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CHILDREN, FAMILIES AND THE STATE: AMERICAN FAMILY LAW IN HISTORICAL PERSPECTIVE

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INTRODUCTION

May minor children sue their parents? Do children have a right, independent from their parents' wishes, to choose where they will live? May minor children be permanently removed from their parents' custody if the parents do not do an effective job of raising them? These are among the questions that the nation's courts have had to wrestle with as the nature of American family life has, in the course of a generation, been revolutionized.[1]

In recent years, few subjects have generated more controversy or evoked more perplexing ethical dilemmas than family law. Jurists have had to grapple with the meaning of such broad and malleable legal concepts as "privacy," "due process," "equal protection" and "the best interests of the child." An explosion of family law litigation has forced judges to confront a series of extraordinarily difficult questions: What is a family? Who is a parent? What are parents' obligations? When and how can the rights of biological parents be terminated? What constitutes a child's best interests in custody and visitation disputes?

Today, half of all civil court cases involve questions of family law.[2] A widespread sense of dissatisfaction has accompanied the proliferation of litigation over the family. Critics charge that family law decisions are too unpredictable and arbitrary; that family law judges exercise excessive discretion; that our present system of family law generates too much litigation and that legal concepts like "the best interest of the child" are so broad and undefined that they allow jurists to impose their own moral preferences in their rulings.[3]

Two broad perspectives dominate public discussion over family law. One perspective, held by many conservatives, complains about the apparent increase in judicial intervention in the internal functioning of

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1. *See generally* MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTION: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE (1988); EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY (1986); Stephen J. Morse, *Family Law in Transition: From Traditional Families to Individual Liberty*, *in* CHANGING IMAGES OF THE FAMILY 316-60, (Virginia Tufte & Barbara Myerhoff eds., 1979).

2. MINTZ & KELLOGG, *supra* note 1, at 228. *See also* Angel Castillo, *Judges Flip the Family Album*, N.Y. TIMES, May 3 1981, at E9.

3. *Cf.* David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, U. MICH. J.L. REF. 805, 806-13 (1985) (discussing government intrusion into the family).

families. It regards the recent spate of family law litigation as a symptom of an erosion of community. According to this view, the proliferation of litigation reflects the breakdown of a broad ethical consensus within American society and the collapse of traditional limits on acceptable behavior. Society has come to believe that every grievance should be cast as a conflict of rights and that all social conflicts should be adjudicated.[4]

A second perspective, held by many liberals, celebrates the growing judicial concern with privacy and individual rights. This perspective regards increasing litigation as an inevitable and essentially positive by-product of a growing concern for individual rights and of dramatic demographic changes—such as increasing rates of divorce and numbers of working mothers—which have generated new kinds of conflicts demanding judicial intervention.[5]

There are kernels of truth in both points of view; yet both perspectives are profoundly ahistorical, and they obscure a fundamental paradox at work in family law. Two apparently contradictory historical developments have occurred simultaneously in family law. One involves a gradually growing emphasis on privacy and individual rights; the other, a gradual increase in the involvement of the legal system in the internal functioning of families. In the pages that follow, we will examine the changing role of law in regulating familial behavior from the seventeenth century to the present, focusing on the transformation of legal norms for marriage, divorce, parent-child relationships and custody and support obligations. What we will see is the way that two paradoxical developments—a stress on privacy and equal rights and a shift toward greater public involvement in internal family functioning—arose hand-in-hand, each reinforcing the other. We will trace the emergence of the idea that family members are individuals who have distinct interests, not reducible to the interests of a family patriarch; and we will see how this idea contributed to the view that the state has a duty to intervene in the family "in the public interest."

I. STATE, LAW AND FAMILY

Given the weakness of other institutional authorities, law has played a particularly important role in American society. Law has provided an arena of social and cultural conflict. It has served as a moral theater where fundamental values have been defined and dramatized. It has furnished a standard by which all forms of disputation are measured. Finally, it has served as a mediator between individuals and the state, defining the limits of state intervention.

Yet for all of its obvious importance, American law poses difficult conceptual issues. Law is, at once, an intellectual system with its own

4. *See id.*; *see generally* CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977).

5. *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985).

commitments, forms and procedures; an ethical structure defining permissible behavior and ways of resolving disputes; and a social process in which legal principles are established through the adjudication of many individual cases. Not simply a mirror of society, the law is a semi-autonomous realm, partially responsive to statutory enactments, social practices and cultural values, and also to its own traditions and precedents. In addition, the law is a powerful legitimizing force, which (in theory) relegates conflicts to a special, abstract realm where decisions are supposed to be made on an evenhanded, non-partisan basis, reflecting broadly accepted notions of equity, fairness and impartiality.[6]

An intensive look at the history of American family law can help us to understand the critical social functions played by law in American society. Such a study can also help us understand the changing relationship between government and individual families and the relationship between the broad social and cultural sources of legal change and the more intrinsically technical sources of legal innovation. Since the earliest days of colonization, government has shown a special interest in the family, enacting statutes to regulate familial behavior, empowering public officials to oversee familial relations and intervene in internal family functioning, assigning rights and obligations to family members and conferring privileged status upon particular kinds of family units. Through law, government has helped socially construct what Americans mean by family.[7]

II. HISTORICAL OVERVIEW

Over the past decade, scholars have engaged in a far-reaching effort to reconstruct the legal history of the family. Although some of their conclusions must remain tentative and subject to revision, this scholarship has clearly identified the outlines of legal change.

A. *The Colonial Law of the Family*

The colonial law of the family varied sharply from one colony to another, reflecting differences in religious ideology, regional economies and demographic circumstances. Colonies actively involved in trade with England, including Maryland, New York, South Carolina and Virginia, created chancery courts modelled on those in England. They retained English common law principles more readily than Connecticut, Massachusetts and Pennsylvania, where religious ideas led authorities to reject English common law and equity.[8]

During the seventeenth century, lawmakers in Massachusetts and Connecticut revised English common law and created a system of family

6. *See* BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 1-10 (1987).

7. *See generally* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960 (1988).

8. *See* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 185-93 (1986).

law embodying basic religious beliefs about how families were to be ordered and authority distributed, the nature of the marital bond and the proper roles of married women and children. This body of law stressed the hierarchical and patriarchal nature of familial relationships, conceived of marriage as a civil contract and placed an emphasis on family unity and interdependence, a wife's submission to her husband's will and children's dependent and subordinate status.[9]

In accordance with their organic conception of society, Puritan Massachusetts and Connecticut required all individuals to marry and live in "well ordered" households, taxing bachelors and single women who failed to marry, fining couples who lived apart from each other and requiring unmarried persons to enter an established household as a boarder or servant.[10] Since marriage was regarded as a public act and an alliance among families, town governments required brides and grooms to submit to extensive community and family supervision. A father had a legal right to determine which men could court his daughters and a legal responsibility to give or withhold consent from a child's marriage, though he could not "willfully" or "unreasonably" deny his approval. No couple could legally join in marriage without announcing their intention to do so at three successive public meetings or by posting a written notice on the meetinghouse door for fourteen days.[11] In all colonies, however, a shortage of clergy and onerous regulations contributed to large numbers of "informal" marriages lacking legal sanction.[12]

Because Puritan lawmakers considered marital unity under the husband a prerequisite of social stability and because they assumed that husbands (or grown sons) would provide for their wives and widows, they tended to eliminate certain English common law protections for married women which assumed that husbands and wives had separate interests within the family. Both Massachusetts and Connecticut rejected English ideas of separate estates for women, dower interest, prenuptial contracts and suits in equity as well as certain common law protections for women against coercion by their husbands.[13]

In sharp contrast, in Maryland, South Carolina and Virginia, where the death rate was higher and widows were more likely to be left with young children, women received somewhat greater protections of property rights as dower was extended to personal and real property. These colonies also retained English protections against coercion by husbands (by requiring wives to acknowledge their consent to the conveyance of property in private examinations apart from their husbands). New York

9. *Id.* at 3-13; Marylynn Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 LAW & HIST. REV. 129 (1983).

10. MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 53-54 (1988).

11. EDMUND S. MORGAN, THE PURITAN FAMILY: RELIGION & DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND 30-34, 83-84 (1944).

12. MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 at 92-94 (1976).

13. *See* SALMON, *supra* note 8, at 185-93.

and South Carolina also recognized the principle of separate estates for women, allowing married women limited rights to own and control property apart from their husbands.[14]

Although married women in colonial New England were legally subordinate to their husbands, they did possess limited legal rights and protections. Husbands who refused to support or cohabit with their wives were subject to legal penalties. Because Puritans regarded marriage as a civil, not a sacred, contract, they permitted divorce in cases of a husband's impotence, cruelty, abandonment, bigamy, adultery, incest or failure to provide. Massachusetts granted approximately forty absolute divorces between 1639 and 1692;[15] another twenty-three divorce petitions were brought to the Governor's Council from 1692 to 1789.[16] In contrast, Maryland, New York and Virginia strictly opposed absolute divorce with right to remarry, while allowing divorce *a mensa et toro* (separation from bed and board) and private separation agreements.[17] In addition to authorizing divorce as a protection to women, Massachusetts Bay and Plymouth colonies also enacted the first laws in the western world protecting "marryed woemen . . . from bodilie correction or strikes by her husband . . . unless it be in his own defense."[18]

The significance of these legal protections for women must not be overstated. In practice, Puritan law reinforced a hierarchical and paternalistic conception of the family. In order to obtain a divorce, a wife had to prove that she had "acted dutifully" and not given her husband "provocation."[19] In a number of instances, authorities allowed husbands to punish an abusive wife or a disobedient child by whipping. Perhaps as a result of the emphasis attached to order and patriarchal authority, women were more likely than men to be punished for adultery, fornication and bastardy.[20]

Even in cases of abuse, Puritan magistrates commanded wives to be submissive and obedient, telling them not to resist or strike their husbands but try to reform their spouses' behavior.[21] Women who refused to conform to Puritan ideals of wifely obedience were subject to harsh punishment including fines or whippings. Courts prosecuted 278 seven-

14. *See id.*

15. *See* LYLE KOEHLER, A SEARCH FOR POWER: THE "WEAKER SEX" IN SEVENTEENTH-CENTURY NEW ENGLAND 49-50, 77-79, 152-53 (1980); SALMON, *supra* note 8, at 58-80; Henry S. Cohn, *Connecticut's Divorce Mechanism: 1636-1669*, 14 AM. J. LEGAL HIST. 35 (1970); Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts* 18 WM. & MARY Q. 586 (1976); Nancy F. Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. SOC. HIST. 20 (1976); D. Kelly Weisberg, *Under Great Temptations Here: Women and Divorce Law in Puritan Massachusetts*, *in* 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 117-28 (D. Kelly Weisberg ed., 1982).

16. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, *supra* note 15.

17. SALMON, *supra* note 8, at 58-68.

18. ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 21-22 (1987).

19. *Id.* at 24. *See also* KOEHLER, *supra* note 15, at 136-60.

20. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 31, 38 (1988).

21. *See* KOEHLER, *supra* note 15, at 136-46.

teenth century New England wives for heaping abuse on their husbands. In general, colonial New England courts valued family preservation above the physical protection of wives and children, seldom granted wives divorce on grounds of cruelty, only punished the most severe instances of domestic abuse and generally meted out mild punishments to men.[22]

New England law treated children, like women, as subordinate and dependent beings. In exchange for paternal support, education and training, children's service and earnings were their father's property. In order to reinforce paternal authority, one law adopted by the Massachusetts General Court in 1646 made it a capital offense for "a stubborn or rebellious son, of sufficient years and understanding [viz. sixteen years of age], to not obey the voice of his Father . . . or mother."[23] In Connecticut and Rhode Island, a rebellious son could be confined in a house of correction. Rebellious daughters and sons under sixteen were subject to whippings. The Massachusetts code did extend certain minimal protections to children. Just as the code outlawed wife beating, it prohibited "any unnatural severitie" toward children.[24]

Since the family was the foundation stone of the Puritan social order and disorderly families defiled God's injunctions, the larger community gave fathers legal authority to maintain "well-ordered" families. If they failed, the community asserted its responsibility for enforcing morality and punishing misconduct. If a family failed to properly perform its responsibilities for teaching religion, morality and obedience to law, then town selectmen had orders to "take such children or apprentices" from neglectful masters "and place them with some masters . . . which will more strictly look unto, and force them to submit unto government."[25] Each year, courts tried a few dozen cases of spouse abuse, cruelty to children and servants, threats against parents, child neglect, adultery and, above all, fornication.[26] In 1648, Massachusetts Bay Colony, fearing that "many parents and masters are too indulgent and negligent" ordered selectmen to keep "a vigilant eye over their brethren

22. *See id.*; *see also* PLECK, *supra* note 18, at 29-31 (discussing the reluctance of the Puritans to invade family privacy); *cf.* D'EMILIO & FREEDMAN, *supra* note 20, at 31-38 (discussing Seventeenth-Century family violence).

23. JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981,at 10 (1988).

24. *See* MORGAN, *supra* note 11, at 78-79, 148; PLECK, *supra* note 18, at 25-28; SUTTON, *supra* note 23, at 10-42; Lee E. Teitelbaum & Leslie J. Harris, *Some Historical Perspectives on Governmental Regulation of Children and Parents*, *in* BEYOND CONTROL: STATUS OFFENDERS AND THE JUVENILE COURT 1-35 (Lee E. Teitelbaum & Aidan R. Gough eds., 1977); Lee E. Teitelbaum, *Family History and Family Laws*, 1985 WIS. L. REV. 1135 (1985).

25. Teitelbaum & Harris, *supra* note 24, at 12. *See also* MORGAN, *supra* note 11 at 27, 78, 148 (noting similar rules).

26. *See* D'EMILIO & FREEDMAN, *supra* note 20, at 22, 27-38; KOEHLER, *supra* note 15, at 136-60; PLECK, *supra* note 18, at 27-32; Henry Bamford Parkes, *Morals and Law Enforcement in Colonial New England*, 5 NEW ENG. Q. 431, 443-47 (1932); Linda Auwers Bissel, Family, Friends, and Neighbors: Social Interaction in Seventeenth-Century Windsor, Connecticut (1986) (unpublished Ph.D. dissertation, Brandeis University); *cf.* ROGER THOMPSON, SEX IN MIDDLESEX: POPULAR MORES IN A MASSACHUSETTS COUNTY, 1649-1699, at 169-89 (1986) (discussing community control).

and neighbors to see . . . [that] their children and apprentices [acquire] so much learning as may enable them perfectly to read the English tongue and knowledge of the capital laws."[27] Between 1675 and 1679, Puritan authorities extended public supervision of familial behavior by authorizing the selectmen in every town to appoint tithingmen, "each of whom shall take the Charge of Ten or Twelve Families of his Neighbourhood, and shall diligently inspect them."[28]

To what extent did the seventeenth century New Englanders use courts to encourage and enforce proper domestic behavior? Not as frequently as popular attitudes about Puritans suggest. Only rarely did courts become involved in cases of domestic violence. Only one rebellious adult son was prosecuted for "reviling and unnatural reproaching for his natural father,"[29] and he was punished, not by hanging, but by whipping. Similarly, only one natural father was prosecuted for excessively beating his daughter.[30] Prosecutions for wife beating were relatively infrequent. Between 1630 and 1699, 128 men are known to have been tried for physically abusing their wives.[31] The punishments for wife abuse were generally mild, usually amounting only to a fine, a lashing, a public admonition or supervision by a town-appointed guardian. In two instances, however, colonists did lose their lives for murdering their wives.[32]

Although early New Englanders paid close attention to the domestic and sexual behavior of individuals, prosecutions were generally infrequent, except in cases of repeated offenses, especially disruptive behavior or in cases involving the indigent. In cases involving the indigent, lawmakers separated children from parents and required them to work for strangers. They also required paupers and their families to wear the letter "P" on the sleeve of their outer garment, removed indigent families out of town and compelled relatives, including grandparents, to support grown children or grandchildren at risk of fines or imprisonment.[33] Punishment of offenses was designed to strengthen communal norms by bringing deviation into the public realm and eliciting proper attitudes—shame and recantation—on the part of the convicted. Couples found guilty by a church court of fornication had to repent publicly before their child could be baptized. Public humiliation, confession and repentance affirmed the boundaries of acceptable behavior.[34] By the mid-eighteenth century, community regulation of the family had dramatically declined due to rapid population growth, increasing

27. Teitelbaum & Harris, *supra* note 24, at 11.

28. MORGAN, *supra* note 11, at 149. *See also* PLECK, *supra* note 18, at 29 (discussing the rationale behind, and the effectiveness of, such rules).

29. PLECK, *supra* note 18, at 26, 29-31.

30. *Id.* at 26-27.

31. KOEHLER, *supra* note 15, at 137.

32. *Id.* at 137-42. *See also* PLECK, *supra* note 18, at 29-31 (describing one instance of wife abuse).

33. Bissell, *supra* note 26, at 106-29. *See also* D'EMILIO & FREEDMAN, *supra* note 20, at 27-32; PLECK, *supra* note 18, at 32-33.

34. Bissell, *supra* note 26, at 106-29.

religious fragmentation, new ideologies emphasizing personal privacy and the spread of market relationships that undercut paternalistic social relationships. The breakdown of communal controls was manifest in rising rates of illegitimacy and premarital pregnancy, the abolition of many church courts and declining legal prosecution of sexual offenses. By the mid-eighteenth century, courts and town selectmen were less concerned about married couples guilty of premarital pregnancy, and more concerned about the economic maintenance of the illegitimate children born to single women.[35]

B. *Family Law of the Poor*

Even in the seventeenth century, a dual system of family law existed, with one set of principles—of patriarchal authority, family unity, domestic privacy and the primacy and inviolability of the family—applying to most families, and a different set of principles applying to the families of the poor. Four key principles characterized the colonial family law of the poor: local responsibility for assisting poor families, outdoor relief (that is, assistance for the destitute in their own homes), the legal obligation of family members to support relatives and apprenticeship of minor children.[36]

Eligibility for public relief was defined by settlement and removal laws. Colonial settlement laws, which grew stiffer with time, authorized local authorities to deny residence to newcomers who might become a burden on the town, required newcomers without means of support to post bond and barred property owners from selling land to newcomers without prior approval by local authorities.[37] During the nineteenth century, residency requirements for public relief were lengthened, and penalties for those who brought the indigent into local communities were toughened. In a number of cases, courts split up indigent families and transported sick or elderly paupers across local boundary lines.[38] Other regulations empowered local officials to remove children from indigent and neglectful parents and apprentice them with a master. They further required parents, grandparents, children and, in Massachusetts and New York, grandchildren to provide support for poor relatives.[39]

Even in cases involving the indigent, a broad stress on the primacy of the family remained. During the colonial era, most indigent individuals received assistance in their own homes, although some elderly, widowed, sick or disabled persons, who were unable to care for themselves, were placed in neighboring households. It was not until the mid-eighteenth century that a small number of towns erected almshouses or workhouses to serve individuals without families, such as vagrants,

35. *See* D'EMILIO & FREEDMAN, *supra* note 20, at 32-34; WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 110-11 (1975); PLECK, *supra* note 18, at 29-35.

36. *See* ABRAMOVITZ, *supra* note 10, at 75-79; BLOOMFIELD, *supra* note 12, at 99-104.

37. *See* ABRAMOVITZ, *supra* note 10, at 79-83; BLOOMFIELD, *supra* note 12, at 99-104.

38. BLOOMFIELD, *supra* note 12, at 99-104.

39. *See id.* at 103-04.

dependent strangers, deserted children or orphans. Yet even these institutions were modelled upon families; such institutions were built in the style of ordinary residences and patterned after the organization of the family.[40]

C. *The Early Nineteenth-Century Reconstruction of Family Law*

During the first decades of the nineteenth century, American jurists, legislators, litigants and legal commentators reformulated English and colonial legal rules and doctrines dealing with families and created a new system that used contract, gender and family status to structure legal rights and obligations. This new set of rules, regulations and practices rearranged the balance of power within the home and dramatically altered the relationship between family members and government.[41]

The new system of family law embodied emergent republican notions of what constituted a proper family. There was a new conception of the woman's role, which defined the ideal wife and mother in terms of piety, virtue and domesticity; a new sentimental conception of children as vulnerable, malleable creatures with a special innocence and a romantic conception of marriage based on free choice and romantic love.[42]

A belief that choice of a spouse should be based on romantic love rather than parental arrangement led judges and legislatures to make matrimony easier to enter. State legislators lowered marriage fees and authorized an increasing number of churches and public officials to perform marriages while courts rejected colonial rules that made marriage licenses and parental consent necessary for a valid marriage. Judges voided state statutes setting minimum age of marriage and reduced restriction on marriages among affines (such as marriages between a widower and his sister-in-law). They also tended to uphold the validity of common law marriage—in sharp contrast to English courts, which rejected "irregular marriage" as invalid—on the grounds that a prohibition on informal marriages would throw into question the legitimacy of such unions and "bastardize" many children.[43]

A belief that the primary object of marriage was the promotion of personal happiness encouraged jurists and legislators to increase access to divorce and remarriage in instances of adultery, physical abuse or failure of a marriage partner to fulfill his or her proper role. In the early

40. *Id.* at 99-104; DAVID J. ROTHMAN, THE DISCOVERY OF ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 3-56 (1971).

41. *See* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK, 70-112 (1982); BLOOMFIELD, *supra* note 12, at 91-131; MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA, ix-xii (1985); Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346 (1979).

42. *See* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 3-25 (1980); JAY FLIEGELMAN, PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY, 1750-1800 (1982); MINTZ & KELLOGG, *supra* note 1, at 43-65; MARY P. RYAN, CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865, at 18-59, 145-85 (1981).

43. *See* GROSSBERG, *supra* note 41, at 64-83.

nineteenth century, the availability of divorce as a remedy to intolerable marriages expanded as states transferred jurisdiction over divorce petitions to courts. By the 1830s, a number of states adopted extremely permissive divorce laws, allowing a divorce to be granted for any misconduct that "permanently destroys the happiness of the petitioner and defeats the purposes of the marriage relation."[44] In conception and in practice, nineteenth century divorce law tended to reinforce contemporary notions of wifely and husbandly behavior. Divorce laws were built around the concept of spousal fault or moral wrongdoing, and in order to obtain a divorce it had to be demonstrated that a husband or wife had violated his or her domestic role in a fundamental way. In a typical divorce, a wife sued her husband for nonsupport, intemperance and his "indolent," "profligate" and "dissipated" behavior while she sought to demonstrate her "frugality" in managing the home.[45]

A view of married women as individuals possessing distinct rights was apparent in the enactment of married women's property acts, which gave married women limited control over property they brought to marriage or inherited afterward, rudimentary contractual capacity and the right to sue or be sued.[46] Despite these statutes, married women were still treated as a separate and special class in the eyes of the law.[47] Courts held, for example, that ambiguous or intermingled assets belonged to the husband, that women's customary ways of earning money, such as taking in boarders, did not meet the legal requirements of a separate estate and that wives could not establish a separate estate without their husbands' consent.[48]

The new domestic ideology was also recognized in legal changes involving child support, child custody and illegitimacy. During the middle decades of the century, New York state judges were the first to establish the principle that parents had a *legal* obligation to support their children, reversing the old common law doctrine that parents had only a nonenforceable *moral* duty to support their offspring.[49] Many courts went even further and rejected the notion that fathers had an unlimited

44. DAVID BRION DAVIS, ANTEBELLUM AMERICAN CULTURE: AN INTERPRETIVE ANTHOLOGY 96 (1979).

45. *See* ROBERT L. GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES 39-140 (1982). The arguments advanced in nineteenth-century divorce petitions reflected broader cultural ideas of womanhood and manhood. Wives told the courts that they were chaste, modest, industrious, frugal and orderly, while their husbands complained that they were unfaithful, slovenly, lazy and improvident. Conversely, husbands asserted that they were kind, thoughtful, affectionate, temperate, industrious, self-controlled and sexually restrained, while their wives complained that they were cruel, indolent, profligate, dissipated and unfaithful. Legal arguments in divorce cases focused on such issues as sexual decorum, work habits and the nature of family relationships. *Id.*

46. *See* BASCH, *supra* note 41, at 200-23.

47. Norma Basch's detailed study of married women and the law of property in nineteenth century New York found that judges severely restricted women's contractual capabilities and strictly construed statutory provisions in order to maintain husbands' common law right to their wives' earnings and services. *Id.*

48. *Id.*

49. BLOOMFIELD, *supra* note 12, at 119-20.

right to their children's earnings and services, ruling that emancipated minors had full control over their own earnings. A growing number of judges also moved away from the common law principle that gave fathers almost unlimited rights to the custody of their children.[50] By the 1820s, a growing stress on children's welfare and women's childrearing abilities led American judges to limit fathers' custody rights. In determining custody, courts began to look at the "happiness and welfare" of the child and the "fitness" and "competence" of the parents.[51] As early as 1860, a number of states had adopted the "tender years" rule, according to which children who were below the age of puberty were placed in their mother's care unless she proved unworthy of that responsibility.[52] Nineteenth-century American law also broke with English common law by extending many legal rights to illegitimate children and making it easier to legitimate children born outside of wedlock by permitting adoption.[53]

D. *The Paradox of the "Modern" Family*

The late eighteenth and early nineteenth centuries witnessed a fundamental redefinition of the boundaries of domestic and civic spheres. In the early seventeenth century, the family's functions were broad and diffuse. It educated children, it cared for the elderly and ill, it transferred property and skills to the next generation and it was the economic center of production. By the early nineteenth century, non-familial institutions assumed many of these functions. The middle class family's roles grew narrower and more specialized: The family provided emotional support and affection and contributed to the socialization of children.[54] While in one sense the family became more private, by appropriating the realms of feeling and emotion, this was essentially a means geared to a public end. The family was supposed to serve the political order by diffusing self-serving needs and instilling the values of willing obedience, service and rational impartiality—the values of good citizenship.[55]

But what about families that failed to perform these critical public

50. *See id.*; GROSSBERG, *supra* note 41, at 235-59; Michael Grossberg, *Who gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUD. 235 (1983).

51. BLOOMFIELD, *supra* note 12, at 119-20; GROSSBERG, *supra* note 41, at 235-60; Grossberg, *supra* note 50, at 238-46 (1983).

52. GROSSBERG, *supra* note 41, at 248-50. *See also* Anonymous, 55 Ala. 428, 432-33 (1876); State v. Kirkpatrick, 54 Iowa 373, 375 (1880); Landis v. Landis, 39 N.J.L. 274 (1877); State v. Baird & Torrey, 21 N.J. Eq. 384, 388 (1869); *In re* Pray, 60 How. Pr. 194-96 (N.Y. 1881); McKim v. McKim, 12 R.I. 462, 466 (1879).

53. GROSSBERG, *supra* note 41, at 196-228; Michael Grossberg, *Crossing Boundaries: Nineteenth-Century Domestic Relations Law and the Merger of Family and Legal History*, 4 AM. B. FOUND. RES. J. 799, 834-40 (1985).

54. JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 185-86 (1970).

55. *Lasch*, *supra* note 4, at 3-4; Barbara Laslett, *The Family as a Public and Private Institution: An Historical Perspective*, 35 J. MARRIAGE & FAM. 480, 487-89 (1973); Teitelbaum, *supra* note 24, at 1141-81.

functions? Perhaps the most striking development in early nineteenth century family law was the development of a host of public and private institutions designed to rectify family failures. Convinced that such failures were to blame for an alarming increase in violence, robbery, prostitution and drunkenness, reformers responded by creating substitute families such as public schools, houses of refuge, reform schools, YMCAs for young rural migrants to cities, orphanages and penitentiaries.[56]

A blurring of boundaries between domestic and civic life emerged, which encouraged the transfer to public agencies of moral prerogatives and of the presumed benevolence and good will that had grown out of kinship bonds. During the mid-1820s, Boston, New York and Philadelphia established the nation's first publicly funded children's asylums for the moral rehabilitation of delinquent, incorrigible and neglected youths. These houses of refuge separated children from "incompetent" parents, removed them from the sources of temptation, pauperism and crime and instilled habits of self-control through moral education, work, rigorous discipline and an orderly environment.[57]

The early nineteenth century houses of refuge set four important legal precedents. The first was that public and private officials had a right to act *in loco parentis* by removing children deemed unruly, incorrigible, in need of supervision, or abused or neglected and placing them in foster homes or institutions where they would be rehabilitated rather than punished.[58] The second precedent was the establishment of formal distinctions between children and adults before the law. Drawing upon the emerging sentimental conception of childhood, jurists held that a child could not, "by reason of infancy,"[59] be considered criminally responsible. Third, juvenile statutes placed non-criminal behavior, including incorrigibility, habitual disobedience and vicious and immoral behavior, under the jurisdiction of the courts. Finally, the new system embodied two key characteristics of the modern juvenile justice system: commitment of juveniles to institutions after summary or informal hearings and indeterminant sentencing.[60]

The early nineteenth century reconstruction of family law and the creation of public institutions in the form of surrogate families represented a fundamental shift in the locus of cultural authority. On one dimension, this involved a shift away from authority vested in household

56. DAVIS, *supra* note 44, at 40; ROBERT M. MENNELL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE AMERICAN STATES, 1825-1940, at 11-12 (1973); ROBERT S. PICKETT, HOUSES OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815-1857, at 74-75 (1969); STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920, at 124 (1976); SUTTON, *supra* note 23, at 43-89; Steven L. Schlossman, *Justice in the Age of Jackson*, 76 TCHRS C. REC. 119 (1974).

57. ROTHMAN, *supra* note 40, at 257-62.

58. JOSEPH M. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA 41 (1971); SUTTON, *supra* note 23, at 45-49; Teitelbaum & Harris, *supra* note 24, at 20.

59. HAWES, *supra* note 58, at 41; SUTTON, *supra* note 23, at 45.

60. HAWES, *supra* note 58, at 41, 57; SUTTON, *supra* note 23, at 43-46; Teitelbaum & Harris, *supra* note 24, at 20.

patriarchs to appointed or elected judges who received broad discretionary authority to interpret law, investigate the moral fitness of parents and act in children's supposed best interests. On a second dimension, it involved a growing differentiation of law from other cultural authorities. By the early nineteenth century, courts showed a reduced interest in enforcing Christian religious and moral values—such as blasphemy, profanity, lewdness and fornication—which became the exclusive province of churches and voluntary reform societies; instead, courts increasingly devoted their attention to disputes involving property and business. Henceforth, when courts intervened in domestic affairs, most notably in cases involving poverty or delinquency, public involvement was justified on a new and explicitly secular ground, as an effort to rectify family failure.[61]

E. *The Late Nineteenth-Century Reorientation of Family Law*

In the late nineteenth century, legal priorities shifted away from individual choice toward social control. A rising divorce rate, a declining middle class birth rate, changes in women's role and mounting concern about child abuse and neglect all encouraged unprecedented arguments for public paternalism and provided new justifications for intervention in the family by secular authorities.[62]

Eugenicistic, racist and nativistic ideas led many states to impose physical and mental health requirements for marriage, outlaw polygamy (in Idaho and Utah) and interracial marriages (primarily in the boarder states and lower South), establish a waiting period before marriage, institute a higher age of consent and adopt procedures for public registration of all new marriages (by 1907, twenty-seven states required registration).[63] A growing number of states barred first cousin marriage and other marriages between blood relations, and an increasing number of judges refused to accept the validity of common law marriages. Convinced that family limitation was an assault on the home, legislators held abortion to be a criminal offense and restricted the dissemination of birth control materials and information. The publication of an 1886 report estimating that the United States granted more divorces than all other western countries combined led many states to make it more diffi-

61. NELSON, *supra* note 35, at 110-11.

62. The late nineteenth-century perception of a crisis of the family had a number of long-term causes. The climbing divorce rate reflected rising marital expectations and demands, as a more companionate ideal of marital relationships spread. The falling birth rate partly reflected the fact that in an urban, commercial society children were no longer economic assets who could be productively employed. The emergence of a self-conscious middle class concerned about social mobility also encouraged new limits on family size, as did women's desire to free themselves from an unending cycle of pregnancy, birth, nursing and new pregnancy. Changes in women's roles added to the sense of crisis, as increasing numbers of women attended high school and college, joined clubs, participated in mixed-sex leisure activities and worked outside the home.

63. MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE-NINETEENTH CENTURY AMERICA 461-72 (1977); GROSSBERG *supra* note 41, at 103-95; Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 AM. J. LEGAL HIST. 197 (1982).

cult to obtain divorces by raising the age of marriage, restricting remarriages after divorce, lengthening residence requirements for divorce and reducing the grounds for divorce from over 400 to fewer than 20.[64] By 1900, just three states—Kentucky, Rhode Island and Washington—permitted courts to grant divorces on any grounds the courts deemed proper. Through law, government articulated a series of moral ideals: that marriage was a life-long commitment (by permitting divorce only on grounds of serious fault), that sexual relations should be confined to monogamous marriage (by prohibiting adultery, cohabitation, fornication and polygamy), and that the purpose of sexual relations was procreation (by criminalizing sodomy and restricting access to contraceptives and abortion).[65]

The increasing social control orientation of family law cannot be reduced simply to a resurgence of moralism in the face of a perceived crisis of the family; it also reflected the rise of a therapeutic conception of law, which viewed families as instruments of the state, children as public wards and the courts as proper vehicles for solving family problems. The rise of a therapeutic view is most evident in new forms of institutional intervention in the family that arose in the late nineteenth century.[66]

Societies for the prevention of cruelty to children (the first was founded in New York in 1875) sought to assist orphaned, destitute, deserted and illegitimate children and rescue ill-treated children from neglectful and abusive parents. Child labor and compulsory education laws sought to take children out of the labor force and keep parents from exploiting their children economically. To provide children with a more wholesome environment, most cities established kindergartens and playgrounds and removed wayward and homeless children from poorhouses and other institutions, placing them instead in "family-like" arrangements such as foster homes and apprenticeships. Public health reformers sought to reduce infant and child mortality, pasteurize milk and cut the death rate from such diseases as tuberculosis and diptheria. Other reformers attacked the double standard of sexual morality and worked to reduce rates of venereal disease. Still others advocated closing down red-light districts and supported pensions for indigent mothers. "Child-savers" and "family protectors" varied widely in their assumptions about the propriety of religious or benevolent organizations running child- or family-saving institutions; the appropriate role of the state and private agencies acting as *parens patriae* and the relative merits of custodial institutions and the family. They were united, however, by a convic-

64. GROSSBERG, *supra* note 41, at 108-09; Grossberg, *supra* note 63; J.P. LICHTENBERGER, DIVORCE: A SOCIAL INTERPRETATION 154-87 (1931); ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA 4-7 (1980); MINTZ & KELLOGG, *supra* note 1, at 126-27; JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, at 20-45 (1978).

65. MINTZ & KELLOGG, *supra* note 1, at 107-13.

66. LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES (1980).

tion that many of society's most intractable social problems originated in deformed or dysfunctional homes and that it was necessary to expand the state's supervisory and administrative authority over the family.[67]

Perhaps the most dramatic attempt to save the family was the movement to prevent cruelty to wives and children. During the last third of the nineteenth century, concern about family violence and child abuse mounted, and philanthropists founded 494 child protection and anti-cruelty societies. Several states passed laws allowing wives to sue saloon-keepers for injuries caused by a drunken husband, and three states (Maryland in 1882, Delaware in 1901 and Oregon in 1905) passed laws punishing wife-beating with the whipping post. These late nineteenth century reformers largely blamed cruelty to children upon alcohol and the flawed character of immigrant men—in sharp contrast to their counterparts of the 1930s and 1940s who downplayed male violence and blamed abuse on mothers who nagged their husbands and children and refused to accept the female role. After the turn of the century, the anti-cruelty movement declined rapidly for two reasons: opponents were convinced that the societies were prejudiced against the poor and the working class and much too frequently removed children from their parents' custody.[68]

The extension of the state's authority over children was also apparent in new policies toward "wayward" children. New legislation, drawing on the old legal doctrine that the state had an obligation to protect children from "imminent harm," gave public agencies the power to remove neglected and vagrant children from their parents, construct industrial-training and reform schools and invoke criminal penalties against parents for abandonment, nonsupport and contributing to the dependency or delinquency of a minor.[69]

To provide care and supervision for neglected, delinquent and vagrant children, philanthropic organizations, settlement houses and private individuals established more than 450 charitable day nurseries in working-class neighborhoods by 1910. The nurseries not only provided custodial care for children whose mothers worked, they also sought to "Americanize" immigrant children through instruction in proper man-

67. *See generally* LEROY ASHBY, SAVING THE WAIFS: REFORMERS AND DEPENDENT CHILDREN, 1890-1917 (1984); GEORGE K. BEHLMER, CHILD ABUSE AND MORAL REFORM IN ENGLAND, 1870-1918 (1982); MICHAEL B. KATZ, IN THE SHADOW OF THE POOR HOUSE, (1986); MIRIAM LANGSAM, CHILDREN WEST: A HISTORY OF THE PLACING OUT OF THE NEW YORK CHILDREN'S AID BUREAU (1964); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE IN THE PROGRESSIVE ERA (1982); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA (1970); Michael B. Katz, *Child-Saving*, 26 HIST. EDUC. Q. 413 (1986).

68. BEHLMER, *supra* note 67, at 11, 52, 136, 213; PLECK, *supra* note 18, at 69-121, 125-63.

69. KELLER, *supra* note 63, at 465-67; SUTTON, *supra* note 23, at 121-53; Douglas Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. CAL. L. REV. 205, 233-36 (1971).

ners, eating habits and personal hygiene. Many reformers viewed day nurseries as a "more humane and less costly substitute" for orphan asylums, where many working parents, lacking other forms of child care, temporarily placed children. In New York City alone, parents placed 15,000 children in orphanages in 1899.[70] The enactment of mother's pensions in thirty-nine states during the Progressive era represented another attempt to help indigent, widowed, separated, divorced and unmarried mothers to preserve their families.[71]

By the beginning of this century, a new mode of discourse and a new set of standards dominated discussion of government policy toward the family. Jurists, charity workers, settlement house workers and other professionals dealing with family problems evolved new notions of "parental fitness," "parental duties," "child welfare" and "children's rights and needs" that justified state supervision of the family "for the protection of society, and the welfare of the child himself."[72] Along with this change, a new therapeutic conception of law emerged, increasing formal state involvement in family affairs, viewing parents as agents of the state and giving judges more discretionary power to set standards of parental fitness and child welfare. This new legal ideology involved a view of all children—not simply poor or delinquent children—as wards of the state, a broadening of problems demanding public intervention, an increase in judicial discretion and a growing conviction that courts could resolve domestic problems.

Nowhere was this viewpoint more apparent than in the reconstruction of the juvenile justice system. In an effort to give special attention and rehabilitative opportunities to youngsters who broke the law, Illinois established the first juvenile court in 1899.[73] By 1917, all but three states had enacted juvenile justice legislation. Within these separate tribunals for young people, informal hearings were designed to replace adversarial proceedings and diagnostic investigations, psychological assessment and rehabilitation were to replace judgments of guilt and innocence and imposition of punishment. In these courts, however, young people were deprived of constitutional safeguards that would apply in a criminal trial. These included protections over the admission of hearsay and unsworn testimony, criminal standards of proof, privilege against self-incrimination and double jeopardy and right to bail and counsel.[74]

The growing assertion of a special state interest in family welfare during the Progressive era can also be seen in the establishment of the first family courts. Family courts were to provide a less formal and less

70. MINTZ & KELLOGG, *supra* note 1, at 129; LESLIE WOODCOCK TENTLER, WAGE-EARNING WOMEN: INDUSTRIAL WORK AND FAMILY LIFE IN THE UNITED STATES, 1900-1930, at 161-65 (1979); Virginia Kerr, *One Step Forward—Two Steps Back: Child Care's Long American History*, *in* CHILD CARE—WHO CARES 159 (Pamela Roby ed., 1973).

71. MINTZ & KELLOGG, *supra* note 1, at 129-30.

72. GROSSBERG, *supra* note 41, at 248-50, 281-85; SUTTON *supra* note 23, at 142.

73. HALEM, *supra* note 66, at 220; SUTTON *supra* note 23, at 121-53.

74. HALEM *supra* note 66, at 220; SUTTON, *supra* note 23, at 121-53; Roger C. Algase, *The Right to a Fair Trial in Juvenile Court*, 3 J. FAM. L. 292 (1963); Frank W. Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. FAM. L. 151, 151-52 (1961).

adversarial forum than the criminal courts for a broad range of family problems including desertion, divorce, child neglect and maltreatment and juvenile delinquency. First in New York City in 1910 and then in many other municipalities and states, family court judges, assisted by a professional staff of psychologists, social workers, probation officers and divorce proctors, were charged with settling domestic conflicts, resolving marital disputes and reconciling marriage partners.[75]

After 1920, a growing number of reformers, convinced that the roots of marital breakdown lay in lack of communication and cooperation, unsatisfactory sexual relationships and psychological maladjustments, created new programs in sex education, marriage reconciliation and counseling services and courses in family living.[76] Believing that the law's adversarial approach to divorce was harmful both to spouses and children, reformers also recommended changes in divorce proceedings. The recommendations included mandatory counseling of parties seeking divorce, nonadversarial divorce proceedings and greater availability of divorce on grounds of mental cruelty and incompatibility. Two states—New Mexico and Oklahoma—revised their divorce statutes to allow divorce on grounds of incompatibility, and three other states—Arkansas, Idaho and Nevada—shortened residency requirements and liberalized divorce codes in order to attract couples seeking divorce.[77]

From the early 1920s onward, family law was increasingly influenced by psychological and clinical studies of the family. Custody law was recast in light of new notions of "psychological parenthood" and the importance of continuity and stability in caretakers (assumptions which led jurists to frown upon joint and divided child custody arrangements).[78] In divorce proceedings, judges tended to dilute stringent legal statutes. In 1931, only seven states specifically permitted divorce on grounds of mental cruelty, but judges in most other jurisdictions reinterpreted laws permitting divorce on grounds of physical cruelty to encompass such conduct as constant nagging, humiliating language, unfounded and false accusations, insults and excessive sexual demands. In these ways and others, psychological and clinical research was incorporated into family law.[79]

One ironic consequence of the continuing academic and clinical research into the family was that it increasingly threw into question certain assumptions held by family professionals, most notably the emphasis attached to preserving the family unit. Studies of divorce, for example, raised penetrating questions about the psychological and emotional implications of divorce for children. In the 1920s, authorities on the family, using the case-study method, had concluded that children experienced the divorce of their parents as a devastating blow that

75. HALEM, *supra* note 66, at 116-28, 220-21, 241-51, 280; MINTZ & KELLOGG, *supra* note 1, at 126-27.
76. MINTZ & KELLOGG, *supra* note 1, at 125-29.
77. HALEM, *supra* note 66, at 129-57.
78. *Id.* at 136; MINTZ & KELLOGG, *supra* note 1, at 107, 126-29.
79. HALEM, *supra* note 66, at 136; MAY, *supra* note 64, at 5-6, 30, 104.

stunted their psychological and emotional growth and caused maladjustments that persisted for years.[80] Beginning in the late 1950s, a growing body of research argued that children from conflict-laden, tension-filled homes were more likely to suffer psychosomatic illnesses, suicide attempts, delinquency and other social maladjustments than were children whose parents divorced. The research further argued that the adverse effects of divorce were generally of short duration and that children were better off when their parents divorced than when they had an unstable marriage.[81]

Professional concern about child abuse and family violence also grew, leading a growing number of physicians and psychologists to call for expansion of child protective services and separating abused children from their parents. In 1954, the Children's Division of the American Humane Association conducted the first national survey of child neglect, abuse and exploitation.[82] Three years later the United States Children's Bureau launched the first major federal study of child neglect, abuse and abandonment. Child cruelty captured the attention of a growing number of radiologists and pediatricians who found bone fractures and physical trauma in children suggesting deliberate injury. After C. Henry Kempe, a pediatrician at the University of Colorado Medical School, published a famous essay on the "battered child syndrome" in 1962, legal, medical, psychological and educational journals began to focus attention on family violence.[83] It is not clear that the incidence of abuse increased; certainly recognition and reporting of abuse increased. Growing professional concern about child abuse led to calls for greater state protection and services for abused and neglected children and their parents.[84]

F. *Legal Regulation of the Family Today*

Up until the mid-1960s, certain largely unquestioned assumptions guided American family law. It was a basic, if generally unstated, premise of family law that the nuclear family had a privileged status and that government could discriminate against non-nuclear families in granting benefits.[85] Similarly, it was taken for granted that the father, as "head and master" of his family, automatically gave his children his surname,[86] determined the family's legal residence,[87] was immune from lawsuits in-

80. HALEM, *supra* note 66, at 158-232.

81. SAR A. LEVITAN & RICHARD S. BELOUS, WHAT'S HAPPENING TO THE AMERICAN FAMILY? 69-72 (1981); HALEM, *supra* note 66, at 158-232.

82. PLECK, *supra* note 18, at 165-81.

83. C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17, 17-24 (1962).

84. PLECK, *supra* note 18, at 164-81.

85. *See* Reynolds v. United States, 98 U.S. 145, 164, 165 (1879).

86. *See, e.g.*, People *ex rel.* Rago v. Lipsky, 63 N.E.2d 642, 644 (1945). *See generally* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 105 (1989).

87. *See, e.g.*, Carlson v. Carlson, 256 P.2d 249, 250 (Ariz. 1953).

stituted by his wife[88] and was entitled to have sexual relations with her.[89] Other underlying legal assumptions were that marriages could only be dissolved on grounds of serious fault, that following a divorce young children were better off with their mothers unless the mothers were unfit, that children were legally incompetent and subject to parental guidance and discipline and that states had the power to regulate private sexual behavior and define the sexual norms according to which citizens were supposed to live.

Since the early 1960s, all of these assumptions have been called into question as new notions of privacy, sexual equality and children's rights produced a revolution in American family law. The practical effect of this revolution has been a gradual erosion in the traditional conception of the nuclear family as a legal entity with its own distinctive rights.[90]

In recent years, courts have overturned older legal definitions of what constitutes a family. In cases involving zoning and public welfare, influential court decisions declared that local, state and federal governments cannot define "family" too restrictively, holding that common law marriages, cohabitation outside of marriage and large extended households occupying the same living quarters are entitled to protection against hostile regulation.[91] In other cases, the Supreme Court ruled that government cannot discriminate against groups of non-related individuals living together in providing food stamps and that state legislatures cannot designate one form of the family as a preferred form.[92] Meanwhile, courts and state legislatures have tended to weaken or overturn laws that assign individual responsibilities on the basis of family relations, including laws that make children legally responsible for the support of indigent parents or statutes that hold parents accountable for crimes committed by their children.[93]

At the same time that definitions of family grew broader and more pluralistic, courts became increasingly willing to intervene in the internal functioning of on-going marriages. Until recently, it was assumed that courts should not interfere in marital decision making except in cases of divorce or separation nor interfere in the parents' discretionary authority over the details of their children's upbringing, except in cases involving neglect, abuse, delinquency or child custody.[94] These assumptions have recently been challenged, as courts have increasingly

88. *See, e.g.*, 1 WILLIAM BLACKSTONE COMMENTARIES *443; Kennedy v. Camp, 102 A.2d 596 (N.J. 1954).

89. *See* State v. Haines, 25 So. 372 (La. 1899) (holding that a husband cannot be found guilty of raping his wife).

90. Glendon, *supra* note 1, at 1-7; Stephen J. Morse, *Family Law in Transition*, *in* CHANGING IMAGES OF THE FAMILY 319, 320-21 (Virginia Tufte & Barbara Myerhoff eds., 1979).

91. RUBIN, *supra* note 1, at 143-61; Morse, *supra* note 90, at 322-25.

92. RUBIN, *supra* note 1, at 143-61; Morse, *supra* note 90, at 322-25; Moore v. City of East Cleveland, 431 U.S. 494 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

93. *See* MINTZ & KELLOGG, *supra* note 1, at 232-33; W. Walton Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 804-08 (1979).

94. Mary Ann Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMP. L. 1 (1975).

stressed the equality of spouses and have held that minors have independent rights that can override parental authority. Invoking the principle that all individuals have rights to privacy, due process and equal treatment under law, courts have increasingly emphasized the separateness and autonomy of family members. Courts have held, for example, that a husband's surname is not necessarily his wife's or his children's,[95] that a husband's home is not necessarily his wife's domicile,[96] that spousal immunity is not inviolate[97] and that under certain circumstances a husband can be prosecuted for spousal rape.[98] In cases involving children's rights, a number of courts have ruled that parents do not have an absolute veto over whether minor girls can obtain contraceptives or abortions (while upholding statutes requiring doctors to *notify* parents before performing abortions).[99]

While judicial involvement in the decision making of ongoing families has increased, the nation's courts and state legislatures showed a decreasing interest in enforcing sexual norms. Beginning in 1965, the Supreme Court, declaring that the constitution created a right to privacy, struck down a series of state statutes that prohibited the prescription or distribution of birth control devices or that limited circulation of information about contraception.[100] In 1972, the Court extended access to contraceptives to unmarried persons.[101] In 1973, it decriminalized abortion, and in 1976 the Court held that a "competent" unmarried minor can decide to have an abortion without parental permission.[102] Since 1962, when Illinois became the first state to decriminalize all forms of private sexual conduct between consenting adults, twenty states have decriminalized private consensual sexual conduct and judicial decisions in four other states have invalidated statutes making such conduct a crime.[103] Today, two-thirds of the states have repealed statutes prohibiting fornication, adultery and cohabitation outside of

95. *See* Commonwealth v. Lowell, 366 N.E.2d 717, 720, 721, 725 (Mass. 1977).

96. OHIO REV. CODE ANN. § 3103.02 (Page 1972)(stating that a husband's home is his wife's domicile)(repealed 1974); Green v. Commissioner 305 N.E.2d 92, 94 (Mass. 1973).

97. Beaudette v. Frana, 173 N.W.2d 416 (Minn. 1969).

98. People v. Liberta 474 N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985). *See generally* Susan Estrich, *To Have and to Hold: The Marital Rape Exemptions and the 14th Amendment*, 99 HARV. L. REV. 1255, 1258-60 (1986).

99. Bellotti v. Baird, 443 U.S. 622 (1979); *cf. In re* Lori M., 496 N.Y.S.2d 940, 942 (N.Y. Fam. Ct. 1985)(upholding the right of a minor to associate with a lesbian).

100. *See e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

101. Eisenstadt v. Baird, 405 U.S. 438 (1972).

102. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See also* Morse, *supra* note 1, at 325-27, 349-50. Although the Supreme Court greatly expanded liberty interests during the 1960s and 1970s, the present Court appears to be moving toward limiting the further growth of such interests. *See, e.g.*, Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986).

103. State v. Saunders, 381 A.2d 333 (N.J. 1977); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980); Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982). *See generally* G. SIDNEY BUCHANAN, MORALITY, SEX, AND THE CONSTITUTION 81-82 (1985); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 950-51 (1979).

marriage.[104]

By far the most dramatic changes in family law have involved divorce. Beginning in California in 1970, no fault divorce statutes replaced laws that allowed divorce only on grounds of fault in every state.[105] Instead of holding a trial to determine whether a spouse was guilty of a serious marital offense, no fault statutes allowed spouses to obtain divorces by mutual consent or on grounds of incompatibility or "irretrievable breakdown" of the marriage.[106] Proponents of change—largely lawyers and judges—argued that no fault divorce would create less adversarial divorce proceedings, reduce perjury and bring law into line with the social reality of sharply rising divorce rates.[107]

Although advocates of divorce reform described the introduction of no fault statutes as a technical modification of existing laws rather than as a major legal reform, in fact the new statutes had far-reaching effects on such issues as alimony, child custody, child support and the division of property. The new no fault statutes undermined the traditional legal assumptions that wives had a right to lifelong support, to retain the marital dwelling and to child custody. Under the new legislation, certain preferences that had generally worked to the advantage of women were eliminated. Temporary "maintenance" or "spousal support" replaced alimony; the principle of equal or equitable division of property replaced the distribution of property on the basis of fault; and gender neutrality, and, in some cases, a presumption in favor of joint custody, replaced the older presumption in favor of mothers in disputes over young children.[108]

One ironic consequence of the new statutes has been to contribute to a sharp increase in the number of poor divorced women. The no fault statutes have not, in practice, effectively aided most divorced women. Most divorces involve families with little property to divide. Moreover, child support awards are often inadequate and compliance with support orders is low. In fact, many women, especially older women, are able to find employment only in lowpaying sales, clerical or service occupations. As a result, the household income of divorced women and their children tends to fall sharply after a divorce, while the

104. *See Constitutional Barriers to Civil and Criminal Restrictions of Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660 (1991).

105. HERBERT JACOBS, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988); RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 619-34 (1988); LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN (1985); Lenore Weitzman & Ruth B. Dixon, *The Transformation of Legal Marriage Through No-Fault Divorce: The Case of the United States*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES: AREAS OF LEGAL, SOCIAL, AND ETHNICAL CHANGE 143 (John M. Eekelaar & Sanford N. Katz eds. 1979). *See also* HALEM, *supra* note 66, at 233-83 (discussing divorce statute reform in the years 1966-1976).

106. *See, e.g.*, CAL. CIV. CODE § 4506(1) (West 1983).

107. HALEM, *supra* note 66, at 233-83; JACOBS *supra* note 105; Weitzman & Dixon, *supra* note 105, at 143-53.

108. HALEM, *supra* note 66, at 233-83; JACOB, *supra* note 105; PHILLIPS, *supra* note 105, at 561-72; WEITZMAN, *supra* note 105, at 15-28.

husbands' income rises.[109]

The revolution that has occurred in family law since 1960 can be viewed from two very different perspectives. On the one hand, this legal revolution has extended gender equality, increased personal freedoms and recognized a right to privacy. Courts and state legislatures have eliminated certain historical preferences given to nuclear families and to fathers, made divorce less adversarial and more accessible and granted wives and children greater access to courts in family disputes. Yet at the same time, a disparate group, which includs women's organizations and "pro-family" conservative groups, has viewed these changes from a much more negative perspective, arguing (in quite different ways) that this legal revolution has produced hardship for many women and children, undermined family stability and intruded on family autonomy in decisionmaking.

III. Sources of Changes in Family Law

It is helpful to interpret transformations in family law in terms of a shifting balance among five broad themes in public discourse on the family. At each historical period, one finds a different balance in the dominant ideology. One theme involves the changing functions of family law. At certain times, family law has been essentially pedagogical; at other times, essentially prescriptive; at still other times, protective of individual rights. A second theme involves the relative responsibility of individuals, public and private institutions and the courts for enforcing values. A third key theme involves the values upheld by family law. At certain points in American history, family law has stressed marital unity and family solidarity; at other times, personal choice and responsibility; at others, family privacy and individual autonomy. A fourth fundamental theme is the form of legal intervention in the family, ranging from non-intervention, which implicitly ratifies socially-assigned family roles and power relationships, to the explicit extension of legal rights, criminalization of certain acts and state-ordered mediation of familial disputes. The final theme concerns changing family ideologies that extend from patriarchal and hierarchical ideals to more romantic and companionate conceptions of familial relationships.[110]

For simplicity of analysis, we will examine transformations in family law in terms of changes in the legal realm and changes in family and society.

A. *Changes in the Legal Realm*

Over the past three hundred years, the functions of family law have undergone a profound change, from pedagogical to therapeutic, from

109. Phillips, *supra* note 105, at 628-30; Weitzman, *supra* note 105, at 70-73. Weitzman found that in California the share of property that wives received following a divorce declined sharply after the adoption of the state's no fault divorce law.

110. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1487 (1983).

prescribing to proscribing and fixing. In colonial New England, family law was conceived in essentially pedagogical or symbolic terms, emphasizing exhortation rather than enforcement. Family laws were taken word for word from the Old Testament. Yet while the realm of law was defined more broadly than it is today, encompassing moral and religious offenses as well as economic disputes or criminal offenses, most legal punishments were by our standards quite mild. Punishments were not designed to imprison or ostracize offenders, but to reinforce communal norms and reintegrate offenders back into the community.

By the nineteenth century, the functions of family law had shifted. Family law was increasingly conceived in instrumental terms, as a way of resolving conflicts, enforcing agreements, assigning rights and promoting socially desirable conduct. Jurists and legislators used new conceptions of contract, gender, and family status to restructure family law and reformulate doctrines governing marriage formalities, divorce, alimony, marital property, child custody, adoption and child support. Accompanying this new instrumental conception of law was a persistent view of law as moral discourse. Legal doctrines governing divorce, custody and other aspects of family relationships were explicitly framed in terms of ethical conceptions of fault and fitness.

In the twentieth century, conceptions of the functions of law again shifted radically. Family law was increasingly conceived in secular and therapeutic terms, reflecting a view that courts had the capacity to solve family problems. Since 1960, expectations about what law can do have risen even further. Increasingly law—like public schools and the tax code—has been regarded as a social institution which could self-consciously promote social change.

To a great extent, these changes in the functions of law reflect broad historical changes in the legal profession. In the American colonies, there were few professional judges or lawyers. Most judges were lay people lacking formal legal training; often they were members of local elites holding positions of authority in other community institutions, such as church courts, and had many face-to-face relationships with litigants. In their decisions, these jurists generally sought to reinforce a consensus of opinions and express shared ethical principles.[111]

By the early nineteenth century, the number of formally trained judges and lawyers had sharply increased. These jurists were interested in establishing principled rationales for legal decisions. They tended to view law in increasingly instrumental terms, as a way of resolving conflicts and promoting socially desirable conduct. By the early twentieth century, family law had become a specialized field within the legal profession, with its own courts focusing exclusively on resolving family-re-

111. Maxwell H. Bloomfield, *Law: The Development of a Profession*, *in*, THE PROFESSIONS IN AMERICAN HISTORY (Nathan O. Hatch ed., 1988); Patricia U. Bonomi, *"Stewards of the Mysteries of God": Clerical Authority and the Great Awakening in the Middle Colonies*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 29 (Gerald I. Geison ed., 1983). *See generally* READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION (Dennis R. Nolan ed., 1980).

lated problems such as desertion, parental neglect or maltreatment of children, adoption, juvenile delinquency and divorce. These courts were designed to offer a less formal and less adversarial mechanism than the regular courts and to draw upon the advice of social workers and psychologists. The shift to specialized jurists aided by psychology and the social sciences helps to account for one of the most striking developments of twentieth century family law: the gradual rejection of the idea that family law should be framed in moral terms such as fault and moral fitness.

B. *Social Changes in Society and the Family*

Transformations in family law resulted in part from changes within the legal system, but they also were the product of broader economic transformations and changes in family ideologies, family functions and gender relations. For example, the patriarchal character of law in colonial New England was tied to particular religious ideologies and to the predominance of a household system of production in which a father's control of land and craft skills reinforced paternal authority. A father's control over inheritance allowed him to exercise control over his children's sexual behavior and their choice of marriage partners. In the eighteenth century, a father's ability to transmit land to his children declined, as did his ability to enforce obedience. A symptom of this decline was a marked increase in children's discretion in deciding whom and when to marry.[112]

The early nineteenth century reconstruction of family law was in part the product of a fundamental transformation in the family itself: the separation of production from other family functions and the isolation of married women and young children in what contemporaries called a "separate sphere of domesticity."[113] As the middle class family lost many of its earlier public functions as a center of production and a mechanism for transmitting skills, and as married women were stripped of traditional productive roles (such as spinning, weaving and fabricating clothing), the functions and responsibilities of the family underwent radical redefinition. Middle-class women gained new roles in the domestic domain and childrearing. In colonial America, childrearing manuals had been addressed to fathers; in the early nineteenth century, in contrast, such tracts were written almost exclusively for mothers. Gender and particularly the mother's role were at the heart of the redefinition of boundaries of domestic and public realms.[114]

At the same time, conceptions of childhood underwent a radical transformation. Children were increasingly regarded in a new light: as special beings with distinctive needs and impulses. Childhood was increasingly viewed as a period of innocence, growth, development and preparation for adulthood. Whereas in the colonial period it was com-

112. *See* STEPHANIE COONTZ, SOCIAL ORIGINS OF PRIVATE LIFE 73-115 (1988).
113. MINTZ & KELLOGG, *supra* note 1, at 50-51.
114. MINTZ & KELLOGG, *supra* note 1, at 43-65.

mon for parents to send off children at the age of eight or nine to work as servants or apprentices in other households, a growing number of nineteenth-century parents kept their sons and daughters home well into their teens and even their twenties. Nineteenth-century parents also made unprecedented efforts to shelter their children from knowledge of such "adult" realities as sexuality and death. One justification for this new emphasis on sheltering and nurturing children was a growing belief that "adolescence" (previously a rarely used term) was a particularly unsettled phase of life during which children were deeply in need of paternal protection and supervision.[115]

The increasing emphasis in family law on equal rights and gender neutral standards since 1960 is linked partly to the rapid influx of married women into the workforce. This contributed to a new image of family as an economic partnership in which husband and wife both share burdens and contribute economically. Married mothers in the workforce have risen from less than 20% in 1950 to 54% in 1980 and over 70% today.[116]

The recent emphasis on children's rights is in part a reflection of the growing litigiousness of the broader society, in which every group asserts its own set of rights. The growing stress on children's rights is also related to an erosion in family structure that has undermined the notion of the family as a single legal entity. The most recent census figures indicate that the number of children living in single parent families has grown significantly.[117]

A high divorce rate, continuing growth in female-headed families and an increase in out-of-wedlock births have all contributed to radical changes in American family structure. In 1989, the divorce rate was more than double the 1966 rate and three times as high as the 1950 level.[118] In each year since 1975, over a million children under age eighteen have been affected by divorce.[119] Largely as a result of the high divorce rate, "[m]ore than one-half of black children lived in single-parent homes in 1989."[120]

Also contributing to a rapid increase in single-parent families is a rising rate of out-of-wedlock births. Out-of-wedlock births have climbed from just 5% in 1960 to 23.4% in 1986.[121] In recent years, single-parent families, once dismissed as "problem" families, have grown progressively more common. This is evidenced by the fact that 22% of American children lived in a single parent family in 1989 as compared with 10% in 1965.[122]

115. OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, U.S. DEPARTMENT OF EDUCATION, YOUTH INDICATORS 1991: TRENDS IN THE WELL-BEING OF AMERICAN YOUTH 3 (1991).
116. *Id.* at 46-47.
117. *See id.* at 28-29.
118. *Id.* at 16-19.
119. *Id.* at 16.
120. *Id.* at 29.
121. *Id.* at 24.
122. *Id.* at 2.

Another demographic factor that has led to an increasing emphasis on children's rights is a marked lengthening of the transition from youth to adulthood. Women are beginning marriage at older ages. During the 1950s, women typically married at relatively young age; the average age of first marriage was around 20.[123] During the 1970s, the marriage age rose rapidly and now stands around 24, higher than at any point since 1890.[124] Meanwhile, young adults are living with their parents longer. Between 1960 and 1990, the proportion of young adults ages 18 to 24 living with their parents increased by nearly 25%.[125] Today, 53% of these young adults are living with their parents.[126] This lengthening of the transition period between youth and adulthood may have increased the willingness of courts to accord children new legal rights.

CONCLUSION

Although it is always treacherous to draw lessons from history, a knowledge of the history of family law can help us identify those elements of contemporary legal discourse that are particularly distinctive and problematic. Two elements stand out: a de-moralizing of family law, that is, a growing hesitance to discuss family issues in moral terms, and an erosion of explicit legal presumptions governing legal decision making, which has markedly broadened the reach of judicial discretion.

One of the most distinctive characteristics of contemporary legal discourse on the family is the tendency to avoid terms that connote moral blame or judgment. In addressing questions of divorce or child custody, courts tend to avoid issues of fault or moral fitness. In cases of child abuse or neglect, the trend in legal opinion is to allow intervention in cases in which a child has suffered or risks physical or mental injury. Today, family regulators are little concerned about questions that preoccupied their predecessors, such as family formation and dissolution (including limitations on marriage, common law marriage, legitimacy and grounds for annulment or divorce) or the obligations of spouses. This new view presupposes diversity in the characteristics and functioning of families and rejects the earlier view that certain specific family roles (such as the supposedly natural capacity of mothers for childrearing) were rooted in moral, religious or natural law. Replacing the older moral discourse is a discourse emphasizing equality and individual rights.[127]

Of course, to say that the drift in family law is away from explicit moral judgments is not to suggest that the law does not make implicit moral judgments. Prior to the adoption of no fault divorce statutes, the law of marriage implicitly upheld a marital ideal involving lifelong sup-

123. *Id.* at 3, 14-15.
124. *Id.*
125. *Id.* at 3, 30-31.
126. *Id.* at 30-31.
127. Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1803-04 (1985); Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 431 (1985).

port and marital fidelity. This was done by making divorce obtainable only on grounds of serious fault and requiring the breadwinner to pay lifetime support in the form of alimony. Since divorce was obtainable only on fault grounds, the spouse who was opposed to a divorce had an advantage in negotiating a property settlement. The tendency now is to avoid questions of fault or responsibility in dissolving a marriage or dividing marital assets. Contemporary notions of divorce law are much less judgmental: either spouse is free to terminate a marriage at will for almost any reason, after a divorce each spouse is expected to be economically self-sufficient and termination of a marriage frees individuals from most economic responsibilities to former dependents.[128]

One of the most striking characteristics of our current structure of family law—with its rejection of earlier forms of moral discourse and its acceptance of the terminability of familial obligations—is its tendency to decontextualize individuals and to eliminate a sense of on-going responsibility. Law is not simply an instrument of dispute adjudication; it is also (as the Puritans and, later, nineteenth century jurists realized) a powerful instrument of moral pedagogy, conveying important messages about responsibility and obligation. Rather than stressing on-going responsibility, the law today tends to reinforce broader individualistic and therapeutic currents in the culture, stressing self-fulfillment and individual happiness as the ultimate social values.[129]

Earlier in American history, one of the basic functions of family law was to articulate and reinforce certain widely-held standards and norms about the family. In recent years, jurists have backed away from using law and family policy to enunciate family standards and norms. Yet value judgments remain implicit in the law, and the values that the law currently tends to stress, such as the terminability of family relationships and obligations, tend to undermine broader values that the society claims to hold, such as the notion that having children entails responsibilities that do not disappear following separation or divorce.

128. *See* GLENDON, *supra* note 1, at 108-11.

129. *See* Walter O. Weyrauch & Sanford N. Katz, AMERICAN FAMILY LAW IN TRANSITION, 496-98 (1983); Schneider, *supra* note 127, at 1814-19.