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A Proposal for a Feasible, First-Step, Legislative Agenda for Divorce Reform

Alan J. Hawkins*

I. INTRODUCTION

American sociologist Andrew Cherlin argues that the institutional boundaries of marriage have shrunk; marriage no longer effectively governs intimate associations before marriage, or structures “proper” pathways to the desired goal of a healthy, stable marriage.1 Personal development and individual emotions are at the core of modern marriage, rather than societal expectations and religious and civil norms.2 Accordingly, marriages are held together now by internal, psychological forces rather than external, societal forces, and these bonds are substantially weaker.3 As a result, divorce is common, with about one third of first marriages ending within ten years and about half ending within twenty years; second marriages have even higher rates of disruption.4 While the divorce rate has decreased since the 1980s,5 much of this is due to the fact that a great deal of family dissolution these days occurs outside the legal arrangement of marriage.6 Additionally, divorce rates among the less educated in society have actually been increasing.7

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5. Id.
6. CHERLIN, supra note 1.
While divorce can have positive effects on social and psychological functioning for some adults and children, especially when the divorce ends high-conflict marriages, empirical research finds that divorce generally puts children at two-to-three times the risk for a host of psychological, social, behavioral, and educational problems. Adults generally do not fare well in divorce either, especially those who did not initiate the divorce.

From a public perspective, divorce is not cheap. One study conservatively estimated the public cost to taxpayers of divorce (and relationship dissolution of unmarried parents) at $112 billion a year in the United States. Despite the fragility of contemporary marriage, especially for more disadvantaged Americans, a happy marriage remains an important life goal for more than 75% of young adults. And about half of U.S. adults, both more-and less-educated, believe that divorce should be harder to get than it is. One might expect, then, that legislators would be more interested in pursuing reforms that could help couples form and sustain healthy marriages. But this does not seem to be the case. Mark Smith refers to divorce as the missing “culture war” in America, documenting how a divorce reform agenda appears to be missing in action in current pro-family debates and movements. A lengthy analysis of why this is the case is beyond the scope of this Article. Suffice to say there is limited legislative momentum to tackle divorce reform.

A comprehensive review of legislative reform since 1990 documented the limited amount of divorce reform legislation passed.

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9. For reviews, see Paul R. Amato, The Impact of Family Formation Change on the Cognitive, Social and Emotional Well-Being of the Next Generation, 15 Future of Children 75 (2005); Heatherington & Kelly, supra note 8.


12. The Nat'l Marriage Project, supra note 7 at 27.


The most common divorce reform initiative has been to raise the legal age of marriage. Four states—Indiana, Maine, Ohio, and Pennsylvania—have passed "time-out" laws to temporarily halt divorce proceedings, allowing an assertion by one spouse of irreconcilable differences to be challenged by the other spouse, who then can pursue a course of reconciliation (counseling) for a brief period of time. Three states—Arkansas, Arizona, and Louisiana—have passed "covenant marriage" laws allowing couples to choose an alternative set of rules to govern their entry into and any possible exit from marriage, including requiring premarital education before marriage and marital counseling if the marriage is threatened. But only these three states have implemented this law, few couples are choosing it, and those who do have low-risk profiles for divorce. Most states mandate a co-parenting class for divorcing parents to try to encourage cooperative parenting between divorcing spouses. While these educational programs appear to have some positive outcomes, they do not promote the possibility of reconciliation. Only one state, Utah, has mandated a class that explores the potential of reconciliation and provides reasons and resources for careful thought about reconciliation.

The few efforts documented above are evidence of the limited legislative agenda to reform divorce laws. Again, the purpose of this Article is not to analyze why this is the case. There are likely professional considerations; legislators are often lawyers, some of whom make a living off of divorce and see it as a needed public service. Others may see divorce as a solely personal matter; government should minimize its involvement rather than intrude further. Some others may see divorce as a personal right not to be constrained and a needed means to terminate unhealthy relationships; if some divorces are unnecessary,

16. Id.
17. IND. CODE ANN. 31-12-1-8 (West 2008); ME. REV. STAT. ANN. tit. 19-A § 902(2) (West 2011); OHIO REV. CODE ANN. § 3105.091 (West 2011); 23 PA. CONST. STAT. ANN. § 3301 (West 1990).
19. Id.
22. UTAH CODE ANN. § 30-3-11.4 (West 2011); see also ALAN J. HAWKINS & TAMARA A. FACKRELL, UTAH COMMISSION ON MARRIAGE, Should I Keep Trying to Work It Out? A Guidebook for Individuals and Couples at the Crossroads of Divorce (and Before) (2009), available at http://divorce.usu.edu/files/uploads/ShouldIKeepTryingtoWorkItOut.pdf. This legislation has run into some implementation issues, however, that may reduce its impact.
that is the cost of the liberties needed to end bad marriages. Other reasons for the reform reticence could be raised. But the purpose here is to propose a brief, feasible legislative agenda of modest divorce reform for consideration by the states. A feasible agenda should be minimally intrusive, cost-effective, likely to be appealing to most individuals, sensitive to concerns about trapping individuals in bad marriages, and unlikely to create deep controversy or strong opposition from the public. By stressing the feasible, one accepts the inevitable difficulty of establishing new law and social policy, especially when it involves a nexus of mandates, money, and personal liberties.

Before proceeding, the Author acknowledges two caveats. First, a divorce reform agenda needs to be accompanied by a broader legislative and policy agenda of effective, coterminous social and economic policy. Reforms to strengthen marriages and prevent divorces will struggle without the individual’s ability to gain a good education, improve job skills, and, in general, participate in a robust economy to support their attempts to build stable and productive lives. Similarly, effective social policy that helps prevent unwanted pregnancies, reduce domestic violence and substance abuse, and support responsible fatherhood will make it easier for couples to form and sustain healthy relationships. An effective policy agenda that enhances the economic and social ecologies that give individuals the best chance of marital success complements and reinforces the divorce reform agenda proposed in this Article.

Moreover, the agenda proposed here focuses on intervention when marital decisions meet the legal system, that is, when couples marry (and seek state recognition of their relationship) and when couples divorce (and require the state to adjudicate the dissolution of their relationship). The advantage of attaching interventions to the legal system is that the interventions are universal; all who marry or seek a divorce must by law complete or consider certain steps. So this Article will propose additional steps or options to marital formation and dissolution that potentially could reduce the need for divorce. But as the Author has argued elsewhere, there certainly are more points of intervention to consider; a connection to the legal system is not a prerequisite for policy efforts to reduce divorce. A positive pathway to a healthy marriage for youth and

24. For an in-depth discussion of the lack of divorce reform efforts, see Smith, supra note 14.
25. RON HASKINS & ISABEL SAWHILL, CREATING AN OPPORTUNITY SOCIETY (2009).
27. See Alan J. Hawkins, Promoting Positive Pathways for Youth and Young Adults to
young adults seems increasingly filled with dangers and detours. And those who are doing the hard relationship work of marriage in a soulmate society with such high expectations for marriage could use some support, as well. More could be done to make couples wiser in their efforts to form and then sustain a healthy marriage. The Author acknowledges the value of such efforts by educational institutions, religious organizations, social service providers, and more in addition to the agenda proposed here that connects divorce reform intervention to the law.28

II. A LEGISLATIVE AGENDA FOR HELPING COUPLES FORM AND SUSTAIN HEALTHY MARRIAGES

A. Premarital Education for Engaged Couples to Strengthen Marital Foundations

The first proposal in this divorce reform agenda seeks to prevent divorce before the marriage begins by encouraging formal premarital education. Research in the United States suggests that only about one third of couples invest in formal premarital education.29 This rate may be increasing somewhat30 but some of the education may not be of high quality.31 Unfortunately, those couples with higher risk profiles for divorce are less likely to participate in premarital education.32 Individuals who have experienced the divorce of their parents should be especially interested in formal preparation as they are two-to-three times more at risk of having their own divorce.33

Formal premarital education has a long tradition.34 It emphasizes building better communication and problem-solving skills to deal with the inevitable challenges of married life. It also usually addresses a wide range of issues that influence marital quality, from money management

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28. For a comprehensive portrait of policy efforts to promote educational opportunities to help individuals and couples form and sustain healthy marriages and relationships, see Hawkins, supra note 15.


31. Stanley et al., supra note 30.


to the division of household labor to in-law issues. A meta-analytic study of the large body of evaluation research shows that premarital education for engaged couples is effective at increasing middle-class couples’ communication skills. There is some limited evidence that couples who invest in formal premarital education are less likely to divorce in the early, high-risk years of marriage. There is also some early evidence that premarital education may be effective for lower income couples, although more research with at-risk populations is needed. Also, practitioners have observed that 10%—15% of couples taking premarital education classes decide to call off the wedding, presumably because they come to believe that the relationship will not succeed.

Nine states—Florida, Georgia, Maryland, Minnesota, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia—have provided an incentive for participation in premarital education by discounting the cost of a marriage license for those couples who invest in these educational services. Educational services provided by religious organizations that meet the legislative standards are approved. Fiscally, it may be wise to offset revenue loss from these discounts by increasing marriage license fees for those who do not invest in premarital education, which at least one state, Texas, has done. No state mandates premarital education; mandates carry a heavier burden and raise issues of access. But state governments could do more to nudge couples towards investments in premarital education, given its potential for reducing divorce in the early years of marriage.

There is a ready-made infrastructure that requires no public support for delivery of premarital education to engaged couples. In the United States, a large majority of weddings take place in religious rather than

35. Id.
37. Nock et al., supra note 18; Stanley et al., supra note 30, at 117–18.
civil settings. Many clergy offer or even require couples they marry to attend a formal premarital education program. Research suggests that premarital education delivered by clergy or their designates in religious settings can be as effective as those programs delivered by trained family-life educators or clinicians in secular settings. States can specify a general set of important topics to be covered, but allow religious organizations latitude in how they address them. In addition, public funds could be used to promote greater use of these services through media campaigns, which some states are doing.

Some couples, however, will marry civilly or prefer secular options for premarital education. These couples could be reached efficiently through various means. A primary possibility is the Cooperative Extension Service of the U.S. land-grant universities. Every county in every state has a Cooperative Extension Service that delivers research-based educational outreach services to its population at low or no cost. Almost all of these services have extension agents trained to deliver family life education. Historically, these extension agents have focused primarily on positive youth development programs and parenting education, and greater attention has been given to rural populations than to urban communities. But recently more attention has been devoted to marriage and relationship education and greater emphasis is being given to urban outreach. Because programs often are widely shared across extension services in the various counties and states, programs developed and tested in one place can be used in many places, helping to stretch resources. Online premarital education programs are emerging, as well, which could be another way to gain ready access to these services.

B. Divorce-Orientation Education to Prevent Unnecessary Divorce

A second point in this proposed divorce reform agenda

46. Hawkins, supra note 15 (stating that at least four states—California, Oklahoma, Texas, and Utah—use public funds to promote greater use of premarital education).
47. See http://www.esrcs.usda.gov/nea/family/family.cfm for information on family life education services and www.nremen.org/stateinit.psh for a list of Cooperative Extension Services providing MRE services.
acknowledges the reality that many married couples, even couples that built their marriage on a healthy foundation, can experience deep disappointments that threaten to dissolve their marriage. Nevertheless, as shown in this section, it seems that good scholarship now points to the parallel reality that a non-trivial proportion of divorces are unnecessary, meaning that the marriage could be repaired and spouses and children (and their community) would be better off if the spouses were able to reconcile rather than divorce.

To some, the term “unnecessary divorce” connotes an inappropriate personal judgment, but this Article uses the term in the context of public policy considerations rather than personal judgment. Evidence for the existence of unnecessary divorce comes from several recent sources. First, research in the United States documents that about half of divorces come from marriages that are not high-distress or high-conflict relationships. These marriages earlier were fairly happy, with low conflict and low rates of violence; the spouses did not expect to divorce. The marriages were hard to distinguish from happy marriages that did not lead to divorce. Importantly, children from these low-conflict marriages that experienced divorce had greater adjustment problems than children who experienced the divorce of their parents that ended a high-conflict marriage. Also noteworthy is that the divorcing adults from low-conflict marriages decreased their happiness and well-being in the wake of the divorce. This is consistent with other research in the United States that documents that, for many, divorce is not an easy or reliable path to a happier life. For instance, Waite and her colleagues found that individuals in unsatisfactory marriages who divorced did not end up happier five years later compared to those who stayed married; neither were they more depressed. This was true even for those who remarried. Moreover, couples who stayed married were not significantly more likely to experience marital violence: 93% reported no physical violence (compared to 96% of happily married individuals). These surprising findings are better understood in light of their findings that most unhappily married individuals who stayed together reported

51. Id. at 635.
52. Id. at 628.
53. Id. at 636.
54. Id. at 635.
55. HEATHERINGTON & KELLY, supra note 8; WAITE ET AL., HAPPY?, supra note 10; Waite et al., Marital Happiness, supra note 10; WALLERSTEIN ET AL., supra note 10.
57. Id.
58. Id. at 10.
after five years that they were happy again. Moreover, we know that, for many, divorce does not solve conflict and can even increase levels of conflict.

The reasons individuals give for their divorce are generally not the “hard” ones many suspect. Paul Amato and Denise Previti found that most divorces are initiated because of such problems as falling out of love, changing personal needs, lack of satisfaction, and feelings of greater entitlement, especially for more educated individuals. A national survey found that the most common reason given for divorce was “lack of commitment” (73%). Other significant factors included too much arguing (56%), infidelity (55%), marrying too young (46%), unrealistic expectations (45%), lack of equality in the relationship (44%), lack of premarital preparation (41%), and domestic violence (29%). These percentages document that some divorces may be necessary to preserve the physical or psychological safety of an individual. But they also suggest that many divorces are the result of problems that potentially could be resolved.

Research indicates that some couples are ambivalent about divorce. A recent study by William Doherty and his colleagues found that, even when asked at the last stages of the legal divorce process, about 25% of divorcing individuals and 10% of divorcing couples (both spouses) said they thought their marriage could be saved with hard work. Similarly, 30% of individuals and 10% of couples indicated interest in a reconciliation service if it were available. Various surveys of divorced individuals indicate that between 10% to 50% wished they had worked harder to save their marriage.

Accordingly, public policy should be oriented toward helping individuals at the crossroads of divorce to carefully consider their decision and, where appropriate, consider the possibility of repairing the relationship. One such policy was recently legislated in Utah, which now
requires divorce orientation education for divorcing parents with
dependent children. This brief educational program was intended to
help divorcing parents think clearly and make informed decisions about
divorce and perhaps prevent unnecessary break-ups. The legislation
specifies that the information presented be research based and fair,
including the known positive and negative outcomes of divorce. There
are, however, implementation problems with the legislation. For
example, most take the class at the last stages of the legal divorce
process. Mandated divorce orientation education would likely be more
effective earlier in the divorce process. It may then be better to make this
program a prerequisite to filing for divorce rather than a step in the legal
process of divorce. Also, the low dosage of the education (one hour) and
the varying quality of the instruction may limit its effectiveness.
Nevertheless, this kind of public policy is headed in a positive direction,
with the potential to reduce unnecessary divorces while avoiding putting
spouses at greater risk for harm. Moreover, given the significant cost to
taxpayers of family dissolution, even small increases (1% to 2%) in
preventing unnecessary divorces will reduce government costs.

A natural infrastructure to deliver this kind of educational
intervention already exists in many areas. In the United States, most
states mandate that divorcing parents take a brief course to learn how to
be better parents in the context of divorce and how to avoid mistakes that
diverging parents commonly make. Nevertheless, these courses do not
include curricula that seriously consider the possibility of
reconciliation. These programs could be modified to include a realistic
and sensitive consideration of reconciliation. Also, some religious
organizations try to provide educational services to help congregant
couples on the brink of divorce, such as the Rctrouvaille program based
on Catholic doctrine. Again, the Cooperative Extension Service and its
staff of family life educators could be tapped to provide divorce
orientation education. Online programs should also be considered so that
individuals at the crossroads of divorce have ready, private access to
these programs.

67. UTAH CODE ANN. § 30-3-11.4 (West 2011).
68. HAWKINS & FACKRELL, UTAH COMMISSION ON MARRIAGE, supra note 22, at 1–8.
69. UTAH CODE ANN. § 30-3-11.4 (West 2011). The legislation also requires information
about the benefits of divorce mediation and collaborative law. Id.
70. Carma M. Needham, At the Crossroads of Divorce: A Formative Evaluation of a Self-
Directed Intervention for Participants of Utah’s Divorce Orientation Education Class for Divorcing
71. SCAFIDI, supra note 11.
73. Fackrell, Hawkins & Kay, supra note 21.
74. For an illustration, see Utah Divorce Orientation, available at http://divorce.usu.edu/ (last
C. Marriage License Fee Surcharge to Help Fund Educational and Promotion Efforts

In an extended era of fiscal austerity, it will be difficult to pass legislation that has a significant price tag. While much of what I have proposed in this agenda will not have costs, some actions will benefit from a supply of funds. To support various services intended to help couples form and sustain healthy marriages and prevent unnecessary divorces, states should consider adding a small user fee to the marriage license fee. Minnesota currently is the only state that does this. A funding stream such as this could be used to support training efforts for licensed therapists to extend their skills in helping distressed couples that are thinking about divorce but still interested in possible reconciliation. In addition, the funds could be used to support efforts directly associated with divorce orientation education as well as premarital education. The funds should be used in a manner that gives special consideration to efforts to help lower income individuals and couples gain access to services to help them form and sustain healthy marriages. Also, a portion of the funds should be used to support research to evaluate the effectiveness of these educational efforts, an often overlooked but important policy task.

In addition, a portion of these funds should support a sustained media campaign to increase awareness of the available services. An important and obvious component to the success of this agenda—to help couples form and sustain healthy marriages—is that couples become aware of the educational resources discussed here and sense that they can be helpful. Because recruitment is a constant challenge for family life educators, a skilled media campaign should be wrapped around this agenda. There is good evidence that social marketing campaigns can impact attitudes and behaviors. A number of organizations have used government funds to build creative, well-received campaigns to promote the use of premarital education and other relationship education services. The costs for a widespread, sustained campaign could be shared among communities, states, non-governmental organizations, philanthropists,
and private organizations with an interest in public efforts to strengthen marriages. But a baseline public funding stream will also be important.

D. What Is Left Out?

The divorce reform agenda proposed here emphasizes feasible reforms that promote delivery of educational services, using existing educational infrastructures, to help more couples form a stronger foundation for their marriage, or recognize dangerous cracks in it, before trouble begins—and helps some couples carefully consider whether reconciliation would be a better path forward than divorce. This proposal is not likely to engender a great deal of public controversy. Promoting educational services that do not require much government funding or oversight but may help couples form and sustain healthy marriages and prevent some unnecessary divorces is unlikely to spur marches on state capitol by angry citizen groups. Accordingly, this agenda seems a feasible first step.

This agenda does not include some other reforms that have been proposed because they are more controversial and would likely slow down first-step reforms. Elsewhere, scholars and activists have advocated, for instance, allowing the judicial system to consider fault in divorce settlements, as well as lengthening divorce waiting periods. In addition, a handful of states allow one spouse to temporarily challenge an assertion of irreconcilable differences to pursue a course of reconciliation. While such proposals have intellectual merit, they will produce heated, lengthy debates among legal practitioners and the public. Society should move forward with a more feasible set of reforms while the debate over other controversial reforms continues.

III. CONCLUSION

Admittedly, the first-step divorce reform agenda proposed here puts much faith in the power of education. Emerging research points to the positive potential of premarital education, but the merits of divorce

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82. Fawcett et al., supra note 36; Stanley, supra note 34.
orientation education have not been evaluated yet. Voluntary educational interventions may seem weak in the face of powerful historical and cultural forces working against individual hopes for life-long marriage. 83 Certainly, prominent scholars doubt the ability of government efforts to change how we form and sustain marriage in our societies. For instance, the late U.S. sociologist James Q. Wilson argues that "restoring the value of marriage is not something that can be done by public policy." 84 Broad cultural change is needed, he asserts, but this must be done privately by individuals, families, churches, neighborhoods, and the media. 85 But he does not consider the possibility that extensive educational efforts over time, encouraged by modest public policy efforts, could help to shift the cultural current. This is a realistic possibility. For example, we have made significant progress with smoking attitudes and behaviors alongside a sustained educational campaign. 86

Others commentators have also thought about the merits of publicly funded efforts to increase the use of relationship and marriage education services to help couples form and sustain healthy marriages. For instance, Paul Amato, one of the most prominent U.S. scholars of marriage and divorce, generally supports the concept of government efforts to provide more relationship education services, especially to lower income couples. 87 Amato, however, does not outline as specific an agenda as has been done in this Article. In addition, Andrew Cherlin, another prominent U.S. family sociologist, implies the need for better education for young adults, especially around the issue of cohabitation and family formation. 88 "We don't want a cohabitation tax or a marriage police," Cherlin says, but he does imply the need for educational efforts to send stronger messages to young adults to "slow down" and think carefully about rushing into relationships, especially when children's lives are at stake. 89 Cherlin's recommendations for how to get this message out, however, are missing. Legal scholars Naomi Cahn and June Carbone intellectually tackle the culture wars around family formation and dissolution, concluding that marriage and relationship education should be a part of the solution: "While those who prize autonomy may be wary of celebrating traditional marriage, most do not begrudge efforts to encourage commitment, educate young people in the qualities that

83. See COONTZ, supra note 3.
84. WILSON, supra note 26, at 221.
85. Id.
86. Hornik, supra note 76.
88. CHERLIN, supra note 1, at 194.
89. Id.
effectively promote relationship stability, or establish voluntary marriage [education] promotion programs.\textsuperscript{90}

Divorce should be available to end destructive marriages. Restrictions to personal liberties must be carefully considered and based in strong logic. Nevertheless, this Article has provided that logic for some carefully considered first steps to divorce reform. Society and government could be doing more to value the institution of marriage and support people's foundational desires to form and sustain healthy, stable marriages.

\textsuperscript{90} NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 168 (2010).