

Feminism and Family Law

KATHARINE T. BARTLETT*

I. Introduction

Feminism's principal contribution to the law of the family in the United States has been to open up that institution to critical scrutiny and question the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others. The family has long been idealized as a refuge—a “haven in a heartless world”—requiring privacy and freedom from public interference. It still is. Feminists have attempted to pierce this shield of privacy, to reach the injustice of family relationships and the law that permits them. They have questioned the premises of family privacy, insisting that just because relationships are private does not make them beyond public concern. They have challenged the inevitability or naturalness of family privacy, arguing that where the line is drawn between private and public is itself a highly discretionary, political act. And they have exposed the hypocrisy of a construct that purports to be neutral but that suppresses recognition of the kinds of harms from which women disproportionately suffer, while leaving room for prohibition of the kinds of harms men experience.

The purpose of this essay is to review some of what feminists have found when they opened up the family to scrutiny and what they have sought to do about it. It focuses on three areas: (1) divorce; (2) sex and reproduction; and (3) domestic violence. Because of space limitations, other relevant areas are omitted, including the law of marriage, work/family regulation, and the state welfare system. Even as to the topics I cover, my purpose is not a comprehensive survey of legal reforms, but rather a sketch of some common themes that helps to explain the role of feminism in family law reform.

*A. Kenneth Pye Professor of Law, Duke University School of Law.

In the course of this analysis, I will stress not only common agendas and insights that feminism has brought to family law reform, but also tensions within feminist thought and practice. Feminists have disagreed, for example, over the extent to which sex differences exist, the origin of these differences, and the significance that should be given them. They have disputed the importance of sex neutrality in formulating solutions to women's subordination. They have debated the advantages and disadvantages of individual rights approaches to securing women's rights, and compared these to approaches that offer protection or benefits to women based on their characteristics as a group and to approaches based on relational or communitarian theories. They have argued about whether to promote woman's economic self-sufficiency and ability to compete in the workplace, or to affirm woman's maternal obligations and the public support necessary to help her meet them. They have questioned each other about who speaks for women, given their diversity and the conflicting nature of some of their interests. And they have disagreed about the extent to which traditional values, including marriage and the nuclear family, should be retained.

These tensions, many of them overlapping, reveal feminism not as a single set of commitments to a particular set of reforms, but as an open commitment to identifying the ways in which the law disadvantages women and to advocating changes to eliminate those disadvantages. Feminists work from a common hypothesis that "women have been, and still are, wrongly treated (or thought about, or regarded, or valued), and that this should be remedied,"¹ and they ask common questions to test this hypothesis. They do not necessarily reach the same answers,² and the answers they reach may change over time, as circumstances change and experience teaches.³ But it is this common hypothesis and the set of questions asked to test it that bind feminists together in a more or less recognizable movement. This essay discusses some issues on which feminists have maintained a more or less common and consistent front, others as to which the common ground has shifted over time, and still others as to which the battles in which feminists

1. See Janet Radcliffe Richards, *Feminism and Equality*, 9 J. CONTEMP. LEGAL ISSUES 225, 226 (1998); see also Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 2 (1987-88) ("[t]o be a feminist today . . . is to believe that we belong to a society . . . in which women are and have been subordinated by and to men, and that life would be better, certainly for women, possibly for everybody, if that were not the case.").

2. This theme I explore in Katharine T. Bartlett, *Cracking Foundations as Feminist Method*, 8 AM. U.J. GENDER & L. ___ (1999).

3. See Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. ISSUES 279, 304-06 (1998) (describing some notable reconsiderations of views by prominent feminists).

have been engaged have been among themselves as well as between themselves and others. Understanding both the common ground and the points of dissension is important in comprehending both the past role of feminism in family law reform, and the role it is likely to take in the future.

II. Divorce

A. Reform and Feminism

Injustice within marriage has been a rallying cry for feminist activists since nineteenth-century suffrage-seekers made man's "absolute tyranny" over woman in marriage one reason why women needed the vote. In 1848, the women who had gathered at Seneca Falls, New York, to protest the "history of repeated injuries and usurpations on the part of man toward woman" included among their complaints man's control over a married woman's property and wages, his right to compel obedience and "administer chastisement," and his right to guardianship of the children.⁴ "Marital bondage," according to one feminist publication at the time, was "woman's chief discontent."⁵ To be sure, women's advocates were not as unified on questions of marriage as they were on the issue of suffrage. Indeed, many of the women active in the woman's suffrage movement believed that woman's most important mission was her domestic role as wife and mother, and opposed reform measures that might weaken marriage and the family. Thus, while Elizabeth Cady Stanton, Susan B. Anthony, and other more radical feminists sought laws making divorce more easily available (especially for the wives of brutal drunkards),⁶ pro-marriage advocates of suffrage argued that divorce would be bad for women, in part because it would result in their being cast off beyond their primes when their prospects for remarriage were bleak.⁷ The case made by radical feminists for a

4. See Declaration of Sentiments, Seneca Falls Convention, Seneca Falls, New York, July 1848, in I HISTORY OF WOMEN'S SUFFRAGE 1848-1861, at 70-71 (Elizabeth Cady Stanton et al. eds., reprint ed. 1985).

5. See JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMAN 139 (1991) (citing to THE REVOLUTION, Oct. 27, 1870, at 264).

6. See Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 L. & HIST. REV. 25, 26-29 (1990).

7. The American Woman Suffrage Association was the pro-marriage wing of suffragism, which argued that the vote for women would strengthen marriage. The concerns of both pro-divorce and anti-divorce, nineteenth-century feminists are described in NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 68-80 (1999), and in MIRIAM GURKO, THE LADIES OF SENECA FALLS: THE BIRTH OF THE WOMEN'S RIGHTS MOVEMENT 202-06 (1974). At the Seneca Falls convention, Stanton's divorce resolution was defeated. See RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 501-02 (1988).

thorough-going overhaul of divorce and family law framed an agenda that eventually became well accepted by reformers in the post-Civil War era,⁸ but this division over what women gain and what they lose in marriage prefigured debates among feminists that continue to this day.

By the end of the nineteenth century and even before women had won the right to vote, many of the legal disabilities imposed on married women had been lifted or qualified. For example, married women obtained the right to own property, including their wages, to sue and be sued, to make contracts, and to be responsible for their acts under the criminal law.⁹ Significantly, divorce remained difficult or impossible to get in many jurisdictions.¹⁰ Reform of the grounds for divorce took place over a long period and the course of reform proceeded differently in different states.¹¹ As reform proceeded, divorce was seen as a "woman's issue" and an expression of women's growing independence from men.¹² Women's advocates, however, do not appear to have been key players in most of these reforms. Neither did they assume critical roles in the no-fault divorce reform movement of the late 1960s and 1970s that eventually made no-fault divorce, in some form or another, available in every state.¹³ While feminists are sometimes given the blame, or credit, for no-fault divorce reform, its history suggests that feminists were neither active, nor well represented, in a campaign that focused less on women's interests than on problems of corruption,

8. See Clark, *supra* note 6; GURKO, *supra* note 7, at 206 (describing how Stanton's ideas on divorce and marriage gradually became accepted as reasonable goals).

9. For a volume of essays describing various nineteenth-century reforms of marital property and contract law, see *History of Women in the United States: Historical Articles on Women's Lives and Activities*, in 3 DOMESTIC RELATIONS AND LAW (Nancy F. Cott ed. 1992).

10. For a summary of divorce law in the different states in the nineteenth century, see PHILLIPS, *supra* note 7, at 439-61.

11. For an excellent history of divorce law in the state of Maryland, focusing on divorce as a legislative act, and the movement to secure judicial divorce, which was established by statute in 1841, see RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW (1994).

12. See, e.g., J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 14 (1997) (referring to the World War I era).

13. To this day, in New York and Mississippi, no-fault divorce cannot be obtained unilaterally, and requires cooperation between the parties. See N.Y. DOM. REL. LAW § 170 (McKinney 1988) (no-fault divorce is available only when the parties agree on the terms of the separation); MISS. CODE ANN. §§ 93-5-1, -2 (1994) (no-fault divorce available only on grounds of irreconcilable differences, which requires joint complaint of husband and wife). In addition, many jurisdictions impose waiting periods; in some states, these periods are quite long. See, e.g., 750 ILL. COMP. STAT. ANN. 5/401 (West 1998) (requiring "in excess of two years" living separate and apart, plus showing of irreconcilable differences causing irretrievable breakdown of marriage and failure of reconciliation).

fraud, and husbands saddled with alimony burdens they claimed to be excessive.¹⁴

Women's groups played a larger role in reforms associated with the consequences of divorce, including property distribution, alimony, child support, and custody. The objectives they sought with respect to these reforms were a mix of material and symbolic goals. In the case of property distribution, women's groups sought primarily to obtain a fairer (i.e., larger) share of assets for women at divorce.¹⁵ While the eight community property states had long recognized the ownership of both spouses in many types of property acquired by either party during the marriage, common law property states identified ownership according to title, and property owned by one spouse—usually the husband—could not be allocated at divorce to the other spouse, except in certain narrow, equitable circumstances.¹⁶ Reform of the system for dividing property between divorcing spouses in the 1970s and 1980s was viewed both as a way to secure some source of support at divorce for women whose husbands failed to provide adequate alimony,¹⁷ and to correct the fundamental unfairness of a system that neither recognized the contributions of wives toward the accumulated property of their husbands nor gave wives any ownership interest in the assets acquired by their “partners” during the marriage.¹⁸ Most women's groups preferred a presumption in favor of *equal* division of the prop-

14. See DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 147 (1989) (feminists “were not active in the campaign [for divorce reform] and their interests were not well-represented”); see also HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 168, 172 (1988) (divorce law evolved as a routine policy process, without significant involvement by feminists, who were preoccupied with the Equal Rights Amendment, abortion rights, and other issues); DiFONZO, *supra* note 12 (giving history of no-fault divorce movement, focusing on the frauds of fault-based divorce and the rise in support for a therapeutic divorce model, neither of which was a significant feminist issue). According to Herma Hill Kay, once women's groups in California became aware of the proposed change from fault to no-fault divorce, “many supported the concept.” Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 56 & n.285 (1987). On some of the reasons feminists may not have been as active as they might have been in family law reform in the 1970s, see Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 435–38 (1988–89).

15. The influence of the views of women's groups on the property provisions of the Uniform Marriage and Divorce Act is described by its Reporter in Robert J. Levy, *Uniform Marriage and Divorce Legislation: A Preliminary Analysis* 164–67 (1968) (UMDA's proposals on marital property were based on reasoning of the 1963 Report of the Committee on Civil and Political Rights of the President's Commission on the Status of Women and the 1968 Task Force on Family Law and Policy of the Citizen's Advisory Council on the Status of Women).

16. See, e.g., *Saff v. Saff*, 402 N.Y.S.2d 690 (App. Div. 1978).

17. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 627 (1991) [hereafter *Good Intentions*].

18. See Marcus, *supra* note 14, at 438–39 & n. 255.

erty acquired by either spouse during the marriage; some favored a more open-ended *equitable* division standard.¹⁹ All women's groups agreed, however, that radical change was required. By 1982, every state, by legislation or court decision, had adopted equitable distribution in one form or another.²⁰

Reform of the child support system was also viewed by feminist reformers as an issue of gender equity, to be addressed by improving the share of the economic pie for women and their custodial children.²¹ While the precise figures are disputed, scholars agree that the standard of living of women and their custodial children is likely to decline significantly at divorce, while the standard of living of custodial fathers either rises, or declines far less severely.²² Federal legislation was enacted in several different packages from 1975 through 1996²³ to attack the problem on several fronts, requiring states (1) to undertake more paternity actions and to obtain more child support orders, both against

19. See Doris Jonas Foster & Henry H. Freed, Jr., *Divorce in the Fifty States: An Overview*, 14 FAM. L. Q. 229, 230 (1981) (reporting that women's groups in Pennsylvania favored equitable, not equal, distribution of property, while the National Organization for Women in New York favored equal division); Marcus, *supra* note 14, at 450 (for many feminists, rebuttable presumption of equal distribution was a "far more attractive reform proposal"); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 850 (feminist advocates in Wisconsin favored equal division of marital property instead of a needs-based standard).

20. See BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* 14 (2d ed. 1994).

21. See, e.g., Nan D. Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs of Women*, 6 HARV. WOMEN'S L.J. 1, 4 (1983) (casting problem of inadequate child support awards as problem of equity for women).

22. The most dramatic figures were widely broadcast, but largely discredited. Lenore Weitzman argued, based on 1978 data, that custodial women and their children experienced a 73% decline in standard of living, measured as income in relation to needs, while noncustodial fathers experienced a 42% increase. LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 338 (1985). Experts refuted Weitzman's figures, but most who have studied the matter agree that custodial mothers and their children suffer economically from divorce, while fathers suffer less, or even benefit. See, e.g., Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?* 25 DEMOGRAPHY 641 (1988) (finding only 33% decline in living standard of wives, using Weitzman data); LESLIE J. BRETT ET AL., *WOMEN AND CHILDREN BEWARE: THE ECONOMIC CONSEQUENCES OF DIVORCE IN CONNECTICUT* 7 (1990) (Connecticut survey shows mean per capita income of divorced wives fell by an average of 16%, while that of divorced husbands increased by 23%). *But see* Sanford L. Braver, *The Gender Gap in Standard of Living After Divorce: Vanishingly Small?*, 33 FAM. L.Q. 111, 131 (1999) (gender gap between women and men at divorce has been "seriously overestimated" because the effects of unequal taxes and of sharing of children's expenses have been ignored).

23. See Social Security Act of 1935, § 453 (42 U.S.C. § 601 *et seq.*), as amended by Child Support Enforcement Act, Pub. L. No. 93-647, § 101(a), 88 Stat. 2351 (1975); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984); Family Support Act of 1988 (FSA), Pub. L. No. 100-485, 102 Stat. 2343

divorced fathers and never-married ones; (2) to establish mandatory, rebuttable guidelines in order to achieve more consistent and more adequate awards; and (3) to adopt stricter enforcement mechanisms, such as automatic income withholding. It is unclear how important the issue of gender equity was in the minds of legislators involved in passing this legislation; the politically conservative impulse to shift the burden of responsibility for poor children from the public to "deadbeat dads" surely provided the major impetus for child support reform.²⁴ However, the ongoing (and somewhat disputed²⁵) public evaluation of the federal legislation has focused significantly on the impact of this legislation on the lives of single mothers and their children.

While women's groups used property distribution and child support reform to try to increase resources for women and children at divorce, feminist reform efforts in the areas of alimony and child custody in the 1970s and 1980s subordinated economic goals to ideological ones. Traditionally, the availability of alimony to an innocent, dependent wife represented part of the marital bargain whereby the wife gave up control of her property and wages permanently in exchange for lifelong support. Although this rationale was undermined once women could control their own property in marriage and once divorce was available to end marriage,²⁶ it seemed clear that many divorced women would con-

(1988); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 22105.

24. The link between public welfare and child support reform is evident from the fact that the federal child support mandates have been tied to legislation concerning public welfare. This federal aid, formerly called Aid to Families with Dependent Children (AFDC), is now known as Temporary Assistance to Needy Families (TANF).

25. The extent to which child support reform has been a success depends in part on the population set being studied. For example, while between 1976 and 1997, the increase in the receipt rate of child support for previously married mothers rose only from 36 to 42%, the receipt rate for never-married mothers increased from 4 to 18%. See Elaine Sorensen & Julie Karant, *Child Support Enforcement is Working Better Than We Think*, 57 POL'Y & PRAC. OF PUBLIC HUMAN SERVICES 44, 44 (1999). Sorensen and Karant found the upward results more promising than might first appear, in that the overall proportion of never-married mothers to previously married mothers has grown from 17 to 54%. *Id.* The Urban Institute credits 56% of the increase to new enforcement tools compelled by federal legislation. *Id.* at 48.

One detailed study, which found an increase of 15% in the average monthly support award, concluded that the increase in award levels, award consistency, and case processing efficiency was "modest." See Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L. Q. 325, 342, 345 (1991). See also Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 159 (1999) [hereinafter *Child Support Policy*] (guidelines have continued "to produce awards that improve the living standard of the child support obligor, while that of his child significantly declines").

26. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 4-5 (Proposed Final Draft, Part I, Feb. 14, 1997).

tinue to need, and in some sense deserve, continuing support from their ex-husbands. Given that before no-fault divorce became available, alimony awards were rare, and low,²⁷ and that, coincident with no-fault divorce, various factors combined to reduce still further the likelihood of obtaining a permanent and adequate alimony award,²⁸ one might have expected feminists to exert pressure on the law to obtain higher and more adequate support amounts.

By and large, however, women's advocates did not seek to expand alimony but rather to contain it. The reasons were symbolic and strategic. One problem these advocates identified with alimony laws was that they promoted the damaging stereotype of the dependent wife. This was true especially in those states in which only men could be made to pay alimony, and only women could receive it.²⁹ But even sex-neutral alimony statutes helped to legitimate the stereotype of women economically dependent upon their husbands, insofar as women were virtually the only beneficiaries. Thus, not only did feminists seek to eliminate sex bias in alimony statutes, but some supported restrictions on alimony, such as time limits and stricter eligibility requirements. This support was part of the strategy to increase women's share of the property divided at divorce.³⁰ The premise of this strategy was that a one-time fair and equitable division of the property at divorce that recognized women's contribution to the couple's assets as a homemaker and parent would serve women's long-term economic interests better than having to rely for a monthly alimony check from a reluctant ex-husband. A fair property division also, it was hoped, would not stigmatize women as needy dependents. In short, even though dependence was an accurate reality for many women, feminists disfavored alimony both out of the fear that alimony only strengthened that reality, and out of the hope that property reform would be worth more to women than the monthly support checks they might give up.³¹

The same (optimistic, some would say) impulse that led feminists to

27. See Garrison, *Good Intentions*, *supra* note 17, at 629, n.27 (citing sources reporting that 9.3% of U.S. divorces included provisions for permanent alimony between 1887 and 1906, and that only about one-fourth of marriages dissolved in the United States around 1959 involved an alimony or property settlement award).

28. Marsha Garrison found that after divorce law reform became effective in New York, alimony awards declined by 43% in the three New York counties she studied. Garrison, *Good Intentions*, *supra* note 17, at 697. Many other studies also showing declines are cited. *Id.* at 634 n.44 & n.45.

29. Such was the case with the Alabama statute found to be unconstitutional in *Orr v. Orr*, 440 U.S. 268 (1979). Ruth Bader Ginsburg filed a brief in the U.S. Supreme Court in *Orr*, as *amicus curiae* for the American Civil Liberties Union.

30. See Garrison, *Good Intentions*, *supra* note 17, at 630, n.29 (citing examples of literature calling for a coordinated strategy of more property and less alimony, based on an economic partnership model).

31. This hope was disappointed. Marsha Garrison's comparison of the files of 900

disfavor alimony as a solution to women's economic vulnerability at divorce also made them uncomfortable with custody presumptions that favored mothers over fathers at divorce.³² Children were viewed for some time as the natural property of their fathers, but between the mid-nineteenth century until the 1970s, mothers in virtually all jurisdictions were favored in custody cases, either through formal statutory presumptions or judicial convention.³³ As other sex-based classifications fell to the equal rights campaign of the 1970s and 1980s, the explicit partiality of these presumptions and conventions came to seem untenable. A few feminist advocates briefly flirted with the possibility of joint custody as a gender-neutral solution that would encourage equal parenting roles,³⁴ but most feminist advocates from the beginning of this period favored some version or another of the primary caretaker presumption.³⁵ Neither type of presumption caught on, and most states continue to operate with the best-interests-of-the-child test in custody cases.³⁶ The upshot is the almost complete elimination of statutory presumptions in favor of mothers, without a substitute standard to control bias against them.³⁷

New York divorces filed in three diverse counties in 1978, two years before the enactment of New York's equitable distribution law, and the files of 900 divorces filed in those same counties in 1984, four years after equitable distribution was enacted, showed an increase of only 10% in the number of women who were receiving an approximately equal division (between 40 and 60%) of the assets. See Garrison, *Good Intentions*, *supra* note 17, at 641–42. Moreover, Garrison concluded that most couples did not have enough significant assets to divide and that the more property a husband had, the lower percentage the wife got of it. *Id.* at 667, 695.

32. MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 124–26 (1994).

33. *Id.* at xiv, 123.

34. See Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986). My view on how to best achieve gender neutrality in custody law has shifted over time. As reporter for the American Law Institute's custody provisions in the Principles of Family Dissolution, I now support a solution that attempts to match custody outcomes with the percentage of caretaking each parent performed during the marriage. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 10–13 (Tentative Draft No. 3, Part I, March 20, 1998). The original concept for this approach was developed in Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992).

35. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1987); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291 (1992).

36. Most states provide some criteria for determining what is in the best interests of the child, and in some cases, the prior level of caretaking is a factor. See, e.g., WASH. REV. CODE ANN. § 26.09.187(3)(a)(i) (West Supp. 1996) (“greatest weight” should be given to relative strength, nature and stability of child’s relationship with each parent, “including whether a parent has taken greater responsibility for performing caretaking functions relating to the daily needs of the child”).

37. There are two significant exceptions. First, in a few jurisdictions the law can be interpreted to permit sex matching—between mothers and daughters, or fathers and sons. See, e.g., ALA. CODE § 30–3–1 (1989) (courts may consider “the age and sex of

B. Feminism and Reform

There are different ways to tell the story of U.S. divorce law reform and feminism's role in that reform. The story may focus on a linear progression of rational improvements in the law, often initiated by women's advocates with a set agenda that, after initial rejection in many instances by unenlightened legislators and judges, gradually gained acceptance. Or, it may be viewed as a more chaotic jumble of actions and reactions, in which the interests of women were often invisible, conflicting, and even incoherent, and in which reforms vigorously sought by women in one historical context came to seem unwise and counter-productive in another.

Both of these stories, of course, have some validity. As described above, feminist agendas for greater equality for women in marriage and for more liberal divorce laws, which were dismissed in the nineteenth century as far too radical, have eventually come to constitute the dominant way of viewing marriage and divorce, even as feminists have themselves moved beyond these agendas toward other, still more radical, objectives. At the same time, feminists have held goals—such as the desire for greater financial security for women and the end of sex-related advantages and disadvantages—that have sometimes been difficult to reconcile. At each stage in the history of feminism and family law reform, it is possible to peek behind the apparent unity and see the evidence of these difficulties.

The tension among feminists caused by multiple, sometimes conflicting goals has been apparent over the past decade especially in the criticisms that prominent feminists such as Martha Fineman and Mary

the child"); *In re Marriage of Arcaute*, 632 N.E.2d 1082, 1085 (Ill. App. Ct. 1994) (approving trial court's reasoning that "other things being equal, pre-adolescent children and adolescent young people derive substantial benefits from the close personal relationship with the same sex parents, to whom they look for a model"); *Warner v. Warner*, 54 N.E.2d 752, 754 (Ind. Ct. App. 1989) ("as a child gets older, being able to identify with a parent of the same sex is important"); *Dalin v. Dalin*, 512 N.W.2d 685, 689 (N.D. 1994) (in upholding custody award of daughter to mother, appellate court concluded that trial court's questions about who would help teach the child "certain things that a girl should learn that [are] easiest to learn from a woman" were "not motivated by or evidence of gender bias"). Most courts decline to give a preference to the same-sex parent. *See, e.g.*, *Seeley v. Jaramillo*, 727 P.2d 91, 95 (N.M. 1986); *Synakowski v. Synakowski*, 594 N.Y.S.2d 852, 853 (N.Y. App. Div. 1993).

Second, in some jurisdictions mothers of out-of-wedlock children still have a custodial preference. *See, e.g.*, ARK. CODE ANN. § 9-10-113(a) (Michie 1998); OKLA. STAT. ANN. tit. 10, § 6 (West 1998); VT. STAT. ANN. tit. 14, § 2644 (1989); *see also* *Rainer v. Feldman*, 568 So. 2d 1226, 1227 (Ala. 1990) (mother of child born out of wedlock has superior custody rights); *People v. Reynolds*, 429 N.W.2d 662, 664 (Mich. Ct. App. 1988) (although statute gives equal rights to both parents, parent "is defined as the mother if the minor is illegitimate"); *Brown v. King*, 388 S.E.2d 400, 401 (Ga. Ct. App. 1989) (custodial parent presumed to be natural guardian).

Becker have made against women's advocates who fought for many of the reforms described in the prior section, for having been too concerned with sex neutrality and not concerned enough with women's material interests.³⁸ It is not clear how fair this criticism is. As Joan Williams points out, feminists who have pursued sex-neutral solutions to women's unequal situations have always sought to advance women's material interests; they have just believed that the best way to do so is within a sex-neutral framework.³⁹ In fact, those feminists who have been especially critical of the equality concept have urged solutions that are themselves consistent with formal equality.⁴⁰ The wisdom of these measures, as with all other measures that feminists propose, turns not on whether or not men and women should be treated "equally," but on which equality solution is best. Of the positions feminists have taken on the legal issues raised by divorce, the revival of a maternal custody presumption⁴¹ would appear to be the only one that poses the stark choice between equal and special treatment.

38. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 176 (1991) [hereinafter *THE ILLUSION OF EQUALITY*] (egalitarian ideology takes a "serious toll" on women who must function in an unequal world; feminists should advocate need for unequal treatment or result equality); MARY ANN MASON, *THE EQUALITY TRAP* 22 (1988) (replacing laws that protect women and children following divorce with laws that dictate that women can take care of themselves has had "drastic effects" on women and children); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 224 (formal equality is even more "dangerous" for women than for racial minorities).

39. Williams, *supra* note 3, at 296–306.

40. Martha Fineman, for example, criticizes "equality feminists" for settling for rules requiring courts to divide marital property equally, arguing that marriage and childrearing places a disproportionate burden on a woman's career and earning capacity. See FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 38, at 36–52. Yet, her solution that property be divided under a needs-based standard is also a sex-neutral solution. Measures to equalize post-divorce income between the custodial home and that of the nonresidential parent that a number of feminists have advocated are also consistent with an equal treatment/formal equality model. See Garrison, *supra* note 25, at 189; SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 183 (1989) (urging that combined alimony and child support be awarded so that both households enjoy the same standard of living); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2260–61 (1994) (advocating income equalization throughout the dependency of any children and additional years thereafter in a ratio of one year for every two years of marriage); Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1102, 1117 (1989) (arguing that divorcing couples should continue their joint financial status for a set period of time after divorce, such as one year for every two years of marriage).

41. This position is advocated in Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUDIES 133 (1992); see also Mary Ann Mason, *Motherhood and Equal Treatment*, 29 J. FAM. L. 1, 23–28 (1990–91) (citing advantages of a maternal presumption); Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 50–51 (1991) (advocating focus on women in custody relocation cases, since discriminatory effects of gender neutral standards will not otherwise be apparent).

Still, there are substantive differences between feminists that explain why one equality solution to a particular problem seems superior to another. Joan Williams puts her finger on one substantive difference when she distinguishes between *equal parenting* advocates and *maternalists*.⁴² Advocates of equal roles in the home and at work put a high priority on men sharing the burdens (and joys) of childrearing and family and women obtaining the opportunities of paid employment, viewing this shared role ideal as necessitating the elimination of not only barriers to women, but favored treatment as well. Maternalists believe the goal should not be to change women by directing them away from motherhood and women's work, but rather to support them when they take these traditional paths.⁴³

Another axis along which feminists differ substantively, and have long done so, concerns the appropriate role of the state. The tension has been especially apparent in the area of child support. Feminists have been supportive, in general, of efforts to obtain more adequate child support awards from fathers. Some feminists, however, have become increasingly critical of the emphasis placed on *private* resources as the way to address financial dependency by mothers and their children. They emphasize that a private system is inadequate in those many cases in which fathers are simply too poor to support their children.⁴⁴ They argue also that dependency is an inevitable condition of children, the elderly, and the disabled and that women who meet the needs of dependents are satisfying a public function, deserving of public support. Martha Fineman couples this latter argument with the criticism that when mothers are forced to rely on private resources, they are inappropriately being forced to depend on a man and thus to conform to a nuclear family norm.⁴⁵

More generally, just how much support the law *should* give to the nuclear family has been a difficult issue for feminists. While most femi-

42. See Williams, *supra* note 3, at 297.

43. See, e.g., Christine A. Littleton, *Reconstructing Gender Equality*, 75 CAL. L. REV. 1279 (1987); FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 38; see also Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (analyzing numerous legal regimes through which home labor is devalued, and proposing reforms).

44. See, e.g., Garrison, *Child Support Policy*, *supra* note 25, at 175-77 (child support guidelines cannot avert poverty of children of poor parents, because it cannot raise the income of a support obligor or recreate the economies of scale available to an intact household).

45. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 213 (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*] ("The focus on paternity proceedings designed to

nists generally support an expanded definition of family and the protection of voluntary relationships, whether or not they are centered on a married, heterosexual couple, feminists also believe that traditional nuclear families serve important societal goals.⁴⁶ It has been said, however, that the “major theoretical contribution of contemporary feminism has been the identification of the family as a central institution of women’s oppression.”⁴⁷ In keeping with this contribution, Martha Fineman has argued for the elimination of the nuclear family as the basic unit to which special property, tax, contract, and tort privileges and protections apply, in favor of the mother-child dyad as the privileged group.⁴⁸

It is perhaps surprising that Martha Fineman, who among influential, contemporary feminists has put the highest priority on protecting women in the exercise of their traditional maternal roles, seems the least supportive of traditional marriage. Conversely, the feminists who have been the most interested in eliminating traditional gender roles have tended to remain more loyal to the traditional, marriage-based family unit.⁴⁹ It is also unexpected, in light of her strong maternalist identification, that Fineman has not been one of the feminists who supports a return to a maternal custody presumption.⁵⁰ These incongruences could be viewed as inconsistencies, but they are better understood as manifestations of the many traps feminists face in attempting to improve women’s situation. The marriage reform trap presents one of the most difficult dilemmas: Is it better for women to save marriage without traditional gender roles, or to save traditional gender roles without marriage? One hundred and fifty years after Seneca Falls, these same questions continue to vex women’s advocates.

tie together financially men and single mothers and their children obscures the magnitude and dimensions of the economic deprivations that make it difficult for women who make decisions to reproduce or to raise their children.”).

46. See, e.g., Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809 (1998) [hereinafter *Saving the Family*].

47. See Ellen DuBois, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism*, 3 FEMINIST STUDIES 63, 63, 70 (1975) (citing to JULIET MITCHELL, *WOMEN’S ESTATE* (1971), as the “clearest exposition” of this insight).

48. FINEMAN, *THE NEUTERED MOTHER*, *supra* note 45.

49. I put myself in this category. I have advocated only sex-neutral solutions to problems, and see such solutions as necessary to a softening of gender roles, which I consider a worthy, feminist goal; and yet much of my scholarship is about how to improve the law that relates to the traditional, nuclear family, on the explicit assumption that this unit is worth preserving. See Bartlett, *Saving the Family*, *supra* note 46, at 815–16.

50. See Fineman, *Dominant Discourse*, *supra* note 35 (advocating a primary caretaker presumption).

III. Sex and Reproduction

A. Reform and Reproductive Rights

It has been one of feminism's greatest insights that society's norms with respect to sex and reproduction are central to women's oppression.⁵¹ Contemporary feminists describe a "sex/gender system," which rationalizes women's subordinate roles according to their biological functions, especially those related to sex and reproduction.⁵² In attempting to expose the sex/gender system, feminist scholars have emphasized how state policies with respect to contraception, abortion, and procreation have been political decisions, masked in medical or moral rhetoric. The link between restrictions on the medical practice of abortion that were in place in the nineteenth century and the desire to maintain women in their "place" are particularly well documented.⁵³ More generally, women in the nineteenth century were portrayed by doctors as fragile and dominated by their reproductive process⁵⁴ in order to justify restrictions on their reproductive choices.⁵⁵ Women who did not conform to expected gender roles were deviants—promiscuous when their sexual activities exceeded the allowable boundaries,⁵⁶ frigid or hysterical when they failed to fulfill their marital obligations.⁵⁷ Restriction-

51. See, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX* 108 (H.M. Parshley ed. & trans. Knopf Books 1953) (1949) ("The fundamental fact that from the beginning of history doomed women to domestic work and prevented her taking part in the shaping of the world was her enslavement to the generative function.").

52. See Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157, 165 (Rayna R. Reiter ed. 1975) (defining the "sex/gender system" as "a set of arrangements by which the biological raw material of human sex and procreation is shaped by human, social intervention and satisfied in a conventional manner").

53. See LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT; BIRTH CONTROL IN AMERICA* xv-xviii (rev. ed. 1990). The movement to restrict abortions, for example, was spearheaded by "regulars," mostly men, who ultimately organized into the American Medical Association, in order to drive out "irregulars," disproportionately women, who made themselves available to perform these procedures. See Brief of 281 American Historians as Amici Curiae Supporting Appellees at 21-24, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

54. See, e.g., HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* 74-75 (1868) ("Woman's mind is prone to depression and, indeed, to temporary actual derangement, under the stimulus of uterine excitation, and this alike at the time of puberty and the final cessation of the menses, at the monthly period and at conception, during pregnancy, at labor, and during lactation.").

55. See CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 22-23 (1985).

56. See PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 43 (1984) (describing struggle, especially by black women, to spurn roles of mistress, whore, and breeder, for moral high ground epitomized by the wife who "was hoisted on a pedestal so high that she was beyond the sensual reach of her own husband").

57. Smith-Rosenberg details at length how the diagnosis of hysteria was used to define woman's role and personality. See SMITH-ROSENBERG, *supra* note 55, at 208-16.

tions on interracial marriage and on penalties against illegitimate children and their mothers also served, in their own ways, to channel permissible sexual and reproductive activity to uphold the sexual hierarchy.⁵⁸

Given the importance of caring for children to women's gender roles, women's ability to determine whether and when they bear children has been viewed by feminists as a critical factor in the degree of subordination they experience. In her classic work on the history of birth control and abortion, historian Linda Gordon traces the history of woman's search for greater reproductive freedom in America through three distinct phases: (1) the "voluntary motherhood" campaign in the second half of the nineteenth century, which affirmed woman's role as mother within the context of the choice and autonomy expressed by the woman's suffrage movement at the time; (2) the "birth control" movement in the first quarter of the twentieth century, which viewed the issue of women's autonomy within the context of a larger socialist movement seeking a revolution of the class structure and empowerment of the working class; and (3) the liberal, middle-class reform movement, beginning in about 1920, which saw birth control and abortion as a matter of "planned parenthood" to be managed with the help of the medical and health professions.⁵⁹

A more radical, feminist pro-abortion movement beginning in the early 1970s represents a fourth phase, in which abortion is viewed as a matter of the right of determination of all women.⁶⁰ This right, initially situated by the U.S. Supreme Court in the sanctity of the marriage bond between husband and wife,⁶¹ expanded into a freedom of intimate decision making centered in the individual woman,⁶² and later combined with the medicalized view of birth control and abortion to form the conceptual basis of the Supreme Court's decision in *Roe v.*

58. See GIDDINGS, *supra* note 56; Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984).

59. GORDON, *supra* note 53, at xix-xx. The focus of the abortion rights movement on woman's autonomy has persisted, although the U.S. Supreme Court's abortion decisions, starting with *Roe v. Wade*, 410 U.S. 113 (1973), have reconfirmed the medical view of abortion. *Id.* at 405.

60. See GORDON, *supra* note 53, at 404.

61. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

62. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976) (invalidating statute giving husband right to veto wife's decision to have an abortion).

Wade.⁶³ The two frameworks have remained somewhat distinct orientations, however, with organizations such as the National Abortion Rights Advocacy League (NARAL) emphasizing the feminist commitment to the individual woman's autonomy and Planned Parenthood and other organizations favoring the medical model of reproductive rights.

*B. Feminism and a New Generation
of Reproductive Issues*

Over the last two decades, feminist activity has been directed, for the most part, less at extending reproductive rights than at preserving them in the face of significant efforts at retrenchment. Soon after *Roe v. Wade*, it was established that, while the individual woman had a right to make the decision to have an abortion, the state could not be compelled to fund it.⁶⁴ More recently, the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁶⁵ has altered the framework of *Roe v. Wade*, which had allowed women unlimited discretion to have an abortion at least in the first trimester of pregnancy, to permit state limits on abortion that do not constitute an "undue burden" on the women's autonomy rights.⁶⁶ Under this evolving standard, courts have upheld, among other things, waiting period restrictions, rules requiring abortion providers to provide certain specified information to women seeking abortions,⁶⁷ and prohibitions against the practice by traditional nonphysician abortion providers.⁶⁸ In addition, prior U.S. Supreme Court decisions requiring a judicial bypass provision to parental consent restrictions⁶⁹ have been altered to permit parental consent provisions with waiting periods even when these restrictions could cause substantial delays in obtaining an abortion.⁷⁰ Efforts

63. 410 U.S. 113 (1973).

64. See *Maier v. Roe*, 432 U.S. 464 (1977); *Harris v. McCrae*, 448 U.S. 297 (1980).

65. 505 U.S. 833 (1992).

66. 505 U.S. at 874.

67. See, e.g., *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526 (8th Cir. 1994) (upholding North Dakota regulation requiring abortion providers to furnish women seeking abortion with information 24 hours prior to procedure); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993) (upholding Ohio statute requiring physician to furnish "objective and nonjudgmental" information to women seeking abortion).

68. See *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (limiting performance of abortions to physicians, in effort to prevent the sole physician's assistant from performing abortions in the state from doing so).

69. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

70. See *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (allegations of 22-day delays).

at enacting federal and state prohibitions directed against a particular method of late-term (or so-called "partial birth") abortions have been vigorously pursued, although to date, the constitutionality of this legislation is in doubt.⁷¹ Further, the exercise by many women of their reproductive rights has been frustrated by violence and threats of violence, and efforts to curb this violence have met with some resistance by courts.⁷²

As reproductive rights are being curtailed in many states, it is hard to imagine a future in which issues of reproductive control are evaluated absent their implications for women, and even harder to imagine a time in which there will not be overwhelming support among feminists for reproductive choice. The feminist responses to these efforts to curtail reproductive rights, however, have included serious review of the individual privacy and autonomy rationale of *Roe v. Wade*. This rationale has been blamed for the abortion-funding decisions⁷³ and for the difficulty of developing a constitutional theory to compel the state to protect women who are physically threatened in their intimate relationships.⁷⁴ With these failures in mind, some feminists have argued that equal protection is a better theory to support reproductive freedom than the right of privacy.⁷⁵

71. The federal Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. (1997) was vetoed by President Clinton on October 10, 1997. At least one state measure was deemed, at least preliminarily, to have constitutional weaknesses. See *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997) (preliminary injunction issued against Nebraska's ban on late-term abortions, since requiring women to use abortion methods that pose greater risks to their own health likely constitutes an undue burden).

72. See, e.g., *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (finding § 2 of the Civil Rights Act of 1871 does not provide a federal cause of action against persons obstructing access to abortion clinics); *Northeast Women's Center v. McMonagle*, 670 F. Supp. 1300 (E.D. Pa. 1987) (dismissing antitrust claim against 31 anti-abortion protestors who have participated in various protest activities). But see *Freedom of Access to Clinic Entrances Act of 1994 (FACE)*, 18 U.S.C. § 248(a)(1)(1997) (providing civil and criminal penalties against "anyone who by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with . . . any person because that person is or has been, or in order to intimidate such person . . . from, obtaining or providing reproductive health services"); *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996), *cert. denied*, 116 S. Ct. 1582 (1997) (upholding FACE from constitutional attack).

73. See *supra* note 64.

74. See Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 984-85 (1991) (concept of privacy reinforces and supports violence against women); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990) (state should be constitutionally obliged to protect women from private violence); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 657 (1983) ("The very place (home, body), relations (sexual), activities (intercourse and reproduction), and feelings (intimacy, selfhood) that feminism find central to women's subject form the core of privacy doctrine. But when women are segregated in private, one at a time, a law of privacy will tend to protect the right of men 'to be let alone,' to oppress us one at a time.").

75. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L.

Other challenges to the privacy theory arose out of the branch of feminism associated with "different voice" theory or "relational feminism." Some feminists found in relational feminism an alternative justification for the woman's right to abortion;⁷⁶ others worried that, by contrast to the appealing images of relational feminism, "choice" rhetoric feeds the unappealing image of mothers pursuing their own self-interest, which is being used to undercut many of women's hard-won rights.⁷⁷ More recently, the reinvigoration of the view of an unwanted pregnancy as a bodily assault, from which a woman should be able to defend herself, has reinvigorated the autonomy perspective, within a framework in which the question of whether the fetus is a person is arguably avoided and the obligation of the state to support women seeking abortions more firmly secured.⁷⁸

A rethinking of the old frameworks has been forced not only by

REV. 955, 1013-28 (1984); see also Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

There are some references in opinions of the U.S. Supreme Court that give support to an equality approach to abortion. See, e.g., *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986) (the "promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . extends to women as well as men"); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part) (discussing both liberty and equality concerns); *Bray v. Women's Health Clinic*, 506 U.S. 263, 322-26 (1993) (Stevens, J., dissenting) (abortion protestors are motivated by discriminatory animus toward women).

76. See, e.g., Robin West, *The Supreme Court 1989 Term, Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 81-85 (1990) (arguing that it is woman's capacity to choose abortion responsibly that justifies giving her control over that decision).

77. See, e.g., Joan C. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1561 (1991); Marjorie M. Shultz, *Abortion and the Maternal-Fetal Conflict: Broadening Our Concerns*, 1 S. CAL. REV. L. & WOMEN'S STUD. 79, 81 (1992) ("uncritical embrace of extreme autonomy rhetoric and exclusively women-regarding positions . . . [undermines] our persuasiveness, [renders] us vulnerable on grounds of principle, and [damages] our aspirations for a humane and responsible world"). See also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 58-62 (1987) (laws that set greater limits on abortion, such as those of most European countries, would better reflect existing consensus in this country and communicate a better message that abortion is a "serious moral issue"). Some have used relational feminism principles to oppose the woman's right to an abortion altogether, rejecting the argument that abortion rights are necessary for women's equality and opposing abortion as a "quick fix," oppressive to women, and discriminatory against unborn children whom it is in women's interests to protect. These arguments, asserted by groups such as Feminists for Life of America (FFLA) are detailed and critiqued in Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, in *FEMINIST NIGHTMARES: WOMEN AT ODDS* 159 (Susan Ostrov Weisser & Jennifer Fleischner eds. 1994).

78. See, e.g., ROBIN WEST, *Liberalism and Abortion*, 87 GEO. L.J. 2117 (1999) (reviewing EILEEN McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996), which develops an argument earlier developed in 1986 by Judith Jarvis Thomson).

threats to women's abortion rights but by other factors, as well. One of these factors is the challenge to the established white, middle-class feminist community by nonwhite women and poor women; since this challenge, the question in evaluating the law relating to sex and reproduction is no longer simply how the law affects women in some general sense, but how it affects certain groups of women, such as those who cannot afford to exercise all of the "choices" the law makes available to them. A second factor has been the emergence of new reproductive technologies, technologies that do not require sex, or even a woman's body, and thus that change the relationship between reproduction and the oppression of women.

Both of these factors have sharpened the tension between autonomy and other potentially competing values and principles woman may care about. For example, new reproductive technologies raise issues about the possible exploitation of poor women, hired to bear children for couples who can afford to pay. An individual autonomy model emphasizes the value in affirming women's choices, including potentially unwise surrogacy arrangements, and the risk that protecting individual women from the choices they make demeans all women.⁷⁹ Yet, such arrangements may enable some women to be exploited or to have to sacrifice their own reproductive freedom in order to facilitate the reproductive choices of other women. Debates over prostitution⁸⁰ and the appropriate legal response to drug-abusing pregnant women⁸¹ have raised similar questions about the meaning of choice in sex and repro-

79. The freedom of contract issue has been a focus of the scholarship addressing surrogacy arrangements. See, e.g., Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996); CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* 146-66 (1989). Freedom of contract issues also arise over the issue of agreements, often involving gay and lesbian parents, to define the involvement of a known sperm donor in the life of a child born as a result of artificial insemination. See, e.g., Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375 (1996); see also *Thomas S. v. Robin. Y.*, 618 N.Y.S. 2d 356 (App. Div. 1994) (dispute between sperm donor and lesbian co-parents).

80. The contours of the debates are set forth in Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth,"* 4 COLUM. J. GENDER & L. 26 (1994).

81. Compare Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (arguing against prosecution of drug-addicted mothers); Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992) (advocating "facilitative" model of voluntary services and treatment); Kathryn Schierl, *Note, A Proposal to Illinois Legislators: Revise the Illinois Criminal Code to Include Criminal Sanctions Against Prenatal Substance Abusers*, 23 J. MARSHALL L. REV. 393 (1990) (urging use of criminal sanctions); Deborah Mathieu, *Mandating Treatment for Pregnant Substance Abusers: A Compromise*, 14 POLITICS & LIFE SCIENCES 199 (August 1995) (urging civil commitment, but not criminal penalties).

duction and how to protect women's interests when women live in very different economic circumstances.

New reproductive practices may send other ideological messages, as well, that may be undesirable from some women's point of view. Advanced scientific methods to achieve conception using a couple's own genetic material, for example, reinforce the autonomy of individuals to act on their desires to have and nurture children,⁸² but at the same time glorify such traditional gender notions as woman's childbearing destiny and the importance of the male "seed" and denigrate infertility, adoptive relationships, and roles for women other than bearing children.⁸³ Technologies that allow couples to choose the sex of their child also enhance reproductive choice, but at the same time they commodify personhood (to which many feminists object)⁸⁴ and interfere with efforts to downplay the matter of sexual distinction.⁸⁵

New reproductive technologies that offer risks to some women and opportunities to others also challenge conventional feminist notions of equality. Women's reproductive autonomy is based on the understanding of reproduction as something that women, not men, do. But with the potential for reproduction to begin outside the woman's body or with genetic material from an outside donor, woman's role comes to be increasingly like that of men, giving new life to the question whether men should have equal control over reproduction. Issues that have arisen so far concerning the enforceability of surrogacy contracts, the ownership of frozen pre-embryos, and the control of drug-using pregnant women, are likely only the tip of the iceberg of this confrontation between equality and autonomy interests.

IV. Domestic Violence

Feminists also have linked family violence with women's inequality and oppression. Traditionally, the law has viewed violence in the family as a private issue, into which the law should not intrude, for fear of

82. Shultz, *supra* note 77; Lori Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L., MED. & HEALTH CARE 72 (1988).

83. See, e.g., Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369 (1992); BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* (1989); Nadine Taub, *Surrogacy: Sorting Through the Alternatives*, 4 BERKELEY WOMEN'S L.J. 285 (1989-1990).

84. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

85. See Ehrenreich, *supra* note 83, at 1376; Derek Morgan, *Making Motherhood Male: Surrogacy and the Moral Economic of Women*, 12 J.L. & SOC'Y 219 (1985); Judith Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741 (1988).

exposing the family to “public curiosity and criticism”⁸⁶ and thus undermining it. Feminists have shown that, to the extent family violence is beyond the reach of the law, men’s abuse of and power over women is enabled and affirmed.⁸⁷

The ebbs and flows of legal responses to domestic violence have had more to do with shifts in political and social fashions in U.S. history than with the actual incidence of crime or knowledge about it.⁸⁸ Thus, for example, late nineteenth-century campaigns against abuse of children and women were tied to the temperance movement, directed (with some condescension) against lower class families, and related more to the desire to domesticate the new, immigrant populations than with any more general concern about the problem of the subordination of women.⁸⁹ By comparison, efforts to use the law to curb family violence in the last few decades of the twentieth century have been closely tied to feminist concerns about equality and individual autonomy for women. At the same time, part of the most recent case for regulating domestic violence has been the growing understanding that it is a more common, and more serious, problem than was previously assumed. Estimates of family assaults vary widely, but the Uniform Crime Reports indicate that, of all female murder victims in 1995, 26 percent were killed by husbands or boyfriends,⁹⁰ and a report submitted to Congress in connection with the passage of the Violence Against Women Act of 1994 estimated that 3 to 4 million women are beaten by their husbands or boyfriends each year—an average of one every fifteen seconds.⁹¹

Feminist successes in achieving reform in this area are quite impressive. The common law exemption for rape has been abrogated completely in at least twenty-four states and, in the remainder of the states, the exemption has been qualified by statute or judicial decision.⁹² All

86. *State v. Rhodes*, 61 N.C. 453, 457 (1868).

87. *Schneider*, *supra* note 74, at 985.

88. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 3–4 (1988).

89. *Id.* at 20–21; Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2138–40 (1996).

90. U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES 1995* at 17 (1996).

91. *Violence Against Women: Victims of the System: A Bill to Combat Violence and Crimes Against Women on the Streets and in Homes, Hearings on S. 15 Before the Committee on the Judiciary*, U.S. Senate, 102d Cong. 238 (1991). This same source reports that as many as 20% of hospital emergency room cases are related to wife battering, *id.*, and that 25% of women who attempt suicide are victims of family violence. *Id.* at 259.

92. See Lisa R. Eskow, *Note, The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 *STAN. L. REV.* 677, 682 (1996).

states now have procedures for obtaining civil protection orders that, under varying circumstances, can enjoin an abuser from harassing, threatening, or abusing a victim.⁹³ The effectiveness of civil protection orders is limited, of course, by the willingness of the state to enforce them and the abuser to obey them,⁹⁴ as well as by the resources and resilience of the victims and how well the victims stand up to the real or potential escalation of the violence.⁹⁵ Still, police training, greater availability of shelters for battered women and their children, and public education efforts directed at both abusers and the abused have helped to improve attitudes and options in these regards.

By 1994 at least twenty-two states and the District of Columbia had statutes requiring mandatory, warrantless arrests in domestic violence situations.⁹⁶ Depending on the statute, arrest may be mandated when the officer determines that a family violence crime has been committed,⁹⁷ when there is probable cause that a protection order has been violated,⁹⁸ where there is probable cause that an aggravated battery has occurred,⁹⁹ or when the officer observes a recent physical injury.¹⁰⁰ In addition, in a number of states, special domestic abuse statutes treat violence in the domestic context as a more serious offense than in other settings.¹⁰¹ Most states now have anti-stalking statutes.¹⁰²

93. Citations to the statutes, along with the varying requirements and procedures for obtaining these orders, can be found in Catherine F. Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993); see also Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28(4) CLEARINGHOUSE REV. 383 (1994).

94. See David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153 (1995); Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414 (1995). Research on the effectiveness of mandatory arrest statutes suggests that employed or otherwise "socially bonded" abusers may be more likely to comply with orders than unemployed abusers or those with weak social bonds. See Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 CRIM. L. & CRIMINOLOGY 1, 30-33 (1992); Anthony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOC. REV. 691, 695 (1992).

95. See Walter W. Steele, Jr. & Christine W. Sigman, *Reexamining the Doctrine of Self Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169, 172-74 (1991).

96. See Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U.J. GENDER & L. 171, 180 n.44 (1994).

97. See, e.g., CONN. GEN. STAT. ANN. § 46b-38a (West Supp. 1999).

98. See, e.g., MINN. STAT. ANN. § 518B.01.14(b) (West Supp. 1999).

99. See, e.g., LA. REV. STAT. ANN. § 46:2140(1) (West 1999).

100. See, e.g., WASH. REV. CODE ANN. § 10.31.100(2)(a)-(b) (West Supp. 1999).

101. See, e.g., MINN. STAT. ANN. § 51B.01 (West Supp. 1999).

102. See Kristin J. Bouchard, *Note, Can Civil Damage Suits Stop Stalkers?*, 6 B.U. PUB. INT. L.J. 551 (1997); Heather M. Stearns, *Comment, Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 SANTA CLARA L. REV. 1027 (1995).

The law has also become more responsive to the impact of domestic violence on the safety and welfare of children. At least two-thirds of the states require consideration of domestic violence in custody determinations.¹⁰³ Many of these states impose a rebuttable presumption or an outright prohibition against an award of custody, or joint custody, to a perpetrator of domestic violence.¹⁰⁴ A finding of domestic violence also increasingly affects the terms of visitation¹⁰⁵ and whether or not a parent will be required to mediate a custody dispute.¹⁰⁶

These reforms have been viewed, uniformly, as matters of women's rights and have succeeded in large part because of lobbying by women's groups. The Violence Against Women Act of 1994 goes far in explicitly recognizing the link between violence against women and women's equality.¹⁰⁷ Among its wide range of measures to address domestic violence, it creates a civil rights remedy for "crimes of violence motivated by gender." Under this provision, any person, including but not limited to a person who acts under color of state law, who

103. See generally Pauline Quirion, *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501 (1997); *Family Violence Project of the National Council of Juvenile and Family Court Judges*, 29 FAM. L.Q. 197 (1995).

104. See, e.g., ARIZ. REV. STAT. ANN. § 25-403(B) & (H) (West Supp.1998) (person who committed act of domestic violence has burden of proving that visitation will not endanger child, and joint custody shall not be awarded if there has been a significant history of domestic violence); DEL. CODE ANN. tit. 13, § 705A(a), (b) (Supp. 1998) (rebuttable presumption that no perpetrator of domestic violence shall be awarded custody of any child); HAW. REV. STAT. ANN. § 571-46(9) (Michie 1997) (rebuttable presumption that placement is detrimental and not in best interests of child); IDAHO CODE § 598.41(1)(b) (West Supp. 1999) (rebuttable presumption against joint custody).

105. See, e.g., LA. REV. STAT. § 9:364(C) (West Supp. 1999).

106. About half the states mandate mediation for custody and visitation issues. See, e.g., CAL. FAM. CODE § 3170 (West Supp. 1999). Somewhat fewer than half the states allow the court to use its discretion whether to mandate mediation. See, e.g., ALASKA STAT. § 25.20-080 (Lexis 1998). Typically, in situations in which mediation would otherwise be required, exception is made where domestic violence has occurred. See, e.g., COLO. REV. STAT. § 13-22-311(1) (1998).

107. See 42 U.S.C. §§ 14031-14040 (1994). This Act was passed as part of the Violence Crime Control and Law Enforcement Act of 1994 and addresses the problem of domestic violence through a variety of different mechanisms, including increased funding for battered women's shelters, a national domestic abuse hotline, rape education and prevention programs, and training for federal and state judges. The Act also expanded substantive legal remedies for domestic violence, including criminal enforcement of interstate orders of protection, and criminalization of crossing state lines for the purpose of or in the course of "harassing, intimidating, or injuring a spouse or intimate partner." See generally Victoria Nourse, *The Violence Against Women Act: A Legislative History*, in *VIOLENCE AGAINST WOMEN: LAW AND LITIGATION* 5-1 (David Frazee & Ann Noel eds. 1996); *Symposium, The Violence Against Women Act of 1994: A Promise Waiting to Be Fulfilled*, 4 J.L. & POL'Y 371 (1996).

commits a crime of violence “because of gender or on the basis of gender and due, at least in part, to an animus based on the victim’s gender” is liable for “compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.”¹⁰⁸

The unity of women’s groups on issues of domestic violence has been unequivocal and unambivalent. There are two major reasons. First, the problem is large, and there has been too much consensus on urgent issues to argue about the rest. In this regard, the campaign for greater legal regulation of domestic violence has been not unlike the movements to secure equal employment opportunity and equal pay for women or to deregulate abortion—both unified movements that accomplished much, before divisions erupted over second-generation issues.

Second, for the most part, domestic violence does not trigger the same conflicts over gender roles that have plagued some of the other family law reform efforts. Whether one thinks that women should be encouraged to juggle family and work rules on equal terms with men or whether one believes full-time motherhood should be equally valued, one can still agree that domestic violence should be regulated like other assaultive conduct. The same is true whether one puts a higher priority on gender neutrality or on the “special” protection of women, whether one thinks that domestic violence is a biological impulse or a socially conditioned response to a gendered world, and regardless of one’s views on the nuclear family or the class or race of woman one has in mind.

Those few substantive issues relating to domestic violence that have divided feminists, tellingly, do implicate one or another of these matters of disputed principle. The most debated of these issues is whether battered woman need their own law of self-defense or whether existing standards are adequate.¹⁰⁹ Some advocates have urged a special

108. 42 U.S.C. § 13981 (1994). *See supra* note 107. The constitutionality of this provision of the Violence Against Women Act is currently under review by the U.S. Supreme Court. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 169 F.3d 820 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 11 (1999).

109. Compare Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991) (existing, gender-neutral rules give adequate protection to women, so long as the law is not applied to prevent facts from reaching juries), with Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN’S L.J. 121, 123, 127–28 (1985) (existing rules designed with male situations and characteristics in mind, not women’s).

“reasonable woman”¹¹⁰ or “reasonable battered woman”¹¹¹ self-defense standard when the defendant woman has killed her abuser, on the grounds that the traditional doctrine of self-defense fails to account for gender differences, including women’s lack of physical defense training, their weaker strength and battered women’s particular perceptions of helplessness.¹¹² A standard especially designed for women, however, concerns feminists committed to gender-neutral approaches, who fear that such rules emphasize women’s passivity and thus reinforce the negative perceptions of women that encourage their unequal and abusive treatment.¹¹³

V. Conclusion

Unity by feminists on numerous issues of importance to women has produced important, enduring successes, sometimes against serious odds. At the same time, feminist involvement in the reform of law relating to divorce, sex and reproduction, and domestic violence has surfaced tensions that feminists have had to confront since the mid-nineteenth century, when the first generation of feminists fought together for the right to vote and argued about the fairness of marriage. Women have wanted to be treated as equals of men, but they have also resisted the negative consequences resulting from their differences. They have seen the harm of gender roles and yet largely accepted the priority on motherhood and caring for others that these roles have imposed on them. They have sought to be treated as individuals and yet have needed protection from the harm women in this particular society suffer as women. Finally, they have desired family, yet recognized the family as a source of oppression and subordination.

110. See, e.g., Crocker, *supra* note 109, at 152; Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 573 (1988).

111. See Kit Kinports, *Comment, Defending Battered Women’s Self-Defense Claims*, 67 OR. L. REV. 393, 416 (1988).

112. See, e.g., Crocker, *supra* note 109.

113. See Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 1 (1994) (battered woman defense “reaffirms that women lack the same capacity for rational self-control that is possessed by men and thereby exposes women to forms of interference against which men are secure”); Martha A. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 4 (1991) (without counteracting images, battered woman syndrome “can interact with and perpetuate existing oppressive stereotypes of battered women”); Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN’S RTS. L. REP. 195, 214–15 (1986) (battered woman syndrome “can be misused and misheard to enshrine the old stereotypes in a new form”).

The tensions within feminism are more apparent and severe in family law than in other areas of legal regulation in which women's advocates have been active. Within family law itself, the most divisive issues have been those that concern the preservation, or elimination, of traditional gender roles. Conversely, the least divisive issues in family law, such as domestic violence, have been those that have been resolved by reference to familiar principles outside of family law. By the same token, the most visible conflicts outside family law, such as the debate among feminists over maternity leave,¹¹⁴ have related to family and gender roles. Family-related issues concerning gender roles have also generated the most backlash against feminism in the popular culture.¹¹⁵

Feminism's long-standing tensions having to do with family and gender roles are not likely to go away. There have been fundamental demographic shifts over the past half century affecting the issues of divorce, sex and reproduction, and domestic violence. More couples divorce, more mothers work in paid employment, and more women defer childbearing. These social changes, however, are doing little to alleviate the basic tensions within feminism. It would seem fitting that, as feminism continues to evolve, the issues that have most divided feminists over the years—issues of the family and gender roles—are also the ones most likely to define the feminist movement into the next millennium.

114. The best known example is the feminist division over which strategy to pursue in *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987). For an excellent summary of this division, see Williams, *supra* note 3, at 280–85, 307–19.

115. Two end-of-century examples are DANIELLE CRITTENDEN, *WHAT OUR MOTHERS DIDN'T TELL US: WHY HAPPINESS ELUDES THE MODERN WOMAN* (1999) (in seeking and obtaining equality with men, women have compromised their more meaningful and fulfilling roles as wives and mothers); WENDY SHALIT, *A RETURN TO MODESTY: DISCOVERING THE LOST VIRTUE* (1999) (the women's movement has cultivated a loss of modesty, upon which respect, honor, and sexual pleasure depend).