The Family as an Entity

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INTRODUCTION

American family law has a problem. In only one generation of time, we have experienced a "transformation" in the nation's family laws[1] that is "the most fundamental shift [in the state's legal posture toward the family] since . . . the Protestant Reformation."[2] However, we can already see that this brief period of massive reform has tended to produce "a body of family law that protects only the autonomous self,"[3] thereby failing "to nurture the relationships between individuals that constitute families."[4]

For example, American law "has taken the idea of individual freedom to terminate a marriage" further than the law of any Western nation, including Sweden.[5] This approach exhibits a level of "carelessness" about "the economic casualties of divorce [that is] unique among Western countries."[6] These individualistic tendencies are also part of a recent and "profound alteration in society's attitude toward children,"[7] that reflects a "new form of [child] neglect" — adult absence.[8] Some describe this emerging adult attitude as the overdue liberation of children, but, ironically, that rationale "provides easy justification for adults whose personal convenience is also best served by remaining aloof" from children's needs.[9] Empirical research beyond the scope of

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[1] *See* Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

[2] M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 63 (1987).

[3] Minow, *"Forming Underneath Everything that Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894.

[4] *Id.*

[5] *See* M. GLENDON, *supra* note 2, at 78.

[6] *Id.* at 105.

[7] M. WINN, CHILDREN WITHOUT CHILDHOOD 5 (1983) (observing connections among a broad-scale erosion of institutional authority, the instability of marriage, the sexual revolution, and a tendency to treat children as if they were capable of all adult experiences).

[8] TIME, Aug. 8, 1988, at 32.

[9] Hafen, *Exploring Test Cases in Child Advocacy* (Book Review), 100 HARV. L.

typical legal literature also reveals Americans' deep concern that the past generation's excessive individualism "may have grown cancerous,"[10] and is already undermining our sense of family and community in ways that threaten "the survival of freedom itself."[11]

Contemporary legal and other literature is thus beginning to recognize that it may be time to start searching for new forms of understanding and, perhaps, legal reforms that will help restore a sense of caring commitment to family relationships. We have come to appreciate individual liberty to such a degree that this search should include a quest for approaches that will also help the family nurture personal growth, stability, and autonomy. We must seek legal policies that will sustain not only family life, but also the personal liberty that can be nurtured by a stable family experience.

Amid the complexities of thought and experience that this interest could call upon, this Article makes only one modest suggestion — that the contribution of family life to the conditions that develop and sustain long-term personal fulfillment and autonomy depends (among many other important factors) upon maintaining the family as a legally defined and structurally significant entity.[12]

As background to explore the family as an entity that can encourage "familistic" motivations,[13] Part I briefly sketches the history of American approaches to state regulation of family life. Depending on its definition and its implementing strategy, an entity notion in family law can either call upon or deflect government intrusion. American and English history show that family regulation as we know it has ebbed and flowed considerably over time. And in the contemporary period we have seen paradoxically a simultaneous increase and decrease in state regulation of family life, but not as the result of a coherent overall strategy. For example, although government intrusion is at times coercively imposed, citizens sometimes welcome and even solicit intrusion

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REV. 435, 448 (1986) (reviewing R. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (1985)).

[10] R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART vii (1985) [hereafter HABITS OF THE HEART].

[11] *Id.*

[12] "The family" in a pluralistic society is not a monolithic concept. However, American law and culture still draw some significant distinctions between families and other relationships. *See* text accompanying *infra* notes 111-18. One of this Article's purposes is to suggest the value of clarifying and maintaining the meaning of those distinctions. For the kind of "family entity" I have in mind, see text accompanying *infra* notes 247-251.

[13] *See* text accompanying *infra* notes 134-147.

— as in the case of continuing state supervision of child custody following a divorce or in the case of government-supported child care facilities. This historical sketch may also underscore why the issue of family definition through governmental regulation has recently assumed increased importance. It will also reveal that merely being for or against governmental regulation of family matters as a rigid and abstract proposition is not very helpful in achieving the balance that an interest in both family stability and personal autonomy calls for.

Part II then describes how both our legal and our social attitudes toward the family have been shifting from *familistic* toward *contractual* assumptions and suggests that thinking of the family as an entity may help to regain some lost familistic commitments. The limited entity suggested here does not attempt simply to recapture the patriarchal tradition; rather, an entity that views husband and wife as juridical equals can represent a postpatriarchal model in which *all* family members are encouraged to accept and fulfill aspirational commitments that are other directed. The nurturing stability offered by this model is most essential for children. Just as the patriarchal model may have erred in promoting hierarchal authoritarianism, the recent reform era's individualistic model may have erred at the opposite extreme of "atomistic egalitarianism" by attempting to "compensate" in understandable but sometimes overstated ways for the excesses of the "patriarchal concept of the family."[14]

I. Historical Background and Contemporary Context

Recent family law and family history scholarship has begun to reveal the rich complexity and variety to be found in the history of United States family law.[15] This literature clearly demonstrates that for one reason or another traditional histories have almost all been too narrowly focused, in part because the complete story requires understanding unmanageable numbers of component stories.[16] In addition, family

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[14] Schneider, *supra* note 1, at 1860.

[15] One example of this scholarship is the University of Wisconsin Program in Legal History, which has supported the work of several leading family law scholars. *See, e.g.*, Minow, *supra* note 2; Teitelbaum, *Family History and Family Law*, 1985 Wis. L. Rev. 1135. Another example is M. Grossberg, Governing the Hearth: Law and the Family in Nineteenth Century America (1985).

[16] For example, one historian has described Lawrence Stone's major work on *The Family, Sex and Marriage in England 1500-1800* as "an impressive attempt at an almost impossible task; valuable on the upper classes and almost useless on the rest of society." M. Anderson, Approaches to the History of the Western Family, 1500-1914, at 85 (1980).

law's history has been heavily influenced by large scale economic currents too broad to be encompassed within traditional legal or even social studies.[17] However, most writers agree regarding certain general trends that at least provide some context for our thinking about the family as an entity.

A. Before the American Revolution

Since ancient times, an unavoidable tension has existed between the interests of privacy and community — the needs of the clan versus the needs of the state. That tension has produced fluctuating actions and reactions rather than a steady, linear pattern. At the same time, however, Western history has produced a gradual and general decline in the family's institutional strength, as expressed in Sir Henry Maine's generalization that "the [legal and social] unit of an ancient society was the Family, of a modern society the Individual."[18]

One may not accurately assume, as some modern writers do, that the nuclear family headed by parents who assume responsibility for the extended education of their children is a relatively recent European innovation. Philippe Aries' work on the medieval family[19] is frequently cited as showing that "childhood" emerged only after the medieval era. However, Aries himself observed that "medieval civilization had forgotten the *paideia* of the ancients,"[20] making the rediscovery of Greek and Roman attitudes toward the education of children during the Renaissance a "great event."[21] Thus, despite the curiosity Plato aroused in the *Republic* by suggesting the communal rearing of children,[22] each family during the high points of ancient Greek society usually educated its own young. A similar pattern originally prevailed in Roman society, which established the *patria potestas* — "the sacred and imprescriptible sovereignty of the family in its own affairs."[23]

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[17] *See, e.g.*, M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 143 (1981).

[18] H. MAINE, ANCIENT LAW 163 (1st Am. ed. 1870). Thus, "we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract." *Id.* at 165. Robert Nisbet was thinking of such "communities" as family life, religion, and similar mediating institutions when he called "history" the "decline of community." R. NISBET, THE QUEST FOR COMMUNITY 75 (1953).

[19] P. ARIES, CENTURIES OF CHILDHOOD (1962).

[20] *Id.* at 411-12.

[21] *Id.*

[22] *See* Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

[23] R. NISBET, FOREWARD to THE AMERICAN FAMILY AND THE STATE at xxii (J. Peden & F. Glahe eds. 1986). Indeed, an important element in Rome's decline "lay

At early English common law, the authority of fathers within their own families was virtually impenetrable, until the courts developed the doctrine of *parens patriae*[24] — a concept of state authority over at-risk dependent persons. English and American parents during the sixteenth and seventeenth centuries nonetheless commonly exercised severe disciplinary control over their children, partly because of religious beliefs that children were inherently inclined toward evil. Husbands also maintained patriarchal authority over their wives, reinforced by the growth of monarchies and by Protestant theological assumptions. However, even these strict forms of family control during the colonial era were not truly private, because privacy was a little known concept under customary circumstances that blurred the line between the family and the village community.[25]

Beginning in the mid-1600s (but carrying distinct echoes of Greek and Roman instincts regarding family life, rationalism, and education for children), English society developed over the next 150 years a remarkable new vision of family life. This vision influenced American attitudes well into the nineteenth century and, in some ways, permanently. Lawrence Stone regards this emergence of "affective individualism" as such a massive shift in world view that it is "perhaps the most important change in *mentalite* to have occurred . . . possibly in the last thousand years of world history."[26] This set of attitudes, which initially developed among upper social classes and then spread throughout the social structure, reflected greater freedom for children, a more equal partnership between spouses, and less interference in family autonomy from both the community and kinship groups. It also introduced personal choice and affection as significant elements in marital selection and was accompanied by a new sense of sexual openness. Stone calls the dominant family type of this era the "closed domesticated nuclear family."[27]

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precisely in [the] spilling over of the [*imperium militiae* — the power vested in military leaders over their troops] onto the sacred *patria potestas* of civil, kinship society." *Id.*

[24] This doctrine was first developed in the thirteenth century when the king assumed guardianship power over lunatics. 1 W. BLACKSTONE, COMMENTARIES * 452. In the eighteenth century, it was extended to protect children. *Id.* Blackstone noted that ancient Roman law gave fathers the power of life and death over their children. *Id.* English law, by contrast, only allowed a parent to "lawfully correct his child . . . in a reasonable manner." *Id.*

[25] "Domestic life in the village was conducted in a blaze of publicity." L. STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800, at 144 (1977).

[26] *Id.* at 4.

[27] This pattern developed in the period from about 1640 to 1800. The "restricted

The momentum of these trends continued until being slowed by the nineteenth century's moral reform movement. This era of "moral regeneration" actually peaked as early as 1860, followed by a reawakened interest during the late 1800s in individualism and permissiveness. This interest accelerated in the 1920s, slowed for a few decades, then dramatically expanded in the 1960s "for the first time to all sectors of the population."[28]

This perspective suggests a natural swaying of the historical pendulum back and forth over an extended time period between an emphasis on the private sphere and an emphasis on the larger social sphere. It also establishes the roots of contemporary individualism in an early family-related context. Perhaps most important for understanding the origins of our modern assumptions, this view suggests that most features of bourgeois family life appeared before the Industrial Revolution,[29] and that the nuclear family fostered rather than resisted modernization.[30]

However, affective individualism also planted the seeds of increased state authority over family autonomy. Because the emergence of nationalism within the Revolutionary Era's vision of individual liberty established the state as such a protector of individuality, the state could begin to undercut the family's role as a significant intermediate institution between the individual and the state.[31]

B. The Nineteenth Century

Against this background, an American version of the closed domesticated nuclear family emerged in the late eighteenth and early nineteenth centuries and, tempered by a variety of Victorian Era social reforms, found its way into the newly forming system of domestic relations laws. Most of our twentieth century laws on marriage, divorce, adoption, child custody, compulsory education, and the juvenile court were first formalized during this period.[32] Actually, the fundamental outlines of these patterns had long been forming within customary and local laws, but the 1800s developed statutory and common-law

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patriarchal nuclear family" preceded it from about 1550 to 1700, preceded by the "open lineage family" from about 1450 to 1630. *See generally id.*

[28] *Id.* at 680.

[29] *See id.* at 664-65.

[30] *See* B. BERGER & P. BERGER, THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND 85-129 (1983).

[31] *See* R. NISBET, *supra* note 18, at 122-64.

[32] *See generally* M. GROSSBERG, *supra* note 15.

rules that created greater formalization and uniformity.

The dominant Western family form that arose during this period reinforced to some degree the idea that a family entity has the potential both to develop and to protect the autonomy of individual family members. The nineteenth century family gradually moved away from the patriarchal family's hierarchical authoritarianism, reflecting an "increasing differentiation of the conjugal family as a discrete and private social unit . . . with a growing emphasis on individual autonomy and rights."[33] The leading historians of this era see in this development a "growth in *individual* autonomy and rights" in which the family's institutional strength paradoxically reinforced "individualism within the bosom of the family."[34] Still, the individual protections this movement extended to women tended to be limited to the domestic sphere,[35] and the family unit's autonomy remained subject to significant state supervision in such realms as education and the care of wayward children.[36]

In general, the nineteenth century thus modified the colonial era's emphasis on patriarchy, favoring new rights for women and new state powers that limited fathers' authority over children. However, judicial application of these concepts also limited the reach of state supervision, because many judges who generally shared the reformers' middle class values were also sensitive to the need to protect the private sphere. By developing many common-law rules and by limiting the reach of legislation, American judges became "the major institutional check on the therapeutic state."[37]

For example, the judiciary, reflecting growing interest in children's welfare and in egalitarian values, developed the "best interests of the child" standard and finally a preference after about 1860 for maternal care in custody cases through the "tender years" presumption. The nineteenth century's new concept of formalized adoption[38] also reflected judicial experience with custody determinations as well as the new emphasis on child welfare. In addition, statutes restricting child labor and requiring public school education appeared in the mid-1800s, as did the

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[33] M. ANDERSON, *supra* note 16, at 44.

[34] *Id.* at 48.

[35] *See* Minow, *supra* note 3, at 835-36.

[36] *See* Teitelbaum, *supra* note 15, at 1135.

[37] M. GROSSBERG, *supra* note 15, at 298.

[38] The general concept of adoption was known in ancient civilizations, but was not part of English common law. Nineteenth century statutes first codified American adoption rules, but to some extent these statutes essentially formalized earlier colonial practices. *See* L. WARDLE, C. BLAKESLEY, & J. PARKER, CONTEMPORARY FAMILY LAW § 10.01 (1988).

first private child welfare societies. These developments culminated in and secured comprehensive enforcement through the juvenile court movement, which began in Illinois in 1899. New anti-abortion and anti-contraception laws were passed between 1860 and 1880 in response to public reform campaigns that began early in the century.[39]

By such means, the missionary-minded reformers extended their vision of ideal bourgeois family life to the lower classes and to the increasing immigrant population. This method reflected a melting pot strategy that drew heavily on Enlightenment individualism and that was informed by values the reformers believed essential to economic as well as social well-being.[40]

Several themes from this nineteenth century inheritance laid a conceptual foundation for the Progressive Era's interventionistic emphasis on "child saving," even as they also — paradoxically — anticipated contemporary ideas about both individual and family autonomy. First, some scholars believe the most important development of this period was the idea that the family is "a collection of separate legal individuals rather than an organic part of the body politic."[41] This change from earlier notions of paternal sovereignty occurred as the law began to recognize "distinct legal personalities" for women and children. This recognition combined with judges' emerging paternal role to allow the judge to have an individualized relationship with each family member. Such interpretations created a legal framework for state intervention into both husband-wife and parent-child relationships, although most actual intervention was typically limited to severely dysfunctional (and usually poor) families.

Second, nineteenth century attitudes created a sense of proper role and function for each family member, establishing what Lee Teitelbaum calls a "teleological view" of the family.[42] Thus, the "role"

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[39] These laws were more difficult to enforce than others from the same period, both because they involved private conduct and because judges were frequently lukewarm in their willingness to convict violators. *See* M. GROSSBERG, *supra* note 15, at 153-96.

[40] *See* B. BERGER & P. BERGER, *supra* note 30, at 2-25. The Nation's confidence in these unifying concepts was reflected in the development of strong matrimonial fitness legislation and in determined enforcement efforts to prevent interracial and polygamous marriages. The intensity of federal anti-polygamy enforcement in Utah in the late 1800s substantially increased the legal system's power to regulate family life to accord with accepted views about domestic choices. Racial restrictions that originated to forbid marriages between whites and black slaves also combined with rigid attitudes about marital forms in ways that inhibited the effectiveness of the earliest civil rights statutes. *See* M. GROSSBERG, *supra* note 15, at 103-53.

[41] M. GROSSBERG, *supra* note 15, at 103-53.

[42] Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 432

or "status" of a "good" husband, wife, or child was determined according to the functional characteristics of each within a universal understanding of proper family life.[43] These premises also authorized regulatory definitions and policies designed to measure proper functioning within the family framework.

Third, nineteenth century jurisprudence developed a rationale for society's interest (Roscoe Pound termed it "the social interest")[44] in stable marriage and the nurturing of children. The family was seen as a crucial social institution, which gave society an interest in the rearing and education of "sound and well-bred citizens for the future. The parent's claim to the custody of the child and to control over its bringing up has come to be greatly limited in order to secure these interests."[45]

Fourth, these ideas were somewhat offset by constitutional and other forms of legal reinforcement for a continuing tradition of laissez-faire individualism, which created a presumption against intervention into an intact family entity. In addition, the natural rights philosophy that fueled other nineteenth century constitutional interpretations influenced the United States Supreme Court, beginning in the 1920s, to affirm parental liberty and family autonomy as against state regulatory interests in family life. For example, some nineteenth century family intervention cases had introduced the idea that parental rights are derived from the state, which delegates control over children to parents as a terminable trust.[46] In addition, compulsory education laws were being used increasingly by Protestant majorities to require education only in public schools. Both notions reflected the extremes to which nineteenth century "child saver" attitudes had moved in authorizing state supervision, even when neither parental fitness nor children's well being had reached the stage of serious impairment.

However, in *Pierce v. Society of Sisters*[47] and *Meyer v. Nebraska*,[48] the Supreme Court held unconstitutional state laws that required education only in public schools and that prohibited parents from obtaining foreign language instruction for their children. The Court identified

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(1985). This view derived from "direct references to natural law and to a Christian understanding of marriage and the family." *Id.*

[43] *Id.*

[44] Pound, *Individual Interests in Domestic Relations*, 14 MICH. L. REV. 177, 182 (1916).

[45] *Id.*

[46] Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245, 250-51 (1985).

[47] 268 U.S. 510 (1925).

[48] 262 U.S. 390 (1923).

parents' constitutional right to rear and educate their children as part of the "liberty" contained in the due process clause, explicitly affirming that parental interests are inherent rather than being derived from the state: "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[49]

C. The Progressive Era

Neither legal theory nor practice substantially changed during this period when the prior century's family law system was being widely assimilated. Actual family functions were changing materially, however, as the emerging welfare state and the helping professions began to displace the family's role in performing economic, educational, and other socializing tasks. Employment-related and government-related entitlements began to have greater economic significance than marriage and kinship ties.[50] Many traditional family functions began being transferred to sources outside kinship groups,[51] a process facilitated by the public's acceptance of "child saver" values and nineteenth century institutions. The juvenile court system, child labor laws, compulsory education, and child welfare agencies all reflected the assumptions of *parens patriae*, which viewed state agents and child care professionals as essential supervisors for children, especially those at risk.[52] These same assumptions entrusted adult supervisors with broad, personal discretion to assess children's needs and interests.

Progressive Era institutions assumed that individual families should aspire toward such middle class values as self-reliance, reflecting the belief that delinquency and criminal behavior were associated with poverty. From about 1930 to 1960, however, juvenile court interests expanded beyond the view that poverty was per se immoral and began examining such specific practices as parental abuse or inadequate care. The first statutes explicitly permitting juvenile courts to terminate parental rights were enacted in the 1950s.[53] This movement set the stage for the 1960s' expanded interest in child abuse.[54]

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[49] *Pierce*, 268 U.S. at 535 (1925).

[50] *See generally* M. GLENDON, *supra* note 17.

[51] *See generally* C. LASCH, HAVEN IN A HEARTLESS WORLD (1977).

[52] *See* F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 30-48 (1982).

[53] Harris, *The Utah Child Protection System: Analysis and Proposals for Change*, 1983 UTAH L. REV. 1, 12.

[54] *See infra* notes 92-96 and accompanying text.

D. Since 1960

The changes of the past thirty years are of revolutionary scope and character. As Carl Schneider described it, "American family law has been twice transformed," once in the nineteenth century and again since 1960.[55] In this brief period, we have witnessed a "diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated."[56] For example, our once idealistic attitudes toward lifelong marital commitments, spousal support obligations, and sexual behavior outside marriage have all given way to a set of less demanding legal norms symbolized by the very term "no-fault" divorce, which is now available in some form in virtually every state. Judicial standards have changed regarding child custody, alimony, unmarried cohabitation, contraception, abortion, fornication, and a host of other issues.[57]

Attitudes toward the role of child welfare agencies, including the juvenile courts, have been similarly affected. The child savers of the Progressive Era had sought to conform poverty and minority class families with middle class models. But during the 1960s, some critics charged that the juvenile courts were created as instruments for unfairly imposing middle class values on immigrants, the poor, and racial minorities.[58] As such criticism blended with the ring of moral truth reflected in the civil rights movement, welfare agencies grew more willing to accept diverse normative and moral interpretations.

Reflecting such changes, the legal system became less judgmental about personal conduct and choices that would once have been outside the norms of accepted American family teleology. Some of this increased tolerance resulted from greater acceptance of cultural diversity,[59] while some of it mirrored changing attitudes about the general

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[55] The second transformation has occurred "in the last two decades, although its roots run deep." Schneider, *supra* note 1, at 1805.

[56] *Id.* at 1807-08.

[57] *See generally* M. GLENDON, THE TRANSFORMATION OF FAMILY LAW (forthcoming, Univ. of Chicago Press); Schneider, *supra* note 1.

[58] *E.g.*, A. PLATT, THE CHILD SAVERS (1977).

[59] Mary Ann Glendon notes that many recent changes in family law result more from increasing American sensitivity to pluralism and heterogeneity than from new ideas about family life. For example, the reluctance of courts and legislatures to impose "values" other than equality, individual liberty, and tolerance reflects a "posture of legal neutrality" that has been "welcomed by judges and legislators, who are otherwise hard put to justify preferring the values of one sector of the population to those of another." M. GLENDON, *supra* note 57, at 498.

nature and place of moral standards.[60]

To consider a symbolic example, the very term "illegitimate" may no longer accurately describe children born out of wedlock. These children's legal rights now enjoy constitutional status and dependent children in single parent families have been the beneficiaries of expanded governmental entitlement programs.

Charles Murray describes some of these attitudinal shifts as part of a changing dominant assumption about the causes of poverty and family failure: that such problems are caused not by family or individual failure but by systemic social failure and structural poverty.[61] The social programs developed in response to this shift removed incentives to hold parents accountable for family difficulties. The programs also rapidly accelerated (especially among program beneficiaries) the Progressive Era's tendency to transfer responsibility for such traditional kinship functions as child care and health care to state institutions.

Even as these forms of reliance on the state increased, however, other elements of the post-1960 reform era paradoxically attacked traditional child-saver institutions with the argument that state power was suspect. Moreover, the dominant bourgeois family model was not only less likely to be admired, but its basic assumptions — especially those about female roles — were challenged as no longer valid, at least not for society as a whole. For the state to expect conformity to any particular family pattern as ideal became less acceptable. This rejection of traditional aspirations became so widespread that it altered rehabilitative goals, not only in family services but also in the criminal justice system. People found it difficult to agree on the very nature and meaning of rehabilitation.[62]

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[60] The increasing acceptance of diversity was accompanied by a relaxation of some middle class moral aspirations, as American society seemed to replace its former standards of "aspirational morality" with a "morality of the mean," which "accepts man's everyday 'nature' as setting a maximum for the demands which can be made." Schneider, *supra* note 1, at 1819 (quoting Max Weber).

[61] C. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-80 (1984).

[62] As Francis Allen observed:

> It is not only the institutions of criminal justice that have suffered significant losses of confidence. All the institutions traditionally relied on for socializing the young and directing human behavior to the achievement of social purposes have . . . sustained massive losses of confidence and corresponding erosions of morale. Scrutiny of contemporary attitudes toward the family, the schools, and what may inexactly be described as therapy, reveals deep-seated skepticism about the capacity of traditional institutions to achieve beneficial direction to human behavior and aspirations.

F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 19-20 (1981); *see also infra*

While the extent to which these alterations in our assumptions have reduced the family's institutional strength is not yet clear,[63] social, governmental, and legal changes in policy and attitude since 1960 have nonetheless altered the bases for state regulation of choices and behavior in marriage and family life. Many of the changes have increased government intervention in family life, while others have decreased it. Without attempting to be comprehensive, the remainder of this Part observes several illustrative instances in which developments since 1960 represent (1) a reduction and (2) an increase in state regulation of family life.

1. Trends Toward Reduced Family Regulation

a. The Decline of Paternalism

One general theme since the 1960s is a loss of faith in paternalism, reflected in attempts — many of them through class action litigation against state institutions — to reduce all forms of discretionary state authority. Among the most notable and successful examples of these efforts are Supreme Court cases establishing procedural and other constitutional protections for children in juvenile courts and the public schools.[64] The reformers bringing these cases were skeptical about the latitude enjoyed under the Progressive Era's procedural models by welfare agency officials, juvenile judges, and school officials who made their own subjective judgments about the best interests of families and children. The reformers were also concerned about the effects of relatively uncritical institutionalization.[65]

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note 265.

[63] The social scientists who recently updated the classical longitudinal study of the American family in the representative city of "Middletown" observed that "the myth of the declining family," which originated in the 1930s, "now seems nearly as indestructible as the American family itself." T. CAPLOW, H. BAHR, B. CHADWICK, R. HILL & M. WILLIAMSON, MIDDLETOWN FAMILIES: FIFTY YEARS OF CHANGE AND CONTINUITY 328-29 (1982) [hereafter T. CAPLOW, MIDDLETOWN]. Their work comparing modern family life with 1920s patterns led them to conclude generally that despite some notable changes in family functions, there has been "no appreciable decline" over the past fifty years in the institutional strength of the family. *Id.* Other research documents that, although the divorce rate has risen, remarriage rates have risen equally high, with a greater proportion of the population presently marrying than previously married. *See* M. BANE, HERE TO STAY 34-36 (1976).

[64] *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (students must receive notice of charges against them prior to suspension); *In re* Gault, 387 U.S. 1 (1967) (due process requires notice of charges when juvenile proceeding may result in incarceration).

[65] The juvenile courts had frequently placed delinquent youth and status offenders

In addition, the reformers relied heavily on procedural due process claims, challenging the standards and methods state agents followed in determining abuse and neglect, changing foster care placements, terminating parental rights, or imposing discipline on public school students. These challenges were partially designed to reduce the authority exercised by state agents, but they were also at times designed to erect procedural barriers that would discourage state agencies from limiting the entitlements of persons dependent on government services.[66] Because the decisions of such agencies are now subject to increased judicial review, these reforms have decreased state agents' capacity arbitrarily to discipline, institutionalize, and otherwise intervene in the lives of the families and young people with whom they deal. However, recent research casts some doubt on whether the new procedural barriers actually reduce state intrusion and whether they in fact serve children's best interests. The removal of discretionary flexibility from some authority figures may simply shift decision making authority from one state agent to another, or it may deprive children of needed guidance to the extent of abandoning them to their procedural rights.[67]

b. The Decline of Morally Based Norms in Legal Enforcement

State intervention into family life or adult relationships is less likely now than previously to be based on moral judgments.[68] This trend has clearly reduced the general scope of state regulation. For example, child custody decisions involving a cohabiting parent are more likely now to turn on evidence that parental conduct would physically harm a child than on claims that the conduct amounts to moral or emotional neglect. Many contemporary decisions about divorce and alimony implicitly reject lifelong commitments of mutual responsibility between marriage partners, in part because of doubts that the social interest in marriage is as important as the individual interest.

The post-1960 reform era has also shown increased sensitivity to the needs of those who once felt social disapproval in not fitting ideal patterns. Thus, discrimination against unwed fathers (whose interests in

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together and the institutionalization of mentally handicapped children was fairly routine. For discussion of a child advocacy case involving the institutionalization of retarded children, see R. MNOOKIN, *supra* note 9, at 265-364.

[66] *See* Hafen, *supra* note 9, at 453-54 (citing R. MNOOKIN, *supra* note 9).

[67] *See* Hafen, *supra* note 9, at 435.

[68] *See* Schneider, *supra* note 1, at 1808-12. It can be argued, of course, that the reticence of judges or other state agents to evaluate personal conduct in moral terms is itself a moral judgment.

their children were long excluded from legal protections of any kind, probably in part to encourage marriage) and in the laws relating to children born outside marriage (such as support and inheritance rights) has been substantially reduced. These changes began with the purpose of accommodating exceptions to the dominant family pattern, but they may now be approaching the point when no particular pattern will seem either socially or legally normative. Today's relatively high illegitimacy rates are also in some significant part attributable to economic factors.[69]

c. Deregulating Marriage and Reproduction

During the last thirty years, the Supreme Court has established significant limitations on state power to regulate marriage and childbearing, thereby removing some basic planks from the platform of nineteenth century family regulation models. Most of these cases center on a constitutional right of privacy that establishes the right of individuals to make personal decisions regarding marriage and childbearing without state infringement.[70] The Court has thus found that states may not constitutionally prohibit access to contraceptives by married couples,[71] single adults,[72] and adolescents.[73] It has not yet ruled whether parental notice requirements in providing contraceptives to unmarried minors are constitutional. The Court's *Abortion Cases* also establish a woman's right to terminate her pregnancy prior to viability.[74] Unmarried minors are entitled to make their own abortion decisions without parental consent if a judge finds either that the minor is sufficiently "mature" to make her own decision or that an abortion is in her best interest.[75]

The constitutional "right to marry" was introduced in 1967, when the Court invalidated a state law forbidding interracial marriages.[76]

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[69] Post-1960 welfare policies based on nonjudgmental and noninterventionist attitudes appear to have created substantial incentives among single parents to remain unmarried, thereby contributing to large increases in illegitimacy rates and, perhaps, to long-term welfare dependency. *See* C. MURRAY, *supra* note 61, at 124-35.

[70] These cases are summarized in Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 507-11 (1983).

[71] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[72] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[73] *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

[74] *See* Roe v. Wade, 410 U.S. 113 (1973).

[75] *See* Bellotti v. Baird, 443 U.S. 622 (1979).

[76] *See* Loving v. Virginia, 388 U.S. 1 (1967).

This right was expanded in 1978, when the Court overturned a statute prohibiting marriage by persons having unpaid support obligations.[77] A state's right to regulate access to marriage has still been upheld in lower court cases involving homosexual couples[78] and underage adolescents seeking marriage without parental consent.[79]

d. Constitutional Protection for Parental Rights

The Supreme Court has created an important enclave for parental autonomy in childrearing through a series of cases based upon the constitutional rights first recognized in the 1920s.[80] It is significant as a matter of constitutional theory that these cases have established a preference for parental rights that has outlasted the preference given during the early 1900s to economic interests. State intervention into child-parent relationships is now theoretically much more suspect than is state regulation of business activities. That these cases have continued their development to the present significantly qualifies the general trend over the past century toward greater state regulation of the family.

The *Meyer* and *Pierce* right of parents to rear their children without justified state interference was reaffirmed in the 1972 case of *Wisconsin v. Yoder*. This decision recognized a fourteenth amendment "liberty" interest in parental authority as well as a first amendment interest in religious freedom. [81] Of course, this right must still be balanced against significant state interests, such as those prohibiting abuse and neglect or those requiring compulsory education.[82]

The Supreme Court has similarly reaffirmed parental interests in a variety of other recent cases. For example, the Court has held that "the fundamental liberty interest of natural parents" requires states to satisfy a "clear and convincing evidence" standard in terminating parental rights because of severe abuse or abandonment.[83] However, due process

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[77] *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

[78] *See* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

[79] *See* Moe v. Dinkins, 669 F.2d 67 (2d. Cir.), *cert. denied*, 459 U.S. 827 (1985). For discussion of additional right to marry cases in lower courts, see Hafen, *Privacy in the Family and the Home*, in PRIVACY LAW AND PRACTICE § 22.04[1][a] (1987).

[80] *See supra* notes 47-49 and accompanying text.

[81] 406 U.S. 205 (1972).

[82] By applying the *Yoder* standards, parents can meet state educational requirements by providing equivalent education for their children in qualified private schools or, in about half the states, in a qualified home school. *See* W. VALENTE, EDUCATION LAW PUBLIC AND PRIVATE 347-50 (1985).

[83] This is a higher standard than the preponderance of the evidence standard required in civil cases but lower than the reasonable doubt standard in criminal cases. *See*

does not require court-appointed counsel for indigent parents in all termination proceedings.[84]

In the area of children's medical care, the Court assigns considerable weight to the parental right of custody, augmented by common-law parental consent requirements and at times by claims of religious liberty — except in life-threatening circumstances.[85] The Court has also upheld parents' right to commit a child to a mental institution without a formal, adversarial hearing, as long as a physician makes an informal but "independent" determination of the child's needs.[86] And, with the exception of a pregnant minor child's qualified right to make her own abortion decision, the Court has generally upheld parental responsibility to supervise the significant choices of their minor children without state interference.[87]

2. Trends Toward Increased Family Regulation

Because the reform era rejected the interventionist tendencies of the Progressive Era, we should theoretically find greater family autonomy from state regulation today.[88] However, the evidence suggests that governmental involvement in family life is at least as great as ever, and in some ways may be more extensive. Yet today's intervention is of a different kind, based on different assumptions, objectives, and background facts.

For one thing, children have always needed state regulation to protect them when their vulnerability put them at risk. Thus, families have historically shared their educational and protective functions with

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Santosky v. Kramer, 455 U.S. 745 (1982).

[84] *See* Lassiter v. Dep't of Social Servs., 452 U.S. 18 (1981).

[85] The Court recently underscored this form of parental autonomy in rejecting the Reagan Administration's position in the 1986 *Baby Doe* case. The Administration had adopted new regulations for handicapped children, requiring hospitals to provide medical care even when parents would not consent. The Court found that the parents involved in the relevant cases had exercised their constitutionally protected discretion to choose "one course of appropriate medical treatment over another" and that the proposed regulations exceeded the scope of the underlying legislation. Bowen v. American Hosp. Ass'n, 476 U.S. 610, 621 (1986).

[86] Chief Justice Burger's opinion acknowledged the risk that some parents would exploit the Court's presumption that parents act in their children's best interests, but he added, "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." Parham v. J.R., 442 U.S. 584, 603 (1979).

[87] *See* Hafen, *supra* note 70, at 511-17; *infra* notes 111-16 and accompanying text.

[88] The "doctrine of nonintervention" in family life was "never stronger" than it is at present. Schneider, *supra* note 1, at 1838.

state agencies.[89] But the contemporary period has introduced more bureaucratized and, thus, less personal forms of state intrusion, especially as family law has become increasingly merged with public welfare law.[90] As divorce, divorce-related child support, welfare entitlements, and illegitimate births have increased since 1960, in part because of the deregulation of adult choices, the number of children needing state supervision has correspondingly increased. New interest in preventing child abuse and in providing child care has also sparked increased need for regulation, not always because of state initiatives toward unwilling parents, but in part because of an apparent decline in parental ability or interest in child care.

Today's approach to intervention is also more a matter of defense than of offense, based less on the affirmative enforcement of social aspirations than on the more negative need to protect particular family members; less on trying to rehabilitate toward family autonomy than on protecting dependent persons from family members who exploit their family's apparent autonomy. However, this reduced interest in the family's institutional strength can, in the long run, also reduce the family's capacity to nurture personal self-reliance and family members' capacity for autonomous action.[91]

Several illustrations of increased family intervention in the contemporary period warrant consideration.

a. Child Abuse

American family law has long prohibited parental neglect and abuse; however, visible national concern about child abuse is a relatively recent phenomenon. Responding to physicians' newly aroused interest in battered children beginning in about 1962, most states passed stringent reporting laws in the 1960s. Congress also enacted a federal prevention and treatment act in 1974. The incidence of reported abuse has now exploded to the point of provoking negative reactions against abuse of abuse laws.[92] Moreover, some recent longitudinal research indicates

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[89] For this reason, even during the nineteenth century, "there is abundant evidence of increased governmental concern for and intervention in the family during just the period in which the private sphere for family relationships is said to develop." Teitelbaum, *supra* note 15, at 1138.

[90] *See* M. GLENDON, *supra* note 57, at 493-95.

[91] *See infra* notes 261-77 and accompanying text.

[92] *See, e.g.*, Johnson, *The Changing Concept of Child Abuse and its Impact on the Integrity of Family Life*, in THE AMERICAN FAMILY AND THE STATE 257 (J. Peden & F. Glahe Eds. 1986); *Sexual Abuse or Abuse of Justice?*, TIME, May 11, 1987, at 49

that domestic violence has probably decreased, not increased, over the past fifty years.[93]

Today's interest in child abuse arises in part from the public's natural, powerful aversion against actual and deliberate harm to vulnerable children, which has clearly been stirred recently by widely reported cases of gross abuse. The newly aroused interest also reflects how the bourgeois family's standards can be turned against their creators when intervention is motivated more by short-term individual protection than by long-term family rehabilitation. Moreover, such interest in the risks of family intimacy coincides with heightened public awareness of dependent and vulnerable persons' needs in all group and institutional settings. This awareness reflects the strong anti-institutional biases that emerged from the 1960s. It is not surprising that the institutional character and broad parental discretion that characterized the traditional family would now fall within this source of closer scrutiny.

Representing a clear-cut exception to the anti-interventionism stressed by recent opposition to state "child saving," the movement against child abuse has raised strong and largely unresolved differences of professional and political opinion about legal standards for intervention. These differences arise not only from varied judgments about the costs and benefits of intervention, but also from differing assessments of the philosophical conflict between public concern with abuse and growing interest in protecting individual liberties against discretionary state interference.[94]

In partially responding to the momentum of the recent movement against abuse, the Supreme Court and some lower courts have recently clarified parents' constitutional position. For example, the Court now requires a higher standard of proof in cases seeking termination of parental rights than it would require for an initial finding of abuse.[95]

(reporting on L. SPIEGEL, A QUESTION OF INNOCENCE (1987)).

[93] *See* T. CAPLOW, MIDDLETOWN, *supra* note 63, at 336.

[94] A panel of American Bar Association appointees has recommended greater precision in statutory definitions of abuse as well as increased procedural protection against arbitrary intervention. Members of this group have also argued that current laws are excessively vague and take inadequate account of empirical evidence showing that state intervention in neglect cases frequently harms children more than it helps them. At the same time, other experts defend the breadth of current standards, advocating increased intervention to monitor parental care. The ABA standards are thoughtfully compared with both less and more restrictive standards in Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645 (1980).

[95] *See supra* note 83 and accompanying text. Reflecting a similar priority for parents' interests, the Utah Supreme Court invalidated a parental rights termination stat-

Some courts have also increased their scrutiny of parents' procedural protections.[96]

b. The Regulatory Effects of Family Deregulation

Sharply increased divorce and illegitimacy rates have created burgeoning numbers of single-parent families, many of whom are subject to the continuing state supervision of postdivorce decrees or welfare regulations. The rate of out-of-wedlock births among unmarried women ages 15 to 19 increased by 64% from 1960 to 1977, even as that rate was falling among older women. During roughly the same period, the percentage of these mothers who kept their babies rather than placing them for adoption increased from 50% to 90%.[97] The number of children affected by divorce has more than tripled since 1960 and current projections estimate that more than half of all children will experience a parental divorce before they reach eighteen.[98] About one quarter of all children now live in single-parent households, and in nine out of ten cases, the single parent is the mother. Moreover, half of these mothers currently live below the poverty line.[99]

Such emerging egalitarian concepts as joint custody and contractual "palimony" rights between cohabiting partners also increase the need to judicially supervise ongoing intimate relationships. Concern grows about the need to strengthen enforcement of child support laws;[100] foster care resources are bulging past the breaking point;[101] and, with more than 60% of mothers with children under 14 now in the labor force, millions of families look instinctively to the state for help and "child

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ute on the grounds that the statute violated parents' natural rights by focusing on "the best interests of the child" rather than parental unfitness. *See In re* J.P., 648 P.2d 1364 (Utah 1982).

[96] For example, the due process interests at stake in physically removing a child must satisfy rudimentary notice and hearing requirements, even if a welfare agency already has legal custody when natural parents retain physical custody. See Doe v. Staples, 706 F.2d 985 (6th Cir. 1983). Considerable uncertainty surrounds the application of due process standards during the investigatory stages of abuse proceedings, indicating a state of flux in legal developments torn by conflicts between parental and children's rights.

[97] *See* M. VINOVSKIS, AN "EPIDEMIC" OF ADOLESCENT PREGNANCY 28-30 (1988).

[98] L. WEITZMAN, THE DIVORCE REVOLUTION 215 (1985).

[99] *See* M. MASON, THE EQUALITY TRAP 49 (1988).

[100] *See Child Support Enforcement Improvements Under Consideration on Capitol Hill*, 13 FAMILY L. REP. 1377 (1987).

[101] *See Foster-Care System is Strained as Reports of Child Abuse Mount*, Wall St. J., June 15, 1987, at 1, col. 1.

care is fast emerging as a political issue."[102]

Against this background, one can picture much of the nation involved in what appears to be one giant, ongoing custody and fitness hearing before an army of family court judges and welfare supervisors. Families in such circumstances were once the exceptions to the dominant pattern, and the legal framework treated them as such, maintaining a strong noninterventionist stance toward "intact" families while looking with great reluctance past domestic thresholds into exceptional homes. As the exceptions have increasingly become the rule, traditional reticence is ending as paternalistic state supervision of intrafamily decision making becomes ever more routine.

Many of these circumstances have arisen not so much because of a sinister conspiracy to impose state supervision on an unsuspecting populace; on the contrary, the new paternalism has arisen at a time of greater skepticism about family intervention than at any time in the Nation's history.[103] Much of what has happened may be an unintended consequence of our contemporary liberation from those confining nineteenth century family models. By deregulating the dominant pattern, we may have only compounded many of the problems we set out to solve — including our interest in deregulation.

One example is illustrative. The divorce reform movement leading to nationwide "no-fault" approaches sought to assure, among other objectives, women's greater personal and economic equality. It was also intended to promote freedom of choice regarding marital continuity. However, it now appears that the reforms have dramatically *reduced* gender equality in the economic effects of divorce and have damaged women and children affected by divorce in innumerable other ways — including exchanging their family autonomy for ongoing, public judicial scrutiny.[104] We are discovering, among other things, that "one person's freedom is another person's disaster" as we "use law to reward individualism rather than partnership in marriage."[105]

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[102] *The Child-Care Dilemma*, TIME, June 22, 1987, at 54, 56.

[103] *See supra* note 88.

[104] *See generally* L. WEITZMAN, *supra* note 98. In California, for example, women can expect a 73% drop in disposable income one year after divorce, while their former husbands can expect a 42% increase. *See* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1251 (1981). Much of this inequity results from the common pattern in which women now bargain away substantial economic support in exchange for child custody, which they would typically have been given under gender-based presumptions favoring maternal care.

[105] Minow, *Consider the Consequences* (Book Review), 84 MICH. L. REV. 900,

Ironically, however, comparing our divorce reform history with contemporary practice reveals that the original reforms probably did not intend to achieve today's practical outcomes in divorce cases. The major new category of marital breakdown as a ground for divorce was supposed to turn on a substantive judicial finding of irretrievable breakdown, but most judges now resolve that issue as "a mere ritual."[106] In addition, the reformed divorce laws anticipated much higher levels of child and other economic support than what has in fact occurred, [107] and the no-fault concept "by a curious accident of language"[108] created the widely accepted perception that since "neither party is at fault . . . no one is responsible for the end of a marriage."[109]

Indeed, apparently both our attitudes and our laws toward marriage and divorce have been transformed without much thought about "why the law ever had any business regulating marriage: the protection of children."[110]

c. Adolescent Pregnancy

The Nation's recent experience with adolescent pregnancy has increased state supervision of family life in two different ways. First, subpart 1 noted that increasing illegitimacy rates and reduced adoptive placement from out-of-wedlock births have contributed to a growing number of single parent families, many of whom require the inevitable state intrusion of public assistance.

Second, legal and policy responses to the issues of adolescent abortion and contraception have led to a uniquely direct relationship between minor children and state agents. Traditional common-law rules require that parents consent to their children's medical care. Exceptions to this general requirement have developed in recent years when lack of parental consent amounts to neglect or when an obvious need for emergency treatment exists. In addition, most states no longer require consent when confidential treatment is required to avoid serious harm, such as with drug addiction, venereal disease, or pregnancy. These exceptions have recently grown to include minors' decisions about abor-

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914-15 (1986) (reviewing L. WEITZMAN, *supra* note 98).

[106] M. GLENDON, *supra* note 2, at 78.

[107] *See id.* at 86-91.

[108] No-fault automobile insurance was introduced at about the same time in the 1960s as the divorce reform movement was launched, yet "nobody meant to suggest that no one is ever at fault when motor vehicles collide." *Id.* at 80.

[109] M. MASON, *supra* note 99, at 22.

[110] *Id.* at 67.

tion and, in some ways, contraception, thereby creating state intervention into what was once a privileged area of parental discretion.

The Supreme Court held in *Bellotti v. Baird*[111] that a pregnant adolescent may make her own abortion decision if a judges finds that she is "mature"; and if she is not mature but still cannot obtain parental consent, a judge may authorize her abortion if he deems it in her best interest.[112] This procedure disregards a traditional principal of family law by substituting judicial discretion for parental discretion when no evidence exists that parental discretion would be harmful; however, the Court justified its view on the grounds that a pregnant teenager is exposed to serious risks with either choice she makes.[113] The Court may also have been influenced by the longstanding rule allowing an unwed mother to choose whether to keep her child or to place it for adoption, regardless of her age or her own parents' consent.[114]

Theoretically, the Court's approach does not depart from the traditional concept that, because minor children lack mature capacity, parents or persons acting as parents must supervise their choices. The *Bellotti* Court merely replaced age-based determinations of maturity with individualized determinations. However, in actual practice this approach essentially defers to minors' preferences, regardless of their level of maturity. Post-Belloti field research in Massachusetts, where the case originated, shows that of 1,300 pregnant minors who sought judicial authorization for abortions without parental consent between 1981 and 1983, all 1,300 eventually obtained an abortion.[115]

Although the Court has not yet ruled on parental consent requirements in an adolescent contraception case, it did invalidate on constitutional privacy grounds a state law that, without reference to parental consent, prohibited the sale of contraceptives to minors.[116] Moreover, federal adolescent pregnancy programs have made contraceptives available to adolescents without parental notice. However, the rationale that traditionally justifies confidential medical treatment does not apply to adolescent contraception, because no existing medical condition requires treatment — unless, of course, we accept Richard Armour's declaration that adolescence itself is a disease. That view has prevailed in cases and policies granting adolescents access to contraception on the rationale

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111 443 U.S. 622 (1979).

112 *Id.* at 647-48.

113 *Id.* at 648-49.

114 *See* Hafen, *supra* note 70, at 514-17.

115 *See* R. MNOOKIN, *supra* note 9, at 239-40.

116 Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

that parental notice requirements will discourage contraceptive use.[117]

d. Residual Regulation Through Traditional Family Laws

Although certain features of our nineteenth century family law inheritance have been eliminated or relaxed, family law has in some ways proven surprisingly resistant to recent developments that might have eliminated all legal distinctions based on marital status. For example, despite the much-discussed sexual revolution, the Supreme Court has refused to extend constitutional privacy to homosexual acts between unmarried, consenting adults.[118] In addition, the Court's use of due process "liberty" and "privacy" concepts in matters of childbearing, child rearing, and intimate personal relationships arguably arises from the traditional place of marriage and kinship as socially and individually significant values, rather than from a new view of individual autonomy or liberty.[119] In none of its decisions giving constitutional status to parent-child relationships outside marriage has the Court given constitutional status to the relationship between unmarried parents.

Moreover, despite a growing sense of ambiguity about the meaning of "family," state laws defining that term remain relatively stable. No state recognizes the validity of homosexual marriages. Further, spouses and children's rights under state inheritance laws, wrongful death laws, and tax laws are confined to relationships based on marriage or kinship. The celebrated *Marvin v. Marvin*[120] case was based on a contract theory, and the court expressly refused to apply California's family law act or to equate cohabitation with marriage.[121] What remains of traditional, status-oriented family law — and much of it does remain — thus acts somewhat as an anchor during a time of drift, preserving the distinction between formal and informal marriage through state-sanctioned legal definitions that are in fact a form of regulation.

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[117] Recent evidence shows that this justification for overriding traditional parental consent rules has not been as successful as policy makers once assumed. As both the number and proportion of adolescent clients increase in federally funded clinics, teenage pregnancy and abortion rates appear to increase rather than decrease. Increased participation in the clinics is associated with lower *birthrates*, but "the impact on the *abortion* and total *pregnancy* rates was exactly opposite the stated intentions of the [federal] program." Weed, *Curbing Births, Not Pregnancies*, Wall St. J., Oct. 14, 1986 at 32, col. 4-6. *See generally* Olsen & Weed, *Effects of Family-Planning Programs for Teenagers on Adolescent Birth and Pregnancy Rates*, 20 FAM. PERSP. 153 (1987).

[118] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

[119] *See* Hafen, *supra* note 70.

[120] 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977).

[121] *See id.*

II. THE FAMILISTIC ENTITY

> Happy families are all alike; every unhappy family is unhappy in its own way.
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> —Leo Tolstoy,
> *Anna Karenina*

As Part I noted, the nineteenth century model of the American family was based on formalized, two-parent, monogamous relationships grounded in commitments to individual choice, mutual responsibility, affection, and children's personal development. This family "teleology" had its origins not simply in Victorian Era Protestantism or in a capitalist response to the Industrial Revolution. Those factors influenced the shaping of the American pattern, but the root ideas developed earlier, within the deep stirrings of affective individualism. This spirit was a child of the Enlightenment and the Renaissance that blended with and drew upon the classical and other traditions of antiquity.

Our approach to state regulation of family life has proceeded from the assumptions of this long lineage, with variations (rather modest ones, until recently) dictated over time by changing circumstances. State power has been employed to sustain our cultural development of the normative family model, both in ratifying its legal existence and in requiring state agents to respect its autonomy. In that way, the state's sanction of fundamental family forms has minimized state intrusion, not only into family relationships, but also into the value transmission process that forms the core of the child-parent relationship. But because the assumptions that shaped these forms of legal thought were cultural and customary in origin, our theory about the nature of and the proper balance between regulation and autonomy in family life has never been thoroughly developed.

Perhaps partly for that reason, such legal theory as we have contains contradictory strains. For example, some nineteenth century courts assumed that parental authority was derived from the state, while the Supreme Court early in this century declared that parental liberties were natural rights that antedated the state.[122] This same contradiction has persisted into more recent times. In a confusing 1976 case, for instance, the Court stated that parents may not veto their pregnant minor daughter's abortion choice,[123] because *Roe v. Wade*[124] held that the state has no power to veto such a choice and a state cannot delegate to par-

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[122] *See supra* notes 47-49.

[123] *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[124] 411 U.S. 113 (1973).

ents a power it does not possess.[125] Yet in a later case, the Court distinguished foster parents from biological parents on the grounds that a foster family has its source in state law and contractual arrangements, while the biological child-parent relationship is a natural right that antedates the state. Justice Brennan, writing for the Court, stated that this "liberty interest in family privacy has its source . . . not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' "[126]

No wonder the editors of a recent collection of essays on the family and the state concluded: "What is missing is a coherent theoretical framework for separation of family and state that will protect the rights of individuals and yet not destroy the 'mystery' that is the family."[127]

A complete discussion of possible theories for this purpose is beyond the scope of this Article, but Part I's historical sketch offers some hints in the direction of theoretical development. Our ability to assess the costs and benefits of particular forms of regulation or particular state policies that affect family life is hampered by the absence of agreement in today's heterogeneous society about the most fundamental purposes such policies should serve. The apparent absence of this kind of public consensus is a major difference between our day and the last century, when so many American family laws were given formal expression.[128] It is partly because of confusion regarding underlying purposes that we continue, in an incoherent and mostly unintended contemporary pattern, to exchange one form of state supervision for another. This incoherence is not significantly clarified by looking primarily for an unqualified general choice favoring or opposing a state role in family law. Unrestricted state supervision of family life's private sphere is inconsistent with the most basic of democratic and constitutional theories. Yet a stance of total nonintervention is also impossible, because some forms of regulation are needed to protect against other forms. To protect some

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[125] *See Danforth*, 428 U.S. 52 (citing *Roe*, 410 U.S. 113 (1973)).

[126] Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

[127] Peden & Glahe, *The American Family in a Free Society*, in THE AMERICAN FAMILY AND THE STATE 15 (1986).

[128] I say "apparent" absence of public consensus because I agree with Mary Ann Glendon that many "normative legal propositions" in family law "have tended to be phased out" in recent years "even when they are quite widely shared." M. GLENDON, *supra* note 57, at 498. In "relinquishing most of its overt attempts to promote any particular set of ideas about family life, modern family law is thus tracking certain well-established trends in modern law" more than it is consciously rejecting particular family patterns for particular reasons. *Id.* Our current approach to divorce is an illustration. *See supra* note 104-110 and accompanying text.

family members and family choices from intrusion is to expose others to intrusion.[129] In even defining which relationships qualify as "families" in ways that protect those relationships from the state, the state can be seen as "regulating family life." Such regulation in the contemporary world may serve important personal and social purposes, but it no longer necessarily merely ratifies pre-existing "natural" conditions because of the belief that such conditions would need to be "created by God or by nature, not by law."[130]

A similar inadequacy exists in statements of family purpose designed only to assure equality or individual autonomy, because those values are incomplete without reference to the social conditions that sustain them. Too much contemporary legal theory, including that typically expressed in family law literature, takes a strictly short-run view of personal autonomy as an exclusive value.[131]

I wish to suggest in this Part that our policies in family law, along with the many other complex purposes they serve, should encourage "familistic" rather than "contractual" or "compulsory" aspirations and attitudes toward family relationships. I then suggest that thinking of the family as an entity can be a means to that end. If the entity concept would not encourage familistic attitudes, we should find something else that would, for those attitudes are more important than any legal or social structure as such. However, familism as defined in this Part seems to create its own sense of structural entity.

I argue within this framework that meaningful personal autonomy for both present and future generations is the ultimate value of a democratic society and that family stability and altruistic intrafamily commitments can play major roles in pursuing that value. However, individual capacity for autonomous action exists in the long run only when nourished by a constitutional context that holds in productive equilib-

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[129] *See* Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REF. 805 (1985); Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985).

[130] As Francis Olsen stated:

> Nonintervention would seem to have meaning against [such] a backdrop of pre-existing prescribed social roles within the family. State-created background rules shape and reinforce these social roles . . . . The setting of the roles requires political choices that can hardly be considered nonintervention. . . . [However, b]ecause the notion of state intervention depends upon a conception of proper family roles and these roles are [now far more] open to dispute, almost any policy may be experienced by someone as state intervention.

Olsen, *supra* note 129, at 848, 859.

[131] *See* Hafen, *supra* note 70, at 558-60.

rium certain naturally competing tensions between the individual and the social order. Thus, one place to begin searching for theory and purpose is to ask what family forms and which state family policies are most likely to contribute to long-range personal liberty — as the Preamble states, "The Blessings of Liberty" not only "to ourselves," but also to "our Posterity." This aspiration is not merely political but personal, seeking individual development of caring commitments toward the welfare of others within close and lasting bonds of intimacy. American society has been losing this aspiration, partly because we have lost sight of how best to nurture attitudes of obedience to the unenforceable.

The teleology of the closed domesticated nuclear family was quite possibly developed over a very long time — whether consciously or not — as a mediating structure between the individual and the state to help fulfill this hope of the Framers. My interest in the familistic entity, however, is based more on function than on history, especially since no single teleology of the family or of family roles will completely serve such a purpose in today's pluralistic American society. Neither the *ancien regime* of the pre-Revolutionary patriarchal family nor the "rights talk" of the modern era offers an adequate present day solution;[132] rather, we must identify "functions and characteristics" in family life today that "may have the virtue of reintegrating individuals and those with whom they deal."[133] This task is overwhelmingly complex, and my suggestion about the familistic entity is thus intentionally modest, intimating a mere step toward a possible direction rather than outlining a comprehensive plan.

A. Familistic, Contractual, and Compulsory Relationships

The distinguished sociologist Pitirim Sorokin once outlined three distinct types or systems of personal interaction that occur throughout human societies: familistic, contractual, and compulsory.[134]

1. Familistic Interaction

Familistic relationships are ideally solidary, intimate, very broad in scope, and the opposite of antagonistic: "their whole lives [are] inter-

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[132] *See* Teitelbaum, *supra* note 42, at 441.

[133] *Id.*

[134] *See* P. SOROKIN, SOCIETY, CULTURE, AND PERSONALITY: THEIR STRUCTURE AND DYNAMICS (2d ed. 1962). I am indebted to Ralph Lindgren, Professor of Philosophy at Lehigh University, for calling my attention to Sorokin's work.

mingled and organically united into one 'we.' "[135] Despite differences in sex, age, or other characteristics, the members of a familistic system share commitments of mutual attachment and interdependence that by definition transcend self-interest to an unlimited degree. A relationship of this kind "yields, as a by-product, pleasure and utility; but it entails also sorrow and sacrifice. However, the sacrifice is regarded not as a disadvantage or as the personal loss of some value, but as a privilege freely and gladly bestowed."[136] Because these relationships are based upon an "unlimited ethical motivation," detailed or legalistic lists of rights and duties among members can hardly describe the nature of the relationship, let alone prescribe it. Because the group's welfare and other individuals' interests predominate, "there is no formal domination and subordination, no master and servant."[137] This implicit commitment to the good of the larger order gives the familistic model its entity-oriented character. The larger order to which individual interests are subordinated is the family unit, which, like other legal entities, has its own independent existence. That the family entity is comprised of more than merely individual interests is reinforced by society's interest in stable marriage, reflected at least theoretically in the idea that the state is a party to each marriage.[138]

To an outside observer, the spontaneous and extensive demands of familistic commitments may appear to be "a severe limitation of the freedom of the parties,"[139] and even at times "a frightful slavery."[140] However, experience demonstrates that familism can yield in the lives of its participants a surprising blend of "discipline with freedom"[141] and "sacrifice with liberty,"[142] even to the point of high personal fulfillment.[143] Sorokin's description portrays an ideal form that, in practice,

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[135] *Id.* at 99.

[136] *Id.* at 100.

[137] *Id.*

[138] For such reasons, "from time immemorial . . . in every society" states have regulated marriage. P. DEVLIN, THE ENFORCEMENT OF MORALS 61 (1965).

[139] P. SOROKIN, *supra* note 134, at 101.

[140] *Id.* at 101.

[141] *Id.*

[142] *Id.*

[143] Michael Novak once wrote:

> Being married and having children has impressed upon my mind certain lessons. . . . The quantity of sheer selfishness in . . . my breast is a never-failing source of wonder. . . . Seeing myself through the unblinking eyes of an intimate, intelligent other, an honest spouse, is humiliating beyond anticipation. . . . My dignity as a human being depends perhaps more on what sort of husband and parent I am than on any professional work I am

occurs in "many gradations and degrees of purity."[144] As "familistic" implies, family relationships represent the prototype for this social system: It approaches its "purest form . . . between the members of a . . . harmonious family,"[145] even though — obviously — not "all or even the majority of the social relationships among members of the family are familistic."[146] Familistic relationships may also exist "[in] a more diluted form . . . between devoted friends, between the members of a religious organization," and in other deeply bonded associational and personal ties.[147]

2. Contractual Interaction

In a democratic and market-oriented society, most organizations' operations and the conduct of most human relationships fall within Sorokin's middle category: *contractual* interaction. This form mixes solidary and antagonistic elements, but it is especially distinguished from familistic ties by its defined scope of solidarity — it is *always* "*limited* in its extensity."[148] This distinction between limited and unlimited solidarity marks a clear-cut boundary between familistic and contractual relationships. Even though a contractual relationship may have high intensity within the defined sector of its interaction, it never involves the "whole life or even its greater part"[149] and is of limited (and usually specified) duration.[150]

The solidarity in a contractual relationship is usually mutual, but its main motivation is "purposive, implicitly egoistic, utilitarian,"[151] and lacking in a "sense of sociocultural oneness of the parties."[152] Each party typically enters the relationship "for his own sake, uniting with the other party only so far as this provides him with an advantage

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> called to do. My bonds to them hold me back from many sorts of opportunities. And yet these bonds are I know, my liberation. They force me to be a different sort of human being, in a way in which I want and need to be forced.

Novak, *The Family Out of Favor*, HARPER'S, Apr. 1976, at 37.

144 P. SOROKIN, *supra* note 134, at 102.

145 *Id.*

146 *Id.* In "the modern family" the "mixed contractual form" also "constitutes a considerable part of its total system of interactions." *Id.*

147 *Id.*

148 *Id.* (emphasis added).

149 *Id.*

150 *Id.*

151 *Id.* at 103.

152 *Id.*

(profit, pleasure, or service)."[153]

The egotism and independence inherent in this motivation do not allow the relationship to be "unlimited or undefined"; therefore, its defined sphere of solidarity remains "limited and tends to be coldly legalistic"[154] to the point of being "a lawyer's paradise."[155] In this environment, the parties cannot implicitly assume the constant "good faith of the other party,"[156] and "the parties feel quite virtuous . . . if they conform to the legal rule, no matter how unfair, from a higher standpoint"[157] their conduct might be. Moreover, accepting egocentric assumptions about the parties' expectations causes leadership within such relationships to be hierarchical, reflecting "formal domination and subordination" based on defined privileges rather than upon the service orientation of familism.[158] In addition, the high value placed upon personal choice in contractual relationships emphasizes each party's opportunity to interpret the limits of his or her commitment according to self-interest.

Because of such relationships' immense variety, they may reflect numerous forms of cooperation, ranging from "benevolent neutrality"[159] through "competitive cooperation"[160] to "simultaneous love and hate."[161]

3. Compulsory Interaction

Compulsory relationships, by contrast, have no mixture of cooperation and antagonism. Rather, the parties remain strangers who are exclusively antagonistic: "a hated master and an inhumanly treated slave,"[162] an executioner and victim, a despotic government and its subjects, a kidnapper and the kidnapped.[163] The subordinate party enjoys no freedom. Further, the parties do not at all share: "The inner world

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153 *Id.* at 104.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 105.

158 *Id.* at 106.

159 *Id.* at 103.

160 *Id.* Sorokin's description under this heading of "an alliance of otherwise antagonistic individuals . . . against a common enemy" may describe the way some parents have been united in alliances of defense against the demands of their children.

161 *Id.* at 103-04.

162 *Id.* at 107.

163 *Id.*

of each is closed to the other."[164] Thus, oppressors frequently develop "certain ideologies . . . to the effect that the parties are fundamentally different in nature,"[165] such as pure and impure races, masters and slaves, "caste and outcaste."[166] Coercion occurs in many forms, but "when it is applied merely in the interest of the stronger party, the relationship becomes in part or in whole compulsory."[167]

In an observation significant for family law, Sorokin notes that compulsory systems may at times take on a "pseudo-familistic" or "pseudo-contractual" appearance.[168] This is the Machiavellian stance in which the stronger party coercively imposes his or her will on the weaker party while appearing to legitimize the coercion. The coercion appears legitimized by false claims that benevolence motivates the action or that it results from the weaker party's free agreement.

B. From Familistic to Contractual Assumptions in Family Law

As Part I observed, Western society over several centuries has experienced a large-scale movement that could be described as a shift in emphasis away from both familistic and compulsory relationships toward contractual interaction. Family life has become more contractual, as have other institutions that once operated on paternalistic, quasi-familial assumptions. Sir Henry Maine found, for example, that the family originally predated the individual as society's primary unit, but since ancient times, "the movement of the progressive societies has . . . been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family as the unit of which civil laws take account."[169]

The steady democratizing of American institutions since the early nineteenth century also fed the widening stream of individualistic Contract. Within the recent past, this gradually growing current also increased its force, as witnessed by anti-institutional attacks against governmental authority and the authority of such intermediate institutions as schools, churches, and families. In addition, even though widespread changes between the seventeenth and nineteenth centuries rendered the

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[164] *Id.* at 108.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 107.

[168] *See id.*

[169] H. MAINE, *supra* note 18, at 163; *see supra* note 18 and accompanying text.

typical American family noticeably less patriarchal,[170] modern feminism has in our own day revealed and, with some success, challenged throughout society prevailing patterns of patriarchal authoritarianism, including role concepts within the family. Today's feminist critique seeks equality in ways not seriously considered by previous American women's rights movements. These ways include not only pursuing economic and political rights per se, but also going "right to the heart of the matter, which is the historic nature of the *role* of each of the sexes."[171] In the aggregate, these anti-institutional forces have contributed to a legal, social, and often very personal emphasis on individual rights in family relationships.

Robert Bellah and his colleagues document as a major theme in *Habits of the Heart*[172] the recent trend from familistic to contractual attitudes in marriage. Contemporary men and women frequently, perhaps typically, enter marriage with the contractualist's assumption of "uniting with the other party only so far as this provides him with an advantage."[173] A marriage is thus "seen primarily in terms of psychological gratification,"[174] with partners often viewing their relationship with a self-focused "therapeutic attitude [that] denies all forms of obligation and commitment in relationships."[175] The partners hold this view in part because they increasingly "think of [all] commitments — from marriage and work to political and religious involvement — as enhancements of the sense of individual well-being rather than as moral imperatives."[176] A similar view "see[s] the family as a collection of individuals united temporarily for their mutual convenience and armed with rights against each other,"[177] as reflected in the extreme individualism that characterizes the current understanding of no-fault divorce laws.[178]

Developments in constitutional law also reflect the shift toward contract in family relationships, although the Supreme Court is not yet willing to see marriage and sexual privacy in totally individualistic terms.[179] The Court's early marriage cases, for example, "turned on the

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170 *See supra* notes 32-49 and accompanying text.
171 R. NISBET, TWILIGHT OF AUTHORITY 83 (1975).
172 HABITS OF THE HEART, *supra* note 10.
173 P. SOROKIN, *supra* note 134, at 104.
174 HABITS OF THE HEART, *supra* note 10, at 85.
175 *Id.* at 101.
176 *Id.* at 47.
177 Schneider, *supra* note 1, at 1859.
178 *See supra* notes 104-10 and accompanying text.
179 *See supra* text accompanying notes 118-19.

importance of marriage to society,"[180] but its more recent right to marry cases[181] generally "turn on the importance of the relationship to the individual."[182] Characterizing personal domestic interests as "constitutional rights," a process that began only recently, was itself arguably a major factor in transforming our thinking about family relationships from a familistic to a contractual framework. The underlying concepts of state domestic relations laws pre-dated development of the more political individual rights doctrines embodied in the Bill of Rights. These domestic concepts applied to relationships among individuals, while the political rights concepts applied to the relationship between individuals and the state.

It is significant in our comparison of the shift from familistic to contractual assumptions in family life that, "The customary and common law traditions . . . on which domestic relations law rested did not derive from the same premises of self-interest inherent in the natural rights doctrines that fueled the political and economic individualism of the nineteenth century."[183] Rather, the domestic interests of the civil law viewed the family as a "place of love"[184] based on "self-forgetting" and the "capacity to care for another which produces a willingness to care for others."[185] However, in more recent years, American society has applied the potent individualistic constitutional doctrines associated with political rights to a variety of social revolutions in ways that tend to politicize whatever they touch. Thus, we now think of domestic relations as part of the individual tradition, resting upon political power, contract, self-interest, and a concept of liberty that will impose a sense of normative duty only when the power of the State can enforce it.[186]

The individualistic emphasis of some recent Supreme Court decisions was most forcefully stated in Justice Brennan's oft-quoted dicta from *Eisenstadt v. Baird*,[187] a case that recognized the right of unmarried persons to obtain contraceptives: "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional

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[180] Note, *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1248 (1980).

[181] *See supra* notes 76-79 and accompanying text.

[182] Note, *supra* note 180, at 1248-49.

[183] Hafen, *supra* note 70, at 571-73.

[184] Address by Walter Berns to the Philadelphia Society 12 (Apr. 11, 1981) (on file with *Michigan Law Review*).

[185] *Id.*

[186] *See* Hafen, *supra* note 70, at 571-73.

[187] 405 U.S. 438 (1972).

makeup."[188]

One sees a similar emphasis on individual rights within families in the Court's decision that the father of an unborn child may not veto the mother's choice to have an abortion, nor may parents veto their unmarried minor daughter's similar choice.[189] The Court has employed similar contractual/individualistic dicta in recent right-of-association cases. These cases suggest that the first amendment's right of association should not be restricted only to "relationships among family members,"[190] but should also protect other forms of "the most intimate . . . personal attachments"[191] so long as they are "sufficiently personal or private to warrant constitutional protection."[192]

It is by no means clear that the movement from familistic to contractual assumptions in marriage and family life is complete, desirable, or here to stay. I will argue that continuing the trend is not desirable and that steps can and should be taken to limit it. Before pursuing that argument, however, I note the views of some who welcome seeing family relationships in contractual terms.

Some feminist interpretations of both cultural and legal history begin with the pervasive assumption that virtually all of our traditional social, political, and other organizations were established by men to protect their own positions of power over women. The family is a ready target for this challenge, because even after nineteenth century legal reforms gave women increased protection, women were largely confined to a domestic sphere by custom and by laws that reflected custom.[193] The contemporary family is similarly vulnerable to criticism by those who believe that marriage is itself essentially an insulated sphere of male domination. Indeed, one can easily imagine that American family life (both now and traditionally) fits neither the familistic nor the contrac-

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[188] *Id.* at 453. *Eisenstadt* appeared to use a lower scrutiny rational basis test rather than the higher scrutiny the Court used in other cases dealing with procreative rights. For an attempt to place this case in context with related cases, see Hafen, *supra* note 70, at 527-44.

[189] *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[190] Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984)).

[191] *Id.* at 545-46.

[192] *Id.* The facts of these cases orient them not toward sexual intimacy, but toward the problem of applying anti-discrimination theories against privately chosen associations. For instance, can state anti-discrimination laws constitutionally bar individuals from discriminating on the basis of gender or of other categories of close judicial scrutiny in inviting guests home to dinner? Even if this question is answered in the negative, that would not make each dinner party a "family" for constitutional purposes.

[193] *See supra* text accompanying note 35.

tual category, but is more accurately described as a *compulsory* relationship.

If one accepts the premise that deeply rooted beliefs in gender inequality pervade our culture, and if one essentially regards the familistic model as an unrealistic myth, one can see the husband/wife relationship within Sorokin's compulsory category: there is in each marriage a male oppressor and an oppressed female victim. The male oppressor implicitly believes "that the parties are fundamentally different in nature" (male and female) and deceitfully employs pseudo-familistic terminology to justify his continuing domination.[194] This deceit would, of course, consciously over-romanticize the domestic realm, marriage, and motherhood. With this picture in mind, one can logically conclude that shifting to a contractual vision of marriage and family life is not a backward step away from relationships of enduring and genuine commitment; rather, it is a forward step from centuries of oppression toward legally assured protection.

A major question that lingers in this hypothesis is whether those who believe the hypothesis simply claim that the familistic model never has and never could actually exist, or whether they would reject it even if it can and does exit. If that model is nothing but a Machiavellian myth, our future attempts at reform should not aspire beyond contractual family ties. Otherwise, perpetuation of the myth would allow continuation of unfair oppression. But if it is not a myth, excluding the familistic model from our aspirations discourages the potential source of our most transcendent relationships.

Others applaud the shift from a familistic to a contractual emphasis on somewhat different grounds. Some legal scholars appear to welcome this development because they believe it offers greater protection for the interests and choices of individuals whose identity or preferences may be submerged by the rigidity and authoritarianism of familistic assumptions. These writers challenge institutional authority in the family in two different ways, one *internal* to the family and the other somewhat *external* to it.

Those who challenge a familistic entity's internal effects criticize state support for the authority of parents or spouses who may, insulated from judicial review by traditional legal doctrines of family autonomy, unfairly (but short of legal abuse) impose their will on family members. On the other hand, some challenge a legally defined external family structure because they reject as arbitrary the state's authoritarian pref-

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[194] *See supra* text accompanying notes 162-68.

erence for certain family forms that exclude those who seek intimate relationships free from the constraints of stereotypical structures and expectations.

Lee Teitelbaum illustrates the critique of internal authoritarianism in the family, arguing that "the family cannot be viewed as a social entity which has an existence apart from public activity."[195] Thus, when courts refuse to resolve intraspousal financial disputes[196] or when they defer to parental authority in child-parent conflicts, they are not really addressing an "entity" or serving a principle of *family* autonomy or privacy; rather, they are allocating "individual power within a social unit in one way or another."[197] Teitelbaum finds that courts often inappropriately use the metaphor of the autonomous family entity to mask the legal system's inability to operate adequately within continuing relationships. In addition, "American social thought has [incorrectly] assumed that while law must provide formal equality among persons, it is not concerned with correcting naturally occurring inequalities among men."[198]

Criticism of the external, state-sanctioned structure of "approved" family forms challenges the exclusivity of a familistic model that is based on formal marriage (which the family as a stable entity requires),[199] because it violates the fundamental principle of autonomous personal choice in selecting, defining, and expressing oneself through intimate relationships. Kenneth Karst, for example, advocates recognizing a constitutional right that would give any "intimate association" between two persons the same protection as the law now gives to relationships based on marriage and kinship.[200] Others urge constitutional protection for intimate relationships that have some of the "functional equivalents" of formal family ties.[201]

These assumptions lead naturally to the conclusion that the principle of autonomy should also constitutionally protect individual choices concerning sexual privacy among consenting adults. For example, when

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[195] Teitelbaum, *supra* note 15, at 1174.

[196] Professor Teitelbaum cites a Nebraska case in which a cantankerous and backward old man refused to buy a variety of basic, modern conveniences requested by his wife. *See id.* (citing McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953)). When the state court refused to respond to Mrs. McGuire's complaint, was it supporting the autonomy of the family entity — or was it supporting Mr. McGuire?

[197] *Id.* at 1175.

[198] *Id.* at 1179.

[199] *See infra* text accompanying notes 262-64.

[200] *See* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

[201] *See, e.g.*, Note, *supra* note 180, at 1281-83.

the Supreme Court in *Bowers v. Hardwick*[202] refused to extend the constitutional right of privacy to protect homosexual acts, the dissenting justices urged that intimate choices should be protected "*not* because they contribute . . . to the general public welfare, but because they form so central a part of an individual's life."[203] For this reason, the constitutionally guaranteed rights to marry and to have children should be protected not to reflect society's interest in its own continuity, to create incentives for optimal forms of child nurturing, or because of "a preference for stereotypical households,"[204] but because "individuals define themselves in a significant way through their intimate sexual relationships with others."[205] Laurence Tribe, who argued *Bowers* before the Court, has suggested elsewhere that current legal developments are liberating "the child — and the adult — from the shackles of such intermediate groups as [the] family,"[206] perhaps because of growing state intervention into family authority and perhaps to protect personal autonomy. He also suggests, however, that being "liberated from domination by those closest to them"[207] creates a significant need for constitutional law to recognize alternative "relationships that meet the human need for closeness, trust and love in ways that may jar some conventional sensibilities."[208]

Concerns about sexual autonomy and unconventional relationships relate to the problem of defining the family, which definitional process an entity concept requires. If the view of the dissenting justices had prevailed in *Bowers*, the constitutional protection thus given to sexual privacy outside marriage would have affected legal — and thus social — definitions of the family by revising legislative and judicial standards that apply to marriage, custody, adoption, and foster care placement. For example, after New York's highest court struck down that state's anti-sodomy law on constitutional privacy grounds,[209] a lower New York court permitted one adult homosexual to adopt another adult homosexual.[210] This state sanction created a "family" relationship, even

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202 478 U.S. 186 (1986).

203 *Id.* at 204 (Blackmun, J., dissenting) (emphasis added).

204 *Id.* at 205 (Blackmun, J., dissenting).

205 *Id.*

206 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1418 (2d ed. 1988).

207 *Id.*

208 *Id.*

209 *See* People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 734 N.Y.S.2d 947 (1980).

210 *See In re* Adoption of Adult Anonymous, 106 Misc. 2d 792, 435 N.Y.S.2d 527 (1981).

though marriage between persons of the same sex is not permitted in New York or, for that matter, in any other state.[211]

Professor Tribe thus appears to reject *both* the internal authoritarianism of family entity autonomy and the external authoritarianism of state-approved family types. In this light, the constitutionally preferred family model based on marriage and kinship resembles a city under siege: those who are in it want to get out, while those who are outside it want to get in. Is the family the primary problem in this picture, or is the very idea of authority a major factor?

Such broad rejections of any authoritarian feature of the family echo a common theme pervading much contemporary criticism of the familistic model — namely, the view that the entity-oriented family's "vital role in authoritarianism is entirely repugnant to the free soul in our age."[212] The past generation's attack on familistic conceptions arose not only, perhaps not even primarily, because of actual abuses of family authority, but also, more broadly, because the family is one of many institutions whose traditional organizational patterns we have begun to question. We have frequently cast these questions in political terms, rejecting any institutional authority that appears to limit individual liberty. We have benefited so much from liberating ourselves from the *compulsory* bondage of medieval status relationships, slavery, and racism that we have uncritically assumed these benefits would continue by challenging the *voluntary* bonding of familism.

I have elsewhere reviewed some of the anti-authoritarian movements of the 1960s, particularly those involving educational settings and the children's rights movement. This review concludes that the recent revolutionary period dismantled many of our authoritarian assumptions and institutions without replacing them. We created this void largely because the revolution was directed against the very concept of authority, rather than toward consciously seeking in a substantive way to replace existing structures and patterns.[213] The familistic entity's institutional authority can be a primary source in nurturing such affirmative goods as long-term personal autonomy, in maintaining social stability, and in allowing the full discovery of personal belonging and fulfillment.[214] Therefore, our retreat from he familistic model without being prepared

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[211] *See id.*

[212] Adams, *The Infant, the Family and Society*, in CHILDREN'S RIGHTS 51, 52 (1971).

[213] Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 677-95 (1987).

[214] *See infra* text accompanying notes 261-77.

to replace its benefits may not have been as thoughtful as the significance of the subject matter deserved.

The sense of possession implicit in the concept of "belonging" suggests relationships as beautiful as enduring love (familistic interaction) or as ugly as slavery (compulsory interaction). In earlier times, common sense revealed obvious differences between these opposite ends along the spectrum of human relationships. But now we are less sure whether the bonds of kinship and marriage are valuable ties that bind or are sheer bondage. Ours is the age of the waning of belonging.

C. Restoring Familistic Aspirations

Some recent literature reveals an emerging uneasiness about the effects of self-oriented contractualism in family life. The research of Robert Bellah and his colleagues, for instance, describes how Americans have shifted their view of marriage from a relatively permanent social institution to a temporary source of personal fulfillment.[215] Despite this pervasive focus on self-interest, most people still nostalgically hope for a family life based on selfless and permanent commitments. This longing, in a perhaps hopelessly dreamy sense, is "in many ways still the dominant American ideal."[216] However, some researchers remain "concerned that this individualism may have grown cancerous — that it may be destroying"[217] such mediating institutions as "family life, our religious traditions, and our participation in local politics"[218] which Tocqueville believed taught the mores, or "habits of the heart," that were essential to "support the maintenance of free institutions."[219]

Similar concerns are appearing in legal literature. For example, Carl Schneider's essay on the loss of moral discourse in family law is written in an essentially descriptive style, but between (sometimes beneath) its Wagnerian lines lurks a genuine disappointment with the extent to which the growing philosophy of therapeutic models and "nonbinding commitments" is stripping American attitudes toward family life of any sense of "prolonged responsibility."[220] To the extent that the decline in moral discourse Schneider documents merely reflects legal recognition of American society's increasing ethnic heterogeneity, there is less cause for concern. But cultural diversity hardly justifies social or judicial dis-

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[215] *See supra* text accompanying note 174-78.

[216] HABITS OF THE HEART, *supra* note 10, at 86.

[217] *Id.* at vii.

[218] *Id.*

[219] *Id.*

[220] Schneider, *supra* note 1, at 1853.

regard for the idea that family members owe special duties of responsibility to one another. Moreover, contemporary pluralism does not require that, in the name of protecting our cultural heterogeneity, we reject the idea that the obligations of marital partners and parents carry serious moral overtones.

Katharine Bartlett's concern about the limitations of "rights" approaches has led her to propose legal perspectives in family law based on "notions of benevolence and responsibility."[221] These notions are "intended to reinforce parental dispositions toward generosity and other-directedness" as opposed to "parental possessiveness and self-centeredness."[222] Martha Minow also reminds us of the risks we incur with policies that "liberate family members from hierarchical control by one dominant member,"[223] when "such rules . . . neglect the complicated preconditions for communal life"[224] and overlook the reality that "belonging is essential to becoming."[225] In divorce reform,[226] policies that pursue liberation from hierarchical control have the perhaps unintended side effect of building "obstacles to affiliation"[227] by underestimating "the dependence of freedom itself on interpersonal connections."[228]

Mary Ann Glendon's comparative studies show that, despite recent reforms in their divorce laws, Western countries other than the United States continue to regard marriage as "an enduring relationship involving reciprocal rights and obligations."[229] This view has sent citizens in those communities a much more constructive message about "commitment, responsibility, and dependency" than the one sent here.[230] The carefree American message has established a sense of individual independence that not only removes a sense of mutual responsibility between family members, but also specifically relieves fathers of a sense of financial or moral obligation toward wives and children in the name of gender equality.[231]

Peggy Davis' recent research by analogy echoes these findings about

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221 Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988).
222 *Id.*
223 Minow, *supra* note 3, at 894.
224 *Id.*
225 *Id.*
226 *See supra* text accompanying notes 104-10.
227 Minow, *supra* note 105, at 917.
228 *Id.* at 918.
229 M. GLENDON, *supra* note 2, at 106.
230 *Id.*
231 *See* M. MASON, *supra* note 99.

the harm of deconstructing our sense of family entity.[232] Her work notes that perhaps the "greatest perceived sin of American slavery" was its conscious tendency to view slaves as individuals who were bought, sold, and relocated without reference to the effects of such action on their family members.[233] This tendency helps to explain the determined efforts of those who enacted the post-Civil War constitutional amendments to strengthen the autonomy of black families as entities.[234] An inverse image of this idea is mirrored in the French revolutionaries' determination to eliminate some aspects of family organization as part of their plan to eliminate all institutional intermediaries between the individual and the state. Professor Glendon has compared this historical example with the less deliberate but similarly effective momentum in recent years of contract against familism.[235]

Thus, one of the powerful long-term effects of the shift toward contract upon our sense of family relations is that, in addition to undermining the law's capacity to teach altruistic values, we have also, perhaps unwittingly, reduced the capacity of a fundamental mediating structure — the family entity — to keep "alive in a population values and incentives which might well, in the future, serve as the basis of resistance" against totalitarianism.[236] Precisely to minimize such risks, Tocqueville looked to the institutional power of mediating institutions — including the family entity as a foremost example — as not only the source to instill character, public virtue, and other habits of the heart, but also as a primary source to "combat the effects of individualism."[237] The totalitarian cannot succeed until "the social contexts of privacy — family, church, association — have been atomized. The political enslavement of man requires the emancipation of man from all the [intermediate] authorities and memberships . . . that serve . . . to insulate the individual from external political power."[238]

The Supreme Court, in spite of its own participation in the movement from familistic to contractual assumptions,[239] has recently shown considerable interest in strengthening the institutional capacity of intermediate institutions in general and the family in particular. I have ar-

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[232] *See* Davis, *Law, Science, and History: Reflections Upon "In the Best Interests of the Child"*, 86 MICH. L. REV. 1096 (1988).

[233] *Id.* at 1112.

[234] *See id.*

[235] *See* M. GLENDON, *supra* note 57, at 502-03.

[236] R. NISBET, *supra* note 18, at 203.

[237] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 509 (J. Mayer ed. 1966).

[238] R. NISBET, *supra* note 18, at 203.

[239] *See supra* notes 179-92 and accompanying text.

gued elsewhere, for example, that one can rationally understand the Court's family-related constitutional decisions of the past thirty years as protecting only relationships within the realm of marriage or biological kinship.[240] The Court's recent refusal to extend the constitutional right of privacy to consenting adult homosexuals contained a particularly explicit rejection of autonomy-based arguments about consensual relationships.[241]

The Court has at times appeared inconsistent in determining the theoretical origin of parental authority, thus leaving unclear whether it sees parent-child interaction as contractual or familistic.[242] But its decisions on parental rights have, except in abortion cases,[243] strongly reinforced parental authority through constitutional theories that clearly place the rights of parents within the most protected enclave of due process liberty.[244]

In a series of recent nonfamily cases, the Court has also shown new interest in familistic assumptions by constitutionally protecting the institutional autonomy of such intermediate institutions as churches, schools, and universities.[245] Some of the Justices seem to recognize that institutions that mediate between the individual and the megastructures of government can nurture constitutional values by enabling personal development while also providing a buffer against state intrusion. In this sense, such institutions are ultimately the friend, not the enemy, of individual liberty. As Justice Brennan wrote in a recent case upholding religious institutions' right to discriminate in favor of their own members in making employment decisions, "[s]olicitude for a church's ability to [engage in its own self-definition] reflects the idea that *furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.*"[246]

For the same reasons that apply to other intermediate institutions, furthering the family's institutional autonomy as a legally and socially significant entity can further (indeed, may be essential to) developing meaningful personal autonomy as well. This idea is one important reason to think of the family — even with the variety of forms it must take

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[240] *See* Hafen, *supra* note 70, at 463.

[241] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

[242] *See supra* notes 123-26 and accompanying text.

[243] *See supra* notes 111-14 and accompanying text.

[244] *See supra* notes 80-87 and accompanying text.

[245] *See* Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685.

[246] Corporation of the Presiding Bishop v. Amos, 107 S. Ct. 2862, 2871-72 (1987) (Brennan, J., concurring) (emphasis added).

in a pluralistic society — as an entity rather than thinking of it primarily in contractual terms as a less structured association of individuals.

D. A Familistic Entity

We might help to restore a more familistic perspective on family relationships by regarding the family as a structurally significant and legally meaningful entity that affects both individual and social interests. Within this Article's limited scope, this idea is necessarily very general, making only a simple theoretical point with no claim of identifying, much less discussing, the issues that would accompany a full discussion.

This notion of entity is nothing more mysterious than what most Americans still assume (even if partly as myth) is "the dominant American ideal"[247] — namely, relationships based upon marriage and kinship in which legal, biological, and social expectations convey long-term, normative, familistic assumptions. Those who accept membership in such an entity implicitly accept in a general — even if, in many ways, unenforceable — sense the familistic model's characteristics. The most salient of these features are the concepts of unlimited or "whole life" scope, long-term duration, and an other-directed motivation to benefit the familial order and its members.[248] This entity is neither patriarchal nor ecclesiastical, even though it reflects its own long, cultural history, including the historical recognition of a social interest in its continuity.[249] Despite the confusing currents noted earlier, both the Supreme Court[250] and much of our current body of state law[251] already assume the existence of this entity as a core legal and cultural form.

More explicit acceptance of familistic expectations associated with an unenforced preference for a marital entity would have primarily attitudinal implications, although some policy implications may also eventually arise from reinforcing this model as an aspirational principle. For example, one can imagine that renewed interest in familistic entity concepts might reinforce the distinction between informal cohabitation and formal marriage.[252] It might also encourage reconsideration of the ease with which unilateral divorce should be permitted[253] and less willing-

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[247] HABITS OF THE HEART, *supra* note 10, at 86.

[248] *See supra* notes 135-48 and accompanying text.

[249] *See supra* text accompanying notes 44-45 & 121-22.

[250] *See supra* text accompanying notes 118-19.

[251] *See supra* text accompanying notes 119-21.

[252] *See generally* Hafen, *supra* note 70.

[253] *See* M. GLENDON, *supra* note 2, at 63-112.

ness to encourage out-of-wedlock births.[254] Such an emphasis might also reaffirm the presumption that state intrusion into a functioning family is inappropriate until carefully defined threshold levels of abuse or neglect are evident.[255]

This conception of the familistic entity differs from some other recent literature on the general topic of state intervention in the family. Two primary variables can distinguish four different approaches to state intervention: (1) whether the state should have broad authority to define the relationships that qualify as legal families, and (2) whether the state should have broad authority to intrude into existing family relationships. This Article's view is that legal policy best serves the purposes for sheltering the family's legal status by answering "yes" to the first issue and "no" to the second. In other words, the state should retain clear authority to define the family, but it should exercise only limited authority to intervene. This approach maximizes the family's institutional strength in order to nurture personal autonomy and fulfillment, and to provide social stability over the long term.[256] Some scholars would answer "no" to both issues[257] while others would apparently answer "no" to the first and "yes" to the second. Scholars advancing this latter approach believe that the state should not define the terms on which families may be formed, but it should willingly intervene to protect individuals who are at risk through internal family inequalities.[258]

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[254] By including families based upon both marriage and kinship, the "entity" I propose accepts single-parent families, but it strongly prefers to regard child-parent relationships initiated outside marriage as "second choice" exceptions to the preferred rule. For some basis for this approach, see Hafen, *supra* note 70, at 492-96. This view can be maintained in ways that encourage fairness to children without unnecessarily sanctioning their parents' conduct. For example, given the serious and well-documented concerns about recent rises in the illegitimacy rate among teenagers, *see supra* text accompanying notes 96-99, it is bewildering that Justice Brennan would write a plurality opinion protecting a single adolescent's right of access to contraception in the name of a constitutional right to "bear or beget a child." Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977). Such language conveys the message that adolescent pregnancy should be affirmatively encouraged — when in fact the Court was clumsily seeking to allow contraception to *protect* immature young people from becoming pregnant. *See* F. ZIMRING, *supra* note 52, at 62-63. Acceptance of a principle that encourages the marital familistic entity as a preferred environment for newborn children would hardly address the intractable problems of teenage sexual experience, but it could encourage courts and state agencies not to abandon desirable social norms unnecessarily.

[255] *See* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

[256] *See infra* text accompanying notes 261-64.

[257] *See, e.g.*, Chambers, *supra* note 129.

[258] *See, e.g.*, Olsen, *supra* note 129; Teitelbaum, *supra* note 15.

A strong affirmative stance on both issues would be represented by the once-proposed Family Protection Act,[259] especially when combined with the Reagan Administration's stance on the Baby Doe case.[260]

I have discussed elsewhere, and thus will not repeat here, why protection for a familistic model as just described helps to ensure a structure that enhances social stability, personal fulfillment, and long-term protection and development of personal autonomy. Those discussions at least partially addressed both the family's internal authoritarianism and an external, state-sanctioned structure for legally acceptable family forms. In only outline form, the reasons for such protection include children's developmental needs, the social value of family members' learning to obey unenforceable expectations, the political significance in a democratic society of maximizing parental influence over the value transmission process in child rearing, and the place of marriage and minority status as sources of objective jurisprudence.[261]

One theme among these ideas is how a familistic entity promotes rather than undermines the development of autonomy, especially for children. Autonomy must be distinguished from liberty, because autonomy more precisely means having the capacity to engage in autonomous action. A child can be at liberty to act autonomously, but if she remains in a dependent state without having developed the requisite skill, she is still not in fact autonomous. Parents committed to a familistic tradition accept the normative obligation to " 'nourish and educate' children in developing the minimal capacities one must possess before the liberty to make binding choices can be meaningful."[262] This developmental process requires "unbroken continuity" in the child-parent relationship, a fact that "underlies generally accepted policies discouraging state intervention in ongoing family relationships."[263] The short term, noncommittal attitudes that characterize a contractual view of family relationships fundamentally undermine this basic children's need. Parents living in "relationships they regard as impermanent . . . are less likely to invest themselves in long term reciprocal patterns that maximize the quality of child development."[264]

In a related context, removing moral concerns or idealistic aspira-

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[259] This Act is summarized in Chambers, *supra* note 129.

[260] *See supra* note 85.

[261] *See* Hafen, *supra* note 70, at 472-91; Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605 [hereafter Hafen, *Children's Liberation*].

[262] Hafen, *Children's Liberation*, *supra* note 261, at 657-58.

[263] Hafen, *supra* note 9, at 446-47.

[264] *Id.* at 449.

tions from the intellectual framework that informs contemporary state intervention can potentially undermine development of the moral attitudes necessary for autonomous individual capacity and long term social survival. Francis Allen has described the recent decline of the rehabilitative ideal in the criminal law, noting by analogy that many forms of therapeutic counseling have recently become less concerned with actual change and more concerned with simply helping patients to be comfortable.[265] This philosophy resembles therapy for a terminal illness more than it resembles constructive assistance toward the development of healthy and autonomous individual capacity. To the extent that similar attitudes attend intervention in family life, families and the individuals that comprise them are likely to enjoy an appearance of liberty that masks an absence of actual autonomy. As a result, they will require ever more state intrusion over time.

Emphasizing the family's "internal" institutional autonomy may leave some deserving individuals without legal recourse for unequal treatment or other wrongs (short of actual abuse) that they may suffer within the sphere of family privacy. However, unless we to some degree assume that risk, constant legal intervention (or the threat of it) will destroy the continuity that is critically necessary for meaningful, ongoing relationships and developmental nurturing. Even the "direct, prolonged conflict" that may characterize some family continuity may play a significant role in "forging communal bonds."[266] Bonds of lasting intimacy leave family members undeniably vulnerable, but the same relationships and loyalties that seem to tie us down are, paradoxically, the sources of strength most likely to lift us up. One is naive to believe that we could be fully liberated from the apparent bondage created by familistic ties and still somehow be assured of the personal support systems found only in long-term commitments.

Moreover, when we increase state intervention in an ongoing family to protect the autonomy of some family members against others, we may be simply be exchanging one threat to autonomy for another. We must then ask which threat is worse — the state or other family members. In cases of serious spousal or child abuse, the threat from within the family is obviously worse. Over the long run, however, liberal thought has usually, and accurately, perceived the state as a more frightening enemy of personal liberty. Yet, as we have recently "deregulated" the family's external structure by the increased use of contractual models and by the diminution of moral discourse, we have in

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[265] *See* F. ALLEN, *supra* note 62, at 28.

[266] Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 394-95.

some ways actually increased state regulation of intimate relationships.[267]

For example, compare the effects of recent divorce reforms with Mrs. McGuire's problem. Mrs. McGuire's elderly husband unreasonably refused to purchase some modern conveniences for the family, but the Nebraska Supreme Court refused to invade the family's autonomy.[268] On its face, the concept of family entity upheld in this case appeared to render Mrs. McGuire's plight "invisible," ratifying only her husband's economic power over her — which can understandably leave one wondering "in what sense the family as an entity was made free."[269] However, Mr. McGuire was still required to pay for his wife's "necessaries" and Mrs. McGuire could have asked for and received even further support had she been willing to move out, which she chose not to do.[270]

Now consider Mary Ann Mason's problem. She was married in California, had a child, then experienced a "no-fault" divorce.[271] The divorce decree's terms left her alone with her child and with a huge drop in disposable income, while her ex-husband experienced a hefty increase in his disposable income. Ms. Mason reports that by allowing easy termination of marriage on the assumption that "no one is responsible for the end of a marriage,"[272] and by leaving her with the financial responsibility for her child on the assumption that women with children are "independent," the law is an "equality trap"[273] that has undermined men's sense of commitment to their wives and children. This story leaves one wondering in what sense Ms. Mason was made free by so easily disregarding her membership in a family entity, and leaves unanswered the question of who has the worse problem — Mrs. McGuire or Ms. Mason?

In the long run, Ms. Mason's problem may be worse. Familistic assumptions ultimately hold spouses and parents to a higher standard of accountability than do contractual assumptions, even though the contractual approaches may appear at first blush to yield more prompt and direct judicial action. Much familistic accountability is in fact legally unenforceable, relying by its very nature on the informal enforcement

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267 *See supra* text accompanying notes 97-110.

268 *See supra* note 196 and accompanying text.

269 Teitelbaum, *supra* note 15, at 1174, 1178.

270 *See supra* note 196.

271 M. MASON, *supra* note 99, at 14.

272 *Id.* at 22.

273 *Id.*

power of shared social norms, reinforced perhaps only in principle by the assumptions of accepted legal expectations. However, as Mary Ann Mason discovered in her legal research, the general sense of family obligation reflected in earlier American law assured women and children of greater support, both during and following a marriage. She now understands why earlier women's rights reformers supported "the family unit as the essential core of society"[274] — that basic policy more successfully encouraged men to support the other members of their families.[275] This view is more easily understood in families with children, and it by no means addresses the host of gender equality issues that recent reforms have identified. However, it does illustrate how traditional judicial reluctance to invade the family entity can in fact strengthen rather than undermine spousal and parental commitments.

The familistic entity draws upon different philosophical wellsprings from those that feed contractual models. By its nature, the familistic entity has greater capacity to encourage the kind of human caring and sense of mutual responsibility for which the contemporary world cries out — even though such sensitivities cannot always be legally required or enforced. By contrast, people in more enforceable contractually based relationships predictably "feel quite virtuous . . . if they [merely] conform to the legal rule, no matter how unfair, from a higher standpoint" their behavior might be.[276]

A genuine personal willingness to assume affirmative duties and lasting commitments depends heavily upon the influence of normative models that have the innate power to produce altruistic attitudes regardless of legal enforceability. To abandon the quest for social acceptance of such attitudes is tempting when we see that someone like Mr. McGuire obviously falls short of our aspirations. Our irritation with such people moves us to ask "the law" to do something about them. But this urge too easily forgets that rule-bound, enforcement dependent standards have no power beyond what is legally enforceable. It also forgets that people who might have been more willing than was Mr. McGuire to respond at levels well beyond what is enforceable need social incentive and vision as sources of motivation and expectation. "[I]n a pluralistic, secular society like that of the United States," aspirational legal concepts such as the familistic entity can become "an expression and source of common values"[277] that encourage a greater

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[274] *Id.* at 37.

[275] *Id.*

[276] P. SOROKIN, *supra* note 134, at 105.

[277] M. GLENDON, *supra* note 2, at 139.

public willingness to obey the unenforceable.

EPILOGUE

The theme of father and son has recently come to "haunt the imagination of a whole generation of [American] poets."[278] In a 1984 anthology collecting the work of 100 American poets writing on this theme,[279] nine-tenths of the poems were written since about 1950. Poet Stanley Kunitz finds this a "revealing statistic,"[280] noting that "no equivalent selection could have been made in any other period of the history of poetry."[281] Kunitz speculates that perhaps "the filial relationship, being taken for granted in a more stable society, simply did not excite the poetic imagination."[282] Upon further reflection, he finds the modern proliferation of this theme "an authentic cultural manifestation,"[283] not as "an occasion for a devotional exercise" so much as "a summons to testify about a failed intimacy, a failed life, perhaps to redeem it through a new effort of understanding."[284]

Today's father-son poetry reflects the collective intuition of the times:

> With the disintegration of the nuclear family, the symbol of the father as a dominant, or domineering, presence is fading away. Whole sections of our nation are living in fatherless homes as a result of death, illegitimacy, divorce or abandonment. Even when he is physically present in the household, the father may be spiritually absent . . . . Often the father is more than absent; he is lost, as he has been lost to himself for most of his adult life, . . . [And in the modern father-son poetry,] [t]he son goes in search of the father, to be reconciled in a healing embrace.[285]

Kunitz instinctively identifies with this theme, having himself written as a young man after the death of his own father:

> down sandy road
> Whiter than bone-dust, through the sweet
> Curdle of fields, where the plums
> Dropped with their load of ripeness, one by one
> Mile after mile I followed, with skimming feet
> After the secret master of my blood,

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278 Kunitz, *The Poet's Quest for the Father* (Book Review), N.Y. Times, Feb. 22, 1987, at 3, col. 1.

279 DIVIDED LIGHT: FATHER AND SON POEMS (J. Shinder ed. 1984).

280 Kunitz, *supra* note 278, at 36.

281 *Id.*

282 *Id.*

283 *Id.*

284 *Id.*

285 *Id.* at 37.

> Him, steeped in the odor of ponds, whose indomitable
> love
> Kept me in chains
> . . . .
> At the water's edge, where the smothering ferns lifted
> Their arms, Father! I cried, Return! You know
> The way. I'll wipe the mudstains from your clothes;
> No trace, I promise, will remain. Instruct
> Your son, whirling between two wars
> In the Gemara of your gentleness,
> For I would be a child to those who mourn
> And a brother to the foundlings of the field
> And a friend of innocence and all bright eyes.
> O teach me how to work and keep me kind.[286]

Here is the paradox of loving bondage in the ties that bind, the spirit of intimate belonging — liberating while yet confining: "After the secret master of my blood, [whose] indomitable love kept me in chains."[287]

Perhaps our Nation's ambivalent attitude toward morally demanding legal and cultural expectations in family life resembles contemporary attitudes toward father figures: We instinctively reject authority that temporarily represses in order to teach. But when the symbolic, authoritarian father clothed in the form of our legal and social norms concedes to our pleas to be left alone, as we have seen since the 1960s, there may be a momentary sense of freedom which, when prolonged, finally becomes a sense of abandonment. In that sense, the cry for failed intimacy represented by the new father-son poetry may reflect a deeply felt anguish in our culture that reaches out for help. Much of this help must be personal, but some help could well come in the form of a better understanding of the law's role in nurturing familistic commitments: "Father! Return! you know the way. . . . O teach me how to work and keep me kind."[288]

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[286] *Id.* at 3, 36.
[287] *Id.*
[288] *Id.*