

# The Subject of Care

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## Feminist Perspectives on Dependency

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## Masking Dependency: The Political Role of Family Rhetoric

*Martha L. A. Fineman*

### INTRODUCTION

In this chapter, I want to explore the schizophrenic nature of the interaction between social ideals and empirical observations concerning dependency. I am particularly interested in the family as a social and political construct that facilitates this interaction. Specifically, I argue that continued adherence to an unrealistic and unrepresentative set of assumptions about the family affects the way we perceive and attempt to solve persistent problems of poverty and social welfare. In the normative conclusions that are generated and reiterated in political and popular discussions about family, we assess the "justice" of particular policies addressing societal problems with reference to concepts such as the individual and dependency.

Images of the traditional family pervade contemporary political and legal discourse. Rhetoric about this family's form and function ignores or obscures the nature and extent of individual dependency. It also masks the costs of necessary caretaking of dependents, costs that are disproportionately assumed by women. Dependency should be understood to be both inevitable and universal. My argument that in a just society there must be a fundamental obligation for the community to provide for its weaker members is built upon this proposition. Of necessity, fulfilling that collective obligation in a society that has historically appropriated, rather than economically rewarded, caretaking labor will have some redistributive (or market correcting) consequences when those who currently care for dependents at substantial cost to themselves are finally compensated.

The ideal of family is essential to maintaining the myth that autonomy and independence can be attained. Our society mythologizes concepts such as "independence" and "autonomy" despite the concrete indications surrounding us that these ideals are, in fact, unrealizable and unrealistic. Those members of society who openly manifest the reality of dependency—either as dependents or caretakers in

need of economic subsidy—are rendered deviants. Unable to mask dependency by retreating to contrived social institutions like the family, single-mother caretakers in particular are stigmatized and subjected to epithets and scorn for embodying a dependency that society would rather deny.<sup>1</sup>

Inconspicuously complementing the myth of individual autonomy are assumptions about the context in which individuals exist in our society, particularly the assumption that we belong to or aspire to belong to families. A traditional family is typically imagined: a husband and wife—formally married and living together—with their biological children. The husband performs as the head of the household, providing economic support and discipline for the dependent wife and children, who correspondingly owe him duties of obedience and respect. This assumed archetypal family provides the normative expectations for the institution of the family.

This vision of the family is perceived as facilitating individual identity and development. It is touted as the site for intimate connection, the place for individuals to retreat when seeking to satisfy human needs.<sup>2</sup> We desire to be part of a family because we experience it as a psychological conglomerate of nurture and support and/or an emotional proving ground for individual self-development. Other socially supported functions assigned to the family are associated with its role as an economic unit. The “household” is the relevant demographic measure in a variety of economic contexts.<sup>3</sup> The family also has had a historic monopoly on “legitimate” reproduction.<sup>4</sup> Children born outside of the traditional (marriage-based) family are labeled “illegitimate” or deemed “bastards.”<sup>5</sup> In addition to its psychological and functional dimensions, the family also serves as a powerful ideological symbol with political implications. It is the intimate unit in policy and legal discussions that is exclusively designated as what is normatively desirable.

The continued resort to the traditional family as a cultural icon and political anchor is puzzling given the changes in society over the past several decades. In particular, women’s rejection of the hierarchical family<sup>6</sup>; the dissolution of the conceptual lines that had been drawn at the turn of the century between the domestic or “private” sphere and the market/political or “public” sphere<sup>7</sup>; and the increased participation of women in the paid workforce<sup>8</sup> (with their consequential shouldering of dual responsibilities) challenge the vitality and desirability of the traditional family. We seem to ignore these changes with our continued resort to the traditional family unit.

Altered expectations and aspirations about equality and economic opportunity have been the impetus for many individual women to change the ways they practice mothering. On a societal level, these changes have generated reconsideration of the meaning and implications of motherhood. This process of cultural and social rethinking presents a challenge to the dominance of the traditional family model. The rather rapid acceptance (and embrace) of possibly viable and desirable alternatives by certain subsets of society seems to have struck terror in the hearts of many, women and men alike. In some quarters, change is perceived as inherently destabilizing. Groups who view change as inherently destabilizing often also

tend to consider the family to be a foundational institution essential to civilization.<sup>9</sup> Its instability is perceived, therefore, as the equivalent of a threat to society.

Policymakers and lawmakers scramble to understand and to address the implications of change for the family. Reflecting the deep divisions within society on these issues, some seek to impose sanctions and incentives to suppress the emerging social realities or to make them conform to the old ideal.<sup>10</sup> Others take a more pragmatic track and, conceding that change is inevitable, explore the ways in which laws might be refashioned to accommodate the new social realities and their undesirable material consequences.

The current incoherence between family reality and the images of family in law exposes the dominant ideology and its role in policy formation. Refusing to address and to assess the continued viability of ideological assumptions, politicians and pundits resort to condemnation and to repressive policy suggestions. This pattern of reaction to changing family behavior should raise questions about the responsive capabilities of our lawmaking institutions.

### FAMILY, LAW, AND LEGITIMACY

Law performs an important societal function when it monitors or disciplines transformations and transitions in society, imposing conceptual order on the chaos generated by the perception of change. Widespread changes in behavior or rejection of existing social institutions by a significant segment of society should be the impetus for a collective reconsideration of the continued viability of the old normative system. If, instead, change becomes the occasion for retrenchment and repression, inspiring mean-spirited and dangerous polemics that are passed off as politics, the legitimacy of the entire legal system will eventually be undermined.

Reconsideration of basic social institutions does not take place without constraints, of course. Widely held and insistently reinforced beliefs of what is natural, normal, and desirable affect how we approach change. Ideologies that reference collectively held conceptions tame radical initiatives and impulses. In legal reform, the fundamental and initial debate is always about the underlying cultural and social constructs.<sup>11</sup> As components of the dominant ideological structure in which later discussions about policy take place, these constructs direct the progression of reform. Nevertheless, when there are such fundamental shifts in family formation and functioning as we now experience, it is foolish and shortsighted to rely exclusively on antiquated visions and ignore the emerging social realities.

#### Family

Historically, the American family has been our most explicitly gendered institution.<sup>12</sup> The family has been justified and valorized as an institution for its perceived role in reproducing and transmitting norms of social behavior to all its members, but most

particularly to the young. It continues to be gendered in its operations and expectations, as well as in the values that it represents. Concurrently, the complementary legal roles of Husband-Father, Wife-Mother, and Child-Adult are formulated in the context of the relationship between the state and the legally contrived institution of the "official" family. Dependency, "naturally" assigned to the family, is privatized. It is not anticipated in the ideology that either the market or the state will directly contribute to or assist in the necessary caretaking—that is done in the privacy of the family. The ideology of the private family mandates that the unit nurture its members and provide for them economically. The burdens of economic support and caretaking—costs of intrafamily dependency—are allocated within the family based on the perceived family roles its members play.<sup>13</sup> This assignment of burdens within the family operates in an inherently unequal manner; the uncompensated tasks of caretaking are placed with women while men pursue careers that provide economically for the family but also enhance their individual career or work prospects. This division of family labor, perpetuating historic gendered family roles, has been understood as just and "natural," rather than manufactured or contrived.<sup>14</sup>

As appealing as this traditional model may be to some, it is essential to note that even had the world once been so simple, things have changed. An examination of the current statistics on intimate associations reveals that domestic arrangements that do not conform to the traditional family unit are on the rise.<sup>15</sup> More and more individuals are living alone than in decades past.<sup>16</sup> Divorce rates hover around 50 percent, and never-married motherhood is on the rise, even among middle-class, educated women.<sup>17</sup> Couples choose not to become parents in larger numbers than prior generations.<sup>18</sup> Furthermore, even in conforming families (married with children), the traditional roles have broken down. Many women work outside of the home either in a full- or part-time capacity, and some are as deeply committed to career and job advancement as their husbands.<sup>19</sup>

Looking at family reality, however, involves more than just a reference to these empirical changes. The statistics have normative as well as empirical implications. The fact that the United States has a multiplicity of ethnic, religious, and cultural traditions supports the argument that we should develop a pluralistic social model inclusive of diverse family practices. For example, in recent years some people have begun to question the received wisdom as to what should constitute the core or central family connection.<sup>20</sup> Marriage has historically been considered the fundamental building block of society. In the words of Chief Justice Morrison R. Waite over a century ago: "Marriage, while from its very nature a sacred obligation, is . . . a civil contract, and usually regulated by law. Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."<sup>21</sup>

Some people continue to insist that legitimate families can only be built upon the foundation of a traditional marital tie. Others emphasize the biological connection and minimize the importance of legal relations in favor of kinship structures that

form affiliations transcending current formal definitions of the family.<sup>22</sup> For others, the preference is for an affectional family, a unit composed of those with whom we choose to connect but who may not be "related" to us by either blood or marriage.<sup>23</sup> Family affiliations are expressed in different kinds of affiliational acts. Some are sexually based,<sup>24</sup> as with marriage. Some are forged biologically, as through parenthood. Others are more relational, such as those based on nurturing or caretaking<sup>25</sup> or those developed through affection and acceptance of interdependence.<sup>26</sup>

Each of the alternative conceptions of the central or core family connection assumes certain things about what is appropriate and desirable. Each family form carries within its confines the possibility of exclusion and stigma that attaches to nonconforming relationships. Each model, in defining itself, defines the parameters of what is natural or appropriate. The converse of the created ideal may become defined as deviant or pathological. Such a process has attended the dominance of our official and, often, legal adherence to the unitary, heterogeneous patriarchal family.<sup>27</sup> The dominant ideological construction of the family assumes only one appropriate model of family formation, heterosexual marriage.

This model controls the political process in which the state, through its institutions and designated actors, wields the symbolic power of this normative structure in order to justify a parsimonious distribution of economic and social subsidies to nontraditional families.<sup>28</sup> This is occurring in the context of the current debate about the family in the United States. Our debates focus on family form, not function. We are concerned with the legal status and living arrangements of parents; increasingly we impose punitive measures on those who deviate from the traditional model. A discussion of what societal role the family plays—its relationship to the obligations of the state—has not taken place. We deal in platitudes rather than assess what functions we want from the family (whatever its form). Nor do we engage in realistic explorations of how family functions might be successfully performed by nontraditional family units if they were adequately assisted by public subsidies and support now reserved for the nuclear family.

### The Family in Politics

In spite of alternative visions and nonconforming behavior, the politically normative family remains intact: the heterosexual, formally married couple and their biological children. Intimate groups that do not conform to this model historically have been labeled "deviant" and subjected to explicit state regulation and control justified by their nonconformity.<sup>29</sup> The level of state intervention, control, and punishment is being raised currently. For example, the rhetoric directed at unmarried and/or poor women has moved in the space of a few months from that of the disapproving patriarch to that of the ranting, righteous witch hunter. Given a patina

of academic respectability by the likes of Charles Murray,<sup>30</sup> and led by the careening crusading of Newt Gingrich,<sup>31</sup> the descriptive terms and accusations directed at the most defenseless people in our society stigmatize and dehumanize them.<sup>32</sup> We reject a humane social "contract"—one based on the spirit of collective responsibility and an appreciation of the generalized interdependence among all members of society—in favor of a public, ritualistic washing of the federal hands and the devolution of responsibility to states. Many of the states, however, have already declared their intention to pass the problem further down the line, eventually laying the burden on the poor themselves.<sup>33</sup> We have witnessed the creation of explicit punitive and mean-spirited government measures disguised as "reforms."<sup>34</sup>

The idealized family has become the panacea for all social ills in contemporary policy discussions. The institution of marriage is seriously offered as the uniquely appropriate form for social policy, and systems of proposed disincentives to keep unmarried women from reproducing are debated by a multiplicity of predominantly male politicians in various halls of power. Women who do not conform—either by refusing to marry or to participate in paternity proceedings—are faced with threats that their children will be placed in orphanages or that restrictive measures and conditions will be attached to their societal subsidies.<sup>35</sup> They are punished by cuts in their meager public assistance awards if they have additional children,<sup>36</sup> refuse to (or cannot) name the father of their children,<sup>37</sup> are unable to ensure that their children attend school,<sup>38</sup> or fail to get vaccinations for their children.<sup>39</sup> Draconian incentive systems are proposed to tie them to a world of wage work or make work<sup>40</sup>; all of this in a system that refuses to consider mothering to be work.<sup>41</sup>

What have these women done to "deserve" such harsh words and punitive measures? In large part it is the stigma of being poor.<sup>42</sup> But more than poverty is at issue. The broad general target is unmarried women with children, and the attacks on these mothers are the opening salvo of a reactionary plan to discipline women who do not conform to the roles they are assigned within the traditional scheme of the family. This is why all women, whether they are mothers or not, should be concerned with the current debate about poverty. Although the welfare debate seemingly stigmatizes only one form of mothering as pathological, political rhetoric reinforces, re-creates, and reiterates several fundamental premises about families that will be used against all women. Paramount among these is, of course, the strong preference for formally celebrated heterosexual marriage that functions as a reproductive unit and is thus the "core" upon which all else is founded. This preference places responsible reproduction (indeed, responsible sexuality) solely within the context of the traditional family—a context in which legal consequences are clear and decisions will be considered and controlled. Motherhood outside this family unit will be punished and stigmatized. Non-mothers will also be disciplined, pressured, and pitied.<sup>43</sup> Attacks on birth control and abortion can be viewed as extolling the inevitability and naturalness of motherhood.



## THE FAMILY IN LAW

### The Sexual Organization of Family Intimacy

Our conception of the family as an entity is built around a core unit, the married couple. The basic family relationship is founded on the sexual affiliation or conjugation of two heterosexual adults. This heterosexual unit continues to be considered as presumptively appropriate and it retains viability as the essential family connection. Even contemporary critics of the institution are typically revisionists, viewing marriage to be merely in need of some updating and structural reformulation. In fact, arguments that other sexual affiliations—such as nonmarital cohabitation or same-sex relationships—deserve the same privileges afforded to marriage, far from challenging the privileged status of marriage, reinforce it by inscribing onto it the attributes of normalcy, desirability, and privilege.

### The Egalitarian Organization of the Family

As a result of reform movements of the 1970s and 1980s, certain aspects of the law reflect a gender-neutral family ideal.<sup>44</sup> Our linguistic model is now one of an egalitarian family, based on the marital “partnership” of husband and wife. Gone from our formal, official discourse is the hierarchical organization of the common-law marriage described so graphically by Blackstone under the doctrines of “unity” and “merger.”<sup>45</sup>

Female subservience is no longer assumed by formal legal rules,<sup>46</sup> nor is women’s inherent incompetence in the business and market world seriously asserted and used as a basis for exclusion by courts and legislatures. Wives and mothers are held equally responsible for the economic well-being of their families<sup>47</sup> and no longer presumed by virtue of their sex to be the preferred parent in custody disputes.<sup>48</sup> Many legal disabilities for nonmarital children have been removed.<sup>49</sup> There is less stigma to divorce with the ascendancy of “no-fault” philosophy whereby marriages are terminated because of “irreconcilable differences” rather than the culpable conduct of one spouse.

Rhetorical changes in law and legislation, however, do not reflect “real” changes, nor can they compel such changes. In considering the empirical data on the operation of the family, the inescapable conclusion—rhetoric aside—is that gender divisions persist. Women continue to bear the “burdens of intimacy”—the “costs” of “inevitable dependency”—in our society.<sup>50</sup> As a definitional note, “burden” is not the same as oppression. I use the term to signal clearly that there are costs associated with the caretaking tasks that women typically perform in our society. These labors may provide joy, but they are also burdensome and have material costs and consequences that go uncompensated within the private family. Not to recognize these labors as “burdens” ignores the costs to women. If such labor remains invisible, the fact that it goes uncompensated is condoned.

A second definitional point is that it is important to differentiate between various forms of dependency. I am interested in two specific dependencies. The first I label

"inevitable dependency." It is inevitable in that it flows from the status and situation of being a child and often accompanies aging, illness, or disability. This type of dependency is biological and developmental in nature. It is universal. In this sense dependency will always be (and always has been) with us as a society and as individuals. In the current welfare debate the paradigmatic inevitable dependent is the child, considered to be "worthy" or "deserving" of help. The second, complementary form of dependency, however, is more problematic for policymakers. Those who care for inevitable dependents are often themselves dependent—a derivative dependency that stems from their roles as caretakers and the need for resources that their duties generate. This type of dependency is not inevitable, nor is it universal. It is socially defined and assigned, and that assignment is gendered.

Noting that the costs of caretaking associated with these dependencies continue to be allocated to women should not be understood as an argument about essentialism. The allocation is accomplished and reinforced by the culture and ideology of the family. Nonetheless, because something is a social construct does not mean it will be easy to change. In fact, change is difficult because of the tenacity of the potent traditional ideology of the family in American culture.

In discussing the family, we seem caught in a variety of conceptual traps. Abstract notions of equality have become the measure for early feminist efforts to reform the family. Emphasizing equality shifted the focus on relationships between men and women and husbands and wives and led to the articulation of a reform goal in which existing gendered roles within the confines of the traditionally populated family unit would be reorganized.<sup>51</sup> Rather than challenging the basic structure, early reformers merely expected that fathers would perform more household duties as modern mothers spent more time and energy on market endeavors. Under this view marital partners, fulfilling egalitarian impulses, would simply rework their relationship into a nonhierarchical form. The marital tie, nonetheless, would continue to serve as the anchor defining and giving content to their relationship, while defining other family associations.

This approach to family reform influenced and informed the legal changes made during the past several decades—the refashioning of the "egalitarian family" from the structure of its common-law hulk.<sup>52</sup> The grand aspirations for equality are manifested in terms we now use to discuss family relationships—we substitute "partnership" for marriage; "shared parenting" for mothering and fathering; "interdependency" and "contribution" for need and obligatory domestic labor. Unfortunately, this focus on equality has severe practical and theoretical limitations.<sup>53</sup> Reformers naively assumed that sharing could and would happen. With the egalitarian aspiration ensconced in law, women would be freed to develop their careers and men would be unconstrained in choosing nurturing over other endeavors. Such assumptions, viewing the husband and wife as the basic family unit, are unrealistic in a society with a divorce rate hovering at 50 percent and never-married motherhood on the rise.<sup>54</sup>

These statistics indicate that the time has come to admit that the gendered notion of the role-defined and mutually dependent marital couple no longer serves as an

adequate concept. We must begin to rethink the institution of the contemporary family in a way that is responsive to emerging realities. We must begin to think of family policy in terms of the functions we want the family to perform and to leave behind our obsession with form. We should establish a system of sanctions and rewards that reflects the functions society should protect and encourage through social and economic subsidies. Our meager and sporadic family policies fail to facilitate or to support families as they struggle to fulfill their expectations and responsibilities. Unlike other industrialized democracies we have no well-defined notion of collective responsibility for inevitable dependency—lacking are basic income guarantees, comprehensive publicly assisted day care, universal health care coverage, and other societal structures and institutions to help shoulder caretaking burdens. In fact, recent welfare reforms resort to the privatized solutions of marriage or child support as the answer for myriad societal problems, including child poverty.

### The Public Role of the Private Family

In attempting to analyze the tenacity of the sexually affiliated or marriage-based notion of family, we must consider the structural position of the family. In this assessment, we must surrender our preoccupation with the roles of individuals within the family and concentrate on the institution in relation to the state. The relevant questions are: What is the role of the family as a social institution? How does it interact with the state and how does this interaction reflect the ideological underpinnings of the structure? It is important in this regard to remember that the family is first and foremost a social institution. As such it is defined and given social content by significant systems of belief or knowledge with coercive potential exceeding that of law. In this regard, the family as an institution embedded in social understanding should be understood as resistant to redefinition.<sup>55</sup>

## THE FAMILY IN SOCIETY

Within the variety of extralegal cultural and social systems that shape our beliefs about families there are certain core concepts or “metanarratives”<sup>56</sup> that predominate and affect law, as well as shape and influence reform. Two interrelated metanarratives about the American family direct current social policy and limit possible policy initiatives that would help functioning, nontraditional families. The first is that family has a “natural” form—husband, wife and child (the nuclear family)—built around a foundational sexual affiliation reinforced by reproductive biology. This natural family purportedly predates the state; it is also viewed as a complement to the state, essential to the state’s very existence.

The second metanarrative is that of the private family—a unit entitled to protection from the state. Freedom from state intervention is conferred as a “reward” for fulfilling societal and political expectations that the family is the

natural repository for inevitable dependency. The private family is the social institution that is relied upon to raise children and care for the ill, the needy, and the dependent. Ideally it performs these tasks as a self-contained and self-sufficient unit without demanding public resources to do so. In the societal division of labor among institutions, the private family bears the burden of dependency, not the public state. Resort to the state is considered a failure. By according to the private family responsibility for inevitable dependency, society directs dependency away from the state and privatizes it.

As with individual autonomy and self-sufficiency the notion of the private family has important ideological and political currency. As an ideological construct, the private family masks the universal and inevitable nature of dependency and allows the public and government officials to frame rhetoric in terms idealizing capitalistic individualism, independence, self-sufficiency, and autonomy. Significantly, the ideals of self-sufficiency and autonomy operate on two levels: they construct the ideal family as well as the ideal individual within our culture. Applying the ideal of self-sufficiency and autonomy to the private family is as unrealistic as applying it to individuals. Private families receive many hidden direct and indirect subsidies through tax, inheritance, marriage, and other laws. Employer contributions to health and life insurance policies are not counted as income (and hence are not taxed as income)<sup>57</sup>; interspousal transfers are not taxed as gifts<sup>58</sup>; imputed income—domestic labor—is not included as income although the wage earner benefits from it.<sup>59</sup> (Meanwhile, the home-worker receives neither compensation nor pension benefits for her tasks.) Middle-class deductions, such as that for interest paid on mortgage debt<sup>60</sup> or certain child-care expenses,<sup>61</sup> are considered appropriate even though they remove income from the taxable pool.

One rallying cry in favor of welfare caps was that welfare recipients should not receive extra benefits if they had additional children when private families qualified for no such subsidy. Missing from the attack was the realization that for each additional child, private families receive a tax deduction worth considerably more than the pittance typically given to welfare mothers who have more children.

The two metanarratives—that of the natural family and that of the private family—are composed of interdependent assumptions that reinforce one another on an ideological level and perversely interact with one another. The result is the continuation of gender inequality. The tasks assigned the private family mandate that burdens or costs associated with dependency be allocated among family members, and this allocation is gendered. In other words, our perception of the family as a social institution facilitates the continuation of gendered role divisions and frustrates the egalitarian ideal.

### Disciplining Deviant Women

The very definition of single motherhood as an independent and significant social problem, as well as the nature and direction of suggested remedies for the

"crisis," show the strength of the natural and private family concepts in tandem. Under the ideal system, private families need economic resources, and their members need nurture. The head of the household "naturally" supplies his family's economic needs; his wife, the adult "naturally" dependent on her husband's economic provisions for her household work, supplies the caretaking. The reform objective for single-mother families—whether divorced or never married—is to reconstitute the natural family; this is to be achieved by bringing (back) the male to properly privatize dependency. Strikingly central to all family and welfare reforms is the image of male as head of the household. Widespread single motherhood has made it impossible to continue to respond to dependency within the confines of our family ideology. Single motherhood presents strong evidence that the nuclear family paradigm has failed; it illustrates that the private-natural family is no longer viable as the sole, or even primary, institutional response to dependency.<sup>62</sup>

In constructing the problems presented by, as well as the solutions for, both the never-married mother and the divorced mother, the absence of a male is assumed central. The male presence in the form of economic support is induced by conferring "rights" over children. The vision is that male discipline and control can make the family whole in some mystical sense. The economically viable male becomes a vehicle for social policy: "he" is the universal answer, the means offered for resolving the problems of poverty and despair. Consequently, it is hoped that conducting paternity proceedings and forcing fathers to pay child support will alleviate poverty. Both divorce and welfare reforms attempt to reconstitute the natural family, by bringing the father into the picture through an economic and disciplinary connection reminiscent of the traditional male role in the hierarchical private family.<sup>63</sup> Patriarchy is thus reasserted and modified to meet new social realities.

Further consideration of the circumstances in which the private-natural family fails will illuminate the previous abstractions. The current economic circumstances make it unlikely that marriage will resolve the problems of most poor women and children. Unemployment, "downsizing," and the change from a manufacturing to a service economy have eroded the wage scale for many men.<sup>64</sup> In addition, the flight of businesses to suburbs makes finding jobs harder for urban workers who are unable to make the commute.

Even if economic patterns do not create insurmountable obstacles to using marriage as the solution for poverty, significant changes in the way we define family behaviors and aspirations will have an impact. One set of difficulties is presented by the widespread acceptance of the egalitarian family among elites. The second set of problems is found in the sense of crisis surrounding the increased number of women—from all classes and races, resulting from either our high divorce rate or because they never married in the first place—who become single mothers.<sup>65</sup>

As an articulated ideal, the egalitarian family is imposed on existing couple-based family units, and it generates tensions insofar as one goal to be attained by

the partners is equality in the marketplace. Equality as an ideal has developed in a society that rewards and values market work, and feminist theory has reflected this. Mothering and other family work is to be "managed" so women are free to develop their careers. Attempts to achieve equality in the public sphere, particularly in the market, however, leave the two-parent family as an institution potentially without available caretakers.<sup>66</sup>

The never-married or divorced single-mother case presents a version of the same dilemma. Without a designated "partner," if the mother devotes her time to market work in order to support her child no one will be available to perform her caretaker role. If she fulfills her culturally assigned obligations by sacrificing her career to bear the burdens of dependency, as a single mother without a wage earner to support her, she will starve unless she goes begging to the state. In any event her family has not dealt with its dependencies privately.

Both of these situations reveal the latent gender implications embedded in the private family. The task assigned the private family—its societal role as the private repository of inevitable dependency—mandates two parents and some form of role differentiation and division. Given these demands, the family will assume the traditional natural form almost inevitably. This family seems destined to be gendered and unequal.

Of course, the rhetorical resolution for the potential dilemma that there will be no caretaker in the egalitarian coupled family has been to "share" caretaking. Rhetoric aside, empirical information indicates that sharing is not taking place. The figures are overwhelming; little has changed in terms of who does domestic labor, and this is typically true regardless whether or not both partners work.<sup>67</sup> Hence, women must either give up the hope for equality or hire other women at (typically) meager wages to carry the burdens of dependency for them. In either case, some woman's labor is appropriated for necessary caretaking and un- or undercompensated even within the charade of the egalitarian marriage.<sup>68</sup>

In instances where it is necessary to compromise one spouse's career for caretaking, economic incentives guide the choice between marital partners. Equality fictions in the family may abound, but continuing market inequalities typically ensure that when there is a need for a family member to accommodate caretaking by forgoing market time, the efficient caretaker will be the lesser earner, usually the woman.<sup>69</sup> In addition to this economic channeling, centuries of social and cultural conditioning shape the way women understand and exercise their "choices" in defining their family role.<sup>70</sup> Family failures with regard to children, evidenced in even minor deviations from an unattainable ideal, are most likely placed at a mother's feet.<sup>71</sup> Working mothers elicit fears that generations of children will be abandoned to neglect and the horrors of day-care regimentation and abuse.

In the case of single mothers—whether divorced or never married—the inadequacies of the private family are incapable of resolution by pretenses toward equality within the nuclear unit. These families are beyond that paradigm

and are consequentially stigmatized and demonized. Single-mother families are consistently designated "deviant" and "pathological."<sup>72</sup> Ignoring evidence indicating that poverty, not family form, causes harms, policymakers identify single mothers as the cause of crime, poverty, and societal decadence.<sup>73</sup>

On a policy level, the rhetoric currently surrounding never-married mothers tragically obscures the magnitude and dimensions of the economic deprivations that make it difficult for any women outside of the patriarchal family (and many within it) to raise their children.<sup>74</sup> Rather than addressing the needs of existing caretakers, legislators compete to concoct disincentives for single motherhood to punish women for reproducing and incentives designed to push mothers to create a nuclear family.

### A Claim for Justice

When a woman becomes a mother she performs a valuable societal function. She is reproducing to the benefit of the state, the workforce, and the family. The significance of her task historically has been the justification for subjecting her as "mother" to state power. She is supervised and judged according to standards that do not apply to other citizens. The behavior of mothers is regulated through the companion normative systems of law and family ideology. If mothers are found wanting, they may be punished. This is particularly true for poor and single mothers, but all women as mothers risk intervention and subjugation based on their status. State-imposed supervision and control of mothers, and the corresponding sacrifice of privacy, should form the basis for an entitlement to justice by mothers—a claim for the resources to perform the tasks society demands of them.

Of course, my conclusion is not so simple to implement. Our societal sense of what constitutes "justice" for families as social entities, as well as our conclusions about what is "just" in the face of interfamilial conflicts, are formulated in the context of existing, historically legitimized power relations. Our definition and acceptance of the nuclear family as a legal and, perhaps, to a somewhat lesser extent, a social institution, and the acceptance of assigned roles to individual family members reflect the contemporary (and temporal) resolution of struggles for power and dominance.<sup>75</sup>

Conversely, our experience of "power" is filtered through our perception of "justice." Justice legitimizes and condones what might otherwise be viewed as inappropriate coercive maintenance of certain traditional family forms and expressions of individual power within families. Society's sense of justice currently allows some politicians to condemn alternatives to the preferred family arrangement as deviant and to propose subjecting them to exercises of state power that would not typically be condoned if directed toward traditional entities. Intrusion and supervision are justified because of the deviation from state norms. At the same time, families that are in conformity with state standards are

empowered. We perceive that their conformity has justly earned them a right to protection and privacy.

Justice, as a normative conclusion, reflects a particular ideological position. A particular ideology is tested through the interaction of power (or institutions of power, such as law) and prevalent concepts of "justice." For this reason, it is artificial and inappropriate to separate the concept of justice from that of power or ideology.<sup>76</sup> Appreciating these grand theoretical concepts and understanding their implications in society mandate appreciating and understanding the way they affect and influence each other.

In the context of policy development regarding single mothers, the law as "power" and the reform rhetoric as "justice" (or justification) intersect and reinforce each other to portray nonconforming social behavior as behavior in need of punishment, supervision, regulation, containment, and control. Disciplining women is understood to be necessary and appropriate. Traditional family structures and individual roles are perceived as necessary and therefore "neutral" and "just." Unequal allocations of major societal resources (including both cultural and economic capital) to subsidize existing nuclear families are justified by the dominant family ideology.

The subsidized nuclear family unit, mischaracterized as "self-sufficient" and "independent," is held out as the ideal norm. The subsequent apparently successful performance of this class of families furthers the ideology of the independent family and masks or distorts the universal and extensive nature of dependency in society. Their subsidized existence solidifies the notion that successful families manage dependency without resorting to the state.

Challenges to the justness of formulating and implementing state family policy around a model that conforms neither to the way in which a great number of Americans live their lives, nor to the dictates of its own rhetoric, have not been successful.<sup>77</sup> In fact, deviant intimate entities—those families that are poor (or fail to conform to the nuclear model)—are relegated to a separate, stigmatized set of subsidies, increasingly punitive in nature and in implementation. These dependent families are vilified in public discourse and provided with "incentives" to replicate the ideal model.

One concrete manifestation of the injustice of our policies is found in the highly pronounced gendered poverty gap in the United States. American women are much more likely to be poor than are American men.<sup>78</sup> A recent study indicates that American women are 41 percent more likely to live in poverty than are American men.<sup>79</sup> By contrast, poverty is more "equally" experienced in countries like the Netherlands and Italy.<sup>80</sup> Marriage equalizes the ratio—poor couples share meager resources, but one prominent factor lifting women to the level of males who are better off is the availability of government benefits. In the Netherlands, for example, there is a low overall poverty rate, and an almost nonexistent gender poverty gap, due to the generous welfare system.<sup>81</sup>



The approach in this country must change and those women who are caretakers must be given a right to resources to enable them to perform the tasks we demand of them. The concept of justice must be reformulated so that punitive and mean-spirited laws designed to discipline women and children into patriarchy are seen as inappropriate. Transforming justice requires an attack on the underlying ideology that valorizes the nuclear family. A reformulated vision of justice would relate to the empirical needs of society, accepting and accommodating the inevitability of dependency and recognizing the claim of caretakers for resources necessary to accomplish their nurturing tasks.

For too long and for too great an extent, family policy in this country has been fashioned to further the nuclear family ideal. Policy based on the traditional family unit fosters the assumption that the maintenance of intimacy (including everything from contraception to responsibility for the day-to-day care of children) is primarily a "private" task.

It is essential for feminists to point out consistently that without substantial rethinking of the concepts underlying patriarchy—such as that of the private-natural family—the condition of women is unlikely to improve significantly. Without such rethinking it will be a bleak future for women and those inevitable dependents for whom we care.

### NOTES

I would like to thank Sara Velazquez and Susannah J. Braffman for their invaluable assistance on the final draft of this chapter. This chapter reflects many themes set forth in Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

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1. See *infra* Part II.B.
2. Long ago, in *Maynard v. Hill*, 125 U.S. 190 (1888), the U.S. Supreme Court characterized marriage as "the most important relation in life" (*Ibid.*, 205), and as "the foundation of the family and of society, without which there would be neither civilization nor progress" (*Ibid.*, 211). In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the due process clause (*Ibid.*, 399).
3. We see this, for example, in census figures where a person living alone is designated a household. See Terry Lugaila, U.S. Department of Commerce, Series P-23, No. 181, "Households, Families, and Children: A 30-Year Perspective" (Washington: U.S. Department of Commerce, 1992), 14. In contrast, a family is defined as a "group of two or more persons related by birth, marriage or adoption residing together" (*Ibid.*). It is interesting to note that this bureaucratic definition fully incorporates all of the types of families that many American politicians are attempting to marginalize. For a multicultural economic

study of households, past and present, see generally Gary S. Becker, *A Treatise on the Family* (enlarged ed. 1991).

4. In *Lester v. Lester*, 87 N.Y.S.2d 517 (N.Y. Fam. Ct. 1949), Justice Panken stated:

Man enters a marital relationship to perpetuate the species. The family is the result of marital relationship. It is the institution which determines in a large measure the environmental influences, cultural backgrounds, and even economic status of its members. It is the foundation upon which society rests and is the basis for the family and all of its benefits. (*Ibid.*, 520)

See also June Carbone, "Income Sharing: Redefining the Family in Terms of Community," *Hous. Law Review* 31 (1994): 359, 398 (recognizing the historical "insistence on the traditional family as the sole permissible locus of childrearing").

5. Some of these stigmatizing terms are currently used in the political debates over welfare reform. See Fineman, *Neutered Mother, Sexual Family*, chapter 5.

6. This trend is evinced by the growing number of women who will never marry. See Arthur J. Norton and Louisa F. Miller, "Marriage, Divorce, and Remarriage in the 1990s" (Washington, D.C.: Bureau of the Census, U.S. Department of Commerce, 1992), 1-4 (indicating a significant drop in the number of women who ever marry). For example, from 1975-1990, the number of women aged twenty to twenty-four who ever married dropped from 63 percent to 38 percent; for ages twenty-five to twenty-nine, the percentage dropped from 87 percent to 69 percent; for ages thirty to thirty-four, from 93 percent to 82 percent; and for ages thirty-five to thirty-nine, from 96 percent to 89 percent) (*Ibid.*, 3).

7. For enlightening discussions of the public/private sphere, see Nancy F. Cott, *The Bonds of Womanhood: "Woman's Spheres" in New England, 1780-1835* (New Haven, Conn.: Yale University Press, 1977); Frances E. Olsen, "The Family and The Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96 (1983): 1497; Nadine Taub and Elizabeth M. Schnieder, "Women's Subordination and the Role of Law," reprinted in *The Politics of Law: A Progressive Critique*, ed. David Kairys, 2d ed. (New York: Pantheon, 1990), 150; see also Sylvia A. Law, "Rethinking Sex and the Constitution," *University of Pennsylvania Law Review* 132 (1984): 955 (describing women's subservience to men both in the workplace and the domestic sphere and arguing that to achieve a "stronger constitutional concept of sex-based equality" an acknowledgment of biological differences between men and women is in order).

8. See generally Carbone, note 4 (discussing societal and economic pressures on women to marry and surveying studies demonstrating that as more women have entered the job market, marriage rates have gone down); Reva B. Siegel, "Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880," *Yale Law Journal* 103 (1994): 1073 (detailing the move toward increased female labor participation).

9. Diana Hochstedt Butler quotes a Republican presidential hopeful as saying: "Almost every problem we have in this society can be attributed to the breakdown of the marriage-based, two parent family" (Diana Hochstedt Butler, "Romanticizing the Family," *Baltimore Sun*, May 26, 1995, 19A). The Religious Right similarly embraces this belief in the need to return to traditional family values as a response to societal problems. They have most recently demonstrated this through their support of the "Contract with the American Family" (*Ibid.*).

Ralph Reed, executive director of the Christian Coalition and sponsor of the "Contract with the American Family," also attributes problems in society to cultural changes. He has stated:

What ails America isn't just its budget is out of balance, or just that its taxes are too high, or just that it isn't creating enough jobs. . . . It's the culture, it's values, it's a coarsening of the cultural environment. It's a break-up of the family, and these are the things that we want to see addressed. (*MacNeil/Lehrer Newshour* [PBS television broadcast, September 11, 1995])

10. Charles Murray, Newt Gingrich, and the Republican Contract with America urge that if mothers cannot care for their children, primarily because they are poor, the children should be removed from them and placed in orphanages. See, e.g., Charles Murray, "The Coming White Underclass," *Wall Street Journal*, October 29, 1993, A14; Dennis B. Roddy, "The War on Welfare; Legislators Sing the Praises of Orphanages, Foster Homes, with Little Mention of the Cost," *Pittsburgh Post-Gazette*, January 29, 1995, A1.

Generally, advocates for children, professional and nonprofessional, are appalled at this suggestion. See Jenny Dean, "The Modern Orphan," *St. Petersburg Times*, January 29, 1995, 1A ("[Children's advocacy groups] were outraged by the notion that mothers would have to give up their children simply because they were poor"). Dean describes orphanages such as The Children's Home and Boys' Town in Florida as places "where children end up after they have failed in foster families" (*Ibid.*). What these children need, according to child welfare experts, is a "safe, stable family" (*Ibid.*); see also Lynn Benson, "Dysfunctional Speaker?" *Star Tribune*, February 4, 1995, 16A (reader letter) (urging that it is wrong to remove children from their homes only because their parents are poor). Some in the media, holding a similar view, have investigated the past and current history of orphanages and children's homes in this country. See, e.g., Rachel L. Jones, "Talk of Orphanages Collides with Grim Realities," *Pittsburgh Post-Gazette*, December 25, 1994, A10. Jones describes a child at the New England Home for Little Wanderers, where "the majority [of children] must be medicated to cope with reality" (*Ibid.*). Jones's research has convinced her that the "cozy, poignant, drug-free, bruise-free fantasy of orphanages" is outdated (*Ibid.*). She quotes the executive director of the New England Home for Little Wanderers expressing his agreement: "If they do exist, I have no idea where" (*Ibid.*). Jones also interviewed Nan Dale, executive director of Children's Village in Dobbs Ferry, New York, who stated: "In no way am I saying that a group home is better than a family. . . . But we're being pushed to send kids back into horrifying situations in the name of family preservation." Dale continued: "The orphanage talk is just the government reneging on its promise to every citizen that it will provide a safe, decent place to raise their kids. It's the easy way out" (*Ibid.*); see also John Milne, "Home for Youths Teaches an Ethic of Love, Albeit at a Heftier Annual Cost," *Boston Globe*, December 18, 1994, 85. Milne describes some success stories at the Good-Will Hinckley Home, which cares for approximately eighty-nine children. The costs there are \$24,000 per year per child. Milne notes that at this time, 460,000 children are being cared for outside the home, up from 300,000 in 1987 (*Ibid.*). Dennis Roddy describes the success story of one child who was taken from the South Bronx and placed in an institution. The child became a high-school football star and was expected to graduate from college in the near future (Roddy, *supra*, A1). The institution is considered to be moderately priced, but the price tag for the success—well worth it, of course—was \$200,000 (five years in the institution for \$173,000 and foster care at \$10,945 per year) (*Ibid.*). This is roughly six times the national average of \$1,584 paid annually for Aid to Families with Dependent Children (AFDC) (*Ibid.*). But see Brian R. Foltz, "Don't Look Only at Short-Term Costs of Caring for At-Risk Children," *Pittsburgh Post-Gazette*, February 19, 1995, E2 (arguing that even at \$200,000, successful prevention is a bargain).

A Time/CNN survey found, however, that 72 percent of respondents (including two out of three Republicans) oppose orphanages (Milne, *supra*, 85). Fred Taylor, executive director of the nonprofit For Love of Children (FLOC), presents a historic view of orphanages in the District of Columbia (Fred Taylor, "Boys' Town? D.C. Can Do Better," *Washington Post*, February 19, 1995, C8). From 1948 to 1973, the number of children at Junior Village grew from 30 to over 900, "sometimes three to a bed" (Ibid.). This expansion was largely the result of welfare reform that between 1962 and 1965 dropped 4,000 women and children from the District of Columbia's welfare rolls and caused the population of Junior Village to quadruple to over 900. Taylor notes that "the adult survivors of that experience speak with intense anger and regret of those lost years" (Ibid.). He goes on to present another, more humane approach to the admittedly difficult problems we face with our nation's children, recommending building family and community with the "better use of both government and untapped community resources" (Ibid.).

11. One indication of this is the *New York Times* analysis that blamed Sweden's current fiscal difficulties on its expansive welfare structure (Richard W. Stevenson, "A Deficit Reigns in Sweden's Welfare State," *New York Times*, February 2, 1995, A1). This subtly biased article reflects that even a liberal paper may view more socialistic governments negatively. The article cast reported Swedish budgetary problems as vindication of anti-big government attitudes, capitalism, and the puritan work ethic. But see Erik Rhodes, "Sweden's Social Policies Put Us to Shame," *New York Times*, February 10, 1995, A28 (letter to the editor) (criticizing Stevenson's article as an unfair portrayal of the Swedish welfare system and the Swedes themselves).

12. For a discussion of the historically gendered nature of the family with respect to child custody, see Martha L. Fineman and Anne Opie, "The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce," *Wisconsin Law Review* (1987): 107, 111-12.

13. The state will provide assistance if the family falls below the governmentally defined standards of self-sufficiency and independence that are part of the family ideology in our culture.

14. See, e.g., David Popenoe, "Parental Adrognny; Sex Differences in Parenting," *Society* (September 1993): 5, 9 ("It should be recognized, of course, that the parenting of young infants is not a 'natural' activity for males").

15. See Lugaila, note 3. In 1960, the census counted 53 million households; in 1990 the figure was 93 million (Ibid., 15). (The term *household* refers to one or more people who live together. Nonfamily households are those in which the person lives alone or with one or more unrelated people.) In 1960 married couples comprised 75 percent of the family households; in 1990, the figure was down to 56 percent. Conversely, the number of non-family households rose from 15 percent in 1960 to 29 percent in 1990 (Ibid.); see also Constance Sorrentino, "The Changing Family in International Perspective," *Monthly Lab. Review* (March 1990): 41 (documenting a decline in the size of families and a move away from the nuclear family form).

16. In 1960, 4.3 percent of men and 8.7 percent of women lived alone (Lugaila, note 3, at 15). By 1990, those numbers had increased to 9.7 percent and 14.9 percent, respectively (Ibid.); see also "How We're Changing: Demographic State of the Nation: 1993," Special Studies Series, P-23, No. 184 (Washington, D.C.: Bureau of the Census, U.S. Department of Commerce, February 1993) (stating that single-person households comprised approximately one-quarter of all households in 1989).

17. The Bureau of the Census estimates that half of all marriages entered into since 1970 could end in divorce, with the majority of the parties remarrying (Lugaila, note 3, 8). Approximately 25 percent of families were single-parent families in 1990 (Ibid., 36). In 1960, 8.0 percent of children lived with only their mother, 1.1 percent lived with only their father, and 3.2 percent had some other type of living arrangement (Ibid.). By 1990 these figures were 21.6 percent (mothers), 3.1 percent (fathers), and 2.7 percent (other) (Ibid.). The number of white single-parent families increased from 7.1 percent to 19.2 percent; the number of African-American single-parent families increased from 21.9 percent to 54.8 percent (Ibid., 37). In 1990, 22 percent of white single-parent families had a never-married parent; for African-American families the number was 53 percent, and for Hispanics, 37 percent (Ibid., 21). For data on the growing numbers of educated, middle-class single mothers, see *infra* note 54.

18. Households comprised of married couples living with their children declined from 44.2 percent in 1960 to 26.3 percent in 1990, and other families with children increased from 4.4 percent to 8.3 percent. See Lugaila, note 3, 15. The percentage of married couples without children remained approximately the same at around 30 percent (Ibid.).

19. In 1990, in approximately 70 percent of two-parent families with children, both parents worked (Lugaila, note 3, 42). In 27.5 percent of the families, both parents worked full-time; in 30 percent the husband worked full-time, the wife less than year-round full-time; in 21 percent the wife worked only in the home; and in 21 percent the husband worked less than full-time (Ibid., 43).

20. See, e.g., Tamar Lewin, "Poll of Teen-Agers: Battle of the Sexes on Roles in Family," *New York Times*, July 11, 1994, A1, B7 (relating results of a survey finding that over half of teenage girls polled would consider single parenthood, and an overwhelming number were more committed to having a successful career than making a marriage).

21. *Reynolds v. United States*, 98 U.S. 145, 165 (1878); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) [quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage is one of the 'basic rights of man,' [sic] fundamental to our very existence and survival")]. The foundational role of marriage was eulogized by Judge Robert Bork: "The reason for protecting the family and the institution of marriage is not merely that they are fundamental to our society but that our entire tradition is to encourage, support, and respect them" (*Franz v. United States*, 712 F.2d 1428, 1438 [D.C. Cir. 1983] [Bork, J., concurring in part and dissenting in part]). More recently, Justice O'Connor, ruling that states could not prevent prison inmates from marrying while incarcerated, echoed this thought:

Marriages . . . are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. . . . Marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). (*Turner v. Safley*, 482 U.S. 78, 95-96 [1987])

22. See, e.g., Carol B. Stack, *All Our Kin: Strategies for Survival in a Black Community* (New York: Harper and Row, 1974) (explaining the difference between kin and blood relationships among poor urban African Americans); Patricia Hill Collins, "The Meaning of Motherhood in Black Culture and Black Mother/Daughter Relationships," *Sage* (fall 1987): 3 (discussing the role of family networks in African American child-rearing).

23. See, e.g., Frances K. Goldscheider and Linda J. Waite, *New Families, No Families? The Transformation of the American Home* (Berkeley: University of California Press,

1991), 16–19, 67–72 (charting the rise in “nonfamily” living by young adults since the 1950s and its effect on family structure); Amy Swerdlow, Renata Bridenthal, Joan Kelly, and Phyllis Vine, *Families in Flux*, rev. ed. (New York: Feminist Press at The City University of New York, 1989) (exploring alternative family structures); Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991); Mary P. Treuthart, “Adopting a More Realistic Definition of ‘Family,’” *Gonz. Law Review* 26 (1990–1991): 91, 97 (asserting that “many people subscribe to a broader definition of family than the definitions utilized by most courts and legislatures”).

24. See note, “Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family,” *Harvard Law Review* 104 (1991): 1640 (hereinafter “Looking for a Family Resemblance”) (discussing problems with the functional conception of family as applied to homosexual couples and other nontraditional families); see also Craig A. Bowman and Blake M. Cornish, note, “A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances,” *Columbia Law Review* 104 (1992): 1164, 1186–95 (discussing recent proposals for legally recognized domestic partnership agreements). But see generally Nancy D. Polikoff, “We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not ‘Dismantle the Legal Structure of Gender in Every Marriage,’” *Virginia Law Review* 79 (1993): 1535 (arguing against gay and lesbian demands for access to marriage because of the need to challenge the assumptions inherent in the institution of marriage and family).

25. See, e.g., Katharine T. Bartlett, “Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed,” *Virginia Law Review* 70 (1984): 879, 944 (criticizing continued reluctance of the law to recognize psychological parent-child relationships that arise outside the nuclear family); Kris Franklin, note, “‘A Family Like Any Other Family’: Alternative Methods of Defining Family in Law,” *New York University Review of Law and Social Change* 18 (1990–1991): 1027, 1062–64 (advocating reformulation of legal definition of parenthood to reflect existing pluralities of family types); “Looking for a Family Resemblance,” note 24, 1640 (asserting that “the traditional nuclear family is rapidly becoming an American anachronism”).

26. For an interesting example of this practice, see Sherry R. Anderson and Patricia Hopkins, *The Feminine Face of God: The Unfolding of the Sacred in Women* (New York: Bantam, 1991), 211–13 (describing Maya Angelou’s practice of choosing sisters by making an agreement with the chosen sister, discussing the new bond with family members, and forging a family commitment).

27. One of the most entrenched notions about marriage is that it is reserved exclusively for a commitment between one man and one woman. Most state statutes, explicitly or implicitly, limit marriage to “a male and a female.” E.g., Ariz. Rev. Stat. Ann. sec. 25–125 (1991); Fla. Stat. Ann. sec. 741.04 (West 1986); Ga. Code Ann. sec. 19-3-30 (1991); Idaho Code sec. 32-201 (Supp. 1995) (effective January 1, 1996); Utah Code Ann. sec. 30-1-2(5) (1995). For a brief period in 1993, many gay and lesbian couples hoped this would change when the Hawaii Supreme Court held that strict scrutiny analysis would be applied to the question of whether the state’s male/female marriage requirement constituted sex-based discrimination against homosexuals by prohibiting exercise of their civil right to marry. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). To uphold the statute, on remand, the state would be required to demonstrate that the sex-based classification was justified by compelling state interests (*Ibid.*, 67). Responding to this ruling, the Hawaii legislature quickly amended the law to require that marriage be a union “only

between a man and a woman." Haw. Rev. Stat. sec. 572-71 (Supp. 1994). The legislature made the following findings:

SECTION 1. Legislative findings and purpose. The legislature finds that Hawaii's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples. This determination is one of policy. Any change in these laws must come from either the legislature or a constitutional convention, not the judiciary. The Hawaii supreme court's recent plurality opinion in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), effaces the recognized tradition of marriage in this State and, in so doing, impermissibly negates the constitutionally mandated role of the legislature as a co-equal, coordinate branch of government. (1994 Haw. Sess. Laws, Act 217, sec. 1)

28. In contrast, married people receive favorable treatment through estate and gift tax laws. 26 U.S.C. 2056, 2523 (1988). But see David J. Roberts and Mark J. Sullivan, "The Federal Income Tax: Where Are the Family Values?," *Tax Notes* 57 (October 26, 1992): 547, 548-50 (outlining sections of the tax laws that penalize certain married people).

29. See Fineman, *Neutered Mother, Sexual Family*, chapter 5.

30. When Charles Murray first began his crusade, many people, including feminists and politicians, dismissed him as ultraconservative, too radical even for the ultra-right. Today his punitive ideas are being adopted by Congress and the states. He is one of the most vicious commentators on the increased rates of single motherhood, blaming it for all the ills of society: "Illegitimacy is the single most important social problem of our time—more important than crime, drugs, poverty, illiteracy, welfare or homelessness because it drives everything else" (Murray, note 10, A14). In this article, Murray urged that aid to unmarried mothers be terminated; then if the community fails to come to their aid, the children could be placed into orphanages (Ibid.). For a more extensive discussion of the demonization of single mothers and a critique of the characterization of them as the cause of all current social ills, see Fineman, *Neutered Mother, Sexual Family*, chapter 5.

31. According to one published report, House Speaker Newt Gingrich's verbal attacks are carefully calculated (Rupert Cornwell, "Newt Inflates His Word Power," *Independent* (London), February 4, 1995, 10). In 1990 Gingrich's staff circulated a handbook called *Language, A Key Mechanism of Control*, which suggests, on the one hand, words that should be used, and, on the other hand, words that should be avoided (Ibid.). Half of the entries are "optimistic positive governing words"; the other half are "contrasting words." Contrasting words include terms such as "pathetic," "sick," "liberal," "traitor," and "hypocrisy," to be used in describing "an opponent, his record, his proposals and his party" (Ibid.) (quoting Newt Gingrich, *Language, A Key Mechanism of Control*). To describe spending cuts, Frank Luntz, Newt Gingrich's pollster, suggests targeting "bureaucrats," not "programmes"; "charities are OK; orphanages are not" (Ibid.).

32. The image of the "Welfare Queen" is just one example of this distortion. Others include the assertion that the typical woman on welfare has numerous children, primarily to receive benefits. In reality, the birth rate for these women is essentially the same as for the typical American family. See Mimi Abramovitz and Fred Newdom, "Women on Welfare—Myths and Realities, Resource: Women, Work and Welfare" (The Women's Resource Center of New York, Inc., New York, New York) *Newsletter*, January 1995, 8 (stating that "the typical welfare family is comprised of a mother and two children, slightly less than the size of the average family in the United States"). Studies demonstrate that the birth rate among women on welfare is unrelated to the amount of assistance available.

In 1994, seventy-six leading researchers concluded that AFDC is not a principal factor affecting out-of-wedlock births.

Most research examining the effect of higher welfare benefits on out-of-wedlock childbearing and teen pregnancy finds that benefit levels have no significant effect on the likelihood that black women and girls will have children outside of marriage and either no significant effect, or only a small effect, on the likelihood that whites will have such births. . . . The evidence suggests that welfare has not played a major role in the rise in out of wedlock births. (Mark Greenberg, Center for Law and Social Policy, "Contract with Disaster, The Impact on States of the Personal Responsibility Act" [November 1994], 4 [quoting "Welfare and Out of Wedlock Births: A Research Summary" (June 23, 1994)])

Another myth contributing to the anger and hostility of the middle class toward welfare recipients is that welfare is a significant part of the budget. Actually, AFDC accounts for approximately 1 percent of the federal budget (Marlene Andrejco, "A New Contract Is Needed That Will Favor the Poor and Combat Poverty," *Pittsburgh Post-Gazette*, May 11, 1995, A18).

We further demonize these women by promoting the idea that they are lazy and do not want to work. Not true. The fact is that both the states and the federal government have tried many work programs in the past, most of which have failed through no fault of the welfare participants. For example, Christopher Jencks and Kathryn Edin note:

The essence of the so-called "welfare trap" is not that welfare warps women's personalities or makes them pathologically dependent, though that may occasionally happen. The essence of the "trap" is that while welfare pays badly, low-wage jobs pay even worse. Most welfare mothers are quite willing to work if they end up with significantly more disposable income as a result. But they are not willing to work if working will leave them as poor as they were when they stayed home. (Christopher Jencks and Kathryn Edin, "The Real Welfare Problem," *American Prospect* 1, no. 31 [1990]: 43-44)

See also Mimi Abramovitz, "Why Welfare Reform Is a Sham," *The Nation*, September 26, 1988, 221, 246 (stating that although California officials acknowledged that graduates of a training program, to stay off welfare, needed to earn a minimum of \$11.00 per hour, they were averaging only \$6.50 per hour). A 1986 study of work programs revealed that low wages forced 43 percent of Massachusetts training graduates back onto welfare (Joan Walsh, "Take This Job or Shove It," *Mother Jones*, September 1988, 30, 32); see also Jason DeParle, "Welfare Mothers Find Jobs Are Easier to Get than Hold," *New York Times*, October 24, 1994, A1, A14 (noting that many mothers on welfare who get jobs have a hard time keeping them because of low pay, lack of training, harsh working conditions, and other problems including lack of social skills, child care, health insurance, and resentful boyfriends; consequently, at Project Match in Chicago 46 percent lost their jobs within six months and 73 percent within a year); Isabel Wilkerson, "An Intimate Look at Welfare: Women Who've Been There," *New York Times*, February 17, 1995, A1, A18 (discussing difficulties women encounter with welfare and working).

33. See, e.g., Eric Lipton, "Officials Ask: What Price More Spending Authority?" *Washington Post*, February 20, 1995, D1, D4 (discussing local reactions to block grant proposals); Isabel V. Sawhill and Demetra S. Nightingale, "Real Reform or a Shift of Responsibilities?" *Washington Post*, February 20, 1995, A29 (discussing emphasis on block grants in lieu of true reform of welfare programs).



34. E.g., N.J. Stat. Ann. sec. 44:10-3.5 (West 1993) (eliminating incremental increase in AFDC benefits for birth of additional child); Ga. Code Ann. sec. 49-4-115 (1994) (same); see also Madeline Henley, "The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant," *Buffalo Law Review* 41 (1993): 703, 751-52 (discussing welfare reforms in New Jersey, Wisconsin, California, and other states). Virginia plans to require AFDC recipients to work and intends to eliminate increases in benefits for additional births, although in Virginia "a mother with two children [now only receives] \$285 a month, not including food stamps. . . . [and] \$61 more for each additional child up to five" (Peter Baker, "Virginia Jumps at Chance to Shake Up Welfare," *Washington Post*, February 22, 1994, B1, B2). Colorado, Florida, Iowa, Vermont and Wisconsin have received federal waivers from the Department of Health and Human Services to cut off AFDC benefits after a set period (*Ibid.*, B1). New Jersey's family cap program has also been approved (*Ibid.*). See also Tenn. Code Ann. sec. 71-5-133 (Supp. 1994) (requiring that all AFDC recipients be provided written information regarding availability of Norplant when they apply or are recertified for benefits).

Many of these and other reforms have been incorporated into The Personal Responsibility Act, H.R. 4, 104th Cong., 1st Sess. (1995). Among other things, this bill would amend the Social Security Act to deny assistance to children born to young women under 18 years of age, limit the amount of money that can be spent on the poor regardless of need (block grants), cut over \$18 billion from food assistance programs—including food stamps, Women, Infants, and Children Program (WIC), and school lunch/breakfast programs—over the next four years, and end the entitlement status of these programs. When the state runs out of money, people will be placed on waiting lists and will be denied benefits no matter how destitute they are. See Center on Social Welfare Policy and Law, "Ways and Means Committee Backs Block Grants," *Welfare Reform (?) News*, March 1995, 1-4 (hereinafter *Welfare Reform (?) News*). (One assumes that it is at this stage that children will be removed from their homes and placed in orphanages.)

The Senate's plan for welfare reform, passed on September 19, 1995, includes similar provisions eliminating the federal guarantee of assistance to poor families, and substituting unlimited federal support with block grants to the states. Unlike the House bill, however, the Senate bill would give the states the discretion to deny assistance to children born to unmarried, teen-age mothers and to additional children born while the mother is on welfare. Further, the Senate bill, unlike the House bill, requires states to maintain a set spending level ("A Quandary for Clinton: Most Democrats Back a Bill of Lesser Evils," *New York Times*, September 20, 1995, A1, B9).

Although the Senate bill may appear less harsh than the House bill, critics emphasize that it will nonetheless have a devastating impact on poor families. See "The Stampede to Harsh Welfare," *New York Times*, September 20, 1995, A20 (outlining the detrimental effects the Senate bill will have on the poor, and concluding that although the Senate plan may "look better" than the House plan, "it is neither humane, nor reasonable").

35. In some states, women receiving benefits are required to present evidence from paternity proceedings as a condition of receiving their benefits. For example, Wis. Stat. Ann. sec. 49.19(4)(h)(1)(a) (West 1987), makes full cooperation in paternity determinations of "nonmarital" children a condition of eligibility for receiving assistance. Pursuant to Wis. Stat. Ann. sec. 49.19(4)(h)(2) (West 1987), failure to cooperate will disqualify the caretaker for assistance, and "protective payments" for the child will be paid to "a person other than the person charged with the care of the dependent child." Wisconsin law also requires

the state attorney to file an action for paternity within six months of receiving notice that no father is named on the birth certificate of a child, if paternity has not been adjudicated already, regardless of the wishes of the mother. Wis. Stat. Ann. sec. 767.45(6m) (West 1993); see also Cal. Welf. and Inst. Code sec. 11477(b) (West 1991) (requiring aid recipients to cooperate in establishing paternity).

At this time federal law provides for "good cause" refusal to name the father. 42 U.S.C. sec. 602(a)(26)(B)(ii) (1988). "Good cause" is based on the needs of the child and exists only when the child will suffer physical or emotional harm or the mother will suffer such harm that she will be unable to care adequately for the child. 45 C.F.R. 232.42(a)(1)(i)-(iv) (1994). For an extremely punitive application of this standard, see *Waller v. Carlton County Human Servs. Department*, No. C6-89-1116, 1989 WL 145393 (Minn. Ct. App. 1989) (holding "good cause" standard was unsatisfied when woman's account of rape could not be corroborated after she failed to report the rape to police because she feared harm to herself and her child). Women who have named as fathers men whose subsequent blood tests have proved them not to be the father and women who do not know the name or location of the father also have been subjected to severe scrutiny and questioning by state agencies. For example, in *Allen v. Eichler*, 1990 WL 58223 (Del. Super. Ct. 1990), after several men whom the plaintiff had named as the possible father were excluded by blood tests or could not be found, the agency demanded a calendar on which the plaintiff had supposedly written the names of sexual partners. When she refused, she was deemed uncooperative, and her benefits were cut (*Ibid.*, *Neutered Mother, Sexual Family*, 1). One of the provisions of the Personal Responsibility Act reduces AFDC benefits until paternity is established, even when the mother is cooperating fully; if the mother does not cooperate at all, she will be denied aid entirely (*Welfare Reform (?) News*, note 34, 3).

36. See note 34.

37. See note 35.

38. Many states are turning to programs, like Learnfare, which penalize aid recipients, under some circumstances, if they fail to attend school. See, e.g., Fla. Stat. Ann. sec. 409.933 (West 1995); Wis. Stat. Ann. sec. 49.50(7)(g), (h) (West Supp. 1994). These programs, however, can be problematic. A 1990 audit of the Wisconsin Learnfare program found that 84 percent of the orders imposing sanctions were overturned by an administrative judge "because of errors in record-keeping by either the schools or the welfare agency" (Paul Taylor, "Welfare Policy's 'New Paternalism' Uses Benefits to Alter Recipients' Behavior," *Washington Post*, June 8, 1991, A3).

39. See, e.g., Colo. Rev. Stat. sec. 26-2-507 (1)(a)-(b) (Supp. 1994); Virginia Code Ann. sec. 63.1-105.2 (Michie 1995).

40. Many states have imposed "Workfare" programs that require aid recipients to work or participate in job training in order to receive benefits; failure to comply risks the termination of benefits. See, e.g., Conn. Gen. Stat. Ann. sec. 17b-682 (West Supp. 1995); Fla. Stat. Ann. sec. 409.924 (West Supp. 1995); Ind. Code Ann. sec. 12-20-11-1 (Burns 1995); Ohio Rev. Code Ann. sec. 5101.84 (Anderson Supp. 1994); Wis. Stat. Ann. sec. 49.27(5) (West Supp. 1994).

41. Even under the best conditions mothering is work, of course. It is work that is not incorporated into the gross national product, however, and for that reason is often overlooked by various policymakers. For the poor, particularly AFDC recipients, motherhood is even more work in our suspicious and demeaning welfare system. Lines are long and forms and formalities profuse. See generally William H. Simon, "Legality, Bureaucracy,

and Class in the Welfare System," *Yale Law Journal* 92 (1983): 1198 (arguing that the mechanism used to provide aid to the poor is impersonal and formalized).

42. This phenomenon is detailed in Fineman, *Neutered Mother, Sexual Family*, chapter 5.

43. See, e.g., Anne Raver, "Great Expectations: Coping with the Pressure to Reproduce in Our Baby Boom Society," *Newsday*, March 4, 1989, pt. II, p. 1; Paula Voel, "Choosing to Be Childless: So What if They Don't Harbor the Nesting Instinct? These Women Are Content with Their Lives," October 20, 1993, *Lifestyles* 9.

44. For further discussion of this point as it relates to reform of divorce and property division laws, see Martha L. Fineman, "Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce," *Wisconsin Law Review* (1983): 789, 851-52.

45. 1 William Blackstone, *Commentaries*, 442-44.

46. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (adopting an intermediate level of review for the examination of sex-based classifications, requiring that such classifications serve "important governmental objectives and . . . be substantially related to the achievement of those objectives").

47. See *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating, on equal protection grounds, a Louisiana statute providing that only husbands could be held responsible for alimony payments).

48. Courts have rejected the tender years doctrine and other gender-based presumptions and now invoke the best interests of the child as the controlling factor in custody determinations. See, e.g., *Johnson v. Johnson*, 564 P.2d 71 (Alaska 1977), cert. denied, 434 U.S. 1048 (1978); *In Re Marriage of Bowen*, 219 N.W. 2d 683 (Iowa 1974); *State ex rel. Watts v. Watts*, 350 N.Y.S. 2d 285 (1973).

49. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (holding that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally").

50. Studies indicate that across cultures mothers still perform the vast bulk of child care and housework. See "Report of the International Labor Organization," September 6, 1992 (presenting results of a global survey on the distribution of housework and family responsibilities between men and women, which reveals that women still do the vast majority of the work despite the existence in some countries of shared-responsibility laws); see also David Briscoe, "'All Work and No Pay' World," *Times*, September 8, 1992 (discussing report prepared by the International Labor Organization finding that, worldwide, women work more for less pay than men); Anna Quindlen, "Abhors a Vacuum," *New York Times*, September 9, 1992, A21 (same); "Women Work Harder but Paid Less," Xinhua News Agency, September 6, 1992 (same). For further discussion of the unequal distribution of household responsibilities between men and women, see Janice Drakich, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood," *Canadian Journal of Women and Law* 3 (1989): 69, 83-87 (reviewing a 1988 study showing that employed women still spend twice as much time with child care and housework as do their husbands, and demonstrating that contrary to popular anecdotal information, fathers today are actually participating in child care only slightly more than they did in 1967); "Project, Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict," *Stanford Law Review* 34 (1982): 1263 (demonstrating that law firms and law students expect females to be more involved with parenting than with working and contending that structural reform is needed to correct this imbalance); Mary Jo Bane, Laura Lain, Lydia O'Donnell, C. Anne Steuve, and Barbara

Wells, *Monthly Labor Review* (October 1979): 50, 52–53 (claiming that mothers are more likely to pass up work opportunities to raise children); Victor R. Fuchs, "Sex Differences in Economic Well-Being," *Science* 232 (1986): 459 (chronicling the effect that gender and motherhood continue to have on the wages and employment opportunities of women). But see Bureau of the Census, U.S. Department of Commerce, "How We're Changing: Demographic State of the Nation: 1994," Special Studies Series P-23, No. 187 (Washington, D.C.: Bureau of the Census, U.S. Department of Commerce, 1994), 2 (reporting that more fathers are becoming primary caregivers as more women return to work).

For a contrasting opinion, see Nancy R. Gibbs, "Bringing Up Father," *Time*, June 28, 1993, 53. She asserts that even those men who wish to be more involved are frequently stymied by work requirements and women's intransigence. Bosses do not want men to take paternity leave; women do not want them to do child care unless they do it "their" way.

51. Susan Moller Okin seems to be ascribing to this view when she says:

Only children who are equally mothered and fathered can develop fully the psychological and moral capacities that currently seem to be unevenly distributed between the sexes. Only when men participate equally in what have been principally women's realms of meeting the daily material and psychological needs of those close to them . . . will members of both sexes be able to develop a more complete human personality. (Susan Moller Okin, *Justice, Gender, and the Family* [New York: Basic, 1989], 107)

52. This vision of reform was particularly narrow in its consideration of only some family actors in its reconstituted vision. The roles of husband and wife were restructured in regard to child care and vaguely described household domestic tasks; little thought, however seems to have been given to the demands on domestic time and labor spent caring for the elderly, the ill, or the disabled. The egalitarian family was structured on the basis of sexual affiliation—the assumed inevitability of heterosexual pairing and its association with reproductive destiny were expressed in family form. No one argued over who would care for grandma in developing the rhetoric of the "new man" in the reconstructed family story.

The social assignment of dependency is even more pronounced (and less challenged) when it comes to care for the elderly or ill. Daughters (or daughters-in-law) are those to whom elderly parents look for expected accommodations. See, e.g., Hilde Lindemann Nelson and James Lindemann Nelson, "Frail Parents, Robust Duties," *Utah Law Review* (1992): 747.

53. Failing to recognize the gendered nature of the world, early feminists mistakenly believed that formal equality would rectify past discrimination. See, e.g., Wendy W. Williams, "The Equality Crisis: Some Reflections," *Women's Rights Law Report* 7 (1982): 175. Unfortunately this was not, and could not, be true. To be successful, any theory seeking to change women's lives and their relationship to mainstream culture, i.e., patriarchal culture, must be gendered. It must be centered around women and their experiences, which are gendered. Women's experience is not neutral and cannot be theorized as such. See Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991).

54. Recent Census figures show an increase in never-married motherhood. See Amara Bachu, Bureau of the Census, U.S. Department of Commerce, Pub. No. P20-470, "Fertility of American Women: June 1992" (Washington, D.C.: Bureau of the Census, U.S. Department of Commerce, 1993), xix. A survey of unmarried women from eighteen to forty-four years of age showed an increase in never-married motherhood from 15 percent in 1982 to

24 percent in 1992 (Ibid.). The rate of births by unmarried women with at least one year of college education increased from 5.5 percent to 11.3 percent (Ibid.). For women in professional or managerial positions, it rose from 3.1 percent to 8.3 percent (Ibid.).

The media has paid a great deal of attention to the increase in out-of-wedlock births. See, e.g., Joan Beck, "Nation Must Stem the Tide of Births Out of Wedlock," *New Orleans Times-Picayune*, March 6, 1993, B7; Richard Cohen, "Judging Single Mothers," *Washington Post*, July 16, 1993, A19; Jason DeParle, "Big Rise in Births Outside Wedlock," *New York Times*, July 14, 1993, A1; Carol Lawson, "'Who Is My Daddy?' Can Be Answered in Different Ways" and Anne Lamott, "When Going It Alone Turns Out to Be Not So Alone at All," combined articles featured in "Single but Mothers by Choice," *New York Times*, August 5, 1993, C1; Katha Pollitt, "Bothered and Bewildered," *New York Times*, July 22, 1993, A23; Richard Whitmire, "Number of Never-Married Moms Stretches across Income Lines," *Gannett News Service*, July 13, 1993. And, of course, we all recall the Quayle debacle over Murphy Brown. "'Hollywood thinks it's cute to glamorize illegitimacy,' Quayle told reporters. . . 'Hollywood doesn't get it'" (John E. Yang and Ann Devroy, "Quayle: 'Hollywood Doesn't Get It': Administration Struggles to Explain Attack on TV's Murphy Brown," *Washington Post*, May 21, 1992, A1); see also Barbara Dafoe Whitehead, "Dan Quayle Was Right," *Atlantic*, April 1993, 47 (arguing that children who do not live with both of their biological parents are disadvantaged). This view, however, is far from universally accepted:

Before Democrats embrace the view that marriage is the best antidote to poverty, educational failure and psychological distress, they might consult the two-parent families devastated by layoffs in the steel, defense, timber and auto industries—families whose children now exhibit most of the emotional and cognitive problems generally blamed on divorce. (Stephanie Coontz, "Dan Quayle Is Still Wrong: Why the Two Parent Paradigm Is No Guarantor of Happiness," *Washington Post*, May 11, 1993, C5)

Interestingly, it was this increase in nonmarital births among white women that seems to have been the proverbial "last straw" for those in power. As Charles Murray has said: "The brutal truth is that American society as a whole could survive when illegitimacy became epidemic within a comparatively small ethnic minority. It cannot survive the same epidemic among whites" (Murray, note 10, A14).

55. Individual understandings about family are shaped by societal forces and manifest those forces. So, although one may "choose" to live outside of the conventional norms, one does not escape them entirely. No one is exempt from the implications of the culture in which she lives—culture influences our actions, our aspirations, our politics, and what we envision as possibilities.

56. Fineman states:

Essentially a modernist concept, a meta- or public narrative is understood to be the story or "narrative" which legitimates and controls knowledge in the Western world. The modernist attempts to characterize the world as ultimately unrepresentable, while relying on a form of narrative presentation that is familiar or recognizable and which offers the reader or listener a degree of comfort. (Martha Albertson Fineman, "Our Sacred Institution: The Ideal of the Family in American Law and Society," *Utah Law Review* [1993] 387, 387n2)

"The notion of the metanarrative assumes some sort of hierarchy of cultural representations and cultural values. Since the Enlightenment, for example, the central western metanarrative has been that of progress, reason, and revolution, a public narrative of Darwinian evolution

and class struggle" (Fineman, *Neutered Mother, Sexual Family*, 169n14). Metanarratives are normative and aid in the formation of collective identities by encouraging a linear and narrow interpretation of history (Ibid.).

For example, a single metanarrative has established public law adjudication as the paradigm for all adjudication, whether the question implicates common law, statutory construction, or constitutional interpretation. For a critique of an approach that relies on the same principles to analyze common law, statutory construction, and constitutional interpretation, see Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Mass.: Harvard University Press, 1988), 8-13. In contrast, postmodern theories rely on "local, interlocking language games" to replace the idea of overarching structures. Jennifer Wicke, "Postmodern Identity and the Legal Subject," *University of Colorado Law Review* 62 (1991): 455, 462; see generally Fredric Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991); Willem van Reijen and Dick Veerman, "An Interview with Jean-Francois Lyotard," *Theory, Culture and Society* 5 (1988): 277, 301-02 (discussing the abandonment of the metanarrative). Postmodernists reject metanarratives, viewing culture and society as a complex interaction without any single exclusive or overpowering identity. See David Kolb, *The Critique of Pure Modernity: Hegel, Heidegger and After* (Chicago: University of Chicago Press, 1986), chapter 12 (claiming that metanarratives are increasingly irrelevant); Richard M. Thomas, "Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance," *University of Colorado Law Review* 62 (1991): 525, 525-30 (summarizing the debate regarding the metanarrative); see also Roberto M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976), 37-43, 134-37 (describing the difficulty of finding a universal truth that links humankind).

57. I.R.C. sec. 105 (1988 and Supp. 1994).

58. I.R.C. sec. 2523 (1988 and Supp. 1994).

59. See William A. Klein and Joseph Bankman, *Federal Income Taxation*, 10th ed. (Boston: Little, Brown, 1994), 120-22.

60. I.R.C. sec. 163(h)(3) (1988).

61. I.R.C. sec. 21 (1988).

62. Although the private-natural family is not the only possible response to dependency, punitive and harsh measures designed to stigmatize those who deviate from the failed norm seem preferred by many policymakers. See Martha L. Fineman, "Images of Mothers in Poverty Discourses," *Duke Law Journal* (1991): 274 (hereinafter Fineman, "Images") (linking patriarchal ideology to discourses which use single-mother status as a primary indicator of poverty); Martha Albertson Fineman, "Intimacy Outside of the Natural Family: The Limits of Privacy," *Connecticut Law Review* 23 (1991): 955 (arguing that the state justifies invasions of poor women's privacy on the basis of their perceived deviancy).

63. Equality imagery has taken hold in this area. The argument is that fathers as equal parents are equally obligated to be with and care for children, but (the myth grows) they fail to do so because mothers have superior rights over children. According to this view, if law gives fathers more rights over children, they will pay child support for those children. Some have attempted to assess whether more rights actually translate into more support. See, e.g., Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge, Mass.: Harvard University Press, 1992), 251-57 (examining the correlation between compliance with child support obligations and various other factors

and finding that the more contact a father has with his child, the greater the chance of compliance); see also Martha Albertson Fineman, "Legal Stories, Change, and Incentives—Reinforcing the Law of the Father," *New York Law School Law Review* 37 (1992): 227 (arguing against reliance on legal incentives to encourage men to use birth control).

64. See, e.g., Thomas B. Edsall, "Age of Irritation: The New, Bitter Politics of Fear," *Washington Post*, November 28, 1993, C1, C4; Barbara Vobejda, "Education Is No Protection from Wage Squeeze, Report Says," *Washington Post*, September 4, 1994, A20.

65. See note 54 and accompanying text.

66. The solution may be to hire caretakers, but this may come with its own set of problems, as the Zoe Baird and Kimba Woods incidents indicated for professional moms. See Thomas L. Friedman, "Clinton Concedes He Erred on Baird Nomination," *New York Times*, January 23, 1993, A1; Ruth Marcus, "Babysitter Problems Sink Second Clinton Prospect: Wood Withdraws from Consideration as Attorney General," *Washington Post*, February 6, 1993, A1.

67. See note 50 and accompanying text.

68. See generally Ann Laquer Estin, "Maintenance, Alimony, and the Rehabilitation of Family Care," *North Carolina Law Review* 71 (1993): 721, 776 ("Caregiving remains invisible . . . because the law construes family care as matter of love and obligation, not . . . personal choice or arm's-length bargaining"); Siegel, note 8, 1214 ("Today . . . it is women who perform the work of the family, women who seek to escape the work, and women who eke out a living performing the work—for other women"); Joyce Davis, "Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property" (unpublished manuscript, on file with the Virginia Law Review Association), 16–17.

69. See Estin, note 68, 780 (stating that most caregiving costs fall disproportionately on women); Cynthia Starnes, "Applications of a Contemporary Partnership Model for Divorce," *Brigham Young University Journal of Public Law* 8 (1993): 107 (advocating the replacement of current no-fault divorce laws with a broad application of partnership principles so that women are compensated fairly as caretakers); J. Thomas Oldham, "Putting Asunder in the 1990s," *California Law Review* 80 (1992): 1091 (reviewing *Divorce Reform at the Crossroads* [ed. Stephen D. Sugarman and Herma Hill Kay, 1990]).

70. See Carbone, note 8, 363–72.

71. Cf. Barbara Stark, "Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities," *UCLA Law Review* 38 (1991): 1483, 1507 (maintaining that the woman is often blamed for divorce because her domestic role burdens her with preserving the marriage).

72. See Fineman, *Neutered Mother, Sexual Family*, chapter 5.

73. This language is used to describe both types of single mothers, although it is most viciously directed at never-married mothers. See Fineman, "Images," note 62, 280–82.

74. A great deal of evidence indicates that reliance on the private solution of child support is inadequate. Of the 10 million women living with children under twenty-one years of age whose father is not living in the household, only 58 percent were awarded child support payments. See Lugaila, note 3, 40. Slightly more than half of these women received the full amount of payments due (*Ibid.*, 41). In 1991, 35.6 percent of single mothers fell below the poverty line. Mwangi S. Kimenyi and John Mukum Mbaku, "Female Headship, Feminization of Poverty and Welfare," *S. Economics Journal* 62 (1995): 44, 44. Of the 4.2 million women never awarded child support, 64 percent wanted child support. Gordon H. Lester, Bureau of the Census, U.S. Department of Commerce, Consumer Income Series

P-60, No. 173, "Child Support and Alimony: 1989," (Washington, D.C.: Bureau of the Census, U.S. Department of Commerce, 1991), 10. Furthermore, there is significant doubt as to whether the current reforms are effective measures for increasing child support payments from absent fathers. The reforms are hindered by the failure of many states to enforce child support obligations. Family Welfare Reform Act: Hearings on H.R. 1720 Before the Subcomm. on Pub. Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 100th Cong., 1st Sess 134-43 (1987) (statement of Robert C. Harris, associate deputy director, family support administrator, Office of Child Support Enforcement, U.S. Department of Health and Human Services). Moreover, delays in institution of wage withholding and approval of federal funding have contributed to a low rate of payment collection under the reforms (Ibid., 162-72) (statement of G. Diane Dodson, Special Counsel for Family Law and Policy, Women's Legal Defense Fund).

75. The model for family formation and operation historically was patriarchal. Although pure patriarchy is no longer a dominant mode of social organization, the basic tenets remain fundamentally ingrained in the way we define families and understand intimacy.

76. The inseparability of power from justice is generalizable to other subject areas. A major premise adhered to by the Law and Society tradition is that all events, concepts, and concerns must be understood in the contexts in which they operate. Feminists, in particular, have highlighted the significance of the ideological medium in which legal concepts operate. See, e.g., *Women in Law: Explorations in Law, Family and Sexuality*, ed. Julia Brophy and Carol Smart (London: Routledge and Kegan Paul, 1985); Martha Albertson Fineman, "Feminist Theory in Law: The Difference It Makes," *Columbia Journal of Gender and Law* 2 (1992): 1; Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Challenges and Cultural Change," *Yale Law Journal* 100 (1991): 1731; Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," *Stanford Law Review* 44 (1992): 261; see also Carol Sanger, "Seasoned to the Use," *Michigan Law Review* 87 (1989): 1338, 1357-65 (reviewing Scott Turow, *Presumed Innocent* [1987] and Sue Miller, *The Good Mother* [1986]) (describing how both novels demonstrate that American society perceives, and law accepts, motherhood and sexuality as incompatible).

77. The historic construct of the family in its relationship to the state also has implications for what is considered "just" in individual contexts.

78. See Lynne M. Casper, Sara S. McLanahan, and Irwin Garfinkel, "The Gender-Poverty Gap: What We Can Learn from Other Countries," *American Social Review* 59 (1994): 594 (indicating the existence of a poverty gap between men and women in America and contrasting this gap to that found in other countries).

79. Ibid., 598.

80. Ibid.

81. Ibid., 602. The Netherlands has a relatively high income floor, and no citizen is allowed to fall beneath it, regardless of work history. Sweden takes a different track, encouraging mothers to work. In Sweden, women's high employment rates substantially reduce the gender poverty gap (Ibid., 600).