

Rhetoric, the Unnatural Family, and Women's Work

Author(s): Lloyd R. Cohen

Source: *Virginia Law Review*, Nov., 1995, Vol. 81, No. 8, Symposium: New Directions in Family Law (Nov., 1995), pp. 2275-2303

Published by: Virginia Law Review

Stable URL: <https://www.jstor.org/stable/1073579>

REFERENCES

Linked references are available on JSTOR for this article:

https://www.jstor.org/stable/1073579?seq=1&cid=pdf-reference#references_tab_contents

You may need to log in to JSTOR to access the linked references.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



Virginia Law Review is collaborating with JSTOR to digitize, preserve and extend access to *Virginia Law Review*

JSTOR

RHETORIC, THE UNNATURAL FAMILY, AND WOMEN'S WORK

*Lloyd R. Cohen**

... Of course, many families are unhappy. But that is irrelevant. The important lesson that the family taught was the existence of the only unbreakable bond, for better or for worse, between human beings.

The decomposition of this bond is surely America's most urgent social problem.¹

INTRODUCTION

COMMENTING on Professor Martha Albertson Fineman's article *Masking Dependency: The Political Role of Family Rhetoric*² has proven a very difficult task. As a preliminary matter I confess to being unable to fully understand the article. There is some irony in the fact that Professor Fineman is, at least nominally, writing about rhetoric. For I find that she and I not only have very different positive and normative views of the world, but we seem not even to share a common language with which to write about them.

As best as I can make out Professor Fineman's article can be summarized by the following three-part thesis. First, she presents a positive/normative vision of the world. Marriage has been, and is, a bad deal for women. The relationship is inherently unequal, and the effort to make it substantially more equal has thus far been a failure. As a consequence, women are quite reasonably rejecting it by: (1) refusing to marry and having children out of wedlock; and (2) getting divorced. Second, Professor Fineman offers a policy proposal. She apparently believes that these out-of-wedlock births and divorces are all to the good, and therefore the proper public policy is to accept, celebrate, encourage and generously

* Associate Professor of Law, George Mason University School of Law. This Commentary was written with the generous financial support of the Law and Economics Center at the George Mason University School of Law. I thank Margaret Brinig, Frank Buckley, David Haddock, Claire Hill, Nelson Lund, Erin O'Hara and Max Stearns for valuable comments on earlier drafts. I am grateful to Sujatha Bagal for her research assistance.

¹ Allan Bloom, *The Closing of the American Mind* 119 (1987).

² 81 Va. L. Rev. 2181 (1995).

support women who raise children without the benefit of men. Third, Professor Fineman provides an explanation for why these truths are less than self-evident. The misleading rhetoric of the family is to blame. She believes that much public discussion glorifies the traditional family by referring to it as “natural” and insisting that there is special virtue in keeping the affairs of the family private and free from government intrusion. If the language of the family could be transformed to that of “dependency,” we would come to see that all children are dependent on the wider community for support, that their caretakers/mothers are therefore derivatively also dependent on the rest of us, and that it is our duty to generously support them.

I was tempted to comment on all or at least most of the points on which Professor Fineman and I disagree, but we do not merely part company occasionally or at specific junctures; we are on different journeys in different worlds. So, to respond point for point would make for a most unsatisfying write and read. I have chosen instead to reply broadly to each of the three strands of Professor Fineman’s argument.

I. THE RHETORIC OF THE FAMILY

Professor Fineman’s article is nominally about rhetoric so let us begin there. She uses the word in its modern vulgar sense to mean something like the use of words to convey a false image of the world. In eschewing the original Aristotelian meaning of rhetoric Professor Fineman is in large, if not good, company. In modern parlance “rhetoric” has become a suffix, invariably conjoined with the prefixes “mere” or “empty.” The original meaning of rhetoric is the art of persuasive argument. Perhaps moderns hold their disparaging view of rhetoric because they believe that the world is knowable and explainable by employing some scientific method or technique. Were such a method available, resort to mere rhetoric, mere argument, would indeed be a disreputable, deceitful enterprise. But no such method exists.

All any of us have at our disposal to persuade others are arguments. Arguments may be artful, engaging and persuasive, or not. They may employ appealing metaphors, or not. They may tell evocative stories, or not. Their logic may be complete and compelling, or not. Their evidence may be apt and accurate, or not. But argument, and its constituent parts, are all we have available. This is no more true in law than in other disciplines, but is more obvious in law. Law, more than other disciplines, is neither aided nor constricted by the ideology of a narrow received meth-

odology.³ Trials, the Gibraltar in whose shadow all other legal practice and scholarship take place, are merely starched arguments.

That said, what is Professor Fineman's rhetorical point about the rhetoric of the family? She believes that if only we were not addled by misleading linguistic messages approving of intact marriage and disapproving of divorce and unwed motherhood, we would see the central underlying similarity among all three: *dependency*. Professor Fineman would deny a special place of honor to the traditional intact family and instead treat all familial structures in which mothers raise children as equally valid, praiseworthy and deserving of state support. To make her case about language she must vault two hurdles. First, she must make a convincing case that the language we use to talk about the family somehow prejudices and channels our thinking. Second, she must persuade us that some alternative metaphors, analogies and language provide a clearer descriptive and normative picture of the different circumstances in which children are born and raised.

Professor Fineman trips over both hurdles. She simply fails to demonstrate that the language we employ to talk about families conveys an image that prejudices thought. Professor Fineman places great freight on the word "natural" as an adjective of family. She is right that the word conveys the image of something that is right and proper. But, she fails to show that "natural" is a commonly used adjective to describe the traditional monogamous intact family. She provides no examples of the phrase "natural family" used in the fashion she claims. To the extent that the word "natural" is used with respect to familial relations, it is to describe a biological relationship as distinct from a social or legal relationship, as in "natural parents" as opposed to "adoptive parents."

Professor Fineman's emphasis on the importance of the word "natural" is not unwarranted. The words "natural" and "nature" are among the most powerful and important terms in the English language. I lack the space and the expertise to explore in any depth their full normative and positive meanings. For the purpose of this Commentary I simply note that in our era the dominant normative use of the term "natural" as descriptive of human behavior has been to distinguish some mythical prereflective, precultural way of life more in tune with our essential animal nature, from the cultural mores of advanced societies.⁴ To

³ Faith in "scientific" methodology as the path to knowledge does mischief in many social disciplines. Even in the hard sciences it is not a talisman of truth. Practitioners of those arts must ultimately resort to the same tools of rhetoric as the rest of us. See Donald N. McCloskey, *The Rhetoric of Economics*, 21 *J. Econ. Literature* 481, 491-93 (1983).

⁴ There is of course an alternative, older—fifth century Athenian—view of the natural. It holds that man is not merely an animal, but is also a uniquely rational being, capable of

moderns of all political stripes, “natural” has come to mean the primitive, prereflective side of man. With the decline of Western civilization many see this as man’s better side. The alternative view, however, is captured by the disdainful response of the proper Victorian lady to a statement that some practice was natural: “Young man, nature is something that civilized people attempt to rise above.”

In any event, I believe that Professor Fineman’s understanding of the application of the word “natural” to the family is almost precisely the reverse of the truth. While some honor the traditional life-long monogamous marriage, and others hold it in contempt, few would describe it as natural.⁵ Those of us who approve of marriage would observe that to procreate in a natural fashion is to do so irresponsibly, thoughtlessly, and usually promiscuously; civilized human beings use their will, intellect and moral sense to craft a culture that constrains what many would otherwise *naturally* do. Even people outside of academia are far too aware of the various family arrangements that exist in the world, such as polygamy and polygyny, practiced by more primitive (and therefore more natural?) people to believe that our monogamous marital structure was the one and only “natural” family unit.

What is particularly odd about Professor Fineman’s argument is that she seems to be unaware of how successful those of her camp have been in changing the language of the modern world. The evidence surrounds us that as a society we have lost faith in the cultural choices our ancestors made with respect to marriage. When we have abandoned the original meaning of bastard, even barring the term “illegitimate” to describe children born out of wedlock, and when second graders are assigned the book *Heather Has Two Mommies*,⁶ can Professor Fineman truly believe

seeing beyond his finite existence and creating a culture that seeks to realize his unique nature. Allan Bloom, not a naturalist in the sense described in the text, adopts and restates the Greek view in writing that “[n]ature should be the standard by which we judge our own lives and the lives of peoples.” Bloom, *supra* note 1, at 38.

⁵ Consider, for example, Dinesh D’Souza’s commentary on Toni Morrison, each employing “nature” as argued for in the text, one approvingly and the other disapprovingly:

Nobel Prize-winner Toni Morrison proposes an abandonment of societal restraints and a return to the elemental urges of *nature*. “The little nuclear family is a paradigm that just doesn’t work,” she writes. “Why we are hanging onto it, I don’t know. I don’t think a female running a house is a problem. . . . What is this business that you have to finish school at 18? The body is ready to have babies. *Nature* wants it done then.”

Dinesh D’Souza, *Black America’s Moment of Truth*, *Am. Spectator*, Oct. 1995, at 35, 44 (emphasis added).

⁶ Leslea Newman, *Heather Has Two Mommies* (1991) (introducing children to the idea of a lesbian couple). Other children’s books reflecting the different “families” in which

that public discourse about the family is constrained by some special standing, linguistic or otherwise, that attaches to the traditional family?

As for substituting the word “dependency,” here too Professor Fineman fails to make her case. She is not offering us some heretofore unrecognized linguistic tool. The noun “dependent” is not only used in popular discourse; it is deeply ensconced in both the tax code and Aid to Families with Dependent Children (“AFDC”) to describe precisely the relationships at issue. But more important than whether the word is fresh is whether it is a useful aid to thought. Professor Fineman has to make the case that it is helpful to erase the distinctions among the different senses in which children and their mothers are dependent, the different sets of people on whom they are dependent, and the different ways in which they became dependent. For most of us there are meaningful distinctions between a wife’s dependency on her husband and her children’s dependency on their father; a widow’s and her children’s dependency on social security and life insurance; a divorcee’s and her children’s dependency on maintenance and child support; and an unmarried teenage girl’s and her children’s dependency on the rest of us for support. People draw such distinctions because they believe they carry moral and practical weight. If Professor Fineman believes otherwise, she must make that case stand on its own legs, not by merely invoking the word “dependency” or through excursions into the world of meta-narratives and language games.⁷

Professor Fineman’s error is not that she places too great an emphasis on words. It is simply that the words that she focuses on seem to matter

children grow up include: Michelle Lash, Sally I. Loughridge & David Fossler, *My Kind of Family: A Book For Kids in Single-Parent Homes* (1990); Jeanne W. Lindsay, *Do I Have A Daddy? A Story About A Single-Parent Child* (2d ed. 1991).

More generally, much of the “professional” writing on the subject of families has for two decades been arguing that the presence of a father is unnecessary for children. For illustrative examples of this literature, see David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* ch. 4 (1995).

⁷ Professor Fineman has brought the wrong dog to bark up the wrong rhetorical tree. Consider for example the following passage:

“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 un[re]presentable, while relying on a form of narrative presentation that is familiar or recognizable and which offers the reader or listener a degree of comfort.”

... In contrast, postmodern theories rely on “local, interlocking language games” to replace the idea of overarching structures.

Fineman, *supra* note 2, at 2204 n.56 (quoting Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 *Utah L. Rev.* 387, 387 n.2). All of this was a bit hard on a simple country economist/lawyer.

very little. Words are essential to facilitating and channeling thought. The metaphors we use and the stories we tell are vitally important in making a persuasive argument, and, at times, in leading the listener down the garden path to comforting but mistaken notions of the world.⁸

Let me illustrate the importance of language, metaphor and story using the powerful rhetoric of the “ultraconservative[,] . . . punitive . . . vicious”⁹ Charles Murray on the relationship between public charity and unwed motherhood. Prior to Murray’s book, *Losing Ground*,¹⁰ there were two competing stories explaining why unwed girls had babies. The older liberal story was of the ignorant or innocent girl, lacking knowledge of birth control or the ways of men. She becomes pregnant through no fault of her own and is confronted with several awful alternatives: (1) to abort her unborn child, a choice that she may see as akin to murder; (2) to bear the child and then give it away to strangers; or (3) to attempt to raise the child bereft of financial resources. It is surely our moral duty to help this young woman raise her own child. The competing conservative story was of the calculating, lazy, immoral woman, who had babies in order to procure support from the state, i.e., “the welfare queen.” Each of these stories had purchase in the public mind because each was undoubtedly an accurate description of some instances of unwed motherhood. But neither rang quite true as a description of the emerging central case. There was too much evidence of teenage girls purposely having babies and far too much of an increase in the illegitimacy rate for the first to be true. As for the second, purposely having and raising babies for the sole purpose of remaining on welfare seemed too implausible and unattractive a way to make a living.

There is a saying in politics that “you can’t beat somebody with nobody.” So too with rhetoric, a weak argument will be accepted, and its

⁸ Consider an example from a wholly unrelated field. International trade discourse offers several truly misleading metaphors that are habitually employed and serve to confuse both the speaker and the listener. Perhaps the most egregious is the phrase “trade deficit.” A deficit is a lack, usually applied to something of value. Thus a deficit is bad, and a surplus is good. A deficit in international trade means something else entirely. A trade deficit, or current account deficit, signifies that we have bought more goods and services for current consumption from foreigners than they have purchased from us, and there is no good or bad about it. A deficit in the current account (first cousin to trade deficit) will generate an exactly corresponding surplus in the capital account. But talk of deficit misleads people, particularly those uneducated in the discipline of economics, to infer all sorts of evil from its existence. See generally Lloyd R. Cohen, ‘Chicken Little’ and The Myth of International Trade, 3 *The World & I* 685 (Oct. 1988) (debunking various myths regarding international trade).

⁹ Fineman, *supra* note 2, at 2193 n.30.

¹⁰ Charles Murray, *Losing Ground: American Social Policy, 1950-1980* (1984).

shortcomings swept beneath the intellectual rug, until a more persuasive argument is offered.¹¹ Charles Murray provides a more persuasive argument that explains the phenomenon of unwed motherhood in a way that has captured the imagination of a wide audience. Murray writes:

There is an obvious explanation for why single young women get pregnant: sex is fun and babies are endearing. Nothing could be more *natural* than for young men and women to want to have sex, and nothing could be more *natural* than for a young woman to want a baby. A better question than asking why single young women get pregnant is to ask why they don't. The obvious answer is that in the past it was very punishing for a single woman to have a baby.¹²

Murray then goes on to explain how, in real terms, government support for single mothers in England approximately tripled from the mid-1950s to the mid-1970s and that as a consequence the rate of unwed motherhood soared.¹³ He then implicitly anticipates an empirical policy question. If the increase in the rate of illegitimacy is a function of the increase in the benefit level, then what changes in the illegitimacy rate would one anticipate if the benefit level declined slightly or remained unchanged? Murray writes:

The right analogy for understanding the process is not a young woman with a calculator, following the latest quotations on benefits and deciding whether to change her fertility behavior. Rather, the analogy is the way a pot comes to boil. Thus, for example, I doubt that the Homeless Persons Act [a law that placed women at the head of the queue for public housing in the United Kingdom] induced many young women to have babies so that they could get their own flats. Rather, the benefit increases and the Homeless Persons Act were steps in a quiet, cumulative process whereby having a baby as a single mother went from 'extremely punishing' to 'not so bad.'¹⁴

Thus even if the flame is turned down slightly the pot will continue to boil.

¹¹ This is somewhat akin to Thomas Kuhn's view of the evolution of scientific theories. Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970) (arguing that what ultimately displaces a scientific theory is a more compelling theory).

¹² Charles Murray, *The British Underclass*, 99 *Pub. Interest* 4, 24 (1990) (emphasis added).

¹³ *Id.* at 25-26.

¹⁴ *Id.* at 26.

Cleanse your mind of the policy choices that follow from this argument, and try instead to focus on the argument itself. Note how Murray plays the tetrad of rhetorical instruments, facts, logic, metaphor and story, to craft his argument.¹⁵ See how Murray uses the word “natural,” not to describe a particular family institution, but to describe two phenomena that most people would agree are central to human—indeed to mammalian—nature, the desires for sex and motherhood. He uses it not to convey a sense that the practices so described are either good or evil, but rather that they are to be expected from human beings.

Our policy views rest on our descriptive visions of the world. Murray undercuts the depiction of unwed mothers as either calculating she-devils bent on mischief or as helpless waifs. He depicts them instead as being much like you or me. Surely that is an appealing rhetorical move. It is much easier to imagine others as being like oneself than as being markedly different.¹⁶ The rhetorical problem is how to show why these women, if they are fundamentally like us, live such radically different lives. The answer rests on the radically different matrix of costs and benefits that they face. In the end Murray succeeds in presenting an argument to which the reader is led to say, “Yes. Just so!”¹⁷

Professor Fineman is correct that rhetoric bars her path, but it is rhetoric of a higher and more noble sort than some vacuous word game in the public debate. That debate is wide open with seemingly every conceivable position given voice. At the moment, the weight of public opinion does not seem to be tilting in Professor Fineman’s direction. The public wants to curb unwed motherhood and divorce because it views the former as an unmitigated, and the latter as a partially mitigated, social disaster.

The public believes unwed motherhood, and the policies that encourage it, are disastrous for various reasons, each of which alone would be sufficient to justify discouraging childbirth out of wedlock. Those reasons include: (1) unwed mothers and their children are an ever

¹⁵ For an enlightening discussion of the elements of argument, see, Donald N. McCloskey, *If You’re So Smart: The Narrative Of Economic Expertise* ch. 4 (1990).

¹⁶ This too may be thoroughly mistaken. Consider, for example, the apparent inability of various British government leaders of the late 1930s to imagine that Herr Hitler’s desires for himself and his country were very different from their desires for themselves and Britain.

¹⁷ Although Professor Fineman recognizes that Charles Murray’s thinking now represents the prevailing intellectual and political view on the right, Fineman, *supra* note 2, at 2193 n.30, she nonetheless seems unable to distinguish this view from the older conservative story. She states: “The image of the ‘Welfare Queen’ is just one example of . . . [our distorted view of poor mothers]. Others include the assertion that women on welfare have numerous children, primarily to receive benefits.” *Id.* at 2193 n.32.

increasing fiscal burden on society;¹⁸ (2) the sires of these children succeed in procreating without first becoming productive members of society; (3) the working poor and lower middle class generally are demoralized when they see no reward for their restraint (i.e., in financial terms, working poor who practice restraint do not live markedly better lives than those who choose not to take the traditional precautions to provide for themselves and their kin); and (4) it is socially and genetically corrosive to provide incentives for the least productive people in society to have more children than they otherwise would.¹⁹ But beyond all other harms, the most disastrous effect of unwed motherhood is that on children. Children do better and turn out better when raised in traditional families than when raised by unwed mothers, or even when raised in what used to be called broken homes. The children of unwed mothers live out their lives in a growing subculture consisting of state wards, like themselves, and are not socialized to be self-sufficient human beings. They grow up not merely without fathers, but without even a vigorous concept of fatherhood in their lives.²⁰ As far as the rest of us are concerned this is not merely some trans-personal interest in how other people live. Those poorly raised children are much more likely to grow up to be troublesome teenagers and adults.²¹ The dispute amongst, and predicament for,

¹⁸ Professor Fineman, in passing, makes various allusions to the traditional families receiving financial subsidies from the state. See, e.g., Fineman, *supra* note 2, at 2204-06. She briefly notes that on the other side of the ledger, under the federal income tax laws many taxpayers suffer a marriage penalty. *Id.* at 2192 n.28. The reader will have to judge for himself whether married couples receive significant government subsidies. To the author it seems like small potatoes, particularly when compared with AFDC, food stamps, and Medicaid, all of which go overwhelmingly to single mothers and their children. Moreover, if net subsidies are measured as the ratio of gross subsidies to taxes paid, it is ludicrous to argue that the traditional family is being subsidized in comparison to single mothers.

¹⁹ See Richard J. Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* 167 (1994) ("Illegitimacy, one of the central social problems of the times, is strongly related to intelligence. . . . Low cognitive ability is a much stronger predisposing factor for illegitimacy than low socioeconomic background."); Seymour W. Itzkoff, *The Decline of Intelligence in America: A Strategy for National Renewal* 204 (1994) ("We need to stimulate our finest to form families of the traditional sort in which children are conceived, born, raised, and educated to the highest levels for which they are capable. The helpless need to be encouraged and guided not to have children that they cannot rear to functional cultural levels.").

²⁰ Indeed, the loss of a father as a result of divorce or otherwise is a significant predictor of suicide later in life. See R.S. Paffenbarger, Jr. et al., *Characteristics in Youth that Predispose to Suicide and Accidental Death in Later Life*, 59 *Am. J. Pub. Health* 900, 902 (1969).

²¹ "Such family measures as the percentage of the population divorced, the percentage of households headed by women, and the percentage of unattached individuals in the

those of us who hold these views is simply this: how does one strike the balance between a perceived need to provide *ex post* charity to illegitimate children and the desire to remove the *ex ante* incentive for women to have children out of wedlock?²²

If Professor Fineman is to change our minds, and the course of policy, it will not be by writing about rhetoric, but by practicing it. Her task is to persuade us that we are wrong to believe that some ways to have and raise children are better, and should be encouraged, and other ways are worse, and should be discouraged. If Professor Fineman makes an effort to do so, it is by implication in her denigration of the traditional family. Her position on marriage is a re-expression of the modern feminist complaint: marriage is irredeemably hierarchical and unequal, so it should be, and is being, rejected by women. Leaving aside whether women are indeed rejecting marriage, is marriage a bad deal for women? The response to this question is of course, compared to what?

II. THE UNNATURAL FAMILY

Professor Fineman and I differ most sharply on the subject of marriage. She sees it as the problem: I, as the solution. I believe that there is much for society in general, and women in particular, to gain from a world in which men are denied access to women for sex, and more importantly for procreation, unless they marry for life. She, on the other hand, believes that because of its inherently inegalitarian nature, marriage is not to be favored, perhaps barely to be tolerated.

That anyone would seriously assert that the institution and norm of lifetime marriage, and the corollary of a very limited right to divorce,

community are among the most powerful predictors of crime rates." Michael R. Gottfredson & Travis Hirschi, *A General Theory of Crime* 103 (1990). The "relationship between crime and one-parent families" is "so strong that controlling for family configuration erases the relationship between race and crime and low income and crime. This conclusion shows up time and time again in the literature . . ." Elaine Ciulla Kamarck & William A. Galston, *Putting Children First: A Progressive Family Policy For the 1990s*, Progressive Policy Institute, Sept. 27, 1990, at 14-15.

On these and other virtues of marriage and fatherhood, see generally Blankenhorn, *supra* note 6 (outlining problems caused by the absence of fathers); George Gilder, *Men and Marriage* xii (1986) (stating that "civilization depends on marriage").

²² As for divorce, many people are troubled by it because it: (1) robs children of one parent, usually the father; (2) profoundly disrupts the lives of children; (3) has financially ruinous consequences for the children and their mother; (4) cheats one spouse, usually the wife, of the benefit of her bargain from marriage; (5) leads to wasteful self-insuring by women (i.e., women may invest more in career preparation and less in child-bearing than they otherwise would); and (6) punishes those women who do make marriage-specific investments at the expense of other career opportunities.

does not exist primarily for the benefit of women and children is a testament to the enormous material success of Western civilization.²³ For most human beings for all of human history prior to the nineteenth century, mere material survival was uncertain. Many individuals and families, despite diligent labor, could not support themselves. And single women with children, if they had no capital, were doomed to death or “a fate worse than death.”²⁴ Marriage was the one device by which a woman could harness the labor of a man to provide for herself and her offspring.

Men and women are different. It is unnecessary to explore all the dimensions of difference.²⁵ But one difference seems obvious and important for thinking about the legal and social constraints on childbearing and rearing. The male and female role in procreation differs and, probably for that reason, so does their relation to children. Whether for biological reasons, as I believe, or cultural reasons, as many feminists believe,²⁶ most women need no urging to nurture their children. Either the maternal instinct, or acculturation, is a powerful device for ensuring that the overwhelming majority of women will care for their children and frequently the children of others as well, without any prodding from the rest of us.

²³ Judge Richard Neely has observed that

[d]ivorce laws were not designed to protect husbands but rather the wife. Until comparatively recently, grounds for divorce were few and required strict proof.

.....

... Although an energetic man tied to a woman he married when he was young may find himself bored, fenced in, and unhappy, his wife may be perfectly content with the life-style she was encouraged as a child to consider her destiny. Under the liberal grounds for divorce which are becoming acceptable in most states, a man in these circumstances is capable of starting out again with a minimum of either alimony or child support liability, while the woman who had relied to her detriment on society's promise of stable family life can easily find herself in desperate emotional and financial circumstances.

Richard Neely, *Marriage Contracts, for Better or for Worse*, reprinted in *Marital and Non-Marital Contracts* 3, 5, 7 (Joan M. Krauskopf ed., 1979).

²⁴ Paul Johnson, *The Birth of the Modern* 753 (1991) (“Young women who committed suicide in the years 1815-30 were usually pregnant or abandoned or both.”).

²⁵ Mine is what I would take to be the rather unremarkable position that: (1) men vary amongst themselves along many dimensions; (2) women likewise differ on those dimensions; and (3) men differ systematically from women, a good deal on some dimensions, hardly at all on others.

²⁶ I refer here to the social constructivist school. See, e.g., Salvatore Cucchiari, *The Gender Revolution and the Transition From Bisexual Horde to Patrilocal Band: The Origins of Gender Hierarchy*, in *Sexual Meanings: The Cultural Construction of Gender and Sexuality* (Sherry G. Ortner & Harriet Whiteheads eds., 1981).

There are exceptions of course. There is enough variety among human beings so that cases of outrageous neglect and abuse by mothers are not as rare as one would like. But as general social phenomena maternal abuse and neglect are not problems. They are the tiny exception rather than the rule, and as far as I know they are not on the rise.²⁷ Furthermore, in the modern world women are less likely to be forced by economic necessity to marry and to bear and care for children than in the past. The employment opportunities of late twentieth-century America are such that women who do not wish to be mothers need neither marry nor procreate to live a comfortable life.²⁸

The story with respect to fathers is different. Judging from their behavior, it seems obvious that, as a group, men take less pleasure in the company and the personal care of their children than do women. Again, the variation across men, and more importantly, the differences between men and women, could be principally genetic, derived sociobiologically—men have less genetic stake in any individual child than do women—as I believe, or alternatively they could be attributed to cultural influences, as many feminists believe. For the purpose of this relatively short Commentary I will avoid discussing this question in detail. Whatever the reason for the less nurturing character of men, and the variation among men, the characteristic is deep-seated and unlikely to change in the foreseeable future in any predictable direction.²⁹

Men are not biologically programmed to stay with their mates and offspring for life. That many do so is a choice; that many do not is equally a choice. And those choices are made in response to the costs and benefits that society places before them. Aside from desire and duty (the two most important and powerful motives), in the past what ensured that men remained wedded to their children and their children's mother were: (1) women and their families, in the screening and scrutinizing process, to ensure the selection of a bridegroom who would adhere to his marriage

²⁷ The phenomena of newborn babies suffering from crack addiction and fetal alcohol syndrome may suggest that I am too sanguine on this point.

²⁸ In 1859, Boston feminist Caroline Dall wrote, “[p]ractically, the command of society to the uneducated class is ‘Marry, stitch, die, or do worse.’” Caroline H. Dall, “Women’s Right to Labor”; or, Low Wages and Hard Work: In Three Lectures, Delivered in Boston, November 1859 at 104 (Boston, Walker, Wise & Co. 1860). The “worse” referred to in the quotation is almost certainly prostitution.

²⁹ My fear is that many readers believe that culturally determined characteristics are infinitely, easily and deliberately malleable. Various examples from their experience of the deeply attached, nurturing father may seduce them into believing that all men can be taught not merely to follow that example, but to feel that way. Those holding these views will be deaf to all my talk of incentives. They imagine a cultural fix that can be engineered to change people’s inner stance toward life.

vows; (2) the law, in the restrictions and conditions it placed on divorce; (3) social costs and constraints—or stigma, a weak shorthand—imposed on men who failed to care for their families; and (4) a corresponding stigma imposed on women who were promiscuous, divorced, or “home wreckers” that diminished the appeal of such paths and thereby reduced the supply of such women for men if they abandoned the conjugal bed. Prior to the middle of the nineteenth century these constraints were more powerful than they are today. People lived in rather closed insular communities that enforced the ethic of marriage for life;³⁰ the law either prohibited divorce entirely or allowed it only under the most extreme circumstances, and women and their parents protected female chastity until marriage. In that world, the only reliable way that a man could gain sexual access to a woman other than a prostitute was through marriage, and marriage was contingent on being able to support a family.

Men are, as a rule, more promiscuous than women. Many men would, if they could, have sex with as many women as possible, and, if there were no personal consequences, happily impregnate them.³¹ It is in large part because the personal consequences for women are so much more direct, profound, and unavoidable that women are less libertine in their sexual tastes and practices. That more men do not indulge their promiscuous desires, or, more likely, given that “it takes two to tango,” do not compete with other men for the privilege to do so, is largely determined by culture rather than biology. Marriage is the cultural creation that restricts and channels men’s sexual access to women. For several thousand years, both in the West and the East, the stable life-long monogamous marriage has been the norm. That is not to say that there have not been variations on the theme or that the noncompanionate marriage of ancient Greece was the same as modern marriage.³² But even with all this variation, we humans do not mate like elk. Men do not compete with

³⁰ Prior to the nineteenth century, geographic and social mobility were far more limited than they have since become. Men and women were more closely tied to particular communities and social classes, and thus could not simply abandon a former life and begin a new one as they can now. See Lawrence M. Friedman, *Crime and Punishment in American History* 193-201 (1993) (linking the new mobility of the 19th century to an increase in the incidence of bigamy).

³¹ What Father of a Thousand, when he begets a Child, thinks farther than the satisfying his present Appetite? God in his infinite Wisdom has put strong desires of Copulation into the Constitution of Men, thereby to continue the race of Mankind, which he doth most commonly without the intention and often against the Consent and Will of the Begetter.

John Locke, *Two Treatises of Government* 197 (Peter Laslett ed., 2d ed. 1967) (3d. ed. 1698).

³² For discussion on this point, see Richard A. Posner, *Sex and Reason* 38-45 (1992).

one another to establish harems in which the only resource they supply is semen. The historical norm was that a man provided something substantial, usually a promise of lifetime commitment and support, in order to have sexual and procreative access to a woman.

Professor Fineman apparently believes that it is possible to craft a public policy in which unmarried mothers and their children would be supported by the state at much the same financial level they would enjoy in a traditional marriage, without having to submit to marriage with all its degrading inequality. It is a fantasy. It is not merely the political impossibility of garnering approval of such a policy, or the pernicious social shortcomings of such a system, or that most men and women choose to marry voluntarily, voting with their ring fingers in favor of the institution. The primary reason those who agree with Professor Fineman on the beneficence of her policy proposal should nonetheless reject it is because it cannot be made to work even in the gross financial sense. It would simply unravel.

The wrong way to think about the question is to imagine that people make their major decisions in life blind to the consequences for themselves and those for whom they care. To the extent that this appears to be the case, it is only because, for most of us, most decisions are inframarginal. Or, in plain English, those decisions are not close calls. I have to decide whether to teach my classes each day, but given that I have invested a great deal in my career it is not a hard decision. But at various points in the past I made close decisions. Had the expected payoffs been different, I would now be running sailing charters out of the British Virgin Islands instead of editing my less than brilliant prose on a computer screen.

The changes Professor Fineman favors would radically change the incentives men and women face. If women and their offspring are to be supported by the state, what is there for men to do?³³ Or, more precisely, what is to compel men to do what they would otherwise prefer not to do,

³³ Professor Fineman's article is drawn from her recent book *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995). Fineman, *supra* note 2, at 2181 n.*. I was struck by the title. Although I believe that the changed ideologies and laws of the modern world have been, on net, very harmful to women, particularly in their efforts to be mothers and wives (a secondary but still powerful motive), I do not believe that the adjective "neutered" is a useful metaphor to capture this effect. The metaphor applies far more forcefully to men's efforts to be fathers and husbands. Neutering implies taking away one's sexual essence. There is something valuable that men and women can do in life that is tied directly to the sexual character of each. Women can uniquely bear and mother children, and men can uniquely sire and father those children. Given that women are occupied in caring for children, they are generally dependent on an outside source of material support. Thus, a primary historical role of the man has been to provide the

i.e., work hard? Men constitute the majority, and the most productive portion, of the workforce.³⁴ If there is neither the necessity nor much of an incentive to provide for their offspring, what will serve as the motive to force men to work?

Those fathers who can support their children at a level only barely above that which the state would provide in Professor Fineman's world will have scant reason to make the sacrifices necessary to continue to provide a tiny marginal financial benefit for their children. As more men choose to work less, and abandon their children to the state, two things will happen: (1) the bill to support the nation's mothers and children from the public fisc will rise; and (2) the income of the nation will fall. And so the explicit or implicit tax rates will have to be raised. This would put another group of fathers on the margin, another group who will have less reason to make the sacrifices necessary to support their children, and another set of boys and young men who must make life plans in light of the inverted long-run incentives before them. At the margin the strongest incentive for them to invest in a career, to work hard, or to work at all will be removed. And so the process would continue. As the stigma of abandoning one's family declined, the incentive for fathers to behave as dads rather than cads would decline correspondingly. And, if men are reluctant to support their own children, it is ludicrous to imagine that they can be motivated to support the nation's children.

The effect is compounded by the role of women. In a society in which a woman need not, and cannot, rely on the labor of the father of her children, to support her children, she has less incentive to choose whom to have sex with and whom to procreate with on the basis of expected material productivity. Thus men have less need to compete for mates with other men on the basis of their income earning capacity. Competition of course will continue, but this particular socially useful dimension will carry less weight.

Nor will it do to say that these effects are only to be felt with some enormous increase in benefits to unmarried mothers. We are operating at elastic margins now. The failure of men to support their own children is widespread. In portions of the black community it is commonplace for

material (in modern times, financial) support for his wife and offspring. Professor Fineman's proposal would go far to complete the gelding of men.

³⁴ This does not rest on the assumption that men are inherently smarter or more capable than women. Indeed, men's greater productivity follows from equality on those dimensions. If motherhood and homemaking are time consuming endeavors, and men have no comparable demand on their time, then men simply have more opportunity to develop and to employ job skills and knowledge, and a greater incentive to invest in, and dedicate themselves to, market employment.

girls to allow themselves to be impregnated by boys and young men who have neither the intention nor the ability to support their offspring financially.³⁵ This virus, as Professor Fineman notes in quoting Charles Murray, is spreading to the white community.³⁶ There is also the well-known phenomenon of fathers who fail to make even the miserly support and alimony payments that they are required to provide.³⁷

There are cultures that embody the incentives that Professor Fineman's system would generate. In much of Africa, women are the mainstays of the rural economy. Procreation is not tied closely to marriage, and men are not expected or required to support their wives and offspring. In many African cultures, even without the confiscatory taxes that would be required to support generous "family allowances," men view substantial leisure time as something to which they are entitled.³⁸

Marriage, whether polygamous or monogamous, is a marvelous invention. I say again, it is not natural. Marriage is a cultural invention. It is designed to harness men's energies to support the only offspring they may legitimately have, or are likely to have, legitimately or otherwise, in a world in which marriage is the norm. We lose sight of this truth at our peril. The truth has become less obvious in the last century because the poverty and material insecurity that were virtually universal conditions prior to that time have been alleviated in a number of wealthy Western and Eastern countries. And so we have been seduced by a variety of erroneous and pernicious theories on the function of marriage, specifically notions of marriage as entirely contingent on its origin as the culmination and cementing of romantic love or as an equalitarian partnership.

³⁵ On the developing of an ethic among the young men of these communities favoring casual and even predatory sex, see Elijah Anderson, *Race, Class, and Change: Streetwise in an Urban Community* ch. 4 (1990).

³⁶ Fineman, *supra* note 2, at 2203 n.54.

³⁷ On the inadequacy of alimony and child support awards in this country, particularly in comparison to England, see Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* ch. 7 (1985). On the failure of fathers to pay court ordered child support payments, see Gordon H. Lester, Bureau of the Census, U.S. Dep't of Com., *Current Population Reports, Series P-60, No. 173, Child Support and Alimony: 1989*, at 1-2 (1991). The Census Bureau recently published a more comprehensive study. It states that only about 25% of parents without custody make full child support payments. See Barbara Vobejda, *Status of Child Support Called 'Shameful': Most Parents Without Custody Pay Nothing*, *Census Bureau Finds*, *Wash. Post*, May 14, 1995, at A5 (citing the Census Bureau report).

³⁸ See Patricia Draper, *African Marriage Systems: Perspectives From Evolutionary Ecology*, 10 *Ethology and Sociobiology* 145, 151-52 (1989); see also Judith Van Allen, *African Women, "Modernization," and National Liberation in Women in the World: A Comparative Study* 25, 35 n.* (Lynne B. Iglitzin & Ruth Ross eds., 1976) (stating that up to 75% of agricultural labor in some African agricultural societies is done by women).

The error of treating romantic love as the necessary condition for entering into marriage, and, more importantly, for continuing marriage has been by far the more harmful. The metaphor of “falling” in love captures the out-of-control character of the emotion. While “in love,” the object of one’s ardor appears god-like. Given time and experience we awaken to face the illusion. As a social matter, however, the problem is not that love drives us only temporarily insane and that we eventually discover that our mate is not whom or what we thought. It is, rather, that we accept the belief that taking on, and adhering to, the life-long responsibility of marriage and children should be tied to the continuance of so ephemeral a thing as romantic love. This flawed notion has enticed millions of people to abandon marriage when romantic love faded, and, perhaps more importantly, it has led the rest of society to assent and to treat the absence of romantic love as an excuse, even a justification, for abandoning a marriage. Societal acceptance in turn encourages people to act toward their spouses without love, honor or respect, knowing that they can leave should they discover that they have “grown apart.”³⁹ That the law has assented to this cultural change by permitting divorce willy-nilly is independently harmful. But the liberalization of divorce laws was less the cause, and more the effect, of a widespread cultural acceptance of men and women renouncing their marriage vows.

The second pernicious error is the attempt to impose mathematical and political equality on marriage. Democratic equality, whatever its virtues in politics, cannot be applied to a two-person polity. It is a testament to the enormous ethical and aesthetic appeal of the very word “equality” that so inapt a metaphor has been applied to marriage.⁴⁰ There are two separate ways in which the metaphor of equality has been harmful. First, in a legal sense, it has concealed and distorted the essential contractual

³⁹ I have recently learned that many modern marriage vows substitute the phrase “as long as we both shall *love*” for “as long as we both shall *live*.” The love referred to is not a volitional love meaning to act toward the other in a loving manner, as in “love, honor, and respect,” but rather is something independent of the will, a sentiment that may come and go with time and for the absence of which we cannot be held responsible.

⁴⁰ Allan Bloom, in discussing Rousseau, writes:

In essence [Rousseau] was persuading women freely to be different from men and to take on the burden of entering a positive contract with the family, as opposed to a negative, individual, self-protective contract with the state. Tocqueville picked up this theme, described the absolute differentiation of husband’s and wife’s functions and ways of life in the American family, and attributed the success of American democracy to its women, who freely choose their lot. This he contrasted to the disorder, nay, chaos, of Europe, which he attributed to a misunderstanding or misapplication of the principle of equality—only an abstraction when not informed by nature’s imperatives.

Bloom, *supra* note 1, at 116.

and reciprocal (rather than symmetrical) nature of marriage. Marriage is a long-term contract.⁴¹ People form long-term contracts because one or both parties wish to make investments in what economists call specific assets, that is, assets that are valuable only if the specific relationship continues. Such assets may include an owner's unique renovations of his building to suit a particular tenant or a woman's bearing and raising the children of a specific man. A contract allows people to invest with the assurance that the value of their investment will be protected.

As a legal matter, equality should enter into a contract between Amos and Bertha whether for rental of a factory or for marriage, only in that they are equally entitled to enforcement of the contract and to reliance or expectation damages in the event of breach. When one or the other party breaches, seeks to rescind, or seeks to terminate the contract, they are not *equally* encumbered. One may have made a substantially larger investment in the relationship than the other. Typically it is the woman who early in the marriage chooses and is forced by circumstance to invest more; it is she who gives up more opportunities.

Driven by "equalitarianism," some who accept this view nonetheless insist on viewing this greater sacrifice exclusively in terms of the woman's career. Such a view is becoming ever more anachronistic as growing numbers of women combine both marriage and career. More often, the greater loss for the woman is the opportunity cost of an alternative spouse, sacrificed at the time of marriage. Given the burden of children, the higher mortality rates of men, and the age contour of men's taste in women and vice versa, after the termination of a marriage most women find that the alternative beaus that were available when they were young, or more likely their current equivalents, are unavailable, while the divorced man discovers that his choices have improved.⁴²

We have come to these mistaken notions about legal equality with respect to the termination of marriage—and its ruinous effect on alimony, child support and property divisions—because we have been seduced by the inapt equality metaphor, not merely as a legal principle, but as a social ethic. Men and women are so clearly different from one another, and so profoundly different with respect to the very substance of marriage, sex and procreation, that only by morbidly fixating on that singularly base ethical and political category, *equality*, could one think that it

⁴¹ The following discussion is borrowed from Lloyd Cohen, *Marriage, Divorce, and Quasi Rents*; or, "I Gave Him the Best Years of My Life," 16 *J. Legal Stud.* 267 (1987).

⁴² See *id.* at 278-87. Ordinary language, especially humor, is often revelatory of widely shared views of the world. Consider the following joke told to me by a divorcee. "Why are men like spots in a parking lot?" Answer: "All the good ones are taken, and everything left is handicapped."

holds much, if any, application to marriage. The deal between men and women with respect to sex, procreation and marriage is not the exchange of identical services, but rather of reciprocal services. There is no equality about it except to the extent that one has or has not made a good match.

If not a contract of symmetrical equality, then what is marriage to be? I lack the space to explore this question in detail. Preliminarily, I believe we should look to the lessons of history and of successful contemporary marriage to guide our thinking. Western society, and I imagine all other societies, in the very recent past understood marriage as an allocation of separate spheres of power to husbands and wives based on their cultural and biological specialization and accepted hierarchy. That as a formal matter in law, and, as a practical matter, in most marriages, men have been on top of the hierarchy may be a reflection of men's greater physical strength, women's greater front-end investment in marriage, or the symbolic meaning of the sexual act itself.⁴³ For the purpose of this Commentary, I care not what the reason is. I simply want to point out to those women who truly find the remaining vestiges of hierarchy unacceptable that the metaphor of equality offers scant application or relief.⁴⁴ Beyond that I note that in marriage each couple dances its own dance, and it is far from universal that men lead.

The paragraph above was a lengthier excursion into the character of marriage than I normally think prudent. I hesitate to write much about how marriage should be conducted not out of modesty but because this is

⁴³ The notion that the sexual act itself is an act of dominance has been voiced most forcefully by feminists. See, e.g., Andrea Dworkin, *Intercourse* ch. 5 (1987) ("Intercourse is commonly written about and comprehended as a form of possession or an act of possession in which, during which, because of which, a man inhabits a woman, physically covering her; and this physical relation to her—over her and inside her—is his possession of her."); Robin West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1 (1988) (attributing the difference between sexes in part to the way in which sexual intercourse is performed); see also 2 Alexis de Toqueville, *Democracy in America* 212 (Phillips Bradley ed. & Henry Reeve trans., Alfred A. Knopf 1945) (1840) ("[Americans] hold that every association must have a head in order to accomplish its object, and that the natural head of the conjugal association is man.").

⁴⁴ . . . [In marriage] [n]either men nor women have any idea what they are getting into anymore, or, rather, they have reason to fear the worst. There are two equal wills, and no mediating principle to link them and no tribunal of last resort. . . .

. . . .

I am not arguing here that the old family arrangements were good or that we should or could go back to them. I am only insisting that we not cloud our vision to such an extent that we believe that there are viable substitutes for them just because we want or need them.

Bloom, *supra* note 1, at 126-27, 130.

a Commentary about law. A common fallacy is to assume that because the law regulates life, and life is a deep and incomprehensible enterprise, that therefore law's relationship to man is profoundly subtle and complicated. It is not and cannot be made so. The law should be seen as a gross, crude and blunt instrument of social control and regulation. It is not the proper role of family law to subtly regulate and seek to transform the most intimate human relationships. All that law can reasonably do with respect to the family is demand some bare minimum conditions of child care, and enforce—in the loosest sense of that term—a standard form marriage contract and traditional antenuptial agreements. It is a demonstration of our immature arrogance that while we fail to provide the minimum legal protections for children and spouses (usually wives), we cultivate dreams of using family law to change fundamentally the relationship between men and women and their offspring.

III. WOMEN'S WORK

Professor Fineman seems to believe that the recent transformation in women's lives is a reflection of a change in women's consciousness—that today's women, unlike their great-great-grandmothers, want something fundamentally different from life, marriage and children—and that “family law” should change in a particular direction in response.⁴⁵ As she says, “[w]idespread changes in behavior or rejection of existing social institutions by significant segments of existing social institutions should be the impetus for a collective reconsideration of the continued viability of the old normative system.”⁴⁶

I am more than a little skeptical. One of the characteristics of economists, as of all scientists, is that we seek parsimonious explanations. In this final Part, I will argue, if only in miniature, that from an economic perspective the more powerful explanation of the enormous changes in women's behavior over the last two centuries is changes in the matrix of costs and benefits that women face.

I do not wish to overstate my point. There has been one truly fundamental change in the consciousness of Western men and women since 1800, namely the decline of deep faith in God as the central informative guide to action. A fundamental change of that sort shows itself in all aspects of life. Marriage, childbearing and child-rearing, like all of life's activities, take on one meaning when informed by a religious vision and quite another when seen as merely instrumental secular choices. In the latter case they often seem like a grand collection of sacrifices and com-

⁴⁵ Fineman, *supra* note 2, at 2185-86.

⁴⁶ *Id.* at 2186.

promises, accepted, if at all, as the price that must be paid for a compensating good. On the other hand, when marriage is seen as part of the grand whole that is one's life, and that life is seen as part of an even grander whole—a cosmos if you will—it takes on a different, more positive, meaning. Thus it is not my belief that consciousness has not changed nor that the change in consciousness has not generated changes in behavior. Rather, I believe that those changes have less to do with women *per se* and more to do with mankind generally, and that present marriage patterns are as much, if not more, a function of men's changed consciousness as of women's. Specifically, if men no longer recognize the same duty to adhere to their commitments as their great-great-grandfathers, and neither society nor the law holds them to those commitments, the security of marriage and of women's investment in marriage dissolves.

Professor Fineman observes the changes in the lives that women now live as compared to those of prior generations and gives one interpretation, while I give another. Differences in positive explanations are interesting in their own right and important for setting policy. They are also important because they are the substrate of our normative views of the world. The obverse is also true; our positive visions of the world are usually colored by our normative glasses.

The specific question I will now address is the enormous transformation in women's participation in the labor force and the character of the employment they have undertaken. Professor Fineman sees this change as of a single piece with other representations of women choosing to free themselves from the yoke of male oppression.⁴⁷ Mine is a more economical theory. It does not rely on the *deus ex machina* of a change in consciousness. I believe that women's increased market labor is primarily a function of economic and technical changes and secondarily a function of weakening social and legal sanctions that protected women's investment in the traditional marriage.⁴⁸ If a change in consciousness plays a significant role, it is only as an adjunct to those other forces.

⁴⁷ In this respect Professor Fineman is echoing a chorus of feminist voices. The fifteenth anniversary issue of *Ms.*, for example, celebrated the massive increase in labor force participation of women and credited much of that progress to the women's movement. *Ms.*, July/August 1987 (including, among others, pieces by Margaret Atwood, Susan Faludi and Gloria Steinem).

⁴⁸ I am not persuaded that traditional marriage oppresses women; marriage has, however, become a decidedly less secure investment for women, both in the likelihood that it will last a lifetime and in the remedy that the law will provide in the event of breach. Accordingly, I will direct my two daughters to seek an education that will lead to a remunerative career, albeit one that I hope will be consistent with being a wife and mother. My daughters must plan for a life of far greater vocational uncertainty than that which faced their great-great-grandmothers or that which faces my son.

The Western world, and the United States in particular, are far richer than they were two hundred years ago. Perhaps most powerful in their effect on women were the improvements in health and longevity. Changes in public sanitation, especially in water purity, have caused spectacular declines in death from infectious diseases generally and infant mortality rates in particular. Prior to the decline in mortality rates, a married woman spent much of her short life pregnant and nursing. It was the only way she and her husband could ensure that a fair number of their offspring survived to continue their line. Thomas Jefferson and his wife, for example, had six children, only three of whom survived to adulthood.⁴⁹ Although the effect of improved infant mortality was not immediate, given the declining marginal value of children, as of all goods, and the possibility of investing in them both dollars and time, husbands and wives eventually chose to limit family size to something like its former level. This meant that the biological functions of motherhood—pregnancy and nursing—took up a smaller share of women's time, because a woman now needed to bear only two or three children in order to feel relatively secure that two or three would reach adulthood, and continue the process.⁵⁰

Both because of the general improvements in public sanitation and nutrition and because women no longer needed to suffer the medical hazards and physical price of numerous pregnancies, both sexes, but women especially, began to live longer. Until quite recently, there was no significant extension at the top end. Old age has not come much later than in earlier eras. Indeed, many of the wise men of ancient Greece lived vigorous lives well into what even now would be considered old age. The primary change over the last two centuries is that men and women, but particularly women, are now much more likely to reach old age without falling victim to death from infectious disease. One significant effect of these changes is that for women generally, a—perhaps *the*—principal meaningful activity in their lives—bearing and raising children—has over the last two hundred years taken up a progressively smaller absolute and relative portion of their days and years.

Changes in public health principally, and private health secondarily, are not only caused by economic changes, but are themselves economic in the proper broad sense of that term. These health changes exemplify that

⁴⁹ Fawn M. Brodie, *Thomas Jefferson: An Intimate History* 86 (1974).

⁵⁰ See Barbara A. Anderson, Regional and Cultural Factors in the Decline of Marital Fertility in Europe *in* *The Decline of Fertility in Europe* 293, 295-96 (Ansley J. Coale & Susan Cotts Watkins eds., 1986) (presenting the argument that decreasing infant mortality rate was a major factor in the decline in fertility rates); Raaj K. Sah, The Effects of Child Mortality Changes on Fertility Choice and Parental Welfare, 99 *J. Pol. Econ.* 582 (1991).

over the last two hundred years the Western world has increased in wealth with each passing generation at rates unprecedented in human history. The explanation for the increase in wealth can be captured broadly by two causes: (1) vast increases in capital, i.e., more and more machines; and (2) fantastic changes in technology, i.e., better and better machines.

The increase in the stock and quality of capital has meant that the marginal product and wages of labor of all sorts has risen substantially. Women in particular have been favored in this regard. Ronald Coase once remarked that when he was a child, women were, in no small measure, beasts of burden.⁵¹ Most labor was physically arduous, and women—smaller and weaker than men—if forced by circumstances to engage in such labor, suffered from it more and produced less than men. The increase in the quantity and quality of capital has meant not only that labor has become more productive, but also that it has become less demanding of brute strength, thereby leveling the playing field between men and women. The general effect of greater productivity, translating into higher real wages, meant that women were being pulled out of the home and into market production.⁵²

But the story was not that simple. Not only is it a canard to suggest that women did not “work” in great numbers prior to this century; it is something worse—a block to clear thought. Useful labor, in the sense of that which significantly adds to the welfare of people, can be and has been done in the home as well as the marketplace.⁵³ Life in a filthy

⁵¹ Professor Ronald Coase, Address at the Association of American Law Schools Banquet (January 1990).

⁵² Victor R. Fuchs, *How We Live* 127 (1983) (reporting that from 1890 to 1980, workforce participation by women ages 25 to 44 increased from 15% to 60%); Howard N. Fullerton, Jr. & John Tschetter, *The 1995 Labor Force: a Second Look*, *Monthly Lab. Rev.*, Nov. 1983, at 3, 5 (predicting that 60.3% of all women would participate in the labor force by 1995).

⁵³ See Elizabeth Wayland Barber, *Women's Work: The First 20,000 Years* (1994). Women's labor within the home was directed both for family consumption and, when increased productivity allowed, for market production. *Id.* at ch. 7. The principle domains of women's labor within the home have been in textiles and food production and preparation. *Id.* at 30. With regard to food production, women's sphere was in horticulture, i.e., gardening, rather than agriculture, i.e., farming with draft animals. *Id.* at 96-100.

In former times and in primitive cultures the test for whether a class of labor was predominately the domain of women was

the compatibility of this pursuit with the demands of child care Such activities have the following characteristics: they do not require rapt concentration and are relatively dull and repetitive; they are easily interruptible and easily resumed once interrupted; they do not place the child in potential danger; and they do not require the participant to range very far from home.

house, wearing unwashed clothes, and eating uncooked meals would be a life of squalor regardless of one's wealth or income. Cleaning a house, making and washing clothes, and preparing meals are more tangibly wealth-creating activities than virtually all forms of market production. In earlier periods men and women, but mostly women, spent a significantly higher proportion of their time in household production than they do now.

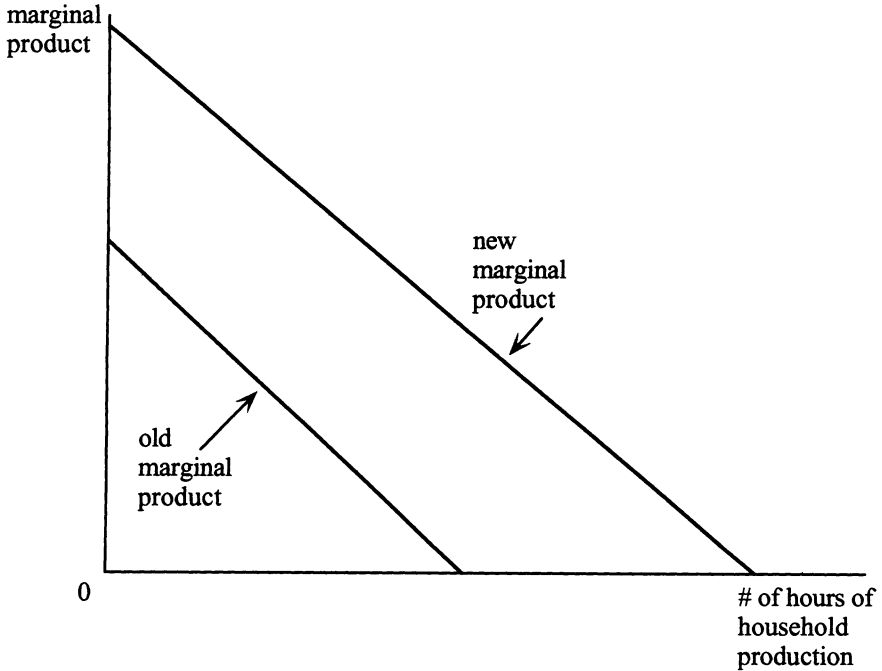
Given the equal if not greater importance of household production, it is by no means clear that increases in the quantity and quality of capital would draw women from the home. For if productivity was increasing markedly in the workplace, as a result of increases in the stock of capital and technological change, was not the same thing happening in the home? And if so, would there not be an equal pull in the opposite direction? While it is virtually impossible to quantify productivity changes in the home on the scale of market production, it seems obvious that domestic labor productivity has indeed increased enormously over these last two centuries. The practical uses of electricity alone have probably increased the productivity of homemakers more than all other devices of home production invented in the two thousand years before 1800. Thus, the facile, but mistaken, conclusion would be that these changes in productivity would exert a counterbalancing effect tending to pull women back into home production. If such a conclusion is erroneous, where does the error lie?

When men or women work in the labor market they produce goods or services for a market of infinite wants. The demand for their particular services is infinitely elastic, and the market value of the last unit they produce is the same as for the first. If they can produce ten times as many widgets they can earn ten times as much money. Home production, however, does not yield returns in the same fashion. When a woman produces in the home for her family, greater productivity does not translate into money income, nor does it translate linearly into greater satisfaction for the woman or her family. For example, even if meals can be prepared in one third the time, there is no virtue in eating nine meals a day. Nor is there really much of a return to having a kitchen floor clean enough to eat off. This does not mean that there is nothing productive and valuable that homemakers can do during the additional time that they have available. They could, for example, read to their children or teach them piano. It is simply that the activities they will now engage in are less valuable

Judith K. Brown, A Note on the Division of Labor by Sex, 72 *Am. Anthropologist* 1073, 1075-76 (1970).

than the last activity they undertook. Were it otherwise, the logical order of the activities would be reversed.

FIGURE 1



In economic terms improvements in the quantity and quality of capital in the home shifted women's marginal product curve far to the right (figure 1) and tilted the "value of the marginal product" curve (figure 2) so that it became far steeper and intersected the old curve well to the left of the old intersection of marginal product with the former wage rate (figure 3).

FIGURE 2

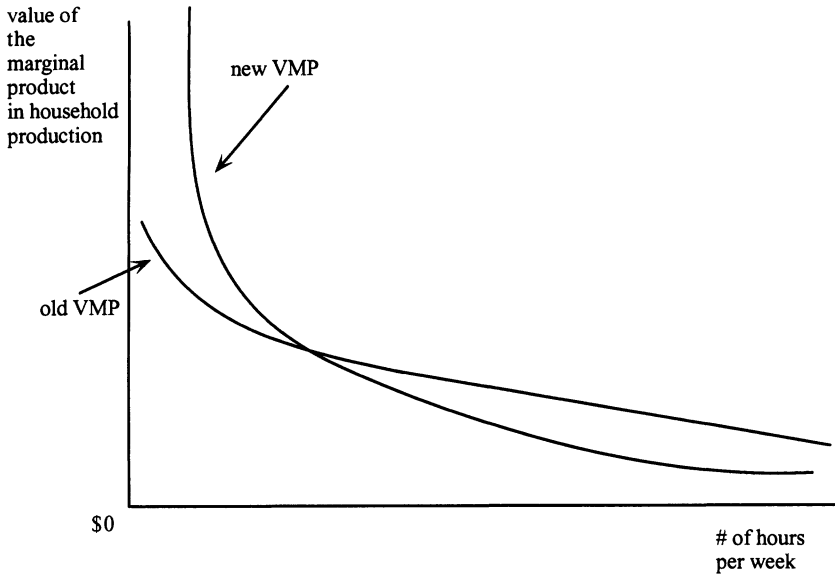
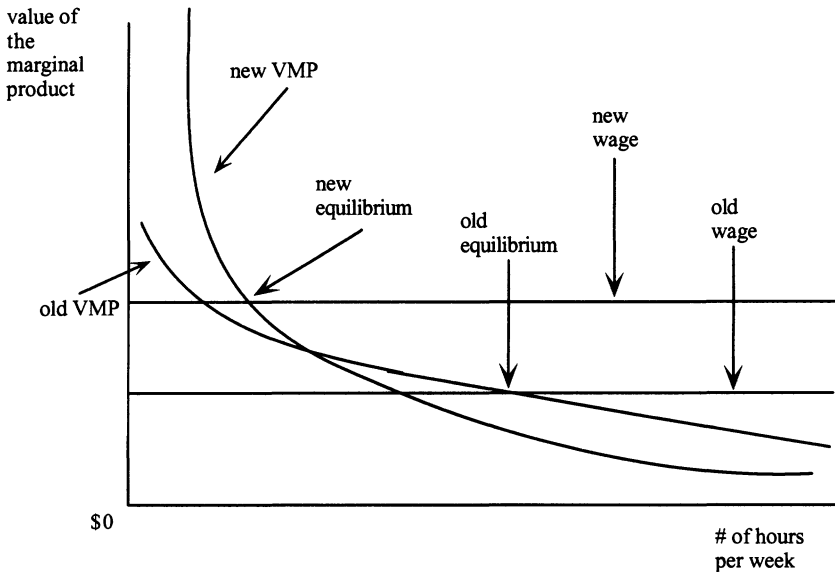


FIGURE 3



The greater productivity in the home resulted in a new equilibrium that entailed some increases in quantity of output, substantial increases in

quality, and large increases in time devoted to other pursuits, specifically leisure or market employment. In plain English, women are now able to produce much cleaner houses, cleaner clothes and better meals in far less time than could their great-great-grandmothers, and for most women there is a recognition that spending more time at this effort to achieve even higher quantities of output or quality of product offers very little payoff in terms of satisfaction to themselves or to their families. Therefore, rather than doing so, they spend less time on these activities. Thus increased capital and changes in technology in the home, instead of pulling women away from the market, have actually served to push women out of the home.

Another factor of substantial but lesser importance is the diminution of the number and level of skills necessary to function satisfactorily in household production. For example, the art of sewing has become less important with mass production of sewn products, and cooking a passable meal has become less of an art given the availability of modern tools and prepared foods. Thus, for some women there is undoubtedly less pride in craft in performing these formerly essential and skilled arts, many of which have been reduced to either hobbies or mere rote labor. That untrained men *can* perform most of these homemaking functions also robs them of much of their womanly character.⁵⁴

This, however, is only part of the story. Mothering, like all other homemaking functions, has become less time consuming over the last two centuries, if only because of the fall in infant mortality and consequent drop in natality. The difference between mothering and all the other homemaking functions, however, is that the timing of this most literally vital homemaking function, mothering, is largely outside the homemaker's control. Even if the mother of a six-month-old need only spend five hours a day directly with her child, she cannot plan in advance which five hours those will be and so must be constantly available. If she is to do her job well, she must change her baby's diapers when they are soiled, feed her baby when he is hungry, hold her baby when he craves attention, and so forth. The essence of being a good mother is to attend to one's children when they are in need. To do otherwise is to be guilty of neglect, if not in the legal sense, certainly in the moral one.

⁵⁴ While some men have actively embraced household tasks formerly performed by women, see, e.g., Anthony Astrachan, *How Men Feel: Their Response to Women's Demands for Equality and Power* ch. 17 (1988); Robert A. Lewis & Joseph H. Pleck, *Men's Role in the Family*, 28 *Family Coordinator* 429 (1979), and others have less enthusiastically increased their share of household production, women still perform the lioness' share of homemaking tasks. See Fineman, *supra* note 2, at 2199 n.50.

Given that homemakers/mothers could always be more flexible with the performance of all nonmothering tasks than with child care and nurturing functions, those other tasks could always be fit around the child-care functions.⁵⁵ Thus the increased productivity both in the home and out, that is pushing and pulling women out of the home, has been incomplete in its effect and a source of much practical difficulty and psychological distress for mothers. Mothers are often left with a set of less than satisfactory choices: (1) staying at home, giving up substantial income, and being less productive than they would like to be; (2) leaving their children alone, or with an older sibling, for large portions of the day while they work outside the home; (3) hiring someone to look after their children while they are employed; or (4) finding market employment that can be done inside the home that is less productive, less suited to their interests and skills, and less remunerative than what is available outside the home.

A discussion of this problem and the market responses to it, including the "mommy track" and the increase in market production in the home, is worthy of another paper. For the moment I am satisfied to note that here, as elsewhere, the greater the demand for such employment, the more energetic will be the supply response. There are substantial gains to be garnered by the firm that offers mothers employment in circumstances conducive to "good" mothering.⁵⁶

Given these economic changes, even if there had been neither antidiscrimination laws nor a shift in women's values, virtually all the changes we have seen in women's employment would have taken place to essentially the same degree as they have. Thus, the vast increases in female employment give no empirical support to the proposition that today's women have an ideological agenda substantially different from that of their great-grandmothers. Modern feminists, waving their flag, and claiming to lead, have run to the head of the phalanx of women marching on their own journey.

CONCLUSION

The social world that my daughters (and son) are entering is a decidedly worse place than was the world that faced their great-great-grand-

⁵⁵ See Brown, *supra* note 53.

⁵⁶ We are looking forward into a new age, when women who so desire can rear their children quietly at home while they pursue a career on their child-safe, relatively interruptable[sic]-and-resumable home computers, linked to the world not by muleback or the steam locomotive, or even a car, but by the telephone and the modem.

Barber, *supra* note 53, at 33.

mothers. While some people might point to all the additional choices open to women, I would point to the rather important choice that women had three or four generations ago that has now been foreclosed: a woman no longer has the choice of readily finding a man of her social class and cultural background about whom she can be secure that he will marry for life and labor for his family.⁵⁷ The old social and legal institutions that evolved over many millennia in the West—providing a secure environment for children to be raised and encouraging various economic, social and moral virtues—led to society's progress and functioned marvelously well. The tragedy is that we seem to be abandoning them and have become confounded by too many fancy theories rooted in neither human nature nor experience to recognize what we have lost.

⁵⁷ See Maggie Gallagher, *Enemies of Eros* (1989); see also Gilder, *supra* note 21, at 137-54 (stating that the women's movement on net is harmful to women).