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REGULATING THE AMERICAN FAMILY

Steven Mintz

ABSTRACT: *The article offers an interpretive synthesis of recent scholarship on family law and government regulation of the family. It traces changes in family law from the colonial era to the present and concludes with an analysis of family law as a discourse involving four broad themes: the law's social functions; the social values upheld by law; the relative responsibility of private individuals and the larger society for enforcing values; and the ways in which the law intervenes in family affairs.*

Until quite recently, American family historians tended to focus their attention on what might be termed the inner dimension of family life: the family's functions and structure, its division of domestic roles and economic strategies, and its developmental cycle and emotional and power dynamics. In the last few years, however, a growing body of scholarship has turned outward, to the legal and institutional context of family life: the laws, institutions, and policies that define normative family relations, stigmatize deviance, and regulate domestic behavior. What this large body of research has decisively demonstrated is the consistent belief throughout American history that there is a strong public interest in regulating what occurs within families, as a way, at various times, of promoting social order, reducing the costs of caring for the poor and the infirm, discouraging divorce, encouraging population growth, and curbing domestic violence and abuse. This scholarship has also shown that a full understanding of family life in the past must take account of the shaping legal and institutional framework in which the family is embedded.

This essay, a synthesis of recent scholarship

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Steven Mintz is Associate Professor of History at the University of Houston and, during 1989–1990, Visiting Scholar at the Center of European Studies, Harvard University. His most recent book, coauthored with Susan Kellogg, is Domestic Revolutions: A Social History of American Family Life *(New York: Free Press, 1988).*

on family law and family policy over the past three centuries, examines the legal and institutional context of American family life. It argues that the history of government regulation of the family can best be understood as a discourse involving the shifting balance of four primary and changing constructs: conceptions of the functions of family law; notions of the values family law should promote; views of the relative role of private individuals and government in regulating families; and forms of public intervention within families.

As we shall see, early colonial New Englanders conceived of family law as moral pedagogy, in which law's primary function was to articulate a religious ideal of hierarchy and patriarchy. A mutually reinforcing matrix of civil and religious authorities developed a range of formal instruments of familial oversight, yet enforcement of family norms rested largely on informal mechanisms, except in cases involving the poor or flagrant and repeated violations of communal norms.

By the early nineteenth century, public discourse on the family had radically shifted. A republican conception of law promoted a contractual ideal of social relationships stressing individual responsibility within the family as well as in commerce. Although early-nineteenth-century popular culture tended to picture the family as a private haven or retreat, it was, paradoxically, during this period that reformers and local governments, eager to rectify parental failures, acquired new authority to act *in loco parentis*, creating a variety of surrogate families including orphanages and houses of refuge, for wayward and neglected youths.

In the late nineteenth and early twentieth century, family law increasingly began to be conceived in therapeutic terms—a trend evident in the development of new notions of "parental fitness," "parental duty," and "child welfare." Child savers, family preservationists, and state and municipal governments invoked therapeutic ideals to justify new programs to reclaim delinquent youths and to keep families intact, including the development of juvenile and family courts and marriage counseling.

In recent years, legal discourse has taken a fresh turn, toward an instrumental conception of family law stressing equality, individual rights, diversity, and the terminability of family relationships and obligations. Ironically, at the same time that the courts have upheld broad conceptions of familial privacy, encompassing such matters as birth control and abortion, jurists have also permitted new forms of intervention into areas previously regarded as bastions of family autonomy.

REGULATING THE COLONIAL FAMILY

As Marylynn Salmon has shown, the colonial law of the family varied sharply from one colony to another, reflecting differences in religious ideology, regional economies, and demographic circumstances. Colonies actively involved in trade with England, including Maryland, New York, South Carolina, and Virginia, created chancery courts modeled on those in England and retained English common law principles more readily than Connecticut, Massachusetts, and Pennsylvania, where religious ideas led authorities to reject English common law and equity (Salmon 1986, pp. 185–193).

During the seventeenth century, lawmakers in Massachusetts and Connecticut revised English common law and created a new system of family law that reflected certain broad assumptions about how families were to be ordered and authority distributed, the nature of the marital bond, and the proper roles of married women and children. This body of law embodied and enforced basic religious and ideological beliefs: the hierarchical and patriarchal nature of familial relationships, marriage as a civil contract, an emphasis on family unity and interdependence, wifely submission to her

husband's will, and children's dependent and subordinate status (Salmon 1983, pp. 129–151, 1986, pp. 3–13).

In Puritan Massachusetts and Connecticut, local governments encouraged all individuals to marry and live in "well-ordered" households by taxing bachelors and single women who failed to marry, fining couples who lived apart from each other, and requiring unmarried persons to enter established households as boarders or servants (Abramovitz 1988, pp. 53–54).

Since marriage was regarded as a public act and an alliance among families, town governments in New England compelled brides and grooms to submit to extensive community and family supervision. A father had a legal right to determine which men could court his daughters and a legal responsibility to give or withhold consent from a child's marriage, though he could not "willfully" or "unreasonably" deny his approval. No couple could legally join in marriage without announcing their intention to do so at three successive public meetings or by posting a written notice on the meetinghouse door for fourteen days (Morgan 1966, pp. 30–34, 83–84). In all colonies, however, a shortage of clergy and onerous regulations contributed to large numbers of "informal" marriages lacking legal sanction. In eighteenth-century Virginia, where a marriage license cost the equivalent of 465 pounds of tobacco and the only officials authorized to sanctify marriages were ministers of the Church of England, informal marriages appear to have been particularly common (Bloomfield 1976, pp. 93–94).

Because Puritan lawmakers considered marital unity under the authority of the husband a prerequisite of social stability and because they assumed that husbands (or grown sons) would provide for their wives and widows, they tended to eliminate certain English common law protections for married women which assumed that husbands and wives had separate interests within the family. Both Massachusetts and Connecticut rejected English ideas of separate estates for women, dower interest, prenuptial contracts, and suits in equity as well as certain common law protections for women from coercion by their husbands. In sharp contrast, in Maryland, South Carolina, and Virginia, where the death rate was higher and widows were more likely to be left with young children, dower was extended to personal and real property. These colonies also retained English protections against coercion by husbands (by requiring wives to acknowledge their consent to the conveyance of property in a private examination apart from their husbands). New York and South Carolina recognized separate estates, extending women limited rights to own and control property apart from their husbands (Salmon 1986, pp. 185–193).

Although married women in colonial New England were legally subordinate to their husbands, they did have limited legal rights and protections. Husbands who refused to support or cohabit with their wives were subject to legal penalties. Because the Puritans regarded marriage as a civil, not a sacred, contract, they permitted divorce in cases of a husband's impotence, cruelty, abandonment, bigamy, adultery, incest, or failure to provide. Massachusetts granted approximately forty absolute divorces between 1639 and 1692; another twenty-three divorce petitions were brought to the Governor's Council from 1692 to 1789. In contrast, such colonies as Maryland, New York, and Virginia strictly opposed absolute divorce with right to remarry, while allowing divorce *a mensa et thoro* (separation from bed and board) and private separation agreements (Cohn 1970, pp. 35–55; Cott 1976a, pp. 586–614, 1976b, pp. 20–43; Koehler 1980, pp. 49–50, 77–79, 151–153; Salmon 1986, pp. 58–80; Weisberg 1982, pp. 117–131). In addition to authorizing divorce as protection for women, the Massachusetts Bay and Plymouth colonies also enacted the first laws in the western world protecting "marryed woemen . . . from bodilie

correction or stripes by her husband . . . unless it be in his own defense" (Pleck 1987, pp. 17–33).

The law in New England treated children, like married women, as subordinate and dependent beings. In exchange for paternal support, education, and training, children's service and earnings were their father's property. In order to support paternal authority over children, one statute adopted by the Massachusetts General Court in 1646 made it a capital offense for "a stubborn or rebellious son, of sufficient years and understanding (viz.) sixteen years of age" to strike or swear at his parents. In Connecticut and Rhode Island, a rebellious son could be confined in a house of correction. Rebellious daughters and sons under sixteen were subject to whippings. The Massachusetts code did extend children certain minimal protections. Just as the code outlawed wife beating, it prohibited "any unnatural severitie" toward children (Morgan 1966, pp. 78, 130–131, 148; Pleck 1987, pp. 25–28; Sutton 1988, pp. 10–42; Teitelbaum and Harris 1977, pp. 8–14; Teitelbaum 1985a, pp. 1147–1148).

Since the family was the foundation stone of the Puritan social order and disorderly families defiled God's injunctions, the larger community gave fathers legal authority to maintain "well-ordered" families and, if they failed, then the community asserted its responsibility for enforcing morality by punishing misconduct and intervening within households to guide and direct behavior. If a family failed to properly perform its responsibilities for teaching religion, morality, and obedience to law, then town selectmen had orders to "take such children or apprentices" from neglectful masters "and place them with some masters . . . which will more strictly look unto, and force them to submit unto government" (Teitelbaum and Harris 1977, pp. 9–11; Morgan 1966, pp. 27, 78, 148). Each year, courts tried a few dozen cases of spouse abuse, cruelty to children and servants, threats against parents, child neglect, adultery, and, above all, fornication (Pleck 1987, pp. 27–32; D'Emilio and Friedman 1988, pp. 15–38; Bissell 1973, pp. 106–129; Thompson 1986, pp. 169–189; Koehler 1980, pp. 136–165; Banfield 1932, pp. 443–447). In 1648, the Massachusetts Bay Colony, fearing that "many parents and masters are too indulgent and negligent" ordered selectmen to keep "a vigilant eye over their brethren and neighbors to see . . . [that] their children and apprentices [acquire] so much learning as may enable them perfectly to read the English tongue and knowledge of the capital laws." Between 1675 and 1679, the selectmen in every town were given authority to appoint tithingmen, "each of whom shall take the Charge of Ten or Twelve Families of his Neighbourhood, and shall diligently inspect them" (Morgan 1966, pp. 88, 100, 146–148; Teitelbaum and Harris 1977, pp. 12–14; Pleck 1987, p. 29; Bailyn 1960, pp. 15–36; Flaherty 1971, pp. 207–244; Haskins 1960, pp. 79–93).

In practice Puritan law tended to reinforce a hierarchical and paternalistic conception of the family. In order to obtain a divorce, a wife had to prove that she had "acted dutifully" and not given her husband "provocation" (Koehler 1980, pp. 136–165; Pleck 1987, pp. 23–25). In a number of instances, authorities allowed husbands to punish an abusive wife or a disobedient child by whipping (Pleck 1987, pp. 23–25, 28–31). Perhaps as a result of the emphasis attached to order and patriarchal authority, women were more likely than men to be punished for adultery, fornication, and bastardy (D'Emilio and Friedman 1988, pp. 31, 38).

Even in cases of abuse, Puritan magistrates commanded wives to be submissive and obedient. They were told not to resist or strike their husbands but to try to reform their spouses' behavior (Koehler 1980, pp. 136–165). Women who refused to obey injunctions about wifely obedience were subject to harsh

punishment. Courts prosecuted 278 New England women for heaping abuse on their husbands and meted out punishments by fines or whippings. In general, colonial New England valued family preservation above the physical protection of wives or children and seldom granted divorce on grounds of cruelty, punished only the most severe abuses, and generally meted out mild punishments to men (Koehler 1980, pp. 136–165; Pleck 1987, pp. 29–31; D'Emilio and Friedman 1988, pp. 31, 38).

To what extent did the seventeenth-century New Englanders use courts to encourage and enforce proper domestic behavior? Not as frequently as popular attitudes about Puritans suggest. Only rarely did courts become involved in cases of domestic violence. Only one rebellious adult son was prosecuted for "reviling and unnatural reproaching for his naturall father" and he was punished, not by hanging, but by whipping. Similarly, only one natural father was prosecuted for excessively beating his daughter (Pleck 1987, pp. 25, 29–31). Prosecutions for wife-beating were relatively infrequent. Between 1630 and 1699, 128 men are known to have been tried for physically abusing their wives. The punishments for wife abuse were generally mild, usually amounting only to a fine, a lashing, a public admonition, or supervision by a town-appointed guardian. In two instances, however, colonists did lose their lives for murdering their wives (Pleck 1987, pp. 29–31; Koehler 1980, pp. 137–142).

Although early New Englanders paid close attention to the domestic and sexual behavior of individuals, prosecutions were generally infrequent, except in cases of repeated offenses or especially disruptive behavior or in cases involving the indigent (in which lawmakers separated children from parents and required them to work for strangers, required paupers and their families to wear the letter "P" on the sleeve of their outer garment, warned indigent families out of town, and compelled relatives, including grandparents, to support grown children or grandchildren at risk of fines or imprisonment) (Bissell 1973, pp. 106–129; Pleck 1987, pp. 30–31; D'Emilio and Friedman 1988, pp. 27–32). Punishment of offenses was designed to strengthen communal norms by bringing deviation into the public realm and eliciting proper attitudes on the part of the convicted—shame and recantation. Couples whom a church court found guilty of fornication had to repent publicly before their child could be baptized. Public humiliation, confession, and repentence affirmed the boundaries of acceptable behavior (Bissell 1973, pp. 106–129; D'Emilio and Friedman 1988, pp. 37–38). By the mid-eighteenth century, the decline of community regulation of the family was manifest in rising rates of illegitimacy and premarital pregnancy, the abolition of many church courts, and declining legal prosecution of sexual offenses. Courts and town selectmen were less concerned about married couples guilty of premarital pregnancy and more about the economic maintenance of the illegitimate children born to single women (Pleck 1987, pp. 29, 31–33; D'Emilio and Friedman 1988, pp. 32–34; Nelson 1975, pp. 110–111; 1981, pp. 23–44; Konig 1979, pp. 121–135, 152–155).

FAMILY LAW OF THE POOR

Throughout American history, there has been a dual system of family law, treating poorer families differently from better-off families. Even in the seventeenth century, a dual system of family law existed, with one set of principles—of patriarchal authority, family unity, domestic privacy, and the primacy and inviolability of the family—applying to most families and a different set of principles applying to the families of the poor. As Maxwell H. Bloomfield has demonstrated, four key principles characterized the colonial family law of the poor: local responsibility for assisting poor

families, outdoor relief (that is, assistance for the destitute in their own homes), the legal obligation of family members to support relatives, and apprenticeship of minor children (Bloomfield 1976, pp. 99–104; Abramovitz 1988, pp. 75–79).

Eligibility for public relief was defined by settlement and removal laws. Colonial settlement laws, which grew stiffer with time, authorized local authorities to deny residence to newcomers who might become a burden on the town; required newcomers without means of support to post bond; and barred property owners from selling land to newcomers without prior approval by local authorities. During the nineteenth century, residency requirements for public relief were lengthened and penalties for those who brought the indigent into local communities were toughened; and in a number of cases, courts split up indigent families and transported sick or elderly paupers across local boundary lines (Abramovitz 1988, pp. 79–83; Bloomfield 1976, pp. 99–104). Other regulations empowered local officials to remove children from indigent and neglectful parents and apprentice them with a master, and required parents, grandparents, children, and, in Massachusetts and New York, grandchildren to provide support for poor relatives (Bloomfield 1976, pp. 103–104).

During the colonial era, most indigent individuals received assistance in their own homes, although some elderly, widowed, sick, or disabled persons, who were unable to care for themselves, were placed in neighboring households. It was not until the mid-eighteenth century that a small number of towns erected almshouses or workhouses to serve individuals without families, such as vagrants, dependent strangers, deserted children, or orphans. Yet as David J. Rothman has observed, even these institutions were modeled upon families; they were built in the style of ordinary residences and patterned after the organization of the family (Bloomfield 1976, pp. 103–104; Rothman 1971, pp. 3–56).

CREATING A NEW CONCEPTION OF FAMILY LAW

During the first decades of the nineteenth century, American jurists, legislators, litigants, and legal commentators reformulated English and colonial legal rules and doctrines dealing with families and created a new system of family law. As Michael Grossberg has shown in his study of nineteenth-century family law, this new set of rules, regulations, and practices rearranged the balance of power within the home and dramatically altered the relationship between family members and government (Grossberg 1985b, pp. ix–xii; Basch 1979, pp. 346–366, 1982, pp. 70–112; Bloomfield 1976, pp. 91–135).

Early nineteenth-century domestic relations law drew upon two major sources. One was republican ideology, with its aversion to unaccountable authority and unchecked government activism and its tendency to define human relations in contractual terms. A second major influence stemmed from emerging "republican" or "democratic" notions of what constituted a proper family: a new conception of women's role (known as the "cult of true womanhood") which defined the ideal wife and mother in terms of piety, virtue, and domesticity; a new sentimental conception of children as vulnerable, malleable creatures with a special innocence; and a romantic conception of marriage based on free choice and romantic love (Fliegelman 1982; Degler 1980, pp. 3–25; Ryan 1981, pp. 18–59, 145–185; Mintz and Kellogg 1988, pp. 43–65). Further contributing to the impulse to reorder domestic relations law were a rash of upsetting social trends: an erosion of paternal authority, an upsurge in illegitimate births and premarital pregnancies, and a growing number of women who were

delaying marriage or not marrying at all (Mintz and Kellogg 1988, pp. 17–23).

A belief that choice of a spouse should be based on romantic love rather than parental arrangement led judges and legislatures to make matrimony easier to enter. State legislators lowered marriage fees and authorized an increasing number of churches and public officials to perform marriages while courts rejected colonial rules that made marriage licenses or banns and parental consent necessary for a valid marriage. Judges voided state statutes setting minimum age of marriage and reduced restriction on marriages among affines (such as marriages between a widower and his sister-in-law). They also tended to uphold the validity of common-law marriage (in sharp contrast to English courts which rejected "irregular marriage" as invalid), on the grounds that a prohibition on informal marriages would throw into question the legitimacy of such unions and "bastardize" many children (Grossberg 1985b, pp. 64–83).

A belief that the primary object of marriage was the promotion of personal happiness (as well as a growing judicial commitment to a contractual view of legal relations) encouraged jurists and legislators to increase access to divorce and remarriage in instances of adultery, physical abuse, or failure of a marriage partner to fulfill his or her proper role. Before the nineteenth century, divorce was exceedingly difficult to obtain and the number of divorces granted was minuscule. In a number of colonies, divorce was unavailable, and in those colonies where divorce was possible, it could only be obtained on the limited grounds of adultery, nonsupport, abandonment or prolonged absence. Colonial law did not in general permit an injured spouse to remarry except in instances in which the marriage could be annulled (such as impotence or bigamy). In many colonies divorce was only available through a special act of the colonial legislature. Given the difficulty of obtaining a divorce, unhappy couples were more likely to separate formally; in eighteenth-century Massachusetts, only 220 couples divorced, but 3,300 notices of separation were printed in colonial newspapers (Degler 1980, pp. 16, 165; Griswold 1982, pp. 18–38; Hindus and Withey 1982, pp. 133–153; Blake 1962, pp. 34–63).

In the early nineteenth century, the availability of divorce as a remedy to intolerable marriages expanded, as states transferred jurisdiction over divorce petitions to courts. By the 1830s, a number of states, led by Indiana, adopted extremely permissive divorce laws, allowing a divorce to be granted for any misconduct that "permanently destroys the happiness of the petitioner and defeats the purposes of the marriage relation" (Davis 1979, p. 96). In conception and in practice nineteenth-century divorce law tended to reinforce contemporary notions of wifely and husbandly behavior. Divorce laws were built around the concept of fault or moral wrongdoing, and in order to obtain a divorce it had to be demonstrated that a husband or wife had violated his or her domestic role in a fundamental way. In his study of divorce in nineteenth-century California, Robert Griswold suggests that husbands were most frequently sued for nonsupport, intemperance, and "indolent," "profligate," and "dissipated" behavior while wives sought to demonstrate their "frugality" in managing the home (Griswold 1982, pp. 39–140).

Of greater importance than divorce in altering the position of women in the nineteenth-century American family was the gradual improvement in the legal status of married women, symbolized by the enactment of married women's property acts which gave them limited control over the property they brought to marriage or inherited afterward, rudimentary contractual capacity, and the right to sue or be sued. It must be stressed, however, that despite

enactment of married women's property rights statutes, married women continued to be treated as a separate and special class in the eyes of the law. Norma Basch's detailed study of married women and the law of property in nineteenth-century New York found that judges severely restricted women's contractual capabilities and strictly construed statutory provisions in order to maintain husbands' common-law right to their wives' earnings and services (for example, by holding that ambiguous or intermingled assets belonged to the husband; that women's customary way of earning money, such as taking in boarders, did not meet the legal requirements of a separate estate; and that wives could not establish a separate estate without their husbands consent). In practice, judges tended to uphold the common-law fiction of marital unity represented by the husband (Basch 1982, pp. 200–223).

The new domestic ideology—as well as the rise of a contractual view of legal relationships—was also recognized in legal changes involving child support, child custody, and illegitimacy. During the middle decades of the century, New York state judges were the first to establish the principle that parents had a legal obligation to support their children, reversing the old common-law doctrine that parents had only a nonenforceable moral duty to support their offspring. Many courts went even further and rejected the notion that fathers had an unlimited right to their children's earnings and services, ruling that emancipated minors had full control over their own earnings (Bloomfield 1976, pp. 199–220). A growing number of judges also moved away from the common-law principle that gave fathers almost unlimited rights to the custody of their children. By the 1820s, however, the growing stress on children's welfare and the special childrearing abilities of women led American judges to limit fathers' custody rights. In determining custody, courts began to look at the "happiness and welfare" of the child and the "fitness" and "competence" of the parents. As early as 1860, a number of states had adopted the "tender years" rule, according to which children who were below the age of puberty were placed in their mother's care unless she proved unworthy of that responsibility (Grossberg 1982b, pp. 234–253, 1983, pp. 235–260). Nineteenth-century American law also broke with English common law by extending many legal rights to illegitimate children and making it easier to legitimate children born out of wedlock by permitting adoption (Grossberg 1985a, pp. 834–840, 1985b, pp. 196–228; Zainaldin 1979, pp. 1041–1084).

THE PARADOX OF THE "MODERN" FAMILY

The late eighteenth and early nineteenth centuries witnessed a fundamental redefinition of the boundaries of private and public spheres. In the early seventeenth century, the family's functions were broad and diffuse. The family was the fundamental unit of society. It educated children; it cared for the elderly and ill; it transferred property and skills to the next generation; and most importantly, it was the economic center of production. By the early nineteenth century, non-familial institutions came to perform many of these functions. The middle-class family's primary roles were to provide emotional support and affection and contribute to the socialization of children (Demos 1970, pp. 182–186).

While in one sense the family became more private by appropriating the realms of feeling and emotion, this was essentially a means geared to a public end. In the eyes of a growing number of commentators, America's experiment in republican government depended on the capacity of families to produce good citizens. The family was expected to serve the political order by diffusing self-serving needs and by instilling the values of willing obedience, service, and rational impartiality—

the values of good citizenship. Failures of the family, in turn, seemed to explain an alarming increase in violence, robbery, prostitution, and drunkenness. In order to rectify parental failures, reformers created substitute families such as public schools, houses of refuge, reform schools, YMCAs for young rural migrants to cities, orphanages, and penitentiaries. The blurring of boundaries between public and private life encouraged the transference to public agencies of moral prerogatives and of presumed benevolence and goodwill that had grown out of kinship bonds (Lasch 1977, pp. 3–8, 12–21; Laslett 1973, pp. 480–492; Teitelbaum 1985a, pp. 1144–1181).

As early as the 1820s, Americans discovered that the nation's growing cities teemed with young people who had gone through "infancy and childhood without a mother's care or a father's protection" (Davis 1979, p. 4). Responsibility for these children lay not simply with their parents, but with the state, as legal writer Joel P. Bishop noted: "children are not born for the benefit of the parents alone, but for the country; and, therefore, . . . the interests of the public in their morals and education should be protected . . ." (Teitelbaum 1985a, pp. 1156). According to this view, the state had a moral duty to intervene to advance the best interests and welfare of children.

During the mid-1820s, Boston, New York, and Philadelphia established the nation's first publicly funded children's asylums for the moral rehabilitation of delinquent, incorrigible, and neglected youths. To combat delinquency, houses of refuge separated children from "incompetent" parents, removed them from the sources of temptation, pauperism, and crime, and instilled habits of self-control through moral education, work, rigorous discipline, and an orderly environment. Further underscoring the blurring of public and private boundaries, advocates of houses of refuge and prisons proposed that families adopt the system of surveillance and calculated privation that had supposedly proved effective in their institutions (Sutton 1988, pp. 43–89; Rothman 1971, pp. 257–262; Mennel 1973, pp. 11–12; Pickett 1969, pp. 74–75; Schlossman 1976, p. 124, 1974, pp. 119–133; Teeters 1960, pp. 165–187).

The early nineteenth-century houses of refuge set four important precedents. The first was that civil officials had a right to act *in loco parentis* by removing children deemed unruly, incorrigible, in need of supervision, or abused or neglected, and placing them in foster homes or institutions. In a landmark 1839 decision the Pennsylvania Supreme Court upheld the commitment of an "incorrigible" girl to the Philadelphia House of Refuge, asking rhetorically: "May not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?" Second, the houses of refuge established a formal distinction between children and adults before the law. Drawing upon the emerging sentimental conception of childhood, which drew a sharp distinction between childhood and adulthood, many jurists held that a child could not be considered criminally responsible "by reason of infancy." They also contended that a concerted effort should be made to rehabilitate rather than punish the child, and the child should be placed in a specialized institution for juveniles. Third, juvenile statutes placed noncriminal behavior, including incorrigibility, habitual disobedience, and vicious and immoral behavior, under the jurisdiction of the courts. Fourth and finally, the new system embodied two key characteristics of the modern juvenile justice system: commitment of juveniles to institutions after summary or informal hearings, and indeterminant sentencing (Teitelbaum and Harris 1977, p. 20; Sutton 1988, pp. 45–49; Hawes 1971, pp. 41, 57).

Highly publicized charges of child abuse within houses of refuge, almshouses, and orphanages contributed to a growing public revul-

sion against institutional confinement of indigent, neglected, or abused children. Orphanages, in particular, tended to be quite large and poorly supervised (in New York State in 1915 the average orphanage held 230 children and twelve institutions housed 800 children). In a reaction against the impersonality and workshop discipline of houses of refuge, in the 1850s a number of states experimented with the "family reform school" in which between one and three dozen children were cared for in a cottage setting by a parent surrogate (Schlossman 1976, pp. 33–54). During the second half of the nineteenth century, reformers increasingly called for the placement of dependent or wayward children in foster homes and demanded enactment of adoption laws to give adopted children the same rights as natural children. Massachusetts became the first modern jurisdiction to adopt a comprehensive adoption law in 1851 (Bloomfield 1976, pp. 134–135; Presser 1971, pp. 443–516).

CHILD-SAVING AND FAMILY PROTECTION

Few issues haunted the imagination of late nineteenth and early twentieth century reformers more than the future of the family. A precipitous rise in the divorce rate, delayed marriage, a shrinking birth rate, and a growing tendency among middle-class women to attend college and pursue careers raised fear that the family, "the original germ-cell which lies at the base of all that we call society," was disintegrating (Brandt 1987, p. 7; Lasch 1977, pp. 8–9; Filene 1976, pp. 36–39; Kennedy 1970, p. 36).

Growing anxieties over the family encouraged unprecedented arguments for public paternalism and provided new kinds of justification for intervention in the family by secular authorities. During the late nineteenth century, many states imposed physical and mental health requirements for marriage, established a waiting period before marriage, instituted a higher age of consent, and adopted procedures for public registration of all new marriages (by 1907, twenty-seven states required registration). Polygamy was outlawed in Idaho and Utah and interracial marriages in the border states and lower South. A growing number of states barred first-cousin marriages and other marriages between blood relations and an increasing number of judges refused to accept the validity of common-law marriages (Keller 1977, p. 468; Grossberg 1985b, pp. 103–152, 1982, pp. 197–226; Mintz and Kellogg 1988, p. 126). Convinced that family limitation was an assault on the home, legislators and judges held abortion to be a criminal offense and restricted the dissemination of birth control materials and information (Grossberg 1985b, pp. 153–195; Dienes 1972; Mohr 1978).

The publication of an 1886 report estimating that the United States granted more divorces than all other western countries combined, encouraged states to make it more difficult to obtain divorces by raising the age of marriage, restricting remarriages after divorce, lengthening residence requirements for divorce, and reducing the grounds for divorce from over four hundred to fewer than twenty. In 1900, just three states—Kentucky, Rhode Island, and Washington—permitted courts to grant divorces on any grounds the court deemed proper (May 1980, pp. 4–7; Lichtenberger 1972, pp. 154–186; Keller 1977, p. 471).

Starting in the 1870s, two reform causes—child-saving and family protection—stimulated public intervention within the family. Children's aid societies and societies for the prevention of cruelty to children (the first was founded in New York in 1875) sought to assist orphaned, destitute, deserted, and illegitimate children and rescue ill-treated children from neglectful and abusive parents. Advocates of child labor laws and compulsory education sought to take children out of the labor force and keep parents from exploiting their children

economically. Other child-savers created kindergartens and playgrounds and led campaigns to remove children from poorhouses and other institutions and place them instead in "family-like" arrangements such as apprenticeship and foster homes. Still others tried to reform the juvenile justice system by establishing juvenile courts, and to aid children born out of wedlock by increasing paternal support requirements. Public health reformers sought to reduce infant and child mortality, pasteurize milk, and cut the death rate from such diseases as tuberculosis and diphtheria. Family-savers attacked the double standard of sexual morality, worked to reduce rates of venereal disease, advocated closing down red-light districts, and supported pensions for indigent mothers (Katz 1986a, pp. 413–424, 1986b; Ashby 1984; Behlmer 1982; Langsam 1964; Platt 1969; Rothman 1980; Tiffin 1982; Trattner 1970).

Child-savers and family protectors were a diverse lot. They included social hygienists eager to reduce prostitution and venereal disease by instilling continence in young men; women's rights advocates hoping to restrain male licentiousness; purity crusaders seeking to reduce vice; eugenicists trying to improve the hereditary qualities of the population; and charity workers attempting to use "scientific philanthropy" to combat poverty and cruelty (Pikens 1968; Boyer 1978, pp. 18–120; Pivar 1973, pp. 50–73, 78–121). They varied widely in their assumptions about such issues as the propriety of religious or benevolent organizations running child- or family-saving institutions; the appropriate role of the state and private agencies acting as *parens patriae*; and the relative merits of custodial institutions and the family. They were united, however, by a conviction that many of society's most intractable social problems originated in deformed or dysfunctional homes and that it was necessary to expand the state's supervisory and administrative authority over the family (Katz 1986a, pp. 413–424).

Perhaps the most dramatic attempt to save the family was the movement to prevent cruelty to wives and children. During the last third of the nineteenth century concern about family violence and child abuse mounted, and philanthropists founded 494 child protection and anti-cruelty societies, several states passed laws allowing wives to sue saloonkeepers for injuries caused by a drunken husband, and three states (Maryland in 1882, Delaware in 1901, and Oregon in 1905) passed laws punishing wifebeating with the whipping post (Pleck 1987, pp. 69–121). These late-nineteenth-century reformers largely blamed cruelty to children on drink and the flawed character of immigrant men—in sharp contrast to their counterparts of the 1930s and 1940s who downplayed male violence and blamed abuse on mothers who nagged their husbands and children and refused to accept the female role (Gordon 1988). After the turn of the century, the anti-cruelty movement declined rapidly for two reasons: opponents were convinced that the societies were prejudiced against the poor and the working class and that they much too frequently removed children from their parents' custody (Pleck 1987, pp. 125–163; Behlmer 1982, pp. 11, 52, 136, 213; Breines and Gordon 1983, pp. 490–528).

The extension of the state's authority over children was also apparent in new policies toward "wayward" children. New legislation, drawing on the old legal doctrine that the state had an obligation to protect children from "imminent harm," gave public agencies the power to remove neglected and vagrant children from their parents, construct industrial-training and reform schools, and invoke criminal penalties against parents for abandonment, nonsupport, and contributing to the dependency or delinquency of a minor (Keller 1977, pp. 465–467; Sutton 1988, pp. 121–153; Rendleman 1971, pp. 233–236).

Concern over the lack of supervision of children also led to the launching of pioneering

efforts to provide day nurseries for the children of working mothers and to enactment of mothers' pensions for poor mothers. By 1910, 450 charitable day nurseries had been opened in working-class neighborhoods, supplemented by a small number of for-profit centers (Mintz and Kellogg 1988, p. 129; Tentler 1979, pp. 161–165). To help indigent mothers preserve their families, thirty-nine states enacted mothers' pensions during the second decade of the twentieth century. Initially, these laws restricted aid to widows with dependent children but were eventually broadened to provide aid to needy families in which the father was physically or mentally incapacitated or in which the mother was divorced, deserted, or unmarried (Mintz and Kellogg 1988, pp. 129–130).

By the beginning of the century, a new mode of discourse and a new set of standards dominated discussion of government policy toward the family. Jurists, charity workers, settlement house workers, and other professionals dealing with family problems evolved new notions of "parental fitness," "parental duties," "child welfare," and "children's rights and needs" that justified state supervision of the family "for the protection of society, and the welfare of the child himself . . . to prepare him for honest and intelligent citizenship" (Sutton 1988, p. 142; Grossberg, 1985b, pp. 248–250, 281–285). Nowhere was this viewpoint more apparent than in the reconstruction of the juvenile justice system. In an effort to give special attention and rehabilitative opportunities to youngsters who broke the law, Illinois established the first juvenile court in 1899. By 1917, all but three states had enacted juvenile justice legislation. Within these separate tribunals for young people, informal hearings were supposed to replace adversarial proceedings and diagnostic investigations, psychological assessment, and rehabilitation were to replace judgments of guilt and innocence and imposition of punishment. In these courts, however, young people were deprived of constitutional safeguards that would apply in a criminal trial (including protections over the admission of hearsay and unsworn testimony, criminal standards of proof, privilege against self-incrimination and double jeopardy, and right to bail and counsel) (Nicholas 1961, pp. 151–152; Algase 1963, pp. 292–320; Sloane 1965, pp. 170–189; Halem 1980, p. 220; Sutton 1988, pp. 121–153).

The new outlook was also exemplified by the establishment of separate family courts charged with resolving a variety of family-related problems, including desertion, parental neglect or maltreatment of children, adoption, and juvenile delinquency, as well as divorce. Proponents believed that separate family courts, dedicated to the welfare of families and children, would offer a less formal and less adversarial mechanism than the regular courts for settling domestic disputes. Many sponsors of family courts were inspired by the example of divorce proctors, who had been hired by a number of jurisdictions prior to World War I to investigate petitions for divorce, make recommendations to the court, and try to achieve reconciliation of the parties. Following the advice of social workers and psychologists, family courts emphasized family rehabilitation and tried to urge reconciliation of spouses whenever possible (Mintz and Kellogg 1988, pp. 126–127). In practice, however, a lack of funds and overcrowded dockets prevented family courts from conducting careful investigations of petitions for divorce or reconciling differences between spouses. Yet they did assert the state's special interest in family welfare (Halem 1980, pp. 116–128, 220–221, 241–251, 280).

After 1920, a growing number of reformers, convinced that the law's adversarial approach to divorce was harmful both to spouses and children, recommended a variety of changes in divorce proceedings, including mandatory counseling of parties seeking divorce, nonadversarial divorce proceedings, and greater

availability of divorce on grounds of mental cruelty and incompatibility. Two states—New Mexico and Oklahoma—revised their divorce statutes to allow divorce on grounds of incompatibility, and three other states—Arkansas, Idaho, and Nevada—shortened residency requirements and liberalized divorce codes in order to attract couples seeking divorce (Halem 1980, pp. 129–157).

Convinced that the major problem confronting the twentieth-century family was not divorce but a breakdown of love and companionship within marriage, a number of social workers, physicians, and psychologists joined together during the 1920s to promote court-based, private and public marriage reconciliation and counseling services. These authorities maintained that marriage required special instruction in the art of personal interaction and that, contrary to older ideals of romantic love, conflict and tension were normal parts of married life. They believed that the major source of marital instability included a lack of communication and cooperation, unsatisfactory sexual relationships, and psychological maladjustments that might be prevented by sex education, counseling, and clinical therapy. By the early 1930s, courses in marriage and family living had spread across the country, dealing with such topics as dating, courtship, reproduction, birth control, and divorce. One of the reformers' most visible successes was the establishment in California in 1939 of Children's Courts of Conciliation, empowered to hold informal hearings on divorce, annulment, and separation suits and family conflicts involving minor children (Halem 1980, pp. 129–157; Lasch 1977, pp. 37, 43, 107–110; Fass 1977, pp. 71–95; Reed 1978, p. 62).

From the early 1920s onward, family law was increasingly influenced by psychological and clinical studies of the family. Custody law was recast in light of new notions of "psychological parenthood" and the importance of continuity and stability in caretakers (assumptions which led jurists to frown upon joint and divided child custody arrangements) (Halem 1980, pp. 158–232). In divorce proceedings, judges tended to dilute stringent legal statutes. In 1931 only seven states specifically permitted divorce on grounds of mental cruelty, but judges in most other jurisdictions reinterpreted laws permitting divorce on grounds of physical cruelty, to encompass such conduct as constant nagging, humiliating language, unfounded and false accusations, insults, and excessive sexual demands. In these ways and others, psychological and clinical research was incorporated into family law (Halem 1980, p. 136; May 1980, pp. 5–6, 30, 104).

One ironic consequence of the continuing academic and clinical research into the family was the questions it raised about certain assumptions held by family professionals, most notably the emphasis attached to preserving the family unit. Studies of divorce, for example, posed the problem of the psychological and emotional implications of divorce for children. In the 1920s, authorities on the family, using the case-study method, had concluded that children experienced the divorce of their parents as a devastating blow that stunted their psychological and emotional growth and caused maladjustments persisting for years. Beginning in the late 1950s, a growing body of research argued that children from conflict-laden, tension-filled homes were more likely to suffer psychosomatic illnesses, suicide attempts, delinquency, and other social maladjustments than were children whose parents divorce; that the adverse effects of divorce were generally of short duration; and that children were better off when their parents divorced than when they had an unstable marriage (Halem 1980, pp. 158–232; Levitan and Belous 1981, pp. 69–72).

Professional concern about child abuse and family violence also increased, leading a growing number of physicians and psychologists to call for expansion of child-protection services

and separation of abused children from their parents. In 1954, the Children's Division of the American Humane Association conducted the first national survey of child neglect, abuse, and exploitation. Three years later the U.S. Children's Bureau launched the first major federal study of child neglect, abuse, and abandonment. Child cruelty captured the attention of a growing number of radiologists and pediatricians who found bone fractures and physical trauma in children suggesting deliberate injury. After C. Henry Kempe, a pediatrician at the University of Colorado Medical School, published a famous essay on the "battered child syndrome" in the *Journal of the American Medical Association* in 1962, legal, medical, psychological, and educational journals began to focus attention on family violence. Growing professional concern about child abuse led to calls for greater state protection and services for abused and neglected children and their parents (Pleck 1987, pp. 164–181).

GOVERNMENT REGULATION OF THE FAMILY TODAY

Over the last two decades, a radical transformation has taken place in the field of family law, as traditional familial expectations collided with changing conceptions of liberty and autonomy, as familial relationships have grown increasingly fluid and detachable, and as the law has relinquished its earlier policing functions over spousal and parental roles (Binchey 1970, pp. 315–317; Glendon 1981, pp. 1–7; Morse 1979, pp. 320–321). Older legal definitions of what constitutes a family were overturned. In cases involving zoning and public welfare, the courts have declared that local, state, and federal governments cannot define "family" too restrictively, holding that common-law marriages, cohabitation outside of marriage, and large extended households occupying the same living quarters are entitled to protection against hostile regulation. In other cases, the Supreme Court has ruled that government cannot discriminate against groups of non-related individuals living together (as for example, in communes) in providing food stamps (while upholding zoning ordinances that limit occupancy of homes to members of families related by blood, marriage, and adoption) and that state legislatures cannot designate one form of the family as a preferred form. (Morse 1979, pp. 322–325; Rubin 1986, pp. 143–161).

Nineteenth-century legal presumptions about the proper roles of husband and wife were called into question. Until recently, the law considered the father to be "head and master" of his family. His surname became his children's surname, his residence was the family's legal residence, he was immune from lawsuits instituted by his wife, and he was entitled to sexual relations with his spouse. Several state supreme courts have ruled that husbands and wives can sue each other, that a husband cannot give his children his surname without his wife's agreement, and that husbands can be prosecuted for raping their wives (Teitelbaum 1985b, pp. 430–434).

Perhaps the most sweeping legal changes have occurred in divorce law. State legislatures, following California's adoption of the nation's first no-fault divorce law in 1970, responded to the sharp upsurge in divorce rates by radically liberalizing their divorce statutes, making it possible to end a marriage without establishing specific grounds, and in many states, allowing one spouse to terminate a marriage without the consent of the other (Weitzman and Dixon 1979, pp. 143–153; Halem 1980, pp. 233–283). Today every state except South Dakota has enacted some kind of no-fault statute. Rather than sue the other partner, a husband or wife can obtain a divorce simply by mutual consent or on such grounds as incompatibility, living apart for a specified period, or "irretrievable breakdown" of the marriage. In any effort to reduce the bitterness associated with divorce,

many states changed the terminology used in divorce proceedings, substituting the term "dissolution" for the word "divorce," and eliminating any terms denoting fault or guilt (Weitzman and Dixon 1979, pp. 143–153; Weitzman 1985; Halem 1980, pp. 233–283).

In recent years, courts have tended to abandon the "tender years" doctrine that a young child is better off with the mother unless the mother is proved to be unfit. The current trend is for the courts not to presume in favor of mothers in custody disputes over young children. Most judges now only make custody awards after considering psychological reports and the wishes of the children. To spare children the trauma of custody conflict, a number of jurisdictions now allow judges to award divorced parents joint custody, in which both parents have equal legal rights and responsibilities in decisions affecting the child's welfare (Mintz and Kellogg 1988, pp. 229–230).

Likewise, courts have moved away from the concept of alimony and replaced it with a new concept called "spousal support" or "maintenance." In the past, courts regarded marriage as a lifelong commitment and in cases in which the husband was found guilty of marital misconduct, held that the wife was entitled to lifelong support. Now maintenance can be awarded to either the husband or the wife. As the legal system has moved away from the principle of lifelong alimony, growing attention has been placed on the distribution of the partners' marital assets and property at the time of divorce (Glendon 1981, pp. 47, 52–55; Mintz and Kellogg 1980, pp. 229–230).

Another dramatic change in the field of family law is the courts' tendency to grant legal rights to minor children. In the past, parents enjoyed wide discretionary authority over the details of their children's upbringing. More recently the nation's courts have held that minors do have independent rights that can override parental authority. In deciding such cases, the courts have sought to balance two conflicting traditions: the historic right of parents to control their children's upbringing and the right of all individuals, including children, to privacy, due process, and equal rights. The U.S. Supreme Court has struck down state laws that give parents an absolute veto over whether a minor girl can obtain an abortion but upheld a Utah statute that required doctors to notify parents before performing an abortion and upheld a New York statute prohibiting the sale to minors of publications that would not be obscene to adults. Two states—Iowa and Utah—have enacted laws greatly expanding minors' rights. These states permit children to seek temporary placement in another home if serious conflict exists between the children and their parents, even if the parents are not guilty of abuse or neglect. In one of the most important decisions involving juvenile offenders and the juvenile courts, in the 1967 case *in re Gault*, the Supreme Court ruled that juveniles who are subject to commitment to a state institution are entitled to advance notice of the charges against them, as well as the right to legal counsel, the right to confront witnesses, and protections against self-incrimination (Mintz and Kellogg 1988, pp. 231–232; Schecter 1968, pp. 416–417).

At the same time, the nation's courts and state legislatures took government out of the business of regulating private sexual behavior and defining the sexual norms according to which citizens were supposed to live. In 1957, the Supreme Court narrowed the legal definition of obscenity, ruling that portrayal of sex in art, literature, and film was entitled to constitutional protections of free speech, unless the work was utterly without redeeming social value. In 1962, Illinois became the first state to decriminalize all forms of private sexual conduct between consenting adults. Since 1970, twenty states have decriminalized private consensual sexual conduct and in four other states, judicial decisions have invalidated statutes making such conduct a crime. In addition, two-

thirds of the states have repealed statutes prohibiting fornication, adultery, and cohabitation outside of marriage. Beginning in 1965, the Supreme Court, declaring in *Griswold* v. *Connecticut*, that the constitution created a right to privacy, struck down a series of state statutes that prohibited the prescription or distribution of birth control devices or that limited circulation of information about contraception. In 1972 (in *Eisenstadt* v. *Baird*), the high court extended access to contraceptives to unmarried persons. In 1973, in the case of *Roe* v. *Wade*, the high court decriminalized abortion and in 1976 (in *Planned Parenthood* v. *Danforth*) the court has held that a "competent" unmarried minor can decide to have an abortion without parental permission (Morse 1979, pp. 325–327, 349–350; Manchester 1974, pp. 1035–1036).

Recent transformations in family law have been characterized by two seemingly contradictory trends. On the one hand, courts have modified or struck down many traditional infringements on the right to privacy. On the other hand, courts have permitted government intrusion into areas traditionally regarded as bastions of family autonomy. Shocked by reports of abuse against children, wives, and the elderly, state legislatures have strengthened penalties for domestic violence and sexual abuse (while greatly expanding foster care programs for children who have been abused or neglected). Courts have reversed traditional precedents and ruled that husbands can be prosecuted for raping their wives. A 1984 federal law gave states new authority to seize property, wages, dividends, and tax refunds from parents who fail to make court ordered child-support payments. Other court decisions have relaxed traditional prohibitions against spouses testifying against each other (Glendon 1981, p. 43).

What links these two apparently contradictory trends is a growing sensitivity on the part of the courts and state legislatures toward the individual even when family privacy is at stake. Thus, in recent cases, the courts have held that a husband cannot legally prevent his wife from having an abortion, since it is she who must bear the burden of pregnancy, and have ruled that a wife's domicile is not necessarily her husband's home. Court decisions on marital rape reflect a growing recognition that a wife is not her husband's property (Glendon 1985, pp. 11, 38, 49, 71–73).

One ironic effect of these legal decisions has been a gradual erosion of the traditional conception of the family as a legal entity. In the collision between two sets of conflicting values—individualism and the family—the courts have tended to stress individual rights. Earlier in time the law was used to reinforce relationships between spouses and parents and children, but the current trend is to emphasize the separateness and autonomy of family members. The Supreme Court has repeatedly overturned state laws that require minor children to receive parental consent before obtaining contraceptive information or an abortion, and lower courts have been unwilling to grant parents immunity from testifying against their own children. Similarly, state legislatures have weakened or abolished earlier laws that made children legally responsible for the support of indigent parents, while statutes that hold parents accountable for crimes committed by their minor children have been ruled unconstitutional (Glendon 1981, p. 61; Garrett 1979, pp. 804–808).

SHIFTING MODES OF LEGAL DISCOURSE ABOUT THE FAMILY

It is helpful to think about family law in terms of a discourse involving four broad themes. At each period of time, one finds a different balance in the dominant ideology. One theme involves the law's functions: pedagogical; prescriptive; protective of individual rights. A second theme involves the broader values of society. At certain times, law has tended to emphasize marital unity and family solidarity;

at other times, personal choice and responsibility; at still other times, family privacy and autonomy or individual rights. A third theme represents the relative responsibility of private individuals and the broader society for enforcing values. A fourth and final theme is the form of legal regulation of the family—including nonintervention, implicitly ratifying socially assigned family roles and power relationships, the explicit extension of legal rights, criminalization of certain acts, or state-ordered mediation of familial disputes (Glendon 1987, pp. 7–9, 112–142; Olsen 1983, pp. 1510–1512).

In colonial New England, many laws dealing with the family were taken word-for-word from the Old Testament and legal rules reflected the Puritan version of Protestant theology. The law was committed to an organic and hierarchical conception of the family in which the family interests were represented by the father. Despite the Puritans' intrusive reputation, the function of Puritan law was in certain important respects pedagogical or symbolic. Enforcement rested largely with individual families or other informal community mechanisms. Local governments allowed individuals a surprising degree of latitude except for repeated or particularly disruptive offenses. Punishments, in turn, were designed to reinforce communal norms and reintegrate the offender back into the community (Bissell 1973, pp. 106–129).

During the early nineteenth century, family law was radically revised as legislators codified and jurists created new doctrines governing marriage formalities, divorce, alimony, marital property, child custody, adoption, child support, and child abuse and neglect. The law's functions remained largely pedagogical, but instead of upholding a hierarchical and patriarchal conception of the family and stressing household unity, jurists and legislators came to think of the family as an institution consisting of distinct members, each with his or her own rights and identity. A new emphasis was also attached to personal responsibility. Informal marriages were transformed into common-law marriages with binding obligations. Divorce was discussed in terms of spousal fault and child custody decisions increasingly rested on a judicial determination of the moral fitness of parents (Teitelbaum 1985b, pp. 430–431).

In the late nineteenth century, legal priorities shifted away from individual choice, voluntary consent, and reciprocal duties to a heightened emphasis on public regulation of the family. New notions of "child welfare" and "state interest" were invoked to justify increasing government supervision of marriage, new restrictions on contraception and abortion, and the creation of new institutions to take care of homeless and ill-treated children and juvenile delinquents. Through law, government articulated a series of moral ideals of family life: that marriage was a life-long commitment (by permitting divorce only on grounds of serious fault), that sexual relations should be confined to monogamous marriage (by prohibiting fornication, cohabitation, adultery, and polygamy), and that the purpose of sexual relations was procreation (by criminalizing sodomy and restricting access to contraceptives and abortion) (Grossberg 1985b, pp. 103–152; Keller 1977, pp. 461–472).

During the late nineteenth and early twentieth centuries, legal discourse continued to shift away from moral discourse toward medical and psychological discourse. Conceptions of "child welfare" and "children's rights and needs" received new resonances and connotations in light of clinical and academic research. Despite the shift in language, however, older legal ideals persisted. Expert opinion tended to discourage divorce, especially when children were involved, stress the importance of keeping families intact, even in cases of abuse and violence, and favor granting child custody to mothers (Halem 1980, pp. 114–157).

Today, jurists and legislators are hesitant to discuss family issues in moral terms. In addressing questions of divorce or child custody,

courts tend to avoid issues of fault or moral fitness. In cases of child abuse or neglect, the trend in legal opinion is away from broad statutes that allow the state to intervene on behalf of a child's moral welfare and instead allow intervention only in cases in which a child has suffered or risks severe physical or mental injury. Today, family regulators are little concerned about questions that preoccupied their predecessors such as family formation and dissolution (including such questions as limitations on marriage, common-law marriage, legitimacy, and grounds for annulment or divorce) or the obligations of spouses. This new view presupposes diversity in the characteristics and functioning of families and rejects the view held earlier that certain specific family characteristics (such as the natural capacity of mothers for childrearing) were rooted in moral, religious, or natural law. Replacing the older view is a discourse emphasizing equality and individual rights (Schneider 1985, pp. 1803–1879; Teitelbaum 1985b, pp. 430–431).

A declining state interest in regulating moral conduct has not meant a withdrawal from private affairs by the state. In recent years courts have become increasingly willing to mediate disputes between family members. In the past, judges tended to subscribe to a tradition of noninterference in the family's internal functioning except in extreme circumstances, on the grounds that intervention would embroil the courts in endless disputes and that legal intervention in many cases would be futile or even counterproductive. In recent years, this tradition of noninterference has broken down as courts have tried to determine the rights of wives and mothers, fathers, children, grandparents, cohabitating couples, handicapped children (and fetuses), and surrogate mothers (Schneider 1985, pp. 1835–1839).

State involvement in nonmarital relations has also increased. Courts in many states have begun enforcing oral contracts and implied contracts between couples cohabitating outside of marriage, reversing the legal tradition of not enforcing "a contract founded upon an illegal or immoral consideration." Further, government has grown increasingly concerned about such issues as enforcement of child-support duties, supervision of pre- and post-nuptial agreements, domestic violence, and contracts among unmarried cohabitants (Schneider 1985, pp. 1814–1819).

State intervention in the lives of children has also undergone certain important changes. While the state has surrendered some of its powers of *parens patriae*, it has gained the legal means to treat juveniles as adults, fully responsible for their actions. Although it has become more difficult to strip parents of their parental rights and remove children from their natural parents permanently, temporary foster care services have expanded. In cases of child abuse, legislatures have mandated reports from professionals working with children and have tried to abrogate patient-client privilege to make reporting more effective (Weyrauch and Katz 1983, pp. 496–498; Rubin 1986 p. 156).

To say that the drift in family law is away from explicit moral judgments is not to suggest that the law does not make implicit moral judgments. Prior to the adoption of no-fault divorce statutes, the law of marriage implicitly upheld a marital ideal involving life-long support and marital fidelity. Divorce was obtainable only on grounds of serious fault and the family breadwinner could be required to pay life-time support in the form of alimony. Since divorce was available only on fault grounds, the spouse who was opposed to a divorce had an advantage in negotiating a property settlement. The tendency now is to avoid questions of fault or responsibility in dissolving a marriage or dividing marital assets. Among the messages conveyed by divorce law today is that either spouse is free to terminate a marriage at will; that after a divorce each spouse is expected to be economically self-sufficient; and that termination of a marriage frees individuals from most economic

responsibilities to their former dependents (Glendon 1987, pp. 108–111).

Earlier in American history one of the basic functions of family law was to articulate and reinforce certain widely held standards and norms about the family. Few people questioned the legitimacy of using law to express broader social values regarding the family. In recent years, jurists and legislators have tended to back away from using law and family policy to enunciate family standards and norms. Yet value judgments remain implicit in the law, and the values that the law tends to stress today, such the terminability of family relationships and obligations, tend to decontextualize individual family members from a broader family context and to erode the traditional view of the family as a legal entity. With the triumph of individualistic, egalitarian, and contractual values, the law tends to reinforce broader individualistic and therapeutic currents in the culture, stressing self-fulfillment and individual happiness as the ultimate social values. As a result, we have almost precisely inverted the values and mode of discourse of our Puritan forebears.

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