Fragile Families and Family Law

by

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Learn to do well;

seek judgment,

relieve the oppressed,

judge the fatherless,

plead for the widow.[1]

Outline

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[1]Isaiah 1:17 (KJV).

I. Introduction

This paper reviews how family law in the United States impacts upon fragile families in four ways. First, it discusses how fragile families are invisible to much of family law, and are largely ignored or neglected in family law. Second, it reviews family law reforms that have been intended to help or have had a beneficial effect upon fragile families. Third, it considers family law doctrines that appear to have had, and proposed doctrines that may be expected to have, detrimental impacts upon fragile families, either to cause or contribute to an increase in fragile families, or to exacerbate the plight of fragile families. Fourth, it suggests that strengthening the culture of marriage in society, and providing marriage-skills-training is one effective way to help fragile families. The paper will concludes with some general observations about the connections between family law and fragile families.

At the outset, it is important to define a few terms. First, by American Family Laws, I refer to the laws that are enacted to regulate family relations in the United States. Most of these laws are *state laws*, as the regulation of domestic relations is not one of the powers delegated to the national government in the Constitution, but remains one of the residual areas of sovereignty reserved under the Constitution (and particularly in the Tenth Amendment) to the States. Thus, the constitutional structural or power-allocation principle of federalism has influenced American family laws including those impacting upon fragile families, by mandating the de-centralization of the majority of family laws in the United States. That means that there is not one body of American family law, but at least 50 bodies of state family laws, which differ significantly from each other to a greater or lesser extent in detail, substance, and procedure. Thus, there is some inconsistency, variation and even direct conflict among the family laws of the fifty states.

However, the federal government does have authority over large areas of human activity which incidentally (sometimes rather substantially) impacts upon and sometimes overrides or preempts the family laws of the states. For example, federal welfare laws and tax laws not infrequently influence and interact with state family laws. Also, some provisions of the U.S. Constitution or judicial doctrines based on the Constitution also influence and may even supercede state family laws. For instance, the constitutional doctrine of equal protection arising out of the Fourteenth Amendment has overturned or required modification of most gender role-based family laws. Thus, the constitutional delegation of specific powers to the national government and the principle of supremacy of the Constitution and the national laws enacted pursuant to specified powers provides some constitutional boundaries for the state regulation of family law and also provides some degree of uniformity of at least those areas of family law that are effected by areas of national regulation, most notably federal tax, welfare, and bankruptcy laws.

Ironically, there may be more federal law regulating "fragile families" than state law. That is because "fragile families" are dealt with as a matter of poverty law, of welfare law, of public benefits law, and those areas of regulation are dominated by Congressional statutes and federal agency regulations and rules.

Second, the term "fragile families" refers to families that are particularly vulnerable for problems of poverty and other forms of social distress. The typical structure of "fragile families" is incomplete or broken, characterized by one-parent-childrearing (usually mother-headed families). Typically "fragile families" are "father-absent" families, which results in both absence of paternal income, but also absence of paternal influence and example. Often they are

families where a father has never been present, because the child was born out of wedlock.[2]

Sara S. McLanahan has been a leading voice in calling attention to the plight of "fragile families."[3] A single mother herself, she has stated: "When I first [began researching this issue] I wanted to demonstrate that single mothers could do just as good a job of raising children as married moms. Unfortunately, the evidence led me to somewhat different conclusions."[4] Her terse summary of the consequences of divorce for children of is well-known: "Almost anything you can imagine not wanting to happen to your children is a consequence of divorce."[5] She has noted that: "Mother-only families are . . . subjected to numerous . . . forms of economic and social instability, such as income loss, residential moves, and changes in employment and

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[2]*See generally* The Fragile Familes and Child Wellbeing Study, available at <http://crew.princeton.edu/fragilefamilies/collaborative.asp> (Viewed May 23, 2003).

[3]*See generally* Sara McLanahan & Gary D. Sandefur, Growing Up With A Single Parent: What Hurts, What Helps (1994); Irwin Garfinkel & Sara S. McLanahan, Single Mothers and Their Children, A New American Dilemma (1986); Sara S. McLanahan, *Father Absence and the Welfare of Children*, in Coping With Divorce, Single Parenting, and Remarriage: A Risk and Resiliency Perspective 117 (1999); Sara McLanahan & Julien Teitler, *The Consequences of Father Absence, in Parenting and Child Development* in "Nontraditional" Families 83 (Michael E. Lamb ed., 1999); Anne Case, I-Fen Lin, & Sara McLanahan, *Educational Attainment of Siblings in Stepfamilies*, 22 Evolution & Human Behavior 269 (2001); Anne Case, I-Fen Lin, & Sara McLanahan, *How Hungry Is the Selfish Gene?* 110 Econ. J. 781 (2000); McLanahan, Sara, and Larry Bumpas, Intergenerational Consequences of Family Disruption. 94 Am. J. Sociol. 130 (1988); Sara McLanahan, *Family Structure and the Reproduction of Poverty,* 90 Am. J. Sociol. 873 (1985); Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration* 1 (Ctr. for Research on Child Wellbeing, Working Paper No. 1999- 03, 1999), Paper Presented at the Annual Meeting of the American Sociological Association, San Francisco, California (Aug. 21-25, 1998), at http://ryder.princeton.edu/crcw/publist/workingpapers/WP99-03- Harper.pdf. Sara McLanahan, *The Consequences of Single Motherhood*, in SEX, PREFERENCE, AND FAMILY 306-18 (David M. Estlund & Martha C. Nussbaum eds., 1997); Sara S. McLanahan, *Single Mothers and Their Children*, *

[4]Sara McLanahan, *, cited in David Myers, *The American Paradox: Spiritual Hunger in an Age of Plenty* 85 (2000).

[5]Sara McLanahan, quote in Myron Magnet, The American Family, 1992, FORTUNE, Aug. 10, 1992, at 42, 43.

household composition. These disruptions – may of which are related to marital breakup – are a source of continued psychological stress and may lead to climical depression in children as well as mothers.[6] She has argued that "poverty and economic insecurity are a consequence of three factors: (1) the low earnings of single mothers, (2) the lack of child support from noncustodial fathers, and (3) the meager benefits provided by public assistance programs."[7] Yet she also has noted that more is involved than the reduction of material support experienced by children in "fragile families," that the extent and quality of investment in children is lower in fragile families compared to comparable intact families, and that "broader disorganization" is evident in the increased rates of crime, drug abuse and underemployment.[8] Her work has shown that father-absent, female headed households are clearly associated with economic deprivation, and family stress.[9] She has also highlighted the risks and struggles of step-parent families.[10]

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[6]McLanahan, *Single Mothers and their Children*, *supra* note __, at 11.

[7]McLanahan, *Single Mothers and their Children*, *supra* note __, at 11.

[8]McLanahan, *Family Structure*, *supra* note__, at 873.

[9]McLanahan, *Family Structure, supra* note __, at 873.

[10]McLanahan, Father-Absence and Youth Incarceration, *supra* note __.

II. How American Family Laws Generally Ignore and Are Oblivious to Fragile Families

For the most part, American Family Laws ignore and are oblivious to fragile families, per se. For example, I ran a computerized (Westlaw) search this summer searching for pieces published in American law reviews in the past two decades that included the term "fragile families," and had only two dozen hits; examining those items I found that not a single article, essay, comment, note, book review or student casenote addressed fragile families *per se*.[11] Not a single article even defined the term "fragile families." The term was merely used incidentally in these articles.

This absence of focus in American law on "fragile families" is largely due to two factors. They are socio-economic dualism in family laws and the dichotomy between liberty and equality.

A. Dualism in Family Laws

Most family laws are written and developed primarily to address the needs and concerns of the socio-economic class who make the laws. Thus, the legal problems of the wealthy are quite well addressed in American family laws, and the concerns and interests of middle class Americans are generally represented in the legislative statutes, codes, administrative regulations and judicial decisions that constitute the body of contemporary family law. However, the concerns and legal quandries of the homeless, the impoverished, the disabled, the unpopular, the

[11]When I began doing research this summer to prepare this paper, I did a search on Westlaw, a very large computerized database, of all of the law reviews, journals, and other legal periodicals. I typed in the term "fragile families" and expected to find at least 50 or 60 law review articles on the subject. In fact, the computer search turned up only 24 "hits" - only 24 articles, comments, notes, essays, or book reviews going back to 1987, in which the term "fragile families" was even used. In most, the term was used only once, and most merely referred in passing to fragile families in the context of discussing some specific problem that incidentally affected fragile families.

marginalized, and the outcasts who are not as well represented in law-making bodies generally are not well-addressed in the laws or legal system.

This dichotomy is neither new nor unique to America, but it has existed in most cultures throughout most of recorded history. Nearly forty years ago, Jacobus ten Broek noted the same dualism in Elizabethan-era English family laws.[12] This dichotomy was true even in and after the "modern," Progressive era of welfare legislation. As Michael Grossberg argues:

> [The] public law of child welfare [that] became imposed on the poor . . . brushed only lightly upon intact, mainstream families. These latter were governed by a private family law which less frequently was the object of legislation, but developed instead through private agreements and the decisions of courts in individual divorce cases.
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> In doing so, domestic relations law reinvigorated what Jacobus ten Broek has called the dual system of family law: liberationist policies for middle and upper classes, and repressive policies for the lower classes and for racial and ethnic groups.[13]

The first point is that there is (and historically has been) a dualism in family law that treats the families of the poor quite differently than it treats the families of the middle-class and

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[12]*See* Jacob Ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 Stan. L. Rev. 257, 287, 291 (1964) ("Feudal law did not recognize the family as such or assign rights and duties to its members by virtue of membership. Property rights were the only privileges which the king's courts would enforce between father and son."); *

[13]Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 Ind. L. Rev. 273, 288 (1995), quoting in the first paragraph Herbert Jacob, Silent Revolution: The Transformation of Divorce Law in the United States 129-130 (1988),✓ and citing after the second paragraph Jacobus Ten Broek, Family Law and the Poor: Essays (Joel F. Handler ed., 1971).✓

of the wealthy. Part of the problem is structural, inherit in democracy. Democratic legal systems generally work well to protect the rights and address the needs of the majority of the people and of those who hold most of the wealth and property of the society. But democracy alone is not structured to respond well to those on the fringes, whose needs or problems differ from those of the popular majority, and who control very little of the wealth, property and goods that are the primary interests of legal systems and which are the source of the greatest influence in all legal systems. Thus, addressing in law the problems of fragile families must overcome the bias against minorities on the margins that is inheres in the very structure of democracy. Overcoming that structural bias against minorities is what the Bill of Rights was all about. But the Bill of Rights does not offer explicit protection for "fragile families," it does not even mention them.

B. The Liberty-Equality Dichotomy in Family Law

Second, the neglect in our legal system of the problems of fragile families also reflects a dichotomy between liberty and equality, or individualism and communitarianism, or libertarianism and statism,[14] This dichotomy is reflected in many dimensions of our family and related laws. The liberty-individualist-libertarian side favors little government intervention in or direct influence upon families. The equality-communitarian-statist side favors massive government intervention, regulation, support, and shaping of families. In terms of process, the equality side favors use of government support programs to help fragile families, while the liberty side favors strengthening independent families; the statist approach favors government agencies as the primary delivery vehicle, while the libertarian approach favors decentralized and private (NGO) organizations that help individuals and couples become stronger, more independent families. The equality side tends to use and rely upon public law (public benefit law, welfare-administrative, constitutional, and criminal law); the liberty side tends to prefer private law (family law, contracts, private ordering). This dichotomy in American laws is at least as old as the Constitution of the United States of America.[15] Even before the Constitution, liberty and equality were seen as conflicting ideals.[16] When Alexis de Tocqueville

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[14]*See generally* Lynn D. Wardle, *Liberty, Equality & the Quest for Family Justice in the United States* in FAMILIES & JUSTICE 208-229 (Brussels: Bruylant, 1997).

[15]The greatest cause of conflict at the Philadelphia Convention of 1787 at which the Constitution of the United States was drafted, which nearly led to the dissolution of the Convention, was whether the states were to be given equal representation in the legislative branch, or whether the citizens were to be given equal representation in both houses of the Congress. *See* Catherine Drinker Bowen, Miracle at Philadelphia 69-128, 185-197 (1966).

[16]John Locke, Second Treatise of Government in Two Treatises of Government ¶¶4-7, 21-23. 95 (1970) (Cambridge Univ. Press 1960); Jules Steinberg, Locke, Rousseau and the Idea

visted America in 1831 he found the country to be "an extraordinary phenomenon" because its citizens enjoyed greater equality than those in "any other country of the world, or in any age of . . . history. . . ."[17] He observed, "It is not only the fortunes of men that are equal in America; even their acquirements partake in some degree of the same uniformity. I do not believe that there is a country in the world where . . . there are so few ignorant and at the same time so few learned individuals."[18] However, he also noted that individual "sovereignty" (i.e., liberty) was the "fundamental principle" and "the grand maxim upon which civil and political society rests in the United States."[19]

American legal scholars today generally assume that equality cannot be achieved without restricting some erty, and that liberty cannot flourish without producing some inequality. For example, in *Justice, Equal Opportunity, and the Family*,[20] James Fishkin asserts that the conflict between liberty and equality creates a "trilemma" for modern American liberalism. That is, America and other liberal democracies are founded on three liberal principles: (1) *equal opportunity* (that all persons should have equal opportunity to compete for the limited goods of this world, and arbitrary native characteristics such as race and gender should not determine

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of Consent 133-141 (1978).

[17]*Id.*, vol. 1, ch. 13, at 53 ("Men [in America] are . . . seen on a greater equality in point of fortune and intellect, or, in other words, more equal in their strength, than in any other country of the world, or in any age of which history has preserved the remembrance."). *See also id.*, vol. 1, Author's Introduction, at 3.

[18]*Id.*, at 51-52.

[19]*Id.*, vol. 1, ch. 18, at 418. "[E]very man is allowed freely to take that road which he thinks will lead him to heaven, just as the law permits every citizen to have the right of choosing his own government." *Id.*

[20]James S. Fishkin, Justice, Equal Opportunity, and the Family (1983).

those opportunities – in other words, everyone gets to line up at the same starting line of the race, none given a head start or handicap), (2) *merit* (that limited goods should be distributed on the basis of merit – the gold medal goes to the first runner to cross the finish line), and (3) *family autonomy* (that the state will not coercively intervene in private families regarding internal family concerns such as child rearing – the teams can train and prepare for the race however they choose). The "trilemma" is that even if goods (public resources, etc.) are distributed solely on the basis of merit, and even if the opportunity to compete on merit is open to all persons, without any advantage or disadvantage given on account of race or sex, all persons will not have an equal chance for success because of family autonomy – because children raised in some families come to the starting point in the race for life's goods much better prepared to succeed than children raised in other families. We cannot achieve any two of these goals without violating the third.[21] Fishkin suggests that, "[i]f taken seriously, the liberal strategy of attempting to ration fairly opportunities for the achievement of unequal positions would require systematic intrusions into the family. Only then could the maintenance of background inequalities be rendered compatible with equal opportunities [and merit]."[22]

In the contest between liberty and equality, the American family law system traditionally has leaned toward liberty. Traditionally, there has been little regulation of the family in the

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[21]We can preserve family autonomy and equal opportunity, but to compensate for the grave disparities in preparation resulting from family autonomy will have to sacrifice the principle of merit (award contracts on the basis or racial quotas); or we can preserve family autonomy and merit, but to compensate for the grave disparities in preparation resulting from family autonomy will have to sacrifice equal opportunity (give racial preferences in educational opportunity); or we can preserve equal opportunity and the principle of merit, but will have to sacrifice family autonomy (massive intervention to guarantee that all children are equally prepared to compete in life's contests).

[22]*Id.* at 3,4.

belief that individuals, families, and the nation flourish best and benefit most from liberty in family matters.[23] The dominant trend of recent developments in family law in the past thirty years (such as the constitutional doctrine of privacy, adoption of no-fault divorce, legitimation of previously-prohibited sexual relations, etc.) has tended to replace old public "equality" norms (all married people may divorce only when set standards are violated; all people will abstain from sexual relations outside of marriage; cohabitation is only permitted for married couples; etc.) with subjective, individually-determined "liberty" standards.

The laws concern for "fragile families" has effected by this dichotomy. The historic preference for liberty has resulted in reluctance to intervene, to "let them alone" despite circumstances in which that amounts to isolation, abandonment and neglect of the suffering. On the other hand, the countervailing preference for equality has resulted in pressures for stultifying conformity to sometimes-dysfunctional or inflexibly oppressive standards, and the fostering of a "welfare" culture of dependency.

[23] *See generally* Bruce C. Hafen, *The Constitution, Status of Marriage, Kinship, and Sexual Privacy--Balancing the Individual and Social Interests*, 81 Much. L. Rev. 463, 479-483 (1983) (liberty and diversity in families foster tolerance, pluralism, and liberty in political society).

III. How American Family Laws Have Tried to Help or Have Benefitted Fragile Families

The principal way in which American family laws have tried to help or to benefit fragile families has been involved three prongs. First, they have tried to establish parentage. Second, they have tried to enforce child support obligations. Third, they have tried to eliminate legal discrimination against children born out of wedlock. Fourth, they have tried to prevent violence against women.

A. Parentage.

For most children born in America, parentage is not an issue because of two well-established presumptions – that the woman who gives birth to a child is the mother of that child, and if she is married, her husband is presumed to be the father of the child. Thus, in most cases, there is no dispute regarding maternity because the identity of the woman who gives birth is usually easy to establish. (Artificial reproductive technology is increasing the number of births in which this is not as clear as it used to be, but in the overwhelming majority of cases the presumption of birth-maternity still provides a reliable basis for establishing maternity.)[24]

There is more problem in identifying the father of the child, and since one-third of all children in America are now born out of wedlock (two-thirds of some sub-groups), the presumption of paternity of the husband of the woman who bears the child only establishes

[24]For example, a child may be born to a "gestational surrogate" into whom an embryo resulting from in vitro fertilization of the egg of a woman desiring to have a child but whose medical condition does not make that possible. *Calvert v. Johnson*, *. Or a child may be born to a "donor surrogate" who donates her egg for in vitro fertilization with the sperm of a man not her husband and reimplantation in her womb, with the intention to deliver the child to another woman - the sperm donor's wife, usually - upon birth. *In re Baby M.,* *

paternity for about two-thirds of the children born in the USA.[25]

At common law, the presumption of husband parentage was virtually irrebuttable. Today, the strength of this presumption varies from state to state. In some states, the presumption of husband paternity is still very strong. For example, in *Michael H. V. Gerald D.*,[26] the Supreme Court of the United States upheld a California statute that totally barred an adulterous man from challenging the presumption that the husband of a married woman was "conclusively presumed" to be the legal parent of a child born to his wife, even though the scientific evidence clearly indicated that the neighbor, who had lived with the woman and the child for a time, was the biological father.[27] Many states, however, allow the presumption to be rebutted by reliable scientific evidence of the husband's nonpaternity (usually DNA blood-type evidence). For example in *In re Findlay*,[28] the New York Court of Appeals rejected the application of the presumption that the offspring of a married woman is deemed to be the legitimate child of her husband in a case in which a woman left her husband in England, came with her lover to America, and had three sons by him, all of whom he acknowledged. The lower courts held that these boys were presumed to be the legal children of the husband notwithstanding the unimpeached evidence to the contrary, but the Court of Appeals reversed.

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[25]Census Bureau, 2000 Census, at *

[26]491 U.S. 110 (1989).

[27]Cal. Evid. Code §621 allowed the mother of the child and her married husband to challenge the presumption of paternity, but not he adulterous, third-party biological father. Although the mother, a married woman, lived temporarily with several men during her marriage to Gerald, and even though the blood test evidence strongly supported a neighbor's claim of paternity, the California courts held that the California law barred the adulterous father's parentage claim, and the U.S. Supreme Court agreed that that did not violate the Constitution.

[28]253 N.Y. 1, 170 N.E. 471 (1930).

Chief Justice Cardozo declared: "Potent, indeed, the presumption is, one of the strongest and most persuasive known to the law, and yet subject to the sway of reasons. . . . The presumption does not consecrate as the truth the extravagantly improbable. . . ."[29]

A brief statistical snapshot shows the relative importance of establishing legal parentage. In 1992 about 4, 065,000 children were born in the United States of America, of whom about 2,828,000 (69.9%) were born in wedlock.[30] Parentage of all children who were born to married parents was established by legal presumption, cases in which the presumption is contested are extremely rare. In 1992, there were 264,330 paternity cases filed in 19 states, and approximately 79,299 paternity adjudications (thus approximately 30% of the paternity claims are successful).[31] Extrapolating for all 50 states, the estimated total number of paternity cases would be approximately 660,000 paternity cases, and the number of successful paternity adjudications would be approximately 200,000. Additionally, there were approximately 51,157 adoptions reported in 1986, including 24,589 adoptions of newborn infants.[32] Using this date, it appears

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[29]*Id.* at 472-473.

[30]U. S. Department of Commerce, Statistical Abstract of the United States 1995 at 873 (115th ed. 1996).

[31]Brian J. Ostrom, et. al., State Court Caseload Statistics: Annual Report 1992 at 26 (1994) (statistics come from only 19 states); *Hearings on the Downey-Hyde Child Support Enforcement and Assurance Proposal Before the Subcomm. On Human Resources of the House Comm. On Ways and Means,* 102nd Cong., 2d Sess., 82 (1992) (Statement of Larry D. Jackson, Commissioner, Virginia Dep't. Of Social Services). In 1986 it was reported that there is a paternity adjunction for only 28% of all children born out of wedlock (meaning that for approximately 72% of illegitimate children there is no formal paternity determination). Ann Nichols-Casebolt & Irwin Garfinkel, *Trends in Paternity Adjudications and Child Support Awards,* 72 Soc. Sci. Q. 83-97 (1991). While some of these children have a presumed father because their mothers have married their fathers after birth, or the father has received the child as his own or done some other act to create a presumption of paternity, it seems likely that most illegitimate children have no known father by formal determination or by presumption.

[32]National Committee for Adoption, Adoption Factbook 80 (1989).

that maternity was established by the fact of birth for virtually all of the children born, and paternity was established for approximately 70% of them, by legal presumption of birth and of being the husband of the woman who gave birth; paternity was established for approximately 5% of them by paternity adjudication; and parentage was established for 1% of infants by adoption.

Establishing parentage is extremely important for several reasons. First, it provides a potential source of financial support and responsibility for the child. With regard to children in "fragile families" that is somewhat dubious because a disproportionate percentage of unwed fathers and mothers and not financially responsible individuals. This is reviewed below.

Establishing parentage is also extremely important because it provides the opportunity for the development of a very profound parent-child relationship. This relationship is critical, almost indispensable, for the healthy emotional development of children. It also is important for the moral maturation of adults. While increasingly the law allows non-parents who either act like parents or who have functioned *in loco parentis* to assert the same legal rights and claims as true legal (legally recognized biological and adoptive) parents, the likelihood that the parent-child bond will actually be developed increases when parentage is clearly established.

B. Collect Child Support

Family law has been revised and strengthened to try to establish and recover child support for children. In intact marriages, this is rarely necessary. When the child is born out of wedlock or if there is a divorce or separation, it becomes very important because studies show that the parent (both fathers and mothers) who no longer live with their children (especially if they have little contact with them) are less likely to voluntarily support them adequately (if at

all).[33]

The federal involvement in child support dates back to 1935 when Congress enacted the Aid to Families with Dependent Children Program (AFDC), which provided support to children in families not receiving support from an absent parent.[34] "[I]n a very real sense, AFDC benefits were a substitute for child support."[35] In 1974, Congress required all AFDC recipients to assign their child support rights to the state and cooperate in the establishment and enforcement of support orders, and state agencies were required to establish a parent locator service using IRS and Social Security information. Ten years later, "Congress effectively nationalized the entire system of child support determination and collection with passage of the Child Support Enforcement Amendments of 1984. The 1984 law required states to establish objective, non-binding, child support 'guidelines ,' a state commission on child support, and a series of new support enforcement procedures such as mandatory wage withholding orders."[36] In 1998, Congress "strengthened these support laws by requiring that support guidelines be used presumptively to establish child support orders, setting federal standards for paternity establishment, extending wage withholding rules to all support orders, and creating the U.S.

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[34]Elizabeth S. Saylor, *Federalism and the Family After Morrison: An Examination of the child Support Recovery Act, The Freedom of Access to Clinic Entrances Act, and A Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 Harv. Women's L.J. 57, ___, n. 188 (2002).

[35]Laura W. Morgan, The Federalization of Child Support, A Shift in the Ruling Paradigm: Child Support as Outside the Contours of 'Family Law,' 16 J. Am. Acad. Matrimonial L. 195, 203 (1999).

[36]Ann Laquer Estin, Federalism and Child Support, 5 Va. J. Soc. Pol'y & L. 541, 546-47 (1998), cited in Saylor, *supra*, note __, at n. 188.

Commission on Interstate Child Support."[37]

While it is clear that much more child support is being collected today than before the 1984 and 1988 federal laws were enacted, the overall success of the Child Support Guidelines is somewhat debatable. The number of public child support enforcement cases (to locate parents, establish paternity, and establish and enforce child support) increased from 5,432,000 in 1980 to 12,796,000 in 1990, to 19,419,000 in 1998; collections were made in 2,064,000 AFDC and non-AFDC cases in 1990 and in 3,859,000 cases in 1998; but the percentage of AFDC cases in which there was collection arose less than three percentage points, from 11.0% in 1980 to 13.9% in 1998, less than half the rate of collection in private cases (28.7% in 1980 and 28.1% in1998); total amounts collected rose ten-fold, from $1,478,000,000 in 1980 to 14,348,000,000 in 1998 with collections merely quadrupling in AFDC cases, but rising 13-fold in non-AFDC cases.[38] Thus, even the increase enforcement project designed to benefit fragile families and the governments that support them seems to have resulted in much greater benefit to private (non-AFDC) families. This is not unimportant because child support is the primary method of support for nearly twice as many children as are on public welfare. In 1997, 4,305,000 families were receiving child support, while 2,682,000 families were receiving public assistance.[39]

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[37]Saylor, *supra* note __, at n. 188.

[38]U.S. Bureau of the Census, Statistical Abstract of the United States, 2001 Table 632, Child Support Enforcement Programs – Caseload and Collections, 1980-1998, available at <http://www.census.gov/prod/2001pubs/statab/sec12.pdf>, seen October 6, 2003.

[39]U.S. Bureau of the Census, Statistical Abstract of the United States, 2001 Table 602, Number of Families Receiving Specified Sources of Income available at <http://www.census.gov/prod/2001pubs/statab/sec12.pdf>, seen October 6, 2003.

Eliminate Discrimination Against Children Born Out of Wedlock.

Today, illegitimacy has largely been abolished as an operative legal classification. It is neither necessary nor desirable to achieve valid child-protective or administrative management policies to categorize on the basis of legitimacy. Usually classification on the basis of paternity will achieve the same goals and purposes historically given to justify classification on the basis of illegitimacy. However, statutes that penalize parents for not legitimating their children generally are not subject to the same degree of rigorous judicial scrutiny. All states allow children born out of wedlock, under conditions prescribed the particular state, to be legitimated by the father. Legitimating a child creates the full parent-child relationship. All states have now enacted statutes that provide that children born into marriages that are invalid retain their status of legitimacy. All states provide that the child is legitimated if the child's parents later intermarry and the father acknowledges the child. Some states provide a judicial process for legitimation.[40]

The history of the abolition of illegitimacy goes back to 1968 when the Supreme Court decided *Levy v. Louisiana*,[41] and *Glona v. American Guarantee & Liability Ins. Co.*.[42] Both cases involved a Louisiana wrongful death statute which provided that wrongful death actions could be brought by children for the death of their parents, and by parents for the death of their

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[40]*See generally,* Lynn D. Wardle & Laurence C. Nolan, Fundamental Principles of Family Law (Ch. 10), at 264-273 (2002) (from which this discussion is taken). *See also* Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence*, 28 Cap. U. L. Rev. 1 (1999).

[41]391 U.S. 68 (1968).

[42] 391 U.S. 73 (1968).

children. However, the statute did not include illegitimate children within the definition of "children." In Levy, five illegitimate children sought to recover for the wrongful death of their mother, and in Glona, the mother of an illegitimate child sought to recover for the wrongful death of her child. In both cases, Louisiana courts upheld the statute and denied recovery. The Supreme Court reversed in both cases. Justice Douglas wrote the opinion for the majority. He began by emphasizing the personhood of illegitimate children: "We start from the premise that illegitimate children are not single 'nonpersons.' They are humans, live, and have their being. They are clearly single 'persons' within the meaning of the Equal Protection Clause of the 14th Amendment."[43] Applying a rational relation test, he concluded that "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."[44] Denying wrongful death recovery to mothers of illegitimate children was equally irrational because it would be "far fetched to assume that women have illegitimate children so that they can be compensated in damages for their death.[45] Justice Harlan, joined by Justice Black and Justice Stewart, dissented arguing that all wrongful death statutes are unavoidably arbitrary: an adulterous wife can recover for the death of her husband, a nonsupportive child can recover for the death of his parents, a loving couple who has raised an unadopted child cannot recover for the death of that child. A biological relationship was deemed to be no more rational than the legal relationship of legitimacy.[46]

Three years later the Supreme Court reached an apparently inconsistent conclusion in

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[43]391 U.S. at 70.

[44]*Id.* at 71.

[45]*Id.*

[46]*Id.* at 80.

Labine v. Vincent.[47] That case involved a Louisiana law which provided that legitimate children could inherit from their parents, naturalized or acknowledged children could only inherit under a will, but under testate succession, and illegitimate children could not inherit by will or in testate succession. A child who had been born out of wedlock, but acknowledged before a notary by her parents, petitioned to be appointed administrator of the estate of her father who had died in testate and had been declared his only heir. Justice Black wrote the majority opinion upholding the law. He emphasized federalism: "The power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of United States and the people of Louisiana to the legislature of that state."[48] While discrimination against illegitimates seemed unfair, the statute also discriminated against concubines as opposed to wives and collateral relations as opposed to ascending and descending relations. The task of drawing arbitrary lines, the Court concluded, was best left to the states. Justice Brennan, joined by Justices Douglas, White, and Marshall, dissented; they would not "uphold the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimate's parents, but also the helpless and innocent children."[49]

A year later, in *Weber v. Aetna Casualty Insurance Co.*,[50] the Court distinguished *Labine*. *Weber* involved a Louisiana Worker's Compensation scheme which gave preference in recovery of worker's compensation benefits to legitimate and statutorial acknowledged

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[47]401 U.S. 532 (1971).

[48]*Id.* at 538.

[49]*Id.* at 541.

[50]406 U.S. 164 (1972).

illegitimate children. Unacknowledged children were entitled to recover only to the extent that the claims of the preferred claimants did not exhaust the fund. Louisiana law did not permit a married man to acknowledge his children born to another woman. The decedent in Weber was married, but was not living with his wife (who was committed to a mental hospital.) Living in his home were his four legitimate children and one unacknowledged illegitimate child of the woman he was living with (who bore another illegitimate child posthumously). When the man died in an industrial accident, the unacknowledged children received nothing because the four legitimate children exhausted the worker's compensation benefits. On appeal, the Supremem Court held the Louisiana statute unconstitutional. Justice Powell, writing for the majority, distinguished *Labine* because in that case the deceased father could have simply insured that his illegitimate children would receive some of his estate by making a will or marrying their mother. In this case, the deceased could neither marry the mother of the illegitimate children nor legally acknowledge them under the Louisiana statute. He further declared:

> "The status of illegitimacy as expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of the infant is illogical and unjust period. Moreover, imposing disability on the illegitimate child is contrary to the basic concept of our system. The legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent."[51]

Justice Rehnquist dissented emphasizing federalism, i.e., that the Supreme Court should not scrutinize too rigorously state legislation dealing with such matters as recover of the death of

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[51] *Id.* at 175.

injured workers, intestate succession, etc.[52]

Gomez v. Perez,[53] involved a Texas law extending the right of paternal support to legitimate children but denied the right to paternal support to illegitimate children. In a Per Curiam opinion, the Supreme Court held that discrimination violated the Equal Protection Clause of the Fourteenth Amendment: "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded to children generally."[54]

In *Parham v. Hughes*,[55] the Court upheld a Georgia statute that denied the father of an illegitimate child a wrongful death claim. Justice Stewart authored a plurality opinion for himself, Chief Justice Burger, Rehnquist, and Stevens. The Georgia statute did not discriminate against illegitimate children, but penalized fathers who refused to legitimate their offspring. The difference in statutory treatment between unwed mothers and unwed fathers was justified by the difference in their circumstances: unwed mothers are easily identifiable, but there is always a question of proof to establish the paternity of an illegitimate child. *Glona* was distinguished because the Louisiana statute in that case excluded every mother of an illegitimate child, while the Georgia statute excludes only fathers who have not legitimated their children born out of wedlock. The fathers could legitimate unilaterally. Justice Powell concurred in the judgment emphasizing that the gender distinction was justifiable because of the difference in proof of paternity and maternity. Justice White with Brennan, Marshall, and Blackman dissented because the statute went further than necessary to achieve the purpose of avoiding problems of proof; in

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[52]*Id.* at 184.

[53]409 U.S. 535 (1973) .

[54]*Id.* at 538.

[55]421 U.S. 347 (1979).

the case at bar, paternity was undisputed. The presumption that the father of a child born out of wedlock will not suffer any loss by the child's death was too sweeping.

The latest two cases were heard in 1998 and in 2001, where the Supreme Court upheld on a strong deference-to-Congress grounds an immigration law that made illegitimate children born to U.S. mothers abroad citizens upon birth, but required illegitimate children born to U.S. fathers to apply for citizenship before majority.[56]

D. Prevent and Punish Domestic Violence

One of the two things that all legal systems are capable of doing best is to prevent and punish physical violence.[57] Because of increasing awareness of the scope and severity of the problem, laws focusing on preventing and punishing domestic violence have greatly increased in the past twenty years. All states prohibit and punish domestic violence with criminal laws,[58] most states have attempted to disarm domestic violence abusers,[59] all states provide simple proceedings for victims of domestic violence to obtain civil protection (protective orders),[60] and all states also take domestic violence into account in various civil proceedings (such as child

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[56]*See* Miller v. Albright, __ U.S. __ (1998); Nguyen and Boulais v. Immigration and Naturalization Service, __ U.S. __ (2001).

[57]The other is to enforce financial obligations.

[58]Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect – Their Legal Framework,* 31 Conn. L. Rev. 77, 106-07 (1998).

[59]Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 Cornell L. Rev. 822, 833 (2002).

[60]Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims,* 40 B.C. L. Rev. 937, ___ (1999).

custody determinations).[61]

The term "domestic violence" is commonly used in the United States to refer to "violence occurring in relationships between current or former partners."[62] Domestic violence involves a continuum of behaviors ranging from degrading remarks to economic exploitation, from beating to sexual abuse, from threats to homicide.[63] There is no standard definition of domestic violence in American law.[64] Each state has its own "domestic violence" law (sometimes several different statutes, with different definitions), and additionally there are several federal statutes defining and punishing "domestic violence."[65] Thus, domestic violence

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[61]Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence,* 69 Fordham L. Rev. 593, 699 n. 595 (2000).

[62]Jenny Rivera, *Preliminary Report: Availability of Domestic Violence Services for Latina Survivors in New York State*, 16 Buffalo Pub. Int. L.J. 1, 2 n.3 (1997-98), cited in Brooks Holland ,*Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide*, 8 Cardozo Women's L.J. 171, 171 (2002).

[63]Laurel Wheeler, Comments, *Mandatory Family Mediation and Domestic Violence,* 26 S. Ill. U. L.J. 559, 561 (2002), citing Barbara J. Hart, Domestic Violence Overview, in Manual for the 1st Judicial Circuit Family Violence Symposia § 1 (1998).

[64] Sharon G. Portwood, John Q. La Fond & Kelly E. Kinnison, *Social Science Contributions to the Study of Domestic Violencw Within the Law School Curriculum,* 47 Loy. L. Rev. 137, 148 (2001) ("no universally accepted characterization of 'domestic violence' exists.").

[65]The most widely-known federal statute is the Violence Against Women Act (VAWA), which incorporated the states' definitions of violence for its civil action provision, 42 U.S.C. § 13981(d)(2)(A) (1994). VAWA's ,main criminal provision, 18 U.S.C. § 2261, prohibits "interstate domestic violence" defined as "travel[ing] across a State line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence." Section 2262 prohibits interstate travel with the intent to violate a protective order. For purpose of the federal Gun Control Act of 1968, 18 U.S.C. § 922(g)(9) (2001), Congress defined domestic violence as violence "committed by a current or former spouse ... of the victim, by a person who is cohabitating with or has cohabitated with the victim as a spouse ... or by a person similarly situated to a spouse ... of the victim." This Act prohibits gun possession by domestic violence abusers, prohibits anyone subject to a domestic violence restraining order from possessing a gun in or affecting commerce, *Id.* § 922(g)(1)-(9) (2001), and also makes it unlawful for "any person

has many definitions.[66] For example, in Utah, the Cohabitant Abuse Procedures Act defines "domestic violence" as "any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another."[67] This law lists 16 separate offenses which if committed by one cohabitant against another constitutes "domestic violence."[68]

... who has been convicted of a misdemeanor crime of domestic violence" to possess a gun in or affecting commerce. *Id.* § 922(g)(8). A misdemeanor crime of domestic violence is defined as any misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" if the victim is the current or former spouse, domestic partner, parent, or guardian of the perpetrator." *Id.*§ 921 (a) (33) (A).

[66] "'Domestic violence,' of course, can entail many definitions, not all of which may be viewed as accurate." Holland, *supra* note 1, at 171 ("While there are many working definitions, no universally accepted characterization of 'domestic violence' exists.").

[67]Utah Code Annotated § 77-36-1 (2002).

[68]Utah Code Annotated § 77-36-1 (2002): "'Domestic violence' also means commission or attempt to commit, any of the following offenses by one cohabitant against another:

(a) aggravated assault, as described in Section 76-5-103;

(b) assault, as described in Section 76-5-102;

(c) criminal homicide, as described in Section 76-5-201;

(d) harassment, as described in Section 76-5-106;

(e) telephone harassment, as described in Section 76-9-201;

(f) kidnaping, child kidnaping, or aggravated kidnaping, as described in Sections 76-5-301, 76-5-301.1, and 76-5-302;

(g) mayhem, as described in Section 76-5-105;

(h) sexual offenses, as described in Title 76, Chapter 5, Part 4, and Title 76, Chapter 5a;

(i) stalking, as described in Section 76-5-106.5;

(j) unlawful detention, as described in Section 76-5-304;

(k) violation of a protective order or ex parte protective order, as described in Section 76-5-108;

(l) any offense against property described in Title 76, Chapter 6, Part 1, 2, or 3;

(m) possession of a deadly weapon with intent to assault, as described in Section 76-10-507;

(n) discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76-10-508;

(o) disorderly conduct, as defined in Section 76-9-102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with any of the

While all agree that domestic violence is a serious problem in the United States, estimates of the incidence and frequency of domestic violence vary widely, depending on how domestic violence is defined and who is making the estimate. Estimates of the number of American couples who experience some form of domestic violence each year vary from 1.5 million to 8.7 million.[69] One of the better sources, The National Institutes of Justice, recently reported that 1.5% of women and .9 % of men were physically assaulted (including rapes) in the last 12 months by an intimate partner, and over their lifetime, approximately 25 % of all women and 7.6 % of all men report being assaulted by a current or former spouse, cohabiting partner or date.[70] Between 1992 and 1996, nearly one million incidents involving non-lethal physical violence were reported as occurring every year.[71] "The percentage of female murder victims

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domestic violence offenses otherwise described in this Subsection (2). Conviction of disorderly conduct as a domestic violence offense, in the manner described in this Subsection (2)(o), does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. Section 921, and is exempt from the provisions of the federal Firearms Act, 18 U.S.C.Section 921 et seq.; or

(p) child abuse as described in Section 76-5-109.1.

"Cohabitant" includes any emancipated person 16 years old or older who is or was the spouse, live-in partner, resided at the same residence as, relative of, parent-in-common with, or the victim. *Id.* § 77-36-1 (1), citing Utah Code Annotated § 30-6-1(2) (2002).

[69]*Compare* Murray A. Strauss & Richard J. Gelles, *How violent are American families? Estimates from the national family violence survey and other studies*, in Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families, 95-112 (M. A. Strauss & R.J. Gelles, eds. 1990) (estimating that 8.7 million couples experiencephysical aggression each year, and 3.4 million experience severe violence carrying high risk of injury) *with* Patricia Tjaden & Nancy Thoennes, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, Nat. Inst. of Justice, 2002, at iii, <http://www.ncjrs.org/pdffiles1/nij/181867.pdf> (estimating that 1.5 million women and 834,732 men are physically assaulted (including rapes) each year by an intimate partner).

[70]Tjaden & Thoennes, *supra,* at iii.

[71]Lawrence A. Greenfield, et al., Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends, Bureau of Justice Statistics Factbook (NCJ-167237) (U.S. Dep't. of Justice, Mar., 1998) cited in Portwood, La Fond & Kennison,

killed by intimate partners has remained at about 30% since 1976."[72] Women and children in "fragile families" are at greater risk of being victims of domestic violence or child abuse than children in intact families.

IV. How American Family Laws Have Harmed or Had Detrimental Impact Upon Fragile Families

[In this section I will review how American family laws have been slow to respond to the plight of fragile families, and have often provided inadequate and misguided "legal" solutions."]

V. How Strengthening the Culture of Marriage in Society and Marital Skills of Struggling Couples Helps Fragile Families

Government efforts to strengthen marriage are growing. For example, three states have enacted "covenant marriage" laws which require a stronger public commitment to marriage, require pre-marital counseling, require counseling to revive the marriage before divorce, and provide stricter grounds for divorce (essentially fault or one- or two-year separation).[73]

By 2001, at least eighteen states reportedly had enacted laws or established programs

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supra, note 6, at 147.

[72]Calle Marie Rennison & Sarah Welchans U.S. Dep't Justice, Intimate Partner Violence 1 (2000), cited in Melissa L. Tatum, *A Jurisdictional Quandry,* 90 Ky. L.J. 123, 127 (2001-02).

[73]*See generally* Alan J. Hawkins, *Reflections on Covenant Marriage*, The Family in America, Nov. 1998, at 1-8.

designed to strengthen marriage.[74] These include marital skills training programs, commissions to investigate how to support marriage, publicity to promote marriage, providing financial incentives to welfare recipients who marry, public marriage education programs, marriage license fee reduction for parties who have had premarital counseling, and setting state goals to reduce the rate of divorce.[75] Florida was one of the first when in 1998 the legislature passed a "Marriage Preservation and Preparation Act" requiring all high school students in the state to be given instruction in "marriage and relationship skills education," offering a reduction in the price of marriage licenses and waiver of the three-day waiting perioid to couples who undergo at least four hours of training in a "premarital preparation course," and requiring couples who file for divorce to attend a "Parent Education and Family Stabilization Course" addressing the legal and emotional impact of divorce on adults and children, financial responsibility, laws on child abuse or neglect and conflict resolution skills.[76]

Supporting and strengthening marriage is one of the hallmarks of President Bush's welfare reform marriage initiatives. For example, in a recent Presidential Proclamation (October 3, 2003) establishing marriage Protection Week, President Bush's declared that protection of

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[74]Cheryl Wetzstein, *Welfare Promotes Marriage*, Wash. Times, Septe. 16, 2001, available at <http://www.washingtontimes.com/national/20020916-9551968.htm> (viewed September 17, 2001) (copy in author's possession).

[75]*Id.* *See also* Fagan, *supra* note __ at 3, 8-11.

[76]Florida Stats. Ann. §§ 741.0305 (fee reduction); 741.04 (waiver of waiting period); 61.21 (parent education course); *see generally* Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 La. L. Rev. 64, 129-130 (1998) (citing Marriage Preparation and Preservation Act, ch. 98-403 (Fla. H.B. No. 1019) (2d Reg. Sess. 1998) (eff. Jan. 1, 1999) and noting that "another provision of the same legislation requires that a course in life management skills (1/2 credit), which would include among the other components marriage and relationship skill-based education, be taught to high school students as a graduation requirement," citing Fla. Stat. ch. 232.6 (eff. Jan. 1, 1999).); *see further* Wardle, *supra* note __.

marriage "is essential to the continued strength of our society," and that his administration is committed to "working to support the institution of marriage byhelping couples build successful marriages and be good parents."[77]

The Administration for Children and Families in the Department of Health and Human Services reports that the House welfare reauthorization bill (HR 4) includes funding for healthy marriage education and research totally over $200 million including matching grants for high school education on the value of marriage and relationship skills, marriage education skill development programs (including conflict resolution), pre-marital education for engaged couples, marriage enhancement programs, divorce reduction, marriage mentoring, etc..[78] The government policy to strengthen marriages is based on abundant research that shows that married couples acquire more wealth, reducing the chance that children will be raised in poverty, children raised in intact two-parent married households enjoy better physical health than children raised in other households, and marriage reduces the risk of domestic violence in the home.[79] The goal is "to help couples, who choose marriage for themselves, develop the skills and knowledge to form and sustain healthy marriages"[80]

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[77]Marriage Protection Week, 2003, By the President of the United States, A Proclamation, available at http://www.whitehouse.gov/news/releases/2003/10/print/20031003-12.html> (seen Oct. 7, 2003).

[78]U.S. Department of Health and Human Services, The Administration for Children and Families, *Healthy Marriage Matters to ACF*, available at <http://faq.acf.hhs.gov/cgi-bin/rightnow.cfg/php/enduser/std_adp.php?p_admin=1&p_faqid=703&p_created=1045142599>, (seen Oct. 6, 2003) (herein "Healthy Marriage").

[79]*Healthy Marriage*, *supra* note __.

[80]U.S. Department of Health and Human Services, The Administration for Children and Families, *Strengthening Healthy Marriages: A Compendium of Approaches*, at 2 available at <http://faq.acf.hhs.gov/cgi-bin/rightnow.cfg/php/enduser/std_adp.php?p_admin=1&p_faqid=703&p_created=1045142599> (draft August 2002), (seen Oct. 6, 2003) (herein "*Strengthening*

Some feminists object because they think it encourages women to become dependent upon men.[81] Some critics object that the fathers of single mothers' children often are poor providers, and abusive, and that pushing marriage may push some women into abusive, impoverished relationships.[82] Others charge that the marriage initiative promotes a stereotype of weak, male-dependent women who are defective because they are not married.[83] Some critics think it is the government trying to legislate and enforce religious morality.[84] Others object that it is getting government involved in the private affairs of its citizens.[85]

Supporters emphasize that the marriage initiative in welfare program is not coercive, and it is not a dating or marriage service; rather it provides an opportunity to those interested to take

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Compendium").

[81]Sarah Stewart Taylor, *Heated Debate on Welfare May Focus on Marriage*, Women's eNews, <http://www.womensenews.org/article.cfm/dyn/aid/467/context/archive> (seen Oct. 7, 2003). "It's a patriarchal sexist mentality to say that the cure for a poor mother's poverty is a father's income," says Gwendolyn Mink, a professor of political science at the University of California at Santa Cruz and author of a 1998 book on welfare reform, 'Welfare's End.' . . . 'It's making women dependent on men instead of doing other things that help women support their families.'" *Id.* "'The ideological underpinning of this is that to allow women to raise children on their own is a real threat to the patriarchy,' says Abramovitz." *Id.*

[82] "Women often have excellent reasons for not wanting to marry their former or current sex partners: The partners may not be particularly good wage earners and many may be abusive, violent or otherwise unfit parents." *Id.*

[83]"'Rather than address the problem, the government is reverting to trying to enforce a stereotype on women,'" she said. *Id.*

[84]"Some women say that's exactly what it is. 'This is a coercive act by the government,' says Mink. She adds that laws that promote heterosexual marriage discriminate against poor lesbian and gay parents." *Id.*

[85]* *See also* Marriage as Public Policy, available at <http://www.arches.uga.edu/~bbethany/> (Seen Oct. 7, 2003).

advantage of it. They point to an extensive survey of 2323 Oklahoma residents (including 300 Medicaid recipients) in 2002 that revealed that eighty-five percent of the population supported the government's effort to promote marriage and reduce divorce was "very good" or "good", and nearly three-fourths (72 percent) of the welfare recipients surveyed said they would consider going to relationship-education classes (six percent higher than the general population).[86] Supporters of the marriage initiative in welfare reform reject the claim that marriage is none of the business of government. "As Governor Keating of Oklahoma has said, '[W]hen you look at the consequences of divorce, the better question is: 'What business do we have not getting involved?' Good government has a critical interest in stable marriages."[87]

Patrick Fagan, a defender of the government's marriage initiative in welfare reform, writes:

> Although America has invested $8.4 trillion in social programs since the War on Poverty began in the 1960s, welfare dependency, juvenile crime, child abuse, school underachievement, drug abuse, suicide among children, and many other problems have increased. At the same time, federal and state governments still spend about $150 billion each year subsidizing single-parent families. This stands in stark contrast to the approximately $150 million they spend each year in an effort to reduce out-of-wedlock births and divorce--the two principal causes of single-parent families in America.

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[86]Cheryl Wetzstein, *Pro-marriage initiatives win enthusiastic survey support*, The Washington Times, July 12, 2002, available at <http://asp.washtimes.com/printarticle.asp?action=print&ArticleID=20020712-15065270> (seen October 7, 2003). Oklahoma Governor Keating had turned over up to $10 million in surplus state welfare funds to marrige-strengthening programs after learning that the sluggish economy and marital instability were connected.

[87]Fagan, *infra* note __, at __.

> In other words, for every $1,000 that government spends providing services to broken families, it spends $1 trying to stop family breakdown. All society receives in return for this lopsided "investment" is more of what it subsidizes--broken families, troubled children, and social problems.
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> . . . .
>
> Rather than throwing more funds at government programs that deal with the effects of family breakdown, federal and state officials should take steps to prevent family disintegration in the first place.[88]

He supports the marriage initiatve because:

> Social science literature is replete with robust findings on the harmful effects of broken families, particularly for children. Juvenile crime, abuse and violence, and lowered income are often associated in the research with single-parent families . . . . Children born out of wedlock have an increased risk of death in infancy, higher incidence of retarded cognitive and verbal development, and higher rates of drug addiction and out-of-wedlock pregnancy as teens. As adults, they have higher rates of divorce, work at lower-wage jobs, and abuse their children more often.
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> . . . .
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> Policymakers who hope to stop this societal fall must look instead at ways to reduce divorce and out-of-wedlock birth by strengthening marriage.[89]

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[88]Patrick F. Fagan, *Encouraging Marriage and Discouraging Divorce*, The Heritage Foundation, Policy Research & Analysis (March 26, 2001), available at <http://www.heritage.org/Research/Family/BG1421.cfm> (Seen Oct. 7, 2003).

[89]*Id.* at __.

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There is some early indication that the marriage initiatives (both private and government) may be having some positive effect on reducing single-parent childrearing.

The analysis of the National Survey of America's Families (a survey of 40,000 nationally representative families) done by Urban Institute scholars Gregory Acs and Sandi Nelson [found]: Between 1997 and 2002, the proportion of children under 6 living in intact married families actually increased. So did the proportion of all children in low-income households (the bottom quater) by close to 4 percent.

. . .

The less good news is that part of the shift away from single mothers was into cohabiting rather than married families. A study by Sara McLanahan and colleagues . . . suggests "children born to cohabiting mothers are reportedly more aggressive, more withdrawn, more anxious/depressive, and have more overall behavior problems at age 3 than children born to married parents." . . .[90]

There is additional evidence that strengthening marriage reduces the problems that afflice "fragile families." For instance, one way to prevent or reduce the incidence of domestic violence is to strengthen marriage skills. It is clear that couples who have learned the skills of conflict resolution are less likely to experience domestic violence and divorce than couples who have not developed those skills. The skills of conflict resolution and successfully living in marriage can be learned. Thus, marriage preparation programs, marriage education, and marital skill training

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[90]Maggie Gallagher, *Good News About Marriage,* Townhall.com <http://www.townhall.com/columnists/maggiegallagher/mg20030910.shtml> (seen Sept. 11, 2003).

programs appear to reduce domestic violence in vulnerable couples.

Scott Stanley, one of the leading researchers into marriage skill development attests: "There is some evidence of a primary preventative effect of PREP [Prevention and Relationship Enhancement Program - a marital skill development program] in lowering the likelihood of relationship aggression."[91] Likewise, another leading study in the field of marriage counseling and education reports that persons who participated in a preventative intervention program for couples planning marriage reported significantly lower instances of physical violence than couples who did not participate in any prevention program.[92] Because couples who have experienced violence during their pre-marital relations are at greatest risk of experiencing domestic violence during marriage,[93] teaching marriage preparation skills to such couples, in particular, may have a positive effect to reduce the risk and rate of domestic violence.[94] "[R]eviewers of the literature agree that marital therapy is effective, at least in the short term, in reducing marital conflict. In addition, . . . analysis of the efficacy of marital therapy for promoting martial stability indicates some long-term positive effects for reducing marital conflict and preventing divorce."[95] Marital and family therapy is reported to be "more

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[91]Scott M. Stanley, *Making a Case for Premarital Education,* 50 FAMILY RELATIONS 272, 277 (2001).

[92]Howard Markman, et al. , *Preventing Marital Distress Through Communication and Conflict Management Training: A 4- and 5-Year Follow Up,* 61 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY, 70, 74-75 (1993).

[93]Amy Holtsworth-Munroe, Howard Markman, et al., *The need for marital violence prevention efforts – A behavioral-cognitive secondary prevention program for engaged and newly married couples,* 4 APPLIED & PREVENTATIVE PSYCHOLOGY 77 (Spring, 1995).

[94]*Id.*

[95]James H. Bray & Ernest N. Jouriles, *Treatment of Marital Conflict and Prevention of Divorce,* 21 JOURNAL OF MARRIAGE AND FAMILY THERAPY 461, 470 (1995).

efficacious than standard and/or individual treatments" in overcoming some problems that may trigger domestic violence, including depressed outpatient women in distressed marriages, marital distress in general, alcoholism, and drug abuse.[96]

For example, the 4- and 5-year follow-up of couples trained in one marriage skill development program (Prevention and Relationship Enhancement Program, or PREP) revealed that couples who had received the training reported about one-fourth the level of physical violence than did comparable (control) couples who had not received the skills training.[97] Another study of the same marital skills program (PREP) showed that couples who had gone through the marital skills training studied three years later "showed a decrease in problem intensity over time, whereas control couples showed an increase."[98] Likewise, the control (untrained) couples "evidenced declines in levels of relationship quality, whereas [marital skills-trained] couples maintained or improved their already high level of functioning."[99] A study of couples with an alcoholic partner who received a behavioral marital therapy (BMT) program reported:

> The prevalence of husband-to-wife violence was significantly decreased in both the first year and the second year after the [therapy], as compared to the year

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[96]William M. Pinsof & Lyman C. Wynne, 21 JOURNAL OF MARRIAGE AND FAMILY THERAPY 585 (1995).

[97]Howard J. Markman, Mari Jo Renick, Frank J. Floyd, Scott M. Stanley & Mari Clements, *Preventing Marital Distress Through Communications and Conflict Management Training: A 4- and 5-Year Follow-Up*, 61 J. Consult. & Clin. Psych. 70, 74-75 (1993) (.39 compared to 1.53 mean yearly physical violence reported by couples with marital skills training and contol group).

98.Howard J. Markman, Frank J. Floyd, Scott M. Stanley & Rangar D. Storaasli, *Preventioni of Marital Distress: A Longitudinal Investigation*, 56 J. Consult. & Clin. Psych. 210, 215 (1988).

[99]*Id.* at 214.

> before [therapy]. The percentage of couples who experienced any violent act decreased from 61.3% in the year before BMT to 22.7% in the first year after BMT . . . and to 18.7% in the second year after BMT . . . . The percentage experience severe violence decreased from 24.0% in the year before BMT to 6.6% in the first year after BMT . . . and to 8.0% in the second year after BMT . . .[100]

Likewise, "[c]omparisons of verbal aggression in the first and second year after BMT for the alcoholic husbands showed that both the frequency of verbal aggression and the prevalance of clinically elevated verbal aggression declined significant . . . ."[101] Other studies suggest that "prevention programs may be useful, because early intervention may help prevent the continuation and escalation of physical aggression."[102] More than 100 studies "show that a wide variety of marriage-strengthening programs can reduce strife, improve communication, incrase parenting skills, increase stability, and enhance mari-2.3kAplinssn."

involve similar skills that can be learned and applied effectively within the mutual support system that we call marriage, these data provide some hope for fragile families who can and are able to marry.

Finally, the general public appears to support social efforts to strengthen marriage.[104] Public opinion surveys consistently report that Americans believe that divorce is too easy. For example, Washington Post/Kaiser/Harvard Survey Project American Values: 1998 National Survey of Americans on Values asked whether divorce should be easier, harder or same as it is; respondents saying that divorce should be harder outnumbered those thinking it should be easier nearly three-to-one, and outnumbered those thinking it should be the same or easier nearly two-to-one -- the highest percentage to say they thought divorce is too easy since the pollsters began charting responses to that question 30 years earlier, in 1968.[105] The same survey also reported that 50% of those surveyed believe that divorce is "not acceptable" when the couple has children (compared to 46% who believe that divorce is acceptable then).[106] While seventy-six percent of those polled agree in principle that divorce is acceptable at least sometimes, eighty percent of the respondents indicated that it was not acceptable at least sometimes.[107] A Time/CNN survey May 7-8, 1999, by Yankelovich Partners Inc also reported that fifty percent of those surveyed agreed that "it should be harder than it is not for married couples to get a divorce," while 61% agreed

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[104]*See generally* Lynn D. Wardle, *Divorce Reform at the Turn of the Millenium: Certainties and Possibilities,* 33 Fam. L. Q. 783 (1999).

[105]*See, e.g.,* Washington Post/Kaiser/Harvard Survey Project American Values: 1998 National Survey of Americans on Values at p. 7, Q12 (asked whether divorce should be easier, harder or same as it is response was: Easier 22, Harder 62, Same 11). <http://www.kff.org/archive/media/projects/values/values.pdf> (searched Aug 3, 1999).

[106]*Id.* at p.7, Q11.

[107]*Id.* at p. 4, Question 7.

that it should "be harder than it now is for couples with young children to get a divorce," and 64% agreed that people "should be required to take a marriage-education course before they can get a marriage license."[108] Thus, there is "widespread dissatisfaction with the current social and legal landscape of marriage and divorce . . . ."[109]

[108]Time/CNN Poll: Divorce, <http://patriot.net/~crouch/wash/timetable.htm> (searched July 31, 1999).

[109]Elizabeth Scott and Robert E. Scott, *Marriage As A Relational Contract*, 84 Va. L. Rev. 1225, 1226 (1998).

VI. Conclusion

From ancient times, care for the widows and the fatherless has been a primary standard of individual and social morality.[110] The existence in significant numbers of "fragile families" is an indication of some failure in American laws and social policies, including American family laws.

Many thoughtful critics have argued that America has gone too far in pursuit of liberty (radical individualism) at the expense of equality (community).[111] The truth is that the American legal system is a hybrid system, that it balances both equality interests and liberty interests.

There is a need for the traditional public-poverty-law approach to provide support for "fragile families." There also is a need for the traditional private (quasi-public) child support order and enforcement programs to provide for the economic needs of "fragile families." There clearly is a need to improve such legal claims, mechanisms and procedures.

However, there is more to the solution than just tried-and-failed traditional "legal"

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[110]Deuteronomy 24:20-21 (KJV)
20 When thou beatest thine olive tree, thou shalt not go over the boughs again: it shall be for the stranger, for the fatherless, and for the widow.
21 When thou gatherest the grapes of thy vineyard, thou shalt not glean [it] afterward: it shall be for the stranger, for the fatherless, and for the widow.
Psalms 82:3 (KJV)
3 Defend the poor and fatherless: do justice to the afflicted and needy.
Malachi 3:5 (KJV)
5 And I will come near to you to judgment; and I will be a swift witness against the sorcerers, and against the adulterers, and against false swearers, and against those that oppress the hireling in [his] wages, the widow, and the fatherless, and that turn aside the stranger [from his right], and fear not me, saith the LORD of hosts.

[111]*See generally*, Mary Ann Glendon, Abortion and Divorce in Western law *passim* (1987); Symposium: *Individualism and Communitarianism in Contemporary Legal System: Tensions and Accommodations* 1993 B.Y.U.L.Rev. 385-742.

procedures. The old axiom that "an ounce of prevention is worth a pound of cure" may provide wise guidances in considering how to address the problems of "fragile families." By helping vulnerable individuals and couples to better prepare for marriage, by providing accessible programs to help them develop marital skills, by providing access for those in trouble marriages to those who can teach skills of marital healing, communication, conflict avoidance and conflict resolution, by encouraging couples to find ways to resolve their difficulties without violence, without abuse, and without abandonment, the continual creation of "fragile families" may be reduced. By teaching the importance and benefits of marriage, by putting high social value upon undertaking, accepting and fulfilling marital responsibilities fewer "fragile families" may be created. By recreating a "marriage culture" in America, fewer vulnerable young individuals, couples and their children may be trapped in the quagmire of "fragile families." There should be a balanced, hybrid approach in public policy to responding to the crisis of "fragile families" in America.