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Why Marriage?

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INTRODUCTION

In 1974, when I was a law student in a class called Injunctions, we often struggled through the factual and legal complexities of an opinion determining whether an injunction should issue. My professor, Owen Fiss, was fond of reminding us after each such session that the object of this entire struggle—the injunction—was "only a piece of paper." His point was that it takes more than the issuance of some form or document to make things happen, to transform the status quo. Words are, after all, only words. Standing alone, they often are not worth much more than the paper upon which they are written. Instead, it is the interpretation and implementation that really matter—not the issuance of the document, but what comes next, that confers content and meaning.

I cannot help but reflect upon this bit of practical-injunction-realism when confronted with the many questions that emerge in response to contemporary policy discussions about the need for laws to strengthen the institution of marriage.[1] Like an injunction, marriage is reducible to a piece of paper—the marriage license. This piece of paper distinguishes one on-going relationship from others, not officially designated marital in nature. Yet what

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[1] Martha Albertson Fineman, The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies 15 (1995) ("Policy on the national and state levels, for the most part, attempts to revitalize and replicate idealized traditional modes of intimate connection symbolized by the nuclear family. This failure of creative imagination on the part of law and legal institutions has resulted in an impoverished approach to the dilemmas of poverty for mothers and children in our society").

meaning does marriage have beyond this fragile manifestation?

This question asks us to consider what we imagine to be the content, purpose, and function of the institution we call marriage. This consideration raises two additional questions of relevance. First, what does the word "marriage" convey to us as individuals? In addressing this question, we look at marriage from a personal perspective—as a cultural and social practice in which we engage. Second, what does marriage convey to us collectively—as a society? From this perspective we look at the functions marriage performs on political, ideological, and structural levels—its construction in law and policy.[2]

Clearly, to both individuals and society, marriage constitutes a legal relationship. Through law, the state defines who may marry and the consequences of marriage at dissolution of the relationship, be it by death or divorce. In this regard, all marriages within a jurisdiction are standardized. Law may establish uniform standards, specifying who may marry whom and what formalities must be observed. Law may also define what economic and other consequences attend the dissolution of the marriage relationship. The ultimate content and conduct of marriage from an individual perspective is, however, far from clear. This is because of the way that society and law have given existing marriage relationships "privacy," thereby shielding them from supervision. For on-going marriages the norms are non-intervention and minimal regulation.[3] In some

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[2] Other questions we might ask include: Is it possible to have one societal definition of marriage in a diverse, pluralistic and secular society such as ours? Is marriage about behavior and functioning or is it about legality and form? What does the legal designation of marriage foster, reform, facilitate, support, preserve, or protect?

[3] There are exceptions to this norm of family privacy, most of them recent, as in the case of abuse and neglect. Others are trivial from the perspective of this paper, such as the rules that preclude spousal testimony in criminal cases. See Frances E. Olsen, The Family and The Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1504-05 (1983).

other on-going formal and legal relationships that are embodied in pieces of paper—the relationship between shareholder and corporation, for example—there is no expectation of privacy. Rights and obligations are defined, limited, and structured so that the range and nature of interactions are predictable and potentially publicly enforceable. By contrast, the issuance of a marriage certificate does not determine the conduct of any specific marriage, what it means to its participants, or how those participants will function within the relationship. The laws governing marriage leave the day-to-day implementation of marriage to the individuals. The conduct of the parties defines their marriage, giving it content and meaning. Marriages are individualized, idiosyncratic arrangements; even external articulations of what constitutes "ideal" relationships may influence them. The law recognizes and reinforces this individualized characteristic of marriage through the doctrine of marital privacy. Except in extreme situations, there are no legal enforcement mechanisms to ensure compliance with standards of conduct imposed generally across marriages.[4] The result might be characterized as creating a vacuum of legally mandated meaning for marriage—a vacuum that is to be filled with various non-legal, sometimes conflicting, individual aspirations, expectations, fears, and longings.

Reflection on the prospect of varied, individualized possibilities for the meaning of marriage suggests, that in order to answer the question "why marriage?" we must first consider "what marriage?" or more succinctly, "what is marriage?" Questioning what marriage actually is calls attention to the institution's individualized and malleable nature. By contrast, a focus on "why marriage" highlights the societal function and rationale for the institution. I will

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[4] Two exceptions, only recently (and imperfectly) considered "extreme," are domestic violence and marital rape. Even when there are general legal standards, such as the common law obligation of a husband to support his wife, the doctrine of marital privacy mandated the relationship end before the right could be realized in court. Martha Albertson Fineman, What Place for Family Privacy? 67 Geo. Wash. L. Rev. 1207, 1214 (1999).

discuss each question—the "what" as well as the "why" of marriage.

Marriage has various meanings to individuals entering into it. Marriage can be experienced as: a legal tie, a symbol of commitment, a privileged sexual affiliation, a relationship of hierarchy and subordination, a means of self-fulfillment, a societal construct, a cultural phenomenon, a religious mandate, an economic relationship, a preferred reproductive unit, a way to ensure against poverty and dependency, a romantic ideal, a natural or divined connection, a stand-in for morality, a status, or a contractual relationship.[5]

Marriage also has multiple potential meanings to the society that constructs and contains it. From the state's perspective, marriage may mean the imposition of order—necessary for record-keeping purposes (e.g., to facilitate property transfers at death). Marriage may also be viewed to provide order in a different context. It has been argued that marriage is the preferred method of containing and harnessing [male] sexuality in the interests of the larger society.[6] Marriage can reflect the moral or religious convention of a society—a symbolic function. Marriage can also be the site where essential reproductive tasks are preformed for society. Society must reproduce itself both through the production of children and the educating and disciplining of those children into workers, voters, and productive citizens—tasks traditionally undertaken by the marital family.[7] In this way, marriage can also be seen as

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[5] This is not meant to be an exhaustive list. There are additional meanings to marriage for individuals, perhaps as many meanings as there are individuals entering (or not entering) the relationship.

[6] See Lloyd R. Cohen, Rhetoric, the Unnatural Family, and Women's Work, 81 Va. L. Rev. 2275, 2287 (1995).

[7] The state interest in this societal function has been urged as giving the state regulatory interests in the marital family. I use this interest to develop an argument that the state has an obligation to restructure other societal institutions to accommodate and subsidize this reproductive function. In doing so, I focus not on marriage, but on the relationship of caretaker and dependent. See generally Fineman, supra note 4.

serving society by taking care of the dependency and vulnerability of some members of the marital family. Finally, marriage can be the mechanism through which society distributes and delivers social goods to its citizens.[8]

We should be clear about which of the many ways of thinking about marriage are informing the arguments that we make and the policy that we propose. If we remain clear about the role or function of marriage to which we subscribe—how we are filling the marriage-meaning-void–our own answer to the question, "why marriage?" may be revealed. In advocating for marriage, it may be the case that we are inappropriately substituting an individualized meaning for a societal rationale for the institution. Only societal-based rationales make legitimate societal regulation and control of marriage. Further, some of the historically societal based rationales for marriage may no longer seem appropriate in our changing world. For example, a couple may want to marry because marriage has a certain societal meaning: access to state subsidy in the form of economic and social benefits not available to other forms of sexual affiliation.[9] The couple may also want to marry because of the institution's individual meaning: a symbolic manifestation of their relationship that will affirm their commitment to each other. If, however, the couple is a same-sex couple, some religious leaders and politicians will oppose such a marriage because they regard marriage as a natural, divinely ordained relationship (an individualized, religious meaning), traditionally and appropriately confined to heterosexual couples (moral or tradition-based societal meaning).[10] In a secular society such as ours, however, only

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[8] This stands in contrast to individualized systems such as in Scandinavia where the individual is the unit of subsidy and policy.

[9] Examples of these benefits include, among other things, health insurance and parenting/custody rights recognized if a partner dies or a relationship ends.

[10] Some of the critics of civil unions in Vermont where it is now legal cite religious belief. See Julie Deardorff, Vermont Is Front Line of Gay Marriage Fight, Chi. Trib., Apr. 3, 2000, at 1. The use of history and tradition is more common. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986). Other state court decisions in the 1970's also limited marriages

the second reason warrants consideration. The issue then becomes whether the societal function of marriage as the mechanism to provide economic benefits and protection is appropriately limited by the moral or traditional meanings of marriage.[11] The questions we would confront in this type of balance would include: when should history and tradition give way to new patterns of behavior; when should law reflect a moral position, particularly when there is no societal consensus that certain conduct is moral or immoral?

As illustrated in this example, the question "why marriage?" might become more complicated and difficult to answer if we must first reveal the meaning (or meanings) we assign to the institution of marriage. This type of consideration forces our focus away from nature or form of the marital relationship to the role or function we want the institution to serve in our society. It also reveals that we are making certain assumptions about the capabilities and capacities of marriage as distinguished from other relationships in society—assumptions about its unique ability to accomplish certain societal functions.

The concept of marriage, and the assumptions it carries with it, limit development of family policy and distort our ideology. The availability of marriage precludes consideration of other solutions to social problems. As the various (and by no means exhaustive) meanings of marriage listed above indicate, marriage is expected to do a lot of work in our society. Children must be cared for and nurtured, dependency must be addressed, and individual

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to heterosexuals, often assuming that marriage was by definition a relationship between a man and a woman. See Martha Chamallas, Introduction to Feminist Legal Theory 265-66 (1999) (citing Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973), Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), and Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974)).

[11] This was the line of reasoning used in Hawaii and Vermont. See Baker v. State, 744 A.2d 864 (Vt. 1999); see also, Baehr v. Lewin, 74 Haw. 530 (1993).

happiness is of general concern.[12] The first question we should be asking is whether the existence of a marriage is, in and of itself, essential to accomplishing any of the societal goals or objectives we assign to it.[13]

I argue that for all relevant and appropriate societal purposes we do not need marriage, *per se*, at all. To state that we do not need marriage to accomplish many societal objectives is not the same thing as saying that we do not need a family to do so for some. However, family as a social category should not be dependent on having marriage as its core relationship. Nor is family synonymous with marriage.[14] Although both of these things might historically have been true, things have changed substantially in the past several decades. Marriage does not have the same relevance as a societal institution as it did even fifty years ago, when it was the primary means of protecting and providing for the legal and structurally devised dependency of wives.

The pressing problems today do not revolve around the marriage connection, but the caretaker-dependent relationship. In a world in which wives are equal partners and participants in the market sphere, and in which the consensus is that bad marriages should end, women do not need the special protection of legal marriage. Rather than marriage, we should view the parent-child relationship as the quintessential or core family connection, and focus on how policy can strengthen this tie.[15] Thus, in a responsive

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[12] See generally The Neutered Mother, supra note 1.

[13] The second question is whether social goal or meaning is (still) a valid one.

[14] Martha L. A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 Va. L. Rev. 2181, 2190-91 (1995) ("Family affiliations are expressed in different kinds of affiliational acts. Some are sexually based, as with marriage. Some are forged biologically, as through parenthood. Others are more relational, such as those based on nurturing or caretaking or those developed through affection and acceptance of interdependence").

[15] See The Neutered Mother, supra note 1, at 15 (discussing the parent-child dyad).

society, one could have a marriage [or other long-term sexual affiliations] without necessarily constituting a "family" entitled to special protection and benefits under law. Correspondingly, one might have dependents, thereby creating a family and gaining protection and benefits, without having a marriage.

If this suggestion seems extreme and radical, it only serves to demonstrate the extent to which marriage continues to be uncritically central to our thinking about the family. What is bizarre is that it remains central in spite of the fact that the traditional marital family has become a statistical minority of family units in our society.[16] The tenacity of marriage as a concept explains the relatively unsophisticated and uninformed policy debates. Marriage, as the preferred societal solution, has become the problem. The very existence of this institution eclipses discussion and debate about the problems of dependency and allows us to avoid confronting the difficulty of making the transformations necessary to address these problems.[17]

I. MAN AND WIFE—FROM PROTECTED TO PARTNERED

Feminist family theorists have pointed out that marriage is a public institution.[18] It has a public function and the law has historically regulated entry into it as well as exit from it.[19] One of the public functions of marriage is

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[16] The latest census figures show traditional arrangement in less than a quarter of households. Single person households, cohabiting adults, and childless couples, for example, are now seen in larger numbers. See Eric Schmitt, For First Time, Nuclear Families Drop Below 25% of Households, New York Times, Late Edition, May 15, 2001, at A1 (reporting on the 2000 U.S. Census data).

[17] Marriage often creates a state-sanctioned unit for dependencies, i.e., for childcare and elder care, which society then does not have to address in the public sphere.

[18] See Olsen, supra note 3, at 1505.

[19] Marriage is public because the state regulates who may marry, how they may divorce, who may take the products of that marriage (children, assets, etc.) regulated by government for tax purposes.

that it plays an important ideological role—our beliefs about marriage help to shape our understandings of other societal institutions. In this regard, marriage has been referred to as a foundational institution.[20]

Marriage has had particular relevance in the construction of gender. Given the importance of gender in virtually all aspects of society, our beliefs about marriage and the tasks it performs should produce an explicit consideration in the development of legal and social theory. One must remember that marriage has not been a neutral social, cultural, or legal institution.[21] It has shaped the aspirations and experiences of women and men in ways that have historically disadvantaged women.[22]

The history of marriage as reflected in the common law centers on dependency and duty. Family roles were gendered in complementary and interdependent ways. Wives owed husbands their sexual and domestic services and, in exchange, their husbands were required to provide for them economically.[23] For that reason, I imagine that since women first banded together under the label

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[20] See Masking Dependency, supra note 14, at 2189 n.21 (observing that Bork eulogized the foundational role of marriage in Franz v. United States, 712 F.2d 1428, 1438 (D.C. Cir. 1983) (Bork, J., concurring in part and dissenting in part) by stating, "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").

[21] Id. at 2182 ("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").

[22] Marriage has shaped women's dependency responsibilities. Their caretaking responsibilities often prevent them from being able to take advantage of opportunities in the workplace. See id. at 2188 (noting that traditionally, "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").

[23] See generally Mary Ann Glendon, The New Family and the New Property (1981).

"feminist," at least some of us have been concerned with marriage, the institution of the family, and the content of family law. Over decades, concern has generated calls for reform. These calls have been heeded, and the transformation in laws with respect to husbands and wives reflects a more significant and far reaching transformation in the marital relationship itself.

Feminists have considered family law reform necessary for two primary reasons—one internal and one external to the institution of the family. The first reason involves the unequal nature of historical family arrangements and interactions.[24] There were real injustices within the hierarchical and patriarchal family, exemplified by the economic inequities that emerged with divorce reform and the prevalence of physical and psychological abuse of women.[25] The second impetus for reform within the family has been generated by looking outside of the family and assessing the effects that women's family responsibilities have had on their position in the larger society.[26] Feminists realized that equality in education, politics, and the workplace could not be fully realized if there were not corresponding changes in family roles and responsibilities.[27]

Feminists from all disciplines asserted that women, in and outside of the family, were primarily defined by

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[24] Id.

[25] See generally June Carbone & Margaret Brinig, Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform, 65 Tulane L. Rev. 953 (1991).

[26] See Martha Albertson Fineman, Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, 8 Am. U. J. Gender Soc. Pol'y & L. 13, 20 (2000) [hereinafter Cracking Foundational Myths] (noting that "[c]aretaking labor saps energy and efforts from investment in career or market activities, those things that produce economic rewards").

[27] See generally The Neutered Mother, supra note 1; see also generally Twila L. Perry, Caretakers, Entitlement, and Diversity, 8 Am. U. J. Gender Soc. P'ly & L. 153 (2000).

their family roles of wife, mother, and daughter.[28] These roles assumed economic dependency, self-sacrifice, and subservience. Furthermore, these family roles displaced other aspirations or occupations on an ideological level, with concrete implications for opportunities provided in or aspirations cultivated for educational or workplace settings.[29] Expectations governing the family (private) sphere correspondingly defined aspirations and possibilities for women in the workplace (public) sphere.[30]

The story of twentieth century family law in the United States has certainly been the transformation of this hierarchically organized relationship of man and wife into a regime of marital partnership, where spouses are conceived in gender-neutral terminology and each is equally responsible for himself or herself, as well as for his or her spouse.[31] As well established as these changes are, we have not yet fully incorporated their implications. We retain unaltered assumptions about marriage, even in the face of this move from dependency to partnership, in regard to women's relationships with their husbands.[32] Part of the "blame" for this failure can be laid at the feet of feminists, because they too under-theorized the family as an institution, although the market and public side of the ledger generated an extraordinary amount of critique and comment.

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[28] For a representative selection of essays, see The State, the Law and the Family: Critical Perspectives (Michael D.A. Freeman ed., 1984).

[29] See Cracking Foundational Myths, supra note 26, at 20.

[30] The feminist legal theorist's story is similar to that of non-legal feminists. Barrie Thorne asserts that in the so-called "first wave" of feminism patriarchal laws such as those that gave husbands control over wives' bodies and property occasioned outrage and generated calls for reform. In the second wave (which occurred in mid Twentieth Century), feminists explicitly analyzed the family as a site of oppression and inequality. The family under such consideration was identified as both an idealized household arrangement and an ideology. Barrie Thorne, Feminist Rethinking of the Family: An Overview, *in* Rethinking the Family: Some Feminist Questions 7 (Barrie Thorne & Marilyn Yalom, eds. 1982).

[31] See The Neutered Mother, supra note 1, at 158.

[32] See Masking Dependency, supra note 14, at 2181.

This is not to say that the family was forgotten. Family law scholars generally embraced the feminist notion that there was an intertwined relationship between the "public" and the "private."[33] They only focused on half of the equation for change, however, accepting and expanding upon the idea that it was necessary to transform the family in order for women to act as full citizens in the public sphere. The debate about the concepts of public and private proceeded along the lines that the "private" institution of the family was in need of "public" reform, and attention was primarily directed toward how internal family relationships were structured and expressed in law. Family law scholars, however, typically left critical examinations of non-family institutions—those in the "public" sphere—to others.[34] When focusing solely on the changes made in regard to individual expectations about relationships within marriage, it seems clear that reform was successful. Family law scholars opened marriage up to scrutiny and made powerful and effective arguments that altered the way we think about gendered violence,[35] reproductive rights,[36] and the legal relationship between husband and wife,[37] as well as the construction of gendered roles within the family.[38] In a recent survey of feminism's effect on family law, Dean

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[33] See, e.g., Thorne, supra note 30.

[34] For the most part, those who were busy looking at institutions and structures in the public sphere ignored the family. This was true of many feminists who also assumed some version of the family as a backdrop to their theorizing. Scholarship in that field was to a large extent divided among those who: (1) using a domination or subordination model focused attention on issues concerning sexual violence and/or reproductive rights; (2) those who worked with a discrimination model confronting issues such as arose in the workplace; and (3) those who concentrated on the family who imported notions of equality and gender-neutrality into the historically most gendered institution in society.

[35] See Elizabeth M. Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973, 985-89 (1991).

[36] See Roe v. Wade, 410 U.S. 113 (1973).

[37] This has been the focus of much of my work. See generally Martha Albertson Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform (1991).

[38] See The Neutered Mother, supra note 1, at 15.

Katharine Bartlett suggests that feminism's principal contribution to the law of the family "has been to open up that institution to critical scrutiny and question the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others."[39] This rendition defines the task of feminism as confronting inequality and subordination, and effecting reforms.[40] Feminism ignored the historical privacy obstacle and pulled our attention to the inner workings of marriage and the marital family.

Dean Bartlett casts the contributions of feminist family law scholars and practitioners in this manner largely as a success story. Feminists challenged the public-private divide, making abuses within the family visible.[41] They generated instability in, and subsequent reform of, "traditional" patriarchal family law. Feminist engagement with and employment of powerful legal concepts such as "equality" led to recasting marriage as a relationship between equal partners. Divorce rules have changed to reflect the perception that wages and income are the product of family labor, not only of individual efforts.[42] The legal relationship between husband and wife has been completely rewritten in gender-neutral, equality aspiring terms.[43] So-called "domestic" violence is now subjected to criminal and civil sanctions, and "marital rape" is no longer considered an oxymoron.[44] Most women, whether they identify themselves as feminist or not, benefit from and generally approve of such manifestations of gender equality.

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[39] Katharine T. Bartlett, Feminism and Family Law, 33 Fam. L.Q. 475, 475 (1999).

[40] Id.

[41] See generally Martha Albertson Fineman & Roxanne Mykitiuk, The Public Nature of Private Violence (1994).

[42] See Fineman, supra note 37, at 46-48.

[43] See Fineman & Mykitiuk, supra note 41, at xiv.

[44] Id.

Given the widespread acceptance of such changes in the way gender equality is understood today, it is worth exploring what Dean Bartlett means when she concludes that the most "divisive issues" for feminists, as well as for the larger society, "have been those that concern the preservation, or elimination, of traditional gender roles" in family or family-related areas of the law.[45] Her discussion of division implies that these roles still exist. What are the implications of her assertion that [f]amily-related issues concerning gender roles have generated the most backlash against feminism in the popular culture?[46] It seems unlikely that she accurately describes the current response to new norms of gender equality that govern the relationship between husband and wife.

Dean Bartlett's remarks most likely reflect the fact that, for the most part, feminist family law has had a limited focus. It has been relentless in an exploration of internal inequities and injustices in the family but has failed to step back and consider the institution of the family in its societal context. It has also neglected to address the very questions about meaning raised in the beginning of this essay. Undertaking such an exploration from a feminist perspective moves us away from concern about family roles and gender equality (at least initially) and directs our attention to the place and meaning of marriage and the marital family in our cultural, social, and ideological system.

Until we undertake this kind of exploration it will be impossible for us to consider what kinds of reforms are likely to make things better (more equal and just) within marriage, the marital families, or society in general. Real reform cannot proceed (or even be adequately theorized)

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[45] Bartlett, supra note 39, at 500 ("The least divisive issues in family law, such as domestic violence, have been those that have been resolved by reference to familiar principles outside of family law. By the same token, the most visible conflicts outside family law, such as the debate among feminists over maternity leave, have related to family and gender roles").

[46] Id.

until we understand and appreciate the way changes in the structuring and functioning of marriage and the marital family challenge and threaten other societal institutions. The backlash to which Dean Bartlett alludes is generated in response to these threats and challenges.

This is a plea for feminist family law scholars not to repeat the same sort of theoretical mistake that mars discussions in other areas of law and policy. We cannot assume that other societal institutions will simply conform in accordance with our arguments about what would be an ideal family form or function. An explicit examination of the marital family as an institution and its relationship to policy and law may not be part of economic or philosophical theory, but discussions of the constraints inherent in the "realities" of the market or the limits of existing theories of justice must be central to feminist reform. We cannot just look to the internal aspects of marital family, focusing on the gendered nature of relationships. We must also look to what work the idea of a marital family does in society, and the ways in which public and private institutions rely on that work getting done.

Dean Bartlett limits her essay to an exploration of three areas of family law that exemplify the gendered nature of family relationships between the adult marital (or heterosexual) couple: It is the relationship between women and men that is hammered out in reforms addressing divorce, sex and reproduction, and domestic violence. [47] Because of "space limitations," she omits other "relevant" areas of inquiry, including two that directly bring children and dependency into the picture—work-family regulation

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[47] See id. at 475. Bartlett addresses the tensions within feminism in regard to the areas she does discuss. In doing so, she by necessity touches on marriage and the child support system (the privatized solution for economic dependency and therefore tied to any discussion of welfare). Perhaps this demonstrates how difficult it is to address any one area of central concern in family law without bumping into others because they are related conceptually and politically as well as in practice.

and the state welfare system.[48] This selection of family topics reflects a broad and persistent feminist preoccupation with the relationship between women and men.

These male-female relation issues are the "easy" areas for contemporary feminism. They are easy because they focus on internal and intimate relations, and because they are areas in which disagreement among feminists, as well as between feminism and the larger society are no longer so pronounced. Laws governing divorce, sex and reproduction, and domestic violence address areas in which there is equilibrium, perhaps even close to a societal consensus, forged in part through feminist sensibilities.

In making this claim about equilibrium or relative consensus, I am not forgetting about the religious right or ignoring the fact that within communities of support nuanced debates still exist, such as those concerning late-term abortion in pro-choice feminist circles. My assertions are merely that the majority of American society (feminist and not):

1. seem to be relatively settled on policies that allow relatively liberal divorce laws coupled with a partnership model for doing economic justice between spouses;

2. have settled into a "live-and-let-live" approach to sex complemented by recognition of a woman's right to "choose"; and

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[48] Id.

3. believe perpetrators of domestic violence should be censored and punished whereas society should provide support and protection for their victims.

Perhaps what is at the heart of Dean Bartlett's observations about division within (as contrasted with backlash to) feminism is her unstated realization that feminist perception of what social arrangements constitute "gender issues" has (or should have) evolved. Concern with women's position *vis-à-vis* men has been displaced by concern over the tenacity of women's historic socially and culturally assigned role as caretaker or nurturer. In this regard, legal feminists seem to have a much more ambiguous response than that generated in response to the traditional roles of husband and wife.

What are we feminists to do with motherhood as both a practice and an ideological structure? In the family arena it is not what we want for women as "wife" but what we aspire to for "mother" that divides us and provokes dissention and debate in and outside of feminist communities. This realization that motherhood is the real "gender issue" also frames a conceptual and theoretical challenge in family law for contemporary legal feminism. It seems apparent that the solutions to the dilemma of dependency and caretaking cannot be found in the family; we must begin to look beyond that institution, making demands for transformation in the workplace and the state.

Returning to the areas omitted from Dean Bartlett's essay, policies surrounding marriage, work-family, and welfare, it seems clear these are among the most contentious issues in society today. They are divisive and controversial within feminism because they confront us with the failure of equality and gender-neutrality initiatives to transform the practice in many families that continues to reflect traditional, gendered patterns. Focusing on work-family conflicts, particularly welfare, brings into focus the inconsistency between what we (still) aspire to as mothers and what we (now) aspire to as equals to men in the

workplace. How do we think about and argue for reform in light of the realization that the role of mother, in spite of decades of attempts to equalize family responsibility and draft gender-neutral, equality-enhancing rules, continues to exact costs to women?

Feminist legal theorists anticipated that as women became more active in the workplace, men would become more involved in the family. Within the family, however, the quest for equality and gender-neutrality has not produced the same sort of "progress" in affecting the actual practices of mothers and fathers as it did for women and men in the market. Generations after the formal articulation of gender-neutral parenting principles, the assumption of responsibilities for children and other dependents continues to be gender-skewed. The implications of motherhood are very different from those of fatherhood. Within individual families we may of course see struggles over the sharing of responsibility. Some men are actually attempting to redefine their own behavior and society's expectations for fathers.[49] Studies show that when they do, they suffer some of the same disadvantages and negative economic consequences as mothers.

Perhaps more striking is the difficulty women and men experience in trying to equalize their behavior as mothers and fathers. When contrasting the persistent gendered divisions of family responsibility against those that demonstrate the successful re-configuration of women's relationship to the workforce, it becomes apparent that norms of equality are not only firmly entrenched, they are also reflected in the expectations and behavior of men and women, wives and husbands (so long as they are not mothers and fathers). What does this continued inequality mean for feminism—or more specifically, for feminists

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[49] See Arlie Russell Hochschild, The Time Bind: When Work Becomes Home and Home Becomes Work, 117-21 (1997) (finding that men who asked for parental leave were seen as not dedicated to their career); see also Gene Koretz, Hazardous to Your Career: The Risks of Taking Unpaid Leaves, Bus. Wk., Jan. 17, 2000, at 26.

concerned with the family and with family law? For one thing, it is clear that society has some interesting (and potentially divisive) issues in need of feminist consideration. The need to define the concepts and vocabulary to be employed in addressing the dependency and resulting inequality inherent in the parent-child relationship is fundamental.[50] The task of developing a vocabulary will undoubtedly be divisive. The language of legal feminism, developed while looking at women compared to men, was framed by the quest for equality, juxtaposing ideas of domination with anti-subordination, victimhood with agency, and special treatment with equality. These are concepts developed to address the legal and structural burdens imposed on women in their roles as wives in relation to men as husbands, and do not adequately capture the dilemmas confronting women in their roles as mothers.[51]

II. THE FUTURE OF FAMILY REFORM?

The absence of feminist concepts to address the dilemmas of motherhood within the egalitarian family has not meant that other disciplines have failed to try to fill the rhetorical vacuum. Borrowing from a potential colonizer, I bring in economics, as it seems ready to supply the rhetoric and concepts to fill any void. In his new reader, "Foundations of the Economic Approach to Law," Avery Katz devotes the last section to "an application on the

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[50] The lack of unequal worth and unequal ability are very difficult to discuss in non-condescending or patronizing ways. See Barbara Bennett Woodhouse, The Dark Side of Family Privacy, 67 Geo. Wash. L. Rev. 1247, 1250 n.21 (1999) (advocating use of the "stewardship" model and the "notion of children's 'need-based rights'").

[51] These concepts helped to make it clear that the historic legal treatment of women in the contexts of divorce, reproduction, and family violence was unequal and unjust. These contexts are also areas in which we are clear(er) about our aspirations for society and its institutions in regard to women's quest for equality. Victor R. Fuchs, Women's Quest for Economic Equality 72 (1988) (noting that despite equality, children are still predominantly the concern of women).

frontier: family law." Professor Katz asserts: "economic analysis can shed light on any sphere of human interaction in which individuals pursue their goals subject to constraint."[52] He describes family relations as:

> [E]xternalities imposed by individual families on the rest of society and by individual family members on others in the household; incentives to invest in the family's material assets and in the human assets of its individual members; strategic behavior arising from family members' efforts to influence each others' conduct; insurance against the financial and emotional risks of disability, unemployment, and household dissolution; and the effects of limited information and bounded rationality on such crucial personal decisions as family formation and career choice.[53]

Professor Katz speculates that among the reasons to date for economics enjoying "relatively less influence" in family law than in other doctrinal fields is the persistence of thinking of market and family as separate realms.[54] Of equal significance, and of particular relevance to feminists, is his additional identification of the difficulty associated with the "fundamental issues of liberalism" raised by the "recurring need" (inherent in the whole idea of family) for some family members to make decisions for others incapable of protecting their own interests.[55] Professor Katz thus labels the family "the archetypal paternalist institution."[56] An economic model, which posits

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[52] See Foundations of the Economic Approach to Law 410 (Avery Wiener Katz ed. 1998).

[53] Id at 410-11.

[54] Id. at 411.

[55] Id.

[56] Id. Professor Katz states that some scholars, due to the complexity inherent in the family context, see economic modeling as inappropriate. In this regard, he recognizes that there are "competing disciplines,"

independent, rational individuals not only interacting with each other, but also seeking to maximize their own utility in that interaction, does not reflect what is assumed about family relationships.[57]

This "recurring need" for a "paternalist" family does not only present a dilemma for the imperial discipline of economics. It also creates a dilemma for feminists. The feminist version of the dilemma arises because this need and the inequality it reflects cannot readily be resolved by a reference to the principles of equality and gender-neutrality that have defined the feminist family law projected thus far. Need and dependency mandate paternalism (or maternalism) in some form, but only for some relationships.

A. The Contractual Affiliation: The End of Marriage as Status

Largely through the law and economics movement, the concept of contract has made headway in legal approaches to family relationships. The idea of contract is useful once it has been adapted to allow us to move beyond a law and economics-individualistic model of contracting. Economic theory tends to accept existing structures as givens, but the idea of contract can be appropriated for consideration of the relationships within the institution of the family. Contract need not only be about the creation of relationships between individuals; it can reflect societal arrangements—interlocking structural and ideological relationships among institutions, or between the state and individuals. In that sense, we do talk about something called the "social contract."[58]

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specifically psychology and biology, that address the issue. He does not mention feminism as a competing discipline.

[57] This does not mean that economists have not used their model to predict and explain family behavior or to argue for policy. Id. at 410-39.

[58] See generally Martha Albertson Fineman, Contract and Care, 76

Economics did not, however, invent the association between contract and marriage. Contract has long served as an accepted metaphor for the marriage arrangement. In traditional practice, however, the whole notion of private ordering exemplified by contracting was historically viewed as inappropriate for forging relationships of intimacy. Although some of the traditional doctrinal language associated with contract found its way into family law, marriage and sexuality were by in large considered appropriately regulated by the state.

The problem is that the idea of marriage as contract has never been taken seriously enough. Although we may discuss "consent" and "consideration" in ascertaining whether a marriage "contract" has been formed, or affix "reliance" and "expectation" in making judgments about the economic or other consequences of divorce, few scholars even today consider marriage an entirely flexible legal institution, susceptible to manipulation and the generation of individualized voluntary (but enforceable) terms. Even in areas where contracting is encouraged, such as settlement agreements, or at least tolerated, such as antenuptial agreements, courts scrutinize terms for fairness and worry about overreaching and bargaining position in ways that would be unacceptable in enforcement proceedings for other types of contracts. Conceptually, although one may have "choice" when entering marriage, when it comes to the terms and consequences of that status, there is no free marketplace in which private ordering is the rule.

What would happen if we were to take the idea of contract as a substitute for traditional, state-defined marriage seriously? If we used the idea of contract to move beyond marriage-as-we-know-it? This would present an interesting "thought experiment." Freed from the mandate of proposing a practical suggestion for social policy, we could begin to confront the reality of marriage as an ideology and mechanism for ordering relationships and

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Chi.-Kent L. Rev. 1403 (2001).

intimacy in ways that obfuscate the dimensions of the social crisis of dependency.[59]

In *The Neutered Mother*, I urge the abolition of marriage as a legal category and, with it, the demise of the entire set of special rules attached to it, doing away with the laws of marriage and divorce as well as altering those areas in which "spouse" is a consequential category such as tax law or probate and estate rules.[60]

It is possible to view this call for the abolition of marriage as a demand for private ordering. Areas of private law—contract, torts, criminal law, property, equality, and so on—would have to do the conceptual and structural work that marriage currently does as a "status," mandating special legal consideration and consequences. The financial implications of sexual affiliates (formerly labeled husband and wife) would be regulated by private, individualized agreement—by contract—with no special rules governing fairness or unique review and monitoring of the negotiation process.[61]

A proposal for the abolition of marriage as a legal category, however, involves much more than just a "simple" preference for "privatization" of potential economic consequences. In the absence of a contract to govern a specific intimate situation, there may be a need for default rules. General regulatory rules such as those found in equity (e.g., unjust enrichment or constructive trust), partnership, and labor law could provide the bases for

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[59] I do not mean the type of "crisis" associated with welfare reform's casting of dependency as pathology. Rather, I am concerned with the crisis generated because inevitable dependency has been delegated to the family.

[60] The Neutered Mother, supra note 1, at 228-30. I anticipate that there would still exist cultural or religious marriages. However, these unions would have no independent legal significance. Any legal consequences that would accrue to them would be provided by legal rules generally applicable across the population.

[61] This is common with antenuptial agreements and doctrinally required (even if not typically practiced) with settlement agreements.

decisions in disputes involving sexual affiliates. Constitutional and civil rights laws might also offer some suggestive parameters for exploring what economic consequences should attach to joint endeavors undertaken by formerly exempt family members.[62]

In other words, in addition to contract rules, ameliorating doctrines would fill the void left by the abolition of marriage law. In fact, it seems apparent that a lot more regulation (protection) would occur once the interactions of men and women were removed from behind the veil of privacy that now shields them when they act in their family roles as husbands and wives. Without the immunity or special relationship defense provided by marriage, for example, there would be no justification for failing to apply the "normal" rules of tort and criminal law to sexual affiliates.

Feminists have pointed out for over a century that the institution of marriage is the location of a lot of abuse and violence. The institution is based on an unequal and hierarchical social arrangement in which men are considered the heads of households, owed domestic and sexual services by wives and obedience and deference by all family members. Once the institutional protection afforded to marriage is removed, behavior would be judged by standards established to regulate interactions among all members of society.

What would be the practical implications of this suggested "reform"? Marriage, no longer available, would no longer stand as a defense to rape. Conceptually bracketing off some assaults as "domestic violence," rendering them somehow less serious than the non-domestic variety, would be problematic.[63] Perhaps we

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[62] I am uncommitted to any particular set of principles for these default rules at this time. The only requirement would be that they be rules of general application and apply to all types of transaction between legally competent adults. Specific categories of affiliation would not be separated out for special treatment.

[63] In the past, certain types of domestic violence were not even

would even begin to develop theories of tort to compensate sexual affiliates for conduct endemic to family interactions but considered unacceptable among strangers. A tort for intentional infliction of emotional or psychological harm might emerge, for example.[64] Norms that prohibit harassment (including stalking), verbal assault, and emotional abuse among strangers would be applied in defining appropriate conduct between sexual intimates.[65]

On a whole different vein, the end of marriage as a state regulated and defined institution undermines, and perhaps entirely erodes, the state interest in controlling and regulating sexual affiliations. If no form of sexual affiliation is state preferred, subsidized, and protected, none could or should be prohibited. Same-sex partners and others forming a variety of other sexual arrangements would simply be viewed as equivalent forms of privately preferred sexual connection. Such unions might even be celebrated in religious or cultural ceremonies, but the state would have no regulatory interest.[66] If there is no marriage, the substantial economic and other societal benefits currently afforded to certain heterosexual units would no longer be justified, nor would punishment of "deviant" sexual connections any longer be permitted.

In addition, some other types of non-sexually based family formation currently interpreted through norms of heterosexual marriage would also "open-up" with the

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considered criminal behavior. Husbands had not only a right, but also a duty to chastise and punish wives and children. Physical chastisement was considered appropriate as long as it did not exceed certain limits. See The Neutered Mother, supra note 1, at 156.

64 There has been some push to do this in the context of divorce already. See Ruprecht v. Ruprecht, 599 A.2d 604, 607 (N.J. Super. Ct. Ch. Div. 1991) (allowing for suit for intentional infliction of emotional harm without physical injury in the context of a divorce); see also Hakkila v. Hakkila, 812 P.2d 1320, 1326-27 (N.M. Ct. App. 1991).

65 Other areas of law that would substitute for (or be supplemented by) the abolition of marriage and divorce rules would include bankruptcy, fiduciary responsibility, equity, and ethics.

66 The exceptions to this general principle should be obvious—rape and child molestation would still be prohibited and punished by law.

abolition of marriage. Single motherhood in particular would become unregulated. Without marriage, motherhood would not be modified by the presence or absence of a legal relationship between heterosexual partners. There would be neither "single mothers" nor "married mothers"—only "mothers." Women would be free to become pregnant without fear of censure or penalty. Paternity proceedings would be neither automatic nor mandatory—inflicted against the wishes and in disregard for the privacy of mothers simply so the state can fill in the blank under "father's name" on a birth certificate and thus ensure male economic responsibility for a child. Sperm banks and specialists in reproductive technologies, including artificial insemination and fertility treatments, would not feel that the marital status of their patients was an ethical or professional concern.[67]

In addition to freeing women from the heterosexual marriage paradigm in their reproductive lives, the abolition of marriage as a legal category would have other implications. As earlier discussed, contract language is often used in referring to the family, though the rules seem more anchored in concepts of status.[68] Interestingly, from the perspective of contract as a metaphor for bargaining, human activities in which women might be considered to have either a "natural" monopoly or to possess more on the "supply" than "demand" side of the equation have been written out of contract.[69]

Sex and reproduction (certainly significant areas of barter and exchange) are not subject to contract. We do not

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[67] This method of reproduction might be preferred once such restraints were removed. It avoids any questions about "consent" vis-à-vis the sperm donor because he would have alienated his interest in his contribution of reproductive material in his donation to the sperm bank.

[68] This is particularly true in modern family law jurisprudence where marriage is referred to as a "partnership" and some of the economic consequences may be tailored to individual preferences through pre-nuptial contracts and/or separation agreements.

[69] More specifically, these areas were set aside and governed by special rules regulating marriage. See Fineman, supra note 58.

allow individualized bargaining, but refer sexual interactions into the extralegal (the modern position) or apply regulatory generalized coercive rules to them. Traditionally, sexual affiliation has been regulated by the marriage contract and by the many rules, both criminal and civil, which bolster and reinforce the institution of marriage by penalizing or prohibiting other sexual affiliations.[70]

There is no obvious reason why sex should be excluded from some contractual schemes (e.g., private bargaining) while it has been an explicit part of another contractual scheme (e.g., the services requirement in the marital contract).[71] Another question might therefore ask what would happen if sexual affiliation, like other

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[70] These rules are not only the law of marriage and divorce, but large areas of criminal and civil law that bolster the institution of marriage and penalize sexual affiliations that do not conform to the marriage model. For instance, laws against prostitution, fornication, adultery, and cohabitation as well as inheritance and probate laws, property rules, and tax law treat economic exchanges between marital partners differently than those that occur between other members of society. See Martha Albertson Fineman, Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation, Wisc. L. Rev. 275, 282-83, 316 (1981).

[71] Kant struggled with the idea of rights to persons as akin to rights to things—describing marital or family status entailing rights "neither to a thing nor merely a right against a person but also possession of a person." Kant further describes the three objects of acquisition: a man acquires a wife, a couple acquires children, and a family acquires servants. We are also told that "whatever is acquired in this way is also inalienable and the right of possessors of these objects is the more personal of all rights." One outgrowth of the (obviously patriarchal) assertion that what is acquired in marriage is a woman (wife) by a possessor (husband or man) was the common law rule that marriage was a defense to rape. See Immanuel Kant, The Metaphysics of Morals 61 (Mary Gregor trans. & ed., 1996); see also Jeremy Waldron, When Justice Replaces Affection: The Need for Rights, *in* Liberal Rights: Collected Papers, 1981-1991 376 (Cambridge Univ. Press, 1996).
Justice Lord Hale expressed the opinion that consent to marriage was consent to provide sexual services on demand. Fortunately, the system of obligations and entitlements built upon this view of the world has been undermined. This would seem to require a reexamination of other basic principles and assumptions. See 1 Hale P.C. 629, *as quoted in* Warren v. State, 336 S.E.2d 221 (1985).

significant areas of social interaction, were not treated differently—if there were no special category of rules regulating consensual, adult sex exchanges and all were subject to contract.[72]

There are a number of interesting legal process questions raised by this set of speculations about abolishing marriage as a legal category and relying on other areas of law to address the problems that might arise between sexual affiliates. These questions involve the mechanisms transforming law, and the ways in which doctrine can adapt to and accommodate new patterns of behavior. Ideological as well as structural forces would have to be considered. Certainly pouring sexual affiliates into the arenas of contract, tort, and criminal law would not leave those doctrines untransformed. How would the content of contract, tort, and criminal law change? Would ideas about bargaining, consideration, and unconscionability be altered? The prospect presents exciting possibilities for reexamining entire areas of substantive law, where assumptions about interactions between independent, equal, and autonomous individuals govern terms and consequences.

Of course, if we take the relationship of husband and wife out of regulation, the obvious question becomes, "What will happen to the children who are left behind?" Although we may comfortably assume in contemporary America that women can be expected to function as equals and make their own bargains, the contract paradigm does not fit so neatly with the recognized need for protection when we speak of children or others who may be dependent and in need of assistance and care.[73]

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[72] The laws punishing prostitution would certainly fall and women would be able to charge for gestational and other reproductive services.

[73] These relationships may not function according to an equality model. They may be hierarchical and unequal. This does not mean, however, that the people are of unequal value, just that they are of unequal ability, however temporarily. See Woodhouse, supra note 50, at 1253, 1255. I am struggling here with the idea of solidarity in

Current American mythology assumes that the marital family serves the essential function of managing dependency.[74] This function has ideological and structural dimensions that shape political and policy discourse and influence law.[75] But the family imagined in this discourse and policy no longer exists; it has changed. Divorce is common and fewer people are forming relationships that conform to the traditional model.[76] Women's aspirations for themselves and expectations of their partners are substantially altered. Yet we insist on assigning primary, almost exclusive, responsibility for dependency to the marital family. Something must give way – family or work. Some women will let go of their aspirations for an equalitarian marriage, whereas others will find they have no choice but to compromise care standards or forgo having children altogether because of the incompatibility of work with caretaking. The point is that continued adherence to an inappropriate image of the marital family will have significant implications for those operating within those families.[77]

Under the marital-family-as-a-repository-of dependency-model, the costs of caretaking are born by the family and, within the family, primarily by women and children. The consequences to women often are not

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contrast to equality as the way to understand the caretaker/dependent relationship. Others use different concepts, such as "stewardship." See id. at 1256-57.

[74] See The Neutered Mother, supra note 1, at 161-64.

[75] Id.

[76] Id. See also footnote 16.

[77] Further, one important historic role that marriage plays in defining other family relationships and responsibilities has been substantially altered in the waning years of the Twentieth Century. Other family relationships are no longer defined by marriage. Unmarried fathers have rights to and responsibilities for their children that were not part of the common law scheme. Non-marital children are entitled to benefits historically reserved for their marital counterparts. Equitable or contractual principles result in allocations of property or other economic adjustments at the termination of a non-marital cohabitation relationship in ways similar to the rules that apply at divorce in many states.

revealed until the family dissolves, by death or divorce, and the caretakers cannot manage to take on the full-time and unassisted role of primary breadwinner, while continuing to caretake. Consequences, both to the individual and to society, may also become apparent when the marital family (or enough marital families) fails in its assigned societal role and children are left on their own without adequate arrangements for care.

B. The Dependency Affiliation: The Beginning of Modern Family Law

Feminist family theorists must open up the debates and insist on a rethinking of the position assigned to the family in the larger society. We can begin with a consideration of the historic role of marital family in society. Changes in patterns of behavior are moving us toward a post-traditional, marital-family model. What role or function can and should our new families (ones that may not be marital in form) be asked to serve? Which functions must be shared with other societal institutions, such as the market and the state? How should the substantial changes in marriage affect the construction of law and policy concerning the family? Finally, how do we protect and provide for children fairly and justly?

Marriage has historically served as the "natural" repository for dependencies.[78] The family is the institution to which children, the elderly, and the ill are referred; it is the way that the state has effectively "privatized" dependencies that otherwise might become the responsibility of the collective unit or state.[79] Yet dependency is of concern well beyond the family. Dependency work is of benefit to the entire society. In this

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[78] I distinguish between what I refer to as "inevitable" dependency—a biological category of physical dependency that may also have economic, psychological, and other social implications—and "derivative" dependency, which is the dependency created in the caretaker for resources in order to accomplish the caretaking task. See The Neutered Mother, supra note 1, at 161-62.

[79] Id.

regard, it is not fair or just that the costs associated with dependency are not more evenly distributed.

In considering these assertions, one must first understand that dependency is a human phenomenon. In earlier work, I attempted to complicate the concept of dependency.[80] This move responded in part to the derisive and pejorative characterizations of dependency that accompanied welfare "reform" and the rhetoric of individual responsibility, as well as much of the discussion surrounding the suggestion that marriage was the solution to most (if not all) social problems concerning children and poverty.[81]

Dependency is "inevitable." Far from being a "pathological" condition associated with human failure, it is an inevitable part of the human condition. It is universal—a developmental and shared experience. All of us were dependent as children, and many of us will become dependent as we age, fall ill, or are disabled.[82] In this regard, "inevitable" dependency can be viewed as a biological category.[83]

There is, however, another important dimension to the discussion about dependency. If dependency in its biological manifestations is universal and inevitable, then we all need caretakers to provide for us during segments of our lives. The simple (but entirely obvious, even if often overlooked) realization is that caretakers of inevitable dependents are themselves dependent on resources in order

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[80] During this century (at least until recently) inevitable dependency in this and all other industrialized democracies was the object of progressive social welfare policies—inevitable dependents constituting the "deserving poor" exemplified by innocent children entitled to protection by the state and entitled to collective resources for education and welfare. See Masking Dependency, supra note 14.

[81] Id.

[82] Id.

[83] Economic and psychological dependencies are not included in this category. Although they may accompany inevitable dependencies, they are better understood in structural or ideological terms.

to provide that care. I label this type of dependency "derivative dependency." [84]

To whom should society assign the responsibility for inevitable dependency (thereby constructing the derivative dependent), and under what conditions should those so designated be expected to fulfill the delegated caretaking roles? In considering these questions one must remember that caretaking requires the sacrifice of autonomy and entails compromises that negatively affect economic and market possibilities. Caretaking has substantial costs that are borne by the family in the first instance and, within those families, by the person who is assigned the duties of caretaker.

Professor Katz got it only half-right when he stated that the family must be "paternalistic."[85] The reality is that the family must be both paternal and maternal. Children and other dependents need both the "paternal" provider and the "maternal" caretaker, but it is difficult to find an all-encompassing "parental" figure who can accomplish both roles in our society under its current organization, where dependency is cloistered within the family and other institutions are free to disregard its demands.

The market assumes an unencumbered worker and is structured accordingly, punishing those who cannot conform. The state assumes self-sufficiency on the part of the family, punishing those units who do not conform. Society mandates the traditional, role-defined, marital family form. Even with the best of egalitarian intentions, marriages tend to slip into traditional and gendered patterns. Even the best single mother is viewed as inadequate. Within society, caretakers are required, but

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[84] There is no societal consensus that derivative dependents have a legitimate claim to societal resources. In the context of "welfare reform," our society has rejected the notion that caretaking supplies a claim for social subsidy. See Martha Albertson Fineman, Legal Stories, Change, and Incentives—Reinforcing the Law of the Father, 37 N.Y.L. Sch. L. Rev. 227, 244-47 (1992).

[85] Supra note 52, at 411.

caretakers need resources, including time, money, energy, and accommodation from the workplace. The roles of head of household and dependent wife-caretaker provided both nurturing and economic resources. They did so, however, through the unpaid appropriation of the wife's labor—initially and most directly through the imposition of caretaking obligations to her husband and children. Fulfillment of these obligations not only benefits those family members who received them, however. Caretaking ultimately benefits the larger society, providing the workers, the voters, the students, and all of the other citizens that populate and contribute to its institutions.

Taking seriously the need for the resources supplied by both paternalism and maternalism in addressing dependency in today's society with its emerging norm of single-parent households will force us to look beyond the horizons of the institution of marriage and the relationship between husbands and wives. In fact, it may result in a radical reconfiguration of how we think about the family, a reconfiguration assessing the implications of both changed family form and essential family function.

Some of us already have begun to construct that reconfigured vision. Mine leaves behind the obsession with the marital tie and is built around the caretaker and dependent relationship.[86] It is this relationship that should be subsidized and protected. Recognizing both the inevitability of dependency and the society preserving work that caretakers do in meeting the demands of that dependency, I argue for the restructuring of our workplaces to accommodate a "dually responsible" worker, and the reinvigoration of our state so that caretaking and market work (maternalism and paternalism) are compatible, accomplishable tasks.[87] Only when this is accomplished will we have a society in which dependency is fairly and justly managed.

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[86] See The Neutered Mother, supra note 1, at 230-35.

[87] See Cracking Foundational Myths, supra note 26, at 20; see also Fineman, supra note 58.