
Women, Equality, and the Federal Marriage Amendment

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I. INTRODUCTION

Marriage and the marital family¹ are arguably the only important social institutions in which women have always been necessary participants. “The marital alliance is fundamentally a reproductive alliance: [r]ecognized marriage has invariably been restricted to heterosexual couples, and the relationship categories that proscribe marriage in any particular society are generally coincident with those that proscribe sexual relations,” state Margo Wilson and Martin Daly in their evolutionary treatment of marriage.² Because marriage has been and is a reproductive alliance, the logic of women as necessary participants is obvious: it takes a woman to make a baby.

We have no knowledge of any society in which same-sex “marriage” has been practiced, until very recently.³ We do not yet know the

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1. I use the term “marital family” to mean the legal union of a man and woman, as distinguished from an informally cohabiting couple. In some societies, a man could marry more than one woman; in both monogamy and polygyny, a woman was a necessary participant, as was a man.

2. Margo Wilson & Martin Daly, *Marital Cooperation and Conflict*, 197, 203 in *EVOLUTIONARY PSYCHOLOGY, PUBLIC POLICY AND PERSONAL DECISIONS* (Charles Crawford and Catherine Salmon, eds., 2004). Margo Wilson and Martin Daly observe:

Marriage is a universal social institution, albeit with myriad variations in social and cultural details. A review of the cross-cultural diversity in marital arrangements reveals certain common themes: some degree of mutual obligation between husband and wife, a right to sexual access (often but not necessarily exclusive), an expectation that the relationship will persist (although not necessarily for a lifetime), some cooperative investment in offspring, and some sort of recognition of the status of the couple’s children.

Id.

3. Same-sex marriages were first performed in the Netherlands in 2001, although Denmark recognized civil partnerships as early as 1989. If we grant Denmark the longest history for same-sex “marriage,” we may say that we have a “history” of the practice in one country for a span of less than 20 years. In comparison, heterosexual marriage is to some degree documented in a number of cultures for several thousand years. For a brief, cross-cultural history of same-sex “marriage” see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1435-69 (1993). But as Nancy N. Polikoff points out in *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1538 n.9 (1993), “Eskridge notes that his review of the literature includes some relationships that were culturally but not legally recognized and other that attained some form of

economic, social, or familial impact of recognizing a form of marriage which does not require at least one woman and one man. It is my belief that normalizing same-sex marriage will ultimately devalue the roles of husband and father, too. The focus of this paper, however, is on the potentially negative impact of same-sex marriage on women.

In some sense, we might characterize historical marriage and the marital family as the only truly sex-integrated⁴ segments of our society, and of most societies of which we have some knowledge. Even in cultures which sharply limited women's role in government, the economy, and education,⁵ marriage was dependent upon at least one female available for marriage to one male. While feminists have characterized traditional marriage and the marital family as a site of oppression,⁶ marriage and the marital family are actually sites of power and status for women in society. For example, Lucienne Portocarero notes that "In terms of observed [social] mobility patterns . . . , it seems quite clear that women generally have better chances of reaching more advantageous class positions via marriage than via occupation in both [French and Swedish] societies." She concludes that

It is a fact that, through marriage, women may compensate for poor occupational prospects. But a woman's possible advantage in sharing her husband's class position by alliance differs essentially from a man's occupational achievement by its very dependence on a relationship involving other aspects of individuals' lives than the work situation.⁷

Some ethnographic studies "indicate that women may exercise considerable influence in both marital and community affairs even though norms are explicitly patriarchal."⁸ How might legalizing the

legal recognition. He refers to the latter as 'marriages.'" It appears that the most widespread form of marriage, however, has been between a man and one or more women, perhaps because of the role women play in reproduction.

4. By using the term "sex-integrated," I am not asserting that sex roles within marriage and the family have necessarily always been equally valued, but that women have been participants, and voluntary participants for a significant portion of western history. The variations of consent, particularly in societies in which parents overtly or covertly arrange marriages, is a topic too large for this paper.

5. Consider our own history: it took a constitutional amendment to bring the vote to all U.S. women, married women's property acts and anti-discrimination legislation to give women fuller economic and educational opportunities.

6. For a brief overview of feminist analyses of the family, see JANET C. OLLENBURGER & HELEN A. MOORE, *A SOCIOLOGY OF WOMEN: THE INTERSECTION OF PATRIARCHY, CAPITALISM, AND COLONIZATION*, 29-33 (2d ed. 1992).

7. See, e.g., Lucienne Portocarero, *Social Mobility in France and Sweden: Women, Marriage, and Work*, 28 *ACTA SOCIOLOGICA* 151, 162, 168 (1985).

8. Rebecca L. Warner et al., *Social Organization, Spousal Resources, and Marital Power: A*

marriage of two persons of the same sex affect the status of women in the family and in our society, given that we have not yet fully integrated women into all areas of social life?⁹

I will argue in this paper that the norm of heterosexual marriage is a necessary—albeit not a sufficient—condition for social equality for women. How the marriage relationship is culturally defined could become a gender representation of relations between the sexes in other areas of society.¹⁰ If those propositions hold true, I contend that the current efforts to legalize same-sex marriage will help normalize and legitimate family forms in which women (or men) are excluded or considered unnecessary. If one sex/gender is considered unnecessary to marriage and family, that new norm will encourage increases in anonymous or casual sex and in transactional procreation. Increases in casual sex and transactional procreation will, in my view, further exploit and devalue women's traditional roles as wives, mothers, and nurturers and will contribute to the contemporaneous slide into one dominant gender role—that of the stereotypical male¹¹. In contrast, if the sexes are seen as fitted to marriage with each other, with equally-valued complementary roles, then women stand a better chance of maintaining, rather than losing, social status in areas outside the family. Further, failure to maintain heterosexual marriage may result in future generations with a decreased ability or desire for men and women to cooperate in families and may ultimately contribute to a new form of gender hierarchy and a new variation of a sex-segregated society.

Cross-Cultural Study, 48 J. MARRIAGE & FAM., 121, 122-28 (1986).

9. In contrast to the western practice of one woman-one man marriage and marital family, women have not been fully integrated into other aspects of society. The labor force is still largely stratified by sex, if not sex-segregated, with 59 percent of men in four occupational groups: "precision production, craft, and repair (18 percent); executive, administrators, and managerial (16 percent); professional specialty (14 percent); and sales (11 percent)." Seventy-three percent of women in the same age group (16 years or older) worked in "administrative support, including clerical (23 percent); professional specialty (19 percent); service workers (except private household, 17 percent); and executive, administrators, and managerial (15 percent)." U.S. CENSUS BUREAU, WOMEN AND MEN IN THE UNITED STATES: MARCH 2002, 3 (March 2003) *available at* <http://www.census.gov/prod/2003pubs/p20-544.pdf>. Women are less likely than men to have earned a bachelor's degree, still earn less than men, and are more likely than men to live in poverty. *Id.* at 3-5. About 15 percent of armed services active duty personnel are female, as of September 30, 2004. Press Release, Census Bureau, U.S. Census Bureau Facts for Features, Women's History Month (February 22, 2006) *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006232.html [hereinafter Press Release] (citing Statistical Abstract of the United States, 2006, Table 501).

10. Muriel Nazzari, *Relations Between the Sexes in Spain and Its Empire*, 4 J. WOMEN'S HIST. 142, 144 (1992).

11. Stereotypes, by their nature, are fictionalized and general caricatures of the real and the particular.

II. HOW DOES SEX-INTEGRATED MARRIAGE BENEFIT WOMEN?

The actual question shot at me by a somewhat cynical jurist was: “What’s marriage ever done for women?” Evolutionary psychologists answer that “the primary benefit that can accrue to women who pursue long-term matings [such as marriage] is gaining continuous access to a man’s resources and parental investment.”¹² Steven Rhoads suggests that women benefit because marriage makes men better, for “men are less attracted to and less well equipped for marriage than women. Men, nonetheless, need marriage. Communities of unmarried young men are prone to engage in violence and predatory sex. Compared with the married, young unmarried men tend to be lazy and unfocused . . . Marriage compels men to grow up,” Rhoads concludes.¹³ Because heterosexual marriage increases women’s access to material resources and to more help in raising children, and reduces male violence, it is reasonable to conclude that heterosexual marriage can benefit women socially because it increases the cooperation of males with females.

The norm of heterosexual marriage is a necessary condition for social equality for women because it requires inter-gender cooperation and it has the potential to increase women’s financial, familial, and interpersonal health. Both family-of-origin and marital status have heavily contributed to the social and economic status of individual men and women. This was true anciently¹⁴ and is true today.¹⁵ Kinship sometimes moderated the effects of what was an otherwise gender-stratified society, such as when the social class of the family-of-origin gave a woman more power or authority than women of lower classes could obtain.¹⁶ For women, marital status in some cultures has entitled

12. David M. Buss & David P. Schmitt, *Sexual Strategies Theory: An Evolutionary Perspective on Human Mating*, 100 *PSYCHOL. REV.* 204, 226 (1993).

13. STEVEN RHOADS, *TAKING SEX DIFFERENCES SERIOUSLY* 252-53 (1994).

14. *See, e.g.*, The Laws of Hammurabi, §§ 144-148 (dealing with votary-wives, concubines, and slave wives); *id.* §§ 165-184 (inheritance laws related to wives, votary-wives, children, children of slave-spouses); *see also* The Middle Assyrian Laws-Assur, § 40 (different dress for wives, concubines, prostitutes); Hittite Laws, §§ 31-33, in MARTHA T. ROTH & HARRY A. HOFFNER, JR., *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* (Piotr Michalowski, ed., 1995) (division of property and custody when unmarried slave and freeborn person dissolve household); *id.* §§ 189-195c (defining incest/unpermitted sexual pairing); JUDITH EVANS GRUBBS, *LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE’S MARRIAGE LEGISLATION*, 261 (1995).

15. *See* Warner et al., *supra* note 9, at 122-23, 126-27 (showing that a cross-cultural study supports the notion that women in nuclear families may have a power or status advantage absent in more complex family types, since the nuclear family requires more cooperation between husband and wife; women in matrilineal groupings tend to have more power than women in patrilineal groupings; close kin networks may increase marital power).

16. Sarah M. Nelson, *Gender Hierarchy and the Queens of Silla*, in *SEX AND GENDER HIERARCHIES* 297, 298 (Barbara Diane Miller ed., 1993) (stating that corporate kinship groups were protectors of sisterly prerogatives; state-level political and economic power can coexist with relative

them to some level of support and to support or property even after divorce¹⁷ or after a husband's death.¹⁸ The notion that a husband owes support to his wife, or that the household is dependant upon a male "breadwinner," is attenuated now that large numbers of women are also in the paid workforce.¹⁹ The mean income of males ages 22-34 decreased by 18.4 % between 1977 and 1992. It improved after 1992, but by 2001 the mean still did not reach the earlier 1977 level. Although women's earnings have risen and men's earnings have dropped since 1977,²⁰ women still gain more economically by heterosexual coupling than do men, even though their work within the home tends to be undervalued.²¹ While more women work outside the home than in former times, men have not substantially increased their workload in the home. "Men remain largely peripheral to work in the domestic sphere while the responsibility for managing the household falls to their partner."²² In a

gender equality if kinship is the overriding organizing principle of the elite classes, *Id.*, at 310, 311).

17.

A generation ago, a married woman was almost assured of alimony—usually for life. Today women are expected to help support themselves; temporary or "rehabilitative"; alimony seems to be the rule, particularly for young women and short-term marriages. As for property, the goal of most divorce statutes is to provide for an "equitable" distribution, taking into account such factors as the age, health, and station of the parties, their skills and opportunity for future acquisition of income and assets, and other relevant criteria as provided by statute.

MARCIA MOBILIA BOUMIL ET AL., *WOMEN AND THE LAW* 319 (1992). The devaluation of women's work within the home, coupled with the affirmation of women's ability to work outside the home, has likely contributed to ending the practice of usually awarding alimony to divorced homemakers.

18. In ancient societies, she was entitled to some support particularly in the event that she has borne her husband children. It would appear that in some cultures dowry in arranged marriages was a means of insuring that a daughter would be properly supported, during marriage and after its dissolution. Raymond Westbrook, *Property and the Family in Biblical Law*, 113 J. STUDY OLD TESTAMENT SUPPLEMENT SERIES, 142, 144-45 (1991); see also RHOADS, *supra* note 14. In the contemporary United States, the Uniform Probate Code reserves some resources for children of men dying intestate, with the bulk of the estate going to the surviving spouse. See, e.g., UTAH CODE ANN. § 75-2-102 (2005) (surviving spouse's share of decedent's estate: 100%, if no surviving descendants of the decedent, or if all of the decedent's surviving descendants are also descendants of the surviving spouse; the first \$50,000, plus ½ of the balance of the intestate estate if one or more of decedent's surviving descendants are not descendants of the surviving spouse).

19. "Women comprised 46% of the total U.S. labor force [in 2005] and are projected to account for 47% of the labor force in 2014." Women's Bureau Quick Facts on Women in the Labor Force in 2005, available at <http://www.dol.gov/wb/factsheets/Qf-laborforce-05.htm> (last visited March 27, 2006).

20. Christopher Brown & Randall Kesselring, *Female Headship and the Economic Status of Young Men in the United States, 1977-2001*, J. ECON. ISSUES, 343, 345 (2003).

21. "[W]omen gain slightly more than 50% in needs-adjusted family income when they cohabit or marry, whereas men neither gain nor lose effective income." Audrey Light, *Gender Differences in the Marriage and Cohabitation Income Premium*, 41 DEMOGRAPHY 263, 278 (2004); see also Carol B. Burgoyne & Alan Lewis, *Distributive Justice in Marriage: Equality or Equity?* 4 J. COMMUNITY & APPLIED SOC. PSYCHOL. 101, 112-13 (1994).

22. Andrew Singleton & JaneMaree Maher, *The "New Man" Is in the House: Young Men, Social Change, and Housework*, 12 J. MEN'S STUD, 227, 239 (2004). But see Anne Fischer, *Will*

sense, women have stepped into a traditional male role—paid labor—but men have not moved into the female role in the home to the same extent. Unpaid labor in the home is generally not counted as part of the gross domestic product,²³ and women in the paid labor force tend to earn less than men. It is little wonder, then, that marriage helps women, especially women with children, attain financial stability.

Given the history of coverture²⁴ it may be unsurprising that some courts and legislatures have given short-shrift to the contribution heterosexual marriage makes to establishing parity for women. However, as annoying as it may seem, the system of coverture at least provided some semblance of a safety net for women; whereas in today's culture, which is ostensibly committed to equality,²⁵ divorce tends to have a

Employers Think it's Weird if I'm a Househusband?, FORTUNE, July 7, 2005, at 208 (claiming that the percent of *nonworking* men 18-25 who are staying home to care for children has jumped from 5.5% to 40.2% during the past decade). It has also been argued that “[h]omemakers of the 1990s do not fit the traditional stereotype. They are more likely to be working outside of the home, to be men, to be ambivalent about their roles, and to be clueless about running a household. They need help, but they want it on their own terms.” Men are far less likely to classify themselves as homemakers than are women. Jan Larson, *The New Face of Homemakers*, 19 AM. DEMOGRAPHICS 45, 45 (1997).

23. Gary L. Becker, *Housework: The Missing Piece of the Economic Pie*, BUS. WK., Oct. 16, 1995, at 30. Becker observes:

Household production [rearing children, preparing meal, providing shelter, caring for sick, assisting elderly, etc.] is an important part of the output of all nations, yet housework is not recognized when measuring the goods and services that make up the gross domestic product. This undervalues the contributions of women, since they are responsible for most of household production.

Id. “Women contribute about 70% of the total time spent at these activities—even in egalitarian nations such as Sweden.” *Id.* Becker further notes that Economist Robert Eisner found “the imputed value of household production in the United States exceeded more than 20% of gross national product from the mid-1940s to the early 1980s—the last year of his estimates.” *Id.*

24. We, of course, have a partial understanding of the practice and sometimes forget to ask what the other alternatives, given the economies of the day, might have been. At the very least, the system ostensibly required support for the wife, a not insignificant “welfare” benefit in a time of somewhat limited resources. In fact, in some areas, women used the system to their benefit. For example

A female merchant who traded separately from her husband while remaining a *femme couverte* presumably felt that having his economic backing, his participation in case of legal action, and a chance to manipulate her poorly defined position in the courts was of greater benefit than gaining nominal independence. While this does not argue that women in late medieval English cities enjoyed a golden age, it does suggest that being a *femme couverte* under the common law was not uniformly perceived as a handicap.

Marjorie K. McIntosh, *The Benefits and Drawbacks of Femme Sole Status in England, 1300-1630*, 44 J. BRIT. STUD., 410, 430-31 (2005).

25. Pamela J. Smock et al., *The Effect of Marriage and Divorce on Women's Economic Well-Being*, 64 AM. SOC. REV. 794, 794-95 (1999) (“[R]elative to divorce, marriage confers substantial economic benefits to women.” “[W]omen's economic vulnerability outside of marriage is ubiquitous.”). The dissolution of cohabiting “union” has similar consequences:

After dissolution, formerly cohabiting men's economic standing declines moderately, whereas formerly cohabiting women's declines much more precipitously, leaving a substantial proportion of women in poverty. This effect is particularly pronounced for African American and Hispanic women. Though the end of the relationship does

disparate impact on the sexes,²⁶ with women who have left the workforce in order to bear and rear children experiencing post-divorce free-fall economic losses²⁷ because the old-fashioned duty of support once required of husbands has been all but jettisoned.²⁸ This is not to argue that women should or should have had to trade independence for economic security and legal disabilities, but merely to point out that historically and currently the status of women vis-à-vis men has been variable, and inextricably tied to husbands or fathers. Therefore, intergenerational and intragenerational cooperation between females and males in marriage and in the family have been and continue to be extremely important. Barbara Diane Miller points out that studying gender hierarchies in complex human societies can be difficult because the hierarchies “vary depending on which sphere of activity is being considered.” The anthropological study of gender considers the possibility that although “women’s status may be low in the public domain in most societies, it may be high, even dominant, relative to males in the domestic domain.”²⁹ It may be that marriage and family

reinforce gender stratification, it is also an ‘equalizer’ between married and cohabiting women, leaving them in strikingly similar economic positions.

Sarah Avellar & Pamela J. Smock, *The Economic Consequences of the Dissolution of Cohabiting Unions*, 67 J. MARRIAGE & FAM. 315, 315 (2005).

26. Joan Raymond, *The Ex-Files*, 23 AM. DEMOGRAPHICS 60, 63 (2001).

27. See, e.g., Simon Kelly & Ann Harding, *Financial Impact of Divorce in Australia: Love Can Hurt, Divorce Will Cost*, AMP.NATSEM INCOME & WEALTH REP., April 2005, at 1, 9, available at <http://www.amp.com.au/group/3column/0,2449,CH10882%255FS13,00.html> (follow “The AMP.NATSEM Report on the Financial Impact of Divorce” hyperlink). For couples separated for one year, the average man’s household disposable income fell by eight percent or \$4,100 per annum while the woman’s income dropped 42 percent or \$21,400 per annum in Australian dollars. *Id.*

28. Alimony is awarded in only a small percent of divorces. Divorce differentially impacts men and women. It is estimated that “mothers pay a wage penalty of about seven percent for each child they bear—usually because they take more breaks in employment and more part-time work, and thus have less experience and seniority than childless women. In addition, part-timers generally earn only 60 percent of what full-timers earn.” In addition, leaving the workforce may cause women to lose government benefits such as Social Security and unemployment compensation. Moreover, filing jointly with their husbands may push them into higher tax brackets than their individual salaries warrant, and because the prime time for career advancement corresponds to the best time for childbearing, mothers tend to lose promotions and raises they would have earned had they stayed full-time in the marketplace. Sarah Glazer, *Mothers’ Movement: Should Moms be Reimbursed for Staying at Home?* 13 CONG. Q. RESEARCHER, 297, 301 (2003) (citations omitted). Current legal theorists have difficulty in finding even a theoretical justification for “alimony,” proposing to replace that outdated notion of support with something more like “post-marital income adjustments.” See Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN’S L.J. 23 (2001).

29. Barbara Diane Miller, *The Anthropology of Sex and Gender Hierarchies*, SEX AND GENDER HIERARCHIES 3, 7 (Barbara Diane Miller ed., 1993) (citations omitted); see also Warner et al., *supra* note 9, at 122-28; Westbrook, *supra* note 19, at 152-54 (discussing dowry and explaining that Sarah could tell Abraham to send Hagar away because Hagar was Sarah’s slave, and that status trumped the marriage relationship Abraham had with Hagar). One problem has been how to measure

offer the opportunity for cooperation with relatively little need for competition between husband and wife, father and mothers, parent and child.

Assuming that there has and does now exist at least a minimal appreciation and respect for women as wives and mothers, it seems that a federal marriage amendment may be the only way for women to maintain their status in the family and in society. This may not require federalization of all aspects of marriage law anymore than denying the constitutionality of religiously-motivated plural marriage federalized all aspects of marriage law. Denying the legal practice of polygyny, however, helped shape the contemporary contours of heterosexual marriage in the United States by restricting a man to one wife at a time.

A. Sex-Integrated Marriage May Promote Social Equality for Women

While we know relatively little about prehistoric human societies, and are trying to better understand the partial histories we have of cultures whose material or written histories are available to us, it appears that women's power bases have varied within "contexts of greater and lesser male dominance," both in the household and in the larger community.³⁰ "No matter how male-female hierarchies among humans are gauged, most scholars would agree that in the statistical sense, patriarchy or male dominance of some sort characterizes the bulk of human societies today."³¹ However, the structural composition of marriage throughout time and across cultures has included at least one woman. Although "[s]imilarity overwhelmingly is the rule in human mating, and this applies to characteristics as diverse as height, weight, personality attributes, intelligence, values, nose breadth, and earlobe length. . . . The only characteristic on which complementarity is the norm, for example, is on biological sex: men tend to marry women and vice versa."³² It may be that this complementarity in mating and in

women's status in a culture, or how to measure dominance, male or female, especially across cultures and across time periods. For a discussion of gender stratification theory, see Randall Collins et al., *Toward an Integrated Theory of Gender Stratification*, 36 SOC. PERSP. 185 (1993). For a discussion of measuring prestige, see Bernd Wegener, *Concepts and Measurement of Prestige*, 18 ANNU. REV. SOCIOLOGY, 253 (1992). See *id.* at 265 (prestige is related to occupational status and income level); *id.* at 268 (there may be a "sex-typical prestige hierarchy"); *id.* (housewifery possesses not prestige, but "master status"); see also Rene Levy et al., *Modern Family or Modernized Family Traditionalism?: Master Status and the Gender Order in Switzerland*, 6 ELECTRONIC J. SOC., Oct. 2002, available at <http://www.sociology.org/content/vol006.004/lwk.html> (stating "the female master status area is the family, employment is subsidiary to it").

30. Miller, *supra* note 30, at 12.

31. Miller, *supra* note 30, at 9.

32. Buss & Schmitt, *supra* note 13, at 205.

marriage has assured women a place in the private, if not the public sphere, and that no longer requiring sex-integrated marriage will inevitably erode women's status in both.

It could be argued that male-male marriage would have little prestige in today's social climate because of strong social disapproval of men who have sex with men ("MSM").³³ It is the case that a gay couple may suffer social disapproval, or experience hate-speech or even hate-crimes in at least some parts of the United States. However, in a number of urban areas, gay couples are likely to find considerable social acceptance.³⁴ For example, it is estimated that one in 20 households in some Washington, D.C. neighborhoods is a gay couple (the term seems to include "lesbian couple," too). It appears that "gay men are more likely than lesbians to live in pricey areas that offer restaurants, nightlife, and bookstores because they can afford to do so, since the vast majority is two-earner couples without children. The more suburban patterns of lesbian couples," according to demographer Gary Gates, "probably reflect concerns about crime, the greater likelihood that they have children and women's lower earning power."³⁵

Social disapproval of gay couples³⁶ may be dissipating nationwide, and the push for same-sex marriage appears to be part of the political

33. The social disapproval seems to be related to anal sex and other high risk activities. When considering the vulnerability of gay men to violence, it should be remembered that those who trust themselves sexually, financially, or in other ways to the care of strangers, whether through anonymous sex, transactional sex, or even hitch-hiking, regardless of sexual orientation, are engaging in a high-risk activity. Some might suggest that the attention given to the tragic Matthew Shepherd case is less illustrative of the plight of gay men than it is of the misogyny of the popular press, given that the deaths of the victims of Ted Bundy, or of the Green River strangler—merely women—did not similarly stir the conscience of the nation to consider the way women are treated.

34. "There's less segregation [in Southwest Washington, D.C.], more assimilation, general acceptance, a feeling among gay people that they do not have to be in a totally gay situation to feel comfortable." Attributed to Paul Kunzler, in D'Vera Cohn, *Census Shows Big Increase in Gay Households*, WASHINGTON POST, June 20, 2001, A01.

35. *Id.*

36. BROKEBACK MOUNTAIN, a gay love story set in the West won 3 of the 8 Academy Awards for which it was nominated. Support groups, political action groups, clubs, and curriculum exist for gay, lesbian, bisexual, transgender, and questioning or queer persons. The Charles R. Williams Institute for Sexual Orientation Law and Public Policy at the UCLA School of Law recently received a ten million dollar endowment. See *Donor Gives UCLA \$10 Million for Sexual Orientation Law Think Tank*, at <http://www.law.ucla.edu/williamsinstitute/press/PressReleases/DonorGivesUCLA.html> (visited 28 April 2006). Even in elementary schools, and high schools, the introduction of alternative family forms—if not alternative sexualities—is increasing. See, for example, Jay Lindsay, *Parents' Suit Challenges Gay-Themed Book*, WASHINGTON POST, April 28, 2006, at http://www.washingtonpost.com/wp-dyn/content/article/2006/04/28/AR2006042800279_pf.html (visited 28 April 2006). The number of openly gay/lesbian elected officials is increasing and the percentage of law review articles devoted to same-sex issues is considerable. Professional groups in law, medicine, and education have taken advocacy positions on behalf of sexual minorities. This group, which is likely no more than 3-5 percent of the U.S. population, is having a significant impact on society.

leverage for decreasing social disapproval further, and perhaps, replacing it with some level of social approval. If Robert Wintemute³⁷ is correct in predicting that it is only a matter of time until gay marriage is recognized everywhere—even in Utah—it is only a matter of time until gay dominance asserts itself, and that assertion may be tinged with misogyny. Some analysts argue that gay men may seek respite from “normative heterosexuality,” but end up retaining a “culture of hegemonic masculinity,” and may “perform masculinity in ways that maintain their male privilege.”³⁸ According to Marie-Jo Bonnet, “we live in a system of symbolic representation in which the male has been universalized.” Bonnet argues that in the French gay/lesbian liberation movement, males have repeatedly used women for their own gain and have ignored women’s input so that women “disappear” from the male homosexual model of equality.³⁹ During the last 60 years the mainstreaming of “gay, lesbian, bisexual, and, more recently, transgender people into all aspects of American political and cultural life” has given gay couples “virtual equality” in aspirational terms, if not in law and in fact.⁴⁰

Nevertheless, even if male couples never constitute a large proportion of marriages, it is likely that the coupling of males will in some ways be more prestigious than the coupling of females, if history be any guide. In both western and eastern cultures, high status males and their male lovers had considerable power and status within their respective societies.⁴¹ That increased status for gay men achieved through legal marriage may advance their political agenda at women’s expense.

37. Robert Wintemute, *Same-Sex Marriage: When Will It Reach Utah?* Address at the Brigham Young University Journal of Public Law Symposium: The Federal Marriage Amendment (Sept. 9, 2005). See Robert Wintemute, *Same-Sex Marriage: When Will It Reach Utah?*, 20 BYU J. PUBL. L. 527 (2006) (in this issue) (making the same argument).

38. Corey W. Johnson & Diane M Samdahl, *The Night They Took Over: Misogyny in a Country Western Gay Bar*, 27 LEISURE SCI. 331, 346 (2005) (ethnographic study of gay men’s misogynistic responses to “lesbian night” at popular gay bar).

39. Marie-Jo Bonnet, *Gay Mimesis and Misogyny: Two Aspects of the Same Refusal of the Other?*, 41 J. HOMOSEXUALITY 265, 275-80 (2001), co-published simultaneously in HOMOSEXUALITY IN FRENCH HISTORY AND CULTURE (Jeffrey Merrick & Michael Sibal, eds.) 265-80 (2001).

40. URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 3 (1995).

41. See William MacDuff, *Beautiful Boys in Nō Drama: The Idealization of Homoerotic Desire* 13 ASIAN THEATRE J. 248 (1996); Sabine Schmidtke, *Homoeroticism and Homosexuality in Islam: A Review Article*, 62 BULL. SCH. ORIENTAL & AFR. STUD., U. LONDON, 260 (1999); PAUL GORDON SCHALOW, THE GREAT MIRROR OF MALE LOVE, 27 (1996) (Samurai man-boy relations providing “social backing, emotional support, and a model of manliness for the boy.”); SARAH B. POMEROY, SPARTAN WOMEN, 54 (2002) (“Homosexual ties among Spartans were common.”); Eskridge, *supra* note 4. *But see*, SARAH B. POMEROY, SPARTAN WOMEN, 160 (2002) (women seem to have had significant power and autonomy).

*B. Sex-Integrated Marriage May Promote Economic Equality
for Women*

Currently, and for most cultures throughout time, marriage has been a sex-integrated family structure, so that to some extent, women were able to share the economic and social status of their husbands, thereby likely improving their own status. Historically and currently, women are disadvantaged economically relative to men, particularly because of the inherently disproportionate burden of reproduction⁴² and women's strong commitment to childrearing, even in the face of economic disparities.⁴³

One way to represent the disparity between males and females is: male (♂) as economically advantaged ($\$^+$), reproductively advantaged ($\#^+$),⁴⁴ and advantaged in general prestige or dominance (\odot^+); and female (♀) as economically disadvantaged ($\$\text{^-}$), reproductively disadvantaged ($\#\text{^-}$), and disadvantaged relative to males in general prestige or dominance ($\odot\text{^-}$). Therefore, the major historical forms of marriage could be represented as:

♂ : ♀ Heterosexual monogamy	$\$^+, \#^+, \odot^+ : \$^-, \#^-, \odot^-$
♂ : (n)♀ ⁴⁵ Heterosexual polygyny	$\$^+, \#^+, \odot^+ : (n)(\$^-, \#^-, \odot^-)$

Assuming commingling of resources, female disadvantage is clearly

42. Buss and Schmitt observe:

Humans are like most mammals in that women tend to be the more heavily investing sex. This occurs in part because fertilization, gestation, and placentation are internal within women. Women carry the additional parental investment associated with lactation for as many as several years after the birth of a child Men, in contrast, do not bear these forms of heavy parental investment, although they can and do invest heavily in other ways. The minimum investment by the man is the contribution of his sperm.

Buss & Schmitt, *supra* note 13, at 206.

43. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005).

44. That is, reproduction alone is less costly for males than for females physically, economically, and socially.

45. Where "n" represents number of females.

offset by heterosexual marriage; the above representation also makes clear why in those cultures where polygyny is allowed, there are sometimes restrictions on the number of wives, or requirements that a man be able to support the wives he marries.⁴⁶ It may also be the case that in industrial societies where home production is much lower, as a general rule, polygyny simply increases the number of dependents, rather than increasing the wealth of the husband-father.⁴⁷

Legalizing same-sex unions will legitimate or normalize a sex-segregated family structure, which, if such segregation follows the typical pattern, will advantage males and disadvantage females. That proposition could be represented in this way:

Marriage Structure	♂	♀
♂	♂♂ \$ ⁺ , # ⁺ , ☺ ⁺ : \$ ⁺ , # ⁺ , ☺ ⁺	
♀	♂♀ \$ ⁺ , # ⁺ , ☺ ⁺ : \$ ⁻ , # ⁻ , ☺ ⁻	♀♀ \$ ⁻ , # ⁻ , ☺ ⁻ : \$ ⁻ , # ⁻ , ☺ ⁻

46. See KATHRYN M. DAYNES, *MORE WIVES THAN ONE: TRANSFORMATION OF THE MORMON MARRIAGE SYSTEM 1840-1910*, at 128 (2001). Daynes notes that plural marriage fostered the redistribution of wealth, allowing poorer women access to more wealth than otherwise available to them. *Id.* at 132-33. Not only did a Mormon man need his first wife's permission to marry again, but he also needed permission from ecclesiastical leaders, which permission was sometimes bluntly refused on the ground of unworthiness of the man or his inability to support another wife. One refusal reportedly read: "What is needed in your family is sufficient brains to take care of one wife and one family, and certainly you cannot get a recommend from me to marry another wife." *Id.* at 194. (internal citations omitted).

47. It is assumed that in agrarian societies, wives and children provide labor for working with animals and crops; most of the U.S. economy no longer fits that model. Polygamy as practiced in Utah sometimes involves wives and children working in group- or family-owned businesses, including mines (one of the coal mines in the county where I grew up was owned by polygamists). In some families, the wives provide for the economic needs of the family. See UTAH ATTORNEY GENERAL'S OFFICE & ARIZ. ATTORNEY GENERAL'S OFFICE, *THE PRIMER: HELPING VICTIMS OF DOMESTIC VIOLENCE AND CHILD ABUSE IN POLYGAMOUS COMMUNITIES 25-26* (updated July 2005), available at http://attorneygeneral.utah.gov/polygamy/The_Primer.pdf. For example, Tom Green was prosecuted for criminal nonsupport and welfare fraud in relation to the support of his five wives and 30 children. See Julie Cart, L.A. Times, September 9, 2001 available at <http://www.rickross.com/reference/polygamy/polygamy69.html>. Polygamous wives apply for state aid as "unmarried" mothers, in a practice referred to as "bleeding the beast." UTAH ATTORNEY GENERAL'S OFFICE & ARIZ. ATTORNEY GENERAL'S OFFICE, *THE PRIMER: HELPING VICTIMS OF DOMESTIC VIOLENCE AND CHILD ABUSE IN POLYGAMOUS COMMUNITIES 7* (updated July 2005), available at http://attorneygeneral.utah.gov/polygamy/The_Primer.pdf. In addition to practices of marrying girls too young to give consent, the polygamous communities also exile many young men, known as "Lost Boys." *Id.* at 11. "Polygamy is illegal in Utah and forbidden by the Arizona constitution. However, law enforcement agencies in both states have decided to focus on crimes within polygamous communities that involve child abuse, domestic violence and fraud." UTAH ATTORNEY GENERAL'S OFFICE, *POLYGAMY*, available at <http://attorneygeneral.utah.gov/polygamy.html>.

The above illustration suggests that male-male marriages would capture more economic resources, have dramatically lower costs inherent in reproduction, and have higher prestige or dominance. Female couples would be more disadvantaged economically, reproductively and in terms of prestige than would male-female or male-male couples.

This brief outline is subject to a number of objections and clarifications.⁴⁸ Female-male marriage is no guarantor of equality; however, the necessary component for female equality at this stage of civilization is that females have access to economic resources sufficient to offset their losses due to pregnancy, childbearing and child rearing, and also opportunity for—if not the reality of—access to social prestige through education and employment. Male-female marriage as the norm is more likely to aid women in acquiring adequate economic resources and education, than is same-sex marriage coupled with transactional procreation. Some fantasy writers have imagined female-dominated⁴⁹ utopian societies; some sociologists have “assume[d] that the hypothetical variation [of gender stratification] ranges from extreme male dominance to a midpoint of gender equality,” but they remain open to “whether particular scenarios could lead in the future, for instance, to female dominance on various dimensions or to new and more complex forms of gender conflict.”⁵⁰ Equality is more likely to be achieved through the cooperation of males who have sufficient love for, respect for, and loyalty to women in their own households that they are willing to seek privilege for, or share privilege with women in general, in part to assure that the women in their own household are treated well.⁵¹ Lesbian relationships have no such advantage, and gay relationships arguably reinforce male dominance by removing the need for development of such notions in the constituent members of the relationship, they both being male, and having no need to seek or share privilege and prestige with the other, or even develop recognition of the need to do so.

III. ERASING WOMAN: ADVANCING GAY MEN

The loss of women’s economic function in household production in industrialized nations has been examined at length elsewhere and will not be recounted here. Since women’s work within the home has shifted

48. See discussion Part III.

49. See, e.g., CHARLOTTE PERKINS GILMAN, *HERLAND* (Pantheon Books 1979) (1915) available at <http://etext.virginia.edu/toc/modeng/public/GilHerl.html>.

50. Collins et al., *supra* note 30, at 187.

51. There could, of course, be other altruistic, reasons for supporting fair treatment for women.

from production to consumption, and areas of employment outside the home have increasingly opened up to females, the educational and economic role of women has increasingly come to resemble that of men, although findings from the Luxemburg Income Study (LIS) indicate that “(i) women’s labour market status lag men’s in nearly every LIS country and time period; (ii) motherhood is a consequential factor nearly everywhere; while parenthood typically has little effect (or a positive effect) on men’s employment rates and earnings, it weakens women’s everywhere.”⁵² Furthermore,

[W]hen working women become mothers, they trade perceived competence for perceived warmth. . . . [W]orking men don’t make this trade; when they become fathers, they gain perceived warmth and maintain perceived competence. . . . [P]eople report less interest in hiring, promoting, and educating working moms relative to working dads and childless employees. . . . Thus, working moms’ gain in perceived warmth does not help them, but their loss in perceived competence does hurt them.⁵³

For the most part, in industrialized countries, the only things women produce in the home today is human capital in their husbands⁵⁴ and their children,⁵⁵ intrinsic human goods, which are much more difficult to

52. Janet C. Gornick, *Women’s Economic Outcomes, Gender Inequality, and Public Policy: Findings from the Luxembourg Income Study*, 2 SOCIO-ECON. REV. 213, 213 (2004) (LIS compiles data from 30 countries, including the United States).

53. Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 J. SOC. ISSUES 701 (2004).

54. Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59 (2001) (arguing that the examination of career asset cases shows that the domestic and supporting work of women is not valued much less than the ‘professional’ work of men whose careers were enhanced through women’s efforts).

55. Anne Crittenden writes:

The idea that time spent with one’s child is time wasted is embedded in traditional economic thinking. People who are not formally employed may create human capital, but they themselves are said to suffer a deterioration of the stuff, as if they were so many pieces of equipment left out to rust. The extraordinary talents required to do the long-term work of building human character and instilling in young children the ability and desire to learn have no place in the economists’ calculations. Economic theory has nothing to say about the acquisition of skills by those who work with children; presumably there are none.

Here is how economists have summed up the adverse effects of child-rearing on a person’s qualifications: “As a woman does not work [sic] during certain periods, less working experience is accumulated. [Moreover] during periods of non-participation, the human capital stock suffers from additional depreciation due to a lack of maintenance. This effect is known as atrophy.” In fact, the only things that atrophy when a woman has children are her income and her leisure.

ANNE CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD*

measure than number of pounds of wool carded, butter churned, shirts sewn, or bottles of fruit canned by women of earlier eras. Although there is still some notion of, and appreciation for, specialization within today's marriages, as well as some acknowledgement that a "breadwinner" is dependent upon the unpaid labor of the wife at home,⁵⁶ in our current economy and individualistic culture it is harder to see and evaluate the equalities of such an arrangement. Compare the female farmer in West Africa, whose independence and value to her husband and family is obvious as she wields her hoe in the production of food for herself, her family, and for trade; the equality is much more readily identifiable.⁵⁷ Marvin Harris argues that when men control technology and the weapons of war,⁵⁸ women are subordinated.⁵⁹ Even when subordinated, women's necessary roles within the family were acknowledged, if not expected. In fact, in our diligence to destroy what was perceived to be the limiting effects of women's traditional familial roles,⁶⁰ we have undercut the value of the roles⁶¹ and of women as well.

In keeping with the male work patterns during the past forty years, women in the United States have spent more years in paid labor than did many of their mothers or grandmothers. With the entry of the majority of

IS STILL THE LEAST VALUED 4 (2001); *see also*, F. Carolyn Graglia, *Outsourcing Our Children: A Review of HOME-ALONE AMERICA*; Mary Eberstadt, *The Hidden Toll of Day Care, Behavioral Drugs, and Other Parent Substitutes* CLAREMONT REVIEW OF BOOKS 5 (2005) (book review), available at <http://www.claremont.org/writings/crb/summer2005/graglia.html> (last visited February 8, 2006) (underscoring the importance of homemaking and childrearing as respectable occupations).

56. Kelly, *supra* note 55.

57. Marvin Harris, *The Evolution of Human Gender Hierarchies: A Trial Formulation*, SEX AND GENDER HIERARCHIES, 57, 70-73 (Barbara Diane Miller, ed., 1993). In hoe agriculture women are as productive as men and that keeps them independent and their labor in demand; in plow agriculture, men operate more efficiently than women in that critical task, resulting in female dependency and subordination. *Id.* at 73.

58. *Id.* at 66-75.

59. According to Miller, during the past few centuries "increased levels of male dominance and a decline of egalitarian or female-dominated systems" has occurred. Miller, *supra* note 30, at 9. She believes that over the next few centuries "the trend toward patriarchy may be reversed, as some would claim has already begun in parts of Europe and North America, and a move toward greater egalitarianism made." *Id.* *But see* Harris, *supra* note 58, at 66-71 (describing how patrilocal residence can evolve in matrilocal residence, and vice versa).

60. *See* E. Diane Looker & Victor Thiessen, *Images of Work: Women's Work, Men's Work, Housework*, 24 CAN. J. SOC. 225 (Spring 1999) (claiming that women's work is reported as less desirable than men's work, housework is seen as women's work and is less desirable (to all but working class females) than paid work). *But see* Marianne A. Ferber & Lauren Young, *Student Attitudes Toward Roles of Women and Men: Is the Egalitarian Household Imminent?* 3 FEMINIST ECON. 65 (1997) (College aged students hold egalitarian attitudes, which may result in greater gender equity; however, it appears from their inconsistencies that to some extent the opinions they expressed represent what they believed they ought to say rather than their real opinions.)

61. Wives do much more housework than their husbands do, even when they are employed, and even when they earn more than their husbands. *See* Michael Bittman et al., *When Does Gender Trump Money?: Bargaining and Time in Household Work*, 109 AM. J. SOC. 186 (2003).

women into the workforce, the focus of feminist groups has shifted from equal opportunity for women to the notion that it is important to create “diversity” in all of our social institutions. Minorities and women (and women classed as a minority by virtue not of total numbers in the population, but percentage of participants in a particular social institution) have been encouraged to participate (and affirmative action and diversity policies have mandated their inclusion in greater numbers) in the paid labor force, the military, various professions sports, and all levels of government—all activities once considered the domain of white males.⁶²

Women’s “progress” has been measured in terms of numbers of women in government and the workforce, and their earnings relative to that of males. Colleges now enroll more women than men, and larger numbers of women are attending graduate programs that were once the exclusive (or near-exclusive) province of males.⁶³ We are regularly treated to scorecards for women: how many CEOs, members of state legislatures, members of Congress, doctors, lawyers, and so forth, are women.⁶⁴ This is rehearsed not only in terms of what are seen as the

62. See Ian Barnard, *Toward a Postmodern Understanding of Separatism*, 27 *WOMEN’S STUD.* 613, 625 (1998).

63. Rebecca S. Powers, *Doing the Daily Grind: The Effects of Domestic Labor on Professional, Managerial, and Technical Workers’ Earnings*, 21 *GENDER ISSUES* 3, 3 (2003). According to Powers,

The status of women relative to men has improved significantly since the mid twentieth century. Between 1967 and 2002, the proportion of women workers in the full-time, year-round U.S. labor force grew from 29 to 41 percent. Women are now more likely than men to enroll in college and in 2000, women were conferred over one-half of all Bachelor’s and Master’s degrees (56 percent and 58 percent, respectively). One consequence of these trends is that the earnings gap between women and men has narrowed. In 2001, among full-time, year-round workers, women earned approximately seventy-six cents to every dollar that men earned (compared to fifty-seven cents in 1973).

Id. (internal citations omitted). *But see, Gender & The Wage Gap: Internet Data Sites & Information Sources* http://www.radford.edu/~gstudies/sources/wage_gaps/wagegap.htm#backslide (visited 9 May 2006) (“According to the Census Bureau, ‘The real median earnings of men who worked full-time, year-round remained unchanged between 2002 and 2003 at \$40,668. The real median earnings of the comparable group of women declined by 0.6 percent to \$30,724. . . . The last time the female-to-male earnings ratio experienced an annual decline was between 1998 and 1999.’ Figures, graph and tables supporting these and other conclusions can be found in the August release of the Current Population Reports . . .” (internal citation omitted)). “[W]omen age 15 and older, who worked full time, year-round, earned [77 cents] for every \$1 their male counterparts earned in 2004. This amount is up from 76 cents for every dollar in 2003.” U.S. Census Bureau, *Facts for Features*, February 22, 2006, at http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006232.html (visited 9 May 2006). However, after adjusting for inflation, earnings for these women declined by 1 percent between 2003 and 2004. “Real median earnings of men age 15 and older who worked full-time, year-round declined 2.3 percent between 2003 and 2004.” U.S. Census Bureau News, August 30, 2005, at http://www.census.gov/Press-Release/www/releases/archives/income_wealth/005647.html (visited 9 May 2006).

64. Women are 47% of workers, 45% of managers, and they possess 51% of bachelor’s degrees, but they are not well-represented in the most elite and highest paid positions:

benefits to the individual women in those male-dominated (read: prestigious) areas, but also as a benefit to society generally as these institutions begin to incorporate more fully into their goals, policies, and practices, women's perspectives, experiences and concerns.⁶⁵

Suppose in contrast to this approach, we were to argue that the processes of the government, of the military, of law schools and law firms, and of medical schools and medical practices would be basically the same whether there were women in those fields or not. As long as the *processes* are the same, it would be argued, or as long as there were men able to do the same tasks in these fields as women, there would be no particular loss to constituents, no loss to national security, no loss to clients, nor to patients, if women were not participants in these social institutions. In other words, the sky would not fall just because women quit holding up their half of it.⁶⁶

This argument would be impolite, impolitic, and virtually unthinkable today if applied to any institution in the public domain, and yet that is the gist of its application in the private domain, i.e. the institutions of marriage and the family. One argument for same-sex marriage (and same-sex parenting) is that functionally, in a marriage or in parent-child relations, it is the warm, respectful *processes* that are important; the *structure* of the household, marriage, or family need not include a woman. It would be counterintuitive to many, and it would

In Fortune 500 companies, women constitute only 4% of the top officers, 3% of the most highly paid officers, and 0.4% of CEOs (Catalyst, 2000). In U.S. politics, only 13% of senators, 14% of congressional representatives, and 10% of state governors are women (Center for the American Woman and Politics, 2001). In the military, women make up 2% of the top officers (U.S. Department of Defense, 1998). Although about 30% of lawyers are women, women make up only 15% of law firm partners and 5% of managing partners in large firms (Rhode, 2001). In contrast to the changes in women's education, labor force participation, and employment as managers, little change has occurred in terms of placing women in the most powerful leadership positions.

Linda L. Carli & Alice H. Eagly, *Gender, Hierarchy, and Leadership: An Introduction*, 57 J. SOC. ISSUES 629, 630-31 (2001). "The health care profession, to this date, is essentially sex-segregated, as 84% of physicians are male and 97% of nurses are female." Feminist Majority Foundation, *Empowering Women in Medicine*, available at http://www.feminist.org/research/medicine/ewm_toc.html (last visited March 27, 2006).

65. See HELEN FISHER, *THE FIRST SEX*, 16-23, 76-83, 104-11, 152-70 (1999). Fisher specifically observes:

Women have many exceptional faculties bred in deep history: a talent with words; a capacity to read postures, gestures, facial expressions, and other nonverbal cues; emotional sensitivity; empathy; excellent senses of touch, taste, smell, and hearing; patience; an ability to do and think several things simultaneously; a broad contextual view of any issue; a penchant for long-term planning; a gift for networking and negotiating; an impulse to nurture; and a preference for cooperating, reaching consensus, and leading via egalitarian teams.

Id. at xvii.

66. Chicken Little meets old Chinese proverb.

mean certain death to any political movement, to argue that women need not apply to graduate schools, enter the military, or become CEOs, because their doing so will make no difference whatsoever to the *processes* of those universities, the armed forces, or businesses. Quite the contrary, it is widely believed that structure affects, if not determines, processes. Certainly, the structure of our government is believed to affect processes, and so minorities and women are encouraged to run for office. The structure of the medical field affects research, so that, for example, having women as doctors has shifted some of the contemporary research emphases. Having larger numbers of women in the practice of law seems to have coincided with a growth of interest in alternative dispute resolution (ADR);⁶⁷ additionally, the increase of women in the practice of law as university professors and in the workforce has spurred considerable interest in identifying and curbing discriminatory attitudes and practices in the workplace.⁶⁸

Perhaps we could persuade ourselves to believe that white males of goodwill could perceive, represent, and incorporate the experiences, perceptions, and viewpoints of women adequately. Even if they did not, it would not matter because there is relatively little difference between the interests, emotions, and interpersonal skills of men and women. Furthermore, not having women as participants is unlikely to change the processes of society, or any one social institution, such as marriage. Our refusal to accept these propositions in the public sphere, coupled with a willingness to accept it in the private sphere, is an index of the ascendancy of stereotypical male values. We are either gullible to believe that women contribute so little to our collective concept of marriage so that we would legalize a form of marriage in which a woman is not a necessary participant, or we have come to see the devaluation of women's work—and women—as simple fact. The impact of normalizing a female-less form of marriage will be to change the dynamics of marriage, not just for the male-male couple, but also for the society-wide understanding of the meaning of marriage.⁶⁹ We may not yet want to

67. In one sense, mediation and alternative dispute resolution have been with us for a very long time, but because mediation can be envisioned as less adversarial than litigation, it is my opinion that it may have particular appeal to women, who may find litigation to formal and not female-friendly. For a discussion of a similar view, see Kate McCabe, *A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U.L.REV 459*t* (2001) (because mediation allows disputants to speak for themselves, it is a place where women can be heard).

68. Reva B. Siegal, *A Short History of Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 8-16 (Catharine A. MacKinnon & Reva B. Siegel, eds., 2004).

69. See Monte Neil Stewart, *Genderless Marriage, Institutional Realities and Judicial Elision*, 1 DUKE J. CONST'L L. & PUB. POL'Y (2005) (marriage is constituted by a web of shared

public meanings as a man/woman institution) at <http://www.law.duke.edu/journals/djclpp/?action=>

give up on the view that there may be a natural ecology of family life, one in which both sexes are needed, even if we feel we do not yet understand fully why that is so. Just as we have cultivated a respect for ecosystems across the world and have sought to understand them, we need to cultivate a respect for the “natural family,” even as we acknowledge our ability to construct or deconstruct it. The question isn’t whether the family is changing, or whether it is malleable, but whether we have the wisdom to understand and appreciate the family within the collective history of the human race, as well as within our own time.

The assertion that there is no “essential” family is an offshoot, at some level, of an anti-essentialist view of human sexuality, which is a view that sexual identity, and even biological sex, is socially constructed. But even if one grants that human beings are to a large degree “socially constructed,” as Ian Barnard points out, that “does not necessarily lead to easy reconstructions of ourselves,”⁷⁰ and I would say, to easy reconstructions of family or society. We should be wary of heralding male-male marriage as any sign of men recognizing the importance of women’s value in the home via a semblance or imitation of woman’s historical role there. Ian Barnard’s analysis of feminist men is telling:

The “new feminist men” appropriate, correct, teach, reduce, use, lead, prescribe, fight over, fetishize, and penetrate feminisms. One of the features of this “male feminism” is its rejection of essentialism; “male feminisms” insistent support for anti-essentialist feminisms bolsters the argument of some “feminist” men that if feminism is about a mode of thinking rather than about “real” women, there is no need to bother hiring women in academia, provided that suitably “womanly” men are hired. . . . The liberal pluralist denial of difference legitimates these men’s unquestioning invasion of feminism. This invasion is presented as an opposition to the reactionary politics of identity and experience, complete with fashionably correct denunciations of “essentialism.”⁷¹

It may be the case that men who are moving into male-male marriage are invading one of the few spaces in which women have had a modicum of power and influence over the centuries. Economist Jennifer Roback Morse is more pointed in her criticism of support for same-sex marriage

showitem&id=24; Monte Neil Stewart, *Judicial Redefinition of Marriage*, 82 CANADIAN J. FAM. L. 11, 13 (2004) (society’s deep logic of marriage emphasizes children as the consequence of male/female coupling and provision for their care); William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623 (2004).

70. Barnard, *supra* note 63, at 622.

71. *Id.* at 623 (internal citations omitted).

from the left of the political spectrum:

The Left wants sex to be an irrelevant category. Now, if the question is who can be an astronaut or accountant, you might be able to make the case that sex is irrelevant. Most people can go along with the idea that we should not be overly rigid about gender roles. But the Left wants much more than that. They want sex to be irrelevant, period. . . . Most Americans intuitively understand that mothers and fathers are different, and that kids need both. Claiming that same sex couples can be married is claiming that sex is irrelevant to parenting. No one outside of a university really believes that. . . . If you accept the premise that all differences between men and women are socially constructed and that we are morally obligated to deconstruct all these differences, you give the Left carte blanche for endless intervention into the most intimate details of people's lives.⁷²

Efforts to legalize same-sex marriage will normalize and legitimize family forms in which women are excluded and are likely to result in another version of gender hierarchy. Current human-interest stories focus on a couple of guys who fall in love and want to marry each other; what is wrong with this picture of domesticity? It could simply be another example of male domination in the private sphere, where the males appropriate the private domain in which females have historically had some prominence. It is not necessary to posit DSM-IV diagnosis⁷³ in order to consider another interpretation: these are males whose "self-definition may preclude [them] from relating emotionally or sexually to [women],"⁷⁴ or who will not create strong, loving, loyal marital relationships with women for reasons which could include misogyny,⁷⁵ latent or explicit. Society should not ratify such male-dominated institutions, at least not until women have achieved equality throughout all social institutions.

Legalizing same-sex marriage would not result in removing women from marriage altogether. Rather, a gender hierarchy model predicts that

72. Jennifer Roback Morse, *Why the Left Hates Sex*, November 28, 2005, available at <http://www.townhall.com/opinion/columns/JenniferRobackMorse/2005/11/28/176881.html> (last visited February 1, 2006).

73. Short title for the handbook for mental health professionals: A DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

74. Sharon Elizabeth Rush, *Breaking with Tradition: Surrogacy and Gay Fathers*, KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY 102, 133 (Diana Tietjens Meyers et al., eds., 1993).

75. ADAM JUKES, WHY MEN HATE WOMEN (1993) (discussing how masculinity and heterosexuality are predicated on the assumption of male superiority, and homosexuality on the inability to identify with the father).

same-sex marriage would result in a hierarchy of marriage structures with the most male-dominated structures having access to greater economic resources, lower inherent reproductive costs, and greater prestige. Male-female marriage would be next in terms of resources, costs of reproduction and prestige; and female-female marriage would likely be third, with fewer economic resources, higher inherent reproductive costs, and lower social status. Of course, it could be argued that lesbians are far more likely than gay men to marry and raise families, and that female-female marriages might improve female status, or improve marriage.

It seems unlikely that lesbian marriage will improve female status in society. Feminists⁷⁶ have observed that male-dominated fields have more prestige than female-dominated fields,⁷⁷ and that males within a female-dominated field tend to have more prestige and earn more money than females in a female-dominated field. For example, the male-dominated occupation of physician has more prestige than the female-dominated occupation of nursing. Female physicians earn less than male physicians earn,⁷⁸ while male nurses tend to earn more than female nurses earn.⁷⁹ A male-male marriage would, by definition, be more male-dominated; a heterosexual marriage would involve one male, and so have some prestige, while female-female marriages, if analogized to the pink-collar ghetto,⁸⁰ would have the least prestige. Interestingly enough, the most

76. See generally, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans., 1953) (1949); see, e.g., *id.* at 64 (“For it is not in giving life but in risking life that man is raised above the animal; that is why superiority has been accorded in humanity not to the sex that brings forth but to that which kills.”); *id.* (“The sphere to which [the little girl] belongs is everywhere enclosed, limited, dominated, by the male universe . . .”).

77. “Workers pay a penalty for working in an occupation containing more women. Or to put the same thing another way, workers enjoy a premium for working in an occupation containing more men.” Paula England et al., *The Devaluation of Women’s Work: A Comment on Tam’s Sex Segregations and Occupational Gender Inequality in the United States*, 105 AM. J. SOC. 1741, 1750 (2000).

78. Alicia Sasser, *Gender Differences in Physician Pay: Tradeoffs between Career and Family*, 40 J. HUM. RESOURCES 477, 477 (2005) (reporting that gender gaps in earnings among physicians are due to women’s greater family responsibilities; married women physicians earn 11 percent less; women with one child an additional 14 percent less, and women with more than one child 22 percent less).

79. Joan Evans, *Men in Nursing: Issues of Gender Segregation and Hidden Advantage*, 26 J. ADVANCED NURSING 226 (1997) (claiming that the entrance of men into nursing elevates not the entire field of nursing but only the status of men). “[I]f male and female nurses have the same productive characteristics, on average, males will earn about \$4,825 [per year] more than females.” David E. Kalist, *The Gender Earnings Gap in the RN Labor Market*, 20 Nursing Economics 155, 162 (2002).

80. Beatrix Hoffman traces the term “Pink Collar Ghetto”:

The words ‘pink collar ghetto’ entered the feminist vocabulary in 1977 with the publication of Louise Kapp Howe’s *Pink Collar Workers*, which vividly portrayed the lives of women in traditionally ‘female’ jobs like beautician, waitress, sales clerk, and secretary. Howe argued that the concept of equal pay for equal work could do little to

vocal proponents for same-sex marriage in the academy are male, although it is widely acknowledged that females are more likely to enter into same-sex unions of various kinds⁸¹ and raise children together than are male-male couples.⁸²

So far, although we have relatively little data upon which to base conclusions, it appears that the gender-dominance theory may not accurately predict the status for various proposed structures of marriage. Demographers and researchers acknowledge that different classifications systems have been used in researching “homosexuals,” and so conclusions should be tentative.⁸³ It appears that individual gay men and lesbians have more formal education than do other individuals,⁸⁴ partnered gays earn substantially less than married men, and lesbians generally earn more than single women and heterosexually partnered women.⁸⁵ In addition, the rate of home ownership is lower for partnered gay and lesbian households, but those who do own houses own homes more expensive than the homes of their heterosexual counterparts.⁸⁶

alleviate wage inequality between men and women because of the prevalence of occupational segregation by sex. The majority of women workers are in ‘pink collar’ occupations – clerical, service, and sales jobs. Pink collar workers have, on average, more years of education than their male counter-parts in blue collar jobs but make considerably less money. Jobs in the pink collar ghetto are usually low paying, nonunion, and offer few or no benefits and no chance of advancement; commonly, they are part-time, seasonal, or temporary. To address the low pay for women in the pink collar ghetto, feminists and labor experts have advocated equal pay not only for equal work but also for jobs of comparable worth. In the 1980s attention shifted to the problem of the ‘glass ceiling,’ which describes the barriers to job advancement faced by mainly white, educated women in managerial positions. Concern for the far more restricting limitations of the pink collar ghetto has revived with the concept of the ‘sticky floor’ that traps women, particularly women of color, in the lowest-paid job categories of government bureaucracies and large corporations.

Beatrix Hoffman, Pink Collar Ghetto, in *Reader’s Companion to U.S. Women’s History*, available at http://college.hmco.com/history/readerscomp/women/html/wh_028700_pinkcollargh.htm (last visited 27 March 2006).

81. See, e.g., Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 DEMOGRAPHY 139, 143 (2000) (about 68 percent of gay men and about 94 percent of lesbians have lived with a same-sex partner).

82. About 21.7 percent of partnered lesbians have children present in the home, and 5.2 percent of partnered gays. *Id.* at 150. This may simply be a function of the common law preference for placing children with mothers upon the dissolution of a marriage; and/or a reflection of the “easier” time lesbians have of gaining children through alternative reproduction (i.e., a sperm donor is arguably easier to find than a willing gestational surrogate).

83. Different researchers may measure different aspects of “homosexuality,” including “same-gender behavior; desire, self-definition, or identification or some combination of these elements.” EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 290 (1994).

84. Black et al., *supra* note 82, at 150.

85. *Id.* at 152.

86. *Id.* at 153.

Obviously, both education and earnings are related to social status and prestige in contemporary society, and so would need to be factored into any model of a hierarchy of marriage structures. It may also be the case that we cannot presume that a gay or a lesbian household or marriage would commingle funds in the same way in which partners in male-female marriages do.⁸⁷

IV. CURRENT EFFORTS TO LEGALIZE SAME-SEX MARRIAGE WILL INCREASE TRANSACTIONAL PROCREATION⁸⁸

Just as transactional sex exploits, demeans, and devalues women,⁸⁹

87. There appear to be some differences in couple interactions among same-sex and heterosexual couples, with same-sex couples reporting that they share costs and household chores more equally than do heterosexual couples. "Contrary to prediction, married heterosexual couples did not report more conflict about housework, money, or styles of communication than did lesbian and gay male couples, despite discrepancies in division of finances, housework, and relationship maintenance behaviors." Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 *SEX ROLES*, 561, 573 (2005).

88. See Camille S. Williams, *Planned Parent-Deprivation: Not in the Best Interests of the Child*, 4 *WHITTIER J. CHILD & FAM. ADVOC.* 375, 382-86 (2005). I view transactional procreation as negatively impacting women. Not everyone shares that view, and some see patterning intimate relations after commercial entities as a means of increasing equity for women and other minority groups. See Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 *N.C.L. REV.* 1 (2003); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 *HARV. C.R.-C.L. L. REV.* 79, 124-25 (2001); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 *TEX. L. REV.* 17 (1998); Martha M. Ertman, *Love and Work: A Response to Vicki Schultz's Life's Work*, 102 *COLUM. L. REV.* 848 (2002) (discussing a transactional approach to housework). Of course, part of the problem with contract law as applied to intimate relations is the assumption that the parties have equal or near equal bargaining power in the "market." I would contend that women's bargaining power is generally less for a variety of reasons including the fact that women seem to want relationships more than do men. See Buss & Schmitt, *supra* note 13.

89. Prostitution is transactional sex, and though some have tried to regulate it in ways beneficial to women, it appears that prostitution is "chosen" generally when there are no better choices. There are feminist arguments for the commercialization of the female body, and it does appear to be the case that for at least brief periods of time individual women may be quite successful in the "erotic marketplace," but the aging mistress or stripper is easily replaced by a younger woman, so market value in the erotic marketplace seems to have a very brief shelf life, and may not build the human capital upon which a 30-40 year career can be built. Some would view archaic practices such as bride-price and dowry as a kind of transaction for sexual and other services, to some extent, however, those were insurance for the bride that she would be entering into an economically stable union. Contemporary patterns of human trafficking combine slavery and transactional sex; pornography distribution and adult businesses run the gamut from virtual to actual transactional sex. For a summary of feminist analyses of the "skin trade," see Laurie Shrage, *Feminist Perspectives on Sex Markets*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2004), available at <http://plato.stanford.edu/entries/feminist-sex-markets/> (last visited May 10, 2006). The United Nations specifically condemns prostitution, calling on its members to "take all appropriate measures . . . to suppress all forms of traffic in women and exploitation of prostitution of women," United Nations, Convention on the Elimination of All Forms of Discrimination against Women, art. 6, opened for signature July 7, 1980, available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article_6.cedaw.htm. As of March 2004, 176 state parties, including Canada,

transactional procreation exploits,⁹⁰ demeans, and devalues women. Because same-sex couples cannot procreate as couples, it is likely that many will choose to contract for the reproductive services of the sex missing from their marriage.⁹¹ This could encourage a view of the reproductive abilities of the missing sex as a commodity and children as products⁹² for which one bargains.⁹³ Because women bear the heaviest burdens and risks related to reproduction, women ought to be particularly cautious about selling their reproductive abilities or “services.” A good deal of altruism is exhibited by women willing to accept little or nothing for gestational or surrogacy services. The danger is that over time, such altruism will backfire, and that same willingness to separate those services from the relationship with a husband, while attaching little or no value those services, will set both the pattern for nonrelational

China, France, Germany, Russia and the United Kingdom, had signed and ratified the Convention. Division for the Advancement of Women, CEDAW State Parties, *available at* <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Mar. 28, 2006). It has been estimated that 45,000 to 50,000 women and children are trafficked annually to the United States for the sex industry. AMY O’NEILL RICHARD, *INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME* iii (1999) *available at* <http://www.cia.gov/csi/monograph/women/trafficking.pdf>.

90. The most extreme case seem to be in areas of AIDS stricken Africa, where many women are left with few resources except their own bodies for commerce. In transactional sex, the big money goes to the pimp, not the prostitute, because women are vulnerable to their customers and need protection, or because the “protector” controls the woman. In assisted reproduction, the big money goes to the doctors, researchers, and middlemen, not to the gestational mothers. In both cases, women are used as a means to an end, the sexual use by men, or as vessels for the production of children; in neither case is the woman seen as an end in herself.

91. Needless to say, assisted reproductive services of various kinds are likely to be available to the wealthier in wealthy nations. The median cost per IVF cycle in 2001 in the United States has been estimated to be \$9,226, with the cost per live birth at \$56,419. Non-U.S. costs were significantly lower, at \$3,531 for IVF (based on data from 25 countries) and \$20,522 per live birth (based on data from eight countries). J. Collins, *Cost-Effectiveness of In Vitro Fertilization*, 19 *SEMINARS.REPROD. MED.* 279-89 (2001), *cited in* Patricia Katz et al., *The Economic Impact of the Assisted Reproductive Technologies*, *NATURE CELL BIOLOGY*, October 2002, at Supp. 29. The costs can be ten times higher if the child is born premature, as many ART babies are.

The reasons for the higher costs in the US are not clear. Indirect economic costs associated with infertility diagnosis and treatment, such as time lost from work, child care expenses or debt incurred to pay for treatment, are more difficult to quantify, but may add to the financial burden assumed by individuals undergoing infertility treatment.

Id. Perhaps the low-tech “turkey-baster” babies will remain available to poor lesbians, or to the gay male collaborating with a willing female, but accompanying that do-it -yourself approach comes the lack of proper screening of donor and sperm, resulting in a greater risk of disease or other problems to the recipient female.

92. See Christine Stolba, *Overcoming Motherhood*, *POL’Y REV. ONLINE*, Dec. 2002 & Jan. 2003, *available at* <http://www.policyreview.org/DEC02/stolba.html> (last visited February 1, 2006).

93. The lightly-regulated, multi-billion-dollar assisted reproduction industry is obviously making money for those with the technology or the business know-how to capitalize on the baby-hunger of individuals and couples of all varieties. Certainly, the women who endure hormonal manipulation to donate eggs, and who risk their health and perhaps their lives to gestate a child for someone else, are not sharing in the wealth created by these technologies.

procreation and will also set the fair market value of gestation and surrogacy as worth little to nothing.

I am concerned that this practice will inevitably undercut what remains of our cultural notions of respect for mothers and the profound service they offer in giving and sustaining vulnerable human life.⁹⁴ Already, some courts do not consider the woman who does all the work of gestation as a mother at all, and there is no reason to suppose that the men contracting for gestational services will necessarily be interested in the mother of their child.⁹⁵ To sell one's reproductive power is to reduce that power to an article of trade. My own children, unique and irreplaceable, are more than the sum of their respective parts and more than the product of my union with their father. It is difficult for me to understand why a woman would be willing to sell her reproductive services to one or more men who are unwilling or feel themselves unable to enter into a long term relationship with a woman. It is the worst kind of male stereotyping to suppose that men either value their sperm so highly that they suppose every woman would want some, or that they have no future concerns about the children that may be conceived and raised apart from them. Certainly, we would not want to reduce our understanding of fatherhood to that of sperm donor, nor our understanding of motherhood to that of egg donor or gestator. In a sense, these transactional procreative arrangements reduce the missing sex to the products of their reproductive abilities: sperm, ova, gestation, labor, and birth, and the ultimate product of the transaction, the child, to a commodity. Same-sex marriage will further exploit and devalue women's traditional roles as wives, mothers, and homemakers by changing the structure of marriage and family life to allow the exclusion of women, and by further legitimating procreation outside the context of the biological parents who have a relationship with each other.

V. THE CONTEMPORANEOUS SLIDE INTO ONE GENDER ROLE: THAT OF THE STEREOTYPICAL MALE⁹⁶

Are there female gender roles within the family that should be

94. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (2001).

95. *Johnson v. Calvert*, 5 Cal. 4th 84 (1993). Those buying the services may or may not treat the mother with respect. Clearly, some reproductive strategies may allow the focus to remain on the gay couple and their reproductive autonomy. For one account as related to adoption, see DAN SAVAGE, *THE KID: WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GO GET PREGNANT* (1999), in which syndicated sex columnist Dan Savage and his boyfriend, eschewed the deep processes of lesbians or other women, and contracted to adopt the child of a "gutter punk."

96. This may be Blackstone for the 21st century: the two sexes are still one—still the male.

preserved in order to maintain some opportunity for female equality? I believe that reserving sex-specific, familial gender roles of wife and mother may help prevent male gender roles from completely erasing female gender roles in the family. Applying an ill-fitting male stereotype to women, who persistently refuse to act like men,⁹⁷ may not benefit women. For example, assuming that women who are mothers can support themselves and need no alimony after the dissolution of a marriage does affirm the ability of women as wage earners, i.e., like the stereotypical male, but ignores the reality that women's workforce participation tends to be patterned differently from males: women tend to spend more time raising their children than do men. Certainly, women can have success in the workforce and in the home, but the strain of doing both simultaneously is tremendous, and the cost of establishing a career first sometimes results in age-impaired fertility. It is not surprising that married couples with children still make the choice in significant numbers for the mother to cut down on the number of hours of work or to drop out of the workforce for a time. Such an arrangement is one way of preserving the physical and emotional health of the woman. An egalitarian family in which both partners work part-time⁹⁸ and care for the children part-time is very difficult to achieve "since part time employment in the United States is poorly remunerated relative to full time employment, and superannuation and health insurance benefits are typically lost in any switch from full to part time employment."⁹⁹

Another example of the ill-fitting male stereotype is the requirement

97. See Dorion Sagan, *Gender Specifics: Why Women Aren't Men*, N. Y. Times 1, June 21 1998, §15 at 1 (stating that hormonal differences affect all organs of the body, abilities, behaviors, and effect of medications); Louise F. Fitzgerald, *Who Says? Legal and Psychological Constructions of Women's Resistance to Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 95 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (arguing that the courts' weighing the "welcomeness" of male sexual advances on females reflects "the tenacity of the cultural insistence that sexual advances by any man to any woman are by definition welcome until she proves otherwise."). In a Hobbesian world, the strong and aggressive can exploit the weaker and less aggressive; this is food for thought about both the relative strengths and weaknesses of the respective sexes, and the propensity of one sex to use violence against the other. Without mediating institutions such as the family and the law, women tend to be vulnerable in the extreme.

98. Even if part-time work were found by both partners, there is still a question about whether the pay would be equal, and whether the woman's pay would become stagnant should she have a child. Even where both marriage partners work full-time, the wife's income is frequently seen as secondary, either in amount or status. See Allen M. Parkman, *Bargaining Over Housework: The Frustrating Situation of Secondary Wage Earners*, 63 AM. J. SOC. 765 (October 2004) (explaining how husbands make only a small increase in their housework load when their wives' employment increases; time and resources available strongly influence time devoted to household tasks, as does gender ideology of the couple).

99. Robert Drago & Yi-Ping Tseng, *Family Structure, Usual and Preferred Working Hours, and Egalitarianism*, Paper presented at HILDA Conference, March 2003, at the University of Melbourne, Australia, at 5 (citing Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001)).

in sexual harassment law that a woman take affirmative steps to report and to stop the unwelcome behavior.¹⁰⁰ While it makes sense to put the perpetrator on notice, such a requirement ignores the dynamics of differential power relationships on the job and in society and how differently the respective sexes perceive female-male interaction, and how their patterns of problem solving tend to differ. It essentially adopts a male model of confrontation. Measuring women's progress in terms of workforce participation and earnings could also be conceptualized as measuring female progress in terms of whether women are more or less conforming to a traditional male gender role. And, of course, males do not seem to be moving in large numbers toward traditional female gender roles.¹⁰¹

VI. SEX-INTEGRATED MARRIAGE AS A NORM FOR COOPERATION BETWEEN THE SEXES

While marriage patterns and practices have varied across cultures and over time, marriage has involved both sexes, which has set a pattern for cooperation between the sexes.¹⁰² Even when the marriage was disrupted or dissolved, society and the children of the marriage had a "placeholder," as it were, for the missing parent as well as some recognition of the joint effort required to bring the child into being and nurture him or her. Cultures have brought to bear the weight of social stigma and the law for men who fail to provide some form of support for the women they impregnate and the children born of their relationship. The law has sought to do the same for unmarried women, but it is harder to enforce that obligation when there has been no marriage. Terrance O.

100. See Fitzgerald, *supra* note 98.

101. See Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208 (2000). Coltrane reviewed more than 200 scholarly articles and books on household labor published between 1989 and 1999, and he concluded that women have reduced and men increased slightly their amounts of household labor.

[W]omen continue to feel responsible for family members' well-being and are more likely than are men to adjust their work and home schedules to accommodate others. Married women are still expected to manage home and family, and wives spend two or three times as many hours on housework as their husbands.

Id. at 1212 (citations omitted). It appears that even men expected to be most "androgynous," are unlikely to step into full-time child-care even for a short period of time. See RHOADS, *supra* note 14 for a discussion of his study about who takes family leave after the birth of a child. While the majority of professors agreed with the statement that "[f]amilies usually do best if the husband and wife share equally in child care, household work, and paid work," few of the male faculty took the leave, nor did they do the intensive baby care that the female professors did. There was anecdotal evidence that some male faculty used the time to advance publishing agendas, or in other ways abused the leave policy. *Id.* at 10-13.

102. See WENDELL BERRY, *SEX, ECONOMY, FREEDOM, & COMMUNITY*, 120 (1993).

Moore argues that in this “gender-blind world” women have found promising careers, but now find it “far more difficult . . . to find honorable men to love them.”¹⁰³ He asserts that “[i]n previous ages, the system of courtship and marriage required on the part of young people both sexual restraint and a strong sense of the future. Young men had to ‘clean up their act’ before they could become truly eligible bachelors.”¹⁰⁴ Moore believes that benefited not only women, but also men and society: “Women, at least a certain kind of women, force men to become civilized when they are not already. Clearly men will not be properly civilized in our day unless the traditional standards for courtship and marriage return in some form.”¹⁰⁵

Contemporary patterns of engaging in non-marital heterosexual relationships have left many mothers in poverty when the parents are unable or unwilling to unite to raise the child together. Some analysts have castigated marriage for subjugating women, but the economic and social situation of a whole class of unmarried mothers is obviously not better than that of their married counterparts.¹⁰⁶ While we often examine this as an economic problem,¹⁰⁷ it is also a problem for the child who is missing one of his or her biological parents to help rear him or her. This is one aspect of the breakdown in cooperation between the sexes in a familial setting, which can have a profoundly negative effect for the child. Rather than staying to help care for the child, the lover who never intended to be a husband drifts into a relationship with another woman, likely producing another child or two; the mother may do the same. Rather than seeing the give-and-take of the daily interaction between a male and a female parent who are husband and wife, the child mostly experiences a female parent who may have a series of boyfriends, but is generally missing the biological male who helped bring the child into

103. Terrence O. Moore, *Heather's Compromise: How Young Women Make Their Way in a World of Wimps and Barbarians*, CLAREMONT REVIEW OF BOOKS (Spring 2004) (book review), available at <http://www.claremont.org/writings/crb/spring2004/moore.html> (last visited February 9, 2006).

104. *Id.*

105. *Id.*

106. Poor women with children may perceive themselves to be better off as poor, unmarried mothers than they would have been if they had married the fathers of their children, sometimes because the men are involved in criminal acts, or mistreat them. See EDIN & KEFALAS, *supra* note 35, at 182-85 & 204-20.

107. The feminization of poverty is even deeper than that measured by income alone “because it extends to an inability to participate in a range of activities which can relieve the pressure on the wage.” Women usually cannot move heavy furniture alone, and may struggle with household and automotive repairs, which they may need to pay to have others perform. If they ask the males they know for favors and help, they sometimes worry that they will be pressured for intimacy in return. Margaret K. Nelson, *How Men Matter: Housework and Self-Provisioning Among Rural Single-Mother and Married-Couple Families in Vermont, US*, 10 FEMINIST ECON. 9, 26 (July 2004).

being: his or her father.

The practice of providing assisted reproductive services to individuals, or same-sex couples contracting for the services of the missing sex, is another aspect of the breakdown of cooperation between the sexes in a familial setting, albeit a form of cooperation in a commercial setting. The individuals and couples have decided in advance of the child's birth that the child has no need to know one of his or her biological parents on an ongoing basis. It is extraordinary hubris to suppose that a child has no need of a mother or father on a daily basis, and to ensure that child will be brought into being without the ability to really know that biological parent.¹⁰⁸

This is no small loss for a child. Parents are not generic or genderless any more than children are. Either sex could be a parent, but try as she might, a mother cannot be a father to her child any more than a father can be a mother to his, if for no other reason than the child knows about mothers and fathers. At some point, even with conscientious same-sex couples, it is quite likely that the child will long to know the missing parent, and may even experience what is sometimes referred to as father hunger, or as mother loss. Most of the research on same-sex couples as parents is on lesbian couples; only a miniscule amount of research has been done on gay fathers.¹⁰⁹

Decades of research confirm that there are differences between the sexes and that by combining those differences in the child's behalf, the child benefits.¹¹⁰ For example, mothers tend to be risk-averse and emotionally nurturing, while fathers tend to encourage their children to try new things, but tend to be less emotionally expressive.¹¹¹ Such

108. See Camille S. Williams, *Planned Parent-Deprivation: Not in the Best Interests of the Child*, 4 WHITTIER J. CHILD & FAM. ADVOC. 375, passim (2005).

109. Beverly R. King notes:

As is common in research on gay and lesbian parenting, more lesbian mothers (336) than gay fathers (79) volunteered to participate. This may be because the sample included only custodial parents, and for previously married individuals, fathers are still less likely to receive custody than are mothers. Another possible explanation is that there may be fewer gay fathers than lesbian mothers in the nation or the sample may not be representative of the true proportion of gay and lesbian parents in this country.

Beverly R. King, *I Have "A Mommy, a Daddy, and a Barbara": The Psychology of Parenting as a Lesbian or Gay Man* (sic), 39 J. SEX RES. 335, 335 (2002) (Book Review) (describing the National Study of Gay and Lesbian Parents); see also Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052, 1061 (2000) ("Although some gay men are also becoming parents after coming out, no research has yet been reported on their children.").

110. RHOADS, *supra* note 14, compiles and summarizes a significant amount of the research in arguing that the differences appear to be real, and ought to be recognized by individuals and policy makers.

111. Research on gender differentiated parental approaches are summarized in BRENDA HUNTER, *THE POWER OF MOTHER LOVE: TRANSFORMING BOTH MOTHER AND CHILD* (1997) and also in KYLE D. PRUETT, *FATHER NEED: WHY FATHER CARE IS AS ESSENTIAL AS MOTHER CARE*

complementarity may allow the best emotional and social development for children by encouraging growth while protecting them from grave harms. If those gender traits hold true for same-sex couples, having same-sex parents would, in effect, double both the strengths and weaknesses common to their sex; their child might not receive an upbringing as “balanced” as the heterosexual parents could provide.¹¹²

Even if it were the case that the child could meet the missing parent, or have some contact with the missing parent, the transactional arrangement undercuts any bond that might be forged with that parent, since that was the parent who “sold” his or her part of the child. It may be particularly difficult for the child who is the same sex as the missing parent to know his or her place in the family, since he or she was brought into a household where one parent is considered superfluous, unneeded: absent as planned.

VII. GENDER HIERARCHY MAY CREATE A NEW VARIATION OF A SEX-SEGREGATED SOCIETY

So what might society look like when women’s roles in the marriage and the family are further devalued and women begin to act more like men? *The Futurist*, hailing “[w]omen’s rising status in society [as] represent[ing] nothing less than a radical transformation of the social fabric,” lists five possible scenarios:

- 1) *Continued Patriarchy*, in which women continue to gain rights, but are pressured into “supermom” roles, participate more in the workforce, but still get unequal pay, and bump into the “glass ceiling;” women are still underrepresented in politics and the nuclear family is still the ideal.
- 2) *High-Tech Androgyny*, in which a leisure society emerges; gender roles blur; sexual recreation is separated from procreation; children are genetically designed, and reared by robotic and other nannies; children experiment with sex, and may change gender before puberty.

FOR YOUR CHILD 17-53 (2000).

112. James M. Herzog, a psychoanalyst, has examined what he calls “father hunger” among the children of divorced parents. Boys especially seem to need to have a father who is loved by the mother, showing him how to “recognize his masculinity and claim it functionally rather than succumb to its inherent capacity to disorganize and destroy.” JAMES M. HERZOG, FATHER HUNGER, 310-11 (2001). Herzog contends that fathering is “a distinctly male form of caretaking,” which he argues can only successfully occur in the presence of a mother, and is “contingent on the presence of homeostatic-attuned caregiving by the mother.” *Id.* at 259-60.

3) *Separation*, in which women do without men genetically and socially; men are banned from some communities; intergenerational families of sisters, daughters, mothers, grandmother and aunts emerge, as does goddess worship.

4) *Male Backlash*, in which a hyper-patriarchy exists with males harshly dominating females; polygamy and harems are common; female slaves do the work, and male-dominated religions are common.

5) *Partnership*, in which neither males nor females dominate, gender differences in work, politics, and the economy are negligible; there is shared parenting in a variety of family forms, including extended generational groups prevail.¹¹³

If power relations theory is correct, outcome 5, the partnership ideal, is never achievable because one gender will always dominate the other. A future such as described in 3 or 4, with female separation or male backlash, respectively, seems like the hyperbole of grim science fiction, not wholly impossible, perhaps, but highly unlikely. It may be possible to find “homosexism,” in which a lesbian’s or a gay man’s “sexual separatism” is globalized so that they “don’t distinguish . . . their “sexual preference from their general, nonsexual likes and dislikes.” In other words, there may be some “gay woman who truly thinks all men are pigs,” and some gay men who think “women smell of rotting fish.”¹¹⁴ But as Ian Barnard claims, “[t]he way that gender designations dictate power disparities shows how processes of separation will have vastly incongruent political meanings as their contexts and agents vary.”¹¹⁵ Wealthy, white males have always, in Barnard’s view, “owned and accessed . . . separatist spaces . . . the Senate, the Country Club, Money Magazine’s Top 100 business leaders, etc.—have become so naturalized by the institutions of power that these institutions do not describe them as tools of specific political agendas and power structures, and thus do not admit that they constitute a separatist politics.”¹¹⁶ The kind of separatism that may have already crept into society and is more likely to increase will be a lack of trust toward members of the opposite sex, and perhaps, an unwillingness to marry because of that lack of trust.

113. Christopher B. Jones, *Women of the Future: Alternative Scenarios*, 30 *FUTURIST* 34, 37 (May/June 1996).

114. Norah Vincent, *Homosexism: You Might Say You Have the Kind of Gay Woman Who Truly Thinks All Men Are Pigs and the Kind of Gay Man Who Thinks Women Smell Like Rotting Fish*, 769 *ADVOCATE* 80, Sept. 29, 1998.

115. Barnard, *supra* note 63, at 624.

116. *Id.* at 625.

In our contemporary society, gays and lesbians tend to congregate in urban areas, and form communities that are subgroups of larger communities with which they interact. These subgroups, and especially queer groups, are not much interested in tagging each other as gay or lesbian, but they are “committed to challenging that which is perceived as normal. In other words, while same-sex couples may be focused just on themselves, queer activists are part of a larger movement that seeks fewer strictures on sexual conduct, or sexual identity in general. There [is] no foolproof membership criteria for queerness other than the willingness to interpret anything and everything as deviant.”¹¹⁷ Lack of impulse control and disdain for tradition sounds more like a prolonged adolescence than a political theory designed to save us from our benighted history or condemned social constructions. All manner of folk, queer and not, are interested in breaking down sexual boundaries and have had significant impact on the sexual activities of the nation as a whole, and on the push for same-sex and alternative forms of marriage. To some extent, this has helped legitimate uncommitted sexual activity—a stereotypical male approach to human (non)relations. Kathy Rudy explains how lesbian separatism has transitioned to, or been co-opted by, queer theory, which shows an intense interest in alternative practices such as “sodomasochism, pornography, man-boy love, group sex, crossdressing, leather bars, and other erotic subcultures that exist in America today, affirming in every case the perverse, the chaotic, and the nonmonogamous.”¹¹⁸ Radical lesbian separatists differ from queer lesbians in that the radicals saw,

men—even gay men [as] the enemy and thus coalition with gay men was difficult or impossible. . . . The current queer environment is radically different. . . . In their eagerness to eliminate the foundation of woman-centeredness, young queers are able to exist within multiple identities and move in and out of various communities without the policing associated with identity politics. (A whole phenomenon exists in queer communities, for example, of lesbians who sleep with men.)¹¹⁹

The queer coalition has given “many lesbians . . . access to material resources traditionally associated with gay men. These financial and social resources have allowed many queers to engage in more aggressive

117. Kathy Rudy, *Radical Feminism, Lesbian Separatism, and Queer Theory*, 27 FEMINIST STUDIES, 212 (2001).

118. *Id.* at 215.

119. *Id.* at 213.

and confrontational style politics.”¹²⁰ There are tensions between females and males in the queer coalition, however. Some feminist scholars believe that the

queer desire to break open the dichotomy between women and men . . . often inadvertently leads to the valorization of those things associated with the male, public sphere . . . those attributes historically associated with women which reproduce both children and daily life, such as relationality and caretaking, are sometimes dismissed as soft and accommodationist by the new queer discourse.¹²¹

These feminists warn that “although in theory queerness transcends or deconstructs gender, in reality it sometimes feels like another way that men are allowed to wield the power, set the agendas, and be taken care of.”¹²² Rudy argues that “[r]adical feminists articulated a sense of sexuality (or at least sensuality) which was intrinsically tied to (what was thought to be) women’s moral nature. In rejecting that notion of womanhood, queer theorists have thrown out also the need or desire for many attributes associated with woman’s worlds.”¹²³ Rudy concludes that “[a]lthough we may not need the ontological categories of ‘women’ and ‘men,’ we do need to recover and value the work historically assigned to women’s realm.”¹²⁴

Even if we manage to avoid separatist trends, if we valorize the exercise of individual sexual autonomy as a primary value, “family” would be defined by individuals and aggregates of individuals on an ad hoc basis: there would be no officially recognized norm in law or in society for the structure of marriage or the family.¹²⁵ Marriage and family life would be ordered by radical privacy.

Since men as a group tend to desire a larger number of sexual partners, and are less likely to insist that sexual activity occur in a committed relationship,¹²⁶ and because uncommitted sexual activity has

120. *Id.*

121. *Id.* at 216.

122. *Id.* at 218.

123. *Id.* at 218-19.

124. *Id.* at 220.

125. Ramona Faith Oswald et al., *Decentering Heteronormativity: A Model for Family Studies*, in SOURCEBOOK FOR FAMILY THEORY AND RESEARCH 143 (Vern L. Bengtson et al. eds., 2004). *But see* Stan J. Knapp & Camille S. Williams, *Where Does Queer Theory Take Us? in SOURCEBOOK FOR FAMILY THEORY AND RESEARCH* 626 (Vern L. Bengtson et al. eds., 2004).

126. David P. Schmitt et al., *Universal Sex Differences in the Desire for Sexual Variety: Tests from 52 Nations, 6 Continents, and 13 Islands*, 85 J. PERSONALITY & SOC. PSYCHOL., 85, 101 (2003). Schmitt notes that his study results mesh:

with a wide range of empirical findings from across the social sciences, including sex

become widely available,¹²⁷ women have lost bargaining power in privately ordered relations¹²⁸ and may be more vulnerable to, or more inclined to engage in transactional sexual activity. This is not to say that all men seek merely uncommitted sexual pleasure, but to point out that while the use of birth control and social acceptance of sexual activity outside of marriage has freed men and women from some of the social constraints previous generations faces, the sexual expression free of constraint has had a disparate impact on the sexes: women still want marriage, but men are less interested in dating, less inclined to marry.¹²⁹

Wendell Berry explains that

[b]ecause of our determination to separate sex from the practice of love in marriage and in family and community life, our public sexual morality is confused, sentimental, bitter, complexly destructive, and hypocritical. It begins with the idea of 'sexual liberation': whatever people desire is 'natural' and all right, men and women are not different but merely equal, and all desires are equal.¹³⁰

Jennifer Roback Morse classifies "hooking up" as "recreational" or "consumer sex," transactions for pleasure. She argues convincingly that "the consumer based approach to human sexuality is destructive of human relationships and genuine community."¹³¹ It is unclear how men and women are supposed to transition from the campus culture of uncommitted sexual activity to the commitment of marriage and

differences in motivations and prevalence of extramarital mating, sex differences in the quality and quantity of sexual fantasies, sex differences in the quality and quantity of pornography consumption, sex differences in the motivations for and use of prostitution, sex differences in the willingness to have sex with strangers, and fundamental sex differences between the short-term mating psychology of gay males and lesbians.

Id. at 99.

127. This, of course, is already the case; the Centers for Disease Control ("CDC") statistics confirm that even teens are sexually active, and sexually-transmitted infections are epidemic among the sexually active.

128. The metaphor used in the rural area where I grew up was "[n]o one buys a cow when the milk is free." Perhaps fewer men commit to long-term relationships when large numbers of women are unwilling or unable to require commitment before entering into a sexual relationship.

129. See Norval Glenn & Elizabeth Marquardt, *Hanging Out, Hooking Up and Hoping for Mr. Right: College Women on Mating and Dating Today*, INSTITUTE FOR AMERICAN VALUES (2001), available at http://www.americanvalues.org/html/r-hooking_up.html (last visited February 3, 2006).

130. BERRY, *supra* note 103, at 140.

131. JENNIFER ROBACK MORSE, SMART SEX: FINDING LIFE-LONG LOVE IN A HOOK-UP WORLD 137 (2005) ("Not only is recreational sex no fun, but consumer sex is profoundly anti-social."); see also Ronald S. Immerman & Wade C. Mackey, *The Societal Dilemma of Multiple Sexual Partners: The Costs of the loss of Pair-Bonding*, 29 MARRIAGE & FAMILY REV. 3 (1999) (present data indicating that the loss of the male-female pair bonding "is aligned with a number of serious societal dysfunctions).

parenthood in a culture of radical individualism. “In this cult of liberated sexuality,” Berry notes,

‘free’ of courtesy, ceremony, responsibility, and restraint, dependent on litigation and expert advice, there is much that is human, sad to say, but there is no sense or sanity. Trying to draw the line where we are trying to draw it, between carelessness and brutality, is like insisting that falling is flying—until you hit the ground—and then trying to outlaw hitting the ground. The pretentious, fantastical, and solemn idiocy of the public sexual code could not be better exemplified than by the now-ubiquitous phrase ‘sexual partner,’ which denies all that is implied by the names of ‘husband’ or ‘wife’ or even ‘lover.’¹³²

Therefore, it is with the oddity of same-sex “marriage,” that sameness drives out the difference that marriage once encompassed.

In this future society focused on openness to all forms of sexuality, it would not be unusual to find individuals of either sex engaging in virtual sexual experiences via computer, internet, or other technology, or participating in anonymous sexual encounters with persons with whom they do not form relationships.¹³³ Because “sexuality” is considered an individual trait, quite separate from relationships, many individuals will conform to serial monogamy lasting as long as the “love” in the relationship appeals to the “constituent continuity of self.”¹³⁴ Some individuals will marry but will participate in a range of extramarital sexual activity, too. Presumably many married men will still add variety to their sex lives and risk their wives’ health by engaging in “the risk and the recklessness of semipublic sex,” at gay pickup spots.¹³⁵ Men who have sex with men (“MSM”), men on the “down low,”¹³⁶ and bisexual men already seem to have established this pattern to the detriment of the women with whom they also have a sexual relationship. Due to the high-risk behaviors of these groups of men, several sexually transmitted infections (STIs) are increasing among MSM and their female partners.¹³⁷

132. BERRY, *supra* note 103, at 141.

133. See Glenn & Marquardt, *supra* note 130.

134. Bernadette Bawin-Legros, *Families in Europe: A Private and Political Stake-Intimacy and Solidarity*, 49 CURRENT SOC. Sept. 2001, at 49, 54.

135. Corey Kilgannon, *A Sex Stop on the Way Home; Just Off a Park's Playing Fields, Another Game Thrives*, N.Y. TIMES, Sept. 21, 2005, at B1, available at <http://www.nytimes.com/2005/09/21/nyregion/21cruise.html?pagewanted=print> (last visited September 21, 2005).

136. Ramon Johnson, *Closeted or Bisexual Men: What is the “Down Low” or “DL”?* available at <http://gaylife.about.com/cs/gay101/a/dl.htm> (last visited November 26, 2005).

137. CENTERS FOR DISEASE CONTROL, TRENDS IN REPORTABLE SEXUALLY TRANSMITTED

Describing coupling in Europe, which is sometimes predicted to be “ahead” of us in social trends, Bernadette Bawin-Legros notes that

lovers want both to maintain the nuclear family, in the form of an exclusive couple, and also not to undergo any frustration as they live to the utmost of their respective desires. The essential problem for modern couples is that they encompass love, passion, tenderness, friendship, intellectual connivance, education of the children and exclusive sexual obligation at the same time. Because it is very demanding and introverted, contemporary love thus contains the seed of its own destruction.¹³⁸

Such a focus on self means less focus on what is good for the children produced by the new sexualities. If women were unwilling to be burdened with pregnancy, that desire, coupled with considerable investment in reproductive research, could spur the quest for an artificial womb, though desire to accomplish something may not alter the feasibility of such a project. For the foreseeable future, human reproduction will still be unequally divided between the sexes, with women still bearing the larger burden of childbearing. Because men tend to look after their own individual interests, and women tend to look after the interests of their children,¹³⁹ patterns of female childrearing are likely to continue,¹⁴⁰ and economic disparity between the sexes likely will persist, which may contribute to increases in both the practices of transactional sex¹⁴¹ and of transactional procreation.

DISEASES IN THE UNITED STATES, 2004: NATIONAL SURVEILLANCE DATA FOR CHLAMYDIA, GONORRHEA, AND SYPHILIS (November 2005), *available at* <http://www.tdh.state.tx.us/hivstd/tipp/2005%20Workshop/std%20trends%20fact%20sheet.pdf> (last visited November 28, 2005) (these STIs increase the risk of infection by HIV, if exposed); *see also* Audrey S Koh, et al., *Sexual Risk Factors Among Self-Identified Lesbians, Bisexual Women, and Heterosexual Women Accessing Primary Care Settings*, 32 SEXUALLY TRANSMITTED DISEASES 563 (2005) (lack of condom use among heterosexual women put them at risk; bisexual women were more likely to be high during sex, had more MSM partners, more male sexual partners, but tended to use condoms more and be tested for STIs more than heterosexual women; lesbians had the greatest number of male sex partners, the highest rate of sex with MSM, but used condoms and were tested for HIV).

138. Bawin-Legros, *supra* note 135.

139. *See, e.g.*, the discussion of “Androgynous Parenting at the Frontier,” in RHOADS, *supra* note 14, at 8-13.

140. Some attribute sex differences in parents’ behaviors as “God-given,” or as hormonally driven, or as a complex of evolutionary psychology and evolutionary biology. My point is to note the persistence of differences, usually with some disadvantage to women in the laissez-faire sexual marketplace, whatever the “cause.” Social constructionists are hopeful that women can be reprogrammed, but their success has been somewhat limited so far.

141. The reasons for transactional sex in Africa range from issues of social status, relative imbalance of economic and social status between men and women or between men and girls, and the patterns of unemployment, poverty, and cultural practices, which allow male sexual activity outside

VIII. CONCLUSION: A FEDERAL MARRIAGE AMENDMENT IS A
NECESSARY STEP TOWARD EQUALITY FOR WOMEN

There may be no way to equalize the physiological disparities of parenthood, but we know that there are ways to equalize the economic and social costs of parenthood. Despite the high economic and social costs inherent in the traditional roles of women in the family, many, if not most women will pay those costs¹⁴² to ensure the welfare of their children. When her husband, the father of her children, is equally committed, her costs are somewhat offset. The marriage between a woman and a man has benefits not only for the marriage partners, but also for their children. Maintaining sex-integrated marriage as the norm has the potential of encouraging men to invest time, thought and resources in their children and the mothers of their children. Jennifer Roback Morse states that “the real issue driving the ‘marriage debate’ is the question of what we owe to children”—mostly material resources —”[o]r do we owe them personal relationships, provided for them by the particular people who brought them into existence?”¹⁴³ Being born into and growing up in the biological, social, material, and economic union of those parents who gave the child life can be a great and irreplaceable gift. Roback Morse argues that “[c]hildren need to have a relationship with their parents. They need their parents to love them and to love each other. Absent that love, children have a much more difficult time developing the qualities of self-command and self-care that society needs for them to have.”¹⁴⁴

Women’s taking care of themselves, their homes, and their children is greatly facilitated by marriage to a loving husband who is also committed to the care of their children. Roback Morse claims that “[c]hildren with a conscience are matrimony’s gift to society.” But, she

marriage all may contribute to the practice. A meta-study of the practice in Sub-Saharan Africa concluded that “gifts and financial benefits” were major motivations. See Nancy Luke & Kathleen M. Kurz, *Cross-generational and Transactional Sexual Relations in Sub-Saharan Africa: Prevalence of Behavior and Implications for Negotiating Safer Sexual Practices*, International Center for Research on Women (ICRW) (2002); see also Minki Chatterji et al., *The Factors Influencing Transactional Sex Among Young Men and Women in 12 Sub-Saharan African Countries*, USAID 6 (2004) (stating that marriage is a strong predictor for young men and young women not engaging in transactional sex, though stronger for women than men).

142. Denise Michaels, “*Is It Time to Re-Assess Women’s Work in 2006?*” available at <http://www.wwork.com/work/working-women-reassess.htm> (last visited March 28, 2006). Twenty of the fifty “most powerful women” named by Fortune magazine in recent years, and millions of less-powerful women have left their corporate jobs to establish a “sane domestic life,” giving up the “prestige and income of occupying the corner office.” *Id.*

143. MORSE, *supra* note 132, at 39.

144. *Id.* at 38.

reminds us, “The development of conscience requires relationship building, which requires time, time, time, between the baby and parents.” The mother who has time and energy to nurse and to rock the child likely has a husband who can “take care of many of the material and financial needs of both the mother and the baby, so they can be together for the extended, intense period of time that is truly necessary.”¹⁴⁵ The time-crunch, stress, and constant need to hurry caused by simultaneously combining the roles of workforce employee and mother is one enemy to the mother-child relationship when maternal employment stresses and presses her. It is a tribute to the tenacity of women that so many mothers have managed so well, and a tribute to the work ethic of fathers that so many of them have given their best to their wives and to their children. The converse is also true: the child abandoned to work out his own moral upbringing, even if his material needs are met, will likely struggle through adolescence and adulthood, and will likely cost society, rather than contribute to society. There may be various ways to defray the costs women incur through marriage and motherhood, but at least until women’s equality has been established *in fact* throughout all our social institutions, it would be unwise to undercut women’s status in sex-integrated marriage and family life.

It may be that we need to restore greater status to role division within marriage and family life in order to allow complementary roles to flourish in that noncompetitive environment, where both mother and father have an irreplaceably important role in cooperating in raising their children. There is some indication that two women or two men parenting may in some ways feel competitive with or jealous of each other, or experience some conflict over what may be considered gendered parenting roles.¹⁴⁶ Much of what both men and women face outside the home is highly competitive. Education, employment, and other pursuits may encourage individual achievement, sometimes at the expense of others or at the expense of relationships with others. It may be possible to reinstate a type of “complementary power”¹⁴⁷ between the sexes by

145. *Id.*

146. See Claudia Ciano-Boyce & Lynn Shelley-Sireci, *Who is Mommy Tonight? Lesbian Parenting Issues*, 43 J. HOMOSEXUALITY No. 2, at 1, 10-11 (2002) (lesbian adoptive parents more likely than heterosexual adoptive and lesbian biological parents to report that their child’s preference for one parent over the other for certain activities caused occasional conflict); Susan Bennett, *Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families*, 20 CHILD & ADOLESCENT SOC. WORK J. No. 3, at 159, 166-69 (2003) (reporting the findings of a small sample study: most children by lesbian couples developed a “primary bond” with one of the adoptive parents, and some non-preferred “mothers admitted they felt some hurt or jealousy when they realized they were not the preferred parent”).

147. Margaret M. Caffrey, *Complementary Power: Men and Women of the Lenni Lenape*, 24 AM. INDIAN QUARTERLY, 44 (2000) (describing the complementary power between the sexes in the

recognizing the importance of each in family life. Certainly by legalizing family forms which exclude either sex, we will have undercut to some degree, the possibility of a respected, non-competitive arena for the sexes.

The *Reynolds*¹⁴⁸ decision was motivated, in part, by a belief that polygamy put “innocent victims” at risk, and that the emotional health, and social and economic status of women and children required the enforcement of laws against bigamy. Similarly, women’s social and economic status will be at risk if same-sex marriage is legalized. Ensuring that the definition of marriage remains as the union of one man and one woman may be the only means whereby women can maintain a framework for equality in the family and in society.

tribe commonly known as the Delaware).

148. *Reynolds v. United States*, 98 U.S. 145, 167-68 (1878).