

WOMEN'S RIGHTS AND SOCIAL WRONGS

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As I was contemplating how best to introduce this presentation, the Federalist Society Symposium brochure arrived in the mail and happily supplied an opening theme. Under the heading "Participants Include" were thirteen men and one woman. Since I had been asked to address the question of civil rights from a "woman's point of view," it struck me that women's problems with rights parallel women's problems with that list. Neither adequately reflects our experience.

The reasons for the continued marginalization of women's interests have to do with a deeper difficulty, which I have elsewhere labeled the "no-problem problem."¹ A central stumbling block in our struggle for gender equality is the perception that the struggle is no longer necessary. Over the past quarter century, the growth in antidiscrimination initiatives, coupled with the gradual erosion in traditional gender roles, has encouraged the illusion that equality for women has been achieved. Whatever sex-linked differences remain have been attributed to women's "different voice" and different choices.² Particularly among conservative constituencies, the prevailing wisdom is that gender inequality is either not a serious problem or is not *their* problem. These comments seek to reformulate that perception as the problem.

From the standpoint of women, the current legal landscape is marked by formal rights and social wrongs. Despite recent progress, the sexes have attained equality more in legal status than in daily experience. Women are still dramatically underrepresented in the highest positions of social, economic, and political power and dramatically overrepresented in the lowest positions. Over eighty-five percent of all elective office holders

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1. See Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* — (forthcoming 1991).

2. The phrase is drawn from C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). For critical responses to this use of Professor Gilligan's work, see surveys cited in Rhode, *Theoretical Perspectives on Sexual Difference*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 1, 4-7 (D. Rhode ed. 1990); and Rhode, *Feminist Critical Theories*, 42 *STAN. L. REV.* 617, 624-25 (1990) [hereinafter Rhode, *Feminist Critical Theories*].

are male, and about two-thirds of indigent adults are female.³ Whatever our achievements in expanding women's access to traditional male roles, we have been less effective in encouraging men to assume traditional female roles. Women continue to shoulder a highly disproportionate share of responsibilities in the home and to pay a price for that burden in the world outside.⁴ On the average, a black female college graduate earns no more than a white male high school dropout.⁵ Sexual violence remains common, and reproductive freedom is by no means secure.⁶ There is, in short, room for improvement.

The inadequacies of civil rights law with respect to gender equality have several dimensions, including (1) the indeterminacy of formal entitlements; (2) the barriers to their exercise; and (3) the limitations upon their scope. Or, to put the point more simply, we cannot pin down the content of rights, but whatever they are, women do not have enough of them.

The indeterminacy critique has been developed at length by feminist and critical legal studies scholars and needs little elaboration here.⁷ In essence, the difficulty is that rights do not re-

3. See D. RHODE, *JUSTICE AND GENDER* 2 n.1, 126 n.33 (1989) (listing additional sources); D. PEARCE, *THE FEMINIZATION OF POVERTY: A SECOND LOOK* 4 (Institute for Women's Policy Research Working Paper, 1989) (summarizing government data but challenging its methodology of collection); *American Women Today: A Statistical Portrait, in THE AMERICAN WOMAN, 1990-1991: A STATUS REPORT* 349, 359 (S. Rix ed. 1990).

4. Recent studies indicate that in an average household, women remain responsible for about 70 percent of the housework, and that working women spend about twice as much time on domestic tasks as working men. See A. HOCHSCHILD & A. MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 21, 271-73 (1989); J. PLECK, *WORKING WIVES/WORKING HUSBANDS* (1985). For additional sources documenting the same trends, see D. RHODE, *supra* note 3, at 174 n.35. Women also constitute 90 percent of single parents. See R. SIDEL, *WOMEN AND CHILDREN LAST* 16 (1988).

5. See *Study Shows College-Educated Women Earn the Same as Male High School Dropouts*, Daily Lab. Rep. (BNA) No. 170, at A-5 (Sept. 1, 1988); Rhode, *Gender Equality and Employment Policy*, in *THE AMERICAN WOMAN, 1990-1991: A STATUS REPORT*, *supra* note 3, at 170. For information on wage gaps faced by minority women, see National Committee on Pay Equity, *The Wage Gap: Myths and Facts*, in *RACISM AND SEXISM: AN INTEGRATED STUDY* 69 (P. Rothenberg ed. 1988); Bender, *Sex Discrimination or Gender Inequality?*, 57 *FORDHAM L. REV.* 941, 941 n.3 (1989); and Kreps, *Introduction*, in *THE AMERICAN WOMAN, 1987-1988: A STATUS REPORT* 24, 27 (S. Rix ed. 1987).

6. For example, it is estimated that 20 to 30 percent of all women will experience a violent sexual assault outside of marriage, and 25 to 50 percent will be beaten by a man with whom they are intimately involved. See S. ESTRICH, *REAL RAPE* 15-18 (1987); M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 19-28, 31-50 (1980); Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 *WASH. L. REV.* 267, 273 (1985). Prominent Supreme Court cases that have curtailed the constitutional right to reproductive freedom include *Webster v. Reproductive Health Services*, 109 S. Ct. 304 (1989); and *Harris v. McRae*, 448 U.S. 297 (1980).

7. See, e.g., Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *TEX. L. REV.* 387 (1984); Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn*

solve conflict; they only restate it in somewhat abstract and conclusory form.⁸ The danger is that mandates of formal equality can mask substantive inequalities. So, too, battles over rights may divert effort from the struggle necessary to give them content.

For example, in the wake of no-fault divorce reform, considerable dispute centered on whether divorcing spouses should be entitled to an equal, or an equitable, division of marital property.⁹ In principle, either formulation was defensible; in practice, neither has been. Divorced wives have ended with a far greater share of caretaking responsibilities and far fewer resources to fulfill them. In the aftermath of most divorces, the husband's income substantially rises, while the wife's income substantially declines.¹⁰ In their interpretation of abstract legal mandates, decisionmakers have been insensitive to the permanent economic sacrifices that many homemakers have made.

Similar problems arise in other substantive areas of the law. Over the past two decades, women have won the right to be free from sexual harassment and domestic violence, but the scope of protection has remained open to dispute. Courts have trivialized harassing behavior as "dalliance[s],"¹¹ or "flirtation."¹² One trial judge expressed a common attitude with uncommon candor: "So, we will have to hear [your complaint], but the court doesn't think too much of it."¹³ Spousal assaults, euphemistically characterized as "domestic disturbances," have been treated as if everyone should simply "kiss and make up

Selves, 62 TEX. L. REV. 1563 (1984); Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382-84 (1984); Rhode, *Feminist Critical Theories*, *supra* note 2, at 633.

8. Given its conclusory nature, a rights-oriented framework often distances us from necessary value choices and obscures the basis on which competing interests are accommodated. See sources cited in *supra* note 7. The counterbalancing and empowering dimensions of rights frameworks, however, should not be ignored. See *infra* notes 32-33 and accompanying text.

9. See L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985); D. RHODE, *supra* note 3, at 149-51; Fineman, *Implementing Equality: Ideology, Contradiction, and Social Change*, 1983 WIS. L. REV. 789, 866-67.

10. See L. WEITZMAN, *supra* note 9; D. RHODE, *supra* note 3, at 149-51; Fineman, *supra* note 9, at 866-67; Rhode & Minow, *Reforming the Questions: Questioning the Reforms: Feminist Perspectives on Divorce Reform*, in *DIVORCE REFORM AT THE CROSS ROADS* 191 (S. Sugarman & H. Kay eds. 1990); *DISPLACED HOMEMAKERS NETWORK, A STATUS REPORT ON DISPLACED HOMEMAKERS AND SINGLE PARENTS* 2 (1987) (40 percent of displaced homemakers—divorced, separated, and widowed women—live below the poverty line, and 20 percent more live near the poverty line).

11. *Vinson v. Taylor*, 760 F.2d 1330, 1330 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing).

12. *Sand v. Johnson Co.*, 33 Fair Empl. Prac. Cas. (BNA) 716 (E.D. Mich. 1982).

13. *Henson v. City of Dundee*, 682 F.2d 897, 900 n.2 (11th Cir. 1982).

and get out of court."¹⁴ Seriously battered women are advised to "just leave," but are denied the physical protection and economic assistance that would make departure possible.¹⁵ In a recent Massachusetts case, the trial judge dismissed charges of brutality with the observation that if the parties wanted to "gnaw on each other, fine," but they were not to do it at taxpayer's expense. Three months later, the wife was dead and the husband awaiting trial for murder, also at taxpayer's expense.¹⁶ Such examples highlight the gap between women's rights and women's experience.

This gap reflects a related limitation in contemporary civil rights: The price for their exercise is often prohibitive. In many areas of special concern to women, current procedures victimize the victim. In harassment cases, for example, a plaintiff's "sexually provocative" dress or language has been considered relevant in determining whether a defendant's conduct is culpable.¹⁷ Despite the passage of legislation protecting privacy rights of rape victims, intrusive procedures remain common. Disclosure of a complainant's sexual history is frequently permitted under statutory exceptions or pretrial rules.¹⁸ Similarly, in many employment discrimination cases, plaintiffs must put their character as well as capabilities at issue. The risks of adverse disclosures, collegial resentment, and vocational blacklisting often deter litigation.¹⁹ Allowing defendants to place victims' conduct on trial means that women must intensify their injuries to remedy them. All too often, even if the plaintiff wins,

14. See S. SCHECHTER, *WOMEN AND MALE VIOLENCE* 160-61 (1982); Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 *JUDICATURE* 280, 283-84 (1987); NEW YORK TASK FORCE ON WOMEN IN THE COURTS, *SUMMARY REPORT* 33, 34-45 (1986). See generally U.S. COMM'N ON CIVIL RIGHTS, *UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE* (1982).

15. See C. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979); D. RHODE, *supra* note 3, at 241 n.31; Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 *U. CHI. LEGAL F.* 23.

16. See Goodman, *My Equal Rites Winners*, *Boston Globe*, Aug. 25, 1987, at 13, col. 1.

17. See *Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57 (1986); *Ukariah v. Magnesium Electron*, 31 *Fair Empl. Prac. Cas. (BNA)* 1315 (D.N.J. 1985); *Halpert v. Wertheim and Co.*, 27 *Fair Empl. Prac. Cas. (BNA)* 21 (S.D.N.Y. 1980).

18. See C. MARSH, A. GEIST & N. CAPLAN, *RAPE AND THE LIMITS OF LAW REFORM* (1982); Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 *WASH. L. REV.* 543 (1980); Bienen, *Rape Reform Legislation in the United States: A Look at Some Practical Effects*, 8 *VICTIMOLOGY: AN INT'L JOURNAL* 139, 144-47 (1983).

19. See K. BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 91, 109, 111 (1988); Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *SIGNS* 421 (1987); Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 *U.C. DAVIS L. REV.* 975, 1010 n.178 (1983).

she loses. Given evidentiary hurdles, as well as the financial and psychological costs of litigation, many gender-related abuses will remain unchanged and unchallenged.²⁰

These barriers are compounded by the inequitable distribution of legal services and the limitations attached to many formal entitlements. The United States spends more on legal services per capita than any other nation but substantially less on civil legal aid programs than other countries with comparable legal systems.²¹ As a consequence, rights are often accessible only to individuals who can afford to exercise them. Reproductive rights represent a case in point. Limitations on access to birth control, such as funding prohibitions, coerce childbirth by those least able to afford the consequences.²²

The restrictions on access to abortions are emblematic of a further inadequacy in the contemporary rights agenda: its lim-

20. For example, most studies suggest that rape is the most underreported of all violent crimes, and that the likelihood of a reported incident ending in conviction is between two and five percent. See R. TONG, *WOMEN, SEX AND THE LAW* 104-05 (1984); Estrich, *Rape*, 95 *YALE L.J.* 1087, 1163-66, 1167-72 (1986); Johnson, *On the Prevalence of Rape in the United States*, 6 *SIGNS* 136, 145-47 (1980); Gavin & Polk, *Attrition in Case Processing, Is Rape Unique?*, 20 *J. RES. IN CRIME & DELINQ.* 126 (1983). For documentation of particular barriers to reporting by minority women, see Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 *MIAMI L. REV.* 75 (1987).

Underreporting is also common for other forms of sexual abuse. Estimates suggest that half of all incidents of domestic violence are unreported. See MacManus & Van Hightower, *Limits of State Constitutional Guaranties: Lessons from Efforts to Implement Domestic Violence Policies*, 49 *PUB. ADMIN. REV.* 269 (1989); Waits, *supra* note 6; BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *INTIMATE VICTIMS: A STUDY OF VIOLENCE AMONG FRIENDS AND RELATIVES* (1980); M. STRAUSS, R. GELLES & S. STEINMETZ, *supra* note 6. A recent study by the federal Merit Systems Protection Board indicates that only five percent of sexual harassment victims filed complaints. See MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 23 (1988).

For information regarding barriers to reporting in other contexts involving gender, see K. BUMILLER, *supra* note 19; Crosby, *The Denial of Personal Discrimination*, 27 *AM. BEHAV. SCI.* 371 (1984); Rhode, *supra* note 1.

21. See Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 *LOYOLA L. REV.* 341, 357-59 (1985). This disparity in commitment of societal resources contributes to a system in which the "haves" repeatedly come out ahead. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC. REV.* 95 (1974).

22. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (upholding Hyde Amendment, which severely limits use of federal Medicaid funds to reimburse costs of abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding Connecticut Welfare Department regulation limiting state Medicaid benefits for first trimester abortions to those that are "medically necessary"). For discussions of how restrictions on public funding affect teens, see PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING, NAT'L RESEARCH COUNCIL, *RISKING THE FUTURE: ADOLESCENT PREGNANCY, SEXUALITY AND CHILDBEARING* (C. Hayes ed. 1987); and Rhode, *Adolescent Pregnancy and Public Policy*, in *THE POLITICS OF PREGNANCY: ADOLESCENT SEXUALITY AND PUBLIC POLICY* — (A. Lawson & D. Rhode eds. forthcoming).

ited scope. The Supreme Court, for example, has upheld denial of abortion funding on the ground that

[a]lthough government may not place obstacles in the path of a woman's exercise of her freedom of [reproductive] choice, it need not remove those not of its own creation The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions . . . but rather of her indigency.²³

Yet to suggest that the state has played no role in creating economic constraints on choice is to reveal an extraordinary degree of myopia. As conservative audiences are particularly aware, government policies regarding welfare, education, employment, taxes, and related issues have an obvious impact on income distribution. Moreover, the usual justification for government's failure to provide assistance, conserving scarce resources, is inapplicable. Federal funds for indigents remain available to subsidize childbirth, which generally costs about ten times more than an abortion.²⁴ The net effect of such decisions has been, in Professor Catharine MacKinnon's phrase, that "women with privileges get rights."²⁵

Moreover, many women lack the rights they need in order to exercise the rights they have. Obvious gaps in contemporary policy include the absence of adequate birth control, child care, parental leave, medical services, educational and vocational assistance, child support, housing, and battered women's programs. In a culture where rights have been defined primarily as "freedoms from" rather than "freedoms to," a wide disparity remains between our rhetorical and financial commitments to gender equality. Of course, talk is cheap, and welfare programs are not. But neither can we insure women's full participation in public life without fundamental changes in legal premises and cultural priorities.

Let me close with a final example. Despite a quarter century's experience with equal opportunity legislation, the one-third

23. *Harris*, 448 U.S. at 316.

24. See *Harris*, 448 U.S. at 348 (Blackmun, J., dissenting); *Maher*, 432 U.S. at 463 (Blackmun, J., dissenting); F. JAFFE, B. LINDHEIM & P. LEE, *ABORTION POLITICS: PRIVATE MORALITY AND PUBLIC POLICY* 143-47 (1981); Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 *STAN. L. REV.* 1113, 1124 (1980).

25. MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45, 52 (J. Garfield & P. Hennessey eds. 1984).

pay gap between full-time male and female workers has not changed. Nor have women reached positions of the greatest social, political, and economic influence. Women now constitute over forty percent of new entrants in law and management, but only about two percent of corporate executives and six percent of partners in major law firms.²⁶ Underrepresentation of women of color is even more pronounced.

Most studies find that objective factors such as education and experience explain only half of these disparities. For some managerial positions, the same resumes or scholarly and artistic achievements are rated lower when they belong to a woman rather than to a man.²⁷ Because research on racial bias reflects similar patterns, women of color face additional obstacles.²⁸ At current rates of change, under the current system of legal rights, it could take seventy-five to one hundred years before a sexually balanced work force is achieved.²⁹

Equal-pay legislation, as currently interpreted, cannot guarantee equal pay in a labor market that is gender-segregated and gender-stratified and that has historically undervalued women's work. Such patterns reflect deeper cultural roots. As Margaret Mead once noted, there are villages where men fish and women weave, and villages where women fish and men weave, but in both cases, the work performed by women is valued less.³⁰ The

26. See *Smeal Launches Campaign to Advance Women in Law*, NAT'L NOW TIMES, Jan.-Feb. 1990, at 3; Bender, *supra* note 5, at 941 n.3; A. MORRISON, R. WHITE & E. VAN VELSOR, *BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA'S LARGEST CORPORATIONS* 5-6 (1987); ABA COMM. ON WOMEN IN THE PROFESSION, *A REPORT TO THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES* (1988).

27. See G. POWELL, *WOMEN AND MEN IN MANAGEMENT* 92 (1988); Ruble, *Sex Stereotypes*, in *IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING* 188 (A.G. Miller ed. 1982); Lott, *The Devaluation of Women's Competence*, 41 J. SOC. ISSUES 43, 50 (1985); Rosen & Jerdee, *Effects of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. APPLIED PSYCHOLOGY 511 (1974); Paludi & Strayer, *What's in An Author's Name? Differential Evaluations of Performance as a Function of Author's Name*, 12 SEX ROLES 353 (1985); Shepela & Viviano, *Some Psychological Factors Affecting Job Segregation and Wages*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES* 47, 50-52 (H. Remick ed. 1984).

28. See J. FERNANDEZ, *RACISM AND SEXISM IN CORPORATE LIFE* 62, 94, 211-15 (1981); Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *Black Employment Opportunities: Macro and Micro Perspectives*, 43 J. SOC. ISSUES 1 (1987); G. WATSON, *BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM* 5-6 (1982); *For the Black Professional, the Obstacles Remain*, N.Y. Times, July 14, 1987, at A16, col. 1.

29. See 2 U.S. COMM'N ON CIVIL RIGHTS, *COMPARABLE WORTH: ISSUE FOR THE 80'S* 109 (1984) (statement of Joy Ann Grune); Beller, *Occupational Segregation and the Earnings Gap*, in 2 U.S. COMM'N ON CIVIL RIGHTS, *supra*, at 23.

30. See M. MEAD, *MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD* 159 (1949).

same remains true in our society, where parking lot attendants have higher average wages than child care attendants.³¹

Equal rights as traditionally conceived have gained women access to the labor force, but have failed to alter its underlying structure. Our workplace has been designed by and for men, with too few opportunities for accommodating employment and family obligations. About fifteen years ago, when I was interviewing at a leading Wall Street firm, a senior litigator invited me to survey the state of his office crammed with files, folders, and document carriers. He then pointed to a photograph of his wife, four lovely children, and two golden retrievers. Gesturing first toward the picture and then toward the files, he asked with genuine curiosity, "Why would a young lady like you want to trade all that for this?" Why, I wondered, do only ladies have to choose? What I said was regrettably less memorable.

To make those choices less necessary will require us to recast our legal rights and recognize their limitations. To secure gender equality, not only in form but also in fact, we need fundamental changes in our workplace structures: more flexible schedules, parental leaves, child care assistance, meaningful part-time work, pay equity initiatives, and affirmative action. This is not a modest agenda, and our rights-based legal framework must expand to promote it.

Whatever its prior limitations, this framework has made crucial practical contributions to the lives of women and other subordinate groups.³² Even largely symbolic campaigns, such as the recent struggle for a constitutional equal rights amendment, can be critical not only because of the specific objective they seek, but also for the political mobilization they inspire.³³ The challenge remaining is to refashion our rights-based agenda in the service of a broader vision. We need not only formal entitlements for women, but also concrete recognition of the values women have traditionally sustained.

31. See Lewin, *Small Tots, Big Biz*, N.Y. Times, Jan. 29, 1989, § 6 (Magazine), at 30.

32. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1366-69 (1988); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1875-77 (1987); Rhode, *Feminist Critical Theories*, *supra* note 2; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 602-04 (1986).

33. See D. RHODE, *supra* note 3, at 63-80; J. MANSBRIDGE, *WHY WE LOST THE E.R.A.* (1986).