

## More Light Thoughts and Night Thoughts on the American Family\*

Judith T. Younger\*\*

It's been seven years since I came before you to give my inaugural lecture as the Joseph E. Wargo Anoka County Bar Association Professor of Family Law.<sup>1</sup> I am sure you don't remember a single word I said. I suspect that seven years from now you will have forgotten the content of this renewal lecture as well. But two more remarkable, roughly contemporaneous events are likely to remain in your minds—one from art and one from life. Indeed, they give me my themes today.

My 1991 talk coincided with a startling announcement by one of the world's most famous cartoon characters.<sup>2</sup> Blondie Bumstead, wife of Dagwood, mother of Cookie and Alexander, and mistress of Daisy, the family dog, told her 250 million readers in more than 2,000 newspapers, fifty-five countries and more than thirty-five languages<sup>3</sup> that she was tired of cooking and cleaning and was going to get a *real* job.<sup>4</sup>

My 1998 talk is taking place here today in the aftermath of another startling announcement — this one by the President of the United States. A few months ago, Bill Clinton, husband of Hillary, father of Chelsea, master of Socks and Buddy, the family pets, told the world that he indeed had a sexual relationship with a White House intern.<sup>5</sup>

Blondie's job and the President's relationship caused trouble in their respective marriages. Blondie and Dagwood had to go to a

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\* Professor Younger gave this lecture on November 17, 1998. She wishes to thank her research assistant, Jennifer E. Joseph for her cheerful help and support.

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1. See Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 MINN. L. REV. 891 (1992).

2. See Dean Young & Denis Lebrun, *Blondie* (visited Jan. 20, 1999) <<http://www.kingfeatures.com/comics/blondie/about.htm>>.

3. See *id.*

4. See Dean Young, *Blondie*, STAR TRIB. (Minneapolis), Sept. 2, 1991, at E5.

5. See Peter Baker & John F. Harris, *Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal 'Prying'*, WASH. POST, Aug. 18, 1998, at A1.

marriage counselor.<sup>6</sup> Bill and Hillary went to a prayer breakfast with Reverend Jesse Jackson,<sup>7</sup> and Bill had to write an apology and plea for forgiveness to his Baptist congregation in Little Rock.<sup>8</sup> Other couples might more easily have divorced. In Florida, where Dean Young draws Blondie, the Bumsteads could divorce on the basis of irretrievable breakdown of their marriage.<sup>9</sup> In the District of Columbia, Bill and Hillary could divorce by living separate and apart for a year.<sup>10</sup> No matter how permissive the divorce laws, however, we know that the Bumsteads and the Clintons will *not* divorce—at least while they live in a comic strip and the White House, respectively. There, powerful forces hold them together: their own sets of internalized values, of course, gained from an early age through religion and education. These are reinforced by external pressures as well. I have in mind the watchful and constant supervision of their marriages by others outside of the nuclear household—relatives, friends, neighbors, staff, news media, world leaders, fans, constituents and the like, always ready to intervene, advise, arbitrate and urge reconciliation.

The Clintons and the Bumsteads are especially interesting to us in light of the ongoing national debate about the wrongness and rightness of divorce and the impact of divorce on children. State lawmakers, fired up by high divorce rates and new research on the long-term problems of children whose parents have divorced, are rethinking divorce laws.<sup>11</sup> In doing so, they are making two assumptions. The first is that changing divorce laws actually affects the incidence of divorce,<sup>12</sup> and the second is that parents' conduct in divorcing damages their children.<sup>13</sup> Both may be wrong.

The Bumsteads and Clintons are troubled couples who stay together though they might easily divorce under permissive divorce laws. Similarly, couples who really want to divorce

6. See *Blondie, Dagwood See Marriage Counselor* (visited Oct. 6, 1998) <<http://www.library.yale.edu/ref/internet/test.html>>.

7. See Susan Baer, *Clinton Contrite at Prayer Breakfast*, BALTIMORE SUN, Sept. 12, 1998, at 10A.

8. See Kenneth L. Woodward, *Sex, Sin and Salvation*, NEWSWEEK, Nov. 2, 1998, at 37.

9. See FLA. STAT. ANN. § 61.052(1)(a) (West 1997 & West Supp. 1999).

10. See D.C. CODE ANN. § 16-904(a)(2) (1998) (stating that a divorce is granted if "both parties . . . have lived separate and apart . . . for a period of one year next preceding the commencement of the [filing for divorce]").

11. See, e.g., Stephanie Coontz, *Divorcing Reality*, NATION, Nov. 17, 1997, at 21; Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bonds*, N.Y. TIMES, June 24, 1997, at A1.

12. See Coontz, *supra* note 11, at 21-23; Sack, *supra* note 11, at A1.

13. See Coontz, *supra* note 11, at 21; Sack, *supra* note 11, at A13.

manage to do so even if the laws are restrictive.<sup>14</sup> They obtain annulments or foreign divorces, or collude with each other and lie to establish whatever the permissible divorce ground, or merely divorce themselves by deserting their families. In fact, changes in divorce laws probably have little to do with divorce rates, as historians of divorce have discovered.<sup>15</sup>

Thus Nelson Blake, in his history of American divorce, *The Road to Reno* (this is not "Janet," but "Reno, Nevada"), tells us that the divorce rate of .3 per thousand in 1860 rose to 2.2 per thousand in 1959.<sup>16</sup> "Why has there been this increasing resort to divorce?" he asks.<sup>17</sup> His unequivocal answer: "Not primarily because of changes in the statute laws. In most states the grounds for divorce were as liberally defined in 1860 as they are today; in several the laws were more liberal at the earlier date."<sup>18</sup>

And Lawrence Stone, in his history of English divorce, *Road to Divorce*, agrees:

[T]here is little evidence that variations in the strictness of divorce laws in any way influenced the degree of marital breakdown or adultery in a given society. The classic example is Scotland: divorce has been permitted ever since the mid-sixteenth century for adultery or desertion, with remarriage for the innocent party, but until the twentieth century the divorce rate remained almost negligible. When the option of divorce for reasons of adultery by either party was first made available in England in 1857, it too, after an initial spurt, had little real effect on the incidence of divorce until the First World War. In 1911 the number of divorces was still below 1,000 a year, out of a population of 6.6 million married couples.<sup>19</sup>

William J. Goode, in *World Changes in Divorce Patterns*, asserts similar findings: "It is unlikely that we can 'explain' differences in divorce rates by [analyzing] the [divorce] laws. Sociologists and demographers have asserted or demonstrated for some decades that easier divorce laws have only a small effect on the divorce rates."<sup>20</sup>

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14. See NELSON MANFRED BLAKE, *THE ROAD TO RENO* 202 (1962) (illustrating, by example of New York, that spouses, when faced with restrictive divorce laws, simply deserted their spouse).

15. See WILLIAM J. GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* 322 (1993); Ira Mark Ellman & Sharon Lohr, *Dissolving the Relationship Between Divorce Laws and Divorce Rates*, 18 INT'L REV. OF L. & ECON. 341, 341 (1998).

16. BLAKE, *supra* note 14, at 226.

17. *Id.*

18. *Id.*

19. LAWRENCE STONE, *ROAD TO DIVORCE* 5-6 (1990).

20. GOODE, *supra* note 15, at 322; see also Ellman & Lohr, *supra* note 15, at

The other assumption motivating lawmakers to rethink divorce law is that divorce is bad for children. The ammunition for this view comes largely from the work of Judith Wallerstein, a psychologist who approached the question with the verve and determination of her namesake. Surely we all remember Judith, the Jewish widow who in the face of an invading Assyrian army, put on her finery, entered the Assyrian camp, captivated its general, Holfernes, and then cut off his head to save her people.<sup>21</sup> Wallerstein's book *Second Chances* has much the same crusading air.<sup>22</sup> It is dedicated "[t]o [all] the men, women, and children who gallantly led the way by sharing their experiences with us so that others could learn."<sup>23</sup> It claimed that almost half of the children studied (ages two through six) had experienced long-term psychological problems that interfered with their lives.<sup>24</sup> This year Wallerstein and Julia Lewis published a longitudinal study on the very same children over the twenty-five year period since their parents separated.<sup>25</sup> Wallerstein found the children extremely vulnerable to drug and alcohol abuse in their teens, and now in their twenties and thirties, suffering from unstable relationships with their fathers, low educational achievement and severe anxieties about commitment.<sup>26</sup> In sum, and in her own words,

[t]he dominant influence on our thinking has been the adult experience. From this perspective, divorce is a time-limited, circumscribed crisis, in which the most severe impact occurs at the breakup . . . . Unlike the adult experience, the child's suffering does not reach its peak at the breakup and then level off. On the contrary, divorce is a cumulative experience for the child. Its impact increases over time. At each developmental stage, the impact is experienced anew and in different ways . . . . The effect of the parents' divorce is played and replayed throughout the first three decades of the children's lives.<sup>27</sup>

Another Judith has now burst onto the research scene. The

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341 (asserting Walter F. Wilcox's conclusion that the influence of law is minimal on changes in divorce statistics).

21. See *Judith* 1-16 (New English Bible with Apocrypha); 2 *DICTIONARY OF JUDAISM IN THE BIBLICAL PERIOD* 357 (Jacob Neusner & William Scott Greene eds., 1996) (defining "Judith").

22. See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES* (1989).

23. *Id.* at v.

24. See *id.* at 299.

25. See Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children; A First Report From a 25-Year Study*, 36 *FAM. & CONCILIATION CTS. REV.* 368-69 (1998).

26. See *id.* at 371-80.

27. *Id.* at 380-81.

new Judith has taken on Wallerstein and her supporters as if *they* were Holfernes and the Assyrian army. Written up in the New Yorker,<sup>28</sup> Newsweek,<sup>29</sup> other magazines,<sup>30</sup> and newspapers,<sup>31</sup> the new "Judith" is Judith Rich Harris, and her new theory is explained in her book *The Nurture Assumption*.<sup>32</sup> Free to state her mind because she is not part of the academic establishment,<sup>33</sup> she has some radical views and, like Wallerstein, the air of a crusader. She says her purposes are to dissuade us of the notion that a child's personality is shaped or modified by the child's parents, and to give us an alternative view.<sup>34</sup> In a nutshell, according to Harris, parents have no important long-term effect on the development of their children's personalities, except for their gene contributions.<sup>35</sup> Beyond parental genes, children are shaped by their peers.<sup>36</sup> Specifically on divorce, Harris criticizes Wallerstein:

The most famous—and most pessimistic—study of the children of divorce is the one by clinical psychologist Judith Wallerstein. Wallerstein found a very high rate of emotional disturbance among the children of middle-class divorced couples. Her books sold a lot of copies but as science they are useless: all the families she studied had sought counseling and all were getting divorced. There was no control group of intact or self-sufficient families with which to compare the children of her patients and no way to filter out her professional biases.<sup>37</sup>

According to Harris, heredity, not their experiences in their childhood homes, is what makes children of divorce more likely to fail in their own marriages and have other troubles.<sup>38</sup> Heredity gives them traits that "increase the risk of almost any kind of unfavorable outcome in life."<sup>39</sup> These traits, such as aggressiveness, insensitivity to others' feelings, impulsiveness and

28. See Malcolm Gladwell, *Do Parents Matter?*, NEW YORKER, Aug. 17, 1998, at 54.

29. See Sharon Begley, *Who Needs Parents?*, NEWSWEEK, Aug. 24, 1998, at 53.

30. See, e.g., *Who Needs Parents?* (Dec. 12, 1998) <<http://www.newscientist.com/ns/981212/harris.html>> (reporting an interview with Judith Rich Harris).

31. See, e.g., Ellen Goodman, *Harris' Book Doesn't Really Let Parents Off Hook*, STAR TRIB., (Minneapolis), Oct. 2, 1998, at A19.

32. See JUDITH RICH HARRIS, *THE NURTURE ASSUMPTION* (1998).

33. See *id.* at xvi.

34. See *id.* at xv.

35. See Steven Pinker, *Foreward* to JUDITH RICH HARRIS, *THE NURTURE ASSUMPTION* xii (1998).

36. See *id.*

37. HARRIS, *supra* note 32, at 305-06.

38. See *id.* at 308-09.

39. *Id.* at 309.

a tendency to be easily bored, make them harder to get along with and increase the chances that they will make unwise choices.<sup>40</sup>

Harris concedes that "[d]ivorce and the parental conflict that surrounds it" make children unhappy at home, but not outside it.<sup>41</sup>

If researchers want to find out how the child's life outside the home is affected by the parents' divorce, [they] will have to collect their data outside the home, and if they want to do it right they will have to use unbiased observers—observers who are unaware of the child's family situation.<sup>42</sup>

What the researchers will find under these conditions, she says, "is that parental divorce has no lasting effects on the way children behave when they're not at home, and no lasting effects on their personalities."<sup>43</sup>

Who to believe? At first, I liked Harris. I thought, "What a reprieve! I'm not responsible for my children's failures (except through my genes, of course)." But then I thought, "What about their successes?" According to Harris, I'm not responsible for those either. Perhaps my mother-in-law had it right, after all. She told me, when each of my children was born, that nothing I could do would make a difference. "It's just LUCK," she said, "good or bad."

If we agree, then, as some authorities suggest, that divorce law has little to do with divorce rates, and that divorce has no lasting effects on children, what difference does it make what divorce laws provide? Well, we shouldn't ignore the law's function as teacher. As one of my great teachers put it: "[T]he Psalmist in the Bible, Plato and Aristotle believed that the law should be as 'a lamp unto the feet and a light unto the path.'"<sup>44</sup> With that in mind, we want divorce laws (and other laws, as well) to teach the right lessons, just in case anyone is attentive. But the right lessons for divorce laws have been especially hard to draft ever since Jesus addressed the question. Before then, each of the three systems of law with which Christians were most acquainted treated marriage as a private contract with dissolution freely allowed.<sup>45</sup> Thus, under Athenian, Roman and Jewish law, divorce was available and easy; though under Jewish law, it was the one-sided privilege of the husband.<sup>46</sup>

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40. *See id.*

41. *Id.* at 311.

42. *Id.*

43. *Id.*

44. EDMOND CAHN, *THE MORAL DECISION* 5 (1955).

45. *See* GEORGE ELLIOTT HOWARD, 2 *A HISTORY OF MATRIMONIAL INSTITUTIONS* 12 (1964).

46. *See id.*

Jesus was, of course, a controversial fellow. He was constantly in trouble and followed by groups of professional hecklers.<sup>47</sup> Among them were the Pharisees, sticklers for Jewish tradition.<sup>48</sup> They asked him a tempting question: Is it lawful to divorce one's wife for any cause?<sup>49</sup> They were trying to get him to take a public stand at variance with the Mosaic law allowing divorce. Jesus knew their hostile purpose and was a match for them. Notice his technique: He unexpectedly replied, "What did Moses command you?"<sup>50</sup> They answered, "Moses allowed . . . divorce."<sup>51</sup> Did Jesus go against this? Not exactly. He made his own declaration, seemingly against divorce but certainly not against Moses.<sup>52</sup> He should have been a lawyer.

The exact meaning of Jesus' words, however, has been vigorously disputed by theologians and commentators, starting with the earliest church fathers.<sup>53</sup> Reputable ancient and modern authority propose that he meant one or more of the following ideas:

1. Marriage is indissoluble, and all divorce is forbidden.
2. Divorce is allowed, but only to husband and only for adultery.
3. Divorce is allowed for adultery to both husband and wife.
4. Neither party to a divorce may marry again while his or her former mate is alive; to do so is adultery.
5. The innocent party may remarry, but not the guilty.
6. Both parties may remarry after severe repentance.
7. Adultery means only one thing: the sexual intercourse of a married person with someone other than husband or wife. (Sounds surprisingly modern — a bit like Bill Clinton).
8. Adultery is a symbolic word, standing for any sin that violates the marriage contract.<sup>54</sup>

We are still struggling to understand exactly what Jesus meant by his answer to the Pharisees that day and to reconcile it

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47. This group of hecklers included enemies from the leading Jewish groups, Pharisees, Sadducees and Scribes, as well as the Roman ruler of Galilee and Peraea, Herod Antipas. See MICHAEL GRANT, *JESUS: AN HISTORIAN'S REVIEW OF THE GOSPELS* 8, 118-19 (1977).

48. See, e.g., REV. FRANCES E. GIGOT, *CHRIST'S TEACHING CONCERNING DIVORCE IN THE NEW TESTAMENT* 16 (1912).

49. See *id.*

50. *Id.*

51. *Id.*

52. See *id.* at 17.

53. See BLAKE, *supra* note 14, at 10-11.

54. See, e.g., *id.*

with the earlier law of divorce.

Like divorce, marriage is the subject of national debate, arising in two contexts. First, should marriage remain an exclusively heterosexual relationship involving only one man and one woman, or are we prepared to expand it to include alternatives, such as same-sex or polygamous unions? Fearful that Hawaii might legalize same-sex marriages, Congress<sup>55</sup> and twenty-nine states have already taken positions against it.<sup>56</sup> In the Defense of Marriage Act, Congress has defined marriage traditionally for federal purposes as "only a legal union between one man and one woman as husband and wife" and the word "spouse" as "a person of the opposite sex who is a husband or a wife."<sup>57</sup> Congress also purported to free states from according full faith and credit to marriages between same-sex partners.<sup>58</sup> The full faith and credit aspect of this legislation, my constitutional law colleagues assure me, is just a symbolic act. Even before the legislation, states could refuse to recognize sister state marriages that they didn't like.<sup>59</sup> Twenty-nine states, including Minnesota,

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55. See Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C. § 1738C and 1 U.S.C. § 7 (1998)).

56. Twenty-six of these states have banned same sex marriage since 1995: Alabama (by Executive Order of the Governor), Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota Tennessee, Texas, Virginia and Washington (enacted by veto override Feb. 6, 1998). See National Gay and Lesbian Task Force, *Anti Same Gender Marriage Laws in the U.S.* (December 1997), <<http://www.nglftf.org/97cgal/marriage.gif>>; ALA. CODE § 30-1-19 (Supp. 1998); ALASKA STAT. § 25.05.011 (Lexis 1998); ARIZ. REV. STAT. § 25-101 (1996); ARK. CODE ANN. § 9-11-109 (Michie 1997); FLA. STAT. ANN. § 741.212 (West Supp. 1999); GA. CODE ANN. § 19-3-3.1 (Michie Supp. 1998); IDAHO CODE § 32-209 (1996); 750 ILL. COMP. STAT. § 5/212 (West Supp. 1998); IND. CODE § 31-11-11 (1997); KY. REV. STAT. ANN. § 402.040 (Michie, WESTLAW through 1998 Reg. Sess.); 19-A ME. REV. STAT. ANN. § 701 (West 1998); MICH. COMP. LAWS ANN. §§ 551.1, 551.271-72 (West Supp. 1998); MINN. STAT. § 517.03 (West 1998); MISS. CODE ANN. § 93-1-1 (Supp. 1998); MO. ANN. STAT. § 451.022 (West 1997); MONT. CODE ANN. § 40-1-401 (1997); N.C. GEN. STAT. § 51-1.2 (1995-96 & Supp. 1998); N.D. CENT. CODE § 14-03-01 (Michie 1997 & Michie Supp. 1997); OKLA. STAT. ANN. tit. 43 § 3.1 (West Supp. 1999); 23 PA. CONS. STAT. ANN. § 1704 (West 1996); S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 1998); S.D. CODIFIED LAWS § 25-1-1 (Michie Supp. 1998); TENN. CODE ANN. § 36-3-113 (1996 & Supp. 1998); TEX. FAMILY CODE ANN. § 2.001 (West 1998 & West Supp. 1998); VA. CODE ANN. § 20-45.2 (Michie 1995 & Michie Supp. 1998); WASH. REV. CODE ANN. § 26.04.010 (West Supp. 1999).

Three other states had same-sex marriage prohibitions before 1995: Kansas, Louisiana, and Utah. See KAN. STAT. ANN. § 23-101 (1995 & Supp. 1997); LA. CIV. CODE ANN. art. 86, 89 (West 1993); UTAH CODE ANN. § 30-1-2 (1998).

57. 1 U.S.C. § 7 (1998).

58. See 28 U.S.C. § 1738C (1998).

59. The United States Supreme Court has recognized a public policy exception



have passed laws that would prevent recognition of same-sex marriages within their respective jurisdictions though validly entered into in a sister state.<sup>60</sup> To me this seems a mean-spirited and foolish position.

First, marriage in western society has not been an immutable institution. It has already undergone radical changes. In the United States alone and only since about the 1960s, marriage has become a fundamental constitutional right.<sup>61</sup> Wives have become equal, rather than subordinate, to husbands;<sup>62</sup> interracial marriage, once prohibited, is now widely accepted in law and society;<sup>63</sup> and marital failure rather than fault of a spouse is ground for divorce.<sup>64</sup> Marriage confers on the couple a unique set of rights: to make medical decisions for, inherit from, share pension rights with, and become guardians of each other. If the United States Supreme Court is right that marriage is fundamental and Constitutional,<sup>65</sup> simple fairness dictates that all consenting adults in committed relationships should be able to enter it. In addition, an expansive view of the relationship is beneficial to society; an exclusive one is not because it fosters alienation. Society should welcome as many of its members into the legal regime as possible. The alternative is a large, visible, articulate, dissatisfied minority camping outside its gates.

The second aspect of the discussion about marriage involves attempts to instill internal values into prospective spouses that would lead them, like the Bumsteads and the Clintons, to stay together after marriage despite stresses in their relationships and the availability of divorce. For example, the Louisiana legislature enacted the much-publicized "covenant marriage" in 1997.<sup>66</sup> A "covenant marriage" is a "marriage entered into by one male and

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to the Full Faith and Credit Clause. See *Nevada v. Hall*, 440 U.S. 410 (1979); see also IRA MARK ELLMAN, ET AL., *FAMILY LAW, CASES, TEXTS, PROBLEMS* 106-08 (3d ed. 1998).

60. See *supra* note 56 and accompanying text (listing the 29 states which have such legislation).

61. See *Developments in the Law, the Constitution, and the Family*, 93 HARV. L. REV. 1156, 1250 (1980).

62. See, e.g., CAL. FAM. CODE § 720 (West 1994) (spouses "contract toward each other obligations of mutual respect, fidelity, and support").

63. See *Loving v. Virginia*, 388 U.S. 1 (1967); Steve Sailor, *Is Love Colorblind? Public Opinion About Interracial Marriage*, NAT'L REV., July 14, 1997, at 30; Catherine Walsh, *Many Boomers and Post-Boomers Rejoice in Freedom to Form Unconventional Families*, AMERICA, Oct. 18, 1997, at 10.

64. See, e.g., HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988).

65. See *Loving*, 388 U.S. at 1.

66. See LA. REV. STAT. ANN. §§ 9:272-75 (West Supp. 1999).

one female who understand and agree that the marriage between them is a lifelong relationship.”<sup>67</sup> To enter such a marriage, the couple must file a declaration of intent to do so,<sup>68</sup> engage in premarital counseling,<sup>69</sup> submit an affidavit that they have done so,<sup>70</sup> and agree to seek counseling if they experience difficulties in the marriage.<sup>71</sup> Aside from these features, “covenant marriage” is unremarkable. Despite its legislative definition as “lifelong,” parties to it may divorce on more grounds than are available in standard marriage. Four of them are fault grounds,<sup>72</sup> and one of them is the no-fault ground of living separate and apart for two years.<sup>73</sup> The author of this statute told a *Washington Post* reporter that in drafting it, she “relied on a 1980 law review article in which a University of Minnesota professor proposed amending no-fault divorce laws to require couples seeking divorce to first prove to the court that the arrangement would not harm their minor children.”<sup>74</sup> That was me.<sup>75</sup> I feel lucky that she did not mention my name. I am much older and a little wiser now, and I am not sure I would make the same proposal. Instead of fragmenting the law of marriage into special arrangements for special unions, such as those in which there are minor children and those in which there are not, and those in which the spouses have made a covenant and those in which they have not, it would be better, I now think, to take a unified approach. I think I would prefer a single, more expansive marriage that makes the same status and the same legal incidents available to all consenting adults in committed relationships. It strikes me as a fairer, more democratic approach than fragmentation, and it has the potential to unify rather than divide us. Incidentally, a bill providing for “covenant marriage” has been introduced here in Minnesota.<sup>76</sup> It

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67. *Id.* § 9:272A.

68. *See id.* § 9:272B.

69. *See id.* § 9:273A(1).

70. *See id.* § 9:273A(2)(a).

71. *See id.* § 9:273A(1).

72. *See id.* §§ 9:307(1)-(4).

73. *See id.* § 9:307(5). Compare with the grounds for standard divorce in Louisiana, which are as follows: living separate and apart; adultery; the defendant spouse has committed a felony and has been sentenced to death or imprisonment at hard labor. *See* LA. CIV. CODE §§ 102, 103 (West Supp. 1999).

74. John Jetter, “Covenant Marriages” Tie the Knot Tightly; Louisiana Begins Experiment in Commitment, *WASH. POST*, Aug. 15, 1997, at A1.

75. *See* Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 *CORNELL L. REV.* 45, 90-94 (1981).

76. H.R. 2760, 80th Leg., Reg. Sess. (Minn. 1998).

seems that attempting to instill internal values like commitment in couples on the eve of their marriages is like trying to teach writing in law schools: Too little, too late.<sup>77</sup>

The Blondie comic strip has upheld the values of marriage, including car pools, big sandwiches, and running into the mailman, for years. In 1991, Blondie nevertheless decided that something was missing in her life.<sup>78</sup> That's why she entered the labor force.<sup>79</sup> It is interesting to note that by doing so she merely took on another job. She didn't relinquish any of those she already had: cooking, cleaning, and child, dog, and Dagwood care. By deciding to open her own small catering business at home, she lost the benefits of working for someone else, such as a paid vacation, a pension and health insurance. But she did avoid the difficult questions that Hillary Clinton and other mothers who work outside the home must answer when their children are young. Can I find child care? Can I afford it? Can I trust it? Child care is neither easier to find, nor less expensive, nor safer than it was thirty-five years ago in 1963 when my first daughter was born. Trying in those days to "have it all"—career, husband, children, a life—was dreadfully hard. In fact, it was the hardest thing I ever did. I certainly wouldn't want to do it again in this inhospitable climate.

Congress and President Clinton have just told welfare mothers, through the *Personal Responsibility and Work Opportunity Reconciliation Act*, that they must go to work within two years of receiving assistance.<sup>80</sup> The states will have to implement the program in the face of reduced federal funding.<sup>81</sup> But putting welfare mothers to work costs money for developing the necessary jobs, for providing education and training, and, of course, for child care.<sup>82</sup> As draconian as this may seem, the Congressional Budget Office assumes that given the costs of meeting the federal work quotas, most states, instead of

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77. See Judith T. Younger, *Legal Education: An Illusion*, 75 MINN. L. REV. 1037, 1039-40 (1991).

78. See Young, *supra* note 4. Now that Blondie is running her own business, she's not so sure life is better. See Dean Young & Denis LeBrun, *Blondie*, STAR TRIB. (Minneapolis), Oct. 10, 1998, at E6.

79. See Young & LeBrun, *supra* note 78, at E6.

80. 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, 8, 21 and 42 U.S.C.). For a description of the law's provisions, see Gary Burtless & Kent Weaver, *Reinventing Welfare—Again*, 15 BROOKINGS REV. 26 (1997).

81. See 142 CONG. REC. S9329 (daily ed. Aug. 1, 1996) (statement of Sen. Moynihan).

82. See *id.*

implementing them, will simply accept the federal penalties for failure to do so.<sup>83</sup> In this sense, the Act is sheer hypocrisy, but it does mark a shift in national policy. If it is all right, even desirable, for welfare mothers to work, the same must be true for other mothers as well. Gone is the old conservative argument that mothers should stay home with their children. Full-time homemakers are no longer the ideal. The working mother of young children is in, whether she works for career satisfaction or out of economic need. But where is her support?

More working mothers need child care than ever before, but they are handicapped by a woefully inadequate, mostly private system of providers. One expert describes present American child care facilities in the following terms: "Most of these settings fall short of any standards that any of us . . . would consider optimal. Barely adequate has become the term of art to describe the typical child-care arrangement in this country . . . about 15-20% are in fact dismal and even dangerous."<sup>84</sup>

We have the tragic Woodward case<sup>85</sup> to remind us that even two affluent educated parents can run afoul of the barely adequate, dismal, dangerous system. This year, English au pair Louise Woodward was tried and convicted of the second degree murder of Matthew Eappen, the eight-month-old son of two doctors.<sup>86</sup> Trial judge Hiller Zobel reduced the charge to manslaughter and sentenced Ms. Woodward to time served,<sup>87</sup> thus enabling her to return to England. In the ultimate irony, Ms. Woodward, now twenty and a convicted felon, "is in school in London . . . studying to be a lawyer."<sup>88</sup>

Despite the difficulties of finding available, affordable, safe child care, it is unlikely that mothers will stop working; they need the money and they like their jobs. Indeed, they are entering the labor force in greater numbers. In America, at least three out of four mothers of school-age children now work.<sup>89</sup> And according to

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83. See *id.* But see Robert Pear, *Most States Meet Work Requirement of Welfare Law*, N.Y. TIMES, Dec. 30, 1998, at A1 (reflecting cautious optimism about states' implementation of the federal work quotas).

84. *A Survey of Women and Work*, ECONOMIST, July 18, 1998, at 13 (quoting Dr. Deborah Phillips, a child-development psychologist at the Institute of Medicine in Wash., D.C.) [hereinafter *Women and Work*].

85. *Commonwealth v. Woodward*, No. 97-0433C, 1997 WL 649119, at \*1 (Super. Ct. Mass. Nov. 10, 1997).

86. See *id.* at \*8.

87. See *id.*

88. *Digging Into the Nanny's Defense Funds*, NEWSWEEK, Nov. 9, 1998, at 32.

89. See *Women and Work*, *supra* note 84, at 3.

the National Institute of Child Health and Human Development, approximately 80% of American babies are regularly cared for by someone other than their mother in the first twelve months of life; most of them start child care before they are four months old; and typically they are in care for about thirty hours a week.<sup>90</sup> Even if we could stop the march of mothers to work, we wouldn't want to. The modern economy wouldn't function so well without women workers. Employers love them. They usually cost less to employ than men; they are more prepared to be flexible; they are less likely to complain over poor working conditions; and fewer are members of trade unions.<sup>91</sup>

It seems equally obvious that women are not going to stop becoming mothers, though they work more, marry less, and have fewer children.<sup>92</sup> Having children seems to be immutable conduct, though it's certainly risky. In or out of wedlock, it is likely to make women poorer. Families headed by divorced or never-married mothers are poorer than two-parent families.<sup>93</sup> Having children costs women career advancement and makes their lives hectic, because like Blondie, they keep their household tasks and remain responsible for their outside jobs and the bulk of child care.<sup>94</sup> Even if we could stop women from having children, we wouldn't want to. Children ensure that society continues, and despite the danger of world overpopulation, most governments think it desirable to keep their populations stable.

So women are going to continue to work and become mothers. Neither activity is bad for American society. Why is it then that society, through government, won't help working mothers with their combined tasks? It should be national policy to make it easier for women to combine motherhood and work. Instead, the governmental attitude is the opposite. My old colleague Urie Bronfenbrenner of Cornell University says "the comparative lack of family support systems in the United States is so extreme as to make it unique among modern nations."<sup>95</sup> In the most charitable

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90. See *id.* at 13.

91. See *id.* at 4.

92. See Andrew J. Cherlin, *By the Numbers*, N.Y. TIMES MAG., Apr. 5, 1998, at 39.

93. See, e.g., Mary E. Corcoran & Ajay Chaudry, *The Dynamics of Childhood Poverty*, 7 FUTURE OF CHILDREN 40, 43-44 (Summer-Fall 1997); NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 24 (1991).

94. See Cherlin, *supra* note 92, at 40; *Women and Work*, *supra* note 84, at 8.

95. Urie Bronfenbrenner, *Child Care in the Anglo-Saxon Mode*, in CHILD CARE IN CONTEXT: CROSS-CULTURAL PERSPECTIVES 281, 282 (Michael E. Lamb et al. eds.,

terms, the American attitude might be described as "a commitment to individualism and family privacy."<sup>96</sup> We don't want working mothers to become dependent on government. More accurately, the American attitude is indifference to, and neglect of, the needs of two important segments of society: working mothers and children. Families cannot solve the problems of child care costs, supply and quality themselves.

Twenty-eight years ago, in 1970, the White House Conference on Children chose daycare as the most serious problem confronting American families.<sup>97</sup> Congress responded a year later by passing the *Comprehensive Child Development Act*.<sup>98</sup> The Act established a national network of child care facilities available to *all* children (not only the poor and the handicapped), and it also provided for a uniform set of standards.<sup>99</sup> Characteristically, President Nixon vetoed it because he thought it "would commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach."<sup>100</sup> The comprehensive act was the high point of child care legislation in the history of the United States. Nothing like it has passed since. Child care still gets lip service on the national agenda. President Clinton describes himself and Hillary as "virtually obsessed with" the idea of providing affordable child care, but he concedes that "we are not there yet."<sup>101</sup> He and Hillary hosted their own White House Conference on Child Care about a year ago which they erroneously touted as "the first-ever."<sup>102</sup> There, President Clinton again spoke about his commitment to addressing the need for safe, affordable, quality child care.<sup>103</sup> But the one-day conference led to only a proposal by the President, in his State of the Union speech, for \$21.7 billion for

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1992) [hereinafter CHILD CARE IN CONTEXT].

96. Kim England, *Who Will Mind the Baby?*, in WHO WILL MIND THE BABY? 3, 8 (Kim England ed., 1996).

97. See ALISON CLARKE-STEWART, DAYCARE 36 (1993).

98. See *id.*

99. See *id.*

100. Veto of the Economic Opportunity Amendments of 1971, PUB. PAPERS 387 (Dec. 10, 1971).

101. Melissa Healy, *Clinton Dispenses Funds for After-School Programs*, L.A. TIMES, Nov. 13, 1998, at A26; The White House, Office of the Press Secretary, *Remarks By the President at Child Care/After School Event* (Nov. 12, 1998) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdii://oma.eop.gov.us/1998/11/16/6.text.1>>.

102. The White House, Office of the Press Secretary, *The White House Conference on Child Care* (Oct. 23, 1998) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdii://oma.eop.gov.us/1997/10/27/1.text.1>>.

103. See *id.*

child care over the next five years.<sup>104</sup> This was to be funded largely out of money from a national tobacco settlement<sup>105</sup> and was subject to approval by Congress. Neither the tobacco settlement nor the Congressional approval materialized.

The other product of the Conference was still another conference generated by a call from Treasury Secretary Robert Rubin, made at the President's request.<sup>106</sup> It brought together business and labor to identify the best child care practices in the private sector and in public-private partnerships.<sup>107</sup> The resulting report, based on a survey of 1,000 employers, concluded that employers believe so-called family friendly policies can save them money.<sup>108</sup> The present administration thus seems content to look to the private sector—business and labor—for relief from the child care problem, linking child care supply directly to the paid employment of mothers. In other countries, notably France<sup>109</sup> and Sweden,<sup>110</sup> child care is viewed as a public rather than a private issue, a responsibility of the whole community, and its supply is linked to all children regardless of their mothers' paid employment status.

If, as Judith Harris says in her book, *The Nature Assumption*, the most important influence on children, after parental genes, is their peers,<sup>111</sup> the question of where and how children spend the hours during which their mothers work takes on great importance. Providing child care that is safe, affordable and stimulating to children's physical, emotional and intellectual development should be a national priority. The failure of our government to make it one is a flagrant disregard of its duties and an insidious form of age and sex discrimination; the victims are children and mothers.

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104. See *Chronology*, CQ RESEARCHER, May 8, 1998, at 419; The White House at Work, *President Clinton's Proposal: Child Care That Strengthens American Families* (visited Oct. 21, 1998) <<http://www.whitehouse.gov/WH/work/010798.html>>.

105. See Interview with Mara Liasson and Robert Siegel of National Public Radio, 34 WEEKLY COMP. PRES. DOC. 116, 119-20 (1998).

106. See *Women and Work*, *supra* note 84, at 13; The White House Backgrounder, *Child Care: The Unfinished Agenda and Accomplishments* (visited Nov. 11, 1998) <<http://www.hhs.gov/news/press/1998pres/981027b.html>>.

107. See *Women and Work*, *supra* note 84, at 13.

108. See *id.*

109. See Steven Greenhouse, *If the French Can Do It, Why Can't We?*, N.Y. TIMES MAG. Nov. 14, 1993, at 59; see also HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* 221-22 (1996) (describing the French child care system).

110. See Carl Philip Hwang & Anders G. Broberg, *The Historical and Social Context of Child Care in Sweden*, in *CHILD CARE IN CONTEXT*, *supra* note 95, at 27, 35-48.

111. See HARRIS, *supra* note 32.

Where are fathers in all this? Some of them, like my exceptional son-in-law, John W. Hammond, are home taking care of their babies. Others are present in their families but can't be relied on for child care or chores; Bill Clinton and Dagwood Bumstead are probably in this group. What we know about Bill as a father we learn from Hillary. In her book, *It Takes a Village*, she says that fathers are important in their children's lives<sup>112</sup> and tells us that Bill was an eager participant in caring for Chelsea. He held her and sang and talked to her for hours.<sup>113</sup> "Bill regularly took her with him to the Governor's office, where he kept a tiny desk stocked with paper and crayons so that she could do her 'work' while he did his."<sup>114</sup> Nevertheless, when Chelsea was small, Hillary says it was she, Hillary, who "worried constantly about child care."<sup>115</sup> She states the well-known fact that "[e]ven when women with children share the bread-winner and rulemaker roles with their husbands, [women] almost always bear the primary—and disproportionate—responsibility for caregiving and homemaking."<sup>116</sup> Dagwood, like Bill, is present in his family, but his role in care giving has not been primary. He is usually frazzled, takes frequent naps, and consumes giant sandwiches. He may very well need care himself. According to one Florida marriage counselor, his eating and sleeping habits are "classic signs of depression."<sup>117</sup> Whatever their limitations as care givers, however, Bill and Dagwood have been home during their children's childhood. Other fathers have not. They are simply gone; they have disappeared from their children's lives. Thus, we have the phenomenon of "fatherless families," which joins divorce law, the definition of marriage, and subsidized child care as a subject of heated national debate.<sup>118</sup> One commentator describes "the decline of fatherhood" as

one of the most basic, unexpected, and extraordinary trends of our time. Its dimensions can be captured in a single statistic: In just three decades, between 1960 and 1990, the percentage of children living apart from their natural fathers more than doubled, from 17 percent to 36 percent. If this trend

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112. See CLINTON, *supra* note 109, at 40.

113. See *id.* at 216.

114. *Id.* at 220.

115. *Id.* at 223.

116. *Id.* at 203.

117. *Blondie, Dagwood See Marriage Counselor*, *supra* note 6 (quoting Florida marriage counselor Kathy Baker).

118. See, e.g., LOST FATHERS 1 (Cynthia Daniels ed., 1998); Patricia Cohen, *Daddy Dearest: Do You Really Matter?*, N.Y. TIMES, July 11, 1998, at A11; Maggie Gallagher, *And Baby Makes Two*, WALL ST. J., Aug. 7, 1998, at W13.



continues, by early in the next century nearly half of all American children will be going to sleep each evening without being able to say good night to their dads.<sup>119</sup>

Liberals see this development as benign. They call fatherless families an inevitable by-product of a culture dedicated to personal freedom and female autonomy. Fatherless families, they say, are safer for children and mothers than ones characterized by male indifference or violence. They say that single women, given enough resources, are perfectly capable of rearing happy, healthy children, and that the fatherless family is merely a variant among many in the evolution of family forms.<sup>120</sup>

Conservatives reject this optimism and blame fatherlessness for all our most difficult problems, from crime to poverty, teen pregnancy, and homelessness. Life without fathers, they say, puts children at risk. They want a return to fatherly authority, praise the virtues of traditional masculinity, and see marriage and fatherhood as a means for stemming men's tendency to sexual promiscuity and social disorder. According to them, we must engage in a rebuilding process, restoring fatherhood to its rightful central place in our culture, thus ending the "me-first" attitude in our society that is at the heart of our present ills.<sup>121</sup>

Whatever one's view on the question, it is established fact that most fathers who leave their families are divorced fathers of legitimate children or unwed fathers of illegitimates.<sup>122</sup> Divorced men have parental rights to their children commensurate, at least in theory, with those of divorced women. Before 1972, however, unwed fathers of illegitimate children were outside the protection of the parental rights doctrine, while unwed mothers were within it, enjoying rights to their children. This distinction was based on the societal expectation that unwed fathers of illegitimates would probably not wish to assert their paternity, but rather would wish to escape it. In the 1972 case *Stanley v. Illinois*, the United States Supreme Court granted unwed fathers parental rights vis-a-vis their illegitimate children, holding that an unwed father, who lived with his children and their mother, was entitled, after the mother's death, to a hearing on his fitness to keep the children.<sup>123</sup> The state viewed him similarly as unwed mothers of illegitimate,

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119. David Popenoe, *Life Without Father*, in *LOST FATHERS*, *supra* note 118, at 33.

120. See Robert Griswold, *The History and Politics of Fatherlessness*, in *LOST FATHERS*, *supra* note 118, at 11-13.

121. *Id.* at 12.

122. See Cohen, *supra* note 118, at A11.

123. 405 U.S. 645 (1972).

and mothers and fathers of legitimate, children.

After *Stanley* and its progeny,<sup>124</sup> the law sent the following message to the unwed father who wants a life with his child: Your biological connection offers you an opportunity that no other man has—to develop a relationship with your child. If you expect to enjoy that opportunity, however, you have to do something to protect it—act like a father to the child, establish a relationship with it, register yourself as its father in an adoption registry, for example. Even if you have done these things, a state may, nevertheless, subordinate your parental rights to those of the child's mother and her husband if the child is in a family with them and they want to care for it.<sup>125</sup>

The fathers who create the problem of fatherlessness do not seem to want lives with their children. They are thus ignoring this message, and the law cannot compel them to heed it. The law does, of course, attempt to connect such fathers to their children economically by making them liable for child support.<sup>126</sup> But, neither that nor a variety of nonlegal programs designed to foster a psychological connection between fathers and children have so far succeeded in overcoming fatherly disaffection.<sup>127</sup>

As to the goodness or badness of the fatherless family for society, children and mothers, my answer is based on my experience. My oldest daughter was born the year *The Feminine Mystique* was published.<sup>128</sup> In that book, Betty Friedan told mothers that we should find fulfillment outside our homes; that we should not have to sacrifice education and careers just because we married and had children. She said we could and should escape domesticity by a combination of self-help and legal reform. We were to join men in the workplace, while inviting them to share

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124. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (providing that a child born to a married couple living together, where the husband is neither sterile nor impotent, is presumed to be the child of the marriage); *Lehr v. Robertson*, 463 U.S. 248 (1983) (noting that the mere existence of a biological link does not merit equivalent protection); *Caban v. Mohammed*, 441 U.S. 380 (1979) (stating that a sex based distinction between unmarried mothers and fathers violates the Equal Protection Clause of the Fourteenth Amendment because it bears no substantial relation to any important state interest); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (holding that equal protection principles do not require an unwed father's authority to veto an adoption be measured by the same standard as is applied to a married father's authority).

125. See *Lehr*, 463 U.S. at 262.

126. See, e.g., Jean Hopfensperger, *Reworking the System for "Welfare Dads,"* STAR TRIB. (Minneapolis), Nov. 22, 1998, at B1 (discussing examples in which Minnesota is helping fathers meet their child support obligations).

127. See *id.*

128. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

power at home. At the same time, she said, we should repeal laws that buttress traditional notions of family and cast spouses in sex-based roles. This program, if followed, Friedan told us, would yield the ideal: happy individuals in egalitarian families. The book spoke to me with great clarity and charisma. I made the best child care arrangements I could, went back to the office, and have been in the work force ever since. I have preached about the importance of law reform for women and worked for it, extolling equality, independence and egalitarian families. I have since discovered that one thing families cannot be is egalitarian. There is always someone in command, though the command may shift from father to mother, to grandma or grandpa, and, in some families, ultimately to the children. I am sure that despite my job, there were times in the course of my family life when I was neither equal to nor independent of my husband; times when my family was not egalitarian, but patriarchal. However, I loved it and it had its good points. It was enduringly stable; it stayed together for thirty-three years; its father and two devoted grandparents were present throughout; and its children turned out very well.

Judith Harris would say that although children are happier when they have more than one adult to love them, a father's presence has little to do with the children's development.<sup>129</sup> She acknowledges that unfavorable outcomes for children are statistically associated with fatherless families,<sup>130</sup> but argues that these are not caused by the absence of fathers, the children's resulting experiences at home, or the quality of parenting they receive.<sup>131</sup> According to Harris, the unfavorable outcomes are caused by other factors. For example, single mothers are poor.<sup>132</sup> This affects the children's status in their peer groups, the likelihood that they will attend college and the neighborhoods in which they live.<sup>133</sup> Furthermore, poverty forces single mothers to rear their children in neighborhoods where there are other single mothers and high rates of unemployment, school dropout, teen pregnancy and crime.<sup>134</sup> This culture comes to children not through their families but from where they live.<sup>135</sup> Take children out of bad neighborhoods, and their culture changes to match that

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129. See HARRIS, *supra* note 32, at 301.

130. See *id.* at 302-03.

131. See *id.*

132. See *id.* at 303.

133. See *id.* at 303-04.

134. See *id.* at 304.

135. See *id.*

of their new peers.<sup>136</sup>

Where does that leave us? I suggest a four-point agenda: First, we should redraft divorce laws, not because we think doing so will lower divorce rates or benefit children, but because we have reached consensus on the lessons we want them to teach. Second, we should redefine marriage to make it inclusive, rather than exclusive, and therefore available to all consenting, committed adults. We should do this out of fairness and for the good of society. Third, we should establish affordable, quality child care for all children because children and mothers need it, and because it would afford us some control over children's relations with peers that Harris tells us are so important. And fourth, regardless of whether a father's presence at home affects children's development, we should lure fathers back to their families because child care is easier when two or more people do it. How do we accomplish this? Perhaps by advertising — that's how we sell Coca-Cola, deodorant and frankfurters.

Thank you. I enjoyed this.

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136. *See id.*