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SYMPOSIUM:
NEW FRONTIERS IN FAMILY LAW

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NEW FRONTIERS IN FAMILY LAW: INTRODUCTION

Laura T. Kessler

A new discussion about families and care is unfolding in family law. Reproductive technologies, globalization, and left-of-center critiques of same-sex marriage offer an especially fertile environment for imagining sex, intimacy, care, and reproduction outside marriage and the nuclear family. These reconceptualizations continue the revisioning enabled by reproductive freedom, no-fault divorce, and women’s entrance and integration into the workforce. The implications of these trends are significant. What happens to family law when a range of relationships and intimate practices displace heterosexual marriage from the epicenter of thinking about the family? Although the full effects of this diffusion are not yet clear, certain trends are emerging.

First, discussion has shifted from divorce and inequalities inside the marital family to inequality among families. Family law scholarship and advocacy in the 1970s and 1980s often focused on remedying the economic destitution of women caused by divorce, as well as problems related to the domination of husbands over wives, such as domestic violence. In current scholarly discussions of the family, alternatives to marriage are as important as reforming marriage. A natural consequence of this shift in priorities is attention on the state, particularly its role in privileging certain families over others. The declining focus on heterosexual marriage has also introduced more antiessentialist analysis into family law scholarship. Because marriage is less prevalent among low-income individuals, people of color, and sexual minorities, a family law that is less marriage-centric is more likely to consider the life experiences of diverse individuals. Finally, with less investment in heterosexual marriage as a dominant focus, a perceptible shift in the disciplinary boundaries of family law is occurring. Today, constitutional law, tax law, immigration law, criminal law, and employment law—indeed, a host of areas providing background rules for families, but not historically considered part of family law—are as likely to be sites of inquiry on families as the law of marriage, divorce, and child custody.

One helpful metaphor that may help us understand these developments is “the frontier.” A frontier is a region that forms the margin of settled or developed territory or a fertile area for explorative or developmental activity.1 This metaphor aptly describes the recent proliferation of family law scholarship exploring sexual

* © 2009 Laura T. Kessler, Professor of Law, University of Utah S.J. Quinney College of Law; kesslerl@law.utah.edu. Many thanks to my research assistants, Deborah Bulkeley, Mary Ann Call, and Tara Nielson, for their work on this introduction.


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and intimate practices outside the settled territory of the marital family. Salient examples include multiple parenthood,\textsuperscript{2} networked families,\textsuperscript{3} polygamy,\textsuperscript{4} polyamory,\textsuperscript{5} unmarried fathers,\textsuperscript{6} queer culture and intimacy,\textsuperscript{7} and friendship.\textsuperscript{8} This work recognizes that law provides the context that can facilitate or hinder unconventional intimate configurations. Some commentators therefore seek to disentangle law from sexual and intimate life.\textsuperscript{9} Others seek legal recognition (and regulation) of a wider range of intimate affiliations.\textsuperscript{10}

The frontier thus provides a new metaphor, replacing older frameworks such as the “channeling” function of family law.\textsuperscript{11} According to the channeling story, family law exists to channel sex and reproduction into marriage, the institution deemed most appropriate for those activities. In the new frontiers of family law, marriage holds a less central, even disfavored, position.

The New Frontiers in Family Law symposium explored this new territory. Some of our questions were: (1) Is the notion of “the family” more limiting than helpful? After all, the history of the family in law is largely about oppression.


\textsuperscript{9} Michael Warner, Beyond Gay Marriage, in LEFT LEGALISM/LEFT CRITIQUE 259, 263–66 (Wendy Brown & Janet Halley eds., 2002); Franke, Domesticated Liberty, supra note 7, at 1400; Franke, Loving, supra note 7, at 2688.

\textsuperscript{10} See, e.g., Martha M. Ertman, Marriage as a Trade: Bridging the Private/Private Distinction, 36 HARV. C.R.-C.L. L. REV. 79 passim (2001).

What is gained by using the family as frame of analysis, and what is obscured?; (2) If our goal is to allow a diverse range of sexual and intimate affiliations to flourish, is law the best tool? After all, culture, social practices, and non-legal institutions order social and sexual life as well as formal law. Moreover, legal recognition for “nontraditional” families and intimate configurations often comes with costs, among them, assimilation of those recognized and further marginalization of those not; (3) Finally, what is the appropriate balance of equality and freedom in our theorizing and advocacy about families? Freedom and equality often inform and enable each other in law and politics, but sometimes they are in tension, particularly in the intimate sphere where substantial dependencies exist.

The symposium explored these questions and their implicit tensions, including those between political conservatives and liberals and tensions among critical left and liberal legal theorists of the family. It materialized only with the valuable contributions of my former colleague, Martha M. Ertman, who helped develop the vision for this symposium and invite the contributors; Herta Teitelbaum, who endowed this symposium in memory of her late husband, Lee E. Teitelbaum, a prolific family law scholar and the beloved former dean of our law school; my dean, Hiram Chodosh, who gave nothing but green lights for this ambitious event; Utah’s Gender Studies Program, which co-sponsored the symposium, and the support of its Director, Kathryn Stockton and Associate Director, Gerda Saunders; Shawn Anderson, Miriam Lovin, and Elizabeth Seeley, who provided tireless logistical support; my colleague Amy Wildermuth, who helped me work through the complexities of publishing a joint issue of the Utah Law Review and the Journal of Law and Family Studies; and the organizational and editorial efforts of the staff of the two journals, in particular, their respective Editors-in-Chief, Rik Wade and Pamela E. Beatse. All deserve substantial thanks.

The symposium, which took place in February 2008, was organized around three conceptions of boundaries as they relate to families: definitional boundaries, geographic boundaries, and disciplinary boundaries. In the first panel, which I moderated, Elizabeth Emens, Professor of Law at Columbia Law School, examined sex, race, and disability discrimination that occurs in the intimate domain, such as in sexual, romantic, and marital relationships. Although Emens emphasized that the legal regulation of intimate discrimination at the individual level would be woefully misguided, she argued that the state should reform its laws and policies to attend to its structural role in intimate discrimination. According to Emens, for sex, the most obvious next step is to cease restricting marriage according to sex. For disability, the state should help to encourage opportunities for intimate affiliation by attending the ways that structures of accommodation operate to help or hinder closeness among nondisabled and disabled people. For race, the state’s goal should not be to encourage race mixing in the intimate realm, but rather to lift burdens on existing relationships, such as residential segregation.

Martha Ertman, Professor of Law at the University of Maryland Law School, presented a paper tracing the roots of today’s ban on polygamy to nineteenth
century Americans' view that Mormons committed two types of treason. According to Ertman, antipolygamists charged Mormons with political treason by establishing a separatist theocracy in Utah. Second, they saw a social treason against the nation of white citizens when Mormons adopted a supposedly barbaric marital form, one perceived as natural for, in the Supreme Court's phrase, "Asiatic and African" people, but so unnatural for whites as to spawn a new, degenerate race. Ertman argued that the racial foundations of American antipolygamy law require us to rethink our own often reflexive condemnation of the practice.

Katherine Franke, Professor of Law and Director of the Program in Gender and Sexuality Law at Columbia Law School, offered a different, but equally provocative vision for family law. Franke argued that efforts to secure marriage equality for same sex couples must be undertaken, at a minimum, in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire. Resisting the normative and epistemic frame that values non-marital forms of life in direct proportion to their similarity to marriage, she argued that we must unseat marriage as the "measure of all things." To this end, she suggested as a thought experiment substituting friendship for marriage at the center of the social field in which human connection takes place. With that new frame, "our investments in marriage and marriage's investments in us are likely to yield in such a way that we can imagine making the argument for same sex couples' right to marry while also imagining and cultivating different longings . . ."13

I closed the panel with a presentation of my research on multiple-parent families, what I call "community parenting." This project seeks to understand why, at a time of increasing recognition of non-traditional families, the "more-than-two" parent family is so widely agreed to be undesirable, even while so many people practice alternatives to the two-parent nuclear family norm. I reviewed the many contexts where multiple-parent families exist, such as in gay and lesbian families, families of color, and separated and divorced families. Finally, I concluded with the suggestion that the law should recognize community parenting, because it is often highly functional and represents a welcome disruption to the gendered, nuclear family. Thus began a lively and engaging conversation.

In the spirit of exploring new territory, that evening we turned to a different format to explore the conferences themes. Bringing to the West things that originated back East, we borrowed the format of Eve Ensler's Obie Award-winning episodic play, The Vagina Monologues, for a first-night-of-the-conference performance. Calling the performance Telling Tales on Families, we solicited monologues from the University and Salt Lake communities with the aim of literally giving voice to a wide range of experiences of family, intimacy, kinship, sexuality, and relatedness. The fifteen monologues we selected from the many

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12 Franke, Loving, supra note 7, at 2689.
13 Id. at 2686–87.
submissions were performed by the winning authors, and, where authors preferred anonymity, by local actresses, students, and members of the wider University community. The winning authors were: Bonnie Baty, Heidi Camp, Martha Cannon, Lynette Danley, Rowenna Erickson, Martha Ertman, Kim Hackford-Peer, Ruth Hackford-Peer, Janet Kaufman, Cynthia Lane, Ashley Morgan, C. La Var Rockwood, Linda Smith, Mary Stainton, Bara Swain, and Karen Williams. The topics addressed by the monologues were diverse, from adoption to mental illness, polygamy to end of life decision-making, domestic violence to the challenges of raising a minority child in a world of discrimination. Thirteen of the monologues are published in this issue, each accompanied by law-student-authored commentary situating the topic of the monologue within its relevant legal context.

_Telling Tales on Families_, like the academic papers, was very much a part of the new frontier idea. It involved a collaboration between the University of Utah’s College of Law and Theatre Department, two departments that have little contact in most universities. As an alternative format for exploring the themes of the symposium, the monologues performance also represented a new frontier in academic discourse. Chosen through a community-wide competition and performed for free at an off-campus public venue, the monologues also reflected cutting edge thinking about bringing the work of the university to the broader community. Finally, by having the law student staff members of the _Journal of Law and Family Studies_ comment on each monologue, the performance represents a new frontier in legal education. Our hope in setting up this format is that the rich conversation between the monologue authors and members of the legal community could be carried through into this issue.

_Telling Tales on Families_ was the subject of an editorial in the _Deseret News_. The newspaper editors described the concept of the performance in glowing terms:

We see it as a first-rate endeavor that will, undoubtedly, provide not only vital information for the legal profession, but will help preserve many real-life moments that would be blown away by time. . . . We offer a tip of the hat to the University of Utah for its willingness to explore the “brave new world” of inner-history. In time, perhaps other disciplines will also realize that because a relationship is small doesn’t mean it is insignificant. As the maxim has it, a few drops of water—when frozen—can split a boulder. A few monologues about family life also will crack open new ways of seeing, appreciating and applying the law.

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16 Id.
There are many people who helped make *Telling Tales on Families* a success, including the committee of faculty members and students from departments across campus who selected the monologues: Brin Bon (undergraduate student), Laura Briggs (Tanner Center), Elizabeth Clement (History), Martha Ertman (Law), Deborah Feder (law student), Tina Hatch (Counseling Center), Lori McDonald (University of Utah, Dean of Students), Kaye Richards (Modern Dance), and Robin Wilks-Dunn (Theatre); playwright and director L.L. (Larry) West and actresses Karen Nielsen-Anson and Betsy West, who provided consultation on direction; M.C. Elizabeth Clement; actresses Kathryn Atwood, Susan Dolan, and Andra Harbold, University employee Leslie Giles-Smith, community member Michael Rockwood, and law student Paul Techo, who served as readers; Aaron Herd, Travis McKee, Pat Standley, and Morgan Stewart, who handled the lighting, sound, and videography; graphic designer Sandy Kerman of Kerman Designs, who designed the playbill; Kimberly Hall, Assistant Director of the University’s Women’s Resource Center, who helped advertise the performance campus-wide; law school public relations person Barry Scholl, who provided media outreach; KCPW News Director and radio host Lara Jones, who dedicated a segment of her show, *Midday Metro*, to the performance; law-student volunteers Monica Diaz Greene, Jordinn Long, Lacey Singleton, and Paul Techo, who helped with performance night logistics; and the Rose Wagner Performing Arts Center’s Black Box Theatre, which made its venue available for the performance.

Day two of the symposium, consisting of two additional academic panels and a tour of the Church of Jesus Christ of Latter-Day Saints Family History Library, proved as engaging as day one. The first panel, moderated by my colleague, Erik & George, Professor of Law at the University of Utah, was organized around the theme of geographic boundaries. The first panelist, Kathy Abrams, Herma Hill Kay Distinguished Professor of Law at University of California-Berkeley School of Law, examined a series of federal enforcement efforts aimed at apprehending and detaining undocumented immigrants. She looked at two recent initiatives: workplace and residential sweeps aimed at apprehending undocumented immigrants, and the emergence of “family detention” facilities designed to house families as they await determination of their immigration status. She argued that, whatever else they do, these policies serve to produce immigrants as less than human—“the kind of beings whose deep connections with parents, children or spouses can be disregarded, indeed flagrantly violated, at will.”

Penelope Andrews, Professor of Law at Valparaiso University School of Law and Chair in Law at LaTrobe University, Australia, examined the evolution of South African legislation and constitutional jurisprudence in the face of competing imperatives, for example, between equality, legal pluralism, customary law/religious law, and the recognition of polygamy. Toward that end, she explored

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legislative attempts to regulate polygamous marriages in South Africa through the Recognition of Customary Marriages Act, a statute designed to provide for equality between the spouses and regulate all aspects of customary marriages, including their establishment, property relationships, and dissolution. She reviewed the history of compromise in the formation of South African Constitution between liberal equality principles and formal recognition of indigenous law, as well as the Constitutional Court’s role in mediating those values and pulling the constitution closer to a vision of gender equality. Andrews located the practice of polygamy within this narrative of progress, and considered the various arguments for and against recognizing polygamy from that standpoint. On the one hand, she noted legal regulation (and recognition) of polygamy may in fact provide rights, albeit limited ones, for women in polygamous marriages. On the other hand, such recognition also suggests that the South African Government is not prepared to make the hard choices that are necessary to ensure that the pursuit of gender equality is not derailed. In the end, Andrews seemed to side with the anti-polygamists, noting that polygamy does not comport with gender equality, but her broader point is that South Africa may provide “a third way” of straddling the equality conundrum that has so bedeviled feminist analyses and discourse in the past few decades.

Laura Briggs, Associate Professor of Women’s Studies at University of Arizona and then-visiting research fellow at the University of Utah’s Tanner Humanities Center, presented her research on transnational adoption. Contesting the “happy multiculturalism” story of transnational adoption, she provided a more troubling account of the practice using Guatemala as a case study. Briggs reviewed the history of various efforts to bring children to the United States since the 1930s, as well as the increasingly privatized nature of the adoption process. By the 1970s and 1980s, according to Briggs, parents were less like petitioners and more like consumers, seeking a child and paying a fee. These conditions created the context for adoption from Guatemala and other Latin American countries, which in the 1980s were engaged in “dirty” wars against leftist insurgents. According to Briggs, these civil wars involved massive human rights violations and organized disappearances of citizens, including children. She then reviewed narrative accounts of Latin American adoption, and demonstrated the tensions between what she termed left-wing solidarity accounts and right-wing “change and conversion” accounts of transnational adoption. She concluded with the following point: when we see transnational adoption as an undifferentiated, neutral anti-racist project, we miss a great deal of the political struggle that goes on under the sign of adoption.

Michael Cobb, Associate Professor of English at University of Toronto, examined the importance of enduring in our family relations past death. Using

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diverse examples from Utah, including Mormon scripture, a will, a Supreme Court probate case, and an episode of HBO's *Big Love*, he argued that transfer of property helps people sustain the hope that families can endure after the death of a relative. According to Cobb, "we're haunted by the property willed to us—by the line of succession's solidification of social relations by the transfer of property after death."19 Building on this insight, he examined what happens to intestate estates if there is both no will and no spouse: "a relentless . . . quest for a blood heir, no matter how distant."20 Cobb suggested that we should be able to continue relating to people other than our legal families after death; in his case, "my boyfriend, or, ideally, my friends."21 More broadly, he demonstrated how intestacy laws fail to sustain and protect the families "we make."22

The final panel, moderated by Martha Ertman, was organized around the theme of "disciplining boundaries.” Mary Anne Case, Arnold I. Shure Professor of Law at the University of Chicago Law School, explored the boundary between religious and civil marriage in a paper analyzing the claim on the part of evangelical Protestant religious conservatives that state recognition of same-sex marriages will undercut their own marriages. While asserting that she supports the legalization of same sex marriage, Case conceded that this vehement objection by evangelical Protestants is exactly right. Through a historical account of how marriage came to be regulated by the state, she explained why. Evangelical Protestants in the United States, according to Case, have abdicated the definition, formation, and dissolution of marriage to the state. That is, there is no difference in the way they understand marriage and how the state defines it. In contrast, this is not true for any other religions. For example, Case explained, Catholics famously do not recognize divorce. Along the same lines, Orthodox Jews recognize a distinct process for obtaining a divorce by which the husband must give a “get” to his wife. As these examples suggest, Catholics and Jews understand the distinction between religious and civil marriage. This disaggregation, according to Case, explains polls showing that the latter two groups are less likely than evangelical Protestants to oppose same-sex marriage. Case then traced the roots of the conflation of civil and religious marriage in the history of Anglo-American marriage law. She concluded that Protestants must suffer the loss of control over the definition of marriage, because the Equal Protection Clause of the Federal Constitution, as it relates to sex discrimination, demands it.

Brenda Cossman, Professor of Law of the University of Toronto Faculty of Law, addressed the recent media attention to the “Opt Out Revolution,”23 that is, the decision of upper middle class, professionally trained women to leave the work

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20 Id.
21 Id. 2009 UTAH L. REV. 323, 333; 11 J. L. & FAM. STUD. 275, 287.
22 Id.
force and to stay home to care for their children. After reviewing the various feminist critiques denouncing the opt-out phenomenon, she noted that she wanted to tell a different story. Rather than simply highlighting the extent to which choice is constrained by market and familial arrangements, she explored what might happen if we took the rhetoric of choice seriously. According to Cossman, the “opt-out” revolution can be usefully understood as an instance when women are called upon to govern themselves through the choices that they make. Instead of denying the reality of choice, Cossman asserted that an effective feminist response would be explore the nuances of how choice operates in many women’s lives, and how it is managed and negotiated, such that motherhood is being reconfigured on new “terrain.”

Melissa Murray, Assistant Professor of Law at University of California-Berkeley School of Law, explored the disciplinary boundary between criminal law and family law. Murray argued that criminal law and family law have long had a cooperative role in constructing intimate life as either licit marital behavior or illicit criminal behavior. Murray then used the 2005 statutory rape case of State v. Koso as a point of entry to move beyond the doctrinal divide that separates family law and criminal law. Koso concerned a fourteen-year-old girl who married a twenty-two year-old man with the consent of her parents. Despite their legal marriage, the man was convicted of statutory rape. Murray used the Koso case to theorize the boundaries where criminal law and family law intersect and overlap in their regulatory agendas. She argued that a more thorough understanding of the interaction of criminal law and family law in the regulation of intimate life may lead to more comprehensive and satisfying solutions to issues that frequently arise in the overlapping boundaries of the two doctrines. More broadly, she looked to the promise created by the potentially blurred line between family law and criminal law to imagine a space between marital sex and criminal sex such that we can imagine sex outside of marriage and, even possibly, outside of law.

Last but not least, Jana Singer, Professor of Law at University of Maryland School of Law, gave a presentation on one of the primary challenges posed by the expansion of family boundaries: the increase in litigation between family members. In particular, she discussed the sharp rise in intra-family litigation and explored some of the reasons that family members have increasingly turned to the judicial system to resolve disputes over their respective rights and responsibilities. Examining the principles and paradigms that courts have used to resolve these intra-family disputes—including constitutional law, contract principles, child-focused decision-making, and therapeutic jurisprudence—she concluded none of these existing dispute-resolution paradigms offers a fully satisfactory framework

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for resolving conflicts between and among family members. According to Singer, policy makers need to think more explicitly about the potential for intra-family litigation when fashioning rules about family structure and relationships.26

Taking advantage of Utah’s unique setting for exploring the boundaries of families and family law, both in its history and geography as a frontier, the symposium concluded with a tour of the Church of Jesus Christ of Latter-Day Saints Family History Library, where we learned about the library’s substantial resources for genealogical research.

From the wealth of material presented at the live symposium, the editors are publishing seven articles and thirteen monologues—some from participants and others from those who could not appear in person—each of which, in its own way, reflects and challenges the major themes of the symposium.27 Of particular note is the addition of an article by renowned sociologist Judith Stacey, which leads the symposium issue. Judith Stacey is Professor of Social and Cultural Analysis, Professor of Sociology, and Director of Undergraduate Studies at New York University. Her paper considers the potentialities of the Mosuo people, a small ethnic-minority culture in southwest China, for offering “creative solutions to inherent contradictions between individual eros and family security.”28 According to Stacey, in contrast with Western family and kinship systems, the Mosuo live in extended, multigenerational households with their mother and her blood relatives. Together, family members “own, maintain, and inherit the family property, perform the necessary labor, rear all children born to the women of the household, and care for aged and dependent members.”29 Traditional Mosuo family values also “radically separate sexuality and romance from domesticity, parenting,
caretaking and economic bonds." Women are afforded equality and mutuality over their sexual and procreative lives, and mutual desire alone governs romantic and sexual unions "for women and men alike." Adults do not normally marry or live with their lovers. In her article, Stacey summarizes her ethnographic tour of the Mosuo community, sketching the lives of three contemporary Mosuo families. She then describes the history of official political party oppression suffered by the Mosuo in the form of "marriage campaigns," and the recent pendulum shift to "unbridled" market-based ethnic tourism of mainstream Chinese and global clientele, who are attracted by the Mosuo reputation for free love. Due to these various pressures, Stacey poignantly observes, "our world risks losing its most successful, egalitarian, and enduring species of nonmarital kinship just when the viability of modern marriage seems in gravest doubt."

In addition to Professor Stacey's article, the published symposium issue includes two other papers not presented at the live symposium, one authored by Mary Anne Case and another by Laura Briggs. Mary Anne Case's contribution argues for a theory of "feminist fundamentalism," which would provide a counterweight to challenges to sex equality from fundamentalist religion. By feminist fundamentalism, Case means "an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles." Laura Briggs' contribution explores the history of transracial adoption in the United States, providing an alternative account of the impact of "racial matching" policies, which disfavor the adoption of African-American children by white parents. Briggs contests the account by some prominent scholars that racial-matching in adoption caused the explosion of minority children in the United States foster care system. Rather, she locates the problem in increasingly aggressive federal laws aimed at terminating the parental rights of poor, minority mothers—that is, in the supply side of the foster care system.

The New Frontiers in Family Law symposium is co-published by the Utah Law Review and Journal of Law and Family Studies. This joint issue represents a significant achievement of our students and our law school in building bridges within and across our law school communities. In keeping with the symposium's

30 Id.
31 Id. at 2009 UTAH L. REV. 287, 292; 11 J. L. & FAM. STUD. 239, 244.
33 Id. at 2009 UTAH L. REV. 287, 308; 11 J. L. & FAM. STUD. 239, 260.
34 Id. at 2009 UTAH L. REV. 287, 321; 11 J. L. & FAM. STUD. 239, 273.
36 Id. at 2009 UTAH L. REV. 381, 382; 11 J. L. & FAM. STUD. 333, 334.
commitment to breaking down existing conventions, the symposium editors wish that authors citing the works published in this issue employ a parallel citation to both the *Utah Law Review* and the *Journal of Law and Family Studies*, in a manner consistent with the footnotes in this introduction. This format is not in *The Bluebook*, but then again, the best things in life are often so for the very reason that they are not "by the book."

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38 *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).
UNHITCHING THE HORSE FROM THE CARRIAGE: LOVE AND MARRIAGE AMONG THE MOSUO

Judith Stacey*

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I. INTRODUCTION

If there were an international endangered species status for vanishing family forms, I would nominate the Mosuo people of Southwest China without delay. The contemporary world stands to lose a great deal, I believe, if we allow the unique, ancient Mosuo family system to expire. We would lose a species of happy family life that Tolstoy never contemplated, one that offers creative solutions to inherent contradictions between individual eros and family security that seem particularly pertinent today. The resilient premodern Mosuo family system anticipated by millennia core principles of what sociologist Anthony Giddens

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1 Scholars use diverse terms and spellings to designate this culture. Most prefer “Mosuo,” some spell it “Moso,” while a minority use neither term, but refer to them as the Na people.
termed the pure relationship of late modernity. Giddens theorized that late twentieth century economic and social conditions enabled the emergence of a utopian practice of intimacy that he termed "confluent love" and "plastic sexuality." Plastic sexuality signifies "decentred sexuality," in Giddens’s lexicon, “severed from its age-old integration with reproduction, kinship and the generations.” Equals can pursue intimacy purely “for its own sake,” and intimate relationships endure only so long as they “deliver enough satisfactions for each individual to stay within it.”

II. THE MOSUO

In 1995, I co-taught a graduate seminar on family and kinship, East and West with the late William Skinner, an eminent Sinologist and anthropologist. That was how I first learned of the existence of the Mosuo people, a small ethnic-minority culture in southwest China who, Bill reported to my utter amazement, did not practice marriage. A dozen years were to pass before I finally made a pilgrimage to the magnificent mountain habitat of the Mosuo in order to observe this exotic family system with my own skeptical eyes and ears.

Thus, in August 2007, I became one of hundreds of thousands of annual visitors who willingly journey seven uncomfortable hours from the nearest city, Lijiang, over jagged, hairpin switchbacks to reach the remote environs of Lugu Lake in Yunnan province. The Chinese state officially recognizes fifty-six ethnic “nationalities,” and Yunnan is home to a hefty share of them. Perched high in the Himalayan borderlands of Yunnan and Sichuan provinces near the Tibetan frontier, Lugu Lake is one of the most popular destinations in China’s flourishing domestic tourist industry. Promotional materials lure visitors, 90 percent of whom are Chinese nationals, to savor spectacular natural scenery and colorfully clothed members of ethnic minority cultures. The prime cultural magnets drawing

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2 ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES 58 (1992) (stating that a pure relationship is one with sustained association entered into as long as both parties are satisfied with it and that it is more synonymous with marriage than other relationship views).

3 Id. at 61–64.

4 Id. at 2.

5 Id.

6 Id. at 27.

7 Id. at 58.


9 See Three Parallel Rivers of Yunnan Protected Areas, China, http://www.eoearth.org/article/Three_Parallel_Rivers_of_Yunnan_Protected_Areas_China (last visited June 19, 2009) (“85 - 95% of visitors are from China . . . [and] 5 - 15% originat[e] from overseas.”).
travelers to Lugu Lake, however, are the fabled family and sexual customs of the estimated forty to fifty thousand surviving members of the ancient Mosuo culture who inhabit its surrounding villages.

The Mosuo consider themselves to be an autonomous ethnic group, but the Chinese state officially classifies them as a distinctive subculture of the much larger Naxi nationality. Distinctive, indeed. For the family regime the Mosuo practice is one of the world’s oldest, most flexible, and resilient, and arguably its most original. Approximately two millennia ago, Tibeto-Burman ancestors of the contemporary Mosuo devised what appears to be the only family and kinship system in the anthropological or historical record that is not based on marriage. Mosuo family principles violate some of the deepest and most popular contemporary convictions about marriage, parenting, and family life. A preponderence of contemporary citizens, policy makers, and even many scholars, East and West, seem to believe that research supports the following claims:

- Marriage is a universal institution.
- The ideal family structure for raising children is an “intact” family which includes a married heterosexual couple and their biological or adopted children.
- The quality and stability of a couple’s marriage profoundly affects their children’s welfare and security.
- Children generally, and boys particularly, need and yearn to know and live with their biological fathers.
- Parents who engage in multiple, short-term, extra-marital sexual liaisons irresponsibly threaten their children’s emotional development.

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11 Scholars are not certain how distinctive the Mosuo kinship and sexual system was compared with other Naxi and nearby ethnic groups, particularly the Pumi. McKhann speculates that the Naxi cultures were once more similar and overlapped with bilateral, bilineal practices generally, but that they evolved in different directions. See Charles F. McKhann, Naxi, Rerkua, Moso, Meng: Kinship, Politics and Ritual on the Yunnan-Sichuan Frontier, in NAXI AND MOSO ETHNOGRAPHY: KIN, RITES, PICTOGRAPHS 23, 25 (Michael Oppitz & Elisabeth Hsu eds., 1998).

Traditional Mosuo family life, however, presents an exception that profoundly questions, rather than proves, all of these rules. Mosuo kinship, in startling contrast with traditional Chinese patriarchy, is primarily matrilineal and matrilocal. “[H]appiness is defined as the ability to live in harmony with matrilineal kin,” explains one of the anthropologists who know the Mosuo best. \(^\text{13}\) “The ultimate meaning of life in this world is to uphold and maintain household harmony.” \(^\text{14}\) Instead of marrying and sharing family life with spouses, adult Mosuo children remain in extended, multigenerational households with their mother and her blood relatives. \(^\text{15}\) Families assign the role of dabu, the household head, to whichever adult woman or man it judges most competent to manage its domestic and economic activities. \(^\text{16}\) Together family members own, maintain, and inherit the family property, perform the necessary labor, rear all children born to the women of the household, and care for aged and dependent members. \(^\text{17}\)

Traditional Mosuo family values radically separate sexuality and romance from domesticity, parenting, caretaking, and economic bonds. \(^\text{18}\) Sex life is strictly voluntary and nocturnal, while family life is obligatory and diurnal. \(^\text{19}\) The cultural attitude toward heterosexual desire is permissive, relaxed, and nonmoralistic, so long as individuals observe strict verbal taboos against discussing their erotic activities among relatives or in mixed gender settings. \(^\text{20}\) At the age of thirteen, a girl undergoes an initiation “skirt” ceremony that culminates in receiving a literal sleeping room of her own. \(^\text{21}\) In what the Mosuo language terms her “flower chamber,” she can freely receive (or rebuff) nocturnal visits from any male suitor who comes to call. \(^\text{22}\) An analogous “pants” ceremony marks the cultural passage to maturity for boys who turn thirteen, but they do not receive private sleeping quarters. \(^\text{23}\) Instead, mature males become eligible to practice tisese, which the


\(^{14}\) Id.

\(^{15}\) See Id. at 707.


\(^{17}\) Id. at 156–57.


\(^{19}\) See id. at 121–22, 186, 192–93.

\(^{20}\) See id. at 127, 195.


\(^{23}\) See id. at 141, 189–90.
Chinese misleadingly translate as walking marriage ("zuohun"). The Mosuo term, however, literally means that a man "goes back and forth." Men live, eat, and work with their maternal families by day, but after nightfall, they can seek entry into the flower chambers of any women they desire.

Traditionally the primary form of tisese, which anthropologist Cai Hua termed "furtive" or "closed" visiting, entailed no public acknowledgement or obligations between the parties. Under the cover of night, adults were free to enjoy erotic intimacy with as many or as few partners as ignited reciprocal desires. Evidence suggests, however, that the secondary form of tisese, termed the "conspicuous" or "open" visit by Cai Hua, is the more widespread practice today, and perhaps always has been. Couples who wish to declare and solidify their intimate bonds conduct a modest ceremony in which the man’s representative presents gifts on his behalf to his lover’s kin. The ceremony entitles him to openly visit his lover on an indefinite, presumably exclusive basis and establishes modest expectations of reciprocal assistance between the pair and sometimes their households. However, whenever a man spends the night with a lover [axiao] whether furtive or open, he is expected to return to his maternal homestead by morning. That is the locus of his domestic life and labor, the site of his primary intimate bonds, his social status, obligations and security.

Among the many extraordinary features of traditional Mosuo family and kinship, perhaps none is as rare as the equality and autonomy it afforded women over their sexual and procreative lives. Mutual desire alone governed romantic

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24 See id. at 47–49.
25 See id. at 50.
26 See id. at 51.
27 CAI, supra note 18, at 185.
28 Id. at 202.
29 Id. at 237.
30 See also Chuan-Kang Shih, Genesis of Marriage Among the Moso and Empire-Building in Late Imperial China, 60(2) J. OF ASIAN STUDIES 381, 403 (2001) (noting that "[b]oth tisese and marriage have served in Moso society as legitimate patterns of sexual union and reproductive institution.") [hereinafter Chuan-kang, Genesis of Marriage]; Chuan-Kang, supra note 16, at 78, 89–90; Walsh, supra note 10, at 92–95 (detailing the Maoist pressure on the Mosuo to adopt conventional marital practices).
31 CAI, supra note 18, at 237–40.
32 Id.; Chuan-kang, supra note 16, at 55–57.
33 See, e.g., CAI, supra note 18, at 186, 240.
34 See Chuan-kang, supra note 16, at 58. At least in respect to their heterosexual desires. I have been unable to locate any data or even scholarly discussion about homosexuality in Mosuo culture, and my repeated attempts to ask questions about this during my visit were met with uniform denial of its existence.
35 Id. at 58–61.
and sexual unions for women and men alike.\(^{36}\) Parents and kin did not meddle or concern themselves with the love lives of their daughters (or sons), because mate choice carried almost no implications for the family or society.\(^{37}\) Under the *tisese* system, men, who must “walk back and forth,” exercise slightly more initiative (or bear somewhat more of a burden) than women when it comes to petitioning for sexual and romantic access.\(^{38}\) However, Mosuo women can freely refuse any undesired visits and explicitly invite desired ones.\(^{39}\) They do not suffer the nearly universal double standard that regulates women’s sexuality elsewhere. Mosuo culture does not venerate female chastity or judge women’s sexual behavior differently from men’s.\(^{40}\) Girls and boys alike learn traditional courting songs and receive encouragement to desire, pursue, and enjoy (hetero)sexual lovers.\(^{41}\)

Likewise Mosuo women enjoy an extraordinary degree of freedom from reproductive demands, one that is particularly mind boggling compared with both the Confucian and Chinese Communist regimes.\(^{42}\) Male lovers or in-laws do not pressure women to produce (especially male) heirs, or to engage in sexual activity at all if they are not in the mood.\(^{43}\) Mosuo maternal families do not need or want each daughter to bear as many children as patrilineal peasant families need their daughters-in-law to do. For its economic and social survival, a Mosuo matrilineage needs each generation of women to bear at least one daughter and to collectively produce a gender mix of children, but no individual woman is compelled to procreate.\(^{44}\) Nor is she individually responsible to care for her children, if she does.\(^{45}\) Lactating sisters traditionally shared breastfeeding as well as childrearing tasks. The Mosuo language does not distinguish between a mother and a maternal aunt, but employs the same word, *emi*, for both.\(^{46}\)

Mosuo women’s reproductive autonomy resulted in distinctive historical fertility patterns compared with women in nearby ethnic groups, and particularly with Han women before the revolution. During the twentieth century, Mosuo women gave birth to fewer children overall, spaced their pregnancies further apart, and were more likely to forego childbearing entirely or to give birth to only one child.\(^{47}\) The Mosuo also achieved lower mortality rates than their neighbors until

\(^{36}\) Cai, * supra* note 18, at 202–05.

\(^{37}\) Id. at 241, 250.

\(^{38}\) See id. at 232.

\(^{39}\) Id. at 205.

\(^{40}\) Id. at 186.

\(^{41}\) See id. at 191.

\(^{42}\) See id. at 226–31.


\(^{44}\) Id.

\(^{45}\) Cai, * supra* note 18, at 250.

\(^{46}\) Id. at 142.

interventions by the Chinese Communists wreaked havoc on their family economy.\textsuperscript{48} In fact, traditional Mosuo men exercise much less reproductive agency than their sisters. Because men generally do not live with or coparent their biological progeny, their sexual behavior has no implications for their own parenting careers or family size.\textsuperscript{49} Instead, the collective childbearing of their sisters determines men's parental roles. Mosuo men are primary social fathers to their nieces and nephews.\textsuperscript{50}

So potently does the typical patrilocal Chinese peasant family need and desire male heirs that it generally considers the birth of a daughter to be at best a "Small Happiness," as the title of Carma Hinton's 1984 documentary film about Chinese gender relations in the revolutionary village Fanshen put it.\textsuperscript{51} The Mosuo, in contrast, claim to have no gender preference in their offspring.\textsuperscript{52} Western audiences who view Tisese, a more recent documentary film about Mosuo kinship,\textsuperscript{53} experience a mind-bending moment along these lines. Describing the birth of her third child, a Mosuo woman recounts asking her mother, who had delivered the baby, whether her newborn was a girl or a boy. The new mother claims, perhaps apocryphally, that her mother replied, "I didn't notice."\textsuperscript{54}

In fact, the matrilineal character of traditional Mosuo kinship generated at least a modest structural preference for daughters over sons. However, Mosuo culture also developed adaptive mechanisms to cope with the arbitrary effects of infertility or gender imbalance among a family's offspring.\textsuperscript{55} Relatives and close friends sometimes exchanged or adopted children amongst themselves when their families needed to gain (or to relinquish) daughters or sons.\textsuperscript{56} Yang Erche Namu, an international celebrity Mosuo singer, model and entrepreneur, describes how her mother had been offered just such an exchange by a close friend. Because Namu's mother lacked a son, her close friend Dujema offered to trade her youngest boy for infant Namu.\textsuperscript{57} Gender-skewed families could also recruit needier relatives or sometimes invite an "open" axiao of the missing gender to join their

\textsuperscript{48} Id. at 41–42.
\textsuperscript{49} Id. at 146–47.
\textsuperscript{50} Id.
\textsuperscript{51} SMALL HAPPINESS (New Day Films 1984).
\textsuperscript{52} Chuan-kang & Jenike, supra note 43, at 25.
\textsuperscript{53} TISESE: A DOCUMENTARY ON THREE MOSO WOMEN (Asian Educational Media Service 2001).
\textsuperscript{54} Id.
\textsuperscript{55} See Chuan-kang, supra note 16, at 147–56 (describing the Mosuo method of adoption); Walsh, supra note 10, at 172–74.
\textsuperscript{56} See Chuan-kang, supra note 16, at 152–53; Walsh, supra note 10, at 172–74.
households, enabling a genre of de facto, but not contractual marriage to form within a maternal extended family.\textsuperscript{58}

\textit{A. A Society Without Fathers or Fatherlessness}

Whenever I report that I journeyed to a culture in which adults do not normally marry or live with their lovers, most Western listeners respond with a series of anxious questions about fatherhood: But do the children know who their fathers are? Don’t the children want to have fathers? Don’t fathers have any responsibility for their children? What happens to the men in the maternal family? What happens to the children, (and especially the boys) who grow up without fathers? Questions like these reveal more about contemporary Western family ideology and preoccupations than about Mosuo kinship or concerns, of course. They presuppose that biology determines family bonds, that our contemporary taken-for-granted family relationships are natural and universal, and that what Westerners call “fatherlessness,” inherently injures children and societies. It routinely seems to strain credulity when I try to explain that the traditional Mosuo family and kinship system did not assign social significance to the role of male genitor, and jaws invariably drop when I quote Namu’s claim that, “People of my mother’s generation did not inquire about their fathers: whatever happened in a woman’s room, in the warm light of her own private fire, was a woman’s private affair.”\textsuperscript{59}

All children born to the same Mosuo woman are full siblings, whether or not they share the same genitor.\textsuperscript{60} Mosuo culture lacks the Western concept of half or step siblings.\textsuperscript{61} The woman in the \textit{Tisese} documentary who claimed that her mother had not bothered to notice the gender of her newborn had given birth to three children, and each had a different biological genitor.\textsuperscript{62} The woman’s first great love had died in an accident soon after her first child was born.\textsuperscript{63} She discovered she was pregnant a second time after indulging in a casual, brief liaison with a man she met in an urban center she visited on family business.\textsuperscript{64} She never had contact with that lover again, nor informed him of her pregnancy.\textsuperscript{65} With her next long-term \textit{axiao}, she had conceived her third and last child.\textsuperscript{66} Despite these diverse

\textsuperscript{58}See Chuan-kang, \textit{supra} note 16, at 70, 82–88, 154 (stating that demographic exigencies may require a woman to call in her \textit{tisese} partner and providing examples of forming relationships to “continue the hearth”).

\textsuperscript{59}See \textit{YANG & MATHIEU}, \textit{supra} note 58, at 53.

\textsuperscript{60}See \textit{Cai}, \textit{supra} note 18, at 120–22.

\textsuperscript{61}See \textit{id.} at 140–50 (discussing Mosuo kinship classifications).

\textsuperscript{62}\textit{Tisese: A Documentary on Three Moso Women}, \textit{supra} note 54.

\textsuperscript{63}\textit{id.}

\textsuperscript{64}\textit{id.}

\textsuperscript{65}\textit{id.}

\textsuperscript{66}\textit{id.}
genetic origins, the three children share identical family statuses and identical parents.\textsuperscript{67} None is fatherless.\textsuperscript{68}

If biological paternity carries no inherent implications for Mosuo kinship, it is nonetheless now often a matter of common local knowledge.\textsuperscript{69} Genetic fathers of children born within open \textit{tisese} relationships typically acknowledge their offspring, give them occasional gifts, and develop avuncular relationships with them, at least for as long as the adult \textit{axiao} relationship with the mother endures.\textsuperscript{70} In a sense, one could say that Mosuo-kinship rules reverse the social expectations that American culture assigns to fathers and maternal uncles. Likewise, although Mosuo kinship is not rooted in marriage, the culture did not entirely preclude marriage.\textsuperscript{71} Mosuo kinship has been a flexible system open to pragmatic adaptations that helped families to survive. As we have seen, one strategy families devised to redress gender imbalances allowed for exceptions to the cultural rule against couples living together.\textsuperscript{72} There were historical precedents for both uxorilocal and virilocal instances of de facto marriages.\textsuperscript{73}

Nonetheless, traditional Mosuo culture did not employ the idiom of marriage to depict such relationships, and the categories of husband and father did not apply.\textsuperscript{74} Contemporary Mosuo informants regard \textit{tisese} rather than marriage as their practice “since time immemorial,” which according to some scholars extends back earlier than 200 BC.\textsuperscript{75} Although there have been substantial changes in Mosuo family practices over time, particularly upheavals since the Communists came to power that I describe below, \textit{tisese} remains the primary institution for sexual union and reproduction.\textsuperscript{76} It now coexists with secondary forms of contemporary marriage and cohabitation.\textsuperscript{77}

\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} See Chuan-kang, \textit{supra} note 16, at 60.
\textsuperscript{70} See \textit{id.} at 56–57.
\textsuperscript{71} See \textit{id.} at 70 (noting that “marriage as we understand the term . . . has been present in Moso society for hundreds of years . . . ”).
\textsuperscript{72} See \textit{id.}.
\textsuperscript{73} See \textit{id.} at 57–58 (noting that the “duration of a \textit{tisese} relationship depends entirely upon the couple’s affectional commitment to each other,” and that “an enduring relationship could result in uxorilocal, virilocal, or neolocal residence and last up to decades”).
\textsuperscript{74} See \textit{id.} at 71.
\textsuperscript{75} Chuan-Kang, \textit{Genesis of Marriage, supra} note 30, at 386; Chuan-kang, \textit{supra} note 16, at 69.
\textsuperscript{76} Chuan-kang, \textit{supra} note 16, at 52 (noting that \textit{tisese} is “still by far the most prevalent pattern of institutionalized sexual union among the Moso”).
\textsuperscript{77} See \textit{id.} at 70.
Although few Americans, and even few family scholars, seem to have heard of the Mosuo, they have attracted substantial media attention.\textsuperscript{78} In fact, the popularity of contemporary ethnic tourism to Lugu Lake is largely a product of the widespread, titillating media treatment that the Mosuo have received both in China and more globally since three provocative books about them were published in the 1980s and 1990s. The books’ titles alone sensationalize Mosuo gender and kinship arrangements. \textit{The Remote Country of Women}, a bitingly satirical novel about China’s coercive Cultural Revolution, romanticizes Mosuo free sexuality and harmonious mother-centered family life in order to condemn the fanatical repressive authoritarianism of the Maoist regime.\textsuperscript{79} \textit{A Society Without Fathers or Husbands},\textsuperscript{80} an ethnography published in France with an introduction by Claude Levi Strauss nearly a decade later, remains so controversial in the People’s Republic of China (“PRC”) that it still has not been translated into Chinese.\textsuperscript{81} That same year, Mosuo celebrity Yang Erche Namu published the first of a series of uninhibited memoirs that are widely credited with (or blamed for) generating much of the ensuing onslaught of media exposure and domestic tourism.\textsuperscript{82}

Recurrent feature stories about the Mosuo have appeared in the popular media in China and abroad ever since in venues ranging from CCTV in China,\textsuperscript{83} ABC’s “Evening News with Peter Jennings”\textsuperscript{84} in the United States, and the BBC’s \textit{Frontline,}\textsuperscript{85} to \textit{National Geographic},\textsuperscript{86} \textit{Time Asia} magazine,\textsuperscript{87} and the \textit{Lonely Planet}.\textsuperscript{88} These typically portray the Mosuo as “living fossils” of a lost world,

\textsuperscript{78} See Eileen R. Walsh, \textit{From Nü Guo to Nü'er Guo: Negotiating Desire in the Land of the Mosuo}, 31 MODERN CHINA 448, 449, 463 (2005) (discussing the media attention received by the Mosuo people).
\textsuperscript{79} BAI HUA, \textit{THE REMOTE COUNTRY OF WOMEN} 53–54 (Qingyun Wu &Thomas O. Beebee trans., 1994).
\textsuperscript{80} CAI, supra note 18.
\textsuperscript{82} See Walsh, supra note 79, at 448–86.
\textsuperscript{83} Lijiang (CCTV television broadcast Apr. 5, 2005).
\textsuperscript{84} \textit{Evening News with Peter Jennings: Mosuo Matriarchy} (ABC television broadcast May 13, 2002).
\textsuperscript{85} \textit{Frontline: The Woman’s Kingdom} (PBS television broadcast June 27, 2006) [hereinafter \textit{Frontline}].
\textsuperscript{86} China’s “Kingdom of Women” (National Geographic Television broadcast June 17, 2008).
alternately characterizing them as "the last matriarchy" or as a utopian land of peace, harmony and free love.\textsuperscript{89} According to ABC News

\[\text{[A]nthropologists say because the men have no power, control no land, and play subservient sexual roles, there is nothing for them to fight about . . . making this culture one of the most harmonious societies on the planet. The Mosuo people, estimated to number around 50,000, have no word for war, no murders, no rapes, no jails.}\textsuperscript{90}

Or, in \textit{Lonely Planet}'s more succinct summary, "The society's run by women, they don't marry; and taking lovers is encouraged."\textsuperscript{91}

Surprisingly, some scholars represent the Mosuo in similar starry-eyed terms. For example, a literary critic's review of \textit{The Remote Country of Women}\textsuperscript{92} is more hyperbolic than the media examples above:

\[\text{[T]here is no marriage; women freely take lovers and are primarily responsible for home and family. The men only have a roof to sleep under if they are accepted as lovers by a woman and only so long as she or he desires. The Mosuo are not only unabashed in their sexuality, but live powerful emotional lives, which, however, almost never erupt into violence because they lack a sense of possessiveness.}\textsuperscript{93}

Romantic and nostalgic depictions of the Mosuo like these foster what anthropologist Louisa Schein calls "internal orientalism" among hundreds of thousands of Asian visitors whom the tourist industry now lures to Lugu Lake annually.\textsuperscript{94}

Of course, however, the Mosuo are by no means "living fossils." While their traditional family system has proven impressively resilient, it is far from impervious to history or unchanged. The Maoist Cultural Revolution followed by capitalist modernization and tourism instigated profound, paradoxical shifts in Mosuo family practices and ideology. Before I discuss these ironic transformations, I want to introduce three contemporary Mosuo families whose

\textsuperscript{89} See Frontline, \textit{supra} note 86.
\textsuperscript{90} \textit{World News with Charles Gibson: In China, Mosuo Women Rule} (ABC television broadcast May 19, 2007).
\textsuperscript{91} See Mackie, \textit{supra} note 89.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} Louisa Schein, \textit{Gender and Internal Orientalism in China}, 23 \textit{MODERN CHINA} 69, 70 (1997).
elder members I visited and interviewed during my own ethnic tourist foray in August 2007.

B. Three Contemporary Mosuo Families

An anthropologist at the Dongba Culture Research Institute in Lijiang arranged for Gezo Ita, a Mosuo woman, to organize and guide my ethnographic tour of her home community. When Gezo was ten years old, her family had sent her from their village near Lugu Lake to attend school in distant Lijiang where she later married and continues to live and work. I had asked to visit families who live in Luoshui village, the Mosuo tourist Mecca on the shores of Lugu Lake, as well as some in more distant locales not yet on the commercial tourist radar. Gezo accompanied me and my multiethnic support entourage first to the home of the Dashus, the “traditional Mosuo family,” she had selected to host us overnight. The Dashus inhabit a working family farm compound situated a twenty-minute drive or an hour’s hike beyond Yongning market town, the county seat, and more than an hour’s drive from the popular tourist villages on Lugu Lake. At the time of our visit, ten members of four generations of Dashus resided in the family’s traditional, large, ancestral Mosuo residence.

The household dabu, fifty-four-year-old Jiama, had been her mother’s only child and was also the sole member of her generation of Dashus. Most likely this is because Jiama was born in 1953, just a few years before the first team of Communist Chinese People’s Liberation Army cadres arrived to “liberate” the Mosuo from their family, cultural, and property system, using draconian methods I will describe below. Jiama’s mother had died long ago, but her aged, hunchback maternal aunt occupied the revered Mosuo status of grandmother and with it residence in the household’s focal “grandmother’s room,” even though infertility had prevented her from giving birth to any children herself. No other members of this oldest generation of Dashus remained. During our stay, “grandmother” participated in lighter household chores—fetching kindling from the courtyard for the eternally lit hearth, emptying plastic wash basins used for morning tooth brushing, feeding the chickens and pigs, and gesturing enthusiastically to cajole

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95 All names of interviewees are pseudonyms.
96 In addition to Gezo, who arranged the visits and translated from Mosuo to Mandarin, my retinue included three other translators, guides and companions: a driver, Mr. Li, a 30 year old married Bai man with one daughter who lives in Lijiang; Wang Fen, a 23 year old female graduate student in anthropology from a university in Kumming who was hired to translate Mandarin to English; and Ron Cho, my seat-mate during my flight from Shanghai to Lijiang, a 27 year old software engineer who was taking a week’s vacation. Ron turned out to be a born anthropologist, and an enthusiastic volunteer research assistant and translator who agreed to join my journey to Lugu Lake.
guests like me to sample the fried bread and oil tea the family had prepared specially for our visit.

Fortunately for the once-endangered Dashu lineage, Jiama had proved much more fecund than had her mother or aunt. For more than three decades, she had sustained an exceptionally long-lasting, exclusive “walking marriage” with a man with whom she had conceived seven living children. At the time of my visit in August 2007, her four daughters and three sons ranged in age from nineteen to thirty-eight. Three of the daughters, but only the youngest son still lived at home. Jiama’s oldest daughter had suffered a severe head injury when she was a small child that had left her both deaf and mute. During our stay, she performed most of the visible domestic chores of food preparation, cleaning, and serving. Her two resident sisters, both of them mothers, made only brief appearances in the central grandmother’s room or the public courtyard during our visit.

Jiama’s youngest child, bilingual in Mosuo and Chinese, was planning to go to a provincial university next year. I observed this affectionate, engaged young uncle reading to his younger nieces and nephew, drilling them on Chinese words, and patiently looping himself in rope for the endless rounds of Chinese Jump Rope his nieces loved to play. Close upon the heels of our arrival at the Dashu residence, Jiama’s twenty-nine-year-old son arrived home for a visit from distant Lijiang where, I was told, he and his wife lived and worked in “the tourist industry.” Accompanying this son home for the visit were two women friends and colleagues, one Han, the other a Turkish-Swede who, like me, spoke neither Mosuo nor Chinese. Jiama’s other two adult children also live and work elsewhere, one of them reportedly also in a “modern” marriage with children.

Three members of the fourth, youngest generation of Dashus were home during my visit, each born to a different mother. Jiama’s ten-year-old grandson was her second daughter’s son. However, I discovered that only one of the two avid Chinese Jump Ropers actually was a full-fledged member of the Dashu lineage and homestead—Jiama’s third daughter’s seven-year-old girl. It turned out that the girl’s five-year old playmate was not a Dashu, because she was the daughter of Jiama’s married son who had brought his women friends home with him from Lijiang. He had arrived laden with new Western clothing and toys for his daughter, who was the primary reason for his visit. The little girl no longer lived with either of her genetic parents. She was spending the summer in this, her father’s household, in part because it offered her companionable playmates. During the school year, however, she would return to her maternal grandmother’s household, located closer to her school in Yongning. One year earlier, her parents had moved together to distant Lijiang to work in the tourist industry, and since then they had been taking turns visiting their daughter as often as they could.

The second “traditional Mosuo family” that Gezo arranged for me to visit lived in an even larger farm-family compound than the Dashus and even further off the trodden tourist trail. Nonetheless, this family proved to be even less traditional than the Dashu lineage. Ayi, the second family’s dabu, was once again a woman in
her fifties and the only household member of her generation. Ayi headed a three-generation family composed simply of her own mother, herself, and four of her six adult children. When I inquired about grandchildren, she told me that so far only her oldest son had any offspring, and thus her first grandchild lived with her mother’s matrilineal family. However, Ayi felt optimistic that soon her matriline would have a grandchild of its own, because, she said, one of her daughters had recently married.

In fact, when our party had entered the courtyard, my travel companion Ron Cho had pointed out that a large Chinese “red double happiness” wedding sign was prominently displayed on one of the windows. We learned that the “newlywed” couple it blessed were not legally married and did not live together, but had conducted the ceremony for an open “walking marriage.” Ayi’s third daughter was cohabiting with her husband elsewhere in an urban “modern marriage.” One of Ayi’s three sons, in contrast, lived in a Buddhist lamasery where he was studying to become a lama. He had come home for the weekend with his teacher, and throughout our two-hour visit, they were chanting in the family’s elaborate worship room. One other daughter and Ayi’s other two sons still lived at home, and none of these had a publicly recognized mate.

Ayi, also like Jiama, had been in an exclusive walking marriage for several decades, and all of her children shared the same father. What’s more, Ayi and her children regarded her longtime axio as her husband and their father, and they were grateful to him for how much help he had provided them during very difficult times. When their father’s own mother died, therefore, the children had invited him to move into their matrilineal home. Reportedly, Ayi’s long-term mate spent most nights and days living and working with Ayi and her family, but he also spent a couple of nights each week in his own maternal home now headed by one of his sisters. In addition, he often accepted overnight hospitality from a married daughter and her husband who lived in a town where he participated in occasional construction work.

On our journey from these two more remote Mosuo families to Loushui, the famed, affluent tourist Mecca on Lugu Lake, we made several detours to inspect aspiring competitors vying for the tourist trade, including a smaller lakeside village and the controversial, new, upscale cultural “palace” guesthouse that celebrity Namu had built. We also hiked across a lengthy, beautiful new “Walking Marriage Bridge” over a marshy “Sea of Grass,” which, according to the signage at its entrance, had been built to facilitate tisece between lovers in Mosuo villages on the rapidly developing Sichuan side of the lake.

In Loushui, Gezo set up a third formal home visit and interview for me with one of the seventy-two official Mosuo families who own and operate the three popular ethnic tourist commercial activities in the village—trough boat rides, donkey rides, and nightly courtship song and dance performances. Like most Loushui property owners, this family had converted their ancestral home into as large a hotel as the site and village regulations would accommodate. Gezo was
eager for me to see the homestead's 400-year-old grandmother's room and to introduce me to Halba, a man of considerable intelligence, cultural sophistication, and political savvy who was the senior uncle of the household. She warned me, however, not to embarrass him (or her) by asking any sensitive questions about his personal life, because, she said, he was a childless bachelor.

Gezo's enthusiasm about this lakeside house and its thoughtful, articulate senior male proved amply justified. I had been duly impressed with the form, space, and traditional decor of the first two Mosuo domiciles I had visited, but this Luoshui homestead was on a decidedly grander scale. Grandmother's sleeping alcove was elaborately carved and carpeted, the requisite "female" and "male" supporting pillars were taller and thicker, and a richer array of antique Buddhist ceremonial objects adorned the center altar behind the hearth, although incongruously they shared the honor with a modern fax machine. It was Halba, the astute, articulate senior uncle, however, who made my visit to this family so enlightening and memorable. He was not the family dabu, but unquestionably its chief moral authority and spokesperson. In fact, I only met the surprisingly young dabu, one of Halba's nieces, as we were about to leave the premises. Gezo introduced the niece to me as the dabu, but later quipped that while the young woman was the dabu of the household, Halba was the director.

After Halba welcomed us, he propped his somewhat senile 84-year-old mother on the honorific senior woman's cushion to the immediate left of the hearth where she nodded in and out of consciousness during our stay. He then assumed the senior male's perch on the right and briefly outlined the four generations in his family. Like Jiama and Ayi, Halba is in his mid-fifties. Unlike them, however, he was not an only child and was not the only member of his generation residing in the family. Halba had four sisters who collectively had given birth to seven children. I met only one of his sisters and one niece—the young woman who had returned after university to become dabu (and run the family hotel). Most of the rest of Halba's nieces and nephews were away at university or living and working elsewhere. Thanks to Luoshui's affluence, all seventy-two of its official Mosuo families could afford to send all of their children to university and no longer needed their labor at home. I mistakenly presumed that the teenage girl who bustled around the kitchen, served us tea, kept the kettle boiling, and ministered to Halba's mother was also a niece. Later I learned that she was a hired domestic worker, an ethnic Pumi recruited from a poorer nearby village that had not shared in the tourist-industry bounty.

Although Gezo had warned me not to raise the subject, Halba volunteered how fortunate he felt to have such wonderful, loving nieces and nephews, because he himself had not married and had not had any children of his own. Thanks to his sisters, however, he was now blessed with young grandchildren, the emergent fourth generation of his family. His niece, the dabu, was toting one of these newest family members on her hip when we crossed paths with her in the courtyard. When I asked if the toddler was her only child, she told me that in fact he was not hers,
but one of her sister’s sons. She hoped to have children some day, she added, “but I’m not married yet.”

C. Conquerors, Communists and Marriage Politics

As even this skeletal sketch of three families indicates, contemporary Mosuo culture has incorporated some of the rhetoric of marriage as well as instances and forms of marital relationships. Over the centuries, waves of first imperial and then Maoist conquerors actively intervened in Mosuo kinship practices. Mosuo sexual, gender, and family values had mystified and offended ruling imperial Chinese and Communist sensibilities at least as much as they challenge contemporary Western convictions about proper family life. Mongol, Confucian and Communist invaders were nonplussed when they encountered the absence of marriage and the maternal domestic units in Mosuo communities, and they applied varying degrees of coercion to correct both affronts.

When Kublai Khan founded the Yuan Dynasty in the thirteenth century, his forces subjugated the indigenous cultures of southwestern China and incorporated their native chieftain system into the state’s centralized bureaucracy. In order to maintain lineal inheritance of their royal authority, Mosuo chieftains began to adopt patrilocal marriage for the ruling families, while commoners, serfs and even other members of the elite continued the *tisese* system. According to Chuan-Kang Shih, one prominent scholar in the field, the *tisese* system began to include exclusive pairing at that point, that is, to incorporate the kinds of monogamous “walking marriages” that Jiama, Ayi, and other members of the families I described have developed. Shih claims that the Qing dynasty (1644–1911) institutionalized these two modifications of traditional Mosuo kinship patterns. The Qing imposed patrilineal primogeniture on the chieftains, which normalized patrilocal marriage among them. Marriage never became normative among commoners, however, nor even among members of the elite who were not chieftains. Nonetheless, “walking marriage,” or what Cai Hua termed the

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98 Scholars disagree over whether *tisese* was the original universal form of Mosuo kinship that was later modified to incorporate marriage, or whether a mixed system, with patrilineal marriage for rulers, was present from the outset. See, e.g., Chuan-kang, *The Yongning Moso*, supra note 16, at 52–58 (noting that the Mosuo were matrilineal and practiced non-conjugal kinship all the way back to the Han period); McKann, *supra* note 11, at 34–35 (believing the Mosuo were originally bilineal, and the matrilineal non-marriage system was a later strategic adaptation to the caste system and a means to maintain power by elites).
100 *Id.* at 401, 405.
101 *Id.* at 405.
102 *Id.* at 404.
“conspicuous” visiting relationship, developed into a secondary institution of sexual union at that time.103

Thus, over the centuries Chinese imperial dynastic policies modified the Mosuo’s exclusively mother-centered and nonmarital traditional culture. Far and away the most dramatic and disruptive interventions in Mosuo family and society commenced in the late 1950s and early 1960s when teams of Chinese People’s Liberation Army cadres made their way to Lugu Lake.104 Close on their heels, the Chinese Communist Party sent research teams comprised of Marxist anthropologists who had been schooled in the evolutionary-stage theory of family and kinship that Friedrich Engels derived from the work of nineteenth-century anthropologist Lewis Henry Morgan.105 These Communist anthropologists conducted extensive fieldwork among the Mosuo and published the first, portentous ethnographies about their kinship and culture.106 They generated representations of Mosuo gender, sexual, and family practices that now lure hordes of titillated tourists. Originally, however, their depictions provided targets for ruthless Maoist efforts at “modernization.”

Viewing Mosuo maternal family residence and tisese through Marxist evolutionary spectacles, the researchers believed they were observing forms of primitive matriarchy and group marriage amidst a culture that had failed to evolve. A paradigmatic Chinese ethnographer of the period marveled, “They are like a colorful historical museum of the evolution of families in which one finds living fossils of ancient marriage formations and family structures.”107 Similarly, an early state-produced documentary film portrayed what it imagined to be the primitive group-marriage system of the Mosuo as evidence of their oppression prior to Communist liberation.108 Ranking high among several ironic (and painful) chapters of Chinese Communist family history, was the ensuing set of Maoist campaigns to liberate the Mosuo from their oppressive kinship regime by helping them to “evolve” from their primitive sexual and household relations into a modern, male-headed, nuclear family system.109 Namu sarcastically recalls the Maoists’ relentless attempts “to reeducate the people—because the Moso shared everything, including

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103 Cai, supra note 18, at 237.
104 See Walsh, supra note 79, at 456 (describing state work teams’ observations of Mosuo families after intervening in the 1950s and 1960s).
105 Id. at 479.
106 See id. (noting researchers produced several reports on the Mosuo in the 1960s, including the 1964 Investigation of the Social and Household Patterns of Ninglang Yi Autonomous County Naxi).
108 See Walsh, supra note 10, at 93.
109 See id. at 92–95.
their lovers, which amounted to a form of primitive communism that was a health hazard and a blight on the face of modern China.\(^{110}\)

Two decades of increasingly coercive waves of this Maoist-style “liberation” began in 1956.\(^{111}\) Teams of Communist cadres and Red Guards staged vigorous campaigns to eradicate tise se and usher Mosuo villagers into modern marriages.\(^{112}\) They came repeatedly, in Namu’s words, “to harangue the people there on the dangers of sexual freedom and the benefits of monogamous marriage.”\(^{113}\) Illustratively, a Party cadre in Bai Hua’s scathing fictional parody of the Cultural Revolution exhorts Mosuo villagers:

> We want you to live a decent, monogamous, legitimate life. What kind of life are you leading now? Only cavemen living ten thousand years ago had lives like yours, so chaotic that a child knows his mother but not his father. This is the residue of group marriage. . . . Aren’t you ashamed of yourselves?\(^{114}\)

Two of the novel’s protagonists, Comrades Zhang Chunqiao and Yao Wenyuan, instruct local officials on, “how to accomplish [their] great historical mission.”\(^{115}\) They explained, “[i]n the shortest possible time, by force or by persuasion, you must drag our Mosuo kinsmen out of the Stone Age and into modern life with the rest of us!”\(^{116}\)

Access to party membership and political status served as potent means of indirect persuasion. Just as the Ch’ing Dynasty made marriage necessary for chieftains in order to bequeath royal status to their lineal descendents, under the PRC, marriage became *de rigueur* for political cadres seeking to establish their political correctness and status.\(^{117}\) The inverted class hierarchy of revolutionary Maoist ideology led peasants to fear intimacy with landlords and “rightists,” and so the universe of potential mates diminished as the formerly democratic practice of tise se became much more class conscious and stratified.\(^{118}\)

When the People’s Liberation Army first arrived in Ninglang County in 1956, between 10 and 14 percent of Mosuo couples were formally married.\(^{119}\) The first marriage campaign during the Great Leap Forward in 1958 marginally increased

\(^{110}\) *See* YANG & MATHEIU, *supra* note 58, at 94.

\(^{111}\) *See* Chuan-kang, *supra* note 13, at 701.

\(^{112}\) *See* Walsh, *supra* note 79, at 92–95.

\(^{113}\) *Yang & Mathieu*, *supra* note 58, at 94.

\(^{114}\) *Bai*, *supra* note 80, at 7–8.

\(^{115}\) *Id.* at 8.

\(^{116}\) *Id.*

\(^{117}\) *See* Chuan-Kang, *supra* note 30, at 387–403.

\(^{118}\) Chuan-kang, *supra* note 13, at 701–02.

\(^{119}\) *Id.* at 706.
the proportion of couples living jointly (whether married or not) to approximately 20 percent in 1960.\textsuperscript{120} A more aggressive campaign during the Cultural Revolution convinced perhaps half of Mosuo partnered couples to get married. However, once again, a few months after the campaign ended, two-thirds of the newlywed pairs divorced and returned to their maternal homes.\textsuperscript{121}

When persuasion proved insufficient to propel the Mosuos' sexual and domestic "evolution," the PRC turned to force. The early sporadic campaigns had been organized at the county level, but after they failed, the provincial government stepped in to wage the draconian "One Husband–One Wife" campaign of 1975.\textsuperscript{122} The Party made marriage compulsory for every adult who had a partner and posted night-time sentries in village streets to ambush men en route to visit their lovers.\textsuperscript{123} Zealous cadres dragged visiting couples out of their beds and exposed them naked to their relatives.\textsuperscript{124} Officials forced the Mosuo to build houses for married couples to inhabit jointly.\textsuperscript{125} They withheld grain and cloth rations from children whose mothers refused to reveal the names of their biological fathers as well as from men who were caught attempting a night visit.\textsuperscript{126}

Coercion proved more effective than had exhortation. This time, virtually all couples married, and the vast majority remained so at the time of Mao's death in 1976.\textsuperscript{127} Through meticulous fieldwork in the 1980s, Shih identified 424 couples in the Yongning area who had been forced into registered marriages.\textsuperscript{128} Jiama Dashu and her lover would have been among these, as were three of Halba's four sisters and their lovers. Jiama reported that she managed to tolerate living with her husband's family in her forced marriage for only three months before she quietly moved back to the maternal home where she is now the dabu. Ayi told me that she had been spared a forced marriage because she was an only child who had already had a child. However, she knew many people who were forced to marry, and she claimed that most of those marriages quickly fell apart. Halba's family had depended heavily upon the labor of his sisters and was short of men. Consequently, when cadres compelled three of his sisters to marry their lovers, Halba's family invited the men to move in with them.

Mosuo adults who lived through the marriage campaigns recount endless stories of domestic disharmony and even violence unleashed by this coerced

\textsuperscript{121} Id.
\textsuperscript{122} See Chuan-kang, supra note 13, at 701.
\textsuperscript{123} See YANG & MATHIEU, supra note 58, at 94.
\textsuperscript{124} See id.
\textsuperscript{125} See id.
\textsuperscript{126} See id.
\textsuperscript{127} Knödel, supra note 121, at 57.
\textsuperscript{128} See Chuan-kang, supra note 13, at 701.
cohabitation, especially when women were forced to move into their husbands' families or to live with their husbands and children in modern nuclear households. This Maoist modernization compelled Mosuo couples suddenly to merge domains of romance and eros with economics and domesticity that their culture had always deemed incommensurable. Forced family evolution also plunged the Mosuo into a challenging crash course on a category of kin quite novel to them—in-laws. The Mosuo language did not contain a word for this relationship. \[129\]

Unsurprisingly, therefore, the Mosuo who survived these campaigns, "describe the rupture in family arrangements that occurred during this time as the most painful effect of cultural policies during the Mao years." \[130\] Halba, for example, reported that most of the forced marriages that took place in Luoshui village ultimately failed and many extended Mosuo families broke up during the Cultural Revolution. According to Halba, prior to Liberation, only seventeen large, extended maternal lineage households inhabited Luoshui. The Cultural Revolution wreaked so much havoc on family life that these households repeatedly divided. By the time Mao died in 1976, the initial seventeen families had fractured into seventy-two smaller ones. Although Halba's family also had suffered considerable conflict after his sisters were forced to marry and their husbands moved into the household, his family stoically resisted the urge to separate. They uncomfortably endured the unwelcome marriages in their midst for what turned out to be several years until Deng Xiao Ping's regime came to power and reversed the Maoist assimilation agenda toward ethnic minority cultures.

In 1981, the national minorities in Ninglang County received official permission to resume their traditional customs. \[131\] Halba informed me that as soon as the reform policies were announced, Luoshui families held a village meeting at which they collectively agreed to return to the traditional tises system. At that point, Halba's three imposed brothers-in-law departed the household and returned to their maternal domiciles. The former conjugal couples converted their Maoist modern marriages back into walking marriages that continue to this day. Research indicates that this was a widespread pattern throughout Ninglang County, with the vast majority of conscripted Mosuo spouses moving back to their maternal homes. \[132\] Recall that two-thirds of Mosuo couples still were married when Mao died in 1976. \[133\] In 1983, however, a mere two years after the new policies were implemented, the marriage rate dropped and stabilized at 32 percent. \[134\] This brought the Mosuo marriage rate to a level below what it had been before the 1975

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129 See Chuan-kang, supra note 13, at 403–04.
130 Walsh, supra note 79, at 457.
131 Knödel, supra note 121, at 58.
132 Id.
133 Id. at 57.
134 Id. at 58.
One Husband–One Wife campaign and only 10 percent above what it had been in 1960, several years before the Cultural Revolution.\footnote{135}

Novelist Bai Hua depicts the revival of Mosuo \textit{tisese} in the characteristically romantic terms of what Louisa Schein terms internal orientalism:

\begin{quote}
\textit{The Mosuo were a simple people. They soon consigned the second political encroachment of the civilized world to oblivion, as if they were forgetting two invasions by mammoths or hordes of elephants. They healed instantly. No sooner had the engines of the departing work team started snorting than the axiao embraced each other.}\footnote{136}
\end{quote}

The reality, of course, was more complex. Although one cannot fail to be impressed with how rapidly the Mosuo divested themselves of the conjugal products of Maoist modernization, they did not develop social amnesia or emerge unaffected from two decades of this crude social engineering. Not only had most Mosuo families suffered and then splintered, but the years of Maoist interventions also introduced some lasting ideological changes in Mosuo family values, discourses and practices that I will return to later.

\section*{D. Performing Kinship for Extramarital Tourism}

The PRC decision to relinquish its attempt to forcibly modernize the cultures of ethnic minorities coincided, ironically again, with the Chinese Communist Party's (CCP) startling shift from socialist class struggle to the Four Modernizations development strategy in 1978. Paradoxically, at the same time that the CCP adopted its momentous turn toward the global capitalist market economy, it granted formal recognition and state support to preserving its distinctive ethnic minority cultures. This unlikely conjuncture allowed the revival of Mosuo maternal families and \textit{tisese}, but also unleashed forces that continue to reshape and threaten the kinship and cultural system that the new policies sought to preserve.

As China began to embrace ethnic diversity in the early 1980s, ethnographies based on the earlier team reports about the Mosuo were published, and state TV produced documentaries that featured their provocative sexual and family system.\footnote{137} This ignited the Chinese public's appetite for ethnic tourism to Lugu Lake just when private enterprise was fostering the development of a domestic tourist industry. And so it happened that the very customs and practices that the Maoists had tried to eradicate came to be celebrated as sources of Mosuo cultural and economic value. Savvy Luoshui villagers seized the moment. Although the population of the well-situated lakeside village included almost as many ethnic

\footnotesize{\begin{itemize}
\item \footnote{135} \textit{Id.}
\item \footnote{136} Bai, \textit{supra} note 80, at 29.
\item \footnote{137} See Chuan-kang, \textit{supra} note 13, at 699.
\end{itemize}}
As the title of a *Time Asia* magazine feature story in 2002 put it, “The Mosuo, a small matrilineal tribe in central China, are preserving their traditions by exploiting them.” Feminist anthropologist Eileen Walsh illustrates how local and external entrepreneurs profitably harvest three, somewhat contradictory, seeds of...
the Mosuo’s exotic appeal, all of which center around women. The most potent and problematic lure is the Mosuo reputation for free love. Misrepresentations of tisese as sanctioned promiscuity disseminated in the books by Bai Hua, Namu, Cai Hua and the popular media attract numerous wishful male sex tourists to Lugu Lake. “Within the touristic frame and imagination,” as Walsh suggests, “the multiple ways of imagining Mosuo territory, as a land of women and a land of sex, blur into a land of women for sex.” With the tourist trade, a red light district quickly developed on the outskirts of Luoshui where at least a dozen establishments employed female sex workers of diverse ethnic and geographic origins who dressed as Mosuo women to service male tourists. An expose of the sex industry in 2004 generated campaigns to eradicate it, but after several years, sex commerce began to reappear.

There is no evidence of male sex workers in Lugu Lake, but the Mosuo reputation for free love also attracts some Han women who seek romantic refuge from their more patriarchal and puritanical sexual culture. Widespread publicity about Helen Xu, a rare Han woman tourist who fell in love with a Mosuo man and married and settled in Luoshui with him, stoked this less prevalent brand of romance tourism. Walsh claims that most local men happily accommodate female tourists who wish to experiment with tisese, much to the distress of local Mosuo women. During a hired boat ride on the lake, I asked the three brothers who took turns rowing and napping about their experiences with women tourists. They recounted receiving frequent flirtatious overtures, but only one of the three acknowledged, rather reluctantly, that he had ever acquiesced. There was no point in doing so, they claimed, because such romances could not last. Because outsiders cannot purchase local property and lack a local family residence, they cannot integrate into Mosuo family life unless they secure an invitation to join a lover’s household. Such an unlikely circumstance also violates the basic principles of tisese that attract tourists to begin with. I interviewed a twenty-five-year-old Han man from Guangdong who had come to Luoshui six months earlier to work on a local education project for the children of migrant workers. He told me that he and other Han men he knows would love to enter a Mosuo “walking marriage,” but that this was virtually impossible, because they had no families to live with. As a result, outsiders rarely attain access to anything beyond an episode or two of furtive tisese.

145 See Walsh, supra note 79, at 474–76.
146 See, e.g., Cai, supra note 18, at 185–262.
147 Walsh, supra note 10, at 472.
148 See id.
149 Id.
150 THE WOMEN’S KINGDOM (Xiaoli Zhou & Brent E. Huffman eds. 2006).
151 See Walsh, supra note 79, at 466.
152 Id. at 471–72.
The seductive sex appeal of the Mosuo collides somewhat with two other ethnic images marketed to tourists. Popular depictions of the Mosuo as matriarchal attract a smaller clientele of feminist tourists, including second-wave feminist scholars like me who are veterans of debates about the universality of patriarchy. Aware that Western feminists hope to find households of cooperative sisters led by wise, respected mothers, some Luoshui families perform the desired script. Walsh observed a visit by two Australian feminist tourists to the family of one of her Mosuo friends who feigned a loving sister relationship with a cousin from a poorer village. In reality, the cousin worked for her wealthier Luoshui relatives whom she resented and regarded as “not Mosuo anymore.”

If the Mosuo’s matriarchal image strikes the fancy of a limited feminist market, it overlaps with a third ethnic image with far broader allure. Romantic notions of a lost primitive world intensify rampant nostalgia among mainstream Chinese members of the one-child family era for the imagined harmony of the large extended families of yore. Walsh suggests that the Mosuo self-consciously cater to these desires by performing family harmony for tourists. Indeed, the Mosuo I interviewed uniformly claimed that their families were more harmonious than families based on marriage, because it is easier for adult children to get along with their natal kin than to have to adapt to life with spouses and in-laws. Perhaps, I was too readily taken in by the theatrical skills of the families I visited, but from what I observed, such claims seemed to have merit.

E. Marriage Markets

Many Mosuo themselves have begun to worry about how long they will be able to sustain their unique family structure. The tisese system revived impressively after the Cultural Revolution, but as we have seen, not without alterations. Previously marginal concepts of marriage, husbands, and fathers gained greater cultural currency and consequence. Current Mosuo family life represents a hybrid accommodation between traditional tisese and modern marriage. On the one hand, the tourist industry coyly markets tisese as a free-love regime. After we returned to Lijiang from Lugu Lake, Ron Cho and I attended an elaborate ethnic-minority spectacle concert in the city’s massive new Cultural Center Performance Hall filled with thousands of passengers deposited by tour buses. The show portrayed the Mosuo through modern dance choreography that pantomimed night visiting. First each of three beautiful Mosuo maidens warmly welcomed three suitors who had climbed the imaginary walls to their flower chambers and then hung their hats outside the window to signal that the room and

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153 Id. at 468–69.
154 Id. at 469.
155 Id. at 476–77.
its resident were occupied. Next, the delighted audience laughed on cue when the
tardy ascent of a disappointed fourth suitor was greeted by a competitor’s cap.

Despite the apparent effectiveness of a ubiquitous marketing strategy that
features the titillations of tisese, all the Mosuo I met were quick to distance their
culture from implications of promiscuity. With near universality, contemporary
locals convey a cultural narrative that downplays notions of sexual freedom and
stresses a norm of long-term “walking marriages” like Jiama’s and Ayi’s. Both the
title and the author of the ethnography, A Society Without Husbands or Fathers,156
elicit widespread hostility from contemporary Mosuo. They insist that Cai Hua
exaggerated and distorted the amount and significance of sexuality in their culture,
and contrary to Hua’s claims, they now routinely employ the vocabulary of
marriage and paternity.

Self-representations of Mosuo intimacy hew closely to endorsing a norm of
long-term monogamous, visiting marriages.157 Whatever the empirical reality of
their contemporary practices, it is significant that the Mosuo reject the very image
of their sexuality that the government and private tourist industry so successfully
exploit. I found no one willing to acknowledge having personally engaged in
multiple, casual “furtive” visits, and most were loathe even to concede the
existence of such behavior by others. Just to elicit the concession that not every
Mosuo enters a permanent “walking marriage” with her or his first lover, or that
not all such “marriages” endure permanently, demanded persistent, skeptical
questioning on my part. This represents a notable change in norms from earlier
descriptions of tisese by anthropologists, journalists and biographers. Mosuo
ideology, and perhaps behavior as well, seems to have shifted toward more
committed, stable monogamous coupling.158

Contemporary Mosuo apply the term “marriage” broadly to both long-term
visiting couples and registered, cohabiting ones. Recall the “Walking Marriage
Bridge” sign over the Sea of Grass and the red double happiness symbol that Ayi
displayed to honor her daughter’s newly recognized visiting relationship.
Similarly, whenever I asked a particular young woman, like Halba’s niece-dabu, or
a university-educated docent at the Luoshui cultural museum, whether she had
children, I received a standard response, “no, I’m not married yet.” Mosuo women

156 See Cai, supra note 18, at 237–38.
157 Cai Hua claimed, quite implausibly, that multiple, furtive visits were practiced
“without exception” even by those who were in “conspicuous” longterm visiting
relationships. See id. at 237, 249, 261. I encountered substantial hostility toward Cai Hua
and his account of Mosuo culture and later discovered that his faculty position at Beijing
University has come under threat due to charges about plagiarism and inaccuracies and
distortions in his data. Xiaoxing Liu, Research on the Na and Academic Integrity, 28
CRITIQUE OF ANTHROPOLOGY 297, 297–301 (2008). Gezo & Wang Li both claimed that
Cai Hua is not welcome to visit at any of his field sites.
158 Walsh, supra note 10, at 65; Chuan-kang, supra note 13, at 154–55; Harrell,
supra note 10, at 16–18.
today seem to routinely refer to axiaos who visit openly and regularly as their husbands, and typically these men seem to become identified, engaged fathers when children are born. These days, it is not easy to guess whether a man caring for a child is its uncle or genitor. I interviewed a forty-year-old café proprietor in Luoshui who discussed his own walking marriage of fifteen years while one of two sons from that relationship draped himself affectionately around his father’s shoulders. This surprised me less than it might have before I had lodged with the Dashu family and observed the close ties that Jiama’s youngest granddaughter enjoyed not only with her genetic father, but with her paternal kin as well.

Moreover, as rising numbers of younger Mosuo go to university and move to cities for work, many like Gezo wind up entering the modern, registered, cohabiting marriages that the Maoists largely failed to impose. During the long car ride back from Lugo Lake to Lijiang, I stumbled onto the genealogy of one such modern marriage laden with more ironies than a Noel Coward could conjure. After learning that my driver was a friend of the married son of Jiama’s I had met, I was asking about the sort of work that the latter did in the tourist industry. That was how I heard about Dongba Valley Cultural Village, the newest of a variety of ethnic museums that the state and private enterprise have established in locations more convenient for tourists than Lugu Lake. My driver explained that Jiama’s son and his wife, as well as one of his nieces, all live and work in a privately owned “authentic minority culture valley” that opened outside of Lijiang in 2006. They had been hired to quite literally perform Mosuo kinship and culture as the sort of living fossils of ancient family life in a “colorful historical museum of the evolution of the family” that the Marxist anthropologists had mistakenly imagined the Mosuo to represent decades ago.

Dongba Valley Cultural Village hires members from a variety of Chinese ethnic minority groups to inhabit “traditional” houses and serve as living displays of their respective cultures, almost as if Old Sturbridge Village in Massachusetts were populated by time-capsuled colonials. My driver Mr. Li explained that in addition to Jiama’s son, his wife, and his niece, three unrelated young women earn their livelihoods by inhabiting and enacting a living diorama of putative Mosuo domestic life in the Village. Fortuitously for me, just as my driver was describing Dongba Valley, Jiama’s son, who was driving back there, flagged Mr. Li to pull over to help him reattach a dangling license plate. That gave me an opportunity to inquire further about Jiama’s son’s family and work life at Dongba Valley and to make a remarkable discovery. It turned out that before Dongba Valley had opened one year earlier, Jiama’s son and his wife had been involved in a normative Mosuo walking marriage. He had lived in his mother Jiama’s household, while his “wife” and their young daughter resided in their separate matrilineal homestead. The employment opportunity at Dongba Valley precipitated a dramatic family change.

159 The state runs Yunnan Folk Culture Villages in Kunming, and additional cultural villages have been set up in the province.
In order to display “authentic” Mosuo life for hire, the couple had been compelled to abandon their former traditional walking marriage along with their young daughter, their maternal households and native Mosuo communities and to become an employed cohabiting couple who lived and worked far from their Mosuo homes.

Further ironies emerged. Jiama had also applied to live and work as the dabu in the living museum’s Mosuo household, but the proprietors had rejected her because she does not speak Chinese. Because Jiama only speaks her traditional Mosuo language, she lacked the ability to explain her “authentic” culture to primarily Han tourists. Instead, the museum manager had assigned the paid “matriarchal” role to Jiama’s son’s wife, until skeptical tourists astutely objected that she was not old enough to be her husband’s mother! The museum then abandoned the performative kinship charade and scaled back the live displays to donning traditional costumes and performing domestic activities and songs and dances. Moreover, although the museum employs parents of young children, like Jiama’s son and his wife, no children reside in the ethnic display houses. I asked Mr. Li, who ferries many tourists to Dongba Valley, what they think when they find no children living in these supposedly authentic families. His witty, bemused reply: “Most tourists aren’t anthropologists.”

Back in Luoshui, tourism is also inducing subterfuges and changes in Mosuo kinship. I belatedly learned that only 40 percent or so of the members of the seventy-two official Mosuo families actually are ethnically Mosuo. Another 40 percent are Pumi, and perhaps 12 percent are Han.160 Like I did, tourists presume that almost everyone they meet in Luoshui is Mosuo, and members of other ethnicities who interact with tourists reinforce the mistake by deploying Mosuo costumes, roles and locutions, like “we Mosuo.”161 Affluent Mosuo families, like Halba’s, hire workers from other ethnic groups to perform domestic and service work. Even some of the official cultural performers are not actually Mosuo. For example, Jama, a twenty-six-year-old Pumi woman featured in the Time Asia story, rows a boat for tourists while dressed in Mosuo garb.

What is more, the high status of Mosuo women that attracts tourists risks becoming a victim of such success. Mothers are now more reluctant to school their daughters than sons for fear of losing them.162 Walsh reports that because tourists regard women as the essence of Mosuo family and ethnicity, men have begun to find it embarrassing to be seen doing household labor, and they feel freer to identify with national rather than ethnic culture.163 Luoshui women complained to her that men were becoming lazy and spoiled and that affluence led many to drink

160 Walsh, supra note 10, at 59–62
161 Walsh, supra note 79, at 453.
162 Knödel, supra note 121, at 62.
163 Walsh, supra note 79, at 478–79; see Walsh, supra note 10, at 337.
and gamble.\textsuperscript{164} Some women claimed resentfully that most local men were intimate with outside women visitors and sex workers and that it was now harder for a Mosuo woman to find and keep a boyfriend.\textsuperscript{165}

Some of the state's affirmative action benefits for ethnic minorities also undermine the distinctive Mosuo culture and family system that the state seeks to sustain. In contrast with most of China, schooling is free through the ninth grade in Yongning,\textsuperscript{166} and affluence enables all qualified Luoshui children to afford university education. Studying in ethnically mixed schools in which the instructional language is Chinese introduces Mosuo children to Han culture along with global concepts of modernity and family. Ethnic minorities were exempted from the one-child family policy and allowed more liberal birth quotas, depending on local demographic and economic conditions.\textsuperscript{167} Mosuo women were allowed to have three children each, but increasingly, the state has been restricting ethnic minority groups to a two-child policy.\textsuperscript{168} Given the small remaining numbers of Mosuo and their traditionally low fertility rates, they may not be able to reproduce the traditional extended households that attract tourists.

Fully aware of these threats to their family and culture, the Luoshui collective of seventy-two families has taken some protective measures. In order to dissuade the young from entering modern marriages, it does not allow couples to establish new households in the village, and it restricts participation in the tourist jobs to the seventy-two families. Halba claimed that the cooperative's principle of economic distribution likewise seeks to preserve the walking-marriage system. It divides collective profits equally among the families irrespective of their size to discourage smaller families from adding a spouse in order to qualify for a greater share. However, I suspect that this could also have perverse effects by making it sensible for larger families to expand their sources of income by dispersing some members to work elsewhere, like Jiama's son, daughter-in-law and niece are doing in Dongba Valley.

Halba soberly regards these policies as stopgap measures that might help to retard but cannot prevent the ultimate erosion of the Mosuo family system. Today, thirteen-year-old Luoshui boys as well as girls have come to expect rooms of their own, and families with sufficient space allocate individual bedrooms even to younger children. Traditional customs, like signaling a nocturnal visit with animal calls or songs have succumbed to technology, enabling lovers to send text messages from ubiquitous cell phones. Families in Luoshui all have become much

\begin{itemize}
\item \textsuperscript{164} Walsh, \textit{supra} note 79, at 478–79.
\item \textsuperscript{165} \textit{Id.} at 473–74.
\item \textsuperscript{166} Knödel, \textit{supra} note 121, at 58.
\end{itemize}
more affluent, but Halba does not think they are happier than before. He rues the “declining morals” he perceives in a generation that has been educated in Han schools and exposed to TV, university education, and affluence. Perhaps the Mosuo family system can survive in remote areas, Halba hopes, but he doubts it can withstand the impact of wealth on Luoshui and the expanding number of tourist-oriented villages. The forty-year-old café owner I interviewed shared the perception that affluence and tourism were eroding traditional Mosuo families. He noted that many of the youth sent to universities wind up intermarrying with Han and staying in cities, as Gezo has done. Like Halba, he pins his hopes for the survival of Mosuo kinship on more remote areas where he anticipates it may last “at least for another seventy to eighty years.”

On the other hand, the café owner pointed out that local ethnic Pumi have begun to adopt the practice of walking marriage, raising the possibility that Mosuo family practices might spread to other cultural groups. A Pumi woman who ran a stall in the popular outdoor evening barbeque market told me that her mother participates in a walking marriage with a Mosuo man. The Time Asia feature on the Mosuo also reported that walking marriage was spreading rapidly among the Pumi near Luoshui. Jama, the twenty-six-year-old who rows tourist boats attired in Mosuo garb, has adopted Mosuo family values as well. She chose a walking marriage rather than marrying her boyfriend, the biological father of her young daughter, because “if I decide my boyfriend isn’t worth it, we’ll split up, so we don’t fight like married couples do.” However, only those who have cooperative residential families nearby can make such a choice, and rapid development is likely to diminish the local ranks of families like these.

The greatest dangers of tourism for Mosuo culture, however, may be indirect. Halba has traveled widely throughout China, partly to investigate the impact of tourism on communities elsewhere. He came away from his journeys preoccupied with the environmental dangers of development. The biggest looming threat to Lugu Lake is the state plan to build an airport on the Sichuan side of the lake. Initial development plans located the airport directly in the exquisite Sea of Grass, but concerted local opposition to such environmental damage convinced authorities to site it a bit further from the lake. Halba took understandable comfort from this hard-won concession, but the airport nonetheless will unleash unavoidable and fiercely destructive effects on Mosuo cultural life as well as the environment. Considering the staggering growth of tourism even while Lugu Lake remains relatively inaccessible, direct access by air is certain to geometrically expand the number and character of visitors. A newly paved road and massive five-star hotel that were under construction on the Sichuan side of the lake foreshadow the dramatic changes they invite.
III. ENDANGERED KINSHIP

Mosuo tisese can fruitfully be understood as a remarkable premodern version of the pure relationship, and arguably purer and more egalitarian than what Giddens envisioned. Tisese, as we have seen, separates sexuality and romantic love from kinship, reproduction and parenting, and does so more radically, I believe, than the late-modern transformation of intimacy that Giddens endorsed. It also enables greater gender equality in heterosexual intimacy than feminists anywhere have yet achieved. Traditional Mosuo sexual unions are governed exclusively by mutual desire and reciprocal affection, unencumbered by other responsibilities. Lovers do not share domiciles, finances, childrearing, daily labor, or kin. Because mate choice carries no implications for a family’s resources, labor, security, or status, families need not intervene, approve, or even know when it occurs. Lovers may freely enter exclusive or multiple relationships, enduring or short-lived, and across class, age, and ethnic boundaries, as they prefer.

Giddens has been taken to task legitimately for ignoring the implications of his idealized vision of the pure relationship for parenting, kinship, dependency, and caretaking. Feminist legal theorist Martha Fineman, on the other hand, places caretaking front and center in her search for legal strategies for redefining family in ways that avoid “tragedies” inherent in what she terms the “sexual family.” Fineman employs that jarring concept to designate a family system generated by the adult sexual pair, precisely opposite, one might say, to plastic sexuality. The “tragic” flaw of this modern family structure is to link family security, property, and especially the welfare of women and children to the vagaries of Cupid’s antics. Most of the seismic upheavals and divisive controversies in Western modern family life over the past half century radiate from this fault line—constituencies battling over the sources and consequences of “the divorce revolution,” unwed childbearing, “fatherlessness,” abortion, day care, the “second shift,” same-sex marriage, lesbian and gay parenthood, and more.

Most premodern societies opted for patriarchal control of female sexuality and reproduction to manage conflicts between individual eros and collective (particularly male) family interests. The remarkable Mosuo, in contrast, devised a brilliant, time-tested alternative both to patriarchy and to the modern sexual family. Mosuo tisese boldly exceeds Fineman’s proposal to make the mother-child dyad

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169 See GIDDENS, supra note 2, at 58 (describing the pure relationship as a restructing of intimacy where each person remains in the relationship because of the mutual benefit gained by staying together).

170 See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES 9 (1995) (noting that society does not value caretaking, but that caretaking should be recognized as a major contribution to society).

171 See id. at 143.
the central unit of family law. It radically frees family fortunes from the capriciousness of sexual love by eliminating marriage altogether. "Women and men should not marry," as Namu explains the Mosuo perspective, "for love is like the seasons—it comes and goes." 172

With the surgical stroke of excising marriage, Mosuo kinship circumvented a plethora of Fineman's "twentieth century tragedies." A society without marriage is one without divorce and with no spinsters or bachelors, widows or widowers, or unmarried, solitary individuals of any sort. Nobody's social status or fate hinges on the success or failure of their love life or marriage, whether chosen or arranged. Although Halba does not have a "wife" or biological children, he is embedded in an intergenerational family. He spoke convincingly of his love for his nieces and nephews and his gratitude for the love and support they provide him in return. Likewise, Jiama's deaf and mute adult daughter enjoys an integrated, stable and productive family life. In a family system without marriage, no children are illegitimate, "fatherless" or "motherless," and few are orphaned. No marriage or divorce means no remarriage as well, and thus no wicked stepmothers, stepsisters, or Cinderellas. Rarely need anyone become a single parent, and even biological only children, like Jiama's three grandchildren, can grow up with siblings and playmates in their households. It seems likely that this helps to explain how the Mosuo achieved lower fertility and lower mortality rates than their neighbors long before they experienced the modern economic developments that generally propel that demographic transition.

Eliminating institutionalized marriage profoundly alters sexual meanings and consequences, and in the case of the traditional Mosuo, with striking gains for women. Lacking concepts of premarital or extramarital sex, Mosuo culture did not fetishize female virginity and chastity or judge women and men by a double standard of sexual behavior that divides women into Madonnas or whores. For this reason, most outsiders presume that tisese implies widespread promiscuity, an impression reinforced by Cai Hua's controversial ethnography and Namu's salacious memoirs that the tourist industry is happy to leave unchallenged. To be sure, most scholarship supports the view that traditionally Mosuo women and men alike felt free to engage in sexual intimacy with a variety of partners if they so desired without fearing social disapproval. 173 Less often noticed, however, is the fact that tisese also grants equal respect and agency not only to those who practice

172 YANG & MATHIEU, supra note 57, at 7.
173 See Cai, supra note 18, at 20 (stating that Mosuo men and women freely engage in sexual intimacy with whomever they desire without creating economic or social bonds); Chuan-kang, supra note 16, at 3 (describing the lack of social and economic consequences for Mosuo men and women who engage in sexual intimacy); Walsh, supra note 79, at 452 (stating that both sexes in Mosuo culture experience a high degree of sexual autonomy); Yan, supra note 108, at 60–61 (analyzing the different types of families among the Naxi people).
monogamy, but to the sexually chaste as well. Counter to popular titillating representations of the Mosuo, they seem to have sustained significant rates of chastity, a second factor that contributed to their lower fertility rates.174

It is impossible to determine how durable most open, visiting unions were in prerevolutionary China. On the one hand, many features of “walking marriages” can sustain romance, passion, and affection longer than is typical for legal marriages. Couples who do not share residences, finances, childrearing, relatives or other obligations bypass most of the primary triggers of conjugal conflict. Members of such couples need not adapt to the often-incompatible preferences, habits and quirks of an individual (of a different gender) who was socialized in another mother’s household. They do not struggle over how many (if any) children to have, how to reward and discipline them, who does the dishes, what church (if any) to attend, how much money or time to spend on what, where, when, or with whom. All of the Mosuo I interviewed claimed that “walking marriages” last longer than other marriages, because they generate so few sources of conflict.

On the other hand, traditional Mosuo couples experience few social or economic incentives or pressure to sustain unsatisfying relationships or to be sexually exclusive. Mosuo country promises scant profits to a couple-counseling industry. If and when lust, love, or affection wanes, “like the seasons,” scant countervailing social or economic glue, public rituals, or investments work to sustain commitment to maintain a flagging union. What’s more, the fact of lifelong family security and the tolerant sexual norms of tisesé make it easy for a disaffected lover to stray, or to just walk away. Predictably, therefore, the question of how the Mosuo manage sexual jealousy, a theme central to the plot of The Remote Country of Women, preoccupies many outsiders.175 Cultural norms operate to suppress sexual possessiveness, as Namu explains:

Although we feel such passions, we must repress jealousy and envy, and we must always be prepared to ignore our differences for the sake of maintaining harmony. All this possibly sounds utopian, but it is absolutely true. In Moso eyes, no one is more ridiculous than a jealous lover, and short of committing a crime such as stealing, nothing is more dishonorable than a loud argument or a lack of generosity.176

If Mosuo culture discourages displays of jealousy and anger, it does not seem to promote promiscuity or to honor fickleness. Small-scale societies exert potent indirect influences on behavior through gossip and reputation. The docent at the

174 See Chuan-kang & Jenike, supra note 43, at 43 (suggesting that further research is needed to determine if celibacy could be a reason for the lower fertility rates).

175 See BAI, supra note 80, at 364–69 (describing the experience of a non-Mosuo man finding his Mosuo wife in bed with another man).

176 YANG & MATHIEU, supra note 57, at 69.
Mosuo cultural museum claimed that individuals earn bad reputations if their romantic behavior appears too licentious or selfish and that companionship, loyalty, and affection cement walking marriages as much as eros does. Although I was surprised to learn that both Jiama and Ayi have sustained their walking marriages over the course of several politically and economically turbulent decades, neither woman considered this noteworthy.

In the end, however, asking whether or not Mosuo walking marriages typically dissolve sooner or later than legal modern marriages is an ethnocentric sociological question, one that assumes a particularly obsessional public status in the United States. Traditional Mosuo culture granted individuals autonomy over such matters of the heart and hormones, because it made their consequences socially irrelevant. What mattered was the durability, stability, and harmony of the maternal family household. More meaningful, in my sociological view, is the durability of this premodern family system itself and the ingenious way in which it reconciles the contradictory goals of individual eros and family security. Mosuo *tisesa* and the maternal extended family combine the democratic and libertarian features of the pure relationship with family stability and solidarity. Coming close to eating their cake and having it too, the Mosuo can enjoy plastic sexuality and gender equality without threatening “reproduction, kinship or the generations.”

Mosuo freedom from pressure to find a spouse contrasts vividly with the circumstances of many contemporary Chinese as well as Westerners. Patriarchal preference for sons and the one-child family policy in China have shrunk the ranks of girls born and raised and thereby the marriage prospects of low-income Chinese men. At the same time, many highly educated, professional women on both sides of the Pacific Ocean anxiously confront a shortage of husbands they consider suitable. In the United States, a vigorous marriage promotion movement censors premarital sex and stigmatizes single parents, worsening the plight of women across the class spectrum—disproportionately African-American women—who face a dearth of marriageable suitors. Children born to unmarried women are a “big happiness” for their Mosuo families, but they incur discrimination and financial duress for single American and Han Chinese women.

Unsurprisingly, therefore, the Mosuo I interviewed were unable, or perhaps unwilling, to identify any downsides to *tisesa*. I repeatedly asked about disadvantages and difficulties in their family system, but to no avail. Everyone emphasized how much more harmonious their families were than what they observed among the Han and other marriage-based cultures. No doubt this sunny narrative reflects some rays of entrepreneurial ethnic self-interest. It helps to

177 See GIDDENS, supra note 2, at 2 (noting that plastic sexuality is not tied to the needs of reproduction and not centered on sexuality).

178 Ron Cho and Wang Fen claimed that extreme anxiety and gold-digging now is common among Chinese professional women who hope to find husbands to liberate them from fulltime employment.
sustain the remunerative cultural image that lures visitors like me to Lugu Lake. Likely too, it reflects cultural taboos against public discussions of intimacy and a propensity to suppress controversy and conflict. Locals denied the existence of sex workers in Lugu Lake, claimed that Mosuo culture never included homosexuality, and that HIV is an outsider problem. Only persistent prodding elicited minimal concessions about the existence of sex and romance tourism. Well, yes, some outside sex workers had operated near Luoshui in 1999, Gezo reluctantly acknowledged, but she immediately reassured me that they were quickly driven away. Likewise, Mosuo men and women insisted that although tourists flirt and sometimes attempt to seduce them, locals do not cooperate, because they know such relationships will fail.

A more individualistic, modern Western perspective would chafe at the level of conformity to family and social norms that Mosuo kinship demands. It is difficult for mobile, modern Westerners to imagine residing permanently with natal kin. Practicing tisese within the context of verbal taboos over sexuality and cultural denials of HIV and homosexuality should place the Mosuo at high risk of HIV and other sexually transmitted diseases. Indeed, early twentieth century opium traders introduced sexually transmitted diseases into Mosuo society that further depressed Mosuo fertility until effective treatments overcame the crisis. One wonders too about genetic risks posed by the opportunities that tisese provides for inadvertent incestuous sexual intimacy among genetic half-siblings. Finally, it seems possible that practicing the pure relationship, Mosuo-style could impose exceptional barriers to intimacy on anyone considered physically unattractive, because it elevates the realm of individual desire above all else. Factors like status, money, family connections, character, achievement, competence, and to some extent even personality, lose some of their compensatory power to attract a mate.

IV. CONCLUSION

In the end, however, the fate of Mosuo kinship will not depend on this sort of cost-benefit analysis of its upsides and downsides. Somewhat poignantly, the very factor that dooms durable relationships between the Mosuo and outsiders now threatens the survival of the Mosuo kinship system itself. To reconcile the pure relationship and family stability, tisese depends upon a high degree of geographic immobility, and perhaps on social and economic stability as well. Cultural conformity also is crucial to sustain intergenerational, extended families. Inherent Mosuo family conflicts over whether or when to divide households due to size and discord seem certain to increase under the centrifugal and individualizing pressures of market capitalism. The ultimate paradox is that after having been rescued from Maoist repression by market reforms that propelled lucrative ethnic tourism to Lugu Lake, Mosuo tisese and maternal families may fall victim to the sources of

their success. Sadly, our world risks losing its most successful, egalitarian, and enduring species of nonmarital kinship just when the viability of modern marriage seems in gravest doubt.
PIONEERS, PROBATE, POLYGAMY, AND YOU

Michael Cobb*

I. THE LANDSCAPE

Families terrify me; and not simply because I came from one. Nor is it simply the case that the family terrorizes queers like me because it and its “family values” are a dominant institution of sexual and political regulation in North America.¹ There is something much more complicated in these relationships of terror. So on hand are two documents—one religious, one legal (although we can almost effortlessly argue that these categories are enduringly tangled). I quote them at length:

Exhibit A:
Selections from Section 132 of the Doctrine and Covenants, sacred text of the Church of Jesus Christ of Latter-Day Saints:

1 VERILY, thus saith the Lord unto you my servant Joseph, that inasmuch as you have inquired of my hand to know and understand wherein I, the Lord, justified my servants Abraham, Isaac, and Jacob, as also Moses, David and Solomon, my servants, as touching the principle and doctrine of their having many wives and concubines—

4 For behold, I reveal unto you a new and an everlasting covenant; and if ye abide not that covenant, then are ye damned; for no one can reject this covenant and be permitted to enter into my glory.

19 And again, verily I say unto you, if a man marry a wife by my word, which is my law, and by the new and everlasting covenant, and it is sealed unto them by the Holy Spirit of promise, by him who is

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anointed, unto whom I have appointed this power and the keys of this priesthood; and it shall be said unto them—Ye shall come forth in the first resurrection; and if it be after the first resurrection, in the next resurrection; and shall inherit thrones, kingdoms, principalities, and powers, dominions, all heights and depths—then shall it be written in the Lamb’s Book of Life, that he shall commit no murder whereby to shed innocent blood, and if ye abide in my covenant, and commit no murder whereby to shed innocent blood, it shall be done unto them in all things whatsoever my servant hath put upon them, in time, and through all eternity; and shall be of full force when they are out of the world; and they shall pass by the angels, and the gods, which are set there, to their exaltation and glory in all things, as hath been sealed upon their heads, which glory shall be a fulness [sic] and a continuation of the seeds forever and ever.

20 Then shall they be gods, because they have no end; therefore shall they be from everlasting to everlasting, because they continue; then shall they be above all, because all things are subject unto them. Then shall they be gods, because they have all power, and the angels are subject unto them.

30 Abraham received promises concerning his seed, and of the fruit of his loins—from whose loins ye are, namely, my servant Joseph—which were to continue so long as they were in the world; and as touching Abraham and his seed, out of the world they should continue; both in the world and out of the world should they continue as innumerable as the stars; or, if ye were to count the sand upon the seashore ye could not number them.

31 This promise is yours also, because ye are of Abraham, and the promise was made unto Abraham; and by this law is the continuation of the works of my Father, wherein he glorifieth himself.

32 Go ye, therefore, and do the works of Abraham; enter ye into my law and ye shall be saved.

33 But if ye enter not into my law ye cannot receive the promise of my Father, which he made unto Abraham.

34 God commanded Abraham, and Sarah gave Hagar to wife. And why did she do it? Because this was the law; and from Hagar sprang many people. This, therefore, was fulfilling, among other things, the promises.

35 Was Abraham, therefore, under condemnation? Verily I say unto you, Nay; for I, the Lord, commanded it.

36 Abraham was commanded to offer his son Isaac; nevertheless, it was written: Thou shalt not kill. Abraham, however, did not refuse, and it was accounted unto him for righteousness.
37 Abraham received concubines, and they bore him children; and it was accounted unto him for righteousness, because they were given unto him, and he abode in my law; as Isaac also and Jacob did none other things than that which they were commanded; and because they did none other things than that which they were commanded, they have entered into their exaltation, according to the promises, and sit upon thrones, and are not angels but are gods.

38 David also received many wives and concubines, and also Solomon and Moses my servants, as also many others of my servants, from the beginning of creation until this time; and in nothing did they sin save in those things which they received not of me.

39 David’s wives and concubines were given unto him of me, by the hand of Nathan, my servant, and others of the prophets who had the keys of this power; and in none of these things did he sin against me save in the case of Uriah and his wife; and, therefore he hath fallen from his exaltation, and received his portion; and he shall not inherit them out of the world, for I gave them unto another, saith the Lord.\(^2\)

Exhibit B:

A Last Will and Testament of Nicole K. Baker, reproduced in Norman Mailer’s *The Executioner’s Song*:

*TO WHOMEVER IT MAY CONCERN:*

I, Nicole Kathryne Baker—have a number of personal requests I would desire to have carried out—in the event that I am at any time found dead.

I am considering myself of a strong, logical, and totally sane mind—so that which I am writing should be taken serious in every respect.

At the time of this writing I am going through a divorce from a man named Steve Hudson.

By my own standards—the event of death should dissolve all ties with that man and the divorce be carried through and finalized AT ALL COSTS.

I wish to legally be returned to my maiden name which is Baker. And have none ever acknowledge [sic] me by any other name.

My daughters [sic] birth certificate states her name as Sunny Marie Baker, even tho [sic], at the time of her birth, I was then legally married to her father—James Paul Barrett.

My son's birth certificate states his name as Jeremy Kip Barrett. Because I was at that time still married to James Paul Barrett, who is not Jeremys [sic] father.

Jeremy's [sic] father is the late Alfred Kip Eberhardt.

Jeremy does have legal grandparents by the last name of Eberhardt who may wish to be notified of his whereabouts. They are residing in Paoli, Pennsylvania, I think.

As to the care custody and welfare of my children—I am not only desiring [sic] but demanding that the responsibility of them and any decisions concerning them—be placed directly and immediately [sic] into the hands of Thomas Giles Barrett and/or Marie Barrett of Springville, Utah.

If the Barretts so wish to adopt my children—they have my willing consent.

If they wish to place the responsibility of one or both children into the hands of another responsible party of their choice—they again have my willing consent.

That is of course—until the children are of legal age to make their own choices.

I have a pearl ring in hock in the bowling alley in Springville. I would really like for someone to get it out and give it to my little Sister—April L. Baker.

Also I have made arrangements for a sum of money to go for April's mental health problem. My mother should not spend that money for anything other than to pay a good Mental Hospital for helping April back to her sanity.

Now, as to the decision as to what should be done with my dead body—I ask that it be cremated. And with the consent of Mrs. Bessie Gilmore I would have my ashes mixed with those of her son—Gary Mark Gilmore. To be then—at any future convenient date scattered upon a green hillside in the State of Oregon and also in the State of Washington.3

Both documents are documents about love, death, and families. Both documents are also about Utah. And Utah is marked by its devotion to families (and most likely love and death), a devotion that seems peculiar, even in a nation enthralled by its almost unquestionable devotion to making families. Wallace Stegner described families in Utah:

The Mormons who fled to the sanctuary of the mountains, and the converts who joined them later, were the kind of people who naturally have large families, and they lived in a time and a part of the world where large families were normal. But add to their normal fecundity the ambition of Brigham Young to people his whole empire with industrious Saints, the pressure he put on his people to be fruitful and multiply.4

Whether or not we can agree that large families are “natural,” Mormons certainly have a unique take on families. The Utah family, “Utah’s Best Crop”—as signposts throughout Mormon country were reported to have advertised under “pictures of chubby rosy children”5—generates much national anxiety. But it wasn’t merely the largeness of Mormon families that made them seem so noteworthy; it was the sexual and marital practices of this frontier, Brigham Young’s “ambition,” that has inspired the most tried, tired, and salacious commentary. That is, it was polygamy—with large numbers of unconventionally reared folk—that got people talking, almost as soon as the Church gained notoriety in the mid-nineteenth-century early days. Mark Twain mocks this fascination in his travel narrative about going West during the Civil War:

And the next most interesting thing is to sit and listen to these Gentiles [that Twain is hanging out with in Salt Lake City] talk about polygamy; and how some portly old frog of an elder, or a bishop, marries a girl—likes her, marries her sister—likes her, marries another sister—likes her, takes another—likes her, marries her mother—likes her, marries her father, grandfather, great grandfather, and then comes back hungry and asks for more. And how the pert young thing of eleven will chance to be the favorite wife and her own venerable grandmother have to rank away down . . . in their mutual husband’s esteem, and have to sleep in the kitchen, as like as not. And how this dreadful sort of thing, this hiving together in one foul nest of mother and daughters, and the making of a young daughter superior to her own mother in rank and authority, are the things which Mormon women submit to because their religion teaches them that the more wives a man has on earth, and the more children he rears, the higher the place they will all have in the world to come—and the warmer, maybe, though they do not seem to say anything about that.6

4 WALLACE STEGNER, MORMON COUNTRY 171 (2nd ed. 2003).
5 Id. at 173.
I don’t want to diminish or mock the history of sexual violence and abuse that adheres to the practices of polygamy (as well as monogamy) in the Beehive State. I cite Twain’s comedic critique to show off how part of polygamy’s difficulty is the extraordinary, often hyperbolic and lurid attention repetitively paid to this marriage practice—for there is long history of this demonization of polygamy. Famously, the Republican Party platform of 1856 declared,

That the constitution confers upon Congress sovereign powers over the territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the territories those twin relics of barbarism—polygamy, and slavery.7

There were numerous sister-wife narratives, which were generically similar to slave narratives. Harriet Beecher Stowe, for example, wrote a preface for Fanny Stenhouse’s Tell It All: A Woman’s Life in Polygamy, describing polygamy as “a slavery which debases and degrades womanhood.”8 And the prohibitionist Frances E. Willard goes further and writes, in an introduction to The Women of Mormonism: Or the Story of Polygamy as Told by the Victims Themselves, “Turkey is in our midst. Modern Mohammedanism has its Mecca at Salt Lake, where Prophet Heber C. Kimball speaks of his wives as ‘cows.’”9 There was even H.B. Parkinson’s big silent film hit in 1922, Trapped by the Mormons, which features the savage capture of women to satisfy the Mormons’ insatiable appetite for wives.10 It would not be a difficult leap to link these various discussions of “Mohammedanism” to the current fret and fear stirred by Islam in the American imaginary today.

One essay by Judge C.C. Goodwin, in 1881, published in The North American Review, is drenched in the rhetoric that polygamy stirred (and still stirs) as non-Mormons made sense of the Mormon difference. Polygamous behavior was akin to some internal terror that was “hiving” away at the American way of life—a terror inextricably linked with lascivious caricatures of polygamous practices from Islamic traditions. Goodwin describes Joseph Smith’s story this way:

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8 FANNY STENHOUSE & HARRIET BEECHER STOWE, TELL IT ALL: A WOMAN’S LIFE IN POLYGAMY vi (1875).
10 TRAPPED BY THE MORMONS (Master Films 1922).
Smith was born in Rutland, Vermont, about the time that Wingate, the combined forger and religious charlatan made such a sensation there. He removed, when a youth, to Palmyra, New York . . . Smith was full of magnetism, full of warm blood, a hearty, generous fellow . . . After proper training, Smith became the prophet . . . For one of his sensual nature, it was but natural to conclude that if celestial plural marriages were good, it was a grievous waste of time to wait for death to sanctify them; that real women were greatly to be preferred to doubtful and unsubstantial ghosts, and that the right thing was to be sealed to those still in the flesh. So he had a revelation; polygamy became part of the Mormon religion, and Joe Smith a little Mohammed. Followers began to flock rapidly around Smith. Probably without being conscious of the fact, he made animalism the key-stone in the arch of his creed, and given to his church all the adhesiveness which cements Christian creeds, and in addition all the fascination which, to sensual natures, clings to Mohammedism.11

Certainly, Goodwin makes a point that people still make about the religions of Joseph Smith and Mohammed: there are striking resemblances between the two faiths. Such connections, especially in the American context, have long troubled many. From Goodwin’s angle, polygamy was considered an Eastern practice in the middle of the American West, an Islamic practice that was a sensual form of “animalism” that ran contrary to American values. Well over a century later, in his article for Salon.com, Andrew O’Hehir makes the connections resolutely clear:

To their respective followers, Mohammed and Joseph Smith are not the inventors of new denominations but restorers of the original, uncorrupted monotheistic tradition of Abraham, Moses and Jesus. Even the language of the two faiths’ central tenets is strikingly similar. In reciting the Shahadah, or principal declaration of faith, Muslims may say: “There is no god but Allah and Mohammed is His Messenger,” or “I testify that Mohammed is the Messenger of God.” One of the most frequent forms of “testimony” in a Mormon meetinghouse comes when a worshiper rises to declare: “I know that Joseph Smith was a prophet of God.” Both religions make claims to absolute and universal truth, and those declarations are meant to reflect knowledge rather than belief in the ordinary theological sense, which may be tinged with doubt. In answering the oft-asked question, “Are Mormons Christian?” one might ask, only half facetiously, whether Muslims are Christian too.12

But instead of charting such a genealogy, I want to leave aside this form of critique, which is indebted to the explicit and salacious worry about the sexual practices of polygamists, and argue something from another angle, which Goodwin’s mockery slightly hints at when he talks of the sanctity of death and the “unsubstantial ghosts” of marriage. I want to suggest that perhaps what makes Utah families so troubling and so terrorizing for so many is not always the polygamous difference (always the politics of traditional versus nontraditional marriage contests), but also what Utah families highlight about most families: as we’ll see, there is a strenuous devotion to conceptualizing family as a death-making enterprise in the Latter-Day Saints’ (LDS) imaginary, one with a major elegiac problem that haunts and casts a shadow on sacred and nonsacred forms of family law. This problem is not merely Mormon; it belongs to most families. And this problem hinges on a human right that marks ghostliness: the right of inheritance. But I’m getting ahead of myself.

Both documents at the beginning of this essay (the revelation of Joseph Smith and last will and testament of Nicole Baker, girlfriend of notorious killer Gary Gilmore) are really about the future of families, or how families cope with a future that necessarily contains death. Smith’s revelation outlines a very religiously legal sense of how one can, through the proper and moral kind of family, achieve a permanent place in the highest heavenly existence in the celestial order of the Mormon afterlife: one gets to the choicest afterlife by the best kind of marriage practices—plural marriage (ideally), but, perhaps more importantly, the right kind of conduct that does not violate the sacred laws and example Smith has been appointed to administer and represent. Baker’s will (which she later has to amend once she realizes that she hasn’t properly distributed her property, just her family) is about how she sees her family enduring after her desperate and unsuccessful suicide attempt (which was her attempt to be with her convicted killer boyfriend for eternity since they couldn’t be together on this earth anymore—he was slated to be killed). Most striking, after she has “arranged” the custody of her children (tangled in all sorts of marriage, ex-marriage, and ad hoc familial arrangements), urged that someone get her ring out of hock, and asked her heirs to provide a small sum of money for the cost of her sister’s mental health care, Nicole directs the disposal of her and Gary’s remains. She wants her ashes mixed with Gary’s; she wants to be with him in death since they can’t be with each other in life; and she wants those ashes scattered in two states on the edge of the North American


13 See Goodwin, supra note 11, at 280.

14 See Letter from Nicole K. Baker to Family and Neighbor (Nov. 15, 1976), in MAILER, supra note 3, at 570–71 [hereinafter Letter from Nicole K. Baker].

15 See supra text accompanying note 3; Letter from Nicole K. Baker, supra note 14.
continent. This is Nicole’s vision of what her future might be: an everlasting blended and scattered connection to her unmarried partner. Dead. But together.

Let’s put aside the obvious judgments. Let’s put aside any frustration we might have with a young mother who abandons her children and family for a deadly love with an abusive serial killer (who has helped devise this botched suicide pact, in part because he’d rather see Nicole dead than with another lover). Let’s also put aside whether or not we agree with Smith’s revelations about the “new and everlasting covenant” of marriage. Instead, I want to think of these two “exhibits” as examples of why questions of inheritance prey upon our imaginations about what constitutes a family.

Although Smith’s revelation is not necessarily a will, there is logic in the revelation that mimics the legal instrument that Nicole was trying to write. Mailer includes a letter Nicole wrote right after will, underscoring the connections between a suicide note and a last will and testament:

Well, all will ultimately be clear and right just know that i love you all today and i will love you always.

Please try also not to grieve for me—or resent Gary.

i Love him

i made my own choice.

i’ll not regret it.

Please Love my kids always, as they are part of the family.

Never hid [sic] truths from them.

When any of you need me, i will be there to listen for i and Gary—and yourselves—are all part of a wondrous good understandin [sic] God.

May this parting bring us closer in Loveing [sic], understanding and expeting [sic] of one another.

i Love you All

Sissy

Although written in a less formal manner, Nicole’s letter essentially emphasizes the main points of her will: take care of my kids; I love you all; and Gary and I will be together. By ending her suicide letter with theological insights into the nature of love and family, Nicole, not really religious, seems to parrot the ambient understanding of family togetherness that permeates the Utah she inhabits. As we think about her letter, listen to the forty-sixth verse of Smith’s revelation: “And verily, verily, I say unto you, that whatever you seal on earth shall be sealed in heaven; and whatever you bind on earth, in my name and by my word, saith the

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16 See supra text accompanying note 3; Letter from Nicole K. Baker, supra note 14.
Lord, it shall be eternally bound in the heavens.” In rapid succession, Nicole is sealing her fate, sealing her will, and sealing her bond with Gary in a manner that she hopes will bring her difficult, fractious, and unruly family into stronger relation. Love, for Nicole as for many others, will be for always. It is her will. It’s God’s will. Death gives us this inheritance.

II. THE HAUNTING

The odd optimism in Smith and Baker brings us to the heart of a major frontier of the families we insist on making: is there a way to endure in our relation’s past death? How can we have, or at least distribute, “forever”? And why are families supposed to be the place where we can seemingly negotiate these hopeful wishes? An area of law that helps me think about these questions is, of course, the realm of probate. Wills, trusts, and estates are jurisdictionally specific, so it’s hard to theorize about them. But I’m going to try because it seems to me that the question of who gets your property after you die is, as Nicole’s will illustrates, not simply about giving real or personal property to people you want. It’s the right to transfer property that reveals the particular role that the devisee or legatee occupies in the life of the testator. And not just the role (lover, brother, sister, mother, father, friend, dog, etc.), but also the quality, if not quantity, of the emotion or concern one can express as a parting wish, as a way of continuing to influence the lives one has left behind. And the posthumous transfer of property is not only about the acquisition of certain monetary or chattel windfalls that could ameliorate (or provide for) some of life’s expensive circumstances: my own grandfather gave me a silver ring, made out of a 1942 dime, that he had made during the second world war on a boat in the South Pacific. It might literally be worth a dime, and certainly cannot pay for something substantial. But its sentimental value is forged into its silver in a way I can’t forget. It’s also the only “thing” of his that he once wore that I now own. He loved me enough to make it a piece of his legacy, and I, as his grandson, am his legatee. I wear the ring, always.

In any case, pieces of property (Nicole’s pearl ring; my grandfather’s dime ring) have characteristics of a relative’s regard, and the transfer of property, moreover, transfers parts of the testator (his or her emotion, his or her wealth, his or her attention, even his or her characteristics) to the inheritor. Oliver Wendell Holmes, Jr. kept circling around this very issue when arguing about succession of property after death in his study of the common law. While detailing various ways other legal histories dealt with the transfer of property after death, and while teasing out the particular and sometimes baffling manner in which an estate’s executors and heirs assume the “persona” of the deceased, Holmes, Jr. makes clear that the law treats them “as if they were one with him [the deceased], for the

18 DOCTRINE AND COVENANTS, supra note 2, at § 132:46.
purpose of settling their rights and obligations.” He describes this particular function as a “fictional” function, which “shadows” particular facts from a long developmental history of common law jurisprudence, and even affects the law “as to dealings between the living.” But this fiction of transferring one’s persona along with one’s property to people who remain after one’s death is not inconsequential. On the contrary, these legal fictions are the terms of art that help make possible what Marx famously states that the commodity (which can be property, among other “things”) does in the kind of industrialized nation that Holmes, Jr. is writing about: the “mysterious character of the commodity-form ... reflects the social characteristics of men’s own labour as objective characteristics of the products of labour themselves, as the socio-natural properties of these things.” Thus, commodities and property start to resemble and reflect the social relations of people—social relations that become “the fantastic form of a relation between things.” Perhaps more novel for our argument is that the legal fiction of inheritance, the shadowy transfer of property and the deceased owners’ persona to survivors, extends Marx’s fetish idea beyond the social relations of the living; succession and transfer open up the social relations of the commodity to relations with the dead. In other words, a will can keep us carrying on and on with the dead in our alienated social worlds, never failing to make “things” play out relations between people, and thus, with ghosts.

So we’re haunted by the property willed to us—by the line of succession’s solidification of social relations by the transfer of property after death. And even if you don’t have a will, or if there is property that is intestate because it’s not covered by a will, the line of succession so closely follows the path of a ghost, if not of a law, of familial affiliation. For example, in the current Utah Code Section 75-02-103, we can read about what happens to intestate estates if there is both no will and, perhaps more grievously, no spouse (the spouse is the easiest and most automatic stop on the line of succession in many probate jurisdictions, often not requiring a testament). What happens is a relentless, nearly common-sensical quest for a blood heir, no matter how distant:

75-2-103. Share of heirs other than surviving spouse.
(1) Any part of the intestate estate not passing to the decedent’s surviving spouse under Section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

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20 Id. at 269, 275.
22 Id. at 165.
(a) to the decedent’s descendants per capita at each generation as defined in Subsection 75-2-106(2);

(b) if there is no surviving descendant, to the decedent’s parents equally if both survive, or to the surviving parent;

(c) if there is no surviving descendant or parent, to the descendants of the decedent’s parents or either of them per capita at each generation as defined in Subsection 75-2-106(3);

(d) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent’s paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent’s paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation as defined in Subsection 75-2-106(3); and the other half passes to the decedent’s maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent’s relatives on the other side in the same manner as the half.

(2) For purposes of Subsections (a), (b), (c), and (d), any nonprobate transfer, as defined in Section 75-2-205, received by an heir is chargeable against the intestate share of such heir. 24

The property of someone dead must haunt the family tree as it hunts for a living person it can be possessed by. We could say that property’s relational itineraries connect and fortify the family’s story, which we could also call a ghost story. And all these heads of a family, all the “by heads” (per capita) who survive the decedent, not so subtly remind us that the family is the default set of social relations that must be remembered and honored by the distribution of property. Sure, the equitable division of wealth between individuals is the explicit point of the law, but those individuals are only found within the realm of familial relation, and specifically relations that are descendants, not decedents. Although this line of inheritance makes sense historically (families and the division of property by a long history of estates, common law, and other models of households throughout the history of law), 25 one question that needs to be asked, even now is: why? Are your family members really the ones you want to inherit your wealth, land, rings, lamps, or love? If your spouse is still alive, in Utah, is she or he a legal spouse? We don’t have to be Mormon or in Utah or even religious to be affected by the

25 To assert as much is almost axiomatic. For a fascinating read on the rise of Common Law, and the problems of dividing and representing power and legal force, see Bradin Cormack, A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law (2007).
implications of the code. I confess: I’ve not made a will yet (I’ll get to it, someday). By not doing so, my house, pension, life insurance, even beloved dog might end up in the hands of my parents who don’t need or won’t appreciate the money or the love or the sentiment or the pet I’d perhaps prefer to transfer to my boyfriend, or, ideally, my friends. Perhaps I’d like to continue relating to people other than my legal family after my death, in substantial ways. Surely, this predicament is my fault. But why is family the default when there is no will, or if there is property not covered by the will? What kind of insidious priority does this code, and the laws of probate more generally in a myriad of jurisdictions, keep assigning to the family? Is the family really the most important kind of social relation one should always have? And what particular force do these compacts between the living and the dead have in sustaining and protecting the families we make?

III. THE CRIMINAL FAMILY

In 1891, The U.S. Supreme Court decided *Cope v. Cope*, a case about whether or not the Territory of Utah would be promoting and protecting the institution of polygamy by acknowledging the right of inheritance of an illegitimate child, George Cope. The facts of the case were relatively clear: Thomas Cope fathered the child with his second plural wife, Margaret, who did not have the legal status of wife because that status belonged to Janet, his lawful wife. He died without a will. Who, then, was automatically entitled to a share of the estate? Or to be more precise, given the obsessive logic of the family in matters of succession: who belongs to this family? The probate, district, and territorial Supreme Courts eventually concluded that George was not an heir.

From this legal vantage point, Thomas, quite simply, did not belong to Cope’s family. But there were several questions for the Court because an 1852 statute of Utah allowed “illegitimate children and their mothers [to] inherit in like manner . . . from the father.” Normally, probate matters are left to the “state’s cognizance,” but this law, which would not necessarily be so prickly in another jurisdiction, obviously put in place legal mechanisms to provide for all the heirs of polygamous families. But the 1862 statute fashioned some gray areas that were (and are) compelling: “all acts and laws which establish, maintain, protect, or countenance the practice of polygamy” were annulled, but could the 1852 statute definitively be

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26 137 U.S. 682 (1891).
27 See id. at 686 (stating that “[t]he question is then presented, [whether] the territorial act of 1852 establish, support, maintain, shield, or countenance polygamy”).
28 Id. at 683.
29 Id.
30 Id.
31 Id. at 684 (citation omitted).
32 See id. at 684–85.
said to be promoting and protecting polygamy? Certainly, in other jurisdictions, the 1852 statute could be read more innocently. The Court thinks out loud:

But while it is the duty of the courts to put a construction upon statutes which shall, so far as possible, be consonant with good morals, we know of no legal principle which would authorize us to pronounce a statute of this kind, which is plain and unambiguous upon its face, void, by reason of its failure to conform to our own standard of social and moral obligations.

So it’s hard to determine whether or not the 1862 Act applies to a law when one has to read into the law the way it is responding to the “peculiar state of society,” which was “existing at the time this act was passed, and still existing in the territory of Utah.” In fact, after a variety of lines of thought, the Court concludes that if the 1852 statute “had been passed in any other jurisdiction, it would have been considered as a perfectly harmless, though possibly indiscreet, exercise of legislative power, and would not be seriously claimed as a step towards the establishment of a polygamous system.”

Subsequent acts of Congress designed to prohibit and punish polygamous practices (especially the “Edmunds-Tucker Act”), kept returning to a nagging issue that made many of these issues about Congress-versus-state control a bit moot. For example, the Edmunds-Tucker Act included an odd provision stating that the disinherance of illegitimate children (annulling an 1852 Utah territorial act granting inheritance rights to illegitimate children) need not apply to any illegitimate children born within twelve months of the Act. This inconsistency of application was obviously a practical solution to a problem inherent in this inheritance quandary: should the modification of probate law in Utah punish those who had no control over their polygamous circumstance? Should children be stigmatized by an onerous challenge to territorial laws originally put into place to protect them? The opinion decides:

Now if it had been intended by the act of 1862 to annul the territorial act of 1852, fixing the inheritable capacity of illegitimate children, why did congress in 1882 recognize the legitimacy of children born of polygamous or Mormon marriages, prior to January 1, 1883? Or why, in

33 Id. at 686 (citation omitted).
34 Id. at 685.
35 Id.
36 Id. at 687.
the act of 1887, did it save the rights of such children as well as of all others born within 12 months after the passage of that act? The object of these enhancements is entirely clear. Not only does congress refrain from adding to the odium which popular opinion visits upon this innocent but unfortunate class of children, but it makes them the special object of its solicitude, and at the same time offers to the parents an inducement, in the nature of a locus penitentiae, to discontinue their unlawful cohabitation.40

The lack of punishment of children then is considered an “inducement,” in the form of allowing for the parents to withdraw from their illegal marriage contracts, and choose instead the cessation of criminal cohabitation. In short, the Court is politely saying: “Get out now, or your children will suffer.” So the Court reversed the lower court’s decision, making George an heir.41

But it’s not enough to say that Cope was decided as it was because it didn’t want either to further stigmatize children or to use the children’s potential inheritance as a carrot to get people out of plural marriages. Part of what makes Cope a fascinating problem is not necessarily the jurisdictional issues, not the questions about whether or not illegitimate heirs have valid claims on an estate, and not even the persistent moral bias in the court’s consideration of plural families. Instead, what is striking is the manner in which the probate claims of children from unconventional families provoke an intense rhetoric of emotion that enables the Court to contradict its (and the lower courts’) position on the inheritance of polygamy. Polygamy’s outlaw status is apparently not as disturbing as what might happen when even the right of family belonging is denied this “innocent but unfortunate class of children.”42

Moreover, children are not the only ones at risk. All families are at risk when there is a death. Death makes the Cope family’s endurance seem so fragile (even the Cope v. Cope title of the case demonstrates the division of the family) so upsetting, that reasonable jurists let a disturbing familial emotion get the best of them:

[B]ut it may be said in defense of this [1852] act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents’ sins. To recognize the validity of the act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than

40 Cope, 137 U.S. at 689.
41 Id.
42 Id.
upon the child; while to hold it to be invalid is to treat the child as, in some sense, an outlaw and a *particeps criminis*.43

In this “state of things,” we’re immersed in Marx’s relation between things, which is a relation between various family members, a relation that becomes adversarial when we have to think about the validity of a law that was intended to preserve the family across generational lines and, in the Mormon worldview, the line between life and death. In the Court’s reading of the legal quandary of a polygamous probate, we have either parents or children punished, and the legal distribution of things is also preserving the “sinful” qualities of polygamous actions. There is a sinful crime here, and no matter which way one divides it (or the estate), someone, if not everyone, in the family is going to have blood on their hands.

But why is it “unjust” to “visit upon” the children “the consequences of their parents’ sins”? These consequences are only really there when the question of inheritance must be settled by a hostile court that doesn’t believe that this family should exist in the first place—a court that has a moral position that adds “odium” to this family (and its class of children). So another way to think about this family’s sinfulness is to implicate the Court in making the family so fragile. The Court is making this generational issue an issue of sinful consequences by pulling apart the family when it revisits the question of whether or not probate statutes can protect the polygamous family. In this way, the Court is functionally similar to the plural parents, who can choose to be polygamous or not: it has a choice to make about how to connect the children to not only inheritance laws, but also the long vitality of the family structure those laws about death enable. The rhetorical leaps of logic that eventually let the children (and the Cope family) off the hook in the decision reveal something curious: the court authorizes, if not protects, George Cope’s relation to his father by giving George part of his father’s estate; in a way, it condones polygamy (at least for a while). The sins of the father or Court be damned! It’s much worse to tear the children away from their deceased parents—from something everlasting and eternal, but construed to be terribly fragile: the families we want to make forever, especially on the occasion of death. This family crime is the crime in which even the Supreme Court can participate.

IV. THE SEALING

The reason why we can put up with all sorts of familial criminality is that we’re worried about the family’s stability, even if we’re not part of a Latter-Day religious schism. We’re worried about how the family unit can so inevitably die as we age, change, and move in the world; an everlasting eternity might not really be in the offing. I’m convinced that Mormons and their polygamous legacies put into sharp relief a concern with the afterlife, and it does not have to be 1891 to ignite

43 *Id.* at 685.
our national worries about polygamy. Indeed, every so often (some people say every ten years), the nation remembers its polygamists, and inevitably controversies erupt over their place in American society. We are currently living in one of those moments. Why? We have here a number of culprits: same-sex marriage; the war on terror (with whiffs of Islamophobia that resonate with early condemnations of polygamy); the failed presidential candidacy of Mormon ex-Massachusetts governor Mitt Romney; and HBO's Big Love. I want to focus on the last culprit for the remainder of this essay. If I had more time, I could carefully explain just how Big Love's appearance during a moment of increased political attention to same-sex marriage and national questions about the details of Mormonism has produced a successful show that mines the theology, history, and culture of polygamists in order to allegorize the struggles of queers who are interested in family, in marriage rights, and in the dynamic clash between religious belief and homosexual practice. The show's creators, Mark V. Olsen and Will Scheffer, have produced a remarkably sensitive portrayal of polygamy, often drawing parallels between queers' struggles for rights, respectability, and prominence within the United States, and polygamists' struggles for rights, respectability, and prominence within the larger Mormon culture. 44 Of course, there are differences between queers and the Fundamentalist Latter-Day Saints (FLDS) (and Big Love's concern for polygamists is not an endorsement of a patriarchal, often abusive culture that pushes the limits of what many would consider acceptable instances of sexual and marital consent), but allegories are not identities, and what HBO has done by green-lighting this show has been to enable people once again to look at a queer region of the United States (remote Utah; specifically what was once known as Short Creek, but is now known as the border towns of Colorado City, Arizona and Hildale, Utah) that tells a story of nontraditional family values (but a story that has quite a long, transhistorical history), which is also the tale of America's inability to either ignore or embrace sexuality in all of what Gayle Rubin would call the "benign sexual variation" of sexual practice. 45 These comparisons might seem dangerous or misguided, but they shouldn't be sidestepped: feminist philosopher Cheshire Calhoun, in a provocative law article, suggests that we need to keep our glare on polygamy (beyond our simple dismissals of its patriarchal, abusive cultural practices), in order to understand how "reflection on the similarities between the polygamy and same-sex marriage debates helps to illuminate the larger social issues of how to satisfy

individuals’ multiple relational needs and whether the state should endorse a single form of marriage.”

Soon after *Big Love*, Warren Jeffs, the leader and prophet of the FLDS, was put on the FBI’s 10-Most-Wanted List, captured, tried, and has now been convicted of assisting in the forced marriage and rape of a teenage girl; CNN’s Anderson Cooper has spent weeks in Southern Utah reporting on this private underbelly of the Utah desert; and marriage traditionalists are putting even more emphasis on the fact that marriage is between *one* man and *one* woman. On April 3, 2008, the FLDS’s Yearning For Zion compound in Eldorado, Texas was raided, approximately 450 women and children were removed, and for the next few months, an unprecedented amount of international media coverage followed the court cases and appeals, resulting in a Texas Supreme Court ruling that decided that there was not enough evidence for such a sweeping invasion, forcing District Court Judge Barbara Walter to sign an order that returned the children to their parents that June. Further court actions will be lengthy and no doubt stir much more publicity.

But the traditional versus the nontraditional sexuality or familial arrangement can’t be the entire source of the American imaginary’s anxiety about Mormonism. In the terribly important *Reynolds v. U.S.*, the opinion delineating whether or not polygamy can be a religious belief worth protecting, a long historical overview about polygamous practice reveals something the majority opinion felt the need to cite in its condemnation of how the Mormon Church had brought the “odious” practice of non-European people to the West. A curious fact: the “ecclesiastical

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48 On his show, AC360°, Cooper had covered the FLDS church so much from 2005–2008 that all the polygamy coverage warranted a bold-font category on the list of categories of frequently reported stories on the show’s homepage.

49 The mission statement on the conservative (and primarily evangelical) Family Research Council has become emphatic about making sure that we are understanding the “true” meaning of family: “Properly Understood, ‘families’ are formed only by ties of blood, marriage, or adoption, and ‘marriage’ is a union of one man and one woman.” Family Research Council, Marriage & Family, http://www.frc.org/marriage-family (last visited June June 25, 2009).


courts” of England, in charge of punishing polygamous offenses up until the time of James I, were deemed the most “appropriate trial[s] of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlements of the estates of deceased persons.”

Certainly the relationship between marriage and probate law in ecclesiastical courts is important in the history of Western jurisprudence; but in the quick histories the Court often trots out in its opinions, nuanced historical evidence is not usually in great abundance. So this rhetorical addition of the probate detail is striking because the questions at hand in Reynolds are not, at face value, necessarily probate questions. Instead, the Court was concerned with (among other things) the proper constitution of grand juries; the proper way of empanelling jurors; the proper admissibility of testimony; and whether or not polygamy was a practice deserving of religious freedom. But by referencing the ties between the history of marriage regulation and the history of probate regulation, the Court seems here to respond, however unawares, to the questions of death and celestial marriage that preoccupy not only the Mormon faith (as we’ve seen), but also all marriages that must negotiate the difficulty of making sense out of a hope for an eternity together with the dreadful pragmatics of death. Something about Mormonism reminds the Court that marriage law and death law might also be in their own, anxious eternal marriage. And our fears about this link can even make the Supreme Court, as we just saw, participate in and support the continuance of family at the expense of laws that might threaten the “traditional” family. More generally, something about religion is important here; why else, at least historically, would an ecclesiastical court be the place where matters of marriage and death would be adjudicated?

When Marx was introducing his “mysterious” concept of commodity fetishism, his analysis was decidedly religious. In the section entitled, “The Fetishism of the Commodity and Its Secret,” Marx writes, “A commodity appears at first sight an extremely obvious, trivial thing.” Of course, it’s not so obvious, and Marx attempts to work against simply thinking about the utility of a commodity. He wants us to be less obvious about our relationships with the commodities, things, and property that are circumscribing this odd world. He assures us, “[b]ut its [the commodity’s] analysis brings out that it is a very strange thing, abounding in metaphysical subtleties and theological niceties.” To begin to make his point, Marx introduces what becomes his famous table, an object made of dead wood, which almost begins to dance:

It is absolutely clear that, by his activity, man changes the forms of materials of nature in such a way as to make them useful to him. The

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52 Id. at 164–65.
53 See MARX, supra note 21, at 163–65.
54 Id. at 163.
55 Id.
56 Id.
form of wood, for instance, is altered if a table is made out of it. Nevertheless the table continues to be wood, an ordinary, sensuous thing. But as soon as it emerges as a commodity, it changes into a thing which transcends sensuousness. It not only stands with its feet on the ground, but, in relation to all other commodities, it stands on its head, and evolves out of its wooden brain grotesque ideas, far more wonderful than if it were to begin dancing of its own free will.\textsuperscript{57}

In order to illustrate his assertion about all the “theological niceties,” Marx rushes into a fantastical description of something both physical and metaphysical, a table on its head, spinning out “grotesque” and “wonderful” ideas.\textsuperscript{58} Marx gives us a sense of this table, an idea that is literally turned on its head, haunted by its abilities to be possessed by some kind of life, by using some religious terms and ideas.\textsuperscript{59} The table transcends its sensuousness by becoming, in a very strange way, religious—Marx takes a “flight into the misty realm of religion.”\textsuperscript{60} In that realm or religion “the products of the human brain [a “wooden brain”?] appear as autonomous figures endowed with a life of their own, which enter into relations both with each other and with the human race.”\textsuperscript{61} Dead things, we’re led to imagine, come alive in the religious idea; “the products of the human brain,” become animate, entering into all sorts of social relations.\textsuperscript{62} And for some reason, Marx calls this process “religious,”\textsuperscript{63} perhaps because he believes religion to be the realm that not only transcends the limits of sensuousness, but also because it’s a realm where one can imagine more readily dead things interacting as if they’re alive. It is in the afterlife, perhaps many of us hope, where we find the dead alive. So in the realm of probate, which worries about how things and people will relate, we have a curious form of morbid optimism—the will of our loves, and the property we possess, exchange, and transfer, can live on and on. Our inheritances, which always require our families, are hopefully our religious salvations.

Let’s look at some helpful scenes from HBO’s \textit{Big Love}. After having acclimated viewers to the shocking circumstances of a plural-marriage lifestyle over most of its first two seasons, the show began to delve more into what we might call the various curiosities (to a non-Mormon audience) of Mormon culture and history that obviously extends to a fundamentalist version of the faith that has not abandoned the principle of plural marriage.\textsuperscript{64} The scenery and setting in Utah

\footnotesize{\textsuperscript{57} Id. at 163–64. For a fascinating take on this table, see BILL BROWN, A SENSE OF THINGS: THE OBJECT MATTER OF AMERICAN LITERATURE 8, 27–30 (2003).
\textsuperscript{58} MARX, supra note 21, at 163–64.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 165.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} See Big Love (HBO 2006–2008).}
smacks of traditional Americana; indeed, the rise of the Mormon faith and the settlement of Utah have been termed by many as a truly American story.cé Yet what often fascinate us are the aspects of this milieu that seem mainstream, but aren’t quite. The history, faith, rituals, and theologies of the Church of Jesus Christ of Latter-Day Saints are not well known to a general audience, so the allusions to the particularity of the Mormon worldview—the oddities that seem out of place in the American heartland—become the points of agitating contact that might compel us to wonder: why are these Mormon differences both entertaining and unsettling? The family’s relation to death is one of these almost oddities.

Specifically, the penultimate episode of the second season, “Take Me As I Am” (directed by Jim McKay), is about the complexities of becoming and unbecoming “sealed.” In this installment, the first plural wife, Barb (played by Jeanne Tripplehorn) reaches out to her estranged, LDS mother, Nancy (played by Ellen Burstyn), who ceased to be in contact with her daughter once she became an apostate of the Mormon Church by following the principle of plural marriage. Upon reading that her liberal (for Mormons) mother, a widow, was about to be remarried to Ned (played by Philip Baker Hall), who had recently lost his wife, Barb yearns to be in contact. For Barb, who has become increasingly reluctant in her choice to add wives to her marriage over the run of the show, her mother and sister are part of not only a family she misses and loves, they also are part of her once “normal” LDS lifestyle. So once Barb learns that her eldest son, Ben (played by Douglas Smith) has a “testimony” of the principle himself (and starts to date identical twin daughters whose main ambition is to marry the same man), Barb experiences a crisis, questioning whether or not her choices have doomed her children to the same kind of anxiety and ambivalence she feels in her religion. She seeks out her mother, who agrees to take Ben away for the summer (where he could have monogamous behavior modeled for him so he could have, according to

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65 Laurie F. Maffly-Kipp, Religion and the Enduring Legacy of Joseph Smith Jr., in Joseph Smith Jr.: Reappraisals After Two Centuries 175, 187 (Reid L. Neilson & Terry L. Givens eds., 2008).
67 Big Love: Take Me as I Am (HBO television broadcast Aug. 19, 2007).
68 Id.
69 Id.
70 Id.
71 Id.
Barb, a choice in his marital destiny). She convinces her mother to let her children (and eventually, reluctantly, her) attend the wedding reception.

Once she and her children arrive at the wedding, Barb's sister, Cindy (played by Judith Hoag), quickly explains an interesting marital dynamic circulating around the nuptials of Nancy and Ned. Ned, apparently, has made it a condition of their wedding that they be "sealed in the temple," a coveted practice of worthy LDS members who have satisfied the requirements of their faith in order to have a temple recommend, gain access to the temple, and follow the ritual of sealing, for time and all eternity, the newlyweds. Being sealed together is a fascinating concept, especially because there are some conceptual difficulties that this episode economically emphasizes. The "heavenly father's" "new and everlasting covenant" of marriage uses familial sealing as a way to attain a strong spiritual and social foundation that will protect and guide the salvation of all the souls within the Mormon family. But this sealing also is thought of as a way to continue spiritually and physically in the afterlife. The specifically Mormon qualities of this concept have to do with where the idea that this kind of family attachment will lead if all goes well: the celestial (as opposed to terrestrial or telestial) kingdom.

As printed above, Doctrine and Covenants Section 132 states:

and if ye abide in my covenant, and commit no murder whereby to shed innocent blood, it shall be done unto them in all things whatsoever my servant hath put upon them, in time, and through all eternity; and shall be of full force when they are out of the world; and they shall pass by the angels, and the gods, which are set there, to their exaltation and glory in all things, as hath been sealed upon their heads, which glory shall be a fulness and a continuation of the seeds forever and ever.  

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72 Id.
73 Id.
74 Id.
75 Id.
78 These different kingdoms of the afterlife in the LDS' faith can be most quickly understood by utilizing the Church's glossary. See The Church of Jesus Christ of Latter-day Saints, Heaven and Eternal Reward, http://www.mormon.org/mormonorg/eng/basic-beliefs/heavenly-father-s-plan-of-happiness/heaven-and-eternal-reward (last visited June 17, 2009).
79 DOCTRINE AND COVENANTS, supra note 2, § 132:19.
In other words, one can become a god in this heavenly realm, but only if one marries, and marries well. Moreover, in the earlier teachings of the Mormon Church (and the current teachings of the fundamentalists), one should ideally also be married, be sealed, to multiple wives.\textsuperscript{80}

So here’s the problem with Ned and Nancy—and listen to how the people sound in the following descriptions (especially since the things we typically seal are \textit{things}—letters, jars, safes, doors, etc.): by Ned asking Nancy to be sealed in the temple to him, Nancy is required to be “unsealed” from Barb’s father first.\textsuperscript{81} But because the Church of Jesus Christ of Latter-Day Saints is a patriarchal religious tradition,\textsuperscript{82} Ned is not required to be unsealed from his first wife, Vera, in order to also be sealed to Nancy.\textsuperscript{83} Ned’s children are angry, both because Nancy is “liberal,” but also because, as Cindy puts it, “Ned’s children don’t want Ned to share Vera in the afterlife.”\textsuperscript{84} So a polygamist quandary then moves into the nonpolygamist’s ever after—should Ned be sealed to more than one wife forever? The fact that this predicament is even a real possibility speaks not only to a gray area in the Mormon church’s claim that they no longer practice polygamy,\textsuperscript{85} but also to the fact that a whole foundational, heavenly cosmos that guides so much of the Mormon worldview, the possibility of “celestial marriage,” is eternally braided in the principle of plural marriage. Doctrine and Covenants Section 132 then cannot be expunged from the sacred texts of the Mormon faith; so not only is polygamy a big part of the Mormon past (and an odd, embarrassing practice of the Church’s founding fathers), but it is also very much a part of the Mormon future—the afterlife, with countless souls, sealed, unsealed, and multiply sealed to various

\textsuperscript{80} \textit{See Jon Krakauer, Under the Banner of Heaven} 6–8 (2003).
\textsuperscript{81} \textit{Big Love: Take Me as I Am} (HBO television broadcast Aug. 19, 2007).
\textsuperscript{84} \textit{Big Love: Take Me as I Am} (HBO television broadcast Aug. 19, 2007).
\textsuperscript{85} That is, the afterlife is such an important concept for the LDS, and it doesn’t seem to have in place the same kind of restrictions for being “sealed” to multiple wives after death as it has for plural marriage in this life. A 26 June 2008 press release, “Protecting the Church’s Identity,” is just one of a number that have come from the Church lately, iterating the differences between the LDS Church and the FLDS Church, insisting that “The Church of Jesus Christ of Latter-Day Saints reiterates that it has nothing whatsoever to do with any groups practicing polygamy.” Press Release, The Church of Jesus Christ of Latter-day Saints, Protecting the Church’s Identity (Jun. 26, 2008), available at http://newsroom.lds.org/ldsnewsroom/eng/commentary/protecting-the-church-s-identity.

True, the Church did officially abandon the practice of polygamy in the 1890s, most prominently in Church President Wilford Woodruff’s 1890 Manifesto. See Irwin Altmann & Joseph Ginat, \textit{Polygamous Families in Contemporary Society} 36 (1996). But the assertion that it “has nothing whatsoever” to do with the practice of polygamy is not fully accurate since the Church has not disavowed its pioneer heritage, and, more for my essay’s concern, the issue of polygamy in the LDS afterlife.
family members. To put this theological worldview (that mirrors a probate worldview) more succinctly: in order to have a future beyond death, you need a family committed to marriage. Or, put more grimly: with no family, there is no future.\footnote{For a critique of futurity, see Lee Edelman, No Future: Queer Theory and the Death Drive 111–15 (2004).}

But the episode's writer, Eileen Myers, is only quickly critiquing the Church and its possible hypocrisies around the principle of plural marriage. What is more important is the showcase of the potential complications that one finds in the sealed eternities of these families trying to live like gods forever. Eternal salvation has a dizzying array of configurations, much like the present world. So even when one marries into an eternal life after death by way of a faith like Mormonism, there is no guarantee that you will be resurrected in the celestial kingdom as you had hoped. \textit{Big Love} does a remarkable job in pressing upon us that such deathly concerns are not the occasional musings of a religious people that has faith in an afterlife. There is such a bracing distress about one's salvation that the whole concept of an afterlife saturates the Mormon outlook (and ours the more we watch \textit{Big Love}). The eternal is not just the desire of an isolated soul hoping to get to heaven: it's a communal desire, or at least a familial desire, where the faithful are eager to have their beloved family members sealed to them forever.\footnote{Such a claim in nearly axiomatic. See LDS.org – Topic Definition – Eternal Life, http://www.lds.org (follow “Gospel Library” hyperlink; then follow “General Topics” hyperlink; then follow “E” hyperlink; then follow “Eternal Life” hyperlink) (last visited June 17, 2009). (stating that “[t]hrough the Atonement of Jesus Christ, everyone will receive this gift. Eternal life, or exaltation, is to live in God’s presence and to continue as families”) (citation omitted). Some histories and biographies of the Church’s founders, especially Joseph Smith, are helpful in understanding the origins of this worldview. See Fawn M. Brodie, No Man Knows My History: The Life of Joseph Smith 67–83 (1966); Richard Lyman Bushman, Joseph Smith: Rough Stone Rolling 281 (2005); D. Michael Quinn, Early Mormonism and the Magic World View 79–111(1998). For a contemporary perspective, see the Frontline and American Experience television documentary, The Mormons, (PBS television broadcast Apr. 30, 2007).}

So when circumstances require that Barb leave her mother's wedding celebration, we’re treated to a heart-wrenching moment between a daughter who desperately loves her mother, but is ripped apart, literally unsealed, from her because of the divergent theological takes on how one is to live the historical revelations of the Mormon Church. As Barb is on a threshold between her polygamous family and her prepolygamous family, she tearfully pleads for a relationship that could put aside the pressing concern about eternity that is keeping these two family members apart. Barb: “I don’t know if I’ll see you in the afterlife. If you’ll be with Daddy, or Ned, or if I’ll be with you, or Bill [her husband, played by Bill Paxton]. But I know, at the very least, I just want to see you in this life.” The two then hug, almost regretfully, before Nancy refuses to console her.
daughter. Nancy: “This is your one, big test.” Barb shakes her head; Nancy turns, and returns to the wedding that Barb can no longer attend. Barb stares after her mother, slowly looks back at her large, waiting family, and this scene dissolves into the episode’s last scene, where she returns to her bedroom with Bill. Nancy will not agree to Barb’s proposal to be concerned only with their relationship in the current life. Emotional intensity and sincerity aside, Nancy has been entrusted with a sacred, nearly legal duty. She had reminded Barb of her ultimate obligation a bit earlier, “You’re my daughter! I’m responsible for your eternal salvation!” Her obligation, her love and responsibility for her daughter, must thus keep them separated, for “time and all eternity.”

This episode of Big Love certainly portrays an impasse between a family about competing notions of afterlife and eternity in various strands of the Mormon faith. It also disturbs one into a sense of how marriage and family, polygamous or not, religious or not, are relationships that are inflected by an overwhelming sense of worry about “forever.” Just look at Google’s most popular website for wedding vows, “My Wedding Vows.” I chose the nondenominational examples to illustrate a sense of eternity’s essentialness:

Nondenominational Wedding Vow Sample 1

“I _______, take thee _______, to be my wife/husband.
To have and to hold,
in sickness and in health,
for richer or for poorer,
and I promise my love to you forevermore”

Nondenominational Wedding Vow Sample 2

I _______, take you _______, to be my wife/husband.
To share the good times and hard times side by side.
I humbly give you my hand and my heart
as a sanctuary of warmth and peace,
and pledge my faith and love to you.
Just as this circle is without end, my love for you is eternal.
Just as it is made of incorruptible substance,
my commitment to you will never fail. With this ring, I thee wed

Nondenominational Wedding Vow Sample 3

Before our friends and those so special to us here,
on this wonderful day of gladness and good fortune, I _______ take

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88 Big Love: Take Me as I Am (HBO television broadcast Aug. 19, 2007).
you _____ as my wife/husband, in friendship and in love, 
in strength and weakness, 
to share the good times and misfortune, in 
achievement and failure, to celebrate life with you forevermore

Here we have eternity, and we need to stop and explain why we no longer see 
marital vows as hinging on “till death do us apart.” Perhaps because we have 
property to inherit, and wills to write, death in marriage seems to not be so final: 
instead, there is a trend to want marriage (or family making) to stop time, to 
conceptualize the relationship as a relationship outside of time, confirming one of 
literary critic Lauren Berlant’s more provocative formulations about metaphors: 
that people “aspire to dead identities,” by which she means “dead” as “in the 
rhetorical sense designated by the phrase ‘dead metaphor.’” A metaphor is dead 
when, by repetition, the unlikeliness risked in the analogy the metaphor makes 
becomes so conventionalized as to no longer seem figural, no longer open to 
history: the leg of the table is the most famous....” Berlant’s part of the table, 
perhaps her favorite part of Marx’s table, no longer seems be open to time, and all 
that time can mean. The metaphor of the table having legs has become so common, 
so conventional, and so required that we fail to see that leggy table as alive. Have 
marrige and love and family, as they are necessarily cast by probate quandaries, 
become as dead as a leg of a table?

Hannah Arendt is crucial here because she explains that the 
experience of the eternal, which to Plato was arrheton (“unspeakable”), 
and to Aristotle aneu logou (“without word”), and which later was 
conceptualized in the paradoxical nunc stans (“the standing now”), can 
occur only outside the plurality of men . . . . Politically speaking, if to die 
is the same as “to cease to be among men,” experience of the eternal is a 
kind of death, and the only thing that separates it from real death is that it 
is not final because no living creature can endure it for any length of 
time.

Never ending might mean never living—or no longer living. (“The standing now” 
[and forever] of the table leg?) If we agree with Arendt (and Berlant), then 
suddenly another version of everlasting love begins to take conceptual shape: the 
wish for the experience of eternity is a curious form of hoping for a death that

89 MyWeddingVows, Non-Denomination Wedding Vows, http://www.mywedding 
vows.com /traditional-wedding-vows/non-denomination-wedding-vows (last visited June 
17, 2009).
90 LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS 
ON SEX AND CITIZENSHIP 60 (1997).
91 Id.
isolates, one where time and language and experience stop, or at least stop meaning. And if we then stitch this understanding of eternity into the kind of fetishism that preoccupied Marx, we have a version of eternal love as a kind of death that leaves us “outside the plurality of men [and other humans]” with our things.\textsuperscript{93} Perhaps we can then grasp another layer of the secret the commodity keeps: alienation [Entfremdung] might also be about separating ourselves from ourselves as we obsess about death, opening ourselves up to an existence only with things rather than people (or, we’re left with people who must be construed as things that will be attached to one another). If we’re not alienated, then we’re thought to have some sort of control over the productions, the fruits of our labor, where those things will go after we die, and also ourselves. But love, families, and the death that circumscribe those significant relationships give us a deadening option for life: the grand choice of a partner/spouse/wife/husband, which is often the precondition of your family, only further alienates you because it leaves you alone, separated, at the precise moment you’ve chosen to believe that you won’t be alone. The family, that set of relationships most often presumed to not be so marred by capitalism, the place that has historically been considered the private household (which Arendt’s work on eternity is trying to show as no longer being private), is stranding us in some “standing now.” It’s helping us feel alienated at the precise moment when we shouldn’t feel such things.

So here’s a great big mystery about the commodity of families (the wedding ring?), which is also a mystery about you (and how well you’ll negotiate your family’s social relations now and “forevermore”): if the family contract is one that is supposed to be sealed for time and all eternity (and if the souls will become things that can be sealed and resurrected in a very physical way in the afterlife), and if this is the logic that supports succession even if there is no legal instrument in place, then we’re stuck in an alienating condition, one wed (and dead) to the kinds of mystical, religious fetishism Marx famously explicates. Part of what the “theological niceties” such as love and marriage are doing, then, is locking people into the kind of familial connections that are as reified and as hard as wood. We learn to stand still with each other, “[i]dentities not live, or in play, but dead, frozen, fixed, or at rest.”\textsuperscript{94} People seal each other with a kiss (“You may now kiss the bride”), as well as with a will, in order to be together through emotions as much as through property (in this life and the next). And then they have eternity, and its obsessive, often religious, demands to endure in face of a terror we cannot survive. From this angle, the transcendence of sensuousness—the transcendence of the material conditions of this world—is a set of relationships we can see, as if in the “social hieroglyphic[s].”\textsuperscript{95} in the wills, the labors, of our love (and the property and things those wills negotiate as we struggle with ways to stay connected after

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{BERLANT, supra} note 90, at 60.

\textsuperscript{95} \textit{MARX, supra} note 21, at 167.
death). The tragic part of Marx’s mystical table that I always forget: this religious thing only stands on its head, generating some “grotesque ideas,” but it does not dance; it is not that figurative place of something dead once becoming alive: it is the grotesque ideas that become “far more wonderful than if it were to begin dancing of its own free will.” It’s a grotesque version of property’s (and by proxy your) afterlife, one with no free will (and I want all sorts of puns to jump to mind right now).

The point is this: as we start to spin out our own wonderful and grotesque ideas about love, marriage, death, and wills, religion, and Marx, we also need to start thinking of marriage and family commitments as wills in and of themselves, pondering the implications of making the family a supernatural relation of terror, longing, loss, and arrest. The Last Will and Testament that we are always making when we are in families, when we “I do,” is shot through with a deep connection between love and property that keeps us wishing that we could survive our deaths. The will is an explicit instrument of law, and the probate court makes up for wills that might not be there, and this legal realm keeps describing, securing, transforming, and codifying the terms of the family by way of the property of the person that will transcend the limits of her or his body, her or his “sensuousness,” which means her or his body, but also the very tactile relationships she or he has with people, places, and things. The will is like a revelation: even when we will become as dead as a table, we’re hoping there is still a way to make our wills extend indefinitely into some eternal future. The will is helping us think that we can do something religious: something like cheat death.

96 Id. at 163–64.
ANC president Jacob Zuma married his fourth wife, Nompumelelo Ntuli, in a closely guarded, traditional Zulu ceremony in the rural village of Nkandla, in northern KwaZulu-Natal, yesterday.

At his KwaNxamala homestead behind green security gates local police barred the media and daring wedding crashers while bodyguards monitored the premises as Zuma, 65—an unashamed traditionalist, appeased his ancestors.

Inside, a handful of Zuma well-wishers, including SA Road link’s chief executive Alan Reddy and businessman Abdul Rahim Malek, witnessed the traditional ceremony.

Jacob Zuma’s wedding to his fourth wife in early 2008, provides an interesting starting point for a discussion on family law, equality and custom. As the leader of the governing political party in South Africa, the African National Congress (A.N.C.), his private and public activities are worthy of some

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consideration. As the quotation above notes, not only does his wedding confirm his credentials as a Zulu traditionalist, but his guests included non-Zulu leaders of the business community in South Africa—an indication of his prominence, not just within his tribal community, but also as part of the wider South African elite. The presence of these prominent South Africans signifies a certain degree of approval or acceptance of polygamy. Indeed, one of the A.N.C.’s most admired members, the lawyer, Phyllis Naidoo, has admitted to paying lobolo for Zuma’s first wife, and other prominent business people have paid for his several weddings.

On the same day that Jacob Zuma was pursuing his fourth nuptials, one of South Africa’s most prominent gay activists also tied the knot. Since the South African Constitutional Court has mandated the government to enact legislation that would recognize gay civil unions, South Africa has witnessed an increase in the number of “gay marriages.” These developments are quite significant in a country where the human rights of gay men and lesbians have only officially been

2 Jacob Zuma’s public and private lives have been under intense scrutiny in the past few years, as he survived his dismissal as Deputy-President of South Africa and a rape acquittal (after a highly publicized case). He now faces a charge of corruption. Two of the major newspapers in South Africa have special reports on Zuma. See Jacob Zuma, Mail & Guardian Online: The Smart News Source, http://www.mg.co.za/specialreport/jacob-zuma (last visited June 21, 2009); SA Elections, http://www.saelections.co.za/ (last visited June 21, 2009).

3 Newspapers in South Africa reported that Jacob Zuma is planning to marry his fifth wife in a few months. See Zuma May Take Fifth Wife, NEWS24.COM, Feb. 17, 2008, http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2272263,00.html. Some have also added that in fact he also plans to marry a sixth wife, and that this has led to some controversy amongst his wives, particularly as to who would become the first lady if he is elected as President of the country. See Bongani Mthethwa & Subashni Naidoo, Jacob Zuma in for a bridal shower, TIMES (Johannesburg), Feb. 16, 2008, available at http://www.thetimes.co.za/News/Article.aspx?id=707756. South Africans go to the polls in April 2009. As leader of the African National Congress, Jacob Zuma is widely expected to become the President of South Africa.

4 Lobolo describes a man’s obligation to pay cattle, horses, money, or other property to the father of his intended bride in consideration of their marriage. See T.W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 195 (1991).

5 Id.


recognized in the past decade or so. The South African government, despite widespread homophobia in South Africa, has made a clear commitment to protecting the rights of gay men and lesbians.

It is the marrying of the traditional and the contemporary, and the constitutional endeavor to accommodate this reality that informs the analysis of polygamy in South Africa.

South Africa's transition from an authoritarian apartheid state to one premised on democracy and human rights was of global significance and one that would have a profound impact on evolving perceptions of democracy and good governance in Africa. The promise of democracy, as encapsulated in South Africa's expansive constitutional framework, one that embodied a range of civil and political rights, on the one hand, and social, economic and cultural rights, on the other, bode well for a continent beset by needless conflicts, widespread corruption, and seemingly intractable poverty. President Nelson Mandela, ushered in to lead this transformative project, embodied all the possibilities of this new "rainbow nation." Most significantly, this transformative constitutional project mandated a rethinking of the public and the private, recognizing that disadvantage and discrimination are often embedded in private arrangements and private relationships.

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8 See South Africa to Legalize Gay Marriage, MSNBC.COM, Nov. 14, 2006, available at http://www.msnbc.msn.com/id/15714036 (stating that South Africa was the first in the world to adopt a constitution prohibiting discrimination based on sexual orientation).


11 As the Kenyan human rights scholar, Makau wa Mutua has noted:

The construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms. South Africa was the first state to be reborn after the universal acceptance, at least rhetorically, of human rights ideals by states of all the major cultural and political traditions.

Makau wa Mutua, Hope and Despair For a New South Africa: The Limits of Rights Discourse, 10 HARV. HUM. RTS. L.J. 63, 65 (1997).


13 The Constitution Of The Republic Of South Africa [hereinafter 'CONSTITUTION'] provides that "A Provision of the Bill of Rights binds a natural or a juristic person . . . ." S. AFR. CONST. 1996 ss. 8(2) and "No person may unfairly discriminate directly or indirectly against anyone . . . ." Id. ss. 9(4). In addition, the Constitution also provides that, "[I]n order to give effect to a right in the Bill of Rights . . . ." the common law should be developed accordingly. Id. s. 8(3)(a). The Constitutional
Although off to a good start, the governing principles of the “rainbow nation” as embodied in the constitution, namely, dignity and equality, were soon to confront competing expectations as to the meaning and interpretation of these principles. These competing expectations surfaced in several contexts, but not unsurprisingly, became more apparent in the discussion around traditional law and gender equality. In this respect, the South African experience mirrors the situation in many countries in which the principle of gender equality appears to contradict cultural or religious norms regarding women’s role and status.

My paper will examine the evolution of South African legislation and constitutional jurisprudence in the face of competing imperatives, for example, between equality, legal pluralism, customary law/religious law, and the recognition of polygamy. I explore legislative attempts to regulate polygamous marriages through the Recognition of Customary Marriages Act (“the Act”), a statute designed to “transform spousal relations in customary marriages,” by providing for equality between the spouses, and by regulating all aspects of customary marriages, including their establishment, property relationships, and dissolution. This paper also examines the tensions between the principle of gender equality on the one hand, and the recognition of polygamy, on the other.

I. “COMPETING” NARRATIVES OF LIBERATION: AFRICAN NATIONALISM AND FEMINISM

The long history of colonialism and apartheid, and local and global efforts to eradicate apartheid meant that in the context of post-apartheid South Africa, the

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17 Gumede (born Shange) v President of the Republic of South Africa & Others 2009 (3) BCLR 243 (CC) ¶ 32 (S. Afr.).
18 Id. at ¶¶ 3, 24, 32.
19 This paper refers only to indigenous marriages, and does not address legislative attempts to regulate religious, especially Islamic marriages. There have been attempts by the South African government to address marriages conducted by Islamic law, but draft legislation has not yet been passed by Parliament. See Rashida Manjoo, The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Rights 3 (Harvard Law Sch. Human Rights Program at, Working Paper No. 08-21, 2007), available at http://ssrn.com/abstract=1115987.
discourse of feminism or gender equality had to “compete” with other liberatory discourses, including anti-racism, African nationalism, and cultural nationalism. Indeed the issue of gender equality only surfaced after determined attempts by South African women to ensure that women’s issues would not be overlooked in the new democratic dispensation. The Constitution of South Africa, especially the Bill of Rights, mediates the challenges of the competing discourses of feminism and African nationalism by recognizing indigenous institutions, and prioritizing the principle of equality. In addition, the Bill of Rights places the eradication of discrimination on the grounds of race on the same constitutional footing as the eradication of discrimination on the grounds of sex and/or gender.

My paper examines the regulation of African customary marriages within the overall context of political transformation and democratic nation-building in South Africa. The passage of the Act occurs against the backdrop of ongoing contestations about the meaning of the newly established democracy in the wake of centuries of colonialism and decades of apartheid. After the first democratic election in 1994, and the adoption of a comprehensive constitutional framework that included an expansive Bill of Rights, South Africans faced the task of creating a legal order consonant with the norms and values of an African state, underpinned by the principle of “ubuntu,” and away from the hegemonic tendencies of the colonial legal framework.

The new constitutional framework embraced the vision of a pluralistic society that strives to incorporate historically marginalized legal systems and institutions, including those of indigenous and religious minorities, within the broader South African legal framework. This incorporation, at least at the theoretical level, represented the rejection of the legacy of colonialism and apartheid and an ethnocentric bias that had relegated indigenous laws and institutions as inferior

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20 I use the term “compete” very loosely here. The central idea is that the eradication of gender inequalities was secondary to the eradication of racial inequalities and authoritarianism. The issues are discussed in Penelope E. Andrews, The Stepchild of National Liberation: Women and Rights in the New South Africa, in THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW 326–358 (Penelope E. Andrews & Stephen Ellmann eds., 2001) (describing numerous efforts and the competition for attention from closely related social concerns).

21 See PUTTING WOMEN ON THE AGENDA (Susan Bazilli ed., 1991); see also THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 64 (Sandy Liebenberg ed., 1995) (describing the specific efforts of South African women to encourage response to these issue under a democratic regime).

22 See infra notes 36-42.

23 Andrews, supra note 21, at 335.


25 In S v Makwanyane 1995 (3) SA 391 (CC) at 446 (S. Afr.) the court explored the concept of ubuntu in some detail, explaining the interlocking and underlying humanity that underpins indigenous cultures.
partners in law and governance. For black women, such rejection was especially significant, since a combination of apartheid and indigenous law in many ways rendered them perpetual minors. The modernist project of constitutionalism and human rights in South Africa and the recognition of gender equality and cultural and religious rights signaled a commitment to full citizenship for South African women. This was notable for an African country at the end of the 20th century, illustrating how the embrace of a pluralistic model of constitutionalism provided an important symbolic and real possibility for democracy in Africa.

The South African Constitution, in spirit and in text, embraced the rights of all South Africans to practice their culture and religion. Successive colonial and apartheid governments had ambivalent and contradictory policies regarding indigenous law and indigenous institutions. However, the “Africanization” of the new constitutional state was a precondition for democracy, and a clear signal that South Africa would shed its colonial and apartheid past. But such derogation from the country’s ignominious past generated a challenge with respect to the embedding of equality as the signature constitutional principle. Simply put, how was the Constitution to balance, on the one hand, the constitutional commitment to equality, while on the other finally providing formal recognition to indigenous laws and institutions? Accommodating this apparent paradox was key—since indigenous laws and institutions had always been relegated to a secondary or

26 The nefarious Black Administration Act 38 of 1927, now repealed, was designed to pigeonhole traditional leaders into disputes that rose only between black, and within a very narrow range of claims. See Martin Chanock, Law, State and Culture: Thinking about ‘Customary Law’ After Apartheid, 1991 ACTA JURIDICA 52, 55-57.
27 See Andrews, supra note 24, at 1496 n.82.
29 By using the term “customary law” I am sweeping with a broad brush. Customary law is not a unified system of law, but instead refers to a largely heterogeneous, written and unwritten, formal and informal, systems of law. In the Recognition of Customary Marriages Act 120 of 1998 s. 1(ii), “customary law” is defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.” (emphasis added).
31 Successive South African governments, and indeed the white population, had always regarded South Africa as a European country on the tip of the continent of Africa. The legal system, legal processes, the legal profession, and indeed the legal culture, had always been regarded as European, rather than African. The new democracy demanded a shift—a recognition that South Africa was an African country and formally engaged with the wider community of African states. See The Small Miracle: South Africa’s Negotiated Settlement (Steven Friedman ed., 1994).
inferior place within the national legal framework. These were not mere theoretical considerations. The struggle for democracy in South Africa involved both the struggle for women’s equality as well as the struggle of African people for the renewal and re-establishment of indigenous laws and customs. These two “competing” struggles generated their own liberatory discourses of gender equality and Africanism.

Both discourses sought an end to a particularized hegemony, namely racism and apartheid, on the one hand, and patriarchy, on the other, although patriarchy took on an especially racialized form in apartheid South Africa. Often these discourses were framed in terms of a debate that sought to prioritize one over the other, or at least provide some clarity with respect to the meaning of equality. These debates were at their most fraught when it came to women’s human rights. This debate was one that had occupied human rights advocates for some decades, and had spawned a vast literature about the role and status of indigenous institutions in contemporary constitutional frameworks that valorize the principle of gender equality.

Termed “the relativism versus universalism debate,” it sought to highlight competing approaches to the recognition of indigenous laws and policies, particularly in the face of demands for gender equality. After several rather disappointing decades of post-colonial neglect of gender equality on the part of African governments, despite formal promises of equality, feminist advocates have been more vocal about the need to have a “zero tolerance attitude” to gender equality. They have eschewed “relativist” approaches that seek to give primacy to indigenous laws and policies even when such laws and policies violate the principle of gender equality. South Africa, so recently decolonized, could therefore benefit tremendously from the lessons generated by the “universalism versus relativism” debate, and the advocacy strategies for gender equality flowing

32 Id.
33 See (UN)THINKING CITIZENSHIP: FEMINIST DEBATES IN CONTEMPORARY SOUTH AFRICA 7 (Amanda Gouws ed., 2005).
34 See id. at 1–6.
35 See id.
37 See Howard, Group versus Individual Identity, supra note 36, at 177–78.
38 “Zero-tolerance” is a term coined by former Mayor Rudolph Giuliani, in an attempt to wipe out crime in New York. See ANDREA MCARDLE, INTRODUCTION TO ZERO-TOLERANCE QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 1, 12 (Andrea Mc Ardle & Tanya Erzen eds.) (2001). Mc Ardle & Erzen are editors, the book is a collection of pieces written by different authors.
39 See HOWARD, HUMAN RIGHTS, supra note 36, at 17–18, 51.
from such debates. But South Africa was also in an optimal position to forge a
direction that might incorporate the most effective human rights approaches, those
that did not merely pit the demands of African nationalism against gender equality,
but could rather develop a nuanced strategy that was mindful not only of the
historical legacy of the marginalization of indigenous laws and institutions, but
also the ubiquitous subjugation of women.\textsuperscript{40}

In framing the fissures between the two discourses, namely African
nationalism and feminism, I am not suggesting a mere gender divide, namely, that
one is presumptively male, and the other female. In fact, in South Africa, lobbying
for the recognition of indigenous institutions was not just a male-only enterprise,
although it was largely so. And indeed, if one observes the support from Zulu
women for the acquittal of Jacob Zuma in his rape trial in 2006, one has to
conclude that significant numbers of Zulu women regard their traditional heritage
and identity as important.\textsuperscript{41} Conversely, the push for the absolute primacy of
equality, racial and gender, reflects not just the agitation of female advocates
(although their numbers were greater than men), but also men who were involved
in the constitution drafting process.\textsuperscript{42}

This paper will suggest that the desired goal of equality in South Africa may
feature similarities with Western feminists’ notions of equality, but may not
necessarily embrace all of these notions. South Africa, I will argue, provides what
may be considered a third way of straddling the equality conundrum that has so
bedeviled feminist analyses and discourse in the past few decades.\textsuperscript{43}

\textsuperscript{40} This nuanced approach has been advocated by several feminist scholars. See, e.g.,
Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and
Immigration, family, and Work, in Global Critical Race Feminism: An International

\textsuperscript{41} For a discussion of the Zuma rape trial, see Penelope Andrews, Democracy Stops at
my Front Door: Obstacles to Gender Equality in South Africa, 5 Loy. U. Chi. Int’l L.
Rev. 15, 18–21 (2007). I do not wish to simplify the contours of this issue. How, when,
and why ethnic identity surfaces as central or compelling markers of identity are best left to
anthropologists, sociologists, psychologists, or other scholars of demographics. I make
these statements based on empirical observations of a limited phenomena—in this case, the
Zuma rape trial.

\textsuperscript{42} See Catherine Albertyn, Women and the Transition to Democracy in South Africa,
in Gender and the New South African Legal Order 39, 54–63 (Christina Murray ed.,
1994).

\textsuperscript{43} See Celina Romany, Themes for a Conversation on Race and Gender in
International Human Rights Law, in Global Critical Race Feminism: An
Mohanty, Introduction to Feminist Genealogies, Colonial Legacies, Democratic
Futures xiii, xiii–xlii (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997);
Agnes Calliste & George J. Sefa Dei, Anti–Racist Feminism: A Conclusion to a Beginning,
II. THE CONSTITUTION AND TRADITIONAL LAW

The colonial authorities always displayed a certain ambiguity towards African cultural norms and traditional law. On the one hand, they condemned practices like polygamy, complaining that the polygamous husband, “had too much land, leisure and sex. Instead of working for an employer, as was his proper destiny, he battened in ease on the labor of his wives. African women, said the colonists, were hardly better off than slaves.”44

On the other hand, the colonial authorities wished to preserve indigenous custom as a means of control and co-option/co-operation from indigenous leaders.45 This was particularly so when an increasingly urban African population began to challenge colonial laws and policies.46 This legal dualism became the basis of colonial, and later the apartheid government’s system of judicial and tribal administrators. In short, this dualism became the “cornerstone” of the system of separate development and apartheid.47

In light of the ambiguous approach to indigenous laws and institutions, the Constitution references the need for the recognition and incorporation of indigenous laws and structures in several significant ways. First, the Bill of Rights reifies the pluralistic character of the constitutional framework, while at the same time remaining faithful to the ideals of equality and dignity, the values that anchor the Bill of Rights. Section 30 provides that “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision in the Bill of Rights.”48 In addition, Section 31 of the Bill of Rights ensures that “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community—to enjoy their culture, practice their religion and use their language.”49 This section also provides that legislation may be enacted that recognizes “marriages concluded under any tradition, or a system of religious, personal or family law,”50 provided such recognition does not

44 HAROLD JACK SIMONS, AFRICAN WOMEN: THEIR LEGAL STATUS IN SOUTH AFRICA 15, 21–22 (1986).
46 SIMONS, supra note 44, at 42–43. As H.J. Simons notes: “Traditional leaders, the diviners, herbalists and chiefs, had lost ground to the new elite. Whites regretted the erosion of tribal discipline and the decay of customs that formerly kept young people in check. Tribalism acquired merit in the eyes of the administration.” Id.
48 S. AFIR. CONST. 1996 s. 30.
49 Id. s. 31(1)(a).
50 Id. s. 15(3)(a).
contradict “other provisions of the Constitution.” These provisions arguably relate to issues of equality and non-discrimination. Reinforcing the freedom of association for all South Africans, the Bill of Rights further provides that those members of indigenous communities have the right “to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

In addition to the rights found in the Bill of Rights, the South African Constitution explicitly recognizes and protects both the institution and the role of traditional leaders.

Section 211 specifically provides that traditional authorities in furthering customary law “may function subject to any applicable legislation and customs.” The Constitution also mandates courts of law to “apply customary law when that law is applicable, subject to the Constitution” and relevant laws that “specifically deals with customary law.”

To realize the multicultural goals promoted in the Constitution, and to ensure the pursuit and promotion of these rights, the Constitution sets up a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. With a directive to be “broadly representative of the main cultural, religious and linguistic communities” that make up the population of South Africa, as well as to “broadly reflect the gender composition” of the country, the Commission is constitutionally mandated to pursue a range of laudable goals. These include the goal “to promote and develop peace, friendship, humanity, [and] tolerance” among the various “cultural ... communities, on the basis of equality; non-discrimination and free association.”

The implementation and enforcement of these rights is bolstered by the constitutional requirement that the courts, including traditional courts, interpret these rights as to “promote the spirit, purport and objects of the Bill of Rights.” In addition, the rights embodied in the Bill of Rights are to complement “other rights or freedoms that are recognised or conferred by ... customary law” with the

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51 Id. s. 15(3)(b).
52 Id. s. 31(1)(b).
53 Id.
54 Id. s. 211(2).
55 Id. s. 211(3).
56 Id. s. 185.
57 Id. s. 186(2)(a).
58 Id. s. 186(2)(b).
59 Id. s. 185(1)(b).
60 Id. s. 185(2).
61 Id. s. 39(2).
62 Id. s. 39(3).
caveat that the rights or freedoms encapsulated in indigenous law do not contradict those found in the Bill of Rights. 63

Some feminist and human rights scholars and advocates have been reluctant to portray indigenous laws and institutions as antithetical to women's rights, appreciating that the characterization of such a binary often downplays the significance of a rights culture that is located within indigenous laws and institutions. 64 Unlike the dominant Western approach to rights discourse and practice, centered on the individual, in indigenous laws and practice, rights are often affiliated to communal interests. Some scholars have argued that the communal approach trumps individual rights and therefore subordinates those in the community, like women and children, who tend to be more vulnerable. 65 In many ways, the South African Constitution attempts to reach a more contextualized approach to indigenous law, acknowledging its salience to the lives of indigenous communities, whilst at the same time recognizing that indigenous laws and institutions should not be immunized from the democratizing prerogatives and rights culture embodied in the Constitution.

In one of its earlier decisions, the Constitutional Court in effect noted that customary law, like the common law, was fluid and always evolving, and therefore capable of conformity with the Bill of Rights. 66 In fact, Justice Sachs has noted that:

[W]e reject the once powerful common-law traditions associated with patriarchy and the subordination of servants to masters, which are inconsistent with freedom and equality . . . . I am sure that there are many aspects and values of traditional African law which will also have

63 Id.

64 See, e.g., T.R. Nhlapo, The African Family and Women's Rights: Friends or Foes?, 1991 ACTA JURIDICA 135, 143–45 (arguing that African community values, as presently constituted, act to discriminate against women and children, but that “it would be perverse to argue for the abolition . . . of the role of the wider family and the community in marriage” because “[t]he positive aspects of [these] communal value[s] are too clearly demonstrated”).

65 See T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 5 (1995) (countering that “[i]t does not follow from an absence of rights that women and children were systematically abused, neglected or treated like chattels”); see also I. Currie, The Future of Customary Law: Lessons from the Lobolo Debate, 1994 ACTA JURIDICA 146, 151 (“[T]he constitutional protection of a right to 'cultural life' may require a court to take account of the structural complexities and social ramifications of . . . customs before considering their revision or abolition in the light of egalitarian principles.”); Nhlapo, supra note 64, at 143–45 (describing the discriminatory effect of African community values on women and children).

66 See Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) at 834 (S. Afr.) (noting customary law's ability to “develop and be interpreted, to future social evolution”).
to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order.67

In a more recent decision, the Constitutional Court, however, struck down a customary law of intestate succession, deeming such law contradicted the principle of equality.68

III. THE CONSTITUTION AND GENDER EQUALITY

The South African Constitution outlines clearly a commitment to gender equality. The Founding provisions emphasize the values that underpin South Africa’s democracy, including the principles of non-racialism and non-sexism.69 Equality is the quintessential value, and the key provisions with respect to gender equality are found in the Bill of Rights. The Bill of Rights incorporates equality as the primary right, providing an elaborate definition of equality, including that “everyone is equal before the law” and everyone “has the right to equal protection and benefit of the law.”70 In addition, the section outlining equality provides that, “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”71

The Bill of Rights “applies to all law,” thereby making no distinction between laws of a public nature, and those that govern private relations.72 This horizontal application of the Bill of Rights allows some possibilities for bringing private arrangements within the ambit of the Bill of Rights. This section is strengthened by the constitutional mandate that legislation, customary law and the common law, be interpreted in a way that furthers the “spirit, purport and objects of the Bill of Rights.”73

The expansive nature of the Bill of Rights, including the proscription of both direct and indirect discrimination in the section on equality,74 has been heralded by feminist scholars who have argued for some time that structural discrimination can only be eroded by a clear commitment to a substantive, as opposed to a formal,

67 S v Makwanyane 1995 (3) SA 391 (CC) at 518 (S. Afr.).
68 Bhe & Others v Magistrate, Khayelitsha, & Others 2005 (1) SA 580 (CC) at 585 (S. Afr.).
69 S. AFR. CONST. 1996 ss. 1–6.
70 Id. s. 9(1).
71 Id. s. 9(3).
72 See id. § 8(1).
73 Id. s. 39(2).
74 See id. s. 9.
equality. Indeed, the Constitutional Court has reiterated its commitment to a substantive equality in several of its judgments. Not only does the Constitution embody many transformative possibilities regarding equality for women, it also recognizes the intersectionality of many forms of discrimination, and particularly those that black women confront. Indeed, it has been argued that by treating the elimination of gender discrimination as just as urgent as the elimination of racial discrimination, the South African Constitution is a marked improvement to the approach taken in the American constitutional framework.

Several bodies are mandated in the Constitution to implement and enforce the human rights listed in the Bill of Rights. Of particular note, in the pursuit of women’s equality, is the establishment of a Commission on Gender Equality to “promote respect for gender equality,” and to “monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.” Another constitutionally mandated body to enforce equality is the Human Rights Commission, although arguably, because its reference is so broad, it may relegate the function of the pursuit of gender equality almost entirely to the Gender Commission.

The Bill of Rights also incorporates a range of rights to ensure that women are secure in their person and that they are shielded from violence, in both the public and private sphere. In addition, the Bill of Rights incorporate a range of socio-economic rights that arguably could go some way to redressing the marginalized economic status of women, thereby ensuring that whilst their civil and political rights are adequately protected in the Constitution, that the root causes of the


76 See Hugo v President of the Republic of South Africa & Another 1996 (4) SA 1012 (CC) at 1023 (S. Afr.); see also Fraser v Naude & Another 1998 (11) BCLR 1357 (CC) at 1360 (S. Afr.) (noting that the prospect of success via procedural means has to be weighed against “the interest of justice”).

77 The Bill of Rights provides that “[d]iscrimination on one or more of the grounds listed . . . is unfair unless it is established that the discrimination is fair.” S. Afr. Const. 1996, s. 9(5).

78 See Andrews, supra note 14, at 326–35.


80 Id. s. 187(2).

81 The Human Rights Commission is established under Section 184 of the South African Constitution. See id. s. 184. I have described in an earlier article how the establishment of two bodies to implement human rights has generated a controversy amongst feminist advocates in South Africa. See Andrews, supra note 14, at 330–31.

82 S. Afr. Const. 1996 s. 12(1).
disadvantage and discrimination from which many women suffer from, namely poverty, are also addressed.83

IV. THE CONSTITUTIONAL COURT AND GENDER EQUALITY

In a series of cases since its inception in 1994, the Constitutional Court has underscored the primacy of equality.84 These cases include those involving the rights of HIV-positive persons not to be discriminated against in their employment;85 the right of prisoners to vote;86 the rights of unmarried fathers in relation to adoption of their children;87 the rights of permanent residents not to be treated unfairly in comparison to citizens in the workplace;88 the rights of homosexuals to engage in consensual sexual conduct;89 and the rights of African girls and women not to be discriminated against under indigenous customary law.90

In March, 2004, the Constitutional Court had occasion to consider a challenge to the legal principle of male primogeniture as it applies to the African customary law of succession,91 the Intestate Succession Act,92 and the Black Administration Act93 and regulations flowing therefrom. The applicants in one case where the two

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83 The Bill of Rights incorporates a range of socio-economic rights, including the right of access to housing, health care, and education. Id. ss. 26, 27, 29.
84 See, e.g., Hoffman v South African Airways 2000 (1) BCLR 1211 (CC) 1220–22 (S. Afr.) (providing the standard for evaluating allegations of inequality under the Constitution); President of the Republic of South Africa v Hugo 1997 (6) BCLR 708(CC) at 725–726 (S. Afr.) (finding that a Presidential Act that prima facia discriminates on the basis set forth in Section 8(2) is entitled to a presumption that the discrimination is fair by virtue of Section 8(4)); Brink v Kitschoof 1996 (6) BCLR 752 (CC) at 769 (S. Afr.) (permitting multiple grounds for alleging discrimination under Section 8(2)).
85 Hoffman v South African Airways 2001 (11) BCLR 1211 (CC) at 1213–15 (S. Afr.).
86 August & Another v Electoral Commission & Others 1999 (3) SA 1 (CC) at 3 (S. Afr.).
87 Fraser v Naude & Another 1998 (11) BCLR 1377 (CC) at 1358–59 (S. Afr.).
88 Larbi-Odam & Others v MEC for Education (North-West Province) & Another 1998 (1) SA 745 (CC) ¶ 15 (S. Afr.).
89 National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 2000 (2) SA 1 (CC) at 23 (S. Afr.).
90 Bhe & Others v The Magistrate, Khayelitsha 2005 (1) SA 581 (CC), at 594–600, 621–22 (S. Afr.).
91 Id.; Shibi v Sithole & Others 2005 (1) SA 580 (CC) (S. Afr.); South African Human Rights Commission and Women’s Legal Center Trust v President of the Republic of South America and Minister for Justice and Constitutional Development 2005 (1) SA 580 (CC) (S. Afr.). The Court combined the three cases since they all concerned the question of intestate succession under African customary law. Bhe, 2005 (1) SA 581 (CC) at 593 (S. Afr.).
92 Intestate Succession Act 81 of 1987.
93 Black Administration Act Act 38 of 1927.
minor daughters of the deceased and in the other a sister of an unmarried deceased brother. All three applicants had been denied the right to be declared heirs; male representatives instead stood to inherit the property of the deceased. The other applicants were the Women’s Legal Center Trust, a women’s legal advocacy organization in Cape Town, and the South African Human Rights Commission, a state institution mandated by South Africa’s Constitution to pursue human rights in South Africa. Both parties intervened in the case to persuade the court that Section 23 of the Black Administration Act violated the South African Constitution by unfairly discriminating against women in that it violated their right to dignity and equality and by denying children their Constitutionally guaranteed protections to safety and security.

The two central issues in the cases were the constitutional validity of Section 23 of the Black Administration Act, which administered the intestate deceased estates of Africans. This section provided that “all movable property belonging to a Black and allotted by him or accruing under Black law or custom to any women with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.”

The second issue was a constitutional challenge to the principle of primogeniture. The thrust of this rule is that only a male who is related to the deceased may inherit in the absence of a will. Women may inherit when named in a will.

In practice this meant that generally it was the eldest son, or the father or male cousins and uncles who were entitled to become heirs. The principle mirrors

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94 Bhe, 2005 (1) SA 581 (CC) at 594 (S. Afr.).
95 See id. at 597.
96 See id. at 598.
97 See id. at 599.
99 Id. s. 28.
100 Black Administration Act 38 of 1927 s. 23.
101 Id. Section 23 also provided for other administrative matters regarding the administration of black estates. Id. This section in effect set up a parallel system of intestate succession for Black South Africans, some aspects of which mimic the Intestate Succession Act, the system set up for White South Africans. Compare id. with the Intestate Succession Act 81 of 1987 s. 1.
102 Bhe & Others v Magistrate, Khayelitsha, & Others 2005 (1) SA 580 (CC) at 593 (S. Afr.).
103 Id. at 617.
104 Id. at 615.
105 It is worth nothing that these issues are not necessarily only those of affluent or middle class individuals. For example, the Bhe property consisted of a temporary informal shelter including the property on which it stood as well as miscellaneous items of movable materials. See Id. at 596.
other aspects of indigenous law in which women are treated as perpetual minors, always under the tutelage of a male. 106

The rationale underpinning the exclusion of women was based on the fact that:

(W)omen were always regarded as persons who would eventually leave their original family on marriage, after the payment of roora/lobola, to join the family of their husbands. It was reasoned that in the new situation—a member of the husband’s family—they could not be heads of their original families, as they were more likely to subordinate the interests of the original family to those of their new family. It was therefore reasoned that in their new situation they would not be able to look after the original family. 107

In its judgment the Court examines the place of indigenous law in South Africa’s constitutional framework, recognizing its importance in South Africa’s culturally diverse society, rendering it both subject to and protected by the Constitution, “accommodated, not merely tolerated” 108 by South African law. Referring to the neglect of the positive aspects of customary law, including its inherent flexibility, its preference for consensus-seeking and co-operation and its “nurturing of healthy communitarian traditions,” 109 customary law was nonetheless subject to the Bill of Rights.

Dealing with the constitutionality of Section 23 of the Black Administration Act, the Court held that in light of its history and context, the section is part of an Act which was a “cornerstone of racial oppression, division and conflict” 110 and that South Africans will take years to eviscerate its legacy. 111 The Court gave short shrift to the argument that Section 23 reflects the pluralist nature of South African society by giving recognition to customary law. The Court noted the racist and destructive roles in entrenching division and subordination—a role which “could not be justified in any open and democratic society.” 112

The Court examined the rule of male primogeniture and held that the rule unfairly discriminates against women and illegitimate children and declared it unconstitutional. Recognizing that such was, however, no longer the setting in which the rules existed, nonetheless, the communitarian context within which

106 It is not just widows, however, who are disadvantaged by the rule of male primogeniture. The rule discriminates against daughters, younger sons (since the eldest is deemed the heir), and extra-marital children. See id. at 620.
107 Id. at 646 (quoting Magaya v Magaya 19993 L.R.C. 35 (Zimb.)).
108 See id. at 604.
109 See id. at 606.
110 See id. at 612–13.
111 See id. at 613.
112 See id. at 616.
customary rules or succession developed, with its “safeguards to ensure fairness in the context of entitlements, duties and responsibilities” and its aim to “contribute to the communal good and welfare,” was noteworthy.\footnote{See id. at 617.}

The Court pointed to the ensuing hardship that results from the application of the rule “in circumstances vastly different from their traditional setting.”\footnote{See id. at 619.} The Court in its judgment cited the importance of customary law in the organization of communal societies, whilst acknowledging both the changing nature of indigenous communities, particularly the role of urbanization in restructuring traditional relationships.\footnote{See id. at 617–18.} The Court also recognized the evolutionary nature of indigenous law which continues to evolve and develop “to meet the changing needs of the community.”\footnote{See id. at 618 (quoting Alexkor Ltd & another v The Richtersveld Community & Others 2004 (5) SA 460 (CC) at ¶ 53 (S. Afr.). This view reflects the holdings in courts in other parts of Africa. Id. at 650. For example, the Nigerian Court of Appeal struck down an Igbo succession rule which discriminated against women. Id. (citing Mojekwu v Mojekwu [1997] 7 N.W.L.R. 305 (C.A.) (Nigeria).)}

In its remedy, the Court ordered that all intestate estates must now be administered under the Intestate Succession Act, thereby creating a non-racial uniform system across the country.\footnote{Id. at 659.} The Court made the order retrospective to April 27, 1994, the day when the first Constitution of South Africa came into effect.\footnote{Id. at 631.}

In a recent judgment, the Court had occasion to consider the constitutionality of a section of the Recognition of Customary Marriages Act that precluded wives in customary marriage entered into before the passage of the Act, from the benefits and protections offered in the Act.\footnote{See Gumede (born Shange) v President of the Republic of South Africa & Others 2009 (3) BCLR 243 (CC) ¶¶ 2–3 (S. Afr.).} The disputed section of the Act provided that “the proprietary consequences of a customary marriage entered into” before the passage of the Act “continue to be governed by customary law.”\footnote{Recognition of Customary Marriages Act 120 of 1998 s. 7(1).} While the property regime of marriages entered into after the promulgation of the Act was in community of property, marriages governed by customary law provided that the family head (the male), is the owner of all the family property, and has full control over such property.\footnote{Gumede 2009 (3) BCLR 243 (CC) ¶ 3 (S. Afr.) (citing KwaZulu Act on the Code of Zulu Law 16 of 1985 s. 20).} The applicant in this case, who had entered into a customary marriage in 1968, and therefore outside of the Act’s protections, and who had instituted divorce proceedings against her husband, claimed that the property regime of customary marriages violated her rights to equality under the
Constitution. A lower court had found in her favor, and the Constitutional Court confirmed that finding, holding that the impugned section of the Act, as well as the customary law provisions, "patently limits the equality dictates of our [the] Constitution." Writing for the majority, Justice Moseneke observed the "patriarchal domination over, and the complete exclusion of, the wife in the owning or dealing with family property unashamedly demeans and makes vulnerable the wife concerned and is thus discriminatory and unfair. It has not been shown to be otherwise, nor is there any justification for it."124

These decisions discussed above suggest that the Constitutional Court, although mindful of the need to respect the cultural rights of all South Africans, are committed to ensuring that all members of indigenous communities enjoy those rights without distinction or discrimination.

V. GENDER EQUALITY AND POLYGAMY

In the opening pages of this article, I juxtaposed the wedding of Jacob Zuma to his fourth wife, with the wedding of a prominent gay couple. These twin matrimonial celebrations reflect the liberal ideology of the South African constitutional framework, and bode well for the toleration and acceptance of many private lifestyles and forms of family arrangements (at least at the formal level).

But arguably, the recognition of the rights of gay people to marry is somewhat different than the recognition of polygamy. The institution of polygamy is embedded in patriarchal traditions that raise profound questions about the volition of women who choose to enter into a polygamous arrangement. Whether the exercise to marry a polygamous husband is a free choice or not, it is arguably circumscribed by economic pressures. The reality is that women's continuing subordinate status in South Africa curtails the free exercise of her choice in a range of situations, including whom she chooses to marry. While women continue to

122 In terms of the divorce degree, she was likely to receive only a very small portion of the marital property. See Id. ¶2.
123 Id. ¶46.
124 Id.
126 For a persuasive discussion on the many ways that polygamy violates a women’s right to equality, see Susan Deller Ross, Polygyny as a Violation of Women’s Right to Equality in Marriage: An Historical, Comparative and International Human Rights Overview, 24 DELHI L. REV. 22 (2002).
earn less than men and are regarded in ways that reinforce stereotypes about their role and status, it is difficult to talk about free choice in choosing a spouse.

This paper seeks to locate the cultural practice of polygamy within a narrative of progress towards gender equality embodied in the South African constitutional framework. This paper suggests that although polygamy is discriminatory (it applies only to a male with several wives), that the legal regulation may in fact provide rights, albeit limited ones, for women in polygamous marriages. In addition, the legal regulation of customary marriages may lead to two contradictory consequences. For those who do not find polygamy objectionable, the Recognition of Customary Marriages Act may have the effect of mainstreaming a cultural practice that has historically been “othered” and viewed as “uncivilized.” Conversely, for those who oppose the practice of polygamy, legal regulation may in fact lead to the decline of the institution.

One of the most enduring narratives in the field of African legal history is the cementing of the subordinate status of African women through the imposition on colonial rule and in particular, indirect rule through the system of chiefs. In South Africa, Martin Chanock and H. J. Simons have written extensively of this process of subordination. In their scholarship they persuasively illustrate how colonial authorities, in the wake of growing urbanization and the need for labor, utilize traditional law and institutions to ensure social control, and thereby a steady stream of labor. Very often, the reification of traditional law on the part of the colonial authorities coincides with resulting disadvantage and discrimination for women.

Despite the colonial trope of female subjugation, my paper attempts to unsettle some of the standard accounts by suggesting that women in polygamous marriages may attempt to exercise some agency and a level of autonomy over their sexuality. This paper suggests that even in a seemingly irredeemably patriarchal society like South Africa, that includes the institution of polygamy, women continue to exercise some autonomy and resistance, including seeking legislative protection. This private resistance on the part of women is difficult to measure empirically. It is easier to highlight women’s resistance to political repression, through, for example, mass protests like the anti-pass campaigns of the 1950s.


See supra notes 44–61.

Id.

See Chanock, supra note 26, at 58; SIMONS, supra note 44, at 60–65.

See Chanock, supra note 26, at 58; SIMONS, supra note 44, at 60–65.

For an account of women’s responses to polygamy, see Dominique Meekers & Nadra Franklin, Women’s Perceptions of Polygyny Among the Kaguru of Tanzania, 34 ETHNOLOGY 315, 315–29 (1995).

See HILDA BERNSTEIN, FOR THEIR TRIUMPHS AND THEIR TEARS 89 (1985); CHERYL WALKER, WOMEN AND RESISTANCE IN SOUTH AFRICA 189–201 (1992).
The account in this paper is one of contestation that attempts to contextualize women's resistance in the face of colonial and apartheid attempts to establish control. It also shows how women, through the choices they make, try to influence the substance and implementation of customary law. My paper suggests that it is not just customary law, but traditional social relations—now increasingly individualized—that may lead to greater equality for women.

In traditional African society polygamy was associated with affluence and status. It was largely viewed as a "stabilizing tool," because of its capacity to generate large families, which was seen as "a necessary social insurance." In addition, a man with many wives was an indication of his sense of social responsibility, and added to his social prestige. As one of Africa's prominent leaders, the late Jomo Kenyatta, noted:

> In Gikuyu the qualification to hold a high office is based on the family and not on property. It is held that if a man can control and manage effectively the affairs of a large family, it is an excellent testimonial on his capacity to look after the interest of the tribe whom he will also treat with fatherly love and affection as though it were all part of his family.

These words may reflect the sentiments of a bygone era, but arguably they still resonate with notable sections of the African population in South Africa and elsewhere.

H.J. Simons, an earlier South African feminist, has noted that polygamy enabled all women to marry and bear children. This was no small consideration in societies where no individual, male or female, could live independently of a family, and there was no possibility of gainful employment outside of the household. Simons also observes that the monogamous marriage would have been lonely for women, and that polygamy enabled wives to share the burdens of household labor, child-bearing and child-rearing.

In the historical context where traditional households were self-sufficient and where families consumed what they produced, it is clear that important socio-

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135 Id.
136 Id. at 85.
137 Id.
138 SIMONS, supra note 44, at 81--82.
139 Id. at 81--82; see also Rhoda Howard, Women's Rights in English-speaking Sub-Saharan Africa, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 46, 60 (Claude E. Welch, Jr. & Ronald I. Meltzer eds., 1984) ("From the woman's point of view, polygamy provides other women to share in child rearing, husband care, and possible economic ventures ....").
economic considerations supported the institution of polygamy.\textsuperscript{140} The question therefore arises whether polygamous unions comport with the contemporary realities of an increasingly urbanized South Africa, with a constitutional framework unequivocally committed to gender equality.

Some scholars have argued, for example, that polygamy degrades women and reduces them to a servile status.\textsuperscript{141} This is particularly the case of forced marriages, where young women are coerced by their families to marry powerful older men.\textsuperscript{142} Others have noted that the institution of polygamy has survived largely by force of habit and that it no longer serves a useful economic or social purpose.\textsuperscript{143} They observe that as the proportion of urbanized, educated and professional women increase that the incidence of polygamy will wane.\textsuperscript{144}

Ironically the Act may in fact contribute to a decline in polygamous unions. It is my contention that the safeguards for women in the Act, as well as the underlying principle of equality in South Africa’s Constitutional and legal framework, may in fact render polygamy an increasingly quaint, possibly obsolete institution. As mentioned earlier in this paper, polygamy thrived during an earlier socio-economic and political period, in societies that tolerated prejudiced attitudes towards women. In fact, in those societies such attitudes institutionalized women’s subordination in legal codes.\textsuperscript{145} The imperatives of equality may become harder to reconcile with an antiquated institution like polygamy, although Jacob Zuma’s example may contradict this observation.

The decline of polygamy as an institution may also be suggested from the approach embodied international human rights instruments. For example, the major women’s human rights document, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),\textsuperscript{146} specifically calls on governments “[t]o modify the social and cultural patterns of conduct of men and women” that are based on notions of the “inferiority or the superiority”\textsuperscript{147} of men

\begin{footnotesize}
\begin{enumerate}
\item Felicity Kaganas & Christina Murray, Law, Women and the Family: The Question of Polygamy in a New South Africa, in AFRICAN CUSTOMARY LAW 116, 130 (T.W. Bennett et al., eds., 1991); see also Ojwang, supra note 134, at 69–70 (stating that socio-economic considerations helped to bring polygamy into existence).
\item See, e.g., SIMONS, supra note 44, at 81.
\item See Howard, supra note 139, at 61–62. To a large extent, the Act recognizes these problems and therefore mandates that women must exercise free choice in choosing a marriage partner. Recognition of Customary Marriages Act 120 of 1998.
\item Kaganas & Murray, supra note 140, at 131.
\item See id.
\item Id. art. 5(a).
\end{enumerate}
\end{footnotesize}
and women and that reinforces “stereotyped roles for men and women.”\textsuperscript{148} CEDAW calls for the elimination of discrimination in marriage, and particularly that men and women are imbued with the “same rights and responsibilities during marriage and at its dissolution.”\textsuperscript{149}

Similarly, the Universal Declaration of Human Rights in its Preamble refers to the “dignity and worth of the human person and the equal rights of men and women . . . .”\textsuperscript{150} The International Covenant on Civil and Political Rights provides that states “shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution.”\textsuperscript{151} It seems therefore apparent that at the international level, at least, the institution of polygamy is hard to justify in the face of a formal commitment to gender equality.

The Recognition of Customary Marriages Act purports to provide a measure of protection for women and to ensure a somewhat conditional equality.\textsuperscript{152} But these protections may not be effective in the context of entrenched patriarchal attitudes in South Africa, and in light of several impediments that continue to thwart the quest for gender equality. One impediment is continued economic inequality and a persistent poverty.\textsuperscript{153}

Despite admirable economic gains for women in the new constitutional dispensation, black women still labor under enormous disadvantages. They are the least educated, still work disproportionately in menial and unskilled labor, and are still subject to widespread discrimination based on a combination of their race, gender, class, and geographical location.\textsuperscript{154}

In one particular area, namely the HIV/AIDS epidemic, poverty has severely impacted on women’s human rights, and accounts for the disproportionate impact of the epidemic on women.\textsuperscript{155} The fact that polygamy legitimizes a man’s ability to have more than one sexual partner, does not mean that the capacity of wives in

\textsuperscript{148} Id.
\textsuperscript{149} Id. art. 16(1)(c).
\textsuperscript{152} Recognition of Customary Marriages Act 120 of 1998.
polygamous relationships to demand that their husbands engage in safe sex practices is strengthened by legislative oversight of such marriages.\footnote{156}

Another impediment to equality that women experience relates to the extraordinarily distressing levels of private violence that women are subjected to, systematically, and with apparent impunity.\footnote{157} I have argued elsewhere that this violence is triggered and reinforced by several interlocking layers of masculinities that make legal protections alone somewhat ineffectual.\footnote{158}

The law may in fact protect women in polygamous unions, but is this sufficient to eliminate underlying notions about women’s subordinated status and role in society?

VI. POLYGAMY AND THE RECOGNITION OF CUSTOMARY MARRIAGES\footnote{159}

As mentioned earlier, successive colonial administrations and the apartheid government regarded polygamy as “a heathen practice confined to the unenlightened.”\footnote{160} The issues of polygamy and its continued existence therefore provided the post-apartheid government with the opportunity to either abolish the practice of polygamy outright, or to bring the practice in line with the new constitutional dispensation. The government chose the latter.\footnote{161}

As the Bill of Rights has increasingly affected many areas of South African law, it has also begun to affect family law, and particularly the rights of women in marriage. Until fairly recently, women in African customary unions had scant legal protection, particularly if their husbands embarked on a subsequent civil law (Christian) marriage.\footnote{162} Under the now repealed Black Administration Act, the later marriage automatically extinguished the first.\footnote{163}

The Recognition of Customary Marriages Act represents an attempt by the South African government to deal with the anomalous situation of women in

\footnote{156} See id. at 18 (discussing the difficulty women have convincing their male partners to use condoms during sexual intercourse).


\footnote{159} For an earlier version of this discussion, see generally Andrews, supra note 24.

\footnote{160} Kaganis & Murray, supra note 140, at 119.

\footnote{161} For a critique of the Act, see D.I. Chambers, Civilizing the Natives: Marriage in Post Apartheid South Africa, 129 DAEALUS Fall 2000 at 101, 111–21.

\footnote{162} See id. at 102–04; Black Administration Act 38 of 1927 s. 22(7).

\footnote{163} To cure the inequity in this situation, in 1988 the Black Administration Act was amended to preserve the property rights of women in customary unions. Specifically it provided that the marital rights of women in customary unions were not affected by subsequent civil marriages. See Marriage and Matrimonial Law Amendment Act 3 of 1988.
customary unions being outside the ambit of formal protections provided to women who are married according to civil law. The passage of the Act also satisfied the South African government’s obligations under international law, including CEDAW,\textsuperscript{164} the African Charter on Human and Peoples’ Rights,\textsuperscript{165} including the Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,\textsuperscript{166} and the International Covenant on Civil and Political Rights.\textsuperscript{167} Indeed, in the Preamble\textsuperscript{168} to the Act, several goals are articulated, including one that provides for the “equal status and capacity of spouses in customary marriages.”\textsuperscript{169} In a purposive break from the colonial and apartheid past, in which customary law was relegated to a place of legal insignificance, the Act repeals several colonial and apartheid-era laws that pertained only to the Black population.\textsuperscript{170} As Deputy-Chief Justice Mosebenke recently noted in relation to the Act:

It [the Act] represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages ..... entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary “unions.”\textsuperscript{171}


\textsuperscript{168} See id., at art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”).

\textsuperscript{169} Recognition of Customary Marriages Act 120 of 1988 Preamble (emphasis added).

\textsuperscript{170} These laws were: the Black Administration Act 38 of 1927, the Transkei Marriage Act 21 of 1978, the KwaZulu Act on the Code of Zulu Law, Act 16 of 1985, and the Natal Code of Law, Proclamation No. R151 of 1987.

\textsuperscript{171} Gumede (born Shange) v President of the Republic of South Africa & Others 2009 (3) BCLR 243 (CC) ¶ 16 (S. Afr.).
It is difficult to assess the impact of the Act on the principle of gender equality. The Act places customary marriages on the same footing as those that pertain to civil (Christian) marriages. This formal recognition of customary marriages gives effect to the spirit and intent of the Constitution, namely, to ensure that “everyone has the right” to engage “in the cultural life of their choice.” In essence, the dominant approach of the constitutional framework is one of legal parity between the various cultural and religious norms, but always with an eye to the maintenance of equality, despite the recognition of such legal parity. In addition, the Act does not just suggest a nod to gender equality, but by repealing the many racially discriminatory laws that only Africans were subjected to under colonialism and apartheid, the Act also confirms the commitment to racial equality.

But one could read into the provisions of the Act a commitment to gender equality. By providing full recognition to customary marriages, it may arguably improve the status of wives within these marriages. The Act explicitly incorporates the principle of equality between the spouses, stating that:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

The legacy of unequal control and acquisition of property for women in customary marriages no doubt prompted the drafters of the Act to ensure that women would not continue to be deprived of the right to control and own property. The Act therefore provides that a customary marriage “is a marriage in community of property and of profit and loss between the spouses,” but the Act makes provision for the spouses to enter into an ante-nuptial contract that “regulates the matrimonial property system of their marriage.”

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173 These laws were the Natal Code of Law, Proclamation R151 of 1987, the KwaZulu Act on the Code of Zulu Law, Act 16 of 1985, the Transkei Marriage Act 21 of 1978, and the Black Administration Act 38 of 1927.
175 This may be so despite the argument about the wider issue of polygamy, namely that the institution is symbolic of patriarchy.
176 Recognition of Customary Marriages Act 120 of 1998 s. 6.
177 Id. s. 7(2).
178 Id. s. 7(2). This section provides that: “A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an
The Act provides that a husband in a customary marriage “who enters into a further customary marriage with another woman” must apply to a court to “approve a written contract” to “regulate the future matrimonial property system of his marriages.”\(^{179}\) These provisions found in the Act reflect a clear desire on the part of the legislature to ensure that wives in customary marriages are afforded a range of protections that previously they had been denied, and consequently to ensure a baseline equity during the subsistence and conclusion of a customary marriage.\(^{180}\)

The Act sets out certain conditions to validate customary marriages, including that the parties to the marriage not be minors, and that full consent is given to the marriage.\(^{181}\) The Act further requires that customary marriages must be “negotiated and entered into or celebrated in accordance with customary law.”\(^{182}\) Where the prospective spouse is a minor, the Act provides for the consent of parents or guardians, and in the absence of such parental or guardian consent, the Act provides for permission to be obtained from the Minister of Justice and Constitutional Development, or a government official.\(^{183}\)

The Act imposes a duty on the parties to a customary union to register their marriage within twelve months of the marriage, and provides that if a registering officer doubts the validity of a customary marriage, he or she may refuse to register such marriage.\(^{184}\) The Act also provides that “any person who satisfies a registering officer that he or she has a sufficient interest” in the marriage may “enquire into the existence of the marriage.”\(^{185}\) The Act also provides that failure to register does not affect the validity of the marriage.\(^{186}\) It is unclear why the Act imposes a duty, and then in the same section directs that failure in carrying out such duty does not affect the validity of the marriage. This section provision may reflect a recognition of the reality that a larger proportion of customary marriages occur in the rural areas, where the parties to such marriages may be unfamiliar with the requirements of the Act as a result of distance and illiteracy.\(^{187}\)

\(^{179}\) Id. s. 7(6).


\(^{181}\) Recognition of Customary Marriages Act 120 of 1998 s. 3(a)(i)–(ii).

\(^{182}\) Id. at s. 3(1) (b).

\(^{183}\) Id. s. 3(3)(a)–(b).

\(^{184}\) Id. s. 4.

\(^{185}\) Id. s. 4(5)(a).

\(^{186}\) Id. s. 4(9).

\(^{187}\) This consideration also appears to underlie the issue of determining the age of a minor. The Act provides that: “If the age of a person who allegedly is a minor is uncertain..."
Although the Act seems to envisage a man with one or more wives, some provisions of the Act suggest that women may in fact embark on more than one union with a man. For example, the Act states that a man and woman who are in a customary marriage may marry each other in a civil ceremony under the "Marriage Act" if *neither* of them is a spouse in a subsisting customary marriage with any other person. With the recognition of gay civil unions, questions may also arise about the validity of gay polygamous unions.

The Act provides that a customary marriage can only be dissolved by a court decree on the ground of irretrievable breakdown, protecting wives in these marriages against desertion. Bringing customary marriages into the mainstream of family law, the Act provides that the dissolution of customary marriages is governed by the Mediation in Divorce Act and the Divorce Act.

Despite the commitment to gender equality in most of the provisions of the Act and its putative protection for wives in these unions, for feminist advocates the most contentious aspect is the recognition of polygamous unions. The issue of the legal recognition of polygamy has always been a difficult one for women advocates to address. It is hard to argue that the institution of polygamy does not discriminate against women. As I have mentioned earlier in this paper, international human rights law has persistently recognized the equal treatment of men and women in marriage, and it is hard to argue that polygamous unions actually reflect such equal treatment. In addition, the symbolism of polygamy, with its apparent benefit to males, and the arguable reification of patriarchal norms, does not comport with societies that have made a formal commitment to equality, like South Africa. Interestingly, Judge Posner has weighed in on the issue of polygamy, raising several arguments against the practice. One such argument is that polygamy limits the freedom of contract for women, because "[i]n most polygamous cultures a woman cannot make an enforceable contract to be a man’s or is in dispute, and that person’s age is relevant for purposes of this Act, the registering officer may in the prescribed manner submit the matter to a magistrate’s court... which must determine the person’s age..." *Id.* s. 5(2).

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188 *Id.* at s. 10 (1) (citing Act 25 of 1961, as the "Marriage Act").
189 *Id.* (emphasis added).
190 *Id.* s. 8(1).
192 Divorce Act 70 of 1979.
193 *See supra* text accompanying notes 72–74.
194 For a comprehensive debate on the issues, see generally FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES (Mai Yamani ed., 1996) (introducing Islamic feminism by examining the history of Islamic laws, identifying obstacles to gender equality, and highlighting the organized feminist movements in the Muslim world); Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136 (1997) (arguing that feminism and cultural relativism share common grounds and could work together).
only wife . . . . " 196 Another argument is that it "undermines companionate marriage" in several ways, including more repression of women, increasing "the agency costs of marriage," and encouraging greater promiscuity in the wider culture. 197

Polygamy, when considered in light of other indigenous family law institutions, such as lobolo, 198 the levirate 199 and the sororate, 200 raises troubling questions about the patriarchal underbelly of indigenous law. These institutions, individually and in combination, suggest that men are still considered the breadwinners and dominant partners in marital relationships. They therefore belie the formal commitment to gender equality as outlined in the Act.

In South Africa, this situation rests uncomfortably with the overall context of constitutional democracy and gender equality. Indeed, a recent Constitutional Court challenge to a section of the Act that allowed the property consequences of indigenous marriages entered into prior to the promulgation of the Act, to stand, was thrown out as violating the equality provisions of the Constitution. 201 The impugned provisions meant that wives in customary marriages were subjected to the marital power of the husband, and could not hold or manage property. Writing for the majority, Deputy Chief-Justice Moseneke observed that such a property system "strikes at the very heart of the protection of equality and dignity," 202 of the Constitution, and that it should therefore be rejected, since "the government has advanced no justification for the discrimination." 203

Whether polygamous unions will decline or not based on these assessments is yet to be seen. The reality is, however, that polygamy is practiced fairly widely, and that legal protection for women in polygamous unions is vital.

196 Id. at 253.
197 Id. at 255–60 (noticing that "wives in a polygamous system have more incentive to engage in extramarital sex than wives in a monogamous system. A related point is that the legion of young bachelors that a polygamous system creates increases the demand for extramarital sex on the part of men as well as of women . . . . ").
198 See supra note 4.
199 See BENNETT, supra note 4, at 126–28 (explaining that under the levirate, when a woman's husband dies, she is obliged to marry one of her deceased husband's brothers or other male relatives).
200 See id. (explaining that under the sororate, when a man's wife dies while she is still of child bearing age, he was given one of his deceased wife's unmarried sisters or other female relative in marriage).
201 See Gumede (born Shange) v President of the Republic of South Africa & Others 2009 (3) BCLR 243 (CC) ¶ 49(S. Afr.).
202 Id. ¶ 36.
203 Id. ¶ 49.
By recognizing the reality of polygamous unions, the South African legislature gives effect to its constitutional promise of allowing everyone to practice the culture or religion of their choice. For a pluralist constitutional democracy, such latitude is crucial. But such recognition also suggests that the South African government is not prepared to make the hard choices that are necessary to ensure that the pursuit of gender equality is not derailed. Even though the Act is a celebration of cultural diversity, it also reflects a continued reticence about gender equality. As I’ve tried to argue in this paper, while polygamy may still be fairly widely practiced in South Africa, in fact, the President is a polygamist, it is hard to make the argument that polygamy comports with gender equality.

The recognition and celebration of South Africa’s many cultural and religious communities should not detract from the reality that the Constitution has centered equality and dignity as primary values. The substance and symbolism of polygamy is hard to square with gender equality and dignity for women. The Recognition of Customary Marriages Act as a practical matter has the possibility of providing considerable protections for women in polygamous marriages. The Act represents a justifiable practical decision on the part of the legislature. But the protections found in the Act are merely a palliative for the underlying realities that pressure women into relationships that provide them with very limited choices, and that arguably erode the benefits of dignity and full citizenship that they are entitled to. At some point in the future, South Africa’s image as a progressive democracy with an admirable Constitution will be questioned in light of the continued toleration of a patriarchal institution like polygamy.

I started this article with reference to Jacob Zuma’s fourth marriage in order to highlight the acceptance of the practice of polygamy, as well as the coexistence of this practice in a society that also allows same-sex unions. In the last month I’ve traveled to South Africa and had occasion to informally speak with a few indigenous chiefs. What I’ve discovered is a very healthy dialectic about the place of indigenous laws, customs and institutions within the broader constitutional framework. This dialectic involves local communities, their leaders in the Congress of Traditional Leaders of South Africa, the national parliament, and the courts, specifically the Constitutional Court, and it is one that may ensure that the character and substance of indigenous laws will evolve in ways that honors the spirit of the Constitution.204

Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children

Mary Anne Case

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© 2009 Mary Anne Case, Arnold I. Shure Professor of Law, University of Chicago Law School. This paper is part of the author’s broader project on Feminist Fundamentalism, which also includes, inter alia, a version published in WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS (Martha Albertson Fineman & Karen Worthington eds., 2009); Mary Anne Case, Feminist Fundamentalism and Constitutional Citizenship, in DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP (Joanna L. Grossman & Linda C. McClain eds., 2009) [hereinafter Case, Constitutional Citizenship]; and Mary Anne Case, Feminist Fundamentalism and the Baby Markets, in BABY MARKETS: MONEY, MORALS AND THE NEOPOLITICS OF CHOICE (Michele Goodwin ed., forthcoming 2010) [hereinafter Case, Baby Markets]. Portions of this paper, and of the broader project, were presented at conferences on Competing Paradigms of Rights and Responsibility: Children in the Discourses of Religion and International Human Rights at the Emory School of Law; Baby Markets at De Paul Law School; Working From the World Up: Equality’s Future at the University of Wisconsin; Women’s Equal Citizenship at Hofstra Law School; Gender and Family Responsibility at the University of Sussex; The Road to Equality: Are We There Yet? at the Thomas M. Cooley Law School; and Constitutionalizing Women’s Equality at the University of California, Berkeley; at Law and Society 2008 and LatCrit 2007; and at faculty colloquia at the law schools of the University of Alabama, Cornell, Georgetown, the University of Iowa, Rutgers Camden, Seton Hall, the University of North Carolina, and the University of Chicago as well as at the University of Chicago Gender and Sexuality Workshop and the Princeton University Program in Law and Public Affairs. I am grateful to organizers and participants in those events, particularly Amy Baehr, Ava Baron, Cynthia Bowman, Maxine Eichner, Martha Ertman, Martha Fineman, Jose Gabilondo, Joanna Grossman, Sally Goldfarb, Michele Goodwin, Dirk Hartog, Beth Hillman, David Hollander, Pnina Lahav, Jamie Mayerfeld, Linda McClain, Larry Rosen, Kim Lane Scheppele, Mike Seidman, Gerald Wettlaufer, Wibren van der Burg, and Viviana Zelizer; as well as to Emily Buss, Peggy Cooper Davis, Jim Dwyer, Chris Eisgruber, Robert George, Nan Keohane, Rachel Rebouche, Cliff Rosky, Cass Sunstein, Walter Wadlington and Deborah Widiss for their brainstorming help; to Jake Glazeski, Lyonette Louis-Jacques, Deborah Megdal and Margaret Schilt for their reference assistance; and to the Arnold and Frieda Shure Fund and Princeton University’s Crane Fellowship in Law and Public Affairs for support.
I. INTRODUCTION

The equality of the sexes, and the instantiation of that equality in the repudiation of “fixed notions concerning the roles and abilities of males and females,”¹ are fundamental commitments on which all levels of government in the United States must follow through, not only in lawmaking, but in hortatory pronouncements, funding decisions, and necessary interventions into the family, such as child custody and adoption decisions. Not only in public schools and government-funded educational programs, but in state-licensed private schools and home schooling, they must ensure that girls and boys receive equal opportunity. And evidence of commitment to sex equality should be at least as assiduously enquired into and at least as positively weighted as a prospective adoptive or custodial parent’s commitment to providing a child with religious training, something many decision makers seem to enquire into and weigh favorably, often without much apparent attention to the substance of the religious beliefs. As things now seem to stand, however, when repressive religious beliefs are pitted against secular feminist ones, the religious beliefs often seem to begin with a presumption to respect which is even more deserved by, but often not granted to, the feminist ones.

Therefore, at a time when so many different religious fundamentalisms are demanding legal recognition—particularly when it comes to control over children, whether within the family, in the schools, or in the broader society—I want to vindicate something I have come to call feminist fundamentalism, by which I mean an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles.²

What it might mean in practice for feminist fundamentalism to operate as a necessary constraint on state action is, for any legal system, particularly tricky when that state action involves children. Many who are themselves personally and professionally committed to sex equality in law and life are also committed to honoring other values, including religious freedom, cultural diversity, personal and family autonomy, and sharp limitations on government interference in private life.

² In Case, *Constitutional Citizenship*, supra note *, I explain at length that while the term “fundamentalism” is used in various ways in various contexts, as I use the term, the hallmark of fundamentalism is an inability or unwillingness to compromise.
and individual choice. Properly interpreted, however, existing U.S. law already commits us as a nation to sex equality as a priority, as I will demonstrate. I will also work through concrete examples of what this might mean in practice for governmental interactions with a wide variety of families with children, ranging from civilly united lesbian couples in Vermont to the members of the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) in Texas.

II. SEX EQUALITY IS A PARTICULAR AS WELL AS A UNIVERSAL VALUE

I could build my vindication of feminist fundamentalism on international human rights norms, because many feminist fundamentalist commitments are not only in accord with, but also independently mandated by, these norms, while some cultural or religious commitments to women's subordination or to fixed sex roles conflict with these norms. Instead, for several reasons, I shall make my case on the basis of U.S. constitutional law.

Nation-states like the United States, as well as individuals such as myself, can have feminist fundamentalist commitments. Focusing on these commitments helps dissolve any perceived dichotomy between feminist or liberal universalism on the one hand and local cultural commitments on the other by highlighting the fact that we, the people of the United States, as well as those elsewhere in the liberal, feminist, constitutional West, have our localized cultural commitments, too, which are at least as important to us, and as entitled to protection and respect, as the local cultural commitments of others are to them. In seeking to dissolve the dichotomy between liberal universalism and cultural particularity, I only wish to bracket, not to deny, disparage, or obviate, universal human rights claims. The fact that some of our local norms are required by and others are at least consistent with universal human rights norms is an independent justification for demanding respect for our norms, quite apart from their cultural significance to us; just as the fact that some other cultural norms violate or are in tension with universal human rights norms is a basis for denying such norms respect notwithstanding their cultural significance. My claim is simply that in addition to whatever force our norms derive from their consistency with universal rights norms, they can also derive additional independent force from the fact of their imbeddedness in and centrality to our particular culture.

Equality and freedom with respect to sex and gender are high among the national cultural commitments of the United States and of the other Western constitutional democracies I have studied as a comparativist. They are also, for some, religious commitments as well. The cultures produced by commitment to sex equality and liberty are at least as extraordinary, fragile, and in need of defense as cultures more generally recognized as unique and endangered, such as those of, say, the hunter-gatherers of Papua New Guinea. Very few cultures over the history or territorial expanse of the world have embraced commitments to sex equality, to the repudiation of fixed sex roles, or to the integration of the sexes, and they
remain at risk.\(^3\) I happen to be contingently lucky that my own personal feminist fundamentalist commitments are pretty close to those embraced by the constitutional culture in which I live, although I am just old enough to have developed them as my personal commitments before the U.S. Supreme Court enshrined them in constitutional jurisprudence.\(^4\)

There are two main ways of formulating the principle behind a norm against the denial of equal protection on grounds of sex. The first is that women should not be subordinated, by the law or, more broadly, by men. The second is that sex should be irrelevant to an individual’s treatment by the law, and, more broadly, to his or her life chances. On this latter view, “fixed notions concerning the roles and abilities of males and females” are anathema when embodied in law, even in law that does not in any articulable way subordinate women to men.\(^5\) And it is this latter view, which repudiates fixed sex roles as well as female subordination, which has become our national constitutional orthodoxy, enshrined in an unbroken line of U.S. Supreme Court case law since the 1970s.\(^6\)

My use of religiously inflected terms such as orthodoxy and anathema in this context is deliberately intended to press several analogies to the discourses of religion. First, just as, for example, the new constitution of Iraq provides that “[n]o law that contradicts the established provisions of Islam may be established,”\(^7\) so in the United States, no law that contradicts the equality of the sexes may be established. Together with racial equality and the nonestablishment of religion, the equality of the sexes is among the very few commitments the existing U.S. constitutional order makes fundamentally binding on government whenever it acts or speaks. Secondly, just as a shared commitment to the principles of Christianity or to Islam can work itself out in importantly different ways among different denominations or communities of believers, so a commitment to sex equality, like commitments to, for example, freedom of speech or religious liberty, although widely shared among liberal constitutional nation-states, can be spelled out in importantly different ways by different constitutional cultures.

My case for feminist fundamentalism could be made with respect to any number of other constitutional orders, including the Canadian and European legal systems I have studied as a comparativist, but it would need to be made in a

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\(^3\) Id.

\(^4\) I explain further the origins of my commitments in Mary Anne Case, *No Male or Female*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* (Martha Albertson Fineman ed., forthcoming Dec. 2009).


\(^7\) [Constitution] § I, art. 2, First, A. (Iraq).
culturally as well as legally specific way.\textsuperscript{8} Thus, for example, a feminist fundamentalist perspective on the French legal system would have to take account of both \textit{parité} and \textit{mixité}, as well as the interaction of these specifically French feminist commitments with other fundamental French values. As French President Nicolas Sarkozy said, “The meaning, the values, of French ‘identity’ is clear. It means laicity, sexual equality, opportunity. I believe in a mix, not in communitarianism, and, when you forget those national values, communitarianism is what you get.”\textsuperscript{9} That the French mix is somewhat different from the American, or, for that matter, the Dutch, the British, the Canadian, or the German, leads France, famously, to answer the question of whether Muslim girls may wear \textit{hijab} in public school classrooms differently than these other nations have, although each of these nations, like France, is also committed to the equality of the sexes.\textsuperscript{10}

III. THE U.S. SUPREME COURT’S ARTICULATION OF SEX EQUALITY AS A PRIORITY

Although both religious freedom and family autonomy are protected by the Constitution of the United States, the Supreme Court has also made clear that:

the family itself is not beyond regulation in the public interest . . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as \textit{parens patriae} may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other

\textsuperscript{8} I set forth at greater length my definition of feminist fundamentalism and its implications for both individuals and nation states in comparative perspective in Case, \textit{Constitutional Citizenship}, supra note \textsuperscript{*}.


\textsuperscript{10} In France, a ban on the wearing of headscarves by pupils in public schools was driven by the French fundamentalist commitment to laïcité, which, contingently and fortuitously, happened to have been worked out historically in opposition to Catholicism and not originally in opposition to the display of Muslim particularity. A similar longstanding fundamental constitutional commitment to secularism led to a similar ban in Turkey, which was upheld by the European Court of Human Rights (ECHR) as being within Turkey’s margin of appreciation. But the petitioner in the Turkish case, Leyla Sahin, completed her education, still veiled, in a university in Austria, which has no comparable commitment to secularism. More recently, the British House of Lords, invoking, not secularism, but the British value of reasonable compromise, sided with the governors of a state school, who were prepared to allow their pupils, the overwhelming majority of whom were Muslim, to wear a uniform veil, but not the more all-encompassing jilbab. For further discussion, see Mary Anne Case, \textit{Feminist Fundamentalism and Constitutional Citizenship}, supra note \textsuperscript{*}. 
ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.

... Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.\textsuperscript{11}

When the state does exert its regulatory power over children and the family, it must do so consistently with its fundamental commitments, including those to equality on grounds of sex as well as race. Among regulations of the family in the public interest are, for example, laws mandating that parents support their minor children.\textsuperscript{12} In the \textit{Stanton} case, in 1975, the U.S. Supreme Court held that it would be unconstitutional for Utah to require a divorced father to support his son until age twenty-one, but his daughter only until age eighteen. The Court explained:

A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. ... If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.\textsuperscript{13}

In the nineteenth and early twentieth century, Justices of the Supreme Court had been willing to go along with society's sex-role stereotyping. Concurring in a judgment that the state of Illinois could deny a license to practice law to Myra Bradwell, a married woman, Justice Bradley wrote in 1873:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of

\textsuperscript{11} Prince v. Massachusetts, 321 U.S. 158, 169–70 (1944) (citations omitted) (upholding the application of laws prohibiting child labor against a woman who had taken her nine year old niece and ward unto the streets of Brockton, Massachusetts to preach and distribute religious pamphlets).

\textsuperscript{12} See \textit{id.} at 165.

womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases. 14

Since the 1970s, however, as the Stanton case indicates, the United States Supreme Court, interpreting the Equal Protection Clause of the Constitution, has consistently held views such as those expressed by Justice Bradley in the Bradwell case to be not only outdated as a descriptive matter, but impermissible as a normative matter as a basis for governmental decision making. 15 More generally, the Supreme Court has held all sex stereotypes to be anathema when embodied in law or in other government action.

In one of his last important opinions, Nevada Department of Human Resources v. Hibbs, Chief Justice Rehnquist reaffirmed that we in the United States have so strong and well-established a constitutional orthodoxy on matters of sex and gender—an orthodoxy not simply of sex equality but of no governmentally endorsed sex-role differentiation in all matters including those related to family and child-rearing—that Congress has prophylactic power under Amendment XIV, Section Five to enforce it on the states. 16 Accordingly, to fight the long-standing, now heretical, “pervasive sex-role stereotype that caring for family members is women’s work,” 17 Congress can impose on the states as employers the Family and Medical Leave Act (FMLA), which mandates that persons of both sexes, not just women, can get leave from their employers for what Martha Fineman calls their inevitable or derivative dependency, that is to say for their own illness or that of close family members, as well as to care for their young children. 18

The Hibbs opinion completes the circle opened in Stanton. When Justice Blackmun’s Stanton majority opinion declared: “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas,” there was a subtle lack of parallelism in the formulation (“only the male,” not “the male only”). 19 Women, the Stanton court held, were welcome in both the public and private spheres, but what of men? “Women’s activities and responsibilities are increasing and expanding,” Blackmun

15 Stanton, 421 U.S. at 14–15.
17 Id. at 731.
19 Stanton, 421 U.S. at 14–15.
Indeed they were, but were men's to the same extent? In his majority opinion upholding the FMLA, Rehnquist perfects the parallelism, holding, in effect, that it is no longer solely "the female [who is] destined . . . for the home and the rearing of the family,"21

According to Rehnquist, Congress has prophylactic power to target through the FMLA "the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest":

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver . . . .23

It is in several respects particularly noteworthy that Rehnquist was the author of the Hibbs opinion. Rehnquist was notoriously a latecomer to acceptance of the current constitutional law of sex discrimination’s repudiation of distinctions between the roles of men and women. While in the Office of Legal Counsel, he unsuccessfully urged the Nixon Administration to oppose the Equal Rights Amendment, accusing ERA supporters of "a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes" as well as of "overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the woman's traditionally different role in this regard."24 As an Associate Justice, he regularly dissented from decisions striking down rules that distinguished on their face between males and females, although he did concur in Weinberger v. Wiesenfeld,25 which, like Hibbs, concerned sex distinctions in the benefits offered parents of young children.26 In that case, plaintiff Stephen Wiesenfeld, who was left with the sole responsibility for the care of his infant son Jason Paul when his wife Paula, the principal wage earner for her family, died in childbirth,27 challenged a law offering Social Security survivor's benefits only to widows, and not to widowers with young children.28

20 Id. at 15.
21 Id. at 14.
22 Hibbs, 538 U.S. at 738.
23 Id. at 736.
26 Id. at 637–38 (maj. op.).
27 Id. at 639.
28 Id. at 641–42.
Because Rehnquist saw as the sole legislative purpose for survivor’s benefits to “make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent, should that parent desire to remain in the home with the child,” he found it “irrational to distinguish between mothers and fathers when the sole question is whether a child of a deceased contributing worker should have the opportunity to receive the full-time attention of the only parent remaining to it.”

Even so, Rehnquist was not yet fully convinced that a man would find his place in the home. The Wiesenfeld case was one of many sex equality cases argued by Ruth Bader Ginsburg, and the only one in which Rehnquist did not vote against the position for which Ginsburg had advocated. Years later, when Ginsburg had joined him on the Supreme Court, Rehnquist asked her, “Tell me this: did he really take care of the baby?” Ginsburg, who had officiated at the wedding of Jason Paul Wiesenfeld, himself now a lawyer, could assure Rehnquist that Stephen Wiesenfeld had indeed taken care of his son. Rehnquist himself took on child care responsibilities late in life, leaving work early to pick up his granddaughters from school when his daughter, a single working mother, had child care problems. Perhaps this is what caused him to demonstrate what he himself wryly called “a capacity for growth” when it came to questions of sex discrimination.

Perhaps it was simply his respect for settled law, as articulated in his concurrence in United States v. Virginia, in which he castigated the Virginia Military Institute for failing to take any action in advance of litigation to comply with the constitutional requirement of sex equality. In any event, although Rehnquist ordinarily gave great constitutional weight to federalism and states’ rights, and was as a result reluctant to extend Congressional powers under Section Five, he saw the need for such power to combat “stereotype-based beliefs about the allocation of family duties.” This is further evidence of the fundamental place that not only sex equality, but its instantiation in the repudiation of sex stereotypes has in the United States constitutional order.

The strength of our constitutional commitment to racial equality has led to constitutionally mandated limitations on government tolerance of and participation in private discriminatory acts, including those affecting the custody and education of children. Just as the Stanton case established that state actors cannot take

29 Id. at 655 (Rehnquist, J., concurring).
31 Id. at 343 n.16.
33 Id.
societal sex role stereotypes into account in setting child support obligations,\(^36\) so the 1984 Supreme Court case of *Palmore v. Sidoti* prohibited any racial discrimination in custody decisions, even when the best interests of an individual child might call for it.\(^37\) The child in question was the young daughter of divorced white parents in Florida whose father sought to gain custody when her mother married a black man.\(^38\) The Supreme Court acknowledged, “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.”\(^39\) It nevertheless held that the courts were precluded from taking racial prejudice into account in determining custody: “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”\(^40\) With respect to education, after mandating that public schools no longer segregate pupils on the basis of race, the Supreme Court, by restricting local governmental attempts to close public schools and channel subsidies to private racially discriminatory schools, placed limitations on government’s ability to assist private actors in finding an end run around school desegregation.\(^41\)

Just as it does with racial equality, government as decision maker must also act consistently with its commitment to sex equality.\(^42\)

Thus, while government as speaker[, actor,] and dispenser of subsidies is free to take a variety of positions, among the positions it may now no longer take nor promote is . . . that of Justice Bradley in *Bradwell v. State* [to the effect] that, "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life,"\(^43\)

\(^{38}\) *Ibid.* at 430.
\(^{39}\) *Ibid.* at 433.
\(^{40}\) *Ibid.*
notwithstanding that such a position may still be fervently held by many people of faith.

What might this mean in practice? Consider a few examples, some more hypothetical than others. At one extreme of the hortatory axis, what constitutional limits might there be on mere government pronouncements of principle unmoored from direct, binding connection to policy? In 1993, the commissioners of Cobb County, Georgia, adopted resolutions proclaiming, inter alia, “that ‘the traditional family structure’ is in accord with community standards, that ‘lifestyles advocated by the gay community’ are incompatible with those standards[,] and that Cobb County would not fund ‘activities which seek to contravene these existing community standards.’ If, by ‘traditional family structure,’ the commissioners had explicitly indicated that they meant, not just a heterosexual couple, but a patriarchal one, with wives submissive to husbands and confined to the domestic sphere as Justice Bradley urged, the resolution would violate existing U.S. constitutional equality norms. “Lifestyles advocated by the [feminist] community” can no longer be “incompatible with the” official community standards of any unit of government in the United States. “Welcome to Cobb County, Where a Woman’s Place is in the Home” would be a combination of welcome mat and no trespassing sign with, in my view, serious constitutional problems.

My colleague Judge Richard Posner apparently agrees with me that such a message would be problematic, since he goes so far in a recent opinion as to list “a woman’s place is in the home” together with “blacks have lower IQs than whites” among the messages whose psychological effects on children could be such as to allow a public school to forbid students inscribing it on T-shirts they wear to class.44

IV. FEMINIST FUNDAMENTALISM IN EDUCATIONAL PROGRAMS

The problems only intensify when government seeks to use its powers to fund or regulate to promote such a problematic message. Attention to such problems is particularly urgent now that the federal government sends, to children as well as adults, messages about appropriate family structure and sexual behavior backed by carrots and sticks. For example, assuming arguendo that “promoting marriage” through subsidies, hortatory, and regulatory means is an appropriate activity for the federal government, it is still constitutionally constrained to promote only egalitarian marriage.45

44 Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 674 (7th Cir. 2008).
45 See Case, supra note 42, at 786.
Court challenges to programs promoting marriage have to date focused un成功fully on claims under the religion clauses, but the fact that a government-funded program whose promotion of marriages in which wives are to be submissive to their husbands does not rely in a "pervasively sectarian" way on Scripture for its subordinating message should not be enough to shield such a program from further constitutional scrutiny.

As Cornelia Pillard has argued:

If government must not act on the belief that men are aggressive and thus better fit than women for military-style education, women are better mothers, or boys are more likely than girls to drink and drive dangerously, then it should follow that government may not seek to indoctrinate students with those same sex-based generalizations.

Pillard's focus is on the sex stereotypes associated with abstinence-only sex education, including the perpetuation, as both a normative and descriptive matter, of "the stereotyped double standards of virility versus chastity, homemaker versus breadwinner, subject versus object of desire," but her point can be generalized to other aspects of the school curriculum, whether in the public schools themselves or in other government subsidized educational programs. Justice Souter, in dissent from his colleagues' decision upholding a program of government-funded vouchers parents could use to pay for religious schools, wrote that not "every secular taxpayer [will] be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention." I would go farther than Souter and say that it would already be unconstitutional for the government to fund this sort of teaching, in the same way as it has been held unconstitutional for the government to fund racial segregation.

Parents with religiously based objections to public school curricula presenting an untraditional view of sex roles have long been told by federal courts that they have no right either to force a public school to change its curriculum or to opt their

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49Id. at 953.
children out of those portions of the curriculum containing messages of sex equality. Thus, in one leading case, born-again Christian Bob Mozert was unsuccessful in his court challenge to his children's being exposed by their public school curriculum to "role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes." Apostolic Lutheran parents in another school district, upset that "schools are contributing to the Women's [sic] Liberation Movement by making [it] mandatory that the boys take home economics and the girls take shop," similarly failed to persuade a court that they were constitutionally entitled to have their children excused from portions of the curriculum the parents found objectionable on religious grounds. But, in rejecting the parents' free exercise claims, the courts in neither of these cases explicitly relied on constitutional sex-equality guarantees.

In my view, the courts could have gone much farther, treating the schools' choice of materials that challenged sex stereotypes, not as merely permissible and as such immune from a free-exercise challenge, but as constitutionally required to provide to both male and female students equal protection on grounds of sex. State-sponsored education is not merely permitted, but also required to refrain from promoting a message of inequality between men and women. Although the constitutional argument is more complicated, the limitation should be no different when it shifts from the public school to those forms of private or home schooling that are authorized by the state as substitutes for public education. Unfortunately, when one moves beyond those institutions bound by Title IX, there has to date been comparatively little in the way of regulatory attention paid in the United States to ensuring that the education provided to students through state-regulated private and home schooling even minimally communicates or comports with norms of sex equality. But scholars such as James Dwyer and Kimberly Yuracko are right to insist that the state is under a constitutional obligation to protect children from receiving a discriminatorily inferior education on grounds of sex; whether or not that education is in a private or home school and whether or not it is dictated by the parents' religious beliefs.

Some might suggest that the U.S. Supreme Court case of Wisconsin v. Yoder, in which the Old Order Amish were allowed as part of their constitutionally protected free exercise of religion to withdraw their teenage children from school in contravention of school attendance requirements, stands in the way of the argument here. But subsequent decisions have made quite clear that the Yoder

52 Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1062 (6th Cir. 1987).
54 Mozert, 827 F.2d at 1065; Davis, 385 F. Supp. at 405–06.
case will be essentially limited in its application to the Amish.\textsuperscript{57} Moreover, although the Amish resisted higher education for their children, they apparently did not distinguish between boys and girls in so doing, giving both sexes similar training.\textsuperscript{58} Scholars who studied them at about the time of the \textit{Yoder} decision reported:

Although the Amish girls always wear dresses and the little boys, after they are toilet-trained, wear trousers, there is little difference in tasks they are taught to perform. Boys are encouraged to like horses and machinery, but children of both sexes accompany their father around the farm and help their mother with simple household tasks.\textsuperscript{59}

Had the Amish insisted on pulling only their daughters out of school without a high school diploma, while also insisting on sending their sons to college, the case would be more on point here.

\section{Sex Equality in Educational Programs Is Linked to Equality for Gays and Lesbians}

The Apostolic Lutheran parents who unsuccessfully litigated in federal court to stop boys from taking home economics were worried about more than Women’s Liberation. They also expressed concern that:

boys between [the] ages of 12 and 16 . . . are very vulnerable to effeminate or homosexual development if [a] certain environment is provided. . . . [I]f students who already have possible unknown problems in this area were placed in this atmosphere condoned and imposed by those in authority it would certainly contribute to a particular students [sic] overall destruction of masculinity. Men are the head of the family not the homemakers.\textsuperscript{60}

Similarly, as part of a successful attempt to persuade Governor Arnold Schwarzenegger to veto the Bias Free Curriculum Act, which would have prohibited educational materials used in California schools from reflecting adversely on persons because of, \textit{inter alia}, their gender or sexual orientation,\textsuperscript{61}

\begin{itemize}
\item \textsuperscript{57} \textit{See}, \textit{e.g.}, Blackwelder v. Safnauer, 689 F. Supp. 106, 135 (N.D.N.Y. 1988)("In sum, the holding in \textit{Yoder} must be limited to its unique facts and does not control the outcome of plain-tiffs' free exercise challenge in this case.").
\item \textsuperscript{58} \textit{Yoder}, 406 U.S. at 208–09 n.3.
\item \textsuperscript{59} John A. Hostetler \& Gertrude Enders Huntington, \textit{Children in Amish Society: Socialization and Community Education} 18 (1971).
\item \textsuperscript{60} Davis v. Page, 385 F. Supp. 395, 403 (D.N.H. 1974).
\item \textsuperscript{61} S.B. 1437, 2005–06 Leg., Reg. Sess. (Cal. 2006).
\end{itemize}
Luis Goldamez, Latino spokesman for the Campaign for Children and Families, insisted:

We can no longer allow girlie-men in this state or any state to dictate to our children what they're going to teach them. We need to see them face-to-face and tell them, we have our pants on the right way, we are men and women, we are not confused. And if anyone needs to teach our children, it needs to be us parents, not girlie-men from this building or any other building.62

One of the myriad ways that the equality of the sexes is linked to gay rights is that those with a religiously based insistence on promulgating fixed sex roles or female subordination often explicitly link it to a religiously based opposition to tolerance for or recognition of homosexual behavior and relationships. It behooves both feminist fundamentalists and advocates for gay and lesbian rights to be more attentive to and explicit about these connections.

Consider, for example, U.S. Secretary of Education Margaret Spellings’s decision to force out of the Public Broadcasting Service (PBS) television series Postcards from Buster an episode featuring a lesbian civilly united couple from Vermont who run a maple sugaring operation with their three children.63 The episode featuring the Vermonters was called “Sugartime,” and there were snide suggestions in the reporting on Spellings’s actions that “sugaring” was thought to refer to an exotic sexual practice, although in fact, of course, the reference was simply to the routine production of maple sugar.64 Although Postcards from Buster had received federal funding specifically to showcase the diversity of American families, and although the series had included, without objection from Spellings, a Muslim family who veiled their preteen daughter, as well as evangelical Christian and Mormon families, Spellings claimed, in a letter to PBS officials, that “[m]any parents would not want their young children exposed to the life-styles portrayed in this [Sugartime] episode.”65 No apparent account was taken of those “many parents” who might not want their children exposed to the religiously traditional “life-styles” portrayed in other episodes. Not only is Spellings’s decision constitutionally problematic viewpoint discrimination, feminists and proponents of equality for gays and lesbians have common cause to object to it.

65 Letter from Margaret Spellings, supra note 63.
VI. FEMINIST FUNDAMENTALISM IN CHILD CUSTODY AND ADOPTION

As has been clear for some time when it comes to state laws governing matters such as alimony and child support, "[s]ex equality norms also [should] constrain government on those occasions when [the state] necessarily adjudicates concerning the family." In the remainder of this Article, I will work through examples, some more controversial than others, of what this might mean for parents and children. Among the questions I will consider is to what extent government in its adjudication of custody as between already-recognized parents or its placement of children for adoption should take commitment or opposition to women's equality into account. Before readers protest that I am proposing massive government intervention into constitutionally protected parenting choices, it is important for me to stress that I am focusing my attention here on situations where there is already, of necessity, governmental intervention. In such situations, a policy of noninterference in the family or of leaving things up to autonomous individuals to decide for themselves simply is not an option. A custody dispute between two divorcing parents, for example, must be resolved—if neither parent is unfit, a court must decide between them in the best interests of the child.

In deciding such cases, evidence of commitment to sex equality should be as at least as assiduously enquired into and at least as positively weighted as a prospective adoptive or custodial parent's commitment to providing a child with religious training, something many decision makers in adoption and custody cases seem to enquire into and weigh favorably, often without much apparent attention to the substance of the religious beliefs. It is notoriously difficult to determine what is actually happening as a general matter in family law cases, given how few result in reported decisions and how manipulable and vulnerable to judicial bias, conscious or unconscious, the relevant standards, such as "best interests of the child," are. From the few reported cases it appears, however, that when repressive religious beliefs are pitted against secular feminist ones, the religious beliefs often begin with a presumption to respect I want to insist is even more deserved, but I realize is often not granted, to the feminist ones.

Consider, as a frightening example, the case of Laurie April Wang, who left her husband after his church subjected her to an exorcism, as it had another woman, to "to rid herself of the 'evil unsubmissive spirits'—the spirits which caused her to speak up for herself and to exercise authority rather than completely submit to her husband." A court adjudicating her custody dispute was unwilling to consider whether her husband's religious convictions and his efforts to pass them on to his son might adversely affect her relationship with her son, apparently

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66 The argument in this section is at the core of Case, Baby Markets, supra note *
67 Case, supra note 42, at 786
68 In re Marriage of Wang, 896 P.2d 450, 454 (Mont. 1995) (Leaphart, J., dissenting) (quoting testimony from the record).
because it “took the position that religion is beyond the pale of the court’s scrutiny.”

Even courts that do, in the end, rule against parents who claim religious authority for the sexist beliefs and practices those parents seek to impose on their children often do so without giving any explicit consideration to the role constitutional norms of sex equality should play in their decision making. Thus, in *Roberts v. Roberts*, a Virginia judge did terminate a father’s visitation with his son and daughter after hearing testimony by a clinical psychologist that the daughter “is particularly at risk of psychological damage because of [her father’s] telling her that women should not strive to accomplish what men accomplish and that they are supposed to be subservient to men”; evidence that the daughter, an “excellent student,” did “better in school this academic year, during which no visitation has occurred, than she did last academic year, when there was visitation”; and evidence that the father had told both children that they and their mother, whom he called “a sinner” and “of the devil,” would all go to hell. The judge concluded that visitation with the father was “causing serious psychological and emotional damage to the children” in no small part because “the values being taught to the children by [their father] are different from the values being taught to the children by [their mother].” Among these conflicting sets of values were that the mother “encourages the children to be whatever they want to be. [The father] tells [his daughter] women cannot do what men do.” But, even with respect to these values, the court insisted only, “Whichever set of values is right, and the court makes no judgment on which set of values is right, they are irreconcilably at odds.”

It may well be true that, as between “tolerance” and “fire and brimstone”—another of the enumerated conflicts in values between these particular parents—a court can make no judgment, but I would argue that a court is constitutionally compelled to choose encouragement of a daughter’s choice of occupation over a fixed and subordinating message that “women cannot do what men do.” That is not to say that the parent who most favors sex equality should always prevail, simply that a court must not remain viewpoint neutral as between sex equality and

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69 Id. at 452.
70 60 Va. Cir. 49, 59 (2002).
71 Id. at 57.
72 Id. at 58.
73 Id. at 57.
74 Id. at 51 (quoting allegations from Ms. Roberts’ petition).
75 Id. at 57.
76 Id. at 59.
77 Id. at 59–60.
78 Id. at 59.
79 Id. (quotation marks omitted).
80 Id. at 60.
its opposite; it must put a thumb on the scales in favor of the parent who would give a daughter the same encouragement, liberty, and opportunity as a son.

If the son or daughter makes use of this liberty to develop interests and ambitions traditionally and stereotypically not associated with his or her sex—if he develops an interest in nursing or she in engineering—this should not be seen as a harm, but as a vindication of our commitment as a constitutional culture not to enshrine “fixed notions concerning the roles and abilities of males and females.”

Sociologist Judith Stacey has reported data suggesting that among the few differences between children raised in lesbian households and other children is that those raised in lesbian households, particularly girls, are somewhat more likely to “behave in ways that do not conform to sex-typed cultural norms,” have a “greater interest in activities associated with both ‘masculine’ and ‘feminine’ qualities and that involve the participation of both sexes,” and have a greater interest in pursuing careers in fields traditionally dominated by the opposite sex. If these reported differences are to play any role at all in governmental decision making about lesbian parenting, they should cut in favor of, not, as some opponents of gay rights have argued, against, recognition of lesbian parents.

Although my take on cases like Wang and Roberts is consistent with the analysis of scholars such as James Dwyer, who has written extensively about religious exemptions to child welfare and education laws as denials of equal protection to children of religious objectors, it is directly at odds with that of some scholars of the First Amendment. Most notably, Eugene Volokh has argued that the First Amendment requires that views such as those articulated by Messrs. Wang and Roberts not be stifled. The hierarchy of U.S. constitutional values is not as Volokh suggests, however. It is not the free exercise or free speech clause that is on a par with equal protection on grounds of race and sex when it comes to the extent of the limitations it places on government action; it is the establishment clause, and, in cases such as Wang and Roberts, the prohibition on government’s establishing a religion and the guarantee of equal protection on grounds of sex cut in the same direction—against the parent insisting on a religiously grounded commitment to female subordination.

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83 See Dwyer, supra note 55, at 121–47 (arguing that parental religious exemptions are unconstitutional).
84 See supra note 55, at 121–47 (arguing that most child custody speech restrictions are unconstitutional).
85 See, e.g., Eugene Volokh, Parent Child Speech and Child Custody Speech Restrictions, 81 N.Y.U. L. REV. 631, 673–712 (arguing that most child custody speech restrictions are unconstitutional).
86 See id. at 686 (arguing that “child custody speech restrictions also can’t be justified simply by arguing that protecting a child’s best interests is so important that it trumps any First Amendment rights”).
One of the reasons the First Amendment may be seen to complicate the analysis in cases like \textit{Wang} and \textit{Roberts} is that both involved conflicts over gender ideology reflected largely in the fathers’ discriminatory speech, rather than in any other alleged discriminatory treatment of children on grounds of sex. Harmful though it may be for Mr. Roberts to tell his daughter that her options are more limited than her brother’s, it might have been even easier for a court to see the harm had her father also pulled her out of school in accordance with his ideology.

Because religious liberty claims played such a central role in decisions such as \textit{Yoder},\textsuperscript{87} there is every reason to believe as a matter of law that a parent who limits a daughter’s education or loads her down with chores will get less respect from a court for this decision if it is only culturally, and not also religiously grounded. Indeed, courts, many dealing with immigrant families in which not only gender role ideology, but a parent’s genuine pressing need for help around the house may keep a girl out of school, generally seem to have fewer problems favoring the parent who equalizes educational opportunity when religion is not at issue.\textsuperscript{88} This may cause consternation among some scholars, but I think it was, for example, perfectly appropriate for a Nevada court that awarded custody of a young Mexican girl to her U.S.-resident father in preference to her illegal immigrant mother to take into account, among other things, that while in her mother’s custody the girl had been forced to assume substantial care-giving responsibilities for her disabled brother.\textsuperscript{89}

Similarly, I think it appropriate that a court considering a teacher’s petition to remove eleven-year-old Linda Berrero Cano from the custody of her migrant Mexican mother and to adopt her considered, among other things, how many school days the girl had unwillingly missed in order to care for her siblings.\textsuperscript{90} Linda’s case was drawn to my attention by Michele Goodwin, who is critical of a judicial system that removes a child from her mother’s poor, unassimilated, Spanish-speaking home to place her with a family that “lives in a brick ranch house with a basketball hoop in the driveway, a swimming pool in the backyard.”\textsuperscript{91} But Goodwin lists as the factors that determine the loser in competition for Linda only “[p]overty, immigrant status, limited political clout, and limited English proficiency,” nothing connected to sex and gender roles.\textsuperscript{92} I agree with her that

\begin{itemize}
  \item \textsuperscript{87} 406 U.S. 205 (1972).
  \item \textsuperscript{88} See, e.g., Rico v. Rodriguez, 120 P.3d 812, 816 (Nev. 2005) (affirming award of custody to the parent who, among other things, could provide “stable schooling for the children”).
  \item \textsuperscript{89} Rico, 120 P.3d at 815.
  \item \textsuperscript{90} See Shaila Dewan, \textit{Two Families, Two Cultures and the Girl Between Them}, N.Y. TIMES, May 12, 2005, at A16 (reporting that “Linda says her family hit her and for a time kept her out of school to take care of younger siblings”).
  \item \textsuperscript{91} Michele Goodwin, \textit{The Free-Market Approach to Adoption: The Value of a Baby}, 26 B.C. THIRD WORLD L.J. 61, 71 (2006).
  \item \textsuperscript{92} \textit{Id.} at 72.
\end{itemize}
there is cause for concern when a judge in a custody dispute overvalues the material and cultural advantages of growing up in a wealthy, assimilated, English-speaking household, and I know too little about the facts of the case to be in a position to evaluate its bottom-line result, but, in apparent contrast to Goodwin, I think Linda’s being unwillingly kept out of school to perform household labor is an important factor for the judge to take into consideration.

Government should “disfavor in competition for children those who, for example, would make a girl do all the household chores while her brother” can study or play. Though the cases that get press attention in this regard tend to feature families that are culturally, ethnically, or religiously exotic, from the polygamous FLDS to Muslim and Mexican immigrants, recently released data on the chores performed by children show that, even in mainstream American families, girls in many households do in fact spend far more hours on household chores than boys, leaving boys more time to play and to study. Moreover, the chores girls are given to do are less likely to be paid and less likely to be marketable than those assigned to boys. Notwithstanding that, as Viviana Zelizer points out, in the nineteenth century families often took in foster children principally to have an extra pair of hands for farm chores and household tasks, we would today find unthinkable the adoption of a Black child to be, in effect, a household servant for his or her White adoptive siblings. We should feel similarly about a girl expected to serve her brothers.

I also agree with Goodwin that it is noteworthy that “Linda Berrero Cano was never surrendered by her mother to the state, nor was she in foster care,” when her teacher sought to adopt her. Unlike custody disputes between two already-recognized parents, or adoption decisions when there are multiple prospective adoptive parents, Linda’s case did not have two contenders for custody who began on a presumptively equal plane. For the teacher to prevail over the mother ordinarily would require a finding of parental unfitness, a much higher standard.

The case for feminist fundamentalism being outcome determinative in custody or adoption decisions is, other things being equal, stronger a) when those competing for a child begin with presumptively equal rights in that child, as occurs in a custody fight between two recognized parents or an adoption decision when there are multiple qualified adoptive parents; b) when both ideology and actions

93 Case, supra note 42, at 787.
94 See Sue Shellenbarger, Boys Mow Lawns, Girls Do Dishes: Are Parents Perpetuating the Chore Wars?, WALL ST. J., Dec. 7, 2006, at D1 (reporting inter alia that according to a University of Michigan nationwide study “boys spend an average 30% less time doing chores” than girls).
95 Id.
97 Goodwin, supra note 91, at 71.
98 Id.
are discriminatory; c) when only culture, not religion, is used to justify the antifeminist contender; d) when the child is a girl, although, as the Wang and Roberts cases show, a son can also be at risk; and most importantly d) when the antifeminist acts or speech rise to the level of child abuse, so as potentially to justify a finding of parental unfitness.

Even those who may find the examples I have thus far cited in this Article unpersuasive would surely agree that there is some point on the continuum at which a parent’s speech or action in support of a commitment to female subordination or rigid sex roles would cross the line into abuse. For example, those who might not agree that it should count against a parent that he tells his daughter her place is in the home doing housework might feel differently if he kept her chained there day and night, an illiterate drudge, and might then favor state intervention, even if there was no recognized competitor for his daughter’s custody, and even if he gave religious justifications for so severely restricting her.

VII. CONCLUSION: THE TEXAS FLDS CASE AS AN EXAMPLE OF HOW NOT TO APPLY THE DISCOURSES OF RELIGION AND HUMAN RIGHTS TO CHILDREN

Unfortunately, the fact that sex-role differentiation with roots in female subordination seems so “familiar” inhibits support for state intervention to combat it.\(^99\) Consider, for example, the reaction to the state of Texas’s April 2008 attempt to remove more than 400 children from parents who were members of the Fundamentalist Church of Jesus Christ of Latter Day Saints living on the Yearning for Zion Ranch.\(^100\) The state’s intervention was prompted by reports that a sixteen-year-old girl was being forced to marry a forty-nine-year-old man.\(^101\) The state did find that “more than 30 of the 53 girls from 14 to 17 who were at the ranch are pregnant or have children.”\(^102\) A quick overview of public commentary on the state’s action reveals that few, other than representatives of the State of Texas itself and self-identified survivors of polygamy, have been quoted in support of the state’s action, however. Pundits on both the left and right condemned the state’s intervention into the family and the community.\(^103\) I agree that the strict


\(^{100}\) See Dan Frosch, Texas Reports Further Signs of Abuse at Sect’s Ranch, N.Y. TIMES, May 1, 2008, at A16.

\(^{101}\) Id.

\(^{102}\) Id.

\(^{103}\) See, e.g., ACLU Statement on YFZ Ranch (May 2, 2008), http://www.aclutx.org/article.php?aid=570 (expressing concern that “[p]arents have been separated from their children without individual, adversarial hearings and without particularized evidence that they ever engaged in abuse or were likely to engage in abuse”).
preconditions Texas law sets before children can be removed from their homes on an emergency basis were not satisfied in this case, and that the Texas courts therefore had little choice but to order the children's prompt return.104

But I am disturbed by the dismissive way in which the Texas Court of Appeals, whose decision that the children should be returned was upheld by the Texas Supreme Court, treated the Texas Department of Family and Protective Services's allegations of danger to the children. The Department took the position that “due to the ‘pervasive belief system’ of the FLDS, the male children are groomed to be perpetrators of sexual abuse and the girls are raised to be victims of sexual abuse.”105 But the Texas Court of Appeals repeatedly insisted that the Department had made no showing of “any risk to them other than that they live in a community where there is a ‘pervasive belief system’ that condones marriage and child-rearing as soon as females reach puberty,” as if this in itself were no big deal.106 To help clarify why I find the court’s attitude so disturbing, imagine that instead of the “pervasive belief system” of the FLDS concerning adolescent female sexual activity with older males, the court had instead been faced with the pervasive belief system of the Sambia of New Guinea, who, as documented by anthropologist Gilbert Herdt, held and acted on the view that if young boys did not regularly fellate older males and ingest their semen, thereby replacing mother’s milk with male milk, they would never grow up to be proper men themselves.107 Would the court have sent young boys back to their families so promptly after finding that they “were in [no] physical danger other than [they] live . . . among a group of people who have a ‘pervasive system of belief’ that condones,” not “polygamous marriage and underage females having children” as did the FLDS,108 but underage males regularly fellating older males as did the Sambia? Surely not. Perhaps this is because the FLDS’s “‘umbrella of belief’” that for girls, “‘having children at a young age is a blessing’”109 is more “familiar and agreeable”110 to the Texas courts than the Sambian “umbrella of belief” that for boys, ingesting semen at a young age is a comparable blessing.

104 I am therefore not suggesting that the bottom line decision of the Texas courts that by law the children should be returned forthwith to their FLDS parents was incorrect. There did not seem to be evidence of imminent physical harm to all the children, nor did it seem that Texas had taken heroic measures to find a solution short of immediate removal, as the law requires. See In re Tex. Dep’t of Family & Protective Servs., 255 S.W.3d 613, 615 (Tex. 2008) (stating that “[o]n the record before us, removal of the children was not warranted”).
105 In re Steed, No. 03-08-00235-CV, slip op. at 4 (Tex. App. May 22, 2008).
106 Id. at 7.
108 In re Steed, slip op. at 7.
109 Id. at 6 n.8 (quoting the Texas Department of Family and Protective Services’ lead investigator).
It remains unclear where in the cycle of socialization into an “umbrella of belief” such as that of the FLDS courts are prepared to intervene so as to protect young girls. If the age of consent remains unchanged, impregnating the girl remains a crime. But, does the after-the-fact possibility of long sentences for statutory rape for men who have sex with young girls trained to believe they risk their salvation if they don’t cooperate actually prevent harm to the girls? Shouldn’t some efforts be made to intervene earlier, before the girls are pregnant?

Yet even when one parent strongly objects to socialization into underage polygamy, courts seem reluctant to rule in favor of that parent. Consider the Pennsylvania Supreme Court’s disposition of the custody dispute between the divorcing Shepps. Their divorce had been occasioned by his conversion to a fundamentalist polygamous variant of Mormonism from the more traditional Mormonism both parents had previously practiced. The trial court had heard evidence that he had told his thirteen-year-old stepdaughter that her salvation depended on her practicing polygamy, and that when she turned fourteen she should marry him, her stepfather. In its final order, the trial court “specifically prohibited” him “while [his biological] child is a minor from teaching her about polygamy, plural marriages or multiple wives,” and an intermediate appellate court upheld the trial court’s order, noting that the record indicated that “promotion of his beliefs to his stepdaughter involved not merely the superficial exposure of a child to the theoretical notion of criminal conduct, but constituted a vigorous attempt at moral suasion and recruitment by threats of future punishment.” But the Supreme Court of Pennsylvania reversed, saying that, even when it came to “religious beliefs, which, if acted upon, would constitute a crime,” their promulgation to a child could not be restricted unless it were “established that advocating the prohibited conduct would jeopardize the physical or mental health or safety of the child, or have a potential for significant social burdens.” I agree with the dissenting judge that such a showing had clearly been made in the Shepp case.

As I see it, in both the Shepp and the Steed cases, court majorities were not only far too willing to be deferential to religious justifications, but also, in addition, far too unwilling to treat female subordination through traditional sex roles as something unusual and disturbing. Similarly, the court-appointed social

111 TEX. PENAL CODE ANN. § 22.11 (“A person commits an offense if, with a child younger than 17 years and not the person’s spouse, whether the child is of the same or opposite sex, the person: (1) engages in sexual contact with the child or causes the child to engage in sexual contact.”).
113 Id. at 1166–67 & n.2.
114 Id. at 1168.
115 Id.
116 Id. at 1174.
117 Id. at 1176–80 (Baer, J., dissenting).
worker in the *Wang* case found after an investigation that there “were no ‘bizarre activities going on’ at the Cornerstone Community Church but rather it was merely a fundamentalist church,”\(^{118}\) notwithstanding testimony about the lengths, including exorcism of supposed demons, the church was prepared to go to ensure compliance with its “teach[ing] that women are not allowed any authority, and that men must be allowed to make all the decisions.”\(^{119}\)

What may help account for the tendency of both left and right to support the FLDS against the Texas Department of Family and Protective Services is a related, though simultaneously diametrically opposite phenomenon, to that afflicting the court majorities: both sides of the political spectrum tended to focus on those aspects of the FLDS’s situation with which they could most readily identify. The religious right could make common cause with the FLDS’s religiously based conformity to traditional sex roles and patriarchal authority; the secular left could focus instead on the ways in which the FLDS was nonconforming and culturally distinct. Each by extension could fear the implications for its own divergences from mainstream culture from any successful attempt to force the FLDS to move to the mainstream.

A feminist fundamentalist take on the FLDS case, especially one informed by information available about the Yearning for Zion Ranch from sources in addition to those cited by the Texas courts, might instead see the case as an object lesson in what can go wrong when the constitutional mandate of equal protection on grounds of sex is not systematically and with full force applied in state regulation of the family and the education of children. A consistent story emerges from the autobiographies of Elissa Wall, whose court testimony about her forced marriage at age fourteen helped put FLDS leader Warren Jeffs in jail as an accomplice to rape,\(^{120}\) of Carolyn Jessop, who successfully challenged the FLDS elder whose fourth wife she became at age eighteen for sole custody of the eight children she ultimately bore him;\(^{121}\) and of the four former FLDS women among the eighteen “women who escaped” polygamy whose stories are told in *God’s Brothel*.\(^{122}\) We read in each of these accounts of girls “treated like an indentured servant, for[c]ed to do all the cooking, cleaning, and babysitting,”\(^{123}\) “condemned to a life of virtual


\(^{119}\) *Id.* at 454.

\(^{120}\) *ELISSA WALL & LISA PULITZER, STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS* 126, 419–20 (2008).

\(^{121}\) *CAROLYN JESSOP & LAURA PALMER, ESCAPE 385* (2007).

\(^{122}\) *ANDREA MOORE-EMMETT, GOD’S BROTHEL: THE EXTORTION OF SEX FOR SALVATION IN CONTEMPORARY MORMON AND CHRISTIAN FUNDAMENTALIST POLYGAMY AND THE STORIES OF 18 WOMEN WHO ESCAPED* 16 (2004).

\(^{123}\) *JESSOP & PALMER, supra* note 121, at 53.
slavery,"124 and taught that "'[a] woman’s role is to be obedient without question to her husband'"125 and that "'[a] woman had no right to speak out ... even if [her] goal was [to] protect[] her daughter."126 These women write, not only of being denied education they specifically longed for and requested,127 but of receiving education, not only in the home, but in FLDS controlled classrooms, into complete submission to the brutality young boys are simultaneously encouraged to perpetrate upon them.128 Thus, for example, according to Carolyn Jessop, Warren Jeffs, who served as a teacher at the FLDS school before he succeeded his father Rulon as the community’s Prophet,

brought one of his wives into the auditorium, which was packed with boys. [She] had a long braid that fell past her knees. Warren grabbed the braid and twisted and twisted it until she was on her knees and he was ripping hair from her head. He told the boys that this was how obedient their wives had to be to them.129

These autobiographical accounts also give the lie to the FLDS claim that the state of Texas’s seizure of the children was uniquely disruptive to the otherwise stable and secure home life the FLDS children had always known.130 Their authors tell of home life in the community repeatedly disrupted by order of the Prophet, who expelled boys and men from the community,131 reassigned the men’s wives and children to other men in other households, frequently moved family members between and among enclaves in Texas, the Colorado/Utah border, and Canada, and

124 MOORE-EMMETT, supra note 122, at 93.
125 WALL & PULITZER, supra note 120, at 188 (quoting a conversation with Warren Jeffs).
126 JESSOP & PALMER, supra note 121, at 52.
127 See, e.g., JESSOP & PALMER, supra note 121, at 32 (noting FLDS girls’ strong desire to attend school); MOORE-EMMETT, supra note 122, at 50 (noting that “thousands of polygamous children are deprived of this basic right either by being removed from school at a young age or receiving an education lacking in quality”).
128 JESSOP & PALMER, supra note 121, at 37, 195.
129 Id. at 195.
130 See, e.g., MOORE-EMMETT, supra note 122, at 94 (recounting how, “[f]or Laura, there were no options living in a community that demands unquestioning allegiance and obedience to all men. It is a community that preaches, ‘You can all but kill a child for deliberately disobeying.’ There were no options when prayer is the only solution to your problems, when you do not know you can call 911, and when your mother is powerless to protect you from beating inflicted by the other mothers or from sexual assault by your father and brothers”).
131 See, e.g., id. at 50 (stating that “[t]he treatment boys receive often depends on family connections and ability to conform. As boys very often present competition for older men seeking marriageable girls, they are driven away to fend for themselves, stay to become the worker bees of the groups or they die mysteriously”).
then occasionally welcomed back those he had previously expelled from the community.\textsuperscript{132}

Unfortunately, however, so long as so many judges continue to underestimate the harm even extremely sexist parents such as those of the FLDS can do, and to undervalue the voices for women’s equality raised against those parents, by, among others, some of their ex-wives and mothers of their children, our legal system will have failed to live up to its constitutional commitment to offer all persons, including the girls and boys whose education, adoption and custody the state regulates, the equal protection of the laws.

\textsuperscript{132} \textit{Wall} \& \textit{Pulitzer}, \textit{supra} note 120, at 18; see, e.g., \textit{id} at 89–91, 117–18 198–99 (discussing how the author’s father lost his priesthood and part of his family—only part because one of his wives refused to follow Jeffs’ command to leave her husband—but was later welcomed back into full membership in the community, “rebaptized into the priesthood,” and invited to join the move to Colorado City).
FAMILY AS A VEHICLE FOR ABJECION

Kathy Abrams*

INTRODUCTION: IMMIGRATION LAW AS FAMILY LAW

In this paper, I take my bearings from those who have argued we can see a system of family law emerging in the area of immigration. Kerry Abrams, to take one example, has looked at a series of laws relating to marriage, and argued that couples that include a noncitizen are subject to a regime of federal laws and policies that is more stringent and interventionist than the state law relating to citizen couples.1

My focus here, however, is on a different area of immigration law or policy: a series of enforcement efforts aimed at apprehending and detaining undocumented immigrants. In particular, I will look at two recent initiatives: workplace and residential sweeps2 aimed at apprehending undocumented immigrants; and the emergence of "family detention" facilities designed to house families as they await determination of their immigration status.3

* © 2009 Kathy Abrams, Herma Hill Kay Distinguished Professor of Law, University of California, Berkeley School of Law (Boalt Hall). I am grateful to Jack Jackson for research assistance, and for organizing a lively and illuminating session at the Homeless Action Center in Oakland, California, where I first discussed the ideas developed in this paper. Many thanks also to the organizers of the New Frontiers in Family Law conference for providing a stimulating venue for discussion of this paper, and a range of other fascinating topics.


407—ULR
359—JLFS
This area of immigration policy doesn’t provide the kind of direct parallel to an area of conventional family law that we see in the area of marriage—a law that serves the same general purposes but imposes additional regulations. What happens to immigrants during apprehension and detention has no parallel in the experience of families comprised entirely of citizens, except perhaps when a family member is accused or convicted of a crime. And this is part of my point. I will argue that, whatever else they do, these immigration initiatives use family as an instrument of abjection. The treatment of family under the policies I’m going to discuss operates to produce immigrants as somehow less than human—the kind of beings whose deep connections with parents, children or spouses can be disregarded, indeed flagrantly violated, at will. This abjection has important consequences for the way that immigrants are seen and understood by others, and the way they see their own future in the United States.

I. TWO ENFORCEMENT INITIATIVES

A. Immigration Sweeps

Over the past two years, the Department of Homeland Security (DHS)’s bureau of Immigration and Customs Enforcement (ICE), the agency responsible for enforcing immigration laws, has mounted a series of sweeps aimed at rounding up immigrants living and working without documentation in the United States. One set of sweeps has targeted Swift meatpacking plants, as well as a number of other firms known to employ immigrants. These workplace sweeps were ostensibly part of a larger program intended to put pressure on the employers of undocumented immigrants, which also includes regulations making employers liable if they fail to take action on Social Security Administration “no match letters,” and a regime of enhanced fines. However, during the period of intensified

http://www.aclu.org/pdfs/immigrants/hutto_settlement.pdf (providing that defendants will improve living facilities in a certain family detention center in Texas, in case brought by, among others, the American Civil Liberties Union and the University of Texas School of Law Immigration Clinic against United States Department of Homeland Security and United State Immigration and Customs Enforcement).


5 The DHS promulgated a Final Rule which described actions which would be required of employers who had received a “no match” letter from the Social Security Administration, in order to avoid the imputation of constructive knowledge of an employee’s ineligibility for employment. See Dept. of Homeland Security Final Rule: Safe-
enforcement that began in 2006, surprisingly few enforcement efforts were directed against employers. A recent report concludes that despite DHS Secretary Michael Chertoff's vow to place employers of undocumented workers in his sights, the number of DHS 'notices of intent to fine' employers for such violations rose to only seventeen in 2007 from three in 2004. Instead, programs such as the workplace sweeps took action directly against workers.

In these sweeps, ICE agents gained access to workplaces by alleging that they had uncovered a scheme of identity theft (by which they meant the use of the social security numbers of others). Instead of identifying the specific workers


6 America's Voice, The Obama Opportunity on Immigration Enforcement: Redirect Priorities to Smart Enforcement, Abusive Employers, and Real Border Security 1, http://amvoice.3cdn.net/0d60a3b4967e248efb_gvm6iilzg.pdf (last visited Aug. 30, 2009). In addition, of the administrative and criminal arrests logged by ICE during workplace actions in 2007, 98% of administrative arrests, and 89% of criminal arrests were of workers, rather than employers or managers. Id. at 2. Figures were almost identical (98%/87%) for ICE enforcement actions in 2008. Id.

7 The patterns noted in the following paragraph are described in two reports on the Swift Plant Raids and related workplace immigration sweeps. See National Commission on ICE Misconduct and Violation of 4th Amendment Rights, Raids on Workers: Destroying Our Rights 13-21, available at http://www.icemisconduct.org/doc/uploads/UFcw%20ICE%20rpt%20FINAL%20150B_061809_130632.pdf?CFID=7884052&CFTOKEN=26955985 (last visited June 30, 2009). The National Commission was formed in response to queries and complaints from members of the United Food and Commercial Workers International Union, which, at the time of the sweeps, represented workers at five of the six Swift plants raided by ICE. Id. at 1-2. The Commission held hearings in five cities across the country, and heard testimony from workers, community members, immigration experts, members of Congress, psychologists and local elected leaders. Id. They requested the appearance of officials from DHS and ICE, who declined to
listed in the warrants, ICE agents herded hundreds or thousands of workers into
common areas, where they were divided by race and national origin, and held,
often for hours. Many were questioned about their birthplaces or asked to provide
documentation. Those unable to do so were arrested, and taken from the plants—
often in handcuffs, and sometimes in front of older children. Arrested workers
were taken to detention sites that were often distant from workplaces and family
homes. Detained immigrants had very limited access to telephones and were rarely
able to communicate with their families. In some cases, those identified as sole
caregivers of small children were released late in the same day; in others, they
were held overnight, or for several days, with no ability to contact their families.
Many arrested parents feared telling officials they needed to contact families,
because they believed ICE would arrest their children as well.8 Once they arrived
at detention sites, detainees faced a choice between signing voluntary departure
papers and being deported (usually before they had a chance to contact families or
lawyers) and contesting deportation, which might have meant weeks or months of
detention, frequently without any family contact.9 Approximately 1300 people
were arrested at the six Swift plants alone (the vast majority were “collateral
catches,” not the people whose Social Security Numbers were in question).10

These operations prompted a firestorm of criticism, but I want to focus here
on their effects on children and on the integrity of immigrant families. A 2007
study by La Raza and the Urban Institute focused on three sites, two Swift plants
and a third site in Massachusetts. It found that a very large number of children
were affected by the raids—one child for every two of the adults arrested.11 A
majority of the children affected were United States citizens; most of the children
were under ten years old, many were under five.12 The raids created sudden,
unexpected crises for children and families: children were separated from their
parents with no warning and no contact, often for as long as several months.
Caregiving responsibilities had to be assumed by an ad hoc combination of
extended family and informal community networks, assisted by public school

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8 Paying the Price, supra note 7, at 35.
9 Id. at 24–27.
10 One source reported that of 1,282 workers arrested at the six plants, only 65 will
face charges of identity theft—most will face administrative immigration charges. Missy
11 Paying the Price, supra note 7, at 2.
12 Id.
Although these networks rose to the immediate challenge of keeping children safe, as time went on, families deteriorated. Families suffered ongoing stress from parental absence, uncertainty about the detained parent’s future and the best choices for the family, and financial hardship, because the parents arrested were usually breadwinners. Children began to show symptoms of “emotional trauma, psychological duress, and mental health problems.”

These workplace sweeps have been supplemented by a larger National Fugitive Operations Program, which has involved efforts such as “Operation Return to Sender.” These sweeps have targeted not only workplaces, but residences, malls, and school areas. Under the auspices of finding accused criminals with outstanding warrants, ICE agents ask for documentation from residents or passersby who appear to be of Latino origin; those who cannot provide it may be arrested and pressed into waiting vans. Although this program was originally intended to target undocumented immigrants as to whom there were outstanding warrants for criminal violations, the goals of the program have

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13 Id. at 36.
14 Id. at 4.
15 See Bennett, Operation Return to Sender, supra note 2.
16 Labor journalist and photographer David Bacon described the approach used by ICE in an interview on the Democracy NOW! website:

So ICE has the names of a few people on warrants, so they'll go—for instance, in Richmond, California, they went out to a school and stationed themselves in front of the school, supposedly looking for these people, and just stopped everybody coming in and out, asked people for their documents, but only, of course, people who looked Latino. And in this case, they were stopping women who had just dropped their children off. So, obviously, they were going to separate these families, if they picked up any of the people who were involved.

Or there was just another immigration raid in Chicago, where they went to a parking lot in a kind of a mall in the Latino community in Chicago, and they just sort of closed off the parking lot, people carrying, you know, assault rifles. They looked like soldiers. And they, again, had the names of supposedly four people that they were looking for. How they expected to find them in a shopping mall in a parking lot, I have no idea. But what they really did was they went and asked everybody for their immigration papers and began just sort of pulling people in, shoving them into vans.

quietly shifted. In 2006, the Department dropped the requirement that 75 percent of those arrested have outstanding criminal warrants, and raised arrest quotas for enforcement teams. These instructions produced a shift toward “easier,” i.e., noncriminal, targets, with the result that 75 percent of the people arrested over five years of enforcement have no outstanding criminal charges, and, in the past year, 40 percent of those arrested had no existing deportation order. The Fugitive Operations Program has generated a range of civil rights complaints, many related to the warrantless entry of personal homes. It has also produced many of the same effects on families as the workplace raids. Children are separated from parents who are detained or deported; in some cases, the emotional effects on children have been starker because parents are arrested when their children are present.

B. Family Detention Facilities

With the increase in enforcement activity, government has also had to decide how to house those who are being detained. Because many of those apprehended at or near borders are coming with families, DHS began, under the Bush administration, to develop a system of “family detention.” Although Congress had instructed DHS to stop separating detained families and to house them in “non-penal, homelike settings,” the current family detention facilities have turned out to be anything but.

The most prominent example is the Hutto Family Detention Center in Tyler, Texas, which began housing families in 2006, and was designed to be a model for subsequent family detention centers. In late 2006, two nonprofit watchdog organizations that gained access to the Center revealed that it was a very disturbing model indeed. The Hutto facility was a former prison, and it retained the feel of that use. All family members were required to wear prison-like garb, and families, including children, were permitted only one hour of education, and one hour of outdoor recreation time per day. Aside from televisions and video games,

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19 *Id.*

20 See Bennett, *Operation Return to Sender*, supra note 2 (describing lawsuits against ICE for alleged civil rights violations in 10 states).

21 Family detention facilities have also been used to house families awaiting decisions on petitions for asylum. See Talbot, *The Lost Children*, supra note 3.

22 See FAMILY VALUES, supra note 3, at 2.

23 *Id.* at 14 (describing new arrivals issued, inter alia, three sets of “scrubs”).

24 *Id.* at 25, 26.
there was virtually no indoor entertainment for children of any age. Detainees were housed in very small, cell-like rooms, in halls in which family members were separated from each other by age, with only the very youngest children permitted to remain with their parents. Security measures (including lasers connected to an alarm system) prevented parents from going to their children at night, even when the children were in distress. Parents experienced little ability to control their children, who were ultimately under the harsh discipline of the ICE officials who administered the Center. This discipline included constant threats to separate children from their families if they misbehaved. Yet because parents feared the imposition of such sanctions, they felt compelled to try to control their children, which produced ongoing tensions among the detained families.

Not surprisingly, these revelations prompted a lawsuit filed in spring 2007 by the ACLU and the University of Texas Immigration Law Clinic. In August 2007, the parties reached a settlement, which provided for the release of the twenty-six plaintiff children, and a series of changes to the Center’s environment. Among other things, children were permitted to wear street clothing rather than prison uniforms, and they received expanded educational programs, as well as toys and books. ICE agreed to eliminate the count system that had forced families to stay in their cells up to twelve hours per day. Detainees were permitted to have visits from relatives and friends. Guards were instructed not to discipline children by threatening to separate them from their parents. Although hailed as a hard-won starting point, rather than a panacea, Hutto operated under these new requirements for two years. At the conclusion of this period, bowing to sustained legal and community pressure, DHS made the decision to transfer the remaining families out of Hutto by the end of 2009, ending its use as a family detention facility.

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25 Id. at 26 (noting that a few plastic trucks and kitchenettes in a cordoned off section of the gym—to which children have only one hour of access per day—are the only “age appropriate” toys that younger children have at Hutto).

26 Id. at 2 (noting that children as young as six are separated from their parents). The report notes that some parents have been permitted to keep all of their children with them, but they are often required to sleep in a single bed. Id. at 17.

27 Id. at 17.

28 Id. at 29. The report also notes that children may be sanctioned for such benign, child-like activities as running around, making noise or climbing on couches. Id.

29 Id. at 42.

30 The following details may be found in Settlement Agreement, supra note 3, at 1–7.


32 In addition to transferring families out of Hutto, and halting plans for three additional family detention facilities, ICE announced that it would gather feedback from local and national organizations as a vehicle for developing a national strategy, which could include the creation of “civil detention centers” and alternatives to detention. Nina
decision does not, however, end the dilemmas presented by family detention. Families currently housed in Hutto will be transferred to the Berks Family Detention Center. Although possessed of a slightly more hospitable physical setting, and better educational and recreational programs, Berks was critiqued in the same report that exposed the deficiencies at Hutto, in many of the same terms. 33

II. TREATMENT OF FAMILY AS A VEHICLE FOR ABJECTION

These enforcement efforts regulate immigrant families in ways that have little precedent in conventional state family law regimes. The issue here is not the one Kerry Abrams identified in the marriage context, 34 that when immigrants are involved, there are additional nexuses of legal intrusion—a requirement of governmental approval, or the imposition of a waiting period. In the immigration contexts described above, we’ve entered a kind of Alice-in-Wonderland world in which very few of the usual assumptions of family law seem to apply. We are miles away from conventional family law regimes, in which the interests of parents in the “care, custody and control” of their children give rise to a doctrine—in some cases a fundamental right—of family privacy. We confront instead scenarios in which parents are separated from children, without parental instigation or findings of inadequacy, and without opportunity for contact or planning. Children are deprived of the protection and financial support of one or both parents, without any consideration of their best interests or even their well-being. Parents are denied the ability to comfort, supervise, or even discipline their children in settings where family members are being held together. The treatment of family in these contexts of immigration enforcement is in many ways more comparable to the treatment of family when a parent has been arrested on a criminal warrant or convicted of a crime. 35 But the family member who is the subject of ICE enforcement in the immigration context has not, in the vast majority of cases, been convicted or even


33 See FAMILY VALUES, supra note 3, at 2. Although noting Berks’ comparative advantages, the study also emphasized that it “strip[ped] parents of their role as arbiter and architect of the family,” “place[d] families in settings modeled on the criminal justice system,” and “violated various aspects of existing standards for the treatment of unaccompanied children and adults in immigration proceedings.” Id.

34 Abrams, Immigration Law and the Regulation of Marriage, supra note 1.

35 For vivid descriptions of the experience of having a parent apprehended, tried, and imprisoned for the commission of a crime, see NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2007).
accused of a crime. Immigration violations, even if demonstrated, are civil infractions; and in these cases the government usually has no more than a suspicion based on employment or residence in a particular setting, brown skin, or—in the strongest cases—maybe a no-match letter.

We might ask, as some scholars have, whether creating this disparate regime of family regulation exceeds even Congress's plenary power over immigration. But at least initially, I want to do something different: I want to ask what is being produced or accomplished by the brutal suspension of the usual family law assumptions or rules. The frank disrespect for the integrity of family and for the relationships between parents and children—the gratuitously harsh and very public disruption of those relationships—can be understood as something more than a regrettable byproduct of enforcement imperatives. The harshness, and the divergence between the treatment of these families and of families under conventional family law doctrine seems to be very much the point—or at least one point—of these efforts. It seems to have a communicative or even performative dimension: it serves to demean and deny the humanity of undocumented immigrants.

It is, sadly, not news that when our society seeks to abject certain members, one of the key vehicles through which this degradation is performed is restrictions on the ability to form or preserve families. The ability of slave owners to disrupt families through the sale of particular slaves, as a form of discipline or as a simple market transaction, is perhaps the most familiar example of such abjection. But legal scholars have documented other forms of legal intervention that abject through regulation—both crude and subtle—of family forms. Katherine Franke, for example, has written about the legally imposed inability of enslaved African Americans to marry, and the harsh regulatory regimes that accompanied the postbellum granting of that right. Adrienne Davis has explored the "sexual economy" of slavery—the ability of slaveholders to devalue the intimate bonds among enslaved people while producing more slaves through sex with enslaved women—and the ways in which postbellum inheritance law did and did not recognize the children of interracial unions. And Leti Volpp has analyzed the

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36 The speed and brutality of the fracturing of families performed by this practice has some parallels in the group deportations occurring today.
ways that the status of male Chinese immigrants was degraded by prohibitions on immigration by Asian women, and the effective prevention of family formation. In other contexts, abjection has been produced by interference with the ability of parents to support, control and care for their children. The most extreme examples concern the removal of children from indigenous families, without findings of parental inadequacy, and their placement with parents of the majority culture. But a more quotidian and pervasive intrusion of this sort is governmental surveillance of the parenting of women receiving public assistance.

We can think about the treatment of immigrant families in a similar light. The treatment of immigrants during these enforcement efforts signals, both to immigrant communities, and to the neighbors and other citizens who observe them, that these families can be disrupted at will: children can be separated from their parents, parents can be deprived of their ability to care for or even to discipline their children without findings of inadequacy and without recourse. These families are in fact abjected: expelled from the community symbolically, before they are expelled concretely. They are reduced to beings for whom the quintessentially human imperatives of care and nurturance, and the possibilities of family formation and preservation, seem not to apply.

This abjection produces a number of important political effects. First, it reinforces specific features of the anti-immigrant discourse articulated by critics from Samuel Huntington to Lou Dobbs, suggesting the current wave of immigrants is different from previous waves, distinctively alien and unassimilable. Treating these immigrants like the most dangerous kinds of criminals also reinforces the dimension of that discourse that associates them with lawlessness. This abjection

39 See Leti Volpp, Divesting Citizenship: On Asian-American History and the Loss of Citizenship through Marriage, 53 UCLA L. REV. 405, 460-61 (2005) (examining the effects of the 1875 Page Act, which prevented Asian women from entering the U.S. “for the purposes of prostitution” and observing that “[t]he Chinese immigrant was generally kept from reproducing a heterosexual family, due in part to restrictions on immigration. This fact produced the perception of Chinese men as aberrant and alien, given the notion of the family as the foundation of civil society”).


41 See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Martha Fineman, Images of Mothers in Poverty Discourses, 1991 DUKE L.J. 274.

42 See SAMUEL P. HUNTINGTON, WHO ARE WE? CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2005).

43 An example of this discourse is the quote that concludes Margaret Talbot’s article on Hutto. See Talbot, The Lost Children, supra note 3. She quotes Cynthia Long, a county, as regretting the separations and difficulties faced by immigrant families, but adding: “The
may also help to enlist neighbors in expelling the communities of immigrants, a kind of mobilization we’re beginning to see in a number of communities. \(^{44}\) It may finally give the immigrants themselves a jarring sense of the future they face if they decide to remain in, or return to, the United States.

III. THE OBAMA ADMINISTRATION AND THE FUTURE OF IMMIGRANT FAMILIES

When I first began examining this question, we were at the height of the Bush administration’s efforts to apprehend and deport undocumented immigrants. Is the election of a new Democratic administration that won broad Latino support and campaigned on a platform of comprehensive immigration reform likely to change these dehumanizing practices? Surprisingly, the answer is less than clear.

There are some signs that point in a positive direction. Both President Obama and DHS Secretary Janet Napolitano have previewed a shift in focus, from mass raids that target large numbers of undocumented workers, to enforcement against employers who seize on flaws in the immigration system to undercut competition or exploit vulnerable workers who may be underpaid, or fired or deported for participating in labor activism. DHS has declared that they will not enter a workplace and arrest workers unless local U.S. attorneys are prepared to prosecute the employer. \(^{45}\) They have expanded the application of “humanitarian guidelines,” which encourage immigration officers “to contact local health agencies and nongovernmental groups, to give people the special medical, social and family support they need—such as making sure that the children of a person who is arrested are properly cared for.” \(^{46}\) Early investigations also suggest that DHS may be willing to look for violations that go beyond the simple employment of undocumented immigrants to patterns of racial discrimination, or exploitation of undocumented status to suppress labor mobilizations. \(^{47}\) Perhaps most importantly, the administration has situated these enforcement efforts within a broader...

\(^{44}\) See Bill Ong Hing & David Bacon, Rights Not Raids, The Nation, May 5, 2009, available at http://www.thenation.com/doc/20090518/hing_bacon (reporting on the authors’ work with the National Commission on ICE Misconduct, and observing that “[i]ncreased enforcement has poisoned communities, spawning scores of state and local anti-immigrant laws and ordinances that target workers and their families”).


\(^{46}\) Id.

aspiration to legislate comprehensive immigration reform within the year, including a path to citizenship for those undocumented workers currently living in the United States.48

Yet these proposed changes offer security neither for undocumented workers nor for the integrity of their family bonds. Workers may still be arrested under revised DHS priorities where U.S. attorneys are prepared to prosecute. Workers and their families, who may have little sense of pending actions against employers, may still be blindsided by workplace arrests, and may have little time to plan for family separations. The E-Verify system, which requires employers to check the social security numbers and other documentation provided by employees may function in a less abrupt fashion; yet it presents other difficulties. Some analysts argue that the database used by E-Verify is so flawed that it may end up depriving U.S. citizens of employment.49 Humanitarian guidelines acknowledge the enormous strains the immigration enforcement places on families. But they are hortatory rather than mandatory; and, more importantly, they provide social support for children and families facing separations, rather than addressing the enforcement priorities that create those separations.50

To revise those priorities, and stem the tide of those separations, more than a shift toward enforcement against employers will need to take place. The administration—and ultimately the American public—will have to broaden the frame, from the punitive “bad actor” focus that penalizes, and justifies the stigmatization of, undocumented workers.51 Immigration enforcement will have to be understood not as a singular end, but as part of a broader set of policies that include comprehensive immigration reform—a goal that the Obama administration endorses, but on which it has expended little political capital.52 And the decision to migrate in search of employment will have to be understood not simply as the decision of an individual, but as a choice shaped by market forces, governmental

49 Id.
50 Edward Sifuentes, Obama Shifts Gears, supra note 45.
51 One might imagine that a simple shift to an enforcement focus on employers could produce a similarly penalizing (though, given the American veneration of the market and of capital, perhaps a less stigmatizing) focus. Employers who exploit the immigration system to secure low-wage workers and suppress labor mobilizations may prove in the eyes of some, including myself, to be a more culpable target. Yet a focus on even on their exploitation is less satisfactory than a focus on the flaws in the immigration system that they are able to exploit.
52 Preston, Firm Stance on Illegal Immigrants Remains Policy, supra note 48. Preston quotes immigration expert Michael Olivas as saying that we now have the “worst of all worlds” because the administration’s in enforcement has not (yet) been accompanied by broad efforts to overhaul immigration policy. Id.
labor regulations and transnational trade policies. As we navigate these transitions, it is also crucial to take a broader perspective on those individuals who, for whatever combination of reasons, have violated existing immigration laws. It is too simple to say, as enforcement advocates sometimes do, that “children sometimes have to suffer” because their parents “have broken the law.” We do not, in fact, impose such excruciating hardships on everyone who breaks our laws. We can, on the one hand, observe a hierarchy in the familial treatment of lawbreakers. Prosecutors told Andrew Fastow, the architect of Enron, and his wife Lea, that their sentences might be so that someone could remain at home to provide continuity of care to their two young children. But we can, on the other hand, glimpse moments of broader social and legal recognition that intimate relationships—and other integral dimensions of our shared humanity—deserve to be respected, even when someone may have violated a law. Though we retain only some fruits of the Warren Court revolution, the rights of the accused reflect this understanding, as do innovative prison programs such as in-house children’s centers that facilitate parent-child bonding, and conjugal visits that respect the integrity of intimate bonds, even for those who have been convicted of serious crimes. The stringency—indeed, the ferocity—with which the government has violated these precepts in the case of immigrants may reflect an effort to reduce a dauntingly complex array of causes and effects to a single culpable act, and a single, highly dispensable actor. We should keep these more humane intuitions in mind, as we struggle to bring the broader picture underlying immigration into view.

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53 Hing & Bacon, Rights Not Raids, supra note 44 (describing pressure to migrate as being created by forces such as NAFTA and globalization).
54 Talbot, The Lost Children, supra note 3.
55 Speaking after the entry of Lee Fastow’s guilty plea, the prosecutor noted that one factor shaping the timing of incarceration for the Fastows is likely to be the goal of facilitating continuous care for the couple’s two young children. “The Fastows’ children can be taken into account in deciding when Andrew Fastow will begin serving his sentence,” [Prosecutor Andrew] Weissmann said. ‘There is no reason for the government, when it can, to have a husband and wife serve their sentences at the same time,’” Mary Flood, Lee Fastow Expresses “Regret” at Sentencing, HOUSTON CHRON., (Dec. 19, 2005).
56 J.R. Watson captured something of this understanding when he wrote, in 1967, “[a]t no time are the civil rights of an individual citizen more vulnerable than when a man stands before a criminal court of justice which will decide his guilt or innocence.” J.R. Watson, Indigent’s Right to Counsel, 3 NEW ENG. L. REV. 61, 61 (1967).
57 Some examples of these kinds of family-oriented innovations—which remain rare, but promising—are discussed in NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 87–107 (2005).
I. INTRODUCTION

In 1994, Speaker of the House Newt Gingrich threatened to take the children of welfare mothers and put them in orphanages as part of congressional welfare reform. The idea didn't sell well. For one thing, it evoked images of *Oliver Twist*—TIME magazine's cover story the next week was, "The Storm Over Orphanages," as commentators and politicians rushed in to condemn Gingrich as heartless. Liberals were appalled; this seemed to symbolize exactly why they opposed his "Contract with America," with which the orphanage proposal was articulated. For another, it was expensive: analysis by the Child Welfare League of America suggested that while the average cost of keeping a child with her mother on Aid to Families with Dependent Children (AFDC) in 1994 was $2,644 a year, with a foster family it would be $4,800 and in residential group care, $36,500. No one on the Republican side of the aisle came to Gingrich's defense. Were Republicans serious about orphanages? "If they were, they have buttoned..."
their lips. This thing has been mercilessly crucified,” an unnamed House staffer
told *Time.* “I would not be surprised if they strike the provision from the bill,
because it’s given us so much grief.”

Yet in 1996, a modified form of Gingrich’s vision became law when two bills
(originally one but subsequently split) were enacted into law. One, the Personal
Responsibility and Work Opportunity Reconciliation Act, eliminated AFDC
(“welfare”)—the program that since the New Deal had kept children out of
orphanages by giving their mothers the support to raise them at home. The second
was the Small Business Job Protection Act of 1996, which contained the Inter-
Ethnic Placement Provisions (IEP, amending the Multi-Ethnic Placement Act,
therefore known as MEPA-IEP). It was designed to make it easier to place foster kids
in adoptive homes. The IEP addressed what was widely regarded as an obstacle
to moving children from foster care into adoptive homes—“racial matching”
policies that, many contended, kept children of color from the most readily
available adoptive homes: those with white parents. Another provision of the
same bill included a tax credit of $5,000 to $6,000 for adopting families. These
measures were followed in 1997 by the Adoption and Safe Families Act (ASFA)
which, among other things, provided state child welfare systems with bonuses for
placing children into adoptions and time limits to terminate parental rights.

Taken together, these adoption reform measures set out to restructure foster
care by providing an enhancement of one exit strategy for children in foster care:
adoption. But these federal measures also simultaneously transformed the financial
incentives that previously encouraged states to keep families together by
eliminating the safety net for children whose mothers had previously been eligible
for AFDC. As a result of the federal measures, many single mothers wound up
unable to support their children or find care for their children while they worked in

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5 *Id.* at 58.
6 *Id.*
7 For the long version of the legislative history, see SANDRA PATTON, BIRTHMARKS:
(codified as amended in scattered sections of 26 U.S.C.); Multi-ethnic Placement Act of
10 *See* PATTON, supra note 7, at 138.
11 *Id.* at 139.
12 *Id.* at 138.
(codified as amended in scattered sections of 42 U.S.C.); Donna Greene, *Move toward
Adoptions*, N. Y.TIMES, March 7, 1999, at 14WC.
the absence of federal payments to families.\(^{14}\) The adoption components were enacted with the full-throated support of liberals.\(^ {15}\)

What happened? How did liberals go from attacking Gingrich’s suggestion to support? The answer lies in the redefinition of the elimination of AFDC and the enactment of MEPA-IEP and ASFA from an assault on the preservation of families to a “racial equality” measure. In 1994, as Congress was debating MEPA, the earlier incarnation of the IEP, Harvard law professor and influential child-policy advocate Elizabeth Bartholet, in a letter to the *New York Times*, described the problem in this way: “this legislation . . . was originally developed in recognition of the fact that child welfare workers throughout the country are holding children of color in foster and institutional care for years at a time rather than placing them in permanent adoptive homes, solely because of their reluctance to place children transracially.”\(^ {16}\)

Well, no. Bartholet’s argument seems to have lost track here of the fact that MEPA-IEP was originally part of the welfare reform bill.\(^ {17}\) The goal of the legislation, as formulated in relation to the Contract with America, bandied about in the press, and discussed in conservative think tanks, was to take children away from single mothers.\(^ {18}\)

Conservatives argued that only the muscular parenting of fathers could fit them for the rough-and-tumble of life and employment in the formal sector, and single mothers, as we have heard since at least the thirties, create weak-willed and pathological children (able only to exist in the kinder, gentler world of gangs and guns).\(^ {19}\) There was a concerted effort to pin all social problems on single mothers.

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\(^{17}\) See supra notes 7–9 and accompanying text.


mothers. In an editorial in the Washington Post in 1993, Richard Cohen called crime "a clear consequence of illegitimacy," while in the Wall Street Journal, Charles Murray railed against the "Coming White Underclass"—those trashy white women who were having out-of-wedlock births; children they would raise in poverty who would turn out badly. The Contract with America promised to "discourage illegitimacy." Ironically, Bartholet is a single mother, and a defender of the diversity of family structure in the face of conservative criticism. Clearly, demonizing single mothers was not her goal, nor for the most part, that of other liberal champions of MEP-IEP. While conservatives fought a battle fraught with controversy to eliminate AFDC (albeit an ultimately successful one), MEP-IEP enjoyed far broader support, precisely because it changed the subject and nature of the debate, focusing not on the evils of welfare mothers or the need to take their children away, but rather on children who discursively were always already in foster care, and "languishing" or "waiting." Although this was a bit of a rhetorical sleight of hand—children got into foster care somehow—it was extraordinarily useful to the conservative policy agenda. It became such a commonplace that these children were just lingering about, seeking adoptive parents but prevented from doing so by wrong-headed policies, that an influential book in the debate was titled Nobody’s Children.

In 1935, the New Deal envisioned an alternative to the private orphanage system for children whose families were too poor to care for them—Aid to Dependent Children (ADC), which enabled mothers to care for their children at home rather than dropping them at an orphanage so they could take a job. Very

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21 Id.
22 See Murray, supra note 18.
25 This language is endemic to the conversation. Consider Kim Ford-Mazuri, who uses the term three times in two sentences: "Because black children represent a disproportionately high number of children in need of homes, they wait up to twice as long for permanent homes as white children wait. . . . An insufficient number of Black families are available for these waiting Black children." Kim Forde-Mazrui, Note, Black Identity and Child Placement: The Best Interests of Black and Biracial Children, 92 MICH. L. REV. 925, 937 (1994) (citations omitted) (emphasis added). The next sentence speaks of "delays in the placement of Black children." Id. (emphasis added). At no point does she consider that another name for this "waiting" might be the period in which birth parents, usually mothers, are scrambling to get their children back. Once the conversation is defined in terms of waiting or delay, the illegitimacy of the claims of birth parents on their own children has already been presumed. See id.
few of these orphanages ever served black children, except for those run by African American churches or individuals. Black children without parental care were likely to wind up in the juvenile justice system instead, sometimes on chain gangs or under the gun of an overseer working alongside sharecroppers on plantation land. At least at first, ADC served very few black children. Southern white lawmakers did not want to see black women out of the work force—where their labor was needed cleaning houses or cropping—and found a variety of ways of preventing black children from receiving ADC. In time, though, administrative changes from above and pressure from below began to equalize the likelihood that poor black women and poor white women would receive ADC. As one might have predicted, this drove some southern white politicians to distraction; if the federal government was going to require that black children receive support from the public fisc, then their mothers were going to pay.

The critical part of this fight began in 1960, with the "Louisiana Incident." At the height of the struggle over school desegregation (think George Wallace and "segregation forever"), governor Jimmie Davis of Louisiana answered a federal order to desegregate the schools in New Orleans by cutting 23,000 illegitimate children—95 percent of whom were black—from the ADC rolls, hoping to force their families to move elsewhere. Davis claimed that the children cut from ADC were "illegitimate" or had siblings that were, and Louisiana was purging the rolls under its "suitable home" rule. If a woman had begotten a "bastard" child while receiving public benefits, officials argued, it amounted to welfare fraud, since it

31 Solinger, supra note 29, at 192.
32 Id.
proved that her children had a "substitute father" who was responsible for their
support, and she was no longer eligible for ADC.  

This was not the first time that southern politicians had used arguments about
welfare or illegitimacy as political tools in their fight against the civil rights
movement; in the period between 1957 and 1967, the city of Birmingham,
Alabama, decreased its expenditures on welfare from $31,000 to a mere $12,000 a
year.  

In Mississippi from 1958 to 1964, the legislature debated bills on
sterilization and illegitimacy each year, making bearing or begetting an illegitimate
child a felony, punishable by sterilization or three years in the state penitentiary.
Some said the legislation was the work of the Citizens' Councils, organized to
uphold white supremacy.  

In floor debate on the 1964 bill, one state legislator argued that "[w]hen the cutting starts, [Negroes will] head for Chicago.
"  

Civil rights leader Fannie Lou Hamer said often in her speeches that unwanted and even
secret sterilizations were common for black women who went into the hospital for
some other reason in her home in Sunflower County; some called the operations
"Mississippi appendectomies."

Although Louisiana was not the first state to reply to a desegregation order by
attacking ADC, this time the federal government responded. The head of the

33 See M. Elaine Burgess & Daniel O. Price, An American Dependency Challenge, in
WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY 191, 195 (Gwendolyn
Mink & Rickie Solinger eds., 2003); SOLINGER, supra note 29, at 53 (describing a raid to
"ferret out welfare chiselers" in which a man was found "hiding under blankets" in the
apartment of a black female welfare recipient).

34 ROBIN D. G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK
WORKING CLASS 95 (1994).

35 See KENNETH C.W. KAMMEYER, POPULATION STUDIES: SELECTED ESSAYS AND
RESEARCH 469 (1975) ("Punitive sterilization bills have been proposed in the Mississippi
legislature since 1958 ostensibly to solve the problem of illegitimacy."); JENNIFER NELSON,
WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 68 (2003) ("The
Mississippi state legislature had been trying to pass a punitive sterilization law since 1958,
arguing sterilization would help prevent illegitimacy."); see also Mary Ziegler, Reinventing
Eugenics: Reproductive Choice and Law Reform After World War II, CARDOZO J.L. &

36 See CLYDE WOODS, DEVELOPMENT ARRESTED: THE BLUES AND PLANTATION
POWER IN THE MISSISSIPPI DELTA 192–93 (1998); Ziegler, supra note 35, at 335 (noting
that pro-eugenics "groups like the [Population Council increasingly targeted members of
racial minorities"

37 STUDENT NONVIOLENT COORDINATING COMMITTEE, GENOCIDE IN MISSISSIPPI 4 (c.
1965).

38 See KAY MILLS, THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER 21–
22 (1993) (recounting Hamer's unwanted sterilization); JENNIFER NELSON, WOMEN OF
COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 68 (2003); DOROTHY ROBERTS,
KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 90
Department of Health, Education, and Welfare (HEW), Arthur Flemming, answered Governor Davis by enacting what came to be called the Flemming Rule: states could not deny aid to needy children with rules restricting eligibility to suitable homes—unless state officials and social workers removed the children from these purportedly unsuitable homes. Flemming presumed this would prove too expensive to states, and southern officials would stop these shenanigans. Instead, HEW inadvertently gave them license to engage in the wholesale terrorizing of single black mothers. The following year, Congress made the Flemming Rule law—but in a way that was sympathetic to the goals of southern politicians, by authorizing funds for a program it called ADC-foster care, which provided federal funds to states to place children in out-of-home care. Foster care exploded; 150,000 children were placed in out-of-home care in 1961 alone. So many black children entered the child welfare system in the next decade that “some observers began to describe this decade as the ‘browning’ of child welfare in America...”

Another factor in the expansion of the child welfare system in this era was the discovery, in medical literature, of “battered child syndrome.” Between 1963 and 1967, all fifty states passed laws mandating that authorities (doctors, teachers, and


40 See BABB, supra note 39, at 52 (1999) (“After the Flemming Rule was instituted, when AFDC investigators entered the applicant’s home and found it to be unsuitable, state intervention was mandatory.”); Lawrence-Webb, supra note 39, at 12–18 (“The new law incorporated aspects of the Flemming Rule with ... federal financial help to states in the removal of children from unsuitable home conditions...”).

41 HOWARD ALTSTEIN & RUTH G. McROY, DOES FAMILY PRESERVATION SERVE A CHILD’S BEST INTERESTS? 6–7 (2002). Other estimates range as high as 244,000 children in foster care that year. See Elizabeth M. Landes & Richard A. Posner, The Economics of the Baby Shortage, in ECONOMIC ANALYSIS OF CONTRACT LAW, ANTITRUST LAW, AND SAFETY REGULATIONS 143, 147 (Jenny Bourne Wahl ed., 1998) (noting that 244,000 children received foster care in 1961; 133,000 from public agencies and 111,000 from voluntary agencies).

42 Sheryl Brissett-Chapman, Child Protection Risk Assessment and African American Children: Cultural Ramifications for Families and Communities, in SERVING AFRICAN AMERICAN CHILDREN: CHILD WELFARE PERSPECTIVES 45, supra note 39, at 49.

43 See C. Henry Kempe et al., The Battered-Child Syndrome, 181 JAMA 17, 17 (1962) (stating battered-child syndrome is “a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent”).
so forth) who suspected child abuse report it. At first, this affected a small and circumscribed group of children and families; one analyst in 1976 estimated that probably less than 10 percent of child welfare cases involved child abuse as opposed to child neglect. In the late sixties and early seventies, however, the political momentum of concern about child abuse spurred states to authorize social workers to remove children from what they suspected to be abusive or neglectful families. In the context of the social movements of the period and the War on Poverty, impoverished communities, particularly communities of racial minorities, that had rarely seen social workers before were suddenly flooded with them. At the same time, state and federal governments became progressively more interventionist to protect children from harm in their homes. Increasingly, legal systems and casework tilted away from protecting the due process rights of the family and toward child protection. Operating in a context where civil rights struggles were being fought out over the terrain of pregnancy and children, officials created a situation ripe for abuse.

Attacks on single mothers were not limited to the South, or to those who would have identified themselves as racial conservatives. In 1965, the uneasy relationship between the civil rights movement and the federal government reached


46 See Kathleen Malley-Morrison & Denise A. Hines, Violence in A Cultural Perspective: Defining, Understanding and Combating Abuse 222 (2004) ("CAPTA also gave states the power to remove children from homes if the child was deemed to be danger." (citations omitted)); Seilander, supra note 44, at 65 (noting some states’ requirements of reporting suspected child abuse and granting social workers immunity from civil or criminal lawsuits).

47 In 1974, Congress authorized massive funding in the Child Abuse Prevention and Treatment Act to investigate child abuse and separate children in families where social workers believed there was abuse. See Barbara J. Nelson, Making an Issue of Child Abuse: Political Agenda Setting for Social Problems 116 (1984) ("[Congress] authorized $85 million to be spent during the next four years" in the 1974 bill); Seilander, supra note 44, at 68 ("Amended several times, CAPTA was the centerpiece of federal efforts to exercise leadership.").

48 Rosemary A. Chalk et al., Violence in Families: Assessing Prevention and Treatment Programs 164 (1999) ("The disadvantages of the juvenile court system include the removal of the child rather than the offender from the home; the lack of due process protections for those accused of abuse comparable to criminal court procedures").
a crossroads. With the passage of the 1965 Voting Rights Act, there was a credible position that the goals of the civil rights movement had been met—formal legal equality had been accomplished. Others, of course, looked at the concentration of African Americans in ghettos, low-paying jobs, and communities that still didn’t even have high schools, never mind a route to higher education, and said that the work—of, say, building an interracial movement to end poverty—had only just begun.49 In this context, the White House and the Department of Labor attempted to get out ahead of this issue, turning, as Southern officials had, to the question of black single mothers and their unfortunate children. First in a speech at Howard University,50 then in the Department of Labor Report, The Negro Family: The Case for National Action (subsequently known as the Moynihan Report, for its author, sociologist and later Democratic Senator Daniel Patrick Moynihan), the Johnson administration laid out an argument that the source of black poverty and unemployment was child rearing and family practices.51 In its much-protested formulation, the Moynihan Report characterized the black family as a “tangle of pathology,”52 characterized by single mothers, a black “matriarchy”53 that emasculated sons, making them unfitted for the competition for jobs.54

This history of how the child welfare system came to work the way it does, and how Black children came to be over-represented in it, was given short shrift in the debate over MEPA-IEP, which insisted that it was all about adoption policy, and race matching. In Bartholet’s writing, as in many legal scholars’, there is a single villain in the story we tell about African-American children’s disproportionate presence in foster care: the National Association of Black Social Workers or NABSW, and the group’s influential 1972 statement opposing transracial adoption.55 In this article, I argue that we need to hear the analysis of

49 For a unique vision, see Richard A. Cloward & Frances Fox Piven, The Weight of the Poor: A Strategy to End Poverty, NATION, May 2, 1966 (setting a blueprint for the welfare rights movement).
50 President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), available at http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/650604.asp (“[U]nless we work to strengthen the family, to create conditions under which most parents will stay together—all the rest: schools, and playgrounds, and public assistance, and private concern, will never be enough to cut completely the circle of despair and deprivation.”).
52 Id. at 29.
53 Id. at 30.
55 Id. at 124.
the NABSW in its historical context to understand what happened in this 1994–1996 policy debate, and why liberals largely missed what conservatives were doing.

II. LIMITING THE DEBATE AND THE HISTORICAL CONTEXT OF THE NABSW STATEMENT

The NABSW in 1972 understood the issue in exactly the terms that conservatives did in 1994–96: that transracial adoption was about taking away the children of impoverished, black single mothers.\(^56\) Advocates of transracial adoption, then and now, tend to see the NABSW statement as being about race in a narrow, individual sense—as a question about the capacity of individual white parents to love and raise an individual black child.\(^57\) For this reason, outcome studies, particularly those by Rita Simon and her collaborators that have found little or no psychological harm to black children from being raised in white families have been influential in this policy debate.\(^58\)

But the NABSW and its supporters have consistently argued that this misses the point of the statement, which they say was about keeping black families together in the first place. So when opponent of race matching Randall Kennedy writes that the reason such policies need to be abolished is that “at any given moment, hundreds of thousands of dependent children are bereft of parental protection, guidance, nurturance, and love,” and “[a] disproportionately large

\(^{56}\) Id. at 127.

\(^{57}\) Id. at 127–28.

\(^{58}\) Actually, all studies have found a range of outcomes. But those that have been the most positive have been the most significant to the debate, which skews our understanding of the social science, and hence, presumably, of reality. See, e.g., DAWN DAY, THE ADOPTION OF BLACK CHILDREN: COUNTERACTING INSTITUTIONAL DISCRIMINATION (1979); WILLIAM FEIGELMAN & ARNOLD R. SILVERMAN, CHosen CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS (1983); LUCILLE J. GROW & DEBORAH SHAPIRO, TRANSRACIAL ADOPTION TODAY: VIEWS OF ADOPTIVE PARENTS AND SOCIAL WORKERS (1975); LUCILLE J. GROW & DEBORAH SHAPIRO, BLACK CHILDREN–WHITE PARENTS: A STUDY OF TRANSRACIAL ADOPTION (1974); JOYCE A. LADNER, MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES (1977); SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA (2000); RITA J. SIMON & HOWARD ALSTSTEIN, ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS (2000); RITA J. SIMON & HOWARD ALSTSTEIN, ADOPtiON, RACE, AND IDENTITY: FROM INFANCY THROUGH ADOLESCENCE (1992); RITA J. SIMON & HOWARD ALSTSTEIN, TRANSRACIAL ADOPTION: A FOLLOW-UP (1981); RITA J. SIMON & HOWARD ALSTSTEIN, TRANSRACIAL ADOPTION (1977); William Feigelman, Adjustments of Transracially and Inracially Adopted Young Adults, 17 CHILD & ADOLESCENT SOC. WORK J. 165 (2000).
percentage of parentless children are black," he is articulating the same reasons that motivated the NABSW to release its statement in the first place. This is intriguing, to say the least. The logic of the NABSW position is lost, though, without a rich and textured sense of the historical context in which it was articulated, one that included a (then) recent and abrupt expansion of the foster care system that was coterminous with the expansion of white families' adoption of children of color. Members and supporters of the NABSW believed that when social workers and caseworkers thought African American children could eventually be placed in white families, they were much more likely to remove them from their birth families. The NABSW's critique of the functioning of the foster care system deserves to be understood in all its nuance, for it continues to be a useful analysis.

A. Limiting the Debate

For the last half century, the idea of adoption across racial lines has occupied a place in the U.S. national imaginary that has far outstripped its significance as an actual practice. It seems to capture all of the things we worry about—vulnerable children, drugs, questions of love and race, irresponsible parenting, the danger of losing one's children, law, and policy. Legal scholar Twila Perry has made the insightful point that issues of race and adoption pit two views of race against each other, both of which have considerable purchase in the national public discourse—"colorblind individualism" versus "color and community consciousness." So as we tack into these hugely emotionally compelling waters, it is helpful to take stock of what this debate is not about, despite the prevalence of claims that suggest something different.

It is not about whether white parents can adopt children of color in the United States. Recent debates about so-called race-matching policies, crystallized in MEPA-IEP, addressed public adoption agencies, which is to say, adoption from foster care. This represents only about 20 percent of children adopted in the United States. Only about three-quarters even of public agencies ever had policies preferring race matching, and such policies never had the force of law. Private

60 See BARTHOLET, supra note 26, at 123–24.
61 See infra notes 121–124 and accompanying text.
64 TOM GILLES & JOE KROLL, BARRIERS TO SAME RACE PLACEMENT 17, 21 (1991) (citing between 76–82% of state agencies have race matching policies).
agencies, unless for some reason they receive public funds, are unaffected by MEPA-IEP, and were always far less likely to have had race-matching policies. 65

When we discuss children in foster care, we are not for the most part talking about abused children; abuse is only alleged in a minority of cases (in 2003, 30 percent). 66 Most are removed for reasons of “neglect,” which some argue includes simple poverty. 67 Neglect certainly includes controversial categories like homelessness, domestic violence, or chronic illness. 68

We are also not talking about children harmed by crack. As I have noted elsewhere, the consensus of the medical literature by the decade after 2000 was that crack has no effect on the outcome of a pregnancy—the “crack baby” scare of the nineties was largely fabricated. 69 Even fetal alcohol syndrome, far more

65 Id. at 17 (citing that only 30% of private agencies have race matching policies).
68 See, e.g., Nina Bernstein, Family Law Collides with Immigration and Welfare Rules, N.Y. TIMES, Nov. 20, 2000, at B1 (stating that New York authorities found neglect and placed the child in foster care because the mother’s chronic illness required frequent hospital visits).
common and scientifically sturdy, turns out to be difficult to diagnose and quite rare, at less than two births per ten thousand in the United States in 1979 (roughly the same rate as cleft palette) and occurring primarily to mothers who have other problems as well—poor baseline health or nutrition in particular. One group, Native American children, were particularly identified with the problem in the popular press, principally as a result of the best-selling book by Michael Dorris, The Broken Cord. Native American children in particular were overdiagnosed with fetal alcohol syndrome; a 1993 genetic study on reservations in Arizona found that between half and two-thirds of the children diagnosed with fetal alcohol syndrome didn’t have it, suffering instead from Down syndrome or some other developmental problem.

I make these points because the conversation about foster care and adoption so often proceeds from just-so stories, stories that begin with crack babies or horribly abused children. In fact, I cannot think of another area of academic or research for engineering the crisis. See Gideon Koren et al., Bias Against the Null Hypotheses: The Reproductive Hazards of Cocaine, 334 LANCET 1440, 1441 (1989). This study found the likelihood that an abstract would be accepted for the annual meeting of the Society of Pediatric Research was significantly affected by whether it did or did not find adverse pregnancy outcomes to be associated with cocaine. Id. Studies that found no effect had an 11% acceptance rate (1 out of 9), while those that found effects had a 57% acceptance rate (28 out of 49). Id. Negative studies tended to be better designed; more likely to have a control group, and more likely to compare polydrug exposure with and without cocaine. Id.


71 See, e.g., Mike Snider, Painful Legacy of Fetal Alcohol Syndrome, USA TODAY, Feb. 3, 1992, at D4 (highlighting Dorris’ book and its impact of educating the public about fetal alcohol syndrome). There was massive press coverage of Native people and fetal alcohol syndrome that followed from the success of that book; NBC, for example, did a week-long series in 1989 entitled Incident at Pine Ridge.


73 For example, Elizabeth Bartholet begins NOBODY’S CHILDREN with two imaginary stories that are meant to illustrate how the current foster care system work and how to fix it. BARTHOLET, supra note 26, at 8–22. Barbara Woodhouse’s often subtle and sensitive arguments about substitute care and transracial adoption nevertheless do their work through a narrative strategy embodied in their titles. See, e.g., Barbara Bennett Woodhouse, “Are You My Mother?”: Conceptualizing Children’s Identity Rights in Transracial Adoptions, 2
legal research where the discussion so often veers into imaginary stories, of simplified and homogenized claims about what is happening with the very diverse families and children in foster care. There are at least three reasons for this. First, few commentators have much first-hand experience of foster care “on the ground,” at the level where children are taken or not taken, where families in distress do not have recourse to the freedom money buys—to send a child to a private psychiatric hospital, (boarding) school, or rehabilitation facilities, where the behavior problems that bring impoverished children and youth to the attention of authorities can be managed by psychiatrists and social workers who have little inclination to take one’s children away (especially since the parents are paying the bill). By the same token, parents in trouble can check themselves into drug or alcohol treatment or anger management treatment, or, if things get really bad, can find a friend or relative that has the resources to take one’s children for a while. There are two responses to family distress from those outside—one therapeutic, the other punitive—and which one you get depends profoundly on income.

Second, discourse about other people’s parenting, usually mothering, falls rather easily into the moralistic and judgmental. Everybody, and I am no exception, has a friend, relative, or colleague whose parenting drives us crazy and who is, we are certain, clearly messing up her kid’s life. Whether we think this rush to judgment forgivable or reprehensible in private life, this impulse cannot be allowed to run public policy about how to balance parental rights and the best interest of the child. If we are ungenerous to those we care about in relation to children whom we imagine as innocent and infinitely malleable, our public conversation is even more hostile about the mothering of strangers and race/class/sexual identity “others.”

Third, generalizations about foster care are ridiculously hard to make because there is not a foster care system in the United States, but diverse systems in 50 states, 8 U.S. territories and possessions, 562 federally recognized Indian tribes, and the District of Columbia. Until recently there was not even a national reporting system that tracked the number of children in these diverse foster care systems; even now, state-level tracking systems are sufficiently different that getting relevant data is challenging. Caseworkers often have considerable latitude in determining what happens to children, so the kinds of things that may be recorded as policy (like “we don’t take children for reasons of poverty”) may or may not be

DUKE J. GENDER L. & POL’Y 107 (1995); Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents; Rights, 14 CARDOZO L. REV. 1747 (1993). Randall Kennedy writes a page and a half about the why foster parents are, on the whole, less desirable than adoptive parents without a footnote that documents anything except some general demographic characteristics. See KENNEDY, supra note 59, at 405–06.

See Richard P. Barth, Fred Wulczyn, & Tom Crea, From Anticipation to Evidence: Research on the Adoption and Safe Families Act, 12 VA. J. SOC. POL’Y & L. 371, 379 (2005) (discussing the inadequacies with the current foster care tracking systems).
enacted when a caseworker walks into somebody’s house. Transparency is not a virtue embraced by child welfare systems, and the confidentiality promised to foster children can equally cloak malfeasance by the adults in the system, who include a complex mix of mental health providers, group home staff and administrators, lawyers, judges, foster parents, social workers, and child protective service caseworkers.

Instead, I would argue that the questions we need to be asking are, why are children of color being taken from their families in such numbers, and why are they so much less likely than white children to be reunited? Legal scholar Dorothy Roberts, in *Shattered Bonds: The Color of Child Welfare*, argues that invidious, if often unconscious, bias permeates the child protective system. Similarly situated children and birth parents are treated very differently, she shows, at every level of the system. Black parents are presented with impossible reunification plans, accused of things they did not do, and denied access to their children. Her empathy and sense that the situation is unconscionable is palpable:

One hundred years from now today’s child welfare system will surely be condemned as a racist institution—one that compounded the effects of discrimination on Black families by taking children from their parents, allowing them to languish in a damaging foster care system or to be adopted by more privileged people. School children will marvel that so many scholars and politicians defended this devastation of Black families in the name of protecting Black children.

Between 1986 and 1992, the size of the child welfare system(s) nearly doubled, from 276,000 in 1986 to 450,000 in 1992, largely as a result of the “crack babies” scare—despite the lack of compelling medical evidence that cocaine causes fetal harm. These kids were disproportionately children of color,

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75 See Dept. of Children & Family Servs. v. Interest of J.C., 847 So. 2d 487, 488–90 (Fla. Dist. Ct. App. 2002) (holding that the removal of a child without good cause was inappropriate).

76 See ROBERTS, supra note 67, at 13–14.

77 Id. at 20–23.

78 Id. at 20, 23–25.

79 ROBERTS, supra note 67, at ix–x.


81 See, e.g., RICHARD P. KUSSEROW, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CRACK BABIES: A NATIONAL EPIDEMIC 4–6 (1991) (emphasizing an increasing burden on the foster care system, primarily due to crack babies).

and so the proportion of white children in the foster care system became progressively smaller. The debate about MEPA-IEP was in significant part about how to stabilize this huge new burden on state budgets, especially since children were being taken at birth. If their mothers were being designated as singularly unfit, with little chance of getting their children back, adoption represented an important alternative to an eighteen to twenty-one year commitment by states to these children’s support.

The NABSW, responding to a similarly abrupt expansion in the size of the child welfare system in the 1970s, and the number of black children in it in particular, sought to shut down transracial adoption, as it was their belief that the availability of this kind of exit strategy from foster care made it easier for caseworkers to remove black children from their families. In the 1990s, in contrast, Congress and liberal advocates sought to expand transracial adoption. By 2003, the number of children in the foster care system stood at 520,000; 35 percent of these children were African American, more than twice their proportion in the U.S. population as a whole.

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84 PALTROW, supra note 82, at 3. Mothers of so-called crack babies, it hardly needs saying, were being vigorously demonized; some of them went to jail for testing positive for cocaine, still bleeding from labor. See Dorothy E. Roberts, Unshackling Black Motherhood, 95 Mich. L. Rev. 938, 941–44 (1997). The sense that there is a question about whether it is ever appropriate for a cocaine-using mother to get her children back was conveyed in the 1995 film Losin Isaiah. Losin Isaiah (Paramount Pictures 1995).
85 National Association of Black Social Workers, NABSW’S POSITION ON TRANS-RACIAL ADOPTION, 5 BLACK CAUCUS 9, 9–10 (1973) [hereinafter NABSW Paper].
88 Id. at 2; see also JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION: 2000, at 1 (2001), available at http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf (explaining that the 2000 U.S. census found that 12.9 percent reported Black or African American). Native children (i.e. American Indian and Alaska Native, or “AI/AN”) were also represented in the foster care system at double their frequency in the population. AFCARS REPORT, supra note 87, at 2 (showing that two percent of children in foster care in 2003 were American Indian and Alaska Native); see also STELLA U. OGUWOLE, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 1 (2002), available at http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf (explaining
In a special issue of the *Duke Journal of Law and Policy*, Elizabeth Bartholet lamented the fact that feminists seem ambivalent about adoption.89 There is a reason for this. Full orphans, especially among young children, are exceedingly rare; most of the time, adoption involves taking somebody’s child.90 In my view, there are times when that is the best decision possible. But a woman losing a child, and a child losing a mother, is hardly a cause for feminist celebration. Furthermore, as I will argue in the next section, the NABSW was (and is) a feminist group, one organized, among other things to defend single mothers. It did and does deserve feminist respect and attention.

**B. Historical Context of the NABSW Statement**

In her 1991 article, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, Elizabeth Bartholet sets the NABSW statement in a context that many other white adoptive parents do, in relation to her own decisions to adopt—in her case, two children from Peru, one of whom appeared, visually, indigenous.91 She states:

I had to decide whether I wanted a child who was a racial look-alike or not. I had to think about whether it would be racist to look for a same-race child or racist to look for a child of another race, as I was learning that the black social workers’ organization opposed transracial adoption, calling it a form of racial genocide.92

For Bartholet and others, the NABSW statement of 1972 was a commentary on the inadequacy of white parents’ abilities in relationship to African American children.93 In her 1993 book, *Family Bonds*, Bartholet makes the NABSW statement both the origin point and the site of continued resistance to placing black children with white families:

The 1960s represented a period of relative openness to transracial adoption. Agencies began to place waiting black children with white parents when black parents were apparently unavailable. But in 1972 an

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90 Cf. LORI CARANGELO, STATISTICS OF ADOPTION (2005), http://www.amfor.net/statistics.htm (noting an orphanage in California in which “[f]ew kids ... were full orphans; most had[d] a surviving parent who couldn’t care for them ... ”).
92 Id. at 1169–70.
93 Id. at 1179–80.
organization called the National Association of Black Social Workers (NABSW) issued a proclamation opposing transracial adoption . . . . Leaders of the NABSW pledged to put a stop to transracial adoption.94

Speaking in 1993, she continued, “[t]here appear to be many adoption workers who either are sympathetic with the NABSW’s position or feel intimidated by its advocates . . . .”95 Or, as Margaret Howard put it in a 1984 article, “In 1972 the National Association of Black Social Workers (“NABSW”) condemned transracial adoption in terms so militant that transracial adoption fell by 39 percent in a single year.”96

In contrast, Leora Neal, executive director of the NABSW chapter in New York City wrote in 1996:

The resolution was not based on racial hatred or bigotry, nor was it an attack on White parents. The resolution was not based on any belief that White families could not love Black children, nor did we want African-American children to languish in foster care rather than be placed in White adoptive homes.

Our resolution, and the position paper that followed, was directed at the child welfare system that has systematically separated Black children from their birth families. Child welfare workers have historically undertaken little effort to rehabilitate African-American parents, to work with extended families, or to reunite children in foster care with their families.97

In a 1994 position paper, Preserving Families of African Ancestry, the NABSW suggested that the 1972 statement had been widely misread, “Many thought that the organization’s position focused exclusively on transracial adoption. Yet, this was one component of the position statement, which instead emphasized the importance of and barriers to preserving families of African ancestry.”98 In these contrasting accounts, questions related to white families were effectively an afterthought; the goal of the statement was to keep black families together.99

94 BARTHOLET, supra note 26, at 94–95.
95 Id. at 97.
99 See id.
Who's right? Should we understand the NABSW statement as primarily an attack on white parents' skills, or an effort to keep black families together? The plainest reading of the statement is that it is a set of criticisms of white families. It reads, in part:

The National Association of Black Social Workers has taken a vehement stand against the placement of Black children in white homes for any reason . . .

. . . In our society, the developmental needs of Black children are significantly different from those of white children. Black children [in Black families] are taught, from an early age, highly sophisticated coping techniques to deal with racist practices perpetrated by individuals and institutions . . . . Only a Black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a Black child's survival in a racist society . . .

. . . We fully recognize the phenomenon of trans-racial adoption as an expedient for white folk, not as an altruistic humane concern for Black children. The supply of white children for adoption has all but vanished and adoption agencies, having always catered to middle class whites, developed an answer to their desire for parenthood by motivating them to consider Black children. 100

This is strong language, and white parents raising children of color could surely be forgiven for believing that they were being criticized, and in harsh terms.

Yet if that point seems obvious, I want to lay out the counterargument here. A statement like this one—and perhaps only a statement like this one—could keep black families together. The statement is equally about black family preservation; it also reads: "We affirm the inviolable position of black children in black families where they belong." 101 In 1972, black parents, mothers in particular, were losing their children in ways that were political and discriminatory. It was so self-evident to most observers that black or mixed-race children would be better off with white parents—for reasons of economic advantage, schools, housing, and the supposed "tangle of pathology" that the Department of Labor and even President Johnson had identified as haunting the black family—102—that in order to get any traction in an uphill argument that supported black families, the NABSW was constrained to identify defects in white families. 103 If that seems hard to believe or remember, an analogy might be helpful here: it is quite similar to the argument, much more

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100 NABSW Paper, supra note 85, at 9.
101 See id., at 9–10.
102 Moynihan, supra note 54, at 1–7.
103 See NABSW Paper, supra note 100, at 9–10.
current, that any impoverished, Third World child without running water or a chance for adequate schooling would self-evidently be better off with loving parents in the United States. It was not enough for the NABSW to show that African-American parents were entitled—legally and morally—to raise their own children. Just as the NAACP had in the recent past successfully argued that black children were psychologically and educationally harmed by segregated schools—in the Brown case\(^\text{104}\)—the NABSW had to show a psychological benefit to black children in being raised in their own communities.\(^\text{105}\)

Although we rarely remember it this way, one of the battlegrounds of black social justice movements in the 1950s, sixties, and seventies was found in issues of reproduction and family.\(^\text{106}\) Sterilization—and laws mandating sterilization particularly of black women—as well as taking black single mothers’ children away were tactics in the war against rebellious black people in the South.\(^\text{107}\) Southern white officials got a lot of traction for their opposition to the civil rights movement out of criticizing, and even breaking up, black families—by labeling some children as illegitimate, and some mothers as immoral, keeping an “unsuitable home.” In fact, this is how the contemporary foster care system was born.\(^\text{108}\)

The NABSW emerged out of this milieu as the only voice at the national level willing to defend black single mothers. Civil rights leaders like Bayard Rustin and James Farmer criticized black single mothers;\(^\text{109}\) Martin Luther King Jr. endorsed the view that part of what was wrong in the black community was the poor child-rearing of single mothers.\(^\text{110}\) Many black single mothers shared a common trajectory in the fifties and early sixties—from sharecropping to factory work in defense plants to jobs lost to returning soldiers and its sequels: poverty, domestic violence, and divorce.\(^\text{111}\) Immoral women with their broken homes were an embarrassment to the respectable black middle class embodied by civil rights leadership. They were trying to show the nation and the world that black Americans were deserving of all the benefits of citizenship: voting, respect, equal access to education and public accommodations. White politicians who made an


\(^{105}\) See NABSW Paper, supra note 100, at 9–10.

\(^{106}\) Moynihan, supra note 54, at 21–25.


\(^{109}\) See Annelise Orleck, Storming Caesar’s Palace: How Black Mothers Fought Their Own War on Poverty 86 (2005); Rainwater & Yancey, supra note 99, at 422–24.

\(^{110}\) See Rainwater & Yancey, supra note 100, at 403–04, 407.

\(^{111}\) See Orleck, supra note 109, at 9, 70–82.
issue of single mothers who had sex with men they were not married to were trying to embarrass church-going civil rights people by making a different class and caste of black people the public face of African-Americans. Although the civil rights movement was always class-diverse—including former sharecroppers as well as middle-class teachers, preachers, and social workers—the working poor, including poor black single mothers, were rarely defended by that movement.\(^{112}\)

Founders of the NABSW first tried to respond to the growing prominence of issues of family and race at the policy level in the National Conference on Social Welfare (NCSW). However, black social workers were not members of the national organization’s policy groups, and some felt they were being systematically excluded.\(^{113}\) In 1968, black social workers walked out of the NCSW annual meeting in frustration, pledging to strengthen the loose-knit, regionally based Association of Black Social Workers into a national organization that could offer an antiracist perspective on the issues of the day.\(^{114}\) The NABSW, initially the National Conference of Black Social Workers, held its first national meeting the next year, in 1969, at Bright Hope Baptist Church, a place characterized by the *New York Times* as “the heart of North Philadelphia’s slums.”\(^{115}\) The location was symbolic: this was to be an organization sympathetic to the struggles of working-class black people, including single mothers. Speakers at that first conference, themed “The Black Family” called for a “Black Renaissance”—black community economic development and antiracist education that would combat invidious stereotypes and self-loathing within the African-American community.\(^{116}\) The group explicitly renounced the politics of respectability that had made the civil rights movement reject single mothers, instead embracing the strengths of the black family, “in all its variety of structures and forms.”\(^{117}\) At that first conference, Dr. Alvin Pouissant decried the Moynihan Report,\(^{118}\) punitive ADC “suitable home” rules, and the legal labeling of some children as “illegitimate.”\(^{119}\) (“Suitable

\(^{112}\) See, e.g., KELLEY, supra note 34, at 82–83 (noting the unwillingness of certain wealthy black leaders to address the problems facing single mothers).


\(^{114}\) Id.


\(^{116}\) Id.


\(^{118}\) Johnson, supra note 115. It should be noted that a version of the Moynihan Report was vetted by Dr. Martin Luther King. See RAINWATER & YANCEY, supra note 99, at 188, 402–09. Civil rights leaders Bayard Rustin and James Farmer also criticized single mothers. See ORLECK, supra note 109, at 86 (stating that Rustin and Farmer “worried aloud that that economically and socially independent black mothers were eroding black men’s sense of self-worth”).

\(^{119}\) See Johnson, supra note 105.
home” rules were enforced by case workers who showed up in the middle of the night and trying to “catch” recipients with a sexual partner—if they had one, they would lose their benefits. In subsequent years, conference participants joined with the National Welfare Rights Organization (NWRO) to call for an end to social workers’ condescension toward black mothers who received AFDC. They marched with the NWRO to demand access to credit in department stores to allow impoverished mothers to keep their children appropriately clothed. The NABSW also expressed disgust with the practice of paying foster parents substantially more than what it paid welfare recipients to raise the same children. It called for increasing housing options for single mothers. At its fourth annual conference, it issued a statement calling for the right of grandparents to foster their grandchildren, and another denouncing both coercive use of birth control and barriers to birth control use. In short, it was an organization willing to speak forthrightly about sexuality and unembarrassed about defending black single mothers who were in straits that some felt made African Americans as a group look bad.

In 1972, at its fourth national meeting, the NABSW also issued the statement for which the group is best remembered, calling transracial adoption a “form of genocide.” It argued that ethnic pride had long been denied black people, and it was principally through the family that this kind of social self-esteem could be built. As a result, it suggested, “black children belong physically, psychologically, and culturally in black families,” because black families could better meet the different developmental needs of black children, including primarily “highly sophisticated coping techniques to deal with racist practices perpetuated by individuals and institutions.” Families that were being broken up had offered good and important resources to their children. The group also denounced the process by which black families were rendered ineligible to adopt,

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121 See Francis X. Clines, Group Will Seek Militants’ Fund, N.Y. Times, May 28, 1969, at 32; Gerald Fraser, Black Social Workers Assail Agencies, N.Y. Times, November 7, 1971, at 72.
122 Clines, supra note 121.
124 Id.
125 See C. Gerald Fraser, Blacks Condemn Mixed Adoptions, N.Y. Times, Apr. 10, 1972, at 27.
127 See id.
128 Id.
contending that it was a myth that blacks wouldn’t adopt, and insisting that it was primarily the shortage of white children that made black or mixed-race children of interest to white adopters. The statement denounced as disingenuous the redefinition of children with one white parent as “bi-racial,” “black-white,” or “inter-racial,” when for the previous two centuries such children had always been understood “by immutable law and social custom” as African American; in doing so, the statement argued, agencies were “emphasizing the whiteness as the adoptable quality.”

They were also uneasy about the ways black children became a project, rather than a family member like others. In this profoundly segregated time and place, they noted, white parents had to seek assistance to figure out how to deal with black children’s hair, to learn black culture, to “try to become black.”

Authors of the statement noted the frequency with which white families had to sever all ties with their own parents in order to parent a black or mixed-race child, suggesting that it weakened the family and left scars on the parents that affected the child.

Finally, the statement commented on the crisis of a black (boy’s) adolescence in an all-white community and school—given the prevalence of a “but would you want your daughter to marry one” sentiment in white communities, who was he supposed to date? By insisting that African American families were not the “tangle of pathology” of the Moynihan report, but a good and healthy resource for black children—and, indeed, offered certain nonreplicable resources for black children in learning to deal with white racism—the NABSW produced a “best interests of the child” rationale to insist that child welfare workers should place children there.

Despite what were presumably good intentions by majority white agencies in the 1960s, and sometimes heroic efforts by black and Puerto Rican social workers, black families seeking to adopt were being rejected in overwhelming numbers for their supposed deficiencies—neighborhood, age, and income prime among them.

In this context, the NABSW sought to make arguments for the affirmative virtues that black families brought to the practice of rearing black children. The heart of the NABSW position was a broadly historical argument, that until one recognized the economic, political, and historical forces separating black children from their families, one could not produce a coherent black child welfare system,

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130 Id.
131 Id. at 10.
132 Id.
133 Id.
134 See id.
135 See, e.g., RUTH G. MCROY, ZENA OGLESBY, & HELEN GRAPE, Achieving Same-Race Adoptive Placements for African American Children: Culturally Sensitive Practice Approaches, in SERVING AFRICAN AMERICAN CHILDREN, supra note 42, at 89–90.
never mind argue that an essential component of it ought to be white adoption of black children.

1. The Importance of Scarcity

The NABSW statement on transnational adoption was promulgated at workshops on the black family in response to a concern that transracial adoption was “a growing threat to the preservation of the black family.”\textsuperscript{136} Why was adoption the problem? The answer was scarcity. In the aftermath of the Flemming rule and the funding of ADC foster care, the system seemed to be expanding limitlessly in its capacity to absorb black children. Many suspected that the politics of loathing of black mothers in general and of fighting against racial justice claims on the terrain of the black family were contributing to the sudden but extensive entry of black children into foster care and adoption. Black social workers, trained and steeped in the case report literature, were thinking of cases like the following from the late fifties, written up in a federal report.

Mary E. had three illegitimate children before she came north to live with her mother and stepfather. When she had two more, her stepfather threw her out of the house. The one room she could afford was crowded enough for an adult and five children; it was also cluttered with unwashed clothes, soiled dishes, and hills of dirt. The neighbors reported that her children roamed the streets while she entertained a man at late drinking parties.

When Mary applied for ADC, the agency worker thought the home situation was almost hopeless. But she knew the difficulty of finding foster homes for Negroes. She began helping the mother to clean up her room, and to exercise more adequate control over her children. At first, progress was slow—the family didn’t even see the dirt. But the mother and her teenage daughter were unusually eager to learn, and to improve their condition. The worker made weekly assignments for housecleaning, laundry, and similar chores, and Mary met the challenge. The oldest son, living in the next town, was contacted. He checked on the children almost daily and eventually, they were always in the house after dark. They got to school on time, with faces washed, hair combed, and clothing clean. If “suitable home” policies had been strictly applied, the

\textsuperscript{136} See Fraser, \textit{supra} note 124, at 27.
family would have been broken up. With ADC money and services, they stayed together and actually moved toward becoming a responsible family.137

There are many things to notice in this narrative, and the genre to which it belongs. Its elements include the helpless and hopeless subject of casework and the heroic caseworker, who, applying principles of good social work, firmness and compassion, completely transforms the situation by acting upon the apparently unpromising raw material of her clients. We might also note that what brought Mary E. to the attention of authorities was not concern by teachers or neighbors about the state of her children or her housekeeping, but the egregious mistake of applying for ADC. But this case also suggests a pre-Flemming, pre-transracial adoption status quo that provided good reason to oppose black children being adopted and fostered in white homes: when there were not homes available, caseworkers kept black families together. The only thing that saved Mary from having her children taken away by the state was “the difficulty of finding foster homes for Negros.”138

The 1972 NABSW position on interracial adoption worked to restore some of the difficulty of pulling black children from their homes by trying to nudge social workers in general back in the direction of that pre-1961 problem of the lack of foster (and adoptive) placements for black children, in hopes of encouraging caseworkers to stop separating black children from their mothers. In a 1987 article in *Ebony*, the president of the NABSW explained the statement in exactly that way, “Our position is that the African-American family should be maintained and its integrity preserved. We see the lateral transfer of Black children to White families as contradictory to our preservation efforts.”139 The group failed. By the mideighties, the number of black children in foster care had skyrocketed.140


138 Id. at 189.


140 Dorothy Roberts, *Under-Intervention versus Over-Intervention*, 3 CARDOZO PUB. L., POL’Y & ETHICS J. 371, 373 (2005) (noting the “huge increase both in the numbers of black children in the system and in the number of children in foster care during the 1980s”).
III. WHY THE INDIAN CHILD WELFARE ACT IS NOT LIKE THE NABSW STATEMENT

A different historical misunderstanding governed another debate related to MEPA-IEP, this one involving Native American children. In 1996, members of Congress tried to overturn a number of provisions of the Indian Child Welfare Act (ICWA) by arguing that like the policies that flowed from the NABSW statement, it constituted race discrimination. In part, commentators based their critique on a historical account that specifically linked the campaign for ICWA to the NABSW statement. For example, in her 1991 article, Bartholet justified linking the two, explaining:

A parallel development [to African American children] occurred with respect to the adoptive placement of Native American children. Indian children were first placed in significant numbers in non-Indian homes in the period from the late 1950s through the 1960s. Certain Native American leaders took a public position against these placements in 1972, the same year the NABSW issued its historic statement against trans-racial adoption. Several years later Congress passed the Indian Child Welfare Act of 1978 which mandates a powerful preference for placing Indian children with Indians as opposed to non-Indians. In recent years several states have passed laws modeled on the Indian Child Welfare Act, mandating a same-race preference in adoptive placement.

While the effort to overturn ICWA failed, many commentators continue to claim that ICWA constitutes illegal—or at the very least unwarranted—racial discrimination. This claim rests on a misunderstanding of both the historical and legal basis of ICWA. The historical claim that the campaign for ICWA began in 1972 by nationalist Native people derives from the work of psychologist Rita Simon and

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142 Id.
143 Bartholet, supra note 26, at 1181–82.
has been widely repeated, even by historians.\textsuperscript{146} It is, however, wrong. The campaign for ICWA began in 1968—before NABSW was even founded—by a multiracial group, the American Association on Indian Affairs (AAIA), which was seeking an end to what they saw as attacks by the Federal Bureau of Indian Affairs on tribes' sovereignty, specifically termination policy, which sought to end the legal existence of tribes. Termination policy converted reservations into land that could be bought and sold (and, some argued, exploited for its uranium and other natural resources).\textsuperscript{147} Ideologically, termination was a policy that sought the full assimilation of Native people into the legal, cultural, and geographical space of the United States—eliminating them as distinct nations.\textsuperscript{148}

The opening salvo in what became the campaign for ICWA was a press conference at the Overseas Press Club in 1968. At it, William Byler, the (Anglo) executive director of the AAIA and a delegation from the Devil's Lake Sioux, of North Dakota protested the removal of the tribes' children by ADC caseworkers employed by the state.\textsuperscript{149} It was the position of the tribal chairman that tribal courts, not the state, had exclusive jurisdiction over children on the reservation, a position that had been upheld in a ruling by the North Dakota Supreme Court—a ruling that had been ignored by caseworkers, who felt that because they administered ADC, they could determine what constituted a suitable home. Byler said:

\begin{quote}
[N]othing exceeds the cruelty [to children] of being unjustly and unnecessarily removed from their families...Today in this Indian community a welfare worker is looked on as a symbol of fear rather than of hope. ... The Devil's Lake Sioux people and American Indian tribes have been unjustly deprived of their lands and their livelihood, and now they are being dispossessed of their children. ... [C]ounty welfare workers frequently evaluate the suitability of an Indian child's home on the basis of economic or social standards unrelated to the child's physical
\end{quote}

\textsuperscript{146} See, e.g., BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION (2002) (discussing origins of the campaign for ICWA); Bartholet, supra note 26 at 1181–82 (discussing origins of the ICWA campaign).
\textsuperscript{149} AAIA and Devils Lake Sioux Protest Child Welfare Abuses, INDIAN AFFAIRS June-August 1968, at 1, 1–3.
\textsuperscript{150} See In re Whiteshead, 124 N.W. 2d 694, 695–98 (N.D. 1963) (discussing jurisdictional questions).
or emotional well-being and that Indian children are removed from the custody of their parents or Indian foster family for placement in non-Indian homes without sufficient cause and without due process of law.  

The AAIA had become involved when the tribal chairman contacted them about an incident with an ADC caseworker where she had literally tried to pull a three-year-old from the arms of his grandmother on the reservation, and without any color of law sought to place him with a white couple in Fargo.  

Even the lawyer from the AAIA was stunned to learn that despite the North Dakota Supreme Court ruling granting exclusive jurisdiction over child welfare to the tribal court, state ADC workers had removed 25 percent of the children from the reservation.  

In subsequent policy fights, Byler and the AAIA specifically contested the characterization of placements of Native American children with white families as “transracial,” arguing that the issue had to do with Native American children’s political status, or citizenship, as members of tribes, bands, and nations. The issue, according to the AAIA, was not race at all, but jurisdiction, which followed from tribal membership—and hence was more akin to questions of what state a case of termination of parental rights and adoption could be heard in than any question related to race. In the 1978 hearings on the bill in the House of Representatives, the Justice Department and members of Congress raised this very point, but were persuaded that ICWA was about political status, not race.  

In fact, the way ICWA was written—over the objection of many tribes, whose representatives felt it excluded many children who were self-evidently Indian—ensured that it was not

152 Id. at 2.  
153 Bertham Hirsch, Keynote Address at UCLA Faculty Center Symposium: The Indian Child Welfare Act the Next Ten Years: Indian Homes for Indian Children (August 22, 1990). It’s not only in the distant past that caseworkers ignore court orders. In one horrific and highly publicized case in Southern Arizona, CPS workers, in defiance of a judge’s divorce order awarding sole custody to the mother with no visits for the father, due to domestic violence, placed the children with the father after a complaint was filed by the father. John Brodesky & Daniel Scarpinato, Files Document CPS Efforts, Failures, ARIZ. DAILY STAR, Aug. 1, 2007, at B2. CPS’s investigation criticized the mother’s housekeeping—finding her trailer “slightly disheveled”—and cited a worker’s concern that she was using drugs, a charge she denied. Id. The one time she was tested for drugs, the results indicated she was clean, and she was told that the complaint had been found unsubstantiated. Id. Nevertheless, the police, CPS, and her ex-husband refused to return the children. Id. The body of one of her children was found in a storage facility; the other was never found, and her ex-husband was charged with their murders. Id.  
about race. Many children who might be readily identified as “racially” Indian are not covered by ICWA. For example, Native American children from Canada or Mexico are not covered by ICWA. In the United States there are 562 federally recognized Indian tribes, but by one researcher’s count, nearly 200 unrecognized or terminated tribes. Children from these groups, who might be descended “racially” only from Indian ancestors, are not covered by ICWA. Further, a child might have four grandparents who are enrolled members of federally recognized American Indian tribes, and be a “full-blood” Indian, but not covered by ICWA, lacking a sufficient blood quantum (say, one-half) to be eligible for membership in any particular tribe. Or, likewise, a child whose mother is an enrolled member of a tribe that counts membership through the paternal line, and a father from a tribe that counts membership as descending through the maternal line would not be eligible for enrollment, and hence not covered by ICWA. ICWA strictly limits itself to status (enrollment or eligibility for enrollment), not (racial) Indian-ness.

The heart of the legal question in ICWA was sovereignty, not race. The federal government made treaties with tribes as sovereign nations, exchanging Native American lands for certain concessions by the U.S. government, made in perpetuity. A century or two after many of these treaties, in 1831, a Supreme Court case, Cherokee Nation v. Georgia, upheld the right of tribes to be treated as nations, “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil,” (albeit domestic dependent nations). As Felix Cohen wrote in his important treatise, Federal Indian Law, for the Department of the Interior:

Perhaps the most basic principles of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty

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158 See id.
159 See 25 U.S.C. § 1903(4) (basing classification as an “Indian Child” on eligibility for membership in an Indian tribe). But see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 11.02[2] (2005) (noting instances where “membership” has been found to include children technically ineligible or whose eligibility is uncertain).
160 Cherokee Nation v. Georgia, 30 U.S. 1, 15–16 (1831).
162 Cherokee Nation, 30 U.S. at 2.
have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.\footnote{FELIX S. COHEN, U. S. DEP’T OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 122 (1941).}

To construe Native peoples as a “racial” group is to miss this fundamental principle of Indian law: Native people are members of nations within the boundaries of the United States. Whatever the degree to which the federal government does or does not recognize the sovereignty of those nations, trying to turn Indian peoples into a “race” as a matter of law is to try to fit the square peg of Native sovereignty issues into the round hole of the black-white racial paradigm. It has no basis in law. Indeed, in 1974, in Morton v. Mancari, the Supreme Court ruled that Native peoples in the United States should be treated as members of political rather than racial groups, and specifically that the equal protection clause that prohibited racial preferences—in this case in personnel matters in federal employment—did not apply in Indian matters, allowing the BIA to maintain its preference for employing qualified Native people.\footnote{417 U.S. 535, at 553–55 & n.24 (1974).}

Finally, however the federal government may attempt to renegotiate the sovereignty of Indian nations, states as such lack the authority to do so because Native nations made their treaties with the federal government. Because child welfare, like all family law, is primarily a state issue, jurisdiction has to revert to tribes as a simple matter of logic—federal courts have no jurisdiction with respect to child welfare, and states have no authority in Indian matters. Even before ICWA, this is how federal courts held. In Fisher, for example, the Federal District Court of Montana found that adoptions had to go through tribal courts.\footnote{Fisher v. District Court, 424 U.S. 382, 383–84 (1976).}

Media coverage of a number of highly publicized cases in the nineties suggested that ICWA was a barrier to specific adoptions because of race. In the Rost twins case, a couple in southern California adopted twin girls at birth.\footnote{Eric Schmitt, Adoption Bill Facing Battle over Measure on Indians, N.Y. TIMES, May 8, 1996, at A19.} The birth father concealed that he was, and more importantly the twins were, eligible for enrollment in the Pomo tribe.\footnote{Id.} Four months later, at the request of the girls’ paternal grandmother, the tribe asked for the order of adoption to be vacated, saying it had not conformed with ICWA.\footnote{Id.} In another case, two parents, both enrolled members of the Mississippi Band of Choctaw Indians, went off the
reservation to have twins and, after their birth, consented to adoption.\textsuperscript{169} Again the adoption was declared invalid because the case should have been heard in tribal court.\textsuperscript{170} These cases, which critics charged involved an abuse of racial classifications by parents and tribes to disrupt adoptions,\textsuperscript{171} motivated some to back amendments to ICWA. But the appropriate analogy would not be to race or questions about the NABSW, but to a birth parent who crossed state lines for an adoption. State jurisdiction questions come up all the time, and adoptions are complicated immensely by them—birth mothers might be trying to thwart a biological father who opposed an adoption, or might travel to a state that allows adopters to be generous in their reimbursement of expenses for a mother, which another state might consider “buying” a baby.\textsuperscript{172} And this was how the U.S. Supreme Court ruled in the \textit{Holyfield} case in 1989, again finding that it was a question of jurisdiction and sovereignty, not race.\textsuperscript{173} Just as an adoption involving a child whose parents resided in Florida should not be heard in Louisiana, a child who was an enrolled member of a Sioux tribe (or eligible for enrollment) would have a hearing in a Sioux court, not, say, a South Dakota court.

While ICWA deserves more extensive treatment than I give it here, my point is simply that it derives from a different history and rests on a legal theory that is not about race. While these points can be debated on their merits, it is misleading to incorporate them into a discussion of race and the NABSW statement. Although those who sought to overturn what was perceived to be public adoption agency policy—race matching—sought to roll a challenge of ICWA into its challenge to race matching with respect to African American children, these matters have to be separated.

IV. CONCLUSION

There is not much evidence that the size and racial demographics of the foster care population were greatly affected by race-matching policies in adoption. The most reliable predictor, of course, would be the numbers and demographics of

\textsuperscript{170} Id. at 53–54.
\textsuperscript{171} See Barbara Ann Atwood, “\textit{Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court}” 51 Emory L.J. 587, 591 (2002) ("[S]ome scholars question the view that tribal power trumps parental choice in, for example, voluntary adoptions of children domiciled on a reservation.").
\textsuperscript{172} The Jessica DeBoers case is an example. \textit{In re Baby Girl Clausen}, 501 N.W.2d 193 (Mich. Ct. App. 1993). In the case, a child was ordered removed from the foster parents who wanted to adopt her in response to questions of jurisdiction. \textit{Id.} at 198. The mother had tried to evade the father’s wishes, placed the child for adoption, then regretted the decision within weeks. \textit{Id.} at 194; Isabel Wilkerson, \textit{Michigan Couple Is Ordered to Return Girl}, 2, to Biological Parents, \textit{N.Y. Times}, Mar. 31, 1993, at A17.
\textsuperscript{173} \textit{Holyfield}, 490 U.S. at 53.
children entering foster care. Second best would be the success at efforts at family reunification, since most children who leave the foster care system leave it when they reunite with their families.\(^{174}\) Black children are far less likely than white children to be returned to their families.\(^{175}\)

The evidence that the demographics of foster care had much of anything to do with transracial adoption, basically, amounts to the following: A 1990 House report found that the length of time children spent in foster care varied by race, with black children spending a longer time in foster care.\(^{176}\) Bartholet's 1991 article cited personal interviews with adoption advocacy organizations and child welfare workers in a handful of states, predominantly in the Northeast, as well as California.\(^{177}\) Whatever the significance of states like New York, Connecticut, Massachusetts, and California, however, it was misleading to make them stand for the nation as a whole. At no time did all states have race-matching policies for children from foster care, and adoption only accounts for 17 percent of even the exits from foster care.\(^{178}\)

The reason there were so many black children in foster care, and the reason they stayed longer, had little to do with adoption. It had to do with how many black children entered the foster care system in the late eighties and early nineties, and the fact that they were being returned to their mothers (and fathers, but usually mothers) at considerably lower rates. Did they need to be removed from their families? There is no baseline, logical number of children that need to be in foster care. The considerable variation over the last half-century of the number of black children in foster care suggests the extent to which it is a matter of policy. As I have suggested, there were almost no black children in foster care before 1961, but the authorization of unlimited federal funds for foster care sent 150,000 children into care in 1961.\(^{179}\) Similarly, before the 1950s, there were almost no Native American children in foster care.\(^{180}\) Rules that scrutinized whether a mother kept a “suitable home” that sent so many black and Native children to foster and adoptive homes in the fifties and sixties were finally determined to be out of bounds,\(^{181}\) but I wonder if a few decades from now we will find the current wave of concern over


\(^{176}\) See Select Comm. on Children, Youth, and Families, supra note 174 at 39.

\(^{177}\) See Bartholet, supra note 26, at 1183 n.50.


\(^{179}\) See supra notes and accompanying text 123-131.

\(^{180}\) See Bartholet, supra note 26, at 1181–82.

substance abuse just as suspect as “suitable home” rules. Perhaps we really are, again, just criminalizing the ways impoverished people get by. Alcohol use, for example, is far more common among white women than among black or Native American women. 182 Perhaps that explains why mothers who drink don’t elicit moral horror and the almost unchecked power of the state to take their children away.

This article has been interested in how and why liberals, and even feminists like Elizabeth Bartholet, joined the campaign against “illegitimacy” waged by neoconservatives in the 1990s as part of the effort to get rid of federal entitlements that supported single mothers. As we have seen, the 1996 Interethnic Placement Act was redefined to separate it from the previous controversy over Gingrich’s remarks about orphanages, and even, ultimately, from the measure to end AFDC. It was called, instead, as legal scholar Joan Heifetz Hollinger defines it, a “law aimed at removing the barriers to permanency for the hundreds of thousands of children who are in the child protective system, and especially, for the African American and other minority children MEPA makes it clear that children in state custody are not exempt from the antidiscrimination principles embodied in . . . Title VI of the 1964 Civil Rights Act.” In the 1970s, activists had worked to remind policy makers that those “barriers” were parental rights, deserving of protection from abuse by an overreaching state system. A great deal had changed in a handful of years.

Most concerning, though, was the way a liberal discourse of “color blindness” in adoption disabled what was, at least initially, sturdy opposition to policies designed to take children from their unworthy single mothers. To borrow from Twila Perry, color blindness met community and color consciousness and together they engaged in a lively and compelling debate. In the meantime, as with the Flemming rule a generation ago, liberal concern about black children met conservative willingness to provide significant funds to take them away—I am thinking here of the ways the 1996 Adoption Promotion and Stability Act, with its $6,000 tax break to families willing to adopt children of color or “special needs” children 183 was like ADC-Foster Care. As a result, we have created the conditions under which the foster care system could stabilize at its new, massive size (about 500,000 children), with a population much less white than a few decades earlier—a new generation’s “browning of child welfare.” 184 As Dorothy Roberts writes,

Scholars who deal with black children in the child welfare system tend to focus on social work practice—how children should be treated—rather than the politics of child protection—how political relationships

182 ARMSTRONG, supra note 70 at 173.
184 See BRISSETT-CHAPMAN, supra note 42, at 49 (discussing the effect of an increasing number of children of color in child protective reports).
affect which children become involved in the system. Child protection authorities are taking custody of black children at alarming rates, and in doing so, they are dismantling social networks that are critical to black community welfare.  

Making the NABSW the villain of the story, making that group responsible for why black children were disproportionately in the child welfare system, misses that organization’s real and substantial contribution to this debate: it tried to call attention to the ways black single mothers are targeted by child protection systems, and tried to defend those mothers.

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THE "OPT OUT REVOLUTION" AND THE CHANGING NARRATIVES OF MOTHERHOOD: SELF GOVERNING THE WORK/FAMILY CONFLICT

Brenda Cossman*

I. INTRODUCTION

"The double shift," "the glass ceiling," "the mommy track": Women's efforts to balance work and family have given rise to a host of buzz words over the last two decades. Now, it is the "Opt-Out Revolution"—the title of Lisa Belkin's New York Times Magazine article in 2003 that described the decision of upper middle class, professionally trained women to leave the work force and to stay home to care for their children.1 Her Sunday magazine cover story, headlined as "Q: Why Don't More Women Get to the Top?" alongside the answer: "A: They Choose Not To," tracked the decisions of eight women graduates from Princeton now living in Atlanta, and four women in San Francisco, three with MBAs, to trade in their briefcases for diaper bags.3 Belkin maps their decisions onto what she identifies as a larger trend amongst highly educated women to opt out of the labor market in favor of motherhood.4

The "opt out" revolution became the media's darling. The CBS Early Show did a feature on "More Stay at Home Moms" featuring Belkin's "opt out" story.5 Within a few months, the story had appeared on the cover of Time Magazine, with "The Case for Staying Home: Why Some Young Moms are Opting Out of the Rat Race."6 Within the year, the CBS Sunday Morning Show declared women were "Staying Home with the Kids," the CBS Early Show featured a story declaring that mothers were "Trading Career for Home," and the New York Times continued to

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3 See Belkin, supra note 1, at 42, 44, 58.
4 See id. at 44.
follow the story, keeping it alive in September 2005 with a front page story, “Many Women at Elite Colleges Set Career Path to Motherhood.”

Belkin’s “opt out revolution” story also became the focus of a feminist maelstrom, with academics and the mommy blogosphere denouncing the article. Some engaged with her statistics, denying that there was an “opt out” revolution at all. Others have argued more normatively that there should not be an “opt out” revolution, that women should be staying at work, while yet others argued that the phenomenon was being misdiagnosed in some form, suggesting for example that women are actually being pushed out. Many of the critiques dispute the “opting” part of the opt out revolution narrative, suggesting that in the context of an inflexible and demanding labor market, and highly gendered world of child rearing, the decisions made by these women are not best understood in the discourse of choice.

I want to tell a different story about the “opt out” narrative. Rather than simply highlighting the extent to which choice is constrained by market and familial arrangements and ideologies, I take this rhetoric of choice seriously, by focusing on its significance and discursive power in this new narrative of motherhood. I argue that the “opt out” revolution can be usefully understood in the register of self governance, that is, a mode of governance in which subjects are called upon to govern themselves through the choices that they make. Opting out, and making motherhood a full time project is part of the contemporary governance regime that insists that subjects “make a project of their lives,” that they take responsibility for their own and their family’s wellbeing and personal happiness. It is symptomatic of a broader trend in contemporary governance that includes not only those mothers who stay home but also those who stay at work, a trend wherein all mothers are called upon to self manage the work/family terrain through the choices available to them. Motherhood emerges as a practice of self

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9 See Linda Hirshman, Homeward Bound, AMER. PROSPECT, December 2005, at 2024 (suggesting that choosing to opt out of professional opportunities is no less unjust merely because it is labeled as a choice).
11 See discussion infra Part III.
12 See NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 61 (1999); Michel Foucault, Governmentality, in THE FOCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87–104 (Graham Burchell et al., eds., 1991); Michel Foucault, Technologies of the Self, in TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOCAULT 16, 22 (Luther H. Martin et al., eds., 1988).
governance, dissolving any broader sense of collective responsibility for the work/family conflict.

II. THE “OPT OUT” REVOLUTION

In the article that started the storm, Lisa Belkin interviewed ten women, eight of whom had graduated from Princeton, living in Atlanta and belonging to the same book club. These eight women of Princeton origin are described as doing things “that women once were not expected to do. They received law degrees of Harvard and Columbia... They waited to have children because work was too exciting. They put on power suits and marched off to take on the world.”

Out of the ten member Atlanta book club, only one of them works full time (she has no children), one works with her husband, “one works part time, two freelance,” and the remaining five are “not working at all.” Belkin corroborates these personal anecdotes with statistics, like the U.S. Census which shows that the number of new mothers who returned to the labor market fell from 59 percent in 1998 to 55 percent in 2000, and to the number of children being cared for by stay-at-home mothers, which increased by 13 percent in less than ten years. The Atlanta women’s stories are buttressed with interviews of women in a San Francisco mother’s group and, what Belkin describes as, “dozens of other women.” Based on these interviews, her own experience, and a smattering of statistics, Belkin’s thesis is that “something more is happening here. It’s not just that the workplace has failed women. It is also that women are rejecting the workplace.”

And so the narrative of the opt out revolution was born: highly trained professional women choosing to leave the workforce to care full time for their children.

The basic narrative is repeated in each of the major news stories. The Time Magazine cover story tells of Cheryl Nevins, a labor lawyer in Chicago who is about to quit her job with the arrival of her third child. The CBS Early Show repeats the same opting out narrative in its “Trading Career for Home” story. This time it is Christina, who after university, “married a doctor, had a son, then another, and decided that her real career was a home.” In “Staying Home with the Kids” on CBS’s Sunday Morning, we meet Jessica Schwartzberg, who quit her job in product development after the arrival of her first child, and Nadine Kerstan, who is

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13 Belkin, supra note 1, at 42, 44.
14 Id. at 42.
15 Id. at 44.
16 Id.
17 Id.
18 Id.
described as having "no intention of returning to work at all."\textsuperscript{20} Each story is interspersed with the same statistics: the four percentage point reduction in the number of new mothers who returned to the labor market between 1998 and 2000, from the U.S. Census.\textsuperscript{21} The stories each repeat that 22 percent of women with graduate degrees stay home and that there has been a 15 percent increase in number of the stay at home mothers in the last 10 years.\textsuperscript{22} From the Harvard Business School survey of its classes of 1981, 1985 and 1991, the stories report that 38 percent of its female graduates in their child rearing years were in the workforce.\textsuperscript{23} From a Catalyst research firm study, "26 percent of women at the cusp of the most senior levels of management don’t want the promotions."\textsuperscript{24} The statistics are used to confirm the basic "opt out" narrative that emerges from the personal narratives: that highly educated, professional women are increasingly choosing to leave their high power jobs to stay home with their children.

III. WHAT'S WRONG WITH THE OPT OUT REVOLUTION? THE FEMINIST CRITIQUE

The media stories about the "opt out" revolution have produced a feminist maelstrom, condemning the Belkin article and the many other stories that followed. Although they often overlap in the arguments of the critics, three distinct modes of critique emerged: descriptive, a normative, and an analytic.

A. The Descriptive Critique: Actually, There Is No Opt Out Revolution

Some commentators have questioned the statistics upon which the "opt out" revolution is premised.\textsuperscript{25} Belkin relied heavily on one statistic: the 4 percentage point decrease in new mothers' employment in between 1998 and 2000.\textsuperscript{26} The opt out stories were revived in 2005 when Census data again showed a 2 percent decrease in the labor market participation of mothers.\textsuperscript{27} But, when these statistics are subject to closer scrutiny, the "opt out" story becomes a little less clear. Heather Boushey of the Center for Economic and Policy Research has shown that men's employment dipped during the same period, and that although women's

\textsuperscript{21} Belkin, supra note 1, at 44.
\textsuperscript{22} 60 Minutes: Staying Home (CBS television broadcast Oct. 10, 2004).
\textsuperscript{23} Id.; Belkin, supra note 1, at 44.
\textsuperscript{24} Belkin, supra note 1, at 45.
\textsuperscript{26} See Belkin, supra note 1, at 44.
\textsuperscript{27} Coontz, supra note 25, at 9.
employment dipped, there was little difference between mothers and non-mothers when older mothers are taken into account—instead of focusing solely on “highly educated, thirty-something mothers.”28 Further, she has shown that highly educated mothers are the least penalized by having children and least likely of all groups of mothers to leave the labor market to care for children.29 Boushey concludes:

The data stands in opposition to the media frenzy on this topic. In spite of the personal anecdotes, highlighted in various news stories, women are not increasingly dropping out of the labor force because of their kids. The main reason for declining labor force participation rates among women over the last four years appears to be the weakness of the labor market.30

Commentators like Boushey and Coontz conclude that there is no statistically significant opt out revolution. Notwithstanding the anecdotal stories, women with young children are not opting out of the labor market. The opt out revolution is, in their view, a myth.31

In a slight variation, other commentators critique the “opt out” narrative for declaring a trend without the statistics to back it up. In what is more of a methodological critique, several critics have pointed to the extent that the media stories, beginning with Belkin, have declared a trend based on a few anecdotal stories. Joan Walsh for example declared, “I was stupefied by the limited sample in Belkin’s story, whose headlines trade in absolutes.”32 Joan Williams, in her study of the media reporting of the opt out revolution, was similarly critical of the extent to which many of the stories declared a trend without statistical support.33 Belkin, and the multiple media stories that followed, stand accused of drawing broad

29 Id. at 12. Controlling for other factors, Boushey found that of women with children under the age of six, 55.6 percent with high school degrees were in the labor market, compared with 66.6 percent of those with college degrees, and 73.2 percent of those with graduate degrees. Id. at 11 & tbl. 5.
30 Id. at 2.
31 A number of critics denounce the opt out revolution, specifically in terms of a myth. See, e.g., E. J. Graff, Essay, The Opt-Out Myth, COLUM. JOURNALISM REV., March–April 2007, at 51, 54 (“By offering a steady diet of common myths and ignoring the relevant facts, newspapers have helped maintain the cultural temperature for . . . ‘the most family-hostile public policy in the Western world.’”). Others simply declare its non-existence. See, e.g., Laura T. Kessler, Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict, 34 PEPP. L. REV. 313, 321 (“In sum, there is no ‘opt-out revolution,’ not even a mini one.”).
33 WILLIAMS, supra note 10, at 18–19.
generalizations from the anecdotal experience of a few interviews. While stopping short of declaring the “opt out” revolution a myth, this variation of the critique nonetheless casts doubt on its accuracy.

B. The Normative Critique: Women Shouldn’t Opt Out

A second and highly controversial response to the “opt out” revolution story was a normative critique: women should not be making this choice. This critique does not take issue with whether the “opt out” revolution is occurring; it either assumes that it is or attempts to add demographic support to the “opt out” phenomenon. Linda Hirshman, in a highly popularized and controversial article in the American Prospect, 34 undertook a study of women who had announced their weddings in the New York Times Style section in 1996, and found that 85 percent of the brides she located were not working full time, and half were not working at all. 35 She further cited several studies, including one of Harvard Business School MBAs which found that only 38 percent of female graduates were working full time, and a 2004 study by the Center for Work Life Policy which found that 43 percent of women with graduate or prestigious bachelor degrees who now had children had taken time out of the labor market. 36 Based on these various studies, Hirshman concluded that the “opt out” revolution was real; highly educated professional women are leaving the workplace for child rearing. 37 And she proceeded to denounce the “opt out” revolution as a failure of choice feminism. 38 In her view, feminism’s celebration and retreat to choice left it without a language within which to criticize the highly gendered ideology of the family. 39

The family—with its repetitious, socially invisible, physical tasks—is a necessary part of life, but it allows for fewer opportunities for full human flourishing than public spheres like the market or the government. This less-flourishing sphere is not the natural or moral responsibility only of women. Therefore, assigning it to women is unjust. Women assigning it to themselves is equally unjust. 40 Hirshman is unequivocal in her proscription: women should work. “Prepare yourself to qualify for good work, treat work seriously, and don’t put yourself in a position of unequal resources when you marry.” 41 And of the New

34 See Hirshman, supra note 9, at 20–26; see also LINDA R. HIRSHMAN, GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD (2006) (effectively translating the controversial article into a short book, with all the same basic arguments of the value of work and the lack of value of choosing to stay home).
35 Hirshman, supra note 9, at 23.
36 Id. at 22.
37 Id. at 23.
38 Id.
39 Id. at 24.
40 Id.
41 Id.
York Times brides, who seem quite happy with their decisions, she is equally unequivocal in her judgment: “what they do is bad for them, is certainly bad for society, and is widely imitated, even by people who never get their weddings in the Times.” The choice to stay home with children is, in her view, a lesser choice:

A good life for humans includes the classical standard of using one’s capacities for speech and reason in a prudent way, the liberal requirement of having enough autonomy to direct one’s own life, and the utilitarian test of doing more good than harm in the world. Measured against these time-tested standards, the expensively educated upper-class moms will be leading lesser lives.

A few anecdotal narratives also appeared of women who had opted out, and who, now divorced, are watching the economic consequences of that choice come home to roost. Terry Hekker, in a Modern Love column of the New York Times Style section, told of her shock in the face of a divorce after 40 years of marriage as a stay at home housewife. Over 25 years earlier, Hekker had written an op ed in the New York Times, on the satisfaction of life as a housewife. Now, she faced the devastating financial consequences—of a woman in her 60s who received only short term alimony and who would have to enter the work force. Of the new opt out revolution, she wrote:

I read about young mothers of today—educated, employed, self-sufficient—who drop out of the workforce when they have children, and I worry and wonder. Perhaps it is the right choice for them. Maybe they’ll be fine. But the fragility of modern marriage suggests that at least half of them may not be.

A similar personal narrative is told by Katie Allison Granju who pursued a flexible work-at-home writing career while caring for her children, and then confronted “a sudden and unexpected shift of seismic proportions”: a divorce and its economic consequences. Did not women of her generation, she wonders, “learn the risks of depending too heavily on our spouses for future economic security by watching

42 Id. at 26.
43 Id.
46 Hekker, supra note 44, at 9.
middle-aged women who had been full-time mothers limp into the workforce in droves as divorce rates skyrocketed during the 70s and 80s?" Granju reflects: "Apparently, however, we didn’t get the message. I know that I didn’t . . . . I fear that many of Lisa Belkin’s opt-out pals are setting themselves up for the same rude awakening." These personal narratives are not as judgmental as the Hirshman critique, yet they gently suggest that opting out may not be a wise choice.

C. The Analytic Critique: “Opt Out” as Misdiagnosis

A third response to the “opt out” revolution is an analytic critique that the phenomenon has been misdiagnosed. These critiques seem to accept that something is happening with women in the labor market, but it is not adequately captured by the idea that women are opting out in favor of full time motherhood. Joan Williams, for example, writes that, although the descriptive critique is helpful as far as it goes, it nevertheless:

[O]verlooks the elephant in the room: The effect of children on women’s employment may not have increased over time, but it is substantial. The Opt Out story reflects the brute reality that most high-level jobs remain overwhelmingly male, and in fact, large numbers of mothers stay home full time and many more have left the fast track.

Williams goes on, however, to provide a very different analysis of the work/family conflict, arguing that many women are actually “pushed out by workplace inflexibility, the lack of family supports, and workplace bias against mothers.”

Many critiques cluster around this question of choice; specifically, the role that choice plays in the “opt out” revolution narrative; and question whether women can be said to be freely choosing to leave the labor market, highlighting instead the more systemic factors that limit women’s options within the labor market and the gendered norms of child rearing. Some emphasize the ideological significance of the rhetoric of choice, particularly, its role in obscuring the more

48 Id.
49 WILLIAMS, supra note 10, at 7.
50 Id.
structural obstacles in the work/family conflict. Catherine Albiston, for example, has focused on the “rhetoric of choice” in the opt out narrative, arguing that it “tends to frame the work and family conflict as a private dilemma rather than a matter for public policy” and “helps obscure how institutions constrain the alternatives from which women must make their choice.”

Yet others argue that even if it is a choice for the few, it is not a choice available to the many. These critics trouble the idea of choice by highlighting the class and race bias of the “opt out” narrative. Some specifically contrast the opt out narrative with welfare reform that forced poor women with very young children into the labor market, while others highlight the economic demands on working and middle class women to work to support their families.

IV. THE OPT OUT REVOLUTION AS SELF GOVERNANCE

The feminist critiques of the “opt out” revolution narrative suggest that Belkin’s story of more and more mothers freely and cheerfully leaving the labor market may be a little too simplistic. The descriptive critique challenges the “more” part of the story, while the misdiagnosis critique suggests that women’s relationships to work/family are rather more complex than captured by the idea of

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53 Id. at 45; see also Heather Hewitt, *Telling It Like It Is: Rewriting the “Opting Out” Narrative*, THE MOTHERS MOVEMENT ONLINE, www.mothersmovement.org/features/05/h_hewett_1005/opting_out_1.htm (“On an individual level . . . the ready phrase ‘opting out’ may provide an easier explanation . . . than calling out the complex array of cultural, structural, economic and personal pressures that influence mothers’ behavior. As Peskowitz points out, it’s a lot easier to use a rhetoric of personal choice . . . than to acknowledge the greater forces that often compel us to make certain choices.”).

54 See, e.g., Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL’Y 7, 8 (2006) (arguing that most women are not professional women, and do not need “better part-time work, shorter work hours and greater workplace flexibility”). Rather, the majority of women need solutions that would help them to spend more time in the workplace, such as longer school days, more public day care and access to higher education. See Albiston, supra note 52, at 47 (arguing that Belkin’s “generalized rhetoric of choice, based on a few extremely privileged women with high salaries, builds a universal master narrative on the experiences and available choices of upper-class, white, straight women”). As a result, Belkin fails to “acknowledge that ‘opting out’ does not have the same cultural meaning across race and class lines. For mothers who receive public assistance, opting out is not viewed as virtuous conformity with biological imperatives, but as lazy opportunism.” Id. at 46–47. “[T]here is far less support for poor, single mothers, and particularly women of color” to make the choice to opt out. Id. at 47; see also Douglas, supra note 51, at 10 (discussing the class/race bias of the opt out revolution).

55 See Albiston, supra note 52, at 34 & n.17.

56 See Selmi & Cahn, supra note 54, at 24.
“opting out.” Yet, it would be a mistake to dismiss the narrative of choice that these women deploy to describe their lives. The narrative of choice is an increasingly important terrain of self governance on which individual mothers are called upon to manage their own work/family conflict. Rather than highlighting the extent to which choice is constrained by market and familial norms and practices, I argue that it is important to take this choice seriously, by focusing on its discursive significance in a newly emerging narrative of motherhood. I tell the story of the “opt out” revolution in the registrar of self governance, drawing on Foucault’s work on governementality, and suggest that it is on this terrain of freedom that motherhood and the work/family conflict is being reconstituted.

A. Self Governance and the Practices of Freedom

“Foucault’s later work on governmentality began to explore governance as the conduct of self-conduct and technologies of the self.” These technologies of self consist of ‘those intentional and voluntary actions by which men not only set themselves rules of conduct, but also seek to transform themselves, to change themselves in their singular being, and to make their life into an oeuvre that carries certain aesthetic values and meets certain stylistic criteria.” These technologies of the self “permit individuals to effect by their own means or with the help of others a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immorality.”

57 The value-added aspect of the normative critique is rather less clear to me. Telling women that they should not make certain choices is bound to be deeply politically unpopular (witness the outpouring of rage directed to Linda Hirshman), and fails to recognize the centrality of choice in contemporary modes of governance. See Judith Stadtmann Tucker, Everybody Hates Linda, THE MOTHERS MOVEMENT ONLINE, Dec. 2005, http://www.mothersmovement.org/features/05/hirshman/homebound_1.htm; Homesick Home, http://thehomesickhome.blogspot.com/ (Dec. 1, 2005, 5:09 PM), available at http://thehomesickhome.blogspot.com/2005/12/failure-to-cause-i-never-joined.html; see also Linda R. Hirshman, Unleashing the Wrath of Stay-at-Home Moms, WASH. POST, June 18, 2006, at B1 (responding to Tucker’s Web article). The stories of women who opted out, and now confront the economic challenges of a post divorce world, may, on the other hand, be a useful cautionary tale, particularly for public policy and legal regulation of the post divorce family. See supra notes 44–48 and accompanying text.

58 BRENDA COSSMAN, SEXUAL CITIZENS 12–13 (2007) (citing Foucault, Technologies of the Self, supra note 12 at 19, 22; Foucault, Governmentality, supra note 12).


60 Foucault, Technologies of the Self, supra note 12, at 18.
Individuals are called upon to cultivate their self; to make themselves a project of self-mastery and self-transformation.\(^{62}\)

Other "scholars have explored how contemporary regimes of subjectification increasingly rely on the self-discipline and the government of oneself. Nikolas Rose describes the analysis as one that directs attention to \"the ways in which individuals experience, understand, judge, and conduct themselves\".\(^{63}\)

Technologies of the self take the form of the elaboration of certain techniques for the conduct of one’s relation with oneself, for example, requiring one to relate to oneself epistemologically (know yourself), despotically (master yourself), or in other ways (care for yourself).\(^{64}\)

"It is an approach to governance that presupposes the freedom of the governed to make choices. It seeks to shape the conduct of others by acknowledging and using this capacity of the subject."\(^{65}\) He argues "individuals are incited to live as if making a \textit{project} of themselves: they are to \textit{work} on their emotional world, their domestic and conjugal arrangements, their relations with employment and their techniques of sexual pleasure, to develop a \textquoteleft style\textquoteright of living that will maximize the worth of their existence to themselves."\(^{66}\) Note the inclusion in this list of one’s "domestic and conjugal arrangements"—Rose highlights the role of the family "in this project of self governance as one of the multiple sites where individuals are called upon to make a project of themselves."\(^{67}\)

"Individuals must make their families, their marriages, their children, their sex lives, their domestic happiness a personal project. They must actively assume responsibility for the pursuit of their wellbeing and that of their family."\(^{68}\)

Alan Hunt similarly argues that this is a mode of governance that "seek[s] to stimulate and activate the controlled choices of individual citizens."\(^{69}\) It is also one "increasingly based on expertise, often \textit{vested} in the hands of experts’ but also often reintroduced to allow non-experts to train themselves to become experts."\(^{70}\) Hunt emphasizes the role of self help in this governance, arguing that it has

\(^{61}\) Cossman, \textit{supra} note 58, at 72 (quoting and citing Foucault, \textit{supra} note 59, at 10).

\(^{62}\) \textit{Id.} at 13.

\(^{63}\) \textit{Id.} at 72 (quoting Nicholas Rose, \textit{Inventing Our Selves: Psychology, Power and Personhood} 29 (1996) (citing Michel Foucault, \textit{Technologies of the Self, supra} note 12; Michel Foucault, \textit{Governmentality, supra} note 12)).

\(^{64}\) Rose, \textit{supra} note 63, at 29.

\(^{65}\) Cossman, \textit{supra} note 58, at 72 (citing Rose, \textit{supra} note 12, at 3–4).

\(^{66}\) Rose, \textit{supra} note 63, at 157.

\(^{67}\) Cossman, \textit{supra} note 58, at 73 (quoting and citing Rose, \textit{supra} note 63, at 157).

\(^{68}\) \textit{Id.}


\(^{70}\) Cossman, \textit{supra} note 58, at 13 (citing Hunt, \textit{supra} note 69).
become a central technique for this self regulation. "[T]hrough sustained self-scrutiny and self-control, the individual is ‘obliged to live life harnessed to projects of its own identity, its normality, its weight, its mental and physical health."71

B. Motherhood: Governance Through Choice

The “opt out” revolution is part of these emerging projects of self governance. Individual women are being called upon to take responsibility for their lives and their families, for negotiating the competing and conflicting demands of work and family by choosing one over the other. It is the very existence of choices in relation to the work/family conflict that are to be managed, negotiated, and balanced that produces motherhood as a project of self governance and reconstitutes the identities of women as mothers through their chosen child rearing projects. Choice operates not as a mere chimera for an underlying subordination but, rather, is the very terrain on which the project of motherhood and its identities are constituted. It may indeed operate to obscure the more structural obstacles facing women who seek to balance work and family. Yet, that is not all it does. The women of the opt out revolution—the upper class, highly educated, professional women capable of commanding (and leaving) six figure salaries are indeed women with some choices. It is absolutely crucial to the “opt out” narrative that their choices are not entirely fantastical. They choose to become doctors, lawyers, MBA-wielding executives. They can choose to leave them, temporarily at least, because of the financial backing of wealthy husbands. They could choose to hire nannies, and continue in their high pressure jobs. But they choose not to. Now, they choose motherhood. It is precisely the fact that this is a generation and demographic of women with choices that makes their choice to “opt out” so significant.

The women of the “opt out” revolution, over and again, emphasize their choices against the backdrop of managing the needs of their families. Some express a process of intense self-scrutiny, a process of looking hard at their needs and desires, and those of their families, and coming to the conclusion that opting out is simply the right choice for them. Consider the story of Katherine Brokaw, one of the Princeton women in Belkin’s story, who went on to Columbia Law School, and then, to become an associate at a New York law firm.72 Her husband was offered a position in Atlanta, where she took up a position in a local firm.73 Three years later, she was pregnant with her first child.74 She took a three month maternity leave with access to firm e-mail, and she went back to work full time.75 Within a few months, she had been put on a major case, which had been “moved up on the calendar by the presiding judge” and produced a “crushing schedule, up

71 Id. at 73 (quoting HUNT, supra note 69, at 218).
72 Belkin, supra note 1, at 45-46.
73 Id. at 46.
74 Id.
75 Id.
to 15-hour days, seven days a week, while still nursing her daughter, who was not sleeping through the night."\(^{76}\) After preparing for the trial, it was postponed, which produced a period of "soul-searching."\(^{77}\) She decided to quit when she realized her goal, becoming a partner, would make her "actual life" worse.\(^{78}\) She is now a full-time mother to her three children.\(^{79}\) \"I wish it had been possible to be the kind of parent I want to be and continue with my legal career\" she says, \"but I wore myself out trying to do both jobs well.\"\(^{80}\) Or consider Cheryl Nevin, the labor lawyer in the *Time* Magazine cover story who was about to quit her job with the arrival of her third child.\(^{81}\) \"It's hard. I'm giving up a great job that pays well, and I have a lot of respect and authority,\" she says. The decision to stay home was a tough one, but most of her working-mom friends have made the same choice. She concludes, \'I know it's the right thing.\"\(^{82}\)

For both of these women, the process was one of intense self-scrutiny of the menu of choices and of reaching the right choice for themselves and their families. In contrast, other, younger women, like Vicky McElhaney Benedict, who graduated from Princeton in 1991 and then from law school at Duke, present their decisions to quit as much less angst-ridden.\(^{83}\) She said, \"[e]ven before I became a mother, I suspected that I wouldn't go back to work.\"\(^{84}\) She is described as secure in her decision to stay home with her children: \"This is what I was meant to do.\"\(^{85}\) While the difficulty of the decision thus varies, either way, everyone is described as ultimately happy with their choices. Denise Stennet, an opt-out mother from a *CBS News* story reflects:

There's no way I could have that career, that financial stability, and maintain the life I have with my children today. I think it's better for me. And that's a personal choice. It's all about making decisions that are right for you and your family. For another woman, maybe the answer is no. But for me, I made the right decision.\(^{86}\)

Jessica Schwartzberg of the *CBS News* story says: \"It was a great decision. I have no regrets, none, zero.\" Choice is the mantra of these news stories. Whether it is in

\(^{76}\) Id.

\(^{77}\) Id. (quoting Brokaw).

\(^{78}\) Id.

\(^{79}\) Id.

\(^{80}\) Id. (quoting Brokaw).


\(^{82}\) Id. (quoting Nevin).

\(^{83}\) See Belkin, supra note 1, at 46.

\(^{84}\) Id. (quoting Benedict).

\(^{85}\) Id. (quoting Benedict).

\(^{86}\) Id.
the words of the “opt out” women or the broader reflections of the narrator, the story is one of women freely and self consciously choosing to leave the labor market to stay home with their children.

The misdiagnosis critique emphasizes that many of these women were in fact pushed out by the demands of their profession. Several of the women, including Katherine Brokaw, are held up as a counter examples of mothers who actually wanted to stay at work, but whose requests to move to more part time hours were rejected, and who were effectively forced to quit. As a result, the critics tend to put her decision to quit in quotation marks: “she ‘chose’ to quit,” to highlight their critique of the choice narrative. Some go further. Susan Douglas writes: “Their ‘choice’ was to maintain their punishing schedules or to quit. I am sorry, but this is not a choice.”

There is little doubt that the crushing demands of their workplaces, and the refusal of their employers to allow part-time or flex hours, forced these women to make a choice that would not have been their first choice. Yet, this should not completely negate the idea that choice is at play. Brokaw could have stayed in her demanding job, like many other mothers do. Or she could have looked for another job, one that was less demanding, was part-time, or did offer flex hours. She did not do so. She made a choice amongst a range of options that were available. These may not have been an optimal range of choices—obviously they were not—but they were choices nonetheless. Indeed, it was the fact that the choices were not optimal that makes the decision-making process so difficult for Brokaw and that led to the process of intense self-scrutiny. Workplace inflexibility, identified by critiques like Williams’, does not negate choice. Williams herself insists that “choice and discrimination are not mutually exclusive.” Yet, many other critics gloss over this observation, arguing instead that the “opt out” narrative is a myth, that women are pushed out, and that their own insistence on the language of choice is a kind of self justificatory narrative.

87 See Belkin, supra note 1, at 46; cf. Williams, supra note 10, at 9 (describing Julia Panley-Pagetti being “fired while on maternity leave”); Graff, supra note 31, at 54 (describing Dr. Diane Fingold’s request for a three and a half hour reduction in her week, the rejection of the request by her medical practice, and her move to a different practice that “was willing to accommodate her part-time schedule”).
88 Graff, supra note 31, at 53.
89 Douglas, supra note 51, at 10.
90 Williams, supra note 10, at 47.
91 See, e.g., Graff, supra note 31, at 54 (“Still, if they were pushed out, why would smart, professional women insist that they chose to stay home? Because that’s the most emotionally healthy course: wanting what you’ve got. ‘That’s really one of the agreed-upon principles of human nature. People want their attitudes and behavior to be in sync,’ said Amy Cuddy, an assistant professor in the management and organizations department at Northwestern Kellogg School of Management. ‘People who’ve left promising careers to stay home with their kids aren’t going to say, “I was forced out. I really want to be there.” It gives people a sense of control that they may not actually have.’”).
Not all of the feminist commentators deny choice so fully. Some of the academic commentary draws on Joan Williams' work to advance a more nuanced analysis of women's choices in the context of work/family. Some, like Laura Kessler, specifically acknowledge that women are making choices, while insisting on bringing the constraints against which these choices are made into sharper relief. Yet others acknowledge this false dichotomy between choice and constraint, but then seem to relegate choice to the background, with greater emphasis placed on the constraints and the extent to which the idea of choice obscures these constraints. Consider for example the writing of Miriam Peskowitz, who attempts to develop a more nuanced discussion of choice. She is critical of the "opt out" narrative because it obscures the underlying structural constraints, and "forecloses any discussion about what 'choice' means and about what kinds of options women have." She tries to avoid simple victim/agent dichotomies suggesting that women make choices "in response to a limited set of workplace options, and a culture that has a constricted imagination of work family." Choice is thereby affirmed. But, she also worries that the popularity of the opt out narrative obscures this background: "Words like 'choice' and "options' substitute for a much richer and complex human tangle of desire and circumstances, consequence and limitations; of foibles and regretted decisions." Yet, even Peskowitz's discussion at times falls back on a distinction between "a bunch of decisions" and "real choice," suggesting that women may be able to make the former, but do not have the latter. Choice here begins to fade.

Many of the critics worry that to acknowledge choice is to deny structural and cultural constraints. Given the dominant and popular discourse of choice, their

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93 See Kessler, supra note 31, at 328–29. Kessler specifically insists that she is not denying that individual women make choices: "It is not my intention to deny the agency of individual women and men. We all make decisions for complex reasons, and every decision can fairly be understood as personal," but instead that the opt out narrative nevertheless tells a liberal and neo-liberal story "that individuals are independent, autonomous, unencumbered beings who are owed little from employers or the state. These stories hide the significant role of powerful institutions such as employers, the state, and the family in women's secondary status at work." Id. at 330–31.

94 See Albiston, supra note 52, at 44–46.


96 Id. at 99.

97 Id. at 107.

98 Id. at 106–07.
anxiety may be legitimate. Yet, their critique—particularly when it verges towards the claim that women are not really making a choice—falls right into the false dichotomy of victim/agent, free will/determinism, that constitute the very discursive problem of choice as an all or nothing proposition. Moreover, it risks negating the agency of the women who stay home to care for children, partial though it may be. Instead of denying choice as illusory or self justificatory, or viewing it exclusively through the lens of constraint, feminist critiques of the “opt out” revolution would, I believe, be better served if it recognized the centrality of choice in contemporary modes of governance. Women are being called upon to make choices, to negotiate through the albeit limited range of options available to them. Indeed, making the choice as individuals becomes their moral imperative. And once made, the popular discourse of choice operates to immunize their decisions from critique: because choice is paramount, and to criticize an individual’s decision is to fail to respect their life project.

V. SELF GOVERNANCE AND THE WORKING MOM, OR “THIS IS HOW SHE DOES IT”

The ideas of self governance and self management applies not only to mothers who stay home, but also to those who stay at work, who are also increasingly called upon to self manage the work/family terrain through the choices available to them. Working mothers must find ways to balance the competing demands on their time. Through an array of self help books, magazine articles, and talk show segments, working mothers are proffered advice on better managing their time, making more efficient decisions, running a smoother household, and otherwise managing the work/family terrain to maximize their own happiness and that of their family. Not unlike the “opt out” narrative, the message is one of self governance, that is, of individual women self regulating through choice. Once again, the work/family conflict is reconfigured in highly individualized terms, in which individual women are called upon to resolve the competing demands on their time through the choices available to them.

99 Williams has written extensively of the extent to which the “rhetoric of choice,” so deeply embedded in American legal and political culture, “diverts attention from the constraints within which an individual’s choice occurs onto the act of choice itself.” Williams, supra note 92, at 1564 (citation omitted).

100 Kathryn Abrams’ work on “partial agency” may be a better place to begin these discussions. Although Abrams emphasizes the structural constraints facing women, she also seeks to theorize the role and meaning of agency within these constraints. See Kathryn Abrams, From Autonomy to Agency: Feminist Perspectives on Self-Direction, 40 WM. & MARY L. REV. 805, 830–31 (1999); Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 COLUM. L. REV. 304, 348 (1995). In the context of the opt out debates, the idea of partial agency might allow the conversation to circumvent the either/or nature of the debate about choice.
A. The Advice Genre

In an Oprah show entitled “Moms with Careers: How do they Do it?,” Oprah interviews women struggling with the work/family balance. One mother, Connie, describes herself as feeling “torn until she found the secret to striking a balance in her busy life.” In Connie’s words:

I surrendered to the fact that things don’t have to be perfect and that I can be a great wife and a great mother and a great career woman and not have to control every situation...Struggles are a part of life, and it’s basically how you manage them that separate people who do well and people who don’t.

Oprah’s narration tells us that “her new found sanity arrived when she changed her outlook.” Connie elaborates: “I just look at things differently...When I surrendered the need to control situations or control what was going on around me is when I felt better and more at peace.” Connie’s secret, then, was simply a change in attitude. There is no broader systemic issue of family, market or state; just a personal narrative about managing competing demands by surrendering to imperfection. This is of course classic Oprah discourse—overcoming obstacles through personal transformation. Yet, it is resonant with the more general advice being directed to working mothers.

It is a narrative repeated a million fold in the self help literature. The self help books directed to working mothers, with titles like This Is How We Do It and How She Really does It: Secrets of Successful Stay at Work Moms offer advice on “staying at work, staying sane, staying satisfied, and staying at the heart of your family.” The secrets range from having a more positive attitude and avoiding guilt to establishing boundaries and being more organized, to recognizing that there are shortcuts to making homemade cookies, and of course, “letting go of perfect.” The message that appears over and again is that working mothers need to find balance. For example, the website of the magazine Working Mother includes different sections, including: “Balance You,” “Balance Work & Career,”

102 WENDY SACHS, HOW SHE REALLY DOES IT: SECRETS OF SUCCESSFUL STAY-AT-WORK MOMS, at front jacket (2005).
103 See id. at 32.
104 See id. at 51. A whole chapter is then devoted to “Giving Up the Guilt.” Id. at 69–92.
105 Id. at 54, 60–62.
106 Id. at 52.
107 Id. at 59.
108 Id. at 66–68.
and "Balance Family." 109 Each of these sections then provides advice to these balance seekers. 110

Labor market conditions are addressed in the section on Best Companies, which provides a list of "2008 Working Mother 100 Best Companies." 111 This list is compiled by a measuring company performance in seven areas: "workforce profile, compensation, child care, flexibility, time off and leaves, family-friendly programs and company culture." 112 There is generally a vetting of these family friendly companies, and profiles with information about each of the companies. 113

This genre of writing is categorically pro-work, with an emphasis on how employers could and should make the work place more family friendly by implementing more family friendly policies. Responsibility is placed here on employers—they should change the way they do things. However, this responsibility is cast in a rather positive, role model light: employers should do this in order to become role model employers. This is not about government regulation. Rather, it is about employer self regulation, about what employers ought to do to become model employers. It is self regulation, but this time up one level, focused on the employer not simply the individual mother.

Despite this overture to the responsibility of the employer, the emphasis through most of this self help literature is on women. The literature advises women to make better choices, through better time management and organizational skills, as well as adopting more realistic attitudes. The solution to the work/family conflict is largely individualized: working mothers just need to self govern—a little better than they current do.

B. Work/Care and the Self Governing Mother

The opt out revolution and the debates around choice need to be connected to and contextualized within the feminist legal debates on work/care. These debates have tended to focus on the failure of public policy on at least one of three levels: the state, the labor market, or employer and the family. 114 Some feminist legal theorists have argued for an acknowledgement of women’s caregiving roles within family and/or state policy, while others advocate policies to ensure women’s labor

110 Id.
114 See Douglas, supra note 51, at 10.
market participation. This is a complex debate, the nuances of which are beyond the scope of the paper. However, each of the multiple positions within the work/care debates focuses the role of the state, the market and/or the family in caregiving, and the appropriate regulatory approach at each of these levels. Despite the significant differences in the positions, each advocates some form of regulatory response. The law is called upon as part of the solution to recognizing and accommodating women’s role in caregiving. The proposed solutions are broad and even contradictory; some advocate for greater recognition of women’s caregiving roles within family law and the division of marital property, while others argue that such a solution only encourages greater dependency and that a better response is to encourage women’s labor market participation.

The shift to self governance, however, pushes the attention away from the state/market/family to the individual. Further, this shift from the more structural or institutional to the self also displaces law and legal regulation in solution to work/family conflict. Rather, in the discourse of the opt out revolution, the problem of the work/family conflict becomes an individualized dilemma to be negotiated by each woman.

It is perhaps not surprising that the role of the state would disappear in this discourse, since the American state is not often seen in broader popular discourse as having a role in caregiving. The disappearance of the responsibility of the market and the employer has not gone uncontested. Rather, these employment conditions are the site of the most significant contestation in the controversy generated by the opt out revolution, as the analytic critique argues that it is hostile market conditions that have pushed these women out.

What is perhaps most surprising, however, is the disappearance of the family, or more specifically the husbands within the family unit. Each of the women of the opt out revolution are able to opt out of the workforce precisely because they have husbands with rather significant salaries to support them. Yet, much of the choice discourse is the choice of the individual woman, rather than a family

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115 See Albiston, supra note 52, at 39–40. No wonder the work/care debates within feminist legal theory have generated an enormous literature.
116 Id.
117 See id.
118 See id. at 47–49.
119 See Williams, supra note 92, at 1609 & n.286.
120 See Albiston, supra note 52, at 39–40.
121 See Douglas, supra note 51, at 10.
122 See, e.g., Belkin, supra note 1, at 46 (“A native of Dallas, [Vicky McElhaney Benedict] ‘had fabulous offers from firms back home, but I didn't take them,' she says. Though not yet engaged, she decided to follow Charlie Benedict to Atlanta instead, ‘where I joined a law firm that was not as high-profile.' She made the choice, she says, looking back on it, ‘because I knew that the long-term career was going to be his.”').
choice.\textsuperscript{123} The discourse of choice is one that is entirely individualized.\textsuperscript{124} The significance of this individualized choice is one with potential temporal consequences.\textsuperscript{125} If the relationship breaks down, it remains unclear how well family law of the future (or even of the present) will compensate women for their caregiving and their opportunity costs.\textsuperscript{126} Given that a woman chose to stay home, any economic cost may be framed as her choice, rather than as a choice made by the family unit as a whole, and as a cost that should be shared by the family as a whole.\textsuperscript{127}

VI. CONCLUSION

The self governance discourse of the opt out revolution may thus operate to deflect attention away from the multiple levels of state, market, and family that constitute the terrain of women’s choices. However, pointing out this obfuscating effect should not be equated with denying the fact of choice. Rather, this Article’s argument is that it is precisely the degree of choice operating in these women’s lives that makes the narrative so powerful, and so difficult to effectively challenge. Instead of denying the descriptive, analytic, or normative reality of choice, an effective feminist response may be to shift its analysis to the terrain of self governance and governmentality, and begin to consider the multiple ways in which motherhood is being reconfigured on this terrain.

\textsuperscript{123} See id.
\textsuperscript{124} See id.
\textsuperscript{125} See infra notes 44–48 and accompanying text.
\textsuperscript{126} See Williams, supra note 92, at 1609.
\textsuperscript{127} See, \textit{e.g.}, id. ("Although judges are more subtle, a student in my Property class accurately expressed the theory underlying such rulings: ‘If a woman takes time off to spend with her kids,’ he said, ‘that’s her choice. Don’t expect me to pay for it.’").
Dear Diary, for a Black mama raising a Black boy in Utah, I just knew “life wasn’t gone be no crystal stair,” if there were would be any stairs at all. Ah yes, Langston Hughes had it right when he said:

Well, son, I'll tell you:
Life for me ain't been no crystal stair.
It's had tacks in it,
And splinters,
And boards torn up,
And places with no carpet on the floor—
Bare.
But all the time
I'se been a-climbin' on,
And reachin' landin's,
And turnin' corners,
And sometimes goin' in the dark
Where there ain't been no light.
So boy, don't you turn back.
Don't you set down on the steps
'Cause you finds it's kinder hard.
. Don't you fall now—

From the time that I knew that I could conceive, I wanted a boy; a strong Black boy who would grow up to be a strong Black man and make great contributions to society like so many great Black men do. It wasn’t until my uncle was murdered at twenty-seven and my brother at twenty-six, and the ways in which I saw many police officers, teachers, and special education counselors salivate at the thought of imprisoning Black men and boys that once I knew I had a boy in my womb I wanted to keep him there forever. Because I knew, once he was born, I would worry about his life every day until there was no longer breath in his or my body. I am reminded, on a constant basis, of the choice that Sethe had to

* © 2009 Lynette L. Danley, Visiting Scholar at the University of Illinois at Chicago, and Symposium Participant, Salt Lake City, Utah, 2008.

make in Morrison’s *Beloved* where she chose a physical death for her children over slavery. Now, I am not courageous enough to go out like that, but I worry about my son in terms of spiritual death, surveillance by teachers, cops, principals, and advisors who only give compliments on his jump shots, rather than the power of his mind. Already, the girls concern themselves with how low he hangs, rather than how tight he is with his love for God, his mad math (Geometry at the second grade level), and chess skills that even Bobby Fisher could appreciate. My boy is compassion, heart-HUMAN.

Still it’s conversations like, “Oh yes Ms. Purewhitebread, I know he is extremely active, aha, oh yes, I know you know how smart he and, uh ha, and yes, he does have a nice jump shot, oh, he does have academic potential, (like I did not go through nineteen hours of labor to get him here), aha, I know you want him to succeed and that you have every confidence in his—aha, so you say you’ve warned him and he still isn’t acting White, oh you said acting right, of course. Sure, we’ll discuss this again at the upcoming parent-teacher conference.” I sit down and think of my mother—I’m everything that I hated and loved about her, M.A.D.: Multi-tasking, Always worrying, and Down on my knees in prayer for my son. Now, I understand her better by and by and I love and adore her even more.

Now, Diary, I need to clarify being a M.A.D. Black mama for myself. Not for you, cause you know me, but for all the parts of me that need reassuring. See there are blessings in being M.A.D. That’s right, blessings in the reality of being a M.A.D Black mama. I now understand that my pain is another Black woman’s gain. That my tests, are my testimonies, allowing me to stand strong as I look my Black son straight in his eyes, telling him that he is great, smart, and strong even when he cries, especially when he cries. He needs to understand who he is because every day he returns to class, to this community, and feels the hatred in this world, he is going to swear that I done lied to him. Still, I rise, so he can rise. I have to believe that my circumstance—his circumstances—are for a purpose greater than our understanding. Our pain is for our advancement. So, I help my son, the only way a single Black mother can—the way I wish on a daily basis a Black man would—learn to love himself. Whole, complete, free of shame, and full of unwavering pride.

So, yes I am M.A.D. A Mad Black Mama who understands that every day is a matter of life and death for my son’s body, mind, and spirit. MAD, I tell you.

- Mad because I know many people don’t want him here—us here for that matter, but here we go showing up anyway
- Mad that approximately 4000 of the 13,000 Black people are institutionalized through the penal system and the others are enslaved by systemic racism, institutionalized racism, colorblind ideology ‘cause now

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2 See generally TONI MORRISON, BELOVED (2004) (A fictional account of slavery and the aftermath of the civil war through the eyes of a Black mother and former slave).
many of us say, “We one race—the human race” as if we can’t be Black and human, we still don’t work as closely together as we could or should

- Mad that there are no schools in the state where my son will see a mass of people who look like him in the classroom, principal’s office, or cafeteria and of those who he does see, maybe one will acknowledge him as a Black boy and speak back
- Mad that instead of recognizing my son for his brilliance, I got to watch the Attention Deficit Disorder alerts because he was given the option to have a seat and his reply was no, but they swear they told him to sit because they asked him nicely. I am sick and tired of being sick and tired of the trials in the media that comes from COPS, the News, VIDEOS, and Hidden scripts that tell the world to FEAR MY SON BECAUSE OF HIS SKIN and to pity him because he lives with him mama—ONLY

So, in my apron I have pockets labeled shoulder to cry on, cuz it’s Black history month and my son has to educate the school, I have another pocket of educational tips for teachers to debunk myths about my son stealing their purses or planning one day to rape their white daughters. Another pocket, oh I got plenty of them, is for the stereotype threat that my son has that he is not good enough, smart enough, loveable, all because of subliminal messages of mediocrity that convolute his mind.

What I cook up for him, what I pack daily in his lunch, and what I whisper in his ears when he sleeps tight at night, is that, yes son, mama is tired, but I ain’t never gonna give up on you. I will meet three times a week with administrators to help dismantle school and community politics that attempts to render parents powerless as they try to protect their youth, I do not believe in the separation of church and state, so I will continue going to the alter to build partnerships with preachers and the Black community so that between us, them, and God, I can help my son with navigation skills used from Africa, during slavery and post emancipation as survival tools to persist in the midst of institutional oppression. I will chastise my son with love before the billy clubs of an officer or the stroke of a teacher’s pen subjugate or designate him marginalized, one to be silenced and a necessary evil in need of extinction. My son, as a Black boy is invisible as is the Black man’s existence. With every beat of my heart, I make his presence known.

“If the word has the potency to revive and make us free, it has also the power to blind, imprison, and destroy.”
-Ralph Ellison

Still, the meaning of MAD for me is what sustains me. “M” is for the Mercy that I have for myself and others because in many ways we are all victims of

humanity. “A” for the Amazing grace that God has shown me each and every day of my life; and D for the Devotion, dedication and drive that catapults me from this space and place any time I need, so that I can get up and do this thing called life all over again. And just when I feel overwhelmed and lonely for Black male leadership and presence in my son’s life, I call on the spirits of my ancestors, the men in my family and community, and those sung and unsung heroes that laid down their life so Julian could speak HIS skin, eating, breathing and living Black like Nat Tucker; Frederick Douglas, Booker T. Washington, Charles Howard Hamilton, Emmet Till, Carter G. Woodson, W.E.B. Dubious, Marcus Garvey, Louis Farrakhan, Ali, Dr. Martin L. King, Malcolm X, Jesse Jackson, Al Sharpton, John Hope Franklin, Barack Obama, like his father, and his father’s father before him. You see, madness ain’t so bad when the stakes are high—Priceless.
STUDY NOTE

RACISM AND THE LAW: SLAVERY, INTEGRATION, AND MODERN RESEGREGATION IN AMERICA

David Welsh

I. INTRODUCTION

"The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law," declared Justice Harlan in his ringing dissent to Plessy v. Ferguson. Yet in 1896, his vision of a "colorblind" America was marred by centuries of racism and prejudice. Similarly, despite lofty ideals, the Supreme Court’s historical treatment of African Americans in the United States stands in sharp contrast to the declaration that all are created equal. "Other racial injustices in this nation’s history are grave, but are different in part because the injuries were less fundamentally legal in nature." Nevertheless, the Court in Brown v. Board of Education “did what, until 1954, neither the presidents nor the Congress could or would do” by abolishing government-imposed racial segregation. Today, the Court continues to struggle with this mandate as demographic and economic factors contribute to the resegregation of neighborhoods and schools.

Professor Lynette L. Danley’s The Diary of M.A.D. Black Mama: The Blessings of Reality, gives a vivid illustration of how racism and the law continue to impact America. This paper will introduce Professor Danley’s monologue by

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1 163 U.S. 537, 560 (1896).
5 Gyebi, supra note 2, at 51.
providing a brief overview of the major Supreme Court decisions that have taken America from slavery and segregation to integration. It will also explore the sharply divided Court decisions that have allowed modern *de facto* resegregation to occur. However, a comprehensive discussion of the dozens of landmark “race” cases and their accompanying historical contexts is beyond the scope of this paper. Additionally, while many minority groups have been disadvantaged by the legal system, this paper will only address the plight of African Americans. Rather than presenting a voluminous historical account, this paper tells the story of racism in American law through a few critical Supreme Court cases that have shaped societal views of race and equality in America.

II. SLAVERY: *DRED SCOTT V. SANFORD*

Slavery in America began with the English colonists of Virginia in 1607 and lasted over 350 years until it was prohibited by the Thirteenth Amendment to the Constitution in 1865. The promise of equality originated with Thomas Jefferson’s declaration that “all men are created equal.” Subsequent constitutional text, however, “diluted Jefferson’s words.” At the Constitutional Convention, the word “slavery” was carefully avoided by the drafters, while a series of compromises permitted the continued importation of slaves, required the return of fugitive slaves, and counted slaves as three-fifths of a person for legislative purposes. As Governor Morris accurately foreshadowed, slavery in America became the “curse of heaven.”

The 1856 case of *Dred Scott v. Sanford* symbolizes the rampant racism of its era. Scott was a Missouri slave who accompanied his master to Illinois where slavery did not exist, and later to Minnesota where slavery was prohibited by the Missouri Compromise. Scott claimed that by residing in a free territory he himself was free under the Missouri Compromise. In a similar case, *Rachel v. Walker*, a slave owner forfeited ownership of a slave that he brought into the

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10 See id.
11 Id. at 422.
13 Id. at 394.
14 Id.
Northwest Territory. Although Scott won in the district court, Sanford prevailed at the appellate level, and the case ultimately arrived in the Supreme Court.

In the majority opinion, Chief Justice Roger B. Taney declared that Scott was not a citizen and therefore did not have standing to bring a claim in U.S. court. Taney “attempted to ground his pro-slavery opinion upon a lengthy historical discourse,” noting that the Framers “considered [African Americans] as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority.”

Even though Taney ruled the Court lacked jurisdiction, he went on to hold that Scott was not a free man and that the Missouri Compromise was an unconstitutional overextension of Congress’s power. Ironically, it was Taney himself who overreached in unwisely deciding an issue not properly presented before the Court and by attempting to wrest a divisive issue from the political process. Ultimately, this decision “substituted his views of racial superiority for the congressional decision to end slavery in territories of the United States.”

While Taney believed this case would settle the slavery question, it actually further divided Southern slaveholders and Northern abolitionists. The prospect of the unregulated expansion of slavery into western territories increased opposition in the North, while the legal weight of Dred Scott led to heightened demands by the South. As a result, the question of slavery was decided not by the Supreme Court, but by the deaths of hundreds of thousands of Americans during the Civil War. Abraham Lincoln observed that the United States would have to pay a high price “until all the wealth piled by the bond-man’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword.” Ultimately, the Court’s decision in Dred Scott exacerbated racial tensions during a critical period, and allowed racial prejudice to overshadow justice.

16 Dred Scott, 60 U.S. at 394.
17 Id. at 395.
19 Dred Scott, 60 U.S. 393, 404–05 (1856).
20 Id. at 519–520.
21 See Konig, supra note 15, at 55.
22 Rich, supra note 9, at 422.
24 Id.
25 Id.
Following the Civil War, the Reconstruction Congress amended the Constitution “not only to abolish slavery, but also to eradicate the racist ideology that Chief Justice Taney relied upon and to offer the victims of past discrimination new constitutional protection.”27 The Emancipation Proclamation of 1863, followed by the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, officially abolished slavery in America, granted citizenship to former slaves, and secured voting rights for members of all races.28 During this period, “Republicans controlled Southern politics [and] blacks enjoyed extensive political power.”29 Nevertheless, it was only a few years until the promise of equality was broken.30 The Compromise of 1877 gave Republicans the presidency, but as a result they traded the power to enforce racial equality in the southern states.31

Over the next thirty years, Southern states passed legislation targeting the suffrage rights of African Americans.32 Disenfranchisement of Black Americans became widespread with “black codes,” voting requirements (including educational requirements, character requirements, and grandfather clauses), and coercion by the Ku Klux Klan.33 Even the Court “abandoned its resolve to protect former slaves from a domineering majority.”34 In the wake of the 1873 Colfax Massacre, in which hundreds of African American militia men were killed in an election battle, the Court determined that Congress was powerless to stop violence in state or local elections.35 In 1883, the Court limited government authority to remedy private acts of racial discrimination and upheld legislation imposing criminal penalties for interracial marriage.36

27 Rich, supra note 9, at 422–23.
29 Chin & Wagner, supra note 4, at 82.
30 See Rich, supra note 9, at 425.
31 See id; see also Vincent DeSantis, Rutherford B. Hayes and the Removal of Federal Troops at the End of Reconstruction, in REGION, RACE, AND RECONSTRUCTION 417, 417–50 (Morgan Kousser & James McPherson eds., 1982) (noting that this was an unwritten compromise resolving the highly controversial 1876 U.S. Presidential election. Republican Rutherford B. Hayes assumed the presidency over his democratic rival, however the deal required Hayes to remove Federal troops from formerly Confederate States. As a result, the era of Reconstruction ended and white supremacy spread in the South.).
32 See Chin & Wagner, supra note 4, at 77.
33 See id. at 91.
34 Rich, supra note 9, at 426.
35 See Chin & Wagner, supra note 4, at 118 (noting that this case “almost immediately affected the course of political events by encouraging political terror”).
36 See Rich, supra note 9, at 426.
In a most notable 1896 case, *Plessy v. Ferguson*, the Court upheld racial segregation on Louisiana railway cars. Justice Henry Billings Brown spoke for the majority in declaring that the segregation law was a reasonable “police” measure. Dissenting, Justice John Harlan denounced the racism of the majority, stating that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”* This “separate-but-equal” precedent justified racial discrimination in countless other contexts. For example, three years later, a unanimous court allowed the diversion of funds from African American schools, holding that “education of people in schools maintained by state taxation is a matter belonging to the respective states.” Nearly a century later, “Linda Brown had to walk a mile in order to attend the Monroe School when she lived just three and a half blocks from the Sumner School, a school for white children.”* *Plessy* illustrates a slide from the promise of racial equality following the Civil War towards earlier notions of legally-recognized inferiority. During this period, “the vestiges of *Dred Scott* remained in countless ways, some covertly, in the minds and actions of public actors, and some not so covertly, in the minds and actions of private actors.”

IV. INTEGRATION: *BROWN V. BOARD OF EDUCATION*

The 1954 case *Brown v. Board of Education* consolidated four public school segregation cases. Under Chief Justice Earl Warren, the Court unanimously rejected the fundamental idea that separate schools could in fact be equal. “To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” This psychological stigma deprived African American students of an equal education and created inherent inequality. Despite intense resistance, Chief Justice Warren was an activist who “understood the difference between law and justice, and chose to do justice.”

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37 163 U.S. 537, 547 (1896).
38 See id.; see also Gyebi, *supra* note 2, at 68.
39 *Plessy*, 163 U.S. at 559; see also Gyebi, *supra* note 2, at 32–33.
40 Chin & Wagner, *supra* note 4, at 112.
42 Id. at 429.
43 Lassiter, *supra* note 12, at 412.
45 Rich, *supra* note 9, at 430.
46 *Brown*, 347 U.S. at 494; see also Lively, *supra* note 18, at 32.
47 See Powell, *supra* note 6, at 665.
Recognizing the challenge that desegregation would pose, the Court placed the implementation of integration “in the hands of district courts, merely mandating that desegregation be done ‘with all deliberate speed’... [and] subsequently refused to hear desegregation cases for eight years.” Desegregation was a lengthy and difficult process as “the reactions of certain public officials to the Brown decision were openly defiant.” However, the Court was undeterred; and in the 1958 case of Cooper v. Aaron, it spoke out against Southern resistance to desegregation. A decade after Brown, the Civil Rights Act of 1964 solidified the Court’s ruling by “remov[ing] barriers to equal access to public accommodations, public education, public facilities, and employment.” After centuries of reflecting societal prejudices that had undermined the concept of equality, the Brown Court took a monumental step forward by leading the way towards a more integrated America.

V. MODERN SEGREGATION: FROM MILLIKEN V. BRADLEY TO PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1

“Brown represented a new promise and a broad commitment to tear down the façade and to produce genuine equality for all persons living in the United States.” Nevertheless, the Court continued to struggle with the mandate of Brown: “[w]as it to end segregation forcefully, or to force integration?” While segregation was prohibited, “coercive government steps to accomplish integration such as busing, magnet schools, and other inter-school-district remedies” were not required. Recent decisions reveal that the Court “seems to have retreated from a vigorous enforcement of racial integration in public schools.”

A critical distinction exists in remedying legally enforced de jure segregation, as compared to de facto segregation which occurs for other reasons. This difference was addressed by the Court in the 1974 case of Milliken v. Bradley. In a five-four decision, the Court struck down the district court’s integration order ruling that “cross-district desegregation measures could not be ordered unless it was shown that intentional racially discriminatory acts of either the state or local officials were a substantial cause of the interdistrict segregation.” Furthermore, in

49 Powell, supra note 6, at 665.
50 Gyebi, supra note 2, at 42.
51 358 U.S. 1, 5–7 (1958).
52 Gyebi, supra note 2, at 50.
53 Gyebi, supra note 2, at 50; see also Rich, supra note 8, at 431.
54 See Rich, supra note 8, at 431.
55 Lassiter, supra note 11, at 413.
56 Gyebi, supra note 2, at 50.
57 See Powell, supra note 6, at 667–69.
59 Powell, supra note 6, at 668.
the 1976 case of *Pasadena City Board of Education v. Spangler*, the Court found that desegregation duties carried time limitations that expired once a racially neutral attendance pattern was implemented.\(^{60}\) Similarly, the 1991 case of *Oklahoma City School Board v. Dowell* established that as soon as a school district "achieves unitary status," it is released from court-ordered desegregation requirements in spite of any *de facto* segregation that may result.\(^{61}\) "Even though the end of busing after the Dowell decision led to a quick resegregation of elementary schools in Oklahoma City, there will be no remedy for this segregation."\(^{62}\)

As a result, "[b]etween 1980 and 1997, the number of African American students who attended majority white schools declined from 37.1% to 31.2%."\(^{63}\) Additionally, "Latino students attending majority white school declined from 45.2% to 25.2% between 1968 and 1997."\(^{64}\) Much of this decline comes from a failure to address the role race plays in issues such as economic prosperity and housing.\(^{65}\) For example, cities such as "New York, Los Angeles, and Chicago have schools that have at least 85% students of color."\(^{66}\)

Under the foregoing trends, *Parents Involved in Community Schools v. Seattle School District No. 1* ("Seattle Schools") came before the Court in 2007, and a sharply divided opinion struck down the plans that two school districts had voluntarily undertaken to "distribute minority and white students more evenly among their schools."\(^{67}\) Chief Justice Roberts' plurality opinion explained that race could be used only to remedy the effects of intentional discrimination in the past or to achieve a compelling state interest.\(^{68}\) Previously, in *Grutter v. Bollinger*, the Court recognized diversity as a compelling interest in higher education.\(^{69}\) However, Chief Justice Roberts felt the case at hand more closely resembled *Gratz v. Bollinger* in which the Court struck down a program using race as the sole factor.\(^{70}\)


\(^{61}\) 498 U.S. 237, 248 (1991); see also Powell, supra note 6, at 668–69.

\(^{62}\) Powell, supra note 6, at 668–69.

\(^{63}\) Id. at 682–83.

\(^{64}\) Id.

\(^{65}\) See id.

\(^{66}\) Id.


\(^{68}\) Seattle Schools, 127 S. Ct. at 2753–54.


\(^{70}\) 539 U.S. 244, 275 (2003).
A concurring opinion by Justice Kennedy placed more value on the district’s diversity goal, but concluded that this could have been achieved through a more narrowly tailored plan that took into account more factors than just race.71 In contrast, Justices Stevens and Breyer both argued that the Court had strayed from Brown.72 As scholars have noted, it seems paradoxical that the Court:

[Can on one day require a school district to take drastic measures, including busing students across a giant school district to increase racial integration in schools, and then prohibit school districts from taking even the mildest measures, such as using race as a tie-breaker in making student assignments, on the next.73

From this viewpoint, the distinction between de jure and de facto segregation demonstrates the “dangers of parsing individual rights too finely at the expense of maintaining stability in legal structure and process.”74

Brown reflects the modern high water mark for the promise of integration in America. However, its legal support has waned just as Reconstruction-era ideals did a century earlier. The Court’s decision in Seattle Schools is a “constitutional pivot point” in the desegregation battle, after which diversity in grade schools is no longer a compelling government interest and cannot be readily implemented.75 One must only imagine a hypothetical classroom of clones who look, think, and act alike (and what they would think about those not like themselves), to recognize the importance of diversity in education. Ironically, this distinction is recognized in higher education, but not during grade school when the world views of children are most significantly shaped.

Under modern law, once past de jure discrimination has been undone, future de facto discrimination is allowed to continue. While modern segregation is more subtle than the legally-enforced racism of Plessy, current economic and demographic factors have created largely the same result. Rather than sending minority students to schools of lesser quality, we send poorer students, most of who belong to minority groups, to these schools. By doing so, we prevent the very types of associations that would ultimately create economic, social, and legal equality in America.

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71 Seattle Schools, 127 S. Ct. at 2744.
72 Id. at 2797–2801.
74 Fischbach & Cacace, supra note 68, at 538.
75 Id. at 494.
VI. CONCLUSION

The effects of slavery, racism, and the struggle for civil rights continue to shape both our law and society.76 While Brown was not a “panacea for all of our racial problems,” it has helped to push America beyond the government-mandated racial discrimination of Dred Scott and Plessy.77 Although de jure segregation has been largely eliminated, the Court now faces the responsibility of dealing with de facto discrimination issues.78 However, today’s sharply divided Court has failed to recognize diversity as a compelling interest in grade school education despite the fact that schools have become increasingly resegregated. As our history reveals, the Supreme Court has tremendous power to either divide or unify America on fundamental questions of equality and race.

76 See Gyebi, supra note 2, at 51–52.
77 Id. at 51.
78 See Gyebi, supra note 2, at 47–51.
MONOLOGUE
MY BEST FRIEND

Martha Cannon*

My best friend just died. What an empty place I feel in my heart! I sat at her bedside and held her hand as she went. I went into my husband’s arms and wondered: how are we going to do this? How are we going to fill the void?

He had the same problem: She was his first wife. I was his last wife. We had several in between, and we all felt the same way. This woman welcomed us into the family. She showed us how to participate in the home, and to take care of the household and the children in the way the family had established it.

It was easier for us than for her—we all brought our talents and contributed to the richness of the family—but she was the one who had pioneered through it. And, she was the one who continually let go of areas previously in her domain as more of us joined the ranks.

I wondered: Would I—Could I—be the kind of friend she was to our husband? For I have always believed that a friend is so much better than a lover. I knew it would take time to build the kind of trust he had for her. I was determined to do that work, because the relationship I observed between them was one I wanted for myself.

We buried her on my daughter’s birthday. Three years earlier, we had buried my father on her birthday, also. But this was a mother to her. She wondered—Do we always have a funeral on my birthday?

I reminisced. I thought about the way we took turns sitting with her at night, helping her make it through. She had something that prevented her from getting her breath. How difficult to watch someone who has meant so much to you struggle for the gift of air. Day in and day out. One day, she asked to go to the hospital and we continued the vigil there.

One of my sisters told me that our friend had learned that I was expecting. I hadn’t told her because she was so sick and I didn’t want her to worry. So, when she found out, she did just that, knowing how sick I got during that time. I could only sit down and cry. Here she was, unable to breathe, and worrying about me!

Our husband led the way. We watched how he dealt with his loss, and it helped us know how to deal with ours. We supported him—he had such a deep friendship with this woman—and he loved and supported us. The circle of friends and family was huge. We had a viewing in Salt Lake City, then a viewing and funeral in the south. Thousands participated. Afterwards, that was when we felt the real loss.

Some say that life goes on and the void is filled. True, we had each other and the realities of life started right back in. But, even today, I feel keenly the loss. I feel keenly the lack of that association. The spot she inhabited in my heart is not filled. I'm an individual, so I don't mirror her. But I have attempted to follow her example and to inculcate in me the traits I admired in her.

It has worked, in large measure. I am regarded as a mother to many, and the love and care we share is boundless. Thank you to this wonderful woman.
I was born and raised in a polygamist cult, the Davis County Cooperative, Latter Day Church of Christ. It's part of the Kingston clan, which started in 1935 in Bountiful, Utah. The desperation of people during the Depression of the 1930s was conducive for the organization of the group. They wanted to restore their true gospel of Jesus Christ: consecration, united order, and plural marriage. My mother was a Mormon and my father was Lutheran. My parents provided our family with love and the basic needs of a good family, which was superior to what the other families within the organization had. Being born into a family of four brothers and two sisters was a real asset for me.

I grew up in the 1940s going to public schools and living in Salt Lake City, on Ninth East between Sixth and Seventh South. This was the beginning of my learning to lie, to keep the secret of my family’s membership in "The Order" as we called it. My father wasn’t a polygamist, being from Illinois, but he knew about cults from the Ku Klux Klan there. My mother was more of a true believer in the Order. Much as it affected our lives, we could never talk about the events or happenings outside the Order, because we were breaking the law. Living like this, I became aware at an early age of the conflict within me of living both in and outside the Kingston clan.

Sundays we would drive clear up to Bountiful to go to church with the Kingston clan. Our friends in the neighborhood weren’t really churchy, so they didn’t ask. Before graduating from East High School in 1958, I dated a few boys outside the Order. I was supposed to remain chaste, but I did experience a few kisses on those dates. I felt so guilty. I never told those boys I was part of the Order. Davis County was being investigated in 1959 so they were all worried about anyone outside the clan knowing.

It was a great burden to carry. I learned to believe that plural marriage sealed men and women in marriage for time and eternity. That a worthy man holding the priesthood, and having many wives, would become a God in eternity and populate other worlds with his wives.

As I grew up in the Order I became dedicated to all of the doctrine in the group and was easily swayed to moving in the direction of a plural marriage. I sensed I was supposed to be a plural wife mostly because my mother guided me in this direction. I really didn’t want to marry this way but I felt pressured and thought that this was what I had to do.

* © 2009 Rowenna Erickson, Tapestry Against Polygamy Co-Founder, Community Member, and Symposium Participant, Salt Lake City, Utah, 2008.
When I was twenty years old, I became the second wife of my brother-in-law. My oldest sister was his first wife. The next thirty-four years of my life were filled with confusion, heartache, and loneliness like I had never experienced before. The first time I really felt love was when I held my first child in my arms. Then, I had something to really live for and at the same time I developed a strength and courage that empowered me to endure. It took twenty years before it occurred to me that I had been “had.” I was in my forties. I was standing in my home in Swede Town, the one where I raised eight kids in a two-and-a-half bedroom house.

What if you died and went to heaven and they told you, “April Fool”? I asked myself, standing there. I answered my own question: “Man I’d be pissed. All this work, and sacrificing, and lying I’ve done. If I found out I was doing it just for them, when I thought I was doing it for God. You have got to be kidding me.”

But I didn’t leave right away. I had eight children, all born at home, six girls and two boys. They didn’t know their father because he didn’t acknowledge them. He’d come over late at night, have dinner, boss them around, sleep with their mother, then leave in the morning. He never talked to them. He was real quiet and unemotional. Sometimes my daughter would ride twenty minutes with him from Swede Town to Taylorsville to visit her half-sister and he wouldn’t talk to her the whole ride.

What helped me out had been with me all along. I have this ability of knowing things before they happen. Growing up, I’d play psychic games with my brothers and win. Around the time I had the thought about “April Fool” in the kitchen, I was developing a spiritual connection with my higher self. I began to see that religion was what I was trying to obey, but spirituality was overriding it.

This led me to discovering hypnosis. I turned the Donohue Show on one day. They had a guest come on and do a root canal on a person in a hypnosis-induced trance. I thought “wow, I’d like to be able to do that.” It stuck in my mind. A couple of weeks later a brochure arrived in the mail from West High School. I saw a class, hypnosis for self-improvement. The cost was fifteen dollars, and I thought “oh man I can’t afford it.” But I saved pop bottles and nickels, and was able to do it. The used the old pendulum method and I learned to do it with my kids.

I was certified in 1986. Then I moved from Swede Town, and started working with women from Colorado City. These polygamous women from Colorado City came to me with their problems. I had never heard of problems like this. I knew sexual abuse existed, but not on this scale. Some of them went on to get more counseling, and some of them I am still friends with.

It was the beginning of finding the truth because I had empowered myself. I learned in my hypnotherapy training that brainwashing occurs through isolation, deprivation, hypnosis, and torture. When I heard that, I thought, “that’s it!” I was being brainwashed, and so was everybody else.

As time went on I wrote a letter to the matriarch of the Kingston group whom I knew. I spilled my guts to her and said I’d been hoodwinked and how they’d stolen money from people and married people off at young ages. I’ll be darned, I
was excommunicated. I was the first and only plural wife excommunicated! I thought “what am I going to do now?” I’d been a part of this all my life. Later I saw it was a blessing. I didn’t know how to get out, but they did it for me.

One more thing I learned in my spiritual journey was that when you pass from the dark into the light, you need something to stabilize you so you don’t fall off. That’s what the hypnosis training was about.
I. INTRODUCTION

On April 3, 2008 investigators from the Texas Department of Family and Protective Services raided the Yearning for Zion Ranch in Eldorado, Texas. A sixteen-year-old girl named Sarah had reported physical and sexual abuse at the ranch in an anonymous phone call. Home to a large community of members of the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS"), the ranch was raided at about 9:00 p.m. Interviews conducted throughout the night with both adults and children, as well as documents found at the Ranch led the Department to remove 486 children from the custody of their families. The department removed the children because of a concern that "the community had a culture of polygamy and of directing girls younger than eighteen to enter spiritual unions with older men and have children." Sarah, the subject of the anonymous phone call, was never found.

The Texas FLDS raid is only the most recent major event in polygamy’s tumultuous history. The effect of polygamy on its participants, both historically and currently, is not clear. As the monologues which this note accompanies show, polygamy has two sides. Rowenna Erickson tells a sordid tale of thirty-four years "filled with confusion, heartache, and loneliness." She explains that all those who participate in polygamy do so because they are being brainwashed. Contrarily, Martha Cannon with gratitude explained that she is "regarded as a mother to many" as she described her feelings of boundless love from her experiences as a plural wife.

The Texas FLDS case and the monologues only begin to illustrate the complex issues of polygamy. This note will define polygamy, provide a brief
overview of its history, discuss its effects on participants and society, and finally explain some of the issues surrounding the enforcement of polygamy laws and the best strategy for further enforcement.

II. DEFINITION OF POLYGAMY

While polygamy has been practiced within many cultures and in many locations, in the United States it is defined as "the state or practice of having more than one spouse simultaneously." At common law, it was a crime to enter into a second marriage while the first was still in force; statutes now formalize the common law crime and employ the terms polygamy and bigamy interchangeably. The terms are inclusive of both, the more common practice polygyny, where one man marries multiple women, and polyandry, where one woman marries multiple men. "Plural marriage," is often a preferred term by those who practice polygamy, because it carries less of a stigma than "polygamy."

III. HISTORY OF POLYGAMY IN THE UNITED STATES

Polygamy, in one of its most widespread forms of practice within the United States, began with the early members of The Church of Jesus Christ of Latter-day Saints (the “Church”), under direction of its founder Joseph Smith. Historians speculate that polygamy began within the Church in the mid-1830s, and was initially practiced only in secrecy. Years after Smith was killed, the second President of the Church, Brigham Young, began publicly teaching the practice in 1852. However, participation was limited; even at its peak in the mid-1850s, less than twenty percent of Church members practiced polygamy.

9 BLACK'S LAW DICTIONARY 1197 (8th ed. 2004).
12 Id.
14 Id.
Beginning in 1862, Congress passed the first of several acts systematically aimed at stopping the practice by criminalizing polygamy, financially crippling the Church, and even revoking women’s suffrage in Utah. In 1879, a member of the Church challenged the constitutionality of anti-polygamy statutes on religious grounds; the Supreme Court held that there was no constitutional right to practice polygamy, and that the government could restrict religious actions, but not beliefs.

The congressional acts were largely successful in stopping polygamy. The Church gave up the practice on September 25, 1890, when then Church President Wilford Woodruff issued an official statement known as “the Manifesto.” Four years later Congress passed the Utah Enabling Act permitting Utah to take steps to obtain statehood—conditioned upon the state constitution containing an irrevocable ordinance banning polygamy. Congress granted Utah statehood in 1896, and the adopted state constitution permanently banned polygamy in the state. The practice was also criminalized by statute. After publication of “the Manifesto,” the Church stopped practicing polygamy and began to excommunicate polygamists. As a result, splinter groups broke off which are now widely known as “Fundamentalists.”

Fundamentalists retreated to isolated communities seeking to avoid what they considered mass persecution. Since that time, the government has made periodic mass raids on polygamous communities. Mass arrests were made in 1935, 1944 and then Utah undertook the largest raid yet in 1953. What is now known as the Short Creek Raid produced 107 defendants, but it became a public relations disaster. While still in the planning stage, the raid was reported in newspapers, and, when executed, news-coverage showed children being torn from the hands of

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18 See Billie, supra note 11, at 131–32; Duncan, supra note 17, at 319, and Sigman, supra note 14, at 118–32 (providing discussions of the Morrill, Poland, Edmunds Anti-Polygamy, and Edmunds Tucker Acts).
20 Id. at 166.
21 Id. at 320.
22 See State v. Holm, 137 P.3d 726, 739 (Utah 2006).
23 See Utah Const., art. III.
26 Id.
27 Id.; Duncan, supra note 17, at 321.
28 See, e.g., Duncan, supra note 17, at 321.
their parents. The public responded sympathetically by condemning the
government actions, and in court the Fundamentalists were able to demonstrate
gross violations of due process rights. The traumatic events of the raid “created
deep scars among the Fundamentalists,” which only served to exacerbate the
problem by creating a deep fear of the government and distrust of outsiders.

For more than fifty years after Short Creek, there were no major raids on
polygamist communities. With the exception of headline grabbing prosecutions
of individuals like Tom Green, or Warren Jeffs, states have taken what some see as
a very tolerant approach to the Fundamentalist communities and polygamists.
However, recently Utah and Arizona have sought to increase their law enforcement
of polygamous communities—especially in cases that “involv[e] child abuse,
domestic violence, and fraud.”

After the nightmare of Short Creek, it was somewhat surprising that, in 2008,
Texas would undertake an even larger raid of a polygamous community. Two
weeks after raiding the Yearning for Zion Ranch, the Texas Department of Family
and Protective Services requested a hearing on emergency orders to remove 486
children from their parents, and then limit parental access. An adversary hearing
was held, and the court issued temporary orders to continue state custody of the
children. Thirty-eight mothers petitioned the Court of Appeals, which vacated the
custody decision of the district court, and the Department appealed. The Texas
Supreme Court affirmed the decision of the Court of Appeals, overturning the
temporary custody orders issued by the District Court. As in the Short Creek raid,
the Fundamentalist group found vindication in the Court’s holding that “[o]n the
record before us, removal of the children was not warranted.” The Court also
found that there were many legal remedies available to the Department of Family
and Protective Services, short of removing the children from their parents. The
Texas FLDS raid has done little to stop the problems of polygamy and may have
again set back the efforts of law enforcement as it has been recognized as another
“disaster of Short Creek proportions.”

29 Sigman, supra note 14, at 139.
30 Id.
32 Duncan, supra note 17, at 322.
33 Id.
36 Id. at 615.
37 Id.
38 Id.
39 Id.
40 Id.
41 Billie, supra note 11, at 133.
IV. EFFECTS OF POLYGAMY

Polygamy is somewhat unique as a criminalized activity in that many of its participants claim that there are no victims. Its effects are far reaching—both for good and bad—on those who participate and on society at large. The experiences of Martha Cannon and Rowenna Erikson clearly illustrate two of the most common viewpoints of polygamy. Erikson’s Escape from Polygamy may more easily be understood, since polygamy commonly receives the negative limelight. On the other hand, there is no way to tell if Cannon’s experience is not more typical of women within polygamy. The secrecy of these polygamist communities, and their fear and mistrust of outsiders, make it difficult to really know which of the two perspectives more accurately defines polygamy.

A. Positive Effects of Polygamy

Although their stories are less often told, there are many women like Martha, who prefer to live in polygamy. Adult women offer varying explanations for their participation in polygamy, ranging from sororal friendships with sister-wives, and assistance in providing for children, to religious and cultural reasons. Elizabeth Joseph is one of the very few women who has come forth to share some of her experiences. She described her experience within polygamy as a “paradox” with compelling social reasons that make the lifestyle attractive to the modern career woman. For her, the help offered by sister-wives allows for the flexibility necessary to juggle the high demands of a career, raise a young toddler, and meet the needs of a husband, in a fulfilling way which she would not be able to do outside of polygamy. The relationship also accommodates the “longing for intimacy and comfort that only he can provide, and when those feelings surface, [she] ask[s] to be with him.” She told an audience with the National Organization of Women that polygamy “offers an independent woman a real chance to have it all” and represents “the ultimate feminist lifestyle.”

In light of the benefits that some polygamist women claim, it has become more difficult for the government to justify the ban on polygamy. Studies have shown “there is no evidence that polygamy per se creates abuse or neglect.”

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43 Sigman, supra note 14, 173–74.
44 Id. at 172–73.
46 Id.
47 Id.
48 Id.
50 Sigman, supra note 14, at 173.
Additionally, the studies have shown no greater propensities for abuse within polygamous families than monogamous ones. Proponents of polygamy also argue that it is a better option than the much more common societal alternative, serial monogamy. They argue that children are better off growing up with a committed polygamist father, than “today's alpha males who've dumped a series of wives and families.” These stories, studies, and arguments support the conclusion that it has been paternalistic for society to remove the choice of polygamy. However, positive effects aside, the problems associated with polygamy are real.

B. Negative Effects of Polygamy

Opponents of polygamy argue that it subjugates women by forcing them into abusive or neglectful relationships. Problems with corporal punishment, domestic violence, and religious, verbal, and emotional abuse have been found in Fundamentalist communities. There are accounts of physical and emotional abuse, not only between husbands and wives, but between sister-wives as well. Abuse is not limited to the adults; wives are abusive to the children of their sister-wives, and there are cases where children have been locked up, and even smothered until they choked or gasped for air.

The tragic reports of domestic violence are not the only problems of polygamy. Many families within Fundamentalist communities live in poverty and often rely on food stamps to survive. The FLDS church advocates “bleeding the beast,” the practice of abusing and exploiting governmental assistance programs, which it considers a righteous endeavor to assist God in destroying the evil U.S. government. The Hilldale and Colorado City communities rank within the top ten cities in western states for the amount of federal poverty aid which they receive.

However, the most destructive problem of polygamy may be underage marriage. Adolescent girls as young as thirteen are forced into arranged marriages without any meaningful or informed consent. Their extremely young ages make these girls especially vulnerable to sexual abuse, which seems fostered in the
community not only by husbands, but fathers and brothers as well.\textsuperscript{63} Surveys show that approximately sixty percent of Fundamentalist wives were married as teenagers.\textsuperscript{64} The sexual abuse and arranged marriages, which are often incestuous, result in high-risk pregnancies, birth defects, and high maternal mortality rates.\textsuperscript{65} Additionally, the mathematical result of plural marriages in FLDS communities is also a problem for young boys, who are forced out of the communities to allow the older men to take younger wives.\textsuperscript{66}

V. ENFORCEMENT OF POLYGAMY LAWS

The problems stemming from polygamy are obviously complex and fully engrained within the Fundamentalist communities. They have also been exacerbated by the increased public support of polygamists and animosity towards the government as the result of raids like Short Creek.\textsuperscript{67} Enforcement disasters like Short Creek, and more recently the Texas FLDS raid, have created barriers to enforcement, barriers that have even been adopted as policy. The Utah Office of the Attorney General states, “Polygamy is illegal in Utah and forbidden by the Arizona constitution. However, law enforcement agencies in both states have decided to focus on crimes within polygamous communities that involve child abuse, domestic violence, and fraud.”\textsuperscript{68} This strategy has been characterized as the “main problem with polygamy enforcement.”\textsuperscript{69} Some see Utah’s polygamy laws as sufficient to stop many of the problems but only if the laws are fully enforced. Conversely, others see even this limited strategy of enforcement as too much and some strong arguments have been made for the legalization of polygamy.\textsuperscript{70} Calls for either extreme in rejecting the adopted strategy of the state against polygamy are overly simplistic.

Pragmatically, it is not possible for the state to fully enforce the polygamy laws; calls for full on enforcement do not show a full understanding of the history of polygamy. As Utah’s Attorney General Mark Shurtleff stated: “Would you truly have us arrest every polygamist? Do you want a Short Creek again? We barely have the resources to prosecute crimes within these organizations.”\textsuperscript{71} The Texas

\begin{footnotesize}
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\begin{enumerate}
\item Id.
\item Duncan, supra note 17, at 327.
\item Id.
\item See generally Sigman, supra note 14, at 182; Duncan, supra note 17, at 327.
\item Billie, supra note 11, at 148.
\item Billie, supra note 11, at 146.
\item See Duncan, supra note 17, at 331–37.
\item Sigman, supra note 14, at 141.
\end{enumerate}
\end{footnotesize}
raid cemented these predictions as it again became a disaster and a setback for law enforcement.  

Legalizing polygamy is also not a viable alternative and may not even be a legal possibility in Utah. As discussed above, statehood was conditioned upon adoption of an irrevocable ordinance banning polygamy and, as such, the ban became a part of the state constitution. 73 In 2005, the constitutional issues were further complicated when the people of the state adopted a constitutional amendment limiting the recognition of marriage to one man and one woman. 74 Therefore, legalizing polygamy in Utah would require amending two parts of the Utah constitution, which would likely prove difficult.

VI. CONCLUSION

The state needs to make protecting the victims of polygamy a higher priority. This is possible under the current strategy of polygamy enforcement. Allegations of abuse within polygamy communities need to be investigated as thoroughly as they are investigated outside of those communities, if not more so because of the chilling effect on reporting which is culturally pervasive in Fundamentalist communities. The state’s highest priority for investigation and enforcement needs to be the protection of children—and more specifically—protecting under-aged girls from being forced into polygamy relationships without their consent. State officials must make special precautions to avoid repeating the mistakes of Short Creek, not by turning a blind eye, but by making sure that due process protections are afforded to Fundamentalist communities just as they are to the rest of society. The Texas FLDS case is demonstrative; the Texas Department of Family and Protective Services went straight to its strongest remedy, emergency removal of the children. 75 The Court recognized that less intrusive remedies, including removal of alleged perpetrators from the child’s home and issuing orders to assist in investigation, were available to protect the children. 76 Similar remedies are available to law enforcement in all other states. Using the least intrusive remedies will garner public support, instead of disdain for the actions of enforcement officers.

If allegations and investigations of abuse are scrutinized within polygamy communities the same as they are without, enforcement officials will not be subjected to the public outcries of the past. Increasing the prioritization and focus of the current law enforcement strategy will allow the state to effectively police polygamy communities and limit abuses while working towards long term solutions that reconcile the two sides of polygamy.

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72 See Duncan, supra note 17, at 326.
74 UTAH CONST., art. I, § 29.
75 In re Tex. Dep’t of Family & Protective Serv., 255 S.W.3d 613, 614 (Tex. 2008).
76 Id. at 615.
MONOLOGUE

MY SON HAS DOWN SYNDROME

*Linda Smith*

My son has Down syndrome. I didn’t know about it before he was born. So the question of whether he should have been born was never at issue.

Today, parents of children with Down syndrome are protesting mandatory pre-natal screening because after screening, parents usually choose not to allow the child with Down's to be born. My son Greg has joined their protest.

Greg is what they call “high functioning.” He can read and write and has ambitions to have a career and a family of his own. Pursuing his career ambitions, he took community college classes in child care and in human development. It was in community college that he learned about abortion. The human development text explained about genetic “abnormalities” and the choice to terminate a pregnancy to prevent the birth of a child with Down syndrome. Greg was horrified.

The professor assigned a short paper on “genetic engineering.” Here is some of what Greg wrote:

Human Development FHS 1500
Ch. 4 Abortion

Abortion is when a woman gets pregnant then she decides not to have the birth. There are several reasons that women decide not to have the births. It can be they are not happy about how the baby turns out or it might have something wrong with the baby or they are different than them. Therefore, they do not want the baby when it gets out of the womb.

My views on abortion are I think it is sick idea. That is how we Americans stereotype other people.

That reminds me of a movie named Shrek. When the movie started Shrek was an Ogre. He did not want anyone around him and he pushed people away from him. The whole movie is based on that idea. In the second movie (Shrek II) Shrek and Fiona had a dark secret that she was an Ogre as well. So they actually find the love again.

* © 2009 Linda Smith, S.J. Quinney Professor of Law and Symposium Participant, Salt Lake City, Utah, 2008.

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I think a human being should have a chance to live on this planet earth. Therefore, we can have a more exciting life. I think we should stop the abortions from happening and accept the differences we have. That also reminds me on the African Americans’ story about how they were treated. It is important to have differences in the worlds.

I will definitely not advise abortion to anyone because at least we should celebrate the differences in the world. In addition, we should accept the people that are different from us.

Today Greg has achieved his first career goal—earning the Child Development Associate (CDA) credential, the initial qualification to work in a preschool. And even better, last May he started work as a pre-school aide. He loves coming up with creative art projects for his three-year-olds and struggles, as any parent would, in getting them to nap quietly. He is now interested in finding a girl friend who would become his wife—so he, like Shrek, can have HIS “chance to live on this planet earth.”
I. INTRODUCTION

In Linda Smith's monologue, *My Son Has Down Syndrome*, Greg expresses his opinion of abortion standing in the unique position of being both an abortion opponent and, statistically speaking, what some today would call an abortion survivor. He is a “high functioning” carrier of an extra chromosome, the discovery of which today leads ninety percent of pregnant mothers to abort. His opinion of the subject of abortion, though expressed in simple terms, carries with it the same logic, emotion, and persuasive appeal that ornamens one opinion of the debate sounded in any number of circles. Indeed, everyone from construction workers to Congressmen has a moral, medical, social, or political opinion on the topic. These themes have been debated just as vigorously in living rooms, barber shops, community centers, and cyber space as they have in the halls of Congress and the courtrooms of the United States. As Greg and his mother share their own voice on the matter, this note examines similar themes as propounded by the mighty voice of the United States Executive Branch.

II. EXECUTIVE ACTION IN THE ABORTION DEBATE

The Executive has exercised its power to influence abortion policy and practice in a number of ways, such as wielding the negotiating power of the presidential veto, forming and enforcing federal regulations, controlling

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appointments to the judicial bench, advocating positions in amicus briefs, and shaping United States foreign policy. This note will focus on three of the mechanisms which have been utilized in advancing the President’s abortion agenda: advocacy in amicus briefs, administrative regulations, and foreign policy.

A. Executive Advocacy: The United States as Amicus Curiae

_Roe v. Wade_ addressed whether the United States Constitution protects a woman’s right to an abortion against state regulation. The Court held that a woman’s right to an abortion is guaranteed by the concept of privacy as protected by the Constitution, and resolved in favor of protecting a woman’s right to an abortion against legislative regulation. The Court indicated, however, that the right to an abortion may be subjected to state regulations based upon the stage of the pregnancy in question, establishing a trimester system.

Not content to watch the Court shape the law of abortion without saying its piece, the Executive Branch entered the debate. Writing for the plurality in _Planned Parenthood v. Casey_ in 1992, Justice O’Connor noted that the Executive Branch had played the role of an advocate and took sides by appearing as amicus curiae in _Casey_, as well as in five other cases over the preceding decade, to request that the Court overrule _Roe v. Wade_. These amicus briefs, found in _Hodgson v. Minnesota_, _Webster v. Reproductive Health Services_, _Thornburgh v. American College of Obstetricians and Gynecologists_, _City of Akron v. Akron Center for Reproductive Health, Inc._, and _Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft_, were submitted, not surprisingly, during the administrations of George H.W. Bush and Ronald Reagan, two Republican presidents known for being staunchly pro-life.

These Executive amicus briefs uniformly asserted two salient themes: first, that the right to abortion established in _Roe v. Wade_ was not a “fundamental” liberty interest, and thus was undeserving of heightened protection because “our Nation's history and traditions” have not historically protected that interest from state restriction. Second, each brief also argued that the respective states seeking

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3 410 U.S. 113 (1973).
4 _Id._ at 154.
5 _Id._ at 162–64.
7 _Id._ at 844.
to limit abortion had legitimate state interests for doing so, particularly the states’ interest in “maternal health and in unborn and future life.”

At the end of the day, the Executive’s concerns were only partially satisfied. The Casey Court explicitly rejected the trimester framework established in Roe v. Wade, however, the Court did not overturn the central holding of Roe, but replaced the rigid trimester framework with a more workable “undue burden” standard. As such, the fundamental right to an abortion remained, subject to regulations that do not place an undue burden upon that right.

B. Executive Lawmaking: Administrative Regulations Governing Abortion

In 1854, the Texas state legislature enacted a criminal abortion statute, which was in effect for over a century. In the intervening century between the enactment of this statute and the Supreme Court’s 1973 decision in Roe v. Wade, the American Law Institute proposed a model penal code for state abortion laws, expanding the exceptions to the abortion ban to include instances in which: the physical or mental health of the mother was gravely impaired; the child would likely be born with “grave physical or mental defects;” or the pregnancy resulted from rape or incest. States began adopting the ALI Model Code in the 1960s, and by 1973, such statutes were in effect in the majority of the states. The United States, see also Brief for the United States as Amicus Curiae Supporting Respondents in No. 88-1125 and Supporting Cross-Petitioners in No. 88-1309 in Hodgson v. Minnesota, 497 U.S. 417 (1990), (Nos. 88-1125, 88-1309), 1989 WL 1127347, *7 (noting that “our Nation’s history and traditions do not prove that an unemancipated minor has any such right independent of her parents’ consent”); Brief for the United States as Amicus Curiae Supporting Appellants in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), (No. 88-605), 1989 WL 1127640, *6 (noting that “Roe rests on assumptions that are not firmly grounded in the Constitution; it adopts an unworkable framework tying permissible state regulation of abortion to particular periods in pregnancy; and it has allowed courts to usurp the function of legislative bodies in weighing competing social, ethical, and scientific factors in reaching a judgment as to how much state regulation is appropriate in this highly sensitive area”).

15 Casey, 505 U.S. at 873.
16 Id. at 876.
17 Id. at 877.
21 Roe, 410 U.S. at 118 n.2.
States Supreme Court entered the scene, and in *Roe v. Wade*, the Court held that a woman’s right to an abortion is guaranteed by the concept of privacy as protected by the Constitution.\(^{22}\)

As has already been discussed, the Executive branch was far from silent during this period and the forty years of legislative and judicial lawmaking that have followed, but it has not contented itself with merely making its opinions known via amicus briefs. Rather, the Executive has promulgated administrative regulations in an effort to influence the abortion issue, albeit purportedly within the framework established by the Court and Congress.

One example of this method of Executive involvement is found in 45 C.F.R. §§ 88-88.6, which sports the unlikely title: “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices” (the Regulation). An eleventh-hour regulation promulgated by President George W. Bush at the close of his second term in office,\(^{23}\) the Regulation aims to lend further protection to “conscience rights” of clinics and physicians unwilling to perform abortion procedures for religious, moral, ethical, or other reasons.\(^{24}\)

Though the idea of protecting conscience rights originated much earlier with the Church Amendments,\(^{25}\) the Public Health Service Act,\(^{26}\) and the Weldon Amendment,\(^{27}\) the Regulation adds additional protections and enforcement mechanisms to conscience rights of health care providers. It prohibits discrimination against physicians who indicate their unwillingness to perform abortions if the entity in question receives federal funding, while mandating that states apply the Regulation.\(^{28}\) In addition to protecting physicians, the Regulation also protects the conscience rights of entire entities that do not wish to perform abortions or provide information about abortions.\(^{29}\)

The argument that the Regulation goes beyond the authorities upon which it is based illustrates how the Executive can potentially impact the abortion debate outside of the bounds set by Congress and the Court. The Regulation seeks to

\(^{22}\) *Id.* at 154.


\(^{24}\) 45 C.F.R. § 88.1 (2008) (“The purpose of this Part is to provide for the implementation and enforcement of the Church Amendments...and the Weldon Amendment.... These statutory provisions protect the rights of health care entities/entities, both individuals and institutions, to refuse to perform health care services and research activities to which they may object for religious, moral, ethical, or other reasons.”) (internal citations omitted).


\(^{28}\) See *id.*

\(^{29}\) See 45 C.F.R. § 88.4 (2008).
overtly distance itself from any dispute that it affects a woman’s right to obtain an abortion:

The ability of patients to access health care services, including abortion and reproductive health services, is long-established and is not changed in this rule. Instead, this rule implements federal laws protecting health care workers and institutions from being compelled to participate in, or from being discriminated against for refusal to participate in, health services or research activities that may violate their consciences, including abortion and sterilization, by entities that receive certain funding from the Department.30

However, whether the Regulation affects a woman’s right to abort is a subject of much debate. The Regulation was ostensibly promulgated in order to:

(1) [E]ducate the public and health care providers on the obligations imposed, and protections afforded, by federal law; (2) work with State and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the Church Amendments, PHS Act § 245, and the Weldon Amendment; (3) when such compliance efforts prove unsuccessful, enforce these health care conscience protection laws through the various Department mechanisms currently in existence, to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law; and (4) otherwise take an active role in promoting open communication within the health care field, and between providers and patients, fostering a more inclusive, tolerant environment in the health care industry than may currently exist.31

The broad spectrum of entities subject to the regulation represents a potential problem in the abortion context; women seeking abortions may be affected in attempting to acquire an abortion from a hospital within a reasonable distance of their location. The “conscience rights” of the doctors are secured within entities that receive federal funding. Although the Act has already gone through the procedure to become a Federal Regulation, it is yet suspect for the way it impacts, or may impact, a woman’s right to an abortion under Supreme Court abortion jurisprudence.

One critic challenges the regulation as a troubling unilateral exercise of power which runs counter to the Constitution. Marci Hamilton suggests that the regulation is unconstitutional on three grounds: first, as an improper exercise of federal power by the Executive branch; second, as an improper exercise of federal power as it relates to the states; and third, for breaking down the church and state barrier. In light of the body of cases addressing the abortion right, the Regulation does not fit neatly within the constitutional rubric. It places the woman’s right to be informed in order to make a life-altering decision on uncertain grounds. Depending upon who the physician or hospital staff member is, a woman may be denied the procedure, as well as any information related thereto. The impact of the regulation is largely conjecture at this point; however, some critics have pointed to the possible ramifications, including the possibility that pharmacists may refuse to dispense contraceptives related to birth control, rape, or unwanted pregnancy.

Although the Executive Branch cannot dictate Congressional legislation, it does maintain the power to regulate agencies, which in turn may affect Constitutional rights such as abortion. Some argue that because President Bush was ineffective in his attempt to get Congress to draft legislation protecting “conscience rights,” he therefore made use of his power to regulate agencies, developing an administrative rule that would have the same practical effect.

Further enriching the drama of Executive maneuverings in the abortion debate, President Obama followed the lead of nearly all newly-elected presidents by issuing a freeze on all executive orders that had not yet been sent to the Office of the Federal Register as of noon on January 20, 2009. The Regulation, however, had already been published in the Code of Federal Regulations as of January 20, 2009, and it went into effect on January 18, 2009. Despite surviving the initial freeze, the Regulation is not in the clear yet. President Obama promised to “review all 11th-hour regulations and address them once he [became] president.” President Obama’s next moves will determine whether the Regulation stays or goes. If the Regulation remains in place, some commentators fear that this

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33 See id.
34 See id.
promotion of healthcare providers’ conscience rights will compromise the abortion rights of women seeking abortions from entities or individuals with a conscience conflict.\footnote{37 See id.}

\section*{C. Executive Policies: Declarations and Foreign Policy}

In addition to the "hard law" methods of influencing the abortion debate, the Executive has also engaged in policy activities to promote the president’s themes—whatever they may be. A simple but illustrative example of this method of Executive involvement is found in National Sanctity of Human Life Day,\footnote{38 See Proclamation No. 6397, 56 Fed. Reg. 66,775 (Dec. 20, 1991) (proclaiming Jan. 19, 1992 the ninth National Sanctity of Human Life Day).} which President Ronald Reagan instituted by declaration published in the Federal Register as an annual commemoration of life coinciding with the \textit{Roe v. Wade} decision.\footnote{39 See Proclamation No. 5147, 49 Fed. Reg. 1,975 (Jan. 13, 1984) (declaring Sunday, Jan. 13, 1984 “National Sanctity of Human Life Day, 1984”); \textit{see also} Proclamation No. 5761, 53 Fed. Reg. 1464 (Jan. 14, 1988) (on the fifteenth anniversary of the Roe decision, Ronald Reagan stated, “[i]n the 15 years since the Supreme Court’s decision in \textit{Roe v. Wade} ... America’s unborn have been denied their right to life. Among the tragic and unspeakable results in the past decade and a half have been the loss of twenty-two million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.”).} President George H.W. Bush continued the celebratory declaration each year during his two terms.\footnote{40 See Proclamation No. 6521, 58 Fed. Reg. 469 (Jan. 4, 1993).} President Bill Clinton, however, elected not to engage in the annual declaration, and the tradition was discontinued for the duration of his two terms. With the advent of another Republican president, President George W. Bush, the tradition was revived.\footnote{41 See Proclamation No. 7863, 70 Fed. Reg. 3273, 3273 (Jan. 14, 2005) (noting the nation’s “significant progress in recent years toward building a culture of life,” citing promotion of “abstinence education, adoption programs, crisis pregnancy programs, and other efforts to help protect life”).}

The Mexico City Policy (the "Policy") is perhaps the most well-known Executive policy on abortion. The Policy, created by President Ronald Reagan in 1984,\footnote{42 Sharon Camp, \textit{The Impact of the Mexico City Policy on Women and Health Care in Developing Countries}, 20 N.Y.U. J. INT’L L. & POL. 35, 35–41 (1987).} made federal funding to non-governmental organizations (NGOs) contingent upon refraining from performing or in any way promoting abortion as a method of family planning in other countries.\footnote{43 U.S. Policy Statement at the United Nations International Conference on Population, 2d Sess., Mexico City (Aug. 6–13, 1984).} Opponents of the Policy argue that it inappropriately deprives NGOs of the ability to assist individuals in foreign
countries to engage in family planning that does not include abortion. Opponents also argue that the Policy "stifles public debate on abortion-related issues, requiring private organizations overseas to choose between continuing their non-U.S. funded efforts to change public policy around abortion in their own countries, or receiving U.S. family planning funds." For this reason, the Policy is also referred to as the "Global Gag Rule."

The Policy stayed in effect through the Bush Senior Administration, but it was rescinded by President Bill Clinton in 1993. President Clinton considered the Policy's conditions as "excessively broad" and "unwarranted," stating that it "undermined efforts to promote safe and efficacious family planning programs in foreign nations." President George W. Bush revived the policy on January 22, 2001, and, most recently, President Barack Obama rescinded the policy on January 23, 2009, once again labeling its conditions as "excessively broad" and "unwarranted."

III. CONCLUSION

The themes of the abortion debate are sounded in many venues and by many people, from pre-school aides to presidents. The Executive has been active in influencing the debate via many methods, including advocacy as amicus curiae, administrative regulations, and Presidential Policies. It remains to be seen what effect the Obama Administration may have on abortion law and policy, but what is sure is that the Executive will continue to play its part in the drama of the abortion debate.

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45 Id.


48 Id.

49 Id.


52 Id.
The poem I am going to read is about the death of my husband’s mother. She was a Canadian with roots in the British Isles. She was a well-spoken and well-read woman, but she had an impish side, and a comfort with the unconventional that sometimes surprised us.

Although it is not clear from the poem, she made the decision to stop eating, and my husband and I slept in her hospital room for five days before her death. She was either unconscious or not really making sense for most of the time that we were there. Then, suddenly, she surfaced and seemed quite herself, reminiscing and telling jolly tales of my husband’s childhood. We made the decision to slip out for dinner just before the restaurant next door closed, and we left her quite lucid. When we returned she was “somewhere else” and we never again experienced her being “with us.”

The poem is entitled “A small decision.” I guess it really encompasses two decisions. The first was our decision to eat that evening that later weighed a little on our minds. The second was her decision not to eat and thus to control her own passing, which was perhaps not such a small decision.

A small decision

Your eyes are . . . empty.
I’ve come so many miles to see you
But no one’s home.

Your breathing is . . . raspy.
The sounds of the corridor drift by,
Cheerful bustle, sounding far away.

I smooth your brow,
Pale . . . translucent.
The blue veins trace a web of connections.

I sit for hours and hours,
Waiting for sentience,
For a memory to surface.

1 August 2004.
And then suddenly you’re there,
Smiling, telling stories
About when I was young.

You talk and talk
As if you hadn’t lost your home,
As if time wasn’t running out.

Last call for food.
I slip out for an hour,
When I return, no one’s home again.

I relive that decision again and again.
The last sentence.
The last chance.
STUDY NOTE
TO DIE OR NOT TO DIE: THE HISTORY AND FUTURE
OF ASSISTED SUICIDE LAWS IN THE U.S.

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I. INTRODUCTION

The accompanying monologue, *A Small Decision*, briefly recounts the passing of the author’s mother-in-law who decided to end her life through starvation. Perhaps surprisingly, there is currently no law in the United States that prevents a person from making the decision to stop eating, even if this decision results in the death of the individual. However, this issue has increasingly become a subject of concern in response to the controversy over assisted suicide. If a person seeking to end her life, for one reason or another, resides in a state where assisted suicide is completely banned, she may decide to employ legal options such as refusing food or drink to hasten death. Refraining from eating or drinking, as well as other life-ending decisions, are common practices in the United States.

Thus, a difficult legal and moral issue has arisen as to whether society is prepared to decriminalize assisted suicide. There are legitimate societal interests in discouraging the assistance of suicide. However, denying a person the option to receive safe and proper aid in dying serves, in effect, to encourage starvation or other distasteful ways to die. This note explores some of the legal history surrounding assisted suicide and comments on the future of assisted suicide laws in the United States. Section II introduces and explains the various classifications of life-ending decisions. Section III reviews the historical background of assisted suicide laws in the United States. Section IV discusses the current state of such laws. Finally, section V deals with the possible future of assisted suicide laws in the United States.

II. CLASSIFICATIONS OF LIFE-ENDING DECISIONS

There are several classifications of life-ending decisions that courts and activists use to distinguish between what is legal and what is not. These include assisted suicide, voluntary or involuntary active euthanasia, voluntary or involuntary passive euthanasia, and non-voluntary euthanasia. These classifications can usually be distinguished by whether there was an act or
omission by the parties involved, whether the act or omission was consented to by
the patient, and the intentions of the parties involved.

Assisted suicide occurs when an individual who has decided to end her life is
provided assistance in doing so by either a physician or other willing individual. In assisted suicide, “the patient herself performs the last death-causing act.” For example, the physician might connect the patient to a machine that dispenses a lethal injection. The patient is the one who then pushes the button that releases the fatal fluid into her body. Voluntary active euthanasia (“VAE”) is very similar to assisted suicide, and is often opined to be the same thing. However, with VAE, a person other than the patient is the one who “commits the death-causing act.” Using the example above, the physician would push the button that releases the fatal fluid into the patient’s body. Assisted suicide and VAE are described as indistinguishable because both forms involve consent on the part of the patient and an action by an involved party that causes the resulting death. Also, in both classifications the party performing the act intends that the act will result in the patient’s death.

Voluntary passive euthanasia (“VPE”) occurs when a patient refuses the administration of life-sustaining medical treatment with the intent to die. Usually the physician will withhold or withdraw any further medical treatment, including feeding tubes, oxygen masks, or other life support, pursuant to the patient’s request or consent. VPE contains the word “passive” because the patient is requesting an omission to act (not providing medical care) rather than a specific action by means of injection or poison. Also with VPE, both parties either intend or have knowledge that the omission to act will result in the patient’s death. Another type of VPE involves a patient who is not relying on any life-sustaining medical treatment, but has made the decision to end her life by refusing to eat or drink. Because VPE can be painful for the patient as the body begins to dehydrate and weaken, the administration of pain medication will often be used in conjunction with VPE.

3 Id.
4 See id.
5 Id.
8 See id.
9 Id.
Involuntary active euthanasia ("IAE") is very much like VAE in that it involves an act by another person that is the cause of the patient’s death.\textsuperscript{10} However, IAE is done against the patient’s will or without the patient’s (or legal guardian’s) consent.\textsuperscript{11} For example, a physician may intentionally administer a lethal amount of pain medication to help lessen the pain a patient is experiencing, and to effectuate that patient’s death. This was a common occurrence in Nazi Germany,\textsuperscript{12} as well as an idea proposed in an article written by the president of the Euthanasia Society, to advocate mercifully and kindly relieving children diagnosed as “defective” from the “agony of living.”\textsuperscript{13} This is also a current legal practice in the Netherlands.\textsuperscript{14}

Involuntary passive euthanasia ("IPE") occurs when another person withholds or withdraws life-sustaining medical treatment from a patient against that patient’s (or their legal representative’s) will. In contrast, non-voluntary euthanasia ("NVE") occurs when another person withholds or withdraws life-sustaining medical treatment from a patient, but does so pursuant to the consent of the patient’s representative. In this case, the patient typically does not consent because she is either incompetent (for example, mentally disabled or a minor child), or is in a persistent vegetative state which prevents her from giving informed consent. Typically, the patient will have executed an advanced directive or medical power of attorney that legally authorizes the withdrawal of medical treatment.

III. LEGAL HISTORY

A. Early American Colonies

The Common Law of England, which strongly condemned both attempted and completed suicide, was adopted by the early American colonies.\textsuperscript{15} Suicide was defined as an individual “deliberately put[ting] an end to his own existence, or commit[ting] any unlawful malicious act, the consequence of which is his own death.”\textsuperscript{16} Under the English common law, suicide was originally an ecclesiastical crime, but evolved into a crime against the State.\textsuperscript{17} The penalties for suicide victims included the denial of the right to a “Christian” blessing or burial and mandated burial in a highway—with a stake driven through the body—to dishonor

\textsuperscript{11} Id.
\textsuperscript{12} Cantor, \textit{supra} note 8, at 1816.
\textsuperscript{17} CeloCruz, \textit{supra} note 10, at 373.
Surviving relatives surrendered the property of the suicide victims to their feudal superiors. The Crown eventually confiscated suicide property, which it justified by classifying suicides as felonies. Common law also classified assisted suicide as a felony. By equating suicide with murder, any person who advised or directed an individual to commit suicide and who witnessed the crime could be liable for murder.

Early American colonies followed this paradigm, punishing suicide and assisted suicide as felonies, and imposing the penalties of dishonorable "burial and forfeiture of goods." This practice continued long after the Revolutionary War and the adoption of the Constitution. Similarly, "[early American] historical treatment of voluntary active euthanasia has been unremittingly condemnatory." Any individual who killed another committed murder, even if she did so at the request of the victim or as a mercy killing to relieve pain or misery.

Over time, many states recognized that it was impractical to punish a suicide victim since the individual was already dead. Also, if the theory of punishment was to deter further crime, as opposed to enriching state coffers, then such punishment would be useless. Furthermore, punishing a suicide victim's heirs for such crime unfairly punishes the innocent for the perpetrator's wrongdoing. These insights led to the rise of decriminalization of suicide in the United States during the mid-1800s. However, many states continued to criminalize the assistance of suicide. In the mid-to-late 1800s, several states codified assisted suicide laws that prohibited acts such as "furnish[ing] another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life." Drafters of these codes noted that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim."

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18 Id. 19 Id. 20 Id. 21 Id. 22 Id. at 374. 23 Id. 24 Id. 25 Id. 26 Id. at 376. 27 Id. 28 Id. at 375. 29 Id. 30 Id. 31 Id. at 377. 32 Washington v. Glucksberg, 521 U.S. 702, 715 (1997). 33 Id. at 716.
B. Twentieth Century United States

Despite such deep-rooted beliefs about assisted suicide, these laws have recently been re-examined—primarily due to advances in medicine and "Kevorkian" technology. Upon judicial review, assisted suicide statutes typically have been upheld. Likewise, prohibitions on euthanasia have consistently been validated.

Although assisted suicide bans eventually became virtually "absolute" in the United States, one exception remained. In 1902, a criminal appeals court in Texas attempted to legalize assisted suicide, reasoning that if suicide was no longer a crime, then assisting suicide should not be a crime either. This ruling was short-lived, however, and immediately overruled by the legislature.

Several decades later, in 1976, the New Jersey Supreme Court faced the first "right-to-refuse" medical treatment case In re Quinlan. In that case, the court held that a twenty-one-year-old girl in a persistent vegetative state was incompetent and thus, unable to make a decision on whether to disconnect her life-sustaining respirator. The court further held that the father of the girl, as her guardian, should be allowed the opportunity to demonstrate that the girl would have made the decision to die in these circumstances. However, the father failed to establish the girl's intent, despite evidence of statements the girl made to her friends regarding her wishes. Almost nine years later, in 1985, the New Jersey Court overruled its holding when it decided In re Conroy. In that case, the court held that any evidence of "information bearing on the person's intent, may be appropriate aids in determining what course of treatment the patient would have wished to pursue."

Since the decisions in these cases came down, nearly every state in the United States "has recognized the right of at least competent adults to refuse even basic, life-sustaining medical care, such as tubes supplying food and water." In 1990,
the Supreme Court again affirmed that the protection of liberty includes the right to reject life-sustaining medical treatment. However, the Court also held that states could require clear and convincing evidence of the incompetent person’s “prior expressed wishes” before discontinuing life-support.

Proponents of assisted suicide argue that the states are already condoning a form of suicide by recognizing the right to refuse care. Thus, if patients have a right to refuse life-sustaining medical care, then they should also have the right to assisted suicide or euthanasia. However, the United States Supreme Court has expressly denied this proposition. In 1997, several physicians argued before the Court that New York’s assisted suicide ban violated the Equal Protection Clause of the Fourteenth Amendment. The Court disagreed with the physicians and held that there is a recognized “distinction between letting a patient die [right to refuse] and making that patient die [assisted suicide or euthanasia].” That same day, the Court heard *Washington v. Glucksberg.* In *Glucksberg,* the plaintiffs argued that a Washington state statute banning assisted suicide violated the due process clause. The Court held the right to assisted suicide was not grounded in our Nation’s history and traditions, and that the assisted suicide ban was rationally related to legitimate governmental interests.

Though possibly viewed as a blow to proponents of assisted suicide, the above cases may also be interpreted as a victory. The immediate consequence of the Supreme Court’s decisions was to return the assisted suicide and euthanasia issue to the states and the political process. A less obvious, but perhaps even more important consequence is the fact that five votes on the Court appeared to be leaning in favor of recognizing a constitutional right to assisted suicide “for competent, terminally ill persons suffering severe pain.” This significant step in support of constitutionalizing assisted suicide lends credence to the view that helping others to effectuate death might not be as terrible as originally believed. Accordingly, society ought to allow any individual to seek assistance in death

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48 Id. at 284.
49 Gorsuch, *supra* note 36, at 654.
50 Id. at 642. One notorious advocate of this viewpoint was Dr. Jack Kevorkian who on June 4, 1990, assisted an Alzheimer’s patient, Janet Adkins, in taking her life. In 1999, after Kevorkian performed euthanasia on a nationwide televised 60 Minutes program intended to provoke a debate over legalizing his practice, he was found guilty of second-degree murder. See *id.* at 600–01.
52 Id. at 807.
54 Id. at 728.
55 Id. at 734.
under safe and controlled circumstances by someone who possesses such expertise, instead of through more dangerous and undesirable means.

IV. CURRENT STATE OF THE LAW

"Since 1992, bills have been introduced to legalize assisted suicide or euthanasia in various state legislatures, including Alaska, Arizona, Colorado, Connecticut, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Mexico, [Oregon], Rhode Island, Vermont, and Washington." Two states, Oregon and Washington, have successfully passed assisted suicide bills into law. In addition, in the state of Montana a District Court judge recently ruled that mentally competent, terminally ill patients should have the "right to die with dignity."

In November of 1994, Oregon became the first state to legalize physician-assisted suicide under the Oregon Death With Dignity Act (ODWDA). The ODWDA went into effect three years later. The ODWDA allows physicians to provide lethal doses of medication to patients who are terminally ill, subject to specific conditions designed as safeguards for the requesting patient. These conditions include: ensuring that a physician diagnose the patient with a terminal illness that will cause the patient's death within six months; that the patient have voluntarily, and with informed consent, requested a lethal dosage of medication; that the diagnosing physician refer the patient to counseling if it is suspected that the patient is suffering from a psychological disorder or depression that might impair her decision making; and that the patient have obtained a second opinion with another physician that confirms the findings of the first physician. Also, although Oregon physicians can prescribe the requested prescription, they may not administer the drug—it must be self-administered. The ODWDA also requires that the request for the drug be made orally and in writing. There is also a required waiting period, and there are "documentation and reporting requirements."

57 Id. at 603.
60 See OR. REV. STAT. § 127.800 (West 2009); see also Susan R. Martyn, Henry J. Bourguignon, Now is the Moment to Reflect: Two Years of Experience With Oregon's Physician-Assisted Suicide Law, 8 ELDER L.J. 1, 1 (2000).
62 Id.
63 Emily P. Hughes, The Oregon Death With Dignity Act: Relief of Suffering at the End of Medicine's Ability to Heal, 95 GEO. L.J. 207, 234 (2006).
Despite attempts in 1997 to repeal the ODWDA, the Act survived another ballot measure and continues to exempt state-licensed physicians from incurring liability for providing lethal doses of medication to terminally ill patients.\(^{64}\)

Fourteen years later, in November 2008, Washington voters passed into law the “Washington Death With Dignity Act” (WDWDA), which became effective on Mar. 5, 2009.\(^{65}\) Virtually identical to the ODWDA, the WDWDA legalizes assisted suicide by permitting physicians to prescribe lethal doses of medication for terminally ill patients pursuant to their request.\(^{66}\) Also like the ODWDA, the WDWDA places conditions upon the assisted suicide process to act as safeguards to protect the requesting patient from any potential abuse.\(^{67}\)

Approximately one month later, on December 6, 2008, a Montana district court judge, Dorothy McCarter, ruled that the Montana state constitutional right to individual privacy and human dignity entails the right of mentally competent, terminally ill patients to obtain physician-assistance to end their lives.\(^{68}\) This ruling was scheduled to take effect immediately. However, Montana’s Attorney General “filed a motion to stay the decision, pending an appeal to the Montana Supreme Court which the Judge denied.”\(^{69}\) On January 27, 2009, the state initiated an appeal to the Montana Supreme Court, which is scheduled to be heard in the spring.\(^{70}\)

Thus far, the recent changes to the law in three states have remained free of abuse of the process.\(^{71}\) Again, the existence of these laws, as well as the lack of abuse that has occurred, substantiates the idea that assistance in death need not be such an immoral and disagreeable process.

V. FUTURE OF ASSISTED SUICIDE LAWS

Based on these recent cases and legislation, there appears to be a trend in support of the legalization of assisted suicide. Still, many states continue to resist. Nonetheless, the majority of states have adopted living will and health care power of attorney laws that tend to lend support to assisted suicide, despite express statements included in the bills that indicate the law is not meant to endorse the practice.\(^{72}\) Resistance to legalizing assisted suicide seems to stem from the fear that

\(^{64}\) Gonzales, 546 U.S. at 249.
\(^{65}\) WASH. REV. CODE ANN. § 70.245 (West 2009).
\(^{66}\) Id.
\(^{67}\) See id. at § 70.245.020–245.150.
\(^{68}\) Montana Judge Endorses Right to Assisted Suicide, supra note 55.
\(^{71}\) Erwin Chemerinsky, Washington v. Glucksberg was Tragically Wrong, 106 MICH. L. REV. 1501, 1513 (2008).
\(^{72}\) Gorsuch, supra note 36, at 640.
abuse will occur—similar to the abuses that occurred in the Netherlands after assisted suicide and euthanasia became legal in that country.

"There are dangers both in legalizing and refusing to legalize" assisted suicide. If the United States were to legalize assisted suicide, legislatures would be required to make determinations as to the limits of who can and who cannot obtain assistance in suicide. Also, the role of physicians would expand from healing ailments into ending lives as well. The taking of one’s life would become a “public process” of which all members of society would participate. On the other hand, if states continue to refuse to legalize assisted suicide, individuals may look to other legal, life-ending options that are available to them. A patient may choose to discontinue life-prolonging nutrition by consciously refusing to eat or drink in order to die. Furthermore, physicians or other persons supportive of assisted suicide may seek more creative ways to assist individuals in hastening their death. Also, family members might take their loved-ones home from the hospital in order to hasten the dying process, instead of leaving them connected to life-preserving apparatuses in a hospital room. Physicians might intentionally, but stealthily, prescribe an overdose of pain medication with the justification that they were seeking to lessen the patient’s pain. Society may also see an increase in the creation of fraudulent living wills or powers of attorney in order to enable family members to hasten death.

Our society must weigh these potential dangers when deciding whether assisted suicide should be legalized. Two states have elected to permit the assistance of suicide, in limited and under highly regulated circumstances to counteract the potential danger of abuse found in the Netherlands. As society becomes reassured that the dangers of abuse can be successfully regulated and prevented, as has occurred thus far under Oregon law, more and more states are likely to legislate for the legalization of assisted suicide.

VI. CONCLUSION

Throughout United States history, society has viewed assisted suicide unfavorably. Recently, however, Americans seem to be more accepting of the controversial procedure. Although assisted suicide is legal in only three states, it appears that as society grows increasingly comfortable with regulation of the issue, it may be more inclined to allow the practice.

73 Id. at 678.
74 Id. at 690.
75 Id.
76 Id.
MONOLOGUE
THE MOST WANTED BOYS IN THE WORLD

*Ruth and Kim Hackford-Peer*

Ruth:
My partner and I met in college twelve years ago. Shortly before Kim moved in
with me, my grandma called to tell me that I wasn’t allowed to “just shack up with
some gal and live in sin.” She told me I would have to get married. She shushed
me when I told her we were denied that particular civil right and added that she got
married to my Grandpa by using a fake ID. She told me the most important thing is
to make a commitment and stick with it. I told her I wouldn’t let her down.

Kim:
We had a beautiful ceremony with many friends and family. But there were also
visible absences. Ruth’s dad and sister didn’t come. Nobody in my family came.
Not everyone supported us like Ruth’s grandma did. But the point is, like
Grandma, we made a commitment and we’ve stuck with it.

Ruth:
About four years later we started talking about conceiving a child using artificial
insemination. I wondered which one of us would carry the child.

Kim:
Look at me. Do I look like I could endure pregnancy much less labor and delivery?
I can’t even tolerate a paper cut. I don’t do needles. And, well—having a baby IN
THERE—that just wasn’t something I ever wanted.

Ruth:
Kim thought I should be the one to put these birthing hips to use. I decided that
since I was providing my womb, she would have the responsibility of “getting the
goods.”

Kim:
I never thought that I, a self-respecting lesbian—would become so occupied with
the thought of sperm. Where to get it? From Whom? At what cost?

Ruth:
I didn’t think using an anonymous sperm donor would be fair to the yet-to-be-
conceived child in case the child ever wanted to know the biological father.

* © 2009 Ruth and Kim Hackford-Peer, Symposium Participants, Salt Lake City,
Utah, 2008.

525—ULR
477—JLFS
Kim: We knew right away that a traditional sperm bank wouldn’t be the answer for us.

Ruth: We started looking at a particular sperm bank that allows the child to get information about the donor when the child becomes an adult. That seemed reasonable.

Kim: And, expensive!

Ruth: While we were struggling with the logistics of our decision to create offspring, friends and family members both started sharing their (unsolicited) opinions on the matter. Some wondered if I had thought of the financial burden of raising children. My sister asked if it were fair to bring children into this homophobic world.

Kim: When you think about it, there ought to be plenty of sperm to go around. The law of supply and demand doesn’t seem to apply here. The stuff’s everywhere but ounce for ounce its more expensive than gold.

Ruth: Is it fair? Of course it isn’t fair. But is it fair to expect me not to have a family because the world around me doesn’t believe in homosexuality? What does that even mean? Homosexuality is not like the tooth fairy. It isn’t something to believe in or not. It just is.

Kim: So we ditched the idea of a sperm bank entirely and placed a “wanted” ad.

Ruth: When I hear that someone doesn’t believe in homosexuality, I typically feel compelled to butt in whether I am being addressed or not. “Take a good long look,” I say, “this is what a lesbian looks like. Now do you believe in homosexuality?”

Kim: I don’t know what we were thinking. I had a hunch that Craig’s list might not be the most desirable venue for sperm solicitation but we were desperate.
Ruth:
A potential donor responded to our ad.

Kim:
The first red flag was that the donor wanted to name the baby. We shrugged it off. What's in a name anyway?

Ruth:
He wasn’t perfect.

Kim:
The second red flag was that the donor had a particular pre-school in mind. The school looked good enough.

Ruth:
He had some expectations himself. More like demands.

Kim:
The final red flag was that the donor wanted to require that we always live within fifty miles of each other.

Ruth:
It was clear that we were looking for a donor. And the nice Craig’s list man, well, he wanted to be a daddy.

Kim:
We called it off.

Ruth:
We know men. We have male friends and acquaintances. I advised Kim that she should find the donor from our circle of friends.

Kim:
I recall awkward conversations with friends and acquaintances in coffee shops—the kind of conversations that voyeuristic coffee goers at nearby tables can’t help but eavesdrop. “What kind of medical conditions run in your family? What is your I.Q.? Baldness? Can I borrow some sperm?”

Ruth:
Our male friends ran scared and the months quickly passed.
Kim:
One day, I was giving a friend a ride home from a community lecture. She asked how the process of getting pregnant was going. She was perhaps a little surprised at my partner’s sudden burst into tears. “We’ll never be moms” she wailed. “We don’t have any sperm.”

Ruth:
Then, out of the blue our friend offered up her husband as our donor. It was totally unprovoked. We didn’t even ask.

Kim:
Now that’s friendship.

Ruth:
I, like my sixteen-year-old sister, got pregnant the first time.

Kim:
Ruth went overdue, had a multi-day Pitocin induction and ended up with a cesarean. Then, the hard part started. The sleep deprivation that lingered for months and months. It was no wonder that two years passed after our son was born before we even thought about having another child.

Ruth:
Our previous donor had agreed to help us again. By this time we had moved back to the west so we ended up having to overnight the goods in a canine semen shipping unit. Apparently horse and dog breeders have been shipping semen for years.

Kim:
Labeled “biological material, please keep cool” the semen shipper wasn’t exactly discreet.

Ruth:
Each month the same Fed-Ex employee handed over the box along with a knowing look and wished us good luck.

Kim:
Fed-Sex we called it. And while Fed-Sex was fun, it wasn’t fecund.

Ruth:
A year passed. A year that was broken down into two week cycles—two weeks of anticipation - followed by two weeks of hopefulness and waiting and wishing—followed by symptoms of PMS that just happen to be the same symptoms of early
pregnancy. Then the let down and disappointment that turn to waiting with anticipation and then the hopefulness.

Kim:
The roller coaster of fertility would get unbearable and we’d take a few months off to regroup and then we’d try again.

Ruth:
We ditched shipping altogether and decided to find a local donor.

Kim:
Cancer, intelligence, and baldness were forgotten. We were desperate. And, I was back to the awkward telephone and coffee-shop conversations.

Ruth:
We did find another donor. A brilliant and amazing gay man without cancer or baldness in his family. Eventually we got pregnant. We have the two boys we always wanted, but legally Kim only has one.

Kim:
If I thought sleep deprivation was hard, it was because I hadn’t yet tried to change adoption laws in the state of Utah.

Ruth:
Riley was born out of state so Kim was able to adopt him. He has the protections of two legal parents. But Casey was born in Utah so we aren’t allowed this coparent adoption.

Kim:
Straight people divorce all the time and the courts help protect those children. But if Ruth and I went through a bitter and ugly separation (it wouldn’t even legally be a divorce), I would have no rights to my baby.

Ruth:
I want to believe in this country that touts “liberty and justice for all” but I go to bed at night worrying that if something tragic happened to me, Casey would be taken from Kim. And since Kim is Riley’s adopted parent, it would mean that Casey would also be separated from his brother.” And I get angry that there are children without insurance or on Medicaid even though there is a willing second parent who wants to pay those insurance premiums. The law here sees that second parent as a legal stranger.
Kim:
Maybe we are forging a new frontier in the family to which some choose to react politically. But my activism isn't political. It is very personal. My family exists. And the laws don't exist here to protect them. To me they are just my boys. And they are the most wanted boys in the world.
Balancing the white plastic stick carefully on top of the toilet tank, I leave the bathroom. I feel a little crazy for wanting to take it with me for proof, good luck or an early demonstration of maternal dedication, and a little crazy for not just throwing it away. I walk slowly down the wood-paneled hall toward the living room. What should I do? I look around for a minute to memorize the look of this rattletrap living room, the 70s beige carpet, the rickety wooden coffee table, painted white like just about every other piece of furniture on Cape Cod, the couch where I lay with my heels up against the wall for an hour, reaching out to the gods, willing them to dispense new life into my life, out at the cape window whose blinds I lowered for privacy those three days I inseminated here, all alone.

I’ve been waiting for this result for so long. I examine my emotions for the standard-issue pregnancy responses. Joy? Check. Excitement? Yes. Also, crowding out the first, a hold back from these months of waiting. Worry. What if I miscarry? What if the baby has Down syndrome? Whom do I tell?

I want to tell Victor. He’s in Seattle, teaching a summer class. Where he sent the sperm from two weeks ago. He’s due to come here next week. I dial his number, anticipating the shared excitement of being the only ones who know. I get his voicemail.

“Hey Victor, it’s Martha. Call me,” I say. Can he hear the glee in my voice? I wonder Why didn’t he pick up?

Annoyance joins the other emotions. I talked to him just before taking the pregnancy test. He said he was going out to dinner with Edsonya and would take his cell.

Maybe he just missed it by one ring will call right back.

Five minutes pass. He doesn’t call.

What happened? He knew I was going to take the test.

Movies play in my head. Victor is walking out of the house—which I’ve never seen—with his cell phone in his pocket, but he can’t hear it in the restaurant’s din. I cut to a close-up of the phone falling out of his pocket as he gets out of the car. I flash back to his kitchen, watch him leave the cell phone on the table. Negligent? Deliberate? I wonder, watching the movie, what I think of Victor’s character in this story.

I switch focus, eyes still a little narrow, and re-survey the living room. The rented room where I conceived all alone. Alone for the first time in eleven months of inseminations with friends, doctors, even just Victor and me a few times. It’s
more dingy than charming. An apple-sized stain discolors the carpet by the end of
the couch, the dark wood on the window sills is rotting at the lower edge, and I can
see the dust on the Venetian blinds from way over here. All alone, how fitting, I
think raising one eyebrow, breathing deep. Now I finally have a positive result, and
no-one to share it with. How alone am I in this? I wonder, and exhale.

I could call someone else. Lisa, another summer person here, Beth, my
summer dalliance, Lee, whom I'm dating more seriously (which is not saying
much), friends Melanie, Faye, or the physicist in Salt Lake City. They're all in on
it. But I want the story be that I told Victor first.

I close my eyes to the shabbiness of this rattler trap cape rental, saying to
myself. If he's in the game, great. If not, it won't be because I left him out.

At 1:00 a.m., 10:00 p.m. Seattle time, the phone wakes me up from a sound
sleep.

“Hey, Martha, it's Victor.” His voice is chipper, as usual.

“Victor . . .” I begin, coming out of my sleep a little confused, struggling to
figure out why he’s calling so late, where he is. Once I sit up I'm fully awake,
happy to have the news and have him on the line.

“Victor, the test came back positive!” I tell him, loud and excited.

“What? I can’t hear you.” He replies through scratchy cell phone reception.

“Positive! It's positive. I'm pregnant. It worked!” I announce, pride swelling
my voice.

Victor screams with delight, a high happy sound.

He tells me that he put the phone in the pocket of his camelhair blazer before
leaving the house. Changed coats, but forgot to transfer the phone to his new coat.
So he just got my message now. As he tells me, I close my eyes, rolling them
inside my lids, the way I did when I was talking to him from Chicago the first time
the sperm leaked out of the jar he sent it in. Should I chide him? I wonder, What if
I need to reach him in an emergency? I don’t. It's not a thought-out choice, if such
a thing were possible at 1:00 in the morning of the first full day of knowing you
are pregnant, figuring out your relationship with your gay friend who will also be a
parent, six weeks before you turn forty, after nearly a year of trying. It's more like
an intuition. If it had words, they might go something like:

Victor's your friend. He's not a partner. His voice is kind. You
shouldn't demand that he take his phone with him. You don't want him to
pinch you that way. You're getting away with something, being single,
having a baby, with a kind, reliable, talented man who will be a father
but not boss you around. Don't push it.

I wonder if he knows I'm making this choice.

We talk a few more minutes, him saying that he’s glad he'll be in
Provincetown in a week. As our voices are going up, signaling the end of our chat,
I say,

“Let’s not tell anyone until we know for sure. I keep remembering how
people say not to tell too early because you might miscarry. I only want to tell the
people that I would want to talk to if I miscarry,” I knock the wooden bedside table with the middle knuckle of my left hand.

“Okay, Martha, but it’ll be hard. This is the best news I’ve ever had in my whole life,” Victor says amiably. Then, “Sleep well!”

Alone in my bed, I don’t know how alone I am. I don’t know a month later, packing up to drive home to Salt Lake City. Lisa helps pack the car, and Lee is driving me as far as Chicago (where Melanee will join me for the last leg). We probably took pictures of all of us on the porch that day, before driving away from the summer and toward the school year. But the one in the photo album is of Victor and me on the weathered gray front porch, standing in front of the screen door. I’m on the right, and his body is turned three-quarters toward me, almost coquettish, like a beauty queen. His head is a couple of inches higher than mine. His arms are circling my lower back and belly to clasp hands on my right hip. The folds of his sand-colored silk shirt flap a little in the breeze, as do the highlighted tips of my ear-length curls. We’re both in shorts, laughing. Amazed, amused to be posing as a sort-of couple, in awe of the gift of being both coupled and not.

In that moment I realized what seems obvious now. That when I left my partner of twelve years because she didn’t want to have a baby, I stepped off the tightrope of romantic love. After spending a year in something like freefall, finding a job and a house and friends in Salt Lake City, my world was no longer comprised of my partner and a small circle of intimate friends and family. In its place, or layered under and around it, was a net of various kinds of love. Each strand of rope a different kind of love. Friendship love, sexual love, co-parenting love, neighborly love, medical love, family love. All woven together tight enough to catch me on my way out of one family and into another. And loosely enough to allow unexpected freedom of movement. It would be years before I found a new home that was rooted in place in addition to people. But in this moment, on the porch of the Provincetown rental, Victor’s arms playfully circled around my soon-to-expand waist, I have a human home.
STUDY NOTE
"YOU ONLY DONATED SPERM":
USING INTENT TO UPHOLD PATERNITY AGREEMENTS

Jesse Michael Nix*

I. INTRODUCTION

Ruth and Kim Hackford-Peer identify themselves as a lesbian couple who went to great lengths to have children in "The Most Wanted Boys in the World."¹ Using sperm donations from two different men, Ruth was able to have two children through artificial insemination.² As a result, Ruth is the legal mother of both children, but Kim is the legal mother of only one because she adopted the first child while living out-of-state, but could not adopt the second child under Utah's adoption laws.³ In the monologue, "Telling,"⁴ Martha Ertman describes herself as a single lesbian woman who wants a child. Using her gay friend Victor's sperm, Martha was artificially inseminated and subsequently became pregnant. Although Martha anticipates that Victor will be a part of the child's life, not all mothers and donors agree on this kind of arrangement.

Many times, a woman in Martha's situation changes her mind about the involvement she wants from the sperm donor. Women like Ruth and Kim often do not plan on the sperm donor having any parenting role. Yet, "what if" questions often are contemplated only after important life incidents. Although unable to change the past, people still think about the many different actions they could have taken to change a series of events. What if Martha later decides that Victor should not be a part of the child's life, or demands that Victor sign a contract that gives away his paternity rights? What if Ruth and Kim later decide that the biological fathers of their children should take a more active parenting role? What if any of the biological dads sue for custody? While none of these actions are currently foreseeable, many other people have experienced disillusioned relationships that end up needing to be resolved in the courtroom.

This Note focuses on agreements between a sperm donor and a mother that either establish or terminate paternity, and whether or not these contracts are legally enforceable. First, this Note will define the different types of sperm donors

² Id.
³ Id.
⁴ Martha Ertman, Monologue, Telling, 11 J.L. & FAM. STUD. 483 (2009); 2009 Utah L. Rev. 531.
in relation to the recipient. Second, paternity presumptions in the Uniform Parentage Act will be discussed. Third, two important cases involving paternity agreements will be contrasted. Fourth, this Note will argue that paternity agreements should be enforced.

II. TYPES OF SPERM DONORS

There are three different categories of relationships involving mothers and sperm donors: anonymous sperm donor, known sperm donor without parental rights, and known sperm donor with parental rights.\(^5\)

The first category encompasses traditional type of anonymous sperm donation. The sperm donor remains anonymous, has no contact with the mother or child, and has no parental rights or responsibilities.\(^6\) Donors usually make donations at sperm banks, sign agreements that waive parental rights, and release the sperm bank from liability.\(^7\) This situation will not be discussed further because the donors never intend to have a parental relationship.

The second category includes Martha and Victor’s situation. The sperm donor is usually a friend who offers his sperm to the mother, and the woman asks the donor to help parent the child. The donor retains all parental rights and responsibilities so that legally it is as if the mother and donor achieved pregnancy without artificial insemination.

The third category involves situations where a mother receives sperm from a known donor, but then either asks the donor to sign a contract that removes parental rights and responsibilities, or makes an oral agreement with the donor to the same effect. This includes Ruth and Kim Hackford-Peer’s situation. Litigation arises when either party decides it wants to establish paternity for one or more of a variety of reasons. This situation is the focus of this note.

III. UNIFORM PARENTAGE ACT

The Uniform Parentage Act ("UPA") was drafted by the Conference of Commissioners on Uniform State Laws in 1973 for the purpose of standardizing the various state laws governing parentage.\(^8\) Since it was drafted, nineteen states have adopted the model act.\(^9\) When first drafted, the UPA only mentioned married women using sperm donors: "The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is

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\(^6\) Id. at 874 n.96.

\(^7\) Id. at 875.


\(^9\) Id.
treated in law as if he were not the natural father of a child thereby conceived."\(^{10}\)

The New Jersey case of *C.M. v. C.C* was the first to deal with the paternity rights of a known sperm donor who donated his sperm to an *unmarried* woman.\(^{11}\)

The court in that case relied on public policy rationale, which “favor[s] the requirement that a child be provided with a father as well as a mother,” to award the donor all the rights and obligations of a natural father.\(^{12}\) Because of this policy, a known sperm donor who donated to an unmarried woman friend faced potential liability for all parental responsibilities and obligations. Many states, viewing this prejudice against an unmarried woman as problematic, amended their own sperm donation statutes to remove the word “married,”\(^{13}\) thereby reading: “The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.”\(^{14}\) This change created a “complete bar to paternity for any sperm donor not married to the recipient,” whether or not the donor was known or whether the woman was married.\(^{15}\)

Many non-traditional couples, including lesbian couples using known sperm donors, try to circumvent the UPA and state statutory presumptions of paternity through contract law.\(^{16}\) In her article, *Bargaining or Biology?*, Katherine Baker argues that “contract as a basis for paternity has more historical support than does biology.”\(^{17}\) Rather than relying on the oral or written contract themselves, courts are more likely to rely on the intent of the parties to either uphold or dismiss paternity agreements.\(^{18}\)


\(^{11}\) 377 A.2d 821, 821 (Cumberland County Ct. 1977) (explaining “[t]his is a case of first impression, presenting a unique factual situation with no reported legal precedents directly on point, in this or any other jurisdiction”).

\(^{12}\) *Id.* at 824.

\(^{13}\) *In re K.M.H.,* 169 P.3d 1025, 1034 (Kan. 2007).

\(^{14}\) *Id.* at 1034–35.

\(^{15}\) *Id.* at 1034.


\(^{17}\) *Id.*

\(^{18}\) *Id.* at 27. A larger discussion of the “intent test” can be found in Anderson, *supra* note 8, at 297–303.
Robin Y. was a lesbian living with her partner, Sandra R., when they decided that they wanted to bear a child through artificial insemination. Friends of the couple introduced them to Thomas Steel, a civil rights attorney and gay man. Although Steel and Sandra R. were both attorneys, and, according to Robin Y., Steel said he would not assert parental rights, an agreement was never drawn up that would have limited Steel’s paternity rights. Robin Y. was successfully inseminated and gave birth to a daughter named Ry. The relationship between Robin Y. and Steel was warm and amicable, evidenced by a letter from Robin Y. to Steel that said: “You have become a very important part of all our lives; we’re so happy that we have grown together as a family.” In July 1990, when Ry was nine-years-old, Steel asked Robin Y. for permission to take Ry on vacation to see his parents. Robin Y. refused, and during these discussions Steel indicated that he wanted to establish a paternal relationship with Ry.

The court found the critical legal issue of the dispute to be whether the rights of a biological parental relationship can be terminated without “strict adherence to statutory provisions,” and ruled in favor of Steel. Presumably because the court did not think it was important, the supposed oral agreement between Robin Y. and Steel was only mentioned in one paragraph. The court wrote, “[w]hile much is made by Family Court of the alleged oral understanding between the parties that petitioner would not assume a parental role towards Ry, any such agreement is unenforceable for failure to comply with explicit statutory requirements for surrendered of parental rights.” Intent was more important to the court than an actual agreement. “The court looked to the functional agreement between the biological mother and the biological father which indicated mutual intent to have

20 Id. at 299; see also Fred A. Bernstein, This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 27 (1996) (citing facts from the lower court opinion in Thomas S. v. Robin Y., which was reversed on appeal).
21 Bernstein, supra note 20, at 27.
22 Id.
23 In re Thomas S., 618 N.Y.S.2d at 358.
24 Bernstein, supra note 20, at 28.
26 Id.
27 Id. at 359.
28 Id. at 361.
29 Id.
the biological father assume a paternal role." Some of the factors the court relied on to show a functional agreement included visits, and the numerous cards and letters from Ry to Steel.

If Robin Y. and Steel had drawn up a written contract abrogating Steel's paternity rights, this case would likely have been analyzed under compliance with New York's statutory requirements for relinquishing paternity. Because there was no written agreement, the court was able to dismiss the oral paternity agreement and use an intent analysis instead.

B. Pennsylvania: Ferguson v. McKiernan

Ivonne Ferguson was a married woman working at Pennsylvania Blue Shield. Joel McKiernan began working at Pennsylvania Blue Shield and developed a sexual relationship with Ferguson. During this period, Ferguson told McKiernan that she wanted to sexually conceive a child with him. He refused, telling her that he did not want to marry her and therefore did not want to father her child. Ferguson changed her approach and asked McKiernan if he would provide his sperm to her so she could use in vitro fertilization to become pregnant. He agreed only after she assured him that she would release him from all paternal responsibilities, including financial support. Ferguson was subsequently impregnated with twins after a successful in vitro fertilization procedure. McKiernan never attended any of Ferguson's prenatal examinations, did not pay for any prenatal expenses, and was only present during Ferguson's labor because she requested his presence as a friend (but neither of them acknowledged his role as the sperm donor). For five years after the birth, Ferguson acted consistently with her agreement with McKiernan not to involve

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30 Baker, supra note 16, at 28 n.146 (emphasis added).
31 In re Thomas S., 618 N.Y.S.2d at 358.
32 See In re Baby Boy P., 382 N.Y.S.2d 644, 646 (N.Y. Fam. Ct. 1976). "If a natural mother is to have her rights to her child foreclosed, strict compliance with the statute must be had and full effect given to the plain language of the documents executed." Id.
33 In re Thomas S., 618 N.Y.S.2d at 362.
34 940 A.2d 1236 (Pa. 2007).
35 Id. at 1238.
36 Id. at 1238–39.
37 Id. at 1239.
38 Id.
39 Id.
40 Id.
41 Id. at 1240.
42 Id.
him in any way in the twins’ lives. Then, during the fifth year, Ferguson filed a
motion seeking child support from McKiernan.

The Supreme Court of Pennsylvania ruled that the pre-insemination oral
agreement between Ferguson and McKiernan was enforceable. First, the court
looked at the intent of the parties when they negotiated an agreement. Ferguson
told McKiernan that she would not request support; they attempted to hide
McKiernan’s paternity from friends, family, and the doctor who performed the in
vitro fertilization; furthermore, McKiernan and Ferguson behaved for five years
after the birth of the twins in a manner consistent with their initial agreement.

Second, the court found the public policy reasons for upholding the paternity
agreement to be compelling. If two parties could not contract to remove the
paternity rights of a known sperm donor:

[I]t would mean that a woman who wishes to have a baby but is
unable to conceive through intercourse could not seek sperm from a man
she knows and admires, while assuring him that he will never be subject
to a support order and being herself assured that he will never be able to
seek custody of the child.

The mother would have to choose between using an anonymous donor who she
knows little about, or she would have to abandon her dreams of motherhood. The
court found no “basis in law” to enforce this type of policy. Knowing that non-
traditional families rely on contracts or other agreements of “varying degrees of
formality” to govern the donation of sperm or eggs, the court upheld the
agreement. The court recognized that using contracts to establish or relinquish
paternity is a viable way of memorializing the intent of the parties.

V. CONTRACTING AWAY PATERNITY RIGHTS

Courts hesitate to rely on contract law in paternity issues because contract
principles use rules of the marketplace, and courts are uncomfortable treating
families like commodities. Paternity involves a child’s rights to “parental care,
Because courts use the “best interest of the child standard” in making determinations concerning children, contract law and contract principles cannot be applicable. Martha Ertman herself wrote that “contracts affecting children are not enforceable in the way that most other contracts are enforceable, primarily because the State has an interest in safeguarding the best interests of children that trumps the parties’ intentions.”

Courts are not unanimous in this regard. The court in *C.M. v. C.C.* ruled that children should have a right to know to their fathers and “[i]t is in the child’s best interest to have two parents whenever possible.” The court held that the sperm donor was the natural father and was thereby entitled to visitation rights. However, while the court in the previously discussed *Ferguson* case viewed the best interest of the child standard as an important policy concern, it ruled that this standard was not the only policy concern involved in paternity contracts. Moreover, some commentators have opined that contract law, specifically a marriage contract, has always governed paternity.

Promissory estoppel offers the court a way to determine what should be done in disputed paternity cases where the donor and recipient used an oral or written agreement. To apply promissory estoppel, one of the parties must prove that an agreement was created. The first party must anticipate reliance by the second party, and the second party actually must have reasonably relied on the agreement. If the court’s only option to avoid injustice is to enforce the agreement, then the agreement must be enforced.

Courts have applied a promissory estoppel analysis in situations where fathers try to deny paternity. One court found that a man was for all “intents and purposes the father of the child” because he acted like the father for two years and the mother relied on the man’s commitment. Another court ruled that a non-biologically related man had paternity rights because the mother relied on his...
conduct and assurance that he would provide support. The intent of the parties was central to the court’s promissory estoppel analysis in both cases. The same type of analysis should be used in paternity suits.

If the court had used a promissory estoppel analysis in *In re Thomas S.*, it is likely that the oral agreement might have been enforced, and the two women could have cared for Ry without the interference of the sperm donor. Though the court looked at the intent of the parties, it viewed the actions of the parties through a traditional family lens, namely the presence of a mother and father. Instead, the court should have looked at who was raising Ry: Robin Y. and her partner Sandra R. Had the court viewed the situation through a lens which recognized a lesbian couple’s ability to raise their child, the court might have ruled in favor of Robin Y. Without explicitly stating so, the court in *Ferguson* used promissory estoppel and the intent of the parties to determine that McKiernan had no paternity rights or obligations. McKiernan reasonably relied on this agreement and it would have been unjust for the court to impose parentage on him five years after the birth of the twins. Thus, when courts are hesitant to enforce paternity agreements, they should look to principles of promissory estoppel.

**VI. CONCLUSION**

Paternity agreements deal with the creation and raising of a child, arguably two of the most important life events in a father or mother’s life. As more people chose artificial insemination to become mother and fathers, it is likely that more people will enter into written or oral paternity agreements (either establishing paternity or removing paternity). These agreements are important to evidence the intent of the parties when they agreed to this important decision. Only when the situation turns litigious will courts have to look at these paternity agreements. It is important for courts to recognize the intent of the parties at the creation of the agreement and their actions afterward. If courts do not uphold paternity agreements, then there is no way for parties to plan for “what if” scenarios.

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65 Markov v. Markov, 758 A.2d 75, 83 (Md. 2000).
Lions and tigers and families, oh my! Yes, I took a little liberty with *The Wizard of Oz*. Those in search of the wizard have nothing on my family. I have an eighty-three-year-old mother, who is in turns smart as a whip, and obtuse as plastic dishpan. She is a thirteen year cancer survivor, and tough as nails. Fragile to look upon. On instructing hospice personnel one of the many times she was admitted, and then kicked out again, when she recovered in the time frame they had predicted she would die in, “I don’t want any medical intervention. Do not resuscitate, unless I choke on popcorn, then resuscitate.” God bless her.

I have an ex-husband. Loves his kids, just doesn’t want to have to pay for them. He went with me to every back to school night, Halloween parade, and school function. We sat together with his new wife. Not so new now, they have been married fourteen years, and for fourteen years our schedules have had to mesh so the kids would get their family time. My son’s high school graduation was a wonder, we all took pictures and cheered and did the wave. We shared a table at my daughter’s cheerleader banquet. The three of us laughed at all the wrong times with my daughter glaring away at us, as each graduating senior, one after another spoke glowingly and tearfully about it being the best years of their lives and how they would all stay best friends forever.

I have one sibling, a brother, I once went three years without talking to him. Didn’t know where he lived, figured my mother did, if I needed to find him. I didn’t. Now I know where he lives and where he works, a list of numbers in my cell phone, with my mother’s aging we talk once a month, see each other once a year, he brings his daughter out to see her grandmother and cousins, she looks like him, and he has a wife who looks and thinks like me, but I know better than to mention that. He rebelled against his family back when he married her you understand. None of us were invited to the wedding. He thought he was too radical for the rest of us back in those days. We were miffed. We got over it. Sort of.

After five years of marriage I met the love of my life. She certainly didn’t look like I thought she would. I didn’t know there was such a thing as a love of

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* © 2009 Cynthia Lane, Symposium Participant, Salt Lake City, Utah, 2008.


2 My mother finally succumbed to cancer in November 2008. We all gathered at her bedside to tell stories, and my children sang to her. She died with my son and daughter holding her hands. Pallbearers at the funeral included my son, my partner, my brother and my ex-husband. It was a good way to begin her trip over the rainbow. Follow the yellow brick road Mom, and we’ll look for you in the Emerald City.
your life, except in novels and movies. I certainly never thought my passion would come in a small female package. Blue eyes that looked deeply into my soul and she gave my heart wings, and broke it beyond all repairing, and all at the same time. I left the marriage for her, three years later she left me. Isn’t karma grand? She still calls every few weeks. No one left the children, by design, not accident that I recovered, found someone willing to put up with me and my children come first attitude. She is strong and funny, calls my ex-husband frequently, they talk on the phone, help each other with projects. She calls my mother too, I think they both like her better than me. Heck, I know they both like her better than me. She is the one who finds out all the kid’s secrets and tells me. I still choose only to believe some of them. Mothers all know how to do this.

My son is an EMT; he helps people. He was a performer in high school, has traveled the world, and was the lead in his high school musical. Good looking, kind, funny, personable, compassionate. An adrenaline junky who loves to sky dive and snowboard. Does all the things I was scared to death to do. Danced with me around the kitchen to swing music on New Year’s Eve, picked me up and didn’t even groan! What more could a mother ask for? The boy has had to beat the girls and their mothers off with sticks since junior high. He had one woman try to set him up with her seventeen-year-old daughter as he was putting her in a neck brace and loading her into the ambulance. Now there was a mother with focus.

My daughter, the cheerleader, honor student, wickedly funny. Designer wardrobe, more shoes than closet. All the things I never was or could be, and she makes it look so easy. Light of my life since the moment I first laid eyes on her at the very moment of her birth in the back seat of my Honda on April Fool’s day. Her birth was the prank, I was the fool. I knew then what was coming and what a great ride it has been! I can hardly wait to see who she will love, where she will go and what she will do . . . and in the same breath I have to stop myself from dropping to my knees and begging her never to leave me. Parenting as with any committed relationship, is not for cowards. The only safety nets are the ones you weave with your own heartstrings and they hurt when you pull on them, but only every time.

Family, the people who sit with you at events you never wanted to go to anyway. Who make you laugh, make you cry, and come to get you when your car breaks down. Who pay attention to the details, and hang in there as best they can. Who forgive you your stupidity even as you forgive theirs. These are the people who see past their own egos, faults and failings and do their best to give you a place in their hearts and homes. People for whom you find a place in your heart and home to return the favor. People who came in to love you and will ultimately leave you anyway, just as you will leave them, by choice, or time passing, or by that random house falling on your head. Knowing that love even when it changes form, endures. Wishing, hoping, believing, that somewhere, somehow, we will all meet up again. Somewhere over that rainbow. Families and children and in-laws, oh my! Oh my indeed!
STUDY NOTE

TWO STEPS BEHIND: THE LAW’S STRUGGLE TO KEEP PACE WITH THE CHANGING DYNAMICS OF THE AMERICAN FAMILY

Jason M. Merrill*

I. INTRODUCTION

Defining the typical American family is becoming a greater challenge as the traditional family structure moves steadily towards alternative forms. Alternative families such as unmarried cohabitating couples, same-sex couples, single-parent households and extended-family households now make up the majority of U.S. families. For instance, in Cynthia Lane’s monologue, she identifies her nuclear family as follows: her mother, brother, son, and daughter (seemingly “normal”); her ex-husband and his wife; and, the same sex “love of her life” (her former partner). Cynthia’s alternative family regularly participates in typical family activities such as birthday dinners and school activities. A close relationship is maintained between each member; Cynthia’s children and mother remain particularly close with her former partner.

The law has struggled to accommodate alternative families in certain areas because the traditional family form remains the primary influence in the creation of family law and policy. This Note first provides an overview of how family dynamics have evolved over recent decades and how laws have sought to define family through ordinances and statutes. The focus then shifts to inconsistencies in child visitation rights based on family type. Next, the lingering challenges faced by unmarried cohabiting couples are addressed. Finally, the effect of traditional, gender-based caretaking roles on the implementation of non-discriminatory employment policies such as the Federal Medical Leave Act is considered.

* © 2009 Jason M. Merrill, Junior Staff Member, Journal of Law & Family Studies; J.D. Candidate 2010.

1 D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 361 (3d ed. 2006) (recognizing 2003 census statistics indicating that the traditional nuclear family—defined as married couples with their own children under the age of eighteen—constitutes less than one in four families).

2 Id.

3 Cynthia Lane, Monologue, Families Oh My, 11 J.L. & FAM. STUD. 507 (2009); 2009 Utah L. Rev. 555.

4 Id.

5 Id.

II. THE EVOLUTION OF FAMILY DYNAMICS AND THE LAW

A. Familial Changes Over Recent Decades

The dynamics of the American family have significantly changed in recent decades. In 1970, more than forty percent of families fit the traditional family definition of married parents and their biological children; currently less than a quarter of families fit this definition. The shift towards alternative family forms is due in large part to higher divorce rates, more single-parent households, and larger numbers of same-sex couples.

Unmarried cohabitating couples—both same-sex and heterosexual—have also increased significantly resulting in higher numbers of alternative households. Heterosexual cohabitating couples have grown in number over the past thirty years from 450,000 to over 4.6 million, forty-five percent of which include children. This increase has been attributed to greater societal acceptance, advances in contraception, and changed views regarding the morality of cohabiting women. The number of cohabitating same-sex couples has also risen. According to the 2000 census, 594,000 households are comprised of same-sex couples. In addition, the number of single-parent households has tripled over the past twenty-five years and it is estimated that sixty percent of children will live in a single-parent household during their lives. The above statistics indicate a significant trend in family dynamics away from traditional forms and towards alternative forms such as single-parent households, unmarried cohabitating couples, and extended family households.

B. Government Response to Changing Families

Despite the clear changes in family dynamics, the law remains conflicted in the implementation of family law and policy. The characteristics and roles of traditional family households remain heavily promoted by legislation that

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7 WEISBERG & APPLETON, supra note 1, at 361.
8 Ayelet Blecher-Prigat, Rethinking Visitation: From a Parental to a Relational Right, 16 DUKE J. GENDER L. & POL'Y 1, 5 (2009).
10 Id. at 177.
encourages or only recognizes traditional marriage. For example, the majority of states, including Utah, still only recognize marriage as the legal union of a man and a woman. One the other hand, however, Massachusetts has expanded the scope of marriage to include same-sex couples and a growing number of states now afford same-sex couples marital benefits by recognizing civil unions or domestic partnerships.

In addition to regulating who can marry, attempts to promote traditional families are also found in the single-family home ordinance laws of local governments. Such regulations often define family narrowly, resulting in the exclusion of families outside of the traditional family form. For instance, a zoning regulation that excluded non-traditional families from a neighborhood was upheld by the U.S. Supreme Court in Belle Terre v. Boraas. Households that consisted of unmarried adults were limited to two in number, meaning that if one or both adults had children, then they were in violation of the ordinance.

However, the Supreme Court subsequently rejected an ordinance which disallowed certain extended family members from living together in Moore v. City of East Cleveland, Ohio. In Moore, an elderly woman was sentenced to five days in jail for housing her son and her two grandsons who were cousins. The ordinance only allowed the husband or wife of the head of a household and their unmarried children. In contrast to Belle Terre, the Court held that zoning is not intended to control the "genetic or intimate family relations of human beings."

Following Belle Terre and Moore the constitutionality of family-defining ordinances has been largely left to the details of state constitutions. Some state courts have held these ordinances unconstitutional for treating unrelated persons who live together differently from traditional families, while others have upheld

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13 Hamilton, supra note 6, at 311 (stating that traditional roles include father providing, mother caretaking, etc.).
15 See generally Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003); see also WEISBERG & APPLETON, supra note 1, at 181 (stating that California, Connecticut, the District of Columbia, Hawaii, Maine, New Jersey, and Vermont have enacted domestic partnership legislation to provide marital like benefits to same sex couples).
17 Id.
18 416 U.S. 1, 7–8 (1974).
19 Id. at 9.
21 Id. at 497.
22 Id. at 496.
23 Id. at 517 (citing White Plains v. Ferraioli, 313 N.E.2d 756, 758 (N.Y. 1974)).
24 Brener, supra note 16, at 449.
such ordinances citing legitimate state interests in the promotion of traditional family values. 25

Perhaps the law will eventually view family relations as being as important as family form. In order to more uniformly accommodate alternative families, the law could adopt a more functional approach in which the functions and characteristics of a nuclear family are identified, and a similarly-functioning alternative family would be entitled to the same benefits. 26

III. INCONSISTENCIES IN CHILD VISITATION RIGHTS AND OTHER LEGAL CHALLENGES FACED BY UNMARRIED COHABITATING COUPLES

A. Child Visitation

One of the striking features of Cynthia Lane’s monologue is that despite divorcing her husband and separating from her same-sex partner, they all continue to have a close relationship with Cynthia’s mother and children. 27 In many instances, however, when a family divides, child visitation becomes a major issue. Courts often approach the visitation rights of alternative family members differently than those of traditional family members. 28 As discussed below, the right to child visitation is often influenced by family type as much as by a child’s best interests.

The Utah case of Jones v. Barlow addressed the issue of child visitation in an alternative family. 29 The case involved two women—Jones and Barlow—who entered into a civil union in November of 2000 and subsequently had a baby girl through Barlow’s artificial insemination. 30 The child’s surname was “Jones-Barlow,” and both women were designated as co-guardians. 31 The couple separated shortly after the child’s second birthday whereupon Barlow ended all contact between the child and Jones. 32 In granting Jones’s petition for visitation, the District Court held that contact with Jones would be in the child’s best interest. 33 The Utah Supreme Court reversed, however, holding that Barlow, the child’s biological parent, could terminate the temporary parental status of Jones

25 Id. at 457.
27 Lane, supra note 3.
28 Blecher-Prigat, supra note 8, at 1.
30 Id. at ¶ 4.
31 Id. at ¶ 5.
32 Id. at ¶ 6.
33 Id. at ¶ 8.
based on her status as co-legal guardian rather than biological or adoptive parent.34 Despite the lower court’s finding that continued visitation was in the child’s best interest, Jones was denied visitation solely because she did not fit a traditional family role.

Unlike Jones v. Barlow, the Utah court was willing to look “beyond the effect of the parent-child relationship . . . [in] determining what constitutes a reasonable award of visitation in the best interest of the children” in a child visitation case involving a more traditional family.35 In Campbell v. Campbell, after a married father of four passed away, a dispute regarding grandparental visitation arose between the mother and paternal grandparents.36 The grandparent’s petition for visitation was granted under the court’s reasoning that such an order was in the best interests of children.37

Jones and Campbell illustrate the law’s apparent preference for nuclear, traditional families. One major distinction in these two cases is the traditional versus alternative familial status when the children were born. Despite a child’s best interests, courts often presume that time spent in a traditional nuclear family setting trumps visitation and contact with the “non-traditional” family members regardless of an established relationship.38 In visitation cases in which a caring guardian has raised a child and a court finds continued contact to be in the child’s best interest, the focus should be more on the child’s well-being than the family type.

B. Non-marital Cohabitation

Unmarried cohabitating couples still face discrimination in many areas. Due to the increased numbers of unmarried cohabitating couples, the law’s continued reliance on marriage as a centerpiece for social policy has created a widening gap between legal policies and modern family realities.39 Nonetheless, marriage remains a “tool relied on by federal and state family policies to ensure the well-being . . . of families and children.”40

Unmarried cohabitating couples often face discrimination in landlord-tenant scenarios. For example in a recent North Dakota case a landlord refused to rent to an unmarried couple, claiming they were unlawfully cohabitating.41 In North

34 Id. at ¶ 22 (stating that a “legal parent may freely terminate the in loco parentis status by removing her child from the relationship . . . .”).
36 Id. at 636.
37 Id. at 640.
39 Hamilton, supra note 6, at 307.
40 Id.
Dakota non-marital cohabitation is a class B misdemeanor. The couple argued that the landlord's refusal was in violation of the North Dakota Human Rights Act. The Supreme Court of North Dakota held that it was not discriminatory to refuse to rent to unmarried persons seeking to cohabitate. Many courts, however, have held that a landlord's refusal to rent to unmarried couples violates state and municipal prohibitions against discrimination based on marital status. Thus, while the laws of some states have progressed to protect the rights of cohabitating couples, others have failed to do so.

Another case involving alleged discrimination based on non-marital cohabitation is Veenstra v. Washtenaw Country Club, wherein a country club golf professional alleged that his employment was terminated because of his separation from his wife and cohabitation with another woman. While the plaintiff asserted that his firing violated the civil rights laws of Michigan, the Court distinguished discrimination based on marital status from discrimination based on conduct—adultery in this case. The dissent, however, stated that "conduct and status are often inextricably linked . . . [and] marital status and conduct are concepts that cannot always be easily distinguished." Discrimination against unmarried cohabitating couples still exists despite the tremendous increase in unmarried couples living together. The law should better recognize the rights of unmarried cohabitating couples and seek to prevent inequality because of the outdated view that cohabitation is less favorable than marriage.

IV. THE EFFECT OF TRADITIONAL CARETAKING ROLES ON NON-Discriminatory Employment Policies

Gender roles within families are increasingly overlapping in the modern American family. The number of households in which both parents work has greatly increased; both men and women must balance workplace and family responsibilities. Congress, in passing the Family and Medical Leave Act ("FMLA"), has attempted to eliminate employment discrimination against caretakers. The FMLA and its state equivalents prohibit employers from

43 North Dakota Fair Housing, 625 N.W.2d at 554.
44 Id. at 563.
47 Id. at 167.
48 Id. (Cavanagh, J. dissenting).
49 See 29 U.S.C. § 2601 (2000) (stating that two-parent households in which both parents work has increased significantly).
50 Id.
discriminating against employees who take their protected family and medical leave.51 Furthermore, courts have prohibited gender-based application of the FMLA, wherein men were discouraged from taking family leave when compared to woman.52

Despite the progressive efforts of lawmakers, litigation involving family care discrimination has increased.53 “Family care commitment discrimination occurs when an employee who has family responsibilities is discriminated against in the workplace because of those responsibilities.”54 Workplace practices often fail to follow the policies set forth in the FMLA.55 For example, in McCormick v. Hi-Tech Planning, a Massachusetts man who recently obtained child custody was fired after being late due to caretaking of his kids. He was told “children should be with their mother . . . [and that] he would still have his job had he not obtained custody of his children.”56 Unfortunately the Court sided with the employer, finding that employment discrimination because of parenthood was not protected by Massachusetts law.57

In adopting the FMLA, Congress has recognized the caretaking responsibilities faced by many employees. However, the gender roles associated with the traditional family model have slowed the implementation of anti-discrimination policy. Courts should better recognize the evolution of caretaking and seek to prevent employers from discriminating from employees based on traditional views of gender roles.

V. CONCLUSION

While the dynamics of the U.S. family have shifted from traditional to alternative, many laws remain centered around traditional family policy. In areas of the law involving child visitation rights, non-marital cohabitation, and caretaking policies, the focus on traditional family form rather than modern family function has resulted in a failure to fully accommodate the needs of alternative families.

54 Id.
55 Id.
57 Id.
It was a Guardianship action filed by the Grandmother (Abuela) of a little girl. The mother had died while she and her daughter were living with Abuela. So Abuela sought permanent custody of the three-year-old child. The lawyer filed the papers in Massachusetts, and served the father (Padre) who was far away in Puerto Rico.

Padre contacted Legal Services because he wanted to raise his daughter, himself, in his home in Puerto Rico. The lawyer began to investigate the case in light of the law—Was the father a fit and suitable person to raise his child? The lawyer phoned the maternal aunt (Tia) who also lived in Puerto Rico. What did she think? Was Padre a suitable parent? Who should care for the child? Tia said,

Yes, he is a good father. But Abuela should raise the little girl. She is the Abuela. She is a woman. She has lost her daughter, the mother of the child. The child should stay with her Abuela. Besides, Padre lives in rural Puerto Rico (en el campo) with cows and chickens living under his house.

The Legal Services office accepted the case and began to seek a custody evaluation to obtain neutral evidence of Padre’s fitness and to determine his concern for his daughter. Meanwhile, a notice was served on Padre, ordering him to appear in the Boston Court for a Pre-Trial Hearing. Before any investigation had begun, Padre called his lawyer. He was in New York, with his cousin, because the court Order had said he must appear. Fast forward the case—the attorney phones the Court:

My client has unexpectedly travelled from Puerto Rico to appear for this Pre-Trial Conference. Abuela does not have temporary custody or any right to prevent my client from taking his daughter back with him. I have to inform him of his rights. I would advise against his doing anything to upset the little girl. But I would suggest that instead of a Pre-Trial Conference, we have a hearing to see if Abuela has any evidence that would justify Guardianship against the wishes of the legal father.

* © 2009 Linda Smith, S.J. Quinney Professor of Law and Symposium Participant, Salt Lake City, Utah, 2008.
OK! The Court will grant that hearing. We have less than a week to prepare. Check the child support records. While the mother and daughter lived in Massachusetts, they received welfare. Did Padre provide any support? Whoa! The Welfare Department notified Padre of his duty to pay support to the state, and he paid everything requested, every month!

The client also brought correspondence—letters between him and his mother-in-law, and letters written to him by his wife. Padre wrote to Abuela:

> I have lost my wife. Now you bring my wife’s body to bury in Puerto Rico, but do not return my daughter to me. Senora, please, I have lost my wife; do not take my daughter from me as well.

There were many letters from the wife, written on thin stationary with questionable spelling and grammar. The couple had not “separated,” but were living apart because the wife had a serious health problem. She had travelled to Massachusetts to obtain the best medical treatment, not to “leave” her husband. The Legal Services secretary, also a puertoriquena, translated all the letters. They were love letters:

> I am going to have the surgery soon. If I do not live, raise our daughter for me. You have been the best husband to me always.

Tragically, the wife died during the surgery. And the husband, Padre thought his desire for custody was his wife’s final wish as well.

Within days the hearing took place. Abuela testified that she wanted custody of her granddaughter and could provide for her. Then, surprisingly, Tia arrived from Puerto Rico to testify. Tia testified that Abuela should receive custody. She continued:

> My sister told me that her husband was abusive to her. He threw a bowl against the wall. He frightened her. He is dangerous and should not have custody of his child.

This was new ... and inconsistent with Tia’s prior account to Padre’s lawyer. How to handle this?

> When did your sister tell you of this abuse? Was it [this month]? Was it [that month]? Let me show you these documents. Can you identify them? What do these letters written by your sister say? So she was writing to her husband that he was the “best husband” and that he should “raise their daughter” at the same time she was telling you about his abuse?
Cross-examination in family law cases can be very powerful, because the parties are not experienced, sociopathic liars, but simply people in pain saying what they think they "need" to say. The secretary who had translated the letters said that the hearing was "just like Perry Mason!" in raising questions about the truthfulness of Tia's testimony.

Second, was proof that the witness supported the Abuela's custody not because of abuse, but due to her cultural views. How to raise that? (The lawyer might have to testify to the conversation, but then could no longer continue as the attorney.) Counsel went forward with the cross-examination, trusting the witness to be honest:

Didn't I phone you and ask you who should have custody? Didn't you tell me that Abuela should keep custody because the child was a girl, and her mother had died and therefore her mother's mother—her Abuela—should raise her? You didn't mention the abuse, did you? Yet that would be the most important reason to keep the child from her father. And you never mentioned it.

Caught, the witness finally responded: "But the language, the language was a problem." Yet counsel pursued this rationalization, "But I was talking to you in Spanish, wasn't I?" "Yes...[Tia the witness admitted]...you were speaking Spanish."

A cultural or moral sentiment that an orphaned daughter should be raised by her maternal grandmother was not consistent, with the laws of our courts that recognized the rights of a fit parent (of either gender) to raise his child.

The Judge called counsel to the bar. The Judge—who had practiced part-time with her husband while raising a large family—announced:

I am going to order that this little girl go back to Puerto Rico with her father. I want the parties to meet together and communicate this plan to the child. I want the father to visit over the weekend. Then, the father may take the child back with him next week. I want the child to be able to come back to visit her grandmother and Massachusetts relatives during the summers. She has lost her mother. These people have lost someone they all love. They must get together and share the child they love for the child's best interest.

Counsel for Abuela began to argue that the Judge was putting the child's health and safety at risk in light of the testimony about the violent Padre. The Judge looked hard at counsel—"I've heard the testimony and this is my decision."

Immediately afterward the parties all went out into the hallways of the court and talked together as the Judge had decreed. "We are sorry we had to lie" said the Abuela and the Tia. "Our lawyer told us that we needed to say you were abusive."
Actually, it is very unlikely the attorney was intentionally suborning perjury. Abuela’s attorney did not speak Spanish. He no doubt counseled his client about the legal standards for guardianship without any intention of tipping her off as to what sort of testimony needed to be manufactured. Yet the dynamic of telling a client the sort of evidence that would be necessary and the client’s presentation of that evidence was unsettling . . . and had the love letters not been available, might have carried the day.

The Padre had no hard feelings. He would go and visit over the weekend. They would all support the little girl returning to Puerto Rico with her father, even though she would live in the country with cows and chickens under the house. And he would be glad for her to visit her Abuela in Boston.

As the Padre was taking leave of the lawyer, he said: “What you have done for me is the most important thing anyone has ever done for me. I will pray for you to be blessed every day of my life.”

Family law cases can be contentious and dysfunctional. Different views about what is “best” for children will conflict . . . and cultural norms about child-rearing will further conflict with legal standards. But occasionally, a wise judge and caring parties can extract a healing experience out of family tragedy. And then, the lawyers may be blessed to be involved.
GRANDPARENT CUSTODY DISPUTES AND VISITATION RIGHTS:
BALANCING THE INTERESTS OF THE CHILD, PARENTS,
AND GRANDPARENTS

Tara Nielson* & Robin Bucaria**

I. INTRODUCTION

In many cultures, the basic family unit is the extended family—three and even four generations living under the same roof, nurturing the children and caring for the elderly—with blended responsibilities. If a mother left behind young children, she felt it was only right for the children to be raised by aunts or grandmothers because that was in the children’s best interest. Under the American legal system, however, the best interest of the child is a judicial determination that takes into account a myriad of tangible and intangible factors that are often grounded in outdated cultural norms.

The Most Important Thing illustrates some of the heart- and gut-wrenching conflicts that can arise between parents and grandparents over custody and visitation. Generally, all parties involved will say they are concerned about and desire what is best for the child, but in reality their viewpoints are often skewed by their own personal interests, as well as cultural and generational differences. Thus the legal rights of the parent may conflict with the grandparent’s idea of what is best for the child, and cultural ideas about child-rearing may conflict with legal standards.

The courts focus on what is in the best interests of the child when making custody or visitation determinations. Conflicts between parents and grandparents often pit the parent’s fundamental right to make decisions concerning the care, custody, and upbringing of their child with differing ideas of what is in the child’s best interests. This Note will analyze the law regarding child custody and visitation rights of grandparents. Part II traces the development of a parent’s fundamental right to rear their child. Part III explains the best interests of the child standard. Parts IV and V examine the current law on custody and visitation petitions with respect to the rights of grandparents.

2 Id.
II. A PARENT'S RIGHT TO THEIR CHILD'S CUSTODY, CARE, AND NURTURE

Parents' fundamental right to the custody, care, and control of their child is found in the Fourteenth Amendment to the United States Constitution, which states: "No State shall ... deprive any person of life, liberty, or property, without due process of law."3 How parents may use their liberty interest to "bring up children"4 is defined through a series of cases beginning in 1923.

In the first of these cases, Meyer v. Nebraska, a state statute prevented teaching foreign languages to a child before "successfully pass[ing] the eighth grade."5 The Supreme Court determined that parents had a right to "control the education of their own."6 Two years later, in Pierce v. Society of Sisters, the Supreme Court affirmed the "liberty of parents and guardians" to direct children when it struck down a compulsory public school attendance statute and allowed parents to choose private education for their children.7 The court stated, "[t]he child is not the mere creature of the state, those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."8 In Wisconsin v. Yoder, the court held that right of Amish parents to raise their children according to their religion, superseded compulsory high school attendance.9 This parental autonomy over the care and control of their children includes the "presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."10 In 2000, Troxel v. Granville reaffirmed this deference to parental decisionmaking: "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."11 The presumption for parental autonomy in childrearing, and the presumption in favor of fit parents making the best decision for the child,12 make it difficult for a grandparent to obtain custody or visitation rights contrary to the wishes of a biological parent.

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3 U.S. CONST. amend XIV, § 1.
5 Id. at 397.
6 Id. at 401.
8 Id. at 535.
10 Parham, 442 U.S. at 602.
12 Parham, 442 U.S. at 602.
However, the Court also set limitations on parental decisionmaking, including restrictions on child labor or breaking laws in the name of religion. 13 Parental control "may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." 14 In Santosky v. Kramer, the Court allowed state intervention in parental authority to protect a child from abuse and neglect, as long as the state gave sufficient due process protection to parents when seeking to terminate parental rights. 15

III. THE BEST INTERESTS OF THE CHILD STANDARD

Although Justice Cardozo is often credited with creating the "best interests analysis" as early as 1925, 16 and even though some courts believed they were acting in the "best interests" of children when awarding their mothers custody if the children were of "tender years," the adoption of the Uniform Marriage and Divorce Act (UMDA) in 1970 actually created the multi-factor best interest analysis. 17 This approach, used among all jurisdictions today, allows courts to look at the "totality of the circumstances," 18 in determining in which home environment a child would be happiest and most successful. 19

According to the UMDA, courts may use this best interests approach to determine custody by taking into account: the wishes of the parent(s); the wishes of the child; the relationship between the child and parent(s), siblings, or "any other person who may significantly affect the child’s best interest"; the child’s adjustment to home, school, and community; and the physical and mental health of all individuals involved. 20 The court may not consider irrelevant conduct of a proposed custodian in determining who should have custody of the child. 21 This provides courts with flexibility in custody determinations, because they are no longer required—or even encouraged—to base decision on only one factor. 22

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13 Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (stating “neither rights of religion nor of parenting are beyond limitation,” and allowing for state regulation of school attendance, child labor, health or other things affecting the child's welfare).
14 Id. at 166 (stating “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare”); see also Yoder, 406 U.S. at 233–34.
16 Finlay v. Finlay, 148 N.E. 624, 626 (1925).
21 Id.
22 Id. (comments in the 1998 main volume).
Although some variation exists among different states as to the factors that ought to be considered when making custody determinations, uniformity exists to the extent that all states now recognize the importance of analyzing several factors, as opposed to one. The best interests approach incorporates the idea of parental autonomy, for "there is a presumption that fit parents are in the best interests of their children."24

IV. A GRANDPARENT'S INTEREST IN THE CUSTODY OF THEIR GRANDCHILD

A. In Loco Parentis

The theory of in loco parentis, meaning "in the place of a parent," 25 presumes that an individual, although not a biological parent, nevertheless acts in the parent's stead by fulfilling all of the roles and obligations of a parent. 26 Grandparents often fall within this category when they care for most, if not all, of their grandchildren's needs as a parent would without expecting or receiving payment for their care. This fits the extended family model, but is also the basis by which some grandparents argue that they have a stronger right to custody because they will, in fact, be a better "parent" than the biological one.

B. Grandparent Custody Petitions

While parents have the legal right to the custody, care, and control of their children, 27 there are many situations where a grandparent assumes the role of primary caregiver for their grandchild. Situations such as divorce, death, immigration regulations, and inability of a parent to care for the child often put grandparents in a parental role. 28 However, a grandparent's parental role in their grandchild's life does not give a grandparent the legal right to the custody, care and control of their grandchild. 29

Courts are reluctant to sever parental bonds, finding that "so long as a parent adequately cares for his or her children (is fit)," there is no reason for the State to "inject itself into the private realm of the family" to further question that parent's ability to make the best decisions for their child. 30 Thus, only when a parent is

27 Troxel, 530 US at 68.
29 See id. at 22.
30 Troxel, 530 U.S. at 68–69.
considered unfit, or a child has been abandoned, does a grandparent have a case for custody, and even then the outcome is not determinative. The heightened burden of proof is on the grandparent to prove why it is not in the child’s best interests to remain or be placed with his or her biological parents.\(^{31}\)

Some factors courts may look to in determining the rights of a grandparent are the extent to which the parent encouraged the relationship, whether the child lived with the grandparent, whether the grandparent completed “parental functions for the child to a significant degree,” and whether they established a “parent-child bond.”\(^{32}\) Meeting these factors is not determinative, however, because the only persons having a legally vested interest in the custody of a child are his parents.\(^{33}\) The grandparent’s age, mental and physical abilities, responsibility for caring for others, relationship with the grandchild and additional factors will be used to determine whether a grandparent is a fit parent.\(^{34}\)

The lack of grandparent clout in gaining custody, regardless of previous relationship, is reinforced statutorily. Custodial statutes rely on the best interests of the child for determination of custody, regardless of relationship. Under nearly all adoption statutes, voluntary termination of parental rights also terminates all grandparental rights, including visitation.\(^{35}\) The policy reason behind this stance is that the biological parent(s) made a thoughtful and reasoned choice in determining that the best interests of the child would be better served with a third party rather than with the grandparents.\(^{36}\)

V. A GRANDPARENT’S INTEREST IN VISITATION WITH THEIR GRANDCHILD

A. Grandparents’ Visitation Rights to Grandchildren

While grandparents carry slightly more weight than others in third party custody litigation, the past several decades have shown a marked increase in statutory visitation rights for grandparents in situations involving divorce or the death of one parent.\(^{37}\) Although variations exist among the different state statutes, all fifty states have enacted grandparent visitation laws.\(^{38}\) Not only have all the


\(^{33}\) Cf. Wilson v. Family Services Division, Region 2, 572 P.2d 682 (Utah 1977) (holding that a grandmother did not have any priority claim in grandchild’s adoption).

\(^{34}\) Id. at 23–24.


\(^{36}\) Cf. id.


states addressed the issue of grandparent visitation rights, but so has the U.S. Supreme Court in the seminal case of *Troxel v. Granville*.

In *Troxel*, the court analyzed a Washington statute that allowed third parties to ask the court for visitation rights, and also provided the court with discretion to award visitation even in instances where visitation was found to be against the custodial parent’s wishes. In addressing the grandparent’s claim for visitation, the Superior Court of Skagit County “issued an oral ruling and entered a visiting decree” awarding visitation to the child’s paternal grandparents, even though the time and extent of the ordered visitation was against the mother’s wishes. The mother appealed, but the Washington Court of Appeals remanded the case “for entry of written findings of fact and conclusions of law.” On remand, the trial court established that grandparent visitation was truly in the grandchildren’s best interests.

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40 *Id.* at 60–61.

41 *Id.* at 61.

42 *Id.*

43 *Id.*
The Court of Appeals then “reversed the lower court’s visitation order and dismissed the Troxels’ petition for visitation,” finding that without an imminent custody action, “nonparents lack standing to seek visitation” under the Washington law. The Washington Supreme Court affirmed the holding of the Court of Appeals, disagreeing on the standing issue, but holding that the statute “unconstitutionally infringe[d] on the fundamental right of parents to raise their children,” in part because it required no “threshold showing of harm,” and was too broad by allowing any third party to seek court-ordered visitation.

The U.S. Supreme Court, after granting certiorari, upheld the Washington Supreme Court’s judgment, and noted that “the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children.” Presumably, in instances where parents are found “unfit,” courts will be more inclined to grant visitation rights to grandparents, as they have greater freedom to “inject [themselves] into the private realm of family” and determine the best interests for the children when parents are failing to do their job of caring well for their children. Notwithstanding the outcome of Troxel, wherein the grandparents’ sought-after visitation order was ultimately denied, states can use Troxel as a guide in enacting their own legislation. In so doing, states can more fully ensure that the constitutional liberties of all parties involved, including those of the child, the grandparents, and the parents, are protected, and that the child’s best interests are truly served.

Although in the monologue the court denied the Abuela’s custody petition, consideration of the child’s best interest and relationship with her Abuela prompted the order for the child’s summer visitation in Boston.

B. An Example of Legislation at Work: Grandparent Visitation Rights in Utah

Section 30-5-2 of the Utah Code grants standing to grandparents for visitation and outlines their visitation rights. Subsection (2) states that notwithstanding a presumption that “a parent’s decision with regard to grandparent visitation is in the grandchild’s best interests,” such a presumption may be overridden by the court after an analysis of various factors that “the court considers to be relevant,” which may include, but are not limited to, the following criteria:

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44 Id. at 62.
45 Id. at 63.
46 Id. at 68.
47 Id. at 68–69.
(a) the petitioner is a fit and proper person to have visitation with the grandchild;
(b) visitation with the grandchild has been denied or unreasonably limited;
(c) the parent is unfit or incompetent;
(d) the petitioner has acted as the grandchild's custodian or caregiver, or otherwise has had a substantial relationship with the grandchild, and the loss or cessation of that relationship is likely to cause harm to the grandchild;
(e) the petitioner's child, who is a parent of the grandchild, has died, or has become a noncustodial parent through divorce or legal separation;
(f) the petitioner's child, who is a parent of the grandchild, has been missing for an extended period of time; or
(g) visitation is in the best interest of the grandchild. 48

Although the statute provides for various factors that the court may consider in making a custody determination, ultimately the decision of how to balance those various factors rests with the court. Accordingly, under Utah law, judges may provide varied reasoning or cite to different factors to explain how and why they came to the conclusion that they did in deciding whether to order that grandparent visitation be allowed. Ultimately how courts reach a decision is not nearly as important as what decision they reach, provided that the outcome is in the child’s best interests. Furthermore, so long as a state’s grandparent visitation statute is drafted in such a way as to provide deference to a “fit” parent’s opinion, as is Utah’s statute, the legislation will most likely withstand constitutional challenges,49 and thereby assist grandparents in obtaining and maintaining their visitation rights with grandchildren.

C. The Future of Grandparent Visitation Rights

Several groups of older Americans, collectively referred to as the “gray lobby” (consisting primarily of members of The National Retired Teachers Association, American Association of Retired Persons, The National Council of Senior Citizens, and The National Council on Aging) have joined together to fight for and protect the right to spend time with their grandchildren.50 As family units continue to evolve and as new trends emerge, more emphasis will be placed on involving grandparents in the lives of grandchildren. As one court noted while citing social science literature, grandparents are able to “influence their families” in four significant ways: 1) by serving “as a stabilizing influence;” 2) by acting as

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50 See Strawman, supra note 42, at 34 n.9.
the “family watchdog,” to keep a lookout to protect the grandchildren from harm; 3) by playing the role of arbitrator between parents and children; and 4) by helping grandchildren understand their heritage.51

Another court, noting the special relationship that exists between grandparents and grandchildren stated “... visits with a grandparent are often a precious part of a child’s experience...”52 Furthermore, a grandchild receives benefits from his or her interactions with a grandparent that he or she “cannot derive from any other relationship.”53

VI. CONCLUSION

The family model is changing drastically and becoming more complicated—it is not unusual to find families with several sets of parents, stepparents, and stepp-grandparents. Domestic partnerships create de facto step parents and grandparents. Subsequent divorces and remarriages may leave a trail of grandparents, and de facto grandparents and step-grandparents, all of whom are certain that their continued involvement in the lives of the children leads to stability, and that they have a right to continued contact.

Courts and legislatures acknowledge the benefits and positive impact that grandparents can have on their grandchildren’s lives, as can be seen by clear statutory rights to visitation given certain circumstances. But the right to visitation and involvement in grandchildren’s lives is not absolute because “parental rights are fundamental and constitutionally protected.”54 Parents deemed fit are able to deny grandparents access to their children when they decide it is in the best interests of the child.55 There is a presumption that parents are acting in the best interests of their child, even if they deny grandparent visitation, but this presumption can be overcome if there is evidence of abuse, neglect, or a special need to continue the child-grandparent relationship.

It is certainly in the best interests of the children to have these disputes resolved with civility rather than rancor, and with cooperation rather than by court order. Perhaps just as mediation and related methods of alternative dispute resolution have become popular—and even mandatory to solve certain conflicts in family law—so too will they be used to assist grandparents in obtaining visitation.

52 See Strawman, supra note 42, at 44 (citing Minkon v. Ford, 332 A.2d 199, 204 (N.J. 1975)).
53 Id. (citing Minkon 332 A.2d at 205).
A non-litigation centered approach may help drastically increase the likelihood that not only will the outcome of visitation-related litigation be in the best interests of the child, but also the process by which that outcome is obtained.\footnote{Troxel v. Granville, 530 U.S. 57, 75 (noting that "the burden of litigating a domestic relations proceeding" can be extremely disruptive to a child's life (citation omitted)).}
I am told that I climbed to the top of our porch trellis when I was two years old. I used to believe that I remembered that moment—the ivy tickling my stomach, a caterpillar crawling into my underpants, clinging to the slats until my father’s outstretched hand supported my bottom, letting go, feeling weightless, feeling safe. But now I think I don’t remember this at all. It was my father’s retelling of the story that was real. His voice rang with pride.

Here are some things I do remember. I remember watching my dad trim the hedge that lined our sidewalk. The top of his hands were hairy. His knuckles were scabby and his fingernails stained brown. He had a workbench in the cellar. Copper-headed nails were kept in a mayonnaise jar. Screws and loose buttons were saved in empty cans of Del Monte Fruit Cocktail or Whole Sliced Pineapple. I remember eating canned fruit before every meal. Dad sweetened his coffee with leftover syrup and made my mother laugh.

I am eight, nine, ten years old. We are climbing Beech Cliff Mountain in Maine. Dad leads the way. We are lost for hours. I scout ahead and find an old farmhouse. No one is there. We drink water from the horse’s trough. I take off my shoes and balance across a wooden fence rail. We leave. The woods get darker and colder. Everyone complains. Jill is afraid of starving to death. Harry is afraid of bears. Sarah doesn’t want to pee in the bushes. I look into my dad’s steel blue eyes. I feel safe and happy. Dad puts my cold hands under his armpits to warm them. The next day, I take a safety pin off the strap of my bathing suit and remove a dozen large splinters from the soles of my feet. It hurts but I don’t care.

Other memories: My father boycotts lettuce. He wears jeans to grandma’s funeral. His first story is published. He gets pneumonia hiking the Appalachian Trail. He gets depressed. He travels through England on a three-speed bike. He quits his job. He washes the dog before Sarah’s wedding. He loses friends. He wins an O’Henry. He gets a job. He writes a novel. He visits my husband in the hospital. He buries our dog. He buys a color TV. He reads to my toddler. He falls down the stairs. He retires. He stays with me after my husband dies. He hikes with my daughter up Cadillac Mountain. They get lost. I’m not worried. I inspect the bottom of my little girl’s feet when she gets home.

A few years later: my father is depressed again. It’s summer. My mom goes to France on a sabbatical. My daughter and I visit over the weekend. Dad looks thin. I find a salt shaker in the freezer and a chicken breast in the dish washer. I borrow his car keys to drive to Dryer’s Farm. As we turn onto Orchard Street, my father
says to me, “You know, you drive just like my youngest daughter.” I pull over to the side of the road. “Dad,” I say, “I am your youngest daughter.”

(Silence)

A few weeks ago, my father died. The morning of his funeral, I tried on three different outfits. My daughter slipped on a pair of blue jeans. She looked beautiful. I held her hand during the service. She knew that I was proud of her. I told her so every day.

(WOMAN closes her eyes.)


(WOMAN opens her eyes.)

Then I cried.
STUDY NOTE
OUR PARENTS' KEEPERS: THE CURRENT STATUS OF AMERICAN FILIAL RESPONSIBILITY LAWS

Michael Lundberg*

I. INTRODUCTION

Bara Swain’s monologue Safety Pin1 demonstrates the strong bond between parent and child, as well as the emotional strain that comes from watching that relationship deteriorate due to the ravages of the aging process. The United States senior citizen population is increasing due to the large size of the Baby Boomer Generation.2 The 2000 U.S. Census indicated that the number of people living in the United States over the age of sixty-five constitutes 12.4% of the population, a number that is likely to increase to 20% by the year 2030.3 The average life expectancy is currently 77.6 years,4 and is consistently on the rise.5 The rapid growth of the senior population, ever-increasing life expectancy, and a decreasing birth rate—along with instability of government programs like Medicaid, Medicare, and Social Security—place the United States on the verge of having more indigent seniors than ever.6 More rigidly enforced laws that provide for the care of the elderly from sources other than the government can counter these developments.7 Prime examples of such legislation are filial responsibility statutes, which impose a duty on children to support their parents.8 First, this Note will summarize the background and current status of filial responsibility in the United States. It will then discuss the Constitutionality of filial responsibility statutes with

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1 Barbara Swain, Monologue, Safety Pin, 11 J.L. & FAM. STUD. 531 (2009); 2009 UTAH L. REV. 579.
3 Id.
5 Id. at 182.
7 Id.
8 Ross, supra note 4, at 174–75.
the landmark case *Swoap v. Superior Court of Sacramento County* serving as an example of the legality of such statutes. States have the authority to use these statutes, and should consider how best to implement them in order to effectively cope with the financial burdens they face. The enforcement of such statutes would be beneficial to our society, and provide desperately needed relief for our strained public treasury.

I. BACKGROUND AND STATUS OF FILIAL RESPONSIBILITY LAWS

A filial responsibility statute is simply a law that "create[s] a statutory duty for adult children to financially support their parents who are unable to provide for themselves."10 Typically, such support includes an obligation to pay for "food, clothing, shelter, and medical attention."11 The rationale behind such laws arises from the reciprocal duty that parents have to care for their children; because parents extended voluntary care to their minor children, it is the filial responsibility of children to return that support to their parents.12 Supporters of such statutes emphasize the economic advantages of these laws and their ability to improve family relationships.13 Although filial responsibility was not recognized under common law, states have historically imposed this duty by statute.14

The obligation to watch over one's parents is centuries-old. It is found in philosophies such as Judeo-Christian theology, which states that children should "honour thy father and thy mother,"15 and ancient Eastern and Roman laws.16 In 1601, filial responsibility was put into statutory form with the enactment of the Elizabethan Poor Relief Act, from which most modern statutes are derived.17 The statute mandated that "father and grandfather and the mother and grandmother, and the children of every poor, blind, lame, and impotent person" must provide as much support as they could to that individual.18

Carrying on the historical tradition of supporting indigent parents, the United States was once replete with statutes enforcing this duty. In fact, during the 1950s,
forty-five states had filial responsibility statutes, and, prior to the 1960s, federal legislation recognized this obligation as well. However, with the passage of Medicaid, states began to repeal their filial responsibility statutes. Subsequently, the establishment of Medicare in the 1960s led to the repeal of the federal statute. Today, there are twenty-eight states with filial responsibility statutes, and few—if any—of the states currently enforce these laws. While Utah has a filial responsibility statute, it is one of eleven states that have never enforced the law.

Utah’s current statute is relatively short and simple when compared to its contemporaries. Nonetheless, at least one writer, Matthew Pakula, suggested that it should be a starting point for a new federal filial responsibility statute. The Utah statute was originally in two parts. The first part provided that “every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy or other unavoidable cause, shall be supported by the father, grandfathers, mother, grandmothers, children, grandchildren, brothers and sisters of such poor person.” Under this section of the statute, failure to provide support would require reimbursing the board of county commissioners in the offender’s home county for any payment of support to the indigent person. Although the Utah legislature repealed this section in 1975, the second portion of the statute is still in effect, albeit never enforced. This provision lists the order in which relatives are liable for the support of the poor person, stating that “children shall first be called upon to support their parents, if they are of sufficient ability.” The statute indicates that after children, responsibility next goes to the parents of the poor person, then the siblings, the grandchildren, and finally the grandparents.

Even though the section covering liability is no longer good law, hypothetically the state could still hold citizens of Utah liable for failure to support

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20 Pakula, supra note 2, at 870.
21 Id. at 861–62.
22 Id. at 870.
24 Id. at 174.
25 Id. at 174 n.51 (listing Alaska, Delaware, Idaho, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Tennessee, Utah and Vermont).
26 Pakula, supra note 2, at 871.
28 Id.
29 1975 Utah Laws 270.
31 Id.
their indigent parents if the children have means of supporting them. The current statute uses the imperative form, *shall*, to indicate that it is still the responsibility of a son or daughter to support his or her parent. However, notice that the statute also has an escape clause for the child, one that is common in most filial responsibility statutes: children are only required to support their parents so long as “they are of sufficient ability.” The justification for such a measure is clear—if a child of insufficient economic ability is forced to provide for her indigent parents, it would result in the state creating a new indigent person to replace the formerly-indigent senior. Therefore, children should be excused from their filial responsibility if they have no economic means of supporting their parents. This is one of three typical ways for children to avoid filial responsibility.

Children can also avoid filial responsibility if they can demonstrate the parent abandoned them. Usually, in order to claim this defense, a child must show that the abandonment occurred and lasted for at least two years while she was still a minor, and that the parent could have supported the child. Again, there is a valid justification for this waiver of the duty of filial responsibility. As previously noted, the rationale for the filial duty is based on the fiduciary care that a parent provided to their child. If the parent did not give the necessary financial support to their child, then it stands to reason that the state should not force the child to give financial support to the parent.

Finally, other states have applied various legal doctrines to reduce the amount a child is required to pay. For example, under the “unclean hands” doctrine, courts can consider a parent’s prior bad acts when considering the amount of support the child must pay. Other states also take into account temporary abandonment when determining the requisite amount.

There are, of course, criticisms of filial responsibility statutes. Among the most prevalent are: the administrative difficulties associated with enforcement; concerns that the laws will reinforce gender, economic, and racial imbalances; and the laws’ apparent contradiction of America’s culture of self reliance. These criticisms often serve as barriers to enforcement. Nonetheless, in recent years, various commentators have advocated the establishment of either a model filial

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32 Id.
33 Ross, supra note 4, at 169.
34 Pakula, supra note 2, at 866.
35 Ross, supra note 4, at 170.
36 See supra note 10 and accompanying text.
37 Ross, supra note 4, at 171.
38 Pakula, supra note 2, at 866.
39 See generally Ross, supra note 4, at 189–93 (discussing various reasons why states do not enforce filial responsibility statutes).
40 Id.
responsibility law that would make state laws more uniform, or a reenactment of the federal filial responsibility law. In sum, filial responsibility statutes are beginning to disappear from state codes despite their long historical tradition. Although there may be several potential explanations for this trend, such statutes are clearly constitutionally available as a tool for state legislatures, as the next section indicates.

III. THE CONSTITUTIONALITY OF FILIAL RESPONSIBILITY STATUTES

Throughout the years, filial responsibility laws have done remarkably well at withstanding legal challenges brought against them. In all cases the constitutionality of these laws has been upheld. is a prime example of the basis for upholding a filial responsibility statute. involved “two recipients of aid to the aged, Ila Huntley and Bieuky Dykstra.” Along with their respective children, Howard Huntley and Julius Dykstra, brought a class action seeking to prevent state officials from requiring Howard and Julius to reimburse the state for aid it had extended to Ila and Bieuky. Howard and Julius each claimed that they were unable to pay their respective fees of $70 and $75 per month and still provide for their own families and pay their own bills. “The Superior Court of Sacramento County issued a statewide restraining order,” enjoining the state from requiring payment, which prompted the state to “seek a writ of prohibition to prevent the Sacramento Superior Court from enforcing the restraining order.”

The statute that the Huntleys and Dykstras challenged was California’s Welfare Reform Act of 1971, which required children of persons receiving public assistance to contribute to the recipient’s support. If children failed to contribute, the statute allowed the county to proceed with legal action. The court was faced with the question of whether the filial responsibility duty “provides a rational basis for upholding the [Welfare Reform Act of 1971] against the challenge that such statutes are impermissibly discriminating.” Noting that “a long tradition of law” and “a measureless history of societal customs [have] singled out adult children to

41 Id. at 207.
42 Pakula, supra note 2, at 877.
43 Ross, supra note 4, at 193.
45 Id. at 842.
46 Id.
47 Id.
48 Id.
49 Id. at 843.
50 Id.
51 Id.
52 Id. at 848.
bear the burden of supporting their parents"53 the court determined that the challenged provisions of the Welfare Reform Act of 1971 “did not touch upon a fundamental interest and did not create any suspect classifications.”54 Rather, “these provisions [of the relatives responsibility statutes] were developed to relieve the public treasury of part of the burden cast upon it by public assumption of responsibility to maintain the destitute,” which the court found was a “legitimate state purpose.”55

Since the statute had a legitimate state purpose, the court only needed to determine that the statute was rationally related to the accomplishment of that purpose.56 The court bluntly determined that there was a rational relationship, and that children were the obvious choice from which to draw funds that would relieve strain on the public treasury: “The selection of the adult children is rational on the ground that the parents, who are now in need, supported and cared for their children during their minority and that such children should in return now support their parents to the extent to which they are capable.”57 Based on these determinations, the court held that the Welfare Reform Act of 1971 was “entitled to enforcement” and that the “respondent court [acted] in excess of its jurisdiction in restraining and enjoining [the county] from enforcing [it] against” the Huntleys and the Dykstras.58 Swoap stands as an excellent example of the constitutionality of filial responsibility laws.

Swoap, and other cases of its kind, demonstrate not only the legality of filial responsibility laws, but their practicality as well. These cases uphold filial responsibility laws for the simple reason that they accomplish the goal that they seek—to provide for the indigent elderly and to prevent a strain on our public funds.59 State legislatures should consider the possibilities and practicalities of reinstating filial responsibility statutes in order to reallocate badly needed funds to other areas.

IV. CONCLUSION

The United States, deeply influenced by early sources such as Judeo-Christian theology, as well as Eastern, Roman, and British law, enacted statutes requiring

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53 Id. at 849.
54 Id. at 851.
55 Id. at 851 (internal citations omitted).
56 Id. at 851.
57 Id.
58 Id. at 852.
59 See generally John Walters, Note, Pay Unto Others as They Have Paid Unto You: An Economic Analysis of the Adult Child’s Duty to Support an Indigent Parent, 11 J. CONTEM. LEGAL ISSUES 376 (2000) (proposing that a federal filial support statute that is stringently enforced would be more economically efficient than relying on welfare or other forms of public care).
children to provide support for the indigent elderly. The rationale for these laws was based mainly on the filial relationship between parent and child. However, due to the enactment of several welfare statutes following the 1950s, many states have repealed filial responsibility statutes or do not enforce them, despite continual support from the judiciary and critics who are concerned with the stability of Medicare, Medicaid, and Social Security. The enforcement of such statutes would be beneficial to our society and provide desperately needed relief for our strained public treasury. Legislatures should give serious consideration to their reinstatement.
~ Full Circle (idiom): To return to the same situation or attitude you originally had.

As a child, I spent most of my time daydreaming—imagining other places and pretending to be someone else—to avoid facing the reality of our home. My family looked ideal from the outside. I lived in a small house with my Mom, Dad, Grandma, two sisters, and a brother. Inside, it was a different story. My father physically abused my brother and sexually abused me. My mother knew, but chose not to defend us; and, I felt trapped in a life that offered no escape. For a very long time, I hated my mother. I despised her because she continued to be with my father when she absolutely recognized that he was hurting his own kids. I blamed my father’s lack of punishment squarely on her weak shoulders.

As an adult, I married a man who was as different as possible from my father. I found a returned missionary who seemed as idealistic as I was. He was fascinating. During every interaction, he understood how to captivate a crowd. He was quick-witted, charming, and brilliantly intelligent. However, things began to change: slowly at first and then swelling exponentially as the months went by until I became afraid of him. I noticed that he was jealous when I spent time with anyone else. I realized that, while he was very funny, he was also sarcastic, biting, and downright vicious toward anyone who crossed him. Despite these warnings, I thought he was simply compensating for undisclosed hurts. I thought his good side could make up for his bad side. I was wrong.

Actually, our first year as husband and wife was wonderful. Yet, the same pattern that emerged while we were dating resurfaced. My husband alternated between jealously guarding our time and actively pushing me away. Then, I found pornography saved on our computer. It seemed minor at first until I found pictures of naked children. Innocent children, surrounded by stuffed animals, being raped. Again, I felt trapped, but I was married to this man, and I wanted to help him. I confronted him. He promised that he would stop, but he continued. Even though I recognized he was having significant issues, I never imagined he would abuse his own children. It devastated me to learn he molested our little ones.

I realized, then, that I had come full circle. I now faced the choice that my mother faced long ago. That night the panic came. My heart quickened and grew louder. My breathing was fast and forced. My brain felt disconnected
from my physical body. Mostly, my mind spiraled down into the darkness; the place where fear reigns. I felt pain, loneliness, and fear. Images circled and blurred inside my head. Finally, after enduring the panic and pain for what seemed like an eternity, I fell asleep.

The next day, I went to Legal Aid to obtain a Protective Order. I could not find a babysitter, so I sat in the little office for most of the day with my four-year-old twins and my four-month-old baby feeling scared, tired, and incredibly alone. I did everything properly: I reported the abuse, I carefully answered questions from the detective and social workers, and I dutifully did what my attorney advised. Nevertheless, on Halloween, the D.A. called to say they declined to prosecute my husband. He explained there was just not enough physical evidence, and the children were too young to be reliable witnesses if their father forced them to take the witness stand. It would be impossible to describe the despair and brokenness I felt while sobbing on the phone.

Since that time, I have learned some lessons from the experience. Ultimately, my mother and I both faced a decision that no parent should ever need to make—whether or not to report a spouse for child abuse. She chose not to tell. Not wanting to be like her, I chose a different path. I chose to leave my husband and try to protect my children. Nevertheless, we both ended up in the same place, since the state never filed charges against my father or my ex-husband. Yet, I’ve learned that my mother’s choice led to a path where the cycle of abuse continued on to the next generation. Now, I hope the fact that I chose to fight for my children permanently breaks the cycle of abuse for our family. I hope that none of my children will ever have to come full circle.
STUDY NOTE
SEEN BUT NOT HEARD: CHILD SEXUAL ABUSE, INCEST, AND THE LAW IN THE UNITED STATES

Alison Adams

I. INTRODUCTION

Ashley Morgan’s monologue Full Circle explores the difficult subject of child sexual abuse. In 2005 alone, over 83,000 children were confirmed victims of sexual abuse in the United States. This number is staggering. Even more shocking is a 1994 retrospective survey of adults, which suggests that the number of confirmed sexual abuse victims is extremely understated. The survey estimated that at least twenty percent of American women and five to ten percent of American men experienced some form of sexual abuse as children. More alarming than the number of children who are victims of child sexual abuse is understanding who is responsible for the abuse; most children are abused by someone they know and trust, and very often the perpetrators are family members.

This Note will discuss child sexual abuse and related law in the United States. It will then consider some definitional controversies that arise within child sexual abuse statutes. Next, it will examine the problem of prosecuting child sexual abuse cases and explore Children’s Advocacy Centers as one solution to the prosecution problem. Finally, it will address incest loopholes that prevent convicted intrafamilial offenders from receiving the maximum punishment allowed by law.


3 David Finkelhor, Current Information on the Scope and Nature of Child Sexual Abuse, 4 Sexual Abuse Child. 31, 31 (1994).

4 Id.


6 Id.
II. CHILD SEXUAL ABUSE AND THE LAW

Child sexual abuse is not a problem of modern import. Indeed, “charity and social workers in the late nineteenth-century United States were familiar with child sexual abuse and knew that [the] most common form of abuse was intrafamilial—that is, incest.”7 Hundreds of child protective agency cases from the late nineteenth century indicate that incest occurred, that these agencies were aware of it, and that they were taking action against it.8

The “child-savers view” of child sexual abuse changed dramatically in the early twentieth century, and “incest was de-emphasized.”9 Child protective agencies continued to see incest cases, but they “obscured” information showing that most acts of child sex abuse occurred within the family.10 “[T]he locus of the problem was moved from home to streets,” the culprit transformed from family member to stranger, and the victim transformed from innocent to sex delinquent.11 This “reinterpretation of child sexual abuse removed scrutiny from family and home, restoring the curtain of impunity that surrounded those sacred institutions.”12

Following the resurrection of nonsexual child abuse as a social problem in the 1960s, incest was again “pulled out of the closet” in the early 1970s.13 Congress began debating child abuse in 1973. These discussions led to the enactment of the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).14 CAPTA allocated federal government resources to prevent child abuse and neglect, and authorized the Secretary of Health and Human Services to establish an Office of Child Abuse and Neglect.15 Additionally, CAPTA authorized the Secretary to provide federal grants to states for child abuse and neglect prevention and treatment programs,16 as well as programs related to the investigation and prosecution of child abuse and neglect cases—“particularly cases of child sexual abuse.”17 Importantly, CAPTA placed significant emphasis on reporting child abuse crimes18 and provided

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8 Id. at 57.
9 Id.
10 Id. at 58.
11 Id. at 57–58.
12 Id. at 58.
13 Id. at 56.
15 Id.
16 Id. § 5106(a)(1)(c).
17 Id. § 5106(c)(a)(1).
18 Id. § 5119(a).
funding for states to maintain accurate child abuse information for criminal background checks.\textsuperscript{19}

To date, CAPTA is the primary source of federal law addressing child abuse. CAPTA has been amended and reauthorized several times.\textsuperscript{20} It was most recently amended and reauthorized on June 25, 2003, by the Keeping Children and Families Safe Act of 2003.\textsuperscript{21} States responded to CAPTA by enacting state laws prohibiting child sexual abuse, and by 1986 all fifty states and the District of Columbia had enacted statutes identifying child sexual abuse as criminal behavior.\textsuperscript{22} Additionally, each state has added child abuse reporting laws.\textsuperscript{23} Thus, laws criminalizing child sexual abuse in the United States are primarily creatures of state statute.

III. DEFINITIONAL CONTROVERSIES

The definition of child sexual abuse under CAPTA is rather broad. The Act provides:

[T]he term ‘sexual abuse’ includes—(A) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or (B) the rape, and in cases of caretaker or inter-familial relationships, the statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.\textsuperscript{24}

Importantly, Congress included incest in the Act’s definition of child sexual abuse.

“Within the minimum standards set by CAPTA, each State is responsible for providing its own definitions of child abuse and neglect.”\textsuperscript{25} Statutory definitions of child sexual abuse vary by state. Each state includes sexual abuse in its definition of child abuse,\textsuperscript{26} however, some state statutes refer specifically to various acts of sexual abuse, while others address sexual abuse only generally.\textsuperscript{27}

\textsuperscript{19} \textit{Id.} § 5119(b).
\textsuperscript{21} 42 U.S.C.A. at §§ 5101–5119(c) (West 2009).
\textsuperscript{22} National Center for Victims of Crime, \textit{supra} note 5.
\textsuperscript{23} Donna M. Pence & Charles A. Wilson, \textit{Reporting and Investigating Child Sexual Abuse}, 4 \textit{SEXUAL ABUSE CHILD.} 70, 71 (1994).
\textsuperscript{24} 42 U.S.C.A. § 5106(g)(4) (West 2009).
Statutes prohibiting child sexual abuse only generally are often underinclusive. As Douglas Besharov stated, sexual intercourse "may be only the last step in a steadily worsening situation. For this reason and because of their inherent harmfulness, state laws should explicitly refer to lesser acts of sexual abuse, such as exhibitionism or improper sexual touching or contacts. They should enumerate specific acts . . . ."28 A statute which fails to prohibit specific acts also precludes the state from punishing an individual for those acts, thereby failing to adequately protect victims.

General child sexual abuse statutes can be overinclusive as well. A statute only generally prohibiting child sexual abuse may bring within its reach parents and caretakers who innocently touch their children. Thus, states should limit child sexual abuse to situations where the purpose of the touching is for sexual gratification.29 A state that does not explicitly provide such limitations may unintentionally illegalize behavior not intended to be reached by the statute.

In order to avoid these "definitional controversies,"30 states with general child sexual abuse statutes should work to enact more specific statutes. "More specificity in the actual definition of child sexual abuse will . . . lead to more appropriate reporting."31 Additionally, states and victims will benefit because all inappropriate acts with a child would be prohibited, and laws against such acts could be enforced.

IV. THE PROSECUTION PROBLEM

Lack of statutory specificity is not the only problem for child sexual abuse victims seeking protection from the law. Compared to other forms of child abuse, a higher percentage of sexual abuse reports are substantiated.32 Yet child sexual abuse is rarely prosecuted. "More than 90 percent of all child abuse cases do not go forward to prosecution" and the unfortunate result is that many suspects are released without further intervention by law enforcement or the justice system.33

27 Id.
29 Id. at 142–43.
30 Finkelhor, supra note 3, at 33.
31 Besharov, supra note 28, at 142.
32 Finkelhor, supra note 3, at 32. To substantiate (or support) a charge of child sexual abuse, a state child protection agency must believe and have evidence demonstrating that abuse occurred. Id.
Such cases may not be prosecuted for a number of reasons including “inability to establish the crime, insufficient evidence, unwillingness to expose the child to additional trauma, and the belief that child victims are incompetent, unreliable, or not credible as witnesses.”

“[C]hild sexual abuse is often exceedingly difficult to prove” as the evidence in such cases is sparse. “Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.” Indeed, child sexual abuse cases with lower rates of prosecution “involve children who have no medical findings, who are younger, whose perpetrator lives in the home, and whose non-offending parent does not support them.”

The prosecutor dealing with a child sexual abuse case is in a conundrum. The prosecutor must prove his case beyond a reasonable doubt, and “[t]he criminal justice system’s mandate does not focus on the needs, wants, or interests of the child victim or family.” While the criminal justice system does not focus on the child victim or the family, the prosecutor may consider them in determining whether to prosecute. Thus, a prosecutor may decline to prosecute where “the probability of obtaining a conviction does not justify subjecting victims and their families to the stress of prosecution.”

Prosecutors might also decline to prosecute child sexual abuse cases that are already being dealt with in the child welfare system. This is a particular problem for a victim who was sexually abused by a family member, since child welfare agencies investigate intrafamilial abuse, while police departments focus on extrafamilial abuse. Because cases in the child welfare system focus more on the family than the perpetrator, the child is also more likely to be removed from the home. The best solution to this problem is for a prosecutor to decide to prosecute child sexual abuse cases whenever there is sufficient evidence, regardless of whether the case is also being handled by the child welfare system.

35 John E.B. Myers, Adjudication of Child Sexual Abuse Cases, 4 SEXUAL ABUSE CHILD., 84, 84 (1994).
39 Delores D. Stroud et al., Criminal Investigation of Child Sexual Abuse: A Comparison of Cases Referred to the Prosecutor to Those Not Referred, 24 CHILD ABUSE & NEGLECT 689, 698 (2000).
40 Cross et al., supra note 36, at 326.
V. CHILDREN’S ADVOCACY CENTERS: ONE SOLUTION

Children’s Advocacy Centers are one solution to the problem of prosecuting child sexual abuse cases. CACs are agencies which “aim to improve the process of criminal justice investigations for children by making the experience more child-friendly and by coordinating the efforts of different investigators.” 42 Research suggests that CACs may assist in providing better outcomes in sexual abuse cases. 43 CACs aid in obtaining a clear disclosure of abuse from the child through forensic interviewing. The CAC model requires forensic interviews to be “of a neutral, fact-finding nature.” 44 CACs also focus on improving forensic interviews. 45 They are “taking care to enhance the value of the child’s report as evidence of a crime,” 46 and these interviews are recorded to avoid duplication, 47 making the experience less traumatic for the child-victim. A 2001–03 study found that most children interviewed by CACs had fewer than two interviews. 48 CACs were also more likely than comparison communities to conduct their interviews in “a child-friendly environment.” 49

CACs assist the prosecution in obtaining crucial physical evidence of child sexual abuse. The CAC model also emphasizes medical evaluations. 50 “Specialized medical evaluation and treatment are to be made available to CAC clients as part of the team response, either at the CAC or through coordination and referral with other specialized treatment providers.” 51 In the 2001–03 study, forty-eight percent of the CAC sample received sexual abuse examinations compared to twenty-one percent in the comparison sample. 52 In fact, some CACs have in-house doctors to provide immediate examinations. 53 Moreover, the 2001–03 study indicated that CACs “have the effect of promoting examinations for more children with suspected sexual abuse.” 54 Thus, CACs are more likely to obtain sexual abuse examinations than other comparison organizations.

42 Cross et al., supra note 36, at 325.
43 Kathleen Coulborn Faller & Vincent J. Palusci, Children’s Advocacy Centers: Do They Lead to Positive Case Outcomes?, 31 CHILD ABUSE & NEGLECT 1021, 1027 (2007).
45 Chandler, supra note 41, at 333.
46 Id.
47 Id.
48 Faller & Palusci, supra note 43, at 1026.
49 Id.
50 National Children’s Alliance, supra note 44.
51 Id.
52 Faller & Palusci, supra note 43, at 1025.
53 Id.
54 Id.
CACs still have room for improvement, but research suggests that they can have a positive impact on the prosecution of child sexual abuse. "Prosecution of child sex abuse relies heavily on whether the child provides a clear disclosure of abuse and whether an appropriate medical evaluation was performed, and CACs aid critically in both of these issues."55 Because Children's Advocacy Centers offer improved evidence-gathering techniques and support for victims, they are likely to result in higher prosecution rates and should be utilized in every case of child sexual abuse.

VI. SLIPPING THROUGH INCEST LOOHOLES

"The statistics about child sexual abuse remain what they were a century ago: the most dangerous place for children is the home, the most likely assailant their father."56 Yet the successful prosecution and conviction of an intrafamilial child sexual abuse offender does not guarantee that such offender will receive the appropriate punishment. As stated, all states have laws criminalizing child sexual abuse. But where an offender is the child-victim's family member, "many states allow the prosecutor to file charges under the incest statute, rather than under [the child] sexual abuse statute."57 Incest convictions often carry far less significant penalties.58

States and prosecutors should make every effort to close incest loopholes. States should amend their statutes to require child sexual abuse to be prosecuted under child sexual abuse statutes. Additionally, until state statutes reflect these changes, prosecutors should prosecute child sex offenders under sexual abuse laws, rather than incest laws. Sexual abuse against a child should be subject to uniform punishment, regardless of whether the offender and the child are related.

VII. CONCLUSION

Child sexual abuse and incest are not new concerns, although they have been "pulled out of the closet" in recent decades. The federal government and every state in the Union have reacted by enacting statutes criminalizing child sexual abuse. But in spite of these statutes, many child sexual abuse cases have not been prosecuted due to the high standard of proof and lack of evidence. However, the CAC model has emerged to assist prosecutors in obtaining critical evidence in child sexual abuse cases. Still, as the example of incest loopholes suggest, the

55 Miller & Rubin, supra note 38, at 17.
56 Gordon, supra note 7, at 61.
58 For an in-depth discussion of statutory schemes involving incest loopholes, see id. at 145–48.
states still have a long way to go to ensure not only that child sexual abuse offenders are prosecuted and convicted, but also that these offenders are punished to the fullest extent of the law.
MONOLOGUE

ANNE

Heidi Camp*

Anne was born early in a violent act of surgical intervention—blood, tissue, and fluids spilling out of the fertile cavity, sucked away by surgical probes and gauze sponges. Two pounds, nine ounces of screaming beginning. Dark hair, dark, wise eyes. Long fingers puckerred from seven months of floating in the warm amniotic swimming pool of her birth mother’s womb.

The first time I saw my adopted daughter she was six weeks old—still less than three pounds in weight. Before we could meet, I was required to undergo ritualistic cleansing, sanctified by antibiotic soap and clothed in sterile robes, with my feet sheathed to prevent contamination of her sacred space. I bowed my head to peer into the protective isolette, trembling fingers tracing a pattern on the clear Plexiglas. Tiny and perfect, she seemed unimpressed by me. But when I spoke, she turned her head toward my voice and opened her eyes. And, in their depth I found my home.

For the first ten years of her life, she lived with a burning passion. She burst through childhood with uncontained joy for life, reluctant to sleep for fear of missing even a moment, and resentful of the exhaustion that tugged at her tiny body and dragged her into unconsciousness. She embraced everything and everyone, tasted everything around her from air to puppy fur to dirt. Fascinated with tiny things, gently embracing potato bugs, nurturing worms, exploring her body, her toes, her elbows. The air around her was carbonated with life.

Had I been paying attention, I would have seen the first leak of life in sixth grade.

It was then that she stepped back from the edge for the first time since her birth. She struggled with math, complained of persistent stomachaches. School spiraled downward. Daily illness kept her from participating, yet doctors couldn’t find anything wrong. A litany of medical tests and exams showed nothing but a normal kid. But still she slipped away, depression stealing her light.

We tried a different school—her pain escalated. The wilderness of her soul dissolved, an angry mist obscuring the space we once shared. For her, the anger was a protective storm, keeping out prying eyes and softening her landscape with a blanket of dark clouds. For me, it was isolation. Alienation. Excommunication.

* © 2009 Heidi Camp, Symposium Participant, Salt Lake City, Utah, 2008.

599—ULR
551—JLFS
I. RIVERS – ANNE AT THIRTEEN

In exasperation, I bent over to pick up (again) the mess that had become the floor of Anne-Marie’s bedroom. I grabbed one of several crumpled up pieces of paper, and unwadded it just to be sure it wasn’t another missed school assignment before lofting it to the garbage bag at my feet. I recognized the loopy handwriting as hers, even though the words were foreign. They spoke of rivers of blood, of “writing pain” with the slice of a razor, of draining her body of pain as the blood traced a path to freedom.


I put my arms around the wildness that had become my daughter—an ecosystem no longer familiar. Together we trekked the pain carved into her forearms, her thighs, her shins. Some cuts were still raw and fresh, others aged to gossamer lines. Geometric designs. Concentric lines that spoke a language beyond my comprehension. I looked to her eyes, seeking to meet her in the sacred ground that had always been our commons. But I was not permitted in, barred by her shame.

II. EXCAVATION – ANNE AT FOURTEEN

Anne-Marie tried to kill herself today. Not just for show, or to elicit the “respect” of peers who found kinship in darkness and depression. She did it for real.

She carefully found her brachial pulse, and marked it with an “X,” a treasure map of sorts. She loaded a new razor blade into the box cutter, and like a pirate with a key, tried over and over to open the artery and let the richness of her life escape. I found her sobbing on her bed, frustration seething in her inability to control this one act, to make her pain stop.

I bundled her in my arms, this land of my heart, and hurried to the hospital.


Silence.

I was alone. She was alone. I did not have the tools to bridge the river that flowed between my precious daughter and the rest of the world. She was barely visible now, alone on that far shore. My heart slowed.

For ten weeks, she remained physically and emotionally separate from me, as a resident of an inpatient rehabilitation program. But over time the angry run-off slowed, and I was finally able to bring her out of rehab, and into the open space of the rest of her life. We paused just outside the locking gate, arms around each other, tears in my eyes, sparkles in hers. “It’s so good to be happy,” she exclaimed. Indeed.
She has learned to control her own demons with a deliberateness and awareness that far exceed her fourteen years of life. The scars on her body are healed now, although when the light is right, you can still see them like pale luminescent ghosts.

She smiles. And the river that isolated her seeps into the ground, drying up like a creek bed after a flash flood. Sometimes, we can almost reach each other. Soon, I’ll be home again.
I. INTRODUCTION

In Heidi Camp’s monologue, Anne, we learn of the struggles of one mother dealing with the traumatic mental health problems of her daughter. Camp discovers that her daughter has become increasingly isolated from the world, and has turned to self-mutilation and suicide attempts in order to alleviate her mental and emotional suffering. Camp then describes her own experiences of isolation, alienation, and helplessness while dealing with the situation. The unfortunate reality is that this story, and others like it, are not isolated incidents or rare occurrences. As the Department of Health and Human Services (HHS) reported: “[m]any children have mental health problems that interfere with normal development and functioning. In the United States, one in ten children and adolescents suffer from mental illness severe enough to cause some level of impairment.” Additionally, the juvenile admission rates to mental health facilities “have rapidly escalated over the past several decades as well.” But not every child is lucky enough to have a parent catch the signs of their mental distress, as evidenced by another HHS statistic: “in any given year, it is estimated that [only] about one in five children receive mental health services.” First, this Note will discuss the prevalence of mental illness among youth in the juvenile justice system. Second, it will explore possible programs that might help states better deal with these issues. Finally, it will examine the approach taken in Utah, and the successes of that program.

The problem of youth affected by mental disorders is compounded when viewed in conjunction with the juvenile justice system. As pointed out by Patrick...
Geary, one of the nation's most preeminent juvenile mental health and justice scholars, “[y]ouths in contact with the juvenile justice system are significantly more likely than other youths to have mental disabilities.”\(^5\) He further notes, “[t]he juvenile justice system has in some ways become a dumping ground for mentally ill, learning disabled, [and] behaviorally disordered juveniles.”\(^6\) Many juvenile offenders have a history of involvement with the mental health system, but end up transitioning to the justice system after the mental health system failed to adequately resolve their problems.\(^7\) In contrast to the general population of children—where the diagnosis rate of serious emotional disturbances ranges from two to seven percent—estimates for the “delinquent population range from sixteen to fifty percent.”\(^8\) To further illustrate this problem, many juvenile delinquency reports show:

> [a]mong delinquent youth, between one and six percent suffer from psychotic disorders, and at least twenty percent are estimated to suffer from serious mental disorders generally (including schizophrenia, major depression, and bipolar disorder). In addition, fifty-five percent of youth in the juvenile justice system show symptoms of clinical depression, and up to nineteen percent of [youth in the juvenile justice system] may be suicidal.\(^9\)

These reports suggest that juvenile mental and psychiatric disorders are even more prevalent for children detained in the juvenile justice system.\(^10\) Not only are these youths dealing with serious mental disturbances, but some estimates show that more than eighty percent are also affected by less severe mental disabilities such as “attention deficit disorder, attention deficit hyperactivity disorder, substance abuse and dependence, learning disabilities, mental retardation, anxiety disorders, and conduct disorders.”\(^11\) These studies show that there is an increasing relationship between a lack of mental health care and the disproportionate presence of youth with mental disorders in the juvenile justice system. The problem is that

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\(^5\) Geary, supra note 3, at 677.
\(^6\) Id. at 677 (internal citations and quotations omitted).
\(^7\) Id.
\(^8\) Id. at 677–78.
\(^9\) Id. at 678; see also Douglas E. Abrams, Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety, 84 OR. L. REV. 1001, 1087 (2005) (stating that “the National Mental Health Association estimated that as many as sixty percent of youths in the juvenile justice system have mental health disorders”).
\(^10\) Geary, supra note 3, at 678 (noting “a far greater proportion of children in the juvenile justice system suffer from a serious emotional disturbance than in the general population”).
\(^11\) Id.
these youths, if not properly screened, end up in contact with the juvenile justice system for far too long; and, without treatment, are much more likely to reoffend.

II. JUSTICE AND TREATMENT: A COMPREHENSIVE APPROACH

People often look to the courts as a method of dispensing justice, and the justice system is seen as being a mechanism for holding people accountable for wrongs that they are responsible for causing. The juvenile justice system presents unique challenges, however, because youths have not yet fully developed a sense of right or wrong. They have not yet fully matured to understand the consequences of their actions. Therefore, retribution is incompatible with the rehabilitative goals of the juvenile justice system. The U.S. Supreme Court specifically noted a distinction between the culpability of an adult defender as compared to a juvenile offender in the 2005 case Roper v. Simmons, which struck down the use of the death penalty in cases where the crimes were committed by juveniles. 12

In an article examining the cycles of the juvenile justice system, Professor Erik Luna, one of the nation’s leading experts in criminal law and theories of punishment, discussed research suggesting that “[a]lthough adolescents may display some of the intellectual capacities of adults, there is an ‘immaturity gap’ in their cognitive faculties, impeding the assessment of risk, understanding of future consequences, power of self-management, and capacity for independent choice.” 13 If this is true of ordinary juvenile offenders, then these factors would warrant even less culpability for the punishment of juveniles with mental disorders. If punishment is not the best course of action, which is likely the case, then states should move toward a more comprehensive treatment and rehabilitation scheme for the juveniles affected by these disorders.

Because the juvenile justice system has evolved into an institution designed to treat and rehabilitate youth, not necessarily punish them, it “offers a unique opportunity to intervene in the lives of children with mental disabilities before any negative behavior or psychological patterns take hold.” 14 The prevalence of mental health problems in juvenile courts, and the desire to treat and rehabilitate, has led some states to consider the concept of “Therapeutic Jurisprudence,” 15 by setting up

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14 Geary, supra note 3, at 688.
15 Id. at 681.

The formation of specialty ‘problem-solving’ or ‘treatment’ courts to better address specific categorical concerns and common needs of certain types of offenders is perhaps the best example of the application of therapeutic jurisprudence concepts in the justice system. These courts have emerged in both the criminal and juvenile justice systems and demonstrate an institutional capacity to address the substance abuse and mental health needs of offenders.
specific problem-solving courts to help deal with root causes of juvenile offenders' behavior, and to lower recidivism rates. The desire to implement these juvenile mental health courts comes from a recognition that mental disabilities often cause, or contribute to, delinquent behavior.\(^\text{16}\)

Professor Luna discussed a research study, conducted in Utah, which identified youth offenders at risk for psychiatric problems, recidivism, and suicide.\(^\text{17}\) The participants of the study were divided into two groups: one group received psychiatric assessment and treatment, in-home services, and case management; the other group received only existing juvenile justice system services.\(^\text{18}\) The researchers found that the first group, those who received the more comprehensive treatment program, "had an overall increase in mental health status and a reduction in recidivism ...."\(^\text{19}\) More importantly, members of that group spent less time in detention and medical facilities, resulting in substantial financial savings to the state.\(^\text{20}\) Professor Luna suggests that "early identification of mental health issues in juvenile offenders, combined with the provision of necessary treatment services, may reduce both crime and costs in the long run while improving (and even saving) the lives of young people today."\(^\text{21}\)

The need for treatment of juveniles with mental disorders is often best illustrated through examples of offenders who received no such treatment. Another article dealing with youth, justice, and mental illness, discussed the case of Barton Gaines:\(^\text{22}\)

Gaines, suffering from several mental disorders including anxiety disorder and manic depression, was never properly diagnosed or treated for his mental illness .... After feeling humiliated in school, Gaines dropped out of ninth grade and began abusing drugs to self-medicate. The [state] did not adequately help Gaines with his mental disease, and as a result, he is now locked up in prison for a crime that was committed as a result of his mania disorder.\(^\text{23}\)

\(^\text{16}\) David E. Arredondo et al., Juvenile Mental Health Court: Rationale and Protocols, 52 JUV. & FAM. CT. J. 1, 3 (2001).
\(^\text{17}\) Luna, supra note 13, at 4.
\(^\text{18}\) Id.
\(^\text{19}\) Id.
\(^\text{20}\) Id.
\(^\text{21}\) Id.
\(^\text{23}\) Id. at 274–75. The prevalence of substance abuse is also commonly linked to juvenile offenders with mental health issues. The NCMHJJ reports: [A]mong youth with at least one mental health diagnosis, approximately 60 percent also met criteria for a substance use disorder. Co-occurring substance
Gaines is a perfect example of how “the ‘problem’ of psychopathology among juvenile justice detainees can be regarded as a public health ‘opportunity.’”24 Had the juvenile justice system identified the causes of Gaines’ offenses as mental illness and treated him, it is likely that those efforts would have been successful before Gaines reoffended, which cost him his freedom, and the government extra tax dollars.

Unfortunately, for many involved in the juvenile justice system, the Gaines scenario is likely to repeat itself as many states struggle with the multi-faceted problem of juvenile justice and mental health reform. “Rather than confront the pediatric mental health crisis with positive measures . . . many states have been moving in the opposite direction.”25 Even when confronted with staggering numbers of youth with mental illness in the justice system, state and federal budget cuts have closed or severely limited access to mental health facilities.26 “As a result, several thousand mentally ill children are incarcerated each year because the juvenile corrections system provides their only access to treatment, frequently in facilities that offer little semblance of meaningful therapy.”27 Because these states do not have the ability to separate and treat these juvenile offenders from the general population, “the state fails the public, which remains at risk when the disturbed youth is released without effective mental health intervention.”28

All of this suggests that many of these minors who end up incarcerated in the juvenile justice system would not be there but for their mental disorder. Because these juveniles do not receive adequate mental health care, they often self-medicate through abuse of drugs and alcohol,29 which in turn leads many of them into contact with the juvenile justice system. Once there, if the underlying cause of these minor’s criminal behavior (their mental illness) is not treated, then they will be released to the outside world in no better shape than when they arrived. In fact, because they will have been in contact with other juvenile offenders, likely learning more antisocial and criminal behaviors, and still without treatment for

use disorders were most common for youth with a diagnosis of disruptive disorder, although significant proportions of youth with anxiety disorders (52.3%) and mood disorders (61.3%) also had a co-occurring substance use disorder.


24 Luna, supra note 13, at 5 (internal citations omitted).
25 Abrams, supra note 9, at 1086 (2005).
26 Id.
27 Id.
28 Id. at 1090–91.
29 David L. Harvey III, Theories of Therapeutic Evolution for Juvenile Drug Courts in the Face of the Onset of the Co-Occurrence of Mental Health Issues and Substance/Alcohol Abuse, 19 J. L. & Health 177, 198 (2004).
their mental disorders, they will likely be released in worse shape than when they arrived.

III. UTAH: A COMPREHENSIVE APPROACH IN ACTION

In response to the problem of juvenile offenders in need of specialized mental health treatment, many states have set up specialized programs to deal with these unique issues. Utah has taken an approach similar to Los Angeles County, California. In L.A. County, juvenile justice officials set up a specific juvenile mental health court in 2001. The court is described as a comprehensive program consisting of a partnership between the “judge, district attorney, public defender, an alternate public defender, Department of Mental Health (DMH) psychologist, school liaison, probation officers, and a psychiatric social worker.” The psychologist functions as a case manager to form connections with providers and oversee treatment and progress. The participating youth then receives individualized attention and access to community-based mental health services including mediation and therapy.

In Utah, the program is much more modest, but set up in a similar way. The program, called the Coordination of Care Court (C3 Court), is a collaborative project between Utah’s Third District Juvenile Court and various partners. Involved agencies include: “Valley Mental Health, Division of Child & Family Services, Division of Juvenile Justice Services, Salt Lake County District Attorney’s Office, Salt Lake County Sheriff’s Office, Salt Lake County Division of Substance Abuse Services, Pappas & Associates, Jordan School District, and the Utah Chapter of the National Alliance for the Mentally Ill (NAMI).”

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31 The country’s first juvenile mental health court was the Santa Clara Court for the Individualized Treatment of Adolescents (CITA). CITA sought to “administer swift and concrete consequences to juveniles who have broken the law and to help them address their mental issues in order to avoid future delinquent behavior.” Harvey, supra note 29, at 193.
33 Id.
34 Id.
35 Involved agencies include: “Valley Mental Health, Division of Child & Family Services, Division of Juvenile Justice Services, Salt Lake County District Attorney’s Office, Salt Lake County Sheriff’s Office, Salt Lake County Division of Substance Abuse Services, Pappas & Associates, Jordan School District, and the Utah Chapter of the National Alliance for the Mentally Ill (NAMI).” Utah State Courts, Coordination of Care Court, http://www.utcourts.gov/courts/juv/juvsites/3rd/coord_care_court.html (last visited Apr. 9, 2009).
year.\textsuperscript{36} The C3 Court, by contrast, only served fifty-three youths since its inception in 2006.\textsuperscript{37}

In one Utah study, a team of medical researchers described and tested a model for treating juvenile offenders who suffer from mental illness.\textsuperscript{38} The program established in that study gave participants family-centered treatment including in-home services, psychiatric assessment and treatment, as well as case management.\textsuperscript{39} The in-home services consisted of a trained specialist teaching the parents specific skills, and efforts were made to work with the youth and mentor them.\textsuperscript{40} The psychiatric services included a full bio-psychological assessment of the participant, as well as a family assessment, a treatment plan (with or without medication), and psychotherapy if needed.\textsuperscript{41} The current Coordination of Care Court was a restructuring of a previous initiative known as the Continuum of Care, which was implemented by Utah’s Juvenile Justice Services but was criticized as being ineffective.\textsuperscript{42}

The existing C3 program offers “individualized treatment plans [that] focus on providing services that are strength-based, family-focused, evidenced-based and culturally sensitive. The plan has measurable goals and objectives that address target behaviors in the areas of school, home and therapy.”\textsuperscript{43} There are two main methods for providing treatment to youth currently in the C3 program. The first, and more intensive, is the day treatment program; a day treatment program is “a highly structured, community-based, postadjudication program for serious juvenile offenders.”\textsuperscript{44} The goals of day treatment are to provide intensive supervision to ensure community safety, as well as provide necessary treatment to the youths.\textsuperscript{45} Intensive supervision is fulfilled by requiring the offender to report to the facility on a daily basis at specified times for a certain length of time. Generally, programs are provided at the facility during the day, evening, or both at least five days a

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\textsuperscript{36} Michelle A. Moskos, et al., \textit{Utah Youth Suicide Study: Evidence-Based Suicide Prevention For Juvenile Offenders}, 10 J. L. \\ & FAM. STUD. 127, 132 (2007).
\textsuperscript{37} Interview with Scott Curry, Coordinated Care Court program manager, in Salt Lake City, Utah (Feb. 10, 2009).
\textsuperscript{38} Moskos, \textit{supra} note 36, at 134.
\textsuperscript{39} \textit{Id}.
\textsuperscript{40} \textit{Id}.
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} Moskos suggested that “the Continuum of Care . . . [did] not appear to include appropriate mental health screening, referral, and delivery of treatment services.” \textit{Id}. at 144.
\textsuperscript{43} Utah State Courts, \textit{supra} note 35.
\textsuperscript{44} Office of Juvenile Justice and Delinquency Prevention, Model Programs Guide—Day Treatment, http://www.dsgonline.com/mpg2.5/day_treatment_intermediate.htm (last visited Apr. 9, 2009).
\textsuperscript{45} \textit{Id}.
\end{flushleft}
week. The second, and less intensive means of providing treatment is weekly monitoring and treatment sessions.

The research indicated that when a plan—such as the one suggested in the article, and the one currently utilized by the C3 Court—is implemented properly, suicide and recidivism rates decreased, while the overall mental health of the participants increased. Although it is still too early to see specific research studies documenting the results from the C3 Court, court records “indicate a significant reduction in charges for C3 clients while also recording an improvement in their school attendance and GPA's. Therapists, families, and participants have reported an increased compliance with therapy, skill building and medication compliance.”

One of the most important aspects of the type of program described by the Utah Youth Suicide Study, and implemented by Utah’s C3 court, is the involvement of the juvenile’s family. No matter how good the treatment is while a juvenile is in custody, the treatment plan as a whole will not succeed if the progress does not continue at home. Juveniles must remain compliant with medication and treatment regimens, and in order for that to occur, parents and other family members must understand the underlying problems, and how to best deal with the affected youth’s behavior.

As other states struggle with the best way to deal with the growing problem of mental illness in the juvenile justice system, it is important that the role of these collaborative individualized mental health courts are considered as options. This is even more true in troubled economic times, when many states are being forced to make tough decisions regarding judicial funding. The needs of these troubled youths as well as the safety of the general public are better served through early identification and treatment of mental illness in juvenile offenders, rather than detention or incarceration.

One large criticism of adding a mental health element to juvenile justice courts is the prospect of additional cost. This cost, however, can be offset. Looking to states that have implemented drug courts as an example, it has been shown that they are saving millions of dollars. Savings to these states’ taxpayers came mostly in the form of decreased recidivism rates, which helps the juvenile justice system avoid costly prison and prosecution expenses for repeat offenders. And if these savings are not enough to offset budgetary concerns, the Mentally Ill

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46 Id.
47 Interview with Scott Curry, supra note 37.
48 Moscos, supra note 36, at 140–43.
49 Utah State Courts, supra note 35.
50 Some states may find it too daunting a task to implement a separate mental health court program. For suggestions on how to supplement existing juvenile drug court programs see Harvey, supra note 29, at 209–20.
51 Id. at 212.
52 Id.
Offender and Crime Reduction Act of 2004 has made available millions of dollars in federal grant money to "communities that integrate mental health treatment and detection into [their] justice system."53

VI. CONCLUSION

Depression, suicidal thoughts, and other serious mental illnesses are not limited to the adult population.54 Youth throughout the country are suffering greatly, and many are still not receiving treatment.55 Anne tells the story of a depressed adolescent girl who was lucky enough to have a mother notice the mental illness as it progressed, and was able to provide treatment for her daughter before it was too late. But for many youths, especially those in contact with the juvenile justice system, the story is a different one. In contrast to the general population of youth in America, those in the juvenile justice system suffer from mental illness at an alarmingly higher rate.56

Giving juveniles and their families access to these mental health courts will greatly increase the chances of successfully rehabilitating offenders because there is an intervention at the earliest opportunity. These mental health courts also strive to give accelerated service, individualized attention to discover the most appropriate treatment, and consistent monitoring of and feedback to participants. These are the same principles that other problem-solving courts, including juvenile drug courts, rely on for their success.57

Unless states can provide a way to identify these youth at an earlier stage, intervene, and provide meaningful and effective treatment, the future of those youths as well as the public safety is in jeopardy. Research has shown, as illustrated by Utah’s C3 Court, that a comprehensive and collaborative approach to treating these kids can “reduce both crime and costs in the long run while improving (and even saving) the lives of young people today.”58 If states do nothing however, not only do those states fail the youth that they are supposed to rehabilitate, but the state also “fails the public, which remains at risk when the disturbed youth is released without effective mental health intervention.”59

53 Id.
54 See generally SURGEON GENERAL’S CONFERENCE REPORT, supra note 2.
55 Id.
56 Geary, supra note 3, at 677–78.
57 Harvey, supra note 29, at 192.
58 Luna, supra note 13, at 4.
59 Abrams, supra note 25, at 1090–91.
I. INTRODUCTION—TAKING AWAY A CHILD’S CHOICE

In *Raising a Woman*, Mary was fourteen when she had an operation that would forever deprive her of the ability to bear a child. In facing this surgery, she had no choice in the matter, no option to say no, and no advocate asking what she wanted. She was alone and left without a voice because her physician, and even her own mother, had taken her choice away. When Mary received a hysterectomy, her mother’s needs were addressed—the monthly anguish in caring for her daughter’s menstruation was eliminated, thereby diminishing the extremely difficult turn that her life had taken in raising a daughter with Cerebral Palsy. But Mary was left empty. It was not a medical necessity, nor would it serve to benefit Mary directly. Instead, the surgery would benefit those that aided Mary in her daily activities. Nonetheless, it was Mary who paid the price for this moment. Alone, without a voice, and choiceless in a doctor’s treatment or mother’s care, Mary forever lost her ability to bear a child, the weight of which fundamentally effects her to this day, decades later.

This Note explores a minor’s choice in regards to medical decision-making. Although a short excerpt includes information about minor’s general right to consent, the majority of the article focuses on a minor’s right to refuse treatment. The Note begins with a brief history of the law surrounding medical care for children with disabilities, and offers parallel examples that demonstrate Mary’s predicament through a discussion of different types of elective medical care. Next, the Note focuses on minor’s right to refuse treatment, a doctor’s duty to her patient, and lastly a parent’s duty to her child.

II. A BRIEF HISTORY

The history surrounding medical care of children with disabilities is complicated, and for the most part deals with courts and legislatures disagreeing...
about parent- and physician-choice and the legislature’s aim to protect disabled children. The divide remains, and this section briefly describes the struggle.

The fight over protecting children with disabilities from medical mistreatment began with litigation surrounding Section 504 of the Rehabilitation Act of 1973. Although that statute did not specifically protect children in medical cases, the act did protect disabled people in general and proscribed any form of discrimination based upon a disability. In the first piece of litigation interpreting this act, the court held the statutory language did not protect a newborn child (“Baby Doe”) whose physicians allowed him to starve to death because he was born with Down syndrome. The backlash from this ruling reached the executive and legislative branches of the federal government. “President Reagan directed the Secretary of Health and Human Services (HHS) to notify health care providers that section 504 applied to Baby Doe situations,” and new regulations were passed by the legislature. The courts subsequently invalidated these actions, however, because they found them to be “arbitrary and capricious.” Congress and the executive branch responded again by clarifying the statute and implementing new regulations to protect children with disabilities, only to be struck down again by the federal court system. In American Hospital Association v. Heckler, the Second Circuit Court of Appeals held that “section 504 could not prevent the medical neglect of a handicapped newborn because the section did not refer to treatment of a handicapped newborn.” The Supreme Court later affirmed this decision in a plurality opinion.

Finally, Congress and the executive branch implemented The Child Abuse Amendments of 1984 creating new rules and regulations in the area. These amendments conditioned providing federal funds to a state on that state’s implementation of rules prohibiting discrimination against disabled children, and offered investigative procedures and legal remedies to prevent neglect. Another body of law developed to prevent discrimination to those living with disabilities was the Americans with Disabilities Act (ADA). Although the ADA fails to

3 Uddo, supra note 2, at 294.
4 Id. at 294–95.
5 Id. at 295.
6 Id.
7 Id.
8 Id. at 296.
9 Id.
10 Id. at 297; see also Bowen v. Am. Hosp. Ass’n, 476 U.S. 610 (1986).
12 Uddo, supra note 2, at 300.
13 Id.
14 Id. at 303; see also 42 U.S.C. §§ 12101–12213 (2000).
address medical care for children, it does clarify that “discrimination based upon a
disability or handicap is intolerable.”\(^\text{15}\)

Although the federal government has been unsuccessful at passing legislation
that withstands the scrutiny of the federal courts, the executive and legislative
branches have circumvented this problem by empowering states to create such
legislation. By conditioning federal funding on the basis that a state protects
disabled children, the federal government has begun to create meaningful change
in this area of law.

III. ELECTIVE MEDICAL TREATMENTS FOR CHILDREN WITH DISABILITIES

Mary’s story of being forced to undergo medical treatment without her
consent is not unique, and although not specifically addressed by the federal
government, there are a number of disabilities that often prompt controversial
medical procedures on children in the same manner. Like Mary’s hysterectomy,
these procedures serve non-medical needs and are performed without the consent
of the patient. This section gives examples and preliminary information regarding
these treatments.

The first example is cochlear implants. The implant is a small device that may
be surgically placed under a deaf child’s skin that allows them to have a “useful
representation of sounds in the environment and help him or her to understand
speech.”\(^\text{16}\) However useful it may be, the device is not medically necessary and is
highly controversial in the deaf community.\(^\text{17}\) A second example is cosmetic
surgery for children with Down syndrome. Although medically unnecessary, it is
becoming more popular for parents to use cosmetic surgery including tongue,
eyebrow, and eyelid reshaping in order to hide the visual cues of Down syndrome
in their children.\(^\text{18}\) Other examples include surgery for children born with

\(^{15}\) Uddo, supra note 2, at 304.

\(^{16}\) NATIONAL INSTITUTE ON DEAFNESS AND OTHER COMMUNICATION DISORDERS,
Cochlear Implants, http://www.nidcd.nih.gov/health/hearing/coch.asp (last visited Apr. 21,
2009).

\(^{17}\) See Robert L. Burgdorf, Restoring the ADA and Beyond: Disability in the 21st
Century, 13 TEX. F. ON C.L. & C.R. 241, 324–25 (2008) (this article discusses a case from
Michigan where a court-appointed advocate charged a deaf mother with neglect after she
refused to consent to cochlear implant surgery for her two deaf children. The court
ultimately held the mother had the right to deny cochlear implants to her deaf children. The
article explains the deaf community’s feeling that cochlear implants are inadequate and a
force of destruction to deaf culture. Burgdorf quotes a former Gallaudet University
president in saying, on behalf of people who are deaf, that “we hold in common this
resentment of efforts to fix us.”).

\(^{18}\) See generally Ann K. Suzedelis, Adding Burden to Burden: Cosmetic Surgery for
Children with Down Syndrome, 8 VIRTUAL MENTOR 538 (2006), available at
http://virtualmentor.ama-assn.org/2006/08/oped1-0608.html; see also National Down
ambiguous genitalia, administration of psycho-altering medications, authorization of child organ donation, and forcing children into controversial and medically unnecessary therapy options such as reparative therapy which aims to change a child’s sexual orientation. All of these examples deal with non-medically necessary treatments for children. Most have major impacts on a child’s future well-being and the direction of their future adult life. Lastly, as in Mary’s case, each of these procedures is generally completed with only the consent of the parent, leaving the patient-child choiceless in the decision.

IV. THE LAW

A. A General Overview of a Child’s Ability to Consent to Medical Treatment

Although each person generally maintains the right to consent to their own medical treatment, this right in children is diminished by the child’s lack of competency. This section will briefly discuss a child’s right to consent and the prevailing interests of the state and parents (who may invoke this right or take it away).


20 See Jennifer Albright, Comment, Free Your Mind: The Right of Minors in New York to Choose Whether or not to be Treated with Psychotropic Drugs, 16 ALB. L.J. SCI. & TECH. 169, 170 (2005); Amanda Slater & Ronald E. Reeve, The “Tug-of-War” over Attention-Deficit Hyperactivity Disorder: Balancing the Interests of Parents and Schools (And Don’t Forget the Kids), 27 DEV. MENTAL HEALTH L. 1, 1 (2008).


22 Sarah E. Valentine, Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth, 19 YALE J.L. & FEMINISM 449, 457 (2008) (giving a detailed account of how these programs are sold to parents despite their devastating impacts on children); see also JASON CIANCIOTTO & SEAN CAHILL, NAT’L GAY & LESBIAN TASK FORCE, YOUTH IN THE CROSSHAIRS: THE THIRD WAVE OF EX-GAY ACTIVISM 71 (2006), available at http://www.thetaskforce.org/downloads/reports/YouthInTheCrosshairs.pdf (this report discusses conversion therapy in detail, finding that “parents are being told that homosexuality is a mental illness, caused primarily by their inability to parent properly.” Id. The treatment for such illness, which parents consent to on behalf of their children, often includes shock therapy or emetics to induce the child into vomiting).
In medical cases dealing with children, there are at least two competing interests—the parent’s rights and duties to protect and care for their child, and the child’s right to privacy and freedom of choice over their own body. For the most part this balancing act takes place on the state level where legislatures may develop statutory language that designates rules. The legislation is often based on the minor’s competency to make medical decisions. However, minors are generally found to “lack the requisite capacity to make decisions for themselves concerning their own medical treatment.”

Therefore, the general rule is that “a minor does not have authority to consent to medical treatment. A healthcare provider must obtain the informed consent of an adult who is authorized under state law to act on behalf of the minor for purposes of making healthcare decisions.” Although parents have a right to protect and care for their children in the manner they see fit, there are various state-recognized exceptions. These exceptions protect the state’s interest in caring for children, which may supersede the parent’s rights in extreme situations. The exceptions may apply to emancipated minors, mature minors, or in sensitive and/or high-risk conditions or procedures.

In cases dealing with sensitive or high-risk procedures, the state may step in to protect the child from parent’s and doctor’s decisions. “[T]he state often has the power to limit parental freedom and authority when parents endanger the welfare of children . . . [the state exerts this authority] to protect those members of society who are unable to protect themselves.” In addition, the state may intervene where the parent has an emotional conflict that has impaired their ability to make a decision based on the best interest of the child (for example, when a conflict of interest arises because a parent offers to donate one child’s organs to save the life of their other child). Another situation that may require state intervention is “when a treatment decision interferes with an individual’s rights and interests,” such as the right to procreation or the right to be free from sterilization. In Mary’s case, under these modern rules, both the conflict of her mother’s interest as well as the strict rules now placed on reproductive rights would certainly be factors in determining whether Mary’s mother or doctor conducted themselves unlawfully by consenting to and performing the hysterectomy.

These exceptions, however, are rarely invoked in the controversial situations discussed in this paper as the state rarely steps in to prevent such procedures.

25 Id. at 671; see also In re E.G., 549 N.E.2d 322, 327 (Ill. 1989) (holding that a minor could refuse a blood transfusion if found to be “mature”).
26 Hawkins, supra note 23, at 2084–85.
27 Lareau, supra note 19, at 145.
28 Id. at 144–46 (discussing the highly pertinent right to procreate and the rule against sterilization).
Instead, the state’s power is generally used only to compel lifesaving procedures when a parent refuses to do so, or to allow a minor to consent to treatment on their own for issues relating to venereal diseases, mental health, or reproductive treatment. In these situations, the state is either protecting the life of the child or protecting the state’s interest in preventing contagious diseases, mentally unstable citizens, or unwanted pregnancies. Therefore, although the state may step in for some of the controversial topics discussed herein, the fact is that they generally do not. The decision is more often left to the parents and child, and because the child is generally found to lack the ability to consent, the decision remains solely in the hands of the parents, leaving the child without choice in the matter.

B. A Doctor’s Duty to Her Patient

The issue of who should be eligible to consent to treatment on behalf of a minor raises interesting questions when compared to a doctor’s rights and duties to her patient for proper care and confidentiality:

Legal compliance is important because failure to obtain effective informed consent may give rise to a cause of action for battery based on healthcare provider’s intentional and unconsented touching of the patient. Additionally, failure to obtain effective informed consent may breach the fiduciary duty that a physician owes to her patient and give rise to a malpractice action.

Generally, where there is no emergency, a medical practitioner must obtain consent of the patient or, where the patient is not competent to give consent (as is generally the case with minors), the practitioner must gain consent from a legally authorized agent. A physician may respect the consent of a minor who is found to be emancipated or mature. In addition, a physician may accept the consent of the state where there is a court order that deemed state intervention necessary to protect the best interest of the child. Therefore, although physicians must protect themselves from performing a procedure on a patient that has failed to consent (in addition to protecting the confidentiality of that patient), in most cases, unless the state intervenes or the minor has been emancipated, physicians are protected only by the consent of the parent.

30 See Vukadinovich, supra note 24, at 668.
C. A Parent's Duty to Her Child—Neglect vs. Abuse

A parent's duty to her child has two competing elements. The first is the deference that the government pays to parents in raising their children. "Decisions of the Supreme Court throughout the twentieth century have granted constitutional protection to parents' rights to rear and educate their children."32 The state, however, has a competing interest and may impose liability against parents who neglect or abuse their children.33 "Parents may face prosecution for neglect or abuse if they do not seek out and obtain necessary medical care for a minor child."34 Therefore, it is a generally recognized rule that a parent has a legal duty to seek proper medical attention and care for their minor children.35 In extreme cases, courts have held that a parent's failure to provide adequate medical care was the proximate cause of death in a homicide prosecution.36 Therefore, while parents do have a broadly-recognized right to parent in the manner they see fit, courts have found that states may usurp those rights in certain situations because parents also have a duty to provide adequate medical care in the best interest of the child.

V. DIFFICULTIES IN ADDRESSING THE PROBLEM

The law surrounding a child's right to refuse treatment for the controversial procedures discussed in this Note is complex. The area is complicated by the many interests involved including those of parents, doctors, states, and of course children. In addition, this area of the law is likely underdeveloped with regards the technical difficulties of bringing actions in such cases. In Mary's case, for example, she is highly unlikely to ever bring an action against her mother who, while making a devastating decision in Mary's opinion, did the best that she could in a difficult situation. Mary understands this and has reconciled her frustration with her mother's decision through her mother's apology and Mary's love for her mother. Therefore, cases are rarely brought in these situations.

In addition, statutes of limitation may prevent the courts from ever addressing actions brought by children against their parents for over-reaching medical authorizations. In most of the examples given, the treatment is authorized when the child is very young and it is not until years, if not decades later, that the child realizes the extent of the harm that was done.37 These cases may, therefore, often

32 Hawkins, supra note 23, at 2080 (offering many cases which stand for the proposition that courts must allow parents to rear their children the way they see fit).
33 See Vukadinovich, supra note 24, at 671.
34 Id.
35 Baruch Gitlin, Annotation, Parents' Criminal Liability for Failure to Provide Medical Attention to Their Children, 118 A.L.R. 5th 253 § 2(a) (2004).
36 See id at § 11.
be barred by the statute of limitations for actions like battery, neglect, or breach of confidentiality.\textsuperscript{38}

Because of the limitations on bringing an action of this nature in court, it is more likely that these issues should be solved on a legislative level. States can take it upon themselves to create a statutory scheme that more adequately addresses the interests involved and seeks to protect children from overzealous parents and medical advisors. States or organizations such as the Down Syndrome Association (which opposes cosmetic surgery for the purpose of hiding visual cues of the condition) could benefit from non-legal remedies. Such options may include advocacy or educational campaigns that reach both parents and medical practitioners. These campaigns could educate decision makers about the long term effects of these procedures on children, both physically and emotionally. They could also help to open the discussion of the many rights and interests that are involved and diminish hasty decisions that are based solely on one party’s interest.

Therefore, although the law in this area may not develop through the courts, due to the limitations on bringing such cases—including the influence of familial relationships and statutes of limitation—there are alternative methods of meliorating children’s welfare in these cases. First, legislative action should create rules and regulations which protect children from narrow-sighted parents or physicians. Second, education and advocacy on behalf of minor children should help to expose the weight of these decisions and how they may effect the children’s future adult lives.

VI. CONCLUSION

Although this paper fails to address the full scope of remedies available, the law should seek to protect children from those who are able to consent on their behalf. Hysterectomies, cochlear implants, organ donation, cosmetic surgery for children with Down Syndrome, genital reconstruction, and reparative therapy all have long lasting effects that will stretch into a child’s adulthood. Therefore, the repercussions of these decisions must be taken very seriously where a person’s life is to be altered without their consent.

This is not so much a tale told on my family, as it is an honoring of a man I revere, my uncle, George.

“Uncle George is a saint,” my mother used to say. He was a family man with an amazing ability to keep a secret. Uncle George grew up in the small Montana town of Coopersville, a town set at the foot of a bowl of mountains on a fertile glacial plain called Indian Prairie. George was from an exceptionally poor family. Even though it was the Depression in that farming community, and no one had much money, their poverty was worse than most.

As everyone in town knew, George was, in the ugly language of the time, the bastard son of a drifter. Apparently, if a father stayed around after a child was born, the child was legitimate; if only the mother stayed around after the birth of their child, the child was, and in some places, still is, a bastard.

George’s father had done chores for his mother’s parents working around their house and small farm for a while. He stayed just long enough to impregnate their pretty, tiny daughter, May, a teenager at the time, and then, as most drifters do, he left town without even knowing he had fathered a child. May was left to face the disgrace of an out-of-wedlock pregnancy, labor and then the delivery of her only child, a son who would grow to be my Uncle George.

But her parents stood behind her, and May, like other women on the prairie in those days, was made of strong stuff. She raised George to be God-fearing, hard-working and deaf to the taunts of the boys from traditional two-parent families. As a school boy, George fought his way through crowds of detractors, until finally, by high school, he had worn down his detractors, who no longer wanted to fight George, alone or even in large groups.

George, by then, my mom said, was strong, well built, with remarkable eyes and wonderfully handsome. And like so many other high school boys, George fell in love sometime between grade school and high school with a girl who would grow to be my Aunt Helen. George carried the school books of Aunt Helen, my mother’s sister, as they walked from class to class. Not too many months went by before the gossips at school were linking George and Helen’s names, and they were right: The pair had fallen deeply in the sort of love that lasts a lifetime.

Sadly, during those high school years, there was another drama unfolding at home for Helen, and her sisters: my mom, Dorothy, and the family’s youngest child, Rose. Their mother was slowly dying of heart disease and kidney failure in a bed set up for her in their living room. Although the Depression had hurt them like
all the families on the prairie, their family had money for just about everything—
everything except, of course, the medical knowledge that would have saved their
mother's life.

My grandmother finally died peacefully at home surrounded by her children.
My own mother could remember those last minutes clearly. "It's so beautiful
there," my grandmother said.

And then, she said, "I wish I could take you with me."

She couldn't of course, and my grandfather was then alone with a wheat ranch
and three teenaged girls. It was the custom of those days to send motherless
children, especially daughters, away to live with relatives. Ours was no different.
Helen, and her two sisters, were sent across the Cascade Mountains to neighboring
Dupont, Washington, to live with our Auntie Inez, a schoolteacher. Auntie Inez, a
no-nonsense sort of woman, took in her grieving nieces. She was perhaps more
practical than compassionate, however, when it came to solving the problems of
teenagers and their struggles with hormonal storms.

Helen, along with both her sisters, was sent to Dupont schools, and while in
school, she met and perhaps fell in love briefly with a boy she met there. I have
always thought that Helen, grieving for her mother, must have wanted more than
anything else, comfort in someone's arms. But this boy, nameless in the family,
was apparently not much liked by anyone, including even Helen.

I can't imagine what it would have meant for Helen to tell Auntie Inez that
she was "in trouble." I certainly would not have had the courage. So, Helen didn't
tell. In fact, she didn't tell anyone, not even her own sisters. Instead when the
school year ended, Helen returned to the ranch and to her father with a terrible
secret: she was pregnant.

There was just one person on the prairie that Helen did trust enough to tell. It
was, of course, the boy she had loved since grade school: George. George had an
amazing solution. They could marry. He had always loved her, he argued, and he
would protect her and her unborn child from the taunts of the boys and girls from
more traditional families. Those were taunts he already knew too much about.

My grandfather was informed of Helen's secret and George's solution all on
the same evening. But our grandfather was a compassionate man. According to my
mom, he offered to go along to be the witness at a marriage ceremony before a
justice of the peace in Utah, since both were too young to marry under Montana's
law.

Helen and George's son, John, now with George's family name, was born a
scant seven months later. But the town's gossips took little notice. No one was
even quite sure when the marriage had taken place, and besides, a baby on the way
was good news then as now. After all, everyone knew those two had been in love
for years.

Our family's tale becomes downright ordinary, at least for the next few years.
George and Helen moved to the ranch with their infant son, and eventually took
over from my grandfather. George was Grandfather’s student in wheat ranching, and George, grateful for the opportunity, was a quick study.

George and Helen had two more children, my cousins, Jean and Joe. They looked up to and adored their big brother Johnny. Their parents felt something similar. Johnny was an extraordinary son—to them both. Life on the ranch went by in the cycles familiar to farm kids everywhere: spring planting, summer work, autumn harvest, winter, school and rest.

My first real memory of Uncle George was as a sort of Pied Piper when my family came for visits to Montana. While he drove a green and yellow John Deere tractor, his children, Johnny, Jean and Joe, and my sister, and I clung and clamored all over the tractor. He needed the weight on the tractor of the children, he explained to my Aunt Helen. She was a little worried that he wasn’t getting all that much plowing done.

Uncle George was also Santa Claus at Christmas, a fact I discovered when I became a teenager. I caught a glimpse of him with sleigh bells and presents in the ranch hallway one wonderful Christmas Eve when we visited, and I loved him more.

Sadly, our ordinary years didn’t last long. When Johnny was fourteen, he was killed in the barn in a mysterious accident, overcome by fumes in an enclosed space from a leaky gasoline can.

Uncle George was nearly inconsolable—we all were. Perhaps of all of us cousins, Johnny had the most promise. John was strong, well-built, with remarkable eyes, and wonderfully handsome. Everyone said he looked like Uncle George, and perhaps for that reason, John and his father were unusually close. My mom flew from Virginia, where we were living, to Montana to be with her sisters, and the rest of our family when they buried John.

The last time I saw Uncle George, he was well into his eighties. Aunt Helen had died a few years earlier after a long struggle. George had not left her side for more than a few hours throughout her illness. By then, Uncle George was suffering from Parkinson’s, growing older and more lonely with each planting cycle. The night I stayed with him, he sat in a chair beside a stone fireplace. The picture on the mantle showed his smiling son, Johnny, holding the rope that tethered a healthy young calf. Uncle George spent that night telling me about how gentle his son, John, had been with animals. “He had a way with them,” Uncle George said with conviction. And, it was obvious how proud he was of the tall boy who had died at age fourteen.

Two years later, I returned to Montana for Uncle George’s funeral. A freshly dug, open grave with a carved headstone waited beside the tent that sheltered his grieving family, George’s children and grandchildren, and the casket. My cousin, Jean, as dear to me as a sister, stood next to me, weeping for her dad.

Suddenly, she whispered urgently to me that the gravestone was wrong! The marriage date was the year Johnny was born. Her parents were married the year before, she said. I put an arm around her and prayed hard to know what to say. My
mom, my source on the secret of Johnny’s birth, had exacted a promise from me when I was a teenager. I promised then that I would keep the secret that even Johnny never knew.

Finally, my weak answer came: “Let it go, Jean,” I said, protecting George, his wife and first born son. “It’s not worth the trouble of cutting a new stone for just one number.”

My words to Jean would have been different had I been free of the promise I gave to my mother years ago. I would have told Uncle George’s daughter that there truly was no one else quite like her father in our whole family. I would have said that Uncle George, like St. Joseph, lived a life that defined a legitimate father by his love for a mother and her unborn child.
Marital Rights for Teens: Judicial Intervention That Properly Balances Privacy and Protection

Pamela E. Beatse

I. Introduction

Teenage marriage and teenage pregnancy are deeply intertwined through legal and social policy in the United States. When the rights of minors, parents, and the state conflict, it causes tension that judges or legislators must resolve by balancing the associated interests and potential harms. The accompanying monologue, *Uncle George’s Story,* deals with each of these issues and demonstrates why society should create laws that maximize privacy rights of teens while still providing them protection against duress, deception, and abuse.

Prominent themes that arise in the context of teen marriage and/or pregnancy include whether a minor has the capacity to consent to marriage, alternative forms of consent by parents or judges, the effect of teenage pregnancy on teen parents and their offspring, the power that states have to regulate marriage, and the problems associated with single-parenthood or abortion. Topics come to the foreground or recede to the background depending on numerous variables. These include whether the topic is viewed historically or in a modern context, who is seeking the marriage, which state the minors reside in, why they want to get married, and the process through which a marriage license is granted.

My discussion will address the interplay between the common law origins of a minor’s capacity to marry and statutory consent requirements, regardless of whether the female teen is pregnant. Specifically, in Part I, I will briefly describe the status of teen marriage in the United States. Then, in part II, I will summarize the common law origins of marital consent for minors and compare this to various state statutory schemes that have developed over time in America. I will look at the Utah policy on teenage marriage in Part III by examining the state’s marriage statute and relevant case law. This will be done by addressing two features of

Karen Williams, Monologue, *Uncle George’s Story,* 11 J.L. & FAM. STUD. 573 (2009); 2009 UTAH L. REV. 621. This monologue tells the story of George, a boy who grew up in Montana as an “illegitimate child” during the depression. After enduring ridicule for most of his young life, George fell in love with a girl who became pregnant with another young man. Rather than allow her and her expected child to be stigmatized by society, George offered to marry her even though they were both minors. The teens’ parents agreed, and the teens were married in Utah because the marriage was not permitted under Montana law.
Utah’s marriage statutes: (1) the requirement that minors under the age of sixteen complete premarital counseling, unless it is not reasonably available; and (2) the encouragement given to persons under nineteen-years-of-age to obtain premarital counseling. Utah has taken this minority position because “it is the policy of the state of Utah to enhance the possibility of couples to achieve more stable, satisfying and enduring marital and family relationships.” The premarital counseling requirement for young teens exists even when the teens have consent of a parent, a legal guardian, or a judge. This law does not preclude marriage for minors when counseling is unavailable or otherwise waived by the court. Thus, this law fulfills the important public policy of providing strong protection for minors, and it does not infringe on their fundamental right to marry. I will not examine annulments, including the distinctions between void and voidable teenage marriages, as it is beyond the purpose of this paper.

II. STATUS OF TEEN MARRIAGE IN THE U.S.

Teenage marriage rates have dramatically fallen since the late 1950s when the median marrying age for women was nineteen. In part, pregnant teens likely participated in many of these teen marriages because the disgrace of bearing a child out-of-wedlock was so great, and there was no legal way to terminate the pregnancy. Additional societal pressures to enter into an early marriage came from the cultural or religious backgrounds of many families. This continues today, as girls who are Hispanic, very conservative, or from the South are more likely to get married as a teen due to their cultural upbringing. Thus, the current social climate still requires a legal balancing of the rights and interests of teens, their parents, and the state.

2 UTAH CODE ANN. § 30-1-9(3)(b) (2008) (requiring minors under the age of sixteen to obtain premarital counseling); UTAH CODE ANN. § 30-1-30 (2008) (announcing the Utah policy of encouraging marriage applicants under the age of nineteen and previously divorced applicants to receive premarital counseling).

3 UTAH CODE ANN. § 30-1-30 (2008).


5 Id.

6 Id.

7 Id. The relevancy of this issue was clearly demonstrated by an upheaval during the 2008 political campaign of Vice-Presidential candidate Sara Palin regarding her unmarried, pregnant teenage daughter. Peter S. Canellos, Convention Perspective: Palin Provides Real-life Drama, BOSTON GLOBE, Sept. 3, 2008, at A1. Conservatives stressed that while the girl made a mistake, she was correcting it by keeping the baby and making plans to marry the baby’s father. Id. Others questioned if it was in the teens’ best interests to get married, but felt it was a good opportunity to address teenage pregnancy. Julian Guthrie, Palin Pregnancy Highlights Need for “the Talk,” S.F. CHRON., Sept. 8, 2008, at A1.
Studies show that early marriages tend to be less stable. Yet, proponents of young marriage argue, "the debate over whether teenagers are prepared for marriage [is] being framed through the lens of a middle-class, well-educated demographic, for whom marrying before being able to drink legally now may look alien, or hillbillyish." These proponents explain that this attitude does not recognize the reality that, although we now treat teens more like children, they were treated more like almost-adults historically. Further, this may be doing a disservice to today's teens by sheltering them from the complexities of modern life. Uncle George's Story highlights many of these themes and demonstrates that some teenagers are mature enough to contemplate adult responsibilities and enter into an adult relationship through marriage.

III. BACKGROUND: CONSENT UNDER COMMON LAW AND STATE STATUTORY SCHEMES

A. Marriage and the Child: Common Law Consent for Minors

Current statutory schemes supersede common law, yet the underlying influence of common law principles continue to reverberate through the justifications and policies still used by courts. Under pure common law, children reached the "age of consent for marriage" at the tender age of seven. During these early times, the law considered children the property of their fathers, which led to betrothals at early ages. These early promises to marry served as a way to transfer property rights, make political alliances, and maintain proper lineage within families. Seven years-of-age was an important legal dividing line between when children had capacity to understand right and wrong, and when courts could

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8 See generally Matthew D. Bramlett et al., First Marriage Dissolution, Divorce & Remarriage: United States, Advance Data, May 31, 2001, available at http://www.cdc.gov/nchs/data/ad/ad323.pdf (reporting that teenage marriages end in divorce at a rate two to three times higher than when the marriage participants are at least twenty-five years old).
9 Kershaw, supra note 4, at B1 (citing comments made by Dr. Bradford Wilcox, an associate professor of sociology at the University of Virginia, and Dr. Karen Sternheimer, a University of Southern California sociology lecturer).
10 Id.
11 See id.
14 Id.
hold them accountable for their actions.\textsuperscript{15} Children between seven and fourteen years of age "[were] presumed not to have the capacity to consent" but they could be found to have capacity or intent under certain circumstances.\textsuperscript{16} Those who were at least fourteen "[were] presumed to have capacity to consent."\textsuperscript{17}

\section*{B. Alternative Forms of Consent: \textquotedblright Consent-Plus\textquotedblright{} for Young Teens}

All states have established a statutory minimum age under which minors may not consent to a marriage without first obtaining permission from a parent or legal guardian.\textsuperscript{18} Most jurisdictions use the age of eighteen as the minimum for capacity

\textsuperscript{15} See John J. Conrad et al., Juvenile Justice: A Guide to Theory, Policy, and Practice 5 (6th ed. 2007) (explaining that in criminal law, children under the age of seven were unable to form intent and the penalties for children between seven and fourteen were limited).


\textsuperscript{17} Id.

to consent. Requiring parental consent is important because it “lessens the likelihood of subsequent parental efforts to invalidate” underage marriages.

Further, if a teenager under eighteen years-of-age desires to get married, most jurisdictions require a consent-plus standard whereby the teen must obtain state consent through a judicial order even when a parent or legal guardian has already given consent. A majority of states created statutory provisions for teenage marriage as a result of America’s traditional bias that pregnant minors should get married, which is why many states include special provisions for pregnant teens. Also, some statutory schemes require physical evidence of pregnancy. For instance, the Ohio statute explicitly allows a court to delay issuing a license until it is convinced the teen is pregnant and will carry the child to term. A minority of states give greater consent power to the state at the expense of teens and their parents to ensure the pending marriage is in the best interests of the minor.

IV. UTAH’S LEGAL RESPONSE TO MARRIAGE FOR MINORS

Each state has a compelling interest in protecting the public health, safety, and welfare of its citizens. When minors are involved, the state has an even greater obligation under the parens patriae doctrine to protect children. Establishes the state’s right to provide a safety net for children when their parents fail to properly protect them from harm. However, the United States Supreme Court has also held that parents have an inherent right to the “custody, care, and

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\text{CODE ANN. § 26.04.010 (2005); W. VA. CODE § 48-2-301 (2001); WIS. STAT. § 765.02 (2006); WYO. STAT. ANN. § 21-1-102 (2000).}
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\text{19 WEISBERG & APPLETON, supra note 12, at 203 (noting that Mississippi uses age twenty-one).}
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\text{20 Id. at 205. “Nonage” is a family law term that refers to marriages where at least one of the parties is a minor.}
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\text{21 “Consent plus” is a term I created to describe the fact that parental consent is not enough for most teens between the ages of fourteen and eighteen.}
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\text{22 See, e.g., ARIZ. REV. STAT. § 25-102 (2003); UTAH CODE ANN. § 30-1-9 (2008).}
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\text{23 See, e.g., DEL. CODE ANN. tit. 13 § 123 (1999 & Supp. 2006); FLA. STAT. ANN. § 741.0405 (LexisNexis 2008).}
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\text{24 OHIO REV. CODE ANN. §§ 3101.04 (LexisNexis 2008).}
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\text{25 See WEISBERG & APPLETON, supra note 12, at 205 (discussing Utah and California’s premarital counseling requirement for teenage marriage license applicants).}
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\text{26 See, e.g., Bastian v. King, 661 P.2d 953, 956 (Utah 1983).}
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\text{27 Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Charles P. Archer, Note, Troxel v. Granville: The End of Grandparent Visitation, 3 J.L. & FAM. STUD. 179, 181–82 (2001). Here, Archer explains, “[u]nder the parens patriae principle, the state has an obligation to intervene to protect children under certain circumstances: 1) when their parents have not met their parental duties; 2) when the family is breaking up or has broken up; and 3) when there is a compelling public policy.” Id.}
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\text{28 See, e.g., Prince, 321 U.S. at 166.}
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nurture” of their children. Consequently, the Utah statute seeks to properly use its parens patriae authority without infringing on the rights of the minor or their parents.

A. Statutory Marital Consent for Minors under Utah Law

The Utah statute controlling the rights of minors to consent to marriage defines a “minor” as “a male or female under 18 years of age.” The statute requires “the signed consent of the minor’s father, mother, or guardian” before issuing a marriage license. If the parents are divorced, then only the parent with legal custody (if sole legal custody was awarded) or joint physical custody (if joint custody was awarded) may provide legal signed consent. Alternatively, if neither parent has custody, the minor’s legal guardian must provide “proof of guardianship” and signed consent. Utah is a consent-plus state when the marriage license applicant is fifteen; and the statute requires written authorization from either “a judge of the court exercising juvenile jurisdiction in the county where either party to the marriage resides” or “a court commissioner as permitted by rule of the Judicial Council.”

B. The Dearth of Consent Precedent: Utah Case Law

Utah courts have rarely found opportunities to rule on cases involving controversies regarding a minor’s capacity to provide consent for a marriage, or as a result of being married. State v. Huntsman and State v. Holm are the two primary cases interpreting Utah law governing a minor’s ability to consent in marriages. Huntsman involved the conviction of an adult man for rape because he had an “illicit act of sexual intercourse” with a married seventeen-year-old who was not his wife. Huntsman argued that a legally-married minor is emancipated and, if he or she gets a divorce, then that teen is no longer required to obtain consent to remarry from a parent, guardian, or the court. Therefore, he reasoned that the married teenager could legally consent to illicit sex (in an adulterous relationship), so the state could not charge him with rape. The court disagreed,

29 Id.
35 204 P.2d 448 (Utah 1949).
36 137 P.3d 726 (Utah 2006).
37 Huntsman, 204 P.2d at 449.
38 Id.
39 Id.
finding that the legislative purpose for requiring consent from a parent, guardian, or the court “is to protect young girls from the illicit acts of the opposite sex.”

Although the law presumes that marital sex will occur after a minor gets legally married, the court recognized that “such a married woman still is immature and still needs the protection” of consent laws. This case is also recognized for having set eighteen as the legal “age of consent” for marriage in Utah.

_Holm_ is less on point because it primarily deals with bigamy under UTAH CODE ANN. § 76-7-101. The thirty-two-year-old man in this case was “a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints (the “FLDS Church”).” He was convicted for “bigamy” and “unlawful sexual conduct with a minor” after he entered a second marriage with his first-wife’s sixteen-year-old sister. The court found that an “inquiry into the possible existence of injury and the validity of consent” was necessary in this case. Holm argued that as long as a parent provided consent, there was “no rational justification” for treating an adult who was legally married to a minor differently from one who was not legally married when consensual sex occurred. The court held that the “state-determined framework within which the legal status of marriage exists” ensured that the law adequately protected legally married minors from abuse or harm. The court reasoned that the legislature has authority to control a minor’s ability to consent because the State has a duty “to ensure the smooth operation of laws” by protecting “beneficial” unions while discouraging “harmful” ones. _Huntsman_ and _Holm_ provide the policy basis of consent laws, show why the State can set the age of consent, and delineate the statutory levels of capacity for minors.

C. Premarital Counseling for Marrying Minors: the Minority Approach that Properly Protects Vulnerable Minors

Ten years ago, the Utah legislature enacted a bill clarifying that minors under the age of fifteen could not legally receive a marriage license, and mandating that fifteen-year-old applicants participate in premarital counseling prior to obtaining a

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40 Id. at 451.
41 Id.
42 Id. at 450.
43 State v. Holm, 137 P.3d 726, 730 (Utah 2006).
44 Id.
45 Id.
46 Id. at 744.
47 Id. at 751–52.
48 Id.
49 Id. at 744.
license. This followed a developing trend among a minority states that encouraged premarital counseling by requiring counseling for teenage marriage license applicants, providing shorter waiting periods, or reducing licensing fees. Legislators generally promote premarital counseling because marriages are stronger when the couple communicates their “mutual expectations, cultural and religious differences, and feelings about children” prior to marriage. The goal of premarital counseling is to cultivate successful marriages by teaching both partners life skills so they can manage conflicts respectfully, properly express appreciation, and keep their love strong.

Utah followed this minority trend to protect minors from rushing into marriage, whether due to duress, abuse, or the simple heedlessness of youth. To accomplish this, the legislature statutorily declared that minors younger than fifteen-years-of-age could not obtain a valid marriage license in Utah regardless of the circumstances. Further, the legislature sought to increase protection of minors by encouraging premarital counseling for teenagers under the age of nineteen.

The specific statutes governing premarital counseling include sections 30-1-9(3)(b) and 30-1-30, to 30-1-38 of the Utah Code. Section 30-1-9 requires that “if the male or female is 15 years of age, the minor and the parent or guardian of the minor shall obtain a written authorization to marry” from the court after it finds

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50 Approval Required for Marriage of a Minor Act, 1999 Utah Laws ch.15 § 2 (1999) (codified as amended at UTAH CODE ANN. § 30-1-9 (2008)). This is similar to a California provision:

[T]he court shall require the parties to the prospective marriage of a minor to participate in premarital counseling concerning social, economic, and personal responsibilities incident to marriage, if the court considers the counseling to be necessary ... the court shall consider, among other factors, the ability of the parties to pay for the counseling.


53 Id.

54 See 1999 Gen. Sess. H. Floor Debate (Utah, Feb. 9, 1999) (statement of Senator Lyle Hillyard). Senator Hillyard explained this statute is directly aimed at limiting the number of marriages where a young minor is involved because teens still come to Utah from other states. Id. This is exactly what happened in the monologue when George and his pregnant bride came from Montana to Utah to take advantage of Utah’s marriage laws. Supra note 1.

55 Id.

56 Compare UTAH CODE ANN. § 30-1-9(3)(b) (2008), with UTAH CODE ANN. § 30-1-30 (2008) (showing differing treatment between fifteen-year-olds and minors aged sixteen to eighteen).
that the marriage is voluntary and is in the minor’s best interest.\textsuperscript{57} Then, the court must “require that both parties to the marriage complete marital counseling” unless it “is not reasonably available.”\textsuperscript{58} Premarital counseling may take many different forms and still be acceptable under the law. Teens may attend “lectures, group counseling, individual counseling and testing.”\textsuperscript{59} Minors can avoid this requirement by waiting six months from the date of their application until the issuance of the marriage license.\textsuperscript{60}

Sections 30-1-30 to 30-1-38 give more detail regarding the terms, conditions, and procedures that govern premarital counseling. For instance, legislators created a seven-member Premarital Counseling Board,\textsuperscript{61} which is authorized to determine counseling procedures and standards for evaluating the program. This Board decides whether approved counseling procedures create awareness of potential problems that may arise in the proposed marriage, teach strategies for dealing with these problems, and “induce reconsideration or postponement where applicants are not sufficiently matured or not financially capable of meeting the responsibilities of marriage.”\textsuperscript{62}

Some question whether premarital counseling is really necessary or effective.\textsuperscript{63} Others believe that requiring counseling creates an improper “roadblock to marriage” because young teens will avoid the burdens of the process by simply living together.\textsuperscript{64} However, numerous studies support that premarital counseling is a “generally effective” tool for “producing significant immediate gains in communication processes, conflict management skills, and overall relationship quality.”\textsuperscript{65} Thus, the Utah procedural requirements and safeguards collectively prevent the State from improperly infringing on family privacy or the minors’ fundamental right to marry. Premarital counseling effectively promotes

\begin{itemize}
  \item \textsuperscript{57} \textsc{Utah Code Ann.} § 30-1-9 (2008).
  \item \textsuperscript{58} \textsc{Utah Code Ann.} § 30-1-9(3)(b) (2008).
  \item \textsuperscript{59} \textsc{Utah Code Ann.} § 30-1-36 (2008). The statutes explicitly allow premarital counseling by religious leaders as long as they provide certification that the minors have participated. \textsc{Utah Code Ann.} § 30-1-33 (2008).
  \item \textsuperscript{60} \textsc{Utah Code Ann.} § 30-1-33 (2008).
  \item \textsuperscript{61} \textsc{Utah Code Ann.} §§ 30-1-31 to -33 (2008). § 30-1-31 explains the board must have four laypersons and three professionals working in psychiatry, psychology, social work, marriage counseling, the clergy, law, or medicine.
  \item \textsuperscript{62} \textsc{Utah Code Ann.} § 30-1-32 (2008).
  \item \textsuperscript{63} \textsc{Weisberg & Appleton, supra} note 12, at 205 (citing Wesley Adams, \textit{Marriage of Minors: Unsuccessful Attempt to Help Them}, 3 FAM. L.Q. 13 (1996)).
  \item \textsuperscript{64} 1999 Gen. Sess. H. Floor Debate (Utah, Feb. 9, 1999).
  \item \textsuperscript{65} Jason S. Carroll & William Doherty, \textit{Evaluating the Effectiveness of Premarital Prevention Programs: A Meta-Analytic Review of Outcome Research}, 52 FAM. REL. 105, 114 (2003). This meta-analysis reviewed twenty-three studies conducted to evaluate premarital counseling. \textit{Id.} at 107. It concluded that premarital counseling participants’ marriages were thirty percent stronger than marriages where the spouses did not participate in premarital counseling. \textit{Id.} at 105.
\end{itemize}
healthy marriages for minors and strikes an appropriate balance between state parens patriae authority, parental authority, and a minor's individual rights.

V. CONCLUSION

Uncle George's Story, pinpoints the many policy tensions at play when minors desire to marry, especially when the minor female is pregnant. Clearly, George was a young man deeply affected by his experiences growing up as an illegitimate child. He made the voluntary choice to marry his childhood sweetheart, who was pregnant with another man's child. With the support of her father, George and his bride were legally married in Utah and had a strong, loving marriage. Yet, this story is not the typical story when teens marry.

Consequently, under pure common law and subsequent statutory provisions, all states have carved out strict rules governing the process teenagers must use to obtain permission to marry. Utah has gone even farther to encourage the formation of strong marriages through its premarital counseling statutes. These statutes encourage older teens (and require fifteen-year-olds) to participate in premarital counseling. Premarital counseling has proven effective in helping participants create a solid foundation for their subsequent marriage. At the same time, it is not an undue burden to obtaining a marriage license, and there is discretion to waive the requirement by choice (through a six-month waiting period) or necessity (when it is not reasonably available). Utah's approach properly protects vulnerable minors from their own immaturity and limits the potential for duress by parents or other adults. Although the Utah statutes represent a minority position, they are a reasonable response to the tensions caused by teenage marriage and teenage pregnancy and similar legislation should be adopted by other states.