Placing the Family in Context

*Lee E. Teitelbaum**

INTRODUCTION

This Symposium aims to explore two perspectives: how the law defines the family and how the law reflects changes in family structure. These are, perhaps, obvious topics to address and require no validation as a symposium's focus. At the same time, the very obviousness of these topics reveals some important aspects of modern family law and the scope of appropriate inquiry. The following discussion sketches several characteristics of the family's place in law which suggest why a broad focus is not only appropriate but essential to a modern symposium on family law.

Part I begins by briefly reviewing what might be called the classical legal tradition. The hypothesis is that family law has been oddly situated in legal discourse. Contracts and torts, "classical" doctrinal areas, developed a specific "theory": that is, a relatively narrow body of generating principles driven by a clear methodological focus. This body of principles allowed those fields to appear rational and even scientific, although at the cost of sharply constraining their scope and even their importance. Family law did not develop a theory in this sense. The approach that did emerge was in some respects equally narrow, but essentially negative. Legal, social, and popular discourse all agreed that the principles of family operation were not part of, and were necessarily different from, those found in other legal and social enterprises. That approach provided little theoretical basis for discussing the relationship between political and social institutions and the family, except to define the boundaries between their respective domains.

As this Symposium's focus suggests, the essentially jurisdictional approach to legal institutions and the family has begun to recede. Parts II and III of this sketch seek to show the importance of this change in approach. These sections suggest that the family should not be regarded

---

* Associate Dean and Professor of Law, University of Utah. The Author would like to express his great appreciation to Wayne McCormack, Carl Schneider, Martha Minow, and Carol Weisbrod, all of whom commented critically but helpfully on parts of this discussion.

as a haven, isolated from other social institutions. Rather, it is a member, although a quite distinctive member, of a set of systems with shared and interactive functions. Although this conceptualization recognizes a greater social role and importance for the family than does the more usual approach, it also seems to ring truer than the traditional view, however much the latter has claimed to celebrate the domestic sphere.

I. The Traditional Approach: The Family as Island

A. The Isolation of the Family in Legal Thought

In a recent article, Carl Schneider sought in a characteristically thoughtful and elegant way to explain why family law has never developed the capacity for generalization found in many other areas of law.[1] One circumstance which may contribute to the low level of theory, he suggests, is the field's relatively recent emergence.[2] Until James Schouler's *A Treatise on the Law of Domestic Relations*[3] appeared in 1870, the law of husband-wife and of parent-child relations were separate areas of discussion, although they were at times combined in the same chapter, as Blackstone did.[4] A second circumstance Professor Schneider mentions is the field's lack of prolonged national attention.[5] Family law has somehow seemed extrinsic to the major concern of American life: progress measured by industrial and commercial development.

A third circumstance is the failure of family law to choose a single problem with which to deal and a single disciplinary focus.[6] These are related factors. Contracts, to take the most familiar example, came to address a single, generalized problem: the enforcement of promises. Torts took compensation for injury as its concern. As Grant Gilmore[7] and Lawrence Friedman[8] have shown, legal writers created both of these foci during the nineteenth century. Langdell formed the view that all of the various existing bodies of commercial law — agency, bailments, insurance, partnership, promissory notes, maritime contracts, to

---

[1] *See* Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. Mich. J.L. Ref. 1039 (1985).

[2] *See id.* at 1044.

[3] J. Schouler, A Treatise on the Law of Domestic Relations (1870).

[4] *See, e.g.*, 3 W. Blackstone, Commentaries * 373, at 138-43.

[5] *See* Schneider, *supra* note 1, at 1045.

[6] *See id.* at 1046-47.

[7] G. Gilmore, The Death of Contract 5-34 (1974).

[8] L. Friedman, Contract Law in America 20-24 (1965).

name only a few — could be categorized into a few basic principles.[9] Holmes objectified these principles, turning them into a set of entirely abstract relationships that were blind to persons or subject matter.[10]

The result was a body of law for which the limit of analysis was "the individual." Of course, "the individual" does not exist in life; it is only the legal expression of Robert Musil's "Der Man Ohne Eigenschaften"[11] — the man without qualities. In contracts, for instance, individuals have no family or relations; they are not clever or stupid; they are not rich or poor. They stand alone, calculating their chances and accepting the results — whether they like them or not.

In thus defining the individual, contract law exemplifies the thrust of nineteenth century legal development: the separation of legal norms from other social structures, particularly the family.[12] Maine's theory of the law's movement from status to contract[13] and Weber's theory of society's increasing formal rationalization[14] both emphasize the relative independence of legal rules. Legal relations came to depend on the personhood of a legal actor and not on her social position, family status, or other situational characteristics.

This development was closely associated with the need, in a commercial society, for legally reliable, secure, and calculable predictions.[15] As commerce spread across countries, these predictions had to be abstractly calculable. Individuals had to be able to make business judgments secure in knowing the conventions and expectations that would govern their transactions. This security could only be supplied by ignoring not only the lines of social differentiation but also the actual capacities and expectations of individuals. Legal doctrine supplied what was therefore necessary: a uniform set of conventions and expectations. Capacity was provided by a working assumption that all persons were equally knowledgeable, while understanding was provided by substantive contract

---

[9] *See* G. GILMORE, *supra* note 7, at 12-13.

[10] *See id.* at 20-21.

[11] *See* R. MUSIL, THE MAN WITHOUT QUALITIES (E. Wilkins & E. Kaiser trans. 1980).

[12] Maine's theory of the movement of law from status to contract and Weber's theory of the increasing formal rationalization of society both emphasize the divergence of legal norms from other social structure. *See* H. MAINE, ANCIENT LAW (1864); M. WEBER, ON LAW IN ECONOMY AND SOCIETY (E. Shils & M. Rheinstein trans. 1966). Legal relations during this period have come to depend on the personhood of a legal actor and not on his or her social position or, particularly, family status.

[13] *See* H. MAINE, *supra* note 12.

[14] *See* M. WEBER, *supra* note 12.

[15] *See* N. LUHMANN, A SOCIOLOGICAL THEORY OF LAW 13-15 (E. King & M. Albrow trans. 1985).

rules themselves. The parol evidence rule assured that nonconventional expectations, even if known, would be given effect only if expressed in the conventions of contract.

Thus, contract law grew out of an interrelated set of assumptions about the nature and function of law. Its relation to economics is not really a choice of one discipline over another, but the seemingly inevitable incorporation of a pervasive ideology and accommodation to the development of regional and international commercial practices.

The relation between torts and economics is much the same. At one time, it is true, tort law seemed to concern itself with notions of personal responsibility and, thus, to have much in common with moral philosophy.[16] After Holmes, however, it was transmuted into a vehicle for economic progress in which liability rested on the violation of objective community standards — those of the "reasonable man." What was "reasonable" took into account efficiency rather than decency, which might have deplored what tort law justified: the infliction of injury to others when economic progress so required.

In contrast, family law never developed the analytical mode which characterizes the "classical" fields of law. One reason, as Professor Schneider indicates, is historical.[17] Family law as a single field did not begin to emerge until the end of the last century. By then, the purity of contracts and torts had already lost some of its charm. In addition, labor laws, antitrust laws, and worker's compensation had begun to command public thought.

However, the most important reason for family law's failure to resolve itself into a single problem and a single analytical mode is that the general ideological tenor of nineteenth and early twentieth century thought which informed contract and tort law did not seem applicable to families. As we have seen, liberal economics meant more than a relatively small academic department located somewhere in the College of Arts and Sciences. In the nineteenth century, economics was a *weltanschauung* rather than a discipline. It affected sociology and all science as well as political thought, as the commonalities found in Darwin and Spencer make clear.[18] This general theory of progress re-

---

[16] *See* G. GILMORE, *supra* note 7, at 16-17.

[17] *See* Schneider, *supra* note 1, at 1044-45.

[18] *See generally* DARWINISM (1880-1889) (a collection of essays at UCLA Biomedical Library). *Compare* C. DARWIN, THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (1872) *and* C. DARWIN, THE DESCENT OF MAN (1871) *with* H. SPENCER, THE FACTORS OF ORGANIC EVOLUTION (1888) *and* H. SPENCER, FIRST PRINCIPLES (1863).

lied explicitly on the self-interested activities of individuals from which public good would emerge.

As clear as this theory is, it was equally clear that what was valued in the public sphere was not valued in the home. The home was the domain in which values inappropriate to success in the world — altruism, sympathy, mutualism — still retained importance. Family life was as much removed from the world ideologically as it was supposed to be socially and personally.

To be sure, a legal approach to the family did emerge, but it was largely by opposition to other bodies of law. A central feature of contract law is that persons are free to bargain and free to walk away from a bad bargain. An equally central feature of domestic relations law has been that persons could not do so. Although traditional domestic relations law — that is, doctrine until the last two or three decades — typically referred to marriage in terms of "contract," it also sharply restricted spousal bargaining capacity. Even with the demise of the common-law doctrine of spousal unity[19] and general adoption of Married Women's Property Acts,[20] courts continued to limit the extent of bargaining allowed between husbands and wives, especially regarding the "essentials" of marriage: the husband's duty of support;[21] the wife's duty to perform household services;[22] and specific issues of daily family life. Nor have spouses generally been free to walk away from bad bargains: that is, from marriages that proved unsatisfactory. Relatively recently, the plaintiff in a New York case[23] complained that his wife had

---

[19] Everyone is familiar with this doctrine or "myth," according to which the husband and wife became "one flesh" upon marriage. The classic statement is that of Blackstone, who observed that: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 W. BLACKSTONE, COMMENTARIES * 442 (W. Lewis ed. 1897). This notion explained why husbands and wives could not contract with each other, commit compensable injuries upon each other, or convey property directly to each other.

[20] *See* Married Women's Citizenship Act, Pub. L. No. 67-346, ch. 411, 42 Stat. 1021, 1021-22 (1922); Married Women's Rights Act, ch. 303, 29 Stat. 193, 193-94 (1896) (District of Columbia statute).

[21] *See, e.g.*, Graham v. Graham, 33 F. Supp. 936, 938 (E.D. Mich. 1940); H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 227 (1965).

[22] *See, e.g.*, Youngberg v. Holstrom, 252 Iowa 815, 108 N.W.2d 498 (1961); Frame v. Frame, 120 Tex. 61, 36 S.W.2d 152 (1931). *See generally* Havighurst, *Services in the Home — A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386 (1932).

[23] Pierone v. Pierone, 57 Misc. 2d 516, 293 N.Y.S.2d 256 (Sup. Ct. 1968).

left home more than a month previously.[24] That seems to have been the good news. Before her departure, the wife drank almost every day, stayed out late at night, and abused her children and the plaintiff.[25] Nonetheless, the court held that plaintiff had failed to establish the grave harm required for cruelty divorce and observed, perhaps smugly, that "the innocent spouse may continue indefinitely to suffer misery and unhappiness, but that is a risk he assumed when the marriage took place."[26]

Tort principles, like those of contract, did not generally operate within the household. The anonymity and independence of individuals in the public sphere contrasted sharply with relations within the family. Once in the home, personal individuality disappeared, to be reified in another entity: the family. To allow one spouse to sue another would impeach that domestic unit, so it was not allowed.[27] The same conclusion was reached for suits between parents and children. Courts often expressed the view that to allow minors to sue their parents would invade the parents' natural authority. A Rhode Island court,[28] for example, denied recovery to a child seeking to sue his parent and an insurance company for injuries arising from an automobile accident, on the following ground:

> Immemorially, the family has been an important element of our civil society, one of the supports upon which our civilization has developed. Save as modified by the Legislature, in domestic affairs the family has remained in law a self-governing entity, under the discipline and direction of the father as its head. . . . Anything that brings the child into conflict with the father or diminishes the father's authority or hampers him in its exercise is repugnant to the family establishment, and is not to be countenanced save upon positive provisions of the statute law. Any proceeding tending to bring discord into the family and disorganize its government may well be regarded as contrary to the common law . . . .[29]

The legal approach to the family thus came to adopt an odd posture. On the one hand, domestic relations does not seem to have resolved

---

[24] *Id.* at 517, 293 N.Y.S.2d at 257.

[25] *Id.*

[26] *Id.* at 518, 293 N.Y.S.2d at 258.

[27] The standard discussion and critique of this doctrine is found in W. PROSSER, HANDBOOK OF THE LAW OF TORTS 859-69 (4th ed. 1971). Prosser observes that, although the initial basis for spousal tort immunity lay in the fiction of marital unity, its more recent justification was typically expressed in terms of preserving "the peace and harmony of the home." *Id.* at 863.

[28] Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925).

[29] *Id.* at 132, 131 A. at 199. For the history of intrafamilial tort immunity, see McCurdy, *Torts in Domestic Relations*, 43 HARV. L. REV. 1030 (1930).

itself into a few generating principles informed by a common methodology, as the "classical" fields have done. On the other hand, the family was, for some time, abstracted from both the society in which it appeared and the rules and methodology applicable to affairs in the larger society. The values held by a "successful" family were directly opposed to the self-interest which drove success in the public arena. Concomitantly, legal rules created to resolve disputes among strangers, to whom anonymity and exigent individualism could and seemingly had to be imputed, appeared inappropriate to the most intimate of relationships.

The doctrinal isolation of domestic relations law was associated, in ways not yet fully clear, with the contemporaneous assumption by various public institutions of responsibilities previously discharged by families.[30] Take, for example, the education of children. Compulsory public school laws appeared in this country as early as the first third of the nineteenth century.[31] These schools were expressly founded on two assumptions: that parents were often unable or unwilling, because of their own ignorance or vice, to properly educate their children, and that when parents failed in this respect, their control over their children was subject to governmental invasion. The New York Public School Society asked for authority over truants on the ground that:

> Every political compact supposes a surrender of some individual rights for the general good. In a government like ours, 'founded on the principle that the only true sovereignty is the will of the people,' universal education is acknowledged by all, to be, not only of the first importance, but necessary to the permanency of our free institutions. If then persons are found so reckless of the best interests of their children, and so indifferent to the public good, as to withhold them from that instruction . . . it becomes a serious and important question, whether so much of the natural right of controlling their children may not be alienated, as is necessary to qualify them for usefulness, and render them safe and consistent members of the political body.[32]

In time, the milder critique of relative expertise replaced this set of assumptions, although with similar implications for the locus of responsibility for education. Progressive educational theory, as it developed

---

[30] For a fuller discussion of this phenomenon, see Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135; Teitelbaum & Harris, *Some Historical Perspectives on Governmental Regulation of Children and Parents*, in BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT (L. Teitelbaum & A. Gough eds. 1977) [hereafter BEYOND CONTROL].

[31] *See* Teitelbaum & Harris, *supra* note 30, at 18-19.

[32] Trustees of the Public School Society of New York, *Twenty-Seventh Annual Report* 14-16 (1832), in 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 260 (R. Bremner ed. 1970) [hereafter CHILDREN AND YOUTH IN AMERICA].

around the turn of the century, supported the spread of compulsory public education without attacking the parents' characters. However, progressive educators did suppose that appropriate instruction required special knowledge and skills which parents could rarely be expected to possess. As John Dewey explained, public schools would do "systematically and in a large, intelligent, and competent way what for various reasons can be done in most households only in a comparatively meager and haphazard manner."[33] As a result, legal regulation reassigned a substantial part of a child's education to public institutions.

A similar pattern characterized other aspects of parent-child relations. The home was, during the colonial period, both the initial and the residual locus of social control. Puritan parents were enjoined to rear their children to work and to accept authority, as well as to pass on "so much learning as may enable them perfectly to read the English tongue and knowledge of the capital laws."[34] The children were enjoined to accept their parents' direction and authority, upon the threat of death.[35] When parents or children failed in their responsibilities, town selectmen might place children in another, presumably more successful, home through the agency of involuntary apprenticeship.[36]

Public apprehension about child-rearing remained acute in the nineteenth century. Indeed, by the 1820s, a body of criminological literature appeared which located the roots of crime precisely in failures of parental supervision.[37] However, the old remedy for such failures — placement of children in a new and better family — no longer seemed as readily available. Industrialization had begun to move fathers from homes and thus from instructing their children in a trade or business, and indenture to employers came to seem dangerous. Official agencies encountered increasing rates of cruelty, neglect, and disease among children. These agencies now resorted to institutional solutions: almshouses for the needy and houses of refuge for truant, neglected, and delinquent boys (and, to a lesser extent, girls).[38] As with compulsory education, the original justification for the rise of these institutions lay in the importance of social control and the paramount public interest in assuring

---

[33] J. DEWEY, THE SCHOOL AND SOCIETY 47-53 (1900), *quoted in* 2 CHILDREN AND YOUTH IN AMERICA, *supra* note 32, at 1117.

[34] *Laws and Liberties of Massachusetts*, *quoted in* 1 CHILDREN AND YOUTH IN AMERICA, *supra* note 32, at 40.

[35] *See* Teitelbaum & Harris, *supra* note 30, at 12.

[36] *Id.* at 9-10.

[37] *Id.* at 15.

[38] *See id.* at 19.

that children were properly socialized. A Pennsylvania court's[39] rationale upholding commitment of a wayward child to a house of refuge sounds remarkably like that which the New York Public Schools Society invoked to support public compulsory education:

> The object of the charity [the House of Refuge] is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living . . . . To this end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members and that of strict right, the business of education belongs to it.[40]

The principle that the public had a prominent and, perhaps, the greatest interest in the education and socialization of children tended to turn the family more in on itself. Assumption of these responsibilities by public agencies made the functions themselves seem ultimately "public." Agency responsibility assumed that determination of the norms for education and socialization appropriately lay within the public arena and that expert agencies could perform education and correction more efficiently than families. These convictions, usually regarded as typical of the social differentiation found in modern societies, plainly distinguish the capacities and roles of public and private actors. What was left to the family was a set of functions — emotional support and succor — that formal systems, which define their activities in terms of relatively specific social tasks and measure their operation in terms of efficiency or utility, rarely seek to assume. To this extent, at least, the family became a residual category in law, although in a rather different way than contracts and torts.

B. The Isolation of the Family in Other Fields of Discourse

The view of the family as a unit whose function and principles of operation differ sharply from those of the public arena was not simply an expression of legal policy. That view was, rather, part of more generally held interpretations. Nineteenth-century social discourse heavily emphasized the separation of "public" and "domestic" spheres. Economic and political life was seen as an egoistic, relentlessly competitive jungle. From this struggle, respite was necessary, and the home — the "private sphere" — provided that refuge.[41] At least rhetorically, these

---

[39] *Ex parte* Crouse, 4 Whart. 9 (Pa. 1938) (per curiam).

[40] *Id.* at 11.

[41] *See* Demos, *Images of the American Family, Then and Now*, in CHANGING

domains were not merely separate but nearly parallel universes with different loci of authority as well as different sets of functions. Public life was the male domain; the home was the wife's. The domestic sphere was a place which storms did not batter nor armies invade. As the *Santa Clara Argus* stated in 1886:

> Where will our sorrows receive the same solace, as in the bosom of our family? Whose hand wipes the tear from our cheek, or the chill of death from our brow, with the same fondness as that of the wife? . . . If the raging elements are contending without, here is shelter. If war is desolating the country, here is peace and tranquility.[42]

Perfect pitch is not required to hear in this refrain an echo of judicial pronouncements, on both sides of the Atlantic, that "each house is a domain into which the King's writ does not run, and to which his officers do not seek to be admitted."[43]

Prevailing sociological theory has also interpreted the family as a world apart from the functions of the public sphere. The sociology of the family, virtually since its origin, has insisted that the family's functions in an industrialized society are sharply limited. The Chicago School of the 1920s emphasized the nuclear family's increasing isolation as a consequence of urbanization and, particularly, the loss of old kinship and communal supports.[44] After World War II, the structural-functionalists, of whom Talcott Parsons is the most prominent theorist, likewise accepted the loss of traditional family functions, although they were more optimistic about the implications of this phenomenon.[45] It was true, in their view, that corporate churches, industrialized means of production, national markets, and professional police and welfare agencies now assumed responsibilities for social control, economic distribution, and education once located in families.[46] However, while the family was no longer necessary for economic production or socialization, it could now undertake new functions and, particularly, become the locus

---

IMAGES OF THE FAMILY 43, 50-51 (V. Tufte & B. Myerhoff eds. 1979); Teitelbaum, *supra* note 30, at 1140-41.

[42] Santa Clara Argus, May 12, 1886, *quoted in* R. GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890, at 129-30 (1982).

[43] This quotation comes, of course, from the celebrated case of Balfour v. Balfour, 2 K.B. 571, 579 (1919). For an American version of the same principle, see McGuire v. McGuire, 157 Neb. 226, 238, 59 N.W.2d 336, 342 (1953) ("[T]he living standards of a family are a matter of concern to the household, and not for the courts to determine. . . .").

[44] *See* B. BERGER & P. BERGER, THE WAR OVER THE FAMILY 10-12 (1983).

[45] *See id.* at 12-13.

[46] *See id.* at 13-14.

of highly charged emotional interaction between spouses.[47]

The relationship between the Parsonian view and legal and historical discourse about the family is plain enough. Although structural-functionalism found an ingenious strategy for rehabilitating the family, the role that it identifies for families in a differentiated society confirms the limits of the family function and emphasizes its removal from other activities now committed to the public domain. The description of the family in the *Santa Clara Argus* captures the main lines of family responsibility later identified by Parsonian theory.

Finally, the view of the family as a haven or island, isolated from public institutions, routinely appears in popular literature. Network television, our "most relentlessly domestic narrative form,"[48] plainly conveys that picture. Television families largely run to type and reflect the traditional image of family life. Until recently, they consisted of two parents and at least two (but not too many) children who live in reasonably comfortable circumstances. In most instances, these families live in detached homes and, even when they live in apartment houses, they might as well be in bungalows since neighbors rarely appear except as comic relief. The offspring follow typical psychological patterns: the older children are responsible, while the youngest child is spoiled but remarkably cute. Ghetto families rarely appear and, if they do, they appear as working class rather than as welfare families. Rural families are rarely seen, and surely not the rural poor. Neither spouse is an alcoholic nor a drug user. With few exceptions, they do not divorce in public. Although spouses may have disagreements and, less often, problems, they rarely are so serious as to be "conflicts." In any case, these disagreements are resolved through mutual understanding and within a brief time frame.

When prime-time families face suffering, it is not because of poverty, substance abuse, or crime; it comes, rather, from a random blow such as disease, mental disorder, or death of a friend. Moreover, the solution is found within the family, suggesting that social problems are private problems to which the public sector has not contributed and which it cannot solve.[49] The only bureaucratic organization these families encounter is the school system, which is benign or, if not, subdued by the joint efforts of parents and children.

It is true that some changes have occurred in the popular depiction of

---

[47] *See id.*

[48] Taylor, *TV Dramas: Sweet Agreement, Little Grit*, New York Times, Aug. 16, 1987, at H25, col. 4.

[49] *See id.*

American families. Spousal roles have changed somewhat to reflect middle-class patterns (Mrs. Cleaver was a housewife; Ms. Huxtable is a lawyer). Moreover, marital status has changed somewhat over time. Until the last few years, single parents were not seen except, perhaps, through widowhood. More recently, divorced single parents have appeared. However, their situations are in keeping with the theory of modern divorce. The separation is not the product of abandonment or cruelty, but a more or less amicable parting of the ways. When the focus is on the single mother, the suggestion is that she either chose the divorce or at least uses her unmarried status as a vehicle for asserting her own career and independence.

In short, family configurations may have changed somewhat, but the nature of the problems they face and solutions they find has not. The family isolated from other social institutions still captures our popular imagination, as it typically has done for legal, social, and historical discourse.

II. Reconstructing the Modern Family

As powerful as this view of the enucleated family has been, one may reasonably doubt that it was entirely coherent even in the nineteenth and twentieth centuries. One doubts even more that the isolation of the family from other social and economic institutions can be maintained today.

This brief discussion has already suggested that the image of the family to which we have customarily referred — that is, the family as an insular unit, separate from the state — is in some respects misleading. That the social place of the family changed during the nineteenth and twentieth centuries is certainly true. The family is not, as it was even in the early history of this country, the primary agent for economic production, the education of children, or even social control. However, this undoubted shift did not occur *because* the family is an island or unit apart from the public world. On the contrary, the "shrinking" of family functions occurred because public agencies considered themselves better able than family groups, at least in general, to discharge these functions, and legislatures and courts agreed with this judgment.[50] Moreover, the converse seems also to have been true. When courts or legislatures deferred to family decisions by invoking notions of family autonomy or privacy, that invocation too was an expression of a

---

[50] For a fuller discussion of the importance of law in defining the areas of public and domestic responsibility, see Teitelbaum, *supra* note 30.

public policy that, in certain circumstances, spouses, parents, and children should be left to work out their own relationships. These boundaries are, however, subject to redefinition as conditions seem to require. Indeed, the boundaries have routinely been redefined when public concern has heightened, as has been true of neglect and abuse, or diminished, as may increasingly be true of public education.

A. The Importance of Modern Family Functions

That the family is left without meaning or function or, as is often said, that it retains only affective functions is also not true.[51] On the contrary, the family plays a central role in modern society. Intermediate administrative and regulatory organizations, such as the educational system and the juvenile court, have not entirely occupied the fields once primarily committed to family authority. In addition, their activities, to a considerable extent, are still dependent on familial decisions. More generally, families still serve in significant ways as economic, moral, and educational systems and thus remain important agencies for the distribution of goods in our society.[52]

Take, for example, the family as an economic system or "unit." Although wealth is no longer produced within the home and the methods of acquiring wealth are largely controlled by public and "private" corporate employers (and hence by even more anonymous "markets"), family members still largely control its consumption. The importance of these consumptive decisions is, in an odd way, revealed by the literature on divorce, which makes clear the often catastrophic consequences of dissolution for a household.[53] That same literature reveals, by implica-

---

[51] *See supra* text accompanying notes 44-47; *see also* Aries, *The Family and the City in the Old World and the New*, in CHANGING IMAGES OF THE FAMILY, *supra* note 41, at 29, 40; Demos, *supra* note 41, at 59-60 (emphasizing the almost entirely emotional functions of family life and the burdens these place on the home).

[52] Niklas Luhmann, who draws heavily on Parsonian theory, remarks about this sharing of responsibility:

> It is striking . . . that in highly complex societies none of the central functions of the societal system can be assumed by a unified organization — and today even less so than before. Given our economic system, for instance, production and consumption choices could never be yoked together into an organizationally unified decision-making process, even if we were to succeed in integrating all organizations of production within an all-embracing system of world-wide planning. Likewise, the functions of education will remain divided up between the school system and the family, although the emphasis may shift.

N. LUHMANN, THE DIFFERENTIATION OF SOCIETY 80-81 (1982).

[53] *See generally* L. WEITZMAN, THE DIVORCE REVOLUTION (1985).

tion, the economic importance of a single household. A family that is "normal" in its composition, income, and role assignments may live together in modest comfort, but that same family, dissolved, will suffer greatly.

Moreover, a family makes crucial decisions about the generation, consumption, and distribution of its wealth as it goes along. How many family members will work is ordinarily decided by husband and wife, and that decision defines the level of consumption available to them. When family members generate excess wealth, they typically decide how it will be employed among an almost unlimited range of options. One young family may spend marginal dollars for a home; a second may spend those dollars to visit Disneyland or their parents; a third family may begin a college fund for the children they expect; a fourth may invest to amass capital for some future goal. One middle-aged family whose children have grown may travel widely to enjoy their mature years; another may save towards retirement, driven by the specter of worldwide economic collapse.

The family acts as a distributive system for other purposes as well. Although public schooling is compulsory and every state maintains a public university system, the family retains a prominent role in the distribution of educational opportunity. Across socio-economic lines, children of wealthy parents are more likely than poor children to have access to private secondary schools, to "elite" colleges, and to graduate education. Even within socio-economic groups, families are largely responsible for educational choices. Those families that seek upward mobility for their children may make what others would regard as uncalled-for "sacrifices" to provide opportunities for all or some of their children. On the other hand, families (like the Yoders)[54] that disvalue customary measures of success on religious grounds may withdraw their children from public education at an early age if continued formal schooling cannot be shown necessary to basic educational development. Those that reject public school curricula for religious reasons may, within limits, choose religious education[55] or even, at least in some states, home instruction.[56] Indeed, the family's importance in distribut-

---

[54] *See* Wisconsin v. Yoder, 406 U.S. 205, 209-13 (1972).

[55] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[56] Some state compulsory education laws expressly permit alternative education under certain conditions. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1982). This Massachusetts statute exempts from the attendance requirement a "child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee." *Id.* The Massachusetts Supreme Judicial Court interpreted this provision to allow, in principle, home education, subject to a process of official approval

ing educational as well as other advantages presents a peculiarly difficult problem for ethicists concerned with equality of opportunity.[57]

Families have much to do with social control as well, although they no longer provide the principal mechanism for that purpose. Crime, delinquency, and mental illness are to a very great extent social phenomena, and families participate directly in their creation and categorization. A blow by one spouse to another is an act, but the actor will only be treated as a spouse abuser if the victim defines the conduct as intolerable and communicates that view to an official agency. A blow by a parent to a child is an act; whether it is child abuse rather than reasonable parental discipline depends largely on whether the family (or some other person) so identifies it.[58] What counts as deviance by children within the home is, as well, largely defined within the home. The kinds of conduct that a family may define as disobedient are virtually infinite because the particular commands that parents may give, and that children may disobey, are virtually infinite.[59]

---

on matters such as curriculum and teacher competence. *See* Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 592 (1987). However, most parental efforts to educate their children at home have not been approved. *See, e.g.*, Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981).

Most of the well-known cases involving alternative education flow from fundamentalist religious beliefs held by parents. There is, however, what might be called a "free school" movement, which operates outside the public school system (but which must be approved). This category includes black community schools and predominantly white experimental schools. A parental decision to enroll a child in such a school is also an important distribution of educational opportunity.

[57] *See* M. WALZER, SPHERES OF JUSTICE 229-31 (1983).

[58] The line between permissible corporal punishment and child abuse is sometimes said to depend on whether the force used is "designed or known to create" a substantial risk of death, serious harm, or disfigurement. *See, e.g.*, Boland v. Leska, 454 A.2d 75, 78 (Pa. Super. Ct. 1982). There are, of course, relatively clear instances of abuse, but many instances are ambiguous in the sense that they could be considered either as appropriate or as inappropriate discipline. The most common types of neglect and abuse, even for substantiated reports, involve minor injuries. Relatively unambiguous parental misconduct, reflected in fractures, hematomas, sprained limbs, and skull injuries, make up only 2.3% of reported cases of neglect and abuse. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, NATIONAL ANALYSIS OF OFFICIAL CHILD ABUSE AND NEGLECT REPORTING 51 (1979).

[59] *See Juvenile Status Offenders*, 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 983, 984 (S. Kadish ed. 1983). Neither family rules nor the juvenile court's jurisdiction over incorrigible children suppose any right to equal treatment. One child may be required to work after school by his parents and another forbidden to do so; one teen-aged girl may be required to be home at 10:00 p.m. on weeknights and another at 11:00 p.m. The only generally applicable rule is one of obedience to parental commands.

Moreover, families differ widely in how they interpret and respond to what they may define as misconduct.[60] One family may take no external action at all, hoping that the blow is only a momentary and isolated incident or that the disobedience is "only a phase." Members of a second family, with few resources, might file a criminal complaint for spousal abuse or refer the child to the juvenile court as an "incorrigible child," expecting to secure in this way services which it cannot afford to purchase. Another family, with means at its disposal, may enlist the services of a private counselor or, perhaps, enroll the wayward child in a boarding school. Alternatively, if a boarding school is too expensive or too distant, the family may interpret the conduct substantiating a juvenile court petition as a sign of emotional disorder, which interpretation could lead to either outpatient or institutional treatment.[61]

These choices within the family system are not determined by the acts themselves.[62] They are also not determined entirely by wealth. Spousal and parental relations often involve long and complex histories which are further influenced by public perceptions. A family will decide not to seek help outside the family as long as it does not define the problem as a "crisis." Mentally ill or alcoholic family members may be hidden from sight (and, consequently, denied rehabilitative treatment) because of embarrassment. Should the deviance become known, however, the family may then declare its rejection of the embarrassing spouse or child through divorce or through juvenile court proceedings.[63] Similarly, a decision to expel a misbehaving child from the family

---

[60] These differences in turn have much to do with the generation of "formal" occasions for social control. A study of two New York courts reports that over one-half of all status offense cases are initiated by parents or relatives of the respondents. Andrews & Cohen, *PINS Process in New York: An Evaluation*, in BEYOND CONTROL, *supra* note 30, at 45, 78. Moreover, that rate is even higher in some courts. In the urban county examined by Andrews and Cohen, parental complaints accounted for more than 80% of all status offenses cases, while parents initiated only 31% of the complaints filed in a suburban court (schools and police officers taking up the slack). *Id.*

[61] On the interrelatedness, and perhaps the interchangeability, of child welfare, corrections, mental health, and chemical dependency systems, see Krisberg & Schwartz, *Rethinking Juvenile Justice*, 29 CRIME & DELINQ. 333, 360-61 (1983); Lerman, *Trends and Issues in Deinstitutionalization of Youths in Trouble*, 26 CRIME & DELINQ. 281, 282 (1980).

[62] To a considerable degree, crime and deviance are social products, defined by various communities including the family. *See* Ross & Teitelbaum, *The Future of Sociology of Law*, in THE FUTURE OF SOCIOLOGY 274, 289-90 (E. Borgatta & K. Cook eds. 1988).

[63] *See* Mahoney, *Pins and Parents*, in BEYOND CONTROL, *supra* note 30, at 161-62.

through reference to juvenile court or otherwise may depend on whether her conduct appears to influence other children, whether a stepparent or friend of the mother appears in the home, or whether important members of the community outside the home notice her misconduct.[64]

The family is a moral and religious system as well, even though household gods have disappeared. While much of religious authority rests in corporate churches, families lie at the center of moral choices in several ways. They make initial decisions about religious affiliations. A child may not be "born into" a religion, but parental commitment to that religion will determine at least his or her original religious definition. Moreover, parental conduct and attitudes have much to do with the strength of the child's attachment to a religious organization. That attachment is likely to be stronger if parents are deeply committed to religious precept and practice and enroll their children in religious activities. Even apart from religion, parental views and conduct seemingly have something to do with a child's moral development and conduct.

Of course, the family is also an emotional system. We generally assume, or perhaps hope, that it provides a "diffuse, enduring solidarity"[65] and unconditional acceptance for its members; a place in which the crucial question is not, "What have you done for me lately?"[66] This characterization of family values is something of an ideal type. In many families, acceptance is in fact conditional and solidarity is problematic. Households have never been isolated from specific expectations of conduct or from considerations of success outside the household.[67] Nonetheless, the interpretation of those expectations, and the emphasis that a family will place on one rather than another aspect of group life, are largely determined within the home and by highly localized criteria.

---

[64] *See id.* at 162-67.

[65] R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART 110 (1985) [hereafter HABITS OF THE HEART].

[66] *See id.* at 111.

[67] Research on divorce during the nineteenth century indicates that petitions were ordinarily founded on failures of role expectations associated with marriage. Husbands were sued for non-support and often for intemperance, a vice typically associated with non-support. The pleadings and testimony in divorce cases likewise recited the failure of husbands to fulfill nineteenth century role requirements, suggesting that public values defined the success of the private realm and that acceptance was conditioned on conformity to those values. *See* R. GRISWOLD, *supra* note 42, at 79. A great deal of commentary suggests that this condition may be even more true now that dissolution is readily available. HABITS OF THE HEART, *supra* note 65, at 110-11. However, households were never entirely isolated from specific expectations of success outside the household.

All of this discussion suggests that the attenuation of primary functional responsibility does not leave the family without importance. On the contrary, the family retains a substantial, if shared, responsibility even for domains that formally seem to have been committed to other social systems.

B. The Centrality of the Modern Family

Moreover, the family plays a central role, in a further and quite literal sense, even in modern, highly differentiated society. Although one usually thinks that the intermediate systems or institutions which characterize such societies link *individuals* to the society at large, only our penchant for thinking in terms of individuals accounts for that conceptualization. One can also think of these systems as linking *families* to society at large, and of families as linking individuals to these systems. Many of these social institutions explicitly draw on family-like terms to define their operations, because those terms express the relationships, obligations, dependencies, and opportunities with which these systems are to some extent concerned. Immigration laws, for example, accord to "spouses" of American citizens a special position.[68] Similarly, the "spouse" or "child" of a decedent has an established priority for inheritance purposes[69] and the surviving "spouse" of a covered person is entitled to social security benefits.[70]

To some considerable extent, one can accurately imagine the family as a hub around which the various intermediate systems turn, both in their sharing of the responsibilities described earlier and in the reliance by institutional systems on family relationships. However, the hub notion is no more than a metaphor, and, like all metaphors, the reality is far more complex than the image suggests. For one thing, the intermediate social institutions are not of one kind. Some institutions, such as public schools and, in some respects, welfare authorities, are governmental entities whose explicit purpose is to serve functions once committed to families but that now generally, or in some instances, are thought appropriate subjects for public administration. Others, such as housing authorities and employment security programs, provide forms of social protection which may affect the structure and operation of families but do not directly undertake what we tend to regard as famil-

---

[68] *See* 8 U.S.C. § 1151(b) (1982).

[69] *See, e.g.*, UNIF. PROB. CODE §§ 2-102, 2-102A (1974) (concerning spouse); *id.* § 2-109 (concerning children).

[70] *See* 42 U.S.C. § 402(e)-(g) (1982 & Supp. IV 1986); *id.* § 416(c)(3) (1982); *see also* Califano v. Boles, 443 U.S. 282 (1979).

ial roles. Still other institutions, such as churches, stand more or less independently of government but possess their own laws addressing the conduct and relations among family members.[71]

Moreover, the relations between these institutions and the family are both various and interactive. Governmental agencies are ordinarily understood as bureaucracies serving relatively specific social purposes. To that end, they adopt procedures and regulations that they regard as appropriate in light of their particular goals and organizational concerns. The relations between those regulations and the operation or even the definition of the family may differ from institution to institution, according to agency interpretations of their purposes and interests. Zoning ordinances and food stamp rules, for example, may provide certain treatment or benefits for groups defined as "families," even though members of these groups are not related by blood or marriage[72] and do not enjoy a "family relationship" for other purposes.[73] Indeed, a direct conflict may seemingly exist between agency regulations and the body of domestic relations law upon which family law generally draws. To return to an earlier example, immigration laws provide special treatment for alien "spouses" of American citizens.[74] A man and a woman may validly be married, and thus a family, for purposes such as support and legitimacy of children. Nonetheless, they may commit fraud for immigration purposes by representing themselves as spouses if they did not intend to carry out what Congress regards as a "standard"

---

[71] The relation of churches to families and government is especially hard to specify because there are quite distinct ways of looking at the authority of religious institutions in this country. What may be considered the usual view assumes that churches function within and are subordinate to limits set by the state. For churches themselves and for their members, the situation may be understood rather as one of a shared sovereignty under which church and state are each dominant within their respective domains. For a thoughtful analysis of these perspectives, see Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1988).

[72] *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining against constitutional attack ordinance including as family not only related persons but also "[a] number of [unrelated] persons but not exceeding two (2) living and cooking together in a single housekeeping unit"); Carroll v. City of Miami Beach, 198 So. 2d 643 (Fla. Dist. Ct. App. 1967) (holding that zoning ordinance defining family as "[o]ne or more persons occupying premises and living as a single housekeeping unit . . ." included group of novice nuns).

[73] Persons who live together but who are not related by blood or marriage are ordinarily not eligible for intestate succession. *See, e.g.*, UNIF. PROB. CODE §§ 2-102, 2-102A, 2-103, 2-109 (1974). For an example involving wrongful death benefits, see Garcia v. Douglas Aircraft Co., 133 Cal. App. 3d 890, 184 Cal. Rptr. 390 (1982). For an example involving social security benefits, see *Califano*, 443 U.S. 282.

[74] *See supra* note 68 and accompanying text.

marital relationship.[75]

It would be tempting to take an extreme positivist view and to conclude that these agencies define the family in their own images and leave it at that. However, relationships among families and institutions are not so unidirectional. A traditional sense and form of the family exists that affects official institutions and makes the relationship between family and other official groups in some degree reciprocal. The Supreme Court's rejection in *Meyer v. Nebraska*[76] of a "Platonic" program of child-rearing, in which parents play no real part,[77] is only one formal expression of the authority this traditional form seems to claim. Adoption agencies prefer foster homes to orphanages and employ religious matching rules. Social security and workers' compensation benefits are commonly available to "surviving spouses" of insured persons but not to others who cohabit with them.[78] These examples all suggest that public institutions model, and perhaps legitimate,[79] their programs by reference to family relationships. Moreover, one can to some extent trace changes in the understanding of "the family" by the ways in which official agencies modify their programs to include, for example, cohabiting partners, although these modifications are likely to be agency-specific and constrained by particular funding and organizational circumstances.

Summarily put, the family is a member of a set of social systems which, in shifting configurations and alignments, participates and to

---

[75] This was the holding of Lutwak v. United States, 344 U.S. 604 (1953). The parties had gone through marriage ceremonies so that the foreign spouses would qualify for an immigration preference under the War Brides Act. *Id.* at 606-07. They also agreed that they would not cohabit and would seek an annulment after arrival in this country. *Id.* at 607. Although it seems likely that these limited purpose marriages would have been held valid as a matter of domestic relations law — that is, they would have been man and wife for all local purposes — the Court held this to be immaterial. *Id.* at 610-11. The relevant question was what Congress had in mind when it created the War Brides preference, and that intent was to facilitate the union of parties who had undertaken to establish a married life together in the usual sense. *Id.* at 611.

[76] 262 U.S. 390 (1923).

[77] *See id.* at 401-02.

[78] *See, e.g.*, Califano v. Boles, 443 U.S. 282 (1979) (social security benefits). States vary in the extension of worker's compensation benefits. *See* Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1140-49 (1981).

[79] For example, schools regularly have sought to legitimate various limitations on student freedom and activity by the claim that administrators or teachers stand *in loco parentis* to children while in school and thus possess the plenary authority associated with parents. *See, e.g.*, D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982); R.C.M. v. State, 660 S.W.2d 552 (Tex. Ct. App. 1983). For analysis and rejection of this theory, see New Jersey v. T.L.O., 469 U.S. 325 (1985).

some extent controls the distribution of opportunities, goods, and benefits in our society. Relationships among these systems are, however, highly complex and even interactive. Exploration of these linkages and effects is crucial to any real understanding of the place of families in a modern legal system.

This exploration must also take special account of one other social institution which affects the relationship between families and intermediate systems. That other social agency is the adjudicatory system. Like other intermediate agencies, courts have their own principles of operation. These principles include sharply restrictive rules of relevance drawn from substantive law, reliance on an adversarial mode of proof, and procedural and evidentiary rules generally intended to serve goals of adjudicative efficiency. Judicial dispute resolution also supposes some allocations of authority. Courts must decide when there is, indeed, a dispute of the sort it will recognize, an issue often more crucial in family than in other settings. Individuals may usually choose whether to invoke judicial authority. If parties to an ordinary contractual relationship can resolve matters between themselves, no adjudication is necessary. Because conduct within the family may involve a variety of other institutions, however, the opportunities for confrontations of authority, and thus disagreement, are far greater. While parents and children may decide that the latter should leave school to work on the farm, educational authorities may disagree. Mother and father may agree that a severely handicapped newborn should not be treated in some fashion; the hospital may disagree. All members of a family may wish to take in Uncle Ralph, who has fallen on hard times, but zoning or housing officials may have something to say about that. Family members may also have disagreements, with respect to which institutions might assert a position.

It is important in these circumstances to examine the bases upon which courts will intervene and the occasions on which they will defer to one source of authority (perhaps the family members[80] or one family member[81]) and thereby decide that substantive adjudication of a dispute is unnecessary.[82] It is equally important to consider the range of possi-

---

[80] *See, e.g.*, Moore v. City of East Cleveland, 413 U.S. 494 (1977) (extended family); Wisconsin v. Yoder, 406 U.S. 205 (1972) (withdrawal from public school).

[81] *See, e.g.*, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976) (holding that mother's right to choose whether to terminate pregnancy not subject to veto by parent or husband).

[82] That statement does not imply, of course, that the court in so deferring has not made a decision which can be regarded as substantive. *See, e.g.*, McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595 (1987)

ble solutions available to courts. As we have seen above and will see further in the Part III, the family is a highly complex system that reaches an infinite variety of accommodations to the functions it carries out, alone or in conjunction with other social systems. Courts, however, tend to have relatively few choices available to them, even despite the broad legal standards characteristic of family law, because of their formally rational nature and their own requirements of efficiency. Judges may for this reason decide that they should not intervene in a family dispute, a result which leaves family members with whatever power they possess under other bodies of law and, particularly, existing social circumstances.[83] This determination, in turn, may be understood by the less powerful party as providing a choice between continued subjection or self-help, including withdrawal from the family or even violence. A decision to intervene, for its part, often implies authoritative but simple solutions to complex questions, the long-term significance of which is predictable only in the sense that it will profoundly affect the course of the group to which it is addressed.

III. The Family as a Special System

Part II has suggested that families retain significant responsibility for functions often regarded as lying within the authority of various formal social systems and that it is useful to think of the family as central to the operations of those systems. This perception is, however, something of an oversimplification. Although one may well consider the family a member of a group of interactive systems, it cannot be understood simply as one of those organizations. The institutions with whose conduct the family is implicated are formal groups — school boards and local schools, police departments, welfare agencies, housing authorities — that typically possess certain organizational characteristics. These groups are specifically instrumental or functional organizations, created to serve a particular social purpose to which their actions must formally be directed and against which their success is formally measured.[84] They also tend to be highly structured and permanent in the sense that

---

(maintaining that an outcome based on justiciability disposes of a claim of right as effectively as an express holding regarding that claim). For a discussion of the importance of the allocation-of-authority issue in cases involving families and the state, see Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. Mich. J.L. Ref. 933 (1985).

[83] For a discussion of the effect of such decisions on family law, see Teitelbaum, *supra* note 30, at 1174-80.

[84] *See* M. Dan-Cohen, Rights, Persons, and Organizations 36-37 (1986).

their definition of purpose and their activities are substantially distinct from the identities of individual members.[85] Moreover, formal organizations often have self-serving or bureaucratic goals, such as harmony or efficiency, which are internally generated and which bear no necessary relation to their formal purposes.[86]

A. The Complexity of Family Life

The characteristics of family groups seem to differ in several ways from those of the formal organizations with which they interact. Perhaps the most important difference lies in the area of specific goal orientation. Whereas specialized systems typically serve a specific function and make decisions by reference to that purpose in a formally rational way, the family must simultaneously accommodate diffuse functions.

For example, family economic decisions, unlike those of a corporation, are not influenced wholly or even largely by economic rationality. They reflect a wide set of circumstances and values. Whether to save or to spend money may depend more on emotional relations within the family than on market conditions. A corporation may or may not be permitted to make gifts to charities; families may do so because of religious or social values. Religious values may likewise drive educational decisions, as they did in *Yoder*.[87] Social and political values may also variously influence these decisions. Parents may refuse to send their daughter to college because her role is to be a wife and mother. They may refuse to send a son to a private college for which he is well-qualified because they resent its "elitist" attitude or the political tendencies of its faculty. Parents may also choose to invest a "disproportionate" amount of their earnings in securing "the best" educational opportunity for their children.

Social control, as we have seen, is also diffusely operationalized in the family setting. The rules devised by parents for their children may reflect religious and cultural values. Economic circumstances and historical experience, such as an alcoholic relative, may play a part in the generation of family rules. Tolerance for disobedience, and thus response to rule violation, is also highly localized. Some parents regard expressions of independence by their children as a normal developmental occurrence or even cause for pride; others regard such demands as disrespectful and inappropriate. Religious and cultural values also in-

---

[85] *See id.* at 32.

[86] *Id.* at 37.

[87] *See* Wisconsin v. Yoder, 406 U.S. 205, 207-12 (1972).

fluence perceptions at this stage; situational factors may play a role as well. Whether a child is referred to court as an incorrigible child or left to "outgrow" her behavior may depend far more on the presence and attitude of a stepparent and on the emotional ties between the mother and her second husband than on the nature or frequency of the child's misconduct.[88]

B. The Dynamism of Family Relations

A further distinction between family and formal groups concerns the family's permanence of structure and identity. While formal organizations are said to possess a persisting character, family groups are characterized by their dynamism and mutability. The most familiar aspect of the dynamic character of family life is, of course, the parent-child relationship. In the early stages, the relationship is one of control mediated, we hope, by affection. The former aspect, at least, is so general as to be nearly universal. As the child grows older, however, the tension between control and the need for independence produces increasing particularity in the relationship. From a structural point of view, the "good parent's" role becomes far more variable as time goes on. From an interactionist perspective, the meaning of childhood becomes far more contested as the child matures and seeks to assert personal preferences against the parental image of what that child is and should become. The shape of parental immortality becomes a central issue, further confounded by the contest between generations with which the personal contest is implicated.

Other familial relations are also dynamic and mutable, and perhaps more so than previously. Two relatively modern phenomena seem to have contributed to the particularity and dynamic quality of family relationships. One is the prevalence of divorce; the other is the probably related increase in the incidence of families in which both spouses are employed.[89] The former has created far more complex and changeable relations than we have seen. The need to maintain two homes may

---

[88] *See generally* Mahoney, *supra* note 63.

[89] The participation of women in the workplace has been among the most significant sociological developments in this half of the century. That change has been especially dramatic for women with children. In 1950 barely more than 10% of women with children under six years of age worked outside the home; in 1982 the figure was about 50%. Spain & Bianchi, *How Women Have Changed*, in AM. DEMOGRAPHICS, May 1983, at 23. Twenty-eight percent of women with children between the ages of 6 and 17 were in the work force in 1950; by 1982 that rate had increased to more than 65%. *Id.*

require adjustments in styles of living and often requires a spouse who has been a homemaker to change her occupation entirely. One partner's actions and the actions of her former spouse may affect her own situation in a variety of ways.[90] The entrance of a stepparent, or a live-in friend, may influence the relation between a custodial parent and her child. The kinds of behavior that are acceptable for the child may change because the custodial parent is less frequently available to deal with the child, because certain conduct previously allowed is unacceptable to the stepparent, or both.

Even for an intact family, the prospect of divorce leads many wives to enter or remain in the labor market. The blurring of domestic and public spheres under current economic and ideological conditions entails recurring localized adjustments of responsibilities and relations within the household.

C. The Variety of Family Relations

These phenomena suggest that more varied family organizations exist now than before. That condition is, of course, true. The Smiths may follow traditional role assignments while the Wilsons both work, and the Johnsons may be previously divorced spouses who have custody of some but not all children of their prior marriages. It is also important, however, that any one family may fall into several of these forms of arrangements at various times. The Smiths may both be employed until children arrive, follow traditional allocation of roles while their children are young, and then both become employed again as the family grows older, either because of desire to do so or because college expense or retirement plans require that they both have incomes. The Smiths may then find that their mutual interest has been exhausted by the time their children are in college or that they now understand themselves in new ways. As a result, they may seek to dissolve their marriage in favor of a second marriage which will have its own features.

Finally, families vary not only in their structures and relations over time, but in the ways they are situated with respect to agencies which have some responsibility for the functions described above. To the considerable extent that families are systems for the consumption and distribution of wealth, the capacity of families to generate wealth on their own affects the degree of their interaction with other social systems. For example, middle class families rarely come into contact with housing authorities or welfare agencies. The capacity of a family to exercise

---

[90] *See supra* text accompanying notes 62-64.

social control also depends considerably on its wealth. One family with a misbehaving child may be able to purchase private psychiatric care on an out-patient or even in-patient basis, or to send the child to a private military academy. Another family, which also wishes to control the child but does not have similar resources, must seek these resources in juvenile court. These options, in turn, affect the operation and even the structure of these families. Child-rearing functions for a family on welfare are shared with a social worker to some and perhaps to a great extent. A family may share social control functions — for example, determination of those with whom children may spend time, until what hour, and on what occasions — with a juvenile probation officer. The functioning of a family which has been able to purchase its own services will probably be far less directly affected.

It is tempting to regard families which routinely deal with public agencies as "atypical" or "problem" families and, for that reason, to think that they should be interpreted and treated in some different and special way. Conceptualization of "the family" as a private precinct, as a haven or refuge, seems to suggest that families which are involved in some significant way with the public domain are dysfunctional. Indeed, this assumption finds support in popular representations of domestic life, if only because these families rarely appear in the television comedic tradition.[91]

Recognizing that families and social agencies typically share responsibilities may invite us to reconsider this view. It is plainly true, as we have seen, that families are not equally situated with respect to public agencies. For example, middle class families do not often deal with public housing authorities. That circumstance is a defining aspect of middle class. It is not, however, a defining aspect of "family" because, as we have seen, interaction between families and intermediate institutions is common rather than remarkable. Families with wider or more prolonged involvement with housing, welfare, and other public authorities should not be regarded as having for that reason entirely lost their functions or areas of responsibility. Middle class families should also not be considered to lack genuine responsibility for education and social control because that responsibility is shared with schools and juvenile courts. Family choices will necessarily be affected by a loss of wealth, the absence of a father in the home, or the number of other persons with whom they share quarters. However, neither poverty nor resort to external public agencies means that the family has ceased to be a com-

---

[91] *See supra* text accompanying notes 48-49.

plex, interactive group with a distinctive identity. It may be a problem family from the perspective of public social systems, but it is still a family in the economic, social control, educational, and affective accommodations it must make. And it is far more like an "ordinary" family than not.

CONCLUSION

This Article has sought to make several points about the social and legal place of the family, even at the cost of questioning the approach taken by much legal, historical, and sociological discourse. At the most general level, the sharp distinction conventionally drawn between public and private spheres seems badly oversimplified. Historically, alterations in the allocation of family responsibilities are associated with perceptions, policies, and laws formulated in what we regard as the public domain. Moreover, these perceptions and the laws they generated were influenced by patterns of family behavior, such as immigration and urban migration, which in turn reflected economic conditions associated with urbanization and modernization.

Currently, the distinction is equally hard to defend in any general way. The existence of agencies and bodies of law dealing with and, for their own purposes, defining the family should not be ignored, as a sharp distinction might imply. How these agencies operate substantially affects the manner in which families carry out their distributive functions, a sphere of activity we think characteristically "private." Education, social control, and economic consumption are shared functions not belonging to either an encapsulated and entirely particularistic domestic domain or to a universalized public sphere.

It is, therefore, important to examine the multifold, interactive, and changing relations between the family and the other social systems with which its functions are associated. The focus of this inquiry must be both broad and precise. On one hand, the inquiry supposes considering a large number of institutions whose activities affect family lives and structure. On the other hand, those institutions and the family possess characteristics which must be examined in detail. Finally, the interrelationships and interactions among these social phenomena must be investigated in a way that accounts for the variability and dynamic qualities of family life and structure, without resort to simplifying notions such as "refuge" or "island" which beg, rather than answer, important questions about the relationship of the family to legal and social institutions.