

THE ROLE OF THE FEDERAL GOVERNMENT
IN STRENGTHENING MARRIAGE

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Marriage and divorce have typically been viewed as the province of state government. It is state law that determines the conditions of entry into and exit out of marriage, and establishes the legal obligations and rights of spouses toward one another. State and local court decisions interpret and help enforce these laws. Over the past century, changes in state law have transformed marriage in many important ways so that it has become more private and egalitarian. Yet despite these changes, marriage has become a more fragile institution. Thus, most of the attention of those who aim to shore up marriage through the so-called “marriage movement” has focused on proposing reforms at the state level designed to reduce the divorce rate and encourage premarital education and counseling.

The federal government, however, has always been more involved in marriage and divorce—and currently has more impact on the institution of marriage—than is usually acknowledged. In 1996, Congress, impelled by its concern that marriage was rapidly becoming an endangered institution, passed two pieces of legislation designed in part to strengthen marriage: the Defense of Marriage Act¹ and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).² In addition, legislation designed to support responsible fatherhood by emphasizing

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¹ Defense of Marriage Act, Pub. L. No. 104-199, 100 Stat. 2419 (codified at 1 U.S.C.A. § 7 and 28 U.S.C.A. § 1738C).

² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C.A., 8 U.S.C.A., and 42 U.S.C.A.).

and promoting marriage passed the House in 2000 by an overwhelming majority.³ Similar legislation nearly passed in the Senate.⁴ These laws have re-opened a long dormant policy discussion about the appropriate relationship between the federal government and marriage.⁵ This article will briefly review the history and current status of this question, and then will outline five different roles the federal government can play to strengthen marriage, if and when this becomes a national goal.

I. HISTORY OF MARRIAGE AND THE FEDERAL GOVERNMENT

It is important to set these new legislative developments in the marriage arena within the context of both the federal government's historic interest in the state of marriage and its role vis-a-vis state governments. In her fascinating new book, "Public Vows: A History of Marriage and the Nation," historian Nancy Cott emphasizes that marriage has always had both a public and a private face.⁶ She provides a detailed account, beginning at the founding of the United States and following through the present day, in which "assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy..."⁷ Until the 20th century, she continues, political and legal authorities were quite clear about the model of marriage they promulgated. The model was... "life-long, faithful monogamy formed by mutual consent, bearing the impress of Christian religion and the English common law in its expectations for the husband to be the family head and economic provider, and his wife the

³ H.R. 4678, 106th Congress (2000).

⁴ S. 3189, 106th Congress (2000).

⁵ See, e.g., Jill Hasday, *Federalism and the Family Reconsidered*, 45 *UCLA L. Rev.* 1297 (1998) (challenging the common assumption in legal circles that family law "emerges as the one clear case in which federal involvement is inappropriate").

⁶ Nancy F. Cott, *Public Vows, A History of Marriage and the Nation* 1 (2000).

⁷ *Id.* at 2.

dependent partner.”⁸ Accordingly, the founders regarded marriage as the domestic government, offering a metaphor for the political union between the states and providing the crucible within which the character of citizens was formed. Marriage was where citizens first learned about obligation, responsibility, and caring about others, all considered essential qualities for a member of a democracy.⁹

At the core of this model of marriage was the legal doctrine of “coverture,” or marital merger, which held that husband and wife were one person in the law. “This rule has worked out in reality to mean that though the husband and wife are one, that one is the husband.”¹⁰ From a contemporary vantage point, the emphasis on mutual consent would certainly be viewed as consistent with democratic values, although the highly prescriptive gender roles would certainly not.

Cott also notes that there are three levels of public authority—the community, the state and the national—which have shaped the institution of marriage in the U.S.¹¹ In the early colonial period, and even later in many of the sparsely populated territories, the community level was most prominent. It was neighbors, friends, and kin whose approval or disapproval of marital behavior had the most influence.¹² State legislators and judges, however, became increasingly active in setting the terms for marriage and divorce. As such, by the late 19th century most states had expanded the grounds for divorce and granted married women property rights.¹³

⁸ Id. at 2-3.

⁹ Id. at 18-19.

¹⁰ Jana Singer, *Legal Regulation of Marriage: From Status to Contract – and Back Again?*, in *Strategies to Strengthen Marriage: What Do We Know? What Do We Need to Know?* 129, 130 (1998) (quoting *United States v. Yeazell*, 382 U.S. 341, 361 (1966) (Black, J., dissenting)) (on file with author).

¹¹ Cott, *supra* note 6, at 24.

¹² Id. at 27.

¹³ Id. at 52-53.

But the state governments were not alone in defining marriage. The federal government was always in the background. The federal government had few direct avenues through which to influence marriage, but it found several indirect routes to control and shape the institution. For example, slaves had no right to marry or parent children, and slave families could be separated at their masters' will. Following the Civil War, however, state legislation and practice actively encouraged freedmen to formalize their unions through legal marriage. Indeed, the right to marry was viewed as a fundamental civil right, and was eventually enshrined in the Civil Rights Act of 1866.¹⁴ In a recent article, Jill Hasday contends that the period of Reconstruction "was actually the culmination of a sustained national debate about the federal government's ability to intervene in family law as...in the nineteenth century, many Americans defined slavery as a domestic relation..."¹⁵ By abolishing slavery, the federal government had actually altered one of the most significant domestic relations of the time. Discomfort with the fact that so many states banned interracial marriage, and with the variations in state divorce laws, even led some reformers of the time to propose that federal control of marriage standards might be a good idea, but this idea was never pursued.¹⁶ Cott goes on to describe the ways in which the federal government, in its dealings with Native Americans, Mormons, and Asian immigrants, attached influential incentives and disincentives to assure the adoption of the Christian monogamous model, and simultaneously discouraged, hounded or punished polygamy, arranged marriages, marriage by proxy and so forth.¹⁷

By the late 20th century the relationship between the state and federal governments and marriage had shifted

¹⁴ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

¹⁵ Hasday, *supra* note 5, at 1299.

¹⁶ Cott, *supra* note 6, at 103.

¹⁷ *Id.* at 105-55.

dramatically. Through adopting no-fault divorce statutes, states effectively removed themselves from their role in deciding appropriate grounds for divorce, thus de-emphasizing marriage as a status and instead emphasizing its contractual nature.¹⁸ In addition, by the middle of the century, state laws and court decisions had made significant inroads into unraveling the legal underpinnings of patriarchy, although other institutions continued to lend it support. The right of the husband to his wife's body was the last, and most egregious, aspect of the doctrine of coverture to be demolished. In 1984, a New York appellate court overturned the state's marital rape exemption and was shortly followed by other states.¹⁹

In other areas of family law, it was the federal government that became more explicitly active. One way in which state laws had served to buttress the unique importance of marriage was the distinction made in various statutes and common law doctrines between children born within a marriage and those born outside of it. Over the past thirty years, a series of Supreme Court decisions eliminated most of the categorical distinctions between marital and non-marital children.²⁰

In addition, several Supreme Court decisions have had the effect of creating a zone of privacy around the marriage relationship. In 1965, in *Griswold v. Connecticut*,²¹ the court struck down Connecticut's ban on birth control and found that "fundamental rights" of privacy, marital choice, and family creation were implied in the Constitution's guarantees of liberty.²² This fundamental right to privacy in reproductive health was

¹⁸ Singer, *supra* note 10, at 132.

¹⁹ *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984).

²⁰ *Id.*; See also Ruth-Arlene W. Howe, *Legal Rights and Obligations: An Uneven Evolution*, in *Young Unwed Fathers: Changing Roles and Emerging Policies* 141-69 (Robert I. Lerman and Theodora J. Ooms eds., 1993).

²¹ 381 U.S. 479 (1965).

²² Cott, *supra* note 6, at 198.

extended to individuals six years later in *Eisenstadt v. Baird* which stated, “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.”²³ The *Roe v. Wade*²⁴ decision in 1973 established the fundamental constitutional right for women to choose abortion. That choice was defined as independent of her marital status or any involvement by her husband in her decision.²⁵

The federal government also became more active in the legislative arena. In 1984, the Family Violence Prevention Act²⁶ funded the first federal grant program designed to provide community-based legal and social services to battered women and their families. This was followed 10 years later by the passage of the 1994 Violence Against Women Act (VAWA)²⁷ which was part of the huge Omnibus Crime Control Act.²⁸ This act greatly increased funding for battered women’s programs, as well as legal and other services for victims of rape, sexual assault, and stalking. While the act did not focus specifically, or exclusively, on inter-spousal violence, some of the opponents of VAWA based their position on the proposition that VAWA would “upset a long-standing tradition of leaving ‘family’ matters to the states.”²⁹

²³ 405 U.S. 438, 453 (1972) (emphasis added).

²⁴ 410 U.S. 113 (1973).

²⁵ Theodora Ooms, A Family Perspective on Abortion, *in* Abortion: Understanding Differences 87-89, 94-96 (Sidney Callahan & Daniel Callahan eds., 1984).

²⁶ Family Violence Prevention and Services Act, Pub. L. No. 98-457, 98 Stat. 1757 (1984) (codified as amended at 42 U.S.C.A. §§ 10401-18 (2000)).

²⁷ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 42 U.S.C.A. and 18 U.S.C.A.).

²⁸ Omnibus Crime Control Act of 1970, Pub. L. No. 107-11, 84 Stat. 1880 (codified as amended in 18 U.S.C.A. §§ 351, 1752).

²⁹ See Hasday, *supra* note 5, at 1394-95.

In summary, in recent decades the federal government, in concert with state governments, has acted to de-institutionalize marriage to a large degree, emphasizing the private contractual nature of marriage, de-emphasizing its public face, and stripping it of most formal aspects of gender inequality. On the other hand, this so-called privatization has been uneven. In certain situations, government is now much more intrusive into a couple's relationship. Federal, state and local governments are now actively involved in intervening in the relationships between men and women, whether married, unmarried or divorced, in cases of domestic violence and divorce disputes. Federal laws now strongly encourage, and in the case of welfare clients require, unmarried parents to legally establish paternity.³⁰ The federal child support enforcement system works with local jurisdictions and courts to establish and enforce divorce custody arrangements, effectively taking away many decision making rights from parents, and often requiring that disputing parents attend mediation sessions or co-parenting programs.³¹

In other less visible arenas, the federal government has acted to support the institution of marriage in its traditional form by granting married persons favored status and benefits in dozens of federal programs. Beginning with the establishment of pensions for disabled men, soldiers' widows, and aged parents in the Civil War, and continuing with the array of social security programs enacted under the New Deal, married persons are frequently treated more favorably in federal programs.

The extensive scope of this federal programmatic involvement in marriage is not generally acknowledged. In 1996, Henry Hyde, Chairman of the Senate Judiciary Committee asked the General Accounting Office (GAO) to

³⁰ 42 USC §§608 A3, 654 (29).

³¹ Theodora Ooms, Policy Responses to Couple Conflict and Domestic Violence: A Framework for Discussion, *in* *Couples in Conflict* 227-40 (Alan Booth et al. eds., 2001).

identify all federal laws in which benefits, rights and privileges are contingent on marital status. This request was then broadened to all those laws in the U.S. Code in which marital status is a factor, even though the laws may not directly create benefits, rights or privileges. The GAO report issued in January 1997 identified 1049 federal laws in which marital status was a factor.³² It grouped these laws into 13 categories including Social Security and related programs, Housing and Food Stamps, Veteran's Benefits, Taxation, and Civilian and Military Service Benefits. In addition, marital and family status is the major criteria for legal immigration, and immigrants can become citizens through marriage to a citizen.³³

There has been remarkably little discussion about this group of federal "marriage" policies embedded in the range of benefit, assistance and other programs: whether they are appropriate, fair, and what effects they have. The exception is periodic references in policy discussions to the so-called "anti-marriage" features of the tax code, Social Security and welfare laws. Most people are familiar with the repeated calls to end the marriage penalty in the tax code. It is very complicated, however, to know how to remove the penalty. This is in part because there are around 60 provisions of the tax code in which liability is different for single individuals and married couples, and in part because more married couples in fact receive a tax bonus than a penalty.³⁴

Apart from the marriage tax penalty, there have been complaints, voiced recently and most loudly by conservatives, that the old welfare program, Aid to

³² See generally Office of the General Counsel, General Accounting Office, Report to the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary, House of Representatives, GAO/OCG 97-16 (1997).

³³ 8 USC §1154 (describing how marriage affects petitioning procedure for aliens).

³⁴ Congressional Budget Office, For Better or for Worse: Marriage and the Federal Income Tax, DC, Congress of the United States, Congressional Budget Office, (1997) at xiv.

Families with Dependent Children (AFDC), inadvertently encouraged marital breakup and “illegitimacy” by only providing assistance to single-parent households.³⁵ In 1988, this criticism was partly deflected when all states were required to provide assistance to eligible two-parent families. Interestingly, the requirements imposed on two-parent families were so much stricter that very few two-parent families in fact received assistance.³⁶

These complaints aside, in recent decades national policymakers and advocacy organizations have basically treated marriage as the “m-word”—assuming that its private, contractual nature meant that it was “off-bounds” to government policy. This attitude persisted in the face of mounting evidence of the negative public consequences of increasing rates of divorce and out-of-wedlock childbearing. Many new programs were created or expanded in response, but what many viewed as the root cause of these social problems—the decline in marriage—was never directly addressed. For a variety of reasons, everyone tiptoed around the subject.³⁷

II. AN EMERGING SPOTLIGHT ON MARRIAGE IN CONGRESS

In the mid 1990s, interest in three separate issues— anxiety about same-sex marriage, welfare reform, and the emerging interest in promoting responsible fatherhood— converged to place a new spotlight on marriage in Congress and to reassert the federal interest in the institution.

First, conservative advocacy groups became increasingly nervous about the growing pressure from many (but by no means all) in the gay and lesbian movement to be allowed to marry. This concern was

³⁵ See, e.g., Judith Havemann, *Republicans steadfast on welfare overhaul*, *Wash. Post*, Nov. 23, 1996, at A4 (describing Republicans offering states bonuses for curbing out-of-wedlock births).

³⁶ Pub. L. No. 100-485, § 401 (1988).

³⁷ See generally Theodora Ooms, *Towards More Perfect Unions: Putting Marriage on the Public Agenda* (1998) (on file with author).

increased in light of a state court ruling in Hawaii that was favorable to this cause.³⁸ In response to this anxiety, the 1996 Defense of Marriage Act (DOMA) was speedily ushered through Congress and passed by large majorities.³⁹ The act was simple, and did only two things: it explicitly defined the words “marriage” and “spouse” in federal law as involving one man and one woman, and, in defiance of the Constitution’s full faith and credit clause, it provided that no state would be required to honor a same-sex marriage contracted in another state.⁴⁰

As Cott points out, DOMA is significant because it reversed the trend to de-institutionalize marriage by reasserting the national public interest in the institution, describing marriage as “the fundamental building block of society.”⁴¹ Indeed, by defining marriage as only occurring between a man and a woman, the law reaffirmed the government’s right to define the acceptable model of marriage, just as historically it had prohibited polygamy and interracial marriage.

The second and more extensive legislation enacted in 1996 was the welfare reform legislation entitled the Personal Responsibility and Work Opportunities Reform Act (PRWORA).⁴² PRWORA established the Temporary Assistance For Needy Families (TANF) block grants program, and replaced the AFDC welfare program.⁴³ Although most of the public debate and controversy surrounding TANF has focused on the law’s stringent work requirements and time limits for financial assistance, some of the key congressional proponents of this bill made it

³⁸ *Baehr v. Miike*, 994 P. 2d 566 (Haw. 1999).

³⁹ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (enacted as amended at 28 USC 1738C).

⁴⁰ Cott, *supra* note 6, at 218.

⁴¹ *Id.* at 218-20.

⁴² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C.A., 8 U.S.C.A., and 42 U.S.C.A.).

⁴³ *Id.* at §§101-16.

very clear that they were as concerned about reducing out-of-wedlock childbearing as they were about reducing dependency and increasing work.⁴⁴ In the findings portion of the bill, much attention is paid to citing facts about the high rates of illegitimacy and its association with welfare dependency and other social ills. In PRWORA, three “family formation” goals are spelled out in the four purposes of the Act:

- (i) to provide assistance to needy families
- (ii) to end dependence of needy parents on government benefits by promoting job preparation, work and marriage
- (iii) to prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies
- (iv) to encourage the formation and maintenance of two-parent families.⁴⁵

It is important to note that these purposes are not aimed exclusively at welfare clients. Purpose (ii) applies to needy or low income families, as defined by the state, and purposes (iii) and (iv) apply to the general population.⁴⁶ Two-parent families are not defined in the law, thus states have been free to interpret the definition very broadly. Indeed, the federal guidance document makes it clear that states may work to improve the relationships between two parents whether they are married, unmarried, separated or divorced, and whether they are living together or not.⁴⁷

This 1996 federal welfare reform program is the first federal law to provide the funds, the mandate, and the flexibility to states to strengthen the institution of marriage. In general, with the exception of Oklahoma and Arizona,

⁴⁴ 142 Cong. Rec. S9337 (daily ed. Aug. 1, 1996) (statement of Sen. Bond).

⁴⁵ Section 401, 110 Stat. at 2118.

⁴⁶ Section 614, 110 Stat. at 2239.

⁴⁷ See www.acf.dhhs.gov/programs/ofa/funds2.htm.

states have done little to pursue the TANF marriage goals. This failure is due in part to the fact that states do not know how to approach the mandates since there is no track record of demonstration programs to draw upon for ideas. The majority of states, however, have changed policies in a more general way to make it easier to serve two-parent families, and have invested substantial effort in preventing teen pregnancy.⁴⁸ However, there is general agreement that the states' actions with respect to marriage and family formation will be under critical scrutiny in the forthcoming debates leading up to reauthorization of the act in 2002, and several proposals are expected to be put forward by Republicans to help encourage and even mandate states to reduce illegitimacy and promote marriage along the lines of TANF's objectives.⁴⁹

The third piece of legislation concerned with marriage grew out of a new interest in fathers. In the early 1980's, a handful of scholars, analysts and advocates brought attention to the fact that the family policy agenda had paid very little attention to a critical element — men and fathers. Since the 1970's, the federal government had been trying to enforce the payment of child support, especially for families on welfare. Otherwise, government programs generally served mothers and their children with almost no attention paid to fathers. Within the last six years, a good deal of interest has emerged in supporting programs that go beyond regarding fathers solely as delinquent, nonpaying dads, to encouraging fathers, whether unmarried, married or divorced, to become more actively involved in their children's lives. Moreover, there

⁴⁸ Hugh Hecl, *The Politics of Welfare Reform*, in *The New World of Welfare* 169-200 (Rebecca Blank & Ron Haskins eds., 2001); Hearing on Welfare Reform and Marriage Before the House Comm. on Ways and Means, Human Resources Subcomm. (2001) (testimony of Theodora Ooms).

⁴⁹ Robert Rector, *Welfare: Broadening the Reform*, in *Issues 2000: The Candidates' Briefing Book* (Stuart M. Butler & Kim R. Holmes eds., 2000); Wade F. Horn & Isabel V. Sawhill, *Fathers, Marriage and Welfare Reform*, in *The New World of Welfare* 421-41 (Rebecca Blank & Ron Haskins eds., 2001).

is a movement to help them do so by offering job training, support groups, parental education, counseling and related services. This focus on fathers opens an avenue to promote marriage, since research suggests that the most effective way for fathers to be involved with their children is to be married to their child's mother in a caring, cooperative, and committed relationship.⁵⁰

The initial Father's Count legislation, which was introduced in the House in 1999, and its revised version, Title V of the Child Support Distribution Act,⁵¹ set up a program of grants for community-based programs targeting low income, non-custodial fathers. In general terms, these programs promoted marriage and successful parenting, and helped fathers improve their economic status through job training. The bill also provided funds for three national fatherhood organizations. The companion Senate bill also included grants for states to develop media campaigns that promote the formation and maintenance of two-parent married families, strengthen fragile families, and promote responsible fatherhood.⁵²

When these bills were first introduced, and later when the language to require grantees to promote marriage was added, a number of advocates, including supporters of the bill, raised several concerns. These fears included possible coercion into unsuitable marriages or violent relationships, and concern about diversion of funds away from single mothers. The House bill's sponsors responded by inserting gender-nondiscrimination language into the bill, as well as requirements that programs provide information about domestic violence. The House bill was

⁵⁰ William J. Doherty et al., *Responsible Fathering: An Overview and Conceptual Framework*, 60 *J. Marriage & Fam.* 277, 286 (1998); Horn & Sawhill, *supra* note 49, at 427-32.

⁵¹ H.R. 4678, 106th Congress (2000).

⁵² S. 3189, 106th Congress (2000).

passed with overwhelming bi-partisan support, but stalled in the Senate.⁵³

These three legislative developments have reopened the question about whether there is indeed a public interest in marriage, and if there is, what role the federal (and state) government should play to strengthen and possibly shape the institution. This question has not yet been fully engaged, but is expected to surface when the issue of promoting marriage is addressed in the upcoming debates about TANF reauthorization and fatherhood grants in the 107th Congress.

In anticipation of these forthcoming debates and beginning in 2000, the Heritage Foundation, Brookings Institution, and other organizations began to issue publications and convened conferences that put forward various policy options and recommendations. A surprising number of these address the family formation goals within TANF.⁵⁴

In the next section, I group these and other policy proposals related to marriage into five overlapping categories of roles and activities that the federal government could potentially engage in.

⁵³ As of October 2001, several versions of these fatherhood bills were under consideration in the current session of Congress.

⁵⁴ See generally Rector, *supra* note 49; Horn & Sawhill, *supra* note 49; Patrick F. Fagan & Robert Rector, The Heritage Foundation, Backgrounder No. 1373: The Effects of Divorce on America (2000); Charles Murray, Family Formation, *in* The New World of Welfare 137-60 (Rebecca Blank & Ron Haskins eds., 2001).

III. ROLES THE FEDERAL GOVERNMENT CAN PLAY TO STRENGTHEN MARRIAGE

A. Collecting Information and Increasing Knowledge

The federal government has a unique responsibility to monitor, compile and publish what is known about marriage, cohabitation, out-of-wedlock childbearing, and divorce. It must also work to improve the collection of data on these issues, to fund more and better interdisciplinary research on marriage and couple unions, and to launch and evaluate special demonstration programs to learn whether and how we can stabilize and strengthen marriage.

It is not doing well in most of these tasks, but it is doing an especially lamentable job with respect to its basic responsibility to collect national marriage and divorce statistics. The U.S. Vital Statistics system, which is a voluntary cooperation between state governments and the National Center for Health Statistics, collects uniform, standardized, complete and timely birth and death data from the state health departments, who in turn collect them from the records filed by county officials. In contrast, marriage and divorce statistics collected through this system were never given high priority and as a result were always incomplete and of poor quality. Instead of getting better, these statistics are getting worse.⁵⁵ Due to budgetary pressures in 1995, the NCHS decided to discontinue collecting marriage and divorce records and disbanded the office. As a result, national estimates of divorce and marriage rates are simply not available, and current statistics tell us nothing about the characteristics of people who are marrying or getting divorced. The unavailability of reliable divorce and marriage statistics seriously handicaps the ability of officials and researchers to describe and understand what is happening to marriage

⁵⁵ Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better off Financially* 191-94 (2000).

in their state or community, and further prevents the development and evaluation of state and local policies designed to strengthen marriage and reduce divorce.

Several other statistical offices and agencies within the federal government help monitor and understand trends in marriage, family formation and dissolution, but there are many gaps. The Census Bureau's decennial and periodic surveys are clearly a significant and useful source of data on family composition and household structure. Recently, the Bureau has made serious efforts to improve their measurement of cohabitation. Unfortunately, census surveys collect data on samples, and hence do not provide information relevant to small geographic areas or for subgroups of the population. Moreover, the Bureau's decision to drop the marital status question from the short form filled out by five out of six American households in the 2000 Census is symbolic of the low priority marriage is now being given by the federal statistical agencies.

The National Institute of Child Health and Development (NICHD) has funded several national surveys, such as the National Survey of Families and Households, which have contributed a good deal to our understanding of marital and family behavior.⁵⁶ In 1998, NICHD sponsored the first government research conference on couple unions that synthesized much of what we know on these subjects.⁵⁷ The National Institute for Mental Health has also funded critically important basic research in couple and marital interaction, and some important outcome evaluation of couples and marriage education programs have been designed based on the basic research.⁵⁸

⁵⁶ See <http://www.ssc.wisc.edu/nsfh> for a full description of the National Survey of Families and Households.

⁵⁷ Linda J. Waite et. al., eds., *The Ties That Bind: Perspectives on Marriage & Cohabitation* (2000).

⁵⁸ Scott M. Stanley, *Making a Case for Premarital Education*, 50 *Family Relations* 272 (2001).

The recommendation to restore and strengthen the collection of statistics on marriage and divorce, and expand the federal research efforts related to marriage, divorce and other couple unions is probably non-controversial and could well receive bi-partisan support.⁵⁹ However, additional funding will be required and the question is whether these issues will achieve sufficient priority to be able to successfully compete against other research goals and interests.

B. Setting National Goals, Providing Public Education, and Using the Bully Pulpit

The federal government uses a variety of avenues through which it can alert the public to an important social concern, set national goals for addressing the concern, investigate remedies, and educate the public about what can be done. Increasing numbers of those in the “marriage movement” are suggesting it is time that the federal government set national goals and launched a national campaign to promote marriage, as has been done with issues such as promoting healthy nutrition, reducing smoking and substance abuse, and teen pregnancy.⁶⁰ Waite and Gallagher suggest that “simply as a matter of public health alone, to take just one public consequence of marriage’s decline, a new campaign to reduce marriage failure is as important as the campaign to reduce smoking.”⁶¹

While many scholars and advocates feel that the case for marriage is strong and the subject urgent enough to justify bold federal action, others believe it is premature to set out national goals or launch a national campaign to actively promote marriage.⁶² They argue that the subject is

⁵⁹ Fagan & Rector, *supra* note 54, at 2-3.

⁶⁰ Waite & Gallagher, *supra* note 55, at 188-201; Fagan & Rector, *supra* note 54, at 1-3; Institute for American Values, *The Marriage Movement: A Statement of Principles* (2000), available at <http://www.marriagemovement.org/html/report.html>.

⁶¹ Waite & Gallagher, *supra* note 55, at 186.

⁶² See, e.g., Daniel T. Lichter et al., *Is Marriage a Panacea? Union*

still too sensitive politically and does not yet have sufficient widespread support. They also argue that we do not yet have sufficient evidence about what programs help marriages succeed to promote large scale programs.⁶³ However, it is possible that a recommendation to launch a national inquiry—such as a commission or task force—to review and synthesize the data and research and explore promising solutions might gain bi-partisan support.

Congressional hearings are another vehicle for public education, and can often lead to action. The hearings leading up to the passage of the child support and fatherhood bill (H.R. 4678) in the House fostered some very interesting public debates on marriage, since the proposed fatherhood grants are required to promote marriage. Nancy Johnson (R-CT), Chair of the Subcommittee on Human Resources and co-sponsor of the bill, said in her opening statement at the hearing on October 5, 1999:

I know that talking about marriages in this context makes some uncomfortable but all the data affirm that the incidence of poverty, underachievement, and abuse are simply far greater in one parent homes.

Marriage is good for both adults and children and public policy must begin to effect that fact. We should not compel young couples to marry, but we can certainly hold it out as the expected standard and track the skills necessary to have a successful relationship...If we can restore marriage to its rightful place at all levels of society, we will have accomplished more

Formation Among Economically-Disadvantaged Unwed Mothers (2001) (on file with author); Isabel Sawhill, *Welfare Reform and the Marriage Movement* (2001) (on file with author).

⁶³ *Id.*

than could be achieved by any government program we might design.⁶⁴

Nancy Johnson's successor chairperson of the House Subcommittee on Human Resources, Congressman Wally Herger (R-CA), declared his intention to hold hearings on marriage and out-of-wedlock childbearing in the 107th Congress, and held the first of these on May 22, 2001.⁶⁵

C. First, Do No Harm

Most people agree that the federal government should remove any policy or program barriers that may inadvertently discourage marriage or encourage divorce or out-of-wedlock births. As noted earlier, calls to remove the marriage penalty in the federal tax code have been frequently voiced, but the solutions are both expensive and very complicated. As a preliminary matter, it is not clear the extent to which decisions to marry or divorce are affected by tax policies. Nonetheless, the arguments for reducing the substantial marriage penalty in the Earned Income Tax Credit, targeted at low-income families, are strong since the penalties are "much larger as a percentage of income, and are therefore much more likely to matter at this income level, than among more affluent families."⁶⁶ Changing the law in this way, wrote Isabel Sawhill, "sends a message that society recognizes the value of raising children in two-parent, married families."⁶⁷

Over the years, questions have been raised about whether, and to what extent, some of the Federal

⁶⁴ See <http://waysandmeans.house.gov>.

⁶⁵ For a list of witnesses and copies of the testimony at this hearing see <http://waysandmeans.house.gov/humres/107Cong/5-22-01/107-28final.htm>.

⁶⁶ Isabel Sawhill & Adam Thomas, *Welfare & Beyond: A Tax Proposal for Working Families with Children 7* (2001) (on file with author).

⁶⁷ *Id.*

Government's basic safety net programs for the poor—welfare, Medicaid, public housing subsidies—are biased against two-parent families and marriage through inadvertently setting up incentives that discourage marriage and encourage out-of-wedlock childbearing. Scholars whose initial research on these questions found no effects, have recently shifted their position. A new scholarly consensus has emerged that welfare programs do have some effect on encouraging these behaviors.⁶⁸ The magnitude of the effects, however, is not large and cannot account for the size of the increase in non-marital childbearing and divorce that has occurred over the last twenty years. Nonetheless, even if the effects appear to be small, most people would agree that it would be better to design programs that did not include incentives to actually discourage marriage.

There has been very little attempt to remove most of these program barriers. Since 1996, however, the clear majority of states have taken steps to at least drop the stricter eligibility requirements for two-parent family households, whether married or unmarried, that existed in the AFDC program. As of 1999, thirty-three states' policies now effectively treat such families the same as single-parent families when determining eligibility.⁶⁹ At the same time, at least fourteen states have now established state-funded programs for two-parent families in order to provide assistance to these families without risking the penalties associated with the TANF high work participation rates for two-parent families.⁷⁰

It is a very complex task to identify the combined effect on family behavior of the various eligibility and other provisions embedded in the current array of welfare

⁶⁸ Welfare, The Family, and Reproductive Behavior: Research Perspectives 1-8 (Robert A. Moffitt ed., 1998).

⁶⁹ State Policy Documentation Project (SPDP), a joint project of the Center for Law and Social Policy and the Center on Budget and Policy Priorities (2000). See www.clasp.org.

⁷⁰ *Id.*

and income support programs, including the Earned Income Tax Credit, Food Stamps, and Medicaid. Some analysts claim there are serious net penalties, to the tune of several thousand dollars on low-income couples who choose to marry.⁷¹ A more detailed, recent analysis, that takes into account child support payments and includes cohabiting couples in the analysis, suggests that the marriage penalty facing low-income couples is much less than believed.⁷² Moreover, the authors maintain that both cohabiting and married couples are financially ahead if they stay living together.⁷³ Nevertheless, the paper recommends making it much easier for two-parent families to access public benefits, and reducing some of the current incentives to cohabit in the tax code.⁷⁴

The debate that is now beginning to emerge seems to be centered on whether the goal should be to strive for neutrality and make welfare programs, the tax code, etc. “marriage-neutral”, or to actively privilege marriage by instituting financial rewards and incentives for marriage and two-parent household formation.⁷⁵

D. The Opportunity to Do Good—Indirectly Strengthening Marriage

Since the New Deal, it has been widely understood that the federal government has a special responsibility to alleviate dire poverty and provide income support and other services to families in most need. In recent years, prominent conservatives have asserted that the high rates of

⁷¹ See, e.g., Eugene Steuerle, *The Effects of Tax and Welfare Policies on Family Formation*, in *Strategies to Strengthen Marriage: What Do We Know? What Do We Need to Know?* 153-62 (1998) (on file with author).

⁷² See generally Wendell. E. Primus & Jan Beeson, *Safety Net Programs, Marriage and Cohabitation, Just Living Together: Implications of Cohabitation for Children, Families, and Social Policy* (2000), available at <http://www.pop.psu.edu>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Rector, *supra* note 49; Horn & Sawhill, *supra* note 49.

single parenthood among the poor were a major cause of their poverty and dependency, and hence have determined that reducing out-of-wedlock childbearing and promoting marriage should be included as goals of welfare reform.⁷⁶

The concern that conservatives see marriage as the solution for poverty has led to considerable resistance to these goals on the part of progressives and others. They point out that the decline in marriage is both the cause and the effect of poverty, and that the reasons why the poor are at such high risk of single parenthood are many and complex.⁷⁷ The interaction between poverty and family structure is gaining some support from new research on unmarried low-income parents.⁷⁸ It also is reinforced by some important new studies that suggest that some of the traditional strategies used to reduce family poverty, such as child support enforcement, earnings supplements, and broader access to medical care through Medicaid expansions, may indirectly contribute to reductions in out-of-wedlock births and increases in marriage and marital stability.⁷⁹ Another anti-poverty strategy gaining support is to give the large numbers of low skilled, unemployed men easier access to the job search, placement, training and employment services currently available to welfare mothers. This would have the indirect benefits of improving their “marriageability”.⁸⁰

⁷⁶ E.g., Murray, *supra* note 55.

⁷⁷ Theodora Ooms, *Strengthening Couples and Marriage in Low Income Communities*, in *Revitalizing Marriage* (Alan J. Hawkins ed., forthcoming 2001).

⁷⁸ Irwin Garfinkel & Sara McLanahan, *Fragile Families and Child Well-being: A Survey of New Parents*, 21 *Focus* 9-11 (Spring 2000); Kathryn Edin, *Few Good Men: Why Poor Mothers Don't Marry or Remarry*, 11 *Amer. Prospect* 26-31 (Jan. 3, 2000).

⁷⁹ See generally Aaron S. Yelowitz, *Will Extending Medicaid to Two-Parent Families Encourage Marriage?* (1997), available at <http://www.ssc.wisc.edu/irp/pubs/dp111897.pdf>.

⁸⁰ Horn & Sawhill, *supra* note 49, at 432.

In the past, little attention was paid to the effect of health and human service programs on family structure. New studies suggest that the federal government should closely examine the ways in which some ongoing efforts to reduce poverty and support the working poor may also support and strengthen marriage *indirectly*, and when they do, recognize this as an additional argument for continuing to invest in these efforts.

E. The Opportunity to Do Good—Directly Strengthening Marriage

As discussed above, the 1996 TANF legislation opens a window for states and communities to engage in activities directly designed to discourage out-of-wedlock childbearing, promote marriage, and strengthen two-parent families. While states have done little so far to pursue these goals directly, policy analysts are now recommending a wide range of activities and actions for states. These include policies that directly privilege or reward those who marry, such as reserving certain numbers of public housing slots for married couples, giving married couples receiving welfare assistance an additional \$100 a month, or launching a demonstration program that would give a cash award to women who postpone childbearing until they are at least 18 and married for at least a year.⁸¹ Such proposals, however, are greeted by many progressives and others with considerable uneasiness if not outright opposition.

One reason is that such proposals only address quantity, the numbers of people who marry or divorce; they do not address the issue of the quality of marriage that many believe is the more important goal. In other words, progressives argue that the goal should not be to promote marriage *per se*, since some marriages are premature, unwise, and even harmful. The goal should be to promote “healthy” marriage, and to find ways to help people have better, long lasting marriages. In short, the goal should be

⁸¹ Rector, *supra* note 49.

to “strengthen marriage.”

In addition, some claim that government is too blunt an instrument and can do little to improve couples’ relationships. This task should be left to the churches and other such groups. But others maintain that government can play an important role in the development, funding and evaluation of demonstration programs to find out what works. The government can also help build the capacity of communities to provide educational and social support services to couples, as well as public education designed to discourage hasty and ill-matched marriages while strengthening the relationships of those who marry.⁸² The kinds of activities that are being proposed, and in some communities are already underway, are relationship skills classes for high school students, couples relationship skills workshops or counseling for engaged couples or unmarried parents, giving an informational handbook on marriage to couples when they get their marriage license, matching young couples with seasoned married mentor couples to provide ongoing support, and offering workshops and counseling to marriages in crisis. A handful of communities, including Greater Grand Rapids, Michigan, have developed promotional materials such as public service advertisements, informational brochures, posters and billboards. And Grand Rapids is not alone. These kinds of activities exist or are being started in communities throughout the country.

Before a public official would want to endorse spending substantial public monies on these approaches he or she is likely to ask: What do we know about the effectiveness of these kinds of activities? The response is that this is a newly emerging field. For the most part, these programs and activities have not been established long enough, or funded adequately enough, to undergo rigorous evaluation. Moreover, the methodological challenges in

⁸² E.g., Ooms, *supra* note 77.

designing evaluations in this field are inherent. However, several of the skills-based couples education curricula were designed based on the findings of decades of marital interaction research, and a few of these have shown some promising results.⁸³

Preventive programs designed to strengthen marriage also have broad appeal and are growing in number, yet the supply remains very limited. Moreover, most of the model program curricula currently being used were initially designed and tested on middle-income, white couples. If they are to become available more broadly, there will need to be an investment in capacity building. This will include training workshop leaders in the secular and religious sectors so as to adapt the curricula for more diverse populations. It would also be wise to proceed incrementally with pilot demonstration programs that are carefully evaluated to find out what approaches seem to work best for which kinds of populations before they are widely replicated.

Until mid-2001, only two states, Oklahoma and Arizona, had taken steps to use substantial amount of unspent TANF funds to directly promote marriage and strengthen two-parent families. Arizona passed legislation in 2000 authorizing \$1.65 million of TANF unspent funds to be spent on prevention-oriented, marriage-related information and education.⁸⁴ This included grants for community-based marriage and communications skills programs, vouchers to low income married or cohabiting

⁸³ Thomas Bradbury, *Understanding and Altering the Longitudinal Course of Marriage: A Review of Research*, in *Strategies to Strengthen Marriage: What Do We Know? What Do We Need to Know?* 29-35 (1998) (on file with author); Scott Stanley, *Acting on What We Know: The Hope of Prevention*, in *Strategies to Strengthen Marriage: What Do We Know? What Do We Need to Know?* 37-53 (1998) (on file with author).

⁸⁴ 2000 Ariz. Sess. Laws HB2199.

couples to attend relationships skills courses, and the development and printing of a marriage handbook.⁸⁵

In January 1999, Governor Frank Keating of Oklahoma, in his Inaugural and State of the State addresses, laid out a series of social goals including a commitment to reducing the state's divorce rate by one third by the year 2010.⁸⁶ At the time, Oklahoma's divorce rate was the second-highest in the nation and believed to have serious economic and social consequences for children, adults and the state's economy. A year later, in March 2000, the governor announced his decision to set aside \$10 million of unspent TANF funds to be used to strengthen marriage and reduce divorce. This represented about 10% of the state's surplus TANF funds. The TANF funds are augmenting and complementing funds and resources provided by the private sector.⁸⁷

From the outset, Oklahoma's strategy was planned to be a multi-sector initiative including religious, business, education, government, legal, health and social service providers, and the media. The initiative aims to change the culture and help stimulate the development of a broad range of services across the state to help youth, engaged couples, unmarried parents, married, divorced and remarried couples.⁸⁸

In the summer of 2001, state governments in Michigan and Utah also decided to invest TANF money in activities designed in part to promote and strengthen marriage. Michigan decided to invest \$1,250,000 of TANF dollars in demonstration projects designed to encourage

⁸⁵ See Arizona section of <http://www.smartmarriages.com> for more information.

⁸⁶ See Inaugural Address, Jan. 1, 1999, at <http://www.state.ok.us/~governor/inaugtext.htm>.

⁸⁷ The author is a senior consultant for the Oklahoma initiative.

⁸⁸ Hearing on Welfare Reform and Marriage Before the House Comm. on Ways and Means, Human Resources Subcomm. (2001) (testimony of Theodora Ooms).

and support fatherhood, as well as help new parents with parenting and with their relationship.⁸⁹ Utah's Commission on Marriage received \$600,000 in TANF Rainy Day funds to support four specific projects aimed at helping strengthen couples, two parent families, and marriages.⁹⁰

One thing seems clear: No short-term program by itself can be expected to make a significant impact on divorce or out-of wedlock birth rates. But in communities where economic, cultural, educational, and service strategies are being tried at the same time over a significant number of years and thereby reinforcing each other, it seems more likely that family formation behaviors may change in a positive direction.

IV. CONCLUSION

What are the chances that the federal government will obtain the public support necessary to undertake any of the roles outlined above? Some of the specific proposals discussed above may not arouse controversy and could probably be implemented. But any proposal that commits substantial federal government resources to activities described as actively promoting marriage, or publicly campaigning for marriage, are likely to encounter skepticism and considerable resistance from several quarters. This is in spite of the fact that the American public still holds marriage in high regard, and the large majority of Americans want to marry and have their marriages last. While this basic public support for marriage is an important foundation to build upon, it is a giant step to assume that as a consequence the public is ready for the federal government to get in the business of promoting marriage.

⁸⁹ See Michigan section of <http://www.smartmarriages.com> for more information.

⁹⁰ See Utah section of <http://www.smartmarriages.com> for more information.

As discussed earlier, concerns about possible government coercion and prescription of particular models of marriage have a historical basis. Moreover, we live in an era in which marriage has been widely regarded as a private and not a public concern. To reassert that there is a public interest in marriage, much more information and education needs to be made widely available about why it is in the interests of their children and society as a whole to promote and strengthen marriage. This is especially important to obtain support from those for whom marriage is not an option, or who have had bad experiences with marriage. There will also need to be more education about what kinds of programs and services are available to help marriages succeed. And, in the absence of definitive studies about their success, people will need to develop some confidence that these programs are promising and worth trying.

A bi-partisan political consensus will be needed to enact and successfully implement any major pro-marriage policy initiative or package of proposals. This support is more likely to be forthcoming if the national proponents of pro-marriage policy readily acknowledge that marriage is not always possible or desirable in individual cases, and they give states the flexibility they need to design initiatives to meet the needs of families in different stages and circumstances. Many single parents are not in a position to marry their child's other parent, some marriages should never begin, and others are better ended. For those parents for whom marriage is not a realistic goal, the goal should be to help both parents fulfill their responsibilities and cooperate in raising their child whenever possible.

The federal government can also play a critical role in investing sufficient monies in well designed evaluations of at least some of these state and local initiatives in order to learn which strategies are most likely to be successful. Public support for the work related goals of welfare reform was obtained only after more than a decade of public discussion and numerous demonstration programs. The same gradualist, and research-based approach should be

used to build public support for any nationwide marriage strengthening initiatives. Finally, enacting pro-marriage policies should not be used as an excuse for denying or cutting back assistance to those who are single parents.

The question for debate is not whether the federal government should play a role in marriage. The federal government has always been, and remains involved in the institution. The question is what kind of role should it play. Now that there is a renewed concern about the status of marriage in the United States, it is important to have an open discussion about whether the federal government should more actively expand its current role, and if so, what its appropriate role should be, which federal agencies or authorizing legislation should take on these expanded roles, and how federal efforts should relate to the state governments and to the private sector. The forthcoming TANF reauthorization debate offers the opportunity to discuss the many research, policy, and value questions that are involved in this challenging, important and controversial policy arena.