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The Political Economy of American Family Policy, 1945–85

George Steven Swan

In a groundbreaking decision of 26 December 1985 in the case of *O'Brien v. O'Brien*, the New York State Court of Appeals determined that professional licenses granted to one or both partners in a marriage are property and hence subject to equitable distribution in divorce.¹ This historic opinion broadening the rights of spouses in divorce actions reversed a 1985 decision of the Appellate Division, which in turn had reversed a decision of the Supreme Court of Westchester County.²

The statute judicially applied in *O'Brien* advanced the law in making more explicit the legal recognition of the long-term intrafamilial division of labor. It represented the continuing evolution of the law in so applying premises hitherto less explicit.

The pro-gender equality/spousal partnership evolution of the law as vindicated in *O'Brien* is timely in the late 1980s in light of perceived outcomes of US family policy of the 1945–85 period. Political manipulation of the economic environment of the family caused (or at least was followed by) profound changes in the American family itself. Such changes in family configuration caused, or at least accompanied, shifts in public opinion on a number of topics.

In the pages that follow I discuss the intrafamilial division of labor, both in principle and as practiced in the United States today, and explore its implications for public policy especially in regard to divorce. I argue that the laws of the 50 United States ought to reflect the general truth that there are spouse-differential payoffs in marriage, these typically being to the advantage of the primary breadwinner (or in any event, husband). The law should be sensitive to the value of homemaker (or at any rate, as in *O'Brien*, wife) investments in the family economy.

I speculate below that various public policies of recent decades in this sphere have enhanced the sway of the central political authority over the family. In the light of *O'Brien*, I argue that if afforded a free field of action in political

economy terms, the family unit (or at any rate the marital unit) can stand on its own to the mutual benefit of its members. When American families have been accorded that freedom, the inequality in earnings between women and men has tended to lessen.

The O'Brien controversy

At the time of their 1971 marriage, Michael and Loretta O'Brien were employed as teachers at the same private school. Loretta O'Brien held a bachelor's degree but required 18 months of postgraduate classes at a cost of approximately \$3,000 to obtain permanent certification in New York.³ She had relinquished the chance to attain her permanent certificate while Michael O'Brien pursued his own studies: he had completed only three and one-half years of higher education upon his marriage, but thereafter returned to school at night to earn his bachelor's degree and to finish enough premedical courses to begin medical school. In 1973 the O'Briens moved to Guadalajara, Mexico, where Michael became a full-time medical student.

While her husband pursued the study of medicine, Loretta O'Brien held several teaching positions and contributed her earnings to the couple's joint expenses. The trial court later found that, aside from a \$10,000 student loan to her husband, she had contributed 76 percent of their income.⁴ In 1976 the O'Briens returned to New York, where Michael completed medical school and did his internship. He was licensed to practice medicine in 1980 and two months later commenced his action for divorce. Loretta O'Brien asserted a counterclaim, and Michael subsequently withdrew his complaint. Loretta obtained an uncontested divorce.

The New York Supreme Court had held that the newly acquired license to practice medicine was marital property subject to equitable distribution, and granted the defendant (Loretta O'Brien) maintenance arrears. On appeal, the Appellate Division held that a plaintiff's medical license is not marital property. This decision was in turn reversed by the New York State Court of Appeals, which held that the plaintiff's medical license was marital property within the meaning of Domestic Relations Law §236 (B) (1) (c), and that it consequently was subject to equitable distribution pursuant to Subsection 5 of that part.⁵ Before the Court of Appeals, Michael O'Brien contended that his license was excluded from distribution not because it was separate property (as distinguished from marital property), but because it was not property at all (and represented a personal achievement in gaining knowledge). The Court of Appeals was unimpressed, observing that those things acquired during marriage and subjected to distribution need not fall within traditional property concepts inasmuch as there is no common law property interest remotely resembling marital property. As the Court understood the economic logic of the law: "Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as a spouse, parent, wage earner or homemaker. . . ."⁶

The Court, in denying Michael O'Brien's assertion that alternative remedies such as an award of rehabilitative maintenance, or reimbursement for direct financial contribution, were appropriate, again adhered to the economic logic of the law: "Limiting a working spouse to a maintenance award, either general or rehabilitative, not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of dependence that the Legislature sought to extinguish by equitable distribution."⁷ Moreover, since a license is marital property, what is called for is an equitable portion thereof, and not a return of funds advanced. The value of the license is the enhanced earning capacity commanded by the holder, although ascertaining the present value of that enhanced capacity may present some difficulty; the Court of Appeals directed the lower court to take a fresh look at how its value might be calculated.

The intrafamilial division of labor

The *O'Brien* decision, recognizing that marriage embraces a male–female partnership that encompasses economic as well as sexual loyalties, comports with the marriage analyses of several disciplines. Modern anthropology posits even among protohominoids intense personal relationships produced by sexually related female–male bondings.⁸ Such a bonding might survive for a few months or a lifetime. Gradually, a male with sexual and economic loyalties to a female would begin protecting and feeding her offspring. So began the sexual contract.

A biological foundation for the intrafamilial division of labor during the hunter-gatherer stage of human prehistory is offered by Susan Graham.⁹ Women who run long distances experience the relationship of low estrogen levels to high body leanness. Women who run are anovulatory and cannot so readily reproduce. This hints that prehistoric cultures in which women roamed afield were those less likely to survive.

Anthropological hypotheses on gender division of labor yield to well-documented history by the advent of the industrial revolution. By then, marriage had become increasingly a concern of the partners (rather than the extended family), who entered their partnership for intimacy, affection, children, and the beneficial division of labor. Typically, men specialized in work for the market and women in home production, including child care.

The nearly universal division of labor by gender has even been speculated to derive from "some human essence."¹⁰ There is, however, nothing in human nature that defines just what this division must be or how it will be translated into behavior of cultural significance. The emergence of a division of labor is explicable in economic terms.

According to economists Richard McKenzie and Gordon Tullock, in launching the marital household the partners "essentially" agree to incur future decision costs.¹¹ These include the time and difficulties of reaching a decision with the doubled number of decisionmakers. It is these decision costs that

impel marriage partners to allocate many issues to unilateral decisionmaking: one spouse can decide without the other on such questions as meal plans or yard chores. While some outcomes inevitably prove not mutually agreeable, the savings in decision costs can more than offset the losses from those unilateral decisions disfavored by the mate.

According to McKenzie and Tullock, the multiple-person household also divides labor to facilitate specialization in work and so utilize comparative efficiencies in production. When spouses choose to minimize the costs of household chores by specializing in work (e.g., housecleaning or lawnmowing), they effectively trade their respective labors with each other. McKenzie and Tullock declare of such spouses: "They will have what many derogatorily call *roles*. However, *these roles need not be what they presently are.*"¹² Economics itself invites the establishment of the intrafamilial division of labor; yet economics does not necessarily suggest any particular spousal roles. Scholars have therefore turned to other disciplines to help predict or explain these roles. Sociobiology, for example, gives grounds to anticipate stronger maternal than paternal dedication to children.

These theoretical arguments are substantiated by the contemporary real-world household division of labor. A March 1985 Roper Organization survey¹³ asked: "How are daily household tasks handled in your house—things like preparing meals, cleaning, grocery shopping, washing dishes, etc.? Would you say you do nearly all of it, or that you do a lot of it but your husband (mate) helps some, or that it's pretty evenly divided between the two of you, or that your husband (mate) does more of it than you do?" Among women married or living as married, 41 percent replied "Wife does nearly all the household tasks." Among men married or living as married whose wives were not employed, the same answer was also given by 41 percent of respondents. Even among men with employed wives this response was 24 percent. The second choice, "Wife does a lot, husband (mate) helps some," was given by around 40 percent of respondents in each of these three categories, while 5 percent or fewer responded that "Husband (mate) does more."

The survey also asked: "Now, if you were free to do either, would you prefer to have a job outside the home, or would you prefer to stay home and take care of a house and family?" Fully 47 percent of women preferred the latter.

The intrafamilial division of labor—even factoring out the variable of children—is further evidenced by responses to the question: "Suppose both husband and wife work and the husband is offered a very good job in another city. Assuming no children, which one of these solutions do you think they should seriously consider?" Among the choices proffered, 72 percent of women and 62 percent of men agreed with the statement "Wife should quit her job, relocate with husband, and try to get another job in new place"; 10 percent of women and 19 percent of men chose "Husband should turn down job and stay where they are so wife can continue her job." When asked the analogous question supposing the *wife* had been offered the good job in another city, 55

percent of women and 58 percent of men preferred: "Wife should turn down job and stay where they are so husband can continue with his job." Only 20 percent of women (and 22 percent of men) chose "Husband should quit his job, relocate with wife, and try to get another job in new place."

The long-term intrafamilial division of labor here evidenced is—like that in *O'Brien*—one in which the wife's genuine contribution to the marriage is less likely than the husband's to be reflected in her long-term income-earning capacity in the job market. Finding evidence of the intrafamilial division of labor does not, of course, prove that divorce is a public policy issue. Nonetheless, the existence of this division of labor complicates the economic task confronting the court during divorce proceedings.

Divorce as a public policy issue

The household's division of labor accompanies its unification of costs. Economies of scale derived from the multiple-person household tend to be forgone upon divorce. As Justice Richard Neely of the West Virginia Supreme Court observes:

When a marriage breaks up, both the family and society become poorer because economies of scale are lost. Somebody has to pay for two houses or apartments instead of one, as well as the duplication of appliances, automobiles, and insurance.¹⁴

Judicial intervention into the divorce process, as in *O'Brien*, seeks to guarantee that both spouses enjoy at least some property rights in the family assets, both intangible and tangible; insofar as this guarantee obtains, both spouses will recognize an incentive to invest in the family's development.

The lower the cost of (i.e., the greater the ease of obtaining) divorce, the fewer the resources likely to be invested in the marital relationship. If the marriage's primary breadwinner can retain most of the new property of career assets the breadwinner has accumulated over the life of the marriage, such as professional education, health benefits, and enhanced earning capacity, the lesson of the law is that a spouse's only safe investment is in himself or herself.¹⁵ This encourages spousal self-investment over investment in the partner, their children, or their marriage itself. But *O'Brien*-like changes in the rules of divorce may encourage changes in the rules of marriage.

The lower the cost of divorce, the more casually might the marriage contract be entered into. It has been discerned in the study of various states' divorce laws that the less costly the divorce process, the greater the proportion of women who are married,¹⁶ whether or not so happily as would be the case in less casual alliances.¹⁷ Hence the ease of divorce since the mid-1960s may undercut the institution of marriage, even if the fraction of married people in the population should increase. The marital relationship (i.e., the institution itself) can be reduced to a casual one of little import to either party.

Differential payoffs of marriage

Men who are single suffer a mortality rate nearly double that of married men and triple that of single women. Single males commit suicide at approximately quadruple the rate of young husbands, quadruple the rate of single women, and quintuple that of married women.¹⁸

While such data suggest that benefits of marriage accrue especially to husbands, they say nothing about the direction of effect: Have these bachelors been beaten in the race of life because they were unreinforced by wives, or were they seen to be failures *ab initio* by prospective wives and therefore rejected? Simply comparing bachelors with never-married women is misleading because of the sociological phenomenon of hypergamy, the tendency for men to marry women slightly below them in age, occupation, and education. The marital-selection problem is greatly reduced by measuring husbands against widowers.

Evidence of the special value to men of marriage is summarized by George Gilder:

[D]ivorced men between the ages of thirty-five and sixty-four have a mortality rate three and a third times as high as divorced women and two and one half times as high as married men. Divorced men die at a rate one third higher even than single men. The figures for widowed men are only slightly lower than for divorced men.¹⁹

A 1981 study of a sample of whites aged 18 and over, enumerated in a 1963 survey and followed to 1975, identified some 1,200 who were widowed between 1963 and 1974, and an equal number of married persons, matched by race, sex, residence, and year of birth. Few if any prospective studies have been able to compare mortality rates of married and widowed populations so closely matched, with so much known of their demographic characteristics.²⁰ The difference in mortality rates between widowed males who remarried and those who did not was substantial. (The age-specific mortality rates among widowed males who remarried were even lower than the rates among married males.)

It has been suggested that a reason for higher mortality among widowed persons who do not remarry is simply that they already are too physically weak to remarry. But an elimination of all the widowed who died in the first three years after time zero in this study was followed by a comparison of the subsequent histories (up to nine years) of survivors who remarried during those first three years with those who did not. This comparison found that males who remarried experienced a substantially lower mortality rate than those who had not.²¹

Admittedly, the exact cause of the difference in the mortality rates between those men who remarry and those who do not remains a question. Yet whatever the reason, mortality statistics indicate that marriage is a status differentially favoring the husband over the bachelor or widower.

Income statistics tell a similar story. The Current Population Survey of the US Bureau of the Census gives estimates of total money income of persons 18 years old for the year prior to the survey. For 1983, the mean income of spouse-present men was \$22,104; that of spouse-present women was \$8,337. However, the mean income of never-married men (\$10,540) was relatively close to that of never-married women (\$8,932).²² Estimates of median income showed roughly the same pattern of differences.

Such figures signal, though they do not prove, that marriage is a crucial factor for incomes in the United States, a factor seemingly favoring husbands. Unlike divorced, separated, and widowed women, the never-married woman probably has been more continually attached to the labor force and has maintained or even enhanced her earning power. The fundamental explanatory factors underlying female–male income differentials seem to be the effects of a woman’s childbearing experience and household labor upon her work experience. Employer prejudice and consequent discrimination are not necessarily involved.²³

Supposing a husband draws upon another individual to assist him in earning his salary (if only by releasing time for him to devote to employment by managing his home), one would expect him to earn more than a bachelor. Supposing a wife devotes herself as did Loretta O’Brien to reinforcing her husband’s career, one would expect her to earn less than would her never-married counterpart. If spouses typically team up as had the O’Briens to promote the husband’s career and if gender discrimination by employers is not great, then one would expect single women and single men to command roughly the same incomes, incomes lower than those of husbands. In each of these cases the Census Bureau figures are consistent with expectations.

The value of homemaker investments

One may readily hypothesize that the payoff from a typical homemaker-mother’s contribution to her marriage is reflected in the enhanced earning power of her husband. This was the view taken by the *O’Brien* Court. But how might one estimate the economic value of her contribution?

The primary expense in childrearing is the opportunity cost of the parents’ time. The greater the potential market value of the parents’ time outside their home, the greater is this component of the expense. Even a decade and a half ago, the estimated opportunity cost of the first child to a mother who had an elementary school education was \$44,000; the estimated opportunity cost of the first child to a mother with a four-year college education was \$82,000.²⁴ (Due to substantial inflation in the interim, the sum today would be far higher.)

In his 1983 book *What Is a Wife Worth?*, Michael Minton unearthed a New York Family Service compilation for 1957 that placed the homemaker’s annual contribution at \$4,350; a 1967 home economics study arriving at an annual value of \$9,400; and a 1974 survey and poll by *The Washington Post* setting the annual figure at \$28,579. Minton recounts a 1973 study by the New

York State College of Human Ecology of Cornell University showing that a nonworking woman with two teenage children contributed \$5,600 worth of household work annually. He offers his own estimate of the 1978 value of a homemaker's contribution (based on replacement value) of \$40,288. Minton contends that it is perfectly plausible for the replacement value of a homemaker's services to exceed the breadwinner's earnings.²⁵

The welfare of young children (an "investment") tends to affect the subsequent welfare of *both* parents (a "payoff").²⁶ In fact, each parent may try to free-ride on the other's contribution to their children. But at every level of maternal education, the opportunity cost of the mother's time devoted to childrearing exceeds the expenses of childbirth and childrearing.²⁷ For most couples their first child is the largest single "purchase" they will make in their lifetimes; benefits therefrom accrue to both spouses notwithstanding the typically greater contribution by the woman.

The family's economic circumstances are presumably an important influence on the parents' decisions concerning childbearing and familial investment in childrearing. Those circumstances in turn are strongly affected by government policy, particularly in the area of taxation.

Federal manipulation of the family's environment

The question of US family policy is a delicate one because the family relationship fundamentally is private. Politicians have treated the institution of the family as they have the issue of kindness to animals: they extoll its virtues.²⁸ Federal policy and legislation nonetheless impinge on the family—for instance, in the manipulation of income tax law and welfare benefits.

High rates of inflation in the United States have greatly eroded the real value of personal tax exemptions, the amount per family member excluded from taxable income for federal tax purposes. The total real costs of having children are thereby increased. McKenzie and Tullock noted with reference to proposals to increase the personal exemption: "Even though such a change in the tax structure is not likely to have an effect on everyone's decision to have a child, it can affect those marginal couples whose estimated costs and benefits of having an additional child are very close or who are more or less indifferent to the idea of having a child but are inclined to hold off."²⁹ Consistent with such economic arguments on the effect of US family policy, the 1986 Tax Reform Act of the avowedly pro-family Reagan administration raises the personal exemption from the current \$1,080 to \$2,000 by 1989 for a taxpayer and each dependent.³⁰

The 80th US Congress legislated changes in the income tax system in 1948. An important feature of these changes was to permit spouses to split their income for tax purposes. Had the personal income tax exemption been indexed for inflation since 1948, it would by 1985 have reached \$2,633³¹—and a typical tax return for a husband–wife family claimed four exemptions

in 1985. Failure to index that exemption for inflation has put an increasing share of the federal tax burden on taxpayers with families.

Senator Daniel Patrick Moynihan of New York, in his 1985 Godkin Lectures at Harvard University,³² cited the calculation of Eugene Steuerle of the US Treasury Department that to offset the same proportion of per capita personal income in 1984 as in 1948, the personal exemption would have to be raised from \$1,080 to \$5,600. Moynihan agreed with Steuerle that by any measure this effective decline in the personal exemption has been the largest single change in the income tax of the post-1945 period. In 1948, he noted, three-quarters of a median family income for a family of four had been exempt from federal taxation. By 1983 less than one-third of the median income for such a family was exempt. Moynihan asked rhetorically: "Was this not in effect a powerful national family policy?"

The Senator also cited the estimate of Thomas Espenshade of the Urban Institute that for a medium-status four-person family to raise a child through the age of 18 necessitated an average total expenditure of \$82,400 in 1981 dollars. In 1985 dollars, this corresponds to an average of approximately \$4,600 per child per year.

Between 1948 and 1985 a combination of changes in the tax code plus erosion of the real value of the dependent tax exemption had "conspired" to raise the average tax rate of a single-income family with four children by 223 percent. In contrast, two-income couples without children encountered no tax rate change. Working families who placed their children in day care facilities could enjoy a tax credit; in contrast, Senator Moynihan noted, parents forgoing a second income to care for their own children received nothing. While levels of taxation greatly increased for all age groups, the steepest rise in rates affected households in the prime childbearing years. One of the few concessions to fertility was the continued tax deductibility of the medical costs of having a baby. (No similar treatment was accorded adoption expenses.) In consequence of these trends in taxation, one might speculate, married women with small children have been virtually forced into the labor market.

To the tax picture can be added the concurrent trends in welfare benefits. Gilder does this in broad strokes, suggesting an American economic climate that has grown increasingly chilling toward the family:

In the U.S., all the net income tax increases since the Second World War have fallen on families with children. . . . Meanwhile, the cost of raising children has soared well ahead of inflation; and the benefits of the welfare state, rising some twentyfold, have gone to broken families, to two-income households, and to individuals without children. It is this interplay of taxes and benefits that mostly explains the rush of mothers into the work force, the outbreaks of illegitimacy and divorce, and the decline in fertility among all women outside the embrace of the welfare state.³³

In sum, the investment costs of raising middle-class children in postwar America have been for the most part private—that is, parents have invested

in their own offspring. Meanwhile the payoffs accruing once those children reach adulthood have, especially over 1965–85, been collectivized by income taxes and social security levies. The tax consumer-voters, through the federal tax collector, reap from the taxpayers the benefits sown a generation earlier by self-sacrificing parents. Supporting this evolution of the political economy is the fact that, as of 1984, only 38 percent of voters were living with children.³⁴

Familial response to the chilling economic environment

The American family changed drastically over the 1945–85 interval. Between 1950 and 1977 the legitimate birth rate contracted by a third, the rate of divorce more than doubled, and the labor force participation rate of wives with young children more than trebled, as did the proportion of households headed by women with dependent children. In Gary Becker's appraisal, the US family changed more swiftly over this period than it had over any equivalent span since the founding of the colonies.³⁵

It has been surmised variously that the rapid shift in the structure of the typical family over recent decades is tied to the contraceptive revolution ushered in around 1960 with the introduction of oral contraceptives or to the rise of feminism, signaled by the 1963 publication of *The Feminine Mystique* by Betty Friedan. However, family changes and the rise of the women's movement are better seen as responses to other, earlier forces.

Among single women aged 25–44, 80 percent worked for pay in 1980, a fraction unchanged since 1950.³⁶ Separated and divorced women, who also traditionally have been employed, had by 1980 increased their 1950 employment participation rate only slightly. For married women, no such constancy prevailed. In 1950, 25 percent of married women were in the labor force; by 1960 this fraction was 32 percent; by 1970, 41 percent; and by 1980, 51 percent.³⁷

The last two decades have witnessed the increasing unacceptability of a woman's staying home full-time with children. A 1985 Gallup survey of 1,009 women aged 18 and over asked: "What's your opinion—in recent years has it become *more* acceptable or *less* acceptable for women to stay home fulltime with children?" (Gallup's emphases). Choosing "More acceptable" were just 32 percent of all women, with virtually identical proportions of working mothers (35 percent) and of nonworking mothers (33 percent) giving this reply. Fully 60 percent of all women (59 percent of working mothers and 57 percent of nonworking mothers) selected "Less acceptable." (The remainder chose "No change" or "Don't know.")³⁸

In 1950 the rate of live births per thousand women aged 15–44 years was 106.2; in 1960 (three years after the peak of the baby boom) it reached 118.0; but by 1970 it had dropped to 87.9 and by 1980, to 68.4. For third births the corresponding rates were: 1950, 18.4; 1960, 22.8; 1970, 13.6; and 1980, 10.3.³⁹

The American family's response to its increasingly hostile economic environment has encompassed, *inter alia*, its acceptance of a norm of two children and two parental breadwinners (or a breadwinner and a half). A 1986 poll asked whether respondents were better off economically than their parents in regard to "the ability to get by without two wage earners in the family." Among those aged 41 and older the responses suggested no overall change (40 percent chose "Better off," 41 percent "Worse off"), but for those aged 30–40 years there appears to have been an erosion of the financial viability of the one-breadwinner family (only 20 percent chose "Better off," while 61 percent chose "Worse off"). The youngest respondents (below 30 years) agreed with the 30–40-year-old group (35 percent chose "Better off," 53 percent "Worse off").⁴⁰ In the emphatic formulation of Kristin Luker: "[W]omen who stay home full-time and keep house are becoming a financial luxury. Only very wealthy families or families whose values allow them to place the nontangible benefits of a full-time wife over the tangible benefits of a working wife can afford to keep one of its earners off the labor market."⁴¹

George Bernard Shaw remarked that chastity is the trade unionism of the married.⁴² Consistent with Shaw, one might hypothesize the following: If a decreasing cost of divorce tends to reduce the importance of the marital relationship, and if both spouses are led to invest themselves in market participation and not in their families, then the relative benefit to a spouse of demanding that sexual activity be restricted to married partners (Shaw's trade unionist "closed shop") decreases. It becomes less important to a spouse that sexual rewards be tied only to marriage, because given the declining costs of divorce a spouse is less certain he or she will remain in that status. Spouses who have devoted themselves to career rather than family can literally cash in their investment and withdraw from the marriage; the spouse is less committed to remaining a spouse. One might further hypothesize a consequent increasing public acceptance of, for example, sexually active adolescents, of premarital sex generally, of homosexuality, and of out-of-wedlock births.

As the political economy increasingly penalized childrearing and discouraged the intrafamilial division of labor, the utility of marriage decreased. In 1972 the Supreme Court in effect recognized a Constitutional right to legalized nonmarital sexual practice; earlier, in 1968, it had eased the legal disadvantages imposed upon unwed as compared with married mothers.⁴³ The rate of first marriages per thousand single women 14 years of age and over, which had risen from 62.1 in 1950 to 87.5 in 1960, slipped back to 82.9 in 1970, 68.1 in 1975, and 66.0 in 1980.⁴⁴

Family configuration and the tides of public opinion

It has been seen from the evidence just presented that federal manipulation of the family's economic environment triggered (or in all events immediately preceded) deep changes in the American family. Although World War II

dramatically expanded women's opportunities to pursue nontraditional goals, women born between 1925 and 1945 (i.e., those reaching adulthood between 1945 and 1965) did not confront a cost/benefit calculus as unfriendly to raising a family as that faced by the generation coming to adulthood between 1965 and 1985. Such shifts in familial configuration in turn launched (or at least accompanied) the evolution of public opinion vis-à-vis several family-linked public questions.

In her 1984 study *Gender Politics: From Consciousness to Mass Politics*, Ethel Klein explored the relationship between marriage and support for "feminist" values. Her analysis of the Census Bureau's 1972 National American Election Study found that once the influence of age was removed there was no significant relationship between men's marital status and their support for feminism. But single, separated, or divorced women were significantly more feminist than were widowed or married women. The relationship held at all ages. As a further indication of the greater social conservatism of married women, Klein reported that more married women (52 percent) than single women (16 percent) saw "conventional marriage with children and no full-time job as the ideal life."⁴⁵

Female labor force participation grew speedily for more than a decade before public attitudes toward working women became favorable, suggesting that feminism is more likely to derive from nontraditional behaviors than vice versa. Klein writes: "Employment since 1968 was a stronger predictor of nontraditional role orientation in 1972 than was sex role orientation in 1968. Labor force participation of married women between 1962 and 1977 was strongly related to changing role perceptions."⁴⁶ Kristin Luker too argues that public opinion's acceptance of working women and even of the working mother followed rather than preceded the large-scale entry of married women with children into the workforce.⁴⁷

Political and public policy attitudes also differ between married and single women. For example, controlling for education, married workers are less supportive of the women's liberation movement than single workers.⁴⁸ In the 1980 presidential election Ronald Reagan drew his strongest support from married men, then from married women, single men, and least of all from single women.⁴⁹ A CBS News/*New York Times* exit poll during the November 1982 congressional election revealed that single voters disapproved of President Reagan's official performance by a 9 percent margin, whereas married voters endorsed his performance by a margin of 13 percent.⁵⁰

Attitudinal differences by marital status are of particular interest on two highly contentious public policy issues—the effective legalization of abortion on maternal demand, established by the 1973 Supreme Court decision in *Roe v. Wade*, and the proposed (but ultimately defeated) Equal Rights Amendment to the Constitution (ERA), which would have removed most gender-based differentiation in law. Married women are more supportive than single women of the prohibition of abortion on demand (the same is true of married versus unmarried men), and female pro-abortion activists are disproportionately found among the never-married and divorced.⁵¹

Family configuration likewise influenced public opinion regarding the proposed ERA. Opinion polls showed a clear majority of the public in favor, but with appreciably less support among married people (and particularly among housewives) than among single people. Congress passed the Equal Rights Amendment in 1971 and it was sent for ratification by a two-thirds majority of the states. Many states approved it rapidly, but fewer than the necessary number. The ratification drive stalled permanently after March 1973. This immediately followed the 22 January 1973 announcement of *Roe v. Wade*. Reaction to US family policymaking in *Roe* may well have influenced public debate on the ERA.⁵²

The failure of the ratification drive for the Equal Rights Amendment contrasts with the successful 1920 guarantee of women's suffrage through the Nineteenth Amendment. The victorious women's suffrage movement had drawn upon the more broadly supported prohibition movement, which itself had culminated shortly beforehand in the 1920 ratification of the Eighteenth Amendment. The temperance movement was called "the maternal struggle" and its slogan was home protection.⁵³ *Roe* and the ERA between them appeared to many as at times the antithesis of a maternal struggle for home protection.

The lesson

In brief, we have observed that overt political manipulation of the economic climate enveloping American families caused (or in any case preceded) widespread subsequent changes in the typical family. Changes such as those in family configuration thereupon caused (or in any case accompanied) shifts in public opinion on several legal issues. Family reactions to economic pressures upon the two postwar generations—but more dramatically upon the 1965–85 generation—have not represented an inevitable unfolding of history.

I have argued that no-fault divorce tends to discourage spousal investments in the marital relationship. More generally, US family policy has tended to destabilize the pattern of familial relationships that could obtain in a context less distorted by political interventions, particularly through the income tax system. I have noted the gap between the attitudes of the married and the unmarried on specific family- (or at least, sex-) related public policy proposals, with the unmarried of the 1965–85 period being more receptive than the married to revising (via *Roe* or the Equal Rights Amendment) the public policies of the 1945–65 interval.

To be sure, rising rates of legalized abortion, declining fertility, and the flight of homemakers into the labor force, especially after 1965, were not exclusively American phenomena. They generally were shared by other Western industrial nations such as Canada, France, Germany, Italy, and the United Kingdom. By the 1970s nearly every noncommunist country utilized a graduated tax structure: personal income taxes, gift and estate taxes, and (to a limited extent) business taxes were almost universally subject to graduation, and were rarely indexed against inflation. Every rise in the general price level consequently pushed economic producers into higher tax brackets.⁵⁴ To varying

degrees, family policy processes analogous to those observed in the United States have characterized most of the industrialized West. Just possibly, analogous economic imperatives elicited analogous familial responses.

The imperative implicit in contemporary public policies

America's state-by-state embrace of no-fault divorce, its implicit adoption of a federal family policy tending to disfavor the familial lifestyles recognized by (say) the tax reforms of 1948, and the emergence of sharp divisions of public opinion concerning *Roe* and the Equal Rights Amendment could be coincidental trends. Alternatively, these simultaneous changes could derive from implicit premises shared by many of the relevant decisionmakers.

If conventional marriage is viewed as an exchange in which a homemaker manages the household and a breadwinner contributes support and status, dissolution of marriage should be treated as the close of a partnership, with neither spouse assuming continuing obligations.⁵⁵ Family relationships, especially the spousal relationship, have become tenuous and insecure (because terminable at will through no-fault divorce) even while employment relationships have shifted away from termination at will to become more secure and predictable.⁵⁶ The common factor in these two trends is replacement of an institution (the business enterprise, the family) that formerly was largely independent of government by another social relation that primarily is one of dependence upon or supervision by the government (increasingly, the central government). This replacement is the imperative implicit in these two public policies.

As the business enterprise becomes increasingly entangled in government regulation, it decreasingly is a freestanding institution mediating between the individual citizen and the central government. Instead, it more closely resembles the government itself, or operates as if it were an arm of the government. Large corporations in particular no longer serve as the context in which millions of Americans pluralistically contract to organize their lives independently of central political power.

As spousal and parental relationships increasingly are trivialized, the family too is decreasingly a freestanding institution mediating between the individual citizen and the central government. As recently as 1945 the family was seen to play a generation-long educational and a lifelong insurance function. Today's family, continually threatened by dissolution, is less and less able to serve as the context in which millions of Americans pluralistically contract to organize their lives independently of central political authority. The educational and insurance roles are among those the government has in considerable measure taken upon itself, especially over the last two decades.

The historian James Hitchcock explains:

Paradoxically, as dogmatic egalitarianism grows in influence, so also does an almost anarchistic notion of personal liberty. It is not accidental that the long-

standing popularity of quasi-collectivist philosophies [e.g., those giving rise to the political intervention eroding the at-will employment relation] in America is now matched by the growing popularity of a doctrinaire libertarianism [e.g., no-fault, at-will divorce], and not merely as a reaction. What both philosophies share is an antipathy to mediating communities.⁵⁷

Both a “mixed-economy” economic policy and a “laissez faire” social policy serve to counter such mediating institutions as the family, private schools, churches, and business enterprises. Characteristically, these American mediating institutions traditionally performed functions that in Europe would have been accomplished by the government.⁵⁸

No-fault divorce facilitated (or at least coincided with) the decline of the family as a mediating institution between the individual and the government; US family policy as it has evolved over 1945–85 facilitated (or at least coincided with) that decline. *Roe* denied personhood to the family’s unborn offspring and so tended to deny legal duties thereto (at least on the part of the state and of the pregnant mother); *Roe* thereby constricted the scope of the family as a framework of inalienable rights and duties encompassing *all* members, and so eroded the family as a mediating institution. The proposed Equal Rights Amendment could have been used as a rationale for federal intervention into family law, lessening the roles of localities and the states as mediating institutions.

Two alternatives to contemporary public policies

A prospective alternative

The “replacement imperative” implicit in contemporary public policies has been seen by many commentators as a necessary development to attain ends deemed desirable, such as nondiscrimination by gender, even if at the expense of mediating institutions like the family. Are there alternative social policies that would be gender-nondiscriminatory but less damaging to the family?

Minton, whose data on the economic value of a wife to her husband were cited earlier, takes it for granted that male–female wage differentials spring from employer sex discrimination. Yet his own data undermine this thesis—they suggest instead that wage differentials derive from the impersonal efficiencies of a substantially sex-blind labor market, at least insofar as it is undistorted by the tax system. The employer hiring a primary-breadwinner spouse has hired two adults even though only one name appears on the paycheck.⁵⁹ The employer recruiting a primary-homemaker spouse has hired but one. The judge who handed down the *O’Brien* decision, unlike Minton, seems to have grasped this distinction.

Divorce attorney Minton’s work on homemakers’ economic worth may appear a rather “liberal” inquiry, so his oversight may appear to be a “liberal” error. But social critics from the Judaeo-Christian perspective also may share

his blindspot. Pope John Paul II has proposed that a “just” wage for family heads, as well as family allowances, would allow mothers to dedicate themselves to their families exclusively:

Just remuneration for the work of an adult who is responsible for a family means remuneration which will suffice for establishing and properly maintaining a family and for providing security for its future.

Such remuneration can be given either through what is called a family wage—that is, a single salary given to the head of the family for his work, sufficient for the needs of the family without the other spouse having to take up gainful employment outside the home—or through other social measures such as family allowances or grants to mothers devoting themselves exclusively to their families.⁶⁰

The Pontiff, like Minton, seems unaware that in a labor market undistorted by political intervention, a profit-maximizing employer may already be spurred to offer a family-supporting paycheck (a “family wage”) to a home-maker-reinforced breadwinner employee. Raising the income tax personal exemption to its value in the 1940s might enable the breadwinner’s paycheck to support a family. Such tax relief would represent diminished political intervention in the family.⁶¹

A retrospective alternative

An apparent example of a labor market becoming increasingly gender-nondiscriminatory when little distorted by political intervention can be drawn from American economic history. The period of laissez faire economic policy in the nineteenth century coincided with a steady fall in the female–male wage gap. From 1820 to 1850 the ratio of female manufacturing wages to male wages increased by nearly 50 percent, from approximately 0.30 to 0.44. The gap in manufacturing wages continued to narrow until about 1885—that is, about the time of the nationwide rejection of the laissez faire doctrine, a shift signaled by the creation in 1887 of the Interstate Commerce Commission. Female full-time earnings for the entire population grew from 46.3 percent of male earnings in 1890 to 60.3 percent of male earnings by 1970, with most of this increase in the period prior to 1930 (by which time the figure had reached 55.6 percent).⁶² The 1930s saw laissez faire explicitly rejected, first by President Herbert Hoover’s administration and then by President Franklin D. Roosevelt, who launched the American political economy (the “mixed economy”) of today.

University of Pennsylvania economist Claudia Goldin concludes:

The stability of the gender gap over the last 35 years has raised questions about the significance of the increased labor market participation of women. It has also been used as evidence to support new legislation to combat discrimination in the labor market. But the historical record indicates that the greatest narrowing

in the gender gap within the industrial sector took place during the period of early industrialization, and that the gender gap across all occupations narrowed until the 1930s. Just as the presence of change in the gender gap during the period from 1820 to 1940 was not an indication of social advancement, so, too, the absence of change over the more recent past does not necessarily signify increasing labor market discrimination.⁶³

Not surprisingly, the federal government over the interval 1945–85 (or at least, 1965–85) has generally not propounded this argument, with its implications that would favor a reduced government role in the labor market.

The economic logic of *O'Brien*, however, is more in keeping with the political economy of the pre-1930 (or more accurately, pre-1885) period. Marriage as a partnership of equals owing mutual duties is an institution that developed from application of contractual attitudes to the marital relationship.⁶⁴ Insofar as feminism seeks to reform the legal position of human beings to afford women freedom to act in accordance with their own desires and economic circumstances, it is a phenomenon deriving from nineteenth century liberalism ('laissez faire'). Women's struggle to preserve the wife's personality in marriage is an aspect of the drive for personal integrity characterizing the political economy founded upon private ownership of the means of production.

Unfortunately, as the foregoing discussion has indicated, the US political economy of 1945–85 has tended to undermine the contractual freedom that would promote economically independent families. It has led to an accelerating decay of the family.

Whether the pro-gender equality/spousal partnership logic of the statutory law applied in *O'Brien* (a logic keyed to the ideas of contractual freedom and economic efficiency) will be sustainable in today's political economy atmosphere (in which that freedom and efficiency are not overriding values) remains problematical. It must be problematical because all other forms of freedom depend on economic freedom as their prerequisite. As Friederich Hayek explains, because even the higher values of life are brought into the cash nexus, each person can sacrifice his or her lesser needs to preserve his or her higher values (such as the family) and so bring about social pluralism.⁶⁵ One or another architect⁶⁶ of the 1948 pro-family federal policy was alert to just this point.

Notes

1 66 N.Y. 2d 576 (1985).

2 *O'Brien v. O'Brien*, 106 A.D. 2d 223, 485 N.Y.S. 2d 548 (Ct. Appeals 1985); and *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S. 2d 801 (Supreme Court, Westchester County, 1982).

3 Facts cited in *O'Brien v. O'Brien*, supra, 66 N.Y. 2d at 581.

4 *O'Brien v. O'Brien*, supra, at 581–82.

5 *O'Brien v. O'Brien*, supra, 66 N.Y. at 580–81, citing Domestic Relations Law, § 236 (B) (1) (c), and (5).

6 *O'Brien v. O'Brien*, supra, 66 N.Y. 2d at 585.

7 *O'Brien v. O'Brien*, supra, 66 N.Y. 2d at 587.

8 Helen E. Fisher, *The Sex Contract: The Evolution of Human Behavior* (New York: William Morrow, 1982), p. 99.

9 Susan Brandt Graham, "Running and menstrual dysfunction: Recent medical discoveries provide new insights into the human division of labor by sex," *American Anthropologist* 87 (1985): 878.

10 Anne Fausto-Sterling, *Myths of Gender: Biological Theories about Women and Men* (New York: Basic Books, 1985), p. 198.

11 Richard B. McKenzie and Gordon Tullock, *The New World of Economics: Explorations into the Human Experience* (Homewood, Ill.: Richard D. Irwin, 1975), p. 98.

12 McKenzie and Tullock, cited in note 11, pp. 102–103 (emphases in original).

13 The survey results are reported in *Public Opinion* (December/January 1986).

14 Richard Neely, "Barter in the court," *New Republic*, 10 February 1986, p. 13.

15 Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: The Free Press, 1985), pp. 375–376.

16 McKenzie and Tullock citing data from Alan Freiden, "The United States marriage market," *Journal of Political Economy* 82, no. 2, part II (March/April 1974): 534–553.

17 "[F]orbidden divorce will induce a more careful search for a marriage partner in the first place. The more costly a mistake is, the less likely it is to be committed; and a mistake in choosing a spouse is more costly in a system that forbids divorce (or makes it very difficult) than in one that permits it. So making divorce hard or impossible fosters happy marriages!" Richard A. Posner, *Economic Analysis of Law*, 3d ed. (Boston: Little, Brown, 1986), p. 132.

18 These statistics are reported by George Gilder, "The princess's problem (all the good ones are married, sort of)," *National Review*, 28 February 1986, pp. 28, 29; Victor Fuchs, *How We Live* (Cambridge, Mass.: Harvard University Press, 1983), p. 176; George Gilder, *Naked Nomads: Unmarried Men in America* (New York: Quadrangle, 1974), p. 26.

19 Gilder, *Naked Nomads*, cited in note 18, pp. 38–39. In particular, divorced and single men are more prone to accidents and suicides, but they experience excess mortality from conventional causes as well.

20 Knud J. Helsing, Moyses Szklo, and George W. Comstock, "Factors associated with mortality after widowhood," *American Journal of Public Health* (1981): 802, 806.

21 According to Helsing et al., cited in note 20, p. 805: "[T]he small numbers of widowed females who remarried plus the already low mortality rates among females made their remarried/not married ratios almost meaningless."

22 US Bureau of the Census, *Money Income of Households, Families, and Persons in the United States: 1982 and 1985*, Current Population Reports, Series P-60, No. 142 (February 1984), p. 145, Table 45; and No. 146 (April 1985), p. 145, Table 45.

23 Armen Alchian and William Allen, *Exchange and Production: Competition, Coordination, and Control*, 3d ed. (Belmont, Calif.: Wadsworth Publishing Co., 1983). As Judge Richard A. Posner of the US Court of Appeals for the Seventh Circuit has concluded:

Economists have conducted studies which show that virtually the entire difference in the average hourly wage of men and women, including that due to the fact that men and women tend to be concentrated in different types of job, can be explained by the fact that most women take considerable time out of the labor force in order to take care of their children. As a result they tend to invest less in their "human capital" (earning capacity); and since part of any wage is a return on human capital, they tend therefore to be found in jobs that pay less. Consistently with this hypothesis, the studies find that women who have never married earn as much as men who have never married.

American Nurses' Association v. State of Illinois, 783 F. 2d 716, 719 (7 Cir. 1986).

24 McKenzie and Tullock, cited in note 11, p. 110.

25 Michael H. Minton, *What Is a Wife Worth?* (New York: McGraw-Hill, 1983), pp. 61–62, 63, 64, 65, 143. In 1972 the Chase

Manhattan Bank computed "women's work" in the home to be worth \$13,391.56 a year. Phyllis Chesler and Emily Jane Goodman, *Women, Money and Power* (New York: William Morrow, 1976), p. 98.

26 Gary S. Becker, *A Treatise on the Family* (Cambridge, Mass.: Harvard University Press, 1981), p. 188.

27 McKenzie and Tullock, cited in note 11, p. 111.

28 James Duffy, *Domestic Affairs: American Programs and Priorities* (New York: Simon and Schuster, 1978), p. 266.

29 McKenzie and Tullock, cited in note 11, p. 117.

30 Michael Bazdarich, "How to profit from tax reform," *Money Maker* (October/November 1986): 18, 21.

31 Fred Barnes, "Tax reform prospects," *New Republic*, 22 April 1985, pp. 10, 11.

32 Daniel P. Moynihan, *Family and Nation* (San Diego: Harcourt Brace Jovanovich, 1986), p. 167.

33 George Gilder, "The Murray imbroglio," *American Spectator*, March 1985, pp. 15, 18.

34 Samuel H. Preston, "Children and the elderly: Divergent paths for America's dependents," *Demography* 21 (1984): 435-457.

35 Becker, cited in note 26, p. 245.

36 Fuchs, cited in note 18, p. 128.

37 Ben J. Wattenberg, *The Good News Is the Bad News Is Wrong* (New York: Simon and Schuster, 1984), p. 182.

38 Letter from Larry Hugick to George S. Swan (11 April 1986) discussing 5-11 February 1985 Gallup survey.

39 US Bureau of the Census, *Statistical Abstract of the United States*, various years. The average number of children per household was 2.19 in 1955 and had reached 2.44 by 1965. By 1975 it had dropped to 2.09 and by 1985, to 1.85.

40 "Portrait of a generation," *Time*, 19 May 1986, p. 35.

41 Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984), p. 209 (emphasis in original).

42 "[W]hat is virtue but the Trade Unionism of the married?," George Bernard Shaw, *Man and Superman: A Comedy and a Philosophy* (New York: Brentano's, 1903), p. 121.

43 *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968).

44 US Bureau of the Census, *Statistical Abstract of the United States 1984*, p. 84. The 1980 figure is from 15 (not 14) years of age.

45 Ethel Klein, *Gender Politics: From Consciousness to Mass Politics* (Cambridge, Mass.: Harvard University Press, 1984), p. 107, citing Gallup Opinion Index, March 1976, p. 30.

46 Klein, cited in note 45, p. 110.

47 As Luker notes parenthetically, "One might speculate that the ability of the labor market to draw married women with children into it was a critical factor in changing public opinion. Single and divorced women could be thought of as working because they had to, and they could be pitied for having failed at the task of making a family. Their employment did not fundamentally challenge cultural assumptions about women's roles in the ways that working married women and working mothers did." Luker, cited in note 41, pp. 116-117.

48 M. Kent Jennings and Richard G. Niemi, *Generations and Politics: A Panel Study of Young Adults and Their Parents* (Princeton, N.J.: Princeton University Press, 1981), p. 293.

49 Charlotte Saikowski, "Fairness will be key 1984 campaign issue for President Reagan," *Christian Science Monitor*, 17 October 1983, p. 3.

50 Martin Plissner, "The marriage gap," *Public Opinion* (February/March 1983): 53.

51 Edward Manier, "Abortion and public policy in the United States: A dialectical examination of expert opinion," in *Abortion: New Directions for Policy Studies*, ed. Edward Manier, William Liu, and David Solomon (Notre Dame, Ind.: University of Notre Dame Press, 1977); Luker, cited in note 41, p. 196.

52 See, e.g., *Pro-Life Feminism: Different Voices*, ed. Gail G. Sweet (Toronto: Life Cycle Books, 1985).

53 Eileen L. McDonagh and H. Douglas Price, "Woman suffrage in the Progressive Era: Patterns of opposition and support in referenda voting, 1910–1918," *American Political Science Review* 79 (June 1985): 415, 420.

54 Jude Wanniski, *The Way the World Works*, revised ed. (New York: Simon and Schuster, 1983), p. 235. Canada's indexing of personal income tax brackets, effective 1 January 1974, had been championed successfully by Finance Minister (subsequently Prime Minister) John Turner. But a 10 percent surtax on all incomes over \$30,000 was added, effective 1 January 1976.

55 David L. Kirp, Mark G. Yudof, and Marlene S. Franks, *Gender Justice* (Chicago: University of Chicago Press, 1986), p. 182.

56 Annotation, "Damages—wrongful discharge of at-will employee," 44 *American Law Reports* 4th 1131 (1986); Fred Strasser, "The death of a doctrine?," *National Law Journal* (20 January 1986): 1; Weitzman, cited in note 15, p. 376.

57 James Hitchcock, *Years of Crisis* (San Francisco: Ignatius Press, 1985), p. 150.

58 Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler, and Steven M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985), pp. 167–168, 212, esp. p. 167.

59 Thomas Sowell, "Status versus behavior," *Washington University Law Quarterly* (1979): 185.

60 Pope John Paul II, "On Human Work," *The Pope Speaks* 26 (1981): 321–322.

61 Tax relief allowing taxpayers to keep their own money does not constitute a subsidy, although there is Supreme Court language to the contrary. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544, 546, 548, 550 (1983); *Bob Jones University v. United States*, 461 U.S. 574, 591, 604 (1983); *Mueller v. Allen*, 463 U.S. 338, 404, 407–08, 411, 414 (Marshall, J., dissenting).

62 Claudia Goldin, "Understanding the gender gap," *New Perspectives* (US Commission on Civil Rights) (Fall 1985): 9, 12.

63 Goldin, cited in note 62, p. 13.

64 Ludwig von Mises, *Socialism: An Economic and Sociological Analysis*, translated by J. Kahane (Indianapolis, Ind.: Liberty Classics, 1981), pp. 82, 83, 87, 90.

65 Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1967), pp. 97, 100. Originally published in 1944, this book preceded by four years the beginnings of US pro-family policymaking.

66 For example, Senator Robert A. Taft, Sr. and Fred J. Cook, *Barry Goldwater* (New York: Grove Press, 1964), p. 62.