

ARTICLES

FAMILY AS A RATIONAL CLASSIFICATION

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Within the past few years, the cities of San Francisco and Berkeley, anxious that they not seem to express any preference for one lifestyle over another, have enacted domestic partnership laws¹ that allow non-marital domestic cohabitants to benefit from one another's health insurance, family leave benefits, and so on.² Stanford University, in the same spirit, has opened married student housing to quasi-marital cohabitants as well.³ New York City recently extended recognition to domestic partners for, among other purposes, establishing successorship rights in that city's feudal housing market.⁴ The premise seems to be that making a distinction between old-fashioned household units and free-form, modern-day adaptations, would be invidious.⁵

The new rules mirror a change in social attitudes. For the most part, published references to conventional families—married persons sharing living quarters with children—are politically incorrect unless conjoined with scoffing references to “Ozzie and Harriet” or “Beaver Cleaver” and described as “mythical” or “mere nostalgia.”⁶

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1. See Elaine Herscher, *Domestic Partners Celebrate/Anniversary of S.F. Law Benefitting Unmarried Gay, Straight Couple*, S.F. CHRON., Feb. 14, 1992, at A25.

2. Pamela Reynolds, *Gay Couples Redefine “Family”*; *Relationships in the '90s*, BOSTON GLOBE, Oct. 5, 1989, at 101.

3. *Id.*

4. See *Braschi v. Stahl*, 543 N.E.2d 49 (N.Y. 1989). See also Mireya Navarro, *New York Extends Health Benefits to Domestic Partners of City Employees*, N.Y. TIMES, Dec. 27, 1993, at B1.

5. See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

6. See generally STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992); Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 241 (1995). See also Elaine T. May, *Myths and Realities of the American Family*, in 5 A HISTORY OF PRIVATE LIFE 539, 583 (Antoine Prost & Gerard Vincent eds., Arthur Goldhammer trans.,

Is there any basis for the a priori belief, which is still widespread in the socially underdeveloped inland provinces of the country, that there might be some systematic differences in the production of socially prejudicial behavior as between conventional married households on the one hand and contractual quasi-marital households on the other? Does a legislative preference for "family" amount to an irrational classification?

The question was squarely raised in *City of Santa Barbara v. Adamson*.⁷ According to the California Supreme Court, the city violated the state's constitution by pegging its residential land use regulations to the subsistence of a "family" (as traditionally and legally constituted).⁸ That sequitur follows from the major premise that privacy is an inalienable right,⁹ and the minor premise that it is essentially a private matter whether a person lives in a marital household, a hippie commune, or some variant that, according to the court, could be termed "an alternate family."¹⁰

The court characterized the city's legislative purpose as preventing the moral hazards that communes pose to traditional families and their children. However, the court stated that to pursue such objectives by means of a flat ban amounts to erecting an "irrebuttable presumption" that communal life

1991); Frances Olsen, *The Myth of State Intervention in the Family*, in *FAMILY MATTERS* 277, 281 (Martha Minow ed., 1993).

7. 610 P.2d 436 (Cal. 1980).

8. *Id.* at 439-41. The ordinance required that all premises be used in a manner consistent with the zone in which it is located. *Id.* at 437 (citing Santa Barbara Municipal Code § 28.10.030). Adamson's house was in a single-family zone. *Id.* at 438. "Family" is defined in the Santa Barbara city ordinance as, "1. An individual, or two (2) or more persons related by blood, marriage or legal adoption living together as a single housekeeping unit in a dwelling unit. 2. A group of not to exceed five (5) persons, excluding servants living together as a single housekeeping unit in a dwelling unit." *Id.* at 437-38 (citing Santa Barbara Municipal Code § 28.04.230(2)).

9. CAL. CONST. of 1879, art. I, § 1 (1974) provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Id.*

10. 610 P.2d at 439-40. According to the court, the *Adamson* communards were a group of 12 adults who live in a 24-room, 10-bedroom, 6-bathroom house owned by appellant Adamson. The occupants are in their late 20's or early 30's and include a business woman, a graduate biochemistry student, a tractor-business operator, a real estate woman, a lawyer, and others. They are not related by blood, marriage, or adoption.

Id. at 438. But this was no mere yuppie dorm:

[They] have become a close group with social, economic, and psychological commitments to each other. They share expenses, rotate chores, and eat evening meals together. Some have children who regularly visit. Two (not including Adamson) have contributed over \$2,000 each to improving the house . . . Emotional support and stability are provided by the members to each other; they enjoy recreational activities such as a trip to Mexico together; they have chosen to live together mainly because of their compatibility.

Id.

is immoral or socially corrosive.¹¹ The city's legitimate goals—to head off the damage and misconduct that communards may (but do not always) do—and that traditional family members sometimes also do (if less frequently)—can be less-restrictively brought about by zeroing in on how the property is used rather than by whom it is used.¹² Using *family* as an operational surrogate in a statutory plan aimed at assuring the stability of a neighborhood is overbroad because it thereby rules out many legitimate associations that would not introduce neighborhood instability.¹³ Additionally, *family* is underinclusive in that it allows many arrangements that would undermine neighborhood stability.¹⁴

Gary Becker was not the first to notice that families are extraordinarily productive arrangements as standard economics judges such matters.¹⁵ That observation helps to explain why the family has proved to be so robust, over so many different times and places. The bottom line is, people like living in families, and they regularly choose to do so rather than selecting superficially plausible alternatives. But why should organized society care, one way or another, about the family? If most people want to live in families, fine; if others do not, so what?

To most of the generations of history the question would probably have seemed both coy and tendentious. From ancient times, it has been widely recognized that there exists an essential connection between families and the larger societies that contain them.¹⁶ It is not only that families are the

11. *Id.* at 441.

12. *Id.* The court stated:

to illustrate, "residential character" can be and is preserved by restriction on transient and institutional uses Population density can be regulated by reference to floor space and facilities. Noise and morality can be dealt with by enforcement of police power ordinances and criminal statutes. Traffic and parking can be handled by limitations on the number of cars . . . and by off-street parking requirements. *In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users.*

Id. at 441-42 (citation omitted).

13. *Id.* at 441.

14. *Id.* The court stated that while the primary goal of the ordinance is "to maintain . . . 'a suitable environment for family life,'" the rule-of-five limit in no way addresses noise, traffic or parking problems, or other deleterious activity that could conceivably affect the "suitable environment." *Id.*

The court further debunks the assumption of "traditional family" stability and concludes that "none of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined." *Id.* (quoting *City of Des Plaines v. Trottnr*, 216 N.E.2d 116, 119 (1966)).

15. See GARY S. BECKER, *A TREATISE ON THE FAMILY* 30-53 (enlarged ed. 1991) (discussing division of labor, specialization, and other efficiencies generated by traditional household and family arrangements).

16. See Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1138-44.

schools of first instance, in which children learn to embrace their deepest and most primitive assumptions about life and other people. It is also, as Confucius,¹⁷ Plato,¹⁸ and probably a hundred of their forerunners recognized, that the family is a sort of molecule, the very stuff of which the larger society is composed, so that the welfare of the one and the other are indissolubly coherent.¹⁹ As we should say in the patois of modern policy wonk-speak, families generate positive externalities for society relative to other living arrangements. One might suppose that so rooted an intuition would attract little skepticism. But a good deal of modern family law appears to accept the subtly inconsistent premise that how a person chooses to live, and with whom, is essentially a private matter into which the community intrudes as a hostile and officious stranger.²⁰ According to our argument, that premise is specious. A matter, even a sensitively intimate one like a person's domestic living arrangements, can hardly be "private" if seen as threatening to result in important external harm.

A matter cannot be simultaneously "private" and "nonprivate." This proposition can be extracted even from *Roe v. Wade*,²¹ that most outlying of privacy cases, wherein the Supreme Court took pains to establish that a fetus is not a person.²² To the extent that a fetus is deemed to be a person (i.e., in the third trimester), there can be no "privacy" right, as such, to destroy it.²³ Its destruction by another person might possibly be justified on some other ground—what the *Model Penal Code* calls "necessity," perhaps²⁴—but not "privacy."

17. See generally CONFUCIUS, *The Analects*, Book 18:6, in *THE ANALECTS OF CONFUCIUS* 220 (Arthur Waley trans., 1956).

18. See generally PLATO, *Laws*, in *THE COLLECTED DIALOGUES OF PLATO 1225-1359* (Edith Hamilton & Huntington Cairns ed., A.E. Taylor trans., 1961).

19. See, e.g., JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY*, bk. 2, ch. 2, § 3, at 224 (1909).

20. See, e.g., William Graham, *There Goes the Neighborhood: The Evolution of "Family" in Local Zoning Ordinances*, 9 *TOURO L. REV.* 699 (1993).

21. 410 U.S. 113 (1973).

22. *Id.*

23. *Id.* at 159-60.

24. An example may be where childbirth posed some acute danger to the mother. MODEL PENAL CODE § 302 (1985) defines the concept of *necessity* as follows:

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

I. A SKETCH OF THE ARGUMENT

What is the basis for the fireside induction that “families” behave differently from a demographically matched group of non-family members? The answer is largely one of the stability of relationships, and the costs that members of any relational group will ordinarily encounter when they try to control the behavior of other group members. Our argument is summarized in the following four paragraphs.

There does exist a probabilistic difference between *family*, as that term is ordinarily understood, and *non-family*, and it has to do with the relative probabilities of exit, emotional as well as physical, from the household. The ease or difficulty of exit carries implications for the ability of the domestic unit to acquire and preserve reputational capital, which in turn affects the stake that household members have in investing in the household’s “brand name.”

There is thus a logical non-religious rationale that explains why families, as producers of collective goods, are encouraged (although not necessarily compelled) by the communities they benefit. Conversely, non-familial domestic morphs will be discouraged (not necessarily forbidden) by the state because expectationally, they produce collective “bads.” They are more often nuisances, in a real sense, to the neighbors.

Family members have incentives to constrain one another’s behavior in order to maximize the family’s equity in such reputational assets as honesty, virtue, trustworthiness, community-mindedness, and so on, because “having a good name” will translate into increased latitude for the members of the family as they function in the larger community. The full value of reputation emerges only over time. Short-term players have very different incentives, an insight that is reflected, among other ways, by the insinuation of malevolence that goes with the term *drifter*.²⁵ Private markets display the same horse-sense when they ordain discernibly higher rental rates for transients than for a long-term tenant of the same abode. It often makes more sense to tax nuisances expectationally than to try to punish only that subset of actors that ultimately proves to be miscreant. When deterrence is

Id. See also 18 PA. CONS. STAT. ANN. § 503(b) (Purdon 1983); TEXAS PENAL CODE ANN. § 9.22 (Vernon 1974).

25. One dictionary describes a “drifter” as “a person of passive spiritless character lacking aim, ambition and initiative and given to roving from one diversion to another without any steady interest.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 690 (1986).

unacceptably costly, a “misbehavior premium” is pooled across all the individuals in a risk category. The unavoidable downside of such a procedure is that certain unoffending people will end up bearing added costs to which their behavior will not at all have contributed.²⁶

“Reputation” is a familial public good, and like any public good it is subject to underinvestment, exploitation, and degradation by free riders.²⁷ The larger society characteristically tries to prevent free riders on public goods by means of taxation or prosecution.²⁸ Within families, free riders are usually dealt with more directly. There is typically a hierarchy of authority that can police collective goods problems at the source and at comparatively low cost. Costs are low, in turn, because the constabulary—parents usually—are already in possession of much arcane and useful information about the constituents. (Even though mom was not there, she knows that the lamp was broken because somebody was using the sofa as a trampoline, and she knows who generally tries to use the sofa as a trampoline.) Furthermore, the strict requirements of justice (in particular, due process) which are so costly in the public realm, are considerably relaxed within the family.

Our desire is to understand how the world came to be the way it is—why prejudices and conventions assumed the forms that they did rather than some other form. Readers will judge for themselves, and will differ, whether what is and has been is also what should be. Because our province is positive theory, we do not insist that the rational preference for traditional families necessarily leads to the conclusion that such families are axiologically superior forms of domestic organization. However, without accepting the preference for traditional families as rational rather than

26. That the policy has a downside does not mean that it is inappropriate. Very seldom is it possible to select an “ideal” public policy; more often the task is to select the least bad from a set of sorry options—in other words, to optimize subject to constraints. It is profitless to criticize a chosen institution merely because it is imperfect if perfection is unattainable (as it usually is). Harold Demsetz called such a barren view of appropriate goals the “Nirvana approach to efficiency.” See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969). Similarly, refusing to embrace the best available policy merely because it is discovered to have a downside (i.e., to impose newly-recognized costs) has come to be known as the “Nirvana Fallacy.” See Fred S. McChesney, *Contractarianism Without Contracts? Yet Another Critique of Eisenberg*, 90 COLUM. L. REV. 1332 (1990).

27. See, e.g., Matthew S.R. Palmer, *Toward an Economics of Comparative Political Organization: Examining Ministerial Responsibility*, 11 J.L. ECON. & ORG. 164, 174 (1995).

28. See, e.g., PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 712-15 (12th ed. 1985); Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 391 (1991).

accidental, capricious, or “merely religious,” any normative case for alternative arrangements is unlikely to be convincing.

II. STRUCTURAL VERSUS PARTICULARISTIC REGULATION

There is, then, not only an unsystematic set of more or less reliable anecdotes, but also a rather familiar theory which tells us that Santa Barbara was right:²⁹ Communes, hippie or otherwise, can be expected to behave differently from families, even if one holds the demographic characteristics of their memberships constant, because communes and families expectationally have different time horizons, and thus different behavioral incentives. Like any other law, that “prediction” is overinclusive and underinclusive and contains a “conclusive presumption” (i.e., that deviation from the formal requirement of the law will tend to produce, though it may not always produce, the harm sought to be avoided). A highway speed limit is also over- and underinclusive, in addition to being a “conclusive presumption.” So what? Nothing follows.

In order to think about the court’s suggestion that the city attempt to enforce its interest behaviorally rather than structurally,³⁰ consider a less controversial situation in which structural regulation is preferred. There is a rule that attorneys must sequester client funds: Fiduciary money and a lawyer’s own personal assets are not to be intermingled.³¹ The rule applies to all lawyers, as though all lawyers were crooked and untrustworthy rather than only a few; it imposes extra costs and burdens universally in order to intercept some (but less than all) frauds, defalcations and ordinary misjudgments. Instead of such overinclusive underinclusive structural arrangements, why not just a rule that forbids lawyers from embezzling client monies and let it go at that?

Surely the answer must have something to do with the costs of enforcement. There are many clients and many lawyers (as there are many families, conventional and unconventional), and their confidential dealings are awkward for the state to scrutinize (as are the confidential dealings of families). Regulation, if it is required, must operate in domains that are

29. *City of Santa Barbara v. Adamson*, 610 P.2d 436, 445 n.1 (Cal. 1980) (Manuel, J., dissenting). More than three dozen other California communities were similarly correct. Santa Ana is the latest community to have such an ordinance overturned. *Briseno v. City of Santa Ana*, 8 Cal. Rptr. 2d 486 (Cal. Ct. App. 1992).

30. *Id.* at 441-42.

31. MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.15 (1995); MODEL CODE OF PROFESSIONAL CONDUCT DR 9-102 (1983).

accessible at reasonable cost. Obviously there are a number of shady characters practicing law, and still more characters who will at some point in their careers become shady (again, just like families). However, it is impractical for the state to identify most of the actual or any of the potential malefactors in order to subject them to special supervision. So the rule applies not to the evil itself—defalcation—which may be invisible until it is too late; rather it applies to easy-to-see conduct—intermingling—that sometimes (not even usually) leads to the evil. Such is the karma of bright-line rules.³²

Santa Barbara can make the same sort of case for its zoning law. The city's police resources are limited. Rather than sending a squad car to investigate every stereo that might disturb the neighbors at two o'clock in the morning—and fingering the actual perpetrator in a house full of suspects may quite strain officers' patience and competence—the city would just as soon restrict certain residential-only zones to entities—families—whom it believes are less likely to be blaring the stereo in the first place.³³ Additionally, in a family, one person can usually be found to take responsibility for the doings of the household. Even if the individuals upon whom the regulation impinged were standing on a highly preferred personal right, the law's impact was marginal. Santa Barbara did legally tolerate Bohemian living arrangements; it simply did not do so everywhere.³⁴ In seeking to segregate what might reasonably be considered mutually incompatible lifestyles, the city effectively increased the amount of neighborhood lifestyle diversity within its jurisdiction.

In *City of Belle Terre v. Boraas*,³⁵ the United States Supreme Court acknowledged the validity of that sort of regulatory construction of the entropies of communal life.³⁶ The Court declared that zoning authorities have broad powers to limit land use to single-family dwellings,³⁷ and

32. See David D. Haddock & Daniel D. Polsby, *Bright Lines, the Federal Communications Commission's Duopoly Rule, and the Diversity of Voices*, 42 FED. COMM. L.J. 331, 356-61 (1990).

33. Justice Sutherland once referred to this sort of prophylactic rule as the "inclusion of a reasonable margin to insure effective enforcement." *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926).

34. *Adamson*, 610 P.2d at 438-39. The court stated that the appellants had three options to live together legally. *Id.* First, the residents could designate five residents as *masters* and the remaining habitants as *servants*. *Id.* Second, they could move to another zone and get a "conditional use permit" to maintain a boarding house. *Id.* Finally, they could petition the planning commission for a variance. *Id.*

35. 416 U.S. 1 (1974).

36. *Id.*

37. *Id.* at 8-10.

defined *family* as

one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.³⁸

Uses meant to be excluded, according to the Court, were “lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses.”³⁹ The excluded arrangements encompassed Mr. Boraas and his five fellow college-student roommates.⁴⁰ But the court was noticeably woolly about the justification for such a land-use regulation. Living arrangements of the Boraas genre, said the court, “present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.”⁴¹

The explanation would be apropos if “more people” was what the village had attempted to regulate—but it was not. Clearly the court was groping for a theory that would allow it, without unmasking itself as a moral dinosaur, to avoid the thrust of Justice Marshall’s dissent.⁴² According to Marshall, who was exactly right,

The instant ordinance discriminates on the basis of . . . a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community. The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.⁴³

Justice Marshall’s opinion sets forth the justification for the proposition that cases of this kind are not merely about communes and ad hoc college

38. *City of Belle Terre*, 416 U.S. at 2.

39. *Id.*

40. *Id.*

41. *Id.* at 9.

42. *Id.* at 12. See also Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 522-23 (1983).

43. 416 U.S. at 16-17.

dorms; realistically they belong to a more general class of cases, what we should call “lifestyle decisions”—people choosing to march to a different drummer when they decide when and with whom to live. The *Boraas* case challenged the Court to articulate a theory upon which the discriminatory fencing-out of such decisions could be defended. Instead of accepting the challenge, the Court ducked. But a few terms later, at least a plurality had the rudiments of the theory that satisfactorily explains their result, as was shown in *Moore v. City of East Cleveland*.⁴⁴

The *Moore* plurality struck down a law practically identical in effect to the one in *Boraas*,⁴⁵ because “it makes a crime of a grandmother’s choice to live with her grandson in circumstances like those presented here.”⁴⁶ Municipalities have comprehensive land-use powers to limit the use of single dwellings to “families,”⁴⁷ but they have nothing like blanket authority to dictate what “families” are.⁴⁸ The state is obliged to recognize that, like it or not, certain kinds of arrangements simply are families.⁴⁹ What makes them so, although the Court did not explicitly recognize it, is this: Blood kinship and the legal constraints entailed by marriage or adoption amount to a bond against exit, an imperfect bond though it is. The existence of such a bond, and the accumulation of common assets that it facilitates, is key to the stability and welfare of the community. In that regard at least, from the standpoint of the community, families are not the same thing as fraternity houses or communes. They’re better.

44. 431 U.S. 494 (1977).

45. *Id.* at 495-96. The Court struck down a housing ordinance limiting the occupancy of a dwelling to members of a single family, namely East Cleveland Housing Code § 1351.02. The Court’s decision rested on the Housing Code’s harsh, narrow, and complicated definition of *family*. *Id.* at 496. Section 1341.08 provides:

‘Family’ means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(1) Husband or wife of the nominal head of the household.

(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head, provided, however, that such unmarried children have no children residing with them.

(c) Father or mother of the nominal head of the household.

(d) . . . [A] family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child

(e) A family may consist of one individual.

Id. at 496 n.2.

46. *Id.* at 499.

47. *Id.* at 498.

48. *Id.* at 507 (Brennan, J., concurring).

49. *Id.* at 504-06.

III. THE EXTERNALITIES PROBLEM AND THE PRISONERS' DILEMMA

The externalities problem of families may be clarified by considering an example with which most teachers are ruefully familiar, namely, students' pursuit of grades. Sensible students want better grades, of course—if for no better reason than, all else being equal, better grades mean better employment prospects. Students' grades can be improved either through arduous labor or by strategy, and students often pursue both paths. The first way involves longer, harder work leading to the student's thorough mastery of the assigned material. The strategic approach requires the student to do such things as take courses with professorial soft touches or lobby for grade inflation—or, better still, for a transitory lowering of standards—to produce a more comely transcript without having to do difficult, meritorious things to warrant it.

Though many students will both work hard and behave strategically, the two paths are fundamentally different. The first benefits the school as well as the student. The second helps the student but hurts the school. It helps each student to become proficient in performing difficult tasks and mastering important bodies of knowledge, and it helps the school's reputation for producing students who have reaped such a demanding harvest. In respect to the school's reputation, a classic opportunity for free riding is present, for a single student's lucubrations (or lack of them) will very seldom have much impact on the reputation of a school one way or the other. This in part explains why students largely ignore the reputational impact on the school when they choose whether to use a bit of time to work or to lobby for a better grade. Yet the school's reputation for producing well-trained students will usually have a material influence on the life chances of a given student. A candidate for an engineering job is very well served, as a rule, if he has a degree from Cal Tech or MIT; and a given student's slacking through his course of study is unlikely to change that fact by much, particularly if the evidence is kept off the transcript.

One edge of a school's reputation is firmly anchored in stereotype: one has certain images of a Cambridge mathematician or a Gottingen philosopher as well as an agriculture major from Succotash State. Such preconceptions can be wildly mistaken. A sizable number (if not necessarily a sizable percentage) of the alumni of important academic programs are comparative dim wits; and many an obscure institution harbors an inscrutable genius who has not yet been recognized (and possibly never will be). A school's brand name is used by the world as a substitute for the heavy lifting that

is entailed by judging each person on the particular merits of his or her case.

If the “merits” of a product, any product, are plain to see, evaluative shortcuts like brand names should be of little, if any, importance. But what if a product’s quality transpires only over time instead of being manifest upon inspection?

In such an instance, a brand name possesses a labor-saving attribute that ought to allow a good name to command a relatively greater price premium.⁵⁰ Brand names are capable of encapsulating a great deal of information about matters not easily or cheaply identified or articulated.⁵¹ “B.S., chemistry, *summa cum laude*, Cal Tech” transmits a larger amount of worthwhile information about a student’s intellectual ability than many pages of written evaluations could do.⁵² For the same reason, the “margin Price-Waterhouse commands relative to a well-qualified accountant with no international brand name, is proportionately much larger than the price difference between Heinz and an own-label can of baked beans.”⁵³

A hard-working student confers a positive externality on the school and on its past, present and future “constituency” (i.e., students, faculty, staff, honorands, community, and so on). Under *laissez faire*, however, a positive externality raises a danger of underinvestment.⁵⁴ Each individual student, considering only his own interest independently from that of the whole constituency, will wish to stop studying sooner than the best interests of the community would dictate. “After all,” he might reason, “the reputational benefits that will accrue to the school will be cashed out largely by people I do not even know.”

50. See Harold Demsetz, *The Effect of Consumer Experience on Brand Loyalty and the Structure of Market Demand*, 30 *ECONOMETRICA* 22 (1962); Lester G. Telser, *The Demand for Branded Goods As Estimated from Consumer Panel Data*, 44 *REV. ECON. & STAT.* 300 (1962).

51. See generally Noel Capon & Marian Burke, *Individual, Product Class, and Task-Related Factors in Consumer Information Processing*, 7 *J. CONSUMER RES.* 314 (1980); George J. Stigler, *The Economics of Information*, 69 *J. POL. ECON.* 213 (1961).

52. *Pace* is the practice of the University of California, Santa Clara, under which professors do not grade students with letters or numbers, but write brief evaluative essays about them instead. The school’s motive, to supply *more* information about the student, is not well-served, because the *real* information that is being sought about a student is not how many adjectives and adverbs he elicits, but how he stacks up against the competition.

53. John Kay, *Art or Science*, *THE ECONOMIST*, Apr. 24, 1993, at 69.

54. Whether an externality distorts private investment initiatives in a particular instance is an intricate technical issue. See James M. Buchanan & W. Craig Stubblebine, *Externality*, 29 *ECONOMICA* 371 (1962). The danger of distortion seems real in the present instance, so we can safely ignore the nuances of the argument.

Schools have ways to mitigate the incentives for underinvestment. Their objective is to produce constituency-optimal amounts of academic effort. To that end they pre-screen applicants and use required courses, exams, problem sets, class interrogation of students (leading to possible embarrassment of the unprepared), compulsory attendance, and so on. If students had no motive to (rationally) underinvest, educations, grades, exams and similar measures would be diminished both in prevalence and importance.

The foregoing analysis helps clarify a phenomenon that has perplexed many professors (including us). Why does it so often seem that we are producing a product that our consumers—that is, our students—are willing to pay for but would prefer not to receive? The answer is that an individual student seeks a certain level of education plus the benefits of the school's reputation; the school (an agency for the students, faculty, staff, honorands, and community, past, present and future, as one timeless entity) seeks to impart the higher level of learnedness that will maintain or enhance the school's reputation. That is a level that students resist at the margin.

Lobbying for relaxed academic standards—a species of rent-seeking behavior—similarly sends ripples far beyond the individual. The best-known form of standards-relaxation is grade inflation,⁵⁵ something that is very difficult for outsiders to descry at any given moment. But over time, grade inflation will diminish the precision of the information that grades synopsisize. If a school's grades ever did predict post-graduate performance, they will do so less well after a bout of inflation. As employers (and others) come to appreciate what has been happening, the reputation of the school will suffer, depreciating the opportunities of future students, and, for that matter, cheapening the estate of all whose wealth depends in some degree on the school's brand name.⁵⁶

Such a devaluation entails a negative externality in that some of its cost, most of it in fact, is borne by someone other than the person who provoked it. Under *laissez faire*, a negative externality implies the risk of overinvestment by perpetrators.⁵⁷ Students will tend to lobby for higher grades on unmeritorious grounds because reputational injuries are ignorably

55. One recent report estimates that at Stanford University, less than 10% of the students receive below a B grade. Larry Reibstein et al., *Give Me an A, or Give Me Death*, NEWSWEEK, June 13, 1994, at 62.

56. Stanford has responded by reinstating the "NP" or no-pass grade, which had been eliminated during the late 1960s. *Id.*

57. See, e.g., Wendy J. Gordon & Tamar Frankel, *Enforcing Coasian Bribes for Non-Price Benefits: A New Role for Restitution*, 67 S. CAL. L. REV. 1519, 1544 (1994).

diffuse and delayed, while lobbying gains are enticingly immediate and concentrated on the lobbyist. Schools seek to diminish lobbying by constraints on faculty discretion—mandatory curves, department-wide examinations, decanal jawboning, or rules that demand full faculty action in order to change an already recorded grade. If students had no motive to (rationally) overinvest in lobbying behavior, those constraining media likewise would be much diminished both in prevalence and importance.

Many students, when feeling glum, think of themselves as virtual prisoners of their station in life. No wonder; they inhabit a prisoner's dilemma. If one must be a prisoner, it is a stroke of fortune to serve one's time chained to the oar-deck of a galley where the other tenants actually enjoy rowing. If every student save one in a school eagerly undertook a painstaking, comprehensive education, the reputation of the institution would be high despite there being one odd truant who failed to come up to the mark. It is perfectly rational to aspire to be that truant. In such a situation, where reputation matters, there is an incentive to shirk—to study less and lobby more. Of course, if every other student behaves in the same way, the school's reputation will suffer. But no one student can do much about that; one person does not make much reputational difference to the school. So it will always be true that one given student's "best" choice is to shirk to a greater or lesser extent.

This is the "dilemma." Everybody is better off if nobody shirks; nobody is better off if everybody shirks. Yet each person is better off shirking no matter what the others do.

One of the functions schools perform is to undermine individuals' rational incentives to profit at the expense of the school's constituency. That is done by (1) rewarding, or making conspicuous, constituency-enhancing behavior that might otherwise be difficult for outsiders to identify and hence reward (i.e., by bestowing Latin honors; giving prizes and citations; preserving the informational content of high grades), and (2) punishing or frustrating community-dissipating behavior such as free-riding. To the extent schools are successful in that effort, they build the capital value of their brand name, and students in aggregate are benefitted because they all are restrained from engaging in behavior that, as rational, atomistic individuals, they can be expected to try to pursue.

IV. THE THEORY APPLIED TO HOUSEHOLDS

The foregoing was offered because its setting will be familiar to many readers. But the underlying theory is quite general and has been used to

great effect to explore such far afield areas as antitrust,⁵⁸ contracts,⁵⁹ and corporation law.⁶⁰ In a very general way the theory elucidates the incentive dynamics of any cluster of people in more or less sustained relationships. Groups of people who are known as one another's associates acquire brand-name capital for themselves willy-nilly ("people are known by the company they keep"), and that capital bestows benefits (or burdens). Households can and do have reputations, just as schools do. Also, like schools, households and their individual members have many frontiers on which their interests potentially conflict.

Most of the world's households are biological families, but there are many variants. For example, some religious orders fit the definition of households and possess a greater stability than the average biological family. Their residents not only "intend" to stay together as a cohesive residential community, but they also possess a track record that substantiates their intention. Then there are collectives and communes of one kind or another, including new-model religious orders. Such households differ in principle from conventional families and established orders because they cannot point to a history that validates their intention to stay together as a more or less permanent domestic grouping. In order to manufacture some impromptu credibility for themselves, such groups may feel the need to adopt bizarre beliefs and rituals, and in other ways burn bridges that might facilitate members' return to, and the group's dissolution in, the mainstream community (at which point anchor-persons will start referring to them as "cults"). Finally, to complete the analysis, one should acknowledge the many combinations and permutations of temporary households, e.g., college

58. E.g., Yoram Barzel, *Measurement Cost and the Organization of Markets*, 25 J.L. & ECON. 27 (1982); Roy W. Kenney & Benjamin Klein, *The Economics of Block Booking*, 26 J.L. & ECON. 497 (1983); Oliver E. Williamson, *Hierarchical Control and Optimum Firm Size*, 75 J. POL. ECON. 123 (1967).

59. E.g., IAN R. MACNEIL, *CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS*, (2d ed. 1978); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations under Classical, Neoclassical and Relational Contract Law*, 72 Nw. U. L. REV. 854 (1978); L. G. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27 (1980); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 83 AM. ECON. REV. 519 (1983); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979).

60. E.g., Armen A. Alchian & Harold Demsetz, *Production, Information Costs and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

roommates and the like, where none of the members intend to abide together for more than a few weeks or months.

Different kinds of households have very different capabilities for creating and maintaining brand name capital. Two factors are crucial: First, some households do not intend to last long enough to make it worth anyone's while to invest in creating much collective reputational capital. Second, and just as important, households differ markedly in their ability to monitor and control member predation on collective assets, including household brand name capital. What you get when you have a household whose members intend to stay together for less than a year, and in which no one has legal or moral authority to speak up on behalf of group-enhancing norms of conduct, is *Animal House*.⁶¹ And what you get when you have a group of people who intend to live together indefinitely, and in which there are agents with legal and moral authority to speak for the interests of the group, is the Benedictine friars⁶²—or a family.

An individual in a household is obliged to engage in certain kinds of domestic labor that cannot enhance that individual's welfare without simultaneously improving the welfare of everyone who lives under the same roof. If I want to enjoy sitting in a cleaned-up living room, I might have to clean it myself; and then it is clean not only for me but for everyone else in the household. Moreover, many kinds of individual domestic labor, such as painting an exterior, mowing a lawn, reducing fire hazards, removing weeds and vermin, or helping neighbors in need, obviously enhance the household's reputation in the neighborhood. The individual expends 100% of the effort taking out an ailing neighbor's trash but is unable to capture (internalize) 100% of the household's reputational gains from the activity. Others in the household benefit to some extent from that labor. If, like the student in our hypothetical, the domestic laborer compares the distaste for an extra hour of work only with a personal benefit rather than thinking of the community, he will stop working too soon for the collective good.

Most households, though, have ways to mitigate behavioral incentives that are antagonistic to the welfare of the group. First, in families there is usually love, which finds its way into the economic analysis by giving certain people (e.g., parents) decided pleasure in the welfare of others (e.g.,

61. NATIONAL LAMPOON'S ANIMAL HOUSE (Universal 1978) (depicting a loud, boisterous, irresponsible fraternity house).

62. The Benedictines are a highly organized monastic order of the Roman Catholic Church. THE ENCYCLOPEDIA AMERICANA 542 (Int'l ed. 1993).

the children). This ensures a higher level of production of positive externalities than would occur if the actors were considering only their own interests as narrowly conceived. It is unusual for people to derive a primary benefit from the welfare of others as such, but no fact about intrafamilial life is more universally remarked than the derived pleasure of parents in the happiness of their children. The whole family enjoys the dishes-put-away condition of the kitchen, but the children (who never put dishes away—do yours?) are not utterly free riders on their parents' labors because their enjoyment, in and of itself, confers a benefit on the parent, that in economic terms amounts to a sort of payment.⁶³

Some household members, especially children, undervalue the well-being of other members of the household. Proper regard for the interests of others is one of the things children usually have to be taught. And in households in which love is absent (roommates) or in which it does not extend to every other household member (communes), the tendency to ignore the intra-household impact of one's actions may be pronounced. Anyone who has ever seen the kitchen sink in a college dorm will readily grasp the point: Members of such households will stop working on common projects too soon for the common good unless the household has some means to control shirking.

The production of negative externalities within households is governed by rules similarly analogous to those that pertain as between students and schools. Students invest to inflate their grades because the inflated grade is theirs alone while the inflationary damage is spread out across the school "community." Similarly, members of a household often have occasion to make themselves happy by means that reduce the well-being of others. Playing the stereo too loud and too late imposes a negative externality that residents of college towns know all too well. Throwing beer cans out windows is another favorite college student hobby—and who has time later to pick up beer cans? And that rusty old '63 Chevy up on blocks on the front lawn until its owner gets around to restoring it—that can not be helping the neighbors' property values. But why should a philosopher-artist be troubled with the neighbors' tidiness fetishes? *Pourquoi devrait-on se soucier des ennuis quotidiens de la petite bourgeoisie?*⁶⁴

When members of a household behave so as to injure the well-being of

63. There is an intriguing sociobiological literature that attempts to explicate altruism toward kindred as rational, maximizing behavior. See, e.g., RICHARD DAWKINS, *THE SELFISH GENE* (2d ed. 1989).

64. "Why should one care about the day-to-day worries of ordinary folks?"

neighbors, they demean the reputation of the household to the detriment of all its members. But a transgressor who does not plan to stay around for long will have less reason to be daunted. He compares the entire personal benefit of the act with the loss of household reputation only as it trickles down to him in his role as a member of the household. And if he plans to exit presently, that comparison will tilt ever more strongly toward selfishness. Unless the household itself can prevent it, some of its members will have strong self-interested reasons for behaving in ways that inflict collective injury.

V. COLLECTIVE VERSUS INDIVIDUAL INCENTIVES

Households are collective agencies—they maximize the good of no particular person but of a community of persons.⁶⁵ (There is no such thing as a one-person “household” for purposes of the analysis of this point.) Among other objectives, households try to defeat shirking and build a good reputation for themselves.⁶⁶ Households (the collective entity) have different incentives from those of the particular individuals that make them up. Individuals’ incentives are to free ride opportunistically on the household’s reputation.⁶⁷ Like the students in our hypothetical, members of a household are in a prisoner’s dilemma. They are better off if they get to be treated as the one person who does not have to follow community-regarding rules, worse off if everybody else behaves in the same selfish way, but better off behaving selfishly no matter what anybody else does. Thus, the members of a household in aggregate are benefited if the household can devise institutions that prevent the individual members from doing some things that they have every inducement to do.

Several features of a household affect its ability to control members’ shirking. Some of those features are observable in some non-familial households, but all are present in paradigm families. Because traditional families are well-endowed with features that permit them to control the incentives of household members to free ride on the household’s brand-name capital, they are rationally seen, as a class, as desirable neighbors. That is not to say that non-familial households are inevitable failures as desirable neighbors, nor that traditional families are inevitably suited to be desirable neighbors. But in the absence of other information, that is the best bet.

65. BECKER, *supra* note 15, at 342-49.

66. *Id.* at 48-53.

67. *Id.* at 183-85.

One control feature of traditional families has been mentioned already. The stronger and more comprehensive the network of love within a household, the less willing any given member will be to behave so as to derogate from the reputation of the household (thus making other household members less well off).⁶⁸ The feelings of love among family members, as compared with other domestic clusters, tend to be relatively strong and comprehensive.⁶⁹

A second feature that highlights a family's proficiency as a monitoring organization can be most clearly seen from a game theoretical assessment of family cohabitants' situation. In a one-time game of prisoner's dilemma, where the results of one transaction do not carry over and affect people's conduct the next time they meet (if ever they do), the opportunistic best choice for an individual is to "defect," which in present context means to shirk.⁷⁰ Shirking, then, is the best atomistic course for every single member of the household, and also the very worst possible choice for the good of the household as such. Where interpersonal transactions are likely to repeat and people are, for better or for worse, yoked in an indefinite ongoing relationship with one another, the structure of behavioral incentives is different, and in fact may be exactly opposite to that which would dominate in a one-time game.⁷¹ Simple co-operative strategies (such as tit-for-tat, i.e., cooperate with cooperators but retaliate against noncooperators) can lead to the participants electing, each on his own individual initiative, without collaboration and, for that matter, for entirely selfish reasons, to cooperate in maintaining the household's reputation. Some nontraditional households, such as the aforementioned Benedictine friars, have game-theoretical characteristics much like those of a traditional family. They are transparently long-lived—not only do they persist indefinitely, but their members and neighbors all foresee that they will. Therefore, like families, there exist strong selfish incentives for personal cooperation, to augment

68. See generally HELEN FISHER, *ANATOMY OF LOVE: THE NATURAL HISTORY OF MONOGAMY, ADULTERY AND DIVORCE* (1992); RICHARD POSNER, *SEX AND REASON* (1992); MATTHEW RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* (1994); Jim Chen, *Unloving*, 80 *IOWA L. REV.* 145, 174-75 (1994).

69. There is, however, a wrinkle. Affectionate feelings within families may be *on average* stronger than those feelings that are typical for other kinds of households, but "hate" is also a characteristic domestic emotion, as police officers and the parents of teenagers can readily attest. So traditional families have more variance than other households as well as higher averages, thereby depressing, one would predict, their desirability as neighbors of first preference.

70. RICHARD DAWKINS, *Nice Guys Finish First*, in *THE SELFISH GENE* 202-33 (2d ed. 1989).

71. *Id.*

and guarantee whatever other cooperative inducements may be in the mix e.g., religious duty).

Other kinds of households are foreseeably unstable, or so their members may think, or so their neighbors may reasonably believe their members think. What neighbors reasonably believe about what household members are thinking is, of course, absolutely crucial to public policy. Words are cheap: People can say anything and promise anything. Incentives are what really matter. Households organized along kinship lines have a better chance of overcoming the atomistic incentives of a one-time prisoner's dilemma, insofar as their concern for one another should translate into a mutual regard for household reputation.⁷²

A third feature that matters to a household's ability to police the behavior of its members is the transportability of household reputation. If a person can readily be identified as a former member of a particular household, the benefits or detriments of that household's reputation may stick wherever the individual goes. So the reputation of the household (i.e., the value of its brand name) may be of lasting significance to a household member. Even while planning to leave a household, a person with a transportable brand name will have less incentive to "defect." The brandedness that goes along with membership in a traditional family yields greater reputational transportability than does membership in most nontraditional households.⁷³ For instance, members of a traditional household typically share a name, less common now than once, but still generally true. Significantly, the surname of an adopted child is usually legally altered to accord with that of the adoptive parents. It is no accident that people of whom one knows little are often casually sized up by observing that they "come from a family with a good (or bad) name."

A fourth feature that favors traditional families as effective agencies for maintaining household reputation is the ability of mature members to coerce younger, less responsible household members (i.e., children, particularly adolescents). In societies where other sorts of controls are relatively costly, grownups are commonly subject to punishment for failing to control or discipline the young.⁷⁴ The blood-feud may be understood

72. One would expect that the weakening of family relationships that is presently evident in much of America and Europe would weaken the iterated nature of the game that families play with each other. See generally BECKER, *supra* note 15, at 347-61.

73. Again, the Benedictine friars will more nearly resemble traditional families in this respect.

74. See LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800*, 129 (1977); Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J.L. &

in that way.⁷⁵ But no one wields the rod of chastisement in more egalitarian households such as fraternity houses and communes. Everyone knows where that leads.

VI. SOME APPLICATIONS

Gary Becker has pointed out that with the prevalence of high divorce rates, traditional families are increasingly insecure loci for public goods creation.⁷⁶ One rationally invests less in a marriage with an a priori fifty percent risk of failure; resulting underinvestment may, in turn, feed back into a higher-than-necessary rate of marital failure.⁷⁷ We will not belabor such obvious implications as the need to rethink the no-fault divorce revolution and to re-focus public assistance policies so that they support traditional families rather than burden them. Those points have been discussed by others.⁷⁸ We limit ourselves to three implications, which we

ECON. 1, 43-45 (1980).

75. See generally David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399 (1979); William I. Miller, *Choosing the Avenger*, 1 L. & HIST. REV. 159 (1983). In a similar vein, Japanese law is said to allow rail carriers to fine the families of people who commit suicide by jumping in front of trains, thereby delaying commuters. See Michael Williams, *Subways in Japan Run on Schedule—Most of the Time*, WALL ST. J., May 26, 1993, at A1.

76. See BECKER, *supra* note 15, at 342-49.

77. *Id.* at 350-56.

78. On no-fault divorce, see Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291 (1987); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55 (1991); Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Disclosure*, 1994 UTAH L. REV. 503; Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741; Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 HARV. J.L. & PUB. POL'Y 241 (1993).

On refocusing public assistance programs, see Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Larry C. Backer, *Of Handouts and Worthless Promises: Understanding the Conceptual Limitations of American Systems of Poor Relief*, 34 B.C. L. REV. 997 (1993); Larry C. Backer, *Welfare Reform at the Limit: The Futility of "Ending Welfare As We Know It,"* 30 HARV. C.R.-C.L. L. REV. 339 (1995); Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J.L. & FEMINISM 99 (1989); Marion Buckley, *Eliminating the Per-Child Allotment in the AFDC Program*, 13 LAW & INEQ. 169 (1994); Matthew Diller, *Review Essay, Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401 (1995); Laura M. Friedman, *Comment, Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J. 637 (1995); Joel F. Handler, *"Ending Welfare As We Know It"—Wrong for Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3 (1994); Thomas H. Kean, *New Ideas for an Old Reform*, 1 STAN. L. & POL'Y REV. 69 (1989); William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443; Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319 (1992).

promise to discuss more fully in a subsequent paper.

A. *Post-Dissolution Transfer Payments*

Post-dissolution transfer payments are often characterized as an effort to give wives—as it has usually been—a monetized equity in the pre-dissolution market earnings and accumulations of the household.⁷⁹ That justification assumes what is not obvious—that one spouse “does” or “should” participate in the value of the other’s labors simply because of the fact of marriage. No doubt there is a widely felt intuition to that effect—but upon what does it rest? The question is famously vexing. Elisabeth Landes made a breakthrough by suggesting that post-dissolution transfers could be reckoned as a means of compensating women for missed opportunities—the *opportunity costs* of marriage.⁸⁰ Lloyd Cohen elaborated this point by showing how far those opportunity costs reach.⁸¹

Our explanation, though consistent with theirs, is quite different. We think post-marital transfer payments contain a large element of private fine, levied in order to discourage a dominant wage-earner from exiting the marriage. By making exit more expensive for that sort of wage-earner, the policy would also postpone or discourage the formation of families in the first place. From the point of view of an externality-shy public, however, a preference for such an effect makes a great deal of sense.

To see why, consider a couple on the margin of the rule. They would have married but for the realization that assets acquired during coverture would have to be shared equally if the marriage were to fail. The existence of the rule makes one or both of them unwilling to marry. Is there any

79. See, e.g., John S. Bradway, *Why Pay Alimony?*, 32 ILL. L. REV. 295, 301-02 (1937) (comparing marital relations to corporations and payments to dividends). The discussion in this text is concerned solely with transfers from one spouse to another. Child support payments, which generally vary with the number of children conceived in a relationship, whether formalized or not, are another matter and beside the present point. See, e.g., Jane Ellis, *Survey the Terrain: A Review Essay of Divorce Reform at the Crossroads*, 44 STAN. L. REV. 471 (1992); J. Thomas Oldham, Review Essay, *Putting Asunder in the 1990s*, 80 CALIF. L. REV. 1091 (1992); Daniel D. Polsby & Martin Zelder, *Risk Adjusted Valuation of Professional Degrees in Divorce*, 23 J. LEGAL STUD. 273, 276-77 (1994) (discussing practical difficulty of deciding what type of post-dissolution wealth transfer would optimize behavior within marriage); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2312-36 (1994) (discussing a variety of economic theoretical justifications for post-dissolution transfer payments); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117-20 (1989) (arguing that alimony is neither workable nor theoretically sound as a means of allocating the risks and benefits attendant to dissolution).

80. See Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978).

81. See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987).

reason for the community to care? As a general matter, no. Remember, those two may subsequently marry each other or someone else. If they do, well and good; if not, well and good anyway. The rule will discourage marriage only in those instances in which the couple foresees that the marriage has an especially good chance of foundering. The community would probably just as soon abide never married individuals as pick up after a disrupted household.

A healthy marriage is a blessing to the community, but if the choice is between having a couple stay single from the outset and having them pass through an unsuccessful marriage on the way to single status, it is probably best, by conventional standards, that they remain single in the first place. A disrupted household leads either to two single people (which is where things would have stood if the couple had never married) or to a single person plus a single parent with children. Empirically, we know that a single parent with children is expectationally an expensive proposition for the community relative to a two-parent family. Theory would predict this result as well. If the value of a good name has not changed, but the cost of acquiring it has risen, people will be less willing to make brand-name investments. A single parent will virtually never be able to supervise children as effectively as the two co-partners in an intact marriage could do. The additional childrearing problems that face single parents would lead naturally to a reduced investment in the reputational capital of the household. Even if the single parent were to remarry (and many do not), a step-parent has no biological motivation, and a reduced reputational motivation, to exercise control over step-children.⁸² As a generalization, one would expect step-parents to do less well in this regard. The evidence seems to be consistent with this prediction.⁸³

That single parents as a group invest less in brand name capital than well-adjusted couples does not imply that single parents invest less than dysfunctional couples. If a parent begins to interfere with the other's childrearing practices as a veiled expression of hostility toward the spouse, the children will be left adrift with no clear understanding of what is expected of them.⁸⁴ Indeed, the children may find themselves in what is

82. See Barbara D. Whitehead, *Dan Quayle Was Right*, ATL. MONTHLY, Apr. 1993, at 47.

83. See MARTIN DALY & MARGO WILSON, SEX, EVOLUTION & BEHAVIOR: ADAPTATIONS FOR REPRODUCTION (1978).

84. See generally James H. Bray, *Psychosocial Factors Affecting Custodial and Visitation Arrangements*, 9 BEHAV. SCI. & L. 419 (1991); Judith Seltzer, *Family Ties After Divorce: The Relationship Between Visiting and Paying Child Support*, 51 J. MARRIAGE & FAM. 1013 (1989).

sometimes called a *double-bind*—whatever they do invites an outburst from one parent or the other. An environment of this kind provides the children with no worthwhile cues about how they should behave; there is no contingency between good behavior and reward or between bad behavior and punishment. Children are thus left to choose their own behavior.⁸⁵ This is the sort of situation that communities have every right to fear and that rationalizes the preference that unions with a peculiar susceptibility to failure never be formed in the first place. Happy families are a boon to a community in many ways. But viewed externally, never-married single people are preferable on average to single parent households, and much superior to unhappy families.

From the community's perspective never-married single people actually have some advantages over households. For one thing, single people can hardly free ride on other members of their household; there are no other members on which to free ride. For illustration, consider lawn mowing. I want the lawn mowed (because it looks nice); but I do not want to mow it (drudgery). If I am part of a household, I have to consider the possibility that some other member of my household, with a stronger feeling about mown lawns, may come along and mow it first.⁸⁶ The cost to me would be having to suffer along with a shaggy lawn for a while, but I would have been saved the drudgery. Now suppose I am single; the possibility of a serendipitous rescue by a family member cannot affect my calculations. Waiting will only make the lawn worse, and eventually I will have to mow it anyway (I think). Therefore, I mow. Next door at the Nelsons', Ozzie and Harriet rejoice.

According to our argument, then, the division of the assets of a failed household would be at least partly inspired by the desire to discourage household dissolution in the first place, whether or not it is also motivated by a desire to "do equity" to divorcing spouses. Even if the facts of a case were not obscured, as they usually are by family privacy, it seems far from obvious what the equities are of a nonchild-bearing, nonwage-earning spouse—a "spouse-as-such"—in the accumulated assets of a family. An extreme case that serves to focus attention on the problem is the notorious

85. The problem is general. For example, in criminal law, one cannot obtain marginal deterrence of undesired conduct unless there is some contingency between behavior and consequences. George J. Stigler, *The Optimal Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

86. This is an application of the theory proposed in Dale T. Mortensen, *Property Rights and Efficiency in Mating, Racing, and Related Games*, 72 AM. ECON. REV. 968 (1982).

*Marvin v. Marvin.*⁸⁷

In *Marvin*, Hollywood wannabe Michele Triola took up with the famous movie star, Lee Marvin, stayed with him for seven years without formalizing the relationship, and then was jilted.⁸⁸ The California Supreme Court invited Triola to show the existence of an oral contract of domestic partnership with Marvin, but her evidence fell short.⁸⁹ Turning to the equities, she could make no credible case concerning the value of the show biz opportunities that she had foregone in order to keep house for Marvin.⁹⁰ And on the other side of the equity coin was: seven years of Hollywood parties; seven years of living on a Beverly Hills estate with fruit trees and water gardens; seven years of Bentleys and Jaguars instead of the '67 Nova she would have been driving if she had stayed home in Iowa; seven years of first-name hobnobbing with Gregory Peck, Cary Grant; and so on.⁹¹ Taking one equity with another, was Triola any worse off than she would have been if Marvin had simply rebuffed her at their first meeting and gone off with somebody else instead?

And so, Triola's entitlement was: Nothing.⁹² Legally married to Marvin, Triola's entitlement would have been: Half.⁹³ Unmarried to Lee, Michele's contribution to the creation of the household's assets—and to the creation of Lee's stardom whence the assets derived—was nil. Would the situation have differed had they been married?

There are, it seems, two possibilities. The first relates to what inferences ought to be drawn from the fact that the parties did not get married. If Michele had had plenty of similarly attractive suitors for her hand, maybe she would have refused to cohabit with Marvin unless he had been willing to get married. In that case, the fact of their marriage would amount to a *prima facie* case that her seven years of cohabitation had been costly to her in terms of foregone life chances. If the law aimed to compensate her for her lost opportunities, she would be entitled to a substantial divorce settlement. What should one infer from Triola's willingness to live with Marvin although unmarried? One hard-to-shake suspicion is that she probably had had no marital opportunities of a value comparable to the deal

87. 557 P.2d 106 (Cal. 1976).

88. *Id.* at 110.

89. *See Marvin v. Marvin*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

90. *Id.* at 558.

91. *Id.* ("plaintiff benefitted economically and socially from her relationship with defendant").

92. On remand, Triola was awarded \$104,000.00 for economic rehabilitation, but the Court of Appeals excluded that amount. *Id.* at 559.

93. CAL. FAM. CODE § 2550 (West 1994).

she was getting with Marvin. Zero lost chances translates into zero post-dissolution transfer payments.

Another possibility is to recognize that what Michele “deserved” or what Lee “deserved” is subsidiary to the state’s concern for marriage as such. Post-dissolution wealth transfers (more accurately, the prospect of having to pay them) serve to stabilize existing families that would otherwise possess a special bias to instability, that is, where one partner’s value in the cash market is, for one reason or another, substantially greater than the other’s.⁹⁴ The message is: do not lightly decide to get married because, if you do and it does not work out, *getting divorced will cost you*.

Post-dissolution transfer payments can have such an effect because of the existence in marriage of familial public goods—items for which enjoyment by one spouse does not affect the enjoyment potential of the other. Marital public goods are diminished, if not destroyed, by divorce. One sort of marital public good is the enjoyment of children⁹⁵—the parental pride of one parent in no way impinges on the parental pride of the other. If the marriage dissolves, however, it will become a rare occasion on which both parents can enjoy the child at once. A public good can be as mundane as a television set: If both spouses enjoy the same program, watching by one does not consume the good or make it less available or less valuable to the other. The smell of baking bread is an even more homely example. But some familial public goods will also be big-ticket capital assets worthy of some carefulness in calculation before saying *arrivederci*—e.g., the marital home.

Marriages seldom involve two people on exactly equivalent rungs of the economic ladder. Other things being equal, the lower-rung spouse is less apt to want to divorce than the other. To see why, consider the following hypothetical. Suppose Sally has invested \$800,000 in household goods over the last year, and her husband Joe has invested \$200,000. Further suppose that \$300,000 of the \$1 million aggregate was spent on *private goods*, goods whose enjoyment by one spouse forecloses enjoyment by the other. These are distributed evenly—he has \$150,000 worth of fancy golf clubs that are too long for her, she has \$150,000 of fancy golf clubs that are too

94. See generally LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNINTENDED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 49-50 (1989); Daniel D. Polsby & Martin Zelder, *Risk-Adjusted Valuation of Professional Degrees in Divorce*, 23 J. LEGAL STUD. 273, 274-77 (1994).

95. See Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. 503 (1993).

short for him. Fully \$700,000 worth of stuff remains in the household pot, family public goods. Adding together the \$700,000 of family public goods and the \$150,000 of private goods, each spouse values the family's assets at \$850,000.⁹⁶

That is a remarkable result, and indeed a sort of communitarian proof that there is, after all, such a thing as a free lunch. The family has invested \$1,000,000 in aggregate but by sharing part of it, has created \$1,700,000 in aggregate value.

Now let Sally and Joe fall out of love and into such an antipathy that having to live together depreciates each one's valuation of the marital capital by \$200,000, so that now each values it at \$650,000. Whether they divorce depends, in part, on what rule governs the distribution of the assets acquired during the marriage. For the sake of simplicity consider two opposite rules: (1) "take out what your put in," and (2) community property—"share and share alike."

Under "take out what you put in," Joe and Sally both value the marriage at \$650,000. In the event of divorce, Joe gets back \$200,000 worth of goods in return for the money he put in, and Sally gets back her \$800,000. Joe is better off staying married; the marital public goods, even as depreciated, are still worth more than the \$200,000 he put in and would now get back. Sally, taking out what she put in, will receive a distribution in divorce that is greater than the now-depreciated value of the familial public goods. So she walks.

Under community property, the result is the same for Joe but different for Sally. Even though Joe can now get half the million that the two of them put into the pot, he is still better off remaining married, because he reckons the value of the family public goods plus his private ones at \$650,000. Sally is now better off remaining married to Joe, because under community property she will be able to take out only \$500,000—her half—which is less than the (admittedly depreciated) value to her of the family's public goods.

Under community property, the marriage survives. If the objective is to encourage household stability in order to control the negative externalities discussed above, "community property" divisions in divorce should be selected over "take what you put in" regimes.

But, as discussed earlier, a dysfunctional family imposes even greater

96. In a more complete analysis one would say that each member of the couple values the goods by something more than they cost. If not, why would the goods have been purchased? For present purposes, however, we put aside gains from trade as a needless complication.

externalities than a disrupted one.⁹⁷ Thus, if hostility between spouses grows sufficiently, other members of the community may well regret that the couple ever got married, and, under the circumstances, will prefer that they now divorce. Even a community property rule will encourage divorce when the value of the union has been disrupted too severely. Suppose the spouses' distaste for one another has blossomed into full-scale mutual abomination. Perhaps then the spouses would reckon that the value of familial public goods had depreciated catastrophically, say by \$400,000. Under such circumstances, both spouses would be better off getting divorced even under the regime of community property. At a certain point, severely degenerated relationships should be permitted to dissolve. Some states of affairs (e.g., domestic violence) are obviously more disruptive to the values of the community than the existence of single-parent households. Under "take out what you put in," Joe would contest the divorce because the \$400,000 of remaining value of the marriage to him is still preferable to the \$200,000 that he put into it. Thus, community property divisions do not halt divorces, but ensure that the relationship will not be abandoned casually. And that means it will not be entered into casually, either. That is where the society's interest chiefly lies.

B. Controlling Opportunism in Quasi-Marriage

The recognition of quasi-marital domestic partnership opens the door to various opportunistic dodges. What is to prevent people from pretending to be domestic partners simply in order to get, for example, health insurance benefits that might otherwise be unavailable? For that matter, one might reply, what is to prevent people from opportunistically getting legally married simply in order to get health insurance or some other material benefit? If opportunistic legal marriage is thought not to be a problem, why should one worry about opportunistic non-traditional householding?

There are two good reasons, one large and one small. The small reason is that it is very difficult to feign legal marriage and very easy to feign domestic partnership. As a generalization, either one is married or one is not. The change from unmarried to married status is accompanied by a license from the state and, usually, a more or less ceremonious and always public contracting. In contrast, the status of domestic partnership is blurry. It may be difficult or impossible for an outsider to tell whether two people really are domestic partners. It may be difficult or impossible for the parties

97. See *supra* notes 82-83 and accompanying text.

themselves to tell. So whether people are domestic partners may often boil down to taking their word for it.

There is a more important reason as well to fear publicly costly opportunism in the formation of a domestic partnership. Legal marriage is a relationship replete with obligation: it is not only for better but also for worse. It is, to be sure, a Blue Cross card for one's spouse; *but it is also having to pay that spouse's deductibles and other uninsured medical expenses, and other necessities as well, whether or not one wants to pay and whether or not one has specifically agreed to pay.* That packet of legal obligation, buttressed more or less by the moral suasions of family and community, offers some assurance that people will not get married just to get access to health insurance—or for that matter to gym facilities or some other transient material benefit.

Domestic partnerships are quite different in this respect. Why not represent your friend as a domestic partner if he needs Blue Cross or wants access to some other fringe benefit available to the families of employees? Why not, indeed, expect the development of a *market* in domestic partnership, in which an employee might retail the value of his fringe benefits to whomever most highly valued them? There is no reason not to if one can simply pick up and walk away at will and if there is no anchoring set of legal obligations between the partners. This is especially true if there is no practical way to tell whether self-proclaimed partners are telling the truth. The incentive structure of this sort of relationship is unpromising to say the least.

C. *Homosexual Quasi-Marriage*

A quite different application of our argument concerns homosexual housekeeping and quasi-marriage, both of which seem to be increasingly prevalent. Monitoring problems are far more manageable in two-person households than in many-person households. It may be, therefore, that homosexual housekeeping and quasi-marriage have a reasonable prospect of stability that communes always lacked. At present there seems to be little evidence on this question one way or the other.

What if such households continue to proliferate? That is a trend that full-bore legitimation would probably encourage. The current learning seems to be that homosexuality is significantly, but not entirely, a matter of inborn

hard-wiring.⁹⁸ That implies the existence of a margin at which people might be either heterosexual or homosexual depending on environmental and social cues. Aside from religious arguments that progressive-minded people hardly credit, there seems to have been rather little public discussion of why societies seem to care about the sexual orientation of the marginal actors.

Is a person's sexuality simply one of those things in which the community has no rightful interest one way or another? Under our analysis the answer is an unqualified "maybe and maybe not," because we know little at present about the connection between sexual orientation and household stability. According to our argument, the community does have an interest in the stability of households irrespective of the sexual orientation of household members. Stable households are more likely to make community-regarding investments in their brand names. For all we know, the stability of fully legitimated homosexual marriage would turn out to compare favorably with that of paradigm heterosexual marriage.⁹⁹ The legal system would do well to consider this question with some care. One thing our analysis clearly points to, though, is for "full legitimation" to motivate homosexual brand capital investments similar to those that have traditionally been sought in paradigm heterosexual households, it would have to entail some kind of legal check against casual household dissolution, as it does for conventional heterosexual marriage. Households, in other words, cannot for long be regarded as legitimately constituted or entirely respectable in the eyes of the community if they are at-will institutions whose members can simply walk away without even having to say "sorry."

At-will associations are usually employed to govern the interactions of parties who do not want to make relationship-specific investments.¹⁰⁰ Tenancy-at-will is not found when renters plan to make major alterations to the premises or when landlords want to make investments on the assumption that a certain, specific tenant will be there.¹⁰¹ Employment-at-will is the preferred form of job contract only when few job specific human

98. Studies by our colleague Michael Bailey suggest that hereditary factors can explain as much as 50% of homosexuality. See Michael Bailey & Richard Pillard, *Are Some People Born Gay*, N.Y. TIMES, Dec. 17, 1991, at A-21. See also Natalie Angier, *Study Suggests Genes Sway Lesbians' Sexual Orientation*, N.Y. TIMES, Mar. 12, 1993, at A11.

99. For an article supporting this idea, see Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215 (1995).

100. Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. LAW & ECON. 297 (1978).

101. See DAVID D. FRIEDMAN, *PRICE THEORY* 487-89 (2d ed. 1990).

capital investments are contemplated by either party.¹⁰² Similar considerations govern “housekeeping-at-will.” If and to the extent that a domestic union is dissolvable only for “just cause,” only after a waiting period, or only upon the payment of a fine, then each partner’s investment in the brand name capital specific to the household becomes to that extent more secure—more self-interestedly rational.¹⁰³

Instead of calling forth more homosexual behavior, legitimating homosexual marriage might cause no change at all. The more or less onerous termination provisions that legitimation would (according to us) have to entail, would change the *ex ante* calculation each quasi-spouse might make concerning whether to quasi-marry in the first place. At the end of the day, matters might well be left more or less as they are now—many quasi-partners living together in quasi-sin, sometimes obtaining from cowed City Halls a few of the benefits of being married (health insurance coverage; family leave) without any of the legal burdens (i.e., unconsented-to liability for one’s quasi-spouse’s necessitous debts, e.g., doctors’ bills).

What sort of legal regime would portend stability in homosexual unions? We do not know. But such information is crucially important. One of the advantages of the traditional domestic framework of life is that the social science research that is necessary to support it has been done informally over millennia. It is therefore firmly embedded in the culture, which is to say, in what people know and expect of one another. People knowing what to expect of other people—and what to expect them to expect—is at the very heart of social life as a game theorist would understand it.

It is extraordinary how much one would need to find out, and to diffuse generally into the culture, about homosexual domestic life. How many homosexual households are there? How are they organized socially, economically, and sexually? How do those factors interrelate (if they do)? And if they do sometimes but not other times, why? Are such households stable? How stable? How are the stable ones different from the ones that are not stable? How do homosexual households change over time? How do male homosexual households compare with lesbian households? Are there relevant distinctions to be drawn between types of “biological” homosexu-

102. See GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION* (3d ed. 1993).

103. For a persuasive argument that engagement rings are a means of collateralizing a promise to marry that is no longer enforceable in a court of law, see Margaret F. Brinig, *Rings and Promises*, J.L. ECON. ORG. 203 (1990).

ality on the one hand and socio-political, psychological, or aesthetic homosexuality on the other? There is something to be said for the legal system treading very carefully until some of the answers to those questions emerge from the research currently under way.

VII. CONCLUSION

We admit that we have re-invented a wheel. Perhaps we should rather claim to have found a wheel that had been lost in the underbrush of new age polemics. Communities can be expected to prefer stable to unstable households because virtually everyone is benefitted if the prisoners' dilemma can be undone through repeat playing. Stable households have stronger incentives to support community-regarding and oppose community-dissipating behavior by their members. Contractual quasi-marital domestic households, because of their at-will characteristics, are more susceptible both to instability and the production of negative externalities. Society can be expected therefore to be somewhere between wary and disapproving of such arrangements, as, of course it traditionally has been. There is room for nontraditional household arrangements to develop with changes in the world we live in. But some means must be found to give them the stability requisite for respectability.