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## ARTICLES

### SAYING “YES” BEFORE SAYING “I DO”: PREMARITAL SEX AND COHABITATION AS A PIECE OF THE DIVORCE PUZZLE

HELEN M. ALVARÉ\*

*Prom Night Specials!*

—Sign on Ocean City, New Jersey Hotel, June 2003

*And since Erlend had wrought her thus, [Kristin] felt herself grown so wholly his, she knew not how she should live away from him any more. She was to go from him now, but she could not understand that it should be so. . . . “You know not how much I deem it means for both of us, [he said,] that we should be wed with all honour.” “Then you should not have made me yours,” said Kristin.*

—Kristin Lavransdatter<sup>1</sup>

#### INTRODUCTION

The signs of the times for sex and marriage are very mixed in the United States today. There is more freedom to talk about human sexuality, and more opportunity for improving healthy sexual experience across the life span. The “double standard” for judging men and women is fading, and women’s sexual health and happiness have become more important. There are also signs of improvement in some of the signal problems resulting from decades of experimentation with long-established sexual norms. The United States is, for example, in a period of

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1. SIGRID UNDSET, KRISTIN LAVRANSDATTER: THE BRIDAL WREATH 130, 163 (Charles Archer & J.S. Scott, trans., 19th prtg. 1939).

stabilizing (though still high) rates of adolescent<sup>2</sup> sexual experience, pregnancies and births following several decades of sustained and visible public alarm over these phenomena. Yet at the same time, rates of births to unmarried mothers recently registered a rise, and the number of cohabiting couples continues to increase.<sup>3</sup>

On the marriage front, we are somewhere past the beginning of a movement to scale back the high divorce rates that have frightened and mystified us for the past several decades. A recent flurry of public and private proposals seek to bring the tools of psychology and the power of state encouragement to the task of preserving intact families, particularly for the sake of children. And research is proceeding apace about why couples divorce, what might be done about it, and the efficacy of different approaches.

More and more frequently, this research is demonstrating a correlation between premarital sex and cohabitation, and an increased risk for divorce.<sup>4</sup> In fact, one of the most robust set of correlates for divorce is premarital sex and cohabitation with partner(s) other than one's spouse. Researchers have not determined the precise mechanism for this correlation—the "why"—but have concluded that both premarital behaviors are associated with about a 33% increased likelihood of divorce<sup>5</sup> as compared with marriages which were not preceded by cohabitation, and up to a 166% increased likelihood of divorce for marriages in which the wife both had premarital sex with a man other than her husband and cohabited with him.<sup>6</sup>

These findings should be of current and substantial interest to policymakers and citizens concerned about divorce and its

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2. For economy of words, this article will use the words "adolescent" and "teenager" interchangeably save when a quoted source specifically uses them both. This precludes resort to the longer phrase "adolescents and teenagers" to describe the group of persons from puberty to majority age. According to *Merriam Webster's Collegiate Dictionary*, adolescence is the "period of life from puberty to maturity terminating legally at the age of majority." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 16 (10th ed. 1998).

3. Centers for Disease Control and Prevention, Dep't of Health and Human Servs., *Births: Preliminary Data for 2002*, NAT'L VITAL STAT. REP., June 25, 2003, at 3; Jason Fields & Lynne M. Casper, *America's Families and Living Arrangements*, in CURRENT POPULATION REPORTS 7, 12 (U.S. Census Bureau, U.S. Dep't of Commerce, Series P20-537, 2001).

4. See *infra* Section II.C.

5. Jay Teachman, *Premarital Sex, Premarital Cohabitation, and the Risk of Subsequent Marital Dissolution Among Women*, 65 J. MARRIAGE & FAM. 444, 450 (2003). Further discussion of the correlation is contained in Section II.C., *infra* and accompanying notes.

6. *Id.* at 453.

related problems. The practices of premarital sex and cohabitation are frequent, the latter is growing, and the scientific evidence of the relationship between these behaviors and divorce is consistently strong. It is also possible that this evidence might provide momentum to programs attempting to prevent adolescent sexual involvement, and might mitigate conflicts over approaches to adolescent sex education, by associating a widely shared goal—marital stability—with laws and policies concerning premarital sex. Still, the process of formulating a response to the correlation between premarital sexual choices and divorce is very likely to provoke controversy, given the apparently increasing strength in the United States of the notion that choices about sexual intimacy are intrinsically private, and the state may not intrude.

To the extent the state does act in the arena of sexual behavior, there are two likely ways in which it might respond to this correlation: first, by means of initiatives to "strengthen marriage"; and second, by means of laws and policies speaking in some way to the issues of premarital sex and/or cohabitation such as those concerning sex education, cohabitation, and the availability of contraception and abortion to unmarried teens. A look at the many current initiatives in the former area, however, uncovers little apparent awareness of this correlation. A look at the latter laws and policies reveals not only inattention, but the frequent communication of messages and values about premarital sex contrary to those associated with lasting marriages.

This Article will attempt a bridge between the subject of public and private responses to premarital sexual behavior and cohabitation, and responses to divorce. It will demonstrate how these responses are currently operating too separately, considering the interdependent importance of premarital sexual choices and marital happiness. It will also propose some solutions to this situation, and respond to the most likely objections to its proposals. Throughout, it will attempt to preserve "something old and something new": the goods of traditional sexual norms as well as the goods of modern research and ideals about marital and sexual health and happiness for men and women. It presumes that it is possible—in light of mounting and decisive evidence of the link between marital happiness and stability and the well-being of individuals and society—to move to a third stage in thinking about sex and marriage: beyond dismissing the possibility of human sexual desires before marriage; beyond a deep suspicion of marriage; and toward a sympathetic understanding of sexuality in the context of the overarching good of marriage.

The Article will proceed in the following manner: Section I will outline the "divorce problem" in the United States today. It will report trends in rates of divorce and the reasons for public dismay. Section II will describe Americans' current beliefs about, and practices of, premarital sex, and cohabitation. It will also describe current empirical knowledge about the relationship between both premarital sex and cohabitation, and divorce.

Section III outlines and characterizes current public and private responses to divorce, including some presently proposed by the United States Congress in the context of welfare reform. While applauding aspects of current efforts, it will note that new initiatives do not, for the most part, take sufficient advantage of the growing body of research linking premarital sex, cohabitation, and divorce.

Section IV describes the messages about premarital sex and cohabitation implicit in relevant laws and policies, including those in the areas of sex education, cohabitation, and minors' access both to contraception and to abortion. While finding some promising trends in abstinence programs, this Section also finds that laws and public policies concerning premarital sex and cohabitation not only regularly overlook the divorce correlation, but often effectively exacerbate it by accepting or encouraging habits and attitudes contrary to those necessary for a successful and enduring marriage according to a well-developed marriage literature.

Section V will recommend elements of a scheme to more visibly and effectively link the problems of premarital sex and cohabitation with divorce. It will offer specific recommendations as well as broad guidelines for future actions.

## I. THE DIVORCE PROBLEM

### A. *Rates*

An average consumer of popular media could hardly be faulted for believing that the United States is a nation filled wall-to-wall with bickering couples on their way to divorce court—or returning there yet again to continue a fight over custody of the children. It is America's "divorce problem" and it has become a commonly accepted fact about this nation, lamented in an automatic way.

Divorce rates began noticeably to rise in the late 1960s before leveling off in the 1980s; they then began a decline in the 1990s. In the late 1960s, divorce rates rose from 2.5 to 3.5 per 1000 members of the population, and increased to 5.2 per 1000 people in 1980. By 2001, the divorce rate had dropped to 4.0 per

1000 members of the population.<sup>7</sup> As to the numbers of divorces relative to the annual numbers of marriages, in 1970, this rate was about 33%, and by the mid-1980s, it was 50%.<sup>8</sup> The data for 2001 show 4.0 divorces for every 8.4 marriages annually, or an annual divorce rate of 47%.<sup>9</sup> The rates of divorce for second marriages are even higher, 60% as of 1997.<sup>10</sup>

The country's divorce problem has generated a veritable industry of therapies, research, scholarship, and public and private proposals directed to the stabilization and preservation of marriage. Before considering these, it is worth noting that the reflexive assumption made by this new industry—that divorce rates should be curbed—should provoke some surprise. After all, social trends show that fewer Americans are getting married;<sup>11</sup> more are cohabiting and even rearing children without the benefit of marriage,<sup>12</sup> but with increased state recognition;<sup>13</sup> Americans are marrying later and for a shorter percentage of their lives;<sup>14</sup> and the impetus toward homosexual marriage is gaining momentum.<sup>15</sup>

7. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 2002: THE NATIONAL DATA BOOK 59 tbl.66 (2002).

8. *Id.* See also Teresa Castro Martin & Larry Bumpass, *Recent Trends in Marital Disruption* 26 DEMOGRAPHY 37, 37 (1989).

9. Centers for Disease Control and Prevention, Dep't of Health & Human Servs., *Births, Marriages, Divorces and Deaths: Provisional Data for 2001*, NAT'L VITAL STAT. REP., Sept. 11, 2002, at 1. See also Peter Fraenkel & Howard Markman, *Preventing Marital Disorder*, in INNOVATIVE STRATEGIES FOR PROMOTING HEALTH AND MENTAL HEALTH ACROSS THE LIFE SPAN 245, 247 (Leonard A. Jason et al. eds., 2002).

10. DivorceMagazine.com, *U.S. Divorce Statistics*, at <http://www.divorce-mag.com/statistics/statsUS.shtml> (last visited Aug. 4, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

11. Marriage rates declined from 10 marriages per 1000 members of the population in 1986, to 8.8 per 1000 in 1996, and to 8.4 per 1000 in 2001. Centers for Disease Control and Prevention, *Births, Marriages, Divorces and Deaths: Provisional Data for 2001*, NAT'L VITAL STAT. REP., Sept. 11, 2002, at 1.

12. About 41% of cohabitant households have children present. Fields & Casper, *supra* note 3, at 13–14.

13. See generally Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001).

14. The median age for marriage is now 25 for females and 27 for males, up from 20 and 23, respectively, in 1970. Fields & Casper, *supra* note 3, at 9.

15. A July 2003 CBS News/*New York Times* poll showed 40% of Americans supported "gay marriage." CBS News/*New York Times* poll of July 13–27, 2003, The Polling Report, Inc., *Law and Civil Rights*, at <http://www.pollingreport.com/civil.htm> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

Yet the "cause of marriage" is generally affirmed, save occasionally in a few academic or media sources.<sup>16</sup> Professor Martha Albertson Fineman, for example, views society's preoccupation with the health of marriage as a social institution as a hindrance to our effectively tending to the "problems of dependency," particularly of children upon their parents, or to the issue of domestic violence.<sup>17</sup> Professor Harry Krause has defined "family values" as "concern[ing] the raising of children. I don't much care what consenting adults do for or to each other."<sup>18</sup> Still others use society's current preoccupation with marriage as an occasion to forward homosexual marriage.<sup>19</sup> And some even conclude that it is impossible to make generalizations about the desirability of marital stability given that "evaluations of goodness and badness depend upon the values of the observer."<sup>20</sup> Noted sociologist William Pinsof, for example, recommends that the sheer frequency of adults' choosing alternate forms of sexual unions today should lead us away from according lifelong marriage "normative" status, and move law and policy toward acceptance and even facilitation of whatever such unions adults might choose.<sup>21</sup>

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16. See Ellen Goodman, *Can Marriage Cure Poverty? Conservatives Now Welcome Government Social Engineering*, PITTSBURGH POST GAZETTE, Feb. 26, 2003, at A19, available at 2003 WL 3891872.

17. Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 246 (2001). See also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 229-30 (1995).

18. Harry D. Krause, "Family Values" and Family Law Reform, 9 J. CONTEMP. HEALTH L. & POL'Y 109, 110 (1992).

19. Robert Kuttner, *The Politics of Family*, AM. PROSPECT, Apr. 8, 2002, at 22, available at 2002 WL 7761389 ("For the fact is that most Americans (and most social scientists) believe children benefit from having two married parents. Many in the liberal camp, however, would qualify that proposition. . . . And if marriage is good for everyone else, why not open it to lesbians and gays?").

20. Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. OF MARRIAGE AND FAM. 1009, 1011 (2001) (noting existence of position).

21. William M. Pinsof, *The Death of "Till Death Us Do Part": The Transformation of Pair-Bonding in the 20th Century*, 41 FAM. PROCESS 135, 149 (2002). Pinsof argues that the frequency of divorce should lead us past our current crisis thinking to "thinking about it more neutrally and inquisitively." *Id.* at 136. He posits that the trend to define the post divorce family as a "'normal unit,' needs to be intensified and expanded." *Id.* at 136. Pinsof believes that as the next generation begins to consider "pair-bonding," they should feel free to choose the type of bond that "best fits who they are and where they want to go." *Id.* at 150. Pinsof's work appears mostly to overlook the substantial findings about the ill effects upon children and adults of divorce, the brevity of cohabitation relationships, and the sheer historical tenacity of the till-death-do-us-part marriage model. He relies heavily and instead on the historical fact that this marriage model descends to us from a time when shorter life expectancies effectively

Yet among Americans generally, polls and studies today report a continuing and strong attachment to the notion of lifelong marriage and recognition of the important role marriage plays in each individual's overall happiness.<sup>22</sup> Seventy-two percent of Americans call divorce a "major threat" to family values, versus 18% who label it a "minor" threat and 7% who say it is "not" a threat.<sup>23</sup> In the succinct words of noted sociologist Arland Thornton, summarizing relevant research from the 1990s: while adults express some pessimism about their actual chances for lifelong marriage,<sup>24</sup>

[b]oth young and old Americans place great emphasis on marriage and children and plan to devote much of their lives to children and spouses. This can be seen in the overwhelming importance that young people place on the significance of a good marriage and family life. The great majority of young people are both planning and expecting marriage. Americans overwhelmingly believe that marriage is a lifetime relationship that should not be terminated except under extreme circumstances. Young people today are also approaching the marriage decision with the expectation that they will stay married to the same person until death intervenes.<sup>25</sup>

The existence of this set of opinions means that Americans are apt to take very seriously new information about choices and

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ended marriages more quickly. Pinsof concludes then that: "From a psychological perspective, it is hard to imagine the value of defining any major social group that is not physically or emotionally harming itself or others as deviant or undesirable," *id.* at 151, imprecisely equating criticism of divorce and non-marital unions with derogation of the persons choosing them.

22. See generally Norval D. Glenn & Charles N. Weaver, *The Contribution of Marital Happiness to Global Happiness*, 43 J. MARRIAGE & FAM. 161 (1981) (concluding that Americans depend very heavily on their marriages for their psychological well-being).

23. See Public Agenda Online, *The Family: People's Chief Concerns*, at [http://www.publicagenda.org/issues/pcc\\_detail.cfm?issue\\_type=family&list=17](http://www.publicagenda.org/issues/pcc_detail.cfm?issue_type=family&list=17) (last visited Aug. 26, 2003) (citing Institute for Social Inquiry, Roper Center, University of Connecticut, 1997) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

24. As of 1998, about 63% of women and 56% of men believe it to be likely that they will actually stay married. See Thornton & Young-DeMarco, *supra* note 20, at 1030.

25. *Id.* at 1030. Thornton notes that recent trends are reversing declines that occurred before 1980 in people's beliefs that married people are happier. Among women, over 80% believe that a good marriage is "extremely important," and among men, the percentage is 70%. *Id.* at 1018. Seventy-three percent of women and 78% of men believe that marriage is for a lifetime. *Id.* at 1020.



behaviors—such as premarital sex and cohabitation—correlated with divorce, even if this information touches upon controversial ground.

### B. *Reasons for Concern*

In addition to knowing that Americans are worried about their divorce rates, it is important to understand why. Answers to this question tend to shape proposals to curb divorce. Judging from legal, popular and academic sources, the “why” of divorce worries seems to begin with children; much later it considers the ill effects of divorce upon society and upon individuals themselves.

Looking first at the worries for children, an enormous quantity and quality of research has concluded that the children of parents who divorce or never marry are more likely to be afflicted with emotional, academic, and economic problems,<sup>26</sup> beyond their adolescence, even into their twenties and thirties.<sup>27</sup> Moreover, while it was earlier surmised that these negative effects were largely due to diminished economic circumstances, one of the most widely respected scholars in this field, Sara MacLanahan, demonstrated to the satisfaction of experts on both sides of the political divide that “loss of economic resources accounts for about 50% of the disadvantages associated with single parenthood. Too little parental supervision and involvement and greater residential mobility account for most of the rest.”<sup>28</sup> These latter factors then include issues of parental authority, time for help with schoolwork, supervision of social activities and the maintenance of relationships with peers and the community.<sup>29</sup>

In addition to the humane concern for children’s happiness and success, there is the economic problem of who will support children if not two willing, on-site parents. Congressional findings preceding the 1996 welfare reform legislation—the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

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26. William A. Galston, *Causes of Declining Well-Being Among U.S. Children*, in *SEX, PREFERENCE AND FAMILY: ESSAYS ON LAW AND NATURE* 290, 301 (David M. Estlund & Martha C. Nussbaum eds., 1997).

27. JUDITH S. WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000). See also HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* 30–32 (5th ed. 2003).

28. Sara MacLanahan, *The Consequences of Single Motherhood*, in *SEX, PREFERENCE AND FAMILY: ESSAYS ON LAW AND NATURE* 306, 310 (David M. Estlund & Martha C. Nussbaum eds., 1997).

29. *Id.*

(PRWORA)<sup>30</sup>—made no secret of the fact that the government wants marriages to succeed, particularly among the poor, so that parents can continue to provide a steady stream of child support to their dependent children. The marriage provisions of the House-passed 2003 amendments to the 1996 PRWORA are even more child oriented.<sup>31</sup> They state plainly that welfare reform is intended to improve child well-being by increasing states' flexibility to design help for poor families, encourage two-parent families, and reduce out-of-wedlock childbearing.<sup>32</sup> This is distinguished from the less instrumental language of the 1996 act which did not include the introductory phrase "improve child well-being by. . . ."<sup>33</sup> President Bush has also characterized his support for the 2003 welfare reform amendments concerning marriage in the language of children's interests: "Strong marriages and stable families are incredibly good for children. And stable families should be the central goal of American welfare policy."<sup>34</sup>

It is not surprising that recent concerns about marriage are expressed as concern for children. The cause of children finds ready sympathy from liberals and conservatives alike.<sup>35</sup> Furthermore, when families fall apart, the state will expend a tremendous amount of money and time to promote the child's present and future best interests. In fact, one of the big family law "stories" of the last twenty years has been the extent of federal involvement in efforts directed towards collecting child support.<sup>36</sup>

Sometimes paired with the concern about the effects of divorce on children is the worry about the effects of divorce on society. Fewer intact families means not only fewer private resources for the care of children, but fewer private resources for vulnerable adults. A 2003 address by Pope John Paul II to the citizens of Croatia captured this increasingly widespread notion:

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30. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

31. See Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. § 601 (2003).

32. *Id.*

33. See 42 U.S.C. §601(a) (2000).

34. Cheryl Wetzstein, *Welfare Promotes Marriage*, WASH. TIMES, Sept 16, 2002, at A10 [hereinafter Wetzstein, *Welfare Promotes Marriage*].

35. Kuttner, *supra* note 19, at 27.

36. KRAUSE ET AL., *supra* note 27, at 27 ("Despite the tradition of federal noninvolvement, in recent years Congress has become involved in many aspects of family law. The lengthiest list of new federal laws is in the area of child support.").

"It must not be forgotten that in helping the family, we also help to resolve other important problems, such as providing assistance to the sick and the elderly, stopping the spread of crime and finding a remedy to drug use."<sup>37</sup> There are also the economic opportunity costs of divorce: the loss of the wealth-building effects of intact families for individuals, communities, and thus the nation as a whole.<sup>38</sup> Less tangible but no less important are the social roles of families diminished by divorce, including families' toleration for, and even nurturance of, individual strengths, families' tendency to act against excessive state intervention,<sup>39</sup> and their forming of citizens fit for a democracy.<sup>40</sup>

Closely related to these social roles are the roles families play in the expression and maintenance of a variety of social and civic virtues. Here, I have in mind the types of commonly admired virtues that are called forth by a life lived among a group of mutually interdependent persons of varying ages and capacities. These can include the traits of fidelity or promise-keeping, especially in difficult times. These, in turn, are closely related to the virtue of adaptability. Good family life also encourages self-sacrificing love, and love for those who are different from you. As to these latter virtues, Professor Milton Regan has opined that marriage helps preserve, as against rampant individualism, an "alternative vision that emphasizes the relational self."<sup>41</sup> While no doubt, some of these traits will have detractors and each has its rational limits,<sup>42</sup> most would likely agree as a matter of experi-

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37. Pope John Paul II, *The Family Requires Special Consideration*, Homily in Rijeka, Croatia (June 8, 2003), at <http://www.zenit.org/english/visualizza.phtml?sid=36863> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

38. DAVID POPENOE & BARBARA DEFOE WHITEHEAD, *THE NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2002: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 4 (2002).

39. Professor Bruce Hafen opines that marriage not only checks government power, but acts as a protector of "pluralistic liberty through the power of its own relational permanency." Bruce Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 482 (1983).

40. William A. Galston, *The Reinstitutionalization of Marriage: Political Theory and Public Policy*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* 271, 273 (David Popenoe et al. eds., 1996).

41. Milton C. Regan, Jr., *Postmodern Family Law: Toward a New Model of Status*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* 159 (David Popenoe et al. eds., 1996).

42. Some feminist scholars in particular are appropriately wary of calls for self-sacrificing love directed solely towards women. See, e.g., Mary Stewart Van Leeuwen, *Re-Inventing the Ties that Bind: Feminism and the Family at the Close of the Twentieth Century*, in *RELIGION, FEMINISM AND THE FAMILY* 33, 33-34 (Anne Carr & Mary Stewart van Leeuwen eds., 1996).

ence and intuition that these qualities are good to have in a family, a community, and a nation.<sup>43</sup> Certainly we appreciate such qualities in one another, and specifically call for them on many occasions. Private and public voices call parents to be self-sacrificing. Health experts urge that adaptability to change is part of successful mental and physical development. Civil rights and other humanitarian groups call for individuals and groups to look past differences—in race, religion, sex, age, and sexual preference—to our common humanity, and to learn to love in and through our differences. No doubt it is easier to affirm these quintessentially human virtues in theory, and to recommend their practice generally, than it is to practice them in the confines of our own marriages and homes. But this is exactly the point: because of its unique qualities among adult human relationships, and due to the specific, external social expectations associated with it, marriage, like no other relationship, offers us constant, even relentless opportunities to build and strengthen these virtues.<sup>44</sup> Marriage is specific to one other person; it is not about good will toward others not intimately experienced. Marriage is still socially and often religiously expected to be permanent—in order to stay faithful, free, and happy through life's inevitable changes, one must adapt, grow, and even occasionally learn to see with new eyes. Marriage brings ever-changing mutual dependencies—physically, emotionally, and financially—requiring each spouse to learn to give and to take, to sacrifice, and to receive sacrificial gifts.<sup>45</sup> Lived according to social hopes and ideals, therefore, marriage is an important source of, and witness to, virtues widely desired in American society and beyond. Its demise threatens the flourishing of these virtues.

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43. According to Professor John Witte, the social science data is still missing a "careful demonstration and documentation of the second core insight of the Western tradition—that marriage is good not only for the couple and their children, but also for the broader civic communities of which they are a part." John Witte Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1070 (2001).

44. One marriage scholar has written that the "belief, trust and caring love absolutely necessary for happiness" are "learned and carried on in families first and more than in any other relationship." THEODORE MACKIN, *WHAT IS MARRIAGE?* 328 (1982).

45. This was captured literally in O. Henry's enduring story, *The Gift of the Magi*, in which a husband and wife each sell their most precious possession in order to buy the other a lavish gift. They discover that the material gifts have become useless—each has just sold what her or she must have in order to use the other's gift—while at the same time each recognizes the receipt of the greater gift of the other's self-sacrificial love. O. HENRY [William Sidney Porter], *THE GIFT OF THE MAGI* (Aladdin Paperbacks 1997).

A final reason expressed for public dismay over high divorce rates is the effect of divorce on the well-being of adults. Before describing the adult-focused concerns though, one should note the irony of American's professed elevation of children's interests over adult concerns. Our American culture is experiencing later marriages,<sup>46</sup> historically low birthrates,<sup>47</sup> high abortion rates,<sup>48</sup> 400,000 "frozen embryos" in storage,<sup>49</sup> and record creation of more or less temporary sexual unions resulting in high numbers of children at risk for the difficulties that arise in one-parent homes. There is also the fact of endless media images celebrating unbridled adult sexual choices. In sum, it is a culture in which human sexuality appears to be viewed through the lens of adult desires, with the unwanted consequences of "disease" and "pregnancy" spoken of in the same breath. That children's interests are so often ignored in fact raises the uncomfortable question whether children's well-being is an actual grass-roots concern. Could it rather be that state and federal bureaucracies have taken the initiative with this message, given that they will be charged with supporting children if parents do not? This is not to contradict the absolute necessity of protecting children's interests, or the sincerity of all who adopt this banner. Rather, it is intended to suggest a strategy for future efforts to curb marital breakdown among Americans. In addition to pointing to how divorce harms children, such efforts could more vocally and directly address adult interests versus treating adult marital stability more as an instrument for assuring children's well-being. Professor Milton Regan has proposed helpful reasons why law and society ought to care about the failures of even childless marriages, on behalf of the costs to the adults involved. He writes that marriage enables individuals to live more freely and with greater opportunities for authentic self-realization because of the

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46. See note 14.

47. Centers for Disease Control and Prevention, Dep't of Health and Human Servs., *Births: Preliminary Data for 2002*, NAT'L VITAL STAT. REP., June 25, 2003, at 3. The birthrate for the U.S. as of 2002 was below the "replacement level" of 2.1 children per woman, to 2.0 children per woman or 13.9 births per 1000 people. This was a 17% decline from 1990 and the lowest level since data collection started in 1909.

48. As of 2001, there were about 1.3 million abortions annually in the United States. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 6 (2003).

49. About 400,000 frozen human embryos are in storage, according to a study conducted by the Society for Assisted Reproductive Technology and the Rand Corporation. See David I. Hoffman, et al., *Cryopreserved Embryos in the United States and their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1063 (2003).

way it requires persons to choose to make and keep commitments. The external standards provided by the institution of marriage help individuals attain a stable, realized sense of self over time, in the midst of a mobile and changing world—a sense which allows them to live in greater individual freedom.<sup>50</sup> Interestingly, nearly a century ago during another period of rapid family change, social and family commentator G.K. Chesterton expressed much the same sentiment when he wrote: "But the main point is the world *outside* the home is now under a rigid discipline and routine and it is only inside the home that there is really a place for individuality and liberty."<sup>51</sup> The differences between families, Chesterton wrote, "are to the advantage of variety, of personality, of the potentialities of the mind of man, or in other words, of life, liberty and the pursuit of happiness."<sup>52</sup>

In sum, even prescinding from the cause of children, good marriages and domestic lives are extremely important. They are a critical element of adult happiness and freedom, when this freedom is rightly and maturely understood as it is actually experienced in the world—as a stable and relational experience and not solely as the experience of a series of individual choices. Section V of this Article will pursue the matter of more visibly and effectively linking the problems of premarital sex and cohabitation with divorce in ways that appeal not just to sympathy for children, but also to adults' aspirations about freedom, love, sex, and marriage.

Despite the relatively less attention given the adult fallout of divorce, there is certainly literature on the subject. It received a brief, but substantially increased visibility with the 2000 publication of *The Case for Marriage*<sup>53</sup> in which the authors marshaled a robust and deep array of empirical findings to the effect that marriage has substantial positive psychological, physical, sexual, and economic benefits for spouses. Others have independently and empirically reported the adult costs of divorce, including diminished physical health,<sup>54</sup> mental health,<sup>55</sup> and work produc-

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50. Milton Regan, Jr., *Law, Marriage and Intimate Commitment*, 9 VA. J. SOC. POL'Y & L. 116, 130 (2001).

51. G.K. CHESTERTON, *The Drift from Domesticity*, in BRAVE NEW FAMILY: G.K. CHESTERTON ON MEN & WOMEN, CHILDREN, SEX, DIVORCE, MARRIAGE & THE FAMILY 53, 58 (Alvaro de Silva ed., 1990).

52. *Id.* at 61.

53. LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY* (2000).

54. Bonnie Burman & Gayla Margolin, *Analysis of the Association Between Marital Relations and Health Problems: An Interactional Perspective*, 112 PSYCHOL. BULL. 39 (1992).

tivity.<sup>56</sup> These types of findings appear to have become generally accepted wisdom about marriage.<sup>57</sup>

Given the widespread effects of marital failure just described, it is no surprise that there exists real momentum, at both the private and public levels, to develop effective responses. Before looking at possible responses, however, it should be noted at the beginning that it is easy to lose focus on the substantive matter of "what works" amidst sometimes loud discourse on some of the more "hot-button" topics in the area, e.g., whether the government is inappropriately using marriage as an anti-poverty tool, and whether new family forms and the possibility of homosexual marriage make any marriage movement a quixotic venture. This Article does not address either of these questions despite their significance. Rather, it will propose means to strengthen marriage which might respond to the increasingly visible connection between premarital sex, cohabitation, and divorce.

## II. CAN TESTING THE WATERS TEST A MARRIAGE?

### A. *Introduction: Why Marriages Fail*

Responding to the various problems caused by divorce, researchers have produced a tremendous volume of literature on the causes of divorce. Very usefully, for nonscientists, sociologists have categorized the "types" of factors associated with individuals and couples who divorce. The language of "factors associated" is used to cover several different types of matters associated with divorce: "causes," of divorce, a term which is self-explanatory; and "correlates," a term requiring more explanation. In the language of sociological research, a "correlate" of divorce indicates

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55. See W. Kim Halford & Ruth Bouma, *Individual Psychopathology and Marital Distress*, in CLINICAL HANDBOOK OF MARRIAGE AND COUPLES INTERVENTIONS 291 (W. Kim Halford and Howard J. Markaman eds., 1998); see also Melinda S. Forthofer, *The Associations Between Psychological Disorder and Marital Transitions in a U.S. National Sample*, 57 DISSERTATION ABSTRACTS INT'L 4946-A (1997).

56. Melinda S. Forthofer et al., *Associations Between Marital Distress and Work Loss in a National Sample*, 58 J. MARRIAGE & FAM. 597, 597 (1996).

57. See, e.g., Americans for Divorce Reform, *Divorce—Economic Effects on Divorced People (and Crime)*, at <http://www.divorcereform.org/econ.html> (last visited Aug. 6, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); see also THE INSTITUTE FOR AMERICAN VALUES, *THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES* (2000) [hereinafter *THE MARRIAGE MOVEMENT*], at <http://www.marriagemovement.org/html/report.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Among the costs of divorce, it cites not only the costs to children but also the large taxpayer costs, and the failures of social and human capital, as well as of human hopes of permanence. *Id.*

a fact, attitude, or behavior, the presence of which is statistically predictive of divorce. It is a "phenomenon that accompanies another phenomenon . . . and is related in some way to it."<sup>58</sup> When the correlate is present in a spouse or couple, in other words, the likelihood that the marriage will end in divorce is increased. Some correlates of divorce will also play a role in causing the divorce; these are also causes. But some correlates may not be causes; rather, it may be the case that similar factors leading to the existence of the correlate also predict a tendency to divorce. For example, as will be further discussed immediately below in Section II(C), it is not perfectly clear whether cohabitation is a correlate alone, or a correlate and a cause of divorce. Uncertainty remains because it may be the case, for example, that an underlying factor like the willingness to defy social conventions determines both cohabitation and divorce, rather than the experience of cohabitation affecting a person in such a way as to cause a decision for divorce. Only in the latter case is cohabitation a true cause of divorce. In the former case, it is a correlate but not a cause.

Studies find that the presence of several factors, attitudes, or behaviors correlate with higher divorce rates. Broadly speaking, these can be grouped under the headings of: (1) demographic factors; (2) behaviors before marriage; and (3) behaviors after marriage. Demographic factors are "stable attributes of persons, their backgrounds, or their contexts—those not readily amenable or impossible to prevent or change through short term interventions."<sup>59</sup> Those correlated with divorce include parental divorce and parental attitudes toward divorce, growing up in a single-parent family, youth at marriage, poverty, growing up in a neighborhood with poverty and high unemployment, and a tendency to view life negatively. The presence of each of these is correlated with higher divorce rates.<sup>60</sup>

Behaviors before and after marriage which affect divorce are not stable attributes, but dynamic variables, which, sociologists

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58. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 260 (10th ed. 1998).

59. Fraenkel & Markman, *supra* note 9, at 250.

60. *Id.* (citing Benjamin R. Karney & Thomas N. Bradbury, *Attributions in Marriage: State or Trait? A Growth Curve Analysis*, 78 J. PERSONALITY & SOC. PSYCHOL. 295 (2000) (reviewing 115 longitudinal studies)). See also Paige D. Martin et al., *Adolescent Premarital Sexual Activity, Cohabitation and Attitudes Toward Marriage*, 36 ADOLESCENCE 601, 602–03 (2001) (citing Paul R. Amato, *Explaining the Intergenerational Transmission of Divorce*, 58 J. MARRIAGE & FAM. 628 (1996)).



assert, can be changed through "acquisition of skills and ideas."<sup>61</sup> Indicators in the category of premarital "behaviors" correlated with divorce include premarital sexual relationships,<sup>62</sup> premarital cohabitation,<sup>63</sup> premarital pregnancy,<sup>64</sup> and premarital child-birth.<sup>65</sup> Much more will be said about practices and beliefs in these areas immediately below.

Post-marriage behaviors associated with divorce, according to a substantial body of literature, include "foremost," the quality and patterns of communicating, including emotional exchanges about problems.<sup>66</sup> Problematic patterns in these areas—includ-

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61. Fraenkel & Markman, *supra* note 9, at 250 (citing Scott M. Stanley & Howard J. Markman, *Strengthening Marriages and Preventing Divorce: New Directions in Prevention Research*, 44 FAM. REL. 392 (1995)).

62. See Teachman, *supra* note 5, at 444; see also Tim B. Heaton, *Factors Contributing to Increasing Marital Stability in the United States*, 23 J. FAM. ISSUES 392, 394–95 (2002) (arguing that premarital sex detracts from marital stability). But see Joan Kahn & Kathryn London, *Premarital Sex and the Risk of Divorce*, 53 J. MARRIAGE & FAM. 845, 846–55 (1991) (noting the correlation, but ascribing it to attitudes of persons likely to engage in premarital sex in the first place, versus the effect of the sexual experience itself). But see Tim B. Heaton, *Comment on "Premarital Sex and the Risk of Divorce,"* 55 J. MARRIAGE & FAM. 240 (1993) (claiming that Kahn and London violated accepted rules of statistical inference to reach their conclusions on causation, and that very little of the association between premarital sex and marital instability can be accounted for by shared characteristics of individuals who choose both premarital sex and divorce).

63. See Teachman, *supra* note 5; Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913 (1991).

64. Centers for Disease Control, *Cohabitation, Marriage, Divorce and Remarriage in the United States*, 23 VITAL & HEALTH STATISTICS 1, 61 tbl. 25 (July 2002). See also Susan G. Timmer & Terri L. Orbuch, *The Links Between Premarital Parenthood, Meanings of Marriage and Marriage Outcomes*, 50 FAM. RELATIONS 178 (2001).

65. Daniel J. Lichter et al., *Is Marriage a Panacea? Union Formation Among Economically Disadvantaged Unwed Mothers*, 50 SOC. PROBS. 60, 63 (2003). Premarital births have a negative impact on the stability of marriages. Such births also reduce the likelihood that the mother will marry at all; 87% of women generally marry before 40, but only 70% of premarital child-bearers, who then stay married for a shorter time. Ascribe News, *Government's Marriage Promotion Policies Likely to Fall Short Without Emphasis on Reducing Unwed Childbearing*, Study Suggests, May 6, 2003, available at 2003 WL 5500941.

66. See Coalition for Marriage, Family and Couples Education, Home Page, at <http://www.smartmarriages.com/continued.html> ("The difference between successful and unsuccessful couples is *how* they handle their differences.") (emphasis in original) (last visited Oct. 17, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); see also Sybil Carrere & John Mordechai Gottman, *Predicting Divorce Among Newlyweds from the First Three Minutes of a Marital Conflict Discussion*, 38 FAM. PROCESS 293 (Fall 1999) (finding that it is possible to predict marital outcomes over a six-year period from the first three minutes of a marital conflict discussion); Ronald M. Rogge & Thomas N. Bradbury, *Recent Advances in the Prediction of Marital Outcomes*, in PREVENTIVE APPROACHES IN COUPLES THERAPY 331, 354 (Rony Berger & Mo Therese

ing the practices of contempt, criticism, defensiveness, withdrawal, stonewalling, negative escalation, and negatively interpreting statements of a partner—are closely associated with higher rates of divorce.<sup>67</sup> Also indicative of divorce are the post-marriage attitudes and practices of "low commitment"<sup>68</sup> or weak sense of "we-ness,"<sup>69</sup> factors of particular interest to researchers hypothesizing that premarital sex and cohabitation may impair these. Infidelity, drinking, and drug use are also robust predictors of divorce.<sup>70</sup>

This Article will treat the question of pre-marriage behaviors including premarital sex and cohabitation, their relationship to divorce, and therefore to policies to avoid divorce. These specific correlates of divorce were selected for treatment for four reasons. First, as Section II(B) below demonstrates, both premarital sex and cohabitation are widespread behaviors; the latter is increasing, and the former is only beginning to decrease marginally. Second, the literature on their correlation with divorce is substantial and authoritative. Third, there is real legal and social momentum right now to strengthen marriages, witnessed by the sheer amount of federal and state marriage strengthening initia-

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Hannah eds., 1999) (finding that communication predicted marital satisfaction among couples who remained married).

67. Rogge & Bradbury, *supra* note 66, at 354.

68. See Press Release, Oklahoma Marriage Initiative, Ground Breaking Study Shows Support for Marriage Education (July 11, 2002), *available at* <http://www.okmarriage.org/press071102.htm> (based on a survey of 2300 Oklahoma adults conducted by the Oklahoma State University Bureau for Social Research entitled, "Marriage in Oklahoma," released July 2002) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

69. Susan G. Timmer & Terri L. Orbuch, *The Links Between Premarital Parenthood, Meanings of Marriage, and Marital Outcomes*, 50 FAM. REL. 178, 184 (2001). Also, a sense of "we-ness," also called a sense of the "dyadic" rewards of marriage, such as "companionship, compatibility, common interests, or good partnership" predicts a greater marital stability. *Id.* at 180. On the other hand, "couples who did not mention dyadic advantages in their meanings appeared to be at greatest risk for divorce. Thus, we argue in favor of education or treatment goals that build a sense of partnership and enhance the positive qualities of the marital relationship." *Id.* at 184. See also Sybil Carrere et al., *Predicting Marital Stability and Divorce in Newlywed Couples*, 14 J. OF FAM. PSYCH. 42 (Mar. 2000) (stating the variable of "perceived marital bond" was significant in predicting which couples would marry or divorce within five years of marriage).

70. Paul R. Amato & Stacy J. Rogers, *A Longitudinal Study of Marital Problems and Subsequent Divorce*, 59 J. OF MARRIAGE & FAM. 612, 618 (1997). Whether husbands or wives report marital infidelity on the part of the other, this increases the couples' odds of divorce; between 1980 and 1992, infidelity increased the probability of divorce by a far greater percentage than any other factor, save when wives reported to researchers their own abuse of drugs or alcohol. *Id.*

tives and funding, the number of private activists, academic and therapeutic groups speaking out, and the amount of public attention devoted to the subject.<sup>71</sup> This momentum, combined with the strength of the literature, may be enough to help Americans and policymakers overcome their likely hesitancy to tread in the area of private sexual choices. Nevertheless, recent debates concerning new marriage policies pay little to no attention to these correlates. Fourth, current laws and policies related to the practices of premarital sex and cohabitation seem unaware of their importance for marriage. They are too narrowly focused on the outcomes of disease and pregnancy versus the marital effects of these choices, and too often even encourage behaviors and attitudes contrary to those linked with marital stability.

### B. *Beliefs and Practice: Premarital Sex and Cohabitation*

#### 1. Premarital Sex, Practices, and Beliefs

In the United States today, despite majority disapproval of premarital sex (especially teenage premarital sex), premarital sex occurs very frequently. Following the 1960s, the incidence of teen premarital sexual experience "rose dramatically."<sup>72</sup> In May 2003, the Kaiser Family Foundation reported, to much public dismay, that 37% of those between the ages of fifteen and seventeen reported having had intercourse, as did 80% of those between the ages of eighteen and twenty-four.<sup>73</sup>

As a result, the U.S. has the highest rates of teen pregnancy and births in the western industrialized world.<sup>74</sup> Teen pregnancy rates rose a stunning 24% between 1986 and 1991. But from 1991 to 2001, they declined by 31% for those between the ages of fifteen and nineteen, and 38% for girls aged fifteen to seven-

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71. See, e.g., WILLIAM J. DOHERTY ET AL., *WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* (2002); see also GLENN T. STANTON, *WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY* (1997).

72. Sandra L. Caron & Eilean G. Moskey, *Changes Over Time in Teenage Sexual Relationships: Comparing the High School Class of 1950, 1975, and 2000*, 37 *ADOLESCENCE* 515, 515 (2002).

73. KAISER FAMILY FOUNDATION, *NATIONAL SURVEY OF ADOLESCENTS AND YOUNG ADULTS: SEXUAL HEALTH KNOWLEDGE, ATTITUDES AND EXPERIENCES* 14 tbl. 9 (2003), available at [http://www.kff.org/content/2003/3218/kff\\_youth\\_survey\\_Final\\_04\\_03.pdf](http://www.kff.org/content/2003/3218/kff_youth_survey_Final_04_03.pdf) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

74. NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, *WHATEVER HAPPENED TO CHILDHOOD? THE PROBLEM OF TEEN PREGNANCY IN THE UNITED STATES* (1997).

teen.<sup>75</sup> Births to unmarried teenagers have declined for four consecutive years, from 1999 to 2002.<sup>76</sup> Teen abortion rates are also declining. According to the Alan Guttmacher Institute, the research affiliate for the largest abortion provider in the nation, Planned Parenthood, between 1980 and 2000, annual abortion rates for women aged fifteen to forty-four dropped from twenty-nine per 1000 women, to twenty-seven in 1990, to twenty-one in 2000.<sup>77</sup> The decline of both teen births and abortions indicates that the rate of teen sexual experience is also declining. Indeed, according to the Center for Disease Control's 2001 Youth Risk Behavior Surveillance System Report,<sup>78</sup> 54.4% of high schoolers reported themselves to be virgins, up from 45.7% in 1990.<sup>79</sup> Still, studies of ever-married women indicate that only about 25% of them had experienced their first sex with their husbands.<sup>80</sup>

As for American beliefs on the morality of premarital sex, interestingly, sociologists would place the United States today in the cluster of "sexually conservative" countries along with Ireland, Northern Ireland, and Poland. In the United States, 29% say premarital sex is "always" wrong, 12% say "almost always," and 18% say "only sometimes," versus 41% who say it is "not at all" wrong.<sup>81</sup> Another survey, measuring opinion by gender, reports

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75. Nat'l Campaign to Prevent Teen Pregnancy, General Facts and Stats, at <http://www.teenpregnancy.org/resources/data/genfact.asp> (last visited Aug. 3, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

76. Nat'l Ctr. for Health Statistics, *Births: Preliminary Data for 2002*, 51 NAT'L VITAL STAT. REP., June 25, 2003, at 1; see also Cheryl Wetzstein, *Birthrate Figures for Nation, Teens Hit Record Lows*, WASH. TIMES, June 26, 2003, at A1.

77. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 8 (Feb. 2003).

78. This study asks 13,601 teens about their sexual behavior. See Cheryl Wetzstein, *Reported Number of Teen Virgins Rises: Survey Polled 13,601 High Schoolers*, WASH. TIMES, July 22, 2002, at A3 [hereinafter Wetzstein, *Reported Number*].

79. Ctr. for Disease Control, *Youth Risk Behavior Surveillance—United States, 2001*, SURVEILLANCE SUMMARIES, June 28, 2002, at 15 (asking 13,601 teens about such things as substance abuse, sexual behavior, and physical activity). See also Wetzstein, *Reported Number*, *supra* note 78, at A3 (quoting Dr. Kristin Moore of Child Trends, Inc. that the Youth Risk Behavior Surveillance System is conducted every two years by the Centers for Disease Control and Prevention and is one of two primary vehicles tracking teen sexual behavior). The National Survey of Family Growth, which was last reported in 1995, is expected to make a report in a year or two, and will include information about teens who are not in high school.

80. Teachman, *supra* note 5, at 446.

81. Eric D. Widmer et al., *Attitudes Toward Nonmarital Sex in 24 Countries*, 35 J. SEX RES. 349, 351 tbl.1 (1998).

that only 40% of female and 30% (up from 20% in 1985) of male Americans believe that premarital sex is always or almost always wrong.<sup>82</sup> This contrasts with a European country such as Great Britain in which only 12% believe premarital sex is "always" wrong and 70% say it is "not at all" wrong.<sup>83</sup> When the question focuses on teens, however, this same survey reports that 91% of women and 85% of men say that teen sex is always or almost always wrong.<sup>84</sup> As for teenagers' opinions, a respected study by the National Campaign to Prevent Teen Pregnancy reports that 55% of teen boys and 72% of teen girls say they wish they had waited longer to have sex. Fifty-eight percent of older teens (ages seventeen to nineteen) say the same. And another 78% of teens say teens should not be sexually active.<sup>85</sup>

## 2. Cohabitation: Practice and Beliefs

Cohabitant living is also receiving a good deal of attention in recent years due to its increasing practice. In the 2000 Census, unmarried couples totaled 3.8 million American households.<sup>86</sup> If present trends continued, there would be not one cohabiting couple for every twelve married couples, but one per seven married couples by the year 2010.<sup>87</sup> Between 1970 and 1990, the proportion of marriages preceded by cohabitation increased from 11% to 50%.<sup>88</sup> The median duration of cohabitation is 1.3 years, with 40% of cohabitants breaking up within one year. One-third of these relationships last two years and only one in ten lasts five years.<sup>89</sup> About 41% of cohabiting households include minor children.<sup>90</sup>

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82. Thornton & Young-DeMarco, *supra* note 20, at 1022 tbl.4.

83. Widmer et al., *supra* note 81, at 351.

84. Thornton & Young-DeMarco, *supra* note 20, at 1023. The authors note that it's possible that this survey reflects that the young are becoming more conservative, but scientists are not certain there is yet sufficient evidence to predict a trend. *Id.*

85. NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, NOT JUST ANOTHER THING TO DO 4 (2000), available at <http://www.teenpregnancy.org/resources/data/pdf/teenwant.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

86. Fields & Casper, *supra* note 3, at 12.

87. *A Few Facts on Cohabitation*, at <http://www.members.aol.com/cohabiting/facts.htm> (last visited Sept. 27, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

88. Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 914 (1991).

89. Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615, 620 (1989).

90. Fields & Casper, *supra* note 3, at 13.

People are cohabiting for a number of reasons, most prominently, to test relationships and presumably to avoid divorce. This turns out to be a great irony considering the correlation between cohabitation and divorce to be discussed immediately below. *Monitoring the Future*,<sup>91</sup> a national survey carried on by the Institute for Social Research at the University of Michigan since 1976, reports that young people affirmatively endorse living together before marriage as a good idea "to see if they really get along."<sup>92</sup> This finding rings true with researchers, who point out that the parents of these young people are more often divorced and more likely to cohabit soon after separation from their spouse.<sup>93</sup> The combination of parental conflict and divorce, then parental cohabitation, can easily lead the children to undertake more risky sexual behaviors<sup>94</sup> and to believe that "cohabitation is a necessity" as an "attempt to determine compatibility."<sup>95</sup> *Monitoring the Future* also reported that while over 80% of girls and 73% of boys state that having a good marriage and family life is extremely important to them, only 28% of the girls and 38% of the boys believe that they will have a happier life if they choose marriage over cohabitation or the single life.<sup>96</sup> This survey also reported in 1998 that 59% of women and 67% of men agreed that cohabitation is a good idea on the grounds that people are "doing their own thing and not affecting anyone else."<sup>97</sup>

### C. Correlation of Premarital Sex, Cohabitation and Divorce

It is not contested today that there exist strong correlations between the practices of premarital sex and/or cohabitation and divorce. Studies on this subject were conducted several decades ago, but even more detailed and conclusive findings have become available recently.

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91. This survey has been performed by the Survey Research Center of the University of Michigan annually since 1976 and uses a nationally representative sample of high school seniors answering a self-administered questionnaire in the classroom during school hours. Thornton & Young-DeMarco, *supra* note 20, at 1020.

92. *Id.* at 1031.

93. Paige D. Martin et al., *Adolescent Premarital Sexual Activity, Cohabitation and Attitudes Toward Marriage*, 36 *ADOLESCENCE* 601, 602 (2001).

94. See E. Mavis Hetherington et al., *What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children's Adjustment*, 53 *AM. PSYCHOL.* 167, 169 (1998) (sexual activity at an earlier age).

95. Martin et al., *supra* note 93, at 602.

96. POPENOE & WHITEHEAD, *supra* note 38, at 30-31.

97. Thornton & Young-DeMarco, *supra* note 20, at 1024 tbl. 5, app. at 1036.

In 1991, an important study suggested a “relatively strong positive relationship between premarital sex and divorce.”<sup>98</sup> A very recent study exploring the question in greater detail concluded that women who have had their first sexual experience before marriage are about 34% more likely than women who did not “to experience marital dissolution at each point in their marriages.”<sup>99</sup> This increased risk is not present with women whose only premarital sex involved the man they married.<sup>100</sup> For each year premarital sex is delayed, the risk of marital disruption is reduced by about 8%.<sup>101</sup> A very recent analysis, based upon the results of the National Survey of Family Growth, documents that there is an almost perfectly inverse relationship between earlier ages at first intercourse and the stability of a woman’s marriage. Defining “stability” as being “married at the time of the survey” and “in that same marriage for more than five years,” this study showed that sexually active women over thirty who had first sex at ages fifteen to sixteen were only 41% likely to be in stable marriages, while women who had delayed sex to ages twenty-one to twenty-two or even twenty-six were respectively 66.6% and 68.7% likely to be in such marriages.<sup>102</sup> Among the same group of women, those who had first sex with their husbands were 80.4% likely to be in stable marriages. Those with even one other sexual partner were 53.6% likely, and women with six to ten partners were only 17% likely to be in a stable marriage at the time of the survey.<sup>103</sup>

An associated risk of premarital sex, premarital childbirth, is also correlated with an increased risk of divorce. The odds of divorce for a premarital parent are twice those of marital parents.<sup>104</sup>

As for the relationship between cohabitation and divorce, it is considered, in statistical parlance, “[o]ne of the most robust predictors of marital dissolution that has appeared in the litera-

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98. Teachman, *supra* note 5, at 445, citing Kahn & London, *supra* note 62. The correlation between premarital sex and marital disruption was reported as early as 1974. See Robert Athanasiou & Richard Sarkin, *Premarital Sexual Behavior and Postmarital Adjustment*, 3 ARCHIVES OF SEXUAL BEHAV. 207 (1974).

99. Teachman, *supra* note 5, at 450.

100. *Id.* at 452.

101. *Id.* at 450.

102. ROBERT E. RECTOR ET AL., THE HARMFUL EFFECTS OF EARLY SEXUAL ACTIVITY AND MULTIPLE SEXUAL PARTNERS AMONG WOMEN: A BOOK OF CHARTS 10 (2003), available at <http://www.heritage.org> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

103. *Id.* at 18.

104. Timmer & Orbuch, *supra* note 69, at 182.

ture."<sup>105</sup> "[V]irtually all studies of the relationship between premarital cohabitation and divorce have found a positive link."<sup>106</sup> The probability of a married couple separating or divorcing within ten years of the marriage is 33% higher for those who lived together before marriage than for those who did not.<sup>107</sup> The latest research indicates that this risk is lower for women who have cohabited before marriage only with their husbands, and who never had premarital sex with another man.<sup>108</sup> The 33% figure, in other words, is likely reflecting the fact that women who lived with their husbands before marriage were also more likely to have cohabited with another man and/or had premarital sex with a man not their husband before marriage.

Looking at both premarital sex and cohabitation, the most recent study found that as compared to women who did not have premarital sex or cohabit before marriage, the increased risk for divorce for women who had the following behaviors is as follows: (1) for women who had premarital sex and cohabited with a man other than her husband, 166%; and (2) for women who cohabited twice and had their first premarital sex with someone other than her husband, 109%.<sup>109</sup> Note that this data is about women's behavior only. The data concerning male behaviors and divorce risk will not be available until after analysis of the data collected in 2002 during Round Six of the National Survey of Family Growth. It remains possible, then, that divorce risks for marriages where both parties had premarital sex and cohabited with others before marriage might be even higher.<sup>110</sup>

Concerning both cohabitation and premarital sex, researchers regularly note that they are uncertain about the reasons for the correlation between these behaviors and divorce. The divorce results may be the effect of alterations of attitudes, values, and relationship skills due to the actual experiences of cohabitation or premarital sex. But they may also flow from pre-existing characteristics of individuals which determine both their willingness to engage in premarital sex and/or cohabitation and

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105. Teachman, *supra* note 5, at 445.

106. *Id.*

107. Bumpass & Sweet, *supra* note 89, at 621. See also Alfred DeMaris & K.Vaninadha Rao, *Premarital Cohabitation and Subsequent Marital Stability in the United States: A Reassessment*, 54 J. MARRIAGE & FAM. 178 (1992) (reviewing ten cohabitation studies and concluding that persons who cohabit before marriage have lower marital quality and higher risk of dissolution at any given point in the marriage).

108. See Teachman, *supra* note 5, at 453.

109. *Id.* at 452-53.

110. *Id.*



their willingness to divorce.<sup>111</sup> When considering interventions to address this correlation, this uncertainty regarding the mechanism of causation means that experts, including teachers seeking to reduce the divorce risks of these behaviors, have to identify and address not just the behavior itself, but the reasoning that might first attract a person to premarital sex or cohabitation and then divorce. Researchers have tried to identify some characteristics of cohabitators generally, in the event that it is these characteristics, and not the experience of cohabitation and premarital sex, that lead to greater divorce rates. Some possibly relevant characteristics of cohabitants proposed include: less hesitancy to break social conventions about sex and marriage, less commitment to marriage as a permanent institution, acceptance of divorce as an "appropriate" means to end a poor relationship, an emphasis on "individualism," and poor relationship and communications skills.<sup>112</sup> Also, during cohabitation, cohabitators are more than twice as likely to be unfaithful than married persons.<sup>113</sup> As to characteristics associated with choosing premarital sex, researchers have proposed that it may evidence less commitment to the idea of a permanent relationship with one person.<sup>114</sup>

While the mechanism(s) by which they operate are unclear, it is clear that premarital sex and cohabitation are regularly associated with divorce. This is important information, coming at a time when millions of people are engaged in these behaviors, and may even believe that they are improving their chances for a long and happy marriage. Yet this information is relatively easy to obtain as opposed to the answer to the question, "what to do about it?" There are two types of laws and policies which might

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111. *Id.* at 454; see also Kahn & London, *supra* note 62, at 853. The authors conclude that "prior attitudes [traditional versus nontraditional attitudes toward marriage], and not the sexual activity *per se*, . . . influences the risk of divorce." But see Zheng Wu, *Premarital Cohabitation and the Timing of First Marriage*, 36 CAN. REV. OF SOC. & ANTHROPOLOGY 109, 123 (1999) (suggesting that the experience of cohabiting "itself has a causal influence on marriage timing because the experience may change a person's views of marriage and reduce their commitment to the institution").

112. See Elizabeth Thomson & Ugo Collella, *Cohabitation and Marital Stability: Quality or Commitment?*, 54 J. MARRIAGE & FAM. 259 (1992) (13,000 adults studied); Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668 (1996).

113. Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48 (2000). Thereafter, during marriage, women who previously cohabited are 3.3 times more likely to have a secondary sex partner than are non-cohabitators. Renata Forste & Koray Tanfer, *Sexual Exclusivity Among Dating, Cohabiting and Married Women*, 58 J. MARRIAGE & FAM. 33, 43 (1996).

114. See, e.g., Teachman, *supra* note 5, at 446.

attempt to address this harder question: recent marriage initiatives, discussed in Section III, *infra*, and laws and policies about premarital sex and cohabitation, including sex education, contraception, abortion, and the legal status of cohabitation, covered in Section IV, *infra*. In neither of these areas is there adequate use made of the available information about these correlates of divorce. And in the case of the latter laws and policies, some may even encourage attitudes and practices which contribute to marital instability. It is to current marriage strengthening initiatives that we now turn.

### III. AND MARRIAGE THERAPIST MAKES THREE: CURRENT INITIATIVES TO STRENGTHEN MARRIAGE

#### A. *Introduction*

During the 1996 welfare reform debate and again during the 2003 debate over amendments to welfare reform, public discourse about government intervention to strengthen marriage focused on the incentives and opportunities offered to poor Americans to marry and stay married. While this is a topic that merits sustained and diverse debate, it is not the subject of this Article. This Article intends to look at the content—not the audiences—of current government and private initiatives in light of the emerging research about the link between divorce, premarital sex, and cohabitation. On the other hand, in order to cover the most important state and private initiatives, it makes sense first to set out those offered via the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>115</sup> They are important because it was the debate over the disproportionate amount of divorce and unwed parenting among the poor that provided the impetus not only for welfare reform, but also for recent public awareness of the problematic effects of divorce and single parenting generally on children, adults, individuals, and society as a whole. It is also the case that PRWORA allowed the states to spend money on all citizens—not just the needy—for its goals of reducing out-of-wedlock pregnancy and maintaining two-parent families.<sup>116</sup> Finally,

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115. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in various sections of 42 U.S.C.).

116. See 42 U.S.C. § 601 (2000). See also ADMIN. FOR CHILD. AND FAM., U.S. DEP'T OF HEALTH AND HUM. SERV., HELPING FAMILIES ACHIEVE SELF SUFFICIENCY: A GUIDE ON FUNDING SERVICES FOR CHILDREN AND FAMILIES THROUGH THE TANF PROGRAM (last modified 12/21/1999), available at <http://www.acf.hhs.gov/programs/ofa/funds2.htm> (on file with the Notre Dame Journal of Law, Ethics & Public Policy) ("Neither [the purpose of reducing out-of-wedlock pregnancies]

welfare reform initiatives are important because they allow federal and state money to flow to a host of sometimes preexisting marriage-strengthening programs available to anyone, giving these programs more life and visibility.

The following summary of the most widely known initiatives will begin, therefore, with those created as a result of the PRWORA and its currently proposed amendments,<sup>117</sup> then list additional marriage initiatives proposed outside the context of welfare reform. Following this listing is a characterization of all of these marriage initiatives according to their object (e.g., maintaining child support, making divorce harder to get, etc.), their timing, and their content. Given the great number of proposals and programs presently existing, these are overlapping but helpful ways to attain a broad understanding of how public and private actors are presently responding to the weaknesses of marriage.

#### B. *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*

The first congressional finding in the Personal Responsibility and Work Opportunity Reconciliation Act states that “[m]arriage is the foundation of a successful society.”<sup>118</sup> The second states that marriage is the “essential institution . . . which promotes the interests of children.”<sup>119</sup> The remainder of the findings consists for the most part of a listing of specific harms children suffer when growing up in a single parent home. Consequently, among the four major purposes of PRWORA, Congress listed the “formation and maintenance of two parent families,”<sup>120</sup> specifically encouraging states to be “flexible”<sup>121</sup> in designing approaches for encouraging these. In accordance with this purpose, from 1996 to today, some states have used savings accrued from reducing their expenditures on poor families—Temporary Assistance for Needy Families (TANF)—on marriage and other two-parent family initiatives, as described below.<sup>122</sup>

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nor the following purpose [of achieving two-parent families] is limited to needy families or individuals.”).

117. See Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. (2003); S. 367, 108th Cong. (2003).

118. § 101(1), 110 Stat. at 2110.

119. § 101(2), 110 Stat. at 2110.

120. 42 U.S.C. § 601(a)(4) (2000).

121. *Id.* § 601(a).

122. See Courtney Jarchow & Jack Tweedie, *Welfare and Wedding Vows: Some Legislators Want to Use Welfare Funds to Strengthen Marriages; Others Have Questions*, 29 ST. LEGISLATURES 24, 24–25 (Apr. 2003), available at 2003 WL 8909268.

Proposed amendments to PRWORA by the House of Representatives in 2003 would offer states not merely leftover savings, but large matching grants specifically to promote marriage. These proposals have the vocal support of President Bush<sup>123</sup> and could be used for the following kinds of marriage promotion activities: advertising campaigns on the value of marriage and the skills needed to increase marital stability and health; high school programs on the "value of marriage, relationship skills and budgeting;" premarital education; marriage skills training such as parenting skills, financial management, conflict resolution, and job and career advancement for unmarried pregnant women and unmarried expectant fathers; marriage enhancement and marriage skills training for married couples; and, divorce reduction and relationship skills training, marriage mentoring, and programs to reduce the disincentives to marriage in means-tested aid programs, if offered in conjunction with any of these activities.<sup>124</sup> The House bill further offered 100 million federal dollars annually, for five consecutive years, to be matched by state funds for a total of 1.5 billion dollars for healthy marriage promotion activities.<sup>125</sup>

Section 117 of the 2003 House bill would further amend PRWORA by authorizing the Secretary of the Department of Health and Human Services to create a new fatherhood program. This program also encourages marriage promotion, specifically mentioning the ability of religious entities to participate.<sup>126</sup> Additional monies are appropriated for this.

Finally, the House bill would authorize the Secretary to spend an additional twenty million dollars annually, from 2004 to 2008, for projects of "national significance" to be developed by the Secretary and offered to interested states. These programs would "promote and support marriage and responsible fatherhood" by collecting, evaluating, and developing information about successful strategies, and making them available to interested states.<sup>127</sup>

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123. Wetzstein, *Welfare Promotes Marriage*, *supra* note 34, at A13 (quoting President Bush as saying that "[s]trong marriages and stable families are incredibly good for children. And stable families should be the central goal of American welfare policy.").

124. See Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. § 103(b) (2003).

125. *Id.*

126. *Id.* § 119(b).

127. *Id.*

Another federal law, the Promoting Safe and Stable Families Act,<sup>128</sup> provides grants to states in part for services that "strengthen parental relationships and promote healthy marriages."<sup>129</sup> In accordance with this act, the Administration for Children and Families of the Department of Health and Human Services (HHS) is soliciting projects in 2003 for pro-marriage programs to be administered by child welfare agencies in partnership with "experienced marriage education providers which may be public or private non-profit organizations including community-based organizations."<sup>130</sup> The programs, primarily marriage education and skills training, must be research-based. HHS contemplates funding ten projects in 2003 at the rate of \$200,000 each, per year of operation.<sup>131</sup>

What, then, have the states done for marriage, either on their own or with federal encouragement? Since 1996, a number of states have turned their attention to marriage, some by using TANF savings, and some by passing additional types of marriage legislation. Arizona was the first to use one million dollars of TANF savings as of April 2000 to develop and promote marriage skills courses, engaged couples' education, a marriage handbook, vouchers for low income parents to attend marriage skills training, and the establishment of a Marriage and Communications Skills Commission to oversee the entire program. Faith-based organizations were also permitted to offer marriage programs.<sup>132</sup>

Oklahoma, with perhaps the best known marriage programs, started its Oklahoma Marriage Initiative (OMI) with ten million dollars of TANF savings, following a 1998 study demonstrating a relationship between the state's high divorce rate and its slow economic growth.<sup>133</sup> According to the manager of the

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128. 42 U.S.C.A. § 629a (2003) (Pub. L. No. 103-66, § 13711(a) (2), 107 Stat. 649 (1993), *amended by* Pub. L. No. 105-89, § 305(a)(1), (2), (b)(3)(A), 111 Stat. 2130 (1997); Pub. L. No. 107-133, § 101, 115 Stat. 2414 (2002)).

129. 42 U.S.C.A. § 629a(a) (2) (2003).

130. See Child. Bureau, Dep't of Health and Hum. Serv., Application Package to Request Financial Assistance, Program Announcement No. CB-2003-01, 135 (2003), *available at* <http://www.acf.hhs.gov/programs/cb/funding/cb2003/index.htm> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

131. *Id.* at 143.

132. Jarchow & Tweedie, *supra* note 122, at 28; Wetzstein, *Welfare Promotes Marriage*, *supra* note 34, at A10 & A13.

133. TANF Reauthorization: *Building Stronger Families: Hearing Before the Senate Finance Comm.*, 107th Cong. 115 (2002) (statement of Howard H. Hendrick, Sec'y of Health and Human Servs. and Exec. Dir. Okla. Dep't Human Servs., Okla.).

OMI website, the initiative is devoted to "improv[ing] the well-being of children by strengthening marriages."<sup>134</sup> OMI supports "relationship rallies," featuring marriage professionals,<sup>135</sup> marriage resource centers, relationship curricula for schools, marital communications and conflict skills training, parent training, a marriage mentoring program, improved state data-collection, partnering with faith-based and charitable groups to strengthen families, and the reduction (to \$5.00) of the marriage license fee for couples taking a marriage preparation course.<sup>136</sup>

Utah also took advantage of TANF savings to create a Governor's Commission on Marriage and to develop a marriage education video, marriage enrichment materials, an annual marriage conference, and vouchers for low income persons to receive marriage education.<sup>137</sup> West Virginia pays outright cash bonuses (\$100 per month) to married couples on welfare in order to reduce prior economic disadvantages of marriage for this group. Michigan is also using TANF savings for marriage promotion, allowing its Family Independence Agency to issue grants to groups developing family formation programs.<sup>138</sup>

Outside of the context of poverty and welfare assistance, there are many other initiatives directed toward strengthening marriages and reducing divorce, including the following:

1. Covenant marriage laws in three states, which generally provide marrying couples the option of choosing a form of marriage that is both more difficult to enter (e.g., with premarital counseling requirements) and more difficult to exit (e.g., longer waiting periods, the demonstration of fault grounds).<sup>139</sup> Additional states have proposed but not yet passed covenant marriage legislation.<sup>140</sup>

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134. Jarchow & Tweedie, *supra* note 122, at 25. See also Oklahoma Marriage Initiative, at <http://www.okmarriage.org/about.htm> (last visited Sept. 15, 2003) (describing the initiative as "dedicated to reducing the state's divorce rate, strengthening families, and reducing dependence on government support.") (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

135. Goodman, *supra* note 16, at A19.

136. Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 68 (2003).

137. Wetzstein, *Welfare Promotes Marriage*, *supra* note 34, at A13; Spaht, *supra* note 136, at 57.

138. Wetzstein, *Welfare Promotes Marriage*, *supra* note 34, at A13.

139. LA. REV. STAT. ANN. §§ 9-272, 9-309 (West 1997); ARIZ. REV. STAT. § 625-901-04 (West 2000); ARK. CODE ANN. § 9-11-801-08 (Michie 2002).

140. See Am. for Divorce Reform, Covenant Marriage Legislation, Covenant Marriage Links, at <http://www.divorcereform.org/cov.html> (last visited Aug. 4, 2003) (stating that in 2003 alone, at least five states proposed covenant

2. Discounted marriage license fees and sometimes reduced waiting periods for licenses<sup>141</sup> in exchange for attendance at premarital counseling.<sup>142</sup>
3. Marriage skills courses for engaged couples.<sup>143</sup>
4. Handbooks for couples seeking marriage licenses.<sup>144</sup>
5. High school "relationship skills" classes.<sup>145</sup>

marriage legislation, including Indiana, Texas, Utah, Virginia, and West Virginia) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

141. See FLA. STAT. ANN. §§ 741.0305(3)(a)(1-6), 741.04 (West Supp. 2003).

142. See *id.*; MD. CODE ANN., FAM. LAW § 2-404.1 (1999); MINN. STAT. ANN. § 517.08 (West Supp. 2003) (stating that premarital inventory, communications instruction, and conflict resolution training can be provided by secular or religious experts).

143. See Jarchow & Tweedie, *supra* note 122, at 1.

144. *Id.* Florida's handbook for couples seeking a marriage license, FLA. BAR ASS'N, FAMILY LAW HANDBOOK (1999), available at [http://www.flclerks.com/PDF/2000\\_2001%20pdfs/7-99%20VERSION%20Family%20Law%20Handbook.pdf](http://www.flclerks.com/PDF/2000_2001%20pdfs/7-99%20VERSION%20Family%20Law%20Handbook.pdf) (on file with the Notre Dame Journal of Law, Ethics & Public Policy), drafted by the family law section of the Florida Bar Association, reads: "[T]he State of Florida has an interest in your marriage. . . . in whether the marriage is long lasting and happy," *id.* at 1, but "staying happily married is hard," *id.* at 2, so couples should know "how to work through the rough spots," a skill that can be learned, *id.* It also contains information about the legal nature of the marriage contract, the laws affecting the economic interests of a couple during marriage and at divorce and death, child custody issues on divorce and community resources. *Id.* at 1-8; see also TEX. FAM. CODE ANN. § 2.014 (Vernon Supp. 2003).

145. See FLA. STAT. ANN. § 1003.43(1)(i) (West Supp. 2003) (requiring high schools to offer a one-half credit course in life-management skills including among the other components, marriage and other relationships skills-based education). Katherine Shaw Spaht notes that this curricula seems to ignore the benefits of marriage, possibly treating all "relationships" as of equal value. Its conflict resolution program also seems to apply to all types of relationships. See Spaht, *supra* note 136, at 17 n.329.

In the Florida Department of Education's July 2003 Curriculum Framework for the program, "Life Management Skills," the purpose of the course is described as to

assist students with the development of essential life management skills to enhance the quality of personal and family life. The content includes, but is not limited to: positive emotional, social, physical, and intellectual development of the individual; marriage and skill based relationship education; family and community; consumer education; nutrition, cardiopulmonary resuscitation (CPR); hazards of smoking; substance education; breast and testicular self-examination and cancer detection; human immunodeficiency virus (HIV), acquired immunodeficiency syndrome (AIDS) and other sexually transmitted diseases; and benefits of sexual abstinence, and consequences of teenage pregnancy.

FLA. DEP'T OF EDUC., CURRICULUM FRAMEWORK, LIFE MANAGEMENT SKILLS 43 (2003), available at <http://www.firn.edu/doe/dwdframe/fc/pdf/20010600.pdf>

6. State commissions charged with recommending ways that states and cities can promote strong marriages.<sup>146</sup>
7. New funds for premarital education research.<sup>147</sup>

Efforts to pass similar bills in additional states proceeded apace in 2003,<sup>148</sup> as did additional initiatives to strengthen marriage. These included bills making divorce harder to get,<sup>149</sup> perhaps especially for couples with children.<sup>150</sup> To date, these bills have not become law.<sup>151</sup> A related development, apparently not to strengthen marriage, but to ease its effects on children, is the imposition of a "parent education" prerequisite for parents seeking a divorce. This education consists of approximately four hours of instruction on parenting in the best interests of children following a divorce. It has largely replaced the process previously used by family courts to actually prevent divorce, mandatory con-

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(last visited Oct. 27, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

The intended outcomes are described as

skills contributing to positive emotional development and effective marriage and personal relationships, recogniz[ing] the effects of human immunodeficiency virus (HIV) acquired immunodeficiency syndrome and sexually transmitted diseases (STDs) and assess[ing] their consequences on the individual, family and community, and identify[ing] the benefits of sexual abstinence and consequences of teenage pregnancy.

*Id.*

The Florida statute was amended by the Act of June 9, 2003, sec. 11, § 1003.43, 2003 FLA. SESS. LAW. SERV. 2003-391 (West) to add to the required course the content of parenting skills, and to remove the requirement that it be taught as a requirement to 9th and 10th grade students.

146. See Bruce Alpert, *Louisiana Joins U.S. Marriage Push: Stability Called Key to Health, Happiness*, TIMES-PICAYUNE (New Orleans), April 7, 2002, at A1, available at 2002 WL 3092505 (Louisiana was motivated by its 46% out-of-wedlock birthrate.); Spaht, *supra* note 136, at 57. South Carolina created its Attorney General's Commission on Marriage and Family to study how state policies affect families, to recommend tax incentives for marriage, and media campaigns on the value for couples of premarital education.

147. See, e.g., TEX. FAM. CODE ANN. § 2.014 (Vernon Supp. 2003).

148. See Am. for Divorce Reform, *Divorce Reform Bills Introduced in 2003*, at <http://www.divorcereform.org/03bills.html> (last visited August 4, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

149. See, e.g., S. 29, Mont. Leg., Reg. Sess. (2003).

150. See *id.* Bills of this type were introduced in Colorado, Indiana, Louisiana, New Hampshire, New Mexico, and Oklahoma. See Am. for Divorce Reform, *supra* note 148.

151. See, e.g., Joseph Dits, *Marriage: What's Government Got to Do With It?* SOUTH BEND TRIBUNE, Feb. 23, 2003, available at 2003 WL 9897721 (stating that the failed Indiana bill would lengthen the wait for divorce for couples with children or when one spouse objects to the divorce).



ciliation or reconciliation counseling for parents.<sup>152</sup> Between 1994 and 1998, the number of American jurisdictions requiring this curriculum tripled from 541 to 1516.<sup>153</sup>

In addition to individual laws and other public initiatives to strengthen marriage, there has arisen a self-described "Marriage Movement" in the United States. Comprised of scholars, activists, educators, counselors, religious leaders and many others, the movement has its own statement of principles intended to bolster and make visible a "grass-roots movement to strengthen marriage."<sup>154</sup> The statement offers a critique of current laws and policies affecting marital stability and parenting, and proposes specific goals for individuals, communities, and lawmakers to strengthen marriage.

A host of marriage strengthening programs developed by experts in marriage education are becoming more visible. There are dozens of types of programs<sup>155</sup> with perhaps the best known focusing upon improving couples' communication skills in response to the research regarding the role poor communication plays in causing divorce. While many of these programs have been available to the public for years, they have only recently been offered the chance to partner in a significant way with federal and state governments via laws allowing them to provide services to couples subject to premarital counseling requirements<sup>156</sup> or through federal grants pursuant to the marriage and family goals of welfare reform legislation. While it would be impossible to characterize all of these programs, it is important to look at some of the most well known and well regarded in order to assess their content.

The Prevention and Relationship Enhancement Program (PREP)<sup>157</sup> is perhaps the best known marriage skills course. It

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152. JUDY PAREJKO, *STOLEN VOWS: THE ILLUSION OF NO-FAULT DIVORCE AND THE RISE OF THE AMERICAN DIVORCE INDUSTRY* 18-19 (2002).

153. Margie J. Geasler and Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 FAM. & CONCILIATION CTS. REV. 36, 36 (1999).

154. See THE MARRIAGE MOVEMENT, *supra* note 57.

155. See The Coalition for Marriage, Fam. & Couples Educ., at [http://www.smartmarriages.com/directory\\_browse.html](http://www.smartmarriages.com/directory_browse.html) (offering the best list of these programs) (last visited Sept. 15, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

156. Arkansas amended its covenant marriage law in 2003 to allow marriage education specialists to qualify as premarital counselors. Act of Apr. 7, 2003, sec. 1, § 9-11-802, 2003 Ark. Adv. Legis. Serv. 1115 (Michie).

157. Scott M. Stanley, *Making a Case for Premarital Education*, 50 FAM. RELATIONS 272, 276 (2001) (PREP is considered the soul of the Oklahoma Marriage Initiative); see Carla Hinton, *Couples Embrace Marriage Initiative: Program Strength-*

"emphasizes strategies for enhancing and maintaining commitment."<sup>158</sup> PREP helps couples to reject entering into inappropriate relationships,<sup>159</sup> and also helps engaged, newlywed, just-married, and long married couples to better communicate, manage conflict, and avoid dysfunctional beliefs and interpretations about each other.<sup>160</sup> Another group, the Coalition for Marriage, Families and Couples Education, led by a self-described "feminist,"<sup>161</sup> encourages Americans to get educated about how to stay happily married. The Coalition has run "Smart Marriage Conferences" every year since 1997 teaching couples, marriage counselors, clergy, and others the skills needed by spouses for a happy marriage.<sup>162</sup> It also provides the most comprehensive public information available about the great variety of marriage programs open to students, and engaged and married couples.

The Marriage Savers' Community Marriage Policy project encourages an interfaith array of clergy and other local leaders (e.g., judges, business owners)<sup>163</sup> to adopt voluntary policies to strengthen marriage. First adopted in Modesto, California,<sup>164</sup> over one hundred sixty communities presently have such policies.<sup>165</sup> These policies will often include the promise that clergy will not marry couples without substantial premarital preparation including a premarital inventory, a required waiting period

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*ens Bond Within Families*, THE DAILY OKLAHOMAN, Feb. 15, 2003, at 2-D, available at 2003 WL 13943256.

158. Wade Horn, *Closing the Marriage Gap*, 21 CRISIS: POLITICS, CULTURE & THE CHURCH 32, 33-34 (2003).

159. See Hinton, *supra* note 157, at 2-D.

160. See Prevention and Relationship Enhancement Program, *Overview of PREP*, at [http://www.prepinc.com/main/docs/overview\\_prep.pdf](http://www.prepinc.com/main/docs/overview_prep.pdf) (last visited Sept. 19, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

161. Pam Belluck, *States Declare War on Divorce Rates, Before Any "I Dos"*, N.Y. TIMES, Apr. 21, 2000, at A1.

162. See Interview by Jon Galuckie with Diane Sollee, Founder, Coalition for Marriage, Family and Couples Education, Washington, D.C. (May 1997) at <http://www.smartmarriages.com/playbackinterview.html> (last visited Sept. 19, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

163. Considered perhaps the most comprehensive community policy, Grand Rapids, Michigan's policy has the support of pastors, social workers, psychiatrists, business, political, and judicial figures. Roger Sider, *Grand Rapids Erects a Civic Tent for Marriage*, POL'Y REV., July/Aug. 1998, at 6-7.

164. Theresa Walker, *Keeping It Together: Love Isn't All You Need for Successful Marriages*, ORANGE COUNTY REG., Mar. 17, 2003, at A6, available at 2003 WL 6989738; see also Spaht, *supra* note 136, at 49.

165. Marriage Savers, 176 Cities with Community Marriage Policies/Covenants, at <http://www.marriagesavers.com/public/cities.htm> (2001) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); see also Horn, *supra* note 158, at 36.

before marriage, and the provision of a mentor couple in the relevant religious congregation to provide long-term guidance.<sup>166</sup>

The Assistant Secretary for Children and Families in the U.S. Department of Health and Human Services, whose office is most deeply involved in forwarding federal marriage initiatives, regularly has written warm endorsements for several other marriage strengthening programs. Such programs include the relationship/communication focused programs of Couples Communication,<sup>167</sup> Practical Application of Intimate Relationship Skills (PAIRS),<sup>168</sup> Relationship Enhancement (RE),<sup>169</sup> and the child-focused Transitions to Parenthood.<sup>170</sup>

Together, these programs and the marriage movement generally evidence a real momentum toward strengthening marriage and reversing the high rate of divorces in the United States. In order to consider whether they take into account premarital sex and cohabitation as divorce indicators, it is useful to categorize them further, by object, timing, and content.

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166. Marriage Savers, *Biography of Mike McManus*, at [http://www.marriagesavers.com/bio\\_of\\_michael\\_j.htm](http://www.marriagesavers.com/bio_of_michael_j.htm) (last visited Sept. 16, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); See also Spaht, *supra* note 136, at 49.

167. Sherod Miller & Peter A. D. Sherrard, *Couple Communication: A System for Equipping Partners to Talk, Listen, and Resolve Conflicts Effectively*, in PREVENTIVE APPROACHES IN COUPLES THERAPY 125, 126 (Rony Berger & Mo Therese Hannah eds., 1999). This program teaches communication skills, including styles of communication that help "navigat[e] the inevitable rapids that occur in any relationship." *Id.* It teaches how to communicate about issues more effectively on a daily basis, manage and resolve conflicts, and build a better relationship. *Id.*

168. Lori Heyman Gordon & Carlos Durana, *The PAIRS Program*, in PREVENTIVE APPROACHES IN COUPLES THERAPY, *supra* note 167, at 217, 218. This course is designed to enhance self-knowledge and help participants develop the ability to sustain a pleasurable, intimate relationship. *Id.* It teaches skills in commitment, communication, and creative use of conflict. *Id.* Additionally, the course stresses knowledge of self to teach how past experiences can be transferred into the present marriage in disruptive ways. *Id.*

169. Clay Cavado & Bernerd G. Guerney, Jr., *Relationship Enhancement Enrichment and Problem-Prevention Programs: Therapy-Derived, Powerful, Versatile*, in PREVENTIVE APPROACHES IN COUPLES THERAPY, *supra* note 167, at 73, 76. The program provides skills training in handling and preventing troubles, as well as in making conscious choices to elicit more rather than less desired responses from another. *Id.* It attempts to teach the skills of love, compassion, belonging, trust, loyalty, security, and pleasure, as well as how to fulfill these for the other partner. *Id.* It also teaches how to resolve problems in ways perceived fair, to retain caring atmospheres during conflict discussions, to take another's perspective, to see oneself clearly, and to avoid negative communication exchange and anger escalation. *Id.*

170. See Horn, *supra* note 158, at 35.

### C. *Objects, Timing, and Content of Current Marriage Initiatives*

#### 1. Objects

It regularly appears that the major object of many current marriage initiatives is the preservation of children's economic and emotional well-being, especially for children living in poverty. The adult audience thus becomes the means to the end of preserving children's interests. Evidence of this object comes from welfare reform legislation itself, as well as from statements made by the leaders, experts or supporters of various marriage proposals. President Bush and leadership at the Department of Health and Human Services regularly speak of PRWORA-related initiatives as directed toward children's well being.<sup>171</sup> State administrators of marriage initiatives do the same.<sup>172</sup> In January, 2003, when HHS Secretary Tommy Thompson announced \$2.2 million of grants for strengthening families, the vast majority of the funds were given to groups improving child support collection. About one-quarter of the funds went to groups—including faith based groups—stressing the importance of a healthy marriage among low income and unwed parents.<sup>173</sup>

Proposals for divorce law reform also usually have children foremost in mind. They regularly contemplate making divorce more difficult for spouses who are parents.<sup>174</sup> On the other hand, it is not universally true that efforts to curb divorce are expressly child-focused. In particular, leadership of private programs or curricula, such as those described immediately above, speak often of strengthening the couples' relationship, even while they also regularly note the benefits of a happy marriage for children. This is especially true of the marriage-skills programs.

#### 2. Timing

A second notable aspect of the current crop of marriage programs is their timing. Most are designed to be offered to couples shortly before marriage, immediately after marriage, or after a couple has experienced an out-of-wedlock pregnancy or childbirth.<sup>175</sup> These are undoubtedly crucial times for any marriage.

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171. See *supra* Section I.B. and notes 30–33.

172. See, e.g., Sider, *supra* note 163, at 6–7 (describing the program as intending “to give children a better chance of growing up in stable, two-parent homes”).

173. See Cheryl Wetzstein, *HHS Grants Promote Support of Children, Healthy Marriages*, WASH. TIMES, Jan. 4, 2003, at A3 [hereinafter Wetzstein, *HHS Grants*].

174. See Section II.B. and notes 149–150.

175. See, e.g., Wetzstein, *HHS Grants*, *supra* note 173, at A3.

The premarital stage is the time when a couple's marital plans are most likely to intersect legal, religious, and even business leaders in the community, making it a logical time for the state and private groups to step in. It is quite possible that, especially right before marriage, a couple is more open to advice. However, the opposite could also be true, meaning that programs offered post-marriage—after couples have more experience—may be more likely to get a real hearing from couples so disposed.

It is also true, however, that the habits and attitudes of persons, as well as the relationship dynamics of partners, will largely be formed by the time they are ready to marry, or shortly after they have married.<sup>176</sup> This does not make engaged or newlywed couples "old dogs" that cannot learn new tricks, but it does raise the question of whether there are ways to strengthen marriages that might be introduced earlier in life. Sections IV and V, *infra*, suggest that there are ways, both to rid existing and relevant laws and policies of messages problematic for marriage, and to adopt new laws and policies with the explicit intention of helping more individuals earlier in their lives to avoid premarital sexual practices harmful to marriage.

This strategy has already begun in Florida, a state which has passed legislation making high school courses on marriage and other relationships part of the required curriculum.<sup>177</sup> A number of other states and school districts offer high school marriage curricula without any state legislative mandate. While there is no officially collected data concerning the number of school districts providing such courses, the only complete survey of extant high school marriage programs—*Hungry Hearts: Evaluating the New Curricula for Teens on Marriage and Relationships*<sup>178</sup>—states that such courses are most prevalent in the states of Florida, Utah, Minnesota, California, South Dakota, Massachusetts, New

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176. Howard J. Markman, a leading voice in the area of marriage strengthening and therapy, has pointed out how extremely difficult it is to save a marriage already in trouble. He notes that "for too long, it has seemed as though the field of marital therapy were sending interventionists to the bottom of a cliff to wait for couples to fall off, rather than working on building edifices to keep happy couples from toppling over as they struggle with the challenges associated with the contemporary marriage." Howard J. Markman, *Foreword to PREVENTIVE APPROACHES IN COUPLES THERAPY*, *supra* note 167, at xv.

177. See *supra* note 145 and accompanying text; Oklahoma also encourages high schools to teach a relationship curriculum. See Spaht, *supra* note 136, at 56.

178. DANA MACK, *HUNGRY HEARTS: EVALUATING THE NEW CURRICULA FOR TEENS ON MARRIAGE AND RELATIONSHIPS* 7 (2000).

Jersey, Oklahoma, Pennsylvania, New York, and Colorado.<sup>179</sup> The same study further estimates that 2000 schools in fifty states provide "formal courses on marriage and relationship skills" and that this number is growing.<sup>180</sup> Schools sometimes offer these courses as stand-alone courses, and other times they are part of school-based social services or components of other courses such as health (the largest subgroup), sex education, family living, life skills, consumer sciences, or parenting.<sup>181</sup> In 2003, the House-passed amendments to PRWORA encouraged states to provide more such programs by offering federal matching funds to be spent specifically on, among other marriage initiatives, high school programs on the "value of marriage, relationship skills and budgeting."<sup>182</sup>

A leading scholar in the field of marriage and the law already has pointed out that the real value in these courses, with respect to information about and support for marriage, per se, could vary.<sup>183</sup> This point is apparent even from the language authorizing the teaching of such courses, as well as the available course descriptions. The Florida Department of Education's description of the Florida curriculum appears to speak of marriage and all other relationships as equally valuable, and it seems to diminish the importance of behaviors and skills necessary for successful marriage by piling information about budgeting, smoking, and nutrition into the same course.<sup>184</sup> The *Hungry Hearts* survey concluded overall that while some curricula discuss marriage, others speak only generally of relationships. Reviewing the most widespread curricula used, this study concluded that the curricula do not always contain scientifically validated information about benefits and challenges of marriage as compared with divorce, cohabitation, and unmarried childbearing. The material also regularly fails to recommend the characteristics and habits likely to support stable marriage versus those that undermine it.<sup>185</sup>

By addressing citizens at a time in their lives when they are developing behaviors and attitudes crucial to marital success, such courses have the potential positively to affect marital stabil-

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179. *Id.*

180. *Id.* at 9. This finding was based upon interviews with marriage educators, public school officials, and curricula publishers. *Id.* at 7.

181. *Id.* at 7-8.

182. See Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. § 103(b) (2003).

183. Spaht, *supra* note 136, at 17.

184. See *supra* note 145.

185. See MACK, *supra* note 178, at 9-10, 48.

ity. Recommendations regarding additional programs and policies directed to adolescents and the amendment of some existing programs relevant to premarital sexual behaviors will be the subjects of Sections IV and V.

### 3. Content

The currently popular and more widely available programs intended to strengthen marriage also can be characterized broadly according to content. First, such programs often provide information about the elements and indicators of strong marriages, as well as troubled ones; such information may include demographic, as well as behavioral and attitudinal indicators. It does not appear that information about the correlation between premarital sex, cohabitation, and divorce is included. Instead, the counseling and the manuals that are now required or encouraged by laws, such as covenant marriage laws, or laws which will be part of federal welfare reform, often include information about divorce indicators. However, it is not clear from the available descriptions whether high school courses include such information.<sup>186</sup>

Second, some recent marriage initiatives encourage skills training for better marital communication and the management of typical conflicts that arise during marriage. Such training is characteristic of the courses offered immediately before marriage with state support and encouragement, as well as some high school curricula. It is also characteristic of some post-marital courses. A summary of over 100 courses compiled by the Coalition for Marriage, Family and Couples Education indicates that existing marriage education offerings are largely skills training courses. One could also describe such programs as "therapeutic," or in the nature of preventive couples therapy.<sup>187</sup>

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186. For samples of curriculum descriptions, see The Coalition for Marriage, Family and Couples Education, LLC, CMFCE Directory of Youth and School Based Marriage Education Programs, at <http://www.smartmarriages.com/school.html> (last visited Sept. 16, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

187. There is some resistance to the strategy of the state offering couples therapy. For example, Professor Stephen Baskerville has written that: "Government as family therapy was an idea that in fact originated with the Clintons who saw it as an opportunity for politicizing children and extending government into the deepest recesses of private life." Stephen Baskerville, *Government as Family Therapist*, NAT'L REV. ONLINE, May 6, 2003, at <http://www.nationalreview.com/comment/comment-baskerville050603.asp> (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Baskerville also characterizes new therapeutic marriage initiatives as a pointless substitute for the better solution of rolling back no-fault divorce laws. *Id.* The Department of Health and Human

A third way to characterize current initiatives involves recognizing those programs that offer or mandate time for couples to think about their future lives together. This time requirement is accomplished mostly by requiring couples to attend premarital counseling, or by facilitating couples' attendance at other marriage strengthening programs, possibly by offering vouchers. For couples considering divorce, covenant marriage proposals, as well as other yet-to-be enacted proposals seeking to decrease that rate of divorce for parents, further intend to build time for premarital reflection into couples' schedules.

Fourth, current marriage initiatives convey a strong message of state solidarity with marriage and married couples. The number of new programs initiated and relevant statements made by the President, in combination with the amount of leadership offered by federal agencies and state governors, creates this message of solidarity. This message is furthered by high levels of government spending (even during a sluggish economy) and large amounts of public discourse provoked by these new initiatives. This "intangible" is significant, especially given the message that the state appeared to be conveying for parts of the last thirty years: that marriage is more of a private choice than an affirmative social good deserving encouragement in law and policy.

Having described the marriage programs enjoying the most widespread support today, it is possible to conclude they do not pay a significant amount of attention to the relationship between premarital behaviors, including sex and cohabitation, and strong marriages. Certainly, these initiatives appear mostly sensible, properly researched, well-executed, and well-received. Empirical testing of the effectiveness of marriage skills training is ongoing and, thus far, promising.<sup>188</sup> HHS is encouraging more of it.<sup>189</sup>

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Services' leading voice on marriage initiatives, Wade Horn, appears eager to reject the characterization of new federal initiatives as "therapeutic," stating that "education for marriage is not therapy," because it does not require trained therapists; rather, community and faith-based involvement is solicited. Horn, *supra* note 158, at 34. While this is true, it remains unclear how the content of the programs is not therapeutic in the colloquial sense; the majority of the programs recommended by Secretary Horn are described as "couples therapy" in a book of a similar title. PREVENTIVE APPROACHES IN COUPLES THERAPY, *supra* note 167. They are further described by a national leader in preventive couples therapy as a "psychoeducational approach," although they emphasize "providing information and teaching skills to couples, rather than . . . understanding and resolving unconscious conflicts." Howard J. Markman, *Foreword* to PREVENTIVE APPROACHES IN COUPLES THERAPY, *supra* note 167, at xv-xvi. The conclusion seems unavoidable, however, that family sociologists and therapists have developed new forms of couples therapy and that, in some cases, these programs will be offered with the assistance and encouragement of the government.

188. Fraenkel & Markman, *supra* note 9, at 245.



Couples who received premarital counseling and ongoing mentoring, as well as couples who took marriage skills courses, are reporting divorce at lower rates and higher marital satisfaction, although it has already been suggested that regular "refresher training" might be necessary. Moreover, some communities with relatively longer experience with community marriage policies are reporting significant drops in divorce rates,<sup>190</sup> although it is not perfectly clear whether community marriage policies are causing these positive results.<sup>191</sup>

Yet, in addition to these policies, more is clearly needed if society is serious about addressing correlates of divorce other than those correlates already apparent shortly before marriage or post-marriage. Specifically, given the robust correlation expressed in the expert literature regarding the relationship between premarital sex, cohabitation, and divorce, and the frequency of these practices, more policies and programs targeting these problems are needed. Few people are likely to be surprised that premarital decisions about emotional and sexual intimacy affect marital attitudes. It is a matter of common sense and common experience. At the same time, however, many people probably believe that society is already amply addressing premarital sex through sex education. A closer look, though, at the panoply of laws and policies concerning both sexual education and other areas affecting premarital sex and cohabitation reveals inadequate and sometimes wrongheaded treatment of these particular correlates of divorce. It is to an analysis of these laws and policies—in the areas of sex education, contraception, cohabitation, and abortion—that we now turn.

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189. See Department of Health and Human Servs., Evaluation of Interventions to Strengthen Marriages of Low Income Couples, Research and Demonstration Solicitation No. 233-03-0034 (May 8, 2003) available at 2003 WL 17186105 (seeking nine-year performance evaluations that assess healthy families among low income couples who are married or planning to marry).

190. See Karin Glendening, *Chattanooga Success Story: Strategic Giving Reverses High Rates of Divorce and Absentee Fathers*, 2003 PHILANTHROPY 16, 17 (reporting a 16.7% decrease in the rate of divorce over the five year period of the program); see also Paul Giblin et al., *Enrichment Outcome Research: A Meta-Analysis of Premarital, Marital and Family Intervention*, 11 J. MARITAL & FAM. THERAPY 257 (1985) (evaluating twenty different types of marriage programs and integrating eighty-five studies of programs involving 3,886 couples). The authors concluded that "the average couple participating in any one of the programs studied improved their behavior and relationship so that they were better off than more than two-thirds of the couples that did not participate in any program." *Id.* See also Mark H. Butler & Karen S. Wampler, *A Meta-Analytic Update of Research on the Couples Communication Program*, 27 AM. J. FAM. THERAPY 223 (1999).

191. See Belluck, *supra* note 161.

#### IV. THE PLACE OF MARRIAGE IN THE STATE'S SEX TALK

##### A. *Introduction: Telling the Story of Sex and Marriage*

Federal, state, and local laws and policies send messages about premarital sex and cohabitation in more ways than one. Certainly, the choice of sex education curricula is an important way to send such messages. Additionally, laws concerning contraception and abortion—particularly, minors' access to contraception and abortion—also send messages about the role of sex in the lives of adolescents. Similarly, laws affecting cohabitants speak to the state's understanding of the relationship between sex and marriage.

This Section will characterize the leading programs in sex education, the legal trends in the areas of abortion and contraception for minors, and the emerging legal responses to cohabitation. It seeks to discern the messages these programs and trends convey about values necessary for strong marriages and about any relationship between premarital sex and marriage. The goal of surveys that evaluate these types of laws is to discover, as Mary Ann Glendon suggests, what "story" the current laws and policies tell regarding premarital sexual relations and cohabitation.<sup>192</sup> Is the story conducive to building strong marriages, or not? After suggesting here that current messages are problematic, Section V will suggest ways in law and policy to build bridges between the marriage issue and the issue of premarital sexual relationships posing problems for marriage.

An introductory note regarding the task of characterizing sex education trends is necessary. There is an overwhelming volume of literature about sex education, often comprised of arguments between supporters of "abstinence" education versus supporters of "comprehensive sexuality" education. Abstinence education generally includes programs that stress abstinence until marriage as a possible and expected norm, as a superior health benefit, and as a shield from the harms of adolescent sexual involvement.<sup>193</sup> Comprehensive sexuality education, on the other hand, instructs on both abstinence and contraception for the prevention of pregnancy,<sup>194</sup> presuming that abstinence is an

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192. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 62 (1987).

193. See National Coalition for Abstinence Education, *Frequently Asked Questions About the Title V Abstinence Education Program* (1997), at <http://www.respectincorporated.com/fundinfo.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

194. SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, 2002 ANNUAL REPORT 9 (2002) [hereinafter *SIECUS ANNUAL REPORT*],

unrealistic expectation for many adolescents today. Given the struggle between these two models, it is sometimes hard to get information which is not utterly contradicted by one side or the other. Getting an overview of sex education today is also complicated by the fact that there are thousands of local schools and school boards choosing and even altering a great variety of possible sex education curricula.<sup>195</sup> For the narrow purpose of this Section, however—searching out pervasive and influential messages about premarital sexual choices and marriage—it is still possible, from this vast material, to draw some conclusions, based particularly on information not contradicted or denied by the leading players on either side of the sex education debate. Some of the leading providers and analysts of sex education in the United States consulted for this section include: the Planned Parenthood Federation of America<sup>196</sup> (and its affiliate, the Alan Guttmacher Institute<sup>197</sup>), the Henry J. Kaiser Family Foundation,<sup>198</sup> The National Campaign to Prevent Teen Pregnancy,<sup>199</sup>

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available at [http://www.siecus.org/pubs/fy2002\\_annual\\_report.pdf](http://www.siecus.org/pubs/fy2002_annual_report.pdf) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

195. THE KAISER FAMILY FOUNDATION, *ISSUE UPDATE, SEX EDUCATION IN THE U.S.: POLICY AND POLITICS* 1, 3–4 (Oct. 2002) (“Across the nation, states have passed a patchwork of sex education laws ranging from general mandates that the subject be taught to more specific guidelines regarding types of messages to be included.”), available at [http://www.kff.org/content/2003/3224-02/Sex\\_Ed\\_Issue\\_Update\\_Final.pdf](http://www.kff.org/content/2003/3224-02/Sex_Ed_Issue_Update_Final.pdf) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

196. In existence since 1916, Planned Parenthood operates nearly 900 health centers in forty-nine states and serves nearly five million Americans yearly. See <http://www.plannedparenthood.org/Zip.htm> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

197. The Alan Guttmacher Institute (AGI) was founded in 1968 and operates today with a budget of over nine million dollars. It is the research affiliate of the Planned Parenthood Federation of America. Alan Guttmacher Institute, *The History of the Alan Guttmacher Institute*, at <http://www.agiusa.org/about/history.html> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). AGI describes its mission as providing “reliable, balanced, nonpartisan information on sexual activity, contraception, abortion and child bearing.” Alan Guttmacher Institute, *Frequently Asked Questions*, at <http://www.agi-usa.org/about/faq.html> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

198. The Henry J. Kaiser Foundation has roughly one-half billion dollars of assets. The Foundation’s mission is to be the independent voice and source of facts for major health care issues facing the nation. Drew E. Altman, *The Kaiser Family Foundation’s Role in Today’s Health Care System*, at <http://www.kff.org/docs/about/message.html> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

199. The National Campaign to Prevent Teen Pregnancy was founded in 1968. The Campaign’s mission is to improve the well being of children, youth, and families by reducing teen pregnancy. Its current goal is to reduce the teen

the Sexuality Information and Education Council of the United States (SIECUS),<sup>200</sup> the Abstinence Clearinghouse,<sup>201</sup> the National Coalition for Abstinence Education,<sup>202</sup> and Sex Respect, Inc.<sup>203</sup>

Finally, in assessing the content of sex education in the United States today, account must also be taken of the huge federal initiatives, especially since 1996, that offer matching and direct funds to states and groups willing to promote abstinence messages, and the content of messages emerging from these programs. The largest initiative, fifty million dollars per year for the

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pregnancy rate by one-third between 1996 and 2005. National Campaign to Prevent Teen Pregnancy, Mission & Goal, at <http://www.teenpregnancy.org/about/atc.asp> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

200. The Sexuality Information and Education Council of the United States (SIECUS) was incorporated in 1964. "SIECUS develops, collects, and disseminates information, promotes comprehensive education, and advocates the right of individuals to make responsible sexual choices." Sexuality Information and Education Council of the United States, About SIECUS, at <http://www.siecus.org/about/about0000.html> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). In 2002, SIECUS raised over 2.5 million dollars in public support. SIECUS ANNUAL REPORT, *supra* note 194, at 58. SIECUS' website receives over 400,000 visitors annually. *Id.* at 11. SIECUS has provided technical assistance to over 600 cities in 48 states that have experienced sexual education controversies. *Id.* at 15.

201. The Abstinence Clearinghouse was founded in 1997 and is a non-profit educational organization that "promotes the appreciation for and practice of sexual abstinence." Its National Advisory Conference is comprised of more than forty nationally-known abstinence educators. Abstinence Clearinghouse, About Us, at <http://www.abstinence.net/about/history.php> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

202. The National Coalition for Abstinence Education (NCAE) is an ad hoc coalition of sixty organizations supporting abstinence-only sexuality education. NCAE serves as an unofficial watchdog for the Title V abstinence program and is regularly sought by reporters to comment upon developments in sexuality education. See, e.g., *Sex Education in North Carolina*, THE NEWS & OBSERVER (Raleigh, N.C.), Apr. 2, 2000, at A26, available at 2000 WL 3922154; Joan Lowy, *Grants Fund Abstinence Message*, PATRIOT LEDGER (Quincy, Mass.), Apr. 5, 1999, at 7, available at 1999 WL 8457332.

203. In 1983, Colleen Kelly Mast developed a sexual education curriculum guide for teachers, out of which grew the Sex Respect program. Sex Respect, How did the Sex Respect Program Originate, at <http://www.sexrespect.com/ProgramOrig.html> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). By 1997, the program was used in over 2500 schools, at <http://www.sexrespect.com/GeneralIntro.html> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy), and by 2003 was used in all fifty states and twenty-three foreign countries, at <http://www.sexrespect.com/ProgramOrig.html> (last visited Sept. 14, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

years 1998 through 2002, was part of Title IX of PRWORA.<sup>204</sup> Social Security Act Title V programs may not contradict the eight specific messages specified in section 912 of PRWORA, including (1) the social, psychological, and health gains of abstinence; (2) that abstinence until marriage is the expected standard for school aged children; (3) that a faithful marriage is the expected standard of sexual activity; (4) that abstinence is the only way to avoid pregnancy, sexually transmitted diseases, and other related health problems; (5) that sex outside marriage is likely to have harmful psychological and physical effects; (6) that out-of-wedlock childbearing is likely to harm the child; (7) skills for refusing sexual advances; (8) and that sexual activity should be delayed until a person attains "self-sufficiency."<sup>205</sup> While every state eventually accepted these abstinence funds, some used them for programs supplementary to existing comprehensive sexuality education programs, such as after school programs, or curricula for the very young student.<sup>206</sup>

Sidestepping some states' less-than-enthusiastic use of PRWORA abstinence money, the federal government began to offer direct abstinence money to community groups through a program entitled Special Projects of Regional and National Significance (SPRANS)/Community-Based Abstinence Education (CBAE).<sup>207</sup> Under the SPRANS-CBAE program, the federal government gives grants directly to community organizations (not state agencies) for strict abstinence education for those aged twelve through eighteen.<sup>208</sup> Groups providing comprehensive sexuality education, even with separate funds, may not be SPRANS recipients.<sup>209</sup> All recipients must adhere to the

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204. 42 U.S.C. § 710(d) (2000).

205. 42 U.S.C. § 710(b)(2)(A-H) (2000).

206. See Adrienne D. Coles, *Response to Abstinence Funds Raises Questions*, EDUCATION WEEK ON THE WEB, Apr. 14, 1999, at <http://www.edweek.com/ew/ewstory.cfm?slug=3lsex.h18&keywords=abstinence> (last visited Aug. 1, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

207. SPRANS funding is administered on the authority of Title IX (Section 912, the Abstinence Education Grant Program) of PRWORA, by the Maternal and Child Health Bureau of the Department of Health and Human Services. See Dep't of Health and Human Servs., Maternal and Child Health Bureau, Section 510 Abstinence Education Grant Program, at <http://www.mchb.hrsa.gov/programs/adolescents/statefs.htm> (last visited Aug. 7, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter Maternal and Child Health Bureau].

208. *Id.*

209. Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-116, 115 Stat. 2177, 2187 (2001).

messages about abstinence listed in PRWORA.<sup>210</sup> By the fiscal year 2002, sixty million dollars of SPRANS funding had been made available.<sup>211</sup>

More abstinence education monies have also recently become available under the Adolescent Family Life Act (AFLA),<sup>212</sup> first passed in 1981. According to Health and Human Services, in fiscal years 2002–03, fifty-six out of 107 AFLA-funded demonstration projects were abstinence education (with another forty-five projects devoted to care for pregnant and parenting teens), for a total of nearly twenty-nine million dollars.<sup>213</sup>

### B. *Premarital Sex and Marital Values in Law and Policy: A Summary*

Turning first to sex education in the United States, the message to abstain from premarital sex (and consequently cohabitation) is in the ascendancy today, judging from the attention it is receiving in federal law, funding, and public discourse. This was virtually bound to happen given rates of adolescent sexual experience and pregnancy during the 1980's and 1990's. But the struggle for the hearts and minds of adolescents, and their parents and their teachers, is hardly over. Partisans on both sides of the sex education debate continue daily to challenge the effectiveness and wisdom of each other's strategies for preventing the problems associated with teen sex. Too often, both types of sexuality education programs proceed outside the context of the relationship in which the majority of adolescents will eventually spend most of their sexual and procreative lives: marriage. One sees marriage playing a role in some of the new abstinence programs, but often it is portrayed only as the acceptable precondition for a sexual relationship. This is very different from considering marriage as the state in life during which sexual relations might find their most complete and fulfilling expression, and thus the state to which sexual education might be oriented. Marriage plays a far lesser role in other types of sex education. What follows will describe the types of messages about marriage, and values important to marriage, found in leading abstinence and comprehensive sexuality education programs, as well as in

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210. See 42 U.S.C. § 710(b)(2)(A-H) (2000).

211. See Maternal and Child Health Bureau, *supra* note 207.

212. 42 U.S.C. § 300z (1981).

213. Office of Population Affairs, Dep't of Health and Human Servs., Office of Adolescent Pregnancy Programs, at <http://opa.osophs.dhhs.gov/titlexx/oapp.html> (last visited Aug. 5, 2002) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

additional laws and policies touching on premarital sexual behaviors.

# 1. Heavy on Pregnancy and Disease, Light on Divorce

Current sex education materials for adolescents regularly publicize the tangible effects of sex—pregnancy and disease—nearly to the exclusion of others. At the same time, they regularly indicate that any effects of sexual relations are controllable. SIECUS' very definition of healthy sexual relationships as "consensual, non-exploitative, honest, pleasurable, and protected against disease and unintended pregnancy,"<sup>214</sup> embodies these dual messages.

Planned Parenthood's information and education about the "morning after pill" conveys the same message, sometimes even more starkly. In 1999, Planned Parenthood mass-mailed an advertisement for morning after pills to young women. On the front was a grainy photo of an unmade bed and the words, "ABOUT LAST NIGHT . . . You have 72 hours to *erase* last night."<sup>215</sup> On the back was information about its morning after pill.<sup>216</sup>

Sometimes there are more specific assurances that premarital sex will not have other problematic effects. Contrary to what is empirically known about the relationship between premarital sexual behaviors and divorce, a major report issued by one of the most influential groups in high school sex education, SIECUS, states that so long as sex is "nonexploitative," it will not have harmful psychological effects.<sup>217</sup> The report claims, in fact, that sex might even be good for children: "If sexual expertise is expected of adults, children must get a chance to understand the rudiments."<sup>218</sup> Planned Parenthood further assures teens on its

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214. NATIONAL GUIDELINES TASK FORCE OF THE SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION 8 tbl.1 (2d ed. 1996) [hereinafter SEICUS TASK FORCE], available at <http://www.siecus.org/pubs/guidelines/guidelines.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

215. Helen Alvaré, *About Last Night*, CRISIS: POL., CULTURE & CHURCH, Feb. 1999, at 31 (describing postcard from Planned Parenthood in 1999) (emphasis added).

216. *Id.*

217. See SEICUS TASK FORCE, *supra* note 214.

218. Mac Edwards, *Sexual Pleasure Has Central Place in the Human Potential*, SIECUS REPORT, Apr. 1, 2002, at 3, available at 2002 WL 22371020 (quoting Judith Levine, *Promoting Pleasure: What's the Problem?*).

influential website "teenwire," that "losing one's virginity isn't so overwhelming or scary" if partners are "as sure as they can be."<sup>219</sup>

Abstinence initiatives can also focus too narrowly on disease and pregnancy. By placing the most comprehensive federal abstinence initiative, Title IX of PRWORA, within welfare reform legislation, Congress sent the message that abstinence programs are intended mostly to prevent the problems of out-of-wedlock childbirth, listed so copiously in the findings section of PRWORA.<sup>220</sup> Yet there are signs that some abstinence programs are increasingly tying marital happiness to premarital sexual behaviors. The influential Abstinence Clearinghouse provides its many members and visitors to its sophisticated website with a resource entitled "Saving Sex for Marriage Reduces the Risk of Divorce."<sup>221</sup> The state of Nebraska's abstinence program specifically ties abstinence to "healthier emotional and psychological outlook to marriage and life in general"<sup>222</sup> and informs students of the lower divorce rate for virgins.<sup>223</sup> Materials provided by a variety of other abstinence programs increasingly tout the effects on marital stability of reserving sex for marriage.<sup>224</sup> At the same time, abstinence curricula do not appear to present a more comprehensive vision of what marriage is, such that it is strengthened by "waiting." Sexuality education that painted a fuller picture of this goal and future, including its sexual elements, would better serve the function of strengthening marriage, while strengthening too, the case for the "wait."

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219. Shannon Phelps, *Scared to Lose It?*, at [http://www.teenwire.com/warehouse/articles/wh\\_20011004p119.asp](http://www.teenwire.com/warehouse/articles/wh_20011004p119.asp) (last visited June 4, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

220. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Findings Section under Title I of PRWORA codified as amended 42 U.S.C. § 601(a)(2000)).

221. Family Research Council, *Saving Sex for Marriage Reduces the Risk of Divorce*, available at Abstinence Clearinghouse, <http://www.abstinence.net/library/index.php?entryid=81> (posted Mar. 28, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

222. SEXUALITY AND EDUCATION COUNCIL OF THE UNITED STATES, ABSTINENCE IN COMMUNITIES ACROSS THE NATION, SIECUS REPORT, Aug. 1, 2002, at 1819, available at 2002 WL 22371045 (quoting the registered nurse who coordinates the abstinence program for Alliance Public Schools in Nebraska).

223. *Id.*

224. See, e.g., SCOTT PHELPS, PROJECT REALITY, ABSTINENCE-WITHOUT-HYPHENS EDUCATION (2003), available at <http://www.projectreality.org/abstinenewithouthyphens.pdf> ("The end goal of abstinence is nothing less than the restoration of marriage in America today.") (on file with the Notre Dame Journal of Law, Ethics & Public Policy). See also Friends First, Research That Suggests Pre-Marital Sexual Involvement Increases Chances of Marital Dissolution, at <http://www.friendsfirst.org/factmarriage.html> (last visited Aug. 5, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).



Another message sent by leading sex educators—closely related to the notion, “it’s all about preventing disease and pregnancy,”—is the notion that sex can be made to communicate exactly what one mentally intends, and no more. It can “say,” “temporary” today and at other times, “permanent and exclusive.”<sup>225</sup> One online sex education website laments the fact that sex sometimes “says” procreation even when it’s unwelcome: “Unfortunately, sexual intercourse produces babies. (Think of the advantages of sex just being for fun and love, then, when ready, going to Wal-Mart to get a new baby for \$999.98.)”<sup>226</sup> It goes on to advise readers that “in your own heart only you can decide what meaning your sex acts will have to you.”<sup>227</sup>

This subjective and instrumental approach to understanding the connotations of sexual relations contrasts with an approach that married people hope and expect to have: that sexual relations will act as a sign as well as a cause of greater unity between the spouses. They expect that sex will strengthen their marriage, and at some times, be procreative, causing the growth of love in ways that adults can rarely imagine before they take up their roles as parents. The opposite message—that the fruits of sex are predominantly negative—undermines a healthy marital hope and understanding about sex. It also facilitates confusion about what behavior might connote “promise,” or “love,” or “exclusivity,” if not one that is physically intimate, historically associated with love and fidelity, and the possible source of a lasting and visible sign, a child.

## 2. Anybody’s Choice

Another value appearing in law and policies on premarital sexual behaviors is that sexual mores are widely variable, and require individual discernment, that can be accomplished by the young. This contradicts the fact that marital sexual mores are not widely variable, but historically and even globally fairly stable.<sup>228</sup> It also contrasts with the social conclusion—expressed for example in laws setting age thresholds for marriage<sup>229</sup>—that

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225. JAMES T. BURTCHAELL, *FOR BETTER, FOR WORSE: SOBER THOUGHTS ON PASSIONATE PROMISES* 60–63 (1985).

226. CLAYTON E. TUCKER-LADD, *Premarital Sex . . . The Situation*, in *PSYCHOLOGICAL SELF-HELP* (revised Mar. 1, 2002), at <http://www.mentalhelp.net/psychelp/chap10/chap10u.htm> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

227. *Id.*

228. See, e.g., Witte, *supra* note 43.

229. KRAUSE ET AL., *supra* note 27, at 70 (most states allow marriage without parental involvement at the age of eighteen).

such mores are able to be understood properly by mature adults, not children.

This problematic premarital sexual value is strongly promoted by SIECUS' primary document on sex education in American schools—*The Guidelines for Comprehensive Sexuality Education*.<sup>230</sup> It lists helping young people "develop their own values" among the most important goals of a comprehensive sexuality education.<sup>231</sup> In the listing of "values inherent" in its Guidelines, SIECUS includes that "people should respect and accept the diversity of values and beliefs about sexuality that exist in a community."<sup>232</sup> (This should be distinguished from an admonition to respect the persons who hold diverse opinions.). The standards or values SIECUS encourages readers to "respect" include choices concerning the right person with whom to have sex, "responsibly," and not "premature[ly]."<sup>233</sup>

Planned Parenthood advises teens on its website to "think of [abstinence] as a smart choice," (especially for avoiding disease), but subject to change when you've found "the right person" or you're "ready to do the deed," and not "too busy."<sup>234</sup> Some states' campaigns on premarital sex are equally standardless. Minnesota's "Say Not Yet" Campaign is about teens putting off sex "until they are emotionally and physically ready."<sup>235</sup> An Iowa program encouraging male responsibility encourages males to "respect" young women and reject sexual relations that lack "intimacy."<sup>236</sup> Girls Incorporated encourages the 200,000 girls participating in its Preventing Adolescent Pregnancy Program to "wait until later for sexually intimate relationships," by either abstaining or "ensuring that the relationship is nonexploitative and protects both partners from unintended pregnancy."<sup>237</sup>

230. SEICUS TASK FORCE, *supra* note 214.

231. *Id.* at 6.

232. *Id.* at 7.

233. *See id.*; Edwards, *supra* note 218.

234. Planned Parenthood Federation of America, *Abstinence—Is It Right for You Now?*, at [http://www.teenwire.com/warehouse/articles/wh\\_20001025p087.asp](http://www.teenwire.com/warehouse/articles/wh_20001025p087.asp) (last visited Oct. 25, 2000) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

235. Kate Kompas, *'Say Not Yet' Campaign, Teens Push Abstinence*, ST. CLOUD TIMES, May 21, 2003, at 1A, available at 2003 WL 6831838; *see also* Minnesota Education Now and Babies Later, *Say Not Yet! to Sex*, at <http://www.saynotyet.com> (last visited Oct. 28, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

236. *See* Tara Deering, *Teens Learn About Manhood*, DES MOINES REG., May 29, 2003, at A3.

237. Heather Johnston Nicholson & Mary F. Maschino, *Strong, Smart and Bold Girls: The Girls Incorporated Approach to Education*, 29 FORDHAM URB. L. J. 561, 577-78 (2001).

Abstinence programs, on the other hand, particularly those adhering to the standards of PRWORA and SPRANS-CBAE, are clearly communicating that there is an expected norm, outside of subjective opinion or discernment, about the best place for sexual relationships. This is in accord with PRWORA's language: "a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity."<sup>238</sup> The language is stark. It is also a blunt response to the fact that this notion was fading, and a sharp contrast with the soft language used in many comprehensive sexuality programs.

Additional laws about premarital sexual behaviors send the message that adolescents are able to discern their own sexual values. Laws concerning minors' abortions regularly allow a pregnant girl to convince a judge she has never previously met, that she is sufficiently mature to discern her own abortion decision.<sup>239</sup> The Supreme Court has required such "judicial bypass" provisions as part of most or possibly all state parental involvement legislation.<sup>240</sup> According to the National Abortion and Reproductive Rights Action League, such laws exist in forty-two states, are enforced in thirty-two states, and are easily avoided in two states: Maryland<sup>241</sup> and Utah.<sup>242</sup> These states give abortion doctors broad discretion as to whether to notify a minor girl's parents. Yet without much information, and with no experience concerning marriage and parenting, it is foolish to believe that young women are able to discern the full meaning of an abortion in their lives. Requiring parents' involvement in minors' abortions (when parents are present and without any history of

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238. 42 U.S.C. § 710(b)(2)(D) (2000).

239. This tendency is only confirmed by magazines designed for single young women. See, e.g., *Lunch with Latifah: Seven Teens, One Queen and an Afternoon of Straight Talk*, ESSENCE MAG., Oct. 2002, at 172, 239 ("Everything is always going to come down to your choices and decision . . . go with what your gut is telling you.").

240. See *Hodgson v. Minnesota*, 497 U.S. 417, 420 (1990) (requiring bypass for a two-parent notification statute); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510–11 (1990) (requiring bypass for a parental consent statute; Court intimated that one parent notice statutes, versus consent statutes, may not require a waiver or bypass option).

241. See MD. CODE ANN., HEALTH—GEN. I § 20-102(b) (West 2000 & Supp. 2002) ("A minor has the same capacity as an adult to consent to medical treatment if, in the judgment of the attending physician, the life or health of the minor would be affected adversely by delaying treatment to obtain the consent of another individual;" such treatment includes "advice about pregnancy.").

242. See UTAH CODE ANN. § 76-7-304(2) (1953) (stating physicians shall "notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed . . .").

abuse) is the only appropriate legal way to acknowledge minors' practical inability to make important decisions of implicating their sexual choices and their marital futures.

The faulty message that adolescents and teenagers are able to discern sexual values is also sent by the regular absence of a parental involvement requirement in federal and state laws giving minors' access to birth control, including in the single largest federal program providing contraceptives to adolescents, the Public Health Services Act Title X programs.<sup>243</sup> Many state laws specifically provide for minors' access without parental involvement, sometimes requiring only that they have a referral from any doctor, clergy, family planning clinic, school or state agency; such referral can be made without any significant acquaintance with the minor, her medical or psychological history, or her family situation.<sup>244</sup>

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243. See 42 U.S.C. § 300(a) (2000). See also Rachel Benson Gold, *Issues in Brief: Title X: Three Decades of Accomplishment*, GUTTMACHER REP. ON PUB. POL'Y, Feb. 2001, reprinted at [http://www.guttmacher.org/pubs/ib\\_1-01.html](http://www.guttmacher.org/pubs/ib_1-01.html) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Title X programs, providing population research and family planning, have been the largest provider of health services, including contraception, to teens since 1975. *Id.* All Title X clients are "entitled to confidential care." *Id.* In 1978, Congress clarified that Title X services included providing contraceptives to adolescents. It was in 1978 that Congress amended Title X to include "services for adolescents" within the "broad range . . . of family planning methods and services" to be offered by Title X service providers. See 42 U.S.C. § 300(a), Hist. & Stat. Note 1978 (2000). There was, consequently, an attempt by Congressman Volkmer that same year to attach a parental involvement requirement to Title X, but it failed. See 124 CONG. REC. H37,044 (1978).

244. See, e.g., COLO. REV. STAT. ANN. § 13-22-105 (2000) (stating birth control procedures may be furnished by physicians to any minor who either has the consent of parent or guardian, or who "has been referred for such services by another physician, a clergyman, a family planning clinic, a school or institution of higher education, or any agency or instrumentality of this state or any subdivision thereof, or who requests and is in need of birth control procedures, supplies, or information"); 325 ILL. COMP. STAT. ANN. 10/1 (stating birth control may be given by doctors to any minor who: "4. Has the consent of a parent or guardian;" or "5. as to whom the failure to provide such services would create a serious health hazard;" or "6. who is referred for such services by a physician, clergyman, or a planned parenthood agency"); MD. CODE ANN., HEALTH—GEN. I § 20-102(b), (c) (2000 & Supp. 2002) (stating "a minor has the same capacity as an adult to consent to medical treatment if, in the judgment of the attending physician, the life or health of the minor would be affected adversely by delaying treatment to obtain the consent of another individual;" this same capacity to consent to treatment applies to advice about contraception other than sterilization); MISS. CODE ANN. § 41-42-7 (1999) (stating birth control is available to any minor who has the consent of a parent or guardian, or is referred by another doctor, clergy, family planning clinic or school or institution of higher learning or any agency or instrumentality of this state or any subdivision thereof); OR. REV. STAT. § 109.640 (2001) (stating any doctor can give birth

However, the practice of facilitating minors' access to contraception without parents' involvement appears to confirm the faulty idea that minors can maturely discern their sexual readiness. It removes a possible barrier to their engaging in sexual intercourse which can undermine their future marital happiness. Furthermore, such laws have no requirement that providers of birth control require "informed consent" about the relationship between premarital sex or cohabitation and increased divorce rates. This is irresponsible considering the central role that a marriage relationship will play in the lives and happiness of the vast majority of most adults.

Leaving minors to discern their own sexual values without information about the consequences of sexual activity, or without the guidance of their parents ignores minors' own needs in their own words. It also contradicts values associated with stable marriages.<sup>245</sup> These marital values include: (1) acceptance of the fact that there are norms concerning human sexuality that are exterior to the person; and (2) accepting the specific content of these norms, which prize exclusivity over infidelity, and permanency above transiency.

### 3. Marriage as Uniquely Valuable

Extant laws and social policies touching on premarital sex and cohabitation, and even marriage and relationship curricula for teenagers, often do not support marriage in a way that discourages sexual relationships that threaten marriage. In the sex education area, the widespread curricula patterned upon SIECUS materials have adopted a norm of sexual expression completely untied to marriage. This norm states that people should "engage in sexual relations that are consensual, non-exploitative, honest, pleasurable, and protected against disease and pregnancy."<sup>246</sup> Marriage does not even receive specific

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control to any person without regard to their age); TENN. CODE ANN. § 68-34-107 (2002) (stating contraceptives can be supplied to any minor who "has the consent of such minor's parent or legal guardian, or who has been referred for such service by another physician, a clergy member, a family planning clinic, a school or institution of higher learning, or any agency or instrumentality of this state or any subdivision thereof, or who requests and is in need of birth control procedures, supplies or information"); UTAH CODE ANN. 1953 § 76-7-325 (1) (1999) (stating any person before giving contraceptives to a minor shall notify the minor's parents or guardian "*whenever possible*." (emphasis added)).

245. Roberta L. Paikoff et al., *Adolescent Sexuality*, in *PSYCHOL. PERSP. ON HUMAN SEXUALITY* 416, 427 (Lenore T. Szuchman & Frank Muscarella eds., 2000) (stating that adolescents assert that parents are the most important transmitters of values to them).

246. SIECUS TASK FORCE, *supra* note 214, at 8.

attention in SIECUS-inspired courses but is rather treated in a section entitled "marriage and lifetime commitments." Furthermore, ignoring completely the empirical evidence about cohabitant instability and the relationship between cohabitation and divorce, SIECUS-style programs educate teenagers that "many people live in lifetime committed relations, even though they may not be legally married," and that "people who cohabit can have the same commitment and responsibilities toward one another as married people."<sup>247</sup>

Even relationship and marriage education curricula used currently in high schools and some colleges often ignore the unique roles of marriage. The most recent in-depth study of undergraduate level textbooks on the subjects of marriage and family suggests that marriage is being portrayed as a mostly problematic institution without relative superiority for participants or society compared to cohabitation, divorce, step families and gay families.<sup>248</sup> It further concluded that while domestic violence and child abuse were given extensive treatment, almost no treatment was given to the social functions of marriage or the relative health, economic, or other advantages it is now acknowledged that married couples enjoy.<sup>249</sup>

The Hungry Hearts study of the most popular high school curricula, described *supra* in Section III, concluded that while the schools were promoting relationship and communication skills, too many taught very generic skills in these areas, rarely mentioning marriage and failing to note the important legal, social, economic, child rearing, and religious dimensions of marriage as opposed to cohabitation, single parenting, or the single life. This survey rated only three of the ten most commonly used curricula very favorably.<sup>250</sup>

A look at abstinence curricula reveals that while they virtually always speak of marriage as the proper place for a sexual relationship, they may not speak to the institution of marriage as uniquely valuable or make use of all of the social and personal

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247. *Id.* at 22.

248. NORVAL GLENN, CLOSED HEARTS, CLOSED MINDS: THE TEXTBOOK STORY OF MARRIAGE 3 (1997). See also MACK, *supra* note 178, at 5 (suggesting that the ten leading marriage and relationship skills curricula currently in use in U.S. schools "focus only on the psychological, interpersonal dimensions of marriage" while mostly ignoring the importance of marriage as a "public institution with important legal, economic, social, and religious dimensions").

249. See GLENN, *supra* note 248, at 7, 13, 16.

250. Press Release, Institute for American Values, Report: Hungry Hearts (Sept. 20, 2000), available at [http://www.americanvalues.org/html/r-hungry\\_hearts.html](http://www.americanvalues.org/html/r-hungry_hearts.html) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

evidence of this conclusion emerging from the social science literature. Again, sexuality education that painted a fuller picture of this goal and future, including its sexual elements, would better serve the function of strengthening marriage, while strengthening too, the case for the "wait."

Cohabitation laws and policies are the final area with the opportunity to communicate values about premarital sex, cohabitation, and divorce. But the signs here can be difficult to read: it might appear that courts' recent enforcing of rights and obligations between cohabitants, similar to those of married couples, is erasing social distinctions between cohabitation and marriage. But courts might simply be reflecting the greater modern willingness to let people contract about matters, including familial matters.<sup>251</sup> Courts might also, in a spirit of equity, be seeking results which could support the more vulnerable party to the cohabitation.<sup>252</sup>

With these caveats in mind, one can discuss the content of various legal developments in the area of cohabitation and their possible effects on attitudes and understandings about marriage.

As neatly categorized by Professor Grace Ganz Blumberg,<sup>253</sup> there are three outstanding legal developments in the area of cohabitation. First, the statutory conferral of benefits upon couples in nonmarital sexual unions—as reciprocal beneficiaries (in Hawaii)<sup>254</sup> or civil unions (in Vermont).<sup>255</sup> Some smaller jurisdictions also allow cohabitants to obtain state benefits previously reserved for the married.<sup>256</sup> Closely related are state policies conferring discrete, not general, benefits on cohabitants. One example is state housing loans. In Virginia, for example, the Housing Authority in July of 2003 abolished its rule denying low-interest home mortgage loans to unmarried couples. Until that point, Virginia had been the only state housing-finance agency in the country that limited loans to joint applicants

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251. See KRAUSE ET AL., *supra* note 27, at 179.

252. See Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1449 (2001) ("I propose . . . we should acknowledge claims [of cohabitants upon one another] when failing to do so risks leaving one partner in an interdependent relationship seriously vulnerable or disadvantaged because of her reliance on the other, particularly when the relationship has ended.").

253. GANZ BLUMBERG, *supra* note 13, at 1272–73.

254. HAW. REV. STAT. ANN. §§ 572C-1-7 (Michie 1999).

255. VT. STAT. ANN. tit. 15 § 1204 (2002).

256. See Regan, *supra* note 252, at 1436–37 (citing Julianna S. Gonen, *Same-Sex Unions and Domestic Partnerships*, 2 GEO. J. GENDER & L. 329 (2001)).

"related by blood, marriage or adoption or by legal custodial relationship."<sup>257</sup>

A second set of policies reflecting values about cohabitation are private employer policies.<sup>258</sup> There is a trend today of extending traditionally spousal benefits, such as health insurance, to unmarried cohabitants of the employee.<sup>259</sup>

A third set of relevant policies on cohabitation<sup>260</sup> are those developed by courts called to decide cohabitants' mutual rights and obligations, usually at the termination of the relationship. Today, more courts are treating cohabitant couples like spouses for purposes of property distribution at death or at the dissolution of the relationship. They are employing a variety of theories to reach similar results.<sup>261</sup> The American Law Institute reflected this in its proposed chapter six of its Principles of the Law of Family Dissolution, stating that "the equitable considerations shaping the financial rules . . . at the end of a marriage are equally pertinent at the end of a stable nonmarital cohabitation of substantial duration, whether same-sex or opposite-sex."<sup>262</sup>

Professors Ganz Blumberg and Regan<sup>263</sup> have undertaken very helpful summaries and analyses of the trends in the law concerning cohabitation. Their writing confirms that the United States is trending toward greater legal and social acceptance of cohabitation. These developments are proceeding without any apparent acknowledgment of the correlation of cohabitation with divorce. Rather, the story told by trends in law and policy concerning cohabitation is one of the diminishing significance of marriage and a disregard of the relationship between cohabitation and divorce. It is understandable that states and employers may wish to allow citizens and employees, respectively, to share medical and other benefits with others who may be dependent on them. It is understandable that courts will want to provide

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257. Bill Baskerville, *Board Expands Mortgage Subsidies: Unmarried Couples Will Be Qualified*, WASH. TIMES, July 28, 2003, at B1.

258. GANZ BLUMBERG, *supra* note 13, at 1272-73.

259. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS [hereinafter ALI PRINCIPLES], chs. 4, 5, § 6.03 Reporter's Notes, cmt (b) at 918 (American Law Institute 2002).

260. GANZ BLUMBERG, *supra* note 13, at 1273.

261. See *id.* at 1293-94 (noting that some states will specifically enforce cohabitant mutual obligations similar to those applicable to married couples if the cohabitants functioned like a married couple; while other states "nominally follow the contract rubric of *Marvin* . . . but . . . [t]o the extent that the law of contract does not reach such results, these courts also effectively . . . reach a result that seems equitable in light of the parties' domestic behavior").

262. *Id.* at 1295 (citing ALI PRINCIPLES, *supra* note 259).

263. See Regan, *supra* note 252.



some financial protections for vulnerable cohabitants at the time of the dissolution of their relationship.<sup>264</sup> Yet, as a general principle, and aside from these interests, states ought not to facilitate or subsidize cohabitation, knowing now more clearly than ever that it is correlated with marital breakdown, and all of the associated costs of divorce to children, adults, and society as a whole.

Taken together, the messages sometimes sent by the array of laws, policies, and programs which logically touch on premarital sexual behaviors, indicate that—even with the recent upsurge in abstinence education—there is a dearth of content concerning the relationship between premarital sex, cohabitation, and divorce. This might be accounted for in part by the size of the divorce problem, and the consequent number of possible responses to it. It might also be due to the faulty belief that existing sex education programs are handling it. Perhaps it even reflects a lower interest among some “elites” in society, in preserving marriage as an institution, or fears of “establishing” a religious view of sex and marriage. The following section will offer responses to the types of fears and beliefs preventing greater attention to a significant set of divorce correlates, in the course of offering specific and general proposals for responding to the correlation between premarital sex, cohabitation, and divorce in law and public policy.

## V. PROPOSED SOLUTIONS AND RESPONSES TO SOME OBJECTIONS

No one article can or has proposed the definitive answer to a question that has eluded the most sophisticated sociologists, psychologists, public health specialists, parents, and others: how to sharply curb premarital sex, and cohabitation. Instead, this Article points out the strength of the correlation between premarital sex, cohabitation, and divorce, and suggests ways that relevant laws could better use this information to strengthen marriage, especially in the current climate of heightened interest in marriage. This involves not only an objective look at the effects of current laws and programs and suggestions for removing values contrary to marriage (Section III, *supra*), but also suggestions for incremental improvements in relevant laws and policies to take full account of the correlation.

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264. I am in agreement with the lines drawn in this regard by Professor Milton Regan in his analysis in *Calibrated Commitment*, *supra* note 252, at 1449.

### A. *Specific Responses*

The first obvious place for addressing premarital sex and cohabitation are sex education and marriage courses directed to high school and younger students. In either type of course, students ought at least to be introduced to the empirical evidence linking premarital sex, cohabitation and divorce. In order for this to occur in sex education courses, it is likely to require a "re-contexting" of the course material toward marriage. The current context, as conveyed *supra* in Section IV, is often not marital. There are many ways to describe what it is about: physical or mental health, developmental maturity, or the avoidance of harm to others. But it is not about the link between sex and marriage, though marriage is the relationship most crucial to the happiness of most adults and the one in which sex will be most frequent, most significant, and most procreative. Cautioning teenagers about premarital sex and cohabitation in the context of the social and personal goods of marriage could provide additional motivation to avoid taking risks. This group has recently shown itself receptive to information and capable of turning around the national statistics on premarital sex and pregnancy. They also retain strong aspirations for healthy marriages.<sup>265</sup>

This adolescent longing is best answered if information about sex and cohabitation is presented in the positive context of the marital values referred to above. This involves avoiding the now frequent lesson that good sex focuses most on the avoidance of disease and pregnancy. A positive vision of loving, committed, fruitful sexual relations is the best context in which teenagers might understand and be motivated to avoid premarital sexual relationships. A practical hurdle to be overcome here, of course, is the lack of a developed sense of future orientation among adolescents.<sup>266</sup> At the same time, they are acutely aware of the failure rates of modern marriages. A positive message about the meaning of marriage combined with the advice to avoid behavior associated with trouble for their marital hopes is a realistic combination.

A second proposal is to direct government funding in ways that recognize that premarital sex, cohabitation, and divorce are part of the same puzzle. This includes funding currently

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265. See Thornton & Young-DeMarco, *supra* note 20, at 1030.

266. See generally Frank F. Furstenberg, *The Sociology of Adolescence and Youth in the 1990s: A Critical Commentary*, 62 J. MARRIAGE & FAM. 896 (2000); Monica Kirkpatrick Johnson et al., *Adolescents' Anticipation of Work-Family Conflict in a Changing Societal Context*, in 6 ADVANCES IN LIFE COURSE RES. 233 (Sandra L. Hofferth & Timothy J. Owens eds., 2001).

earmarked either for sexuality education or marriage strengthening. More funding is necessary for studies directed towards understanding the reasons for the correlation between premarital sexual behaviors and divorce and the best means for responding to it. Additional research on the reasons for teen sex and cohabitation is also necessary. As a relatively recent phenomenon, cohabitation in particular requires far more investigation and more developed programs for reducing its incidence. Public support for such funding might be increased by connecting the research to marriage strengthening, a currently ascendant idea.

A widespread federal or state ad campaign about cohabitation would also help, especially in light of the misperception that cohabitation stabilizes a future marriage. Such a campaign might look very much like the 2003 Ad Council Campaign<sup>267</sup> on drugs. This campaign was directed towards parents with the blunt message to disregard adolescent claims that parental guidance is unwelcome. It insightfully recognized that the current generation of parents needs this type of encouragement given parents' confusion regarding whether they can effectively influence adolescents and parents' apparent reluctance to make firm moral judgments in this area. A similar campaign is necessary in order to confront the widespread belief that premarital sex and cohabitation are becoming inevitable.

Another area ripe for change is the law regarding minors' access to contraception and abortion. Parents ought to be reinserted in decisions about whether their minor children will receive health care or even surgery in the forms of contraception and abortion. The law should stop indicating to minors that they are capable of gauging the full effects of premarital sexual involvement, parenting or abortion, without parental guidance.

Also in the contraception area, new laws should require that the informed consent information given to minors receiving contraception include information about the correlation between premarital sex, cohabitation, and divorce. Doctors already regularly provide information about the relationship between sex, some forms of birth control, and sexually transmitted diseases. Information important to the future happiness and stability of marriages is no less crucial and no less related to overall health and happiness. For minors whose contraception consists of condoms sold over the counter, the law could also require the posting of an appropriate warning on these packages.

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267. See generally The Advertising Council, at <http://www.adcouncil.org> (last visited Sept. 19, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

There is also a window of opportunity for the state during the time its adult citizens are engaged and seeking marriage licenses. Presently, only some states are providing handbooks on marriage to couples seeking marriage licenses, and some states are requiring or encouraging premarital counseling. All states should have some means of helping couples contemplating marriage with information, counseling, and time to reflect. The information should include what is currently known about the relationship between premarital sexual behaviors, including cohabitation and divorce. States could also include in this counseling, the advice that cohabiting couples should separate prior to marriage in order to consider the meaning of their prior cohabitation(s) in light of the nature of the marital commitment.

Another promising avenue for assisting marriage involves extending the current timing and objectives of private initiatives such as PREP and the Marriage Savers' Community Marriage Policies.<sup>268</sup> Instead of encountering couples first when they are engaged, such programs might seek to develop interventions for high schools and colleges concerning what makes marriages strong. Such programs might also address more directly cohabitation as a problem for their communities, whether they do so through churches, businesses, high school programs, or public messages. Such programs might also consistently adopt a policy already practiced by a number of churches: to require cohabiting couples to separate for a prescribed period for reflection before they can be married by a religious or judicial authority who is a signatory to the community policy.<sup>269</sup>

### B. *Guiding Principles for the Future*

Section IV proposes reforming laws and policies currently conveying information and values that likely weaken marriage, and Section V(A), immediately above, offers specific suggestions for new laws and policies that make the connection between premarital sex, cohabitation, and divorce. This portion of the Article offers more general principles for shaping future laws and policies on this subject, and tries to address the likely objections that will be raised especially in regard to state action about sensitive sexual choices.

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268. See *supra* notes 157–66 and accompanying text.

269. It is a common practice, for example, of Roman Catholic dioceses to require couples to wait about six months after their engagement before marrying in the Church.

# 1. Don't Oversell or Undersell the Benefits of Laws and Programs to Make Moral Changes

Certainly, the "story told" by the law is important; one has only to look at the story told about divorce and its effects over the last thirty years to understand this. Removing the law's messages of indifference or support toward premarital sex and cohabitation is an excellent first step. This should be followed by stepping up messages against these practices and relating them specifically to marital failure.

Yet, as Professor Douglas Kmiec has pointed out, the law can be a "fairly blunt and cumbersome instrument."<sup>270</sup> Underlying today's premarital sexual behaviors are real changes in beliefs—religious, philosophical, cultural—and the law is not a precision tool for dialoguing with or altering these.

There is also the question of government competence in this particular area, a challenge posed often by those currently rejecting government actions aimed at strengthening marriages. It is undoubtedly reasonable to be worried about government-as-sex-and-marriage-counselor, given the complexity of marital life and its very personal as well as social elements. Also, given the wide variety of possible therapeutic "wisdom" about marriage, and the relative newness of the research underlying the task, how is the government to choose?

On the other hand, the blunt opinion that "[t]he combination of marriage and government [is] a shotgun wedding"<sup>271</sup> is too extreme. From the beginning of the United States, government has had an express legal and social interest in marriage. Also from the beginning, a large body of regulation has protected social interests in marriage, especially marital stability, which is the same interest expressed in current legislative and policy proposals.<sup>272</sup> Milton Regan persuasively argues that the government's promotion of stability and commitment in mar-

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270. Douglas W. Kmiec, *A Reply to Drs. Carlson and Hitchcock: Still a Fool's Game—The Mistaken Pursuit of Family Virtue Through Politics and the Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 647, 649–50 (1996).

271. Sharon Tubbs & Thomas C. Tobin, *When Government Wants Marriage Reform*, ST. PETERSBURG TIMES, Feb. 8, 2003, at 1D, available at 2003 WL 12203733.

272. See Lynn O. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 778–79 (2001). Professor Lynn Wardle points out that the "justifications for and the purposes of legal regulation of marriage have consistently been to protect and promote general social interests, not private interests." *Id.* He argues that this has been the primary purpose of marriage laws and "not to promote any individual's or any particular class's private interests." *Id.*

riage is comprehensible not only from the perspective of social good but also from the perspective of individual autonomy, which is enhanced, not weakened, when government facilitates the making and keeping of intimate commitments.<sup>273</sup> It should also be noted that suspicion about government involvement in marriage strengthening often comes from the very same persons who demand copious state action on behalf of child support and "parent education." "In the words of one ACLU official, 'I'm not sure that government, with all of its competence, should be sticking its nose in marriages'. . . . [Government should] concentrate on prekindergarten and after-school programs and making life easier for single parents.'<sup>274</sup> Yet support for children is best accomplished in stable marriages. When there is premarital childbearing or when marriages fail, there is dramatically more personal and intrusive government intervention into family life than what is proposed by current marriage initiatives and this Article. This Article does not propose a return to enforcement of anti-fornication laws to reduce premarital sex and cohabitation, even though these might still pass constitutional muster after the Supreme Court's decision in *Lawrence v. Texas*,<sup>275</sup> especially in light of the evidence about their links to divorce.<sup>276</sup> It does not propose any sort of limit on marriages for persons whose premarital behavior is correlated with more frequent divorce. The focus is rather upon removing from current laws messages problematic to marriage, and giving teens and engaged couples more and better information and time for reflection about the elements of marital success. This is not the kind of intimate meddling in relationships some seem to fear. And such proposals also do not begin to compare, it should be repeated, with the degree of intimate government involvement now imposed when there is family breakdown.<sup>277</sup>

Another challenge to government action for marriage is the government's relative inexperience in marriage strengthening initiatives of the type recently underway. Yet this is understanda-

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273. Regan, *supra* note 252.

274. Tubbs & Tobin, *supra* note 271, at 1D.

275. 123 S.Ct. 2472 (2003).

276. See *id.* While the *Lawrence* Court declared that the constitutional right of privacy protected consensual sexual behavior, Justice Kennedy's opinion urged the states to forego regulation with an important caveat: "absent injury to a person or abuse of an institution the law protects." *Id.* at 2478. Considering the evidence available about the consequences for marriage and the well-being of children, it is rather easily argued today that premarital sex and cohabitation threaten the longstanding social institution of marriage.

277. Jarchow & Tweedie, *supra* note 122, at 24.

ble in light of the relative newness of the coincidence between high divorce rates and public will to improve them. Accusations about the "untested" nature of new efforts<sup>278</sup> are also being met by the government with proffers of findings from years of research about marital strengthening programs predating widespread public awareness of them,<sup>279</sup> and by new federal money for scholarly research in relevant areas.<sup>280</sup>

## 2. Be Aspirational

Marriage strengthening proposals should appreciate the signs of the times—including the size of the phenomena of premarital sex and cohabitation—but remain aspirational, pointing to the kind of future young people say they hope for.

Certainly, it is a generally accepted understanding of the law that it does not guarantee results, but tries to "impart the right lessons."<sup>281</sup> More than that, it can "sum[arize] our ideals" and reinforce them.<sup>282</sup> At the moment, the ground for sowing the right lessons about marriage is especially fertile. Americans' ideals for marriage remain strong. There is a hope for lifelong permanence, fidelity, the maintenance of a romantic bond between

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278. See, e.g., Laura Meckler, *Promoting Wedlock to the Poor: A New Program Would Encourage Marriage Through Child Support Funds Matched Federally*, PHILADELPHIA INQUIRER, May 11, 2003, at A5, available at 2003 WL 20392462 (asserting that "little evidence exists about what might work"); *Punishing the Poor*, SALT LAKE TRIB., Feb. 17, 2003, at A14, available at 2003 WL 3674308 (referring to "untested programs"); *Welfare Reform Needs Thoughtful Consideration*, SEATTLE POST-INTELLIGENCER, Feb. 20, 2003, at D6, available at 2003 WL 6290223 (referring to "unproven programs to promote marriages").

279. See, e.g., Horn, *supra* note 158, at 1 ("Wade Horn says that the government can help Americans strengthen—and even save—their marriages. And he has the data to prove it.").

280. See Dep't of Health and Human Servs., Solicitation Notice No. 233-03-0034, *Evaluations of Interventions to Strengthen Marriages of Low Income Couples* (May 8, 2003), available at 2003 WL 17186105 (seeking nine year performance evaluations testing healthy families among low income couples in child rearing years who are married or planning to marry) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). See also Abstinence Clearinghouse, at <http://www.abstinence.net> (last visited Sept. 19, 2003) (announcing that it was the recipient of an HHS grant to provide national criteria for evaluating abstinence programs; to provide a list of science-based, medically accurate list of information for grantees; and to suggest culturally diverse ways of teaching about abstinence) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

281. See, e.g., Judith T. Younger, *Marriage, Divorce and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367, 1379 (1993).

282. GLENDON, *supra* note 192, at 111.

husband and wife, and responsibility to children. Adolescents have these same hopes.<sup>283</sup>

Standing against these ideals are the size of our problems, as summarized in Sections II and III, *supra*. Yet, we have left the "bad old days" of skyrocketing rates of premarital sex and pregnancy and of real confusion about the wisdom and effects of these practices with respect to marital happiness. Some initiatives to reduce these problems now have a track record. Moving this message beyond disease and pregnancy, and toward a marriage focus, is merely an extension of an existing phenomenon, not an untried project. The idea floated in the 1960s and 70s that there might be real good in teen experimentation with premarital sex is rarely aired today, and never to wide appeal.<sup>284</sup> Rather, the trajectory is about how to slow or stop teen sexual experimentation. The public is more aware of the relationship between out-of-wedlock pregnancy and births and the problems of poverty, sexually transmitted diseases, and diminished well-being for children. In sum, we are not at the beginning of efforts to curb premarital sex and cohabitation, but somewhere further along, and we have more information at our disposal than ever before.

### 3. Use Empirical Evidence

A third principle that should guide future efforts to address the correlation between divorce and premarital sexual behaviors is the liberal use of empirical evidence. This makes sense on its face: it is persuasive to listeners,<sup>285</sup> and it is the safest way for government actors to proceed, especially in a controversial area, and against the charge that it is seeking to promote "religious" versus secular ideas. Finally, there is simply more relevant empirical evidence available today than before on this subject.

Here, it is important to note that both the message and the messengers will be dismissed if they employ exaggeration or

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283. See Thornton & Young-DeMarco, *supra* note 20, at 1021, 1030. See also Michael Fucci, *Educating Our Future, An Analysis of Sex Education in the Classroom*, 2000 BYU EDUC. & L.J. 91 (2000) (recommending a sex education program incorporating high expectations).

284. Note, for example, the public flap that followed publication of JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN* (2003), a book which indicates that sexual experience is good for children.

285. See, e.g., Mike McManus, *Cohabitation: Pastors Try to Cope with the Dilemma*, NEWS HERALD (Fla.), Oct. 24, 1998, at 6B, at <http://www.newsherald.com/archive/religion/mm102498.htm> (reporting that the story of a Protestant pastor in Michigan who concluded that the best way to persuade couples to separate before marrying in the Church was with the empirical evidence) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).



wrong information. Reported comments from those opposed to the government's abstinence messages often highlight the exaggerated or wrong information that some instructors have given out in such programs.<sup>286</sup> There are accusations that such claims spread "fear and misinformation" and "encourage[ ] ideology to trample over sound public health policy and scientific research."<sup>287</sup>

But there is a wealth of relevant, empirical information about the goods of delaying sex until marriage. As set forth in Section III, *supra*, there is evidence which has proved consistent over time, is unchallenged, and demonstrates a robust statistical correlation between premarital sex, cohabitation and divorce. There are also more findings available today regarding why teenagers especially seek premarital sex and cohabitation in the first place.

While there is still a great deal more to learn about teenage behavior,<sup>288</sup> there are respected findings to the effect that teenagers are more likely to engage in premarital sex if they give diminished weight to social norms about premarital sex,<sup>289</sup> are male,<sup>290</sup> have lower educational levels, have moved a lot,<sup>291</sup> are members of an at-risk group such as African-Americans,<sup>292</sup> are children of single parents or a female-headed family,<sup>293</sup> have more opportunities for sex on account of more dating<sup>294</sup> and

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286. See, e.g., Julie Jones, *Money, Sex and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075, 1077-78 (2002) (critiquing abstinence programs, claiming that they use incorrect information about sexually transmitted disease and birth control methods).

287. SIECUS ANNUAL REPORT, *supra* note 194, at 4,7.

288. See, e.g., Paikoff et al., *supra* note 245, at 425.

289. Mary Rogers Gillmore et al., *Teen Sexual Behavior: Applicability of the Theory of Reasoned Action*, 64 J. Marriage and Fam. 885, 894, 895 (2002).

290. See Gerbert Kraaykamp, *Trends and Countertrends in Sexual Permissiveness: Three Decades of Attitude Change in the Netherlands 1965-1995*, 64 J. MARRIAGE & FAM. 225, 238 (2002).

291. See Jewelle Taylor Gibbs, *Psychosocial Correlates of Sexual Attitudes and Behaviors in Urban Early Adolescent Females: Implications for Intervention*, 5 J. SOC. WORK & HUM. SEXUALITY 81, 91-94 (1986).

292. See Lydia O'Donnell et al., *Long-Term Influence of Sexual Norms and Attitudes on Timing of Sexual Initiation Among Urban Minority Youth*, 73 J. School Health 68, 68, 70 (2003); Dawn M. Upchurch et al., *Neighborhood and Family Contexts of Adolescent Sexual Activity*, 61 J. Marriage & Fam. 920, 924 (1999).

293. Upchurch et al., *supra* note 292, at 924, 926.

294. Leighton Ku et al., *Neighborhood, Family and Work: Influences on the Premarital Behaviors of Adolescent Males*, 72 SOC. FORCES 479, 482, 488, 495, 496, 498 (1993).

more time alone,<sup>295</sup> and live in a neighborhood experiencing high unemployment.<sup>296</sup> For young women in particular, one influential study concluded that they are affected by dependency needs (e.g., unmet needs for parental love) and a distant relation with the mother, leading them to engage in sex with men from two to six years older.<sup>297</sup>

There are also widespread findings that religiosity is a robust correlate of refusing or delaying premarital sex and cohabitation. People who have sex earlier and premaritally report being lesser influenced by religion.<sup>298</sup>

There is, in sum, ample empirical evidence upon which to continue and improve efforts to reduce premarital sexual behaviors; there is also the additional motivation coming from its likely good effects upon future marital stability. Unembellished use of this information by both private and public actors should be made part of efforts to strengthen the marriages of the future.

#### 4. Be Experimental

Public understanding and concern is still catching up with the size of our teen pregnancy, out-of-wedlock birth, and cohabitation problems. The relationship between these problems and divorce is relatively recently known. Changes in cultural beliefs about marriage and family—like the erroneous belief that cohab-

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295. DOUGLAS KIRBY, SUMMARY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY 13–14 (National Campaign to Prevent Teen Pregnancy 2001); Yvonne Zipp & Steven Savides, *Boston Answers Call for After-School Care*, CHRISTIAN SCIENCE MONITOR, Mar. 22, 2001, at 3, available at <http://search.csmonitor.com/durable/2001/03/22/p3s1.htm> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

296. See Ku et al., *supra* note 294, at 497 (reviewing data from the 1988 National Survey of Adolescent Males, a survey of 1880 never-married males from across the nation, ages 15–19, collected by the Institute for Survey Research at Temple University).

297. See Ethel Hall, *Factors Associated with Sexual Activity in Early Adolescence*, 5 J. SOC. WORK & HUM. SEXUALITY 23, 32 (1986).

298. See Ann M. Meier, *Adolescents' Transition to First Intercourse, Religiosity, and Attitudes About Sex*, 81 SOC. FORCES 1031, 1031–32 (2003). Political and moralistic arguments often cite a degeneration of values as the source of the trend toward earlier sex. Arguments of this tenor implicate detachment from religion as fundamental to this downward shift in age at first sex. These arguments are not pure rhetoric. Empirical evidence confirms that Americans' attitudes toward premarital sex have become more permissive over time and the influence of religiosity on these beliefs has deteriorated. *Id.* See also Niclas Berggren, *Rhetoric or Reality? An Economic Analysis of the Effects of Religion in Sweden*, 26 J. SOCIO-ECONOMICS 571 (1997) (arguing that religion has a negative effect on divorce, abortion, non-payment of child support, and out of wedlock pregnancy in Sweden).

itation will assure a better marriage—are only now being sorted out. The quality and effectiveness of existing programs is still under evaluation. Particularly with respect to the abstinence message—which on its face would seem a logical response to existing problems—more testing is warranted to answer the question how it should be communicated to effectively decrease rates of premarital sexual involvement. Even supporters of “comprehensive sexuality education” acknowledge that abstinence methods are not fully tested. Fortunately, results from “a well-designed, federally-sponsored evaluation of Title V funded abstinence programs” are scheduled to be available soon.<sup>299</sup> Notions that abstinence programs are no more than “challenges” posed by the religious right have to be set aside in the name of objective inquiry and a real desire to fix current problems.<sup>300</sup>

For their part, supporters of abstinence programs may want to reconsider drawing the line at any talk of contraception in sex education programs. Failing to acknowledge information that is already present in teen magazines, websites, and all forms of media may have the effect of undermining the credibility of the good information that abstinence programs do contain. A good framework for introducing information about contraception might include using marriage as the expected and “free” context in which to have a sexual relationship; explaining the personal and social goods of marriage; linking premarital sex and cohabitation to divorce, and including research findings about the states of mind that may dispose a person both to premarital sex and divorce; describing the personal and social benefits of marriage; acknowledging the existence and availability of contraception to teens; describing the means and full range of effects of contraception, including its rates of success and failure (particularly its high failure rate among teens) and its health effects. Such a framework might overcome the “credibility gap” in messages failing to acknowledge contraceptive messages to teens, while meeting these messages with sound and persuasive evidence likely to discourage premarital sex, all in the context of marriage.

With regard to ongoing research about comprehensive sexuality education, at the very least the research needs to empirically

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299. KIRBY, *supra* note 295, at 5. Noted sexuality education researcher Dr. Douglas Kirby has opined that “very little rigorous evaluation of abstinence-only programs has been completed. . . . [G]iven the paucity of the research and the great diversity of abstinence-only programs that is not reflected in these three studies, one should be very careful about drawing conclusions about abstinence-only programs in general.” *Id.*

300. SIECUS ANNUAL REPORT, *supra* note 194, at 6.

demonstrate that such education actually reduces rates of teen sexual involvement. The most recent and widely aired study comparing outcomes in schools with and without condom give-away programs did not even compare the number of pre-program pregnancies or teen sexual experience to the post-program number. Supporters were rather content to tout the absence of any increase in pregnancies after the programs.<sup>301</sup> Its supporters trumpet this information as if it answers all objections, but it does not. In light of all that is known about the effects of premarital sex, including its divorce correlation, all sexuality education programs ought to be required to show that they actually reduce premarital sexual involvement.

Other approaches to reducing teen sexual involvement also need more investigation. According to an important study, "Service Learning" programs—in which youth are given worthwhile work to do on behalf of local persons and communities—show very promising results in the area of lowering teen sexual involvement.<sup>302</sup> "Vocational education," the Conservation and Youth Service Corps and Job Corps in particular, has shown less promise than service learning,<sup>303</sup> but one wonders if this could change if the United States employed more of the comprehensive types of vocational education employed in some of the European Union countries.<sup>304</sup> Comprehensive vocational education would also likely be attractive to some of the groups experiencing the highest rates of adolescent premarital sex and pregnancy: those living in neighborhoods with high unemployment rates and high rates of single parenthood. It offers comprehensible, realistic hopes for a future that is tied to a desirable job and income. While experts note that evaluations of the results of service learning and vocational programs generally have not been as long-

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301. Associated Press, *Condoms in Schools Don't Cut Sex*, WASH. TIMES, May 29, 2003, at A10.

302. See KIRBY, *supra* note 295, at 8 (noting that such programs also contain structured time for preparation and reflection, relationships with facilitators, supervision after school, and the development of particular competencies).

303. See *id.* at 13–14.

304. See Symposium, *Vocational Training and Lifelong Learning in Austria and Germany*, 5 AUSTRALIA CENTRE SERIES (2002); Ministry of Foreign Affairs, *Vocational Training in France: An Answer to Your Questions* (2002), available at [http://www.france.diplomatie.fr/education/formation\\_pro\\_gb.pdf](http://www.france.diplomatie.fr/education/formation_pro_gb.pdf) (last visited Sept. 17, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

term or rigorous as possible, some extant findings are promising.<sup>305</sup>

##### 5. Exercise an Option for At-Risk Groups

Statistics already demonstrate that poorer Americans are more at risk for premarital sex, premarital pregnancy, cohabitation, and divorce.<sup>306</sup> Fear is growing among some groups that access to a good marriage and family life is increasingly unavailable to the poor. Public and private efforts to use information about the correlation between divorce and premarital sexual behaviors should reach out especially to these groups, not with penalties or bias, but also without blurring the clarity of the message: premarital sex and cohabitation can be harmful to your marriage, yourself, and any children you may have.

Too often, under the rubric of kindness or tolerance, messages rejecting certain sexual behaviors are interpreted as unjust criticism of the poor or of minority communities. This interpretation is hindering acceptance of marriage strengthening programs for fear that new programs will demonize people who live in alternative family forms, particularly the poor.<sup>307</sup> One social work scholar, for example, called the new initiatives on marriage a "right wing social agenda" that further "marginalizes nondominant family forms."<sup>308</sup>

But holding fire here is false kindness. Nowhere is this better expressed than in theologian Don Browning's criticism of the Draft Presbyterian Report on Families. He called the report "a marvelous example of how elitism can silently march under the banner of inclusiveness."<sup>309</sup> Browning points out that the report, issued by 96% white Presbyterians with mostly intact families of middle to upper incomes, writes mostly about acceptance of alternative family forms and how children in such families are doing "just fine."<sup>310</sup> Browning challenges the Church to offer "more than superficial acceptance" to at-risk families. He writes

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305. Paikoff et al., *supra* note 245, at 426 (citing Joseph P. Allen et al., *Preventing Teen Pregnancy and Academic Failure: Experimental Evaluation of a Developmentally Based Approach*, 64 CHILD DEV. 729 (1997)).

306. See Fields & Casper, *supra* note 3, at 5, 13.

307. See, e.g., Laura Curran, *Social Work and Fathers: Child Support and Fathering Programs*, 48 SOC. WORK 219 (2003), available at 2003 WL 12847989.

308. *Id.* at 225.

309. Don Browning, *How Inclusiveness Becomes Elitist: Reflection on the Presbyterian Report on Families* (May 13, 2003), at [http://www.americanvalues.org/html/how\\_inclusiveness\\_becomes\\_elit.html](http://www.americanvalues.org/html/how_inclusiveness_becomes_elit.html) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Browning is Director of the Religion, Culture and Family Project of the University of Chicago. *Id.*

310. *Id.*

that such families instead want "concrete help and a theological framework that acknowledges, rather than minimizes, the challenges they face."<sup>311</sup>

Indeed, it is well documented that wealthier and more educated Americans are more likely to adopt attitudes about sexuality that contradict traditional mores.<sup>312</sup> But they also have the resources to more often avoid the consequences of sexual behaviors violating established norms. They have money for birth control, future plans for college and a job, family support for unexpected needs, and a greater likelihood of marriage, to name just a few. The poor have thinner margins. Suggesting they adopt the sexual morality supported by the more privileged is likely a recipe for disaster. The famous *Wall Street Journal* editorial "No Guardrails" once opined:

It may be true that most of the people in Hollywood who did cocaine survived it, but many of the weaker members of the community hit the wall. And most of the teenage girls in the Midwest who learn[ed] about the nuances of sex from magazines published by thirty-something women in New York will more or less survive, but some continue to end up as prostitutes on Eighth Avenue. . . . If as a society we want to live under conditions of constant challenge to institutions and limits on personal life . . . then we should stop crying over all the individual casualties, because there are going to be a lot of them.<sup>313</sup>

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311. *Id.*

312. See Judith Treas, *How Cohorts, Education and Ideology Shaped a New Sexual Revolution on American Attitudes Toward Nonmarital Sex, 1978–1998*, 45 Soc. PERSP. 267, 270 (2002); see also Gerbert Kraaykamp, *Trend and Countertrends in Sexual Permissiveness: Three Decades of Attitude Change in The Netherlands 1965–1995*, 64 J. MARRIAGE & FAM. 225, 236 (2002) ("[T]he more educated adopt more progressive attitudes towards sexuality.").

313. Editorial, *No Guardrails*, WALL ST. J., Mar. 18, 1993, at A12. Apparently, this editorial generated a firestorm of response from the public. The editor of the *Wall Street Journal* took the unusual step of summarizing and highlighting some of the more extraordinary letters, including the one from one reader who said "to be frank, my immediate and guttural reaction was to scream." Robert L. Bartley, Editorial, "No Guardrails": *Values Debate a Tectonic Clash*, WALL ST. J., Apr. 15, 1993, at A14. The *Wall Street Journal* also acknowledged that the same argument was also made in a book published at the time of the editorial, MYRON MAGNET, *THE DREAM AND THE NIGHTMARE: THE SIXTIES' LEGACY TO THE UNDERCLASS* (1993), in which the author argued that "[s]ociety's most privileged children can survive mistakes fatal to the less fortunate. In selfish pursuit of immediate gratification, our cosmopolitan elites have undermined the values needed to sustain a larger society." *No Guardrails*, *supra*, at A12. The editorial concluded by reaffirming the theme:

Public and private efforts to reach out on the issues of premarital sexual behaviors are likely to be spearheaded by persons with education and good income. This should not cause them to berate the poor for their problems, nor should they demean their lives by seeming to advise them to marry merely as a means to the end of economic prosperity. At the same time, however, their privileged state should not blind policymakers to the needs of all—including the poor—for honest information and motivation about the benefits of avoiding premarital sex and cohabitation.

## 6. Address Immediate Crises, Too

It is not good strategy for strengthening marriage to ignore the immediate needs of children and parents in at-risk families. State programs to strengthen marriage need to plainly communicate that income, food, and educational programs assisting children of divorced or single parent households will not be sacrificed in the name of strengthening future families. The fear that the state will not heed this advice underlies some of the opposition to new marriage strengthening initiatives.<sup>314</sup> As a sign of *bona fides* versus politics and as a humane act in keeping with the spirit of marriage strengthening initiatives, government cannot fail to meet the needs of this generation of children that are disadvantaged due to poverty, divorce, cohabitation, and out-of-wedlock pregnancy in the name of hope for better results for the next generation.

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For in the social problems of the 1990s, we suffer from variations on the theme that American society is immoral. That the individual can decide which rules to follow and which to flout. That society has no legitimate authority in erecting guardrails. For better or worse, an antidote is brewing in the kitchens of Queens.

*Id.*

314. See Laura Meckler, *Promoting Wedlock to the Poor: A New Program Would Encourage Marriage Through Child Support Funds Matched Federally*, PHILA. INQUIRER, May 11, 2003, at A5, available at 2003 WL 20392462 (noting that HHS Asst. Sec. Wade Horn reported that money for marriage would not be taken from child support funds); see also *Welfare Reform: Building on Success, Hearing on Welfare Reform Before the Sen. Fin. Comm.*, 108th Cong. (2003) (testimony of Margy Waller, Visiting Fellow, Brookings Institution), available at 2003 WL 11716251 (arguing that there are not enough dollars for needy families and that they should be used for immediate needs such as child care, transportation, jobs, and "proven strategies"); see also Heath Foster, *Bush's Welfare Adviser Promotes Marriage Initiative*, SEATTLE POST-INTELLIGENCER, Dec. 6, 2002, at B2 (noting that a welfare rights organization asserted: "This is a bone thrown to the conservative wing by the administration to distract from what will really improve the well-being of children and families. . . . Education and training is the biggest anti-poverty program for low-income women.").

## 7. Encourage the Religious Effect, but Avoid Establishing Religion

Teachings on saving sex for marriage are long held and definitively pronounced in the major religions.<sup>315</sup> Programs sponsored by religions encouraging adolescents to wait until marriage for sex are increasingly visible, such as True Love Waits.<sup>316</sup> Research continually shows that religious adherence is a robust predictor of all of the following goods relative to marital stability: virginity until marriage, delayed initiation of sexual intercourse, and avoidance of cohabitation.<sup>317</sup> In fact, teenage girls tell researchers that the primary reason they remain virgins is due to their religious or moral values.<sup>318</sup>

Does this mean, then, that government programs directly opposing premarital sex and cohabitation or subsidizing private programs with the same messages establish religion? It does not, but the charge requires a response if there is to be saved a message that has proved effective and good for marriage. What follows will distinguish the "save sex for marriage" message from religious teaching. It will also consider ways to let the beneficial effects of religious teachings about sex and marriage flourish, without violating Establishment Clause limits.

The most comprehensive argument that messages to abstain until marriage are *de facto* religious messages has been forwarded by Professor Gary Simson and Erika Sussman in an article critiqu-

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315. See, e.g., Pope John Paul II, The Origin of the Crisis in Marriage, Address to the Roman Rota (Jan. 30, 2003), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/2003/january/documents/hf\\_jpii\\_spe\\_20030130\\_roman-rotan\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/january/documents/hf_jpii_spe_20030130_roman-rotan_en.html) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

[W]hy it is [sic] always necessary to love the other spouse even when so many apparently justifying reasons, would lead one to leave? . . . The ultimate reason, therefore, for the duty of faithful love is none other than what is the basis of the divine covenant with the human person: God is faithful. To make possible the fidelity of one's spouse, even in the hardest cases, one must have recourse to God in the certainty of receiving assistance.

*Id.*

316. Susan D. Brandenburg, *Teens Promise God They'll Wait*, FLA. TIMES-UNION, Mar. 1, 2003, at A4.

317. See Niclas Berggren, *Rhetoric or Reality? An Economic Analysis of the Effects of Religion in Sweden*, 26 J. OF SOCIO-ECONOMICS 571 (1997).

318. See The National Campaign to Prevent Teen Pregnancy, General Facts and Stats About Teen Pregnancy, at <http://www.teenpregnancy.org/resources/data/genfact.asp> (last visited Sept. 23, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Also, three of four girls say they have sex because their boyfriends want them to. *Id.*



ing Title V abstinence programs.<sup>319</sup> Their argument relies on the types of religious references made in abstinence program materials and on the authors' presumptions about the epistemology of the abstinence message.

Regarding the presence of religion in current programs, Simson and Sussman are suspicious of a reference in the teacher's manual of a popular program to the fact that secular principles supporting abstinence are also supported by some religions (the religious teachings themselves are not described), and also by a recommendation that parents who hold moral positions regarding premarital sex be encouraged privately to share their religious values with their children.<sup>320</sup> Certainly, state sponsored abstinence programs should not proselytize or endorse religion. But referring to what religions teach or the fact that families may be able to confirm secular values with similar religious values, is not teaching religion. These messages can easily be distinguished from explicit endorsements of religion: encouraging students to adopt abstinence for religious reasons such as sin or salvation. The Supreme Court in *Bowen v. Kendrick*<sup>321</sup> held that even religiously affiliated entities were permitted to speak against premarital sexual involvement.<sup>322</sup> And in *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>323</sup> a secular institution was permitted to fund a student-directed religious publication equally with non-sectarian publications.<sup>324</sup> Government funding of abstinence programs in secular or even religiously affiliated entities which occasionally reference the existence of religious teachings is therefore surely permissible. A rush to overturn such messages and the programs containing them looks more like animus against an effective abstinence message versus a real establishment concern.

In the case of errors made by pervasively sectarian entities, some of which may have greater difficulties separating secular from sectarian messages on abstinence, one possible solution is

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319. See Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 265 (2000).

320. *Id.* at 284-91.

321. 487 U.S. 589 (1988).

322. *Id.* at 607. The Court found that the interest in and participation of religious entities was not dispositive to the Establishment Clause question. It found that the Adolescent Family Life Act was reasonably motivated by the promise of eliminating or reducing the social and economic problems caused by teenage sexuality, pregnancy, and parenthood. *Id.* at 602.

323. 515 U.S. 819 (1995).

324. *Id.*

to adopt a strategy proposed by Rabbi David Saperstein.<sup>325</sup> Rabbi Saperstein suggests that some of the larger religious social service institutions, as opposed to churches, may more easily teach without proselytizing, as they are accustomed to serving very diverse and not necessarily religious populations.<sup>326</sup>

Simson and Sussman further attempt to associate abstinence with establishing religion by arguing that the abstinence messages are "very difficult to understand except in religious terms."<sup>327</sup> Part of this argument claims that abstinence programs are not sufficiently effective to be pursued save from a religious motivation, referring to a claimed lack of research demonstrating that these programs work to reduce teen sexual involvement.<sup>328</sup> Simson and Sussman seek to buttress this argument by noting the range of agreement between the contents of abstinence education and the major religions' teachings about saving sex for marriage.<sup>329</sup> They look at course materials and conclude that some secular abstinence programs are just "somewhat secularized" versions of religious programs, and appear to be simply "patterned after those beliefs."<sup>330</sup> At the same time, these authors correctly acknowledge what the Supreme Court made clear in *Bowen v. Kendrick*, that "it is, of course, entirely possible for lawmakers to take a particular position for secular reasons that others might take for religious reasons."<sup>331</sup> They simply find no readily apparent secular rationales for promoting pure abstinence teachings. A similar article by Julie Jones makes the argument that programs teaching abstinence look like establishment of religion because they are out of step with current thinking.<sup>332</sup> Simson and Sussman elaborate on this point, claiming that these programs are too unrealistic:

[It is incredible that students] typically will be so impressed . . . that they will for that reason choose to ignore the plethora of contrary advice expressly and implicitly offered them by various of their peers and by much of the society and culture around them. Indeed the strategy is so simplis-

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325. See David Saperstein, *Public Accountability and Faith Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353 (2003).

326. *Id.* at 1358–61.

327. Simson & Sussman, *supra* note 319, at 286.

328. *Id.* at 287–88.

329. *Id.* at 286–87; see also Jones, *supra* note 286, at 1094–95.

330. Simson & Sussman, *supra* note 319, at 284–287.

331. *Id.* at 287 (citing *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988)).

332. See Jones, *supra* note 286, at 1090–91 (claiming that Title V advances a religious belief when it proposes that "a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity").

tic that students seem much more likely to be thoroughly unimpressed by the school's position. It treats as simple and straightforward an issue—whether or not to have premarital sex—that teenagers are agonizing over.<sup>333</sup>

There are many flaws in this argument. It is not the case that abstinence has a primarily religious rationale and lacks a strong secular rationale. The message to save sex for marriage has tremendous history of wide support from Americans generally, particularly as it applies to teenagers.<sup>334</sup> For centuries and still today, due to the inherent intimacy of sex and its link to children, ordinary people have rationally linked sex with the only extant institution that could mediate sexual instincts, protect vulnerable parties, and prevent social chaos—marriage.<sup>335</sup> They have also understood the idea that there is something about the very nature of the human body and about procreation, such that their dignity is better acknowledged in a permanently committed sexual union. Today, these understandings are further supported by empirical findings.

It is also wildly exaggerated to say that the abstinence has lapsed as a secular ideal and opinion today. Even after periods of increasing rates of teen sexual involvement and pregnancy, and changing national opinion about all types of sexual mores, national opinion about teen sexual involvement remains firmly in the negative. Highly visible and empirically supported reasons having to do with disease, pregnancy, abortion rates, poverty, the well-being of children, and now, marital stability all suggest the value and importance of premarital abstinence, despite the difficulty of attaining it.

The argument from the negative—that teen abstinence programs must be promoted as a matter of *fides* because *ratio* does not support them—is premature and exaggerated. Even critics of abstinence say it has some effect although definitive testing of its effectiveness awaits.<sup>336</sup> There is also the fact that some trial and error is bound to occur, especially with large initiatives. Government has the discretion to try methods having reasonable bases and to give them some time to work. Furthermore, the government is demonstrating its ongoing bona fides in this area

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333. Simson & Sussman, *supra* note 319, at 288–89.

334. See *supra* Section II.B.; see also *supra* notes 81–85 and accompanying text.

335. See, e.g., Lloyd R. Cohen, *Rhetoric, the Unnatural Family and Women's Work*, 81 VA. L. REV. 2275 (1996) (arguing that traditional views of marriage and family add stability to society).

336. See Kirby, *supra* note 295, at 8.

by supporting studies evaluating outcomes from abstinence programs.<sup>337</sup>

Interestingly, another reason one finds overlap between what religions teach and what abstinence programs teach about premarital sex, is not because abstinence programs need to rely on scripture or religious tradition, but because religions regularly rely on "natural law" principles in their reasoning about sexual relations. Skeptical observers of abstinence curricula unfamiliar with churches' reliance on natural law principles are more apt to make the mistake of confusing religious with secular abstinence messages. A good example of this reliance is found in the Roman Catholic Church's teachings on nonmarital sexual unions (called by the Church "defacto unions"), in which the Church first relies on natural law evidence: "If the possibility is accepted of a specific love between a man and a woman, it is obvious that this love is inclined (in itself) toward intimacy, a certain exclusivity, the generation of offspring, and a joint life project."<sup>338</sup> Following this, the "natural reality is taken into consideration in the canonical laws of the Church."<sup>339</sup> The Roman Catholic document on human sexuality and contraception, *Humanae Vitae*, also explicitly recognizes that the moral teaching of the church on sex and marriage are "based on the natural law," then "illuminated and enriched by divine Revelation."<sup>340</sup>

Abstinence programs should, therefore, be able to avoid an "establishment" charge. On the other side of the coin, religious messages about avoiding premarital sex and cohabitation should be allowed to flourish, especially given their effectiveness. This could take place, largely on private initiative if, for example, communities took up the issues of premarital sex and cohabitation among an adolescent audience in the same way Community Marriage Policies approach engaged or married couples. Churches and other religious organizations willing to provide programs on premarital sex should also be prime candidates for receiving

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337. See Abstinence Clearinghouse, at <http://www.abstinence.net> (announcing that The National Abstinence Clearinghouse was the recipient of an HRSA contract aimed at the following: evaluating abstinence programs, providing a list of science-based, medically accurate list of information for grantees, and suggesting culturally diverse ways of teaching about abstinence) (last visited September 22, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

338. PONTIFICAL COUNCIL FOR THE FAMILY, FAMILY, MARRIAGE AND "DE FACTO" UNIONS 25 (2000).

339. *Id.* at 39.

340. Pope Paul IV, *HUMANAE VITAE* 4 (1968).

state aid for secular materials about premarital sex in the same way many parochial schools now receive state aid for textbooks.

## 8. Parents' Rights First, but with Reservations

One hears the message quite regularly, usually from supporters of abstinence education, that parents ought not to be usurped in their role as children's primary educators about marriage and family life. Professor Kmiec urges the primacy of the family and the church, while acknowledging that in the "current climate of worries about divorce sensible statements about sex and marriage might get a hearing."<sup>341</sup> Family literature also continues to show that parents are still the most important transmitters of "value and belief systems throughout the adolescent and early adult period."<sup>342</sup> Indeed, studies have shown that when more traditional parents convey the message of "no sex until marriage," their children delay or avoid premarital sex at higher rates.<sup>343</sup> Parental communication in the form of expressing love and helping teens feel less alone at a difficult time during their development also reduces risk for premarital sex and pregnancy.<sup>344</sup>

At the same time, these are not your father's parents! Many parents today find themselves in the position of a single mother recently quoted to say: "He could have had sex and never told me, but he trusts our relationship. . . . What is there to be angry about? Something I've done in the past? I was a teenager,

341. Kmiec, *supra* note 270, at 650.

342. Paikoff et al., *supra* note 245, at 427.

343. See Kristin A. Moore et al., *Parental Attitudes and the Occurrence of Early Sexual Activity*, 48 J. MARRIAGE & FAM. 777, 779–80 (1986). This effect is less strong upon sons. *Id.* at 780–81.

344. Jeffrey Caruso, *Sex Education and Condom Distribution: John Susan, Parents and Schools*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 663 (1996) (asserting that parents remain the primary sex educators in the minds of adolescents). See also Interview with Sarah Brown, Director, National Campaign to Prevent Teen Pregnancy (Talk of the Nation radio broadcast, May 27, 2003), *available at* 2003 WL 6674024.

[W]hen we ask young people what could the adults do to help them stay risk-free or, you know, avoid early sex, you know what they often say? They say things like, 'don't leave us alone so much.' Or they say, 'Pay attention to us before we get in trouble.' They're very aware in their own way that when there's no one paying attention to them, in particular nothing much to do, that sometimes life happens even if it's not sort of the first choice. There's not only loneliness amongst these young people; I think for some there's significant depression. So when we see someone who's sad and lonely, we have to realize that may end up at places that we don't prefer.

*Id.*

too."<sup>345</sup> Parents of this generation are more likely than their parents to have experienced sex, childbearing, and cohabitation before marriage. And it is the children of these parents who are especially likely to be sexually active at a young age.<sup>346</sup> This generation of parents has also been more exposed to notions about sexual freedom and privacy, perhaps most famously summarized by the United States Supreme Court in the 1992 *Planned Parenthood v. Casey*<sup>347</sup> decision reaffirming legal abortion: "at the heart of liberty is the right to define one's own conception of existence, of meaning, of the universe, and of the meaning of human life."<sup>348</sup> It is an understatement to conclude that parents likely perceive weakening social support for communicating and enforcing teachings on premarital sex to their children.

Yet Americans generally are increasingly unhappy with the problematic fallout of nonmarital sexual relations and cohabitation. The newer information about their relationship to divorce is only likely to increase their concern. Also, the visibility of children's interests in law and policy is currently very high, with child support policies and child custody rules and procedures constantly reassessed and improved. Adults should no longer hide behind their own ambivalence and rationalizing. That is a self-centered strategy hiding behind the banner of parental kindness. It would be too ironic if parents left teenagers to their sexual freedom on the grounds of their maturity, all the while avoiding their own mature responsibilities to their children.

All this is to counsel that while parents' rights regarding their children's education are primary, and may be exercised by many parents in ways that lead to more stable marriages for their children, the state, the church, and other private groups still have a role to play, particularly with teenagers, when it comes to educating about attitudes and behaviors linked to marital stability.

## 9. They're Only Young Once

Current programs explicitly to strengthen marriage most often encounter couples right before marriage or after it. Laws and policies communicating messages about premarital sex and cohabitation encounter persons most often during their adoles-

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345. Lety Laurel, *Willing to Wait*, SAN ANTONIO EXPRESS-NEWS, May 28, 2003, at 1H, available at 2003 WL 20248961.

346. See Esther I. Wilden & Toni Terling Watt, *Risky Parental Behaviors & Adolescent Sexual Activity at First Coitus*, 80 MILBANK Q. 481 (2002).

347. 505 U.S. 833 (1992).

348. *Id.* at 851.

cence or shortly afterwards; but these often contain problematic or messages relative to marital stability. What is needed are marriage-strengthening initiatives, including programs that address premarital sexual behaviors. Such programs should be offered at the crucial times people are making choices about these behaviors—before and during high school.

A very recent study reminds us that about one in five teens has had sexual intercourse by their fifteenth birthday.<sup>349</sup> A significant number of young teens (47%) report responding to pressure when they had their first sex. Another recent study finds that attitudes and norms, responsibilities and refusal attitudes respecting sex expressed as early as seventh grade have been found predictive of later sexual behavior.<sup>350</sup> Added to this is the fact that people are marrying later, with a long time spent in a “peer world” between adolescence and marriage.<sup>351</sup> They have fewer siblings and close extended family, and may well need more help with information and skills about marital interdependence.<sup>352</sup> They are the greatest “at risk” group, having grown up in the midst of the divorce revolution.<sup>353</sup> They have also demonstrated the ignorance of youth about things like the effects of having a baby out of wedlock and the fact that cohabiting does not, as they believe, make a marriage stronger.<sup>354</sup> The noted “Monitoring the Future Survey” characterized the confusion of teenagers on these subjects, reporting that while 80% of girls and 73% of boys believe that having a good marriage and family life is extremely important to them, only 28% of girls and 38% of boys believe that they will have a happier life if they choose marriage over cohabitation or the single life.<sup>355</sup> Even 50% of boys and 54% of girls believe erroneously that single parenting is a lifestyle

349. See KAISER FAMILY FOUNDATION, *supra* note 73; see also Cheryl Wetzstein, *1 out of 5 Children Has Sex by Age 15*, WASH. TIMES, May 20, 2003, at A2.

350. Lydia O'Donnell et al., *Long Term Influence of Sexual Norms and Attitudes on Timing of Sexual Initiation Among Urban Minority Youth*, 73 J. SCH. HEALTH 68, 73 (2003).

351. Fields & Casper, *supra* note 3, at 9 (stating that men today are marrying at an average age of twenty-seven and women at twenty-five).

352. Barbara Dafoe Whitehead & David Popenoe, *Why Men Won't Commit: Exploring Young Men's Attitudes About Sex, Dating and Marriage*, in THE NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2002: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 7, 16 (2002) (referring to focus groups conducted with unmarried heterosexual men in four metropolitan areas, ages twenty-five to thirty-three, and from a variety of religious, ethnic, and family backgrounds).

353. Paige D. Martin et al., *Adolescent Premarital Sexual Activity, Cohabitation and Attitudes Toward Marriage*, 36 ADOLESCENCE 601, 605 (2001).

354. Whitehead & Popenoe, *supra* note 352, at 31–32.

355. *Id.* at 31.

that is on a par with marriage or not affecting anyone else.<sup>356</sup> One of the leading evaluators of sex education in the United States, Dr. Douglas Kirby, speaks of the "alarming[ly]" "limited attention to young people's preparation for marriage and family life," including inattention to how their actions will affect their future family lives.<sup>357</sup>

Because behavior correlated with marital success or failure is happening at young ages, programs and messages to address these must begin at young ages too.

## 10. Highlight Self-Interest

Section I above detailed the visibility of the children's welfare argument in the current national discourse about strengthening marriage. It is not surprising that many of the efforts to strengthen marriage today dwell on the benefits for children of two married parents. A sense of moral responsibility of parents to their children is a "broadly shared societal value."<sup>358</sup> But it stands to reason that it might be difficult to capture the attention and will of teenagers with encouragement to behave for the sake of children they may or may not have in the future.

On the other hand, it is obvious that Americans, particularly teens and young adults, are intensely interested in the subjects of love and romance. A glance at any form of media directed to adolescents, and even adults, tells the story. When it comes to marriage, the same is true. Seven out of ten Americans disagree with the statement that "the main purpose of marriage is having children."<sup>359</sup> Marriage, for Americans, has increasingly become about adult happiness and well-being. A recent anecdote makes the point:

Outside another casino, two teenage girls were walking along in tee shirts and miniskirts when one of them was handed a 'Good Girl Card' [by a member of a pro-abstinence group]. She read the card aloud, laughing through the STDs. But when she read that married people live longer, are healthier, happier, have more money and even have better sex lives than their single counterparts, her

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356. *Id.*

357. Martin et al., *supra* note 353, at 605.

358. Francis J. Catania, Jr., *Learning From the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 858, 862 (citing Elizabeth Scott, *Rational Decision Making About Marriage and Divorce*, 76 VA. L. REV. 36 (1990)).

359. Whitehead & Popenoe, *supra* note 352, at 25; see also TOM W. SMITH, *THE EMERGING 21ST CENTURY AMERICAN FAMILY*, 48 tbl.20 (National Opinion Research Center, University of Chicago, GSS Social Change Report 42, 1999).



tone became more serious. 'Abstinence.net,' she said. 'I'm going to hold onto this. Hey Molly, look at this.'<sup>360</sup>

A study issued by the National Marriage Project confirmed that it is hard to appeal to men to act based on interest in future children: "The men realize that women face time pressures to marry and bear children. At the same time, however, they express little sympathy for women's circumstances. Several men took the view that men had to be careful because women 'want to get married just to have kids.'"<sup>361</sup>

Messages to younger people about attitudes and behaviors strengthening marriage would do better, then, to appeal to self-interest alongside concern for the well-being of children. It also turns out that the invisible hand of marital self-interest has beneficial outcomes for children. Psychological research shows, in fact, that even when an adult's relationship with his or her child is good, if the spousal relationship is not healthy, the adult-child relationship becomes compromised as well. In fact, leading sociologists point out that the loss of the father-mother relationship often leads to the father losing interest in the children.<sup>362</sup> Another study showed that even "temporary disruptions in parents' physical and psychological functioning due to a marital transition interfere with their ability to offer support and supervision at a time when children need them most."<sup>363</sup>

Marriage strengthening messages referencing children's well-being are right and good. But they may not be enough to grab the attention of adolescents and teens. Messages about avoiding premarital sex and cohabitation should also take advantage of their interests in romantic love.

## CONCLUSION

It is a great understatement to say that in America today, there exists a diversity of opinions about human sexuality and marriage. It would be false to conclude from this, however, that there is no consensus at all about the value of marriage. There is a yearning for marriage that has stood the many tests of time. It

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360. Angie Vineyard, *Working the Strip in Vegas: Taking the Abstinence Message to Sin City*, NATIONAL REVIEW ONLINE, July 8, 2003, at <http://www.nationalreview.com/comment/comment-vineyard070803.asp> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

361. Whitehead & Popenoe, *supra* note 352, at 16.

362. FRANK F. FURSTENBERG & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS WHEN PARENTS PART* 35 (1991).

363. Hetherington, *supra* note 94, at 179.

appears there is always a yearning for the values marriage both represents and calls forth from those who choose it.

Sound and convincing research now exists indicating that Americans may have to think beyond divorce law reforms and beyond even marriage strengthening initiatives for a more complete response to the weakness of the institution of marriage. We have to attend to the formation of premarital ideas and habits about intimate, sexual commitment. Some will resist acting on this research because it would likely involve reinstatement of some sexual ideals held in the past. It will conjure up images of a time when sexual expression itself was suspect and sexual health was of seemingly little concern. It will conjure up notions of violations of intimate privacy. But there is no reason why a return to some of the ideals of the past cannot be married with more current and enlightened notions about sexual health and wholeness, for women and for men. It also does not appear that Americans have much of a choice, given their strong attachment to marriage. Americans do not merely aspire to parenthood; they do not aspire to a brief or even life-long cohabiting relationship. They aspire to marriage, and the intrinsic permanence of marriage. To no one's surprise, choices about sexual relationships and living arrangements before marriage affect the quality of marriage. Pursuing marital happiness today, then, seems to require a greater unification in law, policy, and culture of messages about sex and marriage.

