I. Introduction: Best of Times and Worst of Times

A. Best of Times and Worst of Times

In A Tale of Two Cities Charles Dickens famously described the age of the French Revolution as “the best of times and the worst of times.” Dickens wrote:

“It was the best of times it was the worst of times, it was the age of wisdom it was the age of foolishness, it was the epoch of belief it was the epoch of incredulity, it was the season of light it was the season of darkness, it was the spring of hope it was the winter of despair, we had everything before us we had nothing before us...”

The same duality exists today; it is both the best of times and the worst of times – for families, marriage, and especially for children. Living side-by-side in the same country, same city, and

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1 The valuable research assistance of Alyssa Munguia and Curtis Thomas is gratefully acknowledged.
2 Charles Dickens, A Tale of Two Cities (1859).
same generation are children who do and will enjoy unprecedented advantages and opportunities — superior health, education, financial support, stable families, safety, minimal risk of crime and at risk behaviors, love, nurture, guidance, relationship satisfaction, job prospects, and socialization -- and children who are and will be significantly disadvantaged comparatively in terms of their health, education, financial support, family instability, victimization, at-risk behaviors, prospects for criminal behavior and incarceration, deprivation or impaired love, nurture, guidance, and reduced relationship satisfaction, job prospects, and socialization. As Baroness Deech (former law professor and Principal of St. Anne’s College, Oxford) recently declared: “It is marriage that makes all the difference . . . ”3 She added: Statistics show that the best thing for children is to live with two married parents.”4 In that same debate about marriage in the House of Lords, the chief Rabbi, Lord Sacks noted:

Children lucky enough to be born into strong families are advantaged in almost every area for the rest of their lives: school attendance, educational achievement, getting and keeping a job. They will earn more. They will be healthier. They will be more likely to form strong marriages of their own. Children who do not have that good fortune will be disadvantaged for the rest of their lives.”5

This paper focuses on children’s lives and circumstances. It begins in Part II with a brief review of the evidence of the disintegration of families in America in the first dozen years of the twenty-first century. Part III links those specific indicators of family disintegration to separation

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4 Id.
5 William Rees-Mogg (Lord), Reward marriage and rescue British society, The Times (London), 18 Feb. 2011, at 27.
of children from their parents and the detrimental consequences to society in general and to children in particular of separation of children from their parents. Part IV notes the growing practice popularity of the phenomenon of adult implementation of deliberate, planned, intentional, structured separation of children from their parents (intentional single parenting, and parenting by same-sex couples, primarily), notes some qualitative distinctions between that and accidental or unplanned separation of children from their parents, but also notes the distinct or a same-sex couple seeks to possibility that the practical detrimental consequences for children are not entirely ameliorated by planned parentlessness. Part V turns to the law and examines whether children have in any significant sense a legal right to have a parental relationship with their parents. It examines fundamental constitutional and human rights, legal policy, and the role and ability of law to remedy the problems of disintegration of marital families and parentlessness. Part VI provides a conclusion suggesting that one of the most troubling harmful consequences of the continued disintegration of families is the growing deprivation of children of parental relationships with both of their parents; that whether children do or do not have a formal, legal right to a parental relationship with both of their parents; and that the law should respect, protect and promote the ability of children to have parental relationships with both of their parents.

B. The exclusiveness of biological and adoptive motherhood and fatherhood

As used in this paper, the term “parent” means the biological or adoptive mother and father of a child, and “parental relationship” means a real, physical associational relationship between the child and his biological or adoptive mother and father both of whom participate in providing support for, loving, caring for, teaching, and training their child. These definitions do not include as parents or eligible for a “parental relationship” some categories of adults who have some supervisorial, familial or quasi-familial relationship with minor children, such as the
categories of “de facto” parents and “parents by estoppel” approved by the American Law Institute’s *Principles of the Law of Family Dissolution*. Nor do these terms as used herein include multiple fathers or multiple mothers (as in adoption of a child by two men or two women); fatherhood and motherhood are both deemed to be an exclusive legal status.

Multiple-fatherhood and multiple-motherhood is not included for several reasons. First, those are still quite uncommon in the world; even in the western world, the overwhelmingly practice and preference remains for exclusive one-mother-one-father parenthood. Second, multiple-father and multiple-motherhood involve significant conceptual differences from exclusive dual-gender parenthood and deserve thorough, separate analysis.

Modern artificial reproductive technologies (ART) such as in vitro fertilization, sperm donation, and surrogacy, make it possible multiple men to assert some claim to fatherhood and multiple women to assert some claim to motherhood. For example, consider the number of potential parents in the following hypothetical: Husband & Wife (H&W) want a child but they both are infertile. They contract with a married Sperm Donor (SD) for SD to donate sperm, and they contract with Egg Donor (ED) for ED to donate an egg. Both egg donor and sperm donors are is married (to SDW1 and to EDH1). Husband and Wife also contract with a Gestational Surrogate (GS) to carry the embryo/fetus to birth. GW also is married (to GSH1). After the contracts are signed and the child is conceived and implanted in the gestational surrogate, all four couples involved (H and W, SD and SDW1, ED and EDH1, GS and GSH1) divorce & all eight of the adults remarry other persons before the child is born. Who are the legal parents of the child?

As Figure __ shows, at the time the child is born, at least thirteen persons have some plausible claim to legal parentage under existing laws, doctrines or arguable extensions of them.

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Good parenting requires both teamwork and autonomy. It requires enough teamwork to insure not merely back-up of another adult, but, more importantly, the benefits to the child of the contributions, skills, insights and perspectives of both human genders – male and female.

Parenting also requires autonomy and privacy, room to exercise and respect for the styles of loving, teaching, providing, modeling, and care-giving, and the opportunity for each parent to provide meaningful individual and individualized parenting – not merely parenting by committee.

Thus, the parenting dyad of one father and one mother have proven throughout history to be the most effective and beneficial for children. The supplemental support of other adults, such as grand-parents, uncles, aunts, and step-parents is often valuable and helpful to both children and their parents, when it is subject and subordinate to the judgment and decisions of the mother and/or father of the child. On the other hand, the experience of generations has shown that attempts at multiple parenting – whether due to intermeddling of overly-controlling (albeit often well-intentionally and objectively) of grand-parents, aunts and uncles, or by step-parents or by non-marital partners, usually result in creating increased conflict, inefficiencies, and parenting struggles that estrange the adults from each other and from the children, and that create negative risks of harm for the children and for their human development.7

Thus, this paper does not accept the view of the California Supreme Court in Sharon S. v. Superior Court,8 that a second woman legally should be allowed to adopt as a second mother the biological child of another woman who has sole custody of her own child, who is fit to parent, who opposes the adoption by her former live-in partner (but who had earlier signed and not

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7 Sharon S., 73 P.3d at 561.
timely withdrawn her consent to the adoption). The four-judge majority found that the number of parents was not germane to adoption and held that a biological parent may allow her child to be adopted by other co-parents, not limited to a total of two parents. The three dissenters disagreed. Two dissenters argued that only two parents, not more, is best for children, and that California statutory and case law contemplate a child having not more than two parents. The third dissenter, Judge Janice Rogers Brown (now on the U.S. Court of Appeals for the D.C. Circuit) criticized the majority for “trivializ[ing] family bonds” and “import[ing] the principles of the marketplace into the realm of home and family . . . .” She read the adoption statues as authorizing adoption only when “the birth parent and adopting parent have formally joined together to forge a common future.” She reminded the majority that all “[s]ociety has a considerable stake in the health and stability of families . . . [which] provide the seed beds of civic virtue required for citizenship in a self-governing community,” and she refuted what she called the majority’s “the-more-parents-the-merrier view of parenthood.” “The law permits single individuals to adopt a child on their own because one parent is better than none. It does not follow, however, that two unrelated parents are better than one.” Single parent adoption presents a “choice . . . between adoption and foster care,” whereas “if the birth parent has a

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9 The error of this decision is exacerbated by the fact that the guardian ad litem or attorney for the child opposed the adoption, and the woman petitioning to adopt had a domestic violence restraining order against her to protect the biological mother.
10 Id. at 561.
11 Sharon S., 73 P.3d at 578-79.
12 Id. at 586.
13 Sharon S., 73 P.3d at 585.
14 Id.
15 Id.
16 Sharon S., 73 P.3d at 587.
relationship with a second parent, and then a third, and then a fourth, the child may be worse off than if the birth parent had simply raised the child alone.”

Similarly, under the concept of exclusive motherhood and fatherhood adopted in this paper, adoptions by same-sex partners would not give two adults of the same gender recognizable legal parenthood rights. *

II. The Worst of Times – The Disintegration of Marriage and Families

While there are many factors that shape life fortunes and contribute to the gap between these two contrasting classes of children, the single most critical difference between them is one factor – whether they are raised in a stable, healthy home by their own biological or adoptive parents. Another name for that factor – a single word and single criteria that is the single largest discriminating factor between advantaged and disadvantaged children -- is marriage. 18 The legally recognized intact marital union of their biological or adoptive mother and father is the greatest predictor of children being raised in a stable, healthy, advantaged life; while the non-marital status of their parents (whether due to divorce, separation or non-marriage) is the greatest predictor the disadvantaged life and prospects of children.

There are many aspects of the disintegration of families. I will focus on the disintegration of marital families and will mention just ___ points of disintegration.

First, there has been a dramatic increase in cohabitation without marriage. In 1960, just one percent of all couples living together were unmarried. Today, ten percent of all couples living together or cohabiting without marriage, as shown in ___. By 2010, over 7.5 million

17 Id.
opposite-sex American couples were cohabiting without marriage, according to a 2010 Census report,\(^9\) up from only

The U.S. National Center for Family and Marriage Research reported in 2010 that the percentage of women 19-44 years-old who have cohabited increased by over 75% between 1987 (33%) and 2006-08 with over half (58%) now reporting cohabitation.\(^{20}\) Two-thirds of all women 19-44 cohabit prior to their first marriage. Nearly one-fifth of all current unions involving American women in this age group are non-marital cohabitations.\(^{21}\) The National Center also reveals that the more education women have the less likely they are to cohabit; in 2006-08, only 47% of women with four or more years of college had ever cohabited; 52% of women with 1-3 years of college; 69% of women who complete high school, and 73% of women who do not complete high school.\(^{22}\) The Pew Research Center reports that over one-third of Americans do not view cohabitation as a step toward marriage, including one-quarter of those who cohabitated.\(^{23}\)

Cohabitation is fraught with heightened risk and disadvantages for children. It is estimated that 40% of all nonmarital births are to women who are cohabitating.\(^{24}\)

Children living with non-marital cohabiting parents are at significantly heightened risk of experiencing the break-up of their parents than children of married parents. Statistics published in 2005 by the British Office of National Statistics revealed that while less sixteen


\(^{21}\) *Id.* at 3.

\(^{22}\) *Id.* at 3.


\(^{24}\) Parness & Townsend, *supra* note __, at 89, citing __.
percent (16%) of all couples with children in the U.K. were cohabiting without marriage (59% married; 11% unmarried) more than seventy-two percent (72%) of children under age five who suffer the separation of their parents were children of non-marital, cohabiting parents.\textsuperscript{25} Baroness Deech recently reported that “only 8 per cent of married parents split up before their child is five compared with 43 per cent of the unmarried.”\textsuperscript{26}

Research has consistently shown that sexual relations before marriage, including cohabitation before marriage, has a detrimental impact upon the quality, integrity, and stability of the subsequent marriage. Research published in December 2010 in the Journal of Family Psychology based on 2,035 married persons who participated in the RELATE online marital assessment program found that compared to persons who engaged in sex before marriage, married persons who had not had sex before marriage had 22% higher relationships stability, 20% higher relationships satisfaction, 15% higher quality of marital relationship, and 12% better-rated spousal communication.\textsuperscript{27} Other studies report that about one-third of couples who marry without cohabiting will break-up before their tenth-anniversary. About two-thirds of couples who cohabit before marriage will break-up \textit{before} they marry; then, of those who marry, \textit{another} one-third of those who marry will break up before the tenth-anniversary of their marriage.\textsuperscript{28} In other words, couples who cohabit before marriage have a profoundly higher risk of break-up of

\begin{itemize}
\item \textsuperscript{26} Baroness Deech, supra note \_\_ at \_.
\end{itemize}
the relationship before the tenth anniversary of marriage than couples who do not cohabit before marriage.

Second, the social value of, desirability of, and status of marriage has plummeted, and this is reflected in many statistical reports. The proportion of adults (age 15 and older) who are married has fallen from about 70% for men and 65% for women in 1960 to 56% for men (a drop of 14% or one-fifth) and 53% for women (a drop of 12% or nearly one-fifth).\textsuperscript{29} The percentage of ever-married adults at age 25 has dropped from 83.2% of men born in 1935 to 50.2% of those born in 1975, and from 65.9% of women born in 1935 to 37.3% of women born in 1975.\textsuperscript{30} The annual marriage rate for women has fallen from 90.2 per 1000 women 15 and older in 1960 to just 37.4 in 2008.\textsuperscript{31}

Additionally, both men and women are putting off marriage. In 1960, the median age at marriage for men was just above 22.5 years-old, and for women 20.1 years-old. In 2009, the median age at marriage for men is 28.1 years-old, and for women 25.9 years-old, as shown in Figure _.\textsuperscript{32} This alone would not be disturbing, as many factors including increased enrollment in college and graduate education, longer educational careers, and cohabitation may explain the delay in marriage. But combined with the overall drop in marriage rates and presence in society, it spells trouble.

A very significant report for the social status of marriage was released by the Pew Research Center on March 9, 2011. It found that “millennials” (those born 1981-92) rated being


\textsuperscript{30} Both men and women are less likely to marry in their twenties. in The Heritage Foundation, 2011, at http://familyfacts.org/charts/155/both-men-and-women-are-less-likely-to-marry-in-their-twenties (seen 11 March 2011), citing U.S. Census Bureau, Survey of Income and Program Participation (SIPP), 2004.

\textsuperscript{31} Fig. __

\textsuperscript{32} Fig. __
a good parent as being one of the most important things in their life, 10 points higher (at 52%) than their Gen-X older siblings, but they rated having a successful marriage 5 percent points lower (only 30%) than the Gen-X cohort only a few years earlier. In other words, less than one-third of persons who were aged 18-20 in 2010 considered having a successful marriage as “one of the most important things in their life.” The same study found that 5% of millennials reported that they do not want to marry and another 25% were not sure they wanted to marry. This means that there is increased likelihood of avoidance of marriage, and when coupled with the high value placed on raising children, it portends more practice of childbearing out of wedlock.

Moreover, this report comes close on the heels of another Pew Research Center which in November 2010 found that thirty-nine percent (39%) of Americans surveyed believe that marriage is becoming obsolete.

Third, the number and percentage of children born out of wedlock in the United States has dramatically skyrocketed in recent decades, and is now at historic high levels. In 1940, there were fewer than 90,000 children born to unmarried women in the United States; in 2010 there are approximately 1.8 million children born to unmarried women in the United States – a twenty-fold increase in about two generations. In 1940, less than four percent of all births were to unmarried women; today, forty-one percent of all children born in the United States are born to

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34 Id. See also Wendy Wang, id.
unmarried women, as shown in Table 1, more than a ten-fold increase.\textsuperscript{37} There has been a six-fold increase in the percentage of children born to unmarried women since 1960, as Figure A shows.\textsuperscript{38} As Figure B shows, the birth rate for married women has dropped nearly fifty percent (50\%) since 1960, and about twenty percent (20\%) in the last twenty years alone,\textsuperscript{39} while the birth rate for unmarried women has risen nearly 150\% in the same time period, and the gap between the birth rates per 1,000 women of married and unmarried women has closed from 135 (156.6 to 21.6) to only 36 births per 1000 (88.7 to 52.3).\textsuperscript{40}

Related to this, the value of parenthood as assessed by high school seniors has remained almost the same for more than thirty years (since 1976, consistently70\% of all high school seniors agreed that being a father and raising children is one of the most fulfilling experiences a man can have, and about 60\% of all high school seniors agreed that being a mother and raising children is one of the most fulfilling experiences a woman can have).\textsuperscript{41} However, attitudes about marriage have fallen dramatically resulting in some social pressure to have children without marriage.


\textsuperscript{38} \textit{More than four in 10 children are born to unwed mothers}, The Heritage Foundation, 2011, at http://familyfacts.org/charts/205/more-than-four-in-10-children-are-born-to-unwed-mothers (seen 11 March 2011) ("Currently, the figure is highest among blacks, but the rate of increase is highest among whites and Hispanics.").

\textsuperscript{39} \textit{Paul Taylor}, et al, \textit{The New Demography of American Motherhood} 1, 2 (Pew Research Center, May 6, 2010; revised Aug. 19, 2010), available at __.


Fourth, divorce has stabilized at extremely high levels and shows very dangerous signs of social class separation. The rate of divorce by age 55 has risen from 30% for both men and women born in 1935 to 42% for women born in 1945, and nearly 40% for men born in 1945.42 While nearly nine out of 10 couples (87%) married in the late 1950s remained married for at least ten years, only seven out of ten couples (69%) married in the early 1990s remain married for at least 10 years.43 On the other hand, the percentage of first marriages that end in divorce has remained relatively stable for more than two decades; the sharp annual increases in the divorce rates have ended and some modest decline has emerged.44 “In 2008, there were more first marriages than first divorces, and the ratio of first marriages to first divorces in the U.S. was 1.74,” (1.74 first marriages for every first divorce), and overall ratios of marriage to divorce was 1.83.45 That may be due to the fact that more first-unions are pre-marital cohabitations than ever before, most of which break-up before the parties ever marry.

High rates of marital break-up are common in all western nations. We take for granted and ignore the traumatic impact upon children. A poignant comment from British children about divorce was reported in the British newspaper, the Telegraph. “[I]n response to a survey conducted in 2008, children under 10 revealed that if they could make a new rule, they would

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ban divorce. Marital splits were named by the children as the second worst thing in the world after being fat.” 46

Fifth, as a result of several of the above trends, there has been a dramatic increase in the number of children being raised by single-parents, mostly their mothers. The 2007 Census revealed “that 25.8% of approximately seventy-four million [American] children under eighteen (or about nineteen million children) were living in lone-parent households. . . . [A]pproximately sixteen and one-half million lived with their mothers alone.” 47 By 2009 that percentage had risen to 26.2%; 22.8% in mother-only homes, and 3.4% in father-only homes, a shown in Figure C. 48 The percentage of children not being raised by two parents has nearly tripled since 1960.49 Only 61% of American children today are living with both biological or adoptive parents. 50 Nearly six percent of all U.S. children under age 18 are being raised by one or both parents in a non-marital cohabitation relationship. 51 Nearly half of children in single-mother homes (44.1%) are being raised by never-married mothers. 52

46 Baroness Deech, supra note ___ at ___.
49 Id.
Sixth, teen pregnancies and abortions are at very high levels. Despite (or, as some would argue, possibly because of) promotion of sexual education in the schools and increased accessibility of contraceptives to teens, …

Thus, the non-formation and disintegration of marriage and resultant child-bearing and child-rearing by single parents are the major continuing drivers and manifestations of the disintegration of the family. These phenomena create a widening gulf between advantaged children who are raised by and have parental relationships with both their mother and their father (by birth or adoption) and disadvantaged children who are deprived of a parental relationships with both of their parents -- their mother and their father. Separation of children from at least one of their parents during a substantial period of their childhood is the major scourge of the disintegration of the family in this generation.

III. The Public Costs and Private Harms of the Disintegration of Marital Families:

A. The Social Costs of the Disintegration of Marital Families.

The social costs of non-marital child-bearing and divorce are enormous. Data compiled by the National Fatherhood Initiative in 2008 reported that the federal government alone spends nearly $100 billion per year for fourteen federal social welfare programs directed to father-absent families.53 Another, more conservative, estimate in a study by an academic in 2008 reported that the public costs of divorce and child-bearing out of wedlock in the United States total at least $112 billion in tax dollars every year for identifiable national, state and local governments spending to deal with the consequences

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of marital non-formation (child-bearing out of wedlock) and marital break-up (separation and divorce). 54

Children born out of wedlock or of divorced parents are legally entitled to financial support from both of their parents, but this is often illusory. According to the Office of Child Support Enforcement in the U.S. Department of Health and Human Services, in fiscal year 2007, “[n]early $25 billion [in unpaid child support] was collected at a combined State/Federal cost of $5.6 billion.” 55

For decades, lawmakers (including the U.S. Congress) have sought to increase child support by absent-fathers through a variety of legal enforcement mechanisms, including requiring states to adopt child-support guidelines, 56 stretching the time in which child-support claims and collections can be filed in court, 57 adoption of uniform acts to facilitate enforcement of child support, 58 mandating methods to improve and increase the use of state paternity-establishment mechanisms, in large part to facilitate increased child-support payments by fathers of children aided by TANF, 59 requiring states to establish simple process for voluntarily

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56 Beginning in 1975, Congress began passing laws requiring states to tighten efforts to ascertain paternity and establish and enforce collection of child support. Summarize FPFL Ch 36 at 903+, and cite main (75, 84, 96 etc.) fed stats**
57 Cite federal laws and cases re: statutes of limitation for paternity and support collection in FPFL chs 36-37 **
58 See, e.g., Uniform Reciprocal Enforcement of Support Act, *; Revised Uniform Reciprocal Enforcement of Support Act, *; Uniform Interstate Family Support Act, *
acknowledging paternity, \textsuperscript{60} requiring “that states must consider a signed acknowledgement to be a legal finding of paternity,”\textsuperscript{61} etc.

Yet unpaid child-support remains a huge problem. As of 2006, uncollected child support arrearages totaled over $105 billion dollars, according to the Office of Child Support Enforcement in the U.S Department of Health and Human Services.\textsuperscript{62} The annual deficit in collection of ordered child support rose 30\% from $10 billion in 1993 to $13 billion in 2001.\textsuperscript{63}

Divorce takes a high cost in tax dollars in all western societies. Recently, it was reported in the House of Lords in the United Kingdom that: “The overall cost of family breakdown has been variously estimated at between £24 billion to £40 billion. As a society, we cannot afford serial marriage breakdown and cohabitation on this scale.”\textsuperscript{64}

\textbf{B. The Detrimental Consequences for Children of Deprivation of Parenting by Both Parents}

The disintegration of the family is also a great personal tragedy causing great personal harm to individuals including children. The detrimental consequences of divorce for children have been studied and documented consistently for decades. The most recent news, sadly

\begin{quotation}
\textsuperscript{60} Id.  \\
\textsuperscript{61} Id. at 60.  \\
\textsuperscript{64} Baroness Deech, \textit{supra} note __, at __. See also William Rees-Mogg (Lord), \textit{Reward marriage and rescue British society}, The Times (London), 18 Feb. 2011, at 27 (“Married people do often feel that the State gives far too little support to marriage, yet . . . research suggest[s] that the breakdown of marriages, including cohabiting partnerships, costs the State the extraordinary figure of £ 40 billion. . . .”)
\end{quotation}
consistent with the sorrow of earlier studies, concerns impact on the mortality of children whose parents divorce. “The Longevity Project” based on data compiled for nearly ninety years, identified factors associated with shorter or longer life-span. The latest report, in 2011, noted that:

Parental divorce during childhood emerged as the single strongest predictor of early death in adulthood. The grown children of divorced parents died almost five years earlier, on average, than children from intact families. The causes of death ranged from accidents and violence to cancer, heart attack and stroke. Parental break-ups remain, the authors say, among the most traumatic and harmful events for children. 65

Divorce takes a terrible toll in the educational attainment. The children of divorced parents are less likely to graduate from college or attain advanced post-graduate degrees. In a cyclical effect, this correlates to their greater likelihood of divorce. “By the 1990s, the divorce rate for highly-educated Americans dropped from 22 percent to 19 percent. For those with only a high school diploma, the divorce rate rose from 34 percent to 42 percent,” and for those without a high school diploma, it rose to 45%. 66

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The risks of juvenile delinquency, criminal behavior, and incarceration are much greater for children raised apart from their fathers. More than two decades ago, Dr. Urie Bronfenbrenner, reported that even after controlling for such factors as low income, “children growing up in [single-parent] households are at a greater risk for experiencing a variety of behavioral and educational problems, including . . . criminal acts.” The National Report on Juvenile Offenders and Victims from the U.S. Department of Justice has noted that “[j]uveniles who lived with both biological parents had lower lifetime prevalence of law violating behaviors than did juveniles who lived in other family types.” Sara McLanahan of Princeton University has shown that “[b]oys raised outside of intact marriages are two to three times more likely to commit a crime leading to incarceration by the time they are in their early thirties, even after controlling for race, family background, neighborhood quality, and cognitive ability.” The percentage of households headed by women is statistically one of “the most powerful predictors of crime rates.” Moreover, separation and divorce are even “more strongly associated with

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67 The empirical evidence of the strong connection between juvenile delinquency, and single-parent child-rearing, and divorce are reviewed in Lynn D. Wardle, The Fall of Marital Family Stability and the Rise of Juvenile Delinquency, 10 J. L. & Fam. Studs. 83 (2007), from which some of the data noted herein is taken.
delinquency than are single-parent households per se. . .”72 “[T]he prevalence of delinquency in 
broken homes is 10–15 percent higher than in intact homes.”73 The correlation of single-
parenting, especially divorce, and delinquency is constant across cultures. A 2001 British study 
reported that boys living in permanently disrupted families on their fifteenth birthdays had 
significantly higher rates of delinquency, whether measured by delinquency convictions, self-
reported juvenile delinquency, or adult convictions.74

One major consequence of child-bearing out of marriage and of marital 
dissolution is poverty for the child. Single-mother parenting dominates the 
poverty class. “[A]bout 40% of children in households earning less than $50,000 
annually live with their mothers alone.”75

Family structure is associated with the economic, parental, and community 
resources available to children, as well as their overall well-being. On average, living 
with two parents who are married to each other is associated with more favorable

72 Cesar J. Rebellon, Reconsidering the Broken Homes/Delinquency Relationship and Exploring Its Mediating Mechanisms,” 40 
CRIMINOLOGY 103, 103 (2002). Rebellon also interestingly concludes that “recent remarriage has a robust longitudinal effect on 
status offending, but not on more severe forms of offending.” Id. at 129.

73 Edward L. Wells & Joseph H. Rankin, Families and Delinquency: A Meta-Analysis of the Impact of Broken Homes, 38 SOC. 

74 Heather Juby & David P. Farrington, Disentangling the Link Between Disrupted Families and Delinquency, 41 BRIT. J. 
CRIMINOLOGY, 22, 22 (2001) (examining the difference in rates of delinquency between boys living in intact, disrupted, and high-

75 Helen M. Alvare, Father-Absence, Social Equality, and Social Progress, 29 Quin. L. Rev. 123, 124, citing U.S. 
outcomes for children both through, and independent of, higher income that characterizes these families.45

IV. The Problems of Planned Partial Parentlessness

A. The Growing Phenomenon of Planned Partial Parentlessness

Planned partial parentlessness is a growing phenomenon in many affluent countries. 76 There are two principal forms of this phenomenon: deliberate conception by a woman of a child outside of marriage which she intends to raise as a single mother,77 use of ART by both single men and single women to create a child that they intend to raise alone, and use of both ART and adoption by same-sex partners (both gay and lesbian) to create or obtain a child which they intend to raise without a parent of the opposite sex.78

Use of artificial procreation by same-sex couples is experiencing a mini-boom,41 and the most recent calculations using reliable Census data indicate that between 300,000 and 400,000


77 This is to be distinguished from the phenomenon of accidental pregnancy with resulting childbirth to an unmarried woman. In our sex-saturated society, overly-sexually-stimulated society sexual relations occur on the spur of the moment, or planned by persons using contraceptives to avoid pregnancy and both result in unplanned pregnancies, and often result in unintended single-parenthood. That is not the social problem discussed in this section.

78 Adoption of parentless children by unmarried adults is not considered in this section because the children are already alive, and not created or intended to be raised without a parent of the opposite-sex, but are adopted to provide for the needs of the child. That is much like a widow or widower raising a child without the other parent.
children are being raised by about 160,000 same-sex couples. Adoption by same-sex parents is not only increasing, but is a subject of ongoing legal policy debate and controversy. The deprivation and disadvantage experienced by the child, and the impact of co-parental loss upon future generations is not insignificant.

Since social-choice parentlessness results from deliberate decisions made by at least one parent, sometimes both parents, to separate the child from the consistent, daily, parental influence of the other parent, to make one parent an absent, or infrequent parent, in some respects it is an even more poignant form of parentlessness than the parentlessness of war orphans, AIDS orphans, and the orphans left by famine and pestilence. It connotes a form of direct parental rejection by the absent parent, or indirect parental rejection by the excluding parent (whose choice deprives the child without his or her consent of the ongoing, regular parental influence of the other parent). Thus, social-choice parentlessness may wound and undermine a child in ways that are comparable to the terrible forms of involuntary parentlessness

42Lynn D. Wardle, Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies, __ J. L. & Fam. Studs. __ *10-12 (in press).

43Id. at 12-13 (estimating based on 2000 Census records that about 6,500 adopted children of same-sex couples among the 53,000 adopted children living with unmarried partners).

(from war, AIDs, starvation, plague, lack of medical attention, etc.) that plague third-world countries. Deliberate choice of partial parentlessness reflects a prioritizing of adult autonomy over responsible parenting. The implications are as potential staggering for society as they are potentially tragic for the children involved.  

B. The Risks to Adolescents Who Engage in Homosexual Behaviors

The risks of engaging in homosexual behaviors are well known. The risks to adults of contracting HIV/AIDs and more than a dozen other sexually-transmitted diseases are well-known and I will just briefly summarize them here. **

Of course, youth who engage in homosexual conduct face and convey to others those serious public health risks, also. Additionally, they face some very severe additional risks that can stunt or distort their development as responsible, healthy, human beings.

Three scholars who reviewed the literature and did their own study reported in 2007:

Recent studies have shown that youth who report same-sex or both-sex romantic attractions or sexual behavior (sex minority yough) are at elevated risk for negative health outcomes, such as high rates of suicide attempts, victimization in school violence, drug and alcohol abuse, early onset of sexual behavior, eating disorders, and teenage pregnancy, compared to heterosexual peers . . . .

Other recent studies of youth who engage in gay, lesbian, and bisexual behaviors are at heightened risk for increased substance abuse, earlier sexual activity, more dangerous sexual practices, multiple sexual partners, aggressive behavior, and suicide ideation

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79 Wardle, Parentlessness, supra note __, at __.
80 Martha W. Moon, et al., Risk Comparison among Youth who Report Sex with Same-Sex versus Both-Sex Partners, 38 Youth & Society 267, 267 (March 2007)
compared to comparable heterosexual youth. The earlier youth identify as being homosexual the more likely they were to have experienced negative health outcomes. One recent study reported that gay, lesbian and bisexual youth were, on average, 190% more likely to engage in substance abuse than heterosexual youth; the risk was 340% higher for bisexual youth, 400% higher for females. Substance abuse is associated with increased risks of dangerous sexual practices. Recent studies have confirmed that male youth who engage in sex with other males engage is sex earlier and are more likely to

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83 Dudley, et al, supra note 82, at 329.
have multiple sexual partners and more dangerous sexual habits. Compared to boys with opposite-sex-only partners, boys with same-sex-only partners were at higher risk for emotional problems, including depression, and suicidal behavior. Thus, homosexual behavior is associated with a host of serious health and welfare issues for youth.

Sadly, risk of homosexual behavior also appears to correlate with parental divorce and being raised by a single mother. Both of those factors manifest parental absence – depriving a child of the benefit of growing up with the parental influence of both his or her mother and father in their lives. Could it be more than a mere coincidence that the mainstream emergence of the gay, lesbian and bisexual lifestyles, the LGBT rights movement, and the push for legalization of same-sex marriages and civil unions

84 Id. at 329. A recent study in Thailand corroborates this finding; it reports that 15-21 year-old vocational students who engaged in homosexual or bisexual activities were had an earlier mean age at sexual debut (14.7 years) and a higher mean number of lifetime sexual partners (7.9) than did heterosexual males (16.8 years and 5.8 partners, respectively). Both homosexual and bisexual males (25.9%) and females (32.2%) were sexually coerced more often than were heterosexual males (4.6%) and females (19.6%). Fritz Van Griensven, Frits, The prevalence of bisexual and homosexual orientation and related health risks among adolescents in northern Thailand, 33 Archives of Sexual Behavior 137 (April 2004), available at https://www-lib-byu-edu.earl.byu.edu/cgi-bin/remoteauth.pl?url=http://proquest.umi.com.earl.byu.edu/pqdweb?did=815872861&Fmt=6&clientId=9338&RQT=309&VName=PQD.


86 Van Griensven, supra note __, at __.

87 R __ Garofalo, et al., Sexual Orientation and Risk of Suicide Attempts Among a Representative Sample of Youth,153 Arch Pediatr. Adolescent Med. __ (May 1999) See also Falulkner, supra note __, at __; Durant, supra note __, at __.
movement in the 1990s and the first decade of the twenty-first century occurred at the time of the coming of age of the first generation of children of no-fault divorce in the United States?

V. **Children’s Legal Right to A Parental Relationship With Both Parents**

A. **The Child’s Fundamental Right to A Parental Relationship With Both Parents**

The policy that children have the right to a parental relationship is embodied in or underlies many international treaties and conventions. For example, seventy-six (76) nations, including the United States, have ratified, adopted or acceded to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.88 The Abduction Convention was designed to deter or remedy the wrongful removal by one parent of children from the place where they have resided with the other parent.89 A parent who has custody of a child who is removed from that jurisdiction is entitled to the return of the child.90

The Convention on the Rights of the Child (CRC) likewise embodies the principle that children have a right to a parental relationship with both of the parents. Article 7 specifically recognizes the right of every child, “as far as possible, . . . to know and be cared for by his or her

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parents.”\textsuperscript{91} Article 8 of the Convention further protects “the right of the child to preserve his or her identity, . . . including family relations.”\textsuperscript{92} Article 16 of the CRC also guarantees to children “the right to the protection of the law” against any “arbitrary or unlawful interference with his or her privacy, family, [or] home.”\textsuperscript{93}

For European nations, the European Convention for the Protection of Human Rights and Fundamental Freedoms also gives important protection to the right of children to enjoy a parental relationship with their parents. Article 8 of the provides explicit protection of “private . . . family life,”\textsuperscript{94} which has been interpreted to include the right of children to know their family origins and identity.\textsuperscript{95}

The United Nations Declaration of Human Rights explicitly protects family and clearly embodies and protects the expectation that marriage will be a dual gender institution protecting equal rights for men and women. *


\textsuperscript{92} G.A. Res. 44/25, supra note 91, at 168.

\textsuperscript{93} Id.

\textsuperscript{94} “Everyone has the right to respect for his private and family life, his home and his correspondence.” The European Convention for the Protection of Human Rights and Fundamental Freedoms, Section I, Art. 8 (Nov. 4, 1950), http://www.hri.org/docs/ECHR50.html.

Family and marriage are institutions that are given special constitutional protection in most of the nations of the world. Generally, one hundred fifty-six sovereign nations (156) today have constitution provisions that protect in some form families and family relations, including one hundred twenty-seven (127) nations with constitutional provisions that protect marriage.96 Moreover, the constitutions of forty-four (44) nations contain provisions that specifically, clearly, often emphatically, protect marriage as a male-female, gender-integrating institution.97

B. Protection of A Child’s Relationship with Both Parents Is Deeply Imbedded in American Legal Policy

While there may not be a positive constitutional right for children to have a meaningful parental relationship with both of their parents, that certainly has been and is a strong policy in both international and American family law, and it is based on strong, clear moral principles.98

In American law, unilateral efforts by one parent to deprive a child of a relationship with the other parent are clearly against public policy in every American state. Likewise, interference by the custodial parent with visitation by the noncustodial parent, or vice versa, is taken very seriously. For example, the attempt by one parent to alienate the child from the other parent, provoke very forceful responses from the courts, including modifying and changing custody.99

96 See App. I.
97 See App. II.
Likewise, physical and other kinds of interference with the child’s relationship with the other parent has been grounds for courts to modify custody, changing custody from the interfering parent to the parent who will not interfere with the right of the child to have a parental relationship with the non-custodial parent. Courts can and sometimes do impose contempt sanctions for interference with visitation or custody. Similarly, if the noncustodial parent interferes with custody or visitation by keeping the children longer than allowed or absconding with the child, the law takes those behaviors very seriously, and criminal prosecution may result because our laws recognize how important it is for the child to have the opportunity to develop a parental relationship with both of his or her parents. “Parental kidnapping is a crime, theory of parental alienation syndrome); Andrew Schepard, Editorial Notes, 42 Fam. Ct. Rev. 607, 608 (2004) (noting recent debate over validity of diagnosis of parental alienation syndrome).  

In many American states, interference with visitation is grounds for such a modification of custody. Edward B. Borris, *Interference with Parental Rights of Noncustodial Parent as Grounds for Modification of Child Custody*, 8 Divorce Litig. 1, 1–2 (1997) (reviewing cases and finding that most states consider interference with visitation appropriate grounds for a change in primary custody); see, e.g., *Iowa Code Ann.* § 598.41(1)(c) (West 2001) ("[T]he denial by one parent of the child’s opportunity for maximum continuing contact with the other parent, without just cause, [shall be considered] a significant factor in determining the proper custody arrangement."); *Kan. Stat. Ann.* § 60-1616(e) (2005) ("Repeated unreasonable denial of or interference with visitation rights . . . may be considered a material change of circumstances which justifies modification of a prior order of legal custody . . ."); *Minn. Stat. Ann.* § 518.18(c) (West 2006) ("The time limitations prescribed [in other subsections] shall not prohibit a motion to modify a custody order or parenting plan if the court finds that there is persistent and willful denial or interference with parenting time . . ."); *Mont. Code Ann.* § 40-4-219(1) (2005) (allowing the court to consider whether one parent has willfully and consistently frustrated contact between the child and the other parent in determining whether to modify a parenting plan); *Wash. Rev. Code Ann.* § 26.09.260(2)(d), (3) (West 2005) (stating the court can modify a parenting plan or custody decree only if the nonmoving party has been found in contempt of court at least twice in the past three years for failing to comply with residential time provisions in the parenting plan or has been convicted of custodial interference in the first or second degree).  


recognized as such in the United States by every state, the District of Columbia, and the federal
government."103 Various tort claims also have been recognized to provide relief against the
parent interfering with the other parent’s parent-child relationship.104

Concern about parents depriving children of a relationship with the other parent was, of
course, a major part of the motivation behind enactment of the federal Parental Kidnapping
Prevention Act of 1980 (PKPA)105 and the Uniform Child Custody Jurisdiction (and
Enforcement) Act and subsequent versions adopted in one form or another by every state.106

“Currently, almost every state criminally forbids custodial interference by parents or relatives of
the child.”107 So serious is our concern about depriving the child of the chance to develop a filial
relationship with the other parent, if a parent crosses state lines, federal criminal and civil laws as

within twenty-four months a class I misdemeanor); see also MODEL PENAL CODE § 212.4 (2001). See generally
Nancy Levit, Matrimonial Torts and Crimes: An Annotated Bibliography, 19 J. AM. ACAD. MATRIMONIAL LAW.
117, 181 (2004) (discussing articles on matrimonial torts, including interference with custody and child abduction,
from 1995–2000). \endnote{ed}{\textsuperscript{103}} Susan Kreston, Prosecuting Parental Kidnapping, 15 NOTRE
\endnote{ed}{\textsuperscript{104}} See, e.g., RESTATEMENT (SECOND) OF TORTS § 700 (1977) (“One who . . .
otherwise compels or induces a minor child to leave a parent legally entitled to its custody . . . is subject to
liability to the parent.”); Jesse E. Weisshaar, Note, Does Loss of Custody of a Child Resulting from Attorney
Negligence Cause Damage?, 70 MO. L. REV. 1333, 1351 (2005); Celia Guzaldo Gamrath, Visitation Abuse v.
Unlawful Visitation Interference—Is There Comfort for Noncustodial Parents?, 91 ILL. B.J. 450, 450 (2003); Linda
L. Berger, Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based
on Domestic Deceit that Interferes with Parent-Child Relationships, 33 LOY. L.A. L. REV. 449, 508 (2000); Joy
M. Feinberg & Lori S. Loeb, Custody and Visitation Interference: Alternative Remedies, 12 J. AM. ACAD.
MATRIMONIAL LAW. 271, 275, 278 (1994); William L. Hill, Note, Tort Recovery for Internal Interference with
Family Law—Child Support Orders—Court May Terminate Child Support Order If Custodial Parent
Intentionally Interferes With Visitation Rights—In re Marriage of Boundreaux, 201 CAL. APP. 3D 447, 247 CAL.
Rptr 234 (6TH DIST. 1988), 102 HARV. L. REV. 920, 920 (1989); Eve Kahao Gonzalez, Note, Intentional
\endnote{ed}{\textsuperscript{106}} Uniform Law Commissioners, A Few Facts About the Uniform Child Custody Jurisdiction & Enforcement
At one time the Uniform Child Custody and Jurisdiction Act (UCCJA) was in effect in fifty-two American jurisdictions. See id. It was recently updated, revised, and renamed the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is currently in effect in forty-five jurisdictions. Id. \endnote{ed}{\textsuperscript{106}} \endnote{ed}{\textsuperscript{107}} Catherine F. Klein, Leslye E. Orloff & Hema Sarangapani, Border Crossings: Understanding the Civil, Criminal,
and Immigration Implications for Battered Women Fleeing Across State Lines With Their Children, 39 FAM. L.Q.
109, 117 (2005). \endnote{ed}{\textsuperscript{107}}
well as many state laws may come into play. The federal PKPA denies interstate full faith and credit recognition to custody decrees obtained by a parent who has abducted his or her child to another state. Congress also amended the Fugitive Felon Act to make it applicable to parents who abduct or retain their children in violation of state law and extended the Federal Parent Locator Service to abducted children. Congress additionally enacted the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 (PROTECT Act), which establishes criminal liability for attempting to remove a child from the United States with the intent to interfere with another person’s legal custody of the child. All these, and many other state, federal, and international laws emphasize the message of the importance of preserving the right of the child to develop and enjoy a real parental relationship with both his or her mother and father.

C. The Role of the Law in Remediying the Disintegration of Families

The causes of and remedies for the disintegration of marital families in the United States are complex. Legal reforms are certainly an essential part of the solution, but are not (alone) a sufficient solution. One example of this is the the Personal Responsibility and Work

\[\text{\footnotesize{108 See, e.g., Klein et al., supra note \_\_\_, at 112 (noting that the UCCJA, the UCCJEA, the federal PKPA, state criminal custody or visitation interference laws, and state civil custody or visitation interference statutes may all be implicated); Kreston, supra note \_\_, at 537–40 (describing role of the Federal Bureau of Investigation in responding to domestic parental kidnapping and the role of the Office of Children’s Issues of the Department of State in dealing with international parental kidnapping).}}\]


\[\text{\footnotesize{110 Ch. 271, 47 Stat. 326 (1932) (no currently effective sections).}}\]


\[\text{\footnotesize{112 42 U.S.C. § 663(a) (2000).}}\]


Opportunity Reconciliation Act of 1996 (herein “PRWORA”). Fifteen years ago Congress passed PRWORA, which one commentator called “the most radical welfare reforms in the history of welfare and child support enforcement.” It established four policy goals, all of which relate to strengthening families, and three of which emphasize encouraging and strengthening marriages – i.e., to

(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.


117 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No 104-
Yet, as the above charts and graphs has shown, in the fifteen years since PRWORA was enacted, the percentage of children born out of wedlock has continued to rise (overall it has risen about 30% in the last fifteen years); the percentage and number of couples cohabiting without marriage has continued to rise, steeply; the annual rate of marriage has continued to decline (with a brief blip); the overall percentage of married adults has continued to drop at about the same rate as before; and positive attitudes of young adults toward marriage have continued to decline. However, since 1996 there have been some inklings of good news; the divorce rate has slowly dropped - about 50% faster - than during the previous fifteen years; While the birth rate for married women has ceased to drop and for unmarried women seems to have risen more slowly, and the rise in median age at first marriage has moderated, to mention some small indicators that perhaps some cultural influences are changing. To what extent the federal welfare legislation promoting marriage may have caused or influenced these developments in not clear.

Divorce laws clearly have some impact upon the increased practice of divorce.

“Research across 18 European countries indicates that 20 per cent of the increase in divorce rates during the past 40 years is due to legal reforms.” Likewise, “[t]he construction of a forced—indeed, illiberal—law of cohabitation may deter even more men from making any commitment, let alone marriage.”


118 See Table 1, infra, and Fig. 1, infra.
119 See Table 1, infra, and Fig. 1, infra.
120 See Fig. __, infra.
121 See Fig. __, infra.
122 See Fig. __, infra.
123 See Fig. 2, infra.
124 See Fig. 2, infra.
125 Baroness Deech, supra note __, at __.
126 Id.
Other legal factors also may influence the disintegration of marital families. While it is hard to quantify, it is logically possible that the promotion and growing acceptance of same-sex marriage in the past decade may have contributed to a decline in the social status, perceived important, and individual desirability of marriage.

# OLD Abstract:

*Throughout history a common goal of beneficent civilizations has been to build for the future; for parents and the adult generation of a society to give their children better opportunities and a better world than they (the adults) had. Yet it has become common for commentators today to observe that children (at least in North America) today are unlikely to enjoy the quality of life and standard of living that their parents enjoyed. This paper will begin with a review of the validity of the Jeremiad predictions that children today have a bleak future, less promising than their parents had when they were growing up. The evidence will show that it is “the best of times and the worst of times,” to recall Charle’s Dickens famous description, and that living side-by-side in the same generation are children who are and will be significantly disadvantaged and children who do and will enjoy unprecedented advantages. While there are many factors that reflect life fortunes, the single most critical difference between them is one factor – whether they are raised in a stable, functional healthy home by their own parents. Another name for that factor is traditional conjugal (co-parental) marriage.*

*The paper also will undertake a comparative law examination of the legal protection in American and European law that critical factor – marital parenting. This section will focus in*
particular on the legal protection for children to enjoy a parental relationship with their own (biological) mother and father. This will distinguish traditional adoption, in which parentless children are placed from or near infancy in an family home designed to imitate and replicate their birth family, where they are raised by their carefully-screened adoptive mother and father, as well as step-parent adoptions where the child-rearing parent re/marries and his/her spouse adopts to provide a mother and a father for the child.

VI. Conclusion

Yet in the context of ART and adoption of children by same-sex partners, we seem to forget all of this. Likewise, when a single woman or single man seeks to obtain a child by ART or adoption for their own fulfillment or self-actualization, we only ask: can we do it technically (is it possible medically, physically, and financially)? If it can be done technically we think no further. Thus, the policies of our laws are schizophrenic.

“[T]he State does not have the physical or financial resources to replace the work done inside marriage for the benefit of family.”126 In theory other organizations, such as the state, could provide some of the technical services provided for children by parents, overall such contributions do not come close to compensating in social services alone for the loss of a parent. “The State is a blunt instrument of social welfare; it is always short

of money and lacks the personal warmth that is an essential element of sensitive support.”

“Marriage is a cultural institution that depends on the moral support of society . . . .”

Members of the academic community need to overcome their shyness and speak up about the importance of marriage. As Baroness Deech perceptively noted, leaders of society should speak of marriage with as much enthusiasm as they show in discussions about, for example, the environment-and please may we drop the word "partner", which should be confined to tennis and solicitors' firms, and be less shy about marital status? After all, being married is the most public way that men and women have been able to invent over thousands of years of showing a permanent bond with each other and with their families. There can be no family tree without public recognition and preservation of its roots.

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127 Id.
129 Baroness Deech, supra note __, at __.