

OZZIE AND HARRIET HAD IT RIGHT

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It is tempting to come before an audience convened by the Federalist Society and denounce kooky feminist notions about the family and children—which in effect was my commission today—but I am not going to do it. In fairness, a line ought to be drawn between “feminism” and “feminists.” Anyone who wants to can call herself a feminist, and to be sure, some haters and weirdos have done so. But I do not believe that this should reflect on the many serious people who call themselves feminists. In any case, I do not fully understand what feminism is supposed to be, although I believe I do fully understand (if not always agree with) the ideas of a number of self-identified feminists.

Whatever the proposition regarding the role of women in our society, one can find someone who calls herself a feminist to agree or disagree with it. Women are the same as men; they are different from men; they are the same as one another; they are different from one another because of differences in their race, class, age, language group, religion, or ethnicity; they are different from one another, not as members of interest groups, but as individuals; they are different from men but also different from women who, like Kay Bailey Hutchison and Jeanne Kirkpatrick, emerge from their silence in a voice “uninflected” by the experience of womanhood.¹ A woman’s place is in the House, and in the Senate, and sometimes even in the home, although staying home and baking cookies is viewed as tantamount to lobotomy. Liberal feminists think one thing, cultural feminists think something else; radical feminists think a great many contradictory

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1. For an exposition on feminist attitudes toward women’s “sameness” and “difference” with respect to men, see Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 826-29 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) and identifying three principal strands of feminism: (1) “difference” feminism, which argues that women should be permitted to compete on equal terms with men; (2) “different voice” feminism, which argues that there is a distinctly female way of approaching moral and legal dilemmas; and (3) “dominance” feminism, which describes gender inequality in terms of the social subordination or domination of women). For a criticism of the traditional view of the movement as a “sisterhood,” see ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM* 22, 28-29 (1991) (citing ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988)). For the notion that some women are “uninflected” by the female experience, see Naomi Wolf, *Are Opinions Male? The Barriers That Shut Women Up*, THE NEW REPUBLIC, Nov. 29, 1993, at 20, 22.

things, including, in some cases, that the entire concept of "thinking," as the verb "think" is conventionally used, is hardly more than a patriarchal deceit.² Every one of these contending propositions could find a feminist sponsor or adversary.³ Just think of it: an "ism" so doctrinally powerful that it is consistent with every possible state of the world.

These comments notwithstanding, I have no criticism for the feminists today. Things are tough enough when there's only one undefined term on the table, but I am not going after the ball when the woods are thick with talk about "power," "dominance," "equality," "oppression," "silence," "patriarchy," and so on. Instead, let me proceed directly to my thesis, which I hope Federalists, feminists, and others will find acceptable.

I propose three related assertions about families—assertions that are, I must say, screamingly obvious to literally billions of people in the world, yet apparently somewhat obscure to many American intellectuals. First, I assert that families, as conventionally understood, are part of the natural human order and that thus, as a generalization, children were meant to be reared by blood relations.⁴ Second, it is exceedingly difficult for one single adult to rear one child successfully, let alone children. One needs plenty of good help: friends and relations, neighbors and community, context and culture, the market, and—if I may be impolite enough to use the "f" word here—fathers.⁵ Third, Gary Becker was right: families are extraordinarily effective engines for creating human welfare.⁶

In truth, one can go further and safely assert that families are the preeminent human institutions for creating human welfare. Corporations, law schools, and courts do not compete in this

2. Some feminist scholars claim that modern science embodies a male, sexist reality and that a bias-free world requires redefining objectivity, rationality, and the scientific method. Lee Dembart, *A Biologist's Spirited Defense of Science, Reason*, L.A. TIMES, June 4, 1993, at E4 (reviewing LEWIS WOLFERT, *THE UNNATURAL NATURE OF SCIENCE: WHY SCIENCE DOES NOT MAKE COMMON SENSE* (1993)); see also Charles Trueheart, *Science and the Feminist Critique: In The American Scholar, Revisionists Taken to Task*, WASH. POST, Jan. 19, 1988, at D7.

3. See generally Daniel R. Ortiz, *Feminism and the Family*, 18 HARV. J.L. & PUB. POL'Y 523 (1995) (comparing and contrasting "liberal" feminism, "difference" feminism, and "dominance" feminism and their various propositions).

4. See F. Carolyn Graglia, *The Housewife as Pariah*, 18 HARV. J.L. & PUB. POL'Y 509 (1995) (arguing that daycare is an unacceptable substitute for the care of a real parent).

5. See Barbara D. Whitehead, *Dan Quayle Was Right; Harmful Effects of Divorce on Children*, ATLANTIC MONTHLY, Apr. 1993, at 47 (arguing that, despite society's affirmation of the single-parent family, children are better off when raised by two parents).

6. GARY S. BECKER, *A TREATISE ON THE FAMILY* 5-6, 8-10, 17-18, 277-306, 342-43 (1991).

league. How families accomplish this feat is a very good question. There are many conceivable “domestimorphs”—my neologism describing the set of all possible living arrangements—that do not seem to have the well-known liabilities of traditional family units. Many people from my generation experimented with some of these: communes, serial polygamy, nomadism of one form or another, and perhaps the most popular of form of all, ad hoc bilateral “living together.” Many modernists still speak enthusiastically for legal protection of the self-realizing freedom non-traditional domestimorphs are supposed to foster.⁷ From the point of view of the community and the welfare of resulting children, however, this great menu of possibilities has rather disappointed.⁸

In the face of the discouraging results of modernism for the community and the family, let me offer an example of a domestimorph that is optimal for both community and family—Ozzie and Harriet, the very icon of the ridicule that has often been directed against traditional families.⁹ Ozzie and Harriet are an ostensive definition of what I mean when I say “family.”

Three concepts drive the superiority of the Ozzie-and-Harriet family. The first is that domestimorphs are typically “commons”—indeed commons-within-commons—and as such are alive with free rider problems that have to be controlled.¹⁰ There

7. See, e.g., Jennifer L. Heeb, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 377-93 (1993) (arguing in favor of constitutional due process protection for same-sex marriages); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1641, 1657-59 (1991) (arguing for “an open registration system for nontraditional adult relationships.”)

8. See Whitehead, *supra* note 5 (arguing that children are better off in traditional families); see also LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985) (discussing the negative social and economic effects of the divorce revolution on women and children).

9. See, e.g., Stephen B. Reed, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337 (1991); Al Kamen, *A Word From the Communitarians*, WASH. POST, Nov. 19, 1992, at A21 (describing the advice of a panel of communitarians that President Clinton “recapture the family values issue from the right wing” without “calling for a return to ‘the traditional family of Ozzie and Harriet.’”); David Margolick, *Lesbian Child-Custody Cases Test Frontiers of Family Law*, N.Y. TIMES, July 4, 1990, at 1, 10 (“[j]udges are trying with some bewilderment to apply legal doctrines dating from the conventional ‘Ozzie and Harriet’ television era to evolving family configurations.”)

10. In a large family, in which many people must cooperate for the common good (the successful running of the household), members of the family have an incentive to “free ride” by allowing others to do the work while still enjoying the benefits of that work. Families are effective at monitoring such “shirking.” BECKER, *supra* note 6, at 31. On the

is both an internal family good, which every domestimorph member has an incentive to free ride upon, and an external community good, upon which each individual domestimorph has an incentive to free ride.

The student quarter near many large universities supplies us with good, understandable illustrations of both internal and external free riding. As for the internal commons, the sinks in dormitories and fraternity houses are full of dishes. The incidence of that sort of thing in a bourgeois household is much less. Why? Do *you* like washing dishes? As for the external commons, there is more litter in the yards, there are more loud noises after midnight, more people driving too fast and while drunk, and more people urinating out second-floor windows in College Town than in a typical bourgeois community. Why? Don't *you* like to have a good time, too?

These sorts of disruptions are the misdemeanors of young people who are free riding on their housemates and the larger community. Families, unlike dorms and fraternities, have a robust and effective structure for containing such entropies. Their organizing hierarchy, mom and dad, get to do all the things that secret policemen everywhere have always dreamed of doing—going through people's drawers without asking, collecting minute dossiers of physical, psychological, and educational information, keeping detailed track of friends, associates, and telephone calls, levying fines and corporal punishments without hearings, appeals, or other punctilio—all of this perfectly legitimate and all directed at promoting the welfare of the children and preserving the respectability and reputation of the household within the community.

The effectiveness of families as monitors and enforcers of free rider problems is a function of two factors—love and information. By “love” I mean affection that privileges retribution without notice and a hearing. The mass of arterial plaque that we call due process¹¹ is essentially absent from family relationships, giving them a flexibility and nuance that is entirely lacking in the public domain. “Information” means that when I come home and find the lamp next to the sofa broken, not only do I know

free rider problem generally, see Garrett J. Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

11. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that procedural due process requires that a predetermination evidentiary hearing be held before welfare payments can be discontinued).

who did it, I know how he did it (by jumping on the sofa, which he was severally warned about), and even, within close limits, when he did it. No outsider could readily duplicate this classic insider information. Consequently, through love and information, the enforcement of rules and behavioral standards that control first- and second-order free riding is remarkably easier in traditional families than in other domestimorphs.

The final basic concept underlying the superiority of traditional families is that of no-exit. Traditional families are not at-will affairs.¹² This fact carries very important implications for the investment incentives that arise in traditional families. In such no-exit arrangements, one should expect to see more investment and less consumption, and more emphasis on the long run and less on the short run, to the obvious benefit of both communities and dependents.¹³ In persistent domestimorphs, group reputations can develop, and these reputations can become valuable common property to the members of the group. Families safeguard their reputations because these assets influence the life chances of their members in many ways that some, especially the young, fail to foresee. Transient living arrangements, on the other hand, make it very difficult to maintain a constructive reputation within the community because, with their here-today-gone-tomorrow cast of characters, no one has an incentive to invest in order to produce this result.

These observations lead directly to a general policy lesson. To the extent that we legitimate, subsidize, and accept at-will domestimorphs—which is what even marriage tends to become under no-fault divorce—we are asking for serious long-term trouble as a society.¹⁴ One of the worst aspects of the problem is that it is not obvious how to restore the status quo ante once we have jeered Ozzie and Harriet off the stage.

Thus, I do not come before you with a grand prescription for how to make things better. Not being a Rhodes Scholar, I am unable to see around enough corners to make good family policy in a systematic way. My basic approach would be simply to quit encouraging dysfunctional behavior. Of course, this approach is not uncontroversial. It means welfare reform that stops govern-

12. *Matthew* 19:6 ("What therefore God has joined together, let not man put asunder.")

13. For a discussion of such intrafamilial investment, see the chapter on altruism in the family in BECKER, *supra* note 6, at 277-306.

14. See generally WEITZMAN, *supra* note 8.

ment transfer payments that pay people to have babies out of wedlock. We might also consider reforming no-fault divorce, perhaps along the lines that Professor Fox-Genovese has suggested.¹⁵ Also, the tax code ought to be purged of marriage penalties, though an Ozzie-and-Harriet-friendly tax reform would certainly consist of far more than that.¹⁶ And landlords and employers, if they choose to do so, should be permitted to make distinctions among people on the basis of their domestimorphic circumstances.¹⁷

Of course, I cannot possibly predict how great a difference such reforms would make (though I have no doubt they would be directionally correct) because I do not possess nearly enough information about how the formal legal order in its various aspects influences people's behavior. This sort of information deficit not only disqualifies me from proposing magisterial improvements in the world, but also from being president—and also, praise the Lord, from being married to one. But I have by this time qualified myself to resume my chair, which I do with many thanks for your kindness and hospitality.

15. Elizabeth Fox-Genovese, *The Legal Status of Families as Institutions*, 77 CORNELL L. REV. 992, 995 (1992) (suggesting that perhaps marriage partners ought not be allowed to assume responsibility for new families until the children of a first marriage are self-sufficient).

16. See, e.g., Tom Herman, *Tax Report: A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., Jan. 19, 1994, at A1 (noting that had the 1948 federal income tax exemption for children been adjusted for inflation and real growth in income, it would today stand at over \$8,600 per child, whereas the actual 1993 exemption was only \$2,350 per child).

17. Attempts to move in this direction are often criticized. See, e.g., Robert C. Mueller, *Donahue v. Fair Employment and Housing Commission: A Free Exercise Defense to Marital Status Discrimination?*, 74 B.U. L. REV. 145 (1994) (arguing against a free exercise of religion defense to illegal housing discrimination by a landlord).