

ARTICLE: AN ANTHROPOLOGY FOR THE FAMILY LAW OF INDIS/SOLUBILITY

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Highlight

The current problem with many legal systems' treatment of the family lies in the fact that anthropologists are not lawyers¹

Alfonso Cardinal Lopez Trujillo

Text

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Introduction

American law on marriage is today increasingly crafted from the outside in, and not the other way around. Outside are current social mores, particularly on the issues of sexual relations, the relative political powers of various interest groups, and the opinions among the membership of various courts, legislatures, and family law scholars. Despite its ascendancy, an outside-in method of lawmaking is destined to make significant mistakes due to a failure to consider the nature of whom and what it is regulating, that is, its failure to rely upon a fully considered, substantial anthropology. An outside-in method of lawmaking on marriage is also a paradoxical method in an age producing copious and respected sociological and psychological literature on the nature and effects of marriage and other adult sexual relationships. An inside-out approach to lawmaking on marriage, on the other hand, looks to anthropological evidence about the nature of human persons and of the unions they form. Its chances for success are greatly improved today, thanks to the existence of this literature measuring outcomes of diverse unions for adults, children, and society.

Alfonso Cardinal Lopez Trujillo's article on the nature of marriage expresses his frustration with the current methods and conclusions of [*498] much of modern family law, particularly its failure to take human anthropology seriously, as captured perhaps most succinctly in his quotation introducing my own essay. As a solution, he recommends:

¹ Alfonso Cardinal Lopez Trujillo, The Nature of Marriage and Its Various Aspects, [4 Ave Maria L. Rev. 297, 335-36](#), (2006).

The development of a legal anthropology on sexuality, marriage, and the family that has as its end the study of family systems in light of human dignity is a desirable and recommended goal. Such an anthropology would not deal with the creation of an artificial system made in the laboratory, but rather analyze the logic and the dynamic of family identities and family relationships. It would consider their ontological link to the human person.²

This approach is only proper and logical, he states, given that legal authorities "do not create the family"³ and do not have unlimited license respecting it. Rather, "their jurisdiction must be limited" and they must "form laws that reflect, and do not confuse, the identity of the family and each one of the identities within the family relationship."⁴ Summarizing the essentially positive ends of this interplay between anthropology and law, Cardinal Trujillo proposes the philosopher Antonio Millan-Puelles's reflection that a "humanized" legal system will allow man to "affirm[] himself because he is anchored in the most profound demands of his nature."⁵

My own article will pursue Cardinal Trujillo's suggestion to find a more solid anthropological basis for that portion of United States family law treating the indis/solubility of adult sexual relationships, including marriage and cohabitation. I take up only the indis/solubility question, not only for reasons of length, but also because there appears to be some limited openness in the United States to dialogue and reform in this area. I do so also because more freely allowing divorce was an important chronological and philosophical "tipping point" in family law. Cardinal Trujillo correctly points this out,⁶ as do proponents of same-sex marriage [*499] who, for example, often premise their arguments for change on this earlier and fundamental change in the law on marriage.⁷

The article will proceed as follows: Section I will propose categories of evidence for exploring human nature in relation to the indis/solubility of adult sexual relationships, e.g., marriage and cohabitation. Section II will examine this evidence as it is found in respected scientific literature and in history. As the sources suggested in Section II are rarely referenced in lawmaking regarding indis/solubility, however, Section III will describe the anthropology that seems in fact to underlie current laws either allowing solubility or simply reducing the legal preferences for indissoluble relationships. Section IV will argue that lawmaking based upon the anthropology described in Section III - an outside-in lawmaking - is incapable of assisting human freedom because of its failure to understand, or to attend fully to, two necessary elements of freedom: truth and solidarity. The conclusion will suggest ways to bridge the differences between lawmaking from "within" and from "without" in connection with the indis/solubility of adult sexual relationships. It will also acknowledge several obstacles to such an effort.

I. Categories for Exploring an Anthropology of Human Marriage

What evidence helps us determine what law might be most in conformity with human nature concerning the indis/solubility of marriage? Where is the evidence that both affirms what is "anchored in the most profound demands of [human] nature"⁸ and encourages individuals and couples to be what they really wish to be and ought to be? Cardinal Trujillo provides important clues in his essay about the categories of evidence that could help ground such an anthropology. His thoughts complement very well the suggestions of other expert observers. They

² Id. at 336..

³ Id.

⁴ Id.

⁵ Id. at 334 (quoting Antonio Millan-Puelles, *Positivismo juridico y dignidad humana*, 34 *Humanitas* 206, 211 (2004)).

⁶ Many legal systems and much contemporary legislation departed from the Western legal tradition on the family from the moment they conceded the right to divorce." Trujillo, *supra* note 1, at 332.

⁷ Thomas Caywood, *Marry-thon Monday: Bay State Gays Ring in New Era; Cambridge First in Line*, *Boston Herald*, May 17, 2004, at 5 (quoting a same-sex couple asserting that they "just want one" of what many Americans have more of - marriage). See, e.g., Andrew Sullivan, *Op-Ed.*, *The Weekly Dish*, *Wash. Times*, Apr. 30, 2004, at A23 (ridiculing the hypocrisy of serial marriages among heterosexuals who would deny same-sex marriage).

⁸ Trujillo, *supra* note 1, at 334 (quoting Antonio Millan-Puelles, *Positivismo juridico y dignidad humana*, 34 *Humanitas* 206, 211 (2004)).

also appeal to reason and to common sense. The first proposed source is historical information about those unions people "have lived and defended throughout the ages,"⁹ not **[*500]** only in the United States, but elsewhere in the world. Even proponents of fundamentally changing the institution of marriage - for example, to include same-sex unions - regularly resort to arguments based upon claimed historical choices.¹⁰

The second source is closely related to the first: not only how men and women around the world have lived over time, but what in the long run they have judged "worthy of the personal nature of man."¹¹

Third, further evidence of what is true to human nature may be found in studies about which adult sexual relationships cause "profound and lasting happiness"¹² and health in couples, children, and societies over the long run. Evidence of this type is widely available today.

Fourth, the physical and biological natures of men and women should be consulted for indications of what is true of human nature regarding sexual unions. Here, for example, one might look to gain insights from the physical complementarity of men and women,¹³ the fact of sexual intercourse as the locus of procreation, and the circumstances under which children flourish. Lawmakers and scholars today seem to avoid serious deliberation about this type of evidence,¹⁴ possibly due to a fear of falling into biological determinism respecting women. Yet it would be negligent to overlook this source, given its central role in the very structure of male/female relationships, as well as in parenting. It can certainly be explored without moving to the problematic conclusion that women are fit for motherhood alone.

These categories together - health, happiness, external effects, and historical practices - are the most obvious sources of available evidence regarding human nature in connection with marriage. **[*501]** Behaviors that make adults, children, and society happy and healthy are very likely good for, and true to, human nature. They contain information about the long run, not the short run, and are thus likely to provide more balanced and helpful information. They ask about the happiness and health of all who might be affected by various possible choices about the indis/solubility of sexual relationships. Finally, these categories are quite susceptible to empirical research, and, in fact, have been the subject of large numbers of scientific investigations.

Before turning to the evidence, however, I must insert an important note about the relationship between this evidence and the attainment of a more authentic freedom in connection with adult sexual unions. It is no accident that when we are examining evidence about the links between adult sexual relationships and health, happiness, and historical choices, we are in a way searching for evidence about "truth" and "solidarity": the truth about whether human nature is oriented toward stable marriage, and the evidence about which sexual relationships do, or do not, serve the well-being of fellow human beings. We are searching, in other words, for the appearance of the two crucial elements of freedom - truth and solidarity - within arguments for or against the solubility of sexual relationships. We will be asking what, in truth, makes human beings happy and healthy over the long run with

⁹ Id. at 325.

¹⁰ Richard Ante, Same-Sex Marriage and the Construction of the Family: An Historical Perspective, 15 B.C. Third World L.J. 421, 426 (1995) (reviewing John Boswell, Same-Sex Unions in Premodern Europe (1994)). See, e.g., William N. Eskridge, Jr., A History of Same-Sex Marriage, [79 Va. L. Rev. 1419 \(1993\)](#).

¹¹ Trujillo, *supra* note 1, at 299.

¹² Id. at 315 (quoting Pope Paul VI, *Humanae Vitae* [Encyclical Letter on the Regulation of Birth] P 9 (St. Paul ed. 1968)).

¹³ Id. at 328, 331. Regarding how human bodies provide information about the marital "nature" of human beings, see Zenit News Agency, Who Invented Marriage? Interview with Canonist Juan Ignacio Banares (June 27, 2005), available at <http://www.zenit.org/english/> (follow "Archive"; Code ZE0506272) (on file with the Ave Maria Law Review). Banares states that physical differences imply a "potential of enrichment for each one, which constitutes complementarity." Id. All persons are naturally structured to be able to enter marriage, but each decides freely whether or not to do so. See also Juan Ignacio Banares, *The Conjugal Dimension of the Person: From Anthropology to Law* (2005).

¹⁴ Trujillo, *supra* note 1, at 325, 330.

respect to the indis/solubility of sexual relationships. We will also be asking about the relative effects, on other family members and on society, of various possible options regarding such indis/solubility. Modern lawmaking on marriage often fails to consult evidence from these categories. As a result, it appears largely to ignore fundamental questions about truth and solidarity, which are important to human flourishing. If these questions are ignored, any rules adopted are more likely to be irrelevant, harmful, or merely unable to command attention or respect. Especially if lawmakers ignore a rule's effects upon others, there is more likely created a situation where they are - to use the words of Justice Scalia in *Michael H. v. Gerald D.*¹⁵ - "inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body."¹⁶

[*502] Not only Cardinal Trujillo and Dionigi Cardinal Tettamanzi, to whom Cardinal Trujillo refers,¹⁷ but also Pope John Paul II, have written forceful analyses of the consequences of divorcing freedom from truth and solidarity. In his encyclical *Evangelium Vitae* (The Gospel of Life), Pope John Paul II wrote that ignoring or denying freedom's "inherently relational dimension"¹⁸ leads to "the freedom of 'the strong' against the weak who have no choice but to submit."¹⁹ Freedom severed from truth, he continued, leads to "persons ... no longer taking as the sole and indisputable point of reference for [their] own choices the truth about good and evil, but only [their] subjective and changeable opinions or, indeed, [their] selfish interests and whims."²⁰ Thus, "any reference to common values and to a truth absolutely binding on every one is lost Everything is negotiable ... even fundamental rights" ²¹

That real freedom cannot exist without truth and solidarity is not a fact known only to Christians. Rather, these dependencies form a commonly accepted premise of virtually all human rights movements, which insist both upon telling unvarnished stories of injustice, and demanding that no one be free while others suffer unjustly. With regard to marriage and the family, the fallout of the failure to link freedom with truth and solidarity increasingly is empirically measured by expert social scientists. Yet much of modern family law concerning the indis/solubility of adult sexual relationships is, as Cardinal Trujillo accurately discerns, the product of reliance upon a disfigured "freedom."²² In other words, lawmakers regularly answered the question of "what freedom requires" without **[*503]** deference to what might be empirically demonstrated, and without accurately understanding the demands of human solidarity. Thus has modern family law on indissolubility failed to base itself on sure anthropological footings.

In the next Section, I will suggest what types of evidence are better suited to fashioning laws on indis/solubility anchored in, and oriented toward, promoting a far more authentic depiction of human freedom - one that does pay deference both to truth and to solidarity.

¹⁵ [491 U.S. 110 \(1989\)](#).

¹⁶ [Id. at 124 n.4](#).

¹⁷ Trujillo, *supra* note 1, at 323 (quoting Dionigi Cardinal Tettamanzi, *Bioetica e societa* 157-59 (2004)).

¹⁸ Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] P 19 (St. Paul ed. 1995) [hereinafter *Evangelium Vitae*].

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* P 20.

²² See, for example, the comments of the Chairman of the National Council of Commissioners on Uniform State Laws in connection with the drafting of the no-fault divorce provisions of the Uniform Marriage and Divorce Act: "When you get a situation in which even one of the parties is determined that the marriage shall no longer persist, ... it is really for the best interests of society to say, 'We ... will dissolve this marriage' National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of the Whole, Uniform Marriage and Divorce Act, at 84 (Aug. 7, 1969) [hereinafter 1 Uniform Marriage and Divorce Act Proceedings] (statement of Commissioner Merrill, Chairman of the Council) (on file with the Ave Maria Law Review); see also [Marvin v. Marvin, 557 P.2d 106, 122 \(Cal. 1976\)](#) ("We cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.").

II. The Anthropological Evidence on Indissolubility

A. Stable Adult Sexual Relationships and Happiness

There exists a flourishing scientific inquiry today into the causes of human happiness, with a scholarly journal, *The Journal of Happiness Studies*, and several recent books to its credit.²³ Scholars have taken up happiness studies with enthusiasm, inquiring about the correlation and even causation between happiness and different types of human sexual relationships. Their conclusions provide strong support for the position that stable marriage is one of the most important causes of human happiness, not only in the absolute sense, but relative to situations of divorce, remarriage, and cohabitation. This conclusion has several components and has been approached from different perspectives by researchers, as the article will explain.

First, people tend to be happier when "attached" in a romantic relationship than when unattached. Married people report the greatest happiness.²⁴ Cohabitants report less. Those without a romantic relationship in their lives report the least.²⁵

Second, those married for a long time report greater happiness than the unmarried in measures of "global happiness,"²⁶ independent of wealth, health, "sociodemographic conditions[,] and national [*504] character."²⁷ Long-term married people also report greater happiness than cohabitants²⁸ - including long-term cohabitants - and greater happiness than the divorced. In fact, divorced persons have the very lowest levels of global happiness.²⁹ Married persons report greater levels of self-esteem and less depression than these other groups.³⁰ Third, and closely related to the second finding, long-term married persons also report less conflict, less violence, and less risk of separation than cohabitants,³¹ who separate far sooner than married couples, not only in the United States,³² but in numerous countries around the world.³³

²³ Dan Baker & Cameron Strauth, *What Happy People Know: How the New Science of Happiness Can Change Your Life Forever* (2003); Robert Spitzer et al., *Healing the Culture: A Commonsense Philosophy of Happiness, Freedom and the Life Issues* (2000); Peter C. Whybrow, *American Mania: When More Is not Enough* (2005); Barry Neil Kaufman, *Happiness Is a Choice* (1991).

²⁴ Meng-Wen Tsou & Jin-Tan Liu, *Happiness and Domain Satisfaction in Taiwan*, 2 *J. Happiness Stud.* 269, 284 (2001).

²⁵ M.D.R. Evans & Jonathan Kelley, *Effect of Family Structure on Life Satisfaction: Australian Evidence*, 69 *Soc. Indicators Res.* 303, 321 (2004) (asserting that "those who cohabit have higher levels of life satisfaction than the unattached," though less than married people)..

²⁶ Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 *J. Marriage & Fam.* 527, 532 (1998).

²⁷ *Id.* at 534-35; see also Tsou & Liu, *supra* note 24, at 284.

²⁸ Stack & Eshleman, *supra* note 26, at 534.

²⁹ Evans & Kelley, *supra* note 25, at 304, 334. The study relied upon a large sample size of 38,447 people and concluded:

Thus our results suggest that a traditional, stable marriage is the most satisfying life style, on average and other things equal. However, divorce does not much reduce life-time average well-being if - and only if - it is promptly followed by remarriage. But divorce followed by unmarried cohabitation results in a noticeable deficit in life-time average well-being. And divorce followed by solitude very substantially reduces life-time average subjective well-being.

Id. at 334.

³⁰ Laura Stafford et al., *Married Individuals, Cohabiters, and Cohabiters Who Marry: A Longitudinal Study of Relational and Individual Well-Being*, 21 *J. Soc. & Pers. Relationships* 231, 243 (2004).

³¹ *Id.* at 241-43.

³² See Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 *Demography* 615, 624 (1989); see also Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 *Population Stud.* 29, 33 (2000).

Fourth, among the many possible primary sources of happiness - namely, money, religion, relationships, employment, and others - people value health first, followed by the existence of a long-term stable relationship such as marriage ³⁴ (and which relationship is more likely to be marriage, given cohabiting relationships' higher instability). ³⁵

Fifth, the relationship between marital happiness and overall happiness holds true in published studies of many different groups including, but not limited to, Americans generally, African- **[*505]** Americans, ³⁶ Mexican-Americans, ³⁷ Taiwanese, ³⁸ Australians, ³⁹ Austrians, Belgians, Finns, Icelanders, Germans, Swedes, Danes, and the Dutch. ⁴⁰

Sixth, confirming the above findings, but from the perspective of a negative question, are the results of the inquiry: "What detracts most from happiness?" Being separated from one's spouse tops the list, followed by losing one's job or one's health, followed by being divorced. ⁴¹ Here it should be noted that cohabitation with someone other than a future spouse would be linked to diminished happiness over time, due to the "robust" correlation between cohabitation and divorce. ⁴² Pre-marital sexual relations with someone other than one's future spouse are similarly correlated with divorce ⁴³ and thus with a decline in happiness. What about remarriage after divorce? While second marriages tend to end at a greater rate than first marriages, ⁴⁴ those in second marriages report satisfaction greater than cohabitants and the divorced, but less than persons in first marriages. ⁴⁵

³³ See sources collected in Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, [52 UCLA L. Rev. 815, 845 n.120 \(2005\)](#).

³⁴ Tsou & Liu, *supra* note 24, at 275; see also Zenit News Agency, *When Material Wealth Is Not Enough: Modern World Richer, But Not Happier* (June 18, 2005), available at <http://zenit.org/english/visualizza.phtml?sid=72829> (Code ZE0561804) (reviewing Richard Layard, *Happiness: Lessons from a New Science* (2005)).

³⁵ See Stafford et al., *supra* note 30, at 241-43.

³⁶ Veronica G. Thomas, *Determinants of Global Life Happiness and Marital Happiness in Dual-Career Black Couples*, 39 *Fam. Rel.* 174, 175-76 (1990).

³⁷ Charles N. Weaver, *Happiness of Mexican Americans*, 25 *Hisp. J. of Behav. Sci.* 275, 288 (2003).

³⁸ Tsou & Liu, *supra* note 24, at 284.

³⁹ Evans & Kelley, *supra* note 25, at 334.

⁴⁰ Peter Gundelach & Svend Kreiner, *Happiness and Life Satisfaction in Advanced European Countries*, 38 *Cross-Cultural Res.* 359, 361, 373 (2004) (observing that "it is a general finding that there is a positive relationship between marriage and perceived happiness," but also noting that seventy-five percent of the people in Denmark and the Netherlands saying they live in a stable relationship are married and the remaining twenty-five percent are not).

⁴¹ Richard Layard, Founder-Director, The Centre for Economic Performance, *Lecture at the London School of Economics and Political Science: What Would Make a Happier Society?* 3 (Mar. 5, 2003), available at <http://cep.lse.ac.uk/events/lectures/layard/RL050303.pdf> (citing John F. Helliwell, *How's Life? Combining Individual and National Variables to Explain Subjective Well-Being* 18-33 (Nat'l Bureau of Econ. Research, Working Paper No. 9065, 2001)).

⁴² Jay Teachman, *Premarital Sex, Premarital Cohabitation, and the Risk of Subsequent Marital Dissolution Among Women*, 65 *J. Marriage & Fam.* 444, 445 (2003).

⁴³ *Id.* at 450.

⁴⁴ In 1997, second and subsequent marriages failed at a rate of sixty percent, while first marriages were failing at a rate below fifty percent. See *Divorce Magazine Homepage*, U.S. Divorce Statistics, <http://www.divorcemag.com/statistics/statsUS.shtml> (last visited Oct. 16, 2005).

⁴⁵ Evans & Kelley, *supra* note 25, at 332-34.

Seventh, according significant importance to a happy marriage and disapproving strongly of adultery makes people happier in their marriages. ⁴⁶

[*506] To all of these findings, an obvious and important question should be posed: are the above results the consequence of a "selection effect," that is, of a phenomenon whereby happier people tend to marry in the first place? The results from a recent Australian study, which followed 38,447 persons over eighteen years, indicate that the high levels of happiness among the long-term married are not simply the result of a "selection effect"; rather, the largest portion of their happiness (61% versus 39%) appears to be the result of the marriage itself. ⁴⁷ Other researchers have independently reached the same conclusion. ⁴⁸

To summarize, though increasing numbers of persons are choosing cohabitation, this inherently soluble relationship does not bring its participants the same level of happiness that a stable marriage does. Nor does the state of being divorced. Nor does the state of being remarried following divorce. Phrased negatively, separation and divorce are among the most significant causes of unhappiness. As cohabitation (or even sexual relations without cohabitation) with a person other than one's future spouse at any time before marriage is correlated with a significant increase in the chances for divorce, then this too is associated with an overall reduction in lifetime happiness. ⁴⁹

Thus, measures of happiness drawn from different cultures indicate that insofar as sexual relationships are concerned, a stable marriage is more suited to human nature than a relationship associated with solubility, such as divorce, remarriage, or cohabitation. This result is complemented by the findings discussed immediately below, that positive outcomes in the areas of education, income, and health - factors themselves associated with happiness at some levels ⁵⁰ - are correlated more with marriage than with cohabitation, divorce, or remarriage.

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B. Marriage and Quality of Life: Health, Education, and Income

That married people tend to have better economic, health, and educational outcomes is a finding that has been confirmed so often that it has entered the realm of popular wisdom. A women's magazine recently reported, "We already know that married guys are happier, healthier, and more successful than their single buddies (there are stacks of studies to prove it)." ⁵¹

Sociological investigations have regularly reported that married persons experience better health (physical and emotional), economic well-being, and longevity than single persons, the divorced, or those living as cohabitants. ⁵² Stepfamilies, too, do not fare as well as first-marriage families in measures of health and well-being. ⁵³

⁴⁶ Tsou & Liu, *supra* note 24, at 282.

⁴⁷ Evans and Kelley, *supra* note 25, at 304, 324 (calling the sixty-one percent figure "conservative").

⁴⁸ Gary R. Lee et al., *Marital Status and Personal Happiness: An Analysis of Trend Data*, 53 *J. Marriage & Fam.* 839, 839 (1991) ("[The] current consensus among scholars is that the effects of the marital relationship itself are stronger and more important than selection effects." (citation omitted)).

⁴⁹ Teachman, *supra* note 42, at 445, 450.

⁵⁰ See *supra* notes 34-35, 41 and accompanying text.

⁵¹ Elise Nersesian, *10 Surprising Truths from Men About Love, Marriage, Sex, and Commitment*, Redbook, June 2005, at 94, 94.

⁵² See Kermit Daniel, *The Marriage Premium*, in *The New Economics of Human Behavior* 113 (Mariano Tommasi & Kathryn Ierulli eds., 1995); Walter R. Gove, *Sex, Marital Status, and Mortality*, 79 *Am. J. Soc.* 45, 45 (1973); Walter R. Gove et al., *The Effect of Marriage on the Well-Being of Adults: A Theoretical Analysis*, 11 *J. Fam. Issues* 4, 5, 7-8 (1990) [hereinafter Gove et al., *Effect of Marriage*]; Lee et al., *supra* note 48, at 839 ("Marriage entails marked advantages in terms of mortality, morbidity, mental health, and more general measures of psychological well-being." (citations omitted)); Yuanreng Hu & Noreen Goldman, *Mortality Differentials by Marital Status: An International Comparison*, 27 *Demography* 233 (1990).

Large numbers of studies pointing in this direction were summarized and put under the microscope in Maggie Gallagher and Linda Waite's *The Case for Marriage*, leading the authors to conclude that "the evidence from four decades of research is surprisingly clear: a good marriage is both men's and women's best bet for living a long and healthy life."⁵⁴ As to health, it has been measured, for example, that during a marriage, but not during cohabitation, men's "risky behavior" declines.⁵⁵ Studies also regularly report less **[*508]** domestic and child abuse among the married than in cohabiting households.⁵⁶

Regarding these outcomes, the same question has been raised here as immediately above respecting "happiness": are these outcomes the product of a "selection effect" (that is, people with better health, and educational and financial status, tend to marry), or the effects of the marriage itself? The "current consensus" among scholars today is that the "effects of the marital relation itself are stronger and more important than selection effects."⁵⁷ For example, it has been concluded that the economic effect likely results from the ability of married couples to take advantage of economies of scale and work specialization. It also appears that married men seek to conform to external social expectations about their ability to work steadily and produce a good income. In a comparison between married and single men with the same educational and job history, married men earn ten percent to forty percent more than their single peers.⁵⁸

C. Effects of Different Adult Sexual Relationships on Children and Society

1. Children

One of the most important questions to ask when considering whether stable marriages really promote "freedom" is whether they promote solidarity with children, as children's well-being is so strongly and intimately affected by couples' choices of relationship. It is also important to ask about how society itself might be affected over time by adults' choices among types of sexual relationships. The number and variety of empirical reports in this area has become rather overwhelming in recent years, but fortunately some important and general conclusions can be summarized.

[*509] First, divorce results in the loss of relations between children and especially their fathers, who are disproportionately unlikely to achieve custody or to see their children as often post-divorce as the mother does.⁵⁹ Fathers and children thus suffer a long-term reduction in the quality of their relationships after divorce.⁶⁰

⁵³ Judy Dunn & Alan Booth, *Stepfamilies: An Overview*, in *Stepfamilies: Who Benefits? Who Does Not?* 217, 219-20 (Alan Booth & Judy Dunn eds., 1994).

⁵⁴ Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* 64 (2000).

⁵⁵ See, e.g., Charlotte A. Schoenborn, Centers for Disease Control and Prevention, *Marital Status and Health: United States, 1999-2002*, at 1 (Dec. 15, 2004) ("Regardless of population subgroup (age, sex, race, Hispanic origin, education, income, or nativity) ... married adults were generally found to be healthier than adults in other marital status categories."); Mayo Clinic, *Healthy Marriage: Why Love Is Good for You*, <http://www.mayoclinic.com/health/healthy-marriage/MH00108> (last visited Oct. 7, 2006) ("People make different choices and adopt different behaviors once they're married. Healthy activities generally increase, and risky behaviors typically decrease, partly due to a sense of responsibility to a spouse.").

⁵⁶ Jan E. Stets, *Cohabiting and Marital Aggression: The Role of Social Isolation*, 53 *J. Marriage & Fam.* 669, 669 (1991).

⁵⁷ Lee et al., *supra* note 48, at 839 (citations omitted).

⁵⁸ The National Marriage Project, *The State of Our Unions 2005: The Social Health of Marriage in America* 16, 17 (2005) [hereinafter *National Marriage Project 2005*] (citing Jeffrey S. Gray & Michael J. Vanderhart, *On the Determination of Wages: Does Marriage Matter?*, in *The Ties that Bind: Perspectives on Marriage and Cohabitation* 356 (Linda J. Waite et al. eds., 2000); Daniel, *supra* note 52, at 113, 113-25; Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive?*, 26 *J. Hum. Resources* 282 (1991)).

⁵⁹ Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 *J. Marriage & Fam.* 79, 79 (1991).

Cohabitation also results in a significant loss of relationships between parents or quasi-parents and children. Forty-one percent of cohabiting couples have children in their homes.⁶¹ Yet cohabitation ends more often than marriage.⁶² Cohabitation is also strongly correlated with later disruption through divorce in the case of persons who cohabit at any time before their marriage with someone they do not marry.⁶³

Cohabitation and divorce also break solidarity with children in another way. It has clearly been established that children's long-term well-being - educational and emotional - is diminished if they are reared by divorced parents, in a stepfamily, or in a cohabiting household.⁶⁴ In fact, even if children are reared in a household with their biological parents, if those parents are cohabiting rather than married, the children's outcomes are relatively diminished.⁶⁵ Also, even measurable parental involvement in their children's lives, or remarriage, cannot totally compensate for the effects of divorce and remarriage on children.⁶⁶ Some of the tangible measures of child [*510] well-being show that in a stable marriage (versus a cohabiting household), there is a diminished risk of child abuse,⁶⁷ there are greater parental expenditures on health care, education, and housing, and there are fewer expenditures on alcohol and tobacco.⁶⁸ Children reared in stable, married families also have better educational and psychological outcomes, and these outcomes hold true across income categories and are thus not solely a function of economics.⁶⁹

Not only are children's educational and emotional outcomes diminished if they are reared outside of marriage, it appears their sense of happiness is affected too. A meta-analysis from 2001 cited a dozen studies on the subject and concluded: "Adults with divorced parents, when compared with adults with continuously married parents, report

⁶⁰ Cf. Ludwig F. Lowenstein, Causes and Associated Features of Divorce as Seen by Recent Research, 42 J. Divorce & Remarriage 153, 163 (2005); Heidi R. Riggio, Parental Marital Conflict and Divorce, Parent-Child Relationships, Social Support, and Relationship Anxiety in Young Adulthood, 11 Pers. Relationships 99, 101, 106 (2004) (finding, without suggesting a reason, a decrease in the quality of father-son relationships after divorce).

⁶¹ Jason Fields & Lynne M. Casper, U.S. Census Bureau, America's Families and Living Arrangements 2000, at 13 (2001).

⁶² See supra note 32 and accompanying text.

⁶³ Teachman, supra note 42, at 445.

⁶⁴ Marion C. Willetts & Nick G. Maroules, Does Remarriage Matter? The Well-Being of Adolescents Living with Cohabiting Versus Remarried Mothers, 41 J. Divorce & Remarriage 115, 115, 117 (2004) (asserting that "maternal remarriage does not provide benefits over maternal cohabitation with regard to adolescent well-being," and that both remarriage and cohabitation are associated with worse outcomes for children than an intact household across a variety of categories such as education, teen pregnancy, and behavioral and emotional outcomes).

⁶⁵ See William J. Doherty et al., Why Marriage Matters: Twenty-One Conclusions from the Social Sciences 7 (2002), cited in Dan Cere, The Council on Family Law, The Future of Family Law: Law and the Marriage Crisis in North America 25, 47 n.65 (2005).

⁶⁶ William H. Jeynes, Does Parental Involvement Eliminate the Effects of Parental Divorce on the Academic Achievement of Adolescents?, 37 J. Divorce & Remarriage 101, 112 (2002).

⁶⁷ Norval Glenn, Institute for American Values, Closed Hearts, Closed Minds: The Textbook Story of Marriage 14 (1997) [hereinafter Glenn, Closed Hearts]; see also Robin Fretwell Wilson, Children at Risk: The Sexual Exploitation of Female Children After Divorce, [86 Cornell L. Rev. 251, 254 \(2001\)](#).

⁶⁸ Thomas DeLeire & Ariel Kalil, How Do Cohabiting Couples with Children Spend Their Money?, 67 J. Marriage & Fam. 286, 289 (2005).

⁶⁹ See William Jeynes, Divorce, Family Structure, and the Academic Success of Children 13-38 (2002) [hereinafter Jeynes, Family Structure]; Wendy D. Manning & Kathleen A. Lamb, Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families, 65 J. Marriage & Fam. 876, 885 (2003); Gary D. Sandefur et al., The Effects of Parental Marital Status During Adolescence on High School Graduation, 71 Soc. Forces 103, 103-04, 115 (1992).

greater unhappiness, less satisfaction with life, a weaker sense of personal control, more symptoms of anxiety and depression, and a greater use of mental health services." ⁷⁰

One highly respected source on children's health and happiness concluded: "The family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in ... stepfamilies or cohabiting relationships face higher risks of poor outcomes There is thus value for children in promoting strong, stable marriages between biological parents." ⁷¹

One additional note about the effects of adult choices of sexual relationships on their children: parents' choices about divorce can affect several generations. For children, their parents' divorce can affect the timing of their marriage, their likelihood of ever marrying, [*511] and their likelihood of divorce. ⁷² Children of divorce are also more likely to marry as teenagers (itself a risk factor for divorce), but if they remain single past twenty, they are more likely to avoid marriage than are adult children from intact marriages. ⁷³ Children of divorce are also more likely than others to cohabit, ⁷⁴ but less likely to marry a cohabiting partner, ⁷⁵ a behavior which itself increases divorce. ⁷⁶ Children of divorce are also less hopeful about their own marital success, ⁷⁷ and, in fact, less able to maintain stable marriages. ⁷⁸ According to a recent study of twenty years of divorce research, even the grandchildren of divorced couples have less education, more conflicted marriages, and more distant relations with their parents than do grandchildren of intact marriages, especially when their parents also have suffered as a result of the grandparents' divorce. ⁷⁹

⁷⁰ Paul R. Amato & Juliana M. Sobolewski, *The Effects of Divorce and Marital Discord on Adult Children's Psychological Well-Being*, 66 *Am. Soc. Rev.* 900, 900-01 (2001), quoted in Julianna Sandell & Eric Plutzer, *Families, Divorce and Voter Turnout in the U.S.*, 27 *Pol. Behav.* 133, 149 (2005).

⁷¹ Kristin Anderson Moore et al., *Child Trends, Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?* 6 (2002), available at <http://www.childtrends.org/files/MarriageRB602.pdf>; see generally Manning & Lamb, *supra* note 69.

⁷² Jenifer Kunz, *The Intergenerational Transmission of Divorce: A Nine Generation Study*, 34 *J. Divorce & Remarriage* 169, 170, 174 (2000) (concluding that "children from divorced homes are significantly more likely to get divorced than children from non-divorced homes").

⁷³ Nicholas H. Wolfinger, *Parental Divorce and Offspring Marriage: Early or Late?*, 82 *Soc. Forces* 337, 345-47 (2003).

⁷⁴ Andrew J. Cherlin et al., *Parental Divorce in Childhood and Demographic Outcomes in Young Adulthood*, 32 *Demography* 299, 313 (1995).

⁷⁵ Nicholas H. Wolfinger, *The Effects of Family Structure of Origin on Offspring Cohabitation Duration*, 71 *Soc. Inquiry* 293, 304 (2001).

⁷⁶ Teachman, *supra* note 42, at 445.

⁷⁷ Ashley D. Bowman & Geoffrey W. Sutton, *Marital Satisfaction and Relational Attachment in a Sample of Newly Married Couples*, 95 *Psychol. Rep.* 989, 990 (2004) ("Parental divorce is associated with their offspring's low optimism toward marital success."); see also Paul R. Amato & Alan Booth, *Consequences of Parental Divorce and Marital Unhappiness for Adult Well-Being*, 69 *Soc. Forces* 895, 900, 902 (1991) (concluding that parental divorce makes adult children more pessimistic about the possibility of a stable marriage and more likely to divorce themselves).

⁷⁸ Zenit News Agency, *Marriage Rooted in Nature of Man and Woman, Says Pope: Warns that Other Forms Are Outside Human Dignity* (June 7, 2005), available at <http://www.zenit.org/english/visuaizza.phtml?sid=72208> (Code: ZE0560704) (asserting that, without indissolubility, "children, [the] fruit of love, ... [cannot] believe in man and in his future in difficult times").

⁷⁹ Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 *J. Marriage & Fam.* 191, 202 (2005).

Finally, "parenting satisfaction," a likely factor in whether a parent's relationship with a child will be supportive, is "significantly higher for married parents" and for "those who are parenting their own biological children."⁸⁰ Furthermore, a "good marriage[] provides a resource for successful parenting, perhaps by increasing [***512**] commitment."⁸¹ Much lower parenting satisfaction is measured for those parenting stepchildren, noncustodial minor children, and for those parenting alone.⁸²

There are still dissenting voices against the evidence that continues to accumulate on these matters. A typical study of this type claims, for example, that family "processes," rather than structure, matter for children's well-being.⁸³ But a closer look at the study past the initial abstract shows that the author still found effects of family structure on twelve of the nineteen variables examined. Furthermore, a far more nuanced conclusion appears later in the article when the author states that she is claiming only that family structure does not "automatically" guarantee a good outcome.⁸⁴ No one disputes, however, that family structure alone does not determine children's fates. At the same time, even the family processes that this author characterizes as central to good outcomes for children are simply far more likely in two-parent married homes. It is not disputed that close and loving parent-child relations may be found in many different adult-child groupings; yet the question remains, which adult-child grouping most naturally and most often provides these? It is the married two-parent home.⁸⁵

Another type of study claims that divorce is preferable for children to living with parents experiencing high levels of conflict.⁸⁶ This may be true, but it has recently come to light that the vast majority of marital breakups are not preceded by high conflict.⁸⁷ At the very least, then, it cannot be presumed in most cases that divorce is preferable for children to preservation of their parents' existing marriage.

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2. Society

There is not the same amount of attention in the literature on families concerning the relative effects on society of the solubility of adult (sexual) relationships. But there is some, and it reveals a number of social costs associated with solubility.

First, it is obvious that when the family breaks down, it is the occasion for a great deal more state interference, involving substantial administrative and legal costs to both the state and the family.⁸⁸ In many cases, in addition to court and agency costs, there are also the costs of administering and disbursing child support enforcement,

⁸⁰ Stacy J. Rogers & Lynn K. White, Satisfaction with Parenting: The Role of Marital Happiness, Family Structure, and Parents' Gender, 60 J. Marriage & Fam. 293, 293, 297 (1998) (studying approximately 1,200 parents).

⁸¹ Id. at 305.

⁸² Id. at 306.

⁸³ Jennifer E. Lansford et al., Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households, 63 J. Marriage & Fam. 840, 840 (2001).

⁸⁴ Id. at 842, 845.

⁸⁵ See, e.g., Glenn, Closed Hearts, supra note 67, at 12 (noting that intact marriages "strongly affect[] the probability that a child will have a warm, concerned relationship with a parent").

⁸⁶ See Donna Ruane Morrison & Mary Jo Coiro, Parental Conflict and Marital Disruption: So Children Benefit When High Conflict Marriages Are Dissolved?, 61 J. Marriage & Fam. 626, 626-27, 636 (1999).

⁸⁷ See Paul R. Amato & Alan Booth, A Generation at Risk: Growing Up in an Era of Family Upheaval 220 (1997) (reporting that about one-third of divorces end high-conflict marriages).

⁸⁸ Cere, supra note 65, at 30; see also Utah Marriage, What Could Divorce Be Costing Your State?, <http://www.utahmarriage.org/index.cfm?id=17htV59n28> (summarizing the results of the then-forthcoming study David Schramm, The Costly Consequences of Divorce in Utah: The Impact on Couples, Communities, and Government (2003)).

Temporary Assistance to Needy Families, food stamps, and public housing.⁸⁹ There are also the costs borne directly by the involved parties: litigation costs,⁹⁰ sometimes including efforts toward follow-up enforcement of child or spousal support or a custody order; moving expenses (broken families are far more likely to move than intact families);⁹¹ and the costs of living in two homes versus one is more expensive. Furthermore, when employees are experiencing marital crises, employers and the wider economy must absorb the cost of significant lost productivity.⁹²

There is also a body of literature that links crime,⁹³ drug and alcohol activity,⁹⁴ and even suicide⁹⁵ to the effects of divorce. A very [*514] recent article has made a convincing case for a causal relationship between divorce and depressed voter turnout, a prime indicator of civic engagement.⁹⁶ Its authors conclude: "We have shown that the experience of divorce is sufficiently consequential to result in a very large drop in voter turnout among young white citizens... . This research illustrates how one aspect of family dynamics has important political consequences."⁹⁷

Soluble sexual relationships have significant and widespread effects on children. While it is true that children also suffer in marital households experiencing highly conflictual adult relationships, it is also true that the vast majority of marital breakups are not preceded by high conflict.⁹⁸ The common good of society is also closely linked to the indissolubility of families, specifically through marriage, leading to the general conclusion that freedom is not served by ideas or laws conveying neutrality or even hostility toward the institution of indissoluble marriage.

3. A Few Words on the Evidence from History

While cohabitation as a regular practice is a relatively recent phenomenon, divorce has coexisted with marriage throughout recorded history, and its place may be examined. Records of divorce rates are not readily available for many historical periods, but we do know the preferences of governments and cultures for stable marriage over instability for many historical periods. While a review of the entire history of divorce is well beyond the scope of this

⁸⁹ Marriage, in The National Marriage Project, *The State of Our Unions 2004: The Social Health of Marriage in America* 15, 17 (2004).

⁹⁰ Pranay Gupte, *It's Personal for a Top NYC Divorce Lawyer*, N.Y. Sun, May 17, 2005, at 10 (noting the staggering cost of divorce litigation).

⁹¹ Jeynes, *Family Structure*, supra note 69, at 20.

⁹² Melinda S. Forthofer et al., *Associations Between Marital Distress and Work Loss in a National Sample*, 58 *J. Marriage & Fam.* 597, 598 (1996).

⁹³ Michael R. Gottfredson & Travis Hirschi, *A General Theory of Crime* 103 (1990) (relating crime in communities to "the percentage of the population divorced, the percentage of households headed by women, and the percentage of unattached individuals in the community"); Cynthia Price & Jenifer Kunz, *Rethinking the Paradigm of Juvenile Delinquency as Related to Divorce*, 39 *J. Divorce & Remarriage* 109, 110, 127 (2003) (showing that in 2001, three of four adolescents in state correctional facilities were from homes with divorce, unmarried parents, or separation, and concluding that divorce impacts the actual causation of juvenile delinquency, but is not the sole factor).

⁹⁴ William H. Jeynes, *The Effects of Recent Parental Divorce on Their Children's Consumption of Marijuana and Cocaine*, 35 *J. Divorce & Remarriage* 43, 43 (2001) (as compared with children of intact families, children of divorce are more likely to use cocaine and marijuana).

⁹⁵ See *Divorceinfo.com*, *The Effect of Divorce on Suicide Risk*, <http://www.divorceinfo.com/suicide.htm#EffectOfDivorce> (last visited Oct. 7, 2006) ("One recent study by the National Institute for Healthcare Research ... indicates that divorced people are three times as likely to commit suicide as people who are married. The Institute says that divorce now ranks as the number one factor linked with suicide rates in major U.S. cities, ranking above all other physical, financial, and psychological factors.").

⁹⁶ Sandell & Plutzer, supra note 70, at 150.

⁹⁷ *Id.* at 150-51.

⁹⁸ See supra note 87 and accompanying text.

article, certainly a few observations can be made, many drawn from the excellent review of the state of marriage in society written by Professor John Witte, Jr.⁹⁹

First, even pre-Christian social norms favored stable marriage over divorce. Aristotle and Plato both encouraged couples to remain [*515] together for the sake of their children.¹⁰⁰ Stoic and Roman lawmakers, too, favored enduring marriages, also for the good of the spouses, the children, and society.¹⁰¹ This was due to the sense that the great project of marriage - children - would be less well-served by a severed family, as well as to the conception of the state as a collection of "households" which ought to model authentic human friendship.¹⁰² When Christianity swept Western Europe, country after country adopted laws forbidding or strictly limiting divorce. Europe's Latin American colonies also followed suit.¹⁰³ Even leaders of the Reformation, such as Martin Luther, who specifically permitted divorce (in contrast with Roman Catholic teachings), proposed very limited grounds for it, with the well-being of children, society, and the couple in mind.¹⁰⁴

In the colonies that later became the United States, while ecclesiastical control over marriage and divorce was explicitly rejected from the beginning, the secular family law still severely restricted divorce.¹⁰⁵ Lawmakers often drew their ideals from extant Protestant and Roman Catholic notions. Divorce was permitted at first only by legislative act and for very few reasons. Later, the United States Supreme Court and lower courts explicitly recognized marital stability as a great good. In a passage quoted in 134 cases since it was written,¹⁰⁶ the Supreme Court stated: "[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."¹⁰⁷

In the United States, following periods of climbing divorce rates, there has always arisen a movement to stabilize marriage. This occurred during the nineteenth century,¹⁰⁸ and again in the early [*516] twentieth century after a spike in the divorce rates during the 1920s,¹⁰⁹ and certainly in the past decade in the United States with the emergence of a large and diverse marriage movement operating nationally and in states and local communities. This movement is presently funded by the federal government, via the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.¹¹⁰ A 1936 Gallup Poll showed 77% disagreeing with the statement that

⁹⁹ John Witte, Jr., *The Goods and Goals of Marriage*, [76 Notre Dame L. Rev. 1019 \(2001\)](#).

¹⁰⁰ See Aristotle, *The Nichomachean Ethics*, Bk. VIII, Chs. 10-12, at 493-503 (H. Rackham trans., 2d ed. 1934) (superimposing political nomenclature on familial relationships); Plato, *Laws*, (A.E. Traylor trans.) in *The Collected Dialogues of Plato 1225, 1351* (Edith Hamilton & Huntington Cairns eds., 1961).

¹⁰¹ Witte, *supra* note 99, at 1028.

¹⁰² Aristotle, *Politics*, Bk. I, Ch. 2, at 13 (H. Rackham trans., 2d ed. 1944).

¹⁰³ Witte, *supra* note 99, at 1038.

¹⁰⁴ *Id.* at 1052-53.

¹⁰⁵ *Id.* at 1063-64, 1067.

¹⁰⁶ *Id.* at 1067.

¹⁰⁷ [Maynard v. Hill, 125 U.S. 190, 211 \(1888\)](#), quoted in Witte, *supra* note 99, at 1067.

¹⁰⁸ Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 9-11 (1985); Max Rheinstein, *Marriage Stability, Divorce, and the Law* 39-48 (1972).

¹⁰⁹ Steven Mintz & Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* 126-28 (1988).

¹¹⁰ 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. (2000)). See generally Glenn T. Stanton, *Why Marriage Matters: Reasons to Believe in Marriage in Postmodern Society* (1997) (positing faithful and permanent first marriages as providing for the greatest sexual health and general well-being of adults, and the best environment for raising children); Helen M. Alvare, *Saying "Yes" Before*

"divorce [should] be easier to obtain." ¹¹¹ A 1954 poll showed 43% opposed to divorce for any reason. ¹¹² A 1966 poll showed only 25% support for divorce on the grounds of two years' mutually agreed separation, and only 13% agreement with the statement that current divorce laws (fault-based laws) are "too strict." ¹¹³ Today, a majority of Americans tell pollsters that they believe divorce to be a great detriment to society. ¹¹⁴

There remains, in other words, a thriving interest in preserving intact marriages, today as in the past, since we are perhaps more acutely aware than ever before of rates of marital failure and avoidance (via cohabitation, for example). Today is also the era of information about the relationship between marriage and personal and social happiness. We know, in sum, that stable marriage is closely empirically associated with human health and happiness, both for the involved adults and for their children, grandchildren, and the wider society around them.

[*517] To state a conclusion from one of the most revered chroniclers of the history of marriage, Edward Westermarck: "There is abundant evidence that marriage has, upon the whole, become more durable in proportion as the human race has risen to higher degrees of cultivation" ¹¹⁵ Professor Witte has reached a similar conclusion: "Western tradition teaches" that marriage, including the norm of durability, is the "general inclination and instruction of nature, of the human body, of the human psyche, of the human heart." ¹¹⁶

It is difficult after this review, especially of the sociological literature, to imagine how one might construct an argument for dethroning marriage from its central place in family law; what argument could overcome this data? Yet such an argument has been constructed and commands considerable influence. Section III describes and criticizes this argument as insufficiently attentive to the empirical evidence set forth above, and as resting upon an impoverished understanding of human solidarity.

III. The Currently Ascendant Anthropology

There has emerged over the last forty years an influential opinion that the most important evidence of what human nature really requires regarding the indis/solubility of sexual relationships is "what people are choosing now" in the way of family forms. It proposes that as large and sometimes increasing numbers of people are now choosing divorce and cohabitation, family law ought to reflect this by altering particular rules and even some of its overarching goals. Some take the "what's happening now" argument to a point well beyond objecting to laws preferring marriage, all the way to the (likely theoretical) proposal that marriage ought to be eradicated as an important family law category. ¹¹⁷

Saying "I Do": Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle, [18 Notre Dame J.L. Ethics & Pub. Pol'y 7, 31-46 \(2004\)](#) (describing and categorizing the various government and private efforts on behalf of marriage); Katherine Shaw Spaht, Revolution and Counter-Revolution: The Future of Marriage in the Law, [49 Loy. L. Rev. 1 \(2003\)](#) (providing an excellent summary of current efforts to strengthen marriage).

¹¹¹ 1 George H. Gallup, *The Gallup Poll: Public Opinion 1935-1971*, at 42 (1972).

¹¹² 2 *id.* at 1222 (1972).

¹¹³ 3 *id.* at 1990 (1972).

¹¹⁴ See, e.g., Pollingreport.com, *The 20th Century*, <http://www.pollingreport.com/20th.htm> (last visited Apr. 6, 2006) (fifty-three percent of those who participated in the nationwide Dec. 20-21, 1999, Gallup/CNN/USA Today poll cited "acceptance of divorce" as "a change for the worse" for American society, with only thirty percent saying it made society better.).

¹¹⁵ Edward Westermarck, *The History of Human Marriage* 535 (3d ed. 1901) (1891).

¹¹⁶ Witte, *supra* note 99, at 1069.

¹¹⁷ See, e.g., Martha Albertson Fineman, *Why Marriage?*, [9 Va. J. Soc. Pol'y & L. 239, 261-66 \(2001\)](#); Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex - or Not at All?*, [34 Fam. L.Q. 271, 298 \(2000\)](#) [hereinafter Krause, *Marriage*]; see generally Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, [102 Colum. L. Rev. 1089, 1127 \(2002\)](#).

Such arguments often begin with the assertion that marriages are declining in numbers and strength,¹¹⁸ and that cohabitation - by **[*518]** nature soluble - is picking up. Thus, these arguments claim that it is virtually impossible any longer to speak of the group formed by indissoluble marriage as "the family," suited to human nature or to being a standard for lawmaking; we must rather speak about "families" as including different groupings of persons premised upon, or allowing easily for, dissolubility. Consider, for example, the sweeping language of Justice Brennan's dissent in *Michael H. v. Gerald D.*: "It is absurd to assume that we can agree on the content of [the] terms [family and parenthood] and destructive to pretend that we do."¹¹⁹ If we fail to tailor the law to address the fact of so many easily soluble relationships, the argument continues, the law will no longer command any respect, or function effectively to settle the kinds of disputes likely to arise in families today. In particular, the law will not be able to address the real needs of the many children present in households affected by solubility; these needs, it is finally suggested, are best met by making no distinctions between parents based on the status of their relationships.¹²⁰

It is almost too easy to disagree with the main thrust of this argument, the logic that "what's happening now" need be the preferred source of family law rules designed to achieve authentic human freedom. It is more than tempting, in fact, to confront this argument immediately with some adapted form of the question: "If Johnny jumps off a cliff, should we jump off a cliff too?" Clearly, some choices are bad, whether they are endorsed by the few or the many. It would be ridiculous to alter current law-making, for example, in the direction of endorsing the choices of many to live in consumeristic excess, blind to the needs of the poor, to dodge child support obligations, or chronically to over-eat or smoke. Rather, it is empirically and intuitively easy to show that these choices are untrue to the good of the person and particularly harmful to weaker members of society, who have smaller margins of error for recovering from setbacks. It is more difficult, of course, to follow this critique with proposals for persuading adults to change their behavior. The conclusion of this article offers suggestions in this vein.

Not surprisingly, given how thin is this suggested anthropology, its proponents do not rest at the point of simply insisting that law reflect increasingly popular choices against indissolubility. Rather, **[*519]** either as a rationale within the argument, or immediately afterwards to show awareness of its possible problematic outcomes, they regularly associate this contention with solidarity with one or more vulnerable groups. Sometimes, but rarely, proponents attempt to link their proposals with empirical evidence regarding how different adult relations help or harm the health and happiness of children and society. For example, they might claim that marriage hurts women by increasing the risk of domestic violence, or thrusting unfair dependent care burdens on them, or even ruining their chances for a decent job or career; then they will suggest that marriage be dethroned as a legal category, in solidarity with women.¹²¹ They might alternatively mention the link between solubility and children's welfare by offering that, if marriage were to be eclipsed or rejected, every effort should be made to step up public and private (especially employer) assistance for children and their caregivers (usually women) who could experience heightened economic, emotional, and educational risks living outside a two-married-parent home.¹²²

In sum, even arguments championing the currently popular will as an important source for fashioning family law and securing freedom do not fail to incorporate some respect for solidarity with the vulnerable into their notion of freedom. Nor do they fail to incorporate some slight recognition of verifiable truths about the outcomes - especially for children - of soluble sexual relationships. Yet, as I hope to demonstrate, their efforts in the direction of embracing truth or promoting solidarity ultimately fail.

¹¹⁸ Fineman, *supra* note 117, at 246 ("What is bizarre is that [marriage] remains central in spite of the fact that the traditional marital family has become a statistical minority of family units in our society.").

¹¹⁹ [491 U.S. 110, 141 \(1989\)](#) (Brennan, J., dissenting).

¹²⁰ See, e.g., Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. Va. L. Rev. 275 (1992) [hereinafter *Minow, All in the Family*] (illustrating the inability of current family law, with its traditional definitions of family, to address a variety of new types of partner and parent-child relationships and conflicts).

¹²¹ See *infra* notes 162-65 and accompanying text.

¹²² See *infra* notes 168-70, 178-79 and accompanying text.

Arguments against the importance of indissoluble marriage, or in favor of increased regularization of sexual partnerships such as cohabitation, appear across types of legal sources, from no-fault divorce legislation to family law scholarship to case law on cohabitation. They also receive support from U.S. Supreme Court decisions involving the solubility of family relationships. In what follows, I will trace within each of these sources the structure of the argument for dethroning indissolubility in sexual relationships, with attention to any references to the importance of solidarity with vulnerable members of families, and to any nods toward the importance of "truth" appearing in their analyses. I will suggest that the arguments are nonetheless impaired, due to their failure to consult facts necessarily relevant to the well-being of the objects of **[*520]** their proposed solidarity, and due to their impoverished (and uninspiring) notion of what human beings really desire and require in the way of solidarity in the context of family life.

A. No-Fault Divorce Legislation

In the United States today, nearly every jurisdiction has a form of what is commonly called "no-fault" divorce.¹²³ This system allows a couple to divorce without having to prove the existence of a specified fault (such as adultery, desertion, or abandonment). Rather, there must be a showing either of having lived separately and apart for a certain amount of time, or of "irreconcilable differences." In most cases, the best that a spouse who objects to the divorce might do is to obtain a delay in the issuance of the divorce decree. Prior to the development of no-fault divorce laws, one spouse was required to prove fault on the part of the other. There is little doubt that the fault system had become rife with corruption, especially in the form of spouses manufacturing situations of apparent adultery, or mutually agreeing to claim the existence of another fault ground.¹²⁴ Lawmakers' answer to this state of affairs was to eliminate the fault requirement. It appears that some supporters of no-fault divorce actually believed that replacing fault - with the "irreconcilable differences" standard - could require a more substantive showing of real marriage failure than that required by existing fault-based laws.¹²⁵ Yet everyone knows the story of what happened next: courts' acceptance of even one spouse's claim of "irreconcilable differences" became automatic. There was no searching inquiry into the real state of a marriage.¹²⁶

For purposes of my analysis, what is significant about the move to no-fault divorce was the way its support depended upon the claim that easy divorce was necessary for real human freedom, as so many more people sought divorces than could obtain them under the fault regime, to the point that they were willing to commit fraud to get them. In the words of the Chairman of the National Conference of **[*521]** Commissioners on Uniform State Laws, which drafted the influential no-fault provisions of the Uniform Marriage and Divorce Act:

The sum and substance of it all is that when you get a situation in which even one of the parties is determined that the marriage shall no longer persist, "that it has become intolerable for me to remain in this state, and I will not remain" - when you reach that state, it is really for the best interests of society to say, "We will wipe the slate clean. We will dissolve this marriage"

... .

... This basically is the theory on which the statute is drawn.¹²⁷

But alongside this argument from the regularity of, and the intensity of desire for, divorce, supporters of no-fault divorce included arguments based on solidarity with women and with children. Some claimed, for example, that

¹²³ See generally Chart 4: Grounds for Divorce and Residency Requirements, [37 Fam. L.Q. 580 \(2004\)](#).

¹²⁴ See, e.g., Unif. Marriage & Divorce Act §§101-309 (amended 1973), 9A U.L.A. 159, 160 (1998) ("The traditional conception of divorce based on fault has been singled out particularly ... as an ineffective barrier to marriage dissolution which is regularly overcome by perjury").

¹²⁵ See Stuart A. Brody, California's Divorce Reform: Its Sociological Implications, 1 Pac. L.J. 223, 224, 229 (1970).

¹²⁶ See Mary Ann Glendon, The New Family and the New Property 33-34 (1981).

¹²⁷ 1 Uniform Marriage and Divorce Act Proceedings, supra note 22, at 84-85.

women in particular suffered from marriage.¹²⁸ It was further claimed that children suffered so much in unhappy marriages that divorce would cause a net improvement in their situation.¹²⁹

Additional movements in the direction of solidarity with women and children came in the form of provisions, adopted near in time to no-fault laws, seeking to give women a more equitable share of property, and to assure the payment of child support.¹³⁰ Some years later, more stringent child support guidelines, backed by federal enforcement, arose to help not only the increasing number of children of divorce, but also the increasing number of children born out of wedlock.¹³¹ Years after this, but still with the fallout from easy [*522] divorce in mind, came additional laws mandating that family courts provide "parent education" for divorcing parents, to ease children's transition out of married households.¹³²

In sum, following upon this monumental exercise in "lawmaking based on what many people say they want," some attention was paid to the needs especially of the more vulnerable parties to divorce: women and children. Yet important shortcomings remained. First, there was a failure seriously to inquire into any empirical evidence about the relationship between divorce and well-being, for adults and children, as well as for the poor. Earlier studies existed indicating trouble for all of these groups. Given the importance of the change in law, more studies and more caution were warranted.¹³³ Second was the failure to accompany the lowering of barriers to divorce with social assistance for marriage preparation and stabilization. Requirements of premarital counseling, or mandatory conciliation, did not accompany final versions of no-fault divorce laws, though they were recommended early in the process of passage.¹³⁴

It is also significant that despite the flood of evidence that has emerged since the 1970s about the ill effects of divorce on adults, children, and society,¹³⁵ there has been no commensurate legislative response in the form of

¹²⁸ See, e.g., Jessie Bernard, *The Future of Marriage* 26-36 (1972) (claiming that women suffer more than men, and benefit less as spouses, and that married women also suffer more than single women).

¹²⁹ See National Conference of Commissioners on Uniform State Laws, *Proceedings in the Committee of the Whole, Uniform Marriage and Divorce Act*, at 131A-132A (Aug. 3, 1970) [hereinafter 2 *Uniform Marriage and Divorce Act Proceedings*] (comments of Professor Robert Levy) (unpublished transcript on file with the Ave Maria Law Review); Alan H. Frank et al., *No Fault Divorce and the Divorce Rate: The Nebraska Experience - An Interrupted Time Series Analysis and Commentary*, 58 *Neb. L. Rev.* 1, 10 (1978) ("It is the breakdown of a marriage which actually is the "social evil" that is so often ... denounced for ... imperiling children. Divorce is merely the law's recognition that the marriage has broken down.").

¹³⁰ *Unif. Marriage & Divorce Act* §§307-309 (amended 1973), 9A U.L.A. 288 (1998).

¹³¹ See *Child Support Recovery Act of 1992*, [18 U.S.C. §228](#) (2000); *Child Support Enforcement Amendments of 1984*, [Pub. L. No. 98-378](#), **98 Stat. 1305** (1984).

¹³² Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, [33 Fam. L.Q. 617, 622 n.23 \(1999\)](#) (stating that by 1998 "1,516 [U.S.] cities or counties reported having parent education programs") (citing Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 *Fam. & Conciliation Cts. Rev.* 36 (1999)).

¹³³ Compare *A Uniform Marriage and Divorce Act Proceedings*, supra note 129 (comments of Levy) (briefly discussing, during consideration of the Uniform Marriage and Divorce Act in 1970, the literature on children's well-being following divorce) with Anna Freud, *Introduction to Psycho-analysis for Teachers* 35-36 (Barbara Low trans., George Allen & Unwin Ltd. 2d impression 1949) (1931) ("The child [of divorced parents] stops work - that is, his normal development is checked and he reacts to the abnormal conditions in some abnormal way.").

¹³⁴ See J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, [31 San Diego L. Rev. 519, 520-22, 542-43 \(1994\)](#) (discussing how conciliation requirements were ultimately dropped from no-fault divorce laws); 1 *Uniform Marriage and Divorce Act Proceedings*, supra note 22, at 77-85 (presenting a discussion between the membership of the National Council of Commissioners on Uniform State Laws considering and eventually rejecting conciliation provisions for the Uniform Marriage and Divorce Act).

¹³⁵ See supra notes 72-79 and accompanying text.

divorce reform. This evidences a disposition in lawmakers to ignore what solidarity might require in connection with divorce, and to fail to take account of the available and highly relevant empirical evidence about the well-being of those affected by divorce.

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B. Cohabitation: Marvin v. Marvin

The law concerning cohabitation is another area in which lawmakers express conclusions about the relationship between the indissolubility of sexual relationships and human nature. In the United States, this area of law first came to prominence during the debate over the enforcement of cohabitants' agreements regarding support and property distribution upon termination of their relationship. California's Marvin v. Marvin¹³⁶ case, the conclusions of which were generally accepted in most states considering the question,¹³⁷ was the first state supreme court decision explicitly permitting the enforcement of such agreements.¹³⁸ This move was remarkable for the change in attitude it indicated toward the status of marriage. Specifically, the prior refusal to recognize such agreements was based upon the determination that recognition would signal too weak a state preference for marriage as the approved form of sexual partnership. While protesting that "lest we be misunderstood, ... we ... point out that the structure of society itself largely depends upon the institution of marriage,"¹³⁹ the Marvin court nevertheless promised enforcement of express property dissolution agreements between cohabitants, save those agreements exchanging promises for sex.¹⁴⁰ Its holding relied explicitly upon the increasing "prevalence of nonmarital relationships in modern society and the social acceptance of them."¹⁴¹ It specifically refused to uphold a legal standard based on "alleged moral considerations that have apparently been so widely abandoned by so many."¹⁴²

But the Marvin court also cited concerns that sound in "solidarity" with possible future spouses. The court suggested, in particular, that allowing cohabitation to take further root might strengthen the institution of marriage: "This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties."¹⁴³ In a **[*524]** footnote, the Marvin Court also approvingly quoted a judicial opinion from another case expressing dismay at the law's abandonment of the less powerful member of a nonmarital cohabiting relationship by failing to provide for support and property rights on the relationship's dissolution.¹⁴⁴

¹³⁶ [557 P.2d 106 \(Cal. 1976\)](#).

¹³⁷ See Garrison, *supra* note 33, at 817-18, 818 n.4 (2005) (noting that the majority of U.S. courts now "permit former cohabitants to recover based on both explicit promises made during the relationships and implicit agreements derived from conduct").

¹³⁸ [Marvin, 557 P.2d at 122](#).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (footnote omitted).

¹⁴⁴ [Id. at 121 n.21](#) ("[Pronouncements that] the parties should and must be left to their own devices ... ignore the ... unannounced but inherent rule ... that the party who has title, or in some instances who is in possession, will enjoy the rights of ownership of the property concerned. The rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property ... at the end of a so-called meretricious relationship." (quoting [West v. Knowles, 311 P.2d 689, 692 \(Wash. 1957\)](#) (Finley, J., concurring))).

After Marvin, the majority of states accepted the basic outlines of its approach: that certain kinds of agreements between cohabitants could be legally enforced.¹⁴⁵ As in Marvin, these cases did not undertake any searching factual inquiry into the meaning and consequences of cohabitation for children, families, and society.

Going several steps further than extant state law on cohabitation, the American Law Institute ("ALI") in its Principles of the Law of Family Dissolution: Analysis and Recommendations¹⁴⁶ has recommended equalizing the property and support consequences of the breakup of a marriage or a cohabitation, even in the absence of any agreement between cohabitants. It reached this conclusion following general assertions that the "functions" of cohabitation were similar to those of marriage, but also acknowledging the possibility of dependencies arising during cohabitation.¹⁴⁷ This concern, on its face, seems to arise out of solidarity with a possibly more vulnerable cohabitant.

Only Washington State¹⁴⁸ has adopted by caselaw a requirement similar to the ALI recommendation that states require roughly equal treatment upon the breakup of spouses and cohabitants. Yet neither in the Washington opinion nor in the ALI's proposal is there any searching factual inquiry about the possible consequences of cohabitation for marriage, for society, for women, or for children.

Once again, relying upon evidence of popular support for soluble relationships, paired with claims to solidarity, including solidarity with marriage itself, lawmakers and scholars equivocated regarding [*525] the relative importance of indissoluble relationships like marriage, without serious inquiry into empirical evidence on the likely implications for those directly involved, or for the wider society. That abundant evidence has emerged since Marvin about the association between cohabitation and divorce¹⁴⁹ has not provoked reform. Rather, further steps in support of institutionalizing soluble relations have been proposed, such as the 2002 ALI recommendations.¹⁵⁰ Again, a stance on its face "for solidarity" lacked any foundation in empirically demonstrable facts. It also failed to appreciate the tie between solidarity and the human person's need, or capacity, for self-donation.

C. Family Law Scholarship

Family law scholarship for about the last fifteen years has been the most direct proponent of characterizing indissoluble marriage as an obsolete or even harmful legal category. Very often, the argument begins with some form of the claim that people have voted with their feet to make indissoluble marriage irrelevant by their choices for divorce, serial remarriage, and cohabitation. A number of authors have taken this path, with some differing emphases; what follows is an attempt to characterize their arguments generally for purposes of discerning the anthropological foundations of the alternatives they recommend.

The first move of such an argument is to make stark claims about the failure of institutionalized marriage, evidenced by the rise in the numbers of couples choosing divorce or cohabitation. Professor Martha Minow, for example, cites a 1990 statistic that only one in four households is "traditional," meaning a husband and wife living with their children.¹⁵¹ Professor Fineman concludes that we are moving toward a "post-traditional, marital-family model"¹⁵²

¹⁴⁵ See Garrison, *supra* note 33, at 818 n.4 (summarizing current state of the law concerning recovery by cohabitants at the dissolution of their relationship, based on implicit or explicit agreement).

¹⁴⁶ American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations §§ 6.01-6.06 (2002) [hereinafter ALI Principles].

¹⁴⁷ *Id.* §6.02 cmt. a; see also §6.03.

¹⁴⁸ [*Connell v. Francisco*, 898 P.2d 831 \(Wash. 1995\)](#).

¹⁴⁹ See, e.g., Alfred DeMaris & K. Vaninadha Rao, Premarital Cohabitation and Subsequent Marital Stability in the United States: A Reassessment, 54 J. Marriage & Fam. 178, 189 (1992) (a meta-analysis of several cohabitation studies); Bumpass & Sweet, *supra* note 32, at 620; Teachman, *supra* note 42, at 450.

¹⁵⁰ ALI Principles, *supra* note 146, §6.02.

and an "emerging norm of single-parent households." ¹⁵³ Citing remarriage, cohabitation, and even extant communities of polygamists, Professor [*526] Harry Krause opines that "popular perception continues to wrap 'marriage' and 'family' in an irrational, sentimental cocoon that has clouded logical discussion and intelligent debate," ¹⁵⁴ as marriage, today, has become just "one lifestyle choice among many." ¹⁵⁵ Professor Minow employs another way of suggesting that stable marriages are becoming obsolete by citing a litany of "enormous variances" in family life, including class, ethnicity, religion, neighborhood, region, size, kin relations, patterns of authority, and affection, as reducing the importance of the current marriage norm. ¹⁵⁶ This, despite the fact that none of these factors challenges indissolubility as a basic attribute of marriage.

Second, relying on the sorry showing of traditional marriage so portrayed, authors favoring a dethroning of marriage "dispute any claim that 'family' as defined by law [can be said to be] natural or obvious." ¹⁵⁷ Instead, legal positivism must be the order of the day, because the law "is all that we have in common." ¹⁵⁸ Thus, marriage "is reducible to a piece of paper," with its only function being to "distinguish[] one ongoing relationship from others, not officially designated marital in nature." ¹⁵⁹ The very best the law can do then is to ask, not what is the "nature or form of the marital relationship," but only what is "the role or function we want the institution to serve in our society," ¹⁶⁰ and then fashion laws to achieve this.

Furthermore, and again pointing to numerical decline of "traditional marriages," these authors claim that a family law with a marriage centerpiece is not relevant to what modern families need. It cannot answer the pressing questions, by children, ex-partners, and others, about what is owed between persons calling themselves a family. Its preservation is not "law [but] ideology." ¹⁶¹

Third, following this claim of irrelevance, a more facially appealing argument - an argument from solidarity - is made about the harm done by retaining marriage at the center of family law. This is the argument that a marriage focus has harmful opportunity costs, for women and children in particular. The state allows the legal [*527] system, for example, to place a "veil of privacy" around married couples, thus preventing the state from stepping into a marriage to regulate behaviors harming women: violence, stalking, torts of emotional distress. ¹⁶² Professor Fineman goes so far as to suggest a general association between marriage and violence: "Feminists have pointed out for over a century that the institution of marriage is the location of a lot of abuse and violence." ¹⁶³ Professor Fineman further labels marriage "the primary means of protecting and providing for the legal and structurally devised dependency of wives." ¹⁶⁴ Professor Krause includes an observation from a woman living in polygamy that

¹⁵¹ Minow, All in the Family, supra note 120, at 279 (citing U.S. Census Bureau data found in Only One U.S. Family in Four Is Traditional, N.Y. Times, Jan. 30, 1991, at A19).

¹⁵² Fineman, supra note 117, at 268.

¹⁵³ Id. at 271.

¹⁵⁴ Krause, Marriage, supra note 117, at 272.

¹⁵⁵ Id. at 276.

¹⁵⁶ Minow, All in the Family, supra note 120, at 277.

¹⁵⁷ Id. at 276-77.

¹⁵⁸ Id. at 284.

¹⁵⁹ Fineman, supra note 117, at 239.

¹⁶⁰ Id. at 244.

¹⁶¹ Martha Minow, Redefining Families: Who's In and Who's Out?, 62 U. Colo. L. Rev. 269, 271 (1991).

¹⁶² Fineman, supra note 117, at 262.

¹⁶³ Id.

¹⁶⁴ Id. at 245.

polygamous marriages could offer so-called "career women" a more useful lifestyle with the availability of other women to help care for their children.¹⁶⁵

Another claimed opportunity cost of the law's marriage focus, sounding in solidarity and more often cited by Professor Fineman, is the way that concern for marriage diverts attention from the "crisis of dependency."¹⁶⁶ This phrase summarizes a situation she characterizes as children's enormous dependency on their parents, with relatively little help from the state,¹⁶⁷ combined with the mother's disproportionate role, and the resulting costs to the mother's career,¹⁶⁸ her "aspirations for an equalitarian marriage," and to the child.¹⁶⁹ Here, Professor Fineman makes a brief nod to the relevance to family policy of empirical evidence, when she acknowledges the "consequences, both to the individual and to society ... when the marital family (or enough marital families) fails in its assigned societal role and children are left on their own without adequate arrangements for care."¹⁷⁰ She further explicitly uses the language of "solidarity" in connection with adult obligations to children.¹⁷¹

Professor Krause, too, in his plea for attention to the needs of dependents, expresses solidarity with children by acknowledging as a "basic value" the "individual human dimension," in accord with **[*528]** which "each child must be guaranteed a decent opportunity in home and school, in life and the economy."¹⁷² The "'new morality' in family law" should be concerned with "modern consensus about the moral claims of intimate dependency," particularly respecting children as the dependents.¹⁷³ He seems to acknowledge that soluble parental relations will compromise the opportunities of the vulnerable, in particular the "social and educational needs" of the poor,¹⁷⁴ and suggests a new appreciation of "selfless human intimacy."¹⁷⁵

While not going so far as to charge law's marriage focus with creating opportunity costs, Professor Krause still holds that marriage is an increasingly irrelevant category around which to organize family law, given the great variety of sexual relationships people form today.¹⁷⁶ The new family, he asserts, will be defined "by a consensus ... over what human intimacy and commitment is truly valuable."¹⁷⁷ He proposes that children's well-being is a more socially legitimate and useful goal than marriage around which to organize policy,¹⁷⁸ even to the point of

¹⁶⁵ Krause, Marriage, supra note 117, at 289-90 (quoting Dirk Johnson, Polygamists Emerge from Secrecy, Seeking Not Just Peace but Respect, N.Y. Times, Apr. 9, 1991, at A22).

¹⁶⁶ Fineman, supra note 117, at 260-61.

¹⁶⁷ Id. at 268.

¹⁶⁸ Id. at 255-56.

¹⁶⁹ Id. at 267.

¹⁷⁰ Id. at 268.

¹⁷¹ Id. at 266 n.73.

¹⁷² Harry D. Krause, "Family Values" and Family Law Reform, [9 J. Contemp. Health L. & Pol'y 109, 128 \(1993\)](#) [hereinafter Krause, Family Values].

¹⁷³ Harry D. Krause & David D. Meyer, What Family for the 21st Century?, 50 Am. J. Comp. L. Supp. 101, 118-19 (2002).

¹⁷⁴ Harry D. Krause, Child Support Reassessed: Limits of Private Responsibility and the Public Interest, [1989 U. Ill. L. Rev. 367, 392](#) (calling for a society responsive to the problem of children's need for care).

¹⁷⁵ Krause & Meyer, supra note 173, at 120.

¹⁷⁶ Krause, Marriage, supra note 117, at 298.

¹⁷⁷ Krause & Meyer, supra note 173, at 120.

¹⁷⁸ Krause, Marriage, supra note 117, at 299.

basing distributions of family benefits solely on "the social value of the parties' relationship," in particular, their contribution to the care of children and other dependents. ¹⁷⁹

In sum, these leading family law authors have proposed dethroning marriage in family law on the premise of its declining relative importance. This premise is their "anthropological basis" for an alternative family law. But their arguments are not all about individual rights and choices to the exclusion of the well-being of others. Nor are they all about individual opinions versus researched fact. Rather, attached to their arguments for the dethroning of marriage - as a rationale, or as a response to the fallout of such a move - are proposals for stepped-up social care for the needs especially of women and children. Respecting children, their proposals usually pay some slight attention to research findings that **[*529]** children reared outside of a stable, married home may have additional emotional, economic, and educational difficulties. Yet their arguments are noticeably lacking significant references to empirical studies and suggestions for applying them to reach law and policy outcomes. These authors also fail to take seriously the possibility that solidarity with various vulnerable groups might require real self-sacrifice, or that human beings are desirous and capable of such sacrifice.

D. Case Law Recognizing Rights to Dissolve Relationships

In addition to no-fault divorce laws and cohabitation cases, there is an additional legal source important for understanding the currently prevailing anthropology regarding indis/solubility of sexual relationships. It is the Supreme Court's jurisprudence concerning nonmarital sexual relations, contraception, and abortion. It is fair to conclude here that the Court's opinions in these cases have effectively put the Constitution on the side of the solubility of family relations, including the dyads of husband/wife and parent/child. The Court has done this both directly - by finding a constitutional basis for rights to sever certain relations - and indirectly, by recognizing a constitutional right to pursue transient sexual relationships without state interference. These cases often speak the language of solidarity, but exhibit the same error appearing in the above legal sources: a failure to probe relevant empirical evidence and to apply it, and a failure to understand what human solidarity might really entail.

In *Boddie v. Connecticut*, ¹⁸⁰ for example, while not going so far as to hold that persons have a constitutional right to a divorce, the Supreme Court did state that so long as states remain the sole source of marriage licenses, they cannot deny access to the courts for those seeking a divorce on the grounds of inability to pay. The *Boddie* Court held that withholding such access would violate the Constitution's Due Process Clause, given that access is "the exclusive precondition to the adjustment of a fundamental human relationship." ¹⁸¹ The Court did not hold that states are generally forbidden to erect hurdles for individuals seeking divorces, only that the ability to pay not be made such a hurdle. Nevertheless, the **[*530]** language in this case regarding marriage and divorce as the state's exclusive domain, and citizens' rights to access the system in order to terminate this "fundamental human relationship," ¹⁸² gives strength to an argument against laws erecting any significant barriers to divorce.

The Supreme Court's abortion cases also give constitutional recognition to a right to dissolve relations - this time between parent and child - and in definitive terms. It is well known that in 1973's *Roe v. Wade* ¹⁸³ and thereafter - more importantly in the 1992 case *Planned Parenthood v. Casey* ¹⁸⁴ - the Court announced that women and minor girls possess a constitutional right to seek an abortion. This right was based largely upon the right the Court had

¹⁷⁹ Krause & Meyer, *supra* note 173, at 107.

¹⁸⁰ [401 U.S. 371 \(1971\)](#).

¹⁸¹ [Id. at 383](#).

¹⁸² [Id. at 382-83](#).

¹⁸³ [410 U.S. 113 \(1973\)](#).

¹⁸⁴ [505 U.S. 833 \(1992\)](#).

earlier announced to buy and use birth control free of state interference, a right first accorded married couples in *Griswold v. Connecticut*,¹⁸⁵ and then given explicitly to single persons in *Eisenstadt v. Baird*.¹⁸⁶

While asserting some state interest in what the Court called the "potential life"¹⁸⁷ of the child the woman was carrying, and acknowledging somewhat fathers' interests in the fates of their biological children, the Court never alluded to any state interest in preserving the indissolubility of the bonds between mother and child or father and child. Rather, Roe emphasized the harm caused to a mother by an unwanted child.¹⁸⁸ Casey (in connection with the question of mandatory spousal notification or consent to abortion) emphasized the frequency of husbands' abuse of their wives.¹⁸⁹ The Roe Court claimed that abortion helps women by protecting them from stigma (due to unwed parenthood),¹⁹⁰ and from psychological harm.¹⁹¹ Justice O'Connor's plurality opinion in Casey seemed to go even further, referring to pregnancy itself as an unrelentingly **[*531]** negative experience: "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."¹⁹² The woman has endured her "sacrifices" from the "beginning of the human race."¹⁹³ "Her suffering is ... intimate and personal" ¹⁹⁴ In the end, Roe, Casey, and all of the leading abortion cases portray the existence of a right to sever the connection with an unborn child as essential to the law's solidarity with women.¹⁹⁵

A less direct, but also important, indicator of the Supreme Court's stance regarding soluble relationships is its opinion in *Lawrence v. Texas*.¹⁹⁶ There, the Court discovered a constitutional right to consensual sexual relations for homosexual persons: "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."¹⁹⁷ The Court readily linked its support for this legal outcome to solidarity with homosexual couples: "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."¹⁹⁸ What is significant about this case for purposes of this article is how the

¹⁸⁵ [381 U.S. 479 \(1965\)](#).

¹⁸⁶ [405 U.S. 438, 453 \(1972\)](#) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis added)).

¹⁸⁷ [Roe, 410 U.S. at 150](#) (emphasis omitted).

¹⁸⁸ [Id. at 153](#) (listing as harms: "specific and direct harm medically diagnosable"; "distressful life and future"; "psychological harm"; "mental and physical health may be taxed"; "distress ... associated with the unwanted child"; "a family already unable, psychologically or otherwise, to care for it"; and "additional difficulties and continuing stigma of unwed motherhood").

¹⁸⁹ [505 U.S. at 889-93](#).

¹⁹⁰ [410 U.S. at 153](#).

¹⁹¹ [Casey, 505 U.S. at 852](#).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ This theme - that if a woman does not possess the right to choose abortion, she does not have any rights - is sounded also by leading abortion advocacy groups. For example, NARAL Pro-Choice America claims that if we value women's "freedom and independence" generally, then we must "mobilize to protect a woman's right to choose." NARAL Pro-Choice America: About Us, <http://www.prochoiceamerica.org/about/index.cfm> (last visited Nov. 4, 2005).

¹⁹⁶ [539 U.S. 558 \(2003\)](#).

¹⁹⁷ [Id. at 578](#).

Court could elevate a sexual relationship having nothing to do with a permanent vow or with children, to the status of a constitutional right, in the same family of rights with other traditional rights of the family, including "marriage, procreation, ... family relationships, child-rearing, and education."¹⁹⁹ Justice Kennedy's opinion makes a strenuous attempt in dicta to link the sexual activity at issue with the existence of a more permanent relationship between the couple by opining: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."²⁰⁰ He further analogizes the place of sexual intercourse in [*532] homosexual relationships to its place in a marriage.²⁰¹ While no evidence supporting the former connection or the latter analogy was recited, the very fact of the attempt seems a nod to the law's historic preference for sexual relations in the context of a permanent relationship. Dicta aside, however, it is clear that what Lawrence did was to exalt to constitutional levels the legal status of sexual relationships of a soluble, possibly even evanescent, nature.

As with the prior examples from cohabitation cases, divorce legislation, and family law scholarship, the constitutional family law cases concerning abortion and unmarried sexual relations show a readiness to alter the law in the direction of accommodating modern choices for soluble sexual relationships, while incorporating into their arguments assertions that solidarity - with women, children, homosexuals, and others - requires such alterations. Empirical evidence is not often consulted, nor is the place of self-donation in human flourishing. The following section will offer a full analysis and critique of this approach to making family law concerning indis/solubility.

IV. Analysis of the Current Anthropology Regarding Indis/solubility

We have seen that different legal sources have proposed that family law ought to react to the volume of current choices in favor of solubility either by removing barriers to solubility or by simply ceasing legally to prefer indissolubility. We have also seen that these sources consistently align themselves with certain claimed needs of the vulnerable, either as the rationale for so changing the law, or as a new commitment necessitated by the change. There appear occasionally very brief references to the fact that current choices for solubility do exact costs, especially to children.

Yet even with their attempts in the direction of acknowledging facts or the need for solidarity, these arguments fail to go far enough. They explore far too few empirical studies, and they evidence a minimal and discouraging view of what the human person requires or is capable of in the quest for authentic freedom and happiness. This article will now address each of these shortcomings respectively.

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A. Empirical and Logical Flaws in the Argument for Dethroning Marriage

With regard to the factual shortcomings of arguments for dethroning marriage, and in addition to their failure to answer the challenges posed by the empirical literature described in Section II, consider the following.

First, with respect to the attempt to render indissoluble marriage anachronistic based on data about the percentage of households containing married parents and their children, use of this figure seems deliberately designed to obtain a small number. Households not comprised of married mothers and fathers with their children may have nothing to do with divorce or cohabitation. They may contain married "empty nesters," widowed parents, grown children of intact marriages, or other traditional configurations. The figures not chosen to characterize the status of American family life tell a far more nuanced story. For example, figures available from the U.S. Census Bureau indicate that the divorce rate has never gone above approximately 41%, meaning about six of ten marriages do not

¹⁹⁸ *Id.*

¹⁹⁹ [Id. at 574.](#)

²⁰⁰ [Id. at 567.](#)

²⁰¹ *Id.*

end in divorce. ²⁰² They further indicate that the divorce rate is highly age specific, and has been steadily decreasing since 1980. ²⁰³ Among those born since 1955, the divorce rate has actually declined compared with the rate among those born earlier. ²⁰⁴ It is also not mentioned that divorce is quite socioeconomic-class specific, and not an undifferentiated "American" phenomenon. Among those who have graduated college, the divorce rate (during the period of most frequent divorce, that is, prior to the tenth anniversary) for those married between 1990 and 1994 is about sixteen percent; it is twenty-seven percent for those married between 1975 and 1979. ²⁰⁵ This suggests not that marital stability is impossible today, but that unfavorable social conditions can make it very hard, and that attention to such conditions could help.

Another perspective not chosen by the proponents of dethroning marriage further highlights their intention to paint a dark portrait. It **[*534]** is possible to conclude that the current rate of marriage (about 8.5 of 10 Americans) ²⁰⁶ and marriage stability (6 in 10) is a testament to the strength, not the weakness, of the institution, considering especially the relentless negative media repetition of high divorce rates, America's fabled consumerism and individualism, our declining birthrates, and our shifting sexual mores.

Second, how can the proponents of dethroning marriage fail to notice that the very goals they seek - phrased often as women's safety, enforcing support obligations, "the stability of families," ²⁰⁷ nurturance, care, and a "suitable environment" for rearing children ²⁰⁸ - are most closely associated with marriage, especially versus cohabitation or single parenting? Or that, practically speaking, married two-parent families can provide these goals more privately, directly, and cheaply, including with a minimum of state interference with the daily conduct of family life. ²⁰⁹

Third, why would those skeptical of the institution of marriage move to the conclusion that solidarity requires society to abandon efforts to shore up marriages, instead of the conclusion that efforts in favor of stability might be paired with stepped-up efforts to take care of at-risk children and their caretakers? It is inconsistent to conclude that the law is powerless in the one arena - helping marriage - but could be very powerful in another: helping or encouraging parents to take care of their children. Why have the skeptics failed to account for the widely known research findings that neither money, nor even the presence of a second caretaker or unmarried parent in the house, can substitute for the presence of married parents when it comes to outcomes for children? ²¹⁰

Fourth, why is indissoluble marriage facilely associated with religion or "ideology" by marriage skeptics, ²¹¹ when stable marriage is also a goal (and has been through history) of vastly different and often secular groups and societies? ²¹²

²⁰² Dan Hurley, *Divorce Rate: It's Not as High as You Think*, N.Y. Times, Apr. 19, 2005, at F7.

²⁰³ *Id.* (claiming expert agreement on this fact).

²⁰⁴ *Id.* (quoting Rose M. Kreider, U.S. Census Bureau, *Number, Timing, and Duration of Marriages and Divorces: 2001*, at 4 (2001), <http://www.census.gov/prod/2005pubs/p70-97.pdf>).

²⁰⁵ *Id.* (citing Steven P. Martin, professor of sociology at the University of Maryland).

²⁰⁶ National Marriage Project 2005, *supra* note 58, at 19.

²⁰⁷ Borten, *supra* note 117, at 1125.

²⁰⁸ *Id.*; Minow, *All in the Family*, *supra* note 120, at 304.

²⁰⁹ Robert E. Emery notes that society "already has a policy designed to help families" achieve the goals proposed for alternative family groupings - "that policy is called marriage." Robert E. Emery, *Promoting Pluralistic Marriage Positively*, *9 Va. J. Soc. Pol'y & L.* 153, 160-61 (2001). He further calls marriage the "best" social tool for helping people regulate intimate relations and rear children. *Id.*

²¹⁰ See *supra* note 69 and accompanying text.

²¹¹ See, e.g., *supra* note 179 and accompanying text.

²¹² See *supra* notes 115-116 and accompanying text.

[*535] Fifth, regarding substituting a focus on solidarity with caretakers for a marriage focus, could it really be the case that citizens would feel secure enough to bear children in significant numbers in a legal and cultural framework providing monetary support for children, but no legal preferences for stable marriage, the only family structure with a horizon long enough to make childbearing seem manageable to most? This question is especially timely in light of the fragile population replacement rate in the U.S. (slightly below the necessary 2.1) and in the face of the demographic winter of our closest European neighbors.²¹³

These questions are neither subtle nor less than obvious for readers of modern sociological studies about the family, which studies are plentiful and in substantial agreement. Why, then, is there such a resounding silence about this evidence in the legal arguments for dethroning marriage? Even while the scholars, judges, and lawmakers embracing such arguments have demonstrated that they do not lack concern for the effects of solubility on women and children especially?

I would conclude that some likely reasons for the silence include an impoverished reading of the fullness of solidarity that human beings need, and are capable of demonstrating, in the quest for authentic freedom and happiness. This is combined with some basic mistrust of marriage as a sexist, biologically determinist institution, and a mistrust of religion. A few observations about each of these conclusions follow.

B. Solidarity and Suspicion

1. The Solidarity We Need

As to the fullness of solidarity human beings need in adult romantic relationships, studies of human happiness and quality of life evidence that persons tend to flourish in relationships that by their very nature and longevity include conflict, but survive when fidelity is valued over momentary impulses and individual will. This is a powerful indicator that human beings are made for the sacrifice and devotion such relationships require. That lesser sexual commitments - cohabitation and premarital sexual relationships - are associated with disruptions of the greater commitment, marriage, is a **[*536]** further sign of the orientation of human nature to permanence. Summarizing his entire book on *Happiness: Lessons from a New Science*, economist Richard Layard concluded: "Humans are deeply social beings Friendship and marriage make people happier."²¹⁴ Moreover, he explained, "If your sole duty is to achieve the best for yourself, ... you are set up to fail. Instead, you need to feel you exist for something larger" ²¹⁵ Thus, "the secret [of happiness] is compassion towards oneself and others."²¹⁶ In other words, greater devotion to others and greater human fulfillment go hand in hand. Soluble relationships on their face contradict this impulse. Indissoluble relationships affirm it.

The human body, which is not dissociated from the mind and heart (and soul, for those religiously inclined), must also play a role in understanding what human beings need in the way of solidarity in romantic sexual relationships. Human nature ordains that emotionally, psychologically, and mentally, human beings experience the temporary exchange of sexual relations as a mutual use of physical bodies, not as an affirmation of the other as a person, worthy of love. Sexual relations carry a deeply personal message of connection, whatever might be the real intentions of the partners, a message that is falsified when a commitment fails to materialize. Testimonies, especially by young women, about the meaning for them of temporary sexual relationships confirm this point precisely.²¹⁷ Less than full self-donation, either over the very short run or over the **[*537]** long run, creates

²¹³ See Ken Dilanian, *Immigration Is Key Issue as the British Vote Today*, *Phila. Inquirer*, May 5, 2005, at A1.

²¹⁴ Richard Layard, *Happiness: Lessons from a New Science* 225 (2005).

²¹⁵ *Id.* at 234.

²¹⁶ *Id.* at 235.

²¹⁷ See, e.g., Nat'l Campaign to Prevent Teen Pregnancy, *Not Just Another Thing to Do: Teens Talk About Sex, Regret, and the Influence of Their Parents* 4 (2000), <http://www.teenpregnancy.org/resources/data/pdf/teenwant.pdf>. Seventy-two percent of teen girls and fifty-five percent of teen boys report that they wish they had waited longer to have sex. Fifty-eight percent of teens

dissonance, not happiness or freedom. Furthermore, an even more tangible sign of the solidarity required by the physical structure of sexual relations is the fact that children are thereby created, children who need demonstrations of long-term commitment and of extremely resilient love.

Proponents of dethroning marriage, however, fail to attend to these signs of what human persons might require in the way of solidarity in the setting of sexual relationships. They seem quite suspicious of the necessary role of "sacrifice" in the freedom, happiness, and health experienced by the long-term married, whether the sacrifices involve refraining from temporary premarital relationships, or sacrifices of time for dependent care, money, career, or even temporary happiness during a marriage. In their suspicion, they vastly underestimate the part that sacrifice must play in the essentially social nature of the human person. We cannot escape society, which means we cannot escape sacrifice, self-denial, and compromise. We may believe it is necessary to escape a particular relationship - and in some cases we may be right - but it is also possible that we are merely running from the human condition: to struggle to live in society with others with whom we do not agree. In the words of G.K. Chesterton, divorce is an attempt to "flee[] from the baffling knowledge of humanity."²¹⁸ The high divorce rate for second and later marriages is certainly a testament to this.

Those skeptical of indissoluble marriage also fail to pay deference to the unavoidable fact of male-female physical complementarity. They fail to see in the dynamic of sexual love - in which a man and woman give themselves to one another completely, and simultaneously open themselves up to accepting a life-long responsibility for a child - any clues about what male-female sexual love is and needs to be: permanent and jointly ready to face the future responsibly. This is given away in their tendency to see the beginnings of a "family" only when the child is born, rather than as present already in the sexual self-giving of a married man and woman.²¹⁹

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2. The Solidarity We Are Capable of

As to what human beings are capable of regarding solidarity, skeptics of indissolubility fail to credit empirical sources showing that marriage itself calls forth strengths from spouses related to endurance - strengths such as resisting risky behaviors, attaining better employment and income, becoming increasingly willing to buy fundamental goods for children, such as education and health care, and maintaining sexual fidelity to one partner, the spouse.²²⁰

They also fail to note that when people find themselves incapable of forming or sustaining the marriage commitment, it is often related to problems independent of their respect for marriage; it is related rather to disadvantages such as a poor family history of commitment, poverty, lack of education, or lack of job prospects. There are simply vastly disproportionate numbers of cohabitations and divorces among those suffering such

between fifteen and seventeen say the same thing. Id. See also Robert E. Rector et al., Heritage Found., Sexually Active Teenagers Are More Likely to Be Depressed 2-3 (2003), <http://www.healthy-futures.org/docs/TeenSexandSuicide.pdf>. The study, using data from the National Longitudinal Survey of Adolescent Health, Wave II, 1996, reported that 25.3% of sexually active teen girls report that they are depressed all, most, or much of the time. Only 7.7% of teen girls who are not sexually active report the same. For teen boys, these figures are only 8.3% and 3.4%, respectively. Further, 14.3% of sexually active teens have attempted suicide, while only 5.1% of sexually inactive girls report that they have attempted suicide. Id. The highly respected British Medical Journal reported similar phenomena in Great Britain. Forty-five percent of teen girls and thirty-two percent of teen boys reported that, for them, sexual intercourse happened "too early" or "should never have happened at all." Daniel Wight et al., Extent of Regretted Sexual Intercourse Among Young Teenagers in Scotland: A Cross Sectional Survey, 320 British Med. J. 1243, 1244 (2000).

²¹⁸ G.K. Chesterton, *Brave New Family: G.K. Chesterton on Men and Women, Children, Sex, Divorce, Marriage & the Family* 224 (Alvaro de Silva ed., 1990).

²¹⁹ Minow, *All in the Family*, supra note 120, at 289 (calling the birth of a child "the triggering act in the creation of a family").

²²⁰ See Renata Forste & Koray Tanfer, *Sexual Exclusivity Among Dating, Cohabiting, and Married Women*, 58 J. Marriage & Fam. 33 (1996) (concluding that behavior of cohabitants regarding sexual fidelity is more like dating persons than like that of the married; there is less sexual fidelity among cohabitants than among the married).

socioeconomic problems. Helping to supply what is lacking in situations of deprivation could enhance marital capabilities. Abandoning hope for marriage is not the necessary response.

Sacred as well as secular sources testify to the fact that human beings have the capacity for tremendous love. St. John of the Cross is perhaps the most famous with his admonition, "Where there is no love, put love - and you will find love."²²¹ The field of "happiness studies" celebrates this capacity. A modern author relates the true story of a miserable, wealthy psychological patient who learned again to experience joy in his marriage from the decision to "love first." He stated to his psychologist, the book's author: "You know I can't make her love me. All I can do is love her." The doctor replied, "Is that enough?" to which the man responded: "It's all there is." The author concludes: "He was right. That's all there is."²²²

In sum, proposals to dethrone marriage take a decidedly impoverished and pessimistic approach to the question of human capacities and needs respecting solidarity. They fail to see the longing for permanent love which necessitates regular and mutual self-sacrifice. They overstate the degree to which married couples **[*539]** part, and ignore the implications of the physical and emotional nature of human sexual relationships. They also ignore the evidence from the sociological and psychological sciences about the relationship between long-term, self-sacrificing love, and happiness. In the presence of real choices between addressing causes of marital failure and tossing marriage, they opt for the latter. Why this pessimism, this skepticism? Examining and sometimes reading between the lines of the proposals to dethrone marriage, it is possible to discern some prior commitments which may lie behind an unwillingness to notice the empirical evidence or to embrace solidarity with self-sacrifice as any part of human freedom. These prior commitments seem to include the belief that marriage is inherently problematic for women, and a suspicion of an institution so long championed by leading religions.

3. Suspicions About Marriage for Women

Sprinkled throughout writings against the centrality of marriage is a tendency to link marriage and violence against women. Dean Alison Harvison Young, for example, writes of the "prevalence of domestic violence and child abuse within traditional family units."²²³ Professor Fineman raises the specter as well.²²⁴ Yet, while the incidence of domestic violence is difficult to summarize conclusively, the evidence is clear that domestic violence is considerably more likely during cohabitation than during marriage, perhaps twice as likely.²²⁵ This linkage between marriage and violence therefore appears to be an ideological commitment rather than a fact, especially when the question is about the relative merits of marriage and more temporary sexual relationships.

Perhaps this unfounded position linking marriage and violence against women is related to another: that marriage means women confined to the home, and not welcomed in the office or otherwise in the public square. This possibility is suggested by, for example, Professor Krause's comment that cohabitation may appeal to **[*540]** "feminists" because it "promises freedom from traditional male dominance that is perpetuated in antiquated marriage and family laws."²²⁶ It is also suggested when doubts about the wisdom of cohabitation and other non-marital arrangements are equated with a desire to resuscitate the "gender-role stereotyped traditional family."²²⁷

²²¹ Catholic Online, St. John of the Cross, http://www.catholic.org/saints/saint.php?saint_id=65 (last visited Mar. 15, 2006).

²²² Baker & Strauth, *supra* note 23, at 33.

²²³ Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 *Am. U. J. Gender Soc. Pol'y & Law* 505, 510 (1997).

²²⁴ See Fineman, *supra* note 117, at 248.

²²⁵ Douglas A. Brownridge & Shiva S. Hall, *Understanding Male Partner Violence Against Cohabiting and Married Women: An Empirical Investigation with a Synthesized Model*, 17 *J. Fam. Violence* 341, 342 (2002) ("Despite methodological differences across ... studies ... the striking finding ... is that a consistently higher proportion of cohabiting than married persons reports violence."); Stets, *supra* note 56, at 674.

²²⁶ Krause, *Family Values*, *supra* note 172, at 117 (emphasis omitted).

This tendency to conflate the concept of indissoluble marriage with the concept of the "traditional" breadwinner/homemaker marriage is a clue that this suspicion prevails. Yet current, almost hyper-awareness of past inequities, combined with current sensitivities toward women's equality and legal safeguards, have vastly expanded women's horizons in U.S. society. It is widely accepted that there is not, and need not logically or practically be, any necessary connection today between marriage and limited roles for women. Furthermore, even while remaining suspicious about the prevalence of sexism, it is possible for marriage skeptics to avoid the drastic course of devaluing marriage itself, and pursue the course of assisting men, women, employers, and the state to achieve a fair work/family balance for both men and women. This is not an easy project, even given the likely long-term net benefits for employers and society.²²⁸ But it is a possible choice and an eminently worthwhile project, especially in light of all there is to gain for marriage, children, and society.

4. Mistrust of Religion

A suspicion of religion is quite obvious in writings questioning the importance of stable marriage. Professor Krause, for example, suggests that taking religion into account when considering marriage "hinders rational analysis."²²⁹ He specifically criticizes the religious notion that marriage could be associated with the attainment of "supra-(or indeed super-) natural virtue,"²³⁰ and expresses satisfaction at the separation of church and state that prevails on the matter of marriage law in the United States.²³¹ It is undoubtedly true that religious leaders have been in the forefront of defending indissoluble marriage, and that statements have been made by [*541] Christian and other authors in the past associating marriage with the subjugation of women. Yet relying on such evidence for a critique of religion's role respecting marriage is out of step with current evidence and trends. Empirical evidence clearly shows that marriages in which religion is important tend to experience less violence, and greater happiness and longevity.²³² Twentieth-century teachings, especially by the late Pope John Paul II, emphasize messages in complete harmony with modern aspirations for marriage, especially about the mutual self-giving required in marriage.²³³ Self-sacrifice is not viewed as a merely feminine trait, but rather is a necessary element of freedom for both men and women.²³⁴

Serious students of history know the depth of experience and reflection that religions, including the Roman Catholic faith in particular, have brought to the question of marriage.²³⁵ It is impossible to dismiss the weight of their achievement, and foolish to disregard it in connection with whatever trials marriage is currently suffering.

In sum, a refusal to consult modern empirical literature on the relative benefits conferred by different sexual relationships, and an aversion to self-sacrifice and commitment as a portion of solidarity, appear to flow in part from

²²⁷ [Id. at 122.](#)

²²⁸ See generally Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000).

²²⁹ Krause & Meyer, *supra* note 173, at 103.

²³⁰ Krause, *Marriage*, *supra* note 117, at 284.

²³¹ Krause & Meyer, *supra* note 173, at 104.

²³² See *infra* notes 247-250 and accompanying text.

²³³ See, e.g., Pope John Paul II, *Familiaris Consortio* [Apostolic Exhortation on the Family] P 43 (St. Paul ed. 1981) ("The relationships between the members of the family ... are inspired and guided by the law of 'free giving' [This] free giving takes the form of heartfelt acceptance, ... generous service and deep solidarity.").

²³⁴ *Evangelium Vitae*, *supra* note 18, P 49 (proposing that the "meaning of life" is the "giving of self"); *id.* P 19 (positing that choices made ignoring the "inherently relational dimension" of freedom, or without recognizing that each of us is "entrusted" to the other, cannot bring about true freedom) (emphasis omitted); Joseph Cardinal Ratzinger, *Congregation for the Doctrine of the Faith, Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and World*, reprinted in *34 Origins* 169 (2004).

²³⁵ See, e.g., George Hayward Joyce, S.J., *Christian Marriage: An Historical and Doctrinal Study* (1948); 3 Edward Westermarck, *The History of Human Marriage* 327-78 (Allerton Book Co. 1922) (1892).

understandable but ultimately unfounded misgivings about the relationship between sexism, religion and marriage. Men and women in modern society have the awareness, the knowledge, and the cultural predilection largely to avoid the inequities of the past as endorsed or imposed by religious or cultural authorities. Current law reinforces such predilections. The real question, therefore, is whether, given what we now know is the human inclination toward and the need for stable marriage, we will seek to correct marriage's current troubles, or rather set marriage [*542] aside in the name of a false anthropology based upon an impoverished and uninformed "solidarity."

Conclusion

The evidence that stable marriages contribute to human flourishing is more complete and reliable today than perhaps ever before. By putting it forward, those in favor of legal efforts to strengthen marriage hope to promote not only the interests of children, but also the authentic good of adult couples and of society. Such evidence might even help constitute a logical place where the two sides of the current debate about the centrality of marriage might meet.

Both sides already share a concern for the healthy formation of children, an outcome heavily dependent upon their family environment. There is also agreement that inadequate care will harm one or more generations of children, and thus threaten social stability in a fundamental way. Proponents of dethroning marriage would perhaps be surprised to find agreement with supporters of indissolubility on the importance of freedom and happiness not only for children, but also for the adults involved in sexual partnerships. While there may be disagreement on the question of what forges that happiness, perhaps here the empirical evidence about the benefits of the long-term stability of marriage could assist.

There might be additional common ground in the two sides' shared concern for those whose social conditions - poverty, little education, and parental divorce - make it harder to get married or stay married. It could be agreed that the greater presence of the unmarried, the divorced, and the cohabiting in lesser-advantaged communities is not a sign of progress or freedom of choice, but a phenomenon correlated with disadvantage, loss, and lack of opportunities. Traditionalists might pursue the course of encouraging good private marriage practices to help lift the poor out of poverty. Skeptics on marriage might tend more to encourage the government to intercede with financial and educational assistance specifically to bring about a greater equality of marital results as between the more and less privileged. Both sides can bring good means to bear on achieving the same good end.

That we do not have such integrated efforts for marriage, based upon common ground, should cause us to pause. That we rather have proposals to dethrone marriage in the law, which proposals are based on claimed solidarity with overextended caregivers, especially [*543] the poor, is likely due to adoption of preexisting premises about marriage which are troubling, premises which suspect marriage and religion in connection with treatment of women.

I have tried to show that these premises are not sound. The facts do not bear them out. Continued reliance on them thus seems to indicate a different and even deeper basis for a will to dethrone indissoluble marriage: a dim view of human persons' capacity and willingness to self-sacrifice, and a dismissal of the relationship between self-sacrifice and long-term happiness. The institution of marriage, particularly indissoluble marriage, and the practice of mutual self-donation are overlapping categories. If the possibility for long-run self-donation is rejected ab initio, then all of the studies about marital benefits, and the hurdles to marriage for the poor, will not reach a willing ear.

One need not be religious to believe that people desire, and are capable of, sustained, self-giving love. Economists and psychiatrists, too, agree that such love correlates with happiness. Notable family law scholar Professor Max Rheinstein wrote in 1972 about the "ways of discipline, self-restraint, acceptance of fate immutable by man, these solely effective ways to find satisfaction here on earth."²³⁶ Professor Minow acknowledges that divorce reformers

²³⁶ Max Rheinstein, *Marriage Stability, Divorce, and the Law* 428 (1972).

in the 1970s might have overlooked the fact of freedom's "dependence ... on interpersonal connections."²³⁷ The law should seek to draw out this truth.

A proposal that the law should attempt not only to reflect human nature, but to assist human beings in doing what they ought to do for their own well-being, is by no means out of step with current legal trends in the United States today. Witness increasing bans and taxes on smoking, tax incentives for environmentally friendly cars, and state sponsored messages about lifestyle habits associated with good health. It should be no surprise that some states are applying such a lawmaking philosophy directly to marriage with state-sponsored educational programs²³⁸ and incentives to help citizens prepare well for enduring marital partnerships.²³⁹

[*544] Observers of modern culture, including Pope Benedict XVI, among other Catholic writers,²⁴⁰ have expressed concern about the possibilities for stable marriage in the current cultural milieu of individualism, consumerism, and secularism.²⁴¹ Yet reductions in divorce rates are not unheard of in history. Indeed, while the history of divorce instructs us that sudden and drastic limits on divorce might not readily succeed, it also indicates that some movement to raise external, cultural,²⁴² and legal barriers to divorce might help. Experienced family researchers have concluded that lowered barriers to exit are certainly a causal factor in higher divorce rates.²⁴³ Laws that slow down divorce through longer waiting periods, mandated counseling, or additional hurdles for divorce by parents of minor children are the types of barriers that might reasonably succeed. If these laws are not paired with others helping couples avoid cohabitation and prepare for marriage, however, they are nearly hollow. This latter proposal has not been tried on any large scale, despite how very much we know about the correlation between cohabitation and divorce and about the likely indicia of successful versus troubled marriages.²⁴⁴

The same legal system that can convey a message about the importance of parenting or other dependent care generally, can speak to the importance of marriage. State rules and messages about the importance of child support have increased child support collections already, and at the same time helped highlight nationally the fact that **[*545]** parents' care is dispositive for children's well-being. No less is due marriage. Research shows that

²³⁷ Martha Minow, Consider the Consequences, *84 Mich. L. Rev.* 900, 918 (1986) (reviewing Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985)).

²³⁸ See, e.g., *Fla. Stat. Ann. §1003.43(1)(i)* (West Supp. 2003) (requiring marriage education in high schools).

²³⁹ See Alvare, *supra* note 110, at 32-40 (describing various state efforts on behalf of marriage); Spaht, *supra* note 110, at 48-69 (providing a description of many current state efforts).

²⁴⁰ Walter George Smith, Divorce: In Civil Jurisprudence, in 5 *The Catholic Encyclopedia* 64 (Charles G. Herbermann et al. eds., 1913), available at <http://www.newadvent.org/cathen/05064a.htm>.

²⁴¹ Joseph Cardinal Ratzinger, *Salt of the Earth: An Interview with Peter Seewald* 205-08 (Adrian Walker trans., Ignatius Press 1997) (1996) (expressing, before his election to the papacy, the practical difficulties of abiding by a vow of indissolubility in the modern world).

²⁴² See Rheinstein, *supra* note 236, at 419.

²⁴³ Lynn K. White & Alan Booth, Divorce over the Life Course: The Role of Marital Happiness, 12 *J. Fam. Issues* 5, 19 (1991) ("These findings ... suggest ... that the rise in the divorce rate has occurred, not because marriages are less happy, but because, in the presence of falling barriers and rising alternatives, the threshold of marital happiness necessary to prompt divorce is lower than it used to be.").

²⁴⁴ See, e.g., James V. Cordova et al., Emotional Skillfulness in Marriage: Intimacy as a Mediator of the Relationship Between Emotional Skillfulness and Marital Satisfaction, 24 *J. Soc. & Clinical Psychol.* 218 (2005) (positing that communication skills about emotions are an important determinant of marital quality, and that the level of intimacy couples can achieve relies in part on emotional skills; that is, the ability to identify and communicate emotions); John M. Gottman et al., Predicting Marital Happiness and Stability from Newlywed Interactions, 60 *J. Marriage & Fam.* 5, 16 (1998) (asserting ability to predict marital stability versus divorce with 82.5% accuracy, and marital satisfaction with 80% accuracy, after observing and categorizing newlywed behaviors).

when individuals come to believe in the possibility of marital stability - particularly lifetime marriage - they are more likely to remain loyal to one spouse.²⁴⁵ That newspapers such as the New York Times are still printing the headline, Divorce Rate: It's Not as High as You Think,²⁴⁶ while popular and even scholarly sources still repeat the "one of two" statistic, is itself a problem that state-supported communication could ameliorate.

Laws should also allow for the influence of one of the most effective voices communicating high expectations for marital stability: religion.²⁴⁷ Studies consistently find that couples holding religious notions about marriage,²⁴⁸ particularly if the spouses have the same religion,²⁴⁹ are less likely to divorce or even to discuss divorce, and more likely to experience a higher degree of marital satisfaction.²⁵⁰

Another area calling for legal measures is the marriage and cohabitation divide between the richer and the poorer. Current choices to avoid marriage altogether or to settle for soluble relationships are the result, not of freedom, but of constraint or loss. It is the lack of parental unity that helps lead to divorce, the lack of attachment to kin that is associated with cohabitation, the lack of an orientation to commitment that is associated with cohabitation or single parenting, the lack of money and education that is associated with both divorce and cohabitation. There are also too few [*546] employment policies helping to ease the tension between adults' roles as workers and as parents. Helping supply what the less privileged lack - instead of mislabeling their actions "freedom" - will assist them in the long run to attain the kinds of happiness and health their more privileged neighbors now enjoy.

None of these are radically new ideas. Some have been proposed for decades.²⁵¹ What is different today is the greater depth and range of evidence available to confirm the wisdom of such ideas and the risks of inaction. A failure to act now is not only a failure to accept and use the gift of modern empirical evidence, but more profoundly, a failure to respect what human beings want for themselves, and what they need, in truth and in solidarity.

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²⁴⁵ See Jane R. Rosen-Grandon et al., The Relationship Between Marital Characteristics, Marital Interaction Processes, and Marital Satisfaction, 82 J. Counseling & Dev. 58, 65 (2004); Maureen R. Waller & Sara S. McLanahan, "His" and "Her" Marriage Expectations: Determinants and Consequences, 67 J. Marriage & Fam. 53 (2005).

²⁴⁶ Hurley, supra note 202, at F7.

²⁴⁷ Glendon, supra note 126, at 118-25; Smith, supra note 240, at 69.

²⁴⁸ Allen S. Maller, Reducing the Risks of Divorce: A Responsibility of Religious Educators, 87 Religious Educ. 471, 471 (1992) ("[Fourteen] sociological studies published between 1938 and 1985 ... reported a direct, positive relationship between religiosity and marital satisfaction."); Andrew J. Weaver et al., A Systematic Review of Research on Religion in Six Primary Marriage and Family Journals: 1995-1999, 30 Am. J. Fam. Therapy 293, 302 (2002) (claiming that religion avoids divorce and is associated with greater marital adjustment and satisfaction).

²⁴⁹ See, e.g., Constance L. Shehan et al., Religious Heterogamy, Religiosity, and Marital Happiness: The Case of Catholics, 52 J. Marriage & Fam. 73, 74 (1990).

²⁵⁰ See Weaver et al., supra note 248, at 302; Olga S. Hunler & Tulin Gen<ced>oz, The Effect of Religiousness on Marital Satisfaction: Testing the Mediator Role of Marital Problem Solving Between Religiousness and Marital Satisfaction Relationship, 27 Contemp. Fam. Therapy 123, 131 (2005) (concluding that there is a significant association between religiosity of spouses and marital satisfaction).

²⁵¹ See Rheinstein, supra note 236, at 406-43.