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## FAMILIES NOW: WHAT WE DON'T KNOW IS HURTING US

*Judith T. Younger\**

Almost twenty years ago, the *Hofstra Law Review* published *Marriage, Divorce, and the Family: A Cautionary Tale*.<sup>1</sup> It was an adaptation of a speech I made as the Sidney and Walter Siben Distinguished Professorship Lecturer for 1992 to 93. The theme of the published piece was that marrying, divorcing, and having children, in or out of wedlock, was dangerous to women, leaving them at risk of poverty and financial dependence on government, men, or others.<sup>2</sup> The piece questioned the usefulness of scholarly debate or legal action to help matters and suggested that women themselves, armed with facts instead of myths, needed to take precautions to minimize the dangers of their own seemingly immutable acts.<sup>3</sup> It nevertheless included a “wish list” of proposed legal reforms “to correct the wrong lessons” the law proclaimed and suggested that a massive advertising campaign waged through the media might be the most effective way to teach women what they needed to learn.<sup>4</sup> I welcome the opportunity to revisit that ground.

On this revisit, I find some things unchanged. Women are still having babies in and out of wedlock. Scholarly debates in and out of academia and the law still have only minimal impact on family behavior. The examples I offer are Congress’s attempt to revamp the welfare system and the American Law Institute’s (“ALI”) attempt to convince courts and legislatures to revamp family law. Some things have changed.

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1. Judith T. Younger, *Marriage, Divorce, and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367 (1993).

2. *Id.* at 1370.

3. *Id.* at 1371–72, 1383.

4. *See id.* at 1371, 1379. The only listed reform enacted was that of welfare law. *See id.* at 1380.

Families are looking quite different from the heterosexual nuclear model, still in vogue in 1993 when I last visited the scene. Marriage has now taken the spotlight: gays want the status,<sup>5</sup> while straights eschew it.<sup>6</sup> There is evidence that some women have learned some advantageous things.<sup>7</sup> I plan to describe the difficulties I have encountered in writing these comments, then move on to the new examples of the old phenomenon: the futility of trying to affect family behavior through scholarly endeavor or the law. From there, I will go to new phenomena, namely gay marriage and some women's newly acquired wisdom. Then I will conclude on a mildly optimistic note about women and family life. My starting point is, of course, 1993 when the speech first aired.

The logical way to begin the return visit, I thought, would be to present a current family demography. I wanted to produce a cohesive statistical picture showing the *facts* of American family life *now*, so that we could judge it against its counterpart of twenty years ago. I found the goal elusive. Studying official data, interpretations of that data by unofficial "fact tanks," media reports on both the data and the interpretations of the data, I soon realized that I would not be able to pin down "*facts now*."<sup>8</sup> The data collectors do not deal in facts, nor do they deal with the present.<sup>9</sup> Instead of facts, they bring forth samplings, approximations, estimates, and provisional information.<sup>10</sup> They are either looking at the past<sup>11</sup> or guessing at the future.<sup>12</sup> Even deciding

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5. See, e.g., Nicole Neroulis, *Gay Marriage Foes to Fight Expected Washington State Law*, REUTERS, Feb. 2, 2012, available at <http://www.reuters.com/article/2012/02/03/us-gay-marriage-washington-idUSTRE81204O20120203> (describing gay couples' support of a same-sex marriage bill in Washington state).

6. See *infra* text accompanying notes 17-26.

7. See *infra* text accompanying notes 118-23.

8. These media reports and interpretations of the data are sometimes misleading or wrong. See, e.g., Rebecca Goldin & Cindy Merrick, *To Cohabit or Not to Cohabit?*, STATISTICAL ASSESSMENT SERVICE (Oct. 22, 2010), [http://stats.org/stories/2010/cohabit\\_oct22\\_10.html](http://stats.org/stories/2010/cohabit_oct22_10.html) (describing how three media outlets interpreted the same statistics about cohabitation differently).

9. See Robert Hughes, *What Is the Real Divorce Rate in the US?*, HUFFINGTON POST (Nov. 20, 2010, 11:25 AM), [http://www.huffingtonpost.com/robert-hughes/what-is-the-real-divorce-\\_b\\_785045.html](http://www.huffingtonpost.com/robert-hughes/what-is-the-real-divorce-_b_785045.html).

10. See, e.g., *id.* (showing that the various surveys on the divorce rate in the United States lack recent data and use estimates).

11. For example, the Centers for Disease Control and Prevention's ("CDC") National Center for Health Statistics published *Marriage and Cohabitation in the United States* in February 2010 based on 2002 information. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 1 (2010).

12. See, e.g., *U.S. Population Projections*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/projections/aboutproj.html> (last visited July 27, 2012) (describing the U.S. Census Bureau's use of population projections, which "are based on assumptions about future demographic trends").

who is an official collector of what particular data is difficult,<sup>13</sup> and so is resolving the clash among them.<sup>14</sup> When one of them puts out two<sup>15</sup> and even three<sup>16</sup> conflicting assumptions or counts, the goal of forming a cohesive picture fails completely. Accordingly, what I offer here is the best statistical picture of today's American families that I have been able to muster. Fewer families are married: indeed "[m]arried couples represented just 48 percent of American households in 2010 . . ."<sup>17</sup> Or was it fifty-one percent?<sup>18</sup> More are merely cohabiting.<sup>19</sup> The married

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13. The CDC gave up collecting some of its vital family statistics in 1996, and the U.S. Census Bureau picked up the slack. *See Marriages and Divorces*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/mardiv.htm> (last visited July 27, 2012) ("The collection of detailed data was suspended beginning in January 1996."). However, the Census Bureau sends searchers back to the CDC for certain family data. *See Marriage and Divorce*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/socdemo/marriage/> (last visited July 27, 2012).

14. Both the CDC and the Census Bureau publish the divorce rate, but they are quite different from each other. *See Hughes, supra* note 9; *see also* Paul R. Amato, *Research on Divorce, Continuing Trends and New Developments*, 72 J. MARRIAGE & FAM. 650, 650 (2010) (noting that several states do not report divorce information to the census, so there is not a "complete count of how many divorces occur in the United States annually"). For further discussion of this issue, see *infra* note 20 and accompanying text.

15. The Census Bureau, for example, learned only recently that about twenty-eight percent (approximately one in three) of unmarried women with babies that it has counted are, after all, living with a cohabiting partner. *See* Press Release, U.S. Census Bureau, Census Bureau Reports Nearly 1 in 3 Unmarried Women Who Give Birth Cohabit (Nov. 4, 2010), <http://www.census.gov/newsroom/releases/archives/fertility/cb10-167.html>. It only recently noticed this because it never asked before. *See id.* In addition, "[o]ne of the report's data sources, the Current Population Survey, recently added a direct question on cohabitation in order to measure this population." *Id.* From the new knowledge, the Census Bureau took a leap of faith to the assumption that the unmarried women are "not raising their children alone." *See id.* There is no question asking whether these women are indeed raising their children alone or together with their cohabitants or "pooling" their economic resources or keeping them separate. *See id.* For other purposes, when the Census Bureau defines poverty, for example, its traditional assumption has been that cohabitants are separate economic units. *See* Kathleen Short, U.S. CENSUS BUREAU, THE RESEARCH SUPPLEMENTAL POVERTY MEASURE: 2010, at 1-2 (2011). In the new supplemental definition of poverty, it takes the opposite view, assuming, as with cohabiting unmarried mothers, that cohabiting couples pool their funds and share expenses just as married couples do. *See id.* at 3. There are similarly conflicting definitions of poverty in use by the Census Bureau yielding quite different results. *See id.* at 3-4 (showing a nearly ten percent disparity in the poverty threshold between the official poverty threshold and the supplemental poverty measure).

16. *See* Martin O'Connell & Sarah Feliz, *Same-Sex Couple Household Statistics from the 2010 Census* 34-35 (U.S. Census Bureau, Working Paper No. 2011-26, 2011), available at <http://www.census.gov/hhes/samesex/files/ss-report.doc> (using three conflicting assumptions to measure same-sex married couples).

17. Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. TIMES, May 26, 2011, at A22.

18. *See* Carol Morello, *Married Adults on Brink of Becoming Minority*, WASH. POST, Dec. 14, 2011, at A2.

19. *See* Sharon Jayson, *Cohabitation Numbers Jump 13%, Linked to Job Losses*, USA TODAY (Jan. 27, 2011, 5:13 PM), [http://www.usatoday.com/news/nation/census/2010-09-24-cohabitation-24ONLINE\\_ST\\_N.htm](http://www.usatoday.com/news/nation/census/2010-09-24-cohabitation-24ONLINE_ST_N.htm).

couples are divorcing freely,<sup>20</sup> with one notable exception.<sup>21</sup> The cohabiting couples are parting even more freely or eventually marrying.<sup>22</sup> Fewer women are having fewer babies,<sup>23</sup> but more of those babies are born out of wedlock.<sup>24</sup> Some of these women are living with cohabitants and raising their children.<sup>25</sup> The number of single mother families is rising, and they are poorer than other families.<sup>26</sup> More gay people, married and not, are declaring themselves, and about one-fifth of them are raising children.<sup>27</sup> One might conclude that traditional marriage is becoming obsolete, and the American family is in crisis. Or one might conclude, instead, that cohabitation is the new marriage, that the American family is changing, but that everything is all right. The trouble with both headers and any other that we might pull out of the shaky demography is that they may be inaccurate descriptions of what is really happening in intimate relationships. My inability to form a better picture surprised me, and it gave rise to a caution that runs throughout these comments: the lack of reliable data.

The two most-talked-about points in my demography are the decline in the percentage of married people in the population and the rise in births out of wedlock. Neither of these is a new concern. Both were evident in 1993 and remarked on even then by the watchful Senator

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20. See NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2009, at 1 tbl.A, 2 (2010), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_25.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf); Press Release, U.S. Census Bureau, Divorce Rates Highest in the South, Lowest in the Northeast, Census Bureau Reports (Aug. 25, 2011), available at [http://www.census.gov/newsroom/releases/archives/marital\\_status\\_living\\_arrangements/cb11144.html](http://www.census.gov/newsroom/releases/archives/marital_status_living_arrangements/cb11144.html). The CDC puts the 2009 divorce rate at 3.4 per 1000 total population, with 44 reporting states and the District of Columbia. NAT'L CTR. FOR HEALTH STATISTICS, *supra*, at 1 tbl.A, 2. The Census Bureau puts the 2009 national divorce rate at 9.2 per 1000 men and 9.7 per 1000 women. Press Release, U.S. Census Bureau, *supra*.

21. See *infra* text accompanying note 120-21.

22. See Casey E. Copen et al., NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006-2010 NATIONAL SURVEY OF FAMILY GROWTH 2, 8 (2012); Sharon Sassler & Amanda J. Miller, *Class Differences in Women's Family and Work Behaviors*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 349, 358-59 (2010).

23. Haya El Nasser & Paul Overberg, *Census Reveals Plummeting U.S. Birthrates*, USA TODAY (June 24, 2011, 9:43 AM), [http://www.usatoday.com/news/nation/census/2011-06-03-fewer-children-census-suburbs\\_n.htm](http://www.usatoday.com/news/nation/census/2011-06-03-fewer-children-census-suburbs_n.htm).

24. See *The Collapse of Family Life: Most Children in U.S. Born out of Wedlock*, DAILY MAIL (Feb. 18, 2012, 22:01), <http://www.dailymail.co.uk/news/article-2103235/Most-children-U-S-born-wedlock.html>.

25. Tavernise, *supra* note 17, at A22.

26. See MARK MATHER, POPULATION REFERENCE BUREAU, U.S. CHILDREN IN SINGLE-MOTHER FAMILIES 1-2 (2010).

27. THE WILLIAMS INSTITUTE, UNITED STATES CENSUS SNAPSHOT: 2010, at 3 fig. "All Same-sex Couples" (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

Daniel P. Moynihan, writing his seminal article, *Defining Deviancy Down*, who was worried in 1993 about the breakdown of family structure and single parenthood.<sup>28</sup> He wrote:

the amount of deviant behavior in American society has increased beyond the levels the community can “afford to recognize” and . . . , accordingly, we have been re-defining deviancy so as to exempt much conduct previously stigmatized, and also raising the “normal” level in categories where behavior is now abnormal by any earlier standard.<sup>29</sup>

Such sentiments, aimed at single mother families, poor and on welfare, swept the nation and gave rise, soon after Moynihan wrote this article, to so-called “welfare reform.”<sup>30</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the “PRWORA”)<sup>31</sup> was signed into law on August 22, 1996.<sup>32</sup> This legislation was a product of hard negotiation between the Democratic President and the Republican Congress.<sup>33</sup> It attempted to revamp the system from “welfare” to “workfare.”<sup>34</sup> People on welfare needed an incentive to get off. The new law was supposed to give it by offering them a hand up rather than a handout.<sup>35</sup> It was a direct response to the sentiments voiced in the report Moynihan wrote in 1965 as Assistant U.S. Secretary of Labor.<sup>36</sup> That is evident from the Congressional findings incorporated into the first section of the PRWORA:

- (1) Marriage is the foundation of a successful society.
- (2) Marriage is an essential institution of a successful society that promotes the interests of children.
- (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children.
- . . . .

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28. See Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17, 22-24 (1993).

29. *Id.* at 19.

30. This was one of the reforms I called for in my earlier article and the only one to become a reality. See Younger, *supra* note 1, at 1380.

31. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S.C. (2006)).

32. *Id.*

33. See J.T. Young, *You Can't Get There from Here*, AM. SPECTATOR (Feb. 16, 2012, 6:08 AM), <http://spectator.org/archives/2012/02/16/you-cant-get-there-from-here>.

34. See *id.*

35. See Daniel T. Lichter & Rukamalie Jayakody, *Welfare Reform: How Do We Measure Success?*, 28 ANN. REV. SOC. 117, 119, 121 (2002).

36. OFFICE OF POL'Y PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

(8) The negative consequences of an out-of-wedlock birth on the mother, the child, the family, and society are well documented . . . .

(10) Therefore, in light of this demonstration of the crisis in our Nation, it is the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests and the policy contained in [this Act] is intended to address the crisis.<sup>37</sup>

In a nutshell, Congress thought that the disadvantages of single motherhood fostered by the existing welfare system showed themselves in poor outcomes for children and justified congressional emphasis on discouraging births outside wedlock and encouraging marriage.<sup>38</sup> Welfare would no longer be an entitlement: cash benefits were made temporary and provisional.<sup>39</sup> Recipients were encouraged to marry and have children within marriage.<sup>40</sup> The Aid to Families with Dependent Children program (the “AFDC”), part of the Social Security Act since 1935, was eliminated and replaced by the more restrictive Temporary Assistance for Needy Families program (the “TANF”).<sup>41</sup> The program was turned over to the states and those that achieved these goals were to get performance bonuses.<sup>42</sup> Ironically, Senator Moynihan, who introduced his own version of proposed reform in the Senate, voted against the compromise bill.<sup>43</sup> He viewed it as an abandonment of dependent children, and an abandonment of those, who, like himself, believed that welfare reform could be effected without harming the people who needed it.<sup>44</sup>

An assessment of the success of the reform depends on whom we ask, when we ask, and the criteria we use to measure success.<sup>45</sup> Here

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37. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 101, 110 Stat. at 2110-12.

38. *See id.*

39. *See id.* § 401, 110 Stat. at 2113.

40. *See id.*

41. *See Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families: Overview*, U.S. DEPARTMENT OF HEALTH AND HUM. SERVICES, <http://aspe.hhs.gov/hsp/abbrev/afdc-tanf.htm> (last updated Nov. 30, 2009).

42. *See id.*

43. *See* Senator Daniel Patrick Moynihan, Statement on the Senate Floor (Sept. 16, 1995) (transcript available in Daniel Patrick Moynihan, *‘It Will Shame the Congress’*, N.Y. REV. BOOKS, Oct. 19, 1995, at 71-72).

44. *See id.*

45. *See Fared Well*, NEW REPUBLIC (Sept. 4, 2006, 12:00 AM), <http://www.tnr.com/article/fared-well> (explaining that the consensus that welfare reform was “not a disaster,” but “may . . . have worked much as its designers had hoped” is largely correct). *But see* Max B. Sawicky, *The Mirage of Welfare Reform*, 6 J. LAB. & SOC. 55, 55-56 (2002) (countering the view that the TANF welfare reform was largely a success).

again there is no reliable data on which to base a conclusion.<sup>46</sup> Welfare rolls may move up or down, not necessarily with the law, but rather with the economy, going down during good economic times like those that followed the enactment of the PRWORA, and moving up in recessions.<sup>47</sup> There is no official follow-up on what happens to welfare recipients who use up their benefits and go off welfare.<sup>48</sup> One thing seems clear, at least: the PRWORA has not greatly affected familial behavior.<sup>49</sup> It has not succeeded in getting single mothers married,<sup>50</sup> nor has it stopped them from producing children.<sup>51</sup> It has not placed mothers into jobs paying enough to keep their children in daycare while they work; they need to work in order to afford daycare and daycare in order to work.<sup>52</sup> It has not shielded them from poverty during the recession.<sup>53</sup> However we rate the PRWORA, the policies underlying it are likely to be reversed if the current Democratic President and Congress survive the coming election.<sup>54</sup>

Moving away from the political arena, we go next to the academy, where, not surprisingly, we find academics still talking and writing about family matters. Much of their effort centered (and continues to center) on the ALI's Principles of Dissolution (the "Principles").<sup>55</sup> The ALI describes itself as "the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law."<sup>56</sup> Its membership consists of lawyers, judges, and law professors.<sup>57</sup> Thus, it is technically not a purely

46. See Lichter & Jayakody, *supra* note 35, at 133-34.

47. See Sara Murphy, *Numbers on Welfare See Sharp Increase*, WALL ST. J., June 22, 2009, at A1-A2 (highlighting the example that welfare rolls have begun increasing in the recession).

48. See Sawicky, *supra* note 45, at 60-61.

49. See Jason DeParle & Sabrina Tavernise, *Unwed Mothers Now a Majority Before Age of 30*, N.Y. TIMES, Feb. 18, 2012, at A1.

50. See *id.* (representing a shift in family structure with which the PRWORA was not in agreement). However, many of them say they would like to marry. See Copen et al., *supra* note 22, at 8.

51. See DeParle & Tavernise, *supra* note 49, at A1.

52. Sabrina Tavernise, *Subsidies for Child Care Keep Dwindling When Families Need Them Most*, N.Y. TIMES, Dec. 14, 2011, at A24.

53. See *id.* But see Robert Rector & Rachel Sheffield, *Air Conditioning, Cable TV, and an Xbox: What is Poverty in the United States Today?*, HERITAGE FOUND. (July 19, 2011), <http://www.heritage.org/research/reports/2011/07/what-is-poverty> (arguing that defining poverty a certain way can show that fewer people are living in poverty than some may think).

54. See Gary Bauer, Op-Ed., *Ending Welfare Reform*, WASH. TIMES, Feb. 26, 2010, at B1.

55. See Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 606-07 (2008) (citing statistics to show the impact of the ALI principles on academia).

56. ALI, <http://www.ali.org> (last visited July 27, 2012).

57. *Membership Overview*, ALI, <http://www.ali.org/index.cfm?fuseaction=membership>.



“academic” organization, but most of its work is done by academics and is scholarly in nature.<sup>58</sup> Law professors are usually the so-called reporters or drafters of ALI projects, as they were for the Principles.<sup>59</sup> Members who attend meetings approve or reject their proposals.<sup>60</sup> Attendees typically represent only small segments of the membership and decide by voice vote.<sup>61</sup> No records are kept of the number who voted “yes” or “no.”<sup>62</sup> The Principles comprise 1187 pages,<sup>63</sup> and were over a decade in the making.<sup>64</sup> They take on the whole of family law<sup>65</sup> and are addressed to courts and legislatures.<sup>66</sup> They went through four successive drafts<sup>67</sup> and were adopted in 2000 and published in 2002.<sup>68</sup> Inevitably, they cover many of the same topics academics were talking about in 1993: the proper roles of fault and judicial discretion in deciding family matters, custodial responsibility for children, division of property on dissolution of marriage, and compensatory spousal payments (called “alimony” or “maintenance” by courts and legislatures), domestic partners, and marital agreements.<sup>69</sup>

Many of the positions the Principles take are extremely controversial. They propose, for example, to treat heterosexual and homosexual couples as having been married when their stable, long-term

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membership (last visited July 27, 2012). The ALI has 3000 elected members. *Id.* Total membership is about 4300. *Member Directory*, ALI, <http://www.ali.org/index.cfm?fuseaction=directory.viewmembers> (last visited July 27, 2012).

58. See *Certification of Incorporation*, ALI, <http://www.ali.org/index.cfm?fuseaction=about.charter> (last visited July 27, 2012) (explaining that the purpose of the ALI is to promote “scholarly and scientific legal work”).

59. The reporters were Professors Ira Mark Ellman, Katharine T. Bartlett, and Grace Ganz Blumberg. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at vii (2002) [hereinafter PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION].

60. *Bylaws (as amended in May 2007)*, ALI, <http://www.ali.org/index.cfm?fuseaction=about.bylaws> (last visited July 27, 2012) (setting out the procedure for voting).

61. David Westfall, *Unprincipled Family Dissolution: The ALI's Recommendations for Division of Property*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 176-77 (Robin Fretwell Wilson ed., 2006) [hereinafter CRITIQUE].

62. See *id.* at 177.

63. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 59, at 1187.

64. Lance Liebman, *Foreword* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 59, at xv, xv.

65. See *id.*

66. Ira Mark Ellman, *Foreword* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 59, at xvii, xvii.

67. Robert Fretwell Wilson, *Introduction* to CRITIQUE, *supra* note 61, at 1-2.

68. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 59.

69. See generally *id.* (containing the ALI's “considered advice” from “a decade of work on the legal consequences of marital dissolution: child custody, child support, distribution of marital property, and compensatory payments to former spouses”).

relationships end.<sup>70</sup> They propose to abandon the almost universal “best interests of the child” standard in deciding custody disputes and to substitute a standard based on past caretaking practice.<sup>71</sup> They would expand the class of people entitled to parental rights but not the traditional rules about who should be liable for children’s financial support.<sup>72</sup> The Principles have certainly kept the academy busy,<sup>73</sup> and have generated a spate of media commentary and the expectation that they would influence their targeted audience.<sup>74</sup> However, according to a sophisticated and fascinating article by Michael R. Clisham and Robin Fretwell Wilson, *American Law Institute’s Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, the Principles’ influence on legislatures and courts, has been minimal.<sup>75</sup> “[E]arly returns suggest that the *Principles* are not having a significant positive influence on their intended audiences. It is likely, however, that the *Principles* will form the grist of academic pieces for years to come.”<sup>76</sup> Both propositions are still true four years later. So again we find a reiteration of an old conclusion: what academics talk about does not carry much weight in the nonacademic world.<sup>77</sup>

Now we move to what is new since 1993. We have always had divergent families on the scene—that is, those not recognized by the law or out of favor with it—and, of course, we still do.<sup>78</sup> Same-sex couples have been among these disfavored groups, but they have made

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70. See *id.* at § 6.02 cmt. a; see also Margaret F. Brinig, *Domestic Partnership and Default Rules*, in CRITIQUE, *supra* note 61, at 269, 278-79 (arguing that the Principles’ proposal to treat cohabitating heterosexual couples as married is against the couples’ interests); Westfall, *supra* note 61, at 177 (noting that the Principles treat the termination of domestic partnerships between unmarried couples like divorce).

71. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 59, at § 2.08 cmt. a; see also Robert J. Levy, *Custody Law and the ALI’s Principles: A Little History, a Little Policy, and Some Very Tentative Judgments*, in CRITIQUE, *supra* note 61, at 67, 74-76 (criticizing the Principles’ proposal “that custody and visitation be awarded so as to approximate the time each parent spent with the child during the marriage”); Patrick Parkinson, *The Past Caretaking Standard in Comparative Perspective*, in CRITIQUE, *supra* note 61, at 446, 446-47 (“The past caretaking standard clearly represents a bold new direction in the law of parenting after separation.”).

72. See Katherine K. Baker, *Asymmetric Parenthood*, in CRITIQUE, *supra* note 61, at 121, 121; Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents*, in CRITIQUE, *supra* note 61, at 90, 98.

73. See Clisham & Wilson, *supra* note 55, at 606-07.

74. See *id.* at 607, 613.

75. See *id.* at 608-09.

76. *Id.* at 613.

77. See Younger, *supra* note 1, at 1370-71.

78. For example, there are fundamentalist polygamous families. See Jonathan Turley, *One Big, Happy Polygamous Family*, N.Y. TIMES, July 21, 2011, at A27.

astonishing strides toward acceptance since 1993.<sup>79</sup> Then, *Bowers v. Hardwick*,<sup>80</sup> holding states could constitutionally proscribe private consensual intimate same-sex conduct, was seven years old.<sup>81</sup> “Don’t Ask, Don’t Tell” (“DADT”),<sup>82</sup> the federal law mandating the discharge of any U.S. armed service member who was openly lesbian, gay, or bisexual, was newly minted.<sup>83</sup> It became official U.S. policy in American military forces in December 1993.<sup>84</sup> *Bowers* has been overruled,<sup>85</sup> DADT is now ended,<sup>86</sup> and the 2010 Census was the first to report the numbers of same-sex couples who describe themselves as married (that is, those who used the terms husband and wife to describe their relationship).<sup>87</sup> Six states allow same-sex couples to marry.<sup>88</sup>

Some would say that the law, through judicial decision and legislation, is accomplishing the cultural shift in attitudes about gay families.<sup>89</sup> Others would attribute it to the mass media, more specifically to television programs like *Will and Grace* and *Ellen*.<sup>90</sup> The former was a sitcom that ran for eight seasons from 1998 to 2006.<sup>91</sup> It featured apartment mates, Will, a gay male lawyer, played by Eric McCormack, and Grace, a straight female interior designer, played by Deborah Messing.<sup>92</sup> The *Ellen* show ran for four seasons from 1994 to 1998.<sup>93</sup> It

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79. See, e.g., MOVEMENT ADVANCEMENT PROJECT, THE MOMENTUM REPORT: AN ANALYSIS OF KEY INDICATORS OF LGBT EQUALITY IN THE U.S. 1-2 (2011), available at <http://lgbtmap.org/file/momentum-report-2011.pdf>.

80. 478 U.S. 186 (1986).

81. *Id.* at 189.

82. 10 U.S.C. § 654 (2006), repealed by Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. 111-321, 123 Stat. 3515; see also *Legislative History of the Law Regarding Homosexuals in the Military*, CENTER FOR MIL. READINESS (Aug. 22, 2008, 11:16 AM), <http://www.cmrlink.org/HMilitary.asp> (referring to the law as “Don’t Ask, Don’t Tell” (internal quotation marks omitted)).

83. *Id.* § 654(b).

84. *Id.* § 654.

85. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

86. See Don’t Ask, Don’t Tell Repeal Act of 2010, § 2(f), 123 Stat. at 3516.

87. O’Connell & Feliz, *supra* note 16, at 3.

88. See *infra* note 111 and accompanying text.

89. See also Adam Liptak, *Gay Vows, Repeated from State to State*, N.Y. TIMES, Apr. 12, 2009, at WK1 (noting the effects of judicial decisions on public opinion of same-sex marriage). See generally James W. Stoutenborough et al., *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419 (2006) (“First, the results of our aggregate level analysis reveal that Supreme Court decisions can have a significant impact on public opinion in the area of gay civil rights.”).

90. See Jennifer M. Bonds-Raacke et al., *Remembering Gay/Lesbian Media Characters: Can Ellen and Will Improve Attitudes Toward Homosexuals?*, 53 J. HOMOSEXUALITY, no. 3, 2007, at 19, 20-21.

91. *Will & Grace (1998-2006)*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0157246/> (last visited July 27, 2012).

92. *Id.*

93. *Ellen (1994-1998)*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0108761/>

featured Ellen Morgan, a neurotic lesbian bookstore owner, played by Ellen DeGeneres.<sup>94</sup> Ellen DeGeneres came out on the *Oprah Winfrey Show* in 1997.<sup>95</sup> Ellen Morgan came out later in the year during the *Ellen* show, doubling the impact.<sup>96</sup> What these characters did for same-sex acceptance, Candice Bergen, as Murphy Brown, in the television show of the same name, had done for acceptance of single motherhood when she became an unwed mother during the 1992 presidential campaign.<sup>97</sup> As Dahlia Lithwick describes the effect in *The New Yorker Magazine*: “A mainstream television comedy featuring openly gay characters demonstrated what social scientists have long known: the single most important indicator of one’s support for gay rights is whether one knows someone who is gay. In a pinch, it seems, a fellow [or a gal] on TV will do.”<sup>98</sup>

For those who prefer to see the law as the instrument of change, we could say the first real legal impetus came from *Romer v. Evans*,<sup>99</sup> in which the U.S. Supreme Court, in 1996, held that a Colorado ordinance that discriminated against gay persons violated the Equal Protection Clause of the U.S. Constitution.<sup>100</sup> Less than a month after that decision both houses of Congress by large majorities passed the Defense of Marriage Act (“DOMA”),<sup>101</sup> defining marriage as a union between one man and one woman for all federal purposes and purporting to relieve states from recognizing any such union though recognized by another state.<sup>102</sup>

President Clinton signed DOMA on September 21, 1996.<sup>103</sup> States followed through with similar legislation and constitutional amendments—so-called “little DOMAs”—of their own.<sup>104</sup> There, gay

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(last visited July 27, 2012).

94. *Id.*

95. Eric Mink, ‘Ellen’ Hype Shifts into Oprah-Drive, N.Y. DAILY NEWS (Apr. 30, 1997), [http://articles.nydailynews.com/1997-04-30/entertainment/18042063\\_1\\_ellen-degeneres-abc-sitcom-audience](http://articles.nydailynews.com/1997-04-30/entertainment/18042063_1_ellen-degeneres-abc-sitcom-audience).

96. Brinda Adhikari & Enjoli Francis, *Ellen DeGeneres Reflects on Coming-Out Episode, 15 Years Later*, ABC NEWS (May 4, 2012), [http://abcnews.go.com/Entertainment/PersonOfWeek/ellen-degeneres-reflects-coming-episode-declaring-gay-15/story?id=16281248#.T\\_9R13BQPLc](http://abcnews.go.com/Entertainment/PersonOfWeek/ellen-degeneres-reflects-coming-episode-declaring-gay-15/story?id=16281248#.T_9R13BQPLc).

97. See Younger, *supra* note 1, at 1378-79.

98. Dahlia Lithwick, *Extreme Makeover: The Story Behind Lawrence v. Texas*, NEW YORKER, Mar. 12, 2012, at 76 (reviewing DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS (2012)).

99. 517 U.S. 620 (1996).

100. *Id.* at 635-36.

101. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1783C (2006)).

102. See *id.*

103. *Id.*

104. DANIELLE O’CONNELL, STATE OF CONN. GEN. ASSEMB., FEDERAL AND STATE DOMA

marriage stalled until the Court decided *Lawrence v. Texas*<sup>105</sup> in 2003. In it, the Court overruled the seventeen-year-old decision in *Bowers*.<sup>106</sup> Changing its mind in *Lawrence*, the Court held, as a matter of substantive due process that a state could not, consistently with the U.S. Constitution, prohibit same-sex consensual conduct in private places.<sup>107</sup> The Court thus “decriminalized” gay Americans.<sup>108</sup>

Just the next year, the Massachusetts Supreme Court, in a four to three decision, held that confining marriage to one man and one woman violated the Massachusetts Constitution.<sup>109</sup> That state thus became the first to issue marriage licenses to same-sex couples.<sup>110</sup> As of this writing, there are six jurisdictions in the United States where same-sex couples can marry.<sup>111</sup> The rest do not afford such protection, though five states do provide civil unions.<sup>112</sup> Alongside those jurisdictions that allow same-sex couples to marry, the majority of states retain their little DOMAs.<sup>113</sup> The federal prohibition still lies on the books but President Obama has instructed the Justice Department not to enforce it.<sup>114</sup> This situation has served to make counting gays, married and not, very difficult for the Census Bureau,<sup>115</sup> and may explain why it has provided no fewer than three counts of them side-by-side.<sup>116</sup> I think there is a great deal of potential societal good to be harvested here. If the demographic picture shows truly that marriage is in danger of becoming obsolete, we ought to welcome this group that is ready and waiting to help shore it up. As gays marry and form stable families, they may lead the way to “saving” heterosexual marriage as well.<sup>117</sup>

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LANGUAGE, 2002-R-0957 (Dec. 6, 2002), available at <http://www.cga.ct.gov/2002/rpt/2002-R-0957.htm>.

105. 539 U.S. 558 (2003).

106. *Id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

107. *Id.*

108. See DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 282-83 (2012).

109. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

110. *Same-Sex Couples Ready to Make History in Massachusetts*, CNN (May 17, 2004), [http://articles.cnn.com/2004-05-17/justice/mass.gay.marriage\\_1\\_lesbian-couples-marriage-law-federal-constitutional-amendment](http://articles.cnn.com/2004-05-17/justice/mass.gay.marriage_1_lesbian-couples-marriage-law-federal-constitutional-amendment).

111. Neroulis, *supra* note 5.

112. Josh Levs, *Two More States Allow Same-Sex Civil Unions*, CNN (Jan. 1, 2012), [http://articles.cnn.com/2012-01-01/us/us\\_civil-unions\\_1\\_civil-unions-marriage-licenses-hawaii-and-delaware](http://articles.cnn.com/2012-01-01/us/us_civil-unions_1_civil-unions-marriage-licenses-hawaii-and-delaware).

113. Neroulis, *supra* note 5.

114. Letter from Eric H. Holder, Jr., Att’y Gen. to Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

115. See O’Connell & Feliz, *supra* note 16, at 6.

116. See *supra* note 16 and accompanying text.

117. See Frank Bruni, Op-Ed., *Value our Families*, N.Y. TIMES, Feb. 21, 2012, at A25; see

Our demographic picture shows us that women continue to engage in the old dangerous conduct: marrying, divorcing, and having children in and out of wedlock. Some are modifying their behavior.<sup>118</sup> First, more women are deciding not to have children at all; childlessness by choice may be becoming a more acceptable lifestyle.<sup>119</sup> Second, while “motherhood without marriage” becomes more and more “normal,” there is one group of women that still “largely resists the trend: college graduates who overwhelmingly marry before having children,” and stay married.<sup>120</sup>

In the affluent neighborhoods where many college-educated Americans live, marriage is alive and well and stable families are the rule. Young Americans with college degrees, once thought to be a cultural vanguard, are creating a neotraditional style of family life: although they may cohabit with their partners, nearly all of them marry before having their first child. Furthermore, while most wives work outside the home, the divorce rate in this group has declined to levels not seen since the early 1970s.<sup>121</sup>

Education is good for women: that was my earlier message.<sup>122</sup> It is heartening to see some women heeding it, and younger women among them.<sup>123</sup>

The more things change, however, the more they stay the same. So it is that we find women engaging in new types of dangerous conduct.<sup>124</sup> They are using assisted reproductive technology (“ART”) to help not

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also Danielle Kurtzleben, *Divorce Rates Lower in States with Same-Sex Marriage*, U.S. NEWS (July 6, 2011), <http://www.usnews.com/news/articles/2011/07/06/divorce-rates-lower-in-states-with-same-sex-marriage> (reporting that “5 of the 10 states . . . with the lowest divorce rates per thousand people . . . perform or recognize gay marriages”).

118. See Gretchen Livingston & D’Vera Cohn, *Childlessness up Among All Women; Down Among Women with Advanced Degrees*, PEW RES. CENTER 2 (2010), available at <http://www.pewsocialtrends.org/files/2010/11/758-childless.pdf>.

119. *Id.*

120. DeParle & Tavernise, *supra* note 49, at A1.

121. W. Bradford Wilcox & Andrew J. Cherlin, *The Marginalization of Marriage in Middle America*, BROOKINGS, 2 (Aug. 2011), [http://www.brookings.edu/~media/research/files/papers/2011/8/10%20strengthen%20marriage%20wilcox%20cherlin/0810\\_strengthen\\_marriage\\_wilcox\\_cherlin.pdf](http://www.brookings.edu/~media/research/files/papers/2011/8/10%20strengthen%20marriage%20wilcox%20cherlin/0810_strengthen_marriage_wilcox_cherlin.pdf).

122. Younger, *supra* note 1, at 1383.

123. Catherine Rampell, *Instead of Work, Younger Women Head to School*, N.Y. TIMES, Dec. 29, 2011, at A1.

124. Magdalena Guguheva, Couns. for Responsible Genetics, *Surrogacy in America*, 17-22 (2010), <http://www.councilforresponsiblegenetics.org/pageDocuments/KA EVEJOA1M.pdf>; Judy Norsigian, *Egg Donation Dangers*, COUNS. FOR RESPONSIBLE GENETICS, <http://www.councilforresponsiblegenetics.org/ViewPage.aspx?pageId=103> (last visited July 27, 2012); *Risks of In Vitro Fertilization (IVF)*, AM. SOC’Y FOR REPRODUCTIVE MED., [http://www.asrm.org/uploadedFiles/ASRM\\_Content/Resources/Patient\\_Resources/Fact\\_Sheets\\_and\\_Info\\_Booklets/risksofivf.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/risksofivf.pdf) (last updated 2012) [hereinafter ASRM].

only themselves, but other women and gay men to have babies.<sup>125</sup> They are engaged in egg retrieval, in vitro fertilization, embryo transfer, and serving as gestational or genetic surrogates for others.<sup>126</sup> This is brave, and when done for someone else, altruistic and not very well paid.<sup>127</sup> Whomever the procedure is done for, it is risky behavior.<sup>128</sup> At the least we could hope to keep careful watch on the women going into these activities and the babies coming out of them, monitoring their numbers and health. The Centers for Disease Control and Prevention (“CDC”) provides some information, for example:

Recent research by the Centers for Disease Control showed that ART babies are two to four times more likely to have certain kinds of birth defects. These may include heart and digestive system problems, and cleft (divided into two pieces) lips or palate. Researchers don’t know why this happens. The birth defects may not be due to the technology. Other factors, like the age of the parents, may be involved. More research is needed. The risk is relatively low, but parents should consider this when making the decision to use ART.<sup>129</sup>

The CDC does not do any of its own counting or monitoring but is dependent on fertility clinics and other agencies like the American Society for Reproductive Technology (“SART”) to report to it.<sup>130</sup> They, of course, are not mere observers; they are deeply interested.<sup>131</sup> SART, according to its website is “the primary organization of professionals dedicated to the practice of assisted reproductive technologies (ART) in the United States.”<sup>132</sup> Both SART and the CDC seem most interested in “success rates,”<sup>133</sup> as is Congress.<sup>134</sup> This is not much of a record on

125. See CENTER FOR SURROGATE PARENTING, <http://www.gaysurrogacyagency.com/> (last visited July 27, 2012); see also Gugucheva, *supra* note 124, at 4.

126. Gugucheva, *supra* note 124, at 4. Genetic surrogacy is not new, of course. There are several examples in the Book of Genesis in the Old Testament: Hagar for Sarai; Bilhah for Rachel, and Zilpah for Leah. *Genesis* 16:1-15, 30:1-23.

127. Gugucheva, *supra* note 124, at 5.

128. See ASRM, *supra* note 124.

129. *Infertility FAQ's*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/infertility/> (last updated Apr. 19, 2012).

130. See *Assisted Reproductive Technology Resources*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/ARTResources.htm> (last updated Apr. 19, 2012).

131. See *About CDC's Division of Reproductive Health*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/DRH/index.htm> (last updated Apr. 25, 2012).

132. SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, <http://www.sart.org/> (last visited July 27, 2012).

133. This means pregnancies per cycle. To translate it into something comprehensible to the ordinary patient is difficult. See DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 55-56 (2006).

134. See Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1 (2006).

which to formulate a sound national policy or educate those most directly involved.

I still believe that education is the key to protecting women from the dangerous things they do. There is a glaring need for reliable data to enable them to learn the right lessons. Perhaps in the next twenty years we will have collected it and their educations will be complete.



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