

Intersecting Voices

DILEMMAS OF GENDER,
POLITICAL PHILOSOPHY,
AND POLICY

Iris Marion Young

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*In memory of my mother,
Marion Cook Young*

*and for
Sandra Lee Bartky*

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discover such problems are not organized to take action to address them. The dominant tendency in drug treatment programs is still to isolate clients from community networks and for programs themselves to be self-contained. The goal of removing clients from the influence of those who would encourage them to continue their drug use is laudable. But this goal is better achieved by linking drug treatment with broader strategies of community control over networks and services through a set of interlocking institutions.

Chapter V

REFLECTIONS ON FAMILIES IN THE AGE OF MURPHY BROWN: ON JUSTICE, GENDER, AND SEXUALITY

IN MAY 1992 Murphy Brown, a situation-comedy character, gave birth cantankerously to a strapping baby boy before millions of television viewers. To the amazement and amusement of many of us, the next day U.S. Vice President Dan Quayle denounced Murphy Brown in a speech to the Commonwealth Club in San Francisco. She's gone too far when she has a baby with no father. An independent woman such as this is a dangerous role model.

It is no coincidence that Dan Quayle's speech came as America was rocketing from the experience of its greatest disorder since the 1960s: the uprising in Los Angeles. Normalcy was suspended, chaos reigned, fear and anger gripped our cities. The world was turned upside down: African American street-gang members appeared on national television as authoritative news analysts.

Dan Quayle's castigation of Murphy Brown worked as an appeal to the basis of all order, The Family. The Family means original unity and comfort, a presocial, pastoral state of nature without encounter and conflict with strangers. It means an orderly hierarchy of father, mother, and children, where authority is clear and each knows his or her place and duties. Appeal to The Family evokes visceral feelings of comfort and security. As I will discuss below, The Family draws a clear boundary between legitimate and illegitimate, but like all boundaries it is arbitrary. Evocation of danger to or dissolution of The Family conjures up fears of identity loss, exposure, extreme vulnerability—what Quayle called "lawless social anarchy."

Whenever uttered in America today the decrying of single motherhood would have a racial subtext, but in the context of the disorder of Los Angeles, which threatened to spill into the entire nation, the text was not very sub. The root cause of the riots in Los Angeles is the breakdown of the family in the ghetto. Black women irresponsibly, shamelessly, have babies without fathers; they sponge off taxpayers and can't give the kids a decent life. Being only mothers, they cannot discipline their sons, who run loose on the streets with guns and torches. The Law of the Fathers is our only hope against being swallowed in the conflagration. "Children

need love and discipline. They need mothers and fathers. A welfare check is not a husband. The state is not a father. . . . Bearing babies irresponsibly is simply wrong.¹

As apparently intended, Dan Quayle's speech launched a summer-long presidential campaign debate on "family values." What might have looked like solid ground for the status quo and conservatism turned out to be pretty muddy terrain. While both major parties quietly colluded in letting the issue of racism in the cities sink back into its normal rumbling silence, and tacitly agreed that single mothers are a social problem, polls bounced around about what good families are and the policies to support them. While Colorado voters approved of an antigay referendum, for the first time in American history a party's candidate for president explicitly supported some rights for gay men and lesbians (though not marriage). The same candidate was able to turn Republican opposition to family leave against them, and to tie the issue of family values to economic recovery.

In the indomitable American way, the drama climaxed on television. There is a general rule in American journalism that the press is not supposed to report on events that are about to occur. But in the third week of September 1992 this cardinal rule was flagrantly broken, as media eyes focused on the still-to-come fall season premier of *Murphy Brown*. *Time* magazine featured Candice Bergen, who plays Murphy Brown, on its cover, sporting a "Murphy Brown for President" button. On the morning before the evening of the great season premier, no less a publication than the *Wall Street Journal*—so staid and respectable that it never prints photographs, only artist-rendered sketches—printed an editorial on "Murphy Brown's Baby." It too lambasted the fictional Murphy and resounded Quayle's alarm at poor single mothers. "Not many disagree now," it said, "that the best cure for childhood poverty is a live-in dad."

The trope of The Family and its invocation as the signifier of order touches such deep chords in the American heart that for many years radicals have been in a rhetorical retreat from the brazen calls for the abolition of marriage and the pluralization of life-styles that were typical of the late 1960s and 1970s, and also typical of earlier Emma Goldman types of radicalism. Those of us who seek to undermine the oppressions of straight women, gay men and lesbians, and people of color of both sexes and sexual orientations, however, should do what we can to break the mystical hold of The Family on people's minds. As the terrain becomes more slippery, we may get a foothold for change; and we may also get mud in our eyes.

In this essay I consider how issues of gender and sexuality should be analyzed as issues of justice. Applying some of my previous work on justice, I argue that the dominant distributive paradigm of justice is not well

suited for conceptualizing many of the issues of justice most central for feminists, issues involving sexuality, reproduction, and family. Those few theorists of justice who do analyze issues of justice and family tend to presuppose the institution of marriage as given, and I will argue that their reliance on the distributive paradigm can account for this.

A feminist theory of justice should criticize the institution of marriage itself, on the grounds that it draws an arbitrary line between legitimate and illegitimate relationships and accords special privileges to the former. Thus I consider what a conception of families should be that does not specifically privilege some relationships, but rather extends the privileges, protections, and obligations currently restricted to married couples and their children to other kinds of relationships. Law, policy, and social practice should break the linkages that currently exist among heterosexual coupling, partnership, parenting, and property rights. The Family should be deconstructed into a series of rights and obligations.

JUSTICE, GENDER, AND SEXUALITY

In recent years certain feminist philosophers, such as Susan Okin, Joan Tronto, Marilyn Friedman, and Sara Ruddick, have questioned the assumption, held by many feminists, that justice should be opposed to care, or that concepts of justice cannot serve feminist moral theorizing about family, sexuality, and personal relations.² This development in feminist moral theory is overdue, in my opinion. As the primary political virtue, justice should be central to feminist moral theory and politics. As Susan Okin rightly and forcefully argues, moreover, the history of male theorizing about justice ignores male domination and male privilege as issues of justice, largely because they wrongly assume that family relations are prior to or outside of the realm of social relations to which issues of justice apply. The issues of sexual liberation, reproductive rights, sexual division of labor, equality in family relations, and so on, which are central to feminist politics, must be understood as issues of justice. This implies, I suggest, a need to rethink the meaning of social justice beyond the distributive paradigm that dominates in contemporary Anglo-American philosophical approaches to justice.

In *Justice and the Politics of Difference* I have defined and criticized this distributive paradigm. It assumes that all questions of justice are about the distribution of social benefits and burdens among individual and groups. These benefits and burdens may be tangibly measurable, such as income received or tax paid. But distributive theorists also speak of intangibles like power and self-respect as goods distributed among agents, a way of speaking about power and self-respect that I believe wrongly reifies relations and processes.³

Due to the rejection of the concept of justice as relevant to the specific moral and political concerns of feminism, there are very few philosophers who have considered moral issues of gender as issues of justice. Most of the few who do analyze gender issues as issues of justice work within the distributive paradigm. James Sterba, for example, restricts his understanding of issues of justice to the distributive questions of equal opportunity and welfare. He argues that a feminist conception of justice conceives human traits as evenly distributed across sexes, and that this implies a transformation of the family in such a way that there would be no gender-specific roles in it.⁴

Susan Okin's is probably the best-known and most thorough account of issues of gender and justice. After criticizing important male theorists of justice, including Rawls, for ignoring issues of justice in the family, she modifies Rawls's theory of justice as fairness to apply to relations between men and women in the family. When radically applied, she argues, Rawls's principle of equal liberty and equal opportunity must imply an abolition of a gender division of tasks and status. Most particularly, the sexual division of labor that allocates primary responsibility for household labor and child rearing to women must be eliminated. While such reforms require change in attitudes and behavior of most men and many women, they also imply specific and far-reaching changes in both government and social policy—to support child-care services, parental-leave policies, and more flexible and family-sensitive public workplace policies.

In extending Rawls's conception to the family, Okin relies on a distributive paradigm of justice. The social injustice that women suffer consists in our having fewer benefits and more burdens in the general pattern of social distribution.

Political power and office, hard work, money and commodities, security—Are any of these things evenly distributed between the sexes? In each case, the assignment of women to the functional role of actual or potential wife and mother, and primary parent, to basic or at least periodic dependence on a man, has a great deal to do with the fact that women, in general, benefit less from the benefits and are burdened more by the burdens in the distribution of social goods than are men.⁵

There is no denying the claim that women suffer distributive injustice. Issues of distribution are important issues of justice, and this is as true for questions of gender justice as for other kinds of questions. But it is a mistake to reduce all issues of justice to issues of distribution, for two primary reasons. First, the distributive paradigm tends either to distort or to ignore issues of justice not easily conceived of in distributive terms. Second, the distributive paradigm tends to presuppose institutional

structures within which distributions take place as given, without bringing the justice of those institutional structures themselves into question.

The distributive paradigm conceives all issues of justice as packages of goods that are possessed by individuals. With this paradigm philosophers and political actors tend to focus on issues like the distribution of property, income, or jobs as the primary issues of social justice. When applied to feminist issues, this focus places in the foreground issues of equal opportunity, the distribution of positions, tasks, economic and social resources between men and women, but ignores or obscures many issues of gender justice that are not so obviously distributive. Thus neither Sterba nor Okin, for example, includes issues of sexuality and reproduction in discussions of gender and justice. I believe this omission can be traced at least partly to their applying a distributive understanding of justice.

One can argue that what is most original about contemporary feminist politics is its raising the most private and personal realms of sexuality and reproduction as public issues of social justice. The systematic harms and inhibitions brought upon women as individuals and as a group by prostitution, pornography, rape, incest, and sexual harassment cannot obviously be conceived as distributive inequalities. These entail systematic issues of justice that are broadly speaking cultural: concerning the organization of sexual practices, the meanings attributed to them, and the representational and symbolic forms associated with sexuality.

Some of the injustices suffered by men and women who wish to form sexual partnerships with people of their own sex can perhaps be conceived in distributive terms. Conceiving injustice toward gay men and lesbians in terms of discrimination, that is, the denial of benefits on arbitrary grounds, uses a distributive concept. But many gay men and lesbians find this too narrow an understanding of their oppression. Violence, stereotyping, stigma, and similar oppressions are not well covered by a distributive paradigm; issues of justice and sexual orientation also turn on the cultural meanings of masculinity and femininity and, like the above issues of the sexual oppression of women, the representational and symbolic forms associated with sexuality.

Justice in procreative and parenting relations is equally ill conceived in distributive terms. Selma Sevenhuijsen argues that the attempt to apply Rawlsian principles of justice to child-custody disputes yields absurd results. For cases where parents dispute about who will have primary custody over their children or about what rights the noncustodial parent will have, it is not at all clear what can be seen as distributed. Conceiving the children as objects to be distributed among parents surely disrespects those children. But it is also conceptually weird to think of rights as the subject of distribution. Justice in custody disputes instead

concerns attention to the concrete relationships between parents and children, and the most appropriate way to create enforceable rights to foster and facilitate the most beneficial set of intimate relations.⁶

Many other contexts of reproduction and parenting raise issues of justice not fruitfully conceptualized as involving the distribution of some kind of goods. Practices of contraception, abortion, surrogate pregnancy, in vitro fertilization, lesbian and gay parenting, and so on raise complex issues of justice and policy questions of how law and bureaucracy should morally conceive and structure relationships, a set of questions not assimilable into a distributive understanding of justice.

When philosophers or political actors try to raise issues of justice not obviously about the distribution of goods, they usually try to reconceive them in terms of costs and benefits distributed among social actors. Such reconceptualization, however, often distorts what is at stake in questions of justice when they are about decision-making power, the definition of social positions and their relations and obligations, or culture and life-style.

The recent U.S. Supreme Court decision on abortion rights can illustrate this distorting effect. Many hailed *Planned Parenthood v. Casey*, which the Court decided in June 1992, as a great "compromise," because it managed to conceive the abortion issue in "more or less" terms. States may have an interest in making abortion more costly, whether in time, money, or emotional stress, but they are not permitted to raise those costs "unduly." Through this supposedly middle-of-the-road mechanism the Court has allowed an issue of decision-making power and access to services to be complexly reconceived distributively as a large series of different rights. The decision has greater impeding consequences on young, poor, and rural women, thus following and reinforcing existing distributive inequalities.⁷

The second and perhaps more important problem with the distributive paradigm of justice is that by focusing on the allocation of benefits and burdens within institutional structures, it obscures those institutional structures at the same time that the paradigm assumes them as given. Thus it fails to evaluate the justice of the institutions themselves that provide the conditions and practices that both produce the benefits and burdens and define the social positions among which they are allocated. For example, many contemporary discussions of social justice ask whether justice permits or requires taxing the rich in order to meet the basic needs of the poor. This distributive way of formulating issues of economic justice presumes without making explicit a social structure with divisions between rich and poor, never asking whether this structure itself is just.

Discussion of gender justice that focus on the distribution of benefits and burdens between men and women frequently assume the institutions of marriage and normative heterosexuality as given, and within which distributions occur. Thus Okin, for example, writes as though the primary issue of gender justice is the distribution of household and child-rearing tasks, and the distribution of paid work, between a husband and wife.⁸ It is certainly not Okin's intention to be heterosexual, and indeed in several passages in her book she refers to gay and lesbian couples as important models of egalitarian relationships.⁹ Nor certainly does she intend to suggest with Dan Quayle that married mothers are better than unmarried ones. My suggestion is that because she considers the distribution of labor and resources within the family as the primary issue of gender justice, she tends to presuppose as given the dominant family norms that privilege marriage without calling their justice explicitly into question.

To summarize, distribution is only a part, albeit an important part, of the social circumstances that feminist principles of justice should evaluate. Issues of justice also include decision-making power, the definition of social positions with their relations and obligations, and culture, which are not reducible to distribution. A broader conception of justice takes not fairness but liberation as its ultimate ideal. This broader conception says that social justice concerns the degree to which a society contains and supports the institutional conditions necessary for all its members to develop and exercise their capacities, express their experiences, and participate in determining their actions and the conditions of their actions. Injustice consists in oppression and domination, which often involve distributive inequality or deprivation, but also involve cultural and relations inhibitions and harms.

WHAT'S WRONG WITH MARRIAGE?

In *Of Woman Born*, Adrienne Rich distinguishes between the institution of motherhood as a structure that systematically oppresses women, on the one hand, and the practices, joys, loves, and pains of particular mothers in particular contexts, on the other.¹⁰ She condemns the institution of motherhood as oppressive and morally backward but urges that mothers and the practices of mothering are often good, useful, and not adequately supported.

Rich's concept of compulsory heterosexuality¹¹ can point to a similar distinction between the institution of marriage, on the one hand, and particular relationships of love and commitment between particular men and women, on the other. In what follows I argue that the

institution of marriage is fundamentally unjust and should be eliminated. This argument does not condemn long-term relationships of sexual love and affective commitment between men and women. Such relationships, however, ought not to have the special privileges and legitimacy they currently have. As my argument proceeds it will become clear that I believe that the elimination of the special privileges of marriage entails not removing the state from relationships, but rather reconstituting the meaning of family and thereby extending the privileges that marriage now confers on some people to many other relationships.

But just what is marriage? Taking a cue from the "family values" debate, we can say that marriage is the keystone of The Family as defining order and legitimacy. The institution of modern marriage normatively links the regulation of sexuality, procreation, and property. Legally marriage has always been male sexual rights over women, the private rights of a particular man over the sexual behavior of a particular woman. The institution of marriage is still the cornerstone of patriarchal power. Important feminist treatises have shown how practices like prostitution, pornography, rape, and sexual harassment are either part of or derived from this institution of marriage, and I will not repeat those arguments here.¹² The important point for my argument is that marriage contains a notion of the sexual rights that men have over women, which rights men often appear to assume in other relationships.

Marriage is also an exclusive institution, the enforcement of heterosexuality, inasmuch as it is defined by most legal jurisdictions as the legal union of a man and a woman, and necessarily one of each.¹³ An alleged justification of this exclusivity is sometimes that marriage is linked to procreation.¹⁴ Thus marriage defines The Family by defining parental rights and excluding others from parental relationships. Marriage, finally, is linked to property and economic stability. Historically, of course, a major function of marriage has been the preservation or enlargement of property.

One might claim that the definition and linkages of marriage that I have just expressed no longer correspond to the social realities of advanced industrial Western societies. The truth in this objection motivates the argument of this essay and the urgency of a "family values" debate. But in sorting out the terms of this debate we should be clear on how the institution of marriage, as distinct perhaps from the practices of relationships, remains a significant regulator of social norms, that is, the establishment of respectability and legitimacy. This is so in all three areas—sexuality, procreation, and property.

Many states in the United States still do not recognize marital rape as a crime. Even where rape in marriage is criminalizable, moreover, many jurisdictions refuse to recognize that forced sex in marriage, or even in relation-

ships like marriage, is a legal wrong. These facts show that the definition of marriage as male sexual property rights over women is alive and well.

While heterosexual sex outside of marriage has become much more common and accepted in the last twenty-five years, moreover, the Murphy Brown debate shows that marriage still generally regulates the norms of procreation. A child born out of wedlock may no longer be legally registered as a bastard, but dominant norms still treat such behavior as deviant or pathological. A woman can still lose her job or otherwise be punished for bearing a child on her own, and some courts will uphold such actions.¹⁵ Unmarried heterosexual couples who have been in a sexual and affectionate relationship more often than not decide to get married when they desire to have children. While there are positive legal reasons for making such a decision, involving protections for the children and for the parents in relation to the children in case the relationship dissolves, for most the entrance to legal marriage also carries an aura of settledness and respectability.

While marriage is a formal alliance of property today only for the few in Western societies, entering marriage and setting up a Family entails major consumption activities for those who can afford them. Marriage continues to be associated with property in the form of a privately owned home, along with large and expensive consumer items.¹⁶

The institution of marriage retains the major social function of conferring legitimacy on people and relationships. Thus marriage, as the keystone of The Family, stands for order itself because it draws a boundary. It creates an unambiguous line between the licit and the illicit. It reproduces this order by granting privileges to those who fall on one side of the line and stigmatizing those who fall on the other side.

Even today the privileges of marriage are many, and we should not need reminding. Marriage entails privileges of property and income—privileges of ownership and inheritance, insurance benefit, credit access, specific tax privileges, social security benefits, survivors benefits for spouses of veterans, immigration privileges.¹⁷ Marriage usually confers rights in relation to children, though the privileges of biological parentage sometimes snarl up this benefit. Married people have a privileged access to reproductive technologies, both to aid and to curtail reproduction. They are the preferred clients of adoption services. Marriage gives people the privilege of gaining access to, taking care of, and signing consent forms for their spouses housed in bureaucratic institutions like hospitals, treatment centers, rest homes, or prisons.

The other side of the privileges of marriage is its oppressions. The institution of marriage privileges heterosexual couples and oppresses homosexual couples, and this certainly is one of its major functions.¹⁸ Few gay men or lesbians have chosen to challenge legally the restriction

of marriage to heterosexual couples. Until recently U.S. courts routinely rejected such challenges. Frequently the courts give no reasons for excluding homosexuals from the rights and privileges of marriage other than asserting that marriage is *by definition* a union of one man and one woman.¹⁹ The 1993 decision of the Hawaiian Supreme Court was a landmark because it argued that a ban on same-sex marriage violates constitutional protections to due process and called for reasons why the state has a compelling interest in limiting marriage to heterosexual couples. As of this writing, most observers expect a trial court to be unable to argue such a compelling interest. In response to fears that states may allow gay men and lesbians legally to marry, the United States Congress has made explicit some of the privileges the federal government confers on married people by withholding them from same sex couples.

In the age of Murphy Brown it is important to observe, however, that lesbian and gay households are by no means the only families that suffer stigma and disadvantage by being excluded from the privileges of marriage. In 1989 nearly 25 percent of all children in the United States and more than half of all African American children lived with one parent. The large majority of these parents are women. Single-mother households have been increasing rapidly as a result of increased divorce, decreased remarriage after divorce, and increased births without marriage. From a statistical point of view, then, families headed by women have become normal.

Neither social policy, social attitudes, nor social theory treats female-headed households as legitimate, however. The woman who voluntarily or involuntarily lives with children alone must not only contend with employers and public bureaucracies that assume parents have the assistance of coparents, but also face serious stigma. Both never-married and divorced mothers commonly face employment, credit, and housing discrimination.

Even among those who call themselves liberals, moreover, public policy discussion usually treats single motherhood as an aberration and social pathology. Liberals and conservatives in policy discussion often share the judgment that the best cure for the poverty, stress, and discrimination that many single mothers face consists in getting or keeping them married. Thus William Julius Wilson's otherwise progressive social democratic program for addressing the problems of poor people argues for a jobs policy targeted at men so that they can marry poor single mothers and support their children.²⁰ Because nearly one-quarter of single-parent families live in poverty, William Galston argues that child-oriented family policy must favor marriage. Thus he calls for legal changes that would make divorce more difficult.²¹

Rates of out-of-wedlock births and divorce may well be a sign that some men and women are taking their family commitments less seriously than they should, especially their commitments to children, preferring to indulge their own desires. But the rise in single motherhood also signals the refusal by many women to tolerate the infidelity, subservience, and battering that too many wives put up with in the past. It appears that increasing proportions of never-married or divorced mothers prefer not to be married, moreover, even though they must deal with low wages, welfare bureaucracies, difficulties of parenting alone, and stigma.²² Surely it is a gross infringement on liberty to send mothers the message that they should get and stay married, whether they like it or not, or face poverty, discrimination, stigma, and even in some cases punishment.

The institution of marriage, finally, tends to oppress unmarried people who wish to set up a household or otherwise be thought of as family. Friends or relatives who wish to set up a common household are often forbidden or discouraged from doing so by zoning laws or housing construction presuming and enforcing a small nuclear family. Efforts at deinstitutionalization and independent living for people with developmental or emotional disabilities have often been stymied by this prejudice about who is a proper family. Four mildly retarded men may have formed bonds of mutual caretaking and companionship in a common household, but zoning rules against "group homes" may impede their living together. The Americans with Disabilities Act of 1990 finally provided some redress for such obstacles.

Rights of personal access and tax privileges are often not extended to grandparents, brothers and sisters, cousins, or nonkin household members who share resources and care for one another. This fact makes marriage and the nuclear family unjust to racial and ethnic groups where extended-family caretaking is the norm.²³

I conclude that the institution of marriage is irreparably unjust. Its original and current meaning is to solidify male power in relation to women, and to draw an arbitrary line around legitimate relationships. Its historical function has been to use women as a means of forging alliances among men and perpetuating their "line." Today, when those functions are diminished but hardly absent, marriage's injustice consists primarily in its discriminatory granting of privileges. Marriage privileges specific ways of living and variously inhibits, stigmatizes, and penalizes other ways of living. A basic principle of liberal justice is that societal norms should regulate the rights and obligations of exchanges, relationships, and institutional structures, without privileging some particular ways of life. The institution of marriage violates this principle, with oppressive

and disadvantageous consequences for many people. If we are not to privilege particular relationships or ways of life, then what it means to be a family must be redefined and pluralized.²⁴

LEGAL REFORM AND CULTURAL REVOLUTION IN FAMILIES

Any project of defining runs the risk of simultaneous over- and underinclusion—of ruling out some aspects of social reality one means to include, or including some one means to exclude. This is especially so in defining family, where we wish to broaden the concept beyond that of heterosexual coupling through legal marriage, but not make it so broad that any and all relationships become familial. Mindful of these problems, in redefining family we should aim at a rough-and-ready characterization of attributes, some but not all of which should be present to call a relationship family. We need a concept of family that understands the “family resemblances” among families, that there are overlapping but not always shared attributes among them, and that perhaps families admit to degrees.²⁵

In this spirit, I define family as people who live together and/or share resources necessary to the means of life and comfort; who are committed to taking care of one another's physical and emotional needs to the best of their ability; who conceive themselves in a relatively long-term, if not permanent, relationship; and who recognize themselves as a family. Family are the ones who care for you when you are sick, and for whom you care when they are sick. Family members are mutually obliged to remember one another's birthdays, the ones on whom we dump our troubles. Family entails commitment and obligation as well as comfort: family members make claims on one another that they do not make on others. I am obliged to consider the lives of my family members when deliberating about a career move, but I am not obliged to consider the lives of others.

I cannot imagine a society without families in this sense. Children flourish in families in this sense, a relatively small group of committed intimates that help them develop a sense of self. Many adults choose not to live in families so defined, for at least part of their lives; they choose to live alone or in more loosely defined collectives. But at other times of their lives most adults want families for the same reason that children need them: they help provide a rooted sense of self and mutual, concrete caring.

The Family as defined through the institution of marriage normatively links a series of relationships that can and should be deconstructed. The Family in that conception implies a two-parent, heterosexual couple living with their genetic biological children and sharing resources. A re-

conceptualization of family must break this series of implications. I shall argue that most of the rights, privileges, and obligations that in current law fall to married couples and biological parents should be disconnected and extended to other kinds of relationships in legally generalized forms. Before taking up that argument, however, let me consider briefly some other approaches to legal reform in family relationships. These include getting the law out of relationships, encouraging private contracts for relationships, and a functional approach to family law.

Some people conclude from arguments like those I have made that justice requires not privileging any ways of living that law and state policy should be removed entirely from defining and regulating family relations. I used to conclude this myself. If families are private and personal, and the state and law are general, public, and quintessentially impersonal, then simple logic seems to dictate that the two should have nothing to do with each other. While there are reasons to demand that state institutions be far less intrusive than they currently are in some families, particularly poor families, today, the removal of all legal definition, relation, and adjudication of family relationships would not serve justice, for several reasons.

The law must define and be prepared to help adjudicate the ambiguities, issues, and conflicts that may arise among family members or former family members. The most important of such claims and obligations concern children. The state and law must provide protections for children just in case particular adults are not protecting them or dispute about their relationships to children. Legal regulation of families is also necessary to protect adults who are vulnerable within families, either because of choices they have made that render them economically dependent or because they are old, ill, or disabled. As I will discuss further below, even in the absence of conflict or neglect, families often need various kinds of state support and recognition to promote the flourishing of their members. As Martha Minow argues, even when the state draws a boundary between itself and families, it functions to regulate both sides of the boundary. Withdrawing state regulation will not promote the freedom of families; instead we need legal norms that are able to conceptualize rights in a way that attends to and responds to the context of particular relationships.²⁶

Some people suggest that the best way to guarantee such particularity is by encouraging people to draw up private contracts delimiting the precise terms of their relationship as they define it. While I think that individuals should be able to make contractual agreements about what they consider private affairs if they choose, and to a large degree people have this ability today, a private contractual approach to family law reform has several problems, both practical and philosophical.

The ability to draw up the terms of a private contract about intimate relations presupposes class privilege. Many people cannot afford the services of a lawyer for such purposes; many people do not understand enough about legal language and possibilities to know what they would want to put into a contract. Private contracts spelling out particular terms of intimate relations, moreover, can work only for adults; relations between adults and children must be regulated by other means.

Perhaps even more important, intimate relationships are too open-ended and multifaceted to come under contractual agreements. People who live together, commit themselves to care for one another, raise children together, have a more complex, many sided, and unpredictable relationship than do those who enter a business contract, for example. In many situations it is impossible to predict what their life situation, resources, feelings, or relationship with children will be in ten years. This unpredictability and changeability partly accounts for why courts sometimes invalidate private contracts concerning intimate relations.

This point leads to a philosophical objection, that the framework of contract thinking is simply inappropriate, even immoral, when applied to intimate relations. Where contract conceptualizes relations as a product of explicit and voluntary agreement, family relations are often not chosen. Even where a relation was chosen at one time, aspects of vulnerability, dependency, and commitment often develop in families that are not explicitly chosen. The framework of contracted relations, moreover, is possible only against the background of more fundamental kinds of social bonds, of which families are an important kind.²⁷

A third approach discussed in family law as an alternative to the existing legal biases that privilege family relations incorporating marriage is the functional approach. Relations that function as familial in people's lives may often emerge or develop that do not fit the normal rules of family, but still ought to be recognized in order to do justice to individuals in situations of dispute or need. Thus courts and other state agencies should be able to operate according to general criteria of such functions to determine particular family rights and obligations. As with family contracts, I think there should be room in legal and policy reasoning for such a functional notion of the family. But a functional approach to family cannot substitute for formal rules delimiting familial rights and obligations, and formal means of declaring family membership. Relying solely on a functional understanding of family would be costly and possibly intrusive, since every case that came before courts or bureaucracies would have to involve an investigation into the actual nature of a particular intimate relation. It would also leave potential disputants too much at the mercy of a particular official's interpretation of the meaning of family functions.

Reform in family law, as I conceive it, would specify general rules and standards of family relationships, but at the same time deconstruct the legal obligations and privileges currently associated with marriage. The chain of implications must be broken that starts with heterosexual rights of sexual intercourse, to connect this with joint property, shared resources, and the right to expect support, and also connects sexual rights with exclusive rights and exclusive obligations regarding children. Issues of sexual rights, property and resources, procreation and parenting, that is, should be more disconnected.

As I discussed earlier, the institution of marriage still contains the assumption that a man has sexual rights over a woman. As Foucault argues, a major meaning of the modern family is the regulation of sexuality and the definition of sexual rights. But sexuality is indeed an area where state and law should keep out. The idea of sexual rights should become incoherent. No one, that is, whatever kind of relations they are in with another, ever at any time should be in a position where they do not have a right to say no to sex. While sexual love can be an important element in some family relationships, legal rules and standards about families should assume nothing about sex, and certainly should not require any demonstration of sexual intimacy. Sex is neither a necessary nor a sufficient condition for families.²⁸

The legal and cultural abolition of the idea of sexual rights, and the formal disconnection of sex from family, would truly be a revolutionary change. The patriarchal idea that men have sexual rights over women with whom they are intimate continues to bias the justice system against the victims of acquaintance rape, or even against victims of sexual harassment. The assumption remains strong, moreover, that a family implies that some member of the household has regular sex with another member of the household. Promotion of gay male or lesbian households as families, for example, often does little to challenge this assumption of sex as a necessary condition for family, even though it is not uncommon for the domestic partner of a gay man or lesbian to be a different person from his or her current lover or lovers. The assumption that sex is an essential attribute of families disqualifies as families household forms that many people live as families, such as single-parent families. The assumption that familial relations are or ought to be sexual, moreover, may discourage the formation, development, or recognition of some kinds of families that some people need or want, as in my example earlier of the mentally disabled men. Finally, while I have no evidence to support it, I have a hunch that the patriarchal assumption of sexual rights in families is a source of child sexual abuse.²⁹

The concept of domestic partnership has been a creative proposal for addressing the exclusion of gay men and lesbians from the benefits of

marriage, and some cities and private companies have adopted the concept to a limited degree. As a method of deconstructing marriage, I would propose that a concept like domestic partnership be universalized. By a simple process of legal registration, any adults should be able to register as domestic partners. I do not even see a reason that only two adults should be allowed to register together as partners, though because of state or employer benefits that partnership would confer, I think it might be reasonable to declare a limit to the number of persons who can register as domestic partners to one another.

Domestic partnership, in the universalized and enlarged form that I conceive it, would carry all the current rights and obligations of marriage having to do with property, support, resources, and access to one another in institutionalized settings—rights of joint ownership, inheritance, to be carried on medical and life insurance policies; immigration rights; rights to visit partners housed in hospitals or prisons; rights to be consulted in treatment options; rights to sign consent forms for; and rights to claim continued resource support at the time of partnership dissolution. Domestic partnership, however, would imply nothing about sex. While heterosexual lovers and homosexual lovers might wish to enter domestic partner relations, so also might sisters or unrelated persons wishing to establish a long-term shared household but who are not sexually involved.

Family law should of course be especially directed at the purposes of nurturing and protecting children. Reproductive and parental rights are currently attached to marriage, and this link too should be deconstructed. All adults, whatever their personal life circumstances, should have equal access to reproductive technologies. Adoption services should not be allowed to discriminate against categories of persons. At the time of the birth of a child, certain people will declare themselves parents of that child, or the child will be given up for adoption. Usually the biological mother of the child will be one of these persons, but the mere fact of her giving birth ought not to make her a parent. Similarly, while I am inclined to agree that something should be done to make men more accountable for the procreative consequences of their sexual activity, the mere fact of being the genetic father of a child should not automatically give a person rights and obligations in relation to that child.³⁰ For one thing, this can force a mother to have continued contact with a man she no longer wishes to know. Contrary to currently dominant legal norms, it should be possible for the declared parents of a child to be of any sex.³¹

Nor should the law assume, as it currently does, that a child can have only two parents. The controversies about the rights of birth mothers who have contracted to bear a child for another couple have raised in a new and unique way the question of whether more than two people can

have parental rights and obligations in relation to a child. Increased divorce and remarriage have also necessitated raising this question. No legal forms can prevent the hurt and confusion that divorce produces for many children. If a child forms a domestic relationship with a new adult that enters her household, however, who wishes to take on the commitment to parent her, that adult should be legally able to become her parent without her having to give up a legal relation with a parent she already has.

But what is this legal relation of parent? While the legal status of parent entails certain rights that courts may decide vary with circumstances—control over health care, religious education, custody or visitation rights for parents who do not have primary custody rights, and so on—I conceive that parenthood primarily involves responsibilities. To declare oneself a parent is to promise to support a child to the best of one's ability, both materially and emotionally, until the child reaches adulthood. Thus while I reject the idea that genetic fathers should be forced to support the children of their issue, fathers or mothers who have taken on the commitment of parenting by declaring themselves parents can be made to pay even if they divorce the other parent(s) and leave the household. The idea of "child-first" divorce polices is sensible in this respect. Courts should make child support awards to a large degree by calculating what the child needs to have a decent life. More vigorous enforcement of postdivorce child-support responsibilities than currently exists, such as attaching paychecks, is consistent with a more universal and just family policy.

If courts consistently ruled for child-support awards that put the needs of children first, however, they might sometimes unfairly burden parents who have left a household, most often men, who would because of these constraints be unable to form or enter new families or make other life choices. For this and other reasons, the welfare of children should be deconstructed from marriage in a final sense: we should not assume that a married couple is solely responsible for the welfare of their biological children. If children are the future of a society, then all the adult members of a society have some responsibility to support all the children. While declared parents would have primary responsibility for the material and emotional support of children, many if not all parents require extensive social supports in carrying out those duties, and nonparents should contribute significantly to such supports.

A just policy of family pluralism would consist not in the state's remaining neutral among family forms, treating them all according to the same rules no matter what their attributes, but rather would positively differentiate among some kinds of families for the sake of providing them with the support that will make them flourish equally with others.

In principle all families need social supports to flourish and be appreciated, but some more than others. I will conclude by briefly discussing such social support issues for two categories of families: families of people with disabilities, and single-parent families.

Even with the passage of the Americans with Disabilities Act, our society has very far to go before it appreciates people with disabilities. Parents of people with disabilities often need a great deal of financial and social support for their families to flourish; while some such financial and social support is available to such parents today, too often parents feel that they must fight for every dime, that they must struggle with service providers over the nature of services, and that the level of support they receive is inadequate. As I have mentioned already, adults with disabilities ought to be able to form families of their own, outside their parents' homes and outside institutionalized settings, if they wish. But they often need financial and social supports in their family settings that others do not require. Empowering people with disabilities to form families includes their being able to parent. Perhaps not all people with disabilities are able to raise children, and many do not wish to try. Many people with disabilities can successfully parent, however, with sufficient financial and social support.³²

As I discuss in more detail in the following chapter, justice requires respecting families headed by women alone. Children of single mothers are more likely to be poor than are other children. The children of a single parent, however, often have an earlier sense of independence and more companionate relations with their parent than do other children. Parenting alone, on the other hand, is harder than parenting with a partner or partners, which can lead to lack of time and other stresses that make the children's lives less peaceful and stable than they might be if there were more than one adult in the home.

A just and liberal society would have abortion and contraception programs and access of a sort that would aim to ensure that every child a woman bears is a wanted child. If we had such policies in the United States today, there would probably be far fewer single mothers. But there would still be many, either because women chose to bear children on their own, or because parents would continue to separate.

Social justice requires that single-parent families be valued and appreciated and given the social support they need to flourish. Among such social support policies are pay equity schemes to equalize women's wages with men's, expanded welfare support, and vastly expanded child-care subsidies, including child-care services to enable teenage mothers to continue with school. The United States could also emulate some European countries in developing "mothers' houses," where single mothers

live in private apartments but also have opportunities for shared cooking and child minding.³³

I have argued that a distributive paradigm of social justice tends to bias the thinking of those who think about gender justice away from issues of sexuality and reproduction. Because dominant approaches to justice consider how benefits and burdens should be distributed within institutions, moreover, theorists of justice and family usually assume the institution of marriage as given. Feminists must question the justice of the institution of marriage itself. Declaring marriage unjust then requires a feminist theory of justice to conceptualize legal frameworks for family relations that deconstruct the series of relations currently joined in the legal framework of marriage and family. Family justice, finally, implies social policies that appreciate plural family forms and provide social support for families, especially for those families with special needs.

54. Janet L. Surrey, "Relationship and Empowerment," in *Women's Growth in Connection*, 164.
55. For statements of this sort of meaning of empowerment, see Ruth J. Parsons, "Empowerment: Purpose and Practice Principle in Social Work," *Social Work in Groups* 14, no. 2 (1991): 7-21; Lorraine M. Gutierrez, "Working with Women of Color: An Empowerment Perspective," *Social Work* 35 (March 1990): 149-53.
56. Handler, "Dependent People," 1083-1111; Fraser, "Women, Welfare, and the Politics of Need Interpretation," 156-58.
57. Parsons, "Empowerment."
58. Handler, "Dependent People."
59. A study by Laurence Gary et al. concludes that the nurturing of social and racial solidarity deters drug use in some African American communities. See their essay, "Some Determinants of Attitudes toward Substance Use in an Urban Ethnic Community," *Psychological Reports* 54 (1984), cited in James Jennings, "Blacks, Politics, and the Human Service Crisis," in *Blacks, Politics, and Economic Development*, ed. James Jennings (London: Verso, 1992).

CHAPTER V

REFLECTIONS ON FAMILIES IN THE AGE OF MURPHY BROWN

Thanks to David Alexander, Ruth Colker, Christine DiStefano, Stephen Macedo, Martha Minow, Deborah Rhode, and Molly Shanley for comments on an earlier version of this essay. Thanks to Carrie Smarto for research assistance.

1. Quotations from Quayle's speech are from *Time*, June 1, 1992, 29-30.
2. Carol Gilligan first opposed the norm of justice to more particularist feminist moral concerns, which she called care: *In a Different Voice* (Cambridge: Harvard University Press, 1982). Many feminist theorists followed her in assuming that justice is a value of public bureaucratic life inappropriate to more relationally oriented contexts of action. But in recent years there have been important challenges to this opposition between justice and care. See Susan Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethics of Care* (New York: Routledge, 1993), esp. 77-92; Tronto, "Gender, Care and Justice in Feminist Political Theory," working papers of the Anna Maria Van Shuurman Centrum of the University of Utrecht, March 15, 1991; Marilyn Friedman, "Beyond Care: The De-Moralization of Gender," in Virginia Held, ed., *Justice and Care: Essential Readings in Feminist Ethics* (Boulder: Westview Press, 1995); Sara Ruddick, "Justice in Families," address to American Philosophical Association, December 1992.
3. See *Justice and the Politics of Difference*, chap. 1.
4. James Sterba, *How to Make People Justice* (Totowa, NJ: Rowman and Littlefield, 1991), chap. 5.
5. Okin, *Justice, Gender and the Family*, 114.
6. Selma Sevenhuijsen, "Justice, Moral Reasoning and the Politics of Child Custody," in Elizabeth Meehan and Selma Sevenhuijsen, eds., *Equality, Politics and Gender* (London: Sage), 88-103.

7. See Iris Young, "The Supreme Court and Abortion," *Dissent* (Fall 1992).
8. See Will Kymlicka, "Rethinking the Family," *Philosophy and Public Affairs* 20, 1 (1991): 77-97.
9. See Susan Okin, "Sexual Orientation and Gender: Dichotomizing Difference," presented at the "Democracy and Difference" conference sponsored by the Conference for the Study of Political Thought, April 1993.
10. Adrienne Rich, *Of Woman Born* (New York: W. W. Norton, 1977).
11. Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence," in Ann Snitow, Christine Stansell, and Sharon Thompson, eds., *Powers of Desire* (New York: Monthly Review Press, 1989), 177-205.
12. See Carole Pateman, *The Sexual Contract* (Palo Alto: Stanford University Press, 1988).
13. Ruth Colker, "Marriage," *Yale Journal of Law and Feminism* 3, 2 (Spring 1991): 321-26.
14. As I will discuss later, courts do not often think they need to give a reason for restricting marriage to heterosexual couples. Occasionally they do, however; in *Singer v. Hara*, the court said that the purpose of marriage is procreation, and this justifies requiring two people of different sexes.
15. *Chambers v. Omaha Girls Club*, 834 F. 2nd 697 (8th cir. 1987).
16. There has been much writing about the function of The Family in promoting consumption in advanced capitalist society. For one interesting recent discussion, see Linda Singer, *Erotic Welfare* (New York: Routledge, 1992), 78-79.
17. See Martha Minow, "Redefining Families: Who's In and Who's Out?" *University of Colorado Law Review* 62, 2 (1991): 269-85.
18. See Richard Mohr, "Policy, Ritual, Purity: Mandatory AIDS Testing," in *Guys/Justice* (New York: Columbia University Press, 1988).
19. G. Sidney Buchanan, "Same-Sex Marriage: The Linchpin Issue," *University of Dayton Law Review* 10 (1985); Hannah Schwarzhild, "Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly," *Berkeley Women's Law Journal* 4 (1988-89): 94-127; Martha Minow, "Free Exercise of Families," *University of Illinois Law Review* 4 (1991): 940.
20. W. J. Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1986).
21. William Galston, *Liberal Purposes* (New York: Cambridge University Press, 1991), 284-89; I develop arguments criticizing Galston's position in my essay "Mothers, Citizenship and Independence: A Critique of Pure Family Values" (see chapter VI in this volume).
22. See Terry Arendell, *Mothers and Divorce: Legal, Economic and Social Dilemmas* (Berkeley: University of California Press, 1986); cited in Jan E. Dizard and Howard Gadlin, *The Minimal Family* (Amherst: University of Massachusetts Press, 1990), 143-44.
23. See William A. Vega, "Hispanic Families in the 1980's: A Decade of Research," *Journal of Marriage and Family*, Nov. 1990.
24. See Minow, "Free Exercise of Families," 925-48; Minow argues that legal reasoning about the liberty to live in family forms as one chooses ought to be thought of as analogous to free exercise of religion.

25. Thanks to Drew Leder for the idea that families have "family resemblances."
26. Martha Minow, *Making All the Difference: Inclusions, Exclusions, and American Law* (Ithaca: Cornell University Press, 1990), 268-83.
27. See Carole Pateman, "The Shame of the Marriage Contract," in Judith H. Stiehm, ed., *Women's Views of The Political World of Men* (Dobbs Ferry, NY: Transnational Publishers, 1984).
28. Compare Martha Alberston Fineman, "The Sexual Family," in *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995), 145-75. Fineman argues that family law should be separated from sex. She differs from me, however, in concluding that this means the abolition of regulation of adult relationships except through contract. She would retain family law only in the form of protections for children and their caretakers. I argue that protections may be needed for adults who share lives whether or not they have a sexual relationship.
29. See Foucault, *History of Sexuality* (New York: Vintage, 1982). "In a society such as ours, where the family is the most active site of sexuality, and where it is doubtless the exigence of the latter which maintain and prolong its existence, incest—for different reasons altogether and in a completely different way—occupies a central place; it is constantly being solicited and refused; it is an object of obsession and attraction, a dreadful secret and an indispensable pivot. It is manifested as a thing that is strictly forbidden in the family insofar as the latter functions as a deployment of alliance; but it is also a thing that is continuously demanded in order for the family to be a hotbed of constant sexual incitement" (p. 109).
30. See Mary L. Shanley, "Fathers' Rights, Mothers' Wrongs?: Reflections on Unwed Fathers' Rights, Patriarchy, and Sex Equality," in Patrice DiQuinzio and Iris Marion Young, eds., *Feminist Ethics and Social Policy* (Bloomington: Indiana University Press, 1997).
31. See Nancy D. Polikoff, "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-contractual Families," *Georgetown Law Journal* 78 (February 1990): 459-575.
32. See Adrienne Asch and Michelle Fine, "Shared Dreams: A Left Perspective on Disability Rights and Reproductive Rights," in Marlene Gerber Fried, ed., *From Abortion to Reproductive Freedom: Transforming a Movement* (Boston: South End Press, 1990), 233-40.
33. See Dolores Hayden, *Redefining the American Dream* (New York: W. W. Norton, 1984), 137-38.

CHAPTER VI

MOTHERS, CITIZENSHIP, AND INDEPENDENCE

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1. William Galston, *Liberal Purposes* (Cambridge: Cambridge University Press, 1991), chaps. 1-7.

2. U.S. Bureau of the Census, *Statistical Abstract of the United States, 1993-94* (Austin, Tex.: The Reference Press), 101-2.
3. Judith S. Wallerstein and Sandra Blakelee, *Second Chances: Men, Women and Children a Decade after Divorce* (New York: Ticknor & Fields, 1989).
4. Andrew Cherlin and Frank Furstenburg, "Divorce Doesn't Always Hurt the Kids," *Washington Post* (March 19, 1989), C3.
5. See Rosemary Dunlop and Alisa Burns, "The Sleeper Effect—Myth or Reality? Findings from a Ten-Year Study of the Effects of Parental Divorce at Adolescence" (paper presented at the Fourth Australian Family Research Conference, Manly, NSW, February 1993).
6. P. R. Amato and B. Keith, "Parental Divorce and the Well-Being of Children: A Meta-analysis," *Psychological Bulletin* 110 (1991): 26-46.
7. Dunlop and Burns, "The Sleeper Effect"; Andrew Cherlin also finds that the adverse effects observed in children are often prior to divorce and can be attributed to a hostile family environment; Cherlin, "Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States," *Science* (June 7, 1991): 1386-89.
8. Dunlop and Burns suggest that one reason that they find lower levels of emotional distress in their studies of children of divorce than do some American studies may be that Australian divorce procedures rely on family court counseling and mediation much more than do those in the United States, which relies on a highly charged adversarial system of divorce settlement.
9. *Statistical Abstract*, 61. These statistics may obscure the fact that unmarried parents may nevertheless be coparenting with other adults in the household. Lesbian parents, for example, usually appear as single mothers in statistics, even when they live in long-term partnerships with another woman.
10. *Statistical Abstract*, 64.
11. *Ibid.*, 77-78.
12. Christopher Jencks, *Rethinking Social Policy: Race, Poverty and the Underclass* (New York: Harper Perennial, 1992), 198; Herbert L. Smith and Phillips Cutright, "Thinking about Change in Illegitimacy Ratios: United States, 1963-1983," *Demography* 25 (1988): 235-47.
13. *Statistical Abstract*, 78.
14. Larry Bumpass, "Children and Marital Disruption: A Replication and Update," *Demography* 21 (February 1984): 71-82.
15. See, e.g., Amitai Etzioni, *The Spirit of Community* (New York: Crown, 1993), chap. 2.
16. Nan Marie Astone and Sara McLanahan, "Family Structure and High School Completion: The Role of Parental Practices," Institute for Research on Poverty discussion paper no. 905-9 (Madison, Wis., 1989).
17. Stephanie Coontz, *The Way We Never Were* (New York: Basic Books, 1992), 224.
18. Sharyne Merritt and Linda Steiner, *And Baby Makes Two: Motherhood without Marriage* (New York: Franklin Watts, 1984), 160.
19. Sara McLanahan, "The Consequences of Single Parenthood for Subsequent Generations," *Focus* (University of Wisconsin, Institute for Research on Poverty) 11 (1988): 16-24.