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THE FAMILY LAW DOCTRINE OF EQUIVALENCE

Amy L. Wax*

BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW. By *Nancy D. Polikoff*. Boston: Beacon Press. 2008. Pp. 259. \$24.95.

Students of patent law learn the doctrine of equivalents. According to the doctrine, a patent protects an invention that does “‘the same work in substantially the same way, and accomplish[es] substantially the same result,’ ” as the device described in the patent, even if it differs “‘in name, form, or shape.’ ”¹ In her new book, Nancy Polikoff² has fashioned something like a parallel doctrine for families. Let’s call it (with a slight play on words) the family law Doctrine of Equivalence. In today’s world, according to Polikoff, a broad set of relationships now plays the same role as marriage and traditional families once did in people’s lives. Conventional forms of family should thus receive no special legal protection. Rather, the law should extend similar privileges to the range of living arrangements that individuals choose for themselves (p. 3).

Like its patent law parallel, the family law Doctrine of Equivalence is grounded in an empirical observation: for more and more people, new family structures have effectively replaced conventional forms. It follows that the law should disclaim distinctions that favor traditional families over alternatives. Although variations on Polikoff’s theme find expression in the work of other academic and nonacademic commentators,³ her case for revolutionizing the legal regulation of families is particularly impassioned, learned, and clear. She wants to abolish a system grounded in formally defined relationships like biological parenthood and marriage in favor of functional incidents like actual dependency, mutual aid and affection, and voluntary association. In her ideal scheme, the category of family would be radically transformed. Entitlements and rights traditionally grounded in marriage and biological relationships will instead arise from a virtually unlimited set of self-declared affiliations (pp. 208–14).

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1. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950) (quoting *Mach. Co. v. Murphy*, 97 U.S. 120, 125 (1877)).

2. Professor of Law, American University Washington College of Law.

3. See, e.g., AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002); *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (Robin Fretwell Wilson ed., 2006); Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 *RUTGERS L. REV.* 377, 380–88 (2007).

Polikoff bills her push to expand the range of protected and respected family forms as a practical accommodation to social change and as a long overdue attempt to level the playing field for those who reject or fall outside conventional structures. But her project draws considerable strength from a wariness toward marriage that proceeds from familiar feminist assumptions. She is not shy about stating the goal: to “‘knock marriage off its perch’” (p. 90). For Polikoff, marriage cannot be redeemed from its patriarchal origins. As society’s main instrument for “polic[ing] the boundar[ies] between acceptable and unacceptable sexual expression” (p. 11), enforcing rigid gender roles, and imposing “catastrophic consequences” on unconventional sexuality, marriage is a central instrument of women’s subordination (p. 12). Because she rejects the distinction between licit and illicit sexual conduct, Polikoff has no use for marriage as an instrument of social control. For her, marriage’s “sexuality-channeling” function is both oppressive and ineffectual and serves no legitimate purpose (p. 11). Rather, marriage is both arbitrary and overly restrictive—an artificial construct that imposes unjustified costs on those who fail at it or choose to deviate from it. Whether they know it or not, women are best served by stripping marriage of its social and legal privileges.

Polikoff’s feminist disdain for marriage leads her straight to the family law Doctrine of Equivalence. From her premise that marriage is a tainted institution harmful to women’s interests, she concludes there is no reason to believe that “marriage is better than other family forms,” and thus no warrant for its favored position in law and policy (p. 99). Her goal is not to mend marriage, but ultimately to end its hegemony (Chapter Seven). Unlike some feminists, she does not come out for abolishing the institution of marriage outright (although one surmises this would not displease her). Rather, she is adamant about eliminating its advantages and significance. The objective is to reform current law to deprive marriage of its special place. According to her, marriage should not be favored, encouraged, or privileged in any way. It should receive no approbation, nor be accorded distinct recognition of any kind.

While *Beyond (Straight and Gay) Marriage* is a valuable addition to the ongoing debate about how the law should regulate marriage and family life, its thesis is ultimately flawed. The legal project of abolishing all distinctions between traditional married couples with children and other forms of family is both ill advised and futile. The evidence is overwhelming that heterosexual married-couple families play an indispensable role in social life because they are best equipped, on average, to perform the central functions of child-rearing and social reproduction. Because not all family types are intrinsically as good at these tasks, not all families should be regarded as equivalent, either informally or in the eyes of the law.

Before delving into the shortcomings of Polikoff’s position, it is important to note this book’s virtues. Polikoff is a deft navigator of the debate now raging over the future direction of the family and the law regulating it, and a capable and shrewd expositor of her own commitments. Her skillful outline of current state and federal trends, and her clearly defined position, make

this book an important contribution to the debate on marriage. Although existing ideas about family run the gamut, the principal approaches can be denominated as traditionalist or pluralist.⁴ Polikoff resoundingly rejects the traditionalist framework, which stresses the centrality and desirability of marriage, the significance of sex differences, and children's paramount interest in being raised by their own two biological parents, because she does not regard heterosexual, married couples as the fundamental pillar of social reproduction, she seeks to debunk the standard justifications for promoting the formation of these conventional families. Embracing a pluralist approach, she sees biological links as dispensable and biological parents' participation in childrearing as optional. For her, there is no natural hierarchy among different settings for raising children and no reason to believe that two-parent married-couple families are intrinsically better. As a framework for securing the well-being of its members, such traditional families are neither morally nor functionally superior to other types that have now proliferated in society. Indeed, no type of family deserves greater social or legal recognition.

Polikoff's clarity on where she stands is a strength. She draws a clear line in the sand between the opposing positions that define the culture wars over family form, and places herself firmly on one side. Likewise, Polikoff pulls no punches in confronting the tensions between her commitment to family diversity and the push to legalize same-sex marriage. In her forthright refusal to paper over irreconcilable differences, Polikoff draws a useful picture of the same-sex marriage movement's cultural commitments and their conflict with aspects of the pluralist manifesto (Chapters Three through Five). As Polikoff recognizes, most proponents of same-sex marriage do not seek to demote marriage from its elevated social and legal position, but rather to reform it selectively (Chapter Five). Apart from seeking admission for same-sex couples, proponents advocate no fundamental change in marriage's meaning or hallowed social role. Rather, they seek to signal their reverence and their willingness to subject themselves to marriage's strictures and responsibilities. Thus, the same-sex marriage movement is essentially conservative: it does not challenge the marital status quo, save for finding a place for gay couples within it.

Indeed, many gay-marriage proponents recognize that the most persuasive case for inclusion rests on acknowledging marriage's unique and pivotal role in social relations. Vocal advocates such as Andrew Sullivan and Jonathan Rauch laud marriage's virtues, extol its advantages, and seek to preserve its formal and informal incidents (pp. 83–84). They take as given that marriage is uniquely effective in protecting adults' interests in stability, prosperity, and happiness. Although gay-marriage proponents are generally tolerant of family diversity and support government aid to unconventional families, many acknowledge marriage with two parents as the

4. Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 *SAN DIEGO L. REV.* 1059 (2005) [hereinafter Wax, *The Conservative's Dilemma*]; Wax, *supra* note 3, at 380–88.

ideal setting for raising children.⁵ All in all, same-sex marriage proponents do not seriously question that marriage is the best foundation for cohesive families. Nor do they deny that the institution possesses unique strengths.⁶

Polikoff will have none of this fetishizing of marriage. She launches a bold and sustained critique of the legalization movement as fundamentally at odds with the goal of “facilitating social, legal, and economic support for diverse family forms outside the patriarchal family” (p. 48). If, as she maintains, the ultimate objective is a system that values all families, then it follows that “less marriage, not marriage, [is the] vision” (p. 48; emphasis omitted). Although she acknowledges that giving same-sex couples marital privileges might foster equal rights for gays in the short term, she insists that “it is not a sensible approach toward achieving just outcomes for the wide range of family structures in which [gay and other] people live. Those outcomes depend on eliminating the ‘special rights’ [for] married couples . . . and meeting the needs of a range of family forms” (p. 84).

In Polikoff’s view, not only does the push to recognize same-sex marriage offer little to most unconventional families, but “the logic of the arguments made to win converts to [gay] marriage equality risks reversing, rather than advancing, progress for diverse famil[ies]” (p. 98). Although Polikoff does not spell out the reasons behind this assertion in detail, her discussion makes the contours clear. First, the insistence that gays need same-sex marriage, and that their exclusion works an injustice, depends on marriage’s retaining special rights, advantages, and privileges. The advantages cited are not just legal. That marriage carries innate, structural virtues further underwrites the argument that gay marriage is good for individuals and society and that preventing gays from marrying unjustly deprives them of the benefits of participating in a superior institution.⁷ Conversely, the push to “value all families” is at odds with the legalization effort, because equal treatment for a broad range of associations necessarily detracts from the urgency of the same-sex marriage cause. If the privileges accorded marital relationships are extended to a more diverse set of arrangements, then gay people’s need for marriage diminishes and the case for allowing them to marry becomes less compelling.

Polikoff’s book is also helpful in setting these tensions against recent legal and social developments. It is ironic that the cause of same-sex marriage has gained strength just as marriage has declined in both legal significance

5. See, e.g., ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002); JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 107–08 (2004).

6. To be sure, there are fault lines within the same-sex marriage community, with some proponents expressing ambivalence about aspects of marriage as conventionally understood. Whether marriage must entail an exclusive sexual commitment is one issue on which gay-marriage advocates express a range of views. A significant portion of the gay community has long endorsed greater sexual freedom and regarded sexual monogamy as repressive. This stance finds expression in a tolerance for sexually “open” marriage and the refusal to posit sexual fidelity as central to marital relationships. For a discussion of this issue, see The Federalist Society, *Debates—Same Sex Marriage*, <http://www.fed-soc.org/debates/dbtid.24/default.asp> (Aug. 6, 2008).

7. See RAUCH, *supra* note 5.

and popularity. In many quarters, marriage is viewed as just one “lifestyle” choice among many, rather than as the unassailable foundation of social life.⁸ Polikoff skillfully outlines the developments that have brought us to the present juncture, highlighting signal changes in the legal landscape. The elimination of distinctions based on illegitimacy (pp. 26–29), the introduction of no-fault divorce (pp. 31–32), the decline in marriage as the chief conduit for fathers’ rights (pp. 23–26), the rejection of moral-conduct tests for welfare benefits (pp. 28–29), and the move away from customary moral judgments in assigning custody of children (pp. 32, 182–83) have all helped dissolve old categories and erode old restrictions. As Polikoff notes, marriage is “no longer necessary to create legally recognized relationships with children” nor to “stave off moral judgments enforced by law” (p. 31). Polikoff’s account shows that we have thus already traveled some way toward “‘knock[ing] marriage off its perch’” (p. 90).

These landmark changes in the law of marriage, legitimacy, paternity, entitlement, and divorce have been recounted before and are familiar to legal scholars. What are less well known are more recent developments: the march of small, incremental changes on the ground. Polikoff’s book is both enlightening and helpful in tracking interesting shifts in workplace practice and in the administration of myriad state, local, and federal programs bearing on people’s intimate and economic lives (Chapters Eight through Eleven). One key area of ferment is government and private benefits, where some programs have taken steps to accommodate diverse living arrangements. Since this necessarily requires rejecting simple formal categories (like biological ties and marriage) in favor of more intricate, functional rules, the landscape is complex. Polikoff provides an interesting picture of incremental moves, undertaken with little fanfare, to expand the types of relationships that trigger entitlement to privileges, benefits, and decision-making powers that had previously been narrowly reserved for traditional family members. These “second wave” transitions from form to function have proceeded on multiple fronts toward a recognition of “economic interdependence,” cohabitation, dependent caretaking and childrearing, and other nonconventional ties as the basis for recognizing various claims and authorizing disbursements. From workman’s compensation (pp. 196–202), to death benefits (pp. 193–96), to health benefits (pp. 146–58), to health decision-making (pp. 159–68), to family leave (pp. 168–73), programs have proceeded by fits and starts to create a surprising amount of leeway, further eroding the primacy of traditional marriage-centered relationships.

Despite the Defense of Marriage Act, even the federal government has joined this trend. Federal employees can now use sick leave to take care of anyone related by “‘blood or affinity,’” with “affinity” covering a range of

8. See, e.g., ELIZABETH FOX-GENOVESE, *MARRIAGE: THE DREAM THAT REFUSES TO DIE* 45 (2008) (“The notion of marriage as the union of one woman and one man has been dissolved in a flood of options, reduced to the status of one ‘choice’ among many.”).

relationships outside the standard legal categories.⁹ Another example of the expansion of benefits beyond legally formalized relationships is the Mychal Judge Act, named after an openly gay New York City fire department chaplain who died at the World Trade Center on 9/11. The Act assigns federal statutory funds to the decedent's designated recipient of his or her life insurance policy—which can include a nonmarital and/or same-sex partner (pp. 143–44). In addition, Polikoff presents some intriguing international developments. She describes how New Zealand and Canada, for example, have steadily moved from formal to functional criteria for a range of rights, benefits, and duties previously tied to narrow definitions of family (Chapter Six).

Polikoff's treatment of the legal landscape does have its shortcomings. Because Polikoff does not purport to provide a systematic and comprehensive review of the erosion of traditional restrictions, her discussion is necessarily spotty and selective. This makes it all too easy for her to sidestep difficult issues and avoid any serious analysis of potential drawbacks of the changes she documents and the additional legal reforms for which she advocates. These include line-drawing problems, legal ambiguities, administrative burdens, moral hazard, and hard cases. Her examples of what can be seen as the Doctrine of Equivalence at work have us wondering about the challenge of administering such an ill-defined expansion.

Polikoff's proposed loosening of categories would allow families to self-define and self-validate. And, unguided by traditional understandings and expectations, many of the informal relationships she envisions will likely be ambiguous, fragile, and short-lived. Do the rules therefore not invite conflicting claims, self-serving wrangling, and gaming the system? Are the liberal criteria regarding health-care decision-makers and entitlement to dependent-care leave, for example, prone to abuse? What is the status of men—related or not—who live with and contribute to children's care temporarily? (As I discuss in more detail below, men's roles are something Polikoff says little about.) What about erstwhile cohabiting partners who have now departed? What if there are multiple former or present partners claiming privileges? Do all retain rights and/or responsibilities? How should the system deal with conflicting claims? What of the scarce resources eaten up in resolving complex disputes? Polikoff's theoretical acceptance of every imaginable permutation of "family" does not get tested by difficult cases. Likewise, in her allusions to countries such as Australia and Canada, where functional relationships sometimes hold sway (Chapter Six), Polikoff fails to delve into how those countries deal with problematic cases. In sum, Polikoff's presentation has too much of the flavor of the advocate's brief. In rooting for her paradigm shift, she paints a picture that is suspiciously upbeat and one-sided. For all we know, it's all smooth sailing.

Polikoff's boosterism is reflected in the personal stories she presents, which finesse similar thorny questions. Consider Victoria and Laura, the

9. P. 104. See U.S. Office of Personnel Mgmt., Sick Leave to Care for a Family Member with a Serious Health Condition, <http://www.opm.gov/oca/leave/html/112week.asp> (last visited Nov. 13, 2008).

ideal poster children for rules allowing second-parent adoptions outside of marriage (p. 85). The couple had lived together for ten years when Victoria gave birth to Maya. Because the couple was fortunate to live in a state that allowed second-parent adoptions, Laura adopted Maya and became her legal parent. When Victoria died in a car crash two years later, Maya was not left an orphan. So far so good, but this account leaves too many questions unanswered. Who is Maya's biological father? Was he ever married to Victoria? What are his rights, if any? Would, or should, Laura be entitled to mother's social security benefits on the father's account if the father should die?¹⁰ Would Laura have control of any money the father left Maya? Suppose Laura (Maya's adoptive mother) had left the family and another lover was on the scene when Victoria died? What would that person's rights and obligations be? Could the new lover adopt Maya as well (so that Maya would have three, or even four, parents)? Although not all these issues are specific to gay families, they are more likely to arise in that context. Gay parents cannot, by definition, be shared biological parents. This means another biological parent will often be hovering in the wings. Polikoff barely mentions the vexed issues that arise from the existence of an extrafamilial or "third" parent. Yet such parents are a not-uncommon feature of nontraditional families, whether straight or gay.

Polikoff's unsystematic approach has other drawbacks. Her generous use of heartwarming stories and sympathetic anecdotes allows her to sugar-coat reality. The individuals she profiles are invariably organized, well meaning, sober, hard working, loyal, and responsible. Generous, civilized, long-time cohabiting partners, fond gay lovers, faithful and steadfast relatives and friends people this book. She seems to be saying "look at these models of bourgeois rectitude living outside the constraints of bourgeois institutions! That proves it can be done." It follows, she suggests, that conventional institutions serve no useful purpose. This is a stark non sequitur. Presenting accounts of people on their best behavior in lieu of hard data allows her to cherry-pick her examples while ignoring the possibility that her exemplars may not be typical. By ignoring population trends in favor of appealing individuals, Polikoff is virtually oblivious to actual patterns on the ground. Not only does Polikoff's anecdotal method allow her to prettify her examples, but it also permits her to ignore an unpretty demographic reality.

No one can deny that "alternative" families sometimes consist of genteel alliances between long-time cohabiting lovers, or decades-long bonds between college-educated same-sex partners who tend lovingly and faithfully to each others' children. But more often they do not follow these patterns. Polikoff's examples obscure this. Like advertisements featuring idealized senior citizens (with grey hair incongruously placed on youthful faces and bodies), she seamlessly transfers the virtues associated with traditional families to her unconventional alternatives.

10. See, e.g., *Califano v. Boles*, 443 U.S. 282 (1979) (holding that only mothers married to the primary beneficiary are entitled to mother's benefits, but failing to resolve that issue in the context of a second-parent adoption).

The real story, unfortunately, is that these virtues don't travel well. In our society at least, nonmarital families are too often populated by the fickle and the feckless. The decline of marriage has generated a sexual and familial landscape of confusion, instability, and disorder. Demographers and ethnographers have recently documented that, for all but the most educated and affluent, extramarital relationships are frequently marked by short-lived liaisons, sudden schisms, paternal abandonment, ambiguous relationships, notorious and callous infidelities, and repeated betrayals that routinely leave women and children in the lurch.¹¹

Consider for example the recent increase in what is known as multiple-partner fertility—that is, individuals bearing children by more than one partner.¹² In most cases, the results of this behavior can only be described as domestic chaos. The dizzying set of relationships of one couple described in the literature is not atypical. Joe (a lab technician) and Mary (a bus driver) are partners with their own shared biological child.¹³ But Joe also has four extramarital children by three other women and Mary has four children by a former partner. Not surprisingly, as noted in the article describing this family, Joe and Mary live “lives of extraordinary complexity.”¹⁴

That complexity is not without consequences. Having children by multiple partners is a formula for family conflict, because the adults involved are likely to experience divided loyalties, jealousies, and resentments. These conflicts, in turn, produce instability: people who are not getting along are less likely to stay together for the long haul, and certainly not for the two decades required to raise children. Likewise, the lives of this couple's children will likely be vexed. Children thrive on certainty, predictability, and routine, which this situation is unlikely to provide.

It is unclear who has authority over each child in this extended family and who possesses the power to make critical decisions for his or her upbringing. Likewise, it is hard to know who bears the ultimate responsibility

11. See, e.g., KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 5–6 (2005); ADRIAN NICOLE LEBLANC, RANDOM FAMILY: LOVE, DRUGS, TROUBLE, AND COMING OF AGE IN THE BRONX (2003); Amy L. Wax, *Too Few Good Men*, POL'Y REV., Dec. 2005–Jan. 2006, at 69, 70 (reviewing EDIN & KEFALAS, *supra*). See generally Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 FAM. L.Q. 567, 577 (2007) [hereinafter Wax, *Engines of Inequality*].

12. Demographers have documented a recent dramatic surge in multiple-partner fertility. See, e.g., Maria Cancian & Daniel R. Meyer, *The economic circumstances of fathers with children on W-2*, FOCUS, Summer 2002; Marcia J. Carlson & Frank F. Furstenberg Jr., *The Prevalence and Correlates of Multipartnered Fertility Among Urban U.S. Parents*, 68 J. MARRIAGE & FAM. 718 (2006); Karen Benjamin Guzzo & Frank F. Furstenberg, Jr., *Multipartnered Fertility Among American Men*, 44 DEMOGRAPHY 583, 596 (2007); Cassandra Logan et al., *Men Who Father Children with More Than One Woman: A Contemporary Portrait of Multiple-Partner Fertility*, CHILDTRENDS RES. BRIEF (Childtrends, Washington, D.C.), Nov. 2006, at 1; *Multiple Partner Fertility*, FRAGILE FAMS. RES. BRIEF (Bendheim-Thoman Ctr. for Research on Child Wellbeing, Princeton Univ., Princeton, N.J.), June 2002, available at <http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief8.pdf>; Wax, *Engines of Inequality*, *supra* note 11, at 575.

13. David J. Pate, Jr., *The life circumstances of African American fathers with children on W-2: An ethnographic inquiry*, FOCUS, Summer 2002, at 25, 26–28.

14. *Id.* at 26.

for each child's financial support. In the same vein, multiple-partner fertility tends to generate multiple households, each with a call on parental resources. The key players will have conflicting priorities, with extramarital partners engaged in a tug-of-war for whatever funds are available. These issues are especially unsettling because there are no established guidelines, embedded in long practice, custom, or law, regarding how the adults within such a tangled web should deal with their roles and responsibilities. The protagonists must make it up as they go along. Oh Brave New World that has such people in it!

The difficulties inherent in the diverse array of family configurations arising from multiple-partner fertility have been described by social scientists who study this growing phenomenon. Two prominent researchers in this field have acknowledged that patterns arising from multiple liaisons "create[] ambiguities in familial norms and roles and competing expectations and obligations."¹⁵ Parents in such families "must make difficult choices about how to allocate their time, resources, and emotion[s]."¹⁶ The researchers conclude that "in all likelihood, such circumstances diffuse the total level of parental investment that children will receive."¹⁷ In short, clarity, continuity, stability, transparency, and clear lines of responsibility and authority—all indispensable elements for effective childrearing—are radically compromised by such arrangements.

In light of these observations, it is important to step back and ask what Polikoff's "valuing all families" approach has to say about families like these. There is no doubt that these families are increasing in number. Is it really in society's best interests to "value" such families, even to the point of being indifferent to their formation? More generally, should society assign equal value to any and all families that people might choose to create? That is, should law and policy really strive to adopt a scrupulously neutral, evenhanded, and nonjudgmental stance toward the behaviors that anyone might engage in, or the living arrangements that might result, regardless of consequences and costs to themselves and others? In recommending that the law recognize and honor all associations that march under the rubric of family, does Polikoff really believe that there are no boundaries or limits, no critical distinctions to be made? Because Polikoff refuses to confront the grim reality of the traditional family's decline, she never has to say what those boundaries are.

The sheer implausibility of putting all families on a par is thrown into stark relief by a simple thought experiment. Each year, I tell the students in my social welfare law and policy seminar about Joe, Mary, and their various offspring. I then ask my students: if Joe left Mary and offered to marry your daughter, what advice would you give her? Would you try to dissuade her? Almost without exception, the students' answer is that they would. Almost

15. Carlson & Furstenberg, *supra* note 12, at 727.

16. *Id.*

17. *Id.*

all view Joe as an unsuitable son-in-law. They would warn their daughter off. (They have the same reaction when the question is posed, *ceteris paribus*, for Mary.) The students offer various reasons for their reaction, but the bottom line is this: Joe and Mary have behaved in an irresponsible manner. If only up close and personal, sound judgment kicks in.

A moment's reflection reveals that the implications of Joe's and Mary's conduct extend beyond the merely private. The reasons are manifest, but bear repeating. As a matter of demographic fact, the relationships that give rise to families like this one are often extramarital, simultaneous, and short-lived.¹⁸ These patterns generate a host of ills. Early and out-of-wedlock childbearing and frequent changes of partners are formulas for downward mobility. These behaviors present formidable obstacles to procuring a decent education and maintaining steady, well-paid employment.

The children raised in such families are likewise disfavored. Because the hallmarks of well-functioning families—clarity, continuity, stability, transparency, and clear lines of authority and responsibility—tend to be lacking in such families, they provide a relatively poor environment for children's upbringing. Indeed, these deficits extend to unconventional and extramarital arrangements of all types, including single-parent, blended, cohabiting, and step-parent families. On average, children raised in families that deviate from the paradigm of two married, biological parents have more health problems, suffer from higher rates of abuse and neglect, and are more likely to fall behind in school, become teen mothers, be unemployed, fall into poverty, and commit delinquent acts and adult crimes.¹⁹

An important consequence of the growth of irregular and unconventional families is that the costs of childrearing, and the fallout from inadequate childrearing, are increasingly socialized. As Charles Murray pointed out decades ago, the single-parent family is not a viable economic unit except for the most privileged.²⁰ Robert Lerman has documented that married-couple families tend to be more solvent and financially secure than otherwise comparable cohabiting partners.²¹ Likewise, multiple relationships create extra households and extra financial burdens. Because multiple-partner families can rarely be self-supporting, they tend to impose a greater burden on the taxpaying public. The inevitable dependency of many single-parent and fragmented families, and the ills to which irregular families are prone, inevitably generate strenuous calls for new programs and policies to address these deficiencies. These measures rarely do much good, because the government cannot substitute for effective families. Nonetheless, we are

18. See *supra* note 11 and accompanying text.

19. See Wax, *Engines of Inequality*, *supra* note 11, at 579–80; *supra* notes 11–17 and accompanying text.

20. Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14.

21. ROBERT I. LERMAN, HOW DO MARRIAGE, COHABITATION, AND SINGLE PARENTHOOD AFFECT THE MATERIAL HARDSHIPS OF FAMILIES WITH CHILDREN? 9–10 (2002), available at http://www.urban.org/UploadedPDF/410539_SippPaper.pdf; ROBERT I. LERMAN, MARRIAGE AND THE ECONOMIC WELL-BEING OF FAMILIES WITH CHILDREN: A REVIEW OF THE LITERATURE 10 (2002), available at http://www.urban.org/UploadedPDF/410541_LitReview.pdf.

reluctant to make the children bear the sins of the parents. But our collective attempts to shore up failed families will inevitably generate unfairness and moral hazard. Those who conduct themselves with prudence and restraint, and thus minimize the risk of imposing costs on others, are made to pay for those who do not. In short, the behavioral choices that give rise to “unconventional” families are too often unwise, irresponsible, and imprudent. The people who create such families frequently engage in costly and self-defeating behaviors. And such arrangements are far from rare. Indeed, except among the most affluent and educated, they are increasingly commonplace.²²

In this vein, Polikoff’s careful selection of appealing stories ignores ominous demographic trends. In particular, she fails to discuss important race and class dimensions of family diversity. The decline in marriage is not spread evenly throughout the population. To the extent that marriage is associated with a panoply of advantages and positive outcomes, disparities in marriage and marital stability by race and class have exacerbated existing inequalities, and will continue to do so for decades to come.

Take, for example, multiple-partner fertility. This is not an equal-opportunity phenomenon. White, college-educated men only rarely father children by multiple women and do so almost exclusively in the context of remarriage after divorce. Less-educated men father children by multiple women more frequently, and usually outside of marriage.²³ Multiple-partner fertility is particularly common among African Americans.²⁴ These patterns are emblematic of more far-reaching race and class divisions. Well-educated whites still marry at very high rates, and their relationships are remarkably stable. Their children frequently grow up in households with two biological, married parents. Most importantly, children in this group are usually raised by their biological fathers—a circumstance strongly associated with positive outcomes.²⁵

In sum, affluent and nonminority children disproportionately benefit from families characterized by continuity and stability, with clear lines of responsibility and authority. In contrast, children with parents who are less educated, black, or hispanic, too often grow up with a divorced or single mother, or in blended families, or with step-parents or cohabiting unrelated adults. The trend for these groups is toward greater instability, with falling rates of marriage and rising numbers of extramarital births. These patterns exacerbate poverty and weaken children’s ties with responsible adults, all of which correlate with worse child outcomes.²⁶ In short, as Kay Hymowitz has

22. See Wax, *Engines of Inequality*, *supra* note 11, at 575.

23. For a more detailed discussion of the social science research, see *id.* and research cited therein.

24. *Id.*

25. See, e.g., Sandra L. Hofferth, *Residential Father Family Type and Child Well-Being: Investment Versus Selection*, 43 *DEMOGRAPHY* 53, 53–54 (2006).

26. See Wax, *Engines of Inequality*, *supra* note 11 (providing an overview of the literature); NORVAL GLENN & THOMAS SYLVESTER, *INST. FOR AM. VALUES, THE SHIFT: SCHOLARLY VIEWS OF*

noted, marriage has become both a marker and a generator of cultural success.²⁷ Because married families are most effective in building human capital and securing the welfare of the future generations, the decline of such families among society's less privileged contributes to growing inequalities by class and race.

Polikoff has little to say about these social facts and thus never confronts potential implications. Her discussion of fatherlessness is particularly inadequate. The term "fatherless" barely appears in the book, and any worries about men's wholesale disengagement from childrearing are banished. Although she offers brief praise for gay male families, she relentlessly disparages the notion that father absence might contribute to society's ill. Her failure even to acknowledge that father abandonment might be a misfortune for children, a form of adult misfeasance, or a source of intractable disparities between the haves and the have nots is unsurprising in light of her blind commitment to valuing all families. Likewise, she is oblivious to the link between marriage and father absence. Specifically, she ignores the evidence that fathers are far more likely to live with their children if married to their mother. On Polikoff's view, these patterns are of no concern. By definition, valuing all families means acknowledging no preference for father presence over father absence, or for fathers' involvement over their

FAMILY STRUCTURE EFFECTS ON CHILDREN, 1977–2002 (2006), available at <http://www.familylibrary.org/assets/pdf/theshift.pdf> (noting the consensus, based on considerable accumulated evidence, that, all else being equal, living out one's entire childhood with married biological parents is best); W. BRADFORD WILCOX ET. AL., INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCE (2nd ed. 2005); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, THE FUTURE OF CHILDREN, Fall 2005, at 75, 85 (summarizing the evidence of the impact of family structure on child well-being and concluding that "the weight of the evidence strongly suggests that growing up without two biological parents in the home increases children's risk of a variety of cognitive, emotional, and social problems"); Paul R. Amato & Bruce Keith, *Separation from a Parent during Childhood and Adult Socioeconomic Attainment*, 70 SOC. FORCES 187 (1991); Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607 (2004); Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILDREN'S RES. BRIEF (Childtrends, Washington, D.C.), June 2002.

27. KAY S. HYMOWITZ, MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE 19–21 (2006). Along these lines, commentators have acknowledged the association of intact families with privilege and enhanced life prospects:

Social solidarity and even simple familial stability have become part of the package of private privileges available to the well-to-do. Behavioral surveys consistently show that, regardless of their political leanings, the better-off and better-educated live more traditional personal lives: They are more likely to marry, far less likely to divorce, less likely to have children outside of marriage, and more likely to remarry when they do divorce than their less accomplished peers. In addition, their kids are more likely to be academically successful and go to college, repeating the cycle.

The new Puritanism and cultural conservatism [Robert] Frank described can also be seen as symptoms of how, in today's society, traditional values have become aspirational. Lower-income individuals simply live in a much more disrupted society, with higher divorce rates, more single moms, more abortions, and more interpersonal and interfamily strife, than do the middle- and upper-middle class people they want to be like.

disengagement. It follows that any connection between marriage and effective fathering can have no bearing on law or policy.

In light of the demographic realities, should society be utterly indifferent to the growth of “alternative” families? According to Polikoff, any consternation is off limits, and “discrimination” of any kind, in any form, is verboten. As already noted, nowhere in this book does Polikoff permit any distinctions in society’s stance toward reproductive choices and family structure. She hews to the line that each arrangement is as good as—no better or worse than—any other, and any attempt at sexual or moral regulation is suspect. Her worldview refuses to acknowledge that some sexual or reproductive choices might be less propitious than others, or that some forms of family might tend toward greater dysfunction. Disapproval is thus banished and judgment suspended. Polikoff’s response to disturbing demographic trends is to repeat the mantra that we must value and honor all families.

These bromides leave us stranded. The declensions of grudging acceptance, tolerance, approval, advocacy, and wholesale embrace—the nuanced stations of our moral life—are collapsed. We are forced to operate on a flattened landscape of morality, law, and policy. We are rendered helpless in our quest to quell the rising tide of fragmented families.

Of course, rejecting Polikoff’s view does not make things simple. Rather it raises some hard questions about when and how people’s decisions to behave responsibly or irresponsibly, well or badly, in their personal, sexual, and reproductive lives should influence law and policy. These are serious questions that do not admit of easy answers. Because Polikoff staunchly refuses to acknowledge that some families might be more or less desirable than others, or more or less healthy for their members or for society as a whole, she never grapples with the really important issue, which is what society can fairly and reasonably do to discourage unwise reproductive choices—or at least to refrain from encouraging them. This dilemma receives no consideration.

In her quest to purge law and practice of any preference for one family form over another, Polikoff not only abandons moral judgment, but also disparages decades of customary practice and rejects any value for established conventions. In dismissing the virtues of traditional family structures, Polikoff’s principal target is marriage itself. Polikoff’s antipathy to marriage is of a piece with her refusal to regard this institution as performing any useful function. Specifically, she rejects the notion that marriage promotes family stability. To be sure, Polikoff is hardly alone in regarding marriage as an empty form and useless vestige—a residual folkway to which some people cling out of mindless habit. Emblematic of the position is a remark by Cass Sunstein and Richard Thaler, in a book chapter advocating the privatization of marriage, that “[n]ow that [divorce] is neither forbidden nor rare, it is hard to contend that the official institution of marriage is essential as a

way of promoting the stability of relationships.”²⁸ This approach radically misconceives how marriage works. Those who dismiss marriage as strictly discretionary are blind to marriage’s heuristic and channeling functions. On their view, it makes no difference if people’s choices are unguided by clear precepts or cut loose from age-old expectations. Tradition does not shape behavior, nor do established institutions help people make choices that minimize harms and costs to others. Rather, moral abstractions and “good values” can substitute for the concrete, down-to-earth scripts that established institutions like marriage provide.

Unfortunately, social facts belie this view.²⁹ The evidence suggests that marriage helps many ordinary people lead better lives. Across a range of social indicators, including wealth, health, violence, longevity, and welfare outcomes for adults and children, alternatives to marriage simply are not as stable, and do not function as well, as marital relationships.³⁰ The reasons are not surprising. With all its imperfections, marriage still provides a ready-made set of expectations, understandings, and aspirations that are widely known. Marriage defines a panoply of duties that family members owe to one another.³¹ Marriage has a clear cultural meaning and an accepted normative force. Essential to marriage are a firm, long-term commitment to mutual aid and support, and a pledge of exclusivity. Although these commitments may sometimes fail, more often they do not. Marriage’s long track record as a building block for families and a foundation for beneficial relations between the sexes suggests that ordinary people desperately need the anchor of clear expectations, and that they respond to them.

The alternatives to marriage create a plethora of choices and uncertainties. The understandings, roles, and duties that attend the myriad liaisons short of marriage are murky, confused, conflicting, and poorly defined. The lack of clear rules offers plenty of leeway for self-serving behavior, betrayal, and irresponsibility. In the name of moral autonomy and tailored choice, alternatives to marriage function as a convenient cover for ignoring duties to others, abandoning the vulnerable, and moving on. On the institutional view, individuals operating within a nonjudgmental world of personalized choices and moral experimentation are less likely to engage in stable social relationships, because individuals will tend to emphasize their own well-being. Deprived of the props of sexual morality and customary expectations, individuals cannot be trusted to give due regard to others or even to comprehend the long-term consequences of their actions. On this vision of social life, the move to substitute a freewheeling regime of self-prescribed improvisation for the settled expectations marriage provides is a radical step indeed.

28. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 220 (2008).

29. See generally Symposium, *Marriage and Child Wellbeing*, *FUT. CHILD.*, Fall 2005.

30. See *supra* text accompanying notes 19–21 and note 26.

31. Wax, *The Conservative’s Dilemma*, *supra* note 4, at 1090; see also David W. Murray, *Poor Suffering Bastards: An Anthropologist Looks at Illegitimacy*, *POL’Y REV.*, Spring 1994, at 9.

In embracing all families as essentially equivalent in their social potential and desirability and in repudiating marriage as the core context for family formation, Polikoff clearly rejects this institutional view. Is her rejection justified, or is the institutional view correct? Are alternatives to marriage just as good, or are they destined to function as second best? Despite the steady accumulation of social scientific evidence showing the benefits of traditional arrangements, the tools at our disposal do not permit a definitive answer. A conception of social life that sees moral expectations as most effectively embodied in transparent institutional forms is not amenable to airtight validation. The best that can be said is that such a vision has withstood the test of time—that all successful societies have limited sexuality and defined family through guidelines for acceptable and unacceptable conduct. This historical experience, coupled with data collected in the past two decades, strongly suggests that marriage is the best foundation for families.

In repudiating marriage and maintaining her insouciance toward demographic trends, Polikoff both evades and denies. The mistake, she contends, is to assume that novel families are somehow less stable or desirable or that they produce worse outcomes for adults or children. Once again, Polikoff's anecdotal approach provides cover. She takes refuge in the well-worn observation that stable, nonmarital families do in fact exist—that unconventional families *can be* as good as others. This no one would deny. But this truism ignores the concept of risk. The existence of exemplary nontraditional families has no bearing on whether nonmarital or unconventional families are as likely to cohere as more established forms.³² Assessing risk requires looking at populations, not individuals.

In this regard, Polikoff's Doctrine of Equivalence—that there are no meaningful differences across a range of family types—comes up against the large and complex body of data, discussed above, that links traditional families (married parents with shared biological offspring) to better outcomes for children. Against this evidence Polikoff launches a lawyerly three-pronged attack that makes generous use of alternative arguments. First, she casts aspersions on the social science evidence regarding the effects of family structure and strives to minimize its significance (p. 68). Second, she asserts that any observed disparities are amenable to a political solution (p. 68). Third, she insists that documented differences in children's outcome are really due to “‘selection effect[s]’” (p. 75). That is, it is not family structure *per se* but rather the situation or characteristics of parents that account for observed outcome differences.

Polikoff's discussion of selection versus causation taps into an ongoing social scientific debate about the relative contribution of money, family

32. See NORVAL GLENN & THOMAS SYLVESTER, INST. FOR AM. VALUES, *THE DENIAL: DOWNPLAYING THE CONSEQUENCES OF FAMILY STRUCTURE FOR CHILDREN 7* (2005), available at <http://www.familyscholarlibrary.org/assets/pdf/thedenial.pdf> (“[W]e found no examples of authors pointing out, for instance, that growing up in poverty does not *inevitably* result in poor child outcomes.” (emphasis added)); GLENN & SYLVESTER, *supra* note 26 (demonstrating that quantitative studies from 1977 to 2002 consistently show nontraditional family structures have a strongly negative effect on child welfare).

structure, neighborhood context, and parental characteristics to children's well-being.³³ Suffice it to say that Polikoff's position in this debate is extreme. Few social scientists in the field adopt Polikoff's view that family structure makes no differences because disparities in family functioning can be traced to the identity of parents. Her insistence that marriage, father absence, and biological relationships are inconsequential flies in the face of a shared dismay among demographers and policymakers across the political spectrum about the negative effects of family breakdown. This consensus is informed by multiple studies showing that, even when parental income, education, and other demographic characteristics are controlled for, traditional married families are more stable and produce better outcomes.³⁴ That traditional arrangements, on average and all else being equal, promote children's welfare suggests that family structure does matter to how children fare.

And all else is usually not equal: families that deviate from the "gold standard" paradigm of the married two-parent nuclear family often have lower income and fewer resources.³⁵ In addition, both the absence of a biological parent and the presence of an unrelated adult (especially a male adult) or stepparent in the home are linked to lower investments of parental income and attention.³⁶ And these domestic circumstances, which are more common in nonmarital families, are in turn associated with lower educational attainment and less socioeconomic success for children.³⁷

By quoting selectively from work on divorced and gay parent families, Polikoff makes light of the full range of social science evidence. To the extent she does review the data, her emphasis on selection effects is highly problematic. One problem is that she fails precisely to clarify what she means by "selection." Nowhere does she specify which factors apart from family structure she thinks account for observed differences in the effectiveness of disparate families. She never says whether she is referring relatively to intrinsic and fixed parental characteristics—such as intelligence, patience, industriousness, and restraint—or whether she means to include a broader set of categories, such as neighborhood, poverty, or even education, that

33. Compare, e.g., Moore et al., *supra* note 26 (summarizing data suggesting that family structure significantly influences outcomes), with Gregory Acs, *Can We Promote Child Well-being by Promoting Marriage?*, 69 J. MARRIAGE & FAM. 1326 (2007) (suggesting that effects attributable to family structure alone are small, and that marriage will make little difference to the welfare of many children in the absence of other life changes).

34. GLENN & SYLVESTER, *supra* note 26, provide an overview of some of this literature.

35. Laura Hamilton et al., *Adoptive Parents, Adaptive Parents: Evaluating the Importance of Biological Ties for Parental Investment*, 72 AM. SOC. REV. 95, 97 (2007) (noting that "[s]ociological work on family structure often focuses on the shortcomings of alternative families," and citing support for the difficulties "linked to alternative family structures"). Adoptive families often function well despite the lack of shared biological parents, but adoptive parents are highly self-selected and disproportionately drawn from a more affluent and educated segment of the population. *E.g.*, *id.* at 109.

36. See Wax, *Engines of Inequality*, *supra* note 11, and research cited therein.

37. See *id.*

arguably might be amenable to policy-based manipulation. She also fails to distinguish between overt and easily measurable traits—such as intelligence and education—and more covert and “unobservable” variables, such as personality or ability to delay gratification.

Why do these distinctions matter? First, social scientists investigating family structure routinely control for observable attributes such as parental education, income, and even intelligence. In general, most find that, even when comparing families that are matched on these factors, family structure continues to make a difference. Thus, existing data indicates that gaps in success rates are not due solely to disparate populations sorting into different types of families. Rather, family structure has independent significance.³⁸

Second, even if some nonstructural attributes of families might be amenable to improvement through government programs or alternative forms of assistance, others may be relatively unobservable and beyond the reach of known interventions. Setting aside the differences among families that social scientists already control for or that policies might be able to improve, the assertion that outcome differences are really due to selection suggests that the reason unconventional families are more troubled is that the people within them are more troubled—and inherently so. But if this is what really makes the difference, neither marriage, nor more resources, nor better government policies will help achieve the Nirvana of Equivalence for these families. Does Polikoff really buy into this counsel of despair? Does she really want to embrace the position that failure to marry is, in effect, a marker of weak character and a defective personality? Is marriage now the redoubt of society’s intrinsically successful, with the hapless and maladaptive relegated to “diversity?” The implications of this position are staggering. Consider that approximately sixty-nine percent of black children are now born out of wedlock.³⁹ If the problems documented for these children, as compared to those with otherwise similar but married mothers, are really due to “selection,” this means that their greater difficulties are traceable to the fixed traits of their biological parents. This is equivalent to saying that sixty-nine percent of black children are effectively destined to inferior outcomes by their parents’ personal shortcomings. I doubt Polikoff would accept her own conclusions.

Finally, Polikoff suggests that, even if some forms of family are generally less successful, equal recognition and government programs will eliminate any shortfalls. The position that public policy can compensate for the deficits of alternative families is a form of wishful thinking that retains remarkable vitality. It is also in tension with the strong version of the Doctrine of Equivalence, which holds that all families in fact work equally well. But never mind. An alternative version is that they *can* work equally well—either family structure doesn’t matter or it can be made not to matter as long as society takes the necessary steps. Thus, if social science

38. See sources cited *supra* note 26.

39. See ANDREW HACKER, *TWO NATIONS: BLACK & WHITE, SEPARATE, HOSTILE, UNEQUAL* 102 (1st Scribner trade paperback ed. 2003); HYMOWITZ, *supra* note 27, at 21 (2006).

shows that marriage functions best, then the government must somehow ensure that other families perform better. If legal privilege contributes to marriage's success, then those privileges must be eliminated. If marriage and traditional structures generate nonlegal advantages, government is duty bound to compensate for these. In short, by abolishing legal distinctions, removing discrimination, providing ample resources, and establishing supportive programs, we can make family structure irrelevant. Then all families will do equally well.

The problem with this position is that it flouts reality. There is no evidence that public intervention can level the playing field for families. Marriage continues to play a social role for which there are currently no substitutes. Can the family of Mary and Joe function as well as that of Mr. and Mrs. Smith and their own two children? Unlikely. The benefits of orderly, exclusive, intact relationships are just too great. The government cannot compensate effectively for the lack of seriousness and permanence that plagues many nonmarital or cohabiting relationships, nor can it make up for the uncertainties and instabilities endemic to complex living arrangements or the lack of shared biological ties. Likewise, no known policies can substitute for the daily presence and devotion of a father. The government can strive to get rid of formal distinctions, and society can try to reform its outlook, purge disparagement and disapproval, and regulate the workplace, business, and social life. But these changes cannot eliminate some families' inherent, structural flaws. Try as we might, we cannot hold society harmless for the risks posed by families that deviate from established forms.

Polikoff will have none of this. She is wedded to the Doctrine of Equivalence, in defiance of all common sense and facts. How to explain this stance? Her real sticking point seems to be marriage. Polikoff cannot bring herself to say anything good about it. In this, she is blinded by feminist ideology and a strong distaste for marriage's unsavory past. For her, marriage's history defines its present reality, as if little or nothing has changed for 200 years.

But time has not stood still for marriage. The institution has evolved, along with law and social attitudes, to accommodate fifty years of secular shifts in gender roles. Sharp divisions of labor and strict separation of spheres are now the exception rather than the rule. To be sure, dislocations and fault lines remain. Gender equality is far from complete, and men seem to benefit more than women from being married.⁴⁰ The reasons for this are complex, with both sexes complicit in an equilibrium short of strict sex role uniformity. All in all, and despite its questionable origins and the forces unleashed by the sexual revolution, marriage remains a robust and healthy institution among those who embrace it. The country's most educated and affluent—the white

40. See, e.g., LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 161–73 (2000); Linda Thompson & Alexis J. Walker, *Gender in Families: Women and Men in Marriage, Work, and Parenthood*, 51 J. MARRIAGE & FAM. 845, 846 (1989); W. Bradford Wilcox & Steven L. Nock, *What's Love Got to Do with It?: Equality, Equity, Commitment and Women's Marital Quality*, 84 SOC. FORCES 1321, 1339–42 (2006).

and Asian upper middle class—continue to marry at high rates. For those who take it seriously, there is good evidence that marriage contributes to life success and continues to serve its distinctive functions reasonably well. In short, the feminist bum rap on marriage is too harsh. We have not ended marriage, but we have come a long ways toward mending it.

To be sure, fewer people are marrying, and fewer children are being raised in traditional, heterosexual, married-couple families. The most vulnerable segments of our society virtually reject marriage despite its benefits. The reasons for this are controversial and poorly understood.⁴¹ The question is not whether this is happening, but whether it is a good thing. Since the answer is almost certainly no, the issue then becomes what, if anything, should be done about it. This important question cannot be addressed until the Doctrine of Equivalence is recognized for what it is—a chimera. Any sound policy must proceed from an understanding that conventional families, although far from perfect, are on average best equipped to do what families do best.

The position that traditional families are most desirable admits of exceptions, of course. Marriage is not for everyone, some marriages are destructive, and there will always be people who choose to make other arrangements. Nontraditional families will continue to exist and to benefit from many general programs that extend to all citizens. Nor, under the current legal regime, is marriage available to all, as few states recognize homosexual marriage.⁴² But the notion that an institution is useless unless it admits of no exceptions is a fallacy of the first order.⁴³ An option that is wrong for some may still be best for most. That good families come in many forms does not mean there is no better or worse. That some have beat the odds does not mean the odds don't exist.

So what is to be done? Traditional marriage between a man and a woman should maintain its vital position at the center of social life. Society should continue to encourage marriage by means formal and informal, and most people should strive for it. At the very least, we should hold the line against the traditional family's continuing erosion by preserving long-standing privileges for marriage and allowing most existing distinctions to stand. Above all, we should abandon the Doctrine of Equivalence and acknowledge marriage's unique and irreplaceable role. Although some will make other choices, marriage deserves its hallowed place. "Knocking marriage off its perch" will do little good, and will likely do great harm.

41. Wax, *Engines of Inequality*, *supra* note 11, at 569–70; *see also* EDIN & KAFALAS, *supra* note 11, at 4–5; Wax, *Too Few Good Men*, *supra* note 11, at 69.

42. For a discussion of the pros and cons of homosexual marriage, *see* Wax, *The Conservative's Dilemma*, *supra* note 4. *See also* The Federalist Society, *supra* note 6.

43. For more on this, *see* Wax, *The Conservative's Dilemma*, *supra* note 4, at 1072–73.