualitatively new phenomenon," *id.* at 25).

⁶ STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 35 (1997). For a poignant cinematographic depiction of the difficulties veterans had in elbowing back, see *THE BEST YEARS OF OUR LIVES* (SAMUEL GOLDWYN PRODUCTIONS 1946).

⁷ JAMES GILBERT, *ANOTHER CHANCE: POSTWAR AMERICA, 1945-1985*, at 57 (2nd ed. 1986).

⁸ *Id.* Within two years after war's end, two million women had lost their jobs. DAVID HALBERSTAM, *THE FIFTIES* 589 (1993).

ing relationships.⁹ By 1946, a surging divorce rate was claiming one in three marriages.¹⁰

Within a short time, prosperity returned and “set off a mood of celebration and hope” in those who had weathered years of Depression and war.¹¹ Sixty percent of Americans attained a middle-class standard of living by the mid-1950s. In the postwar economic glow, the nuclear family was transforming itself into a “secure oasis.”¹² Just as communism and the threat of atomic annihilation could be controlled by containment, each home became a “sphere of influence,” the safest of havens, where potential social threats were neutralized.¹³ Secure in their homes and surrounded by children, Americans defied “doomsday predictions,” and determined to “ward off their nightmares and live out their dreams.”¹⁴ With its seemingly endless supply of ranch-style houses and consumer goods, the United States bestowed upon its citizens the ultimate in liberty and privacy rights, the “freedom to pursue the good life at home.”¹⁵

It was assumed that, sooner or later, those who came of age during and after World War II would get married. They were, in fact, the “most marrying generation on record.”¹⁶ The century-high peak was reached in 1960, when 68% of the population 14 years of age or older were married,¹⁷ with all but 5% of the

⁹ COONTZ, *THE WAY WE REALLY ARE*, *supra* note 6, at 35.

¹⁰ *Id.* See PAUL H. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 92-95(1959) (discussing the divorce rate during and immediately following World War II).

¹¹ ARLENE SKOLNICK, *EMBATTLED PARADISE* 54 (1991).

¹² COONTZ, *THE WAY WE REALLY ARE*, *supra* note 6, at 35.

¹³ MAY, *supra* note 4, at 14. See HALBERSTAM, *supra* note 8, at 591 (“A family was a single perfect universe—instead of a complicated, fragile mechanism of conflicting political and emotional pulls.”)

¹⁴ MAY, *supra* note 4, at 24.

¹⁵ NANCY F. COTT, *PUBLIC VOWS* 197 (2000). In 1959, when Vice President Richard Nixon and Soviet Premier Nikita Krushchev engaged in the famous “kitchen debate,” the two cold war rivals focused not on forms of government or deployment of missiles, but instead on “the relative merits of American and Soviet washing machines, televisions, and electric ranges.” MAY, *supra* note 4, at 16.

¹⁶ MAY, *supra* note 4, at 20.

¹⁷ *Id.* at 21, Table 6. Census tabulations for the three decades, 1950, 1960, and 1970, report the adult married population rising from 66% to 68% and then falling to 63%. Conversely, the percentage of single adults decreased from 23%

adults eventually exchanging vows in the 1950s.¹⁸ The fertility rate, at 3.8 children per woman, was no less stunning.¹⁹ Because of the accelerated pace of childbearing, many young mothers likely had two or more children in diapers at once.²⁰ A previous generation might have turned to extended family members for help. In the 1950s, however, the nuclear family reveled in its self-sufficiency, substituting “marital solidarity” for ties of kinship.²¹ For many families, the flight to the suburbs signified emancipation from ethnicity and family tradition.²² Except for emergencies, parents and relatives were expected to refrain from interfering, and the “isolated conjugal unit” was deemed “desirable, right, and proper by social consensus.”²³

From within their sharply delineated roles as breadwinners and homemakers, men and women pooled their “emotional and financial eggs” and placed them all within the “small basket of the immediate nuclear family.”²⁴ Not content to merely build upon existing traditions, postwar families invested in a new, experimental domestic utopia.²⁵ The deviance of 1950s family patterns from those of earlier eras points up several anomalies. Within the decade, birth control technologies rapidly advanced,²⁶ yet the U.S. rate of childbearing “approached that of India.”²⁷

to 21% before rising to 25%. In all three census tallies, the percentage of divorced and widowed adults held steady at 8% and 3%, respectively. *Id.* The source census statistics may be found at U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, Series A 160-171. Marital Status of the Population, by Age and Sex: 1890 to 1970, available at <http://www2.census.gov/prod2/statcomp/documents/CT1970p1-02.pdf>.

¹⁸ Paul C. Glick, *American Families: As They Are and Were*, in FAMILY IN TRANSITION 93 (Arlene S. Skolnick & Jerome H. Skolnick, eds., 8th ed. 1994).

¹⁹ *Id.* at 94.

²⁰ COONTZ, *THE WAY WE REALLY ARE*, *supra* note 6, at 36.

²¹ ROBERT F. WINCH, *THE MODERN FAMILY* 662 (rev. ed. 1963); *see also* WILLIAMS, *supra* note 1, at 47 (“The extraordinary emphasis in modern, urban, middle-class America upon the marriage pair is bound to result . . . in a greatly simplified kinship structure of isolated families.”)

²² MAY, *supra* note 4, at 25.

²³ WILLIAMS, *supra* note 1, at 48.

²⁴ COONTZ, *THE WAY WE REALLY ARE*, *supra* note 6, at 37.

²⁵ *Id.* at 36.

²⁶ GILBERT, *supra* note 7, at 62.

²⁷ SKOLNICK, *supra* note 11, at 52.

One of America's largest increases in women's employment occurred in the 1950s, yet women had received greater percentages of doctoral and masters degrees in the 1930s.²⁸ Rather than following a line of social and political progression, postwar marriage was a "throwback to the Victorian cult of domesticity with its polarized sex roles and almost religious reverence for home and hearth."²⁹ The white middle class established norms which ultimately shaped the social, political and economic lives of all Americans.³⁰ Those who failed to conform were at risk of becoming "marginalized, stigmatized, and disadvantaged as a result."³¹ Adaptation, not resistance or political activism, was the ruling wisdom of the day.³²

In the "era of the expert,"³³ postwar Americans relied on Benjamin Spock's *Baby and Child Care*³⁴ and on Norman Vincent Peale's *The Power of Positive Thinking*³⁵ as formulas for success. The profession of marriage counseling, which began in the 1930's, developed into the practice of family therapy and became established and respected in the 1950s.³⁶ There was, apparently, some need for therapeutic intervention. The dual

²⁸ GILBERT, *supra* note 7, at 68. According to sociologist Arlene Skolnick, in 1930 half of all professionals were women. In the 1950s, women who attended college did so in pursuit of husbands, often dropping out in order to marry. Women who participated in the 1950s workforce were largely middle-class, married and over 35. Instead of seeking careers, they worked in part-time clerical or service jobs to supplement the family income. They did, however, help to eradicate stigmatizing notions that only lower-class married women worked, or those with husbands in "dire financial straits." SKOLNICK, *supra* note 11, at 53.

²⁹ SKOLNICK, *supra* note 11, at 52.

³⁰ MAY, *supra* note 4, at 13.

³¹ *Id.* Women were culturally cabined within their new domestic status. See HALBERSTAM, *supra* note 8, at 590 ("[S]hort stories in women's magazines about career women . . . portrayed women who were unhappy and felt themselves emotionally empty. Instead, the magazines and the new television sitcoms glorified dutiful mothers and wives.")

³² MAY, *supra* note 4, at 28.

³³ *Id.* at 26.

³⁴ BENJAMIN SPOCK, *THE COMMON SENSE BOOK OF BABY AND CHILD CARE* (1946).

³⁵ NORMAN VINCENT PEALE, *THE POWER OF POSITIVE THINKING* (1952).

³⁶ GILBERT, *supra* note 7, at 62. One writer of the period even proposed that differential functioning of the endocrine system might contribute to marital disharmony. Irritation and incompatibility with the spouse's level of excitability

idealization of married women as scintillating sex objects while wholly absorbed in nurturing their young drove thousands of married women “to therapists, tranquilizers, or alcohol when they actually tried to live up to it.”³⁷ Men, too, felt entrapped within the role of “good-provider,”³⁸ stressed and confined in competitive, increasingly bureaucratic environments.³⁹ Both men and women looked to the psychologists to label and explain their feelings and to help them adapt.⁴⁰ A “distinctly apolitical” strategy, this type of expertise “reinforced the political consensus” by blaming personal weakness rather than flawed institutions for marital dissatisfaction.⁴¹ As couples “sealed the psychological boundaries around the family, they also sealed their fates within it.”⁴² That these relatively fragile structures were burdened by high expectations was not an immediate cause for alarm in the 1950s.⁴³ Outside the safety and security of domesticity lurked dangerous emotional, financial and social hardships.⁴⁴ Even a bad marriage was better than the drastic, evil measure of divorce.⁴⁵

could be glandular in origin and best approached from a medical perspective. See BABER, *supra* note 2, at 235-237.

³⁷ COONTZ, *THE WAY WE NEVER WERE*, *supra* note 5, at 9. In 1963, Betty Friedan would expose the contradictions of “feminine fulfillment” in her classic *THE FEMININE MYSTIQUE*.

³⁸ Frank F. Furstenberg, Jr., *Good Dads-Bad Dads: Two Faces of Fatherhood*, in *FAMILY IN TRANSITION*, *supra* note 18, at 352.

³⁹ MAY, *supra* note 4, at 185.

⁴⁰ *Id.* at 187; JOSEPH VEROFF ET AL., *MENTAL HEALTH IN AMERICA: PATTERNS OF HELP-SEEKING FROM 1957 TO 1976*, at 7-8, 10 (1981).

⁴¹ MAY, *supra* note 4, at 187.

⁴² *Id.* at 36.

⁴³ WILLIAMS, *supra* note 1, at 77.

⁴⁴ MAY, *supra* note 4, at 36.

⁴⁵ *Id.* at 203-4. Concern about divorce rates in the aftermath of World War II may have had a significant impact on some contemporary observers' conclusion that 1950s marriages were fragile, even as other indicators denoted marital stability. See, e.g., BABER, *supra* note 2, at 173 (“Few will dispute the claim that the marriage relationship is becoming more difficult.”); WILLIAMS, *supra* note 1, at 75 (“In spite of many cultural prescriptions nominally supporting the permanence of the marriage tie and the solidity of the nuclear family, American society is characterized by high rates of divorce and other forms of family dissolution.”)

B. *Setting the Boundaries*

Just after World War II, the Gallup poll released a survey showing that 35% of Americans favored stricter divorce laws, 31% believed they should not be changed at all, and only 9% supported liberalized measures.⁴⁶ The postwar public took “a keen interest in the health of the family unit,”⁴⁷ and they were “determined to get married and *stay* married.”⁴⁸ Marital unions formed in the postwar decade achieved a notable degree of stability. This cohort of Americans was, in fact, the only group in the last hundred years “to show a substantial, sustained shortfall in their lifetime levels of divorce.”⁴⁹ Once couples became ensconced in matrimony, many states conspired to “keep them there”⁵⁰ by limiting the grounds for divorce.⁵¹ But blocking the marital exit was not the only way the states contrived to promote the preservation of marriage. Marriage licensing laws examined the fitness of marital candidates and excluded “certain types of mental defectives,”⁵² as well as those with venereal disease.⁵³ To prevent “hasty elopement[s],”⁵⁴ many states instituted waiting periods, usually from one to five days, before granting marriage license applications.⁵⁵ Common law marriage, because it frustrated state efforts to determine who could marry and procreate, was recognized in only eighteen states in the early 1950s.⁵⁶ When a jurisdiction retained common law marriage, it did so to “regularize unions which the parties were otherwise free to abandon at

⁴⁶ Gilbert, *supra* note 7, at 62.

⁴⁷ *Id.*

⁴⁸ MAY, *supra* note 4, at 185 (italics in original).

⁴⁹ ANDREW CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 25 (1981).

⁵⁰ William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN'S L. REV. 435, 445 (1996).

⁵¹ See generally J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA (1997). New York, one of the most restrictive states, permitted divorce solely on the ground of adultery from 1787 until 1967. J. Herbie DiFonzo & Ruth C. Stern, *Addicted To Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 559 (2007).

⁵² HARRIET F. PILPEL & THEODORA ZAVIN, YOUR MARRIAGE AND THE LAW 39 (1952).

⁵³ *Id.* at 36-39.

⁵⁴ *Id.* at 44.

⁵⁵ *Id.* at 43-44.

⁵⁶ *Id.* at 40.

will and to prevent the bastardization of children.”⁵⁷ As a matter of social policy, the “law’s preference for marriage could not have been more clear.”⁵⁸

In 1952, more than half the states had laws prohibiting marriage between whites and those of other races.⁵⁹ Most commonly, whites and blacks were forbidden to marry although, in various states, whites could not wed Indians, Chinese, Japanese, mulattoes, Malays and Mongolians.⁶⁰ In the late 1940’s a white woman and a black man brought suit against the state of California for denying them a marriage license.⁶¹ The California Supreme Court struck down the state’s mixed-race marriage ban on fourteenth amendment equal protection grounds.⁶² Following this “signal precedent,”⁶³ nearly half of the remaining states with interracial marriage prohibitions decided to abolish them.⁶⁴ In contrast to the considerable number of states that disapproved of interracial unions, only a few considered habitual criminals, drug addicts and chronic alcoholics as undesirable marriage partners.⁶⁵

By importing nineteenth-century legal constructs of husband and wife into the postwar era, states ensured the survival of a number of traditions. Thus, husbands were still entitled to manage the family resources and choose the location of the family domicile.⁶⁶ Wives, though entitled to support, could not dictate how the marital resources were to be allocated.⁶⁷ Domestic violence remained hidden in the “private sphere,”⁶⁸ and husbands

⁵⁷ *Id.*

⁵⁸ Nelson, *supra* note 50, at 444.

⁵⁹ PILPEL & ZAVIN, *supra* note 52, at 26.

⁶⁰ *Id.* at 26-28. Pilpel and Zavín note that Arizona, “apparently concerned with the possibility of having the ranges overrun by turbaned riders, prohibits the marriage of whites with Hindus.” *Id.* at 27.

⁶¹ COTT, *supra* note 15, at 184. The California statute banned marriage of a white person “with a Negro, mulatto, Mongolian, or member of the Malay race.” *Id.*

⁶² *Perez v. Sharp*, 32 Cal. 2d 711 (1948).

⁶³ COTT, *supra* note 15, at 185.

⁶⁴ *Id.* Bans on interracial marriage were declared violative of the federal constitution in *Loving v. Virginia*, 388 U.S. 1 (1967).

⁶⁵ PILPEL & ZAVIN, *supra* note 52, at 29.

⁶⁶ HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 306 (2000). See *infra* text at notes 95-102 (discussing the limits of this doctrine.)

⁶⁷ *Id.*

⁶⁸ *Id.*

and wives were barred from testifying against each other.⁶⁹ A spouse who was physically injured by the other might seek criminal sanctions but was precluded in most states from suing the other for damages in personal tort actions.⁷⁰ Also, since sexual intercourse between husband and wife was legally authorized, and indeed a “male marital sexual right,”⁷¹ marital rape could never be defined as unlawful and, therefore, was not a criminal act.⁷²

A sexual double-standard was broadly observed in 1950s law and culture. For example, New York’s restrictive dissolution laws did not allow for divorce on the ground of cruelty, but did allow for judicial separations on that ground.⁷³ In such actions, isolated acts of violence by a husband against his wife did not constitute cruel and inhuman treatment.⁷⁴ But a single violent act committed by a wife against her husband amounted to wrongdoing on her part sufficient to deny her both a separation and

⁶⁹ *Id.*

⁷⁰ JOHN DEWITT GREGORY, ET AL. UNDERSTANDING FAMILY LAW § 7.02[A], at 206 (3d ed. 2005); PILPEL & ZAVIN, *supra* note 52, at 55. Tort suits by wives against husbands for harm to their property interests were allowable under the Married Women’s Property Acts, which all states had adopted by the end of the nineteenth century. But interspousal suits for personal injuries were barred for two reasons born of somewhat contradictory policy concerns: (1) such actions might encourage fraud upon insurers through collusion between the spouses; and (2) such suits would destroy the “peace and harmony” of the marital home. GREGORY, ET AL., *id.* Interspousal tort immunity has been subjected to prolonged and acerbic criticism. *See, e.g.*, HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 10.1, at 371 (2d ed. 1988) (“the kindest thing to be said about . . . these policy arguments is that they are frivolous.”) Since 1970, the immunity rule “has been transformed dramatically from a majority to a minority rule.” Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 359 (1989).

⁷¹ HARTOG, *supra* note 66, at 306-7.

⁷² *Id.* The prevalent view in the 1950s was that a husband who coerced his wife into sexual intercourse was not committing rape, since the element of unlawfulness was missing. *Id.* at 307. Only in the 1980s did scholars and courts engage in serious reconsideration of this view. Today, while most states allow for rape prosecutions in cases in which husbands and wives were estranged, many states still bar the prosecution of husbands for raping wives with whom they were living. GREGORY, ET AL., *supra* note 70, § 7.08[C], at 230.

⁷³ Nelson, *supra* note 50, at 517.

⁷⁴ *Id.* (citing cases).

maintenance (spousal support).⁷⁵ The courts' double standard in defining cruelty flowed from a "[j]udicial blindness to the faults of men and indifference to the difficulties faced by women" that characterized the postwar era.⁷⁶ As long as a wife appeared able to cohabit and co-exist with her husband, courts would deny her a separation.⁷⁷ Since 1920, courts had enforced a policy of keeping husband and wife together,⁷⁸ and the burden of accommodating to a troubled marriage "fell largely on wives."⁷⁹

That wives in troubled marriages had limited options became clear in *McGuire v. McGuire*,⁸⁰ a 1953 decision of the Nebraska Supreme Court which has achieved "a paradigmatic stature in American family law."⁸¹ The decision "mobilized the language of marital privacy"⁸² because it refused to invade "the private domain of the family."⁸³ Even if deeply disturbed, intact marriages were virtually insulated from legal intervention. Lydia McGuire was a hardworking farm wife whose husband Charles, although fairly wealthy, deprived her of all but the most basic necessities.⁸⁴ She desired neither a divorce nor separation, but entreated the court to "compel her rich husband to make her life a little less bleak."⁸⁵ Overturning the trial court's ruling in her

⁷⁵ *Axelrod v. Axelrod*, 150 N.Y.S.2d 633 (Sup. Ct. Kings County, 1956).

⁷⁶ *Nelson*, *supra* note 50, at 514.

⁷⁷ *Baker v. Baker*, 228 N.Y.S.2d 470, 472 (App. Div. 1st Dept. 1962).

⁷⁸ *Reese v. Reese*, 185 N.Y.S. 110, 111 (App. Div. 2nd Dept. 1920).

⁷⁹ *Nelson*, *supra* note 50, at 518. Annulment rulings in this era demonstrated the same gender bias. New York cases declared a man entitled to an annulment if his wife had failed to disclose a previous illegitimate pregnancy, or even if "she turned out not to be the virgin he had expected her to be." *Id.* at 514 (citing cases). But a wife who proved prior undisclosed sexual activity on the part of her husband—impregnating an unwed girl who bore him a child—was denied an annulment. *Pankiw v. Pankiw*, 256 N.Y.S.2d 448 (Sup. Ct. Monroe County, 1965).

⁸⁰ 59 N.W.2d 336 (Neb. 1953).

⁸¹ *HARTOG*, *supra* note 66, at 9.

⁸² *Id.*

⁸³ *Id.* at 8.

⁸⁴ Mr. McGuire paid for groceries directly and had not given his wife any money at all for years. Their 1929 Model A Ford coupe was equipped with a faulty heater and their home lacked indoor plumbing as well as a reliable furnace. Mrs. McGuire was permitted to make only local telephone calls and paid for out-of-state visits to her adult children with money she had made raising chickens. *Id.* at 6-7 (summarizing trial transcript).

⁸⁵ *Id.* at 7.

favor, the state supreme court held that a family's living standards were "a matter of concern to the household, and not for the courts to determine."⁸⁶ Even a court of equity could not presume to interfere where the husband and wife were living together.⁸⁷ A separated or divorced wife might petition for support, but Lydia McGuire faced the unenviable choice of bowing to her husband's superior property rights or leaving the marriage.⁸⁸

What is the significance of the *McGuire* case? On one level, it propounded the still-valid rule that courts will not lightly intrude into an intact marriage.⁸⁹ But was this marriage truly intact? Lydia's petition had described her husband as a very headstrong man" and averred that she was "afraid of what might happen to her personally when legal service of summons has been served upon the defendant."⁹⁰ Lydia requested and was granted a temporary restraining order against Charles,⁹¹ but the state supreme court noted that she made no attempt to prove her allegations, and "the fact that she continued to live with the defendant is quite incompatible"⁹² with her accusations.⁹³ At bot-

⁸⁶ 59 N.W.2d at 342.

⁸⁷ HARTOG, *supra* note 66, at 8. See McGuire, 59 N.W.2d at 342 ("As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out.")

⁸⁸ HARTOG, *supra* note 66, at 10. Whether Lydia McGuire could have left the marriage is problematic, as she did not appear to have grounds to seek separation or divorce. A woman who moved out without adequate grounds would be deemed to have abandoned her marriage, and thus entitled to no support whatsoever. GREGORY, ET AL., *supra* note 70, § 9.03, at 312.

⁸⁹ See Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1214 (1999) (observing that the McGuire case "illustrate[s] the contours of the common law doctrine of family privacy."); Eric Rasmusen & Jeffrey Evans Stake, *Lifting The Veil of Ignorance: Personalizing The Marriage Contract*, 73 IND. L.J. 453, 456 (1998) (noting that "courts have traditionally abstained from intervening in conduct during marriage and this has not changed with the no-fault revolution.")

⁹⁰ HARTOG, *supra* note 66, at 320 n. 7 (quoting trial transcript).

⁹¹ *Id.*

⁹² 59 N.W.2d at 338.

⁹³ That the McGuire court interpreted the requirement of discontinuing cohabitation both literally and narrowly may be inferred from its favorable reference to cases from other states in which a wife had successfully obtained spousal maintenance even though she continued to live the marital home. 59

tom, the court entered a legal judgment about the sharp boundary between the state and the family, although the borderland between these two institutions was about to become a far more contested terrain.⁹⁴

Occasionally, a court would soften its stance on the husband's prerogatives and introduce a note of realism into its reasoning. As a rule, the husband had the right to choose the family's place of domicile.⁹⁵ It was the wife's duty "to go with her husband to the home which he had provided."⁹⁶ If the wife refused to accompany her husband, she was deemed to have abandoned him.⁹⁷ In *Eftimiou v. Eftimiou*,⁹⁸ husband and wife

N.W.2d at 340-342. The distinction was subtle but key: the parties in those cases were living apart, even within the marital domicile, while the McGuires were still cohabiting. *Id.*

⁹⁴ Another view of the case suggests that the trial court simply intruded too far into the domestic arrangements.

The district court decreed that the plaintiff was legally entitled to use the credit of the defendant and obligate him to pay for certain items in the nature of improvements and repairs, furniture, and appliances for the household in the amount of several thousand dollars; required the defendant to purchase a new automobile with an effective heater within 30 days; ordered him to pay travel expenses of the plaintiff for a visit to each of her daughters at least once a year; that the plaintiff be entitled in the future to pledge the credit of the defendant for what may constitute necessities of life; awarded a personal allowance to the plaintiff in the sum of \$50 a month; awarded \$800 for services for the plaintiff's attorney; and as an alternative to part of the award made, defendant was permitted, in agreement with plaintiff, to purchase a modern home elsewhere.

59 N.W.2d at 336. Even the dissenting Justice, who maintained that the equitable power of a trial court did extend to the relief sought by Lydia McGuire, would have limited the award to a modest cash amount. 59 N.W.2d at 345 (Yeager, J., dissenting).

⁹⁵ See, e.g., *Vetrano v. Vetrano*, 54 N.Y.S.2d 537, 538 (Sup. Ct. Queens County, 1945) (noting "the well-settled principle of law that the domicile of the wife is the place where the husband has his domicile").

⁹⁶ *Id.*, quoting *Downes v. Downes*, 225 App.Div. 886, 233 N.Y.S. 39, 40 (2d Dep't 1929).

⁹⁷ See *Bennett v. Bennett*, 79 A.2d 513, 515 (Md. 1951) ("The doctrine is well established that the husband, being the head of the family and legally responsible for its support, has the right to choose and establish the domicile for himself and his wife, and when he provides a new domicile, his wife's refusal to follow him constitutes desertion, unless the change is plainly unreasonable.") This rule that a married woman's domicile was ordinarily that of her husband

each sought a judgment of separation based on abandonment by the other. Despite his ownership of “approximately twelve houses,” the husband insisted on the couple’s residing in a rat-infested cellar with no toilet and no hot water.⁹⁹ When his wife declined to accept these conditions, Mr. Eftimiou asserted that “she would be required to live in a sewer” if he so chose.¹⁰⁰ In the court’s view, the husband’s “exercise in the selection of the place of abode is not an arbitrary power. He must exercise his right in a reasonable manner with due respect for his wife’s health, welfare, comfort and peace of mind.”¹⁰¹ The court granted a judgment of separation in favor of the wife and dismissed the husband’s counterclaim, noting that “the assault on the citadel of the husband’s supremacy is proceeding in these days apace, so that today the wife is no longer in complete subjugation to the dictates of her husband.”¹⁰²

But a wife who attended college and intended to pursue medical studies was deemed “a very ambitious lady” and failed to evoke similar judicial solicitude.¹⁰³ Because she had neglected to keep Jewish dietary laws in the home and had paid less attention to her daughter than her husband thought appropriate, she was found to have constructively abandoned her husband and to have breached her duty to the child.¹⁰⁴ The court’s reliance on gender norms for its ruling was explicit: “The father has a right to expect the mother to give the child that which is necessary for her development and good, as it is his duty to provide the means

was abrogated in Maryland in 1972 by an amendment to the state constitution. See *Blount v. Boston*, 718 A.2d 1111, 1124 n.5 (Md., 1998) (explaining the impact of the state equal rights amendment). In New York, the Domestic Relations Law was amended in 1976 to provide that the “domicile of a married man or woman shall be established for all purposes without regard to sex.” L. 1976, Ch. 62, § 2. The modern view on whether desertion has occurred depends on the justification for one spouse’s decision to establish a new marital residence and the other’s justification for refusing to follow. See *Kerr v. Kerr*, 371 S.E.2d 30 (Va. Ct. App. 1988).

⁹⁸ 204 N.Y.S.2d 785 (Sup. Ct. Kings County 1960).

⁹⁹ *Id.* at 786.

¹⁰⁰ *Id.* at 789.

¹⁰¹ *Id.* at 790.

¹⁰² 204 N.Y.S. 2d at 790.

¹⁰³ *Rosner v. Rosner*, 108 N.Y.S.2d 196, 200 (Dom. Rel. Ct. Queens County 1951).

¹⁰⁴ *Id.* at 201.

to effectuate that, both materially and in cooperation spiritually.”¹⁰⁵

C. *The Symbiosis of Marriage and Divorce*

Americans have always believed in a “fundamental right to marry, and marry, and marry.”¹⁰⁶ In the 1950s and 1960s, this view of marital freedom required easy divorce, which was theoretically unavailable. Indeed, in the world limned by appellate court opinions, divorce came at the end of bitter litigation in which “innocent” spouses proved marital “fault” in an adversary proceeding against their erring partners, whereupon the state “punished” the “guilty” spouses by issuing a divorce decree. In 1955, the Tennessee Supreme Court forcefully articulated this set of legal norms:

Divorce in this state is not a matter to be worked out for the mutual accommodation of the parties in whatever manner they may desire, or in whatever manner the Court may deem to be fair and just under the circumstances. It is conceived as a remedy for the innocent against the guilty. The unfortunate person against whom a divorce is granted may suffer not only the severance of his or her marital relations, but also the deprivation of those rights, such as alimony, which arise out of the marital relation. These provisions thus are intended to further the policy of rewarding the innocent and punishing the guilty.¹⁰⁷

No matter how ponderously the high court recapitulated the formal canon, however, divorce had by the 1950s already become “a matter to be worked out for the mutual accommodation of the parties in whatever manner they may desire.”¹⁰⁸ The drive to escape bad marriages pushed American couples to pinnacles of legal invention, and divorce courts followed their lead.¹⁰⁹ Of the three most prevalent divorce grounds, adultery, desertion, and

¹⁰⁵ *Id.* The same gendered norms underlay the “tender years” presumption, by which the custody of young children was typically awarded to their mothers on grounds of natural fitness. See GREGORY, ET AL., *supra* note 70, § 11.03[B][1], at 461. This presumption gradually yielded to facially gender-neutral custody rules in the 1970s. *Id.*

¹⁰⁶ Mary Ann Glendon, *The New Marriage and the New Property*, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES: AREAS OF LEGAL, SOCIAL AND ETHICAL CHANGE 59, 63 (John M. Eekelaar & Sanford N. Fetz eds., 1980).

¹⁰⁷ *Brown v. Brown*, 281 S.W.2d 492, 498 (Tenn. 1955) (citation omitted).

¹⁰⁸ *Id.*

¹⁰⁹ See generally DiFONZO, *BENEATH THE FAULT LINE*, *supra* note 51.

cruelty, it was the third which became the “dazzling success stor[y] of family law”¹¹⁰ because its plasticity allowed it rapidly to outpace adultery and desertion as the favored vehicle for dissolution. In the 1860s, cruelty accounted for only one-eighth of all decrees; by 1922, it had emerged as the most popular ground. In 1950, divorces and annulments premised on cruelty accounted for 58.7% of the total, while desertion had slipped to 17.6%, and adultery registered merely 2.7%.¹¹¹

But what constituted cruelty? By the decade before the no-fault divorce revolution, cruelty had been transformed into no more and no less than a way for the couple to opt out of an unworkable marriage.¹¹² Far from restricting divorce, the fault system operated as a moral charade, fooling no one but staying in place for want of a cultural alternative. Noted judge and divorce reformer Paul W. Alexander well understood the paradox: “[T]he trouble with guilt as a criterion is . . . [that it] virtually assures mutual consent as a ground for divorce.”¹¹³ The pliant cruelty standard rarely foreclosed any consensual divorce, as long as the parties agreed on the legal story to be presented in court.¹¹⁴ Professor Homer H. Clark, Jr. was describing the

¹¹⁰ Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 79-80 (1976).

¹¹¹ JACOBSON, *supra* note 10, at 121 tbl.58.

¹¹² DiFONZO, *BENEATH THE FAULT LINE*, *supra* note 51, at 43-75 (describing the radical transition in the legal understanding of cruelty).

¹¹³ JOHN S. BRADWAY, ED., *PROCEEDINGS OF THE INSTITUTE OF FAMILY LAW* 179 (1959) (quoting Judge Paul W. Alexander).

¹¹⁴ Divorce-minded New York couples were statutorily barred from concocting fables of matrimonial cruelty. So they became versed in three alternative strategies: (1) migratory divorces for those able to afford six weeks in Nevada or some other divorce-friendly venue; (2) annulments for those wishing to engage in the fiction that their marriages never legally occurred; and (3) staged hotel adultery. *See generally* Richard H. Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303 (1950). The last of these options consisted of nothing less than routinized off-Broadway productions calling for “the husband to be caught in the act of sitting beside a scantily clad correspondent when the wife, a process server, and a private detective . . . burst into the hotel room.” DiFONZO, *BENEATH THE FAULT LINE*, *supra* note 51, at 89. Indeed, so endemic was this procedure that the rare judge who refused to accept the faked hotel evidence would “not be long hearing divorce cases.” Max Rheinstein, *Our Dual Law of Divorce: The Law in Action Versus the Law of the Books*, in *THE LAW SCHOOL, THE UNIVERSITY OF CHICAGO, CONFERENCE ON DIVORCE* 41 (1952).

ancien regime of divorce in Colorado, but his words applied to the whole country: “Colorado . . . permits the parties to obtain divorces by consent, but subjects them to [the] humiliation, hypocrisy, sometimes perjury, and needless hostility of having to testify to one of the prescribed grounds.”¹¹⁵ In short, the legal culture was recognizing a plain if difficult truth about marriage. As the Idaho Supreme Court observed in 1953, an irretrievably broken marriage, immune to reconciliation and shorn of its identity as a family unit, cannot be fixed by rule of law or by authority of the state.¹¹⁶

Divorces are a product of our cultural assumptions about marriage.¹¹⁷ Even in the domestic apogee of the 1950s and 1960s, the American legal system was universally acknowledged as a failure at limiting divorce.¹¹⁸ Indeed, a culture tolerant of divorce lived side by side with its marital counterpart. Charlton

¹¹⁵ Homer H. Clark, Jr., *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 407 (1971). On the farcical nature of divorce litigation in this period, see NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 1-8* (1962) (observing that under a fault-based system of divorce, thousands have had to “resort to some type of make-believe” to have the sour marriage dissolved); Paul Sayre, *Divorce for the Unworthy: Specific Grounds for Divorce*, 18 LAW & CONTEMP. PROBS. 26, 27 (1953) (stating that divorce litigation is the one striking exception to the rule that the defendant tries to prevent the plaintiff from succeeding).

¹¹⁶ *Howay v. Howay*, 264 P.2d 691, 697 (Ida. 1953); see also *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952). (“[W]hen a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted.”)

¹¹⁷ See David L. Cohn, *Are Americans Polygamous?*, ATLANTIC MONTHLY, Aug. 1947, at 30, 32:

We teach our young that to be married is automatically to be happy. We believe that everybody is, ought to be, or can be made happy; that all are “entitled” to happiness as to fresh air. . . . But simultaneously, in our anarchy of impermanence, we believe that if we are not happy in one marriage we shall surely be happy in another.

See also Christopher Lasch, *Divorce American Style*, N.Y. REV. BOOKS, Feb. 17, 1966, at 3, 4 (“Easy divorce is a form of social insurance that has to be paid by a society which holds up domesticity as a universally desirable condition . . .”).

¹¹⁸ See generally DiFONZO, *BENEATH THE FAULT LINE*, *supra* note 51, ch. 4, “The Case of the All-Too-Consenting Adults” (describing the widely-acknowledged failures of the fault system of divorce); see also Clark, *Divorce Policy and Divorce Reform*, *supra* note 115, at 403 (“Anyone acquainted with American marriage and divorce law cannot help but be struck with the fre-

Ogburn, vice-chair and counsel for the Interprofessional Commission of Marriage and Divorce Laws, expressed his dismay in 1950 that the American public “remained rather apathetic in the face of the disturbing character of the divorce evil: the increasing number of divorces and the laxity of the courts in hearing and granting divorces, especially in undefended cases often based on fraud and collusion in violation of the statutes.”¹¹⁹ But Ogburn had a poor grasp of the *zeitgeist*. The public did not loudly tout divorce, but it certainly abided it as the remedy for failed marriage and as the only way to re-enter the happiness sweepstakes. Social researcher Maxine B. Virtue’s 1956 observation that the “present cultural mores generally disapprove of the spouse who does not co-operate when asked for a divorce”¹²⁰ more accurately captured the flavor of a culture which understood the need for flexibility in negotiating the ideal of marriage.

In postwar America, what earlier generations had viewed as the “natural” rights of men became codified as legal entitlements.¹²¹ Women “lost significant legal protections” as the legal power of men increased.¹²² By the end of the 1950s, however, fissures started to appear in the patriarchal, neo-Victorian façade. People began to postpone marriage and to bear fewer children.¹²³ Beginning in 1962, annual rates of divorce rose markedly.¹²⁴ There was a dawning realization that neither the economy nor the individual family benefited by keeping women confined at home.¹²⁵ By the early 1960s, fresh from the hearths and cradles of this golden age of domesticity, educated, middle-class Americans prepared to unveil “the latest and most revolutionary version yet of the modern family.”¹²⁶

quency and emotional fervor of the criticisms leveled at that branch of the law over the last 40 years.”)

¹¹⁹ Charlton Ogburn, *The Role of Legal Services in Family Stability*, 272 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 127 (1950).

¹²⁰ MAXINE B. VIRTUE, FAMILY CASES IN COURT 229-30 (1956).

¹²¹ Nelson, *supra* note 50, at 523.

¹²² *Id.* at 524.

¹²³ SKOLNICK, *supra* note 11, at 73-74.

¹²⁴ CHERLIN, *supra* note 49, at 22.

¹²⁵ SKOLNICK, *supra* note 11, at 74.

¹²⁶ *Id.*

II. How Marriage Has Changed (and Not Changed) Over the Past Half-Century and Why It Matters

In considering the cultural and legal developments that have had the greatest impact on marriage in the past half century, the dramatic rise in divorce rates in the wake of the passage of no-fault divorce laws has often taken center stage. Between 1965 and 1980, the divorce rate more than doubled, from 2.5 divorces per 1,000 Americans to 5.2 divorces.¹²⁷ Even though the rate then began to drop significantly, many cultural critics argued that America was drifting into a “divorce culture”¹²⁸ aimed at “the abolition of marriage,”¹²⁹ to cite the titles of two popular books from the late 1990s.

A. *How No-Fault Divorce Changed Marriage*

No-fault divorce came to life in the late 1960s as a major effort to *retard* the rise in divorce, not to liberate couples willy-nilly from their conjugal obligations. No-fault divorce laws were originally designed to reduce acrimony, improve the chances of reconciliation, and thereby reduce the divorce rate. They failed. But what ensued owed more to the law of unintended consequences than to any legal design to destroy marriage, as critics

¹²⁷ U.S. Census Bureau, Statistical Abstract of the United States: 2006, Table 72. Live Births, Deaths, Marriages, and Divorces: 1950 to 2003, at <http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf>.

¹²⁸ BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997). Whitehead’s book had its genesis in her influential 1993 article, *Dan Quayle Was Right*, *ATLANTIC*, Apr. 1993, at 47. In that piece, Whitehead argued that Americans in the 1970s largely destigmatized divorce because the mores had shifted from protecting children’s well-being to pursuing adult happiness. *Id.* at 52. Divorce became merely an escape hatch from a tumultuous relationship. But her review of social science studies reflecting the serious damage to children of divorce concluded that “growing up in an intact two-parent family is an important source of advantage for American children.” *Id.* at 80.

¹²⁹ MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* (1996). Gallagher’s thesis was apocalyptic: The overthrow of the marriage culture and its replacement by a postmarital culture was responsible for most of the gravest problems facing America—crime, poverty, welfare dependence, homelessness, educational stagnation, even child abuse. Above all, the decline of marriage was behind the precarious sense of economic instability haunting many Americans. *Id.* at 3-4.

have often claimed.¹³⁰ The operating principles of the regime governing marital dissolution in the 1950s and 1960s were formally dependent on proof of fault grounds, but operationally reliant on mutual consent. No-fault divorce a decade later was revolutionary not because it eliminated grounds, but because it effected unilateral divorce.

Beginning at the end of the 1960s in California, the standard of “irreconcilable differences”¹³¹ or its equivalent, “irretrievable breakdown,”¹³² triggered a nationwide overhaul in the process of obtaining a divorce. By 1985, all states had adopted some version of no-fault divorce. Some 35 states enacted an “irreconcilable differences”-type provision, either adding it to their menu of dissolution options, or wiping the slate clean of all fault-based divorce grounds. The remaining states provided a no-fault divorce ground to be established by couples living separate and apart for a specified time.¹³³ The no-fault divorce revolution converted the operational mechanism of divorce from mutual consent to unitary action. In most jurisdictions the legal system effectively exchanged the culpability theory of divorce for one of marital breakdown. But irreconcilable differences are simply not justiciable. The “virtually universal understanding [came to be]

¹³⁰ In California, the Governor’s Commission on the Family which devised no-fault divorce was appointed in 1966 to mount a “concerted assault on the high incidence of divorce in our society and its often tragic consequences.” REPORT OF THE GOVERNOR’S COMMISSION ON THE FAMILY 1 (1966) (quoting Governor Edmund G. Brown, Charge to the Commission, May 11, 1966). See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 885 (2000) (“the history of no-fault divorce illustrates the gulf between founding intentions and achieved effects: the major family law reforms . . . in the 1960s and 1970s were carefully considered efforts aimed at reinforcing the family and lowering the rate of divorce. They largely failed.”); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 60-61, 78-79, 101-03, 162-73 (1988) (arguing that no-fault divorce law reforms were not widely intended or expected to radically alter either marriage or divorce).

¹³¹ Family Law Act of 1969, ch. 1608, 1969 Cal. Stat. 3312, 3314-51 (repealed 1994).

¹³² Unif. Marriage and Divorce Act, 9A past I U.L.A. 159 (1998) (originally proposed 1970).

¹³³ See GREGORY, ET AL., *supra* note 70, § 8.01[C], at 238.

that the breakdown of a marriage is irretrievable if one spouse says it is.”¹³⁴ And, increasingly, one spouse said it was.

What happened to marriage in the age of no-fault? The metamorphosis of divorce into an act of self-actualization was but one component in an emerging ethos featuring “personal autonomy with respect to intimate life choices.”¹³⁵ The dislodgment of a formal culpability analysis in divorce cases was accompanied by cultural rifts in American society “leav[ing] the individual suspended in glorious, but terrifying, isolation.”¹³⁶ Family law appeared now to foster “autonomous individualism” to the detriment of familial relationships.¹³⁷ With divorce at the ready, marriage no longer appeared to require continual tending. “Love,” as the posters advertising the wildly popular 1970 movie *Love Story* endlessly repeated, “means never having to say you’re sorry.”¹³⁸

And so the bonds of marriage weakened. No-fault divorce changed marriage as much as it changed divorce. The move to unilateral dissolution was not, of course, the sole cause for the demise of marriage as a perceived universal boon. Our culture is too diverse, too variable, too atomistic.¹³⁹ In 1940, the Census Bureau classified a male head of household residing with his wife

¹³⁴ MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* 81 (1987); see also WHITEHEAD, *THE DIVORCE CULTURE*, *supra* note 128, at 68 (no-fault divorce “established a disaffected spouse’s right unilaterally to dissolve a marriage simply by declaring that the relationship was over”).

¹³⁵ Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 62 (1991).

¹³⁶ ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 6 (1985)

¹³⁷ Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 3. But see Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 270 (“Individuals continue to want a familial relationship; they simply want more control over the terms of that relationship. This movement toward personal autonomy is nonetheless a movement toward relationships, not away from them.”)

¹³⁸ ERICH SEGAL, *LOVE STORY* 131 (1970).

¹³⁹ See generally MILTON C. REGAN, *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* (1999) (exploring the tensions between spouses as separate individuals with their own aims, and marital partners committed to the joint goals of their union).

as a “normal” family.¹⁴⁰ But married-couple households have been losing statistical ground for decades. They occupied 78% of the nation’s households in 1950, 60% in 1980, and 52.8% in 2000. The number of unmarried partners living together grew tenfold between 1960 and 2000, and 72% between 1990 and 2000. Today, “to be married means to be outnumbered.”¹⁴¹ Results of the American Community Survey, which questioned occupants of 3 million American households in 2005, revealed that unmarried adults headed up 50.3% of the nation’s housing units that year, while married couples occupied 49.7%.¹⁴² Statistics released in September 2007 by the Census Bureau reveal a startling increase of 10 million in the population of unmarried adults in the preceding year. These now number 100 million.¹⁴³

Although divorce rates have received the lion’s share of popular and scholarly attention, the substantial declines in the rates for marriages and for births are perhaps more telling as markers of cultural change. As Table 1 on the following page shows, the divorce rate rose sharply beginning in the late 1960s, peaking in 1980 and then receding significantly, although remaining considerably above the rate before no-fault. The marriage rate varied within a range of 8.5 to 10.6% during the four decades following 1955. However, the rate has since markedly declined, to 7.4% in 2007.¹⁴⁴ By contrast, the birth rate has

¹⁴⁰ COTT, *supra* note 15, at 182.

¹⁴¹ Sam Roberts, *To Be Married Means to Be Outnumbered*, N.Y. TIMES, Oct. 15, 2006, at <http://www.nytimes.com/2006/10/15/us/15census.html> (capitalization altered).

¹⁴² *Id.* Information on the American Community Survey is available at U.S. Census Bureau, <http://www.census.gov/acs/www/index.html>.

¹⁴³ Thomas F. Coleman, *Ranks of Unmarried Adults Reach 100 Million Mark*, Column One, Sep. 17, 2007, at <http://www.unmarriedamerica.org/column-one/09-17-07-census-report.htm>. Earlier, more detailed census figures reveal the following: There were 219,699,000 Americans aged 18 or older in 2006. Of those, 122,784,000, or 55.9%, were married. The unmarried population constituted 96,916,000, or 44.1%. The latter grouping consists of those widowed, divorced, and separated, 41,576,000 (18.9%); and the never-married, 55,340,000 (25.2%). U. S. Census Bureau, *America’s Families and Living Arrangements: 2006*, Table A1. Marital Status of People 15 Years and Over, by Age, Sex, Personal Earnings, Race, and Hispanic Origin, 2006, at <http://www.census.gov/population/www/socdemo/hh-fam/cps2006.html>.

¹⁴⁴ See also Jeremy Greenwood & Nezih Guner, *Marriage and Divorce Since World War II: Analyzing the Role of Technological Progress on the Forma-*

Table 1: Births, Marriages, and Divorces, 1950-2007: Rate per 1,000 Population¹⁴⁵

Year	Births	Marriages	Divorces
1950	24.1	11.1	2.6
1955	25.0	9.3	2.3
1960	23.7	8.5	2.2
1965	19.4	9.3	2.5
1970	18.4	10.6	3.5
1975	14.6	10.0	4.8
1980	15.9	10.6	5.2
1985	15.8	10.1	5.0
1990	16.7	9.8	4.7
1995	14.6	8.9	4.4
2000	14.4	8.3	4.1
2005	14.0	7.7	3.7
2006	14.0	7.6	3.6
2007	14.3	7.4	3.6

followed a fairly steady course, with only slight deviations. It fell from a 1955 high of 25% to a 2005 low of 14%, a decline of 44% during the half-century, before registering a small rise to 14.3% in 2007.

These demographic trends illustrate the cultural swing away from marriage. Marriage “has been facing more competition”¹⁴⁶

tion of Households, Working Paper 10772, NATIONAL BUREAU OF ECONOMIC RESEARCH, Sep. 2004, at 1, at <http://www.arts.cornell.edu/econ/CAE/guner.pap.pdf> (analyzing data to conclude that, out of non-widows between the ages of 18 to 64, in 1950 there were 211 marriages per 1,000 unmarried women as compared with just 82 in 2000).

¹⁴⁵ Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1453. That laws regulating households would be required to encompass a great number of these alternatives to conjugality was signaled by the Supreme Court in *Moore v. City of East Cleveland*, 431 U.S. 494, 498-499 (1977) (holding that a statute limiting household occupancy was unconstitutional because it intruded upon “freedom of personal choice in matters of marriage and family”).

¹⁴⁶ Roberts, *supra* note 141.

becoming “just one of several permissible choices for individuals who wish to pursue an intimate relationship within the framework of the law.”¹⁴⁷

Not only are fewer Americans marrying, but their unions are less stable. First marriages for women during the peak of the Baby Boom lasted longer than recent marriages. Of the first marriages for women from 1955 to 1959, approximately 79% marked their fifteenth anniversary, compared with only 57% for women who wed for the first time from 1985 to 1989.¹⁴⁸

B. Marriage: An Optional Intimate Association

In 1955, marriage in America was the *sine qua non* of intimate pairings: “Never have women and men looked so exclusively to one relationship for the satisfaction of their needs, their wishes, their secret dreams, and their spoken aspirations.”¹⁴⁹ But today those needs, wishes, dreams, and aspirations are fulfilled in many types of personal associations, or even in managing solo.¹⁵⁰ This should not be surprising. The companionship marriage has generated options involving more companionship and less marriage, since the “very factors that have made marriage more satisfying in modern times have also made it more optional.”¹⁵¹ The

¹⁴⁷ Source for the years 1950-2000: U.S. Census Bureau, Statistical Abstract of the United States: 2007, Table 76. Live Births, Deaths, Marriages, and Divorces: 1950 to 2004, at <http://www.census.gov/prod/2006pubs/07statab/vit-stat.pdf>. Source for the years 2005-2007 (measured by 12-month periods ending in March), U. S. Department of Health and Human Resources, Centers for Disease Control, National Vital Statistical Reports (Oct. 30, 2007), *Births, Marriages, Divorces, and Deaths: Provisional Data for March 2007*, Table A. Provisional vital statistics for the United States, March 2007, at http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_04.pdf.

¹⁴⁸ *Most People Make Only One Trip Down the Aisle, But First Marriages Shorter*, Census Bureau Reports, U.S. Census Bureau News, Sep. 17, 2007, at http://www.census.gov/Press-Release/www/releases/archives/marital_status_living_arrangements/010624.html.

¹⁴⁹ LANDIS, *supra* note 1, at v.

¹⁵⁰ Slightly more than one-quarter of all households (26%) consisted of a person living alone in 2006, up from 17% in 1970. U. S. Census Bureau, *Single-Parent Households Showed Little Variation Since 1994*, Census Bureau Reports, Mar. 27, 2007, at http://www.census.gov/Press-Release/www/releases/archives/families_households/009842.html.

¹⁵¹ Stephanie Coontz, *For Better, For Worse: Marriage Means Something Different Now*, WASH. POST, May 1, 2005, at <http://www.washingtonpost.com/>

last half-century has witnessed a virtual end to the stigma of illegitimacy and single parenthood, as well as a significant change in the status of women, allowing for the wider possibility of female economic self-sufficiency.¹⁵²

Developments in reproductive technology, matched—if tardily—by cultural acceptance and legal sanction, have succeeded in largely “separat[ing] sex and childbearing.”¹⁵³ American society has moved past the freedom to have sex without reproduction, and now considers the freedom to reproduce without sex.¹⁵⁴ Assisted reproductive technology (“ART”) emerged in the 1970s and has tremendously increased in complexity and effectiveness.¹⁵⁵ The benefits of ART have spread to many infertile

wp-dyn/content/article/2005/04/30/AR2005043000108_pf.html. Even at the height of America’s love affair with marriage, observers worried that the “companionship marriage, built on an individualistic basis, promises much – perhaps too much.” LANDIS, *supra* note 1, at 524. A quick glance at the recent popular bookshelf suggests widespread belief in marriage as dispensable. See, e.g., EMILY DUBBERLEY, I’D RATHER BE SINGLE THAN SETTLE: SATISFIED SOLITUDE AND HOW TO ACHIEVE IT (2007); ROSANNA HERTZ, SINGLE BY CHANCE, MOTHERS BY CHOICE: HOW WOMEN ARE CHOOSING PARENTHOOD WITHOUT MARRIAGE AND CREATING THE NEW AMERICAN FAMILY (2006); JEN SCHEFFT, BETTER SINGLE THAN SORRY: A NO-REGRETS GUIDE TO LOVING YOURSELF AND NEVER SETTLING (2007); LOUISE SLOAN, KNOCK YOURSELF UP: NO MAN? NO PROBLEM: A TELL-ALL GUIDE TO BECOMING A SINGLE MOM (2007).

¹⁵² See Janet Radcliffe Richards, *Metaphysics for the Marriage Debate*, 42 SAN DIEGO L. REV. 1125, 1134-35 (2005). “Sex before marriage is normal, childbearing by single women and unmarried couples is no longer much condemned, men can be held responsible for the support of their children irrespective of whether they are married, and married couples can deal with their tax and incomes separately.” *Id.* at 1135.

¹⁵³ *Id.*

¹⁵⁴ See generally GREGORY, ET AL. *supra* note 70, § 5.07, at 163-181.

¹⁵⁵ See Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 2004 UTAH L. REV. 57, 57. Donor insemination efforts in the 1950s and 1960s were “viewed with such horror that bills were introduced in state legislatures to ban the procedure.” Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 36 (2000). By the end of the twentieth century, some 35 states had adopted laws facilitating artificial insemination procedures by declaring the consenting husband of the sperm recipient to be the legal father. *Id.* The development of *in vitro* fertilization in the 1970s was similarly greeted initially with horror, then tolerated, now widespread. *Id.* at 36-40.

couples, gay and lesbian couples, and single parents.¹⁵⁶ Collaborative reproduction “is forcing a redefinition of family” by “making a biological distinction between gestation and genetics in determining parentage as well as a consideration of intentionality in defining the family.”¹⁵⁷

Same-sex couples have clearly not achieved equal treatment, either culturally or legally, but they have made tremendous strides in the past few years.¹⁵⁸ The increase in the reported number of same-sex couples has also been dramatic.¹⁵⁹ The modern family can no longer be narrowly construed as an association between a breadwinner and a homemaker. Instead, the concept now encompasses a collection of diverse, often fragile

¹⁵⁶ Rosato, *supra* note 155.

¹⁵⁷ Andrews & Elster, *supra* note 155, at 46. See also Michael J. Malinowski, *A Law-Policy Proposal to Know Where Babies Come From During the Reproduction Revolution*, 9 J. GENDER RACE & JUST. 549 (2006) (noting that developments in artificial reproduction are expanding parental choice not only about whether to have children but also about their offspring’s genetic characteristics). See generally JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* (1997).

¹⁵⁸ See, e.g., CAL. FAM. CODE § 297 (West 2004) (providing legal recognition for domestic partnerships, unions of “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”); *Goodridge v. Dep’t Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (declaring the state may not “deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.”); *Lewis v. Harris*, 908 A.2d. 196 (N.J. 2006) (holding that committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by opposite-sex couples under the civil marriage statutes). In December 2006, the New Jersey Legislature passed a civil union law, complying with the state supreme court mandate. See N.J. STAT. ANN. § 26:8A-1 to -12 (West 2007). Same-sex couples are not, of course, winning all the battles. See, e.g., GREGORY, ET AL., *supra* note 70, § 2.08, at 52-54 (discussing the Defense of Marriage Act, 110 Stat. 2419 (1996), denying federal recognition to same-sex marriage, as well as state laws to the same effect); *Chambers v. Ormiston*, 935 A.2d. 956 (R.I. 2007) (holding that a Rhode Island family court is not empowered to divorce a same-sex couple who had been married in Massachusetts).

¹⁵⁹ The 2000 U.S. Census reported 601,209 total gay and lesbian families. This total included 304,148 gay male families, and 297,061 lesbian families. In 1990, the U.S. Census Bureau reported 145,130 total gay and lesbian families (81,343 male, and 63,787 female). The statistics for 2000 represent a 314% increase. DAVID M. SMITH & GARY J. GATES, *GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 3* (2001), at http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf.

domestic arrangements that comprise the so-called postmodern family—single mothers, blended families, cohabiting couples, lesbian and gay partners, communes, and two-job families as well as adoptive families and those with extended family members raising children.¹⁶⁰

Some couples seek to enter the bastion of marriage and are barred from doing so. Others consciously forego the enumerated rights and privileges enshrined therein. But however these non-traditional amalgamations choose to define themselves, they exist within a state that is charged with recognizing and interpreting the implications of their familial relationships.¹⁶¹ Thus, while the postmodern family resists the dictates of traditional models, it still needs the state to intervene when its constituents demand rights and entitlements that are no longer self-evident. One of the nuclear family's virtues is its social and legal predictability. Nontraditional families challenge the state to identify and apportion rights and entitlements in radically novel contexts. Often, however, the only time-tested precedents available for evaluating these new relationships are the very norms and assumptions that contemporary families seek to evade.

C. *How Marriage Has Not Changed*

Many family law scholars point to changes in gender norms as a significant feature of recent history.¹⁶² True enough, clearly-differentiated gender roles pervaded marriage: “husbands were economic providers, disciplinarians, and the heads of families, while wives were nurturers, caretakers, and subservient to their husbands.”¹⁶³ Social changes beginning in the 1970s worked the gears of the legal system to erase laws which mandated gender

¹⁶⁰ See generally JUDITH STACEY, *BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE-TWENTIETH-CENTURY AMERICA* (1998).

¹⁶¹ See GREGORY, ET AL., *supra* note 70, § 2.02, at 25 (discussing “Consensual Alternatives to Marriage”).

¹⁶² See, e.g., Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 194 (2007) (“Family law scholars have praised the family law revolution that, over the past forty years, has eliminated most official gender role distinctions within the family.”)

¹⁶³ Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 2; see also COTT, *supra* note 15, at 7 (“Marriage decisively differentiated the positions of husband and wife.”).

roles.¹⁶⁴ The norm has shifted away from a “breadwinner/breadmaker marriage.”¹⁶⁵ But not too far.

Gendered norms remain pervasive, often buttressed by marketplace differentiation. In 1979, women who were full-time wage and salary workers earned 63% of what their male counterparts earned. In 2005, the ratio had diminished, with women earning 81% as much as men did.¹⁶⁶ But these gains were far from uniform. Women and men “tend to work in different managerial and professional occupations.”¹⁶⁷ In 2005, among professional and related occupations, women were much less likely than men to work in some of the highest paying fields, such as engineering and computer and mathematical occupations. Instead, women were more likely to be employed in lower paying professional occupations, such as education, training, and library occupations.¹⁶⁸ While 14% of men earned \$1,500 or more per week, only 6% of women did.¹⁶⁹ College-educated men working full-time earn an average of \$62,000, which is more than 25% more than their female counterparts, who earn \$46,000.¹⁷⁰

¹⁶⁴ See, e.g., LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 60-61 (2006). These changes include the elimination of different rules for women and men for purposes of alimony, child custody, property management, and estate oversight. Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 *STAN. L. & POL'Y REV.* 97, 113 (2005). As the U.S. Supreme Court articulated the principle, “neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia*, 518 U.S. 515, 532 (1996).

¹⁶⁵ The phrase is June Carbone’s. JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* xiv (2000).

¹⁶⁶ U.S. DEP’T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, *HIGHLIGHTS OF WOMEN’S EARNINGS IN 2005* at 1 (Sep. 2006), at <http://www.bls.gov/cps/cpswom2005.pdf>. The gender gap was smallest among younger workers. Among workers 25 to 34 years old, women earned 89% as much as men, and among 16- to 24-year-olds, the earnings ratio rose to 93%. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *Id.*

¹⁷⁰ American Association of University Women, *Women’s Educational Gains and the Gender Earnings Gap* (2007), at <http://www.aauw.org/research/statedata/>. Wage differences between the genders are found almost immedi-

Gender norms continue to regulate the division of labor between parents, which resembles that of previous generations:

Motherhood and fatherhood affect careers differently. Mothers are more likely than fathers (or other women) to work part time, take leave, or take a break from the work force—factors that negatively affect wages. Among women who graduated from college in 1992–93, more than one-fifth (23 percent) of mothers were out of the work force in 2003, and another 17 percent were working part time. Less than 2 percent of fathers were out of the work force in 2003, and less than 2 percent were working part time. On average, mothers earn less than women without children earn, and both groups earn less than men earn.¹⁷¹

Personal choices are intertwined with economic choices and consequences, and they are still firmly rooted in gender. In the middle of the previous century, a man’s “thrift and industry”¹⁷² mattered as much as a woman’s “domestic skills,”¹⁷³ but the perception was that the difference in gender norms was diminishing. A 1953 text downplayed the economic motive for marriage, arguing that “a single woman can support herself as well as the average husband would support her.”¹⁷⁴ Yet the cultural roles based on gender persisted. A woman needed to accommodate more to marriage than a man:

The man goes to shop or office after marriage the same as he did before, and even though he comes home to his own home instead of this parental home or a rooming house, he still comes home as before to someone who provides for his needs in food and rest.¹⁷⁵

ately, and worsen over time. One year after college graduation, women working full time earn only 80% as much as their male colleagues earn. Ten years after college, women earn only 69% as much as men earn. JUDY GOLDBERG DEY & CATHERINE HILL, *BEHIND THE PAY GAP 2* (2007). In fact, the gender gap among full-time employees “understates the real difference between women’s and men’s earnings” because it omits women who are working part time or who are not in the labor force. *Id.* Female college graduates who eventually return to full-time employment—as most do—will then have lower wages than similarly-educated males, who have generally remained continuously employed, further exacerbating the gender wage gap. *Id.*

¹⁷¹ DEY & HILL, *supra* note 170.

¹⁷² LANDIS, *supra* note 1, at 4.

¹⁷³ *Id.*

¹⁷⁴ BABER, *supra* note 2, at 163.

¹⁷⁵ *Id.* at 173.

A married woman in the labor force “is subject to the heavy strain of double work.”¹⁷⁶

Much has changed in this century, but much has not. The difference between fatherhood and motherhood is still viewed as “particularly stark.”¹⁷⁷ The mores continue to insist that women take the lioness’ share in child care and housework, resulting in the persistent division of labor described by Arlie Hochschild and Ann Machung.¹⁷⁸ The gendered tasks of marriage result in women working approximately an extra month each year, in terms of chores focused on home and children.¹⁷⁹

¹⁷⁶ *Id.* at 174. See also LANDIS, *supra* note 1, at 275 (observing in 1955 that the birth of children results in far more difficult adjustments for women than for men); WINCH, *supra* note 21, at 411 (reporting in 1963 the general view that “in the American family the wife-mother fulfills the role of bandaging up the skinned knees of her children and applying balm to the scarred psyches of her husband and children,” whether or not she is employed outside the home.)

¹⁷⁷ DEY & HILL, *supra* note 170, at 3.

¹⁷⁸ ARLIE HOCHSCHILD & ANN MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989). See also SCOTT COLTRANE, *FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUITY* 53 (1996) (summarizing studies showing that, although men are taking a larger share of domestic labor, “the majority of men still make only minimal contributions to those tasks conventionally performed by housewives, such as cooking and cleaning.”); Arlie Hochschild, *The Fractured Family*, AM. PROSPECT, Nov. 30, 2002, at http://www.prospect.org/cs/articles?article=the_fractured_family (“we are living in a time of a stalled revolution, a time in which women have changed much faster than the men they live with or the institutions in which both sexes work. This has indeed marginalized family life and turned it into a ‘second shift.’”).

¹⁷⁹ HOCHSCHILD & MACHUNG, *supra* note 181, at 3, 82-83. See DEY & HILL, *supra* note 170, at 3 (arguing that while twenty-first century motherhood “entails substantial economic and personal sacrifices,” fatherhood “appears to engender a ‘wage premium.’” Men spend more time at work after the birth of their children, while women do the reverse.); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000) (arguing that mass-cultural expectations that women be nurturing wives, mothers and daughters shape women’s and society’s notion of women as “inauthentic workers”). But see Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 526-528 (2000) (arguing that pursuing the domestic tasks expected of them has afforded women a “household power base.”). Recent findings suggest a more nuanced picture, concluding that “although the level in home production effort between husbands and wives remains quite unequal, the increase in hours of home production that are related to additional children or decreases in the age of the youngest child are shared much more equally between husbands and wives.” Michael A. Leeds & Peter von Allmen, *Spousal Complementarity in Home Pro-*

Such inequities pervade not only the marriage but continue to handicap women even after the marriage is over. Despite legislative efforts to reform property division upon divorce, the notion of marriage as an economic partnership has yet to be fully endorsed by the trial courts. Rather than value “unwaged work in the home” as equivalent to assets and contributions emanating from “waged work,”¹⁸⁰ lower courts seem predisposed to ignore or to “minimize the homemaker spouse’s contributions to the marital economic partnership.”¹⁸¹ At the same time, legislation replacing alimony with a finite period of maintenance payments has led to further financial disadvantage for women. In the trial courts’ view, limiting the duration of maintenance payments is a justifiable inducement for recipients to become self-supporting as rapidly as possible. The result is a persistent gender-based economic imbalance that, having germinated within the marriage, survives to infect the post-divorce lives of women. The typical division of labor in marriage is an extremely high risk proposition for women, since “divorce renders a wife’s investment almost valueless, while the husband’s investment retains its value in the

duction, *AMER. J. ECON. & SOCIOLOGY* (Oct. 2004), at http://findarticles.com/p/articles/mi_m0254/is_4_63/ai_n7072369. Another finding reports that although the husbands of working women “have not assumed commensurate responsibilities in the home,” most men and women “rate this arrangement as fair.” Allen M. Parkman, *Bargaining over Housework: The Frustrating Situation of Secondary Wage Earners*, 63 *AMER. J. ECON. & SOCIOLOGY* 765,766 (Oct. 2004), at http://findarticles.com/p/articles/mi_m0254/is_4_63/ai_n7072367

¹⁸⁰ Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 *BUFF. L. REV.* 375, 441 n.266 (1988).

¹⁸¹ *NEW YORK STATE TASK FORCE ON WOMEN IN THE COURTS, REPORT 121* (1986). This attitude is both pervasive and continuing. See, e.g., Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 *IOWA L. REV.* 1513, 1515 (2005) (footnote omitted):

Many mothers have been stunned to learn that after years of viewing themselves as proud and valuable contributors to marriage, to family, to a new generation, the law of divorce views them as suckers. Surely this is a mistake, a mother might insist, a confusion of identities, a dialectical lapse that will be corrected as soon as it is discovered. Sadly, there is no mistake. The dispiriting message is that primary caretakers, the vast majority of whom are mothers, have been duped into providing free family caretaking at great personal economic cost; a price they must pay for their imprudent ways.

paid labor market.”¹⁸² Although studies vary, the most accepted conclusion for the alterations in the post-divorce economic status of men and women indicate a 30% average decline in women’s standard of living and a 10% improvement in men’s.¹⁸³

D. *Two Illustrations of the Altered Legal Environment*

This brief section presents two examples showing matrimonial law’s shift in the direction of favoring function over form. Prenuptial contracts were once condemned because they suggested a commercial form for the marital unit. *De facto* parents were entirely inconsistent with the classic family form. Yet both functional elements gradually met with legal approval.

1. *Prenuptial Contracts: From Forbidden to Enforceable*

At common law, a couple could specify certain dispositions of property upon the death of a spouse, but never upon divorce.¹⁸⁴ Through a prenuptial agreement, the spouses could, for example, provide for the care of orphaned relatives, direct that one spouse receive more or less of the marital estate than required by law, or transfer a parcel of land from one to the other in exchange for a waiver of future rights to the estate.¹⁸⁵ But any effort to control post-marital economics in the event of divorce was anathema. As a 1950s legal guidebook for marriage aptly cautioned:

[a] farsighted but cynical couple cannot sit down on the eve of their marriage and work out what alimony the wife is to get in the event they are divorced and expect the courts to pay the slightest attention to their agreement if in fact their marriage works out badly and they separate.¹⁸⁶

For most of American history, states universally rejected prenuptial contracts dictating the terms of post-divorce finances. Such agreements were invalidated because they suggested the contemplation of divorce at the very outset of a marriage. The long-standing rule provided that even though the parties were

¹⁸² REGAN, *supra* note 139, at 155.

¹⁸³ See Starnes, *supra* note 181, at 1504 n.134 (citing studies).

¹⁸⁴ See Homer H. Clark, Jr., *Antenuptial Contracts*, 50 U. COLO. L. REV. 141, 147-148 (1979).

¹⁸⁵ PILPEL & ZAVIN, *supra* note 52, at 19.

¹⁸⁶ *Id.* at 20-21.

“competent to contract,” in looking to “a future separation” such a bargain violated public policy by “tending to encourage domestic feuds and broils.”¹⁸⁷ The gendered nature of the “feuds and broils” to be warded off was plainly stated in a nineteenth century decision: a premarital contract “gives a wife an interest in disobedience, and renders her more independent by misconduct than by the most strict observance of marriage duties.”¹⁸⁸ An appellate opinion over one hundred years later inverted the gender of the villain, but nonetheless retained the role stereotype. The Tennessee Court of Appeals warned in 1964 that a prenuptial contract “could induce a mercenary husband to inflict on his wife any wrong he might desire with the knowledge his pecuniary liability would be limited.”¹⁸⁹

Underneath the choral judicial harmony, however, a few dissonant notes could be heard. In 1950, for example, the Wisconsin Supreme Court decisively foreclosed a husband’s attempt to enforce a premarital contract limiting his support obligations.¹⁹⁰ The majority opinion announced that it would “not look with favor upon an agreement which may tend to permit a reservation in the mind of the husband when he assumes the responsibility of maintaining his spouse in such comfort as he is able to provide and until his death or the law relieves him of it.”¹⁹¹ The majority then favorably cited the Pennsylvania Supreme Court’s opinion that “‘to sustain the claim of the husband . . . would be to invest him with a right to be both a faithless husband and a vicious citizen.’”¹⁹² But to dissenting Justice Timothy Brown, the Wisconsin case presented more utilitarian concerns. He conceded that “[p]ublic policy, of course, favors marriage and is concerned with its stability,”¹⁹³ but he observed that, “in other relationships, con-

¹⁸⁷ *Wyant v. Leshner*, 23 Pa. 338 (1854); *see also Crouch v. Crouch*, 385 S.W.2d 288 (Tenn. Ct. App. 1964) (stating that “any antenuptial contract which provides for, facilitates, or tends to induce, a separation or divorce of the parties after marriage, is contrary to public policy . . . and . . . void.”). *Crouch* was overruled in 1996. *Cary v. Cary*, 937 S.W.2d 777 (Tenn. 1996).

¹⁸⁸ *Wyant*, 23 Pa. 338.

¹⁸⁹ *Crouch*, 385 S.W.2d at 293.

¹⁹⁰ *Fricke v. Fricke*, 42 N.W.2d 500 (Wis. 1950).

¹⁹¹ *Id.*

¹⁹² 42 N.W.2d at 501, quoting *In Re Moorehead’s Estate*, 132 A. 802, 806 (Pa. 1927).

¹⁹³ 42 N.W.2d at 503 (Brown, J. dissenting).

tracts defining the expectations and responsibilities of the contracting parties promote stability.”¹⁹⁴ Why, Justice Brown wondered, is a principle which induces a settled state of affairs in other relationships likely to “tend to promote discord in marriage.”¹⁹⁵

In 1968, when a Florida appellate decision followed precedent in invalidating a prenuptial agreement, a dissenting judge indicated that the contract should have been upheld as “not in contemplation of divorce, but in contemplation of marriage.”¹⁹⁶ On appeal, the Florida Supreme Court agreed with the lower court dissent and held in *Posner v. Posner* that antenuptial agreements settling alimony and property rights upon divorce are not void as contrary to public policy.¹⁹⁷ The prevalence of divorce in modern culture swayed the court. Since “no community or society” existed in which public policy “condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce,” prenuptial contracts have become appropriate planning devices for couples, and public policy should allow their enforcement.¹⁹⁸

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* Justice Brown’s concerns proved nettlesome for some justices when the Wisconsin Supreme Court revisited the issue in 1958. The Court reaffirmed its rule that prenuptial bargains implicating divorce were invalid. *Caldwell v. Caldwell*, 92 N.W.2d 356 (Wis. 1958). In *Caldwell*, however, the court noted that while “some members of the court” agreed with Justice Brown’s *Fricke* dissent, “we do not consider ourselves at liberty to reject the considered decision of our predecessors merely on that account, there having been no change of conditions. . .” 92 N.W.2d at 361. Prenuptial contracting with respect to the consequences of divorce was not permitted in Wisconsin until authorized by a 1977 statute. See WIS. STAT. ANN. § 767.61(3)(L) (originally enacted as Sec. 41, ch. 105, Laws of 1977).

¹⁹⁶ *Posner v. Posner*, 206 So.2d 416, 420 (Fla. Dist. Ct. App. 1968) (Swann, J. dissenting), *rev’d*, 233 So.2d 381 (Fla. 1970).

¹⁹⁷ *Posner v. Posner*, 233 So.2d 381 (Fla. 1970).

¹⁹⁸ 233 So.2d at 384 (“With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also-and agree upon, if possible-the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail.”)

Posner proved to be the watershed decision in this area.¹⁹⁹ In the ensuing years, most courts have gravitated to the conclusion that there is “no reason not to allow persons about to enter into a marriage the freedom to settle their rights in the event their marriage should prove unsuccessful.”²⁰⁰ Another indication of the growing acceptance of pre-nuptial agreements is that 26 states and the District of Columbia have to date adopted the 1983 Uniform Premarital Agreement Act, which was created to establish a framework for enforceable premarital agreements.²⁰¹ Prenuptial contracts finally “came into vogue by the end of the 1980s as an effective instrument for domestic relations.”²⁰² Despite a recent call for reversion to the old rule of non-enforcement,²⁰³ it is doubtful that courts or legislatures will stand in the way of the increasing popularity of these contractual devices.²⁰⁴

2. *Child Custody: From the Natural Parent to the De Facto Parent*

The English common law rendered nearly absolute control of children to their father.²⁰⁵ In a custody dispute with the child’s mother, the father always prevailed, unless he had abused, abandoned, or neglected the child. In the course of the nineteenth

¹⁹⁹ Ten years before *Posner*, the Oklahoma Supreme Court upheld a pre-nuptial contract in which each spouse waived alimony rights upon divorce. *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960). Mysteriously, “the decision met with virtual nonacceptance by other courts.” *Osborne v. Osborne*, 428 N.E.2d 810, 815 (Mass. 1981).

²⁰⁰ *Osborne*, 428 N.E.2d at 815.

²⁰¹ See http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upaa.asp. Several other states regulate the execution and enforcement of prenuptial contracts by statute. 7 AM. JUR. 3D *Proof of Facts* 581§ 1 (2007).

²⁰² 7 AM. JUR. 3D *Proof of Facts* 581§ 1 (2007).

²⁰³ Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 384-393 (2005-2006) (describing prenuptial bargains as *per se* inequitable, and calling for their non-enforcement).

²⁰⁴ See, e.g., Lisa W. Foderaro, *Prenuptial Contracts Find New Popularity*, N.Y. TIMES, Aug. 21, 1997, at <http://query.nytimes.com/gst/fullpage.html?res=9A04E3D7173EF932A1575BC0A961958260> (reporting that divorce lawyers are stating that prenuptial agreements are “gaining in popularity even among the not so fabulously wealthy and not so famous.”); Bina Brown, *Prenups for the People*, cnn.com, Jan. 4, 2007 at <http://edition.cnn.com/2007/BUSINESS/01/04/prenuptial.agreements/index.html> (same).

²⁰⁵ CLARK, *supra* note 70, § 19.1, at 787.

century, American courts began considering the welfare of the child as a counterweight to the natural rights of the father.²⁰⁶ Weighing a child's needs led judges to consider which parent could supply the appropriate nurture. This approach came to favor mothers, since raising children was a major part of women's culturally-created and legally-reinforced "separate sphere."²⁰⁷ By the twentieth century, courts routinely awarded mothers custody of their children under the "tender years" presumption that children, especially young children, needed the nurturing qualities with which all mothers were supposedly naturally imbued. But the maternal preference standard yielded in the latter third of the twentieth century to a theoretically gender-neutral assessment of the best interests of the child. In a landmark child custody case in 1973, the New York Family Court held that the "tender years" presumption violated the due process clause of the fourteenth amendment to the United States Constitution.²⁰⁸ Changing mores about formal gender equality, aided by judicial decisions outlawing many gender preferences in other areas, led to a reconstitution of the best interest standard in allocating child custody.²⁰⁹

Different considerations apply when custody and visitation disputes arise between so-called "natural" (biological or adoptive) parents and those who claim rights either as grandparents, stepparents, or *de facto* parents. The general rule presumes that

²⁰⁶ See generally, Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851*, 73 *Nw. U. L. REV.* 1038 (1979).

²⁰⁷ See Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 *YALE J. L. & FEMINISM* 291, 296 (1992).

²⁰⁸ *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973). See also *Ex parte Devine*, 398 So.2d 686 (Ala. 1981) (concluding that "the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.")

²⁰⁹ See, e.g., *Taylor v. Taylor*, 508 A.2d 964, 970 (Md. 1986) ("The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak."). But see Judith B. Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 *RUTGERS L. REV.* 1141, 1142-43 (1991) (arguing that despite the technical elimination of the maternal preference rule, in practice it is still applied in most courts).

natural parents will prevail, absent a showing of unfitness.²¹⁰ But this presumption has been challenged in a number of areas. Traditionally, grandparents had no visitation rights to their grandchildren. A growing recognition of grandparents' roles in children's upbringing can be traced back to the late 1970s.²¹¹ Courts and legislatures have struggled with the appropriate role of the state in negotiating the access to children sought by grandparents against the desires of a custodial parent.²¹² Similar considerations apply in mediating the role of stepparents.²¹³

The citadel of the biological/adoptive family has for some years been besieged by the burgeoning segment of nontraditional families.²¹⁴ Courts are gradually²¹⁵—and legislatures more gradually still²¹⁶—recognizing the pervasiveness of alternative family

²¹⁰ GREGORY, ET AL. *supra* note 70, § 11.03[B][2], at 463.

²¹¹ Sara Simrall Rorer, *Grandparents' Visitation Rights in Ohio: A Procedural Quagmire*, 56 U. CIN. L. REV. 295, 296 (1987) ("Grandparent visitation statutes are a recent development in statutory law, virtually unheard of ten to fifteen years ago.").

²¹² See *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down as unconstitutional a state statute allowing grandparents increased visitation to children against mother's wishes).

²¹³ See, e.g. *Brown v. Burch*, 519 S.E.2d 403 (Va. Ct. App. 1999) (allowing stepfather to maintain physical custody of child and awarding father joint custody, even though trial court did not find the mother unfit).

²¹⁴ See, e.g., AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03, Reporter's Notes cmts. b-c, at 228-32 (2002) [hereafter ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION] (citing cases).

²¹⁵ *Id.*; see also *Janice M. v. Margaret K.*, 910 A.2d 1145 (Md. Ct. Spec. App. 2006) (holding that a mother's former lesbian partner is a *de facto* parent entitled to visitation with the child the mother adopted during their cohabitation).

²¹⁶ See, e.g., KY. REV. STAT. § 403.270 (2004) (defining "de facto custodian" as "a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for [specified time periods];" and directing that in determining custody "equal consideration . . . be given to each parent and to any de facto custodian"); OR. REV. STAT. § 109.119 (1999) (detailing the rights of a "person who establishes emotional ties creating child-parent relationship"); VT. STAT. ANN. tit. 15, § 1201 (2000) (statute providing same-sex couples the opportunity to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples).

forms by allocating legal rights and burdens to “equitable parents” equivalent to biological and adoptive families.²¹⁷

A comprehensive treatment of this issue is beyond the scope of this essay, but three state appellate opinions issued in 2007 exemplify the present trend embracing alternative family structures. The Maine Supreme Court ruled that a statute permitting married couples to file a joint petition for adoption did not prohibit a joint adoption petition by an unmarried same-sex couple.²¹⁸ Minnesota’s highest court held that a mother’s former same-sex partner was properly awarded visitation with the children whom the mother—but not her partner—adopted during their relationship.²¹⁹ Finally, in a case tinged with clashing policies both old and new, the Virginia Court of Appeals enforced a divorcing couple’s agreement that the husband’s spousal support obligation would terminate upon the wife’s cohabitation in a “situation analogous to marriage,” in light of evidence which showed that the wife was cohabiting with her female intimate partner.²²⁰ The appellate court rejected the claim that the state’s bans on same-sex marriage, same-sex civil unions, partnership contracts, or “other arrangements purporting to grant the privileges and obligations of marriage” made it impossible to find a “situation analogous to marriage” between same-sex partners.²²¹

Epilogue: Unbundling The Elements of Marriage

The law’s trajectory may be sinuous, but its overall direction seems clear: American law and society is moving from sanctioning families grounded in biology and adoption to serving families whose malleable composition is set by functional standards.

²¹⁷ See J. Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute’s Principles of the Law of Family Dissolution*, 2001 *BYU L. REV.* 923, 933-935 (discussing the “equitable parent” doctrine). The American Law Institute has proposed “a rule that allows continued contacts by de facto parents whose participation in the child’s life is important to the child’s welfare, without unnecessarily intruding on the autonomy of parents that is essential to the meaningful exercise of their responsibility.” ALI, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*, *supra* Introduction at 7.

²¹⁸ *Adoption of M.A.*, 930 A.2d 1088 (Me. 2007).

²¹⁹ *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007).

²²⁰ *Stroud v. Stroud*, 641 S.E.2d 142 (Va. Ct. App. 2007).

²²¹ *Id.* at 150-152.

Family formation is a contested legal terrain, and the recent past suggests that the traditional elements of marriage may well be disaggregated and reassembled to satisfy the needs of the growing segment who have either rejected, been excluded from, or are frankly uninterested in the common-law rules of marriage. Our legal system is busy reformulating state-sanctioned marriage in response to social pressures “from same-sex couples seeking admission; from heterosexual couples seeking to customize their marriages; and from states, municipalities, and private groups crafting alternative versions of marriage-like partnerships.”²²² Whether these groups charge into marriage or stay away, they are changing the institution, in ways to serve their needs.

In a similar vein, the legal culture of family-state relations in America has been altered so significantly that it is easy now to misread the lesson of *McGuire v. McGuire*.²²³ “[N]ew norms of family behavior”²²⁴ aptly describe the changed rules in a world in which families are readily blended and upended, and marital couple households have consequently slipped into minority status. Lydia McGuire’s successors may still not obtain support from their husbands without separating from them, but many more family governance issues are now subject to judicial resolution than was true in the 1950s.²²⁵ Moreover, the “percentage of families subject to supervision by state agencies has grown substantially.”²²⁶ Paradoxically, this upsurge in public regulation of the family is occurring at the same time as many aspects of family law have become increasingly privatized.²²⁷

Prioritizing function over form poses difficult policy choices. Providing an unwed couple with the legal rights and responsibilities of marriage may safeguard the rights of some of these part-

²²² J. Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 32 (2003).

²²³ 59 N.W.2d 336 (Neb. 1953), discussed text *supra* at notes 80-84.

²²⁴ Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 UTAH L. REV. 211, 238.

²²⁵ See *id.* at 238 (“With large increases in the number of divorced and nonmarital families, many more families now find themselves before the courts disputing financial, child-rearing, and other questions.”).

²²⁶ *Id.* at 212.

²²⁷ See generally Singer, *supra* note 147, at 1444 (“in virtually all doctrinal areas, private norm creation and private decision making have supplanted state-imposed rules and structures for governing family related behavior.”).

ners at the cost of undermining the autonomy of others who intentionally opted out of marriage. As a society and as a legal culture, we are always redefining our institutions. For the past half-century, at least, we have been reconfiguring marriage and its alternatives with a pragmatic hand. As a consequence, the forms of our marriages and our families have grown less central to the analysis, while the functional attributes of our domestic households have increasingly taken center stage. We are, in effect, unbundling the legal elements of marriage.

