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All in the Family & in All Families: Membership, Loving, and Owing

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ALL IN THE FAMILY & IN ALL FAMILIES: MEMBERSHIP, LOVING, AND OWING

MARTHA MINOW*

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PART ONE: ALL IN THE FAMILY—WHO IS THE FAMILY?

I. INTRODUCTION

The first part of my title, "All in the Family," refers to the television show by that name because it captures the theme I would like to sound here. Otherwise known as the Archie Bunker show, the central character in "All in the Family" exhibited gross racial, ethnic, and sexual prejudices—and yet the show itself celebrated the capacity of human beings to grow and change within families. What interests me here in particular is the shift in the constellation of people treated as family over the years the show was on the air. Initially, Archie and his wife Edith shared their home with their daughter and her husband—not quite a nuclear family, but a rather traditional extended family. Over time, however, Archie meets Edith's lesbian cousin. He also learns to deal with divorce. Ultimately, Edith dies, Archie's daughter separates from her husband and they both move away, and Archie becomes the custodian of a niece who is half-Jewish.¹ All inside this "family," then, the variety of shifting relationships mirrored the variety of potential family memberships in the larger society. Once a show exhibiting the prejudices of a white ethnic patriarch toward his diverse society, "All in the Family," over time, brought that diversity inside the family itself.

Both the growing diversity in groups across this nation who claim to be families and diversity within the families themselves carry consequences for the three basic issues in family law: 1) who is in "the family," 2) what benefits accompany family membership, and 3) what obligations accompany family roles. It may once have seemed that these questions had obvious and uncontroverted answers. It may once have seemed that "family" referred to a natural or obvious social entity created by the biological ties of parent and child and the divine or contractual ties of marriage.

I am skeptical of all stories of a past golden or untroubled age, however,² and I do mean to dispute any claim that "family" as de-

1. See ELLA TAYLOR, *PRIME TIME FAMILIES* 71-76 (1989).

2. See generally OTTO BETTEMANN, *THE GOOD OLD DAYS: THEY WERE AWFUL!*

fined by law is natural or obvious. Certainly it is a legal rule, not a natural fact, that creates the presumption that a child born to a woman who is married is the child of the woman's husband.³ Rules about marriage eligibility and practices have also undergone sufficient historical changes to reveal the political, religious, and social choices embedded in that institution.⁴

Scholars have also shredded the myth of the homogenous family with historical and sociological studies revealing enormous variance in the structures and functions of families. As one author recently concluded, "Families differ by income, by social class, by ethnicity and religion, by neighborhood and region, by number of members, by relations with kin, by patterns of authority and affection, by lifestyle, by the balance of happiness and unhappiness."⁵ Finally, and perhaps most telling, the myth of the homogenous family portrayed in television sitcoms has been challenged on television itself—consider not only "All in the Family," but also "My Two Dads," "The Brady Bunch," and "Kate and Allie," not to mention an oldie but goody, "My Mother the Car."

Today there can be no doubt that the variety of social practices poses new and pressing questions for legal definitions of family, family benefits, and family obligations. No neutral answers, tethered to "nature" or consensus, are available.⁶ Instead, the legal rules inevitably

(1974).

3. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (rejecting constitutional challenge to this presumption brought by the man acknowledged by the mother to be the father of the child).

4. See *infra* text accompanying note 52 (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

5. ARLENE SKOLNICK, *EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY* 3 (1991).

6. It is hardly the case that "nature" or consensus ever ruled in questions of the family, yet some historic periods have been characterized by greater social pressures to create an illusion of consensus about these issues. See *id.* at 49 ("Rarely has an era strived so hard, in the midst of immense social change, to define the normal and the seemingly immutable") (quoting THOMAS HINE, *POPULUXE: THE LOOK AND LIFE OF AMERICA IN THE '50's AND '60's* 177 (1986)). Yet the post-war era of the 1950s and 1960s in fact included a shift toward a family form—the stay-at-home mother with the breadwinner father living with their children—that departed from patterns in preceding and subsequent decades. *Id.* at 51-52.

register choices, and the immediate task is to articulate and debate the considerations that should influence those choices.

In this Article, I will sketch those considerations while documenting the challenge to conventional understandings posed by the current diversity of groupings that are candidates for family status. The challenge to constitutional understandings of family bears a marked resemblance to the controversy over multiculturalism in educational contexts, yet I think we can do better than most of the multicultural debates have in avoiding rigid, polarized positions. Locating the ambivalence over pluralism within American history and constitutional traditions would help; so would clarifying the preconditions for tolerance. These I take as my tasks in Part One of this Article as I address what considerations should guide legal definitions of families and distributions of benefits based on family status. In Part Two, I will reconsider this discussion while examining legal obligations based on family status.

II. NOTHING NATURAL ABOUT IT: LEGAL REGULATION AND FAMILY DIVERSITY

The most basic evidence that regulation of families reflects cultural choices is the constant theme in American culture that "the family" is in crisis—and hence, someone should do something about it. Newspapers over the past few years abound with stories about dramatic shifts in American families.⁷ Historians tell us that Americans have worried about the family for over three hundred years; the Puritans began it all by "decrying the increasing fragility of marriage, the growing selfishness and irresponsibility of parents and the increasing rebelliousness of children."⁸ Wary that I am just another decrier in this tradition of bemoaning the family in crisis, I see two recent patterns of change. The first is the increased gap between legal or conventional definitions of family membership and actual lived practices—that is, the diversity of groups that see themselves as families. The

7. See, e.g., Felicity Barringer, *Changes in Family Patterns: Solitude and Single Parents*, N.Y. TIMES, June 7, 1991, at A1; Pamela Reynolds, *Gay Couples Redefine "Family"*, BOSTON GLOBE, Oct. 5, 1989, at 101.

8. SKOLNICK, *supra* note 5, at 8.

second is an apparent rise in the numbers of families composed internally by people with contrasting religious, ethnic, or racial identities—or, diversity within families. While the first raises directly questions for legal rules about who is “family” and what benefits should attach to family membership, the diversity within families exposes further complications. Each development, in turn, exposes the unavoidable choices for contemporary family law.

A. *Diversity of Families*

More than a year ago, a New York Times headline announced, *Only One U.S. Family in Four is “Traditional”* compared with forty percent in 1970.⁹ The term “traditional” here referred to a married man and woman living with their children. If the children are *their own*—not stepchildren under eighteen—the percentage is even smaller; only eight to ten percent of all households are families of this sort, with a wife who does not work outside the home.¹⁰

Lawful family membership traditionally depended upon marriage, birth of a child to its biological parents, and adoption. Yet today, different groupings of people are increasingly claiming legal family status. The Massachusetts highest court accepted the claim by an unmarried woman to unemployment benefits offered to the legal spouse of someone who had to move for employment purposes; the woman claimed that her cohabitation of 13 years should entitle her to those benefits.¹¹ A few years ago, New York accorded to the gay lover of a man who had died the legal protection against eviction from a rent-controlled apartment that the law grants to spouses of deceased lease-

9. *Only One U.S. Family in Four Is “Traditional,”* N.Y. TIMES, Jan. 30, 1991, at A19 (citing census data).

10. See Martha Minow, *Redefining Families—Who’s In and Who’s Out*, 62 U. COLO. L. REV. 269, 274 (1991).

11. *Reep v. Commissioner of Dep’t of Employment & Training*, 593 N.E.2d 1297 (Mass. 1992). After this decision, the legislature overrode an executive veto and amended the governing statute to prohibit payment of unemployment benefits to anyone who (spouse or not) who accompanies a person to a new locale. 1992 Mass. Legis. Serv. ch. 26. (Westlaw) (H.B. 2935, § 20).

holders.¹² Thus, the question I pose is which kinds of groups should be defined legally as families, and what benefits should accrue because of this family status?

No responsible discussion of these questions can begin without first acknowledging how they implicate social and political choices about distributing privileges. No factual answer can resolve those choices, nor is it possible for the government to be neutral in the face of an array of social relationships. As long as the terms "family," "parent," and "spouse" carry legal significance, they depart from their social meanings and even from the meanings people intend when they apply these terms to themselves.

For example, the legal rules defining "family" for immigration purposes notably chafe people's actual practices of family life—no doubt reflecting a public policy to restrict immigration rather than a conscientious effort to define "family." The Immigration Reform and Control Act of 1986 affords amnesty to undocumented individuals who meet its requirements—but many of these people have spouses or children who do not.¹³ The eligible individuals must choose whether to stay in this country without their relatives or to leave the country, and the ineligible individuals must choose whether to remain illegally.

In addition, the Immigration and Naturalization Service (INS) treats as a "family unit" for its general practices only those immediate family members who regularly reside in the same household.¹⁴ As law professor Carol Sanger notes,

The INS definition of family unity fails to acknowledge that for a variety of reasons many children in this country live with nonparental relatives outside the family home [A]ssume a 14-year-old boy, excludable because he assisted another alien in entering the country illegally, lives with his uncle. The boy will not be considered a member of his father's family group because the boy is functionally part of another family. If, however, the uncle is also applying for legalization and seeks a waiver on

12. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (1989).

13. Tony Arjo, "Family Fairness" Policy Helps Some Newly-Legalized Immigrant Families, Not Others, *YOUTH L. NEWS*, May-June 1990, at 15; Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 *GEO. IMMIGR. L.J.* 295, 295-96 (1987).

14. Sanger, *supra* note 13, at 328-29.

behalf of his nephew, the application cannot be granted in the name of family unity because the nephew is not a member of the uncle's biological family.¹⁵

This kind of scenario is especially likely among families of immigrants who migrate in waves, often with male relatives arriving first and sending later for other immediate family members.¹⁶ Moreover, many immigrants share households and treat as family members nieces or nephews, grandparents, or cousins, which the INS will not include under its definition of family unit.¹⁷

Extended families face special burdens from other governmental programs as well. Eligibility rules for food stamps and other government poverty programs often pose choices between living with family members or living apart from them.¹⁸ The United States Supreme Court has found no defect in regulations that deny separate household eligibility for food stamps to parents who live not only with their own children but also with their siblings, even though unrelated families that share living space may be eligible.¹⁹ The irony here is that the government's policy works against the goal of encouraging relatives to turn to relatives when they face difficult economic times.²⁰ To counter this, New York began an experiment recognizing kinship ties by supporting foster care with relatives, but faced a crisis when the number of participating families seemed too many and too expensive to include.²¹ Yet attentiveness to cultural variety especially calls for rec-

15. *Id.* at 329-30 (footnotes omitted); see also *INS v. Hector*, 479 U.S. 85 (1986) (per curiam) (denying petition for suspension of deportation of teenage nieces living with an aunt because the extreme hardship exemption applies only to spouses, parents, or children).

16. Sanger, *supra* note 13, at 311-12.

17. See Martha Saenz-Schroeder et al., *Family-Sponsored Immigration*, 4 GEO. IMMIGR. L.J. 201, 202 (1990) (comments of Carol Wolchok). In addition, per-country limits produce long waitings—as long as twelve years—for reuniting children with parents who have become permanent United States residents. *Id.* at 203.

18. Lucy Billings, *The Choice Between Living with Family Members and Eligibility for Government Benefits Based on Need: A Constitutional Dilemma*, 1986 UTAH L. REV. 695.

19. *Lyng v. Castillo*, 477 U.S. 635 (1986).

20. See also *Bowen v. Gilliard*, 483 U.S. 587 (1987); cf. Isabel Wilkerson, *Middle-Class Blacks Try to Grip a Ladder While Lending a Hand*, N.Y. TIMES, Nov. 26, 1990, at A1.

21. Suzanne Daley, *Treating Kin Like Foster Parents Strains a New York Child Agen-*

ognizing relationships between grandparents and grandchildren or other extended family ties.²²

Another major discontinuity between law and social practice arises for gay and lesbian people. Some would say that this is fine, that the law should not recognize relationships that are immoral, unnatural, or (in a somewhat circular argument) illegal. Rendering gay and lesbian relationships illegal is, of course, a social and political choice, and it is one currently under challenge around the country and, indeed, around the world.²³

For gay and lesbian activists, it is a form of illegitimate discrimination to deny lawful marriage to gay and lesbian couples,²⁴ to deny adoption and foster care to gay and lesbian individuals,²⁵ and to dis-

cy, N.Y. TIMES, Oct. 23, 1989, at A1; *When Relatives Take Children In*, N.Y. TIMES, Oct. 28, 1989, at 24. The number of children in the kinship program has skyrocketed since the program began in 1986. Nearly 45% of the 49,814 children in New York City's foster care system live in kinship foster homes. New York City Mayor's Management Report, Mayor's Office of Operations, Fiscal Year 1991.

22. See William A. Vega, *Hispanic Families in the 1980s: A Decade of Research*, 52 J. MARRIAGE & FAM. 1015, 1016-17 (1990) (non-nuclear family members are more likely to contribute to household income in Hispanic than in white households and historically, Hispanic families are often extended beyond the nuclear group with an additional relative such as a sibling or cousin of the parents); Melvin N. Wilson, *The Context of the African American Family*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE 85, 93, 101-02 (Joyce E. Everett et al. eds., 1990) (three times as many African-American children as white children under age eighteen live with grandparents and a practice of informal adoption is also prevalent among African-Americans).

23. Same-sex marriage is not lawful anywhere in the United States, although some municipalities have recognized domestic partnerships for certain purposes. In 1989, Denmark recognized the registration of same-sex partnerships which provides homosexual couples with many of the benefits accorded to marriage, including property inheritance. Adoption of children is not enabled by this approach, however, nor is marriage within the Danish church. Sweden in 1988 granted the same partnership rights to same-sex couples as those available to heterosexual couples. See Mary P. Truethart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91 (1990-91).

24. Edward A. Slavin, Jr., *What Makes a Marriage Legal?*, 18 HUM. RTS. 16 (1991) (ABA Section of Individual Rights and Responsibilities); see also Nitya Duclos, *Same-Sex Marriage: Complicating the Question*, 1 J. LAW & SEXUALITY 31 (1991) (urging the question whether lesbians and gay men, or some of them, benefit from legal recognition of their relationships rather than asking the government to grant permission for gays or lesbians to marry).

25. See *Babets v. Secretary of the Executive Office of Human Servs.*, 526 N.E.2d

advantage homosexual parents in contests over custody of their biological children.²⁶ They advocate that it should be unlawful for employers,²⁷ insurance companies,²⁸ and other entities to ignore these family roles or punish gay and lesbian people because of them—as a state attorney general did recently in withdrawing a job offer to a woman because she had undergone a religious marriage ceremony with another woman.²⁹

These calls for legal recognition and protection are increasingly successful.³⁰ As a small sign of the times, or should I say, the stars,

1261 (Mass. 1988) (challenging state policy preferring married and heterosexual applicants as foster parents); *In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987) (answers to certified questions from the legislature: (1) proposed bill prohibiting homosexuals from adopting any person is constitutional, (2) proposed bill prohibiting homosexuals from being licensed as members of foster families is constitutional, and (3) proposed bill prohibiting homosexuals from running licensed day care centers is unconstitutional violation of the Equal Protection Clause); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (noting unavailability of adoption to gay individuals). *But see In re Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992) (granting adoption to lesbian life partner of six-year-old boy's biological mother, giving equal parental status to both parents).

26. See Ray Long, *ACLU Brief Raps Denial of Custody to Lesbian*, CHI. SUN-TIMES, Mar. 8, 1991, at 20; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990). Special problems of finding a fair legal forum arise when lesbian couples separate and then disagree over custody or visitation. See David Margolick, *Child-Custody Cases Test Frontiers of Family Law*, N.Y. TIMES, July 4, 1990, at 1.

27. See Tamar Lewin, *Suit Over Death Benefits Asks, What Is a Family?*, N.Y. TIMES, Sept. 21, 1990, at B7 (describing suit against AT&T for refusing to pay benefits to a lesbian partner after the death of an employee when the company would have paid benefits to a husband).

28. See Claudia H. Deutsch, *Insurance for Domestic Partners*, N.Y. TIMES, July 28, 1991, at 23.

29. Mark Curriden, *A.G. Refuses to Hire Lesbian*, A.B.A. J., Dec. 1991, at 32 (Georgia Attorney General withdrew job offer to Robin Shahar after she disclosed her upcoming religious ceremony with another woman; Shahar filed suit claiming equal protection and freedom of religion and association violations).

30. See, e.g., *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (1989); Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067 (1990); James Barron, *Bronx Hospital Gives Gay Couples Spouse Benefits*, N.Y. TIMES, Mar. 27, 1991, at A1; Pamela Reynolds, *Harvard Broadens Its Housing Policy*, BOSTON GLOBE, Oct. 5, 1989, at 101 (Harvard University settles case filed with Boston Fair Housing Commission to give eligibility to university affiliate apartments to "Harvard graduate students, faculty and staff, whether living

the Star Tribune in Minneapolis recently started publishing announcements of gay or lesbian "domestic partnerships" on what had previously been its wedding and announcement page.³¹

Many people, however, still believe that gays and lesbians should be excluded from the privileges of family membership. It will not do, however, to support this view by reference to nature, convention, or even religion. Many religions are themselves struggling with these questions; some are performing marriages for gays and lesbians, some are ordaining gay and lesbian clergy. Disagreements over these issues are intense and volatile; they involve the central issues of politics—who's in or out, and who gets what. Finding sufficiently shared assumptions with which to resolve these disagreements is itself a challenge, and in our society, that challenge will inevitably turn to the legal system—since it is all that we have in common.

It is important to recognize that the resolutions of those conflicts will, in turn, affect cohabiting heterosexuals and potentially other groups as well. For example, claims by lesbian partners of women with children to a kind of equitable parenthood or *in loco parentis* right based on performing the functions of a parent could, if recognized, produce legal protection for other informal but functional family relationships—such as those between aunts who care for children and boyfriends and the children of their girlfriends. New rules in these contexts will also reflect the eroding significance of biology to lawful family membership in light of new reproductive technologies. For if a woman who contributes no genetic material to the fertilized egg she carries to term can become the lawful mother, why cannot her cohabiting female lover also become a lawful parent for that child?

New reproductive technologies, gay and lesbian couples, immigrants, applicants for food stamps—these may each sound marginal to family law and to legal definitions of family. But if you continue to think that the core legal definitions of family are still safe and uncontested, think again. Consider single parent households—whether never

alone, married, living with someone or involved in a long-term gay or lesbian relationship").

31. *Paper Includes Gay Couples on What Was Wedding Page*, N.Y. TIMES, Mar. 23, 1991, at A10.

married or divorced or stepfamilies—or the term I prefer, blended families. By 1989, nearly twenty-five percent of all children in this country lived in single parent families, and over half of all African-American children lived with one parent.³² As a result of the combined rates of divorce, separation, and births to unmarried people, more than half of all white children and three-quarters of all black children born in the 1970s and 1980s are expected to live for some portion of their childhoods with only their mothers.³³ The number of children living with unmarried parents doubled between 1980 and 1985.³⁴ The sheer decline in the use of the term “illegitimate child” indicates a change, as bearing and keeping children become more socially acceptable for unmarried people³⁵—from movie stars on down.³⁶ Our rates of single-parent—and divorce—households remain the highest in the world.³⁷

Furthermore, numerous families are now created through remarriage, typically following divorce.³⁸ Reflecting the increase, the Census Bureau counted stepfamily households for the first time in 1990.³⁹ One observer predicts that half of all young people will live in blend-

32. NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 18 (1991).

33. *Id.* at 20. But note that “family disruption” due to divorce is comparable to disruption in the last century due to death of a parent. *See* SKOLNICK, *supra* note 5, at 144 (discussing research by Mary Jo Bane).

34. Michael J. Dale, *The Evolving Constitutional Rights of Nonmarital Children: Mixed Blessings*, 5 GA. ST. U. L. REV. 523, 523 (1989).

35. SKOLNICK, *supra* note 5, at 188.

36. Cohabitation without marriage also surged during the past decade; interestingly, here we lag behind Sweden, where one in every five couples is unmarried. *Family Troubles*, WASH. Q., Spring 1991, at 18. According to Census Bureau statistics, there are approximately 2.9 million unmarried couples living together in the United States, an 80% increase since 1980. Barringer, *supra* note 7, at A1.

37. *Id.*

38. *See generally* JUDITH STACEY, *BRAVE NEW FAMILIES* (1990).

39. Marilyn Coleman & Lawrence H. Ganong, *Remarriage and Stepfamily Research in the 1980s: Increased Interest in an Old Family Form*, 52 J. MARRIAGE & FAM. 925 (1990). What we count shows what we care about; the 1890 Census counted whether a woman had children and how many were still alive and what percentage of black blood each person had. *Back Issues: How Have We Changed? The 1890 Census Provides One Indication*, WALL ST. J., Mar. 9, 1990, at 27.

ed families by the year 2000, given current rates of divorce and remarriage.⁴⁰

For single parent households, blended families, adoptive families, gay and lesbian families, and extended families, social practices often do not match legal definitions of family or law enforcement of family roles. The rules may say that children of unmarried fathers are eligible for child support from their fathers but not for public benefits they would receive if their fathers had married their mothers.⁴¹ Unmarried fathers may be counted as members of the family for some legal purposes even if there is no cohabitation, or not counted even if there is. Divorced fathers remain fathers, but it is unclear in some legal circumstances when they remain members of "the family." States also lack clarity about the legal and financial obligations, if any, of a stepparent: if that person has not adopted the child, should the law give no recognition of their relationship if, for example, the stepfather obtains a divorce and then wishes to visit his ex-wife's child?

While it is socially recognized that the blended family composed of a mother and her children, a father and his children from another marriage, and the former spouses or lovers of each adult may act as one "family"—perhaps an extended family—when, if ever, should the law recognize such practices? Should the law enforce duties for step-parents, for example? In her vivid study of two such groupings in Silicon Valley, California, anthropologist Judith Stacey called them "Brave New Families," and found people turning to one another as if they were extended families despite divorces and subsequent remarriages.⁴²

40. See Paul Glick, *Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Analysis*, 38 FAM. REL. 24-27 (1989).

41. Compare *Jimenez v. Weinberg*, 417 U.S. 628 (1974) (disabled worker's nonmarital children born after onset of disability eligible for social security benefits) and *Gomez v. Perez*, 409 U.S. 535 (1973) (nonmarital children entitled to child support) with *Mathews v. Lucas*, 427 U.S. 495 (1976) (social security survivorship benefits unavailable to certain nonmarital children absent proof of dependency at time of the worker's death) and *Califano v. Boles*, 443 U.S. 282 (1979) (nonmarital children can be denied social security insurance benefits).

42. STACEY, *supra* note 38; see also Paul Bohannon, *Divorce Chains, Households of Remarriage, and Multiple Divorcers*, in *DIVORCE AND AFTER* 113-21 (Paul Bohannon ed., 1970) (describing kinship ties after divorce as a chain, establishing a complex network of

While some people continue to turn to one another despite divorce and remarriage, others wish to excise their former relatives after a divorce. As one teenage character reports in a recent short story, "Trouble is all those divorces really mess up the photograph albums . . . Mom butchered ours. There's only about two pictures left of Dad in all twelve albums."⁴³ Should private efforts at emotional excision produce comparable legal results, or should the law assure that Dad stays, in some way, part of the family?⁴⁴

Related questions surround changes in adoption of children. Shifting from an era of sealed documents—part of the myth that no adoption had happened—some adoptive parents now meet the birth mothers, and some experiment with "open adoption" in which an adopted child maintains ties with both the biological and adoptive parents. If these groups of parents function as a kind of extended family, should the legal definition of who is a parent be modified?⁴⁵ Or should law preserve the notion of exclusive parenthood and terminate all legal ties with the biological parent after adoption?⁴⁶

My own intuition favors expansive definitions. I am not alone. As one observer commented recently, "[I]ncreasingly America seems to be agreeing with the concept of family as those who love each other and want to work to support each other."⁴⁷ The American Home Economics Association defines a family unit as "two or more persons who

potential relationships).

43. Pamela Painter, *New Family Car*, in *THE GRAYWOLF ANNUAL EIGHT: THE NEW FAMILY* 240, 244 (Scott Walker ed., 1991).

44. Some studies suggest that parents and children do not mention stepchildren and stepparents living in their household when asked to describe who is in their families. See FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 79 (1991).

45. See LINCOLN CAPLAN, *AN OPEN ADOPTION* (1990).

46. See Katherine Bartlett, *Re-Expressing Parenthood*, 98 *YALE L.J.* 293 (1988).

47. Pamela Reynolds, *supra* note 7, at 101; see also Slavin, *supra* note 24, at 17 (citing a Massachusetts Mutual Life Insurance Poll in which 74% of adults defined family as "a group of people who love and care for each other"). Eighty-one percent of Americans view family as the primary source of pleasure in life—and 51% of parents also viewed it as one of the greatest sources of worry. See Edward F. Zigler & Elizabeth P. Gilman, *An Agenda for the 1990s: Supporting Families*, in *REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY* 237 (David Blankenhorn et al. eds., 1990).

share resources, share responsibility for decisions, share values and goals, and have a commitment to one another over time . . . regardless of blood, legal ties, adoption, or marriage."⁴⁸

Yet these definitions do not match most current legal rules defining family, marriage, or parenthood. Should the rules change to reflect these views or instead continue to discipline or constrain them?⁴⁹ Should shifting legal and informal practices defining family membership also alter the benefits and obligations attached to family roles? I hope I have demonstrated that the answers to these questions are not obvious nor answerable by reference to nature or convention. But before I defend an expansive, or tolerant, view, we need to consider the additional complication of diversity *within* families.

B. Diversity Within Families

One function of families in this society is to nurture cultural diversity; in private homes and communities, families engage in varied religious, ethnic, and lifestyle practices that reflect and in turn support the national commitment to liberty.⁵⁰ Respecting the autonomy of each family in many ways ensures the continuation of social diversity as parents raise their children according to their own values and traditions. We could enforce this diversity, but we do not: our legal system does not pursue the route taken by several other multicultural societies

48. Slavin, *supra* note 24, at 18; see also Thomas Palmer, *All in the Family*, BOSTON GLOBE, Feb. 16, 1992, at 77 ("Liberals were successful, during the 1970s, in getting the family defined more broadly, the word eventually encompassing virtually any two people living together."). Mark Poster criticizes functional definitions of family for neglecting the quality of relationships and uniqueness of each family. MARK POSTER, *CRITICAL THEORY OF THE FAMILY* 143 (1978). Nonetheless, he offers this notion: "The family is the social space where generations confront each other directly and where the two sexes define their differences and power relations." *Id.* Even this capacious notion may exclude some groupings, such as same-sex cohabitation.

49. A study of children's concept of the family indicates that young children rely upon common residence and contact between members to determine who is in the family while older children rely on blood or legal relationship. Rhoda L. Gilby & David R. Pederson, *The Development of the Child's Concept of the Family*, 14 CAN. J. BEHAV. SCI. 110 (1982).

50. See David Blankenhorn, *Introduction* to REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY xi, xiii (David Blankenhorn et al. eds., 1990).

which assign each person a "personal law," or the specific legal rules accompanying his or her religious tradition, such as Hindu, Moslem, Jewish, or Christian.⁵¹

Perhaps we do not have such rules because we believe, in a certain sense, that every family is characterized by diversity. If the birth of a child is the triggering act in the creation of a family, surely this involves the diversity of generations. Any two people who come together in marriage join two distinct family cultures, embedded ways of squeezing the toothpaste, expressing disagreements, and relating to others. The Sunday after my sister married her husband—with whom she had lived for the prior six years—she rolled out of bed and asked when he was going to the delicatessen to get the cold cuts. He looked at her with confusion, asked why he should go, she burst into tears, and two hours later she realized that as a child, growing up, my Dad would go out every Sunday to the delicatessen and pick up cold cuts. My sister also realized that she does not even like cold cuts, but she found she had brought to her new family—the one created by her marriage—a set of expectations about which she had not even been conscious and which certainly surprised her husband.

But specific forms of diversity within families in this country reflect the transcendence of higher barriers and more profound separatisms than those that distinguish delicatessen-going families from others. The history of racial segregation in families is a striking exam-

51. Personal law, determined by religious affiliation, governs the family lives of Hindus, Moslems, and others religious communities in India. See Jamie Cassels, *Bitter Knowledge, Vibrant Action: Reflections of Law and Society in Modern India*, 1991 WIS. L. REV. 109. Personal law based on religious affiliation is a kind of "autonomy regime" for minorities that might otherwise be engulfed by the dominant majority. See Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539 (1991). The closest practices in the United States may be *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discussed *infra* text accompanying note 84 and the Indian Child Welfare Act according tribes jurisdiction and standing to intervene in state actions affecting the custody of Indian children. Yet this statute in operation has not assured Indian control and raises new questions because it curtails the rights of Indian parents to choose placements for their children. See Joan H. Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. L. REV. 451, 500 (1989); Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-1903, 1911-1923, 1931-1934, 1951, 1952, 1963 (1988).

ple. The legacy of slavery and racism included legal rules against interracial marriage and restrictions against interracial adoption. The 1967 Supreme Court decision in *Loving v. Virginia* rejected state laws forbidding interracial marriage.⁵² It was a landmark case for racial justice as well as for the constitutional status of family law.

Interracial adoption, long unheard of, became an experiment in the 1960s and remains a subject of controversy. My colleague Elizabeth Bartholet argues that opposition to it reflects a segregative spirit that should have no place in American law and too often consigns non-white children to foster care or institutions rather than assuring them parents of their own race.⁵³ In a refreshingly courageous judgement, the Supreme Court in 1984 rejected a divorced white father's challenge to a white mother's custody of their child solely on the grounds that the mother was cohabiting with (and later married) an African-American man.⁵⁴ The Court reasoned:

It would ignore reality to suggest that racial and ethnic prejudices do not exist There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possibility of injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.⁵⁵

52. *Loving v. Virginia*, 388 U.S. 1 (1967). A powerful, precursor decision reaching the same result appears in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) (Traynor, J.). The dissent in *Perez* also shows that the question was by no means uncontested. *Id.* at 35 (Shenk, J., dissenting).

53. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).

54. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

55. *Id.* at 433-34 (footnotes omitted).

Thus, at least in theory,⁵⁶ the legal system is not supposed to bow to prejudices against racial diversity within families.

Similar but less high profile patterns have emerged with religious diversity *within* families. The longstanding practice of religious matching by adoption agencies—through which a child born to parents of a particular religion would be matched with adoptive parents of the same religion—is much in decline, and legally unacceptable if it produces unequal treatment and delays in the adoption process.⁵⁷ And while religious institutions and clergy may decline to approve or perform interreligious marriages, secular marriages remain available for unions of men and women from different religions. If, however, those couples have children and then divorce, special problems may arise over the children's religious upbringing and practices. Consider three examples:⁵⁸

—A mother seeks and obtains a restraining order prohibiting her ex-husband, a Mormon, from engaging their children in any religious activity, discussion, or attendance during visitation. The appellate court lifts the restraining order “due to the absence of evidence of harm to the children and our resulting belief that the order represents an unwarranted intrusion into family privacy.”⁵⁹

56. The sobering footnote to reality here is that the child lived with the white father during the litigation—without court approval—and the father ultimately obtained an opportunity to claim lawful custody. *Palmore v. Sidoti*, 472 So. 2d 843 (Fla. Dist. Ct. App. 1985) (permitting proceeding in Texas to resolve the child's best interests).

57. See *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988) (court approves settlement between the City of New York and child care advocates limiting religious matching in foster care to ensure placement on a first-come-first-serve basis). See generally Donald Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 *FORDHAM L. REV.* 383 (1989); Note, *Religious Matching Statute and Adoption*, 51 *N.Y.U. L. REV.* 262 (1976). But see Gregory A. Horowitz, *Accommodation and Neutrality Under the Establishment Clause: The Foster Care Challenge*, 98 *YALE L.J.* 617, 624 (1989) (17 states require or prefer religious matching in adoption placements).

58. See generally Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 *MICH. L. REV.* 1702 (1984); Ann Berlin, *An Overview of Recent Religious Custody Disputes: Towards a Framework for Equitable Resolutions* (unpublished paper, Apr. 13, 1990) (on file with author).

59. *Mentry v. Mentry*, 190 Cal. Rptr. 843, 844 (Ct. App. 1983); accord *Munoz v.*

—A mother seeks a restraint against the father from causing or allowing their children to violate the Jewish Sabbath and dietary laws during their visits with him. The court denies it on the grounds that such an order would violate the father's constitutional right to freely exercise his own religion.⁶⁰

—A mother obtains physical custody of a child but the father obtains "spiritual custody," meaning he is entrusted with inculcating a religious tradition no longer observed by the custodial parent.⁶¹

I will examine the rationales in these cases in some detail because they illuminate how diversity *within* families can pose challenges to the very definition of family and to the privileges or benefits accompanying family membership. They also show the complications that come with a tolerance for interreligious families.

In a post-divorce situation with parents of different religions, what should the law treat as the family unit—that is, who is in the "family"—for purposes of protecting family privacy or balancing interests within the family? What privileges of parenthood should be preserved in this circumstance? In addressing this question, can the state maintain

Munoz, 489 P.2d 1133 (Wash. 1971). Other courts in contrast have relied on psychologist evidence that exposing a child to two different religious traditions would *per se* harm a child and therefore issued a restraint against the noncustodial parent. *See, e.g., Morris v. Morris*, 412 A.2d 139 (Pa. Super. Ct. 1979). Another enjoined the father from taking his children to Assembly of God meetings because the parents' dispute over religion would cause future harm to the children. *Andros v. Andros*, 396 N.W.2d 917 (Minn. Ct. App. 1986).

60. *Brown v. Szakal*, 514 A.2d 81 (N.J. Super. Ct. Ch. Div. 1986); *see also In re Tisekos*, 514 N.E.2d 523 (Ill. App. Ct. 1987) (allowing noncustodial parent to take child to his church rather than mother's church during visitation time); *Kelly v. Kelly*, 524 A.2d 1330 (N.J. Sup. Ct. Ch. Div. 1986) (rejecting custodial parent's request, based on her assertion of the commands of her Catholic faith, for a restraint against the father to prohibit overnight visits of their children in his home in the presence of unrelated persons of the opposite sex because the psychological expert in the case that greater harm would come to the children by suggesting that the father is a bad man than by exposing them to his lifestyle).

61. Dick Johnson, *Struggle for Custody of Children's Faith Becomes Nightmare*, N.Y. TIMES, Dec. 11, 1988, at 1 (describing case of Jerold Simms and Dorothy Boeke).

neutrality toward religion and toward two parents while also protecting the children?

In the first case, the custodial mother left the Mormon church when she separated from her husband, and she sought then to restrict the husband's ability to require the children to engage in Mormon religious activities. The court treated the question as one concerning the risk of harm to the children and rejected testimony by an expert that conflicting religious views would be harmful to the children because the expert had not examined the particular children involved.⁶² The court relied on the reasoning of a judge in another jurisdiction who wrote that

"If the dominating goal of the enterprise is to serve a child's best interests . . . then it might be thought to follow that a policy of stability or repose should be adopted by which the child would be exposed to but one religion (presumably that of the custodial parent) at whatever cost to the 'liberties' of the other parent. The law, however, tolerates and even encourages up to a point the child's exposure to the religious influences of both parents although they are divided in their faiths. This, we think, is because the law sees value in 'frequent and continuing contact' of the child with both its parents and thus contact with the parents' separate religious preferences. There may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose in later life."⁶³

The court thus treated religion as a matter of ultimately individual choice. Parental prerogatives remain unconstrained by the governmental obligation to guard children from harm in the absence of evidence of physical or emotional problems to the children arising from exposure to two religions.⁶⁴ Perhaps most striking is the court's decision to define the "family" to include both divorced spouses and their children in one unit. The court endorses the "salutary judicial disinclination to interfere with family privacy without the evidentiary establishment of compelling need."⁶⁵

62. *Mentry v. Mentry*, 190 Cal. Rptr. 843, 847 (Ct. App. 1983).

63. *Id.* at 846-47 (quoting *Felton v. Felton*, 418 N.E.2d 606, 607-08 (Mass. 1981)).

64. *Id.*

65. *Id.* at 847.

Who is in the family entitled to such privacy? Note that the ex-husband is included in this protected sphere: "The rationale that supports judicial respect for family privacy does not lose its force upon the dissolution of marriage where, as here, a family relationship—even a disharmonious one—continues between the former spouses in connection with the rearing of their minor children."⁶⁶

The dissenting judge in this case, however, painted a contrasting picture. This judge brought out un rebutted evidence at trial that the mother developed the belief that the father was sexually molesting their daughter: "She appealed to her bishop for help and was rebuffed, being told that the issue was not a 'moral' one. The crisis in confidence experienced by the mother led to a dissolution from husband and a break with the Mormon Church."⁶⁷ The mother joined a different church and perceived that the children experienced confusion in reconciling the beliefs of the two parents, compounded, in her view, by the husband's presentation of Mormon materials during his visits with the children. The dissenting judge viewed the reasons for the mother's separation from both husband and church as relevant to the assessment of the children's best interests; that judge also urged a reading of the court's duty to guard children from harm as including future, not only past harm.⁶⁸ This dissenting view exposes the trouble with the majority's definition of the divorced couple and their children as one family unit entitled to family privacy and raises a sharp question about the court's justification for seeking a neutral stance with regard to the conflict presented in the case.

In the second case, a mother sought to restrain her husband from causing the children to violate Jewish traditions, including dietary laws, during his visits with the children. Here the court reasoned that it "must neither violate the mother's or the children's constitutional right to religious freedom *nor permit the imposition upon the father of the*

66. *Id.* at 848. Somewhat crudely, the court at that point cites in support judicial respect for family units in the absence of a marriage. The reference is crude because it relies on *Stanley v. Illinois*, 405 U.S. 645 (1972), which concerned the rights of an unmarried father to qualify as a custodian after the mother of the children died. *Id.* at 849.

67. *Id.* at 851 (Miller, J., dissenting).

68. *Id.* at 851-52.

mother's religion which imposition would violate the father's constitutional right of freedom of religion."⁶⁹ The court reasoned that the mother could not use the court to impose her religious practices on her ex-husband, even though she has the right to select the religious upbringing of the child.⁷⁰ In essence preserving the father's privilege to influence the children's religious upbringing, the court stated that it intended to promote a strong relationship with the noncustodial parent⁷¹ while also remaining impartial toward religion.

The court acknowledged the risk of harm to the children from confrontation with conflicting values, but nonetheless concluded that society is pluralistic and that each individual must balance the conflict between competing commitments to the state and to one's own ethnic or religious heritage.⁷² Here, the court made much of the choices already made by the mother—not only had she divorced and remarried, she had also converted from Christianity to Judaism. The court reasoned that she created a "personal pluralism" with "voluntarily obtained dichotomies"⁷³—and thus the children would share that pluralism.

In this light, the court treated as self-interest—beyond parental privilege—the mother's effort to shield the children from alien influences or temptation to depart from their religious practices.⁷⁴ The court also suggested that the father try to be sensitive to their views "so as not to have them see him as a contradiction in their lives."⁷⁵ But the court would not grant to the custodial parent a power to be used to exclude the father's contrasting religious views and practices as a factor in the children's lives.⁷⁶ The court thus curbed the moth-

69. *Brown v. Szakal*, 514 A.2d 81, 83 (N.J. Super. Ct. Ch. Div. 1986) (emphasis added).

70. *Id.*

71. *Id.*

72. *Id.* at 84.

73. *Id.*

74. *Id.* at 84-85. "[S]he opts for self interest which here must yield to the welfare of the community generally and the father and the children, particularly." *Id.* at 85. The father is treated as both alien and as the community whose interests must be balanced with the mother's individual interests.

75. *Id.*

76. The court reassured itself that the children in this instance were already so well

er's privileges in deference to the father's and expressed confidence that the children would be able to choose their religious practices in light of their mother's guidance when, later, they gained independent reason.

In the third case, the noncustodial father obtained spiritual custody of the child, thus exercising the prerogative to determine the child's religious upbringing. That case marks an exception to the usual practice of according to the custodial parent the right to determine the child's religious upbringing and training.⁷⁷ Yet even if the custodial parent is granted that right, the courts must still struggle with the competing claims of a noncustodial parent to religious freedom and to a right to expose the child to his religious practice.⁷⁸

As these three cases indicate, diversity within families complicates analysis of who is within the family and what benefits accompany family membership. Parental prerogatives such as guiding a child's religious upbringing become complicated when the parents themselves disagree. The secular state, committed to neutrality about religion, then faces a special problem. How can it avoid imposing any particular religious view—that is, how can it remain neutral—while still performing its function of protecting children? The usual judicial answer, demonstrated by these cases, is to turn to the language of children's interests and harms, to consider the testimony of psychologists, and to count on a notion of individual choice for parents and for children as they grow into individuals capable of mature independent reason.

Yet, this usual judicial answer demonstrates the impossibility of neutrality in these cases,⁷⁹ for the emphasis on individual choice of

grounded in their religion that "when they reach the age of mature independent reason they will be sufficiently secure in their custodial parent's religion of choice that they will not misplace the concern of their mother or their rabbis." *Id.*

77. See, e.g., *S.E.L. v. J.W.W.*, 541 N.Y.S.2d 675 (Fam. Ct. 1989).

78. In an unusual case, a custodial mother who had converted from Judaism after the divorce nonetheless agreed to continue to raise the children as Jews; the court rejected the argument offered by the Jewish father that this would violate the mother's own religious freedom. *S.L.J. v. R.J.*, 778 S.W.2d 239 (Mo. Ct. App. 1989).

79. Cf. Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989).

religion neglects the possibility that the sheer fact of being posed with a choice about religious identity alters the child's relationship to religion. Some religions do not treat religious identity as a choice but instead an inheritance. Others treat choice itself as a threat to the religion's integrity.⁸⁰ Even the child who reaffirms the religion of his custodial parent in the face of exposure to his noncustodial parent's religion has a different relationship to religion than one who had no such sustained exposure.⁸¹ The difficulty is not just the legal system's, but the children's and the parents'. This impossibility of judicial neutrality toward religion in these cases mirrors the impossibility of avoiding choice in the legal definitions of "family" and articulations of benefits of family membership.

We face choices about who should be treated as families and what benefits and freedoms should people receive as family members. Yet how should we make such choices? I think we first need to acknowledge that we cannot be neutral about them. I also advocate tolerance in making these choices—but tolerance itself is a substantive value that departs from neutrality. Tolerance can be chosen only as a tradeoff against other values. This is a slippery point, so let me elaborate and locate it in our constitutional tradition.

III. A TRADITION OF TENSIONS

Committed to equality and liberty, riven by legacies of differences and discrimination, our legal system reflects simultaneous devotion to neutrality toward—or better yet, tolerance of—private choices and devotion to officially articulated values. For example, the First Amend-

Unrestricted state supervision of family life's private sphere is inconsistent with the most basic of democratic and constitutional theories. Yet a stance of total nonintervention is also impossible, because some forms of regulation are needed to protect against other forms. To protect some family members and family choices from intrusion is to expose others to intrusion.

Id. at 891-92 (footnote omitted).

80. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

81. The effort to articulate a child's interests in psychological terms, distinct from religious identity, indicates a collision between a secular and religious world view as well as an example of the lawyer's gift for treating as if they were separate two inextricably connected things.

ment stands as a protection of religious liberty and governmental neutrality toward religion and yet in repeated decisions, it also expresses, through judicial interpretation, what the secular or dominant forces in the society will not accept, ranging from polygamy⁸² to the use of peyote in religious ceremonies.⁸³ Similarly, both religious and family freedoms protect the autonomy of the Amish who resist compulsory school law as an incursion on their way of life,⁸⁴ and yet neither religious nor family freedoms can shield a parent or guardian from a child labor law applied to forbid a child from distributing religious leaflets on the street⁸⁵ or from conviction for child endangerment for withholding medical treatment due to religious belief.⁸⁶ Commitment to subgroup autonomy justifies deference to an Indian tribunal with regard to questions of sex discrimination in the treatment of tribal inheritance laws,⁸⁷ but subgroup autonomy has not been accorded sufficient weight to justify excusing children from public school sessions involving texts that offend their parents' religious views.⁸⁸

Yet the question remains of whether the legal system can respect the choices of private individuals and groups while also implementing specific values that limit those choices. Navigating between these two alternatives is especially tricky when courts deal with religious differences within families such as the custody and visitation cases previously discussed. "Neutrality" in some absolute sense is not an option;⁸⁹ instead, there is the choice between deference to private freedom and the alternative of publicly imposed values.

Consider the problem faced by courts when one parent's religious beliefs call for shunning the other parent—what stance toward child

82. *Reynolds v. United States*, 98 U.S. 145 (1878).

83. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

84. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

85. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

86. *People v. Rippberger*, 283 Cal. Rptr. 111 (Ct. App. 1991).

87. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (rejecting claim of a private right of action in federal court under the Indian Civil Rights Act in deference to tribal sovereignty).

88. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

89. Cf. LEE C. BOLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986) (tolerance must be understood as a value, not merely a pragmatic virtue or the results of neutral arbitration).

custody and visitation could a court take and remain neutral? Either the court will favor the stringent religious belief or hinder it.⁹⁰ No neutrality is possible even if the courts leave it to the parties to work things out privately, for then the court effectively "perpetuates the child's role as a pawn in his parents' tug-of-war."⁹¹

A similar problem arises beyond the context of religious divisions. How can the legal system defer to private freedoms in forming families while at the same time adopting policies to support families or to protect children? The very choice of a legal definition of family curbs private freedoms, especially when that definition is used to distinguish those who are eligible for a benefit—immigration, food stamps, social security, and the like⁹²—from those who are not. At the same time, deference to private freedoms itself is ambiguous: whose freedoms are to be protected in the context of family life—which adults, and which children?

We could work for legal rules that do not recognize the "family" in distributing benefits and instead confer benefits solely on individuals regardless of family status. That, too, is a preference—a preference against preferring particular groupings of people. In practice, however, this may work out to be a preference for the conventional groups already privileged as family by social institutions. As long as "family," "spouse," and "parent" are used as legal and social terms in allocating benefits, legal, and thus political and social, decisions will articulate which groupings to value or prefer.

Some people call for a return to the "traditional" family and argue against expanding the definition of "family" to include gay and lesbian couples, extended families, and other groupings.⁹³ Some may view the

90. See *Quiner v. Quiner*, 59 Cal. Rptr. 503 (Ct. App. 1967). The trial court in that case had given custody to the father after the mother testified that she would direct the child to "shun" his father due to her religious beliefs. The appellate court returned custody to the mother after she agreed not to interfere with the father's visitation rights. *Id.* at 505, 517; see Justin K. Miller, *Damned if You Do, Damned if You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271, 297-98 (1988).

91. Berlin, *supra* note 58, at 26.

92. See generally *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (discussing how marriage prohibitions impose severe economic burdens on gay couples).

93. This theme characterizes some of the essays in *REBUILDING THE NEST: A NEW*

trends of increased single-parenthood, unmarried parents, divorce, and gay and lesbian families as eroding the basic values of the society. These people may find proposals for supporting these developments⁹⁴ noxious and a threat to the order that sustains their liberty. Especially concerned with assuring economic self-sufficiency within families, people with this view may support contemporary proposals for reforming the welfare system, such as proposals to promote marriage and deter childbearing by poor people.⁹⁵

Perhaps the constraints on the freedom of poor people do not trouble proponents of such proposals, but efforts to recreate traditional families more generally would be quite coercive, draconian, and likely to fail. As Stephanie Coontz wrote in her piece *Pro-Family But Divorced From the Facts*:

To establish the family wage system, in which married men supposedly support all mothers and children within self-sufficient families, would require either mandating abortion and birth control for our nation's unmarried women or equipping them with chastity belts, prohibiting divorce except among the rich, obliging unwed mothers to give up their children for adoption, and forcing prospective adoptive couples to accept the black, racially mixed, older white, and disabled children who now cannot find homes.⁹⁶

What one may call order, another may call bias; what one may call traditional values, another may call exclusion.⁹⁷ Consider a case like Shirley Cheng's, a seven-year-old with severe juvenile rheumatoid arthritis. The state charged her mother, a naturalized United States

COMMITMENT TO THE AMERICAN FAMILY, *supra* note 47.

94. For a statement of such proposals, see SKOLNICK, *supra* note 5, at 209 ("Although there is little that government or business can do directly to turn around trends in family structure, policy choices such as child care, parental leave, opportunities for both parents to work part-time while children are young, and measures to fight poverty and joblessness can alleviate some of the current strains on families").

95. See Wisconsin Assembly Bill 91 (parental responsibility pilot program 1991) (offering no increase in Aid to Families with Dependent Children (AFDC) with the birth of a new child to a woman already eligible for AFDC and offering benefits even if the parents are married and live together).

96. Stephanie Coontz, *Pro-Family but Divorced from the Facts*, WALL ST. J., Aug. 9, 1989, at 10.

97. See generally CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE, *supra* note 22.

citizen born in China, with neglect because she would not approve of surgery for her daughter and wanted instead to return to China to undertake physical therapy and herbal medicine.⁹⁸ As the hospital spokesperson explained, the problem arose because the mother was denying "the only opportunity to prevent this child from living with a lifelong crippling condition."⁹⁹ Yet the lawyer from the American Civil Liberties Union who represented the mother argued that "[w]hat is outrageous is that powerful people, the institutions and the doctors, are throwing away a brand of medicine practiced by two-thirds of the world."¹⁰⁰

Such a debate echoes contemporary arguments over multiculturalism in schools and universities. There, too, we hear claims that the ever expanding inclusion of diverse cultures and materials is impossible and threatens core values with relativism and low standards; there, too, we hear arguments that a return to tradition is coercive and out of touch with actual people and practices. Although some constructive discussions are emerging in this context, there has been a lot of namecalling and misstating of opponents' positions. I worry especially about the rigidity and polarization of these debates. I think we can do better there, and also in discussions of family law. To begin, we can locate each of these discussions within the long debates in this country over diversity and unity.

98. James Feron, *Can Choosing Form of Care Become Neglect?*, N.Y. TIMES, Sept. 29, 1990, at A1, A28. Shirley's mother, Juliet Cheng, sued the Connecticut Department of Youth Services in federal court and alleged constitutional violations for the deprivation of custody and control over her child's care, moral, and religious treatment. *Cheng v. Wheaton*, 745 F. Supp. 819, 820 (D. Conn. 1990). The federal court agreed that Mrs. Cheng had been denied due process rights when the state juvenile court refused to hear testimony from Mrs. Cheng's homeopathic physician. *Id.* at 823. Granting a preliminary injunction barring surgery and permitting a trial period for homeopathic treatment, the court also called for a panel of experts to evaluate the need for surgery. That panel voted 2-1 against the surgery; one of the physicians believed that the surgery would help but absent the family's support for subsequent physical therapy, the operation would be pointless. The hospital discharged Shirley; the state dropped all charges of abuse or neglect. Telephone Interview with Newington Children's Hospital spokesperson (Mar. 23, 1992).

99. Feron, *supra* note 98, at A28.

100. *Id.* at A1.

However, you should always beware of anyone who pretends to tell the history of a country while standing on one foot, or while beginning to close Part One of a two-part Article as I am now. Consider yourselves forewarned! Yet the perspective afforded by even this fore-shortened history can enhance our discussions. Peter Stuyvesant, representative of the Dutch West India Company that established what later became New York, wrote to his company in Holland for advice about whether to admit a group of Jews. He warned that admitting the Jews would lead to admitting Catholics, Lutherans, and Quakers—and that, of course, is exactly what happened. Because he implemented his company's call for admitting the Jews, Stuyvesant became a hero for American pluralism, despite his personal views. He followed the direction of his company.¹⁰¹

A more complex ambivalence characterized the framers of the Constitution. They had subcommunities very much on their minds when they crafted a political scheme to guard against factions, yet they also assumed and intended to protect the family structures and churches that they knew.¹⁰² Perhaps they hoped that an overarching cultural unity would support toleration of diversity while also eroding that diversity.¹⁰³ They presumed a cultural unity supporting the constitutional order would serve as the precondition for tolerance of diversity; they treated the government as somehow beyond the battle among sub-groups but nonetheless sought loyalty to it and its distinctive values.¹⁰⁴

The Civil War erupted over slavery but also over a clash between Southern and Northern cultures and economies. Its aftermath produced ongoing conflicts over inclusion and exclusion of blacks by whites.

101. See SOLOMON GRAZEL, *A HISTORY OF THE JEWS* 502-04 (1947). The Dutch West India Company directors responded to Stuyvesant that a number of Jews in European Amsterdam had become stockholders in the company, and many of the Jews seeking admittance to the New Netherlands had fought for Holland in South America; therefore, they deserved to be admitted. *Id.* at 503.

102. See William C. MacWilliams, *American Pluralism: The Old Order Passeth*, in *THE AMERICANS* 296, 297 (Irving Kristol & Paul Weaver eds., 1976).

103. *Id.* at 299-301. Thus, MacWilliams argues that the framers presumed widely shared traditional beliefs and virtues, including belief in a conventional family, and yet they set in motion possibilities that would alter it.

104. *Id.*

The progressive reformers at the turn of this century worried that immigrants would maintain group loyalties that would interfere with assimilation and hold the society back.¹⁰⁵ During the very same period, the Catholic church promoted ethnic parishes that preserved distinctive cultural traditions of the new immigrants.¹⁰⁶ Pluralists throughout this century promoted inclusion even while implying a basic faith in shared groundrules for the society, however diverse its members. Some critics argue, however, that the pluralists failed to sustain those ground rules that permitted tolerance itself.¹⁰⁷ Although others assert that the core shared value in America is commitment to constitutionalism which asserts respect for difference.¹⁰⁸ Also threatening the inclusionary impulse, nativist forces opposed to new waves of immigrants resurface almost every decade.¹⁰⁹

Philosopher Joshua Halberstam may have put it best when he asserted that genuine tolerance is impossible, because anyone with truly held convictions believes they and not another set are correct, and yet only those with convictions can be tolerant.¹¹⁰ At the same time, Halberstam notes that "we can limit intolerance by limiting our convictions; by restricting the 'extent' of our convictions as well as their sheer number, we can avoid unwarranted intolerance."¹¹¹ He urges efforts to distinguish what we really think is fundamental from what we care about but need not treat as incompatible with toleration for others. We thus can expand the sphere for freedom while defending its limits in terms that can be understood and argued over by many other people.

Because I favor an expansive sphere for private freedom, I defend a tolerant, and thus expansive, response to legal claims of family

105. *Id.* at 306-09; ROBERT H. WIEBE, *THE SEARCH FOR ORDER* (1967).

106. R. LAURENCE MOORE, *RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS* 63-71 (1986).

107. See MacWilliams, *supra* note 102, at 318; Martin E. Marty, *Pluralists Take It On the Chin—Deservedly*, N.Y. TIMES, Apr. 2, 1988, at 23.

108. Kenneth L. Karst, *Paths of Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

109. *Id.*

110. Joshua Halberstam, *The Paradox of Tolerance*, 14 PHILA. F. 190 (1982-83).

111. *Id.* at 199.

membership. I doubt the value of state standardization and social stigma directed towards groups of people who depart from the state-sanctioned model of the family. I think the values signaled by "family" are worthwhile and yet fragile; stability, nurturance and care should be promoted wherever possible, and people committed to taking on these tasks should be encouraged to do so. These ideas foreshadow my argument in Part Two of this Article.

In Part One, I chiefly have explored a paradox. I have argued that it is not possible for the government to be neutral about families, just as it is not possible for a school to be neutral about the values and cultural images it teaches. Yet I have also suggested that it is possible, and commendable, to restrict the kind of commitments that make tolerance for others difficult or impossible.

This approach may seem most difficult when it comes to thinking about families—as a teacher of mine once said, "One of the difficult things about the family as a topic is that everyone in the discussion feels obliged to defend a particular set of choices."¹¹² Perhaps, ironically, the intensity of debate over families reflects not just our diversity but also a national commonality. Arlene Skolnick recently commented:

Since the nineteenth century, Americans have looked to the family as the source of individual and social salvation. Europeans, by contrast, have looked at the family as a fragile institution in need of support from the wider society The emphasis on the home as the source of both personal happiness and social order has been responsible for the recurring sense of crisis concerning children and the family that has afflicted American culture since the 1820's.¹¹³

The great expectations we bring to our own families and to the idea of the family actually may reflect something missing beyond families—a realm of social life and social meaning beyond home and also beyond workplaces. Perhaps we can reduce our intolerance toward family groupings we do not recognize by working for sociability in more places beyond families.

112. SKOLNICK, *supra* note 5, at 200 (quoting Joseph Featherstone).

113. *Id.* at 200, 223.

As we each participate in constructing our own families, and in claiming benefits and privileges of family status, can we also contribute to a constructive public debate about how society should define family and family benefits and privileges? Can we acknowledge the impossibility of neutrality and the inevitability of choice? Can we refrain from characterizing our own preferences as natural, consensual, or obvious, given the extensive disagreements on these issues? Can we articulate a possibility of tolerance *and* commitment to particular values? Stay tuned as I pursue and reconsider these questions in Part Two as I turn from "All in the Family" to "In All Families—Loving and Owning."

PART TWO: IN ALL FAMILIES—LOVING AND OWING

I. INTRODUCTION

What do you owe a member of your family—however you define "family"? Financial support? How about an organ? Bone marrow? What does a child owe a sibling? Can a parent approve the transplanting of one sibling's organ into another—or would this breach the parent's duty to preserve and protect each child's interests?

Tamas Bosze of Hoffman Estates, Illinois brought these issues to public attention when he sought to test the bone marrow of two children he had fathered out-of-wedlock; Tamas hoped to find a donor match for an older son who was dying of leukemia. As one commentator put it,

Would even the most loving family members want to be forced by the courts to donate a kidney or retina to an ailing child or sibling? The chemistry of love and courage often inspires one relative to donate organs to another. But to do so is an act of will, born of the impulses of a generous individual—not the mandate of the law.¹¹⁴

Tamas's lawyers argued that by participating in a transplant, the half-brothers would benefit: insofar as they would avoid the pain of know-

114. Nancy Gibbs, *The Gift of Life—or Else*, TIME, Sept. 10, 1990, at 70.

ing that they might have been able to save the life of their half-brother, but did not.¹¹⁵ But the mother of the younger boys reasoned that, as a mother, she had to focus on protecting her children from potential complications from the procedures requested by the father of the children.

This is an unusual problem. Yet, in many ways, it resembles other problems of family obligation. For example, how much child support should a noncustodial father owe, especially after he fathers new children with another woman? Should he be able to reduce the support payments to children he fathered in an earlier marriage or relationship because of these new obligations, or should the initial obligations remain unchanged? These questions resemble those raised by the bone marrow transplant in that a parent may have obligations to more than one child as well as to himself or herself. Yet should these obligations be defined? Contemporary industrialized societies lack clear answers about the scope and definition of family duties.¹¹⁶

By looking to family duties, I mean to include issues of moral as well as legal responsibility. While these are potentially distinct issues, they also mutually inform each other. Indeed, emphasizing distinctions at the cost of connections is a mistake when such emphasis disguises how mutual impact and influence work—a point I will return to several times in this discussion. It reminds me, though, of one definition of legal reasoning as thinking about two inextricably connected things as if they were detached.¹¹⁷ Some of the difficulties in defining family obligations, I will argue, arise from just this kind of thinking.

Before examining other difficulties in defining family obligations, I will defend a conviction alongside my plea for tolerance in answers

115. Cf. *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969) (court approves donations of a kidney by a mentally impaired person to his ailing brother).

116. See, e.g., JANET FINCH, *FAMILY OBLIGATIONS AND SOCIAL CHANGE* 177-78 (1989) (summarizing research revealing absence among contemporary British people of a clear sense of the content of family obligations and recommending normative guidelines to clarify these duties).

117. Attributed to Thomas Reed Powell, the quotation appears paraphrased by Lon Fuller: "Thomas Reed Powell used to say that if you can think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind." LON FULLER, *THE MORALITY OF LAW* 4 (1969).

to the questions of who are members of a family and what benefits should accompany family membership. Yet when it comes to obligations of family membership, I think a less generous and more strict approach is justifiable. One way to explain this is by reference to notions of consent or acceptance—that is, if someone claims family membership and the benefits that go along with it, this person may also be said to consent to and accept the obligations that attach to family roles. In other words, let us be welcoming toward those who are willing to take on family obligations, but serious in enforcing the expectation that those obligations will in fact be fulfilled.

This, then, is where I would start in answering the questions of who law should treat as family and what legal benefits should accompany family membership. I would start with duties. Who takes on the duties of family? Who should be encouraged, or forced, to fulfill those duties?

You may well disagree with me on many points.¹¹⁸ You may think that “consent” is mythological. One does not consent to parenthood by engaging in sexual activities, you may say. Or one does not accept a duty to donate an organ or other body part simply because one is a parent. Surely one does not accept this duty as a sibling who never chose to be born much less to be a sibling (I say this as a middle child).¹¹⁹ You may think that preserving traditional narrow definitions of family would avoid any ambiguity about obligations. Or you may think that people should be able to negotiate their own terms of family relationships and not have obligations assigned simply be-

118. Some may prefer to abandon duty rhetoric and use the language of incentive instead. Cf. Richard A. Epstein, *Justice Across the Generations*, 67 TEX. L. REV. 1465, 1466 (1989) (“My thesis is that the debate on equity between the generations focuses too much on duty and too little on practice and incentive” especially regarding taxes and investment). Epstein also counts on “natural parental investment in their children.” *Id.* at 1467. This approach neglects the preconditions for such investment; it also does not speak to issues of obligation running from children to their parents or across other family ties.

119. See Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 544 (1990) (footnote omitted) (“Families are unusual because, in some instances, they create nonconsensual relationships”). Rutherford continues that families are supposed to provide care nonetheless. *Id.* at 547. She also argues that relationships created through voluntary agreement may imply duties beyond those expressly accepted. *Id.* (discussing the Uniform Partnership Act which treats partners as fiduciaries).

cause of the fact of family membership (this is the "tailor-made" rather than "off-the-rack" theory of family ties).

These potentially important points of disagreement actually dim in significance when compared with the three difficulties in defining family duties I will now explore. The first difficulty stems in part from the fact that people disagree not only about family duties but also about governmental duties. The two disagreements are linked and therefore compounded.

In industrial societies since the nineteenth century, governmental support is the likely alternative to privately performed family obligations;¹²⁰ refusal to support a member of one's family may well translate into requests for state subsidy.¹²¹ Thus, disagreement about the scope and enforceability of family obligations quickly collapses into disagreement about the proper boundary between the family and the government.

In the United States, one side in this debate views governmental aid as a dangerous tinge of socialism that undermines private initiative; another side criticizes the availability of governmental subsidies for the ventures of the rich but not for the needs of the poor or middle class.¹²² Whatever view one takes, it becomes difficult to articulate family obligations without engaging large and controverted political questions about the role of the government, the rate of taxes, and conceptions of public and private responsibility. Political debates over the scope of a "social safety net" will affect significantly the articulation of family duties even as articulation of family duties will affect the scope of governmental programs. Working on one problem requires

120. Starting with the English Poor laws, see JOHN E. DAVIS, A TREATISE ON THE POOR LAWS 1-19 (London, Henry Sweet 1869); state support in industrialized countries increasingly replaced religious and community sources of support, see JOHN CUMMINGS, POOR-LAWS OF MASSACHUSETTS AND NEW YORK 15-19 (New York, MacMillan 1895).

121. See FINCH, *supra* note 116, at 3, 7-12.

122. For a recent commentary on this debate, see Ellen Goodman, *Family Rhetoric*, BOSTON GLOBE, Feb. 16, 1992, at 83 ("French parents are not turned into irresponsible louts because their government supports widespread and high quality child care. European families are not shattered by paid maternity leave. Canadians do not consider a health care system a private matter. And quality education is not left to the individual in Japan.").

work on the other, as if they were simultaneous equations. But politics is not as neat as math.

A second difficulty in articulating family obligations grows from the particularly painful disagreements that arise when family members no longer—if they ever did—love one another. Alimony payment after divorce is a classic example.¹²³ Support for an elderly parent is another. Unfortunately, so is child support, though often here it is the lost love between the adults that undermines an obligation to children.

Noncompliance with legally-announced family duties can reflect many things, and certainly one is resentment or disaffection toward the recipient. Views about providing care or financial support for a relative may be colored by how that person feels about the relative. And those feelings, in turn, may be influenced in part by affection and personal compatibility, and in part by a sense of debt due to the benefits the person in need has offered the one in the past.

This issue of reciprocity points to the third difficulty: many family duties are difficult to define because the simple measure of reciprocity will not work. A parent cares for an infant, one hopes, out of love, but if there is a sense of obligation, it more likely derives from the parent's acknowledgment of responsibility for bringing the child into the world, or for attending to someone with special vulnerabilities and needs, than it does from an expected payback sometime in the future. Some philosophers argue explicitly that an adult child does not owe anything to an aging parent simply as a corollary of parental duty, because there is no necessary reciprocation of acts the parent initially performed due to the parent's own sense of duty.¹²⁴ Nor do we owe a return of favors done for us.¹²⁵ But if a familial duty does not

123. Courts may be influenced by the specter of dependency on the state in evaluating alimony or requests for modifying divorce settlements. See Brenda Cossman, *A Matter of Difference: Domestic Contracts and Gender Equality*, 28 OSGOODE HALL L.J. 303 (1990) (exploring the issue in Canadian cases).

124. NORMAN DANIELS, AM I MY PARENTS' KEEPER?: AN ESSAY ON JUSTICE BETWEEN THE YOUNG AND THE OLD 30 (1988); see also Jane English, *What Do Grown Children Owe Their Parents?*, in VICE AND VIRTUE IN EVERYDAY LIFE 682 (Christina Sommers & Fred Sommers eds., 1989).

125. DANIELS, *supra* note 124, at 31.

arise out of reciprocation, what is its source, and what should define its scope?

I will examine each of these difficulties in greater detail while searching for an appropriate pop song to accompany each one. It is not that I have run out of television shows, or judicial opinions, but I do believe that contemporary issues of family duty should become as familiar as pop songs. Then, they may run through our minds and enrich the rhythm of our lives. I will also consult a range of sources that might help in articulating family duties, especially where an individual potentially carries an obligation to more than one other family member. Finally, I will return briefly to defend my initial proposal of stringent attitudes toward family obligations to accompany expansive definitions of family membership. And I hope this provides a starting point, not the end point, for discussing the contemporary issues of family law.

II. BOUNDARIES BETWEEN PUBLIC AND PRIVATE OBLIGATIONS TO FAMILY MEMBERS

You will quickly see why I want something more catchy to use to describe the first difficulty—"the contested boundaries between public and private obligations to family members" just is not going to hit the charts. Nor is "solving the simultaneous equations of family duties and governmental responsibilities." Unfortunately, not many pop songs, or popular discussions for that matter, address this issue directly. There are some candidates if we put the issue more generally, however: consider folk singer Nanci Griffith's song, "It's a Hard Life Wherever You Go,"¹²⁶ or blues artist Etta James' number, "Shakey Ground."¹²⁷ Or R.E.M.'s "Turn You Inside Out."¹²⁸ The basic idea is that the risk of dependency is real for each of us, and deciding whether anyone must help the dependents involves not just definitions of family duties but also definitions of governmental programs.

126. Nanci Griffith, *It's a Hard Life Wherever You Go*, on STORMS (MCA Records 1989).

127. Etta James, *Shakey Ground*, on SAVE YOUR ITCH (Island Records 1988).

128. R.E.M., *Turn You Inside Out*, on R.E.M. GREEN (Warner Bros. Records 1988).

A. *The Role of the Government*

Roscoe Pound in 1916 alluded to this point when he noted that "[i]t is important to distinguish the *individual* interests in domestic relations from the *social* interest in the family and marriage as social institutions."¹²⁹ Lee Teitelbaum, Dean of the Utah Law School, put the point this way: "[T]he family is a member of a set of social systems which, in shifting configurations and alignments, participates and to some extent controls the distribution of opportunities, goods, and benefits in our society."¹³⁰ Student loan programs put it more bluntly: if the loan program can in any way characterize the student as a family dependent, it will look to the resources of other family members in calculating eligibility for and terms of the loan.¹³¹

Clearly, then, such ambiguity about the scope of family duties allows governmental regulations to assume the existence and magnitude of such duties even if the people involved do not or cannot accept them, and the results of this assumption are often perverse or unfair. A painful example arises for spouses who must themselves become poor if their spouses are to qualify for Medicaid when they need care in an institutional setting such as a nursing home.¹³² The states vary in

129. Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916).

130. Lee E. Teitelbaum, *Placing the Family in Context*, 22 U.C. DAVIS L. REV. 801, 820-21 (1989).

131. Thus, the Stafford Loan, the Supplemental Loan for Students, and the Perkins Loan become available only to students who are independent from their parents, a status typically denied to students who are under 23 or claimed as tax deductions by their parents. See GRADUATE AND PROFESSIONAL SCHOOL FINANCIAL AID SERVICE, FINANCIAL STATEMENT FOR STUDENTS APPLYING FOR FINANCIAL AID FOR ACADEMIC YEAR 1992-1993 1-2 (1992). Some colleges and universities adopt eligibility guidelines for financial aid that consider parents' income even for older students. *Id.* at 1. Current legislative debates address the burdens on middle-class families posed by eligibility rules for financing higher education. See Anthony Flint, *Uncertainty Rises on 2 Education Fronts; Changes in US Aid Plan Debated*, BOSTON GLOBE, June 3, 1991, at 1.

132. Paul Drizner, Comment, *Medicaid's Unhealthy Side Effect: The Financial Burdens on At-Home Spouses of Institutionalized Recipients*, 18 LOY. U. CHI. L.J. 1031 (1987). Although family members provide eighty percent of all long-term care for partially disabled elderly persons, DANIELS, *supra* note 124, at 25, the increased incidence or diagnosis of Alzheimer's disease and other severe disabilities often calls for institutional care.

their specific regulations under Medicaid, but they are permitted to "deem" the resources of a non-institutionalized spouse as being available for paying the medical expenses of an institutionalized spouse¹³³ whether or not those resources are actually contributed.¹³⁴ For many people this creates a dilemma: the spouse who remains at home can contribute the portion of income that the state determines he should contribute—and then live on a severely reduced amount of money, or he can refuse to contribute the money and potentially deny his spouse needed medical and nursing care.¹³⁵ While a few states, more humanely, allow spouses to agree to divide their property, as long as the federal government allows the practice of "deeming" with no particular time restrictions, most people will be placed in very difficult situations.

Whether an individual feels a sense of responsibility to provide financially for family members is complicated by the high costs of institutional care and by the governmental determinations of the appropriate level of contribution. Yet the problem should not be viewed solely in terms of the hardship individuals may feel. The demographic shifts in the United States provide the larger social context: more and more people live longer, and more and more medical expenditures are devoted to caring for people in the last years of their lives. Large-scale public policies, not only public and private articulations of family duties, are at stake in the allocation of resources to the care of the elderly. Whether the government assumes private duties is simply part

133. See The Social Security Act, 42 U.S.C. § 1396a(a)(17) (Supp. II 1990); see also *Schweiker v. Gray Panthers*, 435 U.S. 34 (1981) (permitting states to treat spouses as a single economic unit for an indefinite timer period in establishing Medicaid terms). The government also uses "deeming" in allowing states to attribute to the entire household child support received by one child in a household even if this could estrange the parent paying that child support or otherwise harm the recipient child. *Bowen v. Guillard*, 483 U.S. 587 (1987); see generally Lucy Billings, *The Choice Between Living with Family Members and Eligibility for Government Benefits Based on Need: A Constitutional Dilemma*, 1986 UTAH L. REV. 695.

134. See Drizner, *supra* note 132, at 1036; see also Timothy N. Carlucci, Note, *The Asset Transfer Dilemma: Disposal of Resources and Qualifications for Medicaid Assistance*, 36 DRAKE L. REV. 369, 372-73 (1987) (state laws prohibit transfer of assets solely to qualify for social security disability benefits, although an exception may be allowed for the transfer of a home).

135. Drizner, *supra* note 132, at 1037.

of a larger question about the allocation of social resources which is inevitably a public policy question.¹³⁶

The problem grows even more complex when the question of care of the elderly involves not spouses, but adult children. Because families across the United States tend to have fewer children than in the past, "[f]or the first time in history, the average couple has more parents living than it has children."¹³⁷ And because many more people live long enough to become not only elderly, but frail, and because they tend to have fewer adult children, the burden of caring for elderly parents has changed.¹³⁸ Whatever intuitive ideas people may have about a duty to care for their elderly parents, these demographic patterns affect the shape of the need and people's abilities to cope with that need. In addition, the presence or absence of coherent social policies and institutions alters the landscape within which adult children define their own sense of duty to elderly parents. Thus, despite a legal and cultural tradition distinguishing sharply between public and private realms, public and private duties end up tied together and mutually defining, as people actually struggle to address the needs of members of their families.

Other demographic patterns affecting the relationship between public and private duties include the high rates of divorce and remarriage. Adult children with elderly parents may divorce and remarry and then develop changing notions of responsibility for those parents, or for the parents of their spouses and ex-spouses.¹³⁹ Perhaps more profound is the changing role of women in the work force,¹⁴⁰ since typically women provided the day-to-day care for dependents in the fami-

136. See Goodman, *supra* note 122, at 83 (arguing that private family matters cannot be separated from governmental decisions about health care, child care, and other policies).

137. SKOLNICK, *supra* note 5, at 154. Skolnick describes the situation of a great-great-grandmother and her daughter, also a great-grandmother, and asks, who has the right to be old and who should take care of the home? *Id.* at 164.

138. See DANIELS, *supra* note 124, at 24.

139. See *id.* at 25.

140. FRANCES K. GOLDSCHIEDER & LINDA J. WAITE, NEW FAMILIES, NO FAMILIES? THE TRANSFORMATION OF THE AMERICAN HOME 8-10 (1991) (documenting enormous growth of women's workplace participation in the United States since the turn of the twentieth century).

ly. Many families may not be able to accept a solution which removes a woman from the wage-market. Many women will not choose this alternative; some may choose it if their employers make accommodations for dependent-care leave or otherwise protect the woman's job security. While these choices may be experienced as private dilemmas, they are social phenomena shaped at least in part by the practices of employers and governments. For women especially, the articulation of family duties spills over into public policies about the workplace, subsidized dependent care, respite care, and institutional options.

The status of women in the society in general also contributes to difficulties in articulating spousal duties following divorce, especially the terms of alimony. Professor Carl Schneider suggests that "[t]he riddle of alimony is why one former spouse should support the other when no-fault divorce seems to establish the principle that marriage need not be for life and when governmental regulation is conventionally condemned."¹⁴¹

The riddle is not difficult to understand, nor perhaps to answer, given the historical context of gender relations and divorce. Alimony originally was the duty owed by the husband to the wife following the breach of the marriage contract; it reflected the continuing duty to provide support that the husband undertook with the marriage itself. The reforms that brought no-fault divorce in turn expressed some of the erosion of these gendered ideas of marriage, but also revealed more profoundly that increasing numbers of people did not treat marriage as an agreement for life.¹⁴² At the same time, women's continuing disadvantages in the labor market consigned many women after divorce to sharp declines in economic welfare.¹⁴³ Opportunities fore-

141. Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197, 197.

142. See MARTHA MINOW & DEBORAH L. RHODE, *DIVORCE REFORM AT THE CROSSROADS* 191 (Steve Sugarman & Herma Hill Kay eds., 1991).

143. See KATHERINE S. NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* 13, 202-28 (1988); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 204-07 (1985). Numerous methodological criticisms of Weitzman's influential work focus largely on the failure to compare data about women's experiences prior to changes in the rules governing divorce without challenging the

gone during time spent at home attending to the marriage and childraising may not be recaptured by most women.

Some are prompted to ask why an ex-husband should bear through alimony payments the burdens of ongoing societal sex discrimination.¹⁴⁴ Others, in contrast, call for continuing recognition after divorce of spousal obligations undertaken at marriage.¹⁴⁵ A third, very long-run option would involve redressing sex discrimination in the labor market and thereby altering the need for alimony, but not entirely; women who enter marriages with an understanding that they will forgo careers and instead devote more of their time to managing the home and caring for family members would still face economic dependency if divorced. I do not mean to push a position on this debate here; I have done so elsewhere.¹⁴⁶ I only mean to point out that here, too, the articulation of private family duties necessarily implicates larger social issues and public policies.¹⁴⁷

general picture of divorced women's economic disadvantages. See, e.g., Stanley E. Tobin, *The Divorce Revolution*, 20 LOY. L.A. L. REV. 1641 (1987) (book review); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989).

144. See Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act—And Some Reflections About Its Critics and Its Policies*, 1991 B.Y.U. L. REV. 43, 70-71, 76-77.

145. See MINOW & RHODE, *supra* note 142, at 201-04.

146. See *id.*

147. It may seem rather obvious that the scope of family duties implicate the scope of governmental ones. Certainly drafters of the Poor Laws understood this point. Nonetheless, the historical weight of a distinction between the public and private spheres—the government and the family—allows discussions of family matters to seem separate from public policy. See Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985). In addition, the historical exclusion of women from voting and other political activities may have once made it seem that women's concerns remained separate from public policies. Yet, women reformers like Jane Addams appealed to precisely the images of women as mothers and teachers of moral values in an effort to alter public policy. See Jane Addams, *Why Women Should Vote*, LADIES HOME J., Jan. 1910, at 230 ("If woman would keep on with her old business of caring for her home and rearing her children she will have to have some conscience in regard to public affairs lying outside of her immediate household."). Even earlier female reformers connected women's private roles with public policy. Angelina Grimke, for example, urged women of the South to recognize that even though they lacked legislative power, they had duties as family members to oppose slavery: "I know that you do not make the laws, but I also know that *you are the wives and mothers, the sisters and daughters of those who do*; and if you really suppose you can do nothing to overthrow slavery, you are greatly mistaken." Angelina Grimke, *Appeal to the Chris-*

In sum, the first difficulty is that we cannot articulate family duties in the absence of public policy discussions about work structures, gender roles, allocation of medical resources, and subsidies for caring for the elderly. Yet the deep controversies about each of these issues, and about the government's role in them, severely complicate this task.¹⁴⁸

B. *Lost Love*

Finding a pop song for the second difficulty is no problem. Much of the airwaves and record groves are filled with songs about love lost; a modest sampling includes Whitney Houston's "Where Do Broken Hearts Go";¹⁴⁹ Bonnie Raitt's "I Can't Make You Love Me";¹⁵⁰ Joan Baez's "Never Dreamed You'd Leave in Summer";¹⁵¹ and The Pretenders' "Thin Line Between Love and Hate".¹⁵² For a specialized genre of these songs expressing anxious anticipation about the end of love, Roberta Flack's "Will You Still Love Me Tomorrow"¹⁵³ provides a good example. The truth is, when love stops from one direction, it may not stop from the other. The difficulty all these songs suggest for family duties is whether obligations once formed by love should endure when love ends.

Not surprisingly, philosophers as well as songsters have devoted much time to this issue. Philosophers pose the question: are family duties more like the duties of friendship or the duties of contractual

tian Women of the South, in *THE PUBLIC YEARS OF SARAH AND ANGELINA GRIMKE: SELECTED WRITINGS, 1835-1839* 55 (Larry Ceplair ed., 1989).

148. Cf. DANIELS, *supra* note 124, at 35 (the problem is how to produce principles of justice that yield a framework of institutions "within which people having different views about what is good and right in other regards can cooperate").

149. WHITNEY HOUSTON, *Where do Broken Hearts Go*, on WHITNEY (Arista Records 1987).

150. BONNIE RAITT, *I Can't Make You Love Me*, on LUCK OF THE DRAW (Capitol Records 1991).

151. JOAN BAEZ, *Never Dreamed You'd Leave in Summer*, on CLASSICS VOL. 8 (A&M Records 1987).

152. THE PRETENDERS, *Thin Line Between Love and Hate*, on THE SINGLES (Sire Records 1987).

153. ROBERTA FLACK, *Will You Still Love Me Tomorrow*, on THE BEST OF ROBERTA FLACK (Atlantic Records 1981).

agreements?¹⁵⁴ If friendship is the proper analogy, then love rather than debt is the medium of exchange.¹⁵⁵ This view implies that when the love ends, so do the obligations.¹⁵⁶ Once again, issues about alimony following divorce come to mind.¹⁵⁷

Here, I would challenge the analogy between family roles and friendship, but I do so chiefly to expose the kind of difficulties loss of love poses for articulating family duties. Jane English, who advanced that analogy, maintains that "after a friendship ends, the duties of friendship end. The party that has sacrificed less owes the other nothing."¹⁵⁸ Similarly, she argues, an adult child owes parents nothing. She offered an example involving not organ donation, but blood donation:

For instance, suppose Elmer donated a pint of blood that his wife Doris needed during an operation. Years after their divorce, Elmer is in an accident and needs one pint of blood. His new wife, Cora, is also of the same

154. See, e.g., English, *supra* note 124, at 683 (friendship rather than contract is the model for ties between adult children and their parents). Some reject the analogy between contractual relations and family ties for different reasons—and because they view contractual relations not as too binding but instead too unstable. See Virginia Held, *Non-contractual Society: A Feminist View*, in SCIENCE, MORALITY & FEMINIST THEORY (Marsha Hanen & Kai Nielsen, eds.), CANADIAN J. PHIL., Supp. Vol. 13, 111 (1987) (urging image of family ties of a less hostile, cold and precarious kind than contracts); see generally Hafen, *supra* note 79, at 904-16 (relying on Pitirim Sorokin's comparison of familistic, contractual and compulsory forms of personal relationships) (citing PITIRIM SOROKIN, *SOCIETY, CULTURE, & PERSONALITY: THEIR STRUCTURE AND DYNAMICS* (2d. ed. 1962)). Perhaps neither contract nor friendship provide convincing analogies for family ties because the first implies that financial recompense can remedy a breach while the second implies no legal duties at all.

155. See English, *supra* note 124, at 683-85.

156. For reasons such as this one, Immanuel Kant articulated a theory of duty detached from feeling, and indeed, segregated from feeling. See, e.g., Immanuel Kant, *Foundations of the Metaphysics of Morals*, abridged and reprinted as *The Foundation of Morals*, in ETHICS AND METAETHICS: READINGS IN ETHICAL PHILOSOPHY 346-47 (Raziel Abelson ed., 1963).

157. Yet the idea that marriage rests on love is relatively recent. See FRANCES GIES & JOSEPH GIES, *MARRIAGE AND THE FAMILY IN THE MIDDLE AGES* 218-19 (1989); LAWRENCE STONE, *ROAD TO DIVORCE: ENGLAND 1530-1987* 51-58 (1990). When Carl Schneider asks why one former spouse should have to support another once no-fault divorce establishes that marriage need not be for life, see Schneider, *supra* note 141, at 197, he too implies that once the love ends, the obligations end. Yet by posing his point as a riddle, he raises the possibility that the end of a marriage itself does not and should not end the obligations undertaken in it.

158. English, *supra* note 124, at 685.

blood type. It seems that Doris not only does not "owe" Elmer blood, but that she should actually refrain from coming forward if Cora has volunteered to donate. To insist on donating not only interferes with the newlyweds' friendship, but it belittles Doris and Elmer's former relationship by suggesting that Elmer gave blood in hopes of favors returned instead of simply out of love for Doris. It is one of the heart-rending features of divorce that it attends to quantity in a relationship previously characterized by mutuality. If Cora could not donate, Doris's obligation is the same as that for any former spouse in need of blood; it is not increased by the fact that Elmer similarly aided her. It is affected by the degree to which they are still friends, which in turn may (or may not) have been influenced by Elmer's donation.¹⁵⁹

I am not troubled by the rejection here of a *quid pro quo* analysis; the world is simply not neat enough to present many issues of obligation that take the form of "a pint of my blood for yours." Many other things, however, trouble me about this example,¹⁶⁰ but I will focus here on only one. This presentation suggests that what one former spouse owes the other former partner depends on the current state of their feelings for one another. Missing altogether is the potential impact and power of the past—past friendship, past commitment, and past trust.

The fickle quality of present feeling is a problem not merely following divorce, but even in ongoing family relationships. If family membership implies no further obligations beyond the degree of friendship one member feels toward another, then I wonder what justifies preserving the family institution, with its privileges and opportunities.¹⁶¹ Moreover, tying family duties to feelings of friendship tethers

159. *Id.* at 685-86.

160. I am troubled by the initial effort to reframe the issue by introducing a potential conflict with the new wife who conveniently has the same blood type and would feel interfered with by an offer of help from the ex-wife. This seems both a dodge from the hard question—should the ex-spouse feel obliged to donate blood *when it is needed*—as well as an effort to accentuate competitive and interchangeable dimensions of family relationships. I am even more troubled by the switch to a post-divorce example in an essay about ongoing family ties between adult children and their parents; the implication is that adult children and their parents are situated similarly to divorced spouses, perhaps because they too presumably no longer cohabit. The inattention to the differences between these relationships and their shifts over time allows the author to avoid difficult and important questions about what family duties should entail.

161. In a largely snide essay critical of philosophers, including feminists she deems as

those duties to emotions that can and will change rather than assuring stability and continuity.¹⁶²

Tying family duties to feelings most significantly precludes the chance that feelings can themselves be educated as someone learns about and carries out responsibilities.¹⁶³ Professor Bruce Hafen has suggested that "[a] genuine personal willingness to assume affirmative duties and lasting commitments depends heavily upon the influence of normative models that have the innate power to produce altruistic attitudes regardless of legal enforceability."¹⁶⁴ As this point implies, difficulties in defining family duties arise not merely because people disagree about whether those duties should exist apart from feelings, but also because the specified content of family duties will itself influence and shape what people come to feel.¹⁶⁵

hostile to family, Christina Sommers makes one point with which I do agree:

[I]f what one owes to members of one's family is largely to be understood in terms of feelings of personal commitment, definite limits are placed on what one owes. For as feelings change, so may one's commitments. The result is a structure of responsibility within the family that is permanently unstable.

Christina Sommers, *Philosophers Against the Family*, in VICE AND VIRTUE IN EVERYDAY LIFE *supra* note 124, at 728, 751.

162. These values may be most important for parent-child relationships, but I am not convinced of their irrelevance to adult relationships.

163. See generally ROBERT SOLOMON, *THE PASSIONS* (1979) (cognitive theory of the emotions).

The familistic entity draws upon different philosophical wellsprings from those that feed contractual models. By its nature, the familistic entity has greater capacity to encourage the kind of human caring and sense of mutual responsibility for which the contemporary world cries out—even though such sensitivities cannot always be legally required or enforced.

Hafen, *supra* note 79, at 914; see also *id.* at 916 (exploring the paradox of loving bondage through ties that bond to a spirit of intimate belonging).

164. *Id.* at 914.

165. See ALFIE KOHN, *THE BRIGHTER SIDE OF HUMAN NATURE: ALTRUISM & EMPATHY IN EVERYDAY LIFE* 118-204 (1990) (social science research indicates that predispositions to share and to be selfish can be reinforced or truncated by external encouragement).

Different conceptual and enforcement problems are posed by rules holding parents liable for child's curfew violation, John Hood, *Making Parents Pay: Atlanta Law Sets Off a Curfew Craze of Questionable Value*, CHI. TRIB., Apr. 25, 1991, at 17, or holding family members responsible for criminal drug or violent activity occurring by residents of publicly subsidized housing, see Section 8 Housing Assistance Program, 24 C.F.R. §§ 882.215(c)(2), 882.216(c)(1), 882.514(g)(1) (1992) and Housing Voucher Program, 24 C.F.R. §§ 887.213(b)(1), 887.403(d)(1) (1992). These pose the question of vicarious liability designed

Duties and feelings interact in complicated ways. Many people know they have a family duty—even a legally enforceable one—and resent it rather than grow to accept it. Certainly the dismal rates of child support payments demonstrate this problem.¹⁶⁶ Professor David Chambers' classic study of child support enforcement suggests the complex motives and feelings of those who do not pay.¹⁶⁷ Especially sad is the apparent spillover onto the children of negative feelings towards the ex-spouse.¹⁶⁸

This spillover renders especially difficult the task of articulating parental duties for an individual who seeks to modify child support obligations after fathering additional children in a new marriage or relationship.¹⁶⁹ As one observer of these kinds of families noted: "There is anger when money needed by the new family goes to one spouse's children from the old family. There is hurt at the recurring

perhaps with the hope that families can restrain their members from violating laws, a hope that faces serious empirical contest and thus supports unduly punitive rules. I have examined this issue in more detail in Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925.

166. Jason DeParle, *Child Poverty Twice as Likely After Family Split, Study Says*, N.Y. TIMES, Mar. 2, 1991, at 8: "Only 44 percent of absent fathers were paying child support four months after the breakup, a figure that changed little a year later. Although mothers worked more after a breakup, their efforts did not compensate for the fathers' absence, and family income declined by 37 percent." Some estimates paint an even bleaker picture: "[I]n 1983, nearly two-thirds of residential parents reported to the Census Bureau that they received no child support from non-residential parents." Karen Czapansky, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 638 (1989).

In response to such evidence, Prof. David Ellwood noted: "The greatest source of insecurity in America is growing up in a single-parent home We've done very little to see that absent fathers do their share." DeParle, *supra*, at 8 (quoting Prof. Ellwood). The problem encompasses both post-divorce and unmarried parenting situations.

167. DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 241-53 (1979).

168. *Id.* at 242-50. Sommers alluded to this difficulty when she concluded, "I do not know how to make fathers ashamed of their neglect and inadvertent cruelty. What I do know is that moral philosophers should be paying far more attention to the social consequences of their views than they are." Sommers, *supra* note 161, at 752. Czapansky explicitly addressed the difficulty of designing legal rules with incentives for both custodial and noncustodial parents to focus on the children's entire range of financial and emotional needs, and her exploration indicates the grave difficulties in this task. See Czapansky, *supra* note 166, at 619.

169. See Minow & Rhode, *supra* note 142, at 207.

evidence of a past history shared with the first family and forever closed from the new spouse."¹⁷⁰ Clearly, making family duties contingent on feelings is especially fraught with trouble in this context.¹⁷¹ But articulating sensible duties without taking account of shifting feelings may also be terribly mistaken simply as a practical matter.

Perhaps the problem arises with tying family duties to sentiments altogether. It is possible to articulate family duties that survive the flux of feelings; it is possible to frame family responsibilities through which one's own good depends on the welfare of another. Norms predicated on such a view could actually affect what people come to feel and such norms could include a continuation of duty beyond the sentiment that the past should matter when it comes to family obligations.¹⁷² But pursuing these ideas is hardly uncontroversial. Lost love animates so many songs because it is painful, and articulating family duties in the light of past or future painful feelings will be a troubled task indeed.

C. *Inadequacy of Reciprocation Theory*

On the flip side of love that ends is love that is not returned. Consider Joan Armatrading's "Can't Let Go",¹⁷³ or Tina Turner's

170. ALEX SHOUMATOFF, *THE MOUNTAIN OF NAMES* 169 (1985) (quoting LETTY C. POGREBIN, *FAMILY POLITICS: LOVE AND POWER ON AN INTIMATE FRONTIER* (1983)). Pogrebin identifies further complications: "A father feels guilty about spending every day with his stepchildren while his own kids, in the custody of their mother, hunger for more time with him." *Id.*

171. Rules and duties watered down to mirror self-indulgence may not reflect people's deeper desires to be bound. See Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, 34.

172. One version of this view appears in Dwight J. Penas, *Bless the Tie That Binds: A Puritan-Covenant Case for Same-Sex Marriage*, 8 J.L. & INEQUALITY 533, 541 (1990) (advocating same-sex marriage in light of Puritan theological consent of covenant through which each party commits to remain bound by the agreement even in the event of the other's breach). A less stringent version would look to the past as a basis for continuing obligations even if the earlier conditions of love and mutuality were absent. This view animates the responses of many Americans. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 86 (1985).

173. JOAN ARMATRADING, *Can't Let Go*, on HEARTS AND FLOWERS (A&M Records

"You Can't Stop Me Loving You",¹⁷⁴ or even the Indigo Girls' "You And Me of the 10,000 Wars."¹⁷⁵ It is funny that we do not hear many songs about "Thanks for All You Did But I Don't Owe You Anything."¹⁷⁶

Even more scarce, though, are song titles that capture the third difficulty in defining family obligation—that the notion of reciprocation is inadequate to capture the complexity of family bonds, and therefore the measure of family duties becomes difficult to define. For example, unlike an exchange of promises between two people, and even unlike a marriage in which two adults agree to provide and care for one another, relationships between parents and children are not obviously reciprocal.¹⁷⁷ Of course, parents derive benefits from their children, but they differ from those the children derive from their parents.¹⁷⁸ Parents may hope that the children, once grown, will provide comparable financial, emotional, and physical support in return, and indeed, many societies implement such assumptions.¹⁷⁹

1990).

174. TINA TURNER, *You Can't Stop Me Loving You*, on FOREIGN AFFAIRS (Capitol Records 1989).

175. INDIGO GIRLS, *You and Me of the 10,000 Wars*, on NOMADS, INDIANS, SAINTS (Epic Records 1990).

176. One possible candidate: TOM BALL & KENNY SULTAN, *How Can I Miss You When You Won't Go Away*, on TOO MUCH FUN (Flying Fish Records 1990). Yet this song is undoubtedly a tongue-in-check effort, poking fun at the "my man is gone" genre of country and western songs.

177. I do not mean to argue as did Jane English that family members should never be motivated by a sense of reciprocity because that would somehow degrade or sully the relationship, *see* English, *supra* note 124, at 685, but instead that such motives make for difficulties in defining and enforcing family duties.

178. Especially unappealing are efforts to convert the benefits a parent receives from the experience of parenting into a theory of unjust enrichment justifying reciprocal duties by the child, although others have pursued efforts along these lines. *See* Noam J. Zohar, *Procreation and Personal Autonomy: Identity and Individuation in the Parental Relation* (1990) (unpublished Ph.D. dissertation, Hebrew University). A better justification for parental duties toward children looks to the child's dependence on the parent and from compliance with social practices that assign children's care to their parents. *See* John Eekelaar, *Are Parents Morally Obligated to Care for Their Children?*, 11 OXFORD J. LEGAL STUD. 340 (1991).

179. Individuals may craft conditions on gifts of property in order to ensure that their adult children provide them with care and support. *See, e.g.,* Boucher v. Bufford, 494 S.W.2d 503 (Tenn. Ct. App. 1971) (bequest of property to son conditioned on his providing for parents during their lives); Hatfield v. Hatfield, 417 S.W.2d 218 (Ky. 1967) (conveyance

Yet reciprocation implies a more exact one-for-one exchange than the dynamics that most parent-child relations exemplify. Of course, parents derive pleasure and gratification from children as they grow up, but not as *quid pro quo* for what the parents themselves provide the children. Moreover, intergenerational exchanges between adult children and their parents may be complicated by the death, disability, or mobility of one or both parties before completion.

Even this understates the complications, because often more than two parties are involved. Since families often involve more than one generation and more than two people, the notion of reciprocation that so often defines the scope of duties seems out of place. The adult child may have two parents, plus stepparents, who need help as older adults; the adult child may have siblings and step siblings with whom to negotiate about who will provide support for the older relatives. The adult child in turn may have children and feel conflicting pulls of duties in two generational directions. One woman interviewed about these matters reported:

Someone said I should have given up my job and looked after my mother I said, well I have three young children and if I give up work my children would miss a lot [I had to] choose between one kind of duty and another kind of duty. That was very difficult, I had to choose to let her go [into a home.]¹⁸⁰

Moreover, some may actually understand their duty to their aging parents in terms of providing for their own children the way their parents provided for them.

What, though, are the duties of a parent who has more than one child, and one has a disability that calls for more time and attention than the other child? Given all the possible complications, it is difficult, if not impossible, to articulate family duties removed from the

of farm to daughter-in-law condition on her caring for mother-in-law). Yet the courts may well read those obligations narrowly. *See, e.g., Quarnstrom v. Murphy*, 281 N.W.2d 847 (Minn. 1979) (son's obligation to support mother according to father's will construed to be triggered only if she is unable to meet her own financial obligations).

180. FINCH, *supra* note 116, at 151 (quoted in JANE E. LEWIS & BARBARA MEREDITH, DAUGHTERS WHO CARE 78 (1988)) (quoting an interviewee).

particularities of each complicated constellation of family membership; the notion of reciprocity does not help, at least if it implies simply tit-for-tat.¹⁸¹

As an alternative to simple reciprocation, some people and some families operate complex networks of exchange. African-American families often build patterns of sharing and exchange of favors across networks of siblings, aunts, and uncles, and other family members, especially when it comes to caring for children.¹⁸² Today, middle-class blacks often find their economic security jeopardized because they reach out to help more impoverished relatives.¹⁸³ One fourteen-year-old mother explained:

Ever since I can remember I always expected to have a baby when I was 15 or 16 but I never believed I would ever have a chance to get a husband. One of the things my grandmother always said, "Pay your dues to your kin because they will take care of you."¹⁸⁴

"Kin" here could include a variety of people, working cooperatively to meet the basic demands of cooking, cleaning, childcare, and making ends meet.

Other observers worry that complicated family patterns may produce "thinner bonds" even while creating wider kinship patterns. In particular, Frank Furstenberg and Andrew Cherlin recently raised this question about remarriage:

Remarriage certainly expands the potential universe of kin, but does it also dilute the importance of each link? The potential value of weak ties to a large network of relatives shouldn't be underestimated. Access to information, to sponsorship, and to minor assistance through remarriage chains can have a significant impact on a child's life chances. But this thinner form of kinship may not be an adequate substitute for the loss of relatives who had a stronger stake in the child's success. Through divorce and remar-

181. Actually, a deeper problem of conflicting duties arises even between two people, because each may experience conflict between duty to oneself and duty to the other.

182. CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974).

183. Isabel Wilkerson, *Middle Class Blacks Try to Grip a Ladder While Lending a Hand*, N.Y. TIMES, Nov 26, 1990, at A1.

184. SKOLNICK, *supra* note 5, at 217.

riage, individuals are related to more and more people, to each of whom they owe less and less Families not only nurture and protect children, they also distribute resources; and in so doing they create lasting obligations Remarriage has complicated this system of exchange because it offers no clear-cut guidelines for assignment rights and obligations.¹⁸⁵

I wonder what clear-cut guidelines these authors believe existed previously or exist currently for families without remarriage patterns. The problem of defining duties within families seems complicated for everyone who has more than one other person who counts as family. Simple notions of reciprocation will not work.

III. REVISITING DUTIES

Let us revisit the definition of duty in the context of the bone marrow transplant sought by Tamas Bosze. Remember, he wanted to save one son and therefore asked a court to order tests on two other children he fathered with a woman other than his wife.¹⁸⁶ The mother of the two children declined the tests because she believed her duty was to ensure that the children suffered no harm. If she had been the mother of the child needing the bone marrow transplant, should her assessment have differed?¹⁸⁷ Should a parent consider exposing one child to harm in order to help another child?

What notion of duty could help here? Prevailing normative frameworks of analysis could help, despite the difficulties I have explored. Perhaps a parent should try to ensure the greatest good for the greatest number within the family.¹⁸⁸ If so, the parent could weigh the risk to

185. FURSTENBERG & CHERLIN, *supra* note 44, at 86, 95. These authors seem to have white, middle class families in mind—not the kinds of families described by Carol Stack, for example.

I wonder whether Furstenberg & Cherlin have a different economic class in mind than does Carol Stack; if so, it would be somewhat ironic that strong bonds of sharing could exist among people who have little resources while people with more resources find extended networks of family a reason to reduce commitments to share.

186. See discussion *supra* Part Two, section I. The Illinois Supreme Court rejected his request. *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990).

187. It is difficult to figure what role love past or lost may have played between the Tamas Bosze and the mother of these children.

188. This is a roughly utilitarian approach, although 1) it is not clear that most utilitar-

the donor child with the gain to the recipient child in order to fulfill the duty to the family as a whole. Yet even this formulation is inadequate to the multiple interests involved if it neglects long-run consequences. For example, this approach might seem quite wanting if it implied that the greatest good for the family could be achieved by selling one child's organs—or one child altogether—in order to improve the financial security of the remaining family members.¹⁸⁹

Condemning such a result depends upon a norm that differs from the greatest good for the greatest number. Instead, at work is a norm of respect for each individual person that demands that no one is to be used simply as a means.¹⁹⁰ Accordingly, sacrificing one child altogether for the good of others would seem a violation. Yet short of complete sacrifice, this norm could still permit a parent to fulfill duties to more than one child by authorizing bone marrow transplant from one to another. The parent could conclude that the donor child would be devastated by the loss of the sibling or would later regret a failure to help save that sibling. Under this view, it is the duty between siblings that is salient; the parent's duty derives from the donor sibling's duty. By authorizing the bone marrow transplant, the parent may fulfill a duty to protect the donor's interests, not only a duty to the recipient child.

Articulating a parent's duties in this fashion is bound to be tentative and abstract. Besides revealing deeply conflicting normative frameworks for defining such duties, this discussion reveals once again the special problems posed by multiple relationships among family members. Again, reciprocity does not seem a useful concept to provide the measure of duty; at best, it could play a role as part of a process of

ians would apply the calculus of utilities to matters involving children, 2) nor is it clear that they would circumscribe within one family the group whose interests are to be considered. Nonetheless, the calculus of goods and harms across several people is a common method of normative analysis used in both philosophy and everyday decisionmaking.

189. This is a current problem posed when some families surrender a child for adoption, especially families in developing countries responding to the demand for children in wealthier nations. See Elizabeth Bartholet, *International Adoption: Overview*, in ADOPTION LAW AND PRACTICE, §§ 10.01-06 (Supp. 1991).

190. Thanks to Kant for this formulation.

hypothesizing what one would be willing to do for another if called upon to do so.

A different problem of reciprocity joins this discussion with my concerns from Part One of this Article: perhaps obligations within families should be defined as correlates of the very definitions of families and of benefits accorded on the basis of family membership. Here the reciprocity would run between the family and the state rather than between family members. In exchange for the privileges of family status, each family would carry the same package of obligations. For example, if the state accorded lawful marital status to a gay or lesbian couple that so desired it, the argument would run, that couple should have the same obligations as would any other married couple with respect to that benefit. If that couple is entitled to benefits such as eligibility for inheriting a rent-controlled apartment¹⁹¹ or spousal employee benefits,¹⁹² then that couple should be subject to the same income deeming rules applied to other married couples.¹⁹³ Yet even this notion of reciprocity leaves the articulation of family duties undefined. Not only are the family duties applicable to "each family" still ambiguous, but the application of any articulated set of duties across the vast array of family types would yield enough problems to fill Family Law exams from here to eternity.

One response to the confusion about family duties is to use private ordering techniques such as antenuptial contracts, separation agreements, parent-child contracts, and domestic partnership agreements. Yet these private agreements, like all contracts, do not resolve or avoid publicly articulated duties.¹⁹⁴ The question still remains, then, what duties should provide the background assumptions for such private agreements, and what duties should not be subject to private contractual alteration?

Modification of child support once again provides an example. The noncustodial parent may seek to modify child support payments

191. *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989).

192. *See supra* notes 27-28 and accompanying text.

193. *See supra* notes 132-34 and accompanying text (discussing Medicaid rules).

194. Since most such contracts never receive the public review of adjudication, it is difficult to estimate how much they may supplant public obligations.

despite a prior agreement or court order. As I have already mentioned, a typical reason for such a request is the appearance of children in a subsequent marriage or relationship. This problem implicates each of the difficulties already discussed. The state's AFDC payments or other income supports may be implicated if the custodial parent is financially eligible; statutory guidelines for child support would govern in every case and these reflect assumptions about the requisite private investment to keep children off of public dependency programs. The custodial parent might also be inclined to accept a negotiated agreement to reduced child support payments in order to avoid unpleasantness or to avoid nonpayment altogether, especially if the noncustodial parent bears resentment for the loss of love.

The competing obligations owed to the older children and the younger children renders the entire question even more difficult.¹⁹⁵ The support-owing parent may be willing to take on a second job or work overtime in order to meet those competing obligations, but may also decline such extra work if all or some of the added income is directed toward the children not in his household. Perhaps the duties should be evaluated on the imagined assumption that all the children are part of the same family. Hypothesizing that all the children lived in the same household—and the same two parents jointly produced the children and cared for them together—there is an argument for allowing reduced payments per child. The argument would look to economies of scale and also toward fairness within that group of children as a whole. But precisely that assumption of “one family” is absent here, where the noncustodial parent has produced children in a second

195. A critical factor would involve the actual level of the initial child support: is it set at a minimum point or at a generous level; does it call for upward adjustments in light of the cost of living and increased expenses as children grow older? *See generally* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF CHILD SUPPORT ENFORCEMENT, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS 1-4 (1987), *reprinted in* JUDITH AREEN, FAMILY LAW CASES AND MATERIALS 183-94 (2d ed. 1991) (directing states to develop guidelines that ensure equal rights for each child to share in that parent's income “subject to factors such as the age of the child, income of each parent, income of current spouses, and the presence of other dependents”).

household.¹⁹⁶ Implicating all the difficulties in articulating family duties, this problem I hope will stir discussion among us.

This discussion suggests what should now be the predictable three difficulties in articulating family duties: they presuppose and yet also affect governmental duties; they reflect lost love and emotional flux; they lack a clear measure of reciprocity and bear the complications of relationships among many people. Prevailing value discussions that compare utilities or call for respecting persons have paid little attention to issues within families¹⁹⁷ and prompt divergent suggestions when applied to families.

Yet I hope this discussion illuminates more than these difficulties. In particular, I think attention to the connections between matters too often separated enriches the analysis of family duties. Thus, recognizing the interdependence of family duties and state treatment of families can clarify how some apparent dilemmas could be resolved with a shift in governmental policies.

The government will not and cannot be neutral about family duties. Some duties will be enforced and others will not be. But the background governmental rules do have an important impact on the family duties that people accept and those they find too burdensome. Having a reliable safety net would help; having a coherent universal health policy would help. Here, I am reminded of a discussion with a Canadian friend whose father had suffered a heart attack. We discussed questions about how this would affect the family and who would care for him if he became disabled. Then she remarked that however difficult these matters were, she could not imagine the burdens people in comparable situations in the United States would feel if they simultaneously had to worry about the costs of the medical care.

Another useful insight about connections: predicating family duties on feelings may be hazardous, but so is disregarding the possibility that well-articulated family duties could influence positively the feel-

196. Should the presence of a stepparent in first household affect noncustodial parent's child support obligations? This poses another difficult set of concerns worthy of serious attention.

197. See SUSAN OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

ings people develop. This notion includes attending to the value of enduring commitments. Commitments can last even beyond the feelings, especially if we encourage them to last. Granted, reciprocation may fail as a measure of duty where families involve many people across generations. That very failure suggests alternative conceptions of duty that can operate within complex networks of care and exchange.¹⁹⁸ Finally, conceptions of family duties must also be considered in relation to shifting notions of who is in the family and what benefits and duties should attach to family membership.

These insights would not solve, but would enrich, consideration of many controversies. These include contests over religious exposure during visits by noncustodial parents discussed in Part One.¹⁹⁹ The courts tend to treat many cases as clashes between parental prerogatives and children's best interests. For example, courts tend to translate debates over religious exposure during visits with noncustodial parents as a question about the child's best interests. I think it is helpful to start by acknowledging that the government cannot remain neutral. The notion of the child's best interests, if secular, could depart from a religious view, and a decision to permit exposure to more than one religion is no more neutral than a decision to restrict exposure to only one religion, since both affect deeply the child's religious understandings and identity.

I suggest that we shift to the task of articulating more fully the parents' *duties* in this context, including duties to attend to the impact of their prerogatives on the child. Perhaps a different notion of simple reciprocity between the parents is present here, a basic respect for one another's religious views. Yet, once again, that notion is inadequate for this task. Clarifying who is the family for the purpose of respecting family privacy should involve attention to the privileges and duties the parents plan to exercise.

Let me offer one last case. Again, I do not claim to resolve it but instead offer considerations that could deepen our legal and moral un-

198. It might be worth considering different kinds of rationales and duties accompanying different relationships, although that approach would risk dimming the moral content of "duty" and then obscuring the scope of duties when not expressly negotiated.

199. See *supra* text accompanying notes 59-61.

derstandings of it. A car driven by a drunk driver struck a school-teacher named Sharon Kowalski and left her brain-damaged and otherwise considerably disabled.²⁰⁰ Karen Thompson at that time informed Sharon's parents that the two woman had been living together in a close and loving lesbian relationship; they had exchanged rings and were buying a house together.²⁰¹ Karen sought authority to serve as Sharon's guardian. The Kowalskis refused, sought and obtained guardianship, barred Karen from visiting Sharon, and tried to sever the connection between the two women. Recently, the parents, due to their own physical frailty, sought to have another person appointed guardian. The court initially approved this appointment of a third party, but then, finally, accepted Karen Thompson's request for guardianship. The case elicited public attention and involved long and complicated legal proceedings in local, state, and federal courts.

No doubt the Kowalskis believed they acted with concern for their daughter's best interests. At the same time, the case demonstrates the difficulties for people in nontraditional relationships lacking state recognition; without an official marriage or even a durable power of attorney, the law treated Karen Thompson as a stranger for much of the proceedings.²⁰² This case implicates the contemporary, unresolved questions about who is in the family and who should be eligible for the benefits of family membership.

But receiving less discussion are the equally significant questions of family duty here. I began by asserting that family duties should be strict even as I assert that the definition of family should be generous. Karen Thompson clearly accepted the duties accompanying what she treated as a marriage; she pursued the kind of care she believed would be in Sharon's best interests. Sharon's parents also tried to perform a duty to their daughter.

200. See generally KAREN THOMPSON, WHY CAN'T SHARON KOWALSKI COME HOME? (1988); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMPLE L. REV. 511, 514-21 (1990).

201. See THOMPSON, *supra* note 200, at 15; *In re Guardianship of Kowalski*, 382 N.W.2d 861, 863 (Minn. Ct. App.), *cert. denied*, 475 U.S. 1085 (1986).

202. See Robson & Valentine, *supra* note 200, at 515.

Assuming that Sharon's parents owed a duty to care for their daughter—or wished to fulfill such a duty—how should that duty be described? That duty of parents of an adult child, I suggest, should include an obligation to recognize and try to respect the child's life choices, especially choices in defining her own family. A judicial appreciation of this element of parental duty could complicate some cases, but would help join the issues of loving and owing with the issues of family diversity that are bound to perplex us for some time to come.