

HARVARD LAW REVIEW

THE FAMILY AND THE MARKET: A STUDY OF
IDEOLOGY AND LEGAL REFORM

Frances E. Olsen*

Reform strategies aimed at improving the lives of women in American society have ranged from efforts to ensure equal treatment for women in the marketplace to the establishment of family courts to promote fair treatment and harmony within the household. In this Article, Professor Olsen argues that most reform efforts have been conceived and carried out from within the confines of a particular world view, a world view that perceives social life to be divided between separate though interdependent spheres of market and family. She concludes that this structure of consciousness — the dichotomy between market and family — not only has limited the effectiveness of reforms actually undertaken, but also has sharply curtailed the range of possible strategies conceived by reformers. Professor Olsen draws upon Feuerbach's model of historical progress, as well as upon our understanding of relations between the state and civil society and between male and female, to speculate upon the possibilities for radically improving the lives of all individuals, men and women, by transcending the market/family dichotomy.

A new round of debate has developed regarding the family and family values. Some argue that the family is a reactionary institution and a primary locus for the oppression of women; others extol the sharing within family life and seek to reclaim family values as supportive of democratic and progressive goals. Although this debate is yet unresolved, it is already boring. Admittedly, it can stir strong emotions, but on some level we all know it will not lead to any solution. Rather than join the debate, this Article examines the terrain upon which the debate has been conducted.

* Goddard College, B.A., 1968; University of Colorado, J.D., 1971; Harvard University, candidate, S.J.D.

This Article is based in part on research supported by the Peter B. Livingston Fund of Harvard Medical School. I wish to express my appreciation to the Fund, to the editors of the *Harvard Law Review*, and to the dozens of friends and colleagues who offered helpful comments on earlier drafts. Mary Joe Frug, Chris Littleton, Martha Minow, and James B. White were particularly generous and supportive. Duncan Kennedy enriched my understanding of how helpful one person can be to another. I am grateful for his valuable insights, his numerous critical readings, and his unswerving encouragement. He has provided an example I hope to follow.

A central concern underlying the debate is the subordination of women to men. Both sides share the goal of equality and independence for women. Repeated efforts at reform have resulted in a significant measure of success, yet the subordination of women continues. Many different factors may help to explain why the reform strategies adopted have had ambiguous and even contradictory effects. One factor that often receives insufficient attention is the ideological foundations of social reforms. In particular, reforms are limited by their premises, by the unexamined assumptions upon which they are based.

One such assumption embodies the radical separation of the market and the family, the idea that the market structures our productive lives and the family structures our affective lives. In the nineteenth century, the family was seen to constitute a separate sphere of activity — a sphere particularly suited to women. “Woman’s sphere” may no longer be considered to be just home and family, but we do continue to view the family as something sharply distinct from the market. The vision of the market and the family as a dichotomy¹ — the perception that social life comprises two separate though interdependent spheres — can be described as a structure of consciousness.² By structure of consciousness, I mean a shared vision of the social universe that underlies a society’s culture and also shapes the society’s view of what social relationships are “natural” and, therefore, what social reforms are possible.

In my discussion of the market/family dichotomy, I shall refer frequently to two other dichotomies — the ones between state and civil society and between male and female. The state/civil society dichotomy is crucially related to the complexities of the market/family dichotomy; and the dichotomy between male and female is particularly important both to the

¹ A “dichotomy” exists when a significant aspect of experience is divided sharply between two categories that are mutually exclusive but together account for the entire aspect. A pair of subclasses form a dichotomy when they are separated by a “vacuum boundary,” see Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383, 383–85 (1979), and together they constitute an important class. The class of human beings, for example, has been divided between male and female. Virtually everybody is placed in one gender category or the other, and almost nobody is placed in both. This can be contrasted with the division between child and adult, which is far less dichotomized because adolescents are thought of as children for some purposes and adults for other purposes.

² I do not intend to be making any claims about what might be called material reality. I am describing ideas and consciousness, not things or institutions. When I assert that there is a dichotomy between market and family, for example, I am obviously not claiming that the market and the family are separate in any physical sense.

ways in which the market/family dichotomy now affects human existence and to our hopes for constructing new ways of thinking about and leading our lives.

These three dichotomies are each distinct: none is logically dependent upon another and none necessarily entails another. Nevertheless, deep ties exist among them, and each reflects a way of thinking that entails a radical division of the world. All three dichotomies seem eternal; yet by transcending all three, by reconceiving the relationship between the two elements in each of the three pairs and restructuring our thoughts and lives to create, reflect, and reinforce those reconceptions, we have the greatest possibility for bringing about changes that would significantly improve our individual and collective lives.

I. THE IDEOLOGY OF THE FAMILY AND THE MARKET

The separate and unequal spheres constituted for men and women had two opposite effects on women: the woman's sphere both constrained women and provided them with valuable opportunities. In the early nineteenth century, as men's work was largely removed to the factory³ while women's work remained primarily in the home, there came to be a sharp dichotomy between "the home" and "the [workaday] world."⁴ This dichotomy took on many of the moral overtones developed in the theological dichotomy between heaven and earth.⁵ Often the home was referred to as "sacred," and home life was celebrated as the reward for which men should be willing to suffer in the earthly world of work.⁶ The family and home were seen as safe repositories for the virtues and emotions that people believed were being banished from the world of commerce and industry. The home was said to provide a haven from the anxieties of modern life — "a shelter for those moral and spiritual values which the commercial spirit and the critical spirit were threatening to destroy."⁷

At the same time that the home was being glorified, it was being devalued. The woman's sphere was for men "the object

³ See V. CLARK, *HISTORY OF MANUFACTURES IN THE UNITED STATES: 1607-1860* (1916); 1 J. COMMONS, *HISTORY OF LABOUR IN THE UNITED STATES* (1918); 2 *id.*

⁴ See N. COTT, *THE BONDS OF WOMANHOOD* 64-70 (1977).

⁵ See *id.* at 65-70.

⁶ See *id.* at 64.

⁷ W. HOUGHTON, *THE VICTORIAN FRAME OF MIND, 1830-1870*, at 343 (1957) (emphasis omitted).

of yearning, and yet of scorn.”⁸ Ann Douglas has pointed out that, while men sentimentalized the family and exalted domesticity, they continued to behave in the marketplace as if they believed that “profane,” worldly goals represented the greatest good. “It is to their credit that they indirectly acknowledged that the pursuit of these ‘masculine’ goals meant damaging, perhaps losing, another good, one they increasingly included under the ‘feminine’ ideal. Yet the fact remains that their regret was calculated not to interfere with their actions.”⁹

Further, while the world of the marketplace was decried for being selfish, debasing, and exploitative, it was also admired and esteemed. Self-reliance, progress, modernization — each had positive connotations that were associated with the world of commerce and industry. Rationality, discipline, and a focus on objective reality were considered desirable aspects of the “male” sphere of the market.¹⁰ Moreover, although the values of domesticity were used to criticize the destructiveness of marketplace values and the pursuit of wealth, they nevertheless served to “undercut opposition to exploitative pecuniary standards in the work world, by upholding a ‘separate sphere’ of comfort and compensation, instilling a morality that would encourage self-control, and fostering the idea that preservation of home and family sentiment was an ultimate goal.”¹¹

Given this simultaneous glorification and denigration of both the home and the marketplace, it should be no surprise that the sharp split between the two spheres had complex effects upon women. The market/family dichotomy tended to exclude women from the world of the marketplace while promising them a central role in the supposedly equally important domestic sphere. The dichotomy encouraged women to be generous and nurturant but discouraged them from being strong and self-reliant; it insulated women from the world’s corruption but denied them the world’s stimulation. While the dichotomy tended to mask the inferior, degraded position of women, it also provided a degree of autonomy and a base from which women could and did elevate their status.¹²

Nancy Cott has perceptively noted that rather early in the nineteenth century “domestic occupations began to mean for

⁸ N. COTT, *supra* note 4, at 62.

⁹ A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* 12 (1977).

¹⁰ See generally R. TRYON, *HOUSEHOLD MANUFACTURES IN THE UNITED STATES, 1640–1860* (1917) (recounting rise of disciplined modes of production); M. WEBER, *GENERAL ECONOMIC HISTORY* (F. Knight trans. 1927) (same).

¹¹ N. COTT, *supra* note 4, at 69.

¹² For an excellent summary of the literature on the “woman’s sphere,” see *id.* at 197–206.

women what worldly occupations meant for men."¹³ The very process of "distinguish[ing] 'home' and 'woman' from 'the world' and 'man' tended to make the two spheres analogous and comparable."¹⁴ This Article will examine the "analogous and comparable" aspects of the family and the market and the importance that ideas about both have to the status of women and to feminist theory.

A. The Free Market and the Private Family: The Principle of Nonintervention

Although the woman's sphere has been described as "private" and contrasted with the "public sphere of the marketplace and government,"¹⁵ such a characterization can be misleading. There are two different dichotomies involved in this contrast: on one hand, a dichotomy between the market, considered public, and the family, considered private; on the other hand, a dichotomy between the state, considered public, and civil society, considered private.¹⁶ Both the market and the family are thought of as part of "private" civil society in opposition to the "public" state.¹⁷ Calling both the marketplace and the state "public" can thus confuse our thinking about the two dichotomies.

It is important to recognize the distinction between the state/civil society dichotomy and the market/family dichotomy, because the former dichotomy plays itself out in an analogous manner on both sides of the latter.¹⁸ In discourse on the market, the state/civil society dichotomy appears as the issue

¹³ *Id.* at 73.

¹⁴ *Id.* at 72.

¹⁵ Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW* 118 (D. Kairys ed. 1982); see Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 71.

¹⁶ I am using "civil society" in Marx's sense rather than Hegel's. Compare K. MARX, *On the Jewish Question*, in *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* 216 (L. Easton & K. Guddat eds. 1967) [hereinafter cited as *WRITINGS*] (civil society contrasted with political state), with Knox, *Translator's Foreword* to G. HEGEL, *PHILOSOPHY OF RIGHT* at x-xi (T. Knox trans. 1952) (1st ed. 1821) (civil society as an abstract universal that can mature into a state through the educative influence of civil life).

¹⁷ It may be true that the ease with which we use the language of public and private in both of these dichotomies reflects an actual connection between the dichotomies, but it is certainly a mistake to conflate the two or to assume too simple a relationship between them.

¹⁸ Of course it is also true that a single dichotomy can reproduce both its elements on either side of itself.

of state regulation of the economy; in discourse on the family, it appears as the issue of state interference in the family. The classic laissez-faire arguments against state regulation of the free market find a striking parallel in the arguments against state interference with the private family. The two sets of arguments, and the ideals that underlie them, share a great deal more than just hostility to government. Both are constructed of similar elements and subject to similar attacks; our understanding of each is enriched by our understanding of the other.

1. *The Free Market.* — It is possible briefly to summarize the basic themes of laissez-faire theory without denying the richness or complexity of the theory.¹⁹ Laissez-faire theory depends upon the notion of a free and autonomous market. Although the free market does not have to be considered an object or a thing, “the market” must at least be considered a coherent and sensible way of talking and thinking about economic relations among people. Further, laissez-faire theory posits that the market is “natural” in that it reflects actual supply and demand, and “autonomous” in that it was not created by the state and can function independently of the state.²⁰ Laissez-faire theory both assumes and asserts that it makes sense to advocate state neutrality with respect to the market. Economic and social inequalities that persist after the institution of the liberal state (that is, the institution of “political equality”) are deemed to be natural and beyond the proper scope of state activity. Thus, although laissez-faire theorists believe that people should be considered equal in their relations with the state, these theorists characterize the domination and subordination that accompany economic and social inequality in civil society as private matters that do not implicate the political state. A departure from laissez-faire policies is asserted to constitute an effort by the state to alter an inequality

¹⁹ Laissez-faire ideology has been discussed and criticized in detail elsewhere. See, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at xv-xvii, 101-08, 253-66 (1977) (discussing role of judiciary in laissez-faire policies); Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 576-83 (1982) (description and critique of freedom-of-contract ideology) [hereinafter cited as Kennedy, *Motives*]; Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1746-48 (1976) (description and criticism of laissez-faire ideology) [hereinafter cited as Kennedy, *Form and Substance*]. For a classic statement of laissez-faire ideology, see A. SMITH, *AN INQUIRY INTO THE NATURE AND COURSES OF THE WEALTH OF NATIONS* (London 1776). A more recent restatement of these principles may be found in M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

²⁰ See A. SMITH, *supra* note 19, at 459-65.

that otherwise exists quite independently of the state.²¹ Enforcement of contract, tort, and property law is compatible with laissez-faire doctrine only as long as the courts merely facilitate free market transactions without jeopardizing or compromising state neutrality.

Some critics of laissez faire accept the claim that laissez-faire policies would actually represent state neutrality with respect to an autonomous free market, but nevertheless reject these policies²² and urge that the state should regulate the economy to lessen some of the damaging effects of free market inequality. Thus, proponents of laissez-faire policy have had to assert not only that nonintervention is possible, but also that it is preferable to any form of state intervention.

Two classic arguments have been advanced to support nonintervention. The first is based on the theory that, although the natural market functions effectively, it is fragile. Just as introducing rabbits into Australia disrupted the continent's natural ecology, so, too, the attempt to mitigate human suffering by tinkering with one aspect of the market may cause quite unexpected and severe suffering with regard to other aspects of the market.²³

The second classic argument emphasizes the extreme strength and durability of the market. The claim here is that the free market is characterized by strong natural forces that will overcome and nullify any but the most radical efforts to impose state control on the economy, and that nothing less than socialism or total state abolition of the free market will have any lasting effect. Such theorists consider a court's refusal to enforce "harsh" or "oppressive" contract terms or a legislature's attempt to abolish cognovit notes to be reforms doomed to failure. The very same "unequal bargaining position" that is appealed to in support of such reforms can be used to demonstrate their futility. One contract term may be forbidden, but it will be replaced by another or by an adjustment in price; thus, assuming that the basic conditions of

²¹ See, e.g., *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 294, 94 N.E. 431, 439-40 (1911) (holding workmen's compensation legislation unconstitutional on ground that right of property has foundation in fundamental law that cannot be changed by legislatures), *overruled*, *Montgomery v. Daniels*, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975).

²² See, e.g., Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 134 (1916). See generally J. FREY, *THE LABOR INJUNCTION: AN EXPOSITION OF GOVERNMENT BY JUDICIAL CONSCIENCE AND ITS MENACE* (1922) (arguing that injunctions against labor unions are used to violate personal and property rights). For a critique of this position, see Kennedy, *Motives*, *supra* note 19, at 620-24.

²³ This claim has been taken up again by some writers in law and economics. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

supply and demand remain unchanged, bargaining power will stay about the same, and parties will continue to form contracts that reflect this bargaining power.²⁴

2. *The Private Family.* — The idea that the state should not intrude upon the family has, for most people today, a great deal more appeal than does classical laissez-faire economics. Partly for this reason, the parallels between the free market and the private family may not be obvious. In fact, given the dichotomous relationship between the family and the market, the breakdown of classical laissez-faire ideology and the “invasion” of the marketplace by the state might seem to be an additional reason for keeping the state out of the family. Just as the family was once seen as the repository for values being destroyed in the marketplace,²⁵ the family may also be seen as the sanctuary of privacy into which one can retreat to avoid state regulation. If the state/civil society dichotomy is perceived to be breaking down with respect to the market, many would therefore redouble their efforts to preserve the state/civil society dichotomy with respect to the family.

The basic assumptions that underlie arguments in favor of the private family are similar to those underlying the arguments in favor of the free market. The first assumption is that “the family” is a coherent way of talking about certain relations among people. Another assumption is that the family is capable of existing in some sense apart from state activity, as a natural formation rather than only as a creation of the state.²⁶

The issue of state neutrality with respect to the family is more complicated than that of neutrality with respect to the market. Neutrality toward the market means treating the participants in economic life as juridical equals. The state is said to take a neutral stance toward the family, however, when it ratifies the preexisting social roles within the family.²⁷

²⁴ For a description and very effective radical critique of the “unequal bargaining position” argument, see Kennedy, *Motives*, *supra* note 19, at 614–24.

²⁵ See *supra* p. 1499.

²⁶ Again, one need not believe that the family is an actual entity, just as it was not necessary to consider the market a thing, although both are often talked about and conceptualized as if they were concrete. It is necessary only to consider the family as a coherent concept and as something capable of attaining a degree of autonomy. Another way of putting this is that it must make sense to say that a particular family exists even if it is not recognized by the state.

This does not mean that the legal family cannot be seen as something defined solely by the law; indeed, some would define a legal family in just that way. But people also believe in the notion of a natural family, and the areas in which the legally defined family fails to overlap with the natural family create a certain tension. See *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968).

²⁷ See *infra* pp. 1505–06.

In contrast to the market, in which universal selfish behavior is supposed to result in the betterment of society,²⁸ the family has generally been expected to be based on less individualistic principles. The good of all is to be achieved not by each family member's pursuit of individual goals, but rather by sharing and sacrifice among family members. At one time the social good was thought to require the husband to control his wife; and children were, and to an extent still are, expected to obey their parents for the sake of a better society. Parents have often been expected to sacrifice their immediate individual interests for the sake of their children.²⁹ The morality of altruism has been supposed to animate the family to the same extent that the morality of individualism has been supposed to pervade the marketplace.

The state has traditionally been expected to facilitate sacrifice and sharing within the family by ratifying the social roles assigned to family members; thus, it would be considered intervention for the state to treat the members of a family as juridical equals. At one time, for example, the father's social role entitled him to control the children. If the mother were to leave him and take the children with her, the courts would ordinarily be expected to force her to return them to him; for courts to refuse to do so would be considered state interference with the family.³⁰

Today, courts are still ordinarily expected to ratify the social role of parents as disciplinarians. For example, if a court were to allow a child to recover tort damages from her parents for confining her to her room as punishment, most people would consider this a serious state intrusion into the

²⁸ See *infra* pp. 1520-21.

²⁹ See J. Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government*, in SOCIAL CONTRACT 33 (E. Barker ed. 1960) (parents' duty to care for children); *id.* at 35-36 (children's subjection to parents until children are capable of fending for themselves); *id.* at 37 (suggesting that parents' dominion over children has as its objective making the children "most useful to themselves and *others*" (emphasis added)); *id.* at 47-48 (necessity of making husband the final arbiter of all clashes of will in the marital relationship).

³⁰ See *People ex rel. Olmstead v. Olmstead*, 27 Barb. 9, 31 (N.Y. Sup. Ct. 1857) (granting father habeas corpus remedy against mother and mother-in-law to obtain custody of child on ground that "[t]he paramount legal right of the father to the custody and education of his child can be interfered with by a court of equity only where he has been at fault in bringing about the separation"); *People ex rel. Nickerson v. ———*, 19 Wend. 16, 19 (N.Y. Sup. Ct. 1837) (granting father habeas corpus against wife to obtain custody of their child, and stating that "[t]he interference of the court with the relation of father and child . . . is a delicate and strong measure [that] should never be exerted except for the most sound and solid reasons"); F. Olsen, *A History of Child Custody Law as Ideology* (Feb. 4, 1982) (unpublished manuscript on file in Harvard Law School Library).

family, even though the parents' act would have been false imprisonment had it been committed by a third party.³¹

The notion of noninterference in the family depends upon some shared conception of proper family roles, and "neutrality" can be understood only with reference to such roles. For example, one of the bases upon which statutes limiting access to contraceptives have been struck down is that such statutes intrude upon the marital relation.³² Governmental programs providing minors with access to contraceptives, however, are also condemned as state interference in the family.³³ Thus, "interference" is not a simple description of state action or inaction, but rather a way of condemning particular state policies, usually those aimed at changing the status quo. The status quo itself is treated as something natural and not as the responsibility of the state. Actual inequality and domination in the family — as in the free market — are represented as private matters that the state did not bring about, although it could undertake to change them.

The theory of the private family, like free market theory,³⁴ includes the assertion that particularized adjustments of seemingly unfair or inhumane results will not actually serve anybody's long-run interests. One attack made upon ad hoc adjustments by the state is based on the delicate quality of family relations.³⁵ Adherents of this position argue that what might seem to be a minor change in the law could have disastrous

³¹ A modern court might allow tort recovery for serious physical harm caused by a parent's effort to discipline the child; nevertheless, different standards would be applied because the defendant was the parent. *See* MODEL PENAL CODE § 3.08(1)(a) (Proposed Official Draft 1962) (sanctioning use of force by parent against child "for the purpose of safeguarding or promoting the welfare of the minor"); RESTATEMENT (SECOND) OF TORTS § 147 & comment d (1975) (parents' privilege of discipline is broader than that of others); *see also* *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974) (rejecting children's argument that, because their parents had failed properly to supervise them, the parents should be liable for resultant injury).

For the traditional view of parental liability for child beating, see *State v. Jones*, 95 N.C. 588 (1886) (refusing to hold parents criminally liable for disciplinary beatings).

³² *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

³³ The Reagan Administration's recent effort to require birth control clinics to notify the parents of women under 18 who were prescribed contraceptives was, in part, based on the idea that lack of notification was detrimental to the family. *See* N.Y. Times, Feb. 20, 1983, at E5, col. 4. (quoting Richard S. Schweiker, Secretary of Health and Human Services) ("Without this notification parents would not have a chance to participate.") Thus far, two federal district courts have held this "squeal rule" to be unlawful on statutory grounds. *See* *New York v. Schweiker*, Civ. No. 83-0726 (S.D.N.Y. Mar. 21, 1983); *Planned Parenthood Fed'n of Am. v. Schweiker*, Civ. No. 83-0037 (D.D.C. Mar. 2, 1983).

³⁴ *See supra* pp. 1503-04.

³⁵ This attack is analogous to the "fragile market" theory. *See supra* p. 1503.

unforeseen consequences. Thus, a member of England's House of Lords argued in 1838 that a bill allowing mothers to visit children living with their legally separated fathers could "ruin[] half the families in the kingdom."³⁶ It was said to be "dangerous . . . to tamper" with the "delicate" principles of family law.³⁷

In a quite different argument analogous to the "durable market" theory,³⁸ it is claimed that state intervention to protect the weaker family member from abuse by the stronger is ineffective because powerful, underlying, "real" relations between family members will inevitably reassert themselves. Social intervention short of dismembering the family is likely to prove meaningless.

For example, it has been argued that battered wives cannot be helped by the state unless the state undertakes to protect them twenty-four hours a day.³⁹ The wife who does not leave her battering husband is in a position analogous to that of the weaker party entering a contract characterized by unequal bargaining power. Just as the fact that the weaker party chose to enter into the contract suggests that he thought he would profit from it, so the fact that the wife remains in her marriage suggests that, in her own estimation, she gains more from the relationship than she loses. For the police to watch or evaluate the husband's every abuse of the wife would be analogous to the state-drafted contracts that laissez-faire theorists believe must eventually result from any sustained effort to police abuse by the party in a superior commercial bargaining position. As long as the weaker party wants to enter into the contract and as long as the wife wants to stay in the marriage, the state's effort to eliminate particular terms, it is asserted, is bound to be futile.

According to these arguments, therefore, what might seem to be a minor reform either will have no effect or will have such drastic effects that the state might as well abolish families altogether and undertake to raise children itself.

³⁶ 44 PARL. DEB. (3d ser.) 772, 789 (1838) (statement of Lord Wynford).

³⁷ *Id.* at 788 (statement of Lord Brougham).

³⁸ *See supra* pp. 1503-04.

³⁹ Indeed, police are trained to avoid involvement in domestic situations, because such involvement would amount to intrusion on "private" relationships that police supposedly are unable to alter. *See Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979); Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914, 916-30; Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 264, 272 (1971).

*B. Standard Critiques of the Free Market
and the Private Family*

1. *The Market.* — The attack upon the accuracy and coherence of the laissez-faire image of the free market had two major components. First, the notion that the market is private and capable of existing separately from the state was challenged. Commentators argued that “systems advocated by professed upholders of *laissez-faire*” were “in reality permeated with coercive restrictions of individual freedom.”⁴⁰ Furthermore, these coercive restrictions did not conform to “any formula of ‘equal opportunity’ or of ‘preserving the equal rights of others.’”⁴¹ State interference, it was claimed, was unavoidable and would inevitably “affect the distribution of income and the direction of economic activities.”⁴² Because government neutrality was an impossibility,⁴³ a laissez-faire economy was a false ideal.

The second component of this attack was a demonstration that the government was not in fact neutral, but instead benefited certain entrepreneurs at the expense of working people. In making this argument, some commentators assumed that it would be theoretically possible to fashion workable laissez-faire policies, but pointed out that in practice these were “never . . . carried out consistently.”⁴⁴ The extreme version of this argument would suggest that laissez faire is a smoke-screen used by representatives of large industries to limit popular control of business. The same industries, it could be argued, would not really want an across-the-board laissez-faire policy, because they actually depend upon probusiness regulation.⁴⁵

An argument that draws on both components of the attack on laissez faire treats so-called “private law” as a state grant of partial sovereignty to one of the economic actors. Thus, contract law does not simply put into effect the agreement of the parties; rather, the mechanisms for enforcing contract put “the sovereign power of the state at the disposal of one party to be exercised over the other party.”⁴⁶ Similarly, private

⁴⁰ Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 561 (1933).

⁴⁵ *See id.* at 562 (“A government so limited in its powers that it could do no harm would be useless, since it could do no good.”).

⁴⁶ *Id.* at 586.

property is seen to confer on its owner the "sovereign power [of] compelling service and obedience"⁴⁷ from those who need access to the property.⁴⁸ This vision of property and contract law undermines the notion that the state can be a noncoercive, neutral arbiter in the market.

2. *The Family*. — Arguments similar to those developed in the attack on *laissez faire* have been used⁴⁹ to undermine the basis for state refusal to "intervene" in the private family.⁵⁰ One such argument attempts to demonstrate that the state cannot be neutral because it cannot help imposing coercive restrictions upon the freedom of family members. For example, although noninterventionists argue that the state should not interfere to prevent wife abuse,⁵¹ courts will have to deal somehow with cases in which battered wives kill their husbands.⁵² The simple principle of nonintervention in the family gives no clear direction for deciding such cases; it will not dictate whether criminal charges should be brought against these women or whether wife battering should mitigate or provide a defense to homicide. Yet the determination of such questions will inevitably affect the distribution of power within violent marriages and thus the social relations of families.⁵³

⁴⁷ Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

⁴⁸ The Supreme Court decisions that treated freedom to contract as a property right were said to have "pass[ed] a certain domain of sovereignty from the state to the private employer." *Id.* at 11.

⁴⁹ See, e.g., Easton, *Feminism and the Contemporary Family*, in 8 SOCIALIST REV., May-June 1978, at 11, reprinted in A HERITAGE OF HER OWN 555 (N. Cott & E. Pleck eds. 1979) [hereinafter cited as HERITAGE]; Taub and Schneider, *supra* note 15.

⁵⁰ In our earlier discussion of the battered wife, for example, see *supra* p. 1507, the noninterventionist argument would treat wife abuse as a private misfortune for which the state would not be responsible. Although the state might undertake to use its repressive apparatus to reduce the occurrence of interspousal violence by altering the legal consequences attendant upon it, to do so would, according to the noninterventionists, run such great risks of undermining the positive values of the private family that it should not be undertaken.

⁵¹ See *supra* p. 1507 & notes 36 and 50.

⁵² See Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980); cf. Note, *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 HARV. WOMEN'S L.J. 161 (1981) (discussing wife's assault on battering husband).

⁵³ It might be objected at this point that the state could indeed remain neutral with respect to the family by treating wife beating just as it would any other assault and by applying the same laws of self-defense and impaired capacity to the wife's self-help that it would apply generally. Regardless whether the legal treatment of cases involving married couples is identical to that of other cases, the particulars of that treatment will nevertheless affect the balance of power within a family. Given that husbands tend to be physically stronger than their wives and less socially conditioned against the use of violence, they will usually win a battle fought without

The second component of the attack on the private nature of the family is the claim that, even if the state could be neutral vis-à-vis the family, it in fact is not. The theory of the private family, it is argued, is not consistently carried out. Instead, the assertion that family affairs should be private has been made by men to prevent women and children from using state power to improve the conditions of their lives.⁵⁴ By insisting that the family should not be subject to state regulation, men have been able to retain their excessive power. Furthermore, men in fact use the coercive power of the state to reinforce and consolidate their authority over wives and children.

The argument that nonintervention serves to empower husbands to dominate their wives and children has been particularly useful in the attack upon the claimed neutrality of the state with respect to the family. During the first half of the

weapons. The husband's advantage is reduced when the wife has a gun or even a knife. Although statistically more husbands than wives kill their spouses, *see* Schneider, *supra* note 52, at 626, battered wives in general would probably benefit from a greatly expanded law of self-defense. In most families a relatively strong assault law and relatively weak homicide law would tend to shift power from the husband to the wife. Similarly, whether and how property is divided when a couple break up their household, and what value is placed on household services in quasi-contractual recovery, will affect the balance of power within most families. *See* Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101 (1976). In other words, the effect of state regulation upon the family is not dependent upon the state's singling out married people for any special treatment. The state provides the legal ground rules for human association, and these affect the social power of individuals and thus human interaction.

Furthermore, although some have called for the state to disestablish marriage or free itself from any juridical recognition of marriage, not even the strongest advocates of children's rights have suggested the total delegalization of parenthood. And without such total delegalization, the state will continue to affect the underlying relations of power and affection that influence family life, as it does, for example, through state custody law, which inevitably affects the power relations between parents.

⁵⁴ Traditionally, courts regarded wife beating as the husband's prerogative. *See* Bruno v. Codd, 90 Misc. 2d 1047, 1048, 396 N.Y.S.2d 974, 975 (Sup. Ct. 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979); 1 W. BLACKSTONE, COMMENTARIES *432-33; T. DAVIDSON, CONJUGAL CRIME 100-13 (1978); Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 138-39 (1977); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 177 & n.9 (1982). Even though wife beating is no longer explicitly condoned by law, various state officials may actively encourage such conduct through a policy of failing to enforce prohibitions of wife beating, a policy that empowers wife beaters to act with the acquiescence of the state. Often, police fail to respond to calls about wife beating or decline to arrest husbands; prosecutors take a lax stance; and judges refuse to convict or else give very light sentences upon conviction. *See* sources cited *supra* note 36.

nineteenth century, state neutrality meant the ratification and reinforcement of social roles within the family that were openly hierarchical. Husbands were expected to control their wives, and wives were expected to obey their husbands.⁵⁵ Nineteenth century feminists attacked the state for granting husbands sovereignty within the family, and asserted that the state itself was creating inequality when it endorsed separate social roles and realms of activities for the different members of the family.⁵⁶ According to Lucretia Mott, the subjugation of wives by husbands was not apostolic but was "done by law and public opinion."⁵⁷ Lucy Stone and Henry Blackwell protested that the marriage laws "confer[red] upon the husband an injurious and unnatural superiority, investing him with legal powers which no honorable man would exercise, and which no man should possess."⁵⁸

The feminist recognition that state empowerment of the husband enabled him to coerce the family finds a parallel in John Dawson's work on undue influence law,⁵⁹ which elaborates upon the basic contradiction that existed between different concepts of "freedom" in the late nineteenth century. Dawson explains:

On the one hand, doctrines of undue influence were attempting to "free" the individual by regulating the pressures that restricted individual choice; on the other hand, theories of economic individualism aimed at an entirely different kind of freedom, a freedom of the "market" from external regulation. It was not yet fully recognized that the freedom of the "market" was essentially a freedom of individuals and groups to coerce one another, with the power to coerce reinforced by agencies of the state itself.⁶⁰

⁵⁵ Children were also expected to obey their parents, and until recently, failure to observe this duty could result in incarceration for juvenile delinquency. See Katz & Teitelbaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1 (1977-1978).

⁵⁶ The Seneca Falls Declaration of 1848 charged that man had "usurped the prerogative of Jehovah himself" and had falsely claimed the right to assign to woman a particular sphere of action, whereas that right in fact "belong[ed] to her conscience and to her God." Declaration of Sentiments and Resolutions, Seneca Falls (July 19, 1848), reprinted in *FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS* 76, 80 (M. Schneir ed. 1972) [hereinafter cited as *FEMINISM*].

⁵⁷ L. Mott, *Not Christianity, but Priestcraft* (1854), reprinted in *FEMINISM*, *supra* note 56, at 101 (speech to the Woman's Rights Convention in Philadelphia).

⁵⁸ L. Stone & H. Blackwell, *Marriage of Lucy Stone Under Protest* (1855), reprinted in *FEMINISM*, *supra* note 56, at 104 (statement by Lucy Stone and Henry Blackwell, read and signed at their marriage).

⁵⁹ Dawson, *Economic Duress — An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

⁶⁰ *Id.* at 266.

The parallel with nineteenth century family law is striking. Family law doctrine aimed at "freeing" the individual members of a family from external regulation. Feminists argued, however, that this freedom was essentially a freedom of husbands to coerce wives, "with the power to coerce reinforced by agencies of the state itself."⁶¹

One response to feminist attacks on the claimed neutrality of the state was the gradual enactment of laws that seemed more neutral. During the late nineteenth century and the twentieth century, much of the law providing for juridical superiority of the male was replaced by statutes and court decisions providing for juridical equality.⁶² The effect of this legal change upon the actual subordination of women has been debated,⁶³ but what is of interest here is the extent to which the assertion of state neutrality between juridically equal husbands and wives is open to the same attacks as is the asserted state neutrality between juridically equal entrepreneurs and workers. The move toward legal equality does represent a change in the mode of explaining or denying the inferior status of women. It can be seen as a shift from a direct to an indirect mode of legitimating the subordination of women.⁶⁴ Just as the notion of different, essentially incomparable spheres had replaced the claim that God created women inferior to men,

⁶¹ *Id.*

⁶² See, e.g., 1 J. SCHOULER, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 4 (6th ed. 1921). Schouler observes:

There was in this country and England, during the latter part of the nineteenth century, a remarkable movement for giving the wife equal rights in all respects with the husband, which has been so far successful that it can almost be said now that the modern wife has a legal right which, fortunately for all of us, she does not exercise, to leave home in the morning and go to work, collect and keep her own wages and leave her husband to do the housework and take care of the babies.

Id. at 5.

⁶³ See, e.g., Powers, *supra* note 15, at 88-102.

⁶⁴ Women's inferior position is legitimated directly by claims that God or nature made women actually inferior. See, e.g., 1 *Corinthians* 11:3-11:16; 1 *Timothy* 2:8-2:15. It is legitimated indirectly by claims that women are equal in ability and that their inferior position is due to their own behavior. For a discussion of the conditioning that leads women to accept their inferior position, see Bem & Bem, *Homogenizing the American Woman: The Power of an Unconscious Ideology*, in FEMINIST FRAMEWORKS 6-23 (A. Jagger & P. Struhl eds. 1978); cf. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that racism and antidiscrimination law work to legitimate the inferior position of racial minorities). Another kind of indirect legitimation of women's inferiority treats the particular failure of an individual woman to achieve success as a personal shortcoming rather than a societal one, and thus directs her energy toward inward-looking solutions rather than social change.

so the notion of separate spheres was supplanted by the claim that men and women were actually equal.

C. Stage Theory Parallel — The “Lag Theory”

Our present ways of thinking and talking about the market and the family are deeply affected by the history of our ideas about these concepts. One idea that has had a powerful impact is the notion that the family is moving away from feudalism more slowly than the market is; the market has seemed to be the more progressive institution, leading the way toward modernization, while the family has followed a slower but parallel development. According to this “lag theory,” changes in the family reproduce but lag behind those in the market.⁶⁵ In our efforts to understand the lag theory and its effects on our current thinking,⁶⁶ it will be useful to examine popular beliefs about the historical stages of the market and of the family. It is not my goal to present a detailed account of the actual history of either institution. Rather, I will sketch out our conventional, somewhat simplistic, but nonetheless powerful beliefs about the historical development of the market and the family.

1. *Stages of the Market.* — During the feudal period, individuals were not expected to be equal.⁶⁷ Hierarchy was part of the natural order of things, and paying homage to superiors was as fitting as paying homage to God. Even if an individual might properly change his particular position in the existing hierarchy, to try to alter the hierarchy itself would be disgrace-

⁶⁵ There are many different explanations for why the family should lag behind the market; these vary from rather simplistic concepts of the family as part of the “superstructure” determined by the economic “base” of the market to less materialistic claims that the family captures and preserves past ideals to ease the path of change. See J. MITCHELL, *WOMAN’S ESTATE* 152–58 (1971). Such theories also range from loose notions that different institutions just happen to become liberalized at different times to beliefs that because the form of the family is determined by the market and the family exists to serve the market, the family will necessarily follow behind the market, as surely as a traditional Indian woman will follow two steps behind her husband. The important point here is not which of these explanations, if any, might be an accurate description of reality, nor even whether the lag theory is in general right or wrong, but rather the effect that the lag theory has upon our conception of market and family.

⁶⁶ For example, while the lag theory encourages reform of the family, it also reinforces our image of the family as a backward institution and sustains its devalued position. From the perspective of the lag theory, the market provides a model for improving the family.

⁶⁷ See R. SOUTHERN, *THE MAKING OF THE MIDDLE AGES* 98–117 (1953) (describing class structure in feudal society).

ful. Everyone was considered to have an interest in keeping inferiors and superiors in their places. The laws that reflected and maintained this hierarchy were not thought to undermine freedom. Law stood in opposition not to liberty but to will,⁶⁸ the higher one rose toward liberty, the more one was governed by law rather than by the arbitrary will of one's superiors. "High and low alike sought liberty by insisting on enlarging the number of rules under which they lived."⁶⁹

During this period there was no dichotomy between the state and civil society. The state was not seen to intervene in society, because it was not defined as something separate from society. Even when it became meaningful to talk about the state and society as independent entities, "state intervention" posed no special problem as long as the state reflected the hierarchy chosen by God. To the extent that the law accurately reflected the hierarchy and this hierarchy was considered legitimate, the law itself would be deemed legitimate.⁷⁰

This situation changed with the rise of the free market. Social and economic relationships lost their direct political character, and the state became something standing in opposition to civil society. Freedom came to be seen not as a condition dependent on laws,⁷¹ but rather as a quality inherent in man.⁷² The rules governing the hierarchy in society, which had protected people from the arbitrary will of their superiors, came to be considered "strangleholds on liberty."⁷³ Gradually these strangleholds were loosened, and the state seemed to withdraw from the marketplace. The primary role of law was then regarded to be protection of the rights of man, rights said to be shared equally by all.⁷⁴

Of course, juridical equality did not result in social or economic equality, and the state never completely left the

⁶⁸ See *id.* at 107-08.

⁶⁹ *Id.* at 108.

⁷⁰ See Kennedy, *Form and Substance*, *supra* note 19, at 1725.

⁷¹ See R. SOUTHERN, *supra* note 67, at 108.

⁷² For a discussion of the extent to which this ideology included women and of the ways in which early liberal thought understood gender distinctions, see S. OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 99-105, 197-230 (1979); see also *id.* at 106-94 (examining in detail Rousseau's ideas about women).

⁷³ R. SOUTHERN, *supra* note 67, at 108 (describing period before the "tedious gradations and irksome rules" of society came to be seen as "so many strangleholds on liberty").

⁷⁴ Slaves, women, children, and sometimes unpropertied men were excluded from the category "all." Often their exclusion was taken for granted and ignored, but some authors endeavored to justify, deny, or condemn it. See, e.g., J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 13-14 (J. Gough ed. 1952) (1st ed. London 1690) (justifying exclusion of slaves); *id.* at 30-44 (justifying exclusion of children); J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 188-210 (2d ed. 1874, 1967 printing) (justifying exclusion of women).

marketplace. The changes, however, were important. When men were said to be born equal, their subsequent inequality had to be explained or denied. Laissez-faire ideology either denied the inequality or particularized and privatized it. That some men were wealthier than others was attributable to their own efforts and to the laws of supply and demand. This explanation tended to place the onus of inequality upon its victims. Thus, the mode of legitimation shifted from a direct acknowledgment of pervasive hierarchy to an indirect justification of gross inequality among juridical equals.

The third stage of the market, which I will refer to as the welfare state, is characterized by the acknowledgment of state regulation of economic activity, including such legislative reforms as wage and hour laws, antitrust regulation, consumer protection provisions, and establishment of a national system of monetary control.⁷⁵ While the free market system was based on the idea that all men are equal and should be treated identically by the state, the welfare legislation of the late nineteenth century frequently singled out categories of people for special treatment. The relation of employer and employee, for example, was said to create certain noncontractual obligations on the part of the employer to protect his employees. Thus, statuses gave rise to various obligations that might be considered altruistic in that a particular relation would require forms of interaction not based on prospects for immediate individual gain.

Propagandists for the welfare state might suggest the following distinction: in the nineteenth century, men were treated as equals yet allowed to remain grossly unequal; in the twentieth century, the actual inequality was recognized, and through this recognition it became possible to design laws that tended to make people more equal in fact. Opponents of the welfare state have argued, however, that it is wrong to treat people unequally. Early in this century, for example, they claimed that the law demeaned workers by treating them as inferior beings unable to make labor contracts that would require them to work more than ten hours a day⁷⁶ or would prohibit them from joining a union.⁷⁷

In the welfare state, the way that actual inequality and oppression are justified and legitimated differs somewhat from

⁷⁵ I am not using the term "welfare state" in its narrow, modern sense to refer to a system of bureaucratized cash transfer payments from the government to needy individuals. Rather, by welfare state I mean the market system that replaced the free market of the 19th century. See K. POLANYI, *THE GREAT TRANSFORMATION* 223-36 (1944).

⁷⁶ See *Lochner v. New York*, 198 U.S. 45, 57 (1905).

⁷⁷ See *Coppage v. Kansas*, 236 U.S. 1 (1915).

the way they were by laissez-faire theory. The state is still seen as something standing in stark opposition to the individual, but now its role is more than just to legalize or moderate the individual's interaction with others. The state is also seen to have a redistributive function and to protect individuals against severe adversity. The legitimacy of the state is in part dependent upon the belief that the state has provided all the protection necessary and has carried out as much redistribution as it can without causing more harm than good.⁷⁸

Thus, unlike the free market, the welfare state rejects non-intervention and enacts remedial legislation that takes account of people's economic stations. Unlike the feudal system, the welfare state rejects explicit hierarchy and envisions the state regulating society to promote equality.

2. *Stages of the Family.* — Just as the feudal state was not perceived to be clearly separate from civil society, the feudal family was not perceived to be separate from the rest of economic life;⁷⁹ there was no dichotomy between the market and the family. The hierarchical family was an integral part of hierarchical society. Family life was highly regulated by a complex system of rules and laws,⁸⁰ many of which continued to operate as civil society was separated from the state and as the family was separated from the market. Well into the nineteenth century, the family was still openly and juridically hierarchical.

In the next stage of the family's development, the notion of separate spheres for men and women provided a kind of middle ground between traditional hierarchy and juridical equality. Women were said to be different, not inferior. During this stage, women began to gain greater juridical equality. The woman's sphere was gradually expanded to include in some cases the "external relations" of the family, which had previously been assigned to men. Around the middle of the nineteenth century, states began enacting married women's property acts, and mothers were sometimes said to have an equal right to the custody of children.⁸¹

⁷⁸ See N. FURNISS & T. TILTON, *THE CASE FOR THE WELFARE STATE* (1977).

⁷⁹ See J. FLANDRIN, *FAMILIES IN FORMER TIMES 1-2* (1979).

⁸⁰ Although we would consider much of this regulation of the family to be a product of the church rather than the state — in England, for example, most matters relating to the family were handled by the ecclesiastical courts until the 19th century — such a distinction would have been largely meaningless in the feudal period because of the integration of church and state. To the extent that a distinction could be drawn, however, the amount of regulation attributable to the state rather than the church was still considerable. See E. SHORTER, *THE MAKING OF THE MODERN FAMILY 44-53* (1975).

⁸¹ See *Miller v. Morrison*, 43 Kan. 446, 23 P. 612 (1890) (holding that parents have equal and joint right to custody of child and asserting that tendency in state

The liberalization of the family was marked by shifts toward equal juridical rights and the withdrawal of the state. This trend has continued to the present, with the family coming to assume more of the characteristics associated with the free market. The juridical superiority of men over women and of parents over children has been steadily eroded. Moreover, state withdrawal from the family has continued in many areas. Restrictions on divorce have steadily decreased, and courts have been increasingly willing to allow parties to regulate their marriages by contract rather than have the state prescribe the incidents of the marriage relation.⁸² Recent Supreme Court cases tend to remove the state from regulation of procreation decisions and of married people's sexual relations with each other or with third parties.⁸³

As this liberalization has taken place, however, we have also entered the latest stage — the regulated family. As early as the nineteenth century, for example, courts began using the power to decide child custody cases⁸⁴ and to grant divorces⁸⁵ as a means of regulating the marital behavior of husbands and

had always been "toward an exact equality among [sic] the sexes under the law"); *English v. English*, 32 N.J. Eq. 738 (1880) (determining custody on basis of child's best interests, not superior common law rights of father); *Commonwealth ex rel. Myers v. Myers*, 18 Pa. C. 385 (1896) (applying state's equal guardianship statute); *cf. Hewitt v. Long*, 76 Ill. 399 (1875) (criticizing "arrogance" of the common law right of fatherhood and asserting that mothers' rights will not be disregarded); *McShan v. McShan*, 56 Miss. 413 (1879) (asserting that fathers' superior rights to custody are not absolute; court will look into entire circumstances).

⁸² See Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 280-86 (1982).

⁸³ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (striking down state bans on distribution of contraceptives by nonpharmacists and on advertising of contraceptives); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (limiting state power to regulate abortions); *Roe v. Wade*, 410 U.S. 113 (1973) (striking down state ban on abortions); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down state ban on distribution of contraceptives to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down state law forbidding use of contraceptives by married persons). See generally *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1296-1308 (1980) (surveying decisions on procreative rights) [hereinafter cited as *Developments*]; Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 719-38 (1973) (surveying challenges to state interference with private sexual behavior).

⁸⁴ See *Commonwealth v. Briggs*, 33 Mass. 203 (1834) (ordering custody of child shifted from wife to husband to avoid "sanctioning" wife's unauthorized separation from husband); *People ex rel. Brooks v. Brooks*, 35 Barb. 85 (N.Y. App. Div. 1861) (refusing to apply equal parental guardianship statute when wife was found to have left husband without just cause); *cf. Commonwealth ex rel. Myers v. Myers*, 18 Pa. C. 385 (1896) (criticizing equal guardianship statute for removing from courts the power to use custody decision to control marital behavior of wife). *But see Allen v. Affleck*, 10 Daly 509 (N.Y. Ct. Common Pleas 1882) (arguing that custody law should not be used to coerce unwilling husband and wife to live together).

⁸⁵ This indirect regulation had both ideological and practical components. As a

wives. Near the beginning of the twentieth century,⁸⁶ child labor legislation and compulsory school laws significantly affected the control parents had over their children. In the latest stage of the family, as in the welfare state stage of the market, state policies commonly single out particular groups of people for special treatment. Regulation of the family continues to the present day, and legislation now offers protection to wives as well as children.⁸⁷ Many of the provisions that states have passed to deal with battered wives, for example, involve granting the wives remedial rights against their husbands, rights of a kind that would not be allowed against a third party.⁸⁸

3. *The Market as the Basis for a Critique of the Family.*

— The suffragists and other nineteenth century critics of family relations often looked to the progressive features of the contemporary market to garner material for their critique. The market ideology of equal rights and opportunity was turned against the structures and legal provisions that denied women juridical equality and offered them only limited opportunities. Elizabeth Cady Stanton told the New York legislature that “burning indignation” fills a woman’s soul when she “turns over the pages of your statute books, and sees there how like feudal barons you freemen hold your women.”⁸⁹ In the same way that serfs were subject to the arbitrary will of their masters, wives were all too subject to the arbitrary will of their husbands. Feminists demanded that wives be freed from such subordination. Stanton urged the legislature to stop treating marriage as “a kind of half-human, half-divine institution.” If

practical matter, certain behavior could be deterred by allowing a divorce against the offending spouse. This was particularly significant for women (given that a wife might be denied alimony if a divorce were granted against her), as well as for spouses who wished to keep reluctant partners in the bonds of marriage for whatever reason. Ideologically, the inclusion of particular behavior as a ground for divorce was a societal statement of disapproval of the conduct. For example, making cruelty a ground for divorce was an important step beyond withdrawing explicit approval of a husband’s disciplining of his wife.

⁸⁶ Direct state regulation of poor families began much earlier than regulation of wealthy families. For example, in the 18th and 19th centuries, poor children could be and often were apprenticed out regardless of the wishes of their parents. See TenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257, 271–81, 295 (1964).

⁸⁷ See Note, *Domestic Violence: Legislative and Judicial Remedies*, 2 HARV. WOMEN’S L.J. 167, 169–73 (1979). For an example of such legislation, see MASS. GEN. LAWS ANN. ch. 209A (West Supp. 1983).

⁸⁸ See *People v. Cameron*, 53 Cal. App. 3d 786, 790–97, 126 Cal. Rptr. 44, 46–51 (1975).

⁸⁹ Address by Elizabeth Cady Stanton to the New York State Legislature (1860), reprinted in FEMINISM, *supra* note 56, at 115.

marriage was to be viewed as a civil contract, she urged, "let it be subject to the same laws which control all other contracts."⁹⁰

In an essay published in 1851, Harriet Taylor Mill elaborated upon the notion that progress in family relations lags behind economic progress.⁹¹ She argued that the world had just begun to "cast off injustice": "It is only now getting rid of monarchical despotism" and "hereditary feudal nobility."⁹² She continued:

Can we wonder that it has not yet done as much for women? As society was constituted until the last few generations, inequality was its very basis; association grounded on equal rights scarcely existed; to be equals was to be enemies; two persons could hardly co-operate in anything, or meet in any amicable relation, without the law's appointing that one of them should be the superior of the other. Mankind have outgrown this state, and all things now tend to substitute, as the general principle of human relations, a just equality, instead of the dominion of the strongest. But of all relations, that between men and women being the nearest and most intimate, and connected with the greatest number of strong emotions, was sure to be the last to throw off the old rule and receive the new⁹³

In the twentieth century, feminists have continued to raise claims of individual freedom against more traditional "family" values. Feminist demands for emancipation have been channelled into assertions of the individual rights associated with the free market. The focus of liberal reforms on individualism and on the rights of women and children to pursue their self-interest has to some extent made family relations resemble market relations.⁹⁴

Nineteenth century feminists attacked the feudal nature of the private family; similarly, an important strand in current feminist literature attacks the laissez-faire attitude toward the liberal family.⁹⁵ Juridical equality by itself is perceived to be inadequate to alleviate actual conditions of dominance and subordination. Much as the free operation of the market was

⁹⁰ *Id.*, reprinted in FEMINISM, *supra* note 56, at 113.

⁹¹ See H.T. MILL, *Enfranchisement of Women*, in J.S. MILL & H.T. MILL, *ESSAYS ON SEX EQUALITY* 89, 99-100 (A. Rossi ed. 1970).

⁹² *Id.* at 99.

⁹³ *Id.* at 99-100.

⁹⁴ For a complaint that the "economic rationality" of the capitalist market has pushed its way into family relations, see C. LASCH, *HAVEN IN A HEARTLESS WORLD* 36 (1977).

⁹⁵ See sources cited *supra* note 49.

said to lead to unacceptable results, so too the free operation of the family is said to lead to domination and oppression.⁹⁶ Many of the legislative proposals for employing state apparatuses to improve conditions for women are based on a legislative recognition of this actual inequality and may be said to involve treating men and women unequally. In short, the same kind of state intervention and special remedial legislation that moved the market toward a welfare state is called for by some feminist critics of the modern family. Furthermore, the free market ideal of the abstract, independent, equal individual is now coming under feminist attack,⁹⁷ just as it came under progressive attack by market reformers over half a century ago.

Thus, it could be said that during the nineteenth century the free market provided an ideological base from which to attack the family as "feudal," whereas in the twentieth century the welfare state provides a base from which to attack the family as asocial and in fact unequal. In the nineteenth century, efforts to support individualism and juridical equality in the family were considered progressive; in the twentieth century attacks similar to those made on the laissez-faire market over fifty years ago have pushed the family in the direction of becoming a welfare state institution. In both cases the market has provided a model, and one effect of the reform efforts has been state regulation tending to make the family more like the market.

D. Alternative Picture: The Negation Theory

1. *The Radical Opposition of Market and Family.* — A limitation of the lag theory is its failure to account for a different kind of relationship between the marketplace and the family — a relationship of negation. During the nineteenth century, when the marketplace and the family were both becoming "private," they were seen to exist in radical opposition to each other. The marketplace was considered competitive; the family, cooperative. The marketplace was the arena in which individuals were supposed to be most free to pursue their own interests without being responsible for the effects of their behavior on others. Indeed, an important tenet of liberal ideology was that self-interested behavior in the marketplace not only was acceptable, but also benefited society in general.

⁹⁶ See *id.*

⁹⁷ See Easton, *supra* note 49, at 29–34, reprinted in HERITAGE, *supra* note 49, at 571–75.

The marketplace was animated by an individualist ethic; to act selflessly was considered foolish as well as unnecessary.

In contrast, the family was based on the ethic of altruism. Marriage was seen as a decision to share a life together, and the common goals of family life were supposed to supersede the egoistic goals of individual members of the family. Neither husband nor wife was expected to pursue selfish interests over interests of the other. Sharing and self-sacrifice were considered appropriate family behavior.⁹⁸

The opposite ethics of individualism and altruism were accompanied by opposite images of the proper role of the state in the market and in the family. The maintenance of the private marketplace was believed to require the state to limit and direct its own action in order to maximize the opportunity of individuals to enter into whatever contracts they might wish to form. The expression of the will of the contracting parties was supposed to define the terms of the parties' relations; the state was not to tamper with these terms but was to treat each individual as an abstract equal. At the same time, the state was expected to enforce relations that were considered to be voluntarily defined by individuals through their contracts. In this sense, the arena of the marketplace was fully legalized, and the terms dictated by the will of the parties were enforceable by the power of the state through the courts.⁹⁹ The coercive apparatus of the state could be called upon to protect each individual from the crimes, torts, and breaches of contract committed in the market.

Within the family, however, privatization meant delegatization. The state refused to give legal effect to any effort by the parties to define the rights, duties, and liabilities of their own marriage. Once a man and a woman were married, they could no longer enter enforceable contracts with each other.¹⁰⁰ Within the family, privatization created a limited "state of nature," in which the state refused to protect one family member from the harmful acts of any other family member. These

⁹⁸ For a classic view of this type of family, see L. ALCOTT, *LITTLE WOMEN* (Boston 1868).

⁹⁹ See Pound, *The End of Law as Developed In Juristic Thought* (pt. 2), 30 HARV. L. REV. 201, 203, 210 (1917) (discussing theory that law gradually progresses toward a system of individual liberty in which "rights, duties and liabilities flow from voluntary action").

¹⁰⁰ See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 7.1, at 220 (1968). Nor could they alter the terms of the marriage relationship by antenuptial agreement. See, e.g., *French v. McAnarney*, 290 Mass. 544, 195 N.E. 714 (1935) (holding void as against public policy wife's contract to forego any provisions for her own support in return for husband's agreement to recognize their illegitimate child).

refusals were an important part of what it meant for the family to be private and for the state not to intervene in the family relationship. It was generally not considered state intrusion, however, when the state undertook to define the marriage relation and to enforce the roles it decided each family member would fill. The notion that the family was private did not mean that the members should determine their own roles and be able to rely on state enforcement of these roles. Rather, in the private family, the individual's only choice concerned whom to marry; individualism was then to be replaced with state-defined altruism.

Thus, the marketplace was said to be left alone by the state if courts blindly enforced contracts and refused to make any independent judgment of the equities in the existing relationship between the parties. In contrast, the family was said to be left alone by the state if courts flatly refused to enforce contracts between its members and insisted on authoritatively defining family relationships. Market legalization and family delegalization both avoided detailed state investigation and ad hoc readjustments, but they did so in opposite ways. As the market became "private," the state withdrew its controls over the individualism of that sphere. In contrast, the state treated the family as "private" by trusting to the altruistic principles thought to animate family life.

2. *Qualification of Radical Opposition.* — The image of an individualistic market opposed to an altruistic family was not, of course, a true picture of reality, and even the ideals of the marketplace and the family were more complex than this sketch would make them seem. Despite the claims of state withdrawal from the marketplace, there was an irreducible element of altruism in market relations; and despite claims of sharing within the family, there was always an irreducible element of self-interest in family relations.

The assumption that in the marketplace one should look only to one's own self-interest has always been qualified in practice. Market participants sometimes explain and justify their self-interested behavior as the unfortunate result of the pressures of the market; these claims of "altruism," whether believed or not, abound in the marketplace.¹⁰¹ Moreover, the

¹⁰¹ When an employer refuses a requested wage increase, he is more likely to point to competitive pressures than merely to assert that he will pay no more because he can get other workers for the lower price. The "altruism" that leads the employer to believe that he owes his workers an explanation for his actions can be considered simply a more enlightened version of self-interest. For an elaboration of the meaning of "altruism" as I am using the word, see Kennedy, *Form and Substance*, *supra* note 19, at 1717 & n.79.

very fact that the market is legalized — which is to say that the state enforces contract and tort law — requires that, although market relations are claimed to be defined solely by the autonomous wills of individuals, the courts will inevitably participate in the definition of market relations. Any such legalization is in an important sense altruistic.¹⁰²

Similarly, the family was not really an altruistic institution of sharing and mutual sacrifice. Rather, it was patriarchal, and whatever sacrifice was made was often one sided. Women were said to be disinterested simply because they lacked the means for self-seeking.¹⁰³ They were economically dependent upon their husbands, and until the midcentury passage of married women's property acts, whatever property or earnings women received belonged to their husbands.¹⁰⁴ Men supported their wives and children but were free to decide how much support to provide beyond a bare subsistence level.¹⁰⁵

Furthermore, the delegalized family was much like the marketplace. Women had to marry for economic security, and thus the very act of creating a new family was a kind of market transaction.¹⁰⁶ More basically, delegalization of the family carried with it the same internal contradiction from

¹⁰² See *id.* at 1717-22. As Durkheim pointed out half a century ago, the recognition and guaranteeing of any rights among people is necessarily a form of solidarity; and this enforcement has an altruistic element that cannot be reduced to enlightened individualism. See E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 121-22 (A. Simpson trans. 1933). The laws against theft can be seen as state protection for the owner who fails to act effectively in her own self-interest. Tort law similarly protects the victim who fails to look out for herself, and forces the actor to consider the losses his behavior may cause to his victim. Even the enforcement of a contract by the state protects the party who fails to provide her own protection against breach, and it forces the breaching party to compensate the victim for her losses.

¹⁰³ See N. COTT, *supra* note 4, at 20-21.

¹⁰⁴ This rule was modified by the equity courts, which enabled wealthy families to settle property upon their female members, but the modification did not affect the rule that the husband owned the wife's services and income. See H. CLARK, *supra* note 100, § 7.1, at 219-21.

¹⁰⁵ See, e.g., *McGuire v. McGuire*, 157 Neb. 226, 238, 59 N.W.2d 336 (1953) ("As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife.").

¹⁰⁶ Lucy Stone condemned the "horrible perversion of the marriage relation" caused by women's economic dependence. Extemporaneous remarks by Lucy Stone, National Woman's Rights Convention (1855), reprinted in *FEMINISM*, *supra* note 56, at 108.

Jane Austen's novels tried to create a morality that would comprehend the existence of a marriage market and prevent that market from corrupting the notions of love and affection. The women who advanced socially by marriage are deserving (Elizabeth and Jane Bennet in *Pride and Prejudice* and Jane Fairfax in *Emma*), and women who married for wealth without affection are condemned or pitied (Maria Bertram in *Mansfield Park* and Charlotte Lucas in *Pride and Prejudice*). See J. AUSTEN, *EMMA* (London 1816); J. AUSTEN, *MANSFIELD PARK* (London 1814); J. AUSTEN, *PRIDE AND PREJUDICE* (London 1813).

which legalization of the marketplace suffered. Delegalization creates only a limited "state of nature"; once the state undertakes to define the marriage relation, it is impossible for the state to refuse to engage in some enforcement of the individual will of the parties. Activities by the state necessarily encourage or discourage particular individual conduct that readjusts family relations in accordance with the self-interested behavior of the parties. For example, the state might refrain from hearing tort complaints between members of a family and might decriminalize most intrafamilial behavior, but it has never been willing to carry "nonintervention" to the point of providing a spousal exemption from the murder laws.¹⁰⁷

3. *Interdependency of Market and Family.* — Although people considered the market and family to be in radical opposition to each other, they also believed that the strength of each sphere was dependent upon the existence of the other and that each sphere gained legitimacy from the presence of the other. The marketplace was acceptable in part because it was not the only sphere; there was also the family. The ideology of the private family provided reassurance that certain traditional human values would not be lost to society when they were banished from the market. The family offered men an altruistic motive and justification for carrying on their individualistic struggles in the marketplace. It also offered men compensation for their suffering in the debasing world¹⁰⁸ and thus reduced resistance to the increasing dehumanization of the market.

The existence of the free market made the constraints of family life more acceptable to both men and women. The marketplace provided images of freedom and of danger. The images of danger made the marketplace a fearsome alternative to the home and thus tended to reconcile women to being consigned to their own sphere. Further, such images provided men with a chivalrous justification for excluding women from the male sphere. At the same time, the freedom of the marketplace, whether actual or imaginary, made it easier for men to tolerate the confining aspects of family life.

4. *Using the Family to Critique the Market.* — In addition to questioning the possibility and reality of a laissez-faire system, critics of the market used the altruistic values of the

¹⁰⁷ Spousal status has, however, been relevant: the murder of a husband used to be punished with particular severity as a form of treason, whereas the murder of an adulterous wife was allowed under particular circumstances, either by written law or by the law as it was enforced.

¹⁰⁸ See J. MITCHELL, *supra* note 65, at 154.

family to attack market values.¹⁰⁹ Cooperation was urged against competition, and community against individualism. The self-interested individual was not considered a whole person, much less an ideal. Because it was said that in the marketplace the public good was neglected for the sake of private gain, some observers argued that the state had to regulate the private rights of stronger actors in order to prevent them from dominating weaker actors. Without state regulation, they warned, the market would undermine human values even while it appeared to promote freedom and individual rights.

As well as providing a basis for a direct critique of the market, images from the family were used within the marketplace to improve inhumane market conditions — or at least to appear to do so. Among the best-known attempts to appropriate the ideology of the family for the market was the project undertaken by George Pullman at his sleeping-car factory in Illinois. Pullman built a company town for his workers and tried to fashion it into a stable patriarchal community with himself as the authority figure.¹¹⁰ The literature on the project stressed family values, and Pullman adopted an openly paternalistic attitude toward his workers. Regardless of their success or failure,¹¹¹ such experiments are significant as efforts to appropriate to the marketplace the values and images of the family.

5. *The Private Family and the Welfare State Distinguished from Feudalism.* — Although the private family of the nineteenth century could seem “feudal,” it was also an important element of liberal society. The market and the family together created a complex structure in which each influenced and defined the other. The appropriation to the market of values and images from the family may similarly seem “feudal,” but

¹⁰⁹ While the lag theory focuses on the market as a model for the family, *see supra* pp. 1513–20 & n.66, the negation theory sees the market and family as each providing a model for the other. To the extent that the family has provided the basis for a critique of the market, the lag theory by itself inadequately captures our understanding of the relation between the market and the family.

¹¹⁰ *See* S. LENS, *THE LABOR WARS* 80, 86–87 (1973). Another well known effort to appropriate the values of the family to the market came to be known as the “Lowell Factory System.” It was established in the 1820’s when textile mill owners recruited the daughters of New England farmers to operate the mills. *See* H. ROBINSON, *LOOM AND SPINDLE* 7 (1898). The owners established an atmosphere of propriety by requiring the young females to live in special boarding houses staffed by mature Christian women, and tried in general to “exercise a paternal influence over the lives of their operatives.” *Id.* at 7, 79–80.

¹¹¹ *See* R. SENNETT, *AUTHORITY* 62–74 (1980) (describing the failure of Pullman’s plans); Addams, *A Modern Lear*, 29 *SURV. MAG.* 131 (1912) (describing Pullman’s failures and comparing him to King Lear), *quoted in* R. SENNETT, *supra*, at 67–69.

once again, the situation is more complicated. The paternalistic or group-based ideals that find expression in the social provisions of the welfare state do represent the penetration of family ideals into the marketplace¹¹² and cannot adequately be explained as a kind of return to feudalism; they are not just residual feudal values that were preserved in the family.

It is quite true that conservative social reformers often appealed to the values of feudalism in their attacks upon industrial capitalism. Feudal society was sometimes used as a model for criticizing the narrow self-interest and lack of social responsibility ascribed to early industrialists and blamed upon the system of capitalism. Members of "Young England" — the renegade Tories led by Disraeli during Sir Robert Peel's ministry — are said to have "preached a kind of revived and spiritualized feudalism."¹¹³

Similarly, Roscoe Pound described the welfare state of 1930 as a "new feudal system."¹¹⁴ He suggested that the kind of relational society characteristic of feudalism had replaced or was in the process of replacing the individualistic society that had characterized the early period of local economic self-sufficiency in America. The typical laborer or businessman was not an isolated individual who freely competed; rather, he worked for a corporation to which he owed services and from which he received protection. Individual businesses were merging into ever-larger corporations and bringing about what Pound referred to as a "feudal organization of businesses."¹¹⁵ Society increasingly was ordered not around isolated competing individuals and their rights, but rather around relations involving reciprocal duties of service and protection.

The ideology of the welfare state, however, cannot be reduced to feudalism. Pound himself recognized that we would never "exactly" return to a feudal organization of society.¹¹⁶ In contrast with feudal society, the welfare state is based on government control and espouses an ideology of equality. The state undertakes to regulate the market and justifies this regulation primarily on the ground that it will protect the citizenry and promote equality. In feudalism it could not be imagined that the state might reform civil society, because the state was not seen to be separate from civil society. Furthermore, feu-

¹¹² Lag and negation are not competing theories. Each is an important way of understanding how we think about the family and the market, although neither completely captures our ideas.

¹¹³ P. SMITH, *DISRAELIAN CONSERVATISM AND SOCIAL REFORM* 8 (1967).

¹¹⁴ Pound, *The New Feudal System*, 35 *COMM. L.J.* 397, 397 (1930).

¹¹⁵ *Id.* at 402.

¹¹⁶ *See id.* at 403.

dalism was intentionally hierarchical; feudal society did not subscribe to the belief that people were or should be equal.

These two differences are particularly important with respect to the dichotomy between state and civil society. Although state and civil society might seem to have interpenetrated each other in the welfare state, the distinction between the two is as great as or greater than ever. Some conservatives complain that the state has taken over the market, whereas certain revisionists argue that the welfare state was created by powerful entrepreneurs who already controlled the market and who captured the apparatus of the state and utilized it to regulate the market in their private interests.¹¹⁷ Nevertheless, the dichotomy between the state and the market (civil society) remains and plays a vital justificatory role in maintaining the status quo.

In the same way that free market ideology tended to legitimate the status quo by asserting the juridical equality of all individuals, welfare state ideology legitimates the status quo by claiming to promote the maximum equality consistent with the general welfare of society.¹¹⁸ A crucial element of welfare state ideology is the limit placed upon the state's activities. Civil society is never swallowed up or overcome by the state; the state always stops short of public ownership of the means of production or public control of investment decisions.

E. Summary

With the decline of feudalism there arose the dichotomies between the state and civil society and between the market and the family. The free market combined an egalitarian ideology with an individualistic ethic. The private family com-

¹¹⁷ See, e.g., G. KOLKO, *THE TRIUMPH OF CONSERVATISM* 2-10 (1963) ("[R]egulation . . . was invariably controlled by leaders of the regulated industry, and directed toward ends they deemed acceptable or desirable.").

¹¹⁸ The critique of the reality and coherence of the free market has had two distinct and somewhat incompatible elements. See *supra* pp. 1508-09. The first is the claim that the state cannot be independent from civil society but is deeply implicated in the domination and hierarchies that characterize civil society. This element of the critique is subversive of the dichotomy between state and civil society. The second element, which supports the dichotomy, is the assertion that the state is not in fact neutral but rather favors entrepreneurs over workers.

It is the second element of the critique, and only the second element, that is addressed by the welfare state. Certain of the inequalities of civil society are said to be addressed by the state and to be moderated by it. For example, the welfare state claims to reverse the bias that existed against workers, through legislation that specifically protects workers against the exploitation possible in the free market.

bined a hierarchical ideology with an altruistic ethic. In both the market and the family, state activity has tended to moderate these characteristics. Welfare state reforms in the market have reduced individualism while promoting a new kind of hierarchy. Regulation of the family has undermined the hierarchical ideology and at the same time promoted individualism.

The market and the family reflect a parallel development with respect to the dichotomy between state and civil society. The ideologies of both the free market and the family tried to legitimate actual inequality by emphasizing the equality of all with respect to the state. Inequality was said to result from the private relations among people and was thus a natural attribute of civil society rather than the responsibility of the state. It is currently asserted that the state is promoting as much equality as it reasonably can in both the family and the marketplace and that any remaining inequality is a private or particularized matter.

The market and the family also relate to each other inversely. While the values of the market provide the basis for a critique of the family, the values of the family provide the basis for a critique of the market. The state intervenes in the market to make it more like the family, and in the family to make it more like the market.

Viewed from a perspective that favors democratic, intersubjective relations, these state interventions have two distinct effects. Intervention in the market is desirable insofar as it promotes altruism, but is undesirable insofar as it takes the form of the family hierarchy and legitimates and particularizes inequality instead of eliminating it. The state steps in to protect workers; the workers do not assert their own control through local organization and consolidation of power.¹¹⁹ Similarly, intervention in the family is desirable insofar as it promotes women's claims for greater power and tends to undermine formal family hierarchy; it is undesirable insofar as it promotes individualism and particularizes and legitimates hierarchy rather than eliminates it. Intervention exposes family members to market exploitation. Further, it entails the state's stepping in to equalize the results of family interaction; it does not democratize the family.

¹¹⁹ The family offered the model for safe, contained reform of the market system. Radical proposals would have abolished the dichotomy between state and civil society; a reformist program was developed that kept this dichotomy in place by utilizing the dichotomy between market and family. In very important ways, the welfare state is paternalistic rather than democratic.

II. IDEOLOGY AND LEGAL REFORM

The dichotomization of market and family pervades our thinking, our language, and our culture. It limits and impoverishes the ways we experience our affective and productive lives, the possibilities we can imagine for restructuring our shared existence, and the manner in which we attempt change.

A wide variety of reforms aimed at improving the lives of women have been undertaken in the last two centuries. The reform efforts discussed in this Part are familiar, as are their successes and failures. Less familiar are the reasons the reforms have not been more successful — the reasons they have damaged as well as improved women's lives. By approaching this issue from the perspective of the dichotomization of market and family, I hope to cast new light on the attempts at reform and their mixed results.

Reformers who have sought to improve the status of women have tried reforming the family either (1) to promote equality within the family, or (2) to encourage husbands to behave altruistically toward their wives. Reformers have tried to improve the status of women in the market either (1) by requiring market actors to deal equally with women and men, or (2) by making the market more responsive to the needs of women. These four categories of reforms can be described more generally in market/family terms as efforts, respectively, to make the family more like the market, to make the family more like the ideal family, to make the market more like the ideal market, and to make the market more like the family.

Despite its simplicity, this conceptual scheme has considerable descriptive and analytic power. First, the extent to which the four categories capture the broad contours of reform efforts is striking and suggests that insight may be gained from considering such efforts in relation to the dichotomy between market and family. Second, when the reforms are examined from this perspective, a pattern in their successes and failures emerges. The reforms that make the market more like the ideal market or the family more like the ideal family tend to eliminate imperfections in each institution, but as long as we view market and family as a dichotomy, our ideal images of market and family will remain incomplete and unsatisfactory. The failures characteristic of the market sabotage the market reforms, and the failures characteristic of the family sabotage the family reforms.

The reforms that make the family more like the market and the market more like the family likewise do not overcome the dichotomy between market and family, but presuppose it.

Although these reforms might appear to be a step toward transcending the market/family dichotomy, experience with such reforms suggests a persistent tendency simply to reproduce in each sphere the failures as well as the successes of the other. The market/family dichotomy is left intact; the effect of the reforms is less to overcome the dichotomy than simply to reposition it within each sphere. Thus, the successes of reforms designed to make the family more like the market are the successes of the market: they increase freedom and equality. Likewise, the failures of such reforms are the failures of the market: first, the equality promoted by the reforms is juridical equality, which at best is inadequate and at worst legitimates the unequal results that characterize marketplace equality; second, the reforms are based on market individualism, which discounts communal ties and promotes isolation. Similarly, reforms that use the family as a model to improve the market reflect the flaws as well as the virtues of the family. The reforms are successful insofar as they moderate the destructive effects of market individualism, but the altruism with which they would replace it is deeply tied to hierarchy and is ultimately unsatisfactory.

The link between equality and individualism on one hand, and altruism and hierarchy on the other — a link that plagues reforms of the family and of the market — poses a central problem for efforts to improve the lives of women. The analysis presented in this Part does not provide a formula for making reforms more effective, nor does it map out alternative reform strategies. Instead, this Part attempts a fresh look at reform efforts from the perspective of the dichotomization of market and family, in order both to understand the nature of the problem and to lay a foundation for transcending it.

A. Strategies for Improving the Status of Women by Reforming the Family

Family reforms aimed at improving women's status tend either to encourage the family to emulate the egalitarianism of the market, or to protect the family from the selfish, individualistic tendencies of the market and to encourage husbands to treat wives better.

1. *Greater Equality via the Market Critique.* — (a) *Independence and Equality.* — Blackstone's well-known aphorism about the suspension of the wife's legal existence during marriage¹²⁰ found support in early common law provisions

¹²⁰ See 1 W. BLACKSTONE, *supra* note 54, at *430.

that appeared to merge the wife's legal personality into the husband's.¹²¹ Any property to which a woman held legal title passed to her husband upon marriage, and the husband was entitled to any wages the wife earned during the marriage. A married woman could not enter into contracts or execute a will; her husband was responsible for her torts and, if he had been present, for her crimes. A husband was entitled to "chastise" his wife, to rape her,¹²² and to force her to stay in his home. Ordinarily a wife could not testify in court against her husband. The husband had complete guardianship rights over the children. Once a woman married, she could not divorce, and only in extreme circumstances would she be authorized to live apart from her husband.¹²³

Reformers condemned these provisions for being feudal and oppressive, and worked to develop for the married woman a legal personality and existence separate from her husband's. They persuaded courts to qualify the father's superior guardianship rights over his children,¹²⁴ to multiply the exceptional circumstances authorizing a woman to separate from her husband, and to receive testimony of wives against husbands in certain situations.¹²⁵ Equity courts developed forms of property ownership that enabled wealthy families to establish estates for their daughters.¹²⁶ Around the middle of the nineteenth century, several states adopted married women's property acts that allowed women to own property, conduct business, enter into contracts, sue and be sued, and keep any wages they might earn.¹²⁷

¹²¹ For a brief general description of the legal status of wives, see H. CLARK, *supra* note 100, § 7.1, at 219-22.

¹²² See Woodhull, *The Elixir of Life*, in FEMINISM, *supra* note 56, at 152-54; see also L. GORDON, WOMAN'S BODY, WOMAN'S RIGHT 103-06 (1976) (discussing early feminists' struggle to establish a wife's right to refuse sex).

¹²³ See B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 561-63 (1975) (citing sources).

¹²⁴ See, e.g., *State v. Smith*, 6 Me. 462 (1830); *State v. Stigall*, 22 N.J.L. 286 (1849); see also F. Olsen, *supra* note 30 (tracing the history of reformers' efforts to qualify father's guardianship rights).

¹²⁵ See *People v. Mercein*, 8 Paige Ch. 47, 52 (N.Y. 1839) (discussing whether the exception permitting a woman to testify against her husband regarding violence directed at her should be extended to allow her to submit an affidavit regarding the husband's unfitness to have custody of their child), *rev'd*, 25 Wend. 63, 73 (N.Y. Sup. Ct.), *rev'd*, 25 Wend. 83 (N.Y. 1840).

¹²⁶ See H. CLARK, *supra* note 100, § 7.1, at 221-22; Warren, *Husband's Rights to Wife's Services*, 38 HARV. L. REV. 421, 422 (1925).

¹²⁷ See H. CLARK, *supra* note 100, § 7.2, at 222 & n.4; Warren, *supra* note 126, at 422-28, 433-46. Although there has been some debate over whether the statutes were intended to improve the status of women, see L. FRIEDMAN, A HISTORY OF AMERICAN LAW 186 (1973); O'Neill, *Introduction to THE WOMAN MOVEMENT* 21 (W. O'Neill ed. 1969), feminists of the time supported the acts on the grounds that

Reforms establishing the wife's independent and equal existence have continued to the present day¹²⁸ and have benefited women in a number of ways. They have promoted equality for women in marriages by undermining the legitimacy of family hierarchy and the oppressive prerogatives claimed by husbands. At the same time, however, the results of such reforms have often proved detrimental to women. Although the reforms promote equality, they also undermine the altruistic bases of the family and thus leave women open to the kind of individualized, particularized domination characteristic of market relations. The reforms have tended to give women equal rights, but they have not democratized the family.

For example, the married women's property acts did not force the husband to share his power over the family's wealth, but instead provided that each spouse owned his or her separate property. Given that women performed vast amounts of unpaid labor¹²⁹ while men owned most of the property and earned most of the money, the acts had little effect on the lives of most women. Similarly, when the law declared wives to be equal guardians of their children, this pronouncement did not by itself prevent the husband from making every important decision about the children. The basis for the father's authority changed from juridical superiority to other forms of power, such as financial control and physical force, but the authority nonetheless continued. The mother might no longer be powerless simply because she was a wife, but she might well remain powerless for reasons that would seem more particular to her situation.¹³⁰

they increased the freedom, power, and equality of women. *See, e.g.*, Introduction to Addresses by Elizabeth Cady Stanton to the New York State Legislature (1854 & 1860), reprinted in *FEMINISM*, *supra* note 56, at 110, 117.

¹²⁸ A wife is responsible for her own torts and crimes, *see* H. CLARK, *supra* note 100, § 7.2, at 229, and she is capable of criminally conspiring with her husband. *See* United States v. Dege, 364 U.S. 51 (1960). The class of situations in which a wife may testify in court against her husband has radically expanded, *see, e.g.*, Trammel v. United States, 445 U.S. 40 (1980) (holding that wife could choose to testify against her husband as part of a plea bargain), and remaining testimonial disabilities apply equally to husband and wife. *See* Orfield, *The Husband-Wife Privileges in Federal Criminal Procedure*, 24 OHIO ST. L.J. 144 (1963).

¹²⁹ *See* H. CLARK, *supra* note 100, § 7.2, at 224 & n.17; J. KREPS, *SEX IN THE MARKETPLACE* 64-68 (1971); Warren, *supra* note 126, at 422-28.

¹³⁰ That a woman is treated equally by the law does not mean that she will not suffer coercion and abuse. For example, the wife's juridical equality may mean only that a woman is criminally responsible when she is coerced by her husband into criminal activity. It may also mean that the wife is free to waive her marital privilege and that she therefore need not sacrifice herself to protect her husband when she comes under particularized pressure by a district attorney who has charged her in her husband's crime primarily to coerce her to testify against him. *See* Trammel v. United

Women gained more rights to independence in the marriage, but these rights could isolate women as well as empower them. Rather than force husbands to share their power over the family name and domicile, reforms gave the married woman only the right to retain her own surname¹³¹ and to establish her own domicile.¹³² Moreover, by custom and sometimes by law, the father has been permitted to attach his surname to the children of the marriage;¹³³ a mother's different surname has symbolized the isolation that so often seems to accompany equality for women.¹³⁴

While reformers were trying to establish a separate and equal legal status for married women, they were also struggling to enable women to leave unsatisfactory marriages. After liberalizing the grounds for separation, reformers began working on the grounds for divorce.¹³⁵ Legislative reform increased the grounds upon which divorce could be granted, and the new statutes sometimes included vague "catch-all" grounds like "incompatibility" or "cruelty." The reforms also tended to make divorce law more gender neutral. Reformers persuaded trial courts to grant uncontested divorces on increasingly scanty evidence, and encouraged a liberal policy for recognizing out-of-state divorces granted in jurisdictions with less stringent laws.¹³⁶ These reforms have enhanced the ability of

States, 445 U.S. 40, 52 n.12 (1980). For a discussion of the political effects of this particularization or individualization, see F. Olsen, *The Politics of Family Law* (Apr. 15, 1981) (transcript of speech on file in Harvard Law School Library).

¹³¹ See B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 123, at 580-83 (describing litigation and political efforts aimed at gaining for the married woman the right to retain her own surname); Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552 (1971) (arguing that no legal obstacles prevent a married woman from retaining her surname).

¹³² Although a wife may choose her own domicile, the husband's choice of job continues to determine where most couples will live. See Gillespie, *Who Has the Power? The Marital Struggle*, in *FAMILY, MARRIAGE, AND THE STRUGGLE OF THE SEXES* 121-50 (H. Dreitzel ed. 1972). In some two-career families, considerable negotiation does occur, but tradition and men's higher wages combine to increase the husband's bargaining power.

¹³³ See Carlsson, *supra* note 131, at 563-64; Daum, *The Right of Married Women to Assert Their Own Surname*, 8 U. MICH. J.L. REF. 63, 96-99 (1974).

¹³⁴ Some couples give their children a hyphenated last name composed of both the mother's and the father's surnames. This system would seem to be a considerable improvement over using just the father's surname. Of course, in seven generations someone could have a name composed of 128 surnames connected by 127 hyphens. The results after only three generations, however, might sound very dignified: Frances Elisabeth Olsen-Dige-Sørensen-Andersdatter-Hood-McIntyre-Licht-Pfeifer.

¹³⁵ See W. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* (1967).

¹³⁶ See *Williams v. North Carolina*, 317 U.S. 287, 299-300 (1942) (Douglas, J.) (holding that under full faith and credit clause the divorce of party domiciled in state granting divorce must be honored by sister states). *But see Williams v. North Car-*

women to obtain a divorce and have reduced the need for perjury or forum shopping. During the 1970's, almost every state enacted some form of "no-fault" divorce, which allowed the dissolution of any unsuccessful marriage.¹³⁷ The cause of liberalized divorce law has long been strongly associated with the cause of equal rights for married women,¹³⁸ in part because men have been more able than women to avoid the devastating effects of an unhappy marriage.¹³⁹

Although these reforms enable women to leave unsatisfactory marriages, they fail to address the economic, social, and emotional impact that divorce has on women. Moreover, the reforms do little to help women prevent their marriages from becoming unsatisfactory in the first place. In fact, the reforms may adversely affect women by increasing the ease with which *men* can get out of marriages and by undermining the power some wives once had when a husband needed his wife's consent and cooperation to obtain a divorce.¹⁴⁰ A man's earning power typically increases during the course of his marriage, while a woman's often remains constant or even decreases.¹⁴¹ If a couple divorces after twenty years of marriage, the wife is likely to experience a sharp drop in her living standard, despite provisions for alimony, while the husband's living stan-

olina, 325 U.S. 226, 229 (1945) (holding that state may, by challenging validity of divorced party's domicile, collaterally attack jurisdiction of sister state's court to grant divorce).

¹³⁷ See Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105 (1979); *Developments, supra* note 83, at 1308-09.

¹³⁸ See W. O'NEILL, *supra* note 135, *passim*. For earlier examples of this association, see C. HILL, *THE WORLD TURNED UPSIDE DOWN* ch. 15 (1972) (discussing the association in 17th century England).

¹³⁹ Moreover, strict divorce laws have historically operated more harshly upon women than upon men. For example, in many states a woman's single act of adultery constituted grounds for divorce, but a man's adultery would not unless it were repeated or flagrant. See H. CLARK, *supra* note 100, § 12.2, at 328 & n.9. Similarly, if the couple separated over a dispute about where to live, the wife — not the husband — would be said to have deserted. See *id.* § 12.3, at 339.

¹⁴⁰ Wives who had committed marital fault could be divorced against their wishes, but a more common practice was for a couple to agree to an uncontested divorce on (sometimes fabricated) cruelty grounds. See H. CLARK, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 681-82 (1974). Although this was collusion that technically empowered the courts to refuse the divorce, in practice uncontested divorces were routinely granted. See H. CLARK, *supra* note 100, § 12.9, at 362. Furthermore, some states specialized in granting easy divorces to out-of-state petitioners. Collateral attack on these divorces, see cases cited *supra* note 136, was foreclosed if the defendant entered an appearance in the divorcing state. See *Johnson v. Muelberger*, 340 U.S. 581 (1951) (barring third party from collateral attack); *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (barring spouse from collateral attack).

¹⁴¹ See J. KREPS, *supra* note 129, at 28-30 (describing and explaining reduced labor force participation by women during what are prime working years for men).

dard often rises.¹⁴² Marital instability may also have a more pronounced social and emotional impact on women than on men: a divorced forty-year-old man occupies a decidedly different position in society from that of a divorced forty-year-old woman.¹⁴³

(b) *Legalization.* — Reforms tending to establish the husband and wife as juridical equals also tend to “legalize” the relationship — that is, to allow rights to be enforced between husband and wife just as rights are enforced between people in the marketplace.¹⁴⁴ Legalization requires that any deviation from the treatment of husband and wife as strangers be based on their voluntary agreement, not on any state-imposed definition of marriage.¹⁴⁵

In marriage as in the market, the will of the contracting parties is increasingly considered to be the appropriate basis for their relationship. Contracts between husband and wife are no longer treated as illegitimate efforts to alter terms and conditions of marriage that are properly imposed by the state.¹⁴⁶ Rather, such contracts are seen as valid, if perhaps overly formal, expressions of the agreement between the parties, an agreement that is the essence of marriage. Even if many courts will not enforce a marital contract during marriage, they will usually give some effect to the agreement upon the death of one of the parties or the dissolution of the relationship.¹⁴⁷

At the same time that contracts between husband and wife have become enforceable, torts and crimes perpetrated by one spouse against the other have become actionable. Reformers

¹⁴² See Weitzman, *The Economics of Divorce: Social & Economic Consequences of Property, Alimony & Child Support Awards*, 28 UCLA L. REV. 1181, 1241-54 (1981).

¹⁴³ See M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* 76-80 (Penguin ed. 1979). To whatever extent women make a greater emotional commitment to human relationships than men do, they may have more to lose from marital instability. See Easton, *supra* note 49, at 29-30, reprinted in HERITAGE, *supra* note 49, at 571-72. Furthermore, wives seem to be more fungible than husbands; a divorced husband is more likely than his former wife to remarry. See H. CARTER & P. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY* 238-41 (1976). *But see* M. ROMAN & W. HADDAD, *supra*, at 3-4, 75, 80-83 (arguing that in some respects divorce hurts men as much as it hurts women).

¹⁴⁴ See Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 697-711 (1976).

¹⁴⁵ See Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1249 (1974) (discussing advantages of individual marriage contracts); *id.* at 1241-45 (critique of state-imposed definitions of marriage).

¹⁴⁶ See Shultz, *supra* note 82, at 288-91.

¹⁴⁷ See *id.* at 280-86.

have steadily eroded doctrines of intrafamily tort immunity,¹⁴⁸ and what used to be considered the husband's right of "correction" is now recognized as assault and battery.¹⁴⁹ Increasingly, behavior that would be tortious or criminal if committed against a stranger will be so if committed against a spouse.¹⁵⁰ Even if few husbands or wives sue their spouses and interspousal crimes are rarely prosecuted, the removal of the immunities barring such actions represents an important legalization of the husband-wife relationship. In both criminal law and tort law, the state is undertaking to enforce the basic rights of individual women, even against their own husbands.¹⁵¹

¹⁴⁸ See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 8.10-11, at 643-52 (1956); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1035-56 (1930). Although much of the incentive for abrogating these tort immunity doctrines has been related to insurance coverage and concern with spreading losses, such abrogations also have the effect of legalizing relations within the family.

¹⁴⁹ See Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN 2* (M. Ray ed. 1977); Note, *supra* note 87, at 167.

¹⁵⁰ There has recently been a great deal of publicity regarding the ability of wives to charge their husbands with rape. According to a tally reported in *Ms.* magazine, 10 states have eliminated the spousal exemption from their rape laws. Thirteen states, however, have extended the exemption to unmarried cohabitants. *Ms.*, Apr. 1982, at 23.

¹⁵¹ As spouses begin to be treated more like any other juridical equals, the legal treatment of unmarried couples begins to be less distinguishable from the legal treatment of married couples. Just as abusive behavior that was once lawful if between spouses has now been criminalized, other behavior that once was lawful only between spouses has been decriminalized. The freedom to engage in sexual intercourse has come to be considered a part of each individual's privacy rights against the state rather than a privilege bestowed upon married couples. At one time this privilege was an important incident of marriage, see *Diemer v. Diemer*, 8 N.Y.2d 206, 165 N.E.2d 413, 203 N.Y.S.2d 829 (1960), and unmarried couples could be charged with cohabitation or fornication. Such laws are generally no longer enforced, and they have been removed from the statute books in many states. Whether raised in judicial arguments or in legislative battles, the most common weapon against the statutes is the assertion of a right to privacy. *But see Developments, supra* note 83, at 1208-09 & n.77 (noting that some Supreme Court Justices would recognize a state's right to prohibit "immoral" sexual behavior).

Reforms have increased the ease with which individuals may freely choose to live with one or more persons of the same or the opposite sex. The celebrated California case, *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), which allowed a woman to sue the man with whom she had lived for several years when their relationship ended, can be partly explained as an extension of the reforms of the family that promote equality through the legalization of family relations. The decriminalization of nonmarital sexual relationships encouraged the court to uphold the express contract alleged by the plaintiff. *Id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. The contract was just the sort that judges might envision married couples agreeing to: the woman promised to perform traditional wifely tasks for the man, and the man promised to provide financial security for the woman. *Id.* at 666,

These reforms are beneficial in two ways. First, legalization serves generally to improve the wife's status and to protect individual women. Wife beating and marital rape, for example, lose some of their social approval and probably take place less often. Second, the reforms that legalize the husband-wife relationship do enable some individuals to negotiate better marriage terms than those provided by the state. People have more options available to them, and they are freer to experiment with new forms of family relationships.¹⁵²

The reforms, however, do not go far enough. The state will enforce individual rights of women, but the position of women in society may make these rights meaningless. For example, a battered wife may be legally entitled to send her husband to jail, but her economic incentive not to do so may be overwhelming. Although the reforms end certain specific kinds of domination, they legitimate others. A wife who does not press criminal assault charges against a battering husband, for example, may be blamed for allowing herself to be a victim. Similarly, as long as a woman can obtain a divorce but does not, she may be said to have consented to whatever abuse she receives from her husband. The husband and wife are treated as if they were equal bargaining partners, even though women are in fact systematically subordinated to men.

Further, although these reforms promote legal equality and individual freedom, they may discourage altruistic behavior. When a relationship is legalized, parties are left to look out for themselves, and unless the contract provides otherwise, the sharing behavior of one party may not be reciprocated by the other. If a marriage may easily be dissolved, whoever sacrifices for the sake of the marriage is taking a greater risk than she or he would be taking for a permanent relationship.

Finally, in the same way that contracts in the marketplace may formalize domination as much as they express the will of the parties, contracts among lovers and friends may reflect and

at 110, 134 Cal. Rptr. at 819. If marriage is seen as nothing more than what the parties agree to, and if the parties' agreement is all that is enforceable by the courts, a couple's agreement should not be less enforceable just because it does not include formal marriage. For a further discussion of *Marvin*, see *infra* note 160.

¹⁵² The reforms have also increased people's ability to define nonmarital relationships for themselves, see *supra* note 151, relationships that include single-sex couples and larger communal groups. For discussions of new forms of intimate relations, see *THE FAMILY, COMMUNES AND UTOPIAN SOCIETIES* (S. Teselle ed. 1971); N. O'NEILL & G. O'NEILL, *OPEN MARRIAGE* (1972). The abolition of repressive sex legislation increases human freedom and reduces many forms of human suffering. It also tends to reduce the occasions for police harassment of gay men and lesbians.

perpetuate the inequalities in their relationships.¹⁵³ Similar legal treatment of situations involving married couples and those involving strangers may not promote equality or independence for women. Just as advocates of the welfare state argued that special legislation was necessary to protect the rights of workers and create real equality, so advocates of the regulated family have argued that special provisions are necessary to create real equality in families and to protect the individual rights of family members.

(c) *Regulation*. — Designed to create “real equality” within the family, a number of reforms replace rules of formal juridical equality between husband and wife with regulations that treat relations between married couples differently from relations between strangers; these regulations tend to make the family more like the welfare state market.¹⁵⁴ One of the earliest forms of such regulation was aimed at ensuring that marital contracts expressed the “true will” of the parties. Courts recognizing and enforcing contracts that altered the financial consequences of marriage frequently devised special rules regarding undue influence. Forms of overreaching that would not void a commercial contract might well be found to invalidate a marital contract.¹⁵⁵ Some courts have based their special treatment of marital contracts on openly paternalistic appeals and stereotyped images of conniving men and unworldly women,¹⁵⁶ whereas other courts have held that the marriage relationship imposes certain fiduciary obligations on both spouses.¹⁵⁷

Another example of such regulation appears in domestic violence statutes that allow a wife to obtain injunctive relief

¹⁵³ Most criticisms of the will theory of contracts, *see, e.g.*, Cohen, *supra* note 44, at 575–78, and many of the attacks on *laissez faire* are equally applicable to this new contract theory of marriage.

¹⁵⁴ To the extent that welfare state reformers of the market have looked to the family for a model, *see supra* pp. 1524–25, the welfare state market may resemble the family. Thus, reforms of the family that attempt to make it more like the welfare state market will bear a relationship to reforms that attempt to make the family more like the ideal image of the family, *see infra* pp. 1540–42. The focus of reforms of the former category is upon recognizing actual inequality of women in order to establish more than mere juridical equality. Reforms that make the family more like the ideal family differ in that they focus on family solidarity rather than equality. The distinction can be illustrated by two different approaches to dealing with wife beating. The welfare state approach gives wives additional rights against their husbands; the family approach attempts to mediate between the spouses, even at the expense of the wife’s rights.

¹⁵⁵ *See* Posner v. Posner, 233 So. 2d 381 (Fla. 1970); Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969); H. CLARK, *supra* note 100, § 1.9, at 30.

¹⁵⁶ *See* Kosik, 253 Or. at 15, 452 P.2d at 560.

¹⁵⁷ *See In re* Estate of Hillegass, 431 Pa. 144, 244 A.2d 672 (1968).

against a battering husband without making the showing normally required for such relief.¹⁵⁸ It is argued that the particular problems of interspousal violence make this sort of special provision necessary. If a married woman is to receive the same protection against violence that she would enjoy if she were not married, the state must take account of the fact that she *is* married.

A third example involves proposals that have been advanced for transforming housework into paid labor:¹⁵⁹ the law could imply contracts¹⁶⁰ on the part of husbands to pay wages to wives who keep house for them, and it could allow wives to bring legal actions in quantum meruit against their defaulting husbands.¹⁶¹ Some advocates would refuse to allow housekeepers to waive or disclaim their causes of action, just as workers in the welfare state market cannot waive the rights granted by protective labor legislation.¹⁶²

¹⁵⁸ See Note, *supra* note 87.

¹⁵⁹ See S. FEDERICI, WAGES AGAINST HOUSEWORK (1975). Some people would see such proposals as the final assimilation of the family into the market. Market relations have surely replaced family relations, the argument would go, if women expect to be paid for the care they have always taken of the family hearth.

¹⁶⁰ Although the plaintiff in *Marvin* alleged only an express contract, see *supra* note 151, the court considered other causes of action she might allege in an amended complaint and held that she could "assert rights based upon accepted principles of implied contract or equity." *Marvin v. Marvin*, 18 Cal. 3d 660, 682, 557 P.2d 106, 121, 134 Cal. Rptr. 815, 830 (1976). Specifically, the court suggested that a "non-marital partner" should be able to "recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward." *Id.* at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32. The relationship of this holding to the notion of wages for housework was hinted at by a dissent that expressed concern that the holding would give the "nonmarital partner" greater benefits than those often received by a wife. *Id.* at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832 (Clark, J., concurring in part and dissenting in part).

¹⁶¹ It might be argued that requiring payment of wages for housework is not state regulation of marriage and that recognition of a cause of action for nonpayment is simply the logical result of reforms that legalize the marriage relationship. Husbands should not expect their wives to work all day without pay any more than they would expect their plumbers to do so. Even if the plumber were fed while he worked or were put up overnight if the job took more than one day, he would expect payment as well, and courts would find an implied-in-fact contract by the homeowner to make such payment. Thus, it could be argued that the only reason courts have allowed husbands but not homeowners to renege on their implied contracts is that courts have traditionally refused to enforce any contracts between husbands and wives. A more convincing argument, however, acknowledges that wages for housework are an example of state regulation of marriage (or relationships that bear a resemblance to marriage), but asserts that such regulation is necessary if women are to achieve real equality.

¹⁶² See *infra* p. 1557.

2. *Increased Altruism and Solidarity Through State Regulation.* — An alternative strategy seeks to reform the family not by making it more like the market, but rather by making the family more like the ideal image of the family and enforcing an altruistic ethic.¹⁶³ Generally, these reforms tend to widen the separation between the market and the family, and they frequently increase sexual hierarchy. Some of the reforms create financial interdependence within the family; others substitute for a regime of individual rights of family members a strategy of detailed regulation of family behavior on a case-by-case basis.

(a) *Financial Dependence.* — Community property laws,¹⁶⁴ enacted in eight states, have established community ownership both of property gained by the spouses' joint efforts and of wages earned by the husband or wife during the marriage. These laws provide for shared ownership of property by the husband and wife. Whereas the married women's property acts were individualistic, community property laws are altruistic. The shortcomings of community property laws stem from their tendency to undermine equality and promote hierarchy. As originally enacted, most of these laws provided that the husband would manage the property owned by the marital community.¹⁶⁵ A married woman's wages would thus become community property subject to the control of her husband.

Another group of reforms attempted to ensure that the husband would support his family. These reforms sometimes made nonsupport a crime or provided a procedure by which a wife could enforce the husband's support obligations.¹⁶⁶ Some alimony and child support provisions similarly required men to be financially responsible for their families. Statutes were enacted that allowed a widow to take a "forced share" of her deceased husband's estate and thus circumscribed a husband's ability to disinherit his wife.¹⁶⁷ These reforms were

¹⁶³ On the distinction between reforms that attempt to make the family more like its ideal image and those that attempt to make it more like the welfare state market, see *supra* note 154.

¹⁶⁴ See H. CLARK, *supra* note 100, § 7.2, at 226 & n.37.

¹⁶⁵ See Glendon, *supra* note 144, at 703. Most community property states have recently abandoned this rule and provided for equal management. See W. REPPY & C. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* 205 (1982); see also *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that Louisiana statute giving husband unilateral right to dispose of community property violates equal protection clause of the 14th amendment). Some community property states allow the spouse operating a business to retain exclusive control of the business. See Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 UCLA L. REV. 1, 74 & n.353 (1976).

¹⁶⁶ See H. CLARK, *supra* note 100, § 6.4, at 192-94; *id.* § 6.5, at 200-06.

¹⁶⁷ See W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 21-25 (1960). Dower

successful insofar as they limited the husband's power to abuse the control he exercised, but they were unsatisfactory insofar as they left the husband in control.

Recent reforms of this type tend to impose mutual obligations of support upon both spouses and to prevent either spouse from disinheriting the other.¹⁶⁸ Such a cosmetic change, however, fails to eliminate the ideology of sexual inequality, because merely formal gender neutrality does not address actual conditions of economic dependency.

(b) "Deformalization." — The clearest example of "deformalization" as a reform strategy is the family court movement that began at the turn of the century.¹⁶⁹ Family courts were established to deal in an informal and sensitive manner with problems that arise in a family.¹⁷⁰ Frequently, social workers and other "helping" professionals who emphasize adjustment and reconciliation serve on the staffs of family courts. Disputes are to be approached on a case-by-case basis, with resolutions carefully tailored to the particular family. The point is not to protect the individual rights of each spouse against infringement by the other, but to use the state apparatus to promote family solidarity.

Deformalization should be recognized as an alternative strategy, different from both delegalization and legalization. The delegalized private family instituted a limited "state of nature" in which the husband, if he was stronger or more powerful, could dominate his wife. Legalization of the family establishes the husband and wife as individuals with rights against each other and places the enforcement mechanisms of the state at their disposal. In both of these strategies, the state avoids making ad hoc adjustments in the outcomes of family relations.

Delegalization threatens individual rights by refusing to

laws tended to have the same effect. See C. MOYNIHAN, INTRODUCTION TO REAL PROPERTY ch. 2, § 11, at 55-57 (1962).

¹⁶⁸ See, e.g., UNIF. PROBATE CODE §§ 2-201 to -207 (1977); see also *Orr v. Orr*, 440 U.S. 268 (1979) (ruling that alimony laws must be gender neutral).

¹⁶⁹ The first stage was the formation of children's courts, beginning in 1899. See INTERNATIONAL PRISON COMM'N, CHILDREN'S COURTS IN THE U.S. at ix-xvii, 1-9 (1904 & photo reprint 1973). Agitation for a unified family court began in 1917. See Chute, *Divorce and the Family Court*, LAW & CONTEMP. PROBS., Winter 1953, at 49.

¹⁷⁰ See Arthur, *A Family Court — Why Not?*, 51 MINN. L. REV. 223 (1966); Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U. L. REV. 353 (1966); Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205 (1968). For a cogent criticism of family court performance, see Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966).

enforce them, and legalization threatens family solidarity by enforcing individual rights against the family. Deformalization tries to protect family solidarity without destroying individual rights. The anarchy of delegalization is avoided: the state does undertake to protect one spouse from the other. Moreover, because the state does not blindly and impersonally protect abstract rights, the protection is supposed to be less subversive of family solidarity. Rather than require the state to remain formally neutral, deformalization allows the state to make ad hoc readjustments in the outcomes of family relations. Thus, deformalization may avoid both the brute-force domination possible in the delegalized private family and the free market domination possible in the modern legalized family.

At the same time, though, the deformalization reform strategy may have adverse effects on women. First, it fails to provide full protection for individual family members because, in encouraging agreement between the parties, it may force the weaker party to accept a resolution that gives her far less than she would be entitled to in a formal adjudication. Women who try to deal with battering husbands through the family court system may well find themselves the victims of continued battering. Thus, although the aim of deformalization is altruism and family solidarity, the actual result is too often the perpetuation of hierarchy and domination. Second, deformalization violates notions of the rule of law and may result in ad hoc readjustments that are themselves oppressive. The welfare of family members may come to depend upon the uncontrolled discretion of state agencies,¹⁷¹ with the result that the state may directly dominate family life.

Recent efforts to deformalize family law and family relations share the same pattern of possibility and risk that characterized earlier efforts. Informal dispute settlement mechanisms are sometimes beneficial and sometimes harmful. Community courts may themselves be oppressive and may fail to protect one party from the other. Effective local control of informal dispute resolution reduces both these risks,¹⁷² but deformalization should not be supported a priori.

¹⁷¹ Cf. Snyder, *Crime and Community Mediation — The Boston Experience: A Preliminary Report on the Dorchester Urban Court Program*, 1978 WIS. L. REV. 737, 788–89 (noting that one of the problems in a basically successful community mediation program is the general absence of useful standards to control discretion of mediating officials).

¹⁷² See J. AUERBACH, *JUSTICE WITHOUT LAW?* 115–37 (1983); Snyder, *supra* note 171.

B. Strategies for Improving the Status of Women by Reforming the Market

Strategies for improving women's status in the market tend to attack the market either for being too much like the family or for being too little like the family. The market is said to be too much like the family in that the inequality of the family is reproduced in the market: the sexual identities that people develop in families¹⁷³ and the social meanings attached to maleness and femaleness are carried into the marketplace and undermine its supposedly egalitarian character. One solution pursued by reformers is to bar considerations of gender from the marketplace by preventing sex discrimination — and unequal treatment based on familial roles — in employment and other market activities. Thus, the market is to be insulated from the lives people live in families.

The market is said to be too little like the family insofar as it fails to reproduce the altruistic ethic of the family. Reformers often consider women to be particularly victimized by market individualism. The focal point of their criticism is the social irresponsibility or anarchism of the market; reforms are intended to make the market more responsive to human needs. In particular, these reforms call for an adjustment of the market to account for people's family lives rather than for a radical separation between the market and the family.

1. *Eliminating Discrimination Against Women: Making the Market Less like the Family.* — Reformers generally conceive of antidiscrimination law as a strategy to enable women to participate in the market as freely and effectively as men do. For women to participate in the market at all, it was necessary first to change the state laws that made women objects in the market or mere agents of their husbands or that barred them from the market.¹⁷⁴ The further project of making women

¹⁷³ For a more sophisticated explanation of the construction of gender within the "ideology of familialism," see M. BARRETT, *WOMEN'S OPPRESSION TODAY* 205-06 (1980).

¹⁷⁴ The first steps in integrating women into the market were the emancipation of the slaves, a large number of whom were women; the adoption of married women's property acts or community property laws, see *supra* pp. 1531-32, 1540; and the judicial or legislative overturning of statutes barring women from various market activities, such as practicing law or tending bar, see, e.g., *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (striking down state law forbidding women from being bartenders); Act of Mar. 22, 1872, 1871 Ill. Pub. Laws 578 (guaranteeing all persons freedom in the selection of an occupation; passed in response to the state supreme court's refusal to admit a woman to the state bar, a refusal upheld by the United States Supreme Court in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873)); see also *supra* p. 1539 (housework as market activity).

Slaves represented a large portion of the female work force; thus, their emanci-

equal participants in the market is the subject of continuing political and legal battles.¹⁷⁵ The market, despite its egalitarian theoretical premises, reproduces the inequality of the family.¹⁷⁶ This reproduction takes place for a number of reasons and through a number of mechanisms. Efforts to combat it are thus also varied in their intentions and their effects.

One reason women are disadvantaged in the market is that some market actors intentionally discriminate against them. Before such discrimination was outlawed, there were frequent efforts to justify it. The justifications ranged from protecting the family¹⁷⁷ and women from the corruption of the market,¹⁷⁸

pation radically increased the number of women workers participating in the market. The work of black women also had complex ideological effects. On the one hand, it undermined any stereotypic notions that women were incapable of working. On the other hand, it identified work by women with the low status accorded to black women, with the health problems suffered by black slaves, and with the sexual availability forced upon slave women. These complex associations continue to influence the lives of all of us and are discussed in A. DAVIS, *WOMEN, RACE & CLASS* (1981); B. HOOKS, *AIN'T I A WOMAN* (1981).

¹⁷⁵ For an overview of these battles, see W. CHAFE, *WOMEN AND EQUALITY* (1977). See generally *WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION* (C. Gould & M. Wartofsky eds. 1980) (discussing the philosophical underpinnings of feminist strategies) [hereinafter cited as *WOMEN AND PHILOSOPHY*].

¹⁷⁶ See C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 18-21 (1979); Alexander, *Women's Work in Nineteenth-Century London: A Study of the Years 1820-50*, in *THE RIGHTS AND WRONGS OF WOMEN* 59 (J. Mitchell & A. Oakley eds. 1976).

¹⁷⁷ Proponents of "woman's separate sphere" argued that the family would suffer if women participated in the market. Market opportunities would tempt women away from their natural roles as wives and mothers. Good wages would make some women unwilling to marry and raise children, and would make others neglectful of their homes and families, rebellious against their husbands' authority, and sexually unfaithful. See W. WANDERSEE, *WOMEN'S WORK AND FAMILY VALUES: 1920-1940*, at 67, 70 (1981) (observing that married women workers were thought to undermine the stability of the home); Morris, *Inequalities in the Labor Force: Three Sociological Explanations*, in *WOMEN WORKING* 162, 164 (A. Stromberg & S. Harkness eds. 1978) ("If girls and women are not encouraged to enter rewarding careers, they will be easily persuaded to leave the labor force, marry, and raise families.") [hereinafter cited as *WOMEN WORKING*]. For a woman to pursue a career separate from her husband would be "repugnant" to family harmony, according to a concurrence in an 1873 Supreme Court decision that permitted states to bar women from practicing law. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). Supporters and opponents of women's equality agreed that equality in the marketplace would tend to undermine sexual hierarchy within the family. See, e.g., H.T. MILL, *supra* note 91, at 104-07.

¹⁷⁸ Women themselves, it was argued, would suffer damage by participating fully in the market. Women were said to be physically more vulnerable than men, and women's health was said to be crucial because the perpetuation of the race depended upon women's capacity to reproduce. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

to protecting men¹⁷⁹ and the market itself from the ill effects said to result from women's participation in the market.¹⁸⁰ These four concerns are generally no longer considered adequate justifications for state policies excluding women from working in the market, but they continue to appear in various forms¹⁸¹ and in some cases operate to rationalize differential

By working outside the home, women were thought to endanger their "delicacy" and moral superiority and to risk losing "all womanly qualities." F. ENGELS, *THE CONDITION OF THE WORKING CLASS IN ENGLAND* 164 (W. Henderson & W. Chaloner trans. 1958). Finally, mingling with men at work was considered morally degrading, and intentional discrimination against women was said to be intended to protect them from the sexual pressures of the market. *See, e.g.*, *Hargens v. Alcoholic Beverage Control Appeals Bd.*, 263 Cal. App. 2d 601, 608-09, 69 Cal. Rptr. 868, 874-75 (1968) (upholding statute prohibiting women from tending bar, on ground that they may commit "improprieties" while engaged in liquor sales).

¹⁷⁹ Discrimination was justified on the ground that it was necessary to protect the market role of men. *See* W. WANDERSEE, *supra* note 177, at 67, 70 (women workers take jobs away from men). Even when jobs were sexually segregated so that women were not in direct competition with men, employers could save money whenever they were able to convert labor that had been performed by men into "women's work." *Cf.* C. MACKINNON, *supra* note 176, at 11-12 (1979) (by simplifying jobs and breaking them into components calling for less skill, employers create "women's work"). There seemed to some men to be an endless supply of young women who lived with their parents and were thus willing and able to work at wages inadequate to support one person, let alone a family. Women workers were therefore thought to depress wage levels and cause male unemployment.

"The crowding together of a large number of men and women," F. ENGELS, *supra* note 178, at 106, was thought to cause additional problems. Women might see men in undignified circumstances that could undermine respect between the sexes. Men could be distracted from their work by the presence of women; sexual jealousies would erode men's solidarity. Uncertainty regarding the women's sexual availability could corrupt men's morals and lead to misunderstandings. To the present day, evidence of sexual harassment of working women can be used to justify hiring practices that discriminate against women. *Cf.* W. RYAN, *BLAMING THE VICTIM* (rev. ed. 1976) (arguing that reactions to race discrimination frequently take the form of attempts to blame the victims).

¹⁸⁰ It was asserted that women were worse workers than men were because women were too weak for many jobs, lacked mechanical ability, and were inadequately educated. *See* C. MACKINNON, *supra* note 176, at 10-12. Moreover, their psychological makeup — their "natural and proper timidity and delicacy" — ill equipped them for market pursuits. *See* *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). Women were considered intellectually and emotionally incapable of holding many responsible jobs in the market. Opposite the fear that women would neglect their family responsibilities if able to take market opportunities was the concern that they would put family responsibilities ahead of their jobs. Inequalities in wages and promotions are still said to be justified by the fact that women will leave their careers to raise children. *See* Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487, 502 (1981).

¹⁸¹ First, working mothers and "two-career" families are thought to create special problems. Popular books assert that nurturant families and women's equality may be hopelessly incompatible goals. *See, e.g.*, C. BIRD, *THE TWO-PAYCHECK MARRIAGE* (1979); C. DEGLER, *AT ODDS* (1980).

treatment of men and women.¹⁸²

Even when these concerns are rejected as justifications for differential treatment, they are often accepted as explanations

Second, both feminists and antifeminists express concern that too exclusive a focus on eradicating discrimination may damage women psychologically or spiritually by encouraging them to adopt the kinds of instrumental rationality and aggressiveness that are rewarded in the market. Cf. J. KREPS, *supra* note 129 (noting that anxiety in women is commonly thought to arise in part from a tendency to equate achievement with loss of femininity); F. LUNDBERG & M. FARNHAM, *MODERN WOMAN: THE LOST SEX* 11 (1947) (arguing that women are not suited to rough and tumble competition and must sacrifice their most fundamental instinctual strivings and feelings to succeed at work); *id.* at 177 (observing that women often choose "masculine" career paths). Women's special traits and "women's culture" may be damaged or lost if women come to behave as men do in order to be successful.

Third, there is concern that men will be harmed by women's participation in the market. For example, women police officers and firefighters are thought by some to create special problems for their male colleagues, who may feel forced into unsafe situations by their sense of chivalry. See *Wall St. J.*, Feb. 3, 1958, at 1, col. 1; cf. Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII*, 47 S. CAL. L. REV. 585, 630-33 (1974) (disputing arguments that women police officers will be unable to do job and will interfere with safety). Men (and their wives) express concern that marital fidelity may suffer if men and women work closely together. Cf. *Eslinger v. Thomas*, 476 F.2d 225, 231 (4th Cir. 1973) (holding that the South Carolina Senate's refusal to hire female pages because it would "give rise to the appearance of impropriety" was a violation of equal protection); M. KORDA, *MALE CHAUVINISM! HOW IT WORKS* 106, 110-11 (1973) (asserting that office "affairs" are often perceived as status-builders by both parties).

Finally, it is still asserted that the market may suffer from women's participation in it. The concern remains that women are psychologically ill prepared for many jobs and occupations. A number of employers also continue to expect that a woman worker will take time off if her child is sick and will quit her job if her husband is transferred. See W. WANDERSEE, *supra* note 177, at 3 (arguing that working wife might drop out of the work force if she became pregnant or if her husband got a raise or a new job); cf. Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 56-58 (1979) (observing that, because women have been expected to assume most parental responsibilities, they must often work on a part-time basis, take jobs with little responsibility, and compromise employment opportunities).

¹⁸² For example, women have recently been barred from certain jobs on the ground that toxic chemicals may endanger female reproductivity. See *Oil, Chem. & Atomic Workers v. Occupational Safety & Health Review Comm'n*, 50 U.S.L.W. 2524 (D.C. Cir. Feb. 26, 1982); Andrade, *The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person*, 4 HARV. WOMEN'S L.J. 71 (1981); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L. REV. 641 (1981). The concern that women might damage the work environment was recently invoked to bar women from guard positions in maximum-security prisons. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Professor Catherine MacKinnon's discussion of this case is excellent. See C. MACKINNON, *supra* note 176, at 184-86 (1979); see also Note, *supra* note 180, at 493-95 (discussing *Dothard*). The Supreme Court in *Dothard* asserted that it would not have allowed this restriction solely as a paternalistic protection for the women employees, see 433 U.S. at 335, but concluded that the prison had a discipline

for the patterns of pervasive inequality and sexual segregation that continue in the market.¹⁸³ Thus, it may be admitted that the market reproduces the inequality of the family but denied that this inequality is caused by intentional discrimination against women. Rather, unequal results in the market are explained as the effect that growing up and living in families has upon the behavior of men and women in the market. These inequalities may be referred to as "sex-blind" discrimination.¹⁸⁴

There are two general mechanisms by which sex-blind discrimination operates. First, differing family obligations and expectations about men and women prejudice women.¹⁸⁵ Second, the particular upbringings girls receive in families and the roles women have played in the past do in fact leave women ill prepared to succeed in the market, as it is now organized.¹⁸⁶

interest in excluding guards who could be raped by the male inmates, and that only women could be raped. *See id.* at 335-36. *See generally* C. MACKINNON, *supra* note 176, at 186-88 (discussing discrimination that is intended to protect women from sexual harassment).

¹⁸³ *See* J. KREPS, *supra* note 129, at 3-4.

¹⁸⁴ Discrimination also has a self-perpetuating character. Women are disadvantaged in the market today partly because they have been disadvantaged in the past. For a comprehensive discussion of how past race discrimination is perpetuated and what can be done about continuing discrimination, see Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983).

¹⁸⁵ Even if market participants conducted all transactions in complete ignorance of one another's gender, the different family roles and family responsibilities that men and women now actually undertake would affect market outcomes. Women really do take time off from their careers to bear and raise children. Women really do end up doing most of the housework, and they spend more time maintaining extended family ties and nurturing family members than do men. Women more often than men accommodate themselves to the needs of the family; a woman is more likely than a man to quit a job or refuse a particular assignment because the job or assignment seems inconvenient or threatening to the spouse. *See* J. KREPS, *supra* note 129, at 43-44. This fact may be partly attributed to the psychological makeup of women, but it is also caused by the implicit division of labor within families. *See* Frug, *supra* note 181, at 58 n.29.

The inequalities within the family and within the market are mutually reinforcing. The husband's career is usually more important to the financial security and social position of the family than is the wife's, because the husband is paid more; the husband is paid more and has a higher status because the family perceives his career to be more important to the family's welfare than his wife's career is. Furthermore, many jobs are currently structured "as if workers do not have family responsibilities." *Id.* at 56. The implicit assumption is that the person performing such jobs will have a nurturant wife who will take care of the family.

¹⁸⁶ Although there are certainly exceptions, most women receive less training than do men for particular jobs and less education in certain subjects, and this comparative deficiency interferes with women's ability to compete in the market effectively. *See* Baker, *Women in Blue-Collar and Service Occupations*, in *WOMEN WORKING*, *supra* note 177, at 339, 357-59 (observing that mechanical, technical, and vocational training

An important aspect of both mechanisms is that the market was constructed primarily by men, and the roles available in the market as well as the rewards associated with those roles were created in a sexist and discriminatory environment. It is the interaction between women's behavior and the particular demands of the market that results in sex-blind discrimination against women.¹⁸⁷

(a) *Reforms Designed to Integrate Women into the Free Market.* — Many antidiscrimination provisions can be explained or justified as efforts to allow women to be assimilated into the free market. Laws barring women from certain professions¹⁸⁸ or forbidding their employment under the same conditions applicable to men¹⁸⁹ clearly restricted the free market; only if such laws were repealed would employers be able to utilize female labor in accordance with the free market ideal. Laws forbidding conscious sex discrimination in employment,¹⁹⁰ education,¹⁹¹ credit,¹⁹² and housing,¹⁹³ as well as laws and regulations prescribing hiring procedures that employers must follow to protect women from such discrimination,¹⁹⁴ can also be viewed as efforts to make the market more

is frequently unavailable to women). See generally J. CHABAUD, *THE EDUCATION AND ADVANCEMENT OF WOMEN* (1970) (discussing worldwide issue of equality between men's and women's access to education). Most women are taught to behave in a passive and accommodating manner; such behavior is not rewarded in the market. Women fear success more than men do, and have a less secure sense of their competence and self-worth than do men. For a reexamination of this view, see C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 14, 23 (1982) (criticizing the assertion that women fear success, and presenting a theory of women's psychology based on the "human life cycle"). These traits all tend to prejudice women's opportunities for advancement in their jobs. The undesirable traits associated with maleness and ingrained in little boys are much less destructive to men's participation in the market. See Note, *supra* note 180, at 507 & n.113. The market accommodates, and may even reward, aggression and competitiveness.

¹⁸⁷ See Frug, *supra* note 181, at 55-61 (arguing that the labor market is hostile to women because of their child-rearing duties).

¹⁸⁸ See *supra* note 174.

¹⁸⁹ See *supra* note 182. For a discussion of protective labor legislation requiring differential treatment of women, see *infra* pp. 1555-59.

¹⁹⁰ See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981).

¹⁹¹ See, e.g., Education Amendments of 1972, 20 U.S.C. § 1681 (1976).

¹⁹² See, e.g., Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691-1691f (1976 & Supp. V 1981).

¹⁹³ See, e.g., Fair Housing Act of 1968, 42 U.S.C. §§ 3604-3607 (1976).

¹⁹⁴ These procedural safeguards simply prescribe a methodology or procedure; they do not require or even encourage gender-conscious decisionmaking or dictate any social outcome. Thus, they are not affirmative action as I use the term, see *infra* note 197, or as it is generally used.

like the free market ideal. Three of the four classic reasons for intentional discrimination against women — protecting women from the corruption of the market, insulating the family from market pressures, and protecting men's position in the marketplace¹⁹⁵ — are factors that ideal free market actors would not take into account in purely profit-motivated activity. Only the fourth concern — that women are in general less valuable or less productive in the market¹⁹⁶ — provides a market justification for intentional discrimination. Even that argument, however, is weak support for discriminating against all women. Thus, requiring market actors to abandon their irrational biases against women or their misplaced, altruistic inclinations to protect women, family life, or men can be seen as a way of forcing these actors to behave as rational profit maximizers.

Even affirmative action for women¹⁹⁷ can be justified on free market grounds as a measure to eliminate irrational discrimination against women. First, a target or quota may be set to approximate the number of women who would be hired or promoted in the absence of irrational discrimination; such a quota serves as a proxy for gender-neutral decisions,¹⁹⁸ especially in areas, like academic hiring, that are difficult to police.¹⁹⁹ Furthermore, even when affirmative action is intended to compensate individual women for prior discrimination²⁰⁰ or to create a sexually integrated marketplace

¹⁹⁵ See *supra* pp. 1544-45 & notes 177-179.

¹⁹⁶ See *supra* p. 1545 & note 180.

¹⁹⁷ By "affirmative action" for women, I mean any gender-conscious, gender-specific program designed to increase the number of women who receive a particular benefit in the marketplace. Such programs include those setting goals, quotas, or timetables for hiring, promoting, or otherwise benefiting women. By furnishing more lenient standards, affirmative action programs can also make it easier for women to receive some benefit.

¹⁹⁸ An affirmative action program using a quota based on the number of women who would be hired in a sex-blind system may provide the closest approximation possible to the results that would occur in a sex-blind system. This kind of program provides women with many of the benefits of a hiring policy free of intentional sex discrimination. It does, however, have ideological disadvantages for women, see *infra* pp. 1552, 1555, and the people hired may not be the same people who would be hired in a system free of sex discrimination.

¹⁹⁹ See Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 959-78 (1982).

²⁰⁰ Underlying this form of affirmative action is the concern that each individual woman have a fair chance to reap the rewards available in the market. The approach taken to achieve this goal is to confer a benefit on women as a group so that each individual woman will be able to compete effectively in the market despite the disadvantage at which prior discrimination has put her.

by rewarding women beyond what they individually merit,²⁰¹ it is conceived of as a temporary, stopgap measure. It may be seen as a brief departure from the free market system, a departure designed to correct a malfunction caused by irrational, intentional discrimination and to restore free-market, profit-maximizing rationality.²⁰²

Finally, reforms eliminating facially neutral policies that serve to handicap women are sometimes supported as efforts to purify the free market. For example, under the principles established in *Griggs v. Duke Power Co.*,²⁰³ courts have invalidated minimum height, weight, and strength requirements that have a disproportionate impact on women and that cannot be demonstrated to be job related.²⁰⁴ The very fact that the

²⁰¹ If certain institutional conditions that currently disadvantage women are changed — if, for example, male-dominated professions are sexually integrated — women will have a fairer chance in market competition. Many professions have few successful older female members. Law is a notable example. At the leading New York law firm of Shearman & Sterling, only two of 105 partners are women. See EMPLOYER DIRECTORY FOR THE USE OF HARVARD LAW SCHOOL STUDENTS 714 (1982) (on file in Harvard Law School Library). Baker & McKenzie's Chicago office has one woman partner out of 58 partners. See *id.* at 396. Covington & Burling of Washington, D.C., has three women partners out of 81, see *id.* at 252, and Morgan, Lewis & Bockius of Philadelphia has no women partners out of 70, see *id.* at 809. The scarcity of established professional women may severely limit the number of people upon whom younger women can model their lives or careers. It also reduces the number of mentors available to women, because many men seem either unwilling to accept female proteges or incapable of helping them. See J. KREPS, *supra* note 129, at 58–59. Furthermore, as long as women are a small minority in any profession, they suffer from being stereotyped and discounted by people with whom they must deal. See generally Fried, *In Defense of Preferential Hiring*, in WOMEN AND PHILOSOPHY, *supra* note 175, at 309–19 (pragmatic defense of need for preferential minority hiring in the current social context). Such stereotyping may reduce women's effectiveness or at least add a burden to their jobs.

These institutional conditions can be changed by an affirmative action program creating sexually integrated professions. Such a program aims to ensure that, at a minimum, the next generation of women will be more likely to have a fair chance. Like other affirmative action programs, it is a stopgap measure designed to create in the future a market free of sex discrimination. It is also individualistic in the sense that the final goal is to allow each individual a chance to compete equally for the rewards of the market. The approach has a collectivist element in that its strategy is to advance some women who will then create fair conditions for other women. It may not matter whether the women initially advanced are considered personally deserving of the benefits they receive. The initial point of preferring particular women is not to be fair to them, as the goal of affirmative action was earlier understood, see *supra* note 200, but rather to use them to bring about a fairer situation.

²⁰² Before reforms directed at the market can be fully effective in eliminating employment discrimination, however, it might be necessary to free the family of sex discrimination or to define sex-blind employment practices in such a way that they could compensate for unequal roles within the family. See Erug, *supra* note 181, at 58–61; *infra* pp. 1553–54.

²⁰³ 401 U.S. 424 (1971).

²⁰⁴ See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

requirements are not job related suggests that from a free market perspective they are irrational. Courts have also begun to use antidiscrimination law to provide relief for victims of sexual harassment,²⁰⁵ even though employment policies condoning sexual harassment are, in a technical sense, facially neutral.²⁰⁶ One explanation for banning sexual harassment is that such behavior does not belong in the marketplace.²⁰⁷

The major benefit of reforms that attempt to integrate women into the free market is their tendency to promote freedom and equality for women. Such reforms help to free women from economic dependency on men, expand the career options available to women,²⁰⁸ and increase the salaries and advancement possibilities of certain groups of women workers.²⁰⁹ Further, laws requiring equal treatment tend to under-

²⁰⁵ See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Garber v. Saxon Business Prods.*, 552 F.2d 1032 (4th Cir. 1977) (per curiam); Bryan, *Sexual Harassment as Unlawful Discrimination Under Title VII of the Civil Rights Act of 1964*, 14 LOY. L.A.L. REV. 25 (1980); *Symposium: Sexual Harassment*, 10 CAP. U.L. REV. 445 (1981).

²⁰⁶ Of course, men can be sexually harassed, and the sexual harassment of women can harm men, but the burden falls disproportionately on women.

Another example of reforms designed to eliminate facially neutral policies that disproportionately harm women involves what is known as "comparable worth." An employment policy that pays secretaries less than janitors is facially neutral, but it is part of a system in which women are systematically paid lower wages than men are. When a lower paying "woman's" job is substantially comparable to a higher paying "man's" job, courts readily overturn the pay differential on the ground that it constitutes sex discrimination. See, e.g., *Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972); *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490 (4th Cir. 1972); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970). The issue of "comparable worth" arises when the jobs in question are dissimilar but the "woman's" job is arguably as valuable to the enterprise as is the higher paying "man's" job. See Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979); Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980); Comment, *Equal Pay for Comparable Work*, 15 HARV. C.R.-C.L. L. REV. 475 (1980).

²⁰⁷ A more satisfactory approach considers laws forbidding sexual harassment to be attacks on coerced sex and thus akin to laws forbidding rape. See C. MACKINNON, *supra* note 176, at 46-47. It seems likely, however, that the success of sexual harassment litigation is largely attributable to the sense that sexuality belongs in the family sphere and should be kept out of the marketplace, just as the family should be kept separate from the market. Sexual harassment law would thus appear to bear a closer relationship to laws against nepotism than to rape law, and we should not expect wives to be able to charge their husbands with sexual harassment any time in the near future. Professor MacKinnon has argued that husbands should be forbidden from sexually harassing their wives. Lecture by Catharine MacKinnon at Harvard Law School (Jan. 20, 1983).

²⁰⁸ See Frug, *supra* note 181, at 103.

²⁰⁹ Fair employment laws and equal pay statutes, however, have not yet resulted in higher pay for women across the board. See *id.* at 55 n.2 (observing that the

mine demeaning and debilitating stereotypes of women and their roles. Finally, antidiscrimination law legitimates women's complaints of unfair treatment and provides women with a vehicle for fighting back against institutions that oppress them.²¹⁰

The reforms, however, do not go far enough toward real equality or empowerment of women. Moreover, they encourage market individualism. Antidiscrimination law does not end the actual subordination of women in the market but instead mainly benefits a small percentage of women who adopt "male" roles.²¹¹ Meanwhile, it legitimates the continued oppression of most women:²¹² the reforms maintain the status quo by particularizing and privatizing inequality and encouraging women to blame themselves for their failures in the market.

Antidiscrimination law promotes market individualism and promises each individual woman that she can win success in the market if only she chooses to apply herself. It obscures for women the actual causes of their oppression and treats discrimination against women as an irrational and capricious departure from the normal objective operation of the market, instead of recognizing such discrimination as a pervasive aspect of our dichotomized system. The reforms reinforce free market ideology and encourage women to seek individualistic, inward-looking solutions to social problems.

(b) *Welfare State Reforms Designed to Help Women.* — A second common understanding of antidiscrimination law is that it moderates the effects of the free market in order to promote women's equality.²¹³ If intentional discrimination is

median income for women employed in full-time jobs dropped from 63% of men's income in 1956 to 57% in 1973).

²¹⁰ By empowering women to fight back, antidiscrimination law may tend to undo some of the psychological effects of sex roles. It may thus reduce sex-blind discrimination by moderating the passivity and complacency that hinder women in the market. See *supra* note 186.

²¹¹ The antidiscrimination principle, as enunciated by most courts, "has enabled many women who are willing and able to adopt the behavior patterns of their male counterparts to step into traditional male roles. It has not, however, provided any alternative route to political or economic power for women who will not or cannot do so." Note, *supra* note 180, at 499-500.

²¹² The classic analysis of the legitimating role of antidiscrimination law deals with racial discrimination. See Freeman, *supra* note 64.

²¹³ See, e.g., Fried, *supra* note 201, at 315-16. That the same laws can be understood both to support and to subvert the free market might seem odd. In the case of antidiscrimination law, there seem to be two reasons for this curious result. First, discrimination against women can be considered either an aberration from the

considered rational²¹⁴ but socially irresponsible, laws against such discrimination can be seen as an effort to counteract the individualistic ethic of the market and to force market actors to behave more responsibly.²¹⁵ Similarly, affirmative action can be considered more than just an effort to eradicate irrational discrimination; it can be viewed as a method of combating sex-blind discrimination or even as an attempt to restructure the workplace.²¹⁶

Another category of welfare state reforms designed to counteract sex-blind discrimination seeks to reduce the discriminatory impact that the unequal division of family responsibilities has on women in the market.²¹⁷ Probably the most

free market or a natural consequence of free market principles. Second, different market actors will respond to the same laws differently. Some will persist in discriminating, others will attempt to treat all people alike, and still others will treat the protected class more favorably to avoid charges of discriminating against it. *See infra* note 215.

Actually, the statement that a policy can be said either to support or to subvert the free market is a simple corollary of the assertion that state neutrality with respect to the free market is impossible. *See supra* p. 1508. For a vivid illustration of this principle, consider laws against theft. Property owners usually consider such laws to be supportive of the free market, but to the thief they represent state interference with his free market activity — and if the item “stolen” is a competitor’s business goodwill, many might agree with the “thief.”

²¹⁴ It may be argued that wage differentials between men and women and other apparent indicia of discrimination against women are the result not of irrational bias or misplaced protection, but rather of the free operation of the market. *See supra* pp. 1544–46 & notes 177–79. If women really do work less effectively than men, anti-discrimination law arguably prevents the free market from operating efficiently.

²¹⁵ It can also be argued that laws purporting to require gender-neutral treatment of women operate in actual practice to encourage employers to discriminate in favor of women — that is, to hire and to promote them over equally qualified men. First, a woman not hired or promoted may be more likely than a man to sue; second, employers are less likely to be found guilty of sex discrimination the more women they have on their payrolls. *But see Connecticut v. Teal*, 102 S. Ct. 2525, 2534–35 (1982) (rejecting evidence of substantial number of minority employees as defense against employment discrimination charge).

²¹⁶ Affirmative action can also be understood as an effective device to create a sexually integrated market, and sexual segregation can be condemned not simply as an injustice to women but rather as a social loss. From this perspective, ensuring that there be women in schools, offices, factories, and so forth is important for its own sake. Gender-conscious policies are seen not as a mere stopgap, but as a potentially permanent characteristic of market regulation, a characteristic necessary as long as family roles are, in practice, assigned according to gender or as long as people are identified by gender. *See* Ginger, *Who Needs Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 265, 270–75 (1979); *cf.* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–14 (1978) (holding that university has legitimate interest in a diverse student body); *Detroit Police Officers’ Ass’n v. Young*, 608 F.2d 671, 695–96 (6th Cir. 1979) (holding it appropriate for city to attempt to increase minority membership of police force to improve police-civilian relations), *cert. denied*, 452 U.S. 938 (1981).

²¹⁷ Insofar as the family is used to critique the market, the welfare state market

important reform in this category has been the amendment of title VII²¹⁸ to include as sex discrimination most forms of pregnancy discrimination.²¹⁹ Enacted after the Supreme Court ruled that antidiscrimination law did not require states or private employers to include pregnancy benefits in otherwise comprehensive medical plans,²²⁰ the amendment is perhaps the paradigmatic reform phrased in neutral terms but recognized as a reform for women.²²¹ Government training programs for displaced homemakers may also be seen as reforms primarily designed to help women overcome the negative effects of family roles upon women's participation in the market.²²² Neutral phrasing takes on importance with respect to other programs and proposals, such as government subsidies for child care costs, that are generally understood to be programs to help working mothers but that also help working fathers.²²³

These reforms share the advantages of the welfare state. Like other welfare state provisions, antidiscrimination law can promote more than mere formal equality. By recognizing women's subordination, the law can account for and counteract sex-blind discrimination. Because affirmative action acknowledges the common themes in the oppression that each woman suffers,²²⁴ it encourages women to recognize their shared interests and can serve to empower women as a group. The reforms compensate women for their unequal family roles,

may be said to resemble the family, and reforms of the market that make it more like the welfare state will bear a relationship to those that make the market more like the family. The point of the welfare state reforms, however, is to promote equality for women, whereas the chief point of the market reforms is to moderate individualism. The reforms can both promote equality and reduce individualism only to the extent that they begin to transcend the dichotomy between market and family.

²¹⁸ 42 U.S.C. § 2000e(k) (Supp. V 1981).

²¹⁹ The amendment specifically disclaims any requirement that the cost of elective abortion be covered under medical plans. *Id.*

²²⁰ See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (title VII); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (equal protection clause).

²²¹ Indeed, reforms may have to be phrased in gender-neutral terms to pass constitutional scrutiny by the present Supreme Court. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating scheme imposing alimony obligations on husbands but not on wives).

²²² See generally L. SHIELDS, *DISPLACED HOMEMAKERS* (1981) (discussing displaced homemaker programs).

²²³ The extension of child care subsidies to aid working fathers is not only financially important, but also crucial to the development and legitimation of nurturant roles for fathers. See W. FARRELL, *THE LIBERATED MAN* 128-30 (1975) (discussing need for child care); S. GREENBERG, *RIGHT FROM THE START* 71-82 (1978) (discussing need for nurturant parents); Cannon, *Michael and Me*, in *MEN AND MASCULINITY* 65 (J. Plack & J. Sawyer eds. 1974); Fein, *Men and Young Children*, in *id.* at 54.

²²⁴ See C. MACKINNON, *supra* note 176, at 116-18.

improve women's market opportunities, and spread to employers and to the government some of the costs of bearing and raising children, costs that would otherwise fall disproportionately on women. Finally, by acknowledging the unfair treatment accorded women, antidiscrimination law can counteract the tendency of both men and women to lay the blame for a woman's failure in the marketplace on the woman herself rather than on a systemic bias against women.

The disadvantages of these reforms are related to the limitations of the welfare state. Although the state claims to promote greater equality, its efforts to do so have been inadequate. Antidiscrimination law helps only a small group of successful women but fails to change the basic pattern of sexually segregated employment²²⁵ and thus ensures that most women will remain in dead-end jobs. Yet the success of a few is used to justify a system that continues to oppress most women. Although the doctrine of affirmative action presupposes prior discrimination against women, affirmative action policies pretend to have ended such discrimination. Affirmative action thus creates another reason for women to blame themselves when they fail in the marketplace. Moreover, although affirmative action may expand women's social roles, it also tends to reinforce the ideology of inequality²²⁶ and to reintroduce problems of paternalism.²²⁷

2. *Forcing the Market to Respond to Human Needs: Making the Market More like the Family.* — Reforms that seek to improve the status of women by moderating the individualism of the market often improve conditions for women, but they also reinforce sexual stereotypes, augment hierarchy, and therefore undermine the quality of women's lives. Labor legislation that protects women illustrates well the advantages and drawbacks of this reform strategy. Such legislation, enacted around the turn of the century, often singled out women for special treatment, especially after *Muller v. Oregon*²²⁸ es-

²²⁵ See *supra* note 211.

²²⁶ Although affirmative action may legitimate women's complaints that sex discrimination seriously harms women, there are also disadvantages to implying that women may be less able to compete as a result of this harm.

²²⁷ See Gertner, *Bakke On Affirmative Action for Women: Pedestal or Cage?*, 14 HARV. C.R.-C.L. L. REV. 173, 179-88 (1979). I believe that Gertner overestimates the extent to which one can distinguish between affirmative action programs that open up new social roles for women and affirmative action programs that reinforce the ideology of inequality or reintroduce problems of paternalism; a single program can do both. For a good analysis of paternalism and its positive aspects, see Kennedy, *Motives*, *supra* note 19, at 588-90, 635-49.

²²⁸ 208 U.S. 412 (1908).

established the validity of laws that would have been unconstitutional under the freedom-to-contract principles of *Lochner v. New York*²²⁹ had they applied to men as well as to women.

Changed social conditions have made it easy in recent years simply to condemn *Muller* for its blatant sexism and offensive stereotyping,²³⁰ but at the time the case was decided, it was recognized that the case itself and the gender-based labor legislation it authorized had more complex and ambiguous implications.²³¹ On one hand, *Muller* was part of the attack upon the laissez-faire policies associated with *Lochner* and upon the *Lochner* case itself. *Muller* admitted what *Lochner* had tried to deny — that protective labor legislation can benefit workers and society. *Muller* may be seen as part of an effort to make the marketplace responsive to human needs by “delegitimizing” certain forms of exploitation and limiting the free reign of market individualism. The protective labor legislation validated by *Muller* directly benefited many of the most exploited women by undermining the autocratic power of employers and by improving women’s working conditions.

On the other hand, *Muller* undermined the struggles of women for equality²³² and, paradoxically, even offered support for the *Lochner* free market principle by carving out a limited exception to it based on a view of women’s frail physique and unique role in the family.²³³ One effect of this exception was to relieve pressure for broader reforms by making laissez faire more acceptable. Indeed, associating the need for protective labor legislation with the frailty of women²³⁴ offered ideolog-

²²⁹ 198 U.S. 45 (1905).

²³⁰ See, e.g., Taub & Schneider, *supra* note 15, at 127–30. But see Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974) (Douglas, J.) (citing *Muller* to support property tax exemption that benefited widows but not similarly situated widowers).

²³¹ See, e.g., I. BERNSTEIN, *THE LEAN YEARS* 222–25 (1960).

²³² Reforms of the sort approved in *Muller* could actually have an ambiguous effect on women’s struggle for equality. If the reforms went far enough, they might give men an incentive to work for sexual equality in order to get the benefit of the reform for themselves. This does not often happen. But cf. Cowen, *Women’s Rights Through Litigation: An Examination of the American Civil Liberties Union Women’s Rights Project 1971–1976*, 8 COLUM. HUM. RTS. L.R. 373 (1976) (chronicling litigation strategy of Women’s Rights Project in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)); Kanowitz, “Benign” Sex Discrimination: Its Troubles and Their Cure, 31 HASTINGS L.J. 1379, 1419–29 (1980) (arguing that extension to men of benefits that women enjoy only as a result of “benign discrimination” would benefit both sexes).

²³³ *Muller*, 208 U.S. at 422. Women were to be allowed to participate in the marketplace, but their participation in the market was subordinated to their participation in the family. *Muller* thus tended to reinforce the dichotomy between the market and the family and to “keep women in their place.”

²³⁴ Segregating women as a group may improve the chances for reform; it may be possible to enact reforms for women that would be politically unfeasible to enact for

ical support for the claim that legislative protection was unmanly.²³⁵ Moreover, protective labor legislation is effective only when its beneficiaries have no choice but to receive the protection; if individual workers or a whole group can waive the benefits, they can compete more effectively in the market, and the protective legislation loses much of its value. As long as employers can hire workers who waive protection, the employers will have insufficient incentive to improve working conditions. Thus, by restricting the protective legislation to women, *Muller* placed women at a competitive disadvantage and achieved the same effect that might have been expected had the states passed gender-neutral labor legislation but allowed men to waive the protection. Protective labor legislation fell victim to the vicious circle characteristic of much reform: if a reform is too limited in its application, it is unlikely to be very effective; because it appears ineffective, its application is less likely to be extended.

Muller illustrates another disadvantage of reforms that try to make the market responsive to human needs: the altruism they pose against market individualism is linked to hierarchy. *Muller* was based on the thesis that women differ from men in important ways, and although the case might have seemed to exalt women, it effectively degraded them by treating the asserted differences as evidence of women's inferiority.

The same basic pattern of possibility and risk illustrated by *Muller* is repeated in other reforms that try to make the

men. Maternity leave, "split-time shifts," options for slower career paths, and nursery or day-care facilities in the workplace are all examples of reforms that might more readily be afforded to women than to men. Once a reform is accepted, extending its coverage to men may be possible. For example, some of the spousal military benefits now available for husbands would probably never have been instituted had they not been devised with women dependents in mind. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (invalidating discriminatory legislation but leaving open possibility that proof of wives' dependence on their husbands could be a justification for differential treatment in the granting of spousal military benefits).

A second reason that some reforms can more readily be obtained for women than for men is that the reforms may appeal to paternalistic impulses or require altruistic behavior. Women have long been considered more acceptable beneficiaries of paternalism and other forms of "altruistic behavior." Identifying women as the beneficiaries of a reform may make it more palatable.

²³⁵ See *Lochner v. New York*, 198 U.S. 45, 55 (1905). Separate treatment of women may sabotage efforts at reform by facilitating worse treatment for men. For example, it is quite possible that enactment of the current draft registration law would not have been possible but for the exclusion of women from its provisions. See Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 183-85 (1982); *cf. Kanowitz, supra* note 232, at 1394-95 (arguing that the roots of the exclusively male draft are deeply embedded in our culture's perception of sex roles).

market less individualistic. Paid maternity leave requirements, for example, provide an immediate benefit to many women workers because they force employers to moderate profitmaking to accommodate family needs. Yet they create only a minor exception to the normal operation of the market and relieve the pressure for broader reforms that would allow workers to take leaves whenever it might be socially desirable for them to do so. Focusing on maternity leave implies that having babies is the only legitimate reason for temporarily withdrawing from the marketplace. Finally, both blatant and subtle forms of prejudice continue to operate against women who take maternity leave.²³⁶ Maternity leave provisions tend to encourage stereotyping and hierarchy, and thus operate as *Muller* did, though far less offensively.

It might seem that as long as reforms do not single out women as a group,²³⁷ they will not augment hierarchy. Although neutral phrasing does make some difference, it often seems merely cosmetic: the reform is clearly intended for women. Sweeping proposals have been made to grant paid maternity and paternity leaves to parents, to require child care facilities in workplaces, to change career patterns in order to eliminate the pressure to work long hours during the years when people are most likely to be raising young children, to discourage employers from transferring reluctant workers from city to city, and to reduce the disadvantages suffered by people who choose to spend several years out of the workforce.²³⁸ If these policies were applied to everyone without exception or opportunity for waiver, nonparents and other people might well denounce them as forced subsidies of the nuclear family.

Alternatively, if market reform laws condition the granting of benefits on voluntary acceptance by the recipients, two

²³⁶ Even when liberal maternity leave provisions are available, some workers fear that if they take full advantage of the provisions, supervisors and colleagues will take them less seriously as workers. See, e.g., Brill, *Headnotes: The Woman Problem*, AM. LAW., Feb. 1983, at 1, 9 (reporting that some associates at law firms feel "defensive, even guilty" about being pregnant and attempt "to prove themselves and their 'equality' anew by working just as hard through the ninth month as they did before their pregnancy").

²³⁷ Current developments in constitutional doctrine limit the possibility that singling out women will be a permissible reform strategy. See, e.g., Williams, *supra* note 235, at 178-79.

²³⁸ These reforms can also be seen as antidiscrimination provisions. Advocates of such programs urge that they are necessary if women are ever to have an equal opportunity in the market, given our present patterns of family life. The effects of family life upon the market would be reduced, but the method of reducing these effects would be to adjust the market to accommodate the family. See Frug, *supra* note 181, at 99-100.

problems arise. First, men will generally not choose the benefits, or if they do, they will seem to be adopting a woman's role.²³⁹ Practices rather than specific wording may thus reinforce hierarchy and stereotypes. Additionally, a voluntary program introduces the possibility that both men and women will be penalized for choosing to participate. Provisions designed to enable a parent to commit time to child care, for example, may simply result in a subclass of (primarily female) child caretakers who will be able to participate in the market but who will remain relatively unsuccessful there.²⁴⁰ Thus, altruism is once again inseparable from hierarchy. It sometimes seems that if women want to be treated well, they must accept second-class status.

C. Summary

Strategies to improve the lives of women by reforming the family have often promoted the equality of women within families and have sometimes encouraged husbands to treat their wives better. Reforms that increase the juridical equality of wives, however, also tend to undermine altruism and foster individual selfishness. Moreover, some of these reforms legitimate actual inequality by individualizing and particularizing it. Reforms that encourage altruistic behavior within the family tend at the same time to encourage and legitimate sex hierarchy within the family. Although some of the reforms might help to democratize the family, none of them is particularly suited to the task.

Strategies to improve the lives of women by reforming the market have often promoted women's equality and have sometimes made the market more responsive to human needs. Re-

²³⁹ See, e.g., Letter from Professor Lis Sejr, Aarhus Universitet, to Frances E. Olsen (Mar. 18, 1983) (on file in Harvard Law School Library) (discussing difficulty of getting men in Sweden to participate in gender-neutral maternity-paternity leave, and remarking on demand by Danish feminists that proposed paternity leave be made mandatory because it is "the only way of changing the traditional pattern and . . . the easiest way of overcoming discrimination against fathers who want their leave of absence").

²⁴⁰ To respond to this problem, the law could mandate a shortened work week for all people, in order to force everyone to take leisure time sufficient to raise children. Such a provision could be enforced by the imposition of a large fine or surcharge on anyone wishing to work longer hours or requiring others to do so. I consider this plan undesirable as well as politically unfeasible, because it would enforce a sharp differentiation of work from leisure and categorize child care as nonwork. The suggestion is useful, however, as an heuristic device to identify the kinds of policies that might actually be necessary to create fair market opportunities for parents. For another set of suggestions that are useful as a critique, see Powers, *supra* note 15, at 105-10. On the main substantive issue, see Frug, *supra* note 181, at 102-03.

forms that purport to require equal treatment for women, however, often legitimate actual inequality by individualizing and particularizing it. Such reforms also tend to reinforce market ideology and to encourage individual selfishness. Reforms that try to force the market to respond to human needs frequently produce and justify hierarchy in the process. Although any of these reforms may in some cases democratize the market, none of them is particularly suited to the purpose. Both sets of strategies — reforming the family and reforming the market — will sometimes meaningfully improve the lives of women, but none of these strategies should be advocated without qualification: none is adequate for creating democratic, sharing relations among people.

III. TOWARD A NEW VISION

Up to this point I have described a particular structure of consciousness — the market/family dichotomy — and have explored the destructive effects it has on various reform strategies intended to improve the lives of women. As long as our discourse and our thinking remain constrained within this dominant conceptual scheme, we are faced with a kind of stalemate. Like the characters in the story from the first-grade reader, we are trying to build two different playhouses out of the same set of bricks; each effort to improve one aspect of our lives inflicts loss upon some other aspect.

I now examine the possibility of breaking out of this stalemate and speculate upon alternative ways of conceiving and experiencing our affective and productive lives. My aim is simply to begin a conversation about such alternatives.²⁴¹ This conversation can be enriched by the speculative thinking of left and feminist theorists. The critique of the state/civil society dichotomy, developed by Karl Marx and others, is useful for understanding the nature of, and the possibilities of overcoming, the market/family dichotomy. Feminist speculation about transcending the male/female dichotomy provides insight

²⁴¹ None of what I say here is in any sense intended to be a resolution of the dilemmas I have sketched out, nor is it an effort to construct a new system that could become as rigid and oppressive as the market/family dichotomy. Rather, it is meant to be an example of the kind of speculative thinking that we can and should undertake as a first step in a better direction. This endeavor is facilitated by the critique presented in the previous Parts, but the aptness and value of that critique is in no way dependent upon the speculation I engage in here. Criticism or rejection of the direction I suggest should not cast doubt upon my critique. Rather, it should encourage the reader to continue the conversation and to suggest new directions and alternative approaches.

into the possibilities and advantages of transcending the market/family dichotomy.

Becoming aware of these dichotomies and recognizing the crippling effects they have upon our lives and upon efforts to improve our lives will not automatically bring about change. The dichotomies are not only a way of thinking: we have in fact come to experience our lives through them. Thus, we must combine our theory with political practice. A better understanding of alternative conceptions of the world can help us to carry out reforms more effectively. The reforms may in turn change the actual conditions under which we live in such a way that our own experiences will affirm and elaborate upon a different view of the market and the family, the state and society, men and women.

A. *Feminism and Antiliberal Theory*

An important factor in the failure of feminist reforms is their acceptance of a liberal understanding of the state and its relationship to civil society. Criticism of the liberal state and the attack on the state/civil society dichotomy have been important elements of the left attack on liberalism for over a hundred years.²⁴² Some feminists have participated in this

²⁴² For a seminal work, see K. MARX, *supra* note 16, at 216.

Much of the recent legal scholarship criticizing the public/private distinction should be understood as a call to transcend the state/civil society dichotomy. *See, e.g.*, Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1589-91 (1982); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1428 (1982); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 470-73 (1981); Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1360-61 (1982). Some theorists have suggested that we are already entering into a postliberal corporate welfare state society in which the distinction between the state and civil society has become blurred. *See, e.g.*, R. UNGER, *LAW IN MODERN SOCIETY* 192-93 (1976). The state does undertake to regulate the economy, and "private" economic enterprises are thought to carry out quasi-governmental functions. *See id.* at 201. Many thinkers no longer consider the state to be sharply distinguishable from civil society. *See, e.g.*, Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). Bureaucratic administration has replaced earlier liberal conceptions of government. Thus, it could be asserted that the leftist critique of liberalism is now more properly a subject of intellectual history than of social theory and that the results of overcoming the state/civil society dichotomy are disappointing.

It would be a mistake, however, to exaggerate the breakdown of the state/civil society dichotomy. An important element in welfare state ideology is the limitation placed on the particular actions the state may take regarding civil society. This limitation plays a crucial justificatory role. *See supra* p. 1527. It is clear that the state/civil society dichotomy continues to affect reform efforts by restricting our sense of the possible alternatives available to us. Attacks upon and defenses of the nuclear

attack; most feminist reform efforts, however, have taken place against a background of liberal capitalism and have tended to patch up and refine the liberal theory of the state rather than challenge and disintegrate it. The reforms have exposed contradictions within liberalism, but they have not yet led us to develop a feminist theory of the state. One reason the reforms have not been more successful is that they accept as a given the state/civil society dichotomy and are conceived of as state regulation of some aspect of society or as state creation and enforcement of individual rights for women.

Just as feminist reform theory has failed to be adequately informed by the leftist critique of liberalism, so too has leftist theory failed to respond adequately to feminist critiques of patriarchy. Leftist theorists have frequently ignored gender issues or seen them as matters peripheral to the important issues of social change, as mere reflections of the incomplete or inconsistent triumph of liberal principles. Although leftist theorists acknowledge that women and men do not receive equal treatment, they perceive the oppression of women as just a particular instance of the failure of the liberal state to live up to its ideals; few left thinkers have attempted to examine the significance to liberal thought of the male/female and market/family dichotomies.

Antiliberal theorists have made either of two mistakes in dealing with the family. Some have ignored the family or thought of it only in the context of the lag theory²⁴³ and have thus treated the seeming backwardness of the family as a mere curiosity or as a reason for neglecting the family in theoretical discussions. The family has not been recognized to be integral to the structure of liberalism. Some proponents of antiliberal theory have therefore underestimated the family's importance.²⁴⁴ Other proponents have placed false importance on the family by celebrating it as a socialist community. When Carl Degler asserts that Marxists have taken the family as their "model of human order" because they see in it the "epitome of true humanity and interrelatedness,"²⁴⁵ he exaggerates

family, for example, are deeply influenced by that dichotomy. Despite the oppressiveness of the nuclear family, the possibility of abolishing it loses much of its appeal if we assume that the actual alternative may be a society of atomistic individuals facing a monolithic state. The fear of being a completely isolated individual standing against the state provides a strong incentive to form a family. One reason the family has such a strong appeal is that it moderates the state/civil society dichotomy.

²⁴³ See *supra* pp. 1513-20.

²⁴⁴ For general treatments of leftist analyses of the family, see M. BARRETT, *supra* note 173; E. ZARETSKY, *CAPITALISM, THE FAMILY, & PERSONAL LIFE* (1976).

²⁴⁵ C. DEGLER, *supra* note 181, at 472.

only a little. "The very slogan of Communism — 'from each according to his abilities, to each according to his needs' — is," says Degler, "the central principle of family life."²⁴⁶

Both of these leftist approaches to the family accept unquestioningly the market/family dichotomy and fail to appreciate the significance of the family as a *structural* element of civil society. The altruistic, hierarchical, private family is an essential element of nineteenth century ideology. The liberal family is an equally essential element of modern ideology and a structural component of society in the modern corporate welfare state. By failing to address or even notice the dichotomy between the market and the family, most leftist theories assume and thus encourage the continued existence of the dichotomy.

We can learn a great deal by recognizing the relationship between the leftist and feminist contributions and the power of each to enrich the other. The leftist critique of the state/civil society dichotomy and the feminist critique of the male/female dichotomy together inform, and are enriched by, the critique of the market/family dichotomy. Moreover, leftist and feminist speculation about transcending the dichotomies between state and civil society and between male and female suggests the possibility of transcending the market/family dichotomy.

B. Criticizing the Dichotomies

The market/family dichotomy is a human construct that entails the same kind of self-alienation that Karl Marx described in *On the Jewish Question*,²⁴⁷ his classic essay on the state/civil society dichotomy. Marx perceived that human beings lead a "double life" — one life in the state and a separate life in civil society. He referred to the political state, in which we regard ourselves as communal beings, as the "*species-life*" of mankind; the political "citizen" is abstract and universal.²⁴⁸ Civil society, however, is the realm of the particular; each member of civil society is a "private individual," separated from his community and concerned only with his own interests and desires. The dualism between species-life and individual life involves a form of self-alienation, an artificial split of the person into an abstract citizen of the state

²⁴⁶ *Id.* This second mistake is apparent in the writings of important leftists. See, e.g., C. LASCH, *supra* note 94.

²⁴⁷ K. MARX, *supra* note 16, at 216.

²⁴⁸ *Id.* at 225, 240-41.

and an egoistic individual in civil society.²⁴⁹ According to Marx, the project of human emancipation is to overcome this alienation: the human being may become a species-being by reuniting the abstract universal citizen and the concrete particular individual.²⁵⁰ We can thus reclaim our own powers as social powers and thereby become complete *and* moral beings.

The dualism between life in the market and life in the family is slightly different from, but even more pronounced than, the dualism between species-life and individual life. We expect the market to achieve the efficient production of goods and services; it is not the arena in which we are supposed to develop our personalities or satisfy human relational wants. Pervasive hierarchy in the market is imposed and justified on grounds of efficiency. The market is the realm of alienated labor. The expression of the desires to develop personality and to interact with others is relegated to the family and simultaneously glorified and devalued. We see the market as a means to an end, whereas we see the family as an end in itself. The market is the arena for work and the production of goods; the family is the arena for most forms of play and consumption. Dividing life between market and family compartmentalizes human experience in a way that prevents us from realizing the range of choices actually available to us. Much of social and productive life seems effectively beyond our control.

The seemingly contradictory desires to be free and to relate with others in a community present an important dilemma of liberal society.²⁵¹ In laissez-faire ideology, the market is predominantly associated with freedom, and the family is associated with community. In welfare state ideology, the market is supposed to be controlled by the community (the state), and the family is celebrated as a realm of freedom with which the state should not interfere. It turns out, however, that the liberal dilemma of freedom and community is not resolved by the interplay between the market and the family.

²⁴⁹ Marx quotes from Rousseau's statement about the prerequisite for founding a liberal state:

[E]ach individual who is in himself a complete but isolated whole . . . [must be transformed] into a part of something greater than himself from which he somehow derives his life and existence, substituting a limited and moral existence for a physical and independent existence. Man must be deprived of his own powers and given alien powers which he cannot use without the aid of others.

Id. at 241 (emphasis omitted) (quoting J. ROUSSEAU, *THE SOCIAL CONTRACT* 67-68 (London 1782)).

²⁵⁰ *Id.*

²⁵¹ The best statement of this dilemma is in Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 209, 211-13 (1979).

The family has a dual role for both men and women. For men, the family is a realm in which they can expose their "weaknesses," in which they may embrace without shame the values traditionally associated with women. By relating with women in families, men try to reclaim wholeness. Second, the family is a realm in which men can be bosses. In their families men can express competitive values and other values traditionally considered masculine. Men may be compensated in the family for their failures in the marketplace. The home is a haven for men.

The family likewise plays a dual role for women. The home is supposed to be where women belong and where their values are appreciated and allowed free expression. Rather than a haven for women, however, the home has traditionally been a workplace; and now that most women work in the marketplace, the home has become a second workplace. In contrast to the market, where people must often play roles, the family is supposed to be the arena in which people can express their real selves. For many women, however, the contrary is true: it is precisely within the family that they must subordinate themselves and play roles.

The market serves for a few women some of the same functions that the family serves for men. A woman as employee or manager may more acceptably display traits that are considered masculine. The market may offer a socially approved opportunity for women to be rational, objective, and even selfish. In theory, the market frees women from their ascribed roles. In fact, most women are forced into subordinate positions in the market, and their freedom is quite circumscribed.²⁵²

For men, the market is supposed to be the realm in which masculine values are promoted and rewarded. The market presents images of freedom, rationality, and power. The reality of the market for most men as well as most women is that they are dominated and oppressed by employers exercising arbitrary power over them. In some cases the intercession of seemingly neutral rules will reduce the sense of personal domination, but people are to a great extent the "plaything[s] of alien powers" in the market.²⁵³ Thus, both in the market and in the family, we are all faced with a sense of powerlessness.

²⁵² Of course, even if women work in jobs that allow or encourage them to depart from the traditional feminine role, they are still trading one role for another. See generally Note, *supra* note 180 (observing the tendency of conventional sexual equality to result in the judging of all persons by a male standard).

²⁵³ This terminology comes from K. MARX, *supra* note 16, at 216, 225 (commenting on helplessness of individual in civil society).

In fact, we have created a market that embraces a warped and impoverished notion of freedom, a market characterized by alienated commodity production and a radical loss of the sense of human control over market activities.²⁵⁴ Although isolated, individual choice is a hallmark of the free market, such choice becomes part of the "objective" forces of supply and demand that are beyond conscious human control. Even in the welfare state market, we underestimate the extent to which we could consciously determine what to produce and how to produce it.

We have also created a family that embraces warped and impoverished notions of community and freedom. The community within a family is hierarchical. Moreover, freedom in the family is largely an illusion. The family is just what we make it — it exists only to please us. We glorify the family's lack of objective purpose; in the family, one is supposed to be free to express personality and to satisfy the human desire to interact with others, but the very attempt to divorce these goals from other purposive or productive activities makes their realization problematic.

We often tend to forget that our present family arrangements and our present market arrangements are of purely human creation. Marx observed that civil society seems natural because it was formed as a by-product of the dissolution of feudal society, at a time when people's self-conscious activity was focused on the political act of forming the state.²⁵⁵ This is equally true of the modern nuclear family, which is seen as the social form left over from the disintegration of earlier forms of extended families or households. The home is the place where people not recruited into the market are left, and the place to which people return when they finish their work in the market.

Each succeeding political change seems to leave the family a more *natural* entity, a freer expression of human impulses. This process in turn increases the appearance of the family's particularity and of the diversity of family life. Insofar as people consider that the family exists only to serve human emotional wants, that it lacks practical purpose, they believe that it is becoming more pure and family-like.

Most of the time neither our family lives nor our market lives seem fully satisfactory, yet our dissatisfaction with each leads us to romanticize the other in a vicious cycle. To the

²⁵⁴ See generally K. MARX, *Alienated Labor*, in WRITINGS, *supra* note 16, at 287 (classic discussion of alienated labor).

²⁵⁵ K. MARX, *supra* note 16, at 216, 240.

extent that the freedom of the marketplace turns out to be a sham, people cling to notions of marital felicity and domestic happiness. To the extent that community in the family turns out to be an illusion, people seek refuge in their work. Once we accept the "heartless world" as a given, the value of a "haven" from it seems self-evident.²⁵⁶ Only by collapsing the facade of a refuge, however, can we lay the foundation for real freedom and community.

C. Transcending the Dichotomies

The dichotomies between state and civil society and between market and family are very much a part of our thinking. Criticisms of the family are often misinterpreted as attacks upon humanization, connectedness, and parenthood, just as criticisms of the market may be misunderstood to be attacks upon efficient production of goods and services. Yet the production of goods and services is a worthwhile goal, just as it is worthwhile to express personality and to satisfy human desires to relate with others. At present, production is carried out primarily by the market, and the opportunity for expressing personality occurs mostly in the family. My argument is that this separation and polarization of functions reinforces the status quo and limits the possibilities of human association.

People who support the market/family dichotomy argue that life will be impoverished if all of it "falls under a single set of terms."²⁵⁷ The problem, however, is that life all too often is circumscribed by a double set of terms. The market and the family are seen as correlatives, each opposing yet reinforcing the other. But it is my contention that we do not need inhuman environments in order to enjoy human ones, nor do we need unproductive or impractical associations in order to enjoy productive or practical ones. Polarizing the family and the market does not increase the possibilities available to individuals and to the human personality. Instead it reifies the abstractions of "the market" and "the family" and renders us powerless.

Another criticism of efforts to transcend the market/family dichotomy is closely related to liberal criticisms of efforts to transcend the state/civil society dichotomy. Some commentators express the fear that if feminists have their way, families will be abolished and nothing adequate will emerge to replace them. Institutional child care is portrayed as a form of neglect

²⁵⁶ This terminology was popularized by Christopher Lasch. See C. LASCH, *supra* note 94.

²⁵⁷ J. ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN 335 (1981).

likely to produce children who are unable to form close human attachments and are thus not fully human.²⁵⁸ Communal or other alternative forms of social life are seen as mere “hollow replications” of the family — weak, frivolous imitations.²⁵⁹

This concern is identified with the fear of totalitarianism. Critics contend that the rearing of children outside family structures will lead to oversocialized and conformist adults, people who automatically follow orders that they ought to question and challenge.²⁶⁰ These commentators view the family as a potential hiding-place — a refuge for subjectivity and irrational fancy, a realm antithetical to totalitarian existence.²⁶¹ Keeping the family distinct from the rest of civil society, they believe, is crucial to the hopes of maintaining civil society as a separate realm of freedom, a realm not engulfed by the all-powerful state.

The image of Nazi Germany or the cold war image of Soviet Russia is presented as the fearsome alternative to the state/civil society dichotomy. The state controls every aspect of human life; nothing is personal and private; there is no freedom.²⁶² The state is rational, instrumental, and objective, and at the same time deeply irrational and frighteningly subjective. Even if a totalitarian state could assume a democratic form, it is argued, the result would be a dictatorship of the masses, and human freedom would be destroyed.

I do not advocate replacing the present dichotomies with an all-powerful state and an all-embracing market any more than I would advocate making women just like men. The state as it now exists must be ended at the same time that civil society as it now exists is ended; and when we transform the contemporary family, we must simultaneously transform the market.

I favor neither a romantic return to a simpler form of life nor a regression to an earlier, undifferentiated world. It would not be a solution to reestablish cottage industries, to have both parents at home working and caring for the children. I am not envisioning an escape from the complications of existing in the world as conscious free-willed beings, nor do I advocate an evasion of the conflict that may be painful but is inherent in human growth. Rather, I have in mind a situation in which

²⁵⁸ See, e.g., *id.* at 328–31.

²⁵⁹ *Id.* at 330.

²⁶⁰ See *id.*; C. LASCH, *supra* note 94, at 91.

²⁶¹ See C. LASCH, *supra* note 94, at 92 (contending that decline of family leads to subjugation of individual by new forms of coercion).

²⁶² See, e.g., J.F. DULLES, *WAR OR PEACE* 5–16 (1950) (describing Soviet “enemy”).

conflict can take place more effectively. The dichotomies stunt human growth by avoiding and displacing conflict — conflict within the individual psyche and among people. The problem of externalizing conflict through compartmentalization, and the advantages to be gained by transcending the dichotomies, can be illustrated by an examination of the male/female dichotomy.

The differences between men and women are as natural as starvation, religion, and brutality. Inequality between men and women has existed throughout recorded history and has persisted across widely divergent cultures. So too have starvation, religion, and brutality. That each of these phenomena has been long lived does not mean that any of them is immutable.

We have sometimes viewed gender differences as Malthusians viewed starvation — unfortunate for individual victims, but socially necessary and logically inevitable.²⁶³ At other times, gender distinctions have been recognized to be socially created but, like religion,²⁶⁴ enormously useful for maintaining social and political stability, and perhaps even good for the common man. Recently, gender differences have been considered analogous to brutality — we can reduce or overcome them to a certain extent, but we can probably never eliminate them altogether, and perhaps the world would be all too homogenous if we could. In any event, it may be thought that the amount of coercion necessary to eliminate completely either brutality or gender distinctions would constitute too great an infringement on human freedom.

1. *The Feuerbach Model: The Progress of History.* — Perhaps the most useful model for capturing the nature of the male/female dichotomy is suggested by atheist Ludwig Feuerbach's description of religion.²⁶⁵ Feuerbach saw religion as a product of human imagination and God as a projection of human qualities. In Feuerbach's Hegelian language:

²⁶³ Cf. C. LASCH, *supra* note 94, at 79–80 (maintaining that Freud considered differences in the sexes to be neither innate traits nor the products of cultural conditioning, but rather the result of “the process of becoming a woman,” which requires, in any culture, “the repression of the active and phallic side of a woman’s sexuality”). See generally S. GOLDBERG, *THE INEVITABILITY OF PATRIARCHY* (1973) (focusing on the physiological “necessity” of male domination).

²⁶⁴ Compare T. HOBBS, *LEVIATHAN* ch. 12 (London 1651) (asserting that the seeds of religion exist in man and have been cultivated to obedience, law, peace, charity, and civility), with S. WEITZ, *SEX ROLES* 5 (1977) (noting that society “has a vested interest in sex roles insofar as they permit the smooth functioning of the major institutional structures”).

²⁶⁵ See L. FEUERBACH, *THE ESSENCE OF CHRISTIANITY* (G. Eliot trans. 1957).

Man — this is the mystery of religion — projects his being into objectivity, and then again makes himself an object to this projected image of himself thus converted into a subject; he thinks of himself [as] an object to himself, but as the object of an object, of another being than himself. Thus here. Man is an object to God.²⁶⁶

Feuerbach hypothesized that people project their nature onto the God they create, and in contemplating this God, they perceive their own nature: “Consciousness of God is self-consciousness, knowledge of God is self-knowledge.”²⁶⁷ Through their relationship to God, people reclaim their own nature.

The male/female dichotomy, like religion, is a human construction. The “mystery” of sexuality consists in projecting human qualities separately onto males and females to make each the object of the other. The relationship between the sexes becomes a means by which members of each gender can reclaim their own projected nature. In becoming acquainted with each other, men and women become acquainted with themselves.

Feuerbach believed that the process of projecting human qualities onto God served a useful human purpose. “Man first of all sees his nature as if *out of* himself, before he finds it in himself.”²⁶⁸ The history of religion is the history of the recognition by humans of more and more of their own nature. Each new religion correctly perceives the previous one to be idolatry — the worship of something human as if it were divine.²⁶⁹ “Man has given objectivity to himself, but has not recognized the object as his own nature: a later religion takes this forward step; every advance in religion is therefore a deeper self-knowledge.”²⁷⁰

Gender differentiation serves a useful human purpose analogous to that served by religion. The gradual shifts that have taken place in our understanding of maleness and femaleness can be seen as reflections of an historical process resulting in deeper self-knowledge. The historical progress of gender differentiation consists in recognizing that what was previously considered immutable is contingent and subject to human control. The division of human beings into male and female could be judged to have been a useful device for enabling us to become conscious of the wide range of human possibilities.

²⁶⁶ *Id.* at 29–30.

²⁶⁷ *Id.* at 12.

²⁶⁸ *Id.* at 13.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

The transcending of the male/female dichotomy would then be the final step in the reclamation of the whole self, the last stage in this historical process.

2. *Elaborating on the Model: Complications of Gender.* — There are several problems with viewing gender differentiation as historic progress. The first problem is shared by Feuerbach's analysis of religion. Feuerbach did not believe that God actually existed, and although his work was part of an argument for the nonexistence of God, it was at the same time premised upon that nonexistence.²⁷¹ A contemporary believer would either disagree with Feuerbach or would insist that, although early gods were admittedly human projections, Feuerbach failed to capture the essence of contemporary belief because he made a simple factual mistake regarding the existence of God. Similarly, I am arguing that gender distinctions are historically contingent, and an underlying premise of my argument is that male and female traits are not immutable. Anyone convinced that biology is destiny will be unpersuaded by my argument. Given that people identified as women really do exist and are biologically distinguishable from men, some observers will always argue that perceived differences are real rather than projected.

Just as Feuerbach could never really disprove the existence of God or gods, I cannot disprove the general claim that the differences between women and men are biologically determined rather than the result of projections of the self. It is clear, however, that our understandings of maleness and femaleness have undergone dramatic changes and that previous understandings of biological determinism have therefore been mistaken. Whenever assertions of biological constraints are made in a sufficiently specific context, scholars and researchers are ready to disprove them.²⁷² But such disproof will never convince the faithful that there do not exist other basic differences between men and women that make it impossible or unwise to transcend the male/female dichotomy. Perhaps the most we can say with certainty is that even if biological constraints exist that may ultimately limit the possibilities for remaking society, we will not be able to determine the part played by such constraints until we have correctly assessed the part played by the social construction of gender roles. At present, I find no evidence that biology prevents us from

²⁷¹ *Id.* at xxxiv-xxxv.

²⁷² See, e.g., C. MACKINNON, *supra* note 176, at 152-55; see also Note, *supra* note 180, at 497 n.56 (listing sources that discuss biological determinism).

making major alterations in the relationship between women and men or from transcending the male/female dichotomy.

The application of Feuerbach's historical progress model to gender differentiation is complicated by the presence of factors in the relationship between women and men that are not present in the relationship between human beings and God. First, the relationship between man and woman involves two people and two different projected relationships.²⁷³ There is an actual relationship between a man and a woman that takes place alongside the two projected relationships. The projections that are an integral part of our present gender system²⁷⁴ interfere with the actual relationship. I refer to this interference with companionship and love and the limitations it places upon the possibilities of human association as "problems of love." Second, the historical process has been blocked by the reality that men dominate women. Feuerbach's model is based on the projection of positive traits upon God, whereas the traits projected upon women are simultaneously despised and exalted.²⁷⁵ Thus, the problem of domination that characterizes male-female relations is not present in Feuerbach's picture of religion.

(a) *Problems of Love.* — Feminists have long argued that our present gender system, with its inequality and domination, makes true love between the sexes difficult, perhaps impossible.²⁷⁶ What currently passes for love has been described as "a one-sided pathological dependency of women on men."²⁷⁷ Men are seen to be strong and powerful, women to be weak and dependent. Additionally, in our present society women are economically and socially dependent upon men. The chief

²⁷³ Again, someone who believes in the existence of God might dispute that the relationship between a person and God is thus distinct from the relationship between two people. See, e.g., M. BUBER, *I AND THOU* (R.G. Smith trans. 2d ed. 1958).

²⁷⁴ By "gender system" I mean the system wherein male and female are socially constructed as correlative-opposites that form a dichotomy in which males are hierarchically superior to females. Gayle Rubin refers to this as a "sex/gender system." Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, reprinted in *TOWARD AN ANTHROPOLOGY OF WOMEN* 159, 166-67 (R. Reiter ed. 1975). Catharine MacKinnon criticizes this division of sex and gender as a nature/culture distinction. See MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (forthcoming in 8 *SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY* (1983)). I am adopting Professor MacKinnon's usage.

²⁷⁵ The average male feels misogyny of an intensity far exceeding that of the hostility expressed toward God by such notorious "blasphemers" as Friedrich Nietzsche and George Bernard Shaw.

²⁷⁶ For an excellent summary and evaluation of some of these views, see Rapaport, *On the Future of Love: Rousseau and the Radical Feminists*, in *WOMEN AND PHILOSOPHY*, *supra* note 175, at 185.

²⁷⁷ *Id.*

determinants of a woman's status are her acceptance by and associations with men. Under these circumstances, romantic love plays an apologetic role; it mystifies women about their dependency on men and reinforces male hegemony.²⁷⁸

Shulamith Firestone builds upon the ideas introduced by John Stuart Mill²⁷⁹ and others about the harmful effects that sexual inequality has upon the possibilities for love.²⁸⁰ Firestone explains that healthy love requires mutual self-respect, which is destroyed when neither men nor women regard females to be autonomous, equal beings deserving of respect. Women lack self-esteem and seek to gain identity and worth by being loved by men.²⁸¹ Men do not actually respect women but instead generally undervalue them; at the same time, they idealize individual women with whom they "fall in love."²⁸² Because women know they do not fit this idealized image, they can feel no security in being loved and must fear honest and intimate contact that would reveal their true selves.²⁸³ Thus, Firestone argues, love as we know it is both a delusion and a trap for women. But the solution lies in sexual equality: among equals there can be meaningful love.²⁸⁴

Elizabeth Rapaport²⁸⁵ has extended Firestone's critique to show how love is transformed into a destructive dependency relationship for men as well as for women. Drawing on Rousseau,²⁸⁶ she suggests that achieving equality of power and influence between men and women would not by itself solve the problems of love. Love begins with a healthy attraction, a recognition of like sensibilities. But lovers then focus on differences, she argues, because they are seeking to find in their partners the qualities they fear they lack in themselves and are thus in some sense seeking to gain possession of those qualities.²⁸⁷ They do not choose the partner with whom they

²⁷⁸ S. FIRESTONE, *THE DIALECTIC OF SEX* 146-48, 165-75 (1970).

²⁷⁹ See J.S. MILL, *The Subjection of Women*, in J.S. MILL & H.T. MILL, *supra* note 91, at 233-36.

²⁸⁰ See S. FIRESTONE, *supra* note 278, at 142-64.

²⁸¹ See *id.* at 155-56.

²⁸² See *id.* at 128-29, 148, 153.

²⁸³ See *id.* at 149.

²⁸⁴ See *id.*; Rapaport, *supra* note 276, at 185-86.

²⁸⁵ See Rapaport, *supra* note 276, at 185.

²⁸⁶ Rapaport focuses on J. ROUSSEAU, *EMILE* (Everyman ed. 1911) (1st ed. Paris 1762); J. ROUSSEAU, *LA NOUVELLE HELOISE* (Penn. State Press ed. 1968) (1st ed. Geneva 1761); J. ROUSSEAU, *Discourse on the Origin and Foundation of Inequality Among Mankind*, in *THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN AND FOUNDATION OF INEQUALITY AMONG MANKIND* 149 (L. Crocker ed. 1969) (1st ed. Amsterdam 1755).

²⁸⁷ See Rapaport, *supra* note 276, at 199.

have most to share, but rather seek the "pre-eminent" member of the opposite sex.²⁸⁸ Each person hoping to be loved must strive to appear to be that preeminent person. Consequently, even if there were equality between men and women, a relationship of dependency might lead to a false presentation of the self as well as to a fear of exposing the real, flawed self. The lover thus loses his or her identity and autonomy.

According to Rousseau, the tendency to love the one who seems most virtuous and most beautiful,²⁸⁹ combined with the desire to be loved, leads to "emulation, rivalry, and jealousy."²⁹⁰ If we locate choice in sharing rather than in virtue and beauty, however, quite different results obtain. People will be attracted to each other by how much they have to share. They will focus on what they have, not on what they lack or fear they lack.

Thus, the real issue is not dependency, but rather one's attitude toward oneself. It is important that one be self-sufficient, but not that one be independent. The choice is not between being a complete, independent individual and being dependent and incomplete.

Rapaport contends that healthy love is impossible not only because of the inequality between men and women, but also because of the individualist assumptions of liberalism and the actual competitive and hierarchical conditions of capitalist society.²⁹¹ Thus, she argues, socialism and women's equality hold the promise of healthy love.²⁹² Rapaport is correct to reject dependency and autonomy as polar choices. An adult can and should be "autonomous" in the sense of being a full and complete human being. Yet social life is richer than isolation; sharing and intimacy enable a person to enjoy life more fully. To the extent that our social interactions enrich the

²⁸⁸ As Rapaport puts it:

The lover is dependent, entirely, terribly dependent on his beloved for something he needs, the reciprocity of his love. . . . The lover cannot achieve love's desire, reciprocity by the exercise of his own powers. He will only be loved if she finds him pre-eminent. He must present himself in the guise in which she would see her beloved. This leads to a false presentation of the self and the chronic fear of exposure and loss of love. Along the way the lover loses himself and necessarily the opportunity to gain love for this lost self.

Id.

²⁸⁹ See J. ROUSSEAU, *EMILE*, *supra* note 286, at 175-76, *discussed and quoted in* Rapaport, *supra* note 276, at 197.

²⁹⁰ *Id.* at 175, *quoted in* Rapaport, *supra* note 276, at 197.

²⁹¹ Rapaport, *supra* note 276, at 203-04.

²⁹² "Love may be rehabilitated if the just fear of dependency relations we learn from love as we know it turns out to be grounded not in fear of ourselves but the pathological distortions of human personality produced by an unjust, destructive and successfully alterable social order." *Id.* at 204.

quality of our lives, we can be said to be "dependent" upon others for this enhanced existence. To have to depend on another to fulfill immediate emotional needs can be a bad thing; to be able to depend on another to enrich one's life is a good thing. To be autonomous means not to need another in order to feel complete; it does not mean that one is incapable of enriching one's life through social interaction.

Socialism and sexual equality together, however, are not enough to rehabilitate love. We must also counter the self-alienation inherent in our present gender system. When we project human traits separately upon men and women, we ensure that we remain incomplete beings. Our attraction for the opposite sex has a quality of urgency because a relationship with a member of that sex is necessary for our own completion. Our present gender system tends to foster relationships based on need rather than desire. To need another to complete oneself is ultimately unsatisfactory; it interferes with the intimate sharing that is possible between human beings, a sharing that leads us to want contact with others.²⁹³

(b) *Problems of Domination.* — The domination of women by men is self-perpetuating. Women's unfamiliarity with aspects of the world to which they have been denied access has justified their continued exclusion. Menstruation, pregnancy, and childbirth have been made to operate as disadvantages to women and have allowed women to be dominated by men and to need their protection. The degradation of women in the real world was matched by their exaltation in a fantasy world. Women were seen as wonderful and terrible.²⁹⁴

The world came more generally to be viewed as a series of complex dualisms — reason/passion, rational/irrational, culture/nature, power/sensitivity, thought/feeling, soul/body, objective/subjective. Men, who have created our dominant consciousness, have organized these dualisms into a system in which each dualism has a strong or positive side and a weak or negative side. Men associate themselves with the strong sides of the dualisms and project the weak sides upon women. In the same way that men simultaneously exalt and degrade women and the family, they simultaneously exalt and degrade the concepts on the weak sides of the dualisms. Nature, for

²⁹³ Of course, dependency based on need can be homosexual as well as heterosexual. On the tendency of homosexual relationships to reproduce the patterns of heterosexual relationships, see J. MONEY & A. EHRHARDT, *MAN & WOMAN, BOY & GIRL* 163-64, 234-35 (1972).

²⁹⁴ See, e.g., N. HAWTHORNE, *Rappaccini's Daughter*, in *MOSSSES FROM AN OLD MANSE* 91 (Riverside Press ed. 1902) (1st ed. New York 1846).

example, is glorified as something awesome, a worthy subject of conquest by male heroes, while it is simultaneously degraded as inert matter to be exploited and shaped to men's purposes. Irrational subjectivity and sensitivity are similarly treasured and denigrated at the same time.²⁹⁵

Another important aspect of the way these dualisms are viewed in dominant culture is that the inferior half of any dualism is often seen to pose a constant danger to the stronger half. Man is warned to do battle with the flesh, with nature, even with women. Irrationalism is regarded as something that must be conquered, like nature. The weak sides of the dualisms are simultaneously indispensable and threatening to men.²⁹⁶

The limited choices that seem available to women may be described in terms of women's relationship to these dualisms. One feminist strategy accepts the identification of women with their traditional side of the dualisms but tries to deny the hierarchy men have established between the two sides. Another strategy struggles to identify women with the stronger side of the dualisms instead of challenging the devaluation of the side traditionally associated with women. Reformers often adopt both strategies simultaneously. Suffragists, for example, argued not only that women should be allowed to vote because they could be as reasonable and rational as men, but also that granting women the vote would benefit society because of women's superior sensitivity to human values.²⁹⁷ Although neither of these two feminist strategies is necessarily inconsistent with a rejection of the dualisms themselves, such a rejection has not in practice been emphasized.

The traditional identification of women with the weak side of the dualisms — with nature, subjectivity, nurturance — has been a legacy of oppression. Accepting this identification may be tantamount to embracing women's subordinate position. Yet the identification is also a potential source of power and insight. To reject the weak side of the dualisms is to neglect the qualities that women have been allowed to cultivate.²⁹⁸ Both approaches may be considered to accept, perhaps even to reinforce, the dualisms.

²⁹⁵ See C. CHRIST, *DIVING DEEP AND SURFACING* 25-26, 129-31 (1980).

²⁹⁶ See *id.* at 25.

²⁹⁷ Equally inconsistent were those opposing votes for women, who argued both that granting the franchise to women would make little difference and that it would be harmful. Compare B. HARRISON, *SEPARATE SPHERES* 81 (1978) (discussing James Viscount Bryce's argument that women without the franchise enjoy greater political power than they would have with the franchise), *with id.* at 84 (discussing Bryce's fears of the socialistic implications of giving women the vote).

²⁹⁸ See C. CHRIST, *supra* note 295, at 25-26, 130.

The answer that I endorse is not to reject identification with the strengths and values of women, but to recognize the incompleteness of the traditional roles of women and of women's identification with one side of the dualisms. Thus, I would not repudiate the traditional values and roles of women, but would refuse to give those values and roles a privileged place. It is the acceptance and the sexualization of the dualisms that is the chief problem. When one side of a dualism is forced upon us, it is not enough to insist upon the right to choose the opposite side. Nor, of course, is it helpful to grab the weak side of the dualism voluntarily before it is forced upon us. We cannot choose between the two sides of the dualism, because we need both. Similarly, we cannot choose between men's roles and women's roles, because both are essential to us. We can never win if we fight for the bigger portion or even an equal portion of a body torn in two; we must prevent the initial destruction.²⁹⁹

3. *Criticisms and Conclusions.* — As early as the nineteenth century, feminists became aware of the idea of abolishing sex roles.³⁰⁰ The rebirth of the women's movement has again brought this idea into popular discourse, and critics have leveled a variety of attacks against what has been loosely labeled "androgyny." In order to clarify my position, I shall briefly set forth two of these attacks and my response to them.

First, opponents of androgyny warn that the elimination of the present gender system will diminish the possibilities for passion and variety in human association by making everyone boringly the same.³⁰¹ It is true that as long as we sexualize dichotomies and constitute ourselves as incomplete beings, we must depend on finding other, correlatively incomplete beings in order to reclaim wholeness. As incomplete beings, we find it threatening to consider the sudden loss of other incomplete beings who are our inverse. It is perhaps for this reason that atheism or the notion of God's being "dead" is so terrifying to some people:³⁰² they fear that they will forever lose divine traits and remain permanently incomplete. Feuerbach, however, saw that eliminating the belief in God would allow people to recognize that so-called divine qualities are in fact human.³⁰³ With respect also to the division between male and

²⁹⁹ Cf. *id.* at 26 (arguing that women have a crucial role to play in the overthrow of the classical dualistic vision in recent Western thought).

³⁰⁰ For a review of 19th century feminist views, see W. LEACH, *TRUE LOVE AND PERFECT UNION* (1980).

³⁰¹ See, e.g., Elshtain, *Against Androgyny*, 47 *TELOS* 5, 21 (1981).

³⁰² See F. NIETZSCHE, *Thus Spoke Zarathustra*, in *THE PORTABLE NIETZSCHE* 124 (W. Kaufman trans. 1954).

³⁰³ See L. FEUERBACH, *supra* note 265, at xxxviii-xxxix, 20-25.

female, whole people do not need correlatives and will find their social wants more readily satisfied by other complete beings. We can recognize that we would not increase diversity by chopping off the right arms of all women and the left arms of all men; yet what some opponents of androgyny argue is no more sensible. Sex roles limit human potential far more than they expand it.

A second objection to androgyny suggests that the union or transcendence of the male/female dichotomy may be undesirable because it would require that women accept what men have been as a part of the wholeness women seek.³⁰⁴ Instead, this argument runs, women should reject what men have been and find strength in women's culture and the values of our foremothers.³⁰⁵ My response to this is that most of what is wrong with what men have been is what they have not been. The point is not that the passions are superior to reason, subjectivity to objectivity, nature to culture, and so forth. To reverse the dualisms may secure for women a fairer portion of the divided psyche, but to reject the polarization of the dualistic pairs is to create the possibility of wholeness. Although I share the rejection of much of what men have been (or rather what they have *not* been), I feel that I must also reject much of what women have not been (and thus, in the same sense, what we have been).

When I speak of transcending the male/female dichotomy, I have in mind creating a new referential system for relating men and women to the world, a systemic departure from the ordinary image of male and female as correlatives. This does not mean making women more like men, or men more like women. Rather, it means radically increasing the options available to each individual, and more importantly, allowing the human personality to break out of the present dichotomized system. We have all experienced occasional glimpses of what this might mean — moments of power, sensitivity, and connectedness. We should recognize these fleeting experiences as a source of hope, a foreshadow of the human beings we can become. In some ways women will be *less* like present men, and men will be *less* like present women. Rather than shades of grey as an alternative to all black and all white, I envision reds and greens and blues.

³⁰⁴ This position has been attributed to Adrienne Rich. See C. CHRIST, *supra* note 295, at 83–84.

³⁰⁵ See *id.* at 84. This may be seen as an oversimplification of Rich's position. It is true that she envisions more than reversing the dualisms; she would also have us go beyond the values attributed to women *by men* and would have us engage in a new naming — an attempt to create a new definition based on our own experiences. See *id.* at 84–85. This solves only half the problem, because our experiences are themselves impoverished by the male/female dichotomy. See *id.* at 15, *passim*.