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Moral Discourse and the Transformation of American Family Law

Carl E. Schneider

University of Michigan Law School

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MORAL DISCOURSE AND THE TRANSFORMATION OF AMERICAN FAMILY LAW

Carl E. Schneider*

Family law has undergone momentous change in recent decades. In this Article, Professor Schneider proposes that the transformation in family law can be understood as a diminution in the law's discourse in moral terms about the relations between family members and as a transfer of moral decisions from the law to the people the law once regulated. Professor Schneider identifies countertrends and limits to the changes he describes, and then investigates the reasons for the changes. He hypothesizes that four forces helped change family law and moral discourse within family law: the legal tradition of noninterference in family affairs; the ideology of liberal individualism; American society's changing moral beliefs; and the rise of "psychologic man," which is a shorthand way of describing a host of changes in the way law and society view humans and human relationships. Using Roe v. Wade as a case study, he explores the consequences of these four forces for family law. Finally, Professor Schneider suggests fruitful avenues through which the changes could be further investigated.

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* Associate Professor of Law, University of Michigan. B.A. 1970, Harvard University; J.D. 1979, University of Michigan. — Ed.

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I. INTRODUCTION

To complain of the age we live in, to murmur at the present possessors of power, to lament the past, to conceive extravagant hopes of the future, are the common dispositions of the greatest part of mankind. . . .

— Edmund Burke
*Thoughts on the Cause
of the Present Discontents* (1770)

A. *The Subject: Family Law and Moral Thought*

American family law has been twice transformed. The first transformation occurred in the nineteenth century, when a family law answering a narrow range of questions about the legal (primarily property) relations of husbands and wives was gradually replaced by a family law that increasingly ordered relations between husband and wife, that increasingly dealt with the termination of those relations, and that increasingly spoke to the relations between parent and child and between the state and the child. The breadth of this first transformation may be seen in the extraordinary range of family-law subjects that either originated or were wholly reformed in the nineteenth century: the law governing marriage formalities, divorce, alimony, marital property, the division of marital property, child custody, adoption, child support, child abuse and neglect, contraception, and abortion.¹

Family law's second transformation has occurred primarily in the last two decades, although its roots run deep. How this transformation might be characterized is part of the subject of this paper, but that family law has once again been transformed can hardly be doubted. With the possible (and uninteresting) exception of the law governing marriage formalities, every one of the areas listed in the preceding paragraph has changed or is changing significantly, and further areas, like family torts and immunities, might be added to the list.

Dramatic as this transformation is, it resists description. In what terms, through what lens, might one begin to analyze it? It might, for example, usefully be seen as a shift away from public standards to private ordering.² It might, for example, be understood as a response to changing gender roles and the women's movement. These and other approaches are worthwhile, and will, I hope and expect, soon be

1. The first history of nineteenth century family law has only recently been published. It is M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1985).

2. Cf. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Reputation*, 130 U. PA. L. REV. 1429 (1982) (exploring the public/private dichotomy in American politics and academic thought).

pursued.³ In this paper, however, I propose as a fruitful area of generalization the relationship between morals and family law, for few approaches offer so clear an insight into "the ends which the several rules [of family law] seek to accomplish" or "the reasons why those ends are desired."⁴ This is true for several reasons.

First, while morals and law need not coincide, any law must cope with the way the people it regulates regard their moral relations. This is particularly true of family law: moral issues are central to family life and family self-governance, and hence central to the context in which family law operates. Indeed, "morality" in its narrowest meaning but commonest usage connotes exclusively one aspect of family morality — sexual morality. Moral issues arise specially often in the family, where their effect can be specially momentous and their resolution specially hard. For in marrying we take responsibilities for the welfare and happiness of someone who, trusting our assurances, has trusted that welfare and happiness to us; and in having children, we take responsibilities for the welfare and happiness — even the existence — of people who must trust that welfare and happiness to us. No morality is learned so early and in so compelling a situation as the morality of family life, and thus no other morality seems as axiomatic, is felt as passionately, so fixes the behavior we exact of ourselves and expect of others. Yet hardly any other morality contends with contrary impulses and temptations so strong, so ingenious, so insistent. Nor are the family's moral problems wholly internal: the family as a basic social institution takes responsibilities for the nurture, education, and protection of society's new members (and its old).

Second, while morals and law need not coincide, the moral views of citizens and of lawmakers shape, properly, their opinions about the law. Once again, this is specially true of family law. Because people have tenacious and passionate beliefs about family morals, because many people believe that law should vindicate right in matters so important, moral principles are deliberately and expressly incorporated in statute and case law. And for these same reasons, moral sentiments influence lawmakers unawares.

Third, moral issues command special attention from family law because the law typically intervenes in the family precisely when pressing moral problems arise. Furthermore, family law is one of the rare areas of law that tries — in child-custody decisions, for instance — to take into account people's entire moral personalities. And family law,

3. See Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J. L. REF. 1039 (1985).

4. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 198 (1920).

more than most law, encounters crippling problems of enforcement when its rules mismatch popular morals.

Fourth, the relationship between morals and family law merits attention because American views about morals, especially family morals, have changed abundantly. We need to know how thoroughly those changes are and how they have influenced our thinking and our family law, in order that we may eventually ask how desirable those changes are and how far they should affect family law.

Finally, let me put the case for studying family law and moral discourse from a somewhat different perspective. Legal scholarship has lost its method; or, to be more accurate, it is overwhelmed by an embarrassment of methods. Many of these methods — principally the “law ands” — attract us because they offer fresh pictures of how law works and new tools with which to study it. But as we walk toward the blessing of more particular understandings, we walk away from the blessing of more general ones. There is, of course, a tradition of synoptic writing about society, a tradition that attempts to understand how and to what end society’s parts do and should fit together.⁵ Everyone is deterred from writing in that tradition because no one is competent in every area of social inquiry. But law is history, it is the regulator of markets, it is the very product of politics, it is the object of philosophy, it is an expression of society and a social institution itself. If to be a legal academic is to be an amateur historian, political scientist, philosopher, sociologist, and anthropologist, we need manageable ways of doing the unmanageable. That, I believe, is a virtue of studying moral discourse in family law: it is a narrow window through which to glimpse law in its broadest context.

B. *The Hypothesis*

We come now to the first formulation of my hypothesis. Four forces in American institutions and culture have shaped modern family law. They are the legal tradition of noninterference in family affairs, the ideology of liberal individualism, American society’s changing moral beliefs, and the rise of “psychologic man.” These forces have occasioned a crucial change: a diminution of the law’s discourse in moral terms about the relations between family members,

5. A modern example avowedly in that tradition, and directly relevant to the subject of this article, is R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) [hereinafter cited as *HABITS OF THE HEART*]. The Appendix, *Social Science and Public Philosophy*, at 297-307, describes and defends that tradition. The book was published just as this article was completed. Had it been published earlier, I would have relied on it often, for it treats ably many of the themes I discuss here.

and the transfer of many moral decisions from the law to the people the law once regulated. I do not mean that this change is complete or will ever be completed. I do not suppose that it is occurring in every aspect of family law, or everywhere in the country with equal speed. I emphasize that there are other trends, and that there is a considered and considerable reaction to the trend impelled by a revived conservatism and a politicized fundamentalism. But I do suggest that the change is widespread jurisdictionally, institutionally, and doctrinally; that it is deep-seated; and that it is transforming family law.

In this paper, I will initially describe that change in order to demonstrate its strength and its scope. Then, since no area of law flows in a single uninterrupted stream, I will describe some of the eddies and cross-currents affecting moral discourse in family law. Next, I will explore some of the reasons for the present course of family law, hoping that that exploration will also yield a richer sense of the texture and complexity of the change. I will, however, postpone to a later paper the many troubling questions that family law must answer in assessing the wisdom of the change and in deliberating on responses to it.

Before we begin, let me warn against two possible (and related) misreadings of my hypothesis. The first stems from the fact that, as the word is used colloquially, "morality" is a good thing, and more morality is a better thing. Therefore, to say that the law is becoming quantitatively "less moral" seems to imply that the law is becoming qualitatively less good. In some ways this is perhaps true, but for reasons that are immediately obvious, or will shortly become so, it is in other ways surely false.

The second, closely related, misreading of my hypothesis is what might be called the "O tempora, o mores" problem. There is a tradition millennia old — and long honored in this country — of jeremiads against a failing moral order and exhortations to a return to the virtuous past. In light of that tradition, to describe a changing moral order risks implying a wish to restore the status quo ante. I do not wish to do so: I doubt that you can go home again, and even if you could, I doubt you would enjoy it.

II. THE STATEMENT OF THE THEME

A. *The Transformation of Family Law*

Now and then it is possible to observe the moral life in process of revising itself, perhaps by reducing the emphasis it formerly placed upon one or another of its elements, perhaps by inventing and adding to itself a

new element, some mode of conduct or of feeling which hitherto it had not regarded as essential to virtue.

— Lionel Trilling
Sincerity and Authenticity (1972)

I have said that the tendency toward diminished moral discourse and transferred moral responsibility in family law is widespread, and I will now attempt to prove that proposition by briefly surveying family law. The survey will reveal that, in virtually every area of family law, this tendency has made itself felt; that in most areas, the tendency is a considerable one; and that in many areas, it is prepotent.

1. *The Law Surrounding Divorce*

Divorce is among the clearest examples of the change I discern. For over a century, divorce law reflected and sought to enforce society's sense of the proper moral relations between husband and wife. Indeed, the law of divorce was virtually the only law that spoke directly or systematically to an ideal of marital relations.⁶ That ideal included duties of life-long mutual responsibility and fidelity from which a spouse could be relieved, roughly speaking, only upon the serious breach of a moral duty by the other spouse. In the last two decades, however, every state⁷ has statutorily⁸ permitted some kind of no-fault divorce. These reforms exemplify the trend I hypothesize because (1) they represent a deliberate decision that the morality of each divorce is too delicate and complex for public, impersonal, and adversarial discussion; (2) they represent a decision that the moral standard of life-long fidelity ought no longer be publicly enforced; and (3) they represent a decision to diminish the extent of mutual spousal responsibility that will be governmentally required.

It is, of course, true that no-fault divorce rests in part on a moral view about the relations of people to each other and about the proper scope of government influence over people's lives. Thus I am far from suggesting that the decision to adopt no-fault divorce was itself amoral

6. Of course, most states impose a duty of spousal support, either through the doctrine of necessities, family-expense statutes, or, occasionally, the criminal law. VA. CODE §§ 20-61 (1983). These provisions are, however, generally useless to the unsupported spouse and of interest primarily to creditors. See Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767 (1984). Nor will courts generally enforce the support obligation in the absence of an actual separation. *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953). Insofar as this area of law has recently changed, it has been in the direction of gender neutrality.

7. 1985 *Survey of American Family Law*, 11 FAM. L. REP. (BNA) 3015 (1985) [hereinafter cited as 1985 *Survey*].

8. Cf. *Figueroa Ferrer v. Commonwealth of Puerto Rico*, 107 P.R. Dec. 250 (1978), 4 FAM. L. REP. (BNA) 2744, which holds that the "right of privacy or intimacy" protected by the Puerto Rican constitution guarantees access to no-fault divorce.

or immoral. Rather, my point is that, before no-fault divorce, a court discussed a petition for divorce in moral terms; after no-fault divorce, such a petition did not have to be discussed in moral terms. Before no-fault divorce, the law stated a view of the moral prerequisites to divorce; after no-fault divorce, the law is best seen as stating no view on the subject. Before no-fault divorce, the law retained for itself much of the responsibility for the moral choice whether to divorce; after no-fault, most of that responsibility was transferred to the husband and wife.⁹

The availability of no-fault divorce does not eliminate all the possible moral questions to be resolved when couples separate; judicial decisions concerning alimony or maintenance, marital-property division, and child custody and support all may raise such questions. The tendency in each of those areas is likewise toward diminished moral discourse. This trend in alimony law is in part caused by a significant change described in the preceding paragraph — namely, the decline in the belief that each spouse assumes lifelong responsibility for the other. This change has strengthened the disinclination of both courts and legislatures to award alimony for life (or until the remarriage of the recipient), may have led to an increased disinclination to award alimony at all, and has led to a preference for “rehabilitative” alimony (i.e., to awarding alimony only for “the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment.”)¹⁰ Further, just as legislatures relieved courts of the responsibility of evaluating the moral relationship of petitioners for divorce, so are they increasingly relieving courts of that responsibility for petitioners for alimony.¹¹ Even when legislatures have not expressly done so, many courts have inferred from their state’s no-fault divorce statute a legislative intent to eliminate considerations of marital fault in setting alimony.¹² An analogous movement

9. See Part II. C. *infra* for further treatment of the argument that, because a moral basis for the changes described in this Part can be found, moral discourse in the law cannot have diminished. See Part IV. *infra* for an extended demonstration that the changes I describe here cannot comfortably be subsumed under any single new moral view of family life.

10. UNIF. MARRIAGE AND DIVORCE ACT § 308(b)(2), 9A U.L.A. 160 (1979).

11. 1985 Survey, *supra* note 7, at 3015, 3017 (1985). The Uniform Marriage and Divorce Act, for example, provides that maintenance “shall be in amounts and for periods of time the court deems just, without regard to marital misconduct. . . .” UNIF. MARRIAGE AND DIVORCE ACT § 308(b), 9A U.L.A. 160 (1979).

12. See, e.g., *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972). This inference may reveal something about judicial as well as legislative attitudes, since the inference is surely not compelled. Fault was eliminated as a basis for divorce partly because it was thought that people could not usefully be made to live together if they did not want to, whatever their moral relationship. However, in deciding what financial obligations the parties continue to have to each other after the marriage is ended, enforcement problems become less severe and the moral relationship may well be relevant. Indeed, that relevance seems to be conceded by the usual direction to the

may be seen in the treatment of marital property upon divorce; both statute and case law increasingly require courts to ignore marital fault.¹³

In child-custody law, moral discourse has been reduced by the legislative and judicial erosion as proper bases for decision of various issues of morality, particularly sexual morality, such as nonmarital cohabitation¹⁴ and homosexuality,¹⁵ which were once thought relevant. Thus the Uniform Marriage and Divorce Act (a "barometer of enlightened legal opinion")¹⁶ provides, "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."¹⁷ As the Commissioner's Note explains, "This provision makes it clear that unless a contestant is able to prove that the parent's behavior in fact affects his relationship to the child (a standard which could seldom be met if the parent's behavior has been circumspect or unknown to the child), evidence of such behavior is irrelevant."¹⁸ Further, legislatures and courts have, by limiting discussion to the psychological well-being of the child, tried to close off the consideration of morals and values that the "best interests of the child" standard once seemed to invite. Thus the Uniform Marriage and Divorce Act, while requiring a court determining child custody to "consider all relevant factors," expressly mentions (besides the wishes of the child and his parents) the child's "interaction and interrelationship" with any relevant persons, the child's "adjustment to his home, school, and community," and the "mental and physical health" of all concerned.¹⁹

court to make whatever distribution of property and income may be thought to be "right," or "justifiable," or "equitable." It may be true that another reason for no-fault divorce was legislative reluctance to exacerbate the tensions between the parties by discussing painful subjects, but such discussions as to alimony should have fewer consequences, given that divorce has already been decided on. Indeed, to ignore the moral relationship between the parties in setting alimony awards can itself exacerbate tensions. Further, as Professor Müller-Freienfels points out, "there are more possibilities, in practice, of mitigating fault, and reducing its impact, so as to permit compromises" when dealing with alimony. Müller-Freienfels, *The Marriage Law Reform of 1976 in the Federal Republic of Germany*, 28 INTL. & COMP. L.Q. 184, 195 (1979).

13. 1985 Survey, *supra* note 7, at 3021-26.

14. See, e.g., *Kessler v. Kessler*, 236 N.Y.S.2d 472 (Sup. Ct. 1963); *Sparks v. Sparks*, 29 Utah 2d 263, 508 P.2d 531 (1973); *Wildermuth v. Wildermuth*, 14 Wash. App. 442, 542 P.2d 463 (1975).

15. *Doe v. Doe*, 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983).

16. Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 292 (1978) [Ed. note: Professor Schneider is the author of this Note.].

17. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 197 (1979).

18. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 197 Commissioners' Note (1979).

19. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 197 (1979). For a justification and elaboration of this development, see Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

2. *The Law Surrounding Support Obligations*

Developments relevant to my thesis in the child-support area center on the survival of the belief in the parent's obligation to support the child during the child's minority. While my thesis would predict that that belief was waning, there is evidence to the contrary. For example, there has been much attention to and legislation for enforcing child support duties.²⁰ Some legislatures and courts have expanded the legally imposed parental support duty to include the support of children through college²¹ and even law school.²² On the other hand, in this area the law's actual practice may be as telling as its enunciated principle, and even that principle is ambivalently regarded. As Professor Chambers reports, "In the United States in 1975, of five million mothers living with minor children and divorced, separated, remarried, or never married, only about one-fourth received child support payments of any kind during the year and, of those who received anything, fewer than half received thirty dollars or more a week."²³ From this fact, from the low rate of visitation by noncustodial fathers,²⁴ and from the increasing discontinuity of family arrangements, Professor Chambers predicts that legislatures might someday limit child-support obligations (and court-enforced visitation rights) to a short term, perhaps three or four years. He believes this change may be foreshadowed by the willingness of states "to recognize more explicitly the right of couples to agree by contract to vary otherwise applicable obligations of support,"²⁵ and he speculates that "[c]hild-support may come to be viewed in much the same way [as

20. See, e.g., Child Support Enforcement Amendments, Pub. L. No. 98-378, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1305; UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, described at 4 FAM. L. REP. (BNA) 4017 (1978); D. CHAMBERS, MAKING FATHERS PAY (1979) (an illuminating study of Michigan's comparatively effective system and a proposal for a national system for deducting support payments from wages); H. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE (1981); THE PARENTAL CHILD-SUPPORT OBLIGATION: RESEARCH, PRACTICE AND SOCIAL POLICY (J. Cassetty ed. 1983).

21. An Illinois statute, for instance, provides: "The Court also may [upon divorce] make such provision for the education and maintenance of the child or children, whether of minor or majority age, out of the property of either or both of its parents as equity may require . . ." ILL. REV. STAT. ch. 40, § 513 (1983). The Illinois Supreme Court upheld the statute in *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

22. *Ross v. Ross*, 167 N.J. Super. 441, 400 A.2d 1233 (Passaic County Ct. 1979).

23. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1623 (1982) (footnote omitted).

24. He notes, for example, that "fifty-two percent of [the children living with their mothers after divorce] had . . . not had contact with their father in at least a year." *Id.* at 1624. On the other hand, there is evidence that attitudes may be changing: "divorced fathers now seem to be much more involved with their children, more concerned about their personal relationship with them . . ." J. VEROFF, E. DOUVAN & R. KULKA, THE INNER AMERICAN: A SELF-PORTRAIT FROM 1957 TO 1976, 241 (1981) [hereinafter cited as J. VEROFF].

25. Chambers, *supra* note 23, at 1629.

rehabilitative alimony]: aid during a period of transition until the custodial parent can achieve financial independence or enter a new relationship.”²⁶ He also observes that the increasing availability and acceptability of abortion and birth control may lead to a time when “a pregnant woman, not living with the father, who knows that the father has no desire to participate in the child’s upbringing may be seen [in not aborting a child] as making a unilateral decision to bear a child and the responsibility for its birth and for raising it may be seen as hers alone.”²⁷ Two factors enhance this possibility: society’s sense of a public responsibility to support children whose parents cannot support them,²⁸ and the fact that the “[p]rivate law support obligations for spouses and children that remain rest less on ideas of moral and natural duty than they do on utilitarian notions.”²⁹

The rise of public provision for the indigent, especially through Social Security, promoted a change in the law’s moral impositions in another area related to support. Statutes were once common whose object was “to protect the public from loss occasioned by neglect of a moral or natural duty imposed on individuals,”³⁰ namely, the duty of adults to support parents or grandparents who cannot support themselves. Such statutes are now decreasingly common and are evidently rarely enforced.³¹

Marital responsibilities may be said to have diminished in yet another respect. The law was once, and to a considerable extent still is,

26. *Id.* at 1633.

27. *Id.* at 1619 (footnote omitted). Men have tried to escape child support obligations on such grounds, but with one temporary exception they have failed. *See, e.g.,* *People ex rel. S.P.B.*, 651 P.2d 1213 (Colo. 1982). The exception is the bizarre case of the “celebrity” an airline stewardess chose to be the father of her child. “[O]n the crucial night, which followed a long separation, he asked [her] before they had sexual intercourse what she was doing in regard to contraception, and she replied [falsely] that she was ‘on the pill.’” *Pamela P. v. Frank S.*, 110 Misc. 2d 978, 979, 443 N.Y.S.2d 343, 344 (N.Y. Fam. Ct. 1981). The well-known family court judge, Nanette Dembitz, held that, under *Shelley v. Kraemer*, 334 U.S. 1 (1947), this fraud in the conception “interfered with respondent’s right of free choice regarding procreation,” 110 Misc. 2d at 983, to such an extent that he should be relieved of any support obligation beyond that necessary to assure that “the child’s fair and reasonable needs can . . . be met.” 110 Misc. 2d at 985. Connoisseurs of legal novelty will be saddened to learn that, on appeal, the New York Court of Appeals rejected the family court’s holding. 59 N.Y.2d 1, 462 N.Y.S.2d 819, 449 N.E.2d 713 (1983).

28. Grants to States for Aid to Dependent Children, Title IV of the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620, 627-28 (1935).

29. M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 80 (1981).

30. *Illinois v. Hill*, 163 Ill. 186, 191, 46 N.E. 796, 798 (1896).

31. As late as 1956, family responsibility statutes existed in 38 states. Mandelker, *Family Responsibility Under the American Poor Laws: I*, 54 MICH. L. REV. 497, 497 n.1 (1956). In 1980, only 27 states had such laws. Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 813 n.103 (1980). *See* M. GLENDON, *supra* note 29, at 49-50. This type of statute has been challenged, though unsuccessfully, on equal protection grounds. *Swoap v. Superior Court*, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973).

that a couple cannot contract to reduce the marital duties imposed by law.³² An exception to this rule has long been made for pre- and post-nuptial contracts respecting property.³³ Now, a second exception, fostered by both courts and legislatures, is developing that allows couples to agree to some nonproperty divorce terms. This modest³⁴ increase in freedom to contract represents a slackening of legal attempts to regulate moral conduct, but, like most grants of freedom to contract, is not an unambiguous withdrawal from private affairs by the state: With the right to contract comes judicial supervision and interpretation of the contract, and that authority can provide judges with the opportunity to impose their own moral views. This judicial authority is exercised with special zeal in supervising contracts concerning obligations after divorce. Courts commonly require that the parties must either have made a fair agreement or must have understood both the economic circumstances of the other party and any rights waived in making the agreement.³⁵

3. *The Law Surrounding Nonmarital Relations*

Changes in the law of nonmarital contracts likewise reveal a marked alteration in the law's moral viewpoint. It was once "well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or *immoral consideration*,"³⁶ and thus that "[a]n agreement in consideration of future illicit cohabitation between the plaintiffs is void."³⁷ In the celebrated *Marvin*³⁸ case, however, the California Supreme Court discovered that California had always used "a narrower and more precise standard: a contract between nonmarital partners is unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services."³⁹ The court offered to enforce oral contracts and contracts implied in fact, and it enticingly declined to "preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in

32. *French v. McAnarney*, 195 N.E. 714 (Mass. 1935).

33. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982).

34. "Modest" at least in the sense that much remains that cannot be the subject of legally enforced private contracting: i.e., nonproperty aspects of an ongoing marriage.

35. *E.g.*, *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962).

36. *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977) (emphasis in original).

37. *Wallace v. Rappleye*, 103 Ill. 229, 249 (1882), *quoted in* *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1208 (Ill. 1979).

38. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

39. 18 Cal. 3d at 669, 557 P.2d at 112, 134 Cal. Rptr. at 821 (emphasis in original).

which existing remedies may prove inadequate.”⁴⁰ Other states have widely, though not universally, followed suit. This approach, in effect if not precisely in terms, removes from judicial consideration a moral question — whether a relationship is so offensive to morals that the state should decline to enforce contracts respecting it. However, here even more than in marital contracts, the elimination of one moral consideration could create more. This would be true even if judges needed do no more than supervise and interpret express written contracts; it would be truer if judges dealt only with implied contracts; it will be very true indeed if judges are actually to devise standards for “additional equitable remedies” even where no implied contract is found. This visitation of the law into the moral lives of the unmarried seems particularly piquant in view of the likelihood that they stay unmarried in part to avoid the legal consequences of marriage.⁴¹

4. *The Law Surrounding Abuse of Children*

The contraction of moral discourse in the law of child abuse and neglect may be illustrated by beginning with Joseph Story:

[P]arents are intrusted with the custody of the persons, and the education, of their children; yet this is done upon the natural presumption, that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection. But, whenever . . . a father . . . acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere⁴²

Until recently, child abuse and neglect statutes used similarly broad criteria for legal intervention. Georgia’s statute, for instance, still authorizes legal intervention on behalf of any child “without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health or morals.”⁴³ And child-welfare officials and courts long intervened exactly in aid of a child’s presumed moral welfare.⁴⁴ The present trend of influential opinion is to define grounds for intervention specifically and narrowly so that the state may act only when the child

40. 18 Cal. 3d at 684, 557 P.2d at 123, 134 Cal. Rptr. at 832 n.25.

41. Indeed, the opinion has been criticized on just this ground. Kay & Amyx, Marvin v. Marvin: *Preserving the Options*, 65 CALIF. L. REV. 937 (1977).

42. J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1341 (3d ed. 1843).

43. GA. CODE § 15-11-2(8)(A) (1985) (defining “deprived child”). Legal intervention on behalf of a deprived child is authorized under § 15-11-34.

44. A notorious example is *In re Raya*, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (Cal. Ct. App. 1967).

suffers or risks severe physical or mental injury.⁴⁵ Supporters of that approach urge it in part precisely because it lessens intervention on "moral" grounds:

[A]ll intervention involves value judgments about appropriate childrearing practices and value choices about where and how a child should grow up. Considering the seriousness of the decision to intervene, intervention should be permissible only where there is a clear-cut decision, openly and deliberately made by responsible political bodies, that that type of harm involved justifies intervention. Such value judgments should not be left to the individual tastes of hundreds of nonaccountable decisionmakers.⁴⁶

Moral discourse about child abuse has diminished in another way. There has for some time been a tendency to discuss that issue not in moral, but in medical terms. In recent decades, many social issues have undergone such a shift. The shift in language about child abuse has been specially marked, however, because various kinds of experts — psychiatrists, psychologists, and social workers — have directly influenced the statutory, judicial, and administrative discourse about child abuse.⁴⁷

In the related area of child medical care, the direction of change is somewhat obscure, partly because there are few reported cases save those in which a parent has refused a child medical treatment for religious reasons. The paucity of cases may itself indicate the law's apprehension of the mine field of moral issues that questions of child medical care, and particularly questions of neonatal euthanasia, present. The dearth of cases seems especially significant since the incidence of legally consequential child medical care problems appears to have increased with recent advances in perinatal care and since public discussion about and awareness of those problems has certainly increased.⁴⁸

Rationales for the law's reluctance to encounter the moral dilemmas of child medical care have been propounded emphatically in the

45. INSTITUTE OF JUDICIAL ADMINISTRATION-AMERICAN BAR ASSOCIATION JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT, Standards 1.3.A; 2.1 (1981).

46. *Id.* at Standard 1.3 commentary.

47. Weisberg, *The "Discovery" of Sexual Abuse: Experts' Role in Legal Policy Formulation*, 18 U.C.D. L. REV. 1 (1984). As Weisberg points out, the last few years have seen a resurgence of moral language into legal discourse about child abuse. See Part V. *infra*.

48. See, e.g., Mnookin, *Two Puzzles*, 1984 ARIZ. ST. L.J. 667; C. Schneider, *A Response to Two Puzzles* (unpublished manuscript); *Should Uncle Sam Protect Handicapped Babies?* U.S. NEWS & WORLD REP., Jan. 16, 1984, at 63. At this writing, the success of the Reagan administration's attempts — including its "Baby Doe" regulations, 50 Fed. Reg. 14878, 14887-89 (April 15, 1985) (to be codified at 45 C.F.R. section 1340.15) — to bring these questions into legal discourse remains uncertain.

legal literature,⁴⁹ and that reluctance has been demonstrated and articulated judicially in, for example, *In re Phillip B.*⁵⁰ In that case, the state of California sought a court order compelling heart surgery for a twelve-year-old boy with Down's Syndrome who had been institutionalized from birth. The state contended that without the operation, his lungs would deteriorate, the consequent lack of oxygen would so enervate him that he would live from bed to chair, and he would die within, at the outermost, twenty years. The risk of mortality from the surgery was no more than five or ten percent; Phillip's father "expressed no reluctance in the hypothetical case of surgery for his other two sons if they had the 'same problem,' justifying the distinction on the basis of Phillip's retardation."⁵¹ In a brief opinion the court declined to order the operation, since,

Inherent in the preference for parental autonomy is a commitment to diverse lifestyles, including the right of parents to raise their children as they think best. Legal judgments regarding the value of childrearing patterns should be kept to a minimum so long as the child is afforded the best available opportunity to fulfill his potential in society.⁵²

5. *The Law Surrounding Sexual Relations and Reproduction*

In a series of areas, the law's moral discourse has been restricted by narrower definitions of immorality. Perhaps the first change was in the law's treatment of contraception. In the late nineteenth century and into the twentieth century, dissemination of information about contraception was limited by both state and federal statute. In the 1920s and 1930s, an active and successful birth-control movement arose, and as contraception went "from private vice to public virtue," such statutes were repealed.⁵³ The Supreme Court fired the *coups de grace* when, in *Griswold v. Connecticut*⁵⁴ and *Eisenstadt v. Baird*,⁵⁵ it

49. The rationales have been set forth perhaps most emphatically in Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977).

50. 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (Cal. Ct. App. 1979), *cert. denied*, 445 U.S. 949 (1980).

51. *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 418 n.9, 188 Cal. Rptr. 781, 787 n.9 (Cal. Ct. App. 1983). "Evidence established that Phillip, with a recently tested I.Q. score of 57 . . . is a highly functioning Down's Syndrome child capable of learning sufficient basic and employable skills to live independently or semi-independently in a non-institutional setting." 139 Cal. App. 3d at 419, 188 Cal. Rptr. at 788.

52. *In re Phillip B.*, 92 Cal. App. 3d 796, 801, 156 Cal. Rptr. 48, 51 (Cal. Ct. App. 1979). In a subsequent proceeding, a couple who had, through volunteer work, come to know Phillip sought and won appointment as guardians of his person and estate. *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (Cal. Ct. App. 1983). The operation has since been successfully performed. N.Y. Times, Oct. 10, 1983, at A12, col. 1.

53. J. REED, *FROM PRIVATE VICE TO PUBLIC VIRTUE* (1978).

54. 381 U.S. 479 (1965).

held that state regulations limiting access to contraception infringe the constitutional right to privacy.

A slower but still pronounced change has characterized laws prohibiting fornication, cohabitation, and adultery. While all states once had such statutes, fewer than a third have them now, and states that have not repealed them seem to enforce them rarely or sporadically.⁵⁶ Although several Supreme Court Justices have said in dicta that such statutes are constitutional,⁵⁷ the Court has never ruled on the question, and some commentators have argued⁵⁸ and some courts have held⁵⁹ to the contrary.

Laws against homosexuality may be in an earlier stage of a similar process. Although the Supreme Court summarily and delphically affirmed a lower-court ruling refusing to find Virginia's sodomy statute unconstitutional,⁶⁰ a number of state courts have held that such statutes infringe the right of privacy,⁶¹ and a number of states and towns have written antidiscrimination statutes or ordinances protecting homosexuals.⁶²

The law's rescue from the moral difficulties of abortion was more abrupt. In the 1960s and early 1970s, a reform movement began to persuade state legislatures, most notably New York's, to liberalize abortion statutes. In 1973, however, the Supreme Court preempted that movement by holding in *Roe v. Wade*⁶³ that women have a constitutional right to an abortion free from state regulation in the first

55. 405 U.S. 438 (1972). Two shots were needed because the Court missed the first time. See notes 199-202 *infra* and accompanying text.

56. See Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 284; Note, *supra* note 16. One also sees cases involving public employees who have been penalized for unmarried cohabitation. *E.g.*, Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977), *affd.*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978).

57. *Carey v. Population Servs. Intl.*, 431 U.S. 678, 718 n.2 (1977) (Rehnquist, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

58. *E.g.*, Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Note, *supra* note 16.

59. *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980).

60. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *affd. mem.*, 425 U.S. 901 (1976).

61. *E.g.*, *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980).

62. *E.g.*, PALO ALTO, CAL., ADMIN. CODE § 2.22.050 (1969); MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 945 (1975); SEATTLE, WASH., ORDINANCE 102,562 (1973); WIS. STAT. §§ 101.22, 111.31-32(13m) (1981-82); ANN ARBOR, MICH., ORDINANCE CODE ch.112 § 9.150-51(13) (1980); DETROIT, MICH., CODE §§ 7-1004,1005 (1984).

63. 410 U.S. 113 (1973). For an extended discussion of *Roe*, see text at notes 229-58 *infra*.

trimester of pregnancy, and a right to an abortion under limited state regulation in the second trimester. *Roe* neatly exemplifies the diminution of moral discourse: it removed a major moral question from the law,⁶⁴ and did so at a remarkable and revealing moment — exactly when debate about abortion in legislatures was developing vigorously and productively, and when judicial debate was too recent and unformed to give the Court the kind of guidance it ordinarily relies on.⁶⁵ *Roe* exemplifies just as neatly the law's tendency to transfer moral decisions to the people the law once regulated, for *Roe* apparently rested partly on the belief that the pregnant woman could better make the moral decisions about abortion than the state, a belief the Court has carried to the point of protecting a "competent" minor's power to decide to have an abortion without parental guidance.⁶⁶

6. Conclusion

This brief and allusive survey of family law illustrates how broad and deep the trend toward diminished moral discourse and transferred moral responsibility is. In the rest of this Part, I shall suggest two additional ways of analyzing the trend, shall deal with objections to my formulation of it, and shall attempt to articulate some of its complexities.

B. Two Amplifications of the Hypothesis

All systems of ethics, no matter what their substantive content, can be divided into two main groups. There is the "heroic" ethic, which imposes on men demands of principle to which they are generally *not* able to do justice, except at the high points of their lives, but which serve as signposts pointing the way for man's endless *striving*. Or there is the "ethic of the mean," which is content to accept man's everyday "nature" as setting a maximum for the demands which can be made.

— Max Weber
Letter to Edgar Jaffé (1907)

I have described a series of doctrinal developments that support the hypothesis that moral discourse in family law has diminished and that responsibility for moral decisions has been transferred from the

64. R. MNOOKIN, IN THE INTEREST OF CHILDREN 244-46 (1985). *Roe* did leave to the traditional later day several subsidiary legal and moral issues. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); and *Maher v. Roe*, 432 U.S. 464 (1977). And opponents of abortion have pressed their view, often successfully, by all the legislative means left open to them.

65. Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724 (1979), reprinted in *THE LAW AND POLITICS OF ABORTION* 158 (C. Schneider & M. Vinovskis eds. 1980).

66. *Bellotti v. Baird*, 443 U.S. 622 (1979).

law. This description not only supports that hypothesis; it also allows us to amplify it, for there has been an associated change in the *nature* of the moral discourse — namely, a change away from aspirational morality. The family law we inherited from the nineteenth century sought not just to regulate family life, but to set a standard of behavior not readily attainable. That law enunciated and sought to enforce an ideal of lifelong marital fidelity and responsibility. Attempts to diminish the responsibilities of one spouse to the other were denied legal force by prohibitions against altering the state-imposed terms of the marriage contract. Divorce was discouraged, was justified primarily by serious misconduct by a spouse, and was available only to the innocent. Marital responsibility in the form of alimony continued even where the marriage itself had ended. The old family law also enunciated what might be called an ascetic ideal. Sexual restraint in various forms was a prominent part of this ideal. Laws prohibiting fornication, cohabitation, and adultery confined sexual relations to marriage; laws declining to enforce contracts based on meretricious consideration and laws giving relief in tort for interference with the marital relationship sought to achieve the same effect indirectly. Sexual relations were confined to monogamous marriage by laws prohibiting polygamy and to exogamous marriage by laws prohibiting incest. Sexual relations were confined to conventional heterosexuality by sodomy laws. And laws regulating the sale of contraceptives and the use of abortions made the “risks” of normal sexual relations difficult to avoid. Sexual restraint, while central, was not the only feature of the law’s ascetic ideal. That ideal also included, through child-custody law, a view of “good moral character” that valued the diligent, law-abiding, church-going citizen.

Modern family law, as this survey suggests, not only rejects some of the old standards as meaningless, undesirable, or wrong; it also hesitates to set standards that cannot readily be enforced or that go beyond the minimal responsibility expressed in the cant phrase, “Do your own thing, as long as you don’t hurt anybody else.”⁶⁷ The standard embodied in that phrase, with its emphasis on its first clause, is emphatically not aspirational; that standard can instill neither the inspiration nor the empathy to encourage people to anticipate ways in which their conduct might be harmful, much less to shape their conduct so that it is actively helpful.

My survey of family law suggests a second amplification of my

67. The legal changes surveyed exhibit a common tendency to remove from the law rules not justified in terms of preventing palpable harm to particular individuals; that is, those rules whose sole justification is “morality” have become rarer.

hypothesis. I have had to discuss the trend toward diminished moral discourse as though it were entirely disembodied, as though it had no social, economic, or political origins. Legal scholarship's unfortunate ignorance of the politics of family law, the numerous and complex origins of the posited trend, and the limited scope of this paper inhibit precision, and therefore I proffer only a limited working hypothesis. I hypothesize that the trend toward diminished moral discourse in family law is most actively promoted by lawyers, judges, and legal scholars who are, relative to the state legislators and judges who would otherwise decide family law questions, affluent, educated, and elite. This group's views on family law questions are (relatively) liberal, secular, modern, and noninterventionist. Some confirmation of this hypothesis may be found in public opinion surveys that suggest that "community leaders" and members of the "legal elite" consistently have more liberal attitudes on family law questions than the "mass public."⁶⁸ And it does seem likely, for instance, that judicial receptivity to unmarried cohabitation stems in part from the fact that judges' sons and daughters are members of one of the two groups in which nonmarital cohabitation is most common.⁶⁹ Indeed, a good deal of change in family law may be attributable to the encounter of an upper-middle class whose mores are changing with traditional legal regulation of divorce, abortion, and contraception, and to the response of a more feminist upper-middle class to the law's failure to prevent spouse abuse, nonpayment of alimony, and inequitable allocation of marital property.⁷⁰

68. H. McCLOSKEY & A. BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* 171-231 (1983). The authors of this study define "community leaders" and "legal elite" vaguely, but since in each case they are speaking only of *local* elites, and since their sample underrepresented poorer and less-educated members of the public, their study probably understates the class, professional, and institutional differences on family law questions.

Further confirmation of the hypothesis that class affects views about family law issues comes from Professor Kristin Luker's fascinating study of pro- and anti-abortion activists, K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1983). She finds: "On almost every social background variable we examined, pro-life and pro-choice women differed dramatically." *Id.* at 194. The former tended to be middle-middle class, the latter upper-middle class. She concludes that the debate over abortion has become a vehicle for debating class-based differences over the role of women and motherhood in society: "Protecting the life of the embryo, which is by definition an entity whose social worth is all yet to come, means protecting others who feel that they may be defined as having low social worth. . . ." *Id.* at 207. Pro-life people "see an achievement-based world as harshly superficial, and ultimately ruthless. . . . Pro-life people have relatively fewer official achievements in part because they have been doing what they see as a moral task, namely, raising children and making a home. . . ." *Id.* at 207. See also G. PEELE, *REVIVAL AND REACTION* (1984).

69. The two groups are urban young adults with many years of education and urban young adults who spent few years in school. A. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 13-14 (1981).

70. As Professor Lempert hypothesizes: "[W]here the moral desirability of a law is not self-evident to most people, the probability that the law will be effectively repealed will vary directly with

This hypothesis may help us glimpse some of the complexity of the trend toward diminished moral discourse. While a number of the developments I have described — the Supreme Court's privacy decisions for example — clearly reduce moral discourse by eliminating or limiting important moral issues as bases for legal decision, legal (and political) discussion of some version of these issues has sometimes persisted. In general, however, such discussion has been relegated to those legal and political institutions that are relatively less "elite" (and that are relatively more accessible to their lower-middle-class constituents). And insofar as such discussion occurs in "elite" legal and political institutions — resistance to the Court's abortion decision is a prime example — we may expect those institutions to be divided along the class and cultural lines I have described. Professor Fineman suggests an analogue to this process in her valuable and intriguing study of Wisconsin's cohabitation statute, which she finds is differentially enforced depending on local police and prosecutors' sense of the moral views of their particular communities.⁷¹

C. *Some Complexities and Some Definitions*

1. *Some Complexities*

All scholarship is subject to at least one temptation — the temptation to devise a single hypothesis to explain all, or most, of a field. Even a scholar who modestly proposes a limited hypothesis will be read as imposing an unlimited one. But the truth, as Oscar Wilde said, "is rarely pure and never simple."⁷² Nothing important can be explained in terms of a single factor, and even attempts to weight once and for all the many features of a phenomenon always fail. Thus my hypotheses, while important, are not intended to describe or explain all of family law. In this section, then, I shall limn some of the complexities of those hypotheses.

A central complexity is that the "trend" I describe is not a typical "trend," for moral discourse in family law is not diminishing entirely, or even largely, because of a deliberate decision that it should do so. Unlike, for example, the trend in the 1960s toward greater procedural rights for defendants in criminal cases, this trend is not entirely caused by people who self-consciously favor it. Rather, many of the policies

the social status of those identified as violators of the law," and "the moral desirability of a law is less likely to appear self-evident to most people the higher the perceived social status of those identified as violators of the law." Lempert, *Toward a Theory of Decriminalization*, 3 *ET AL.* 1, 5 (1974) (emphasis in original).

71. Fineman, *supra* note 56, at 287-96.

72. O. Wilde, *The Importance of Being Earnest*, Act I.

that perpetuate the trend were adopted for reasons thought sufficient in themselves quite apart from their consequences for moral discourse. True, moral discourse has in some areas been diminished and moral responsibility has in some respects been transferred because of a considered choice to relieve the law of moral discourse or because of a considered opinion that individuals will make better decisions than the state. But the trend has many other sources. Moral discourse has diminished, for example, because of a constriction in the category of acts considered immoral, because of changes in society's view of the nature of one person's responsibility for another, because of society's diminished sense of ability to enforce family law, and because of an unconsidered and unnoticed change in the nature of the language courts and legislatures use.

A sense of the complexities that the word "trend" tries to organize may be won by examining the consequences of obeying a common first impulse — my own first impulse — when confronted with a topic like mine: namely, the impulse to think in terms of "moral images" of the family in the law.⁷³ On consideration, though, the unwisdom of doing so becomes clear: There is no "law" that presents "a moral image" of "the family." It is instructive to consider why.

First, the United States has thousands of different legal institutions, each capable of generating its own legal doctrines and hence its own moral image of the family.⁷⁴ The three major jurisdictional levels — federal, state, and local — each have different responsibilities for and perspectives on families.⁷⁵ Further, each jurisdiction normally has three branches of government — legislative, judicial, and executive — each, again, with its own responsibilities for and perspectives on families.⁷⁶ And, yet further, there are within the executive and judiciary several different levels, each able to write (at least until corrected by a higher level) binding law, and each, again, with its own responsibilities for and perspectives on the family. Within the judicial branch,

73. Cf. *CHANGING IMAGES OF THE FAMILY* (V. Tufte & B. Myerhoff eds. 1979).

74. See generally Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RESEARCH J. 425 (exploring legal pluralism in American society).

75. While local jurisdictions make little family law, they make some, as when they define "family" for zoning purposes. See, e.g., *Moore v. East Cleveland*, 431 U.S. 494 (1977) (holding unconstitutional a local zoning ordinance defining "family" to include households in which grandmothers lived with grandchildren who were siblings, but to exclude households in which grandmothers lived with grandchildren who were cousins). Cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (holding constitutional a local zoning ordinance defining "family" to exclude households of more than two unrelated people).

76. While the executive does not by itself make family "laws," it does write family "rules," as when the Social Security Administration makes regulations amplifying on the statutory definition of "dependent," or when a police department tells its officers how to handle domestic quarrels.

for example, are trial and appellate courts. Trial judges commonly differ in ability and temperament from appellate judges, trial judges and appellate judges work under different time pressures, trial judges confront the litigants and the whole record while appellate judges confront only isolated issues of law, and so on. For that matter, many family law disputes are handled by a specialized branch of the trial bench — a family court, juvenile court, or probate court — which, like all specialized institutions, has its own careers, customs, and convictions.

Thus the first problem with describing the law's moral image of the family lies in the multiplicity and diversity of legal institutions. The second problem lies in the multiplicity and ambiguity of legal doctrines. Even a single level of a single branch of government in a single jurisdiction commonly produces legal doctrines in many areas of the law. One difficulty, then, will be that of isolating those doctrines that speak to family problems: there is no body of law that everyone agrees is "family law." Although most law schools offer a course called "family law," and although many states compile statutes under the rubric of "domestic relations," those phrases have no uniform content. Moreover, some kinds of law — tax codes, for example, or the statute establishing the Federal Housing Administration — are not "family law," but so affect families that they must be considered when investigating the law's view of the family.

Another difficulty will be that those legal doctrines that concern the family will present different images, and different moral images, of it. Even law that is undeniably "family" law rarely treats "the family" as a whole. Rather family law is divided in two — the law of husband and wife, and the law of parent and child — and each part is doctrinally fragmented. Nor is this surprising: different areas of the law generally have histories of their own, operate on logic of their own, respond to interest groups of their own, and move at paces of their own.⁷⁷

A third difficulty will be that, even were there doctrinal consistency, different moral images of the family may be presented by articulated doctrine and by the law in practice. Because family law defers many crucial and complex questions to unguided or faintly guided ju-

77. For example, the law of most jurisdictions declines to interfere in parents' decisions about where their children shall live, even if the parents have solicited legal intervention by entering into a contract on the subject. The law declines because it assumes that parents will do their best to make wise decisions for their children and that the parents' best will usually be better than the law's. See, e.g., *In re Polovchak*, 97 Ill. 2d 212, 223, 454 N.E.2d 258, 262 (1983), *cert. denied*, 104 S. Ct. 1413 (1984). Nevertheless, in some jurisdictions a court may override even a joint parental decision as to where the children shall live if that court is presiding over the parents' divorce. E.g., CAL. CIV. CODE §§ 4600.5(a), 4608 (West. supp. 1985).

dicial discretion,⁷⁸ unarticulated rules of thumb are common.⁷⁹ Principle and practice also differ in those many areas of family law in which legal principle lags behind social principle or practice, as during those long years in England when adultery was the only ground for divorce, and perjured testimony won many divorces.⁸⁰

Not only will articulated principle and actual practice present different images, but actual practice — how courts and lawyers resolve disputes — will present different images from perceived practice — how courts and lawyers think they resolve disputes.⁸¹ This in turn will affect actual practice in, for example, that vast majority of cases that are never litigated or are settled by consent of the parties, for in those cases the parties may have received legal advice based on false impressions of actual practice.

Yet another difficulty will lie in identifying the moral viewpoint even of legal doctrine that undoubtedly speaks to the family. A single legal doctrine, as any student of the common law knows, can often be justified on several moral grounds. One might look to the law's expressed moral justification, but "the law" presents fewer opportunities for such justification than one would suppose. Statutes, of course, need not justify themselves and indeed sometimes cannot, since they may be compromises of incompatible moral purposes. Legislative histories often are not made, are sketchy, or proffer only a jumble of testimony from various interested parties. Even judicial opinions often

78. The division of marital property under such provisions as that of the Uniform Marriage and Divorce Act, UNIF. MARRIAGE AND DIVORCE ACT § 307(a), 9A U.L.A. 143 (1979) (requiring that courts "equitably apportion" the property of the husband and wife taking into account a long list of undefined factors) and the award of child custody under the "best interests of the child" standard are two major examples.

79. For example, Michigan child support law asks divorce court judges to make whatever decrees they "deem just and proper concerning the . . . maintenance of the minor children of the parties." MICH. COMP. LAWS § 552.16 (1979). One might infer that the legislature intended to require judges to amass and assess the special facts of each case and devise an order tailored to those facts. However, as Professor Chambers reports, "In nearly all Michigan counties, the judges . . . rely on a locally devised schedule that fixes the orders of support in relation to two factors only: the number of children in the family and the net earnings (after taxes and Social Security) of the noncustodial parent." D. CHAMBERS, *supra* note 20, at 39.

80. For an engaging and influential illustration of this phenomenon, see A. HERBERT, *HOLY DEADLOCK* (1934). And of course the English example had many American counterparts. See, e.g., H. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 20-25 (1963); Engel, *supra* note 74, at 444-51.

81. See Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141 (1980).

Note further that the image perceived by lawyers and the image perceived by the laity often diverge, as I am reminded by the alarmed silence and nervous titter when I tell my family law class that "open and notorious cohabitation" is, in Michigan, a crime punishable by one year in the county jail. For a discussion of such differences in perception, see Engel, *supra* note 74, at 444-51.

speak only in terms of statutory language, legal precedent, and doctrinal logic.

Finally, just as there is no "law" that presents "a moral image," so also is there no "family." Rather, there have always been many kinds of families, a fact the law reflects and even helps cause. For instance, Professor Bloomfield argues that antebellum law distinguished repeatedly between indigent and nonindigent families,⁸² a number of states now treat unmarried couples like a new hybrid whose partners are neither "married" nor single,⁸³ the Supreme Court presses states to treat illegitimate children as though they were legitimate,⁸⁴ and the law has created a new form of family through foster-parent programs.⁸⁵

Thus the number and kind of problems with describing the law's moral image of the family suggest that we might better search, not for the law's moral *image* of the family, but rather for the law's moral *discourse*, between institutions, over time, about families. This formulation, I believe, describes the inquiry somewhat more precisely. It sensitizes us to the multiplicity of voices that speak about the law's relationship to families' morals, to the likelihood of conflict between those voices, and to the certainty of change as the discourse develops. It may also sensitize us to the intricacies, contradictions, and continuities in "the law's" discourse with "society" about these questions.

2. *Some Definitions*

I have said that "the law" has tended to eliminate "discourse" about the "moral" relations of family members. What do I mean by these words?

"Law" has come to have a broad meaning, has come to be understood as "generic and protean, found in many settings, not uniquely associated with the state or with a clearly organized political community."⁸⁶ And a broad definition of law may be specially apt when discussing law and the family.⁸⁷ However, to keep this paper manageable, and because I am particularly interested in the relation-

82. M. BLOOMFIELD, *The Family in Antebellum Law*, in AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, 91 (1976).

83. See text at notes 36-41 *supra*.

84. See, e.g., *Gomez v. Perez*, 409 U.S. 535, 537-38 (1973).

85. See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977).

86. P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 12 (1978).

87. For example, there is a large body of church law (ranging from informal to highly formal) that greatly influences the way many families live.

ship between the family and the state, I define "the law" to include only law promulgated by governmental institutions. And while, even thus limited, "the law" is, as we have just seen, greatly complex, I shall for simplicity's sake speak of "the law" as if it were univocal.

"Discourse" is similarly problematic. By legal discourse I refer to the ways the law expresses ideas, both among legal institutions and between legal institutions and the people and social institutions the law wishes to affect. The discourse that I will explore is primarily of two kinds: first, the use by courts or legislatures of moral language and ideas, and second, the prohibition of conduct on moral grounds. The latter category raises questions about whether the law's *failure* to prohibit conduct also is part of moral discourse. While sensitivity is necessary to the times this is true, I suspect that the law's silence more often indicates the law's inattention, indecision, or indifference.

The most troublesome definitional problem lies in the word "moral." In some sense *every* legal decision is a "moral" decision. For instance, one might say that a resolution of a legal issue in terms of economic efficiency is also a resolution in moral terms, since there is available a moral basis for resolving legal issues on economic grounds. And, on a principle of the conservation of moral energy, one might say that there can *never* be a diminution of moral discourse because every decision not to discuss an issue in moral terms is itself a moral decision. Nevertheless, legal actors and those they govern distinguish between decisions made on moral grounds and decisions made on social, economic, psychological, or "legal" grounds. That these distinctions will sometimes break down and will always blur at the edges does not mean that the distinctions are useless, that different bases for decision will not lead to different results, or that decisions justified in different terms will not be differently received by those affected.

The differences between these kinds of decisions may be illustrated by the various rationales for prohibiting incest. A decision made on moral grounds turns on whether particular conduct is "right" or "wrong," whether it accords with the obligations owed other people or oneself. Incest might be prohibited on moral grounds because it is instinct with coercion or because it violates natural or divine law which prescribes standards of right and wrong. A decision made on psychological grounds turns on whether particular conduct promotes psychological health. Incest might be prohibited on psychological grounds because the prohibition eases resolution of the Oedipal conflict. A decision made on social grounds turns on whether particular conduct promotes the effective functioning of society as a whole. Incest might be prohibited on social grounds because "the prohibition of

incest establishes a mutual dependency between families, compelling them, in order to perpetuate themselves, to give rise to new families.”⁸⁸ A decision made on economic grounds turns on whether particular conduct promotes economic efficiency. Incest might be prohibited on economic grounds because such a prohibition, by discouraging endogamy, encourages capital formation.⁸⁹ A decision made on “legal grounds” turns on whether particular conduct is required in order to comply with authoritatively promulgated principles. A court might enforce a prohibition against incest quite apart from its own beliefs about the wisdom of such a prohibition because it believed that the legislature intended that such a prohibition be enforced and that the decision to prohibit such conduct was constitutionally confided in the legislature.

In each of these different situations, the governmental actor will consult a different rationale and will speak a different language; and the people acted upon will understand what has happened in different ways. It is, of course, always possible to reach a given result through several rationales and with varying language. But in analyzing legal problems, we legitimately test the merits of the rationales offered for a result, and we properly remember that the way we talk about problems can change the way we think about them. In this paper I direct attention to changes in the way we talk about and justify modern family law because those changes change the way we think about it and act on it.

III. THE THEME INVERTED: TWO COUNTER-TRENDS AND THEIR LIMITATIONS

I have suggested that family law has tended to diminish discourse about the moral relations of family members and to transfer moral decisions, and I have offered instances of that tendency. However, in Part II. C., I said that no area of law can be explained in terms of one trend and that no trend of importance lacks counter-trends of importance. To emphasize this point, and to place the tendency toward diminished moral discourse in context, I wish to explore two of its leading counter-trends.

A. *The Counter-Trends*

In two areas of the law generally there has been especially active discourse about the moral relations between people. The first of these

88. Lévi-Strauss, *The Family*, in *MAN, CULTURE, AND SOCIETY* 349 (H. Shapiro ed. 1971).

89. Cf. 1 T. ZELDIN, *FRANCE 1848-1945: AMBITION AND LOVE* 287 (1973).

is contract law. That field has in recent decades seen, for example, a new eagerness to apply the doctrine of unconscionability, a keener hostility to contracts of adhesion, a readier eye for contractual liability on equitable grounds, and, as in landlord/tenant and labor law, a renewed willingness to use status-based ideas to help those the law takes to be helpless.⁹⁰

The second such field consists of the laws that grew out of the intense moralism of the civil rights movement. The purpose of a civil rights movement is by definition to alter the rights of citizens vis-à-vis their government. However, the larger purpose of our civil rights movement — and one of the means of accomplishing the governmental purpose — was to introduce a morality of equality into everyday life: into life at school;⁹¹ in neighborhoods;⁹² on buses, in department stores, and at lunch counters;⁹³ in hotels and restaurants;⁹⁴ at work,⁹⁵ at play,⁹⁶ and at home.⁹⁷ Indeed, one tribute to the moral strength of that purpose has been the willingness of the law to serve it by expanding the state-action doctrine⁹⁸ and the commerce clause.⁹⁹ Courts making civil rights law have expressly sought to change popular attitudes by ending “the role-typing society has long imposed.”¹⁰⁰ Significantly, the movement and these legal reforms were resisted precisely on the grounds that “you can’t legislate morality.”

I suggest that these two areas of the law and the social ideas they symbolize have contributed elements of waxing enthusiasm for moral analysis in family law.¹⁰¹ It is in the areas of family law susceptible to

90. On the last of these points, see Donahue, *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242, 258 (1974).

91. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

92. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

93. *Bell v. Maryland*, 378 U.S. 226 (1964).

94. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

95. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (interpreting Title VII of the Civil Rights Act of 1964, §§ 7017-18, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. II 1978)).

96. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam).

97. *Loving v. Virginia*, 388 U.S. 1 (1967).

98. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948); but see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

99. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

100. *Stanton v. Stanton*, 421 U.S. 7, 15 (1975).

101. While the discussion that follows treats recent developments, the contributions of the egalitarian and contractarian principles did not begin in the last two decades. The current of egalitarianism that sprang out of the reordering of family relations in the early nineteenth century worked large changes in family law, and family law’s anxious and ambivalent relation to the contractarian ethos was likewise especially marked in that century. See M. GROSSBERG, *supra* note 1.

contractual analysis that courts have been most inclined to examine the specifics of people's moral relations in search of a fair result. For example: courts have sought to reward the expectation interests of people who have supported their spouses through school,¹⁰² have countenanced contracts (have even been willing to imply contracts) between unmarried cohabitants,¹⁰³ have begun to allow parties to alter the contract of adhesion that is the marriage contract,¹⁰⁴ and have closely supervised those alterations to prevent unconscionable contracts.¹⁰⁵ The civil rights movement's egalitarian ethos has likewise vitalized moral discourse in some parts of family law. That ethos has hastened the reform of marital property law,¹⁰⁶ alimony,¹⁰⁷ child-custody law,¹⁰⁸ grandparents' visitation rights,¹⁰⁹ the doctrine of necessities,¹¹⁰ and various support requirements.¹¹¹

B. *Limits to the Counter-Trends*

However appealing contractarian and egalitarian principles may be for family law, there are inherent limits on the capacity of each to reverse, or even greatly delay, the trend toward reduced moral discourse in family law. Many of these limits grow precisely out of the uneasy relationship between the egalitarian ethos and the contractarian ethos. Much of the moral strength and interest of the contractarian ethos is in fact drawn from the egalitarian ethos: Traditional contract law achieves its modern attraction by its distinction from status-based means of social organization; "reformist" contract law achieves its attraction by more realistically assessing the original relative situations of the contracting parties. Significantly, however, reformist contract law's assessment of the contracting par-

102. *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

103. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

104. *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962).

105. *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962) (setting aside antenuptial contract where husband did not disclose the full extent of his assets).

106. Note, for example, the Uniform Marriage and Divorce Act's various attempts to keep the husband's nominal ownership of property from guaranteeing him ownership of it after a divorce, including the statute's provision that a court may dispose of property "belonging to either or both" and its direction that "the contribution of a spouse as a homemaker" shall be considered in dividing property. Uniform Marriage and Divorce Act § 307 (Alternative A), 9A U.L.A. 96 (1979).

107. *Orr v. Orr*, 440 U.S. 268 (1979).

108. Consider, for instance, the waning of the tender-years presumption and the increasing preference for joint custody.

109. 1985 *Survey*, *supra* note 7, at 3020-21.

110. See Note, *supra* note 6.

111. *Swoap v. Superior Court*, 10 Cal. 3d 490, 511, 516 P.2d 840, 854, 111 Cal. Rptr. 136, 150 (1973) (Tobriner, J., dissenting).

ties' situation results in differential treatment of the contracting parties based precisely on their status. Thus in landlord/tenant law, to take one example, both statute and case law have not only provided systematic protections for tenants *qua* tenants, but have made those protections unwaiveable.¹¹²

Although reformist contract law is status-based, it seems, because of its commercial nature, status-based in a relatively inoffensive way. That law commonly deals with contracts between actors (usually an individual and a business) who are of disparate wealth, knowledge, and expertise and who have joined in only one kind of transaction (usually a rental or sale). Moreover, the fairness of the contract is commonly measurable straightforwardly, in economic terms.¹¹³

In some ways, status-based family-law contracts share the attractions of their commercial counterparts. Those attractions arise particularly from the perception that, when the contracting parties are a man and a woman, the man is likely to have social and economic advantages that could affect the ultimate fairness of the contract. But there are dissimilarities between the family contract and the commercial contract that limit the former's attractiveness and its capacity to expand moral discourse in family law. First, given the large proportion of "relationships" that can usefully be called endogamous, and given the changing patterns of women's education and careers, the relative advantages of the parties to a family contract, especially at the time of the contract, are less palpably unequal than the relative advantages of the landlord and tenant or the customer and seller, and any inequalities that persist seem likely to diminish.

Second, and more important, even if we are convinced that the bargaining positions of the man and the woman are and will remain unequal, it is much harder in the family than the commercial situation to know what a fair contract would look like. This is because, unlike the commercial contract, the family contract is really about many kinds of transactions between the parties, the fairness of which can often not be measured in economic terms.¹¹⁴ Nor does the egalitarian ethos provide reliable standards for evaluating or reformulating family contracts: Egalitarianism can require the law to shape its doctrines so that they do not discriminate between similarly situated parties, but it

112. Donahue, *supra* note 90, at 256.

113. Where the fairness of the contract is problematic, reformist contract law sometimes tries to ensure "procedural" fairness. See, e.g., UNIF. CONSUMER CREDIT CODE §§ 2-501 to 2-505 (1968), which provides for a cooling-off period before certain kinds of sales contracts take effect.

114. This helps explain the insistence of some courts on certain "procedural" practices in the formation of antenuptial contracts. See, e.g., *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962).

cannot readily speak to the many ways in which members of a family may be differently situated, either by conduct (where, for instance, a spouse has wasted joint assets) or by status (where, for instance, one of the parties is incapable of contracting — an impediment that alone makes almost the whole of parent/child family law unsusceptible to contractual discourse), or, most important, by choice (where the parties have altered their positions by contract). In other words, egalitarianism provides only one, partial standard of decision.

This last factor reminds us that contract law itself sets limits on the moral inquiries the law should make, limits so significant that contractarianism is itself an important cause of the trend toward diminished moral discourse. Contract law embodies a moral preference for allowing the contracting parties to arrange their own affairs, a preference expressed, for instance, in the doctrines that a court will not investigate the adequacy of consideration and that a court will interpret a contract in light of the intent of the parties. Indeed, just that preference accounts for much of the eagerness to introduce contract principles into family law,¹¹⁵ and the preference seems specially apt in the family context, where people's reasons for choosing "unequal" contracts may be based on deep-seated and well-considered social and religious views. To the extent that an egalitarian ethos prevails over contract law's preference for effectuating the parties' intent, the problem of legally enforced paternalism will be raised. And that paternalism seems inconsistent with the egalitarian ethos itself.¹¹⁶

A third relevant difference between commercial and family contracts is that, while we can plausibly encourage parties to a commercial contract to bargain at arm's length, to establish their rights against each other in writing in advance, and to enforce those rights in courts, the whole contractual approach will seem to many families (and possibly should seem to the law) inimical to good family relations.¹¹⁷ (Indeed, it may be inimical to good commercial relations.)¹¹⁸

Thus, while family law is being transformed by the diminution of moral discourse in and the transfer of moral decision from many of its fields, there are at least two major sources of resistance to that trend.

115. See Shultz, *supra* note 33. Furthermore, if contract law is to be predictable enough to be useful (or fair) to those wishing to plan their lives through family contracts, some standard limits on judicial rewriting of contracts will be necessary.

116. Recall that many of the reforms hastened by the egalitarian ethos — reforms of alimony, child-custody, and support law — altered paternalistic protections of women.

117. Compare Professor Weisbrod's provocative discussion of the difficulties of viewing in traditional contract terms the contracts that nineteenth-century utopian communities made with their members. C. WEISBROD, *THE BOUNDARIES OF UTOPIA* 186-99 (1980).

118. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

These two sources — contractarianism and egalitarianism — seem, however, to be subject to some inherent limitations. In any event, their continued influence on family law will depend on the unpredictable political future of this country, a subject mercifully outside the scope of this paper.

IV. VARIATIONS ON THE THEME: SOME OBSERVATIONS ON THE CAUSES OF THE TREND

So far, I have attempted to show that family law is undergoing significant change — a trend toward diminished moral discourse and toward the transfer of moral decision. I have described that change, and I have placed it in the context of countervailing changes. I will next examine four features of American life that form yet a broader context of this change in family law — the legal tradition of noninterference in the family, the ideology of liberal individualism, society's changing moral views, and the rise of psychologic man. I undertake this examination for three reasons.

First, and most simply, I wish to explore the reasons for the change. The causes of a trend so extensive and various can never be fully understood, but we can at least make a useful start.

Second, I explicate the trend's origins because the reader might otherwise be tempted to dismiss it as merely a feature of one or another of its causes. In particular, the reader might suppose that the trend is not away from moral discourse, but toward a morality of liberal individualism. To some degree, I do not find that supposition troubling: liberal individualism is so protean that identifying the form it has taken in this time and in this place is itself a worthwhile enterprise. But to a larger degree, I think that supposition is incorrect: I hope that my survey of four of the trend's causes will show that it is, rather, an independent phenomenon arising from and sustained by several interacting but distinguishable forces.

Third, I examine the trend's origins to place it in its context and thereby make possible a richer sense of its scope and nature than was possible in my initial survey of the trend. That sense will, I hope, develop as each cause is discussed. But, of course, the causes are intricately related to each other, and the trend cannot be fully perceived by looking at its origins in isolation from each other. I therefore have selected for specially detailed discussion the rise of psychologic man, and I have provided a case study of *Roe v. Wade* that I hope will give a more complex sense of the constituents and dynamics of the rise of psychologic man in particular and the trend toward diminished moral discourse in general.

Useful as I hope this examination of the trend's origins will be, I undertake it hesitantly. When we investigate the law's discourse, we are asking, to an important extent, about the patterns of speech and thought of the lawmakers themselves. These patterns are shaped, of course, by formally articulated ideas of many kinds, including legal doctrine. But they are also shaped by the ill-defined and unarticulated ideas that form popular culture. The obscurity of those ideas, and the variety of combinations in which they appear, conceal the ways they mold legal attitudes. To put the problem somewhat differently, we may observe with some confidence general trends of thought in society; we may observe with perhaps a little more confidence general trends in law. But unless the match between the two trends is unusually close, or unless the lawmakers were unusually forthcoming about their reasoning and motives, we can rarely say confidently that the popular trend "caused" the legal one. In addition, each of the "causes" is itself caused by a multitude of deeper causes — urbanization, industrialization, the affluence of modern society, the structure and needs of post-industrial society, and so on. I acknowledge the presence and importance of those deeper causes, but do not address them because their generality would make my discussion fruitlessly premature.

Identifying the causes of legal change is problematic enough when the change is legislative, but at least legislators often operate in public (since they must explain themselves to voters and the press, and since pressure on them may be applied directly and overtly), and legislative change is a well-studied branch of political science. Judges, however, work in secret, pressure on them is indirect, and judicial change is less well studied by scholars. Even exegesis of judicial opinions affords few reliable insights into the reading or subtler assumptions of judges, if only because opinions are often not drafted by judges. Furthermore, judges may not be exposed to the same social influences most of the world is, even leaving aside the narrowness of the professional stratum from which they are generally recruited. The mass of judges, particularly at the upper reaches of the profession, lead lives of quiet preparation. They are busy, and often spend their days reading briefs, motions, and opinions, many of which are on technical questions and most of which are prepared by equally busy lawyers. Their work lives are isolated; they may see little even of the other judges on their bench; they are surrounded by people who cannot afford to offend them. Their social lives may be isolated. They are often old when they reach

the bench.¹¹⁹ In short, Justice Holmes is an entirely misleading example of the judicial type. He had an unusually active intellectual life before reaching the bench, his judicial work was less consuming than judicial work is today (partly because he was content to write sensibly brief opinions), his intellectual life continued while he was a judge, and he revealed that life in letters and speeches. We can therefore talk about the influences on his thought in ways that we cannot hope to do for most jurists.

A. *The Legal Tradition of Noninterference in the Family*

[A] law may bind two members of the community very closely to each other; but that law being abolished, they stand asunder. . . . Such, however, is not the case with those feelings which are natural to mankind. Whenever a law attempts to tutor these feelings in any particular manner, it seldom fails to weaken them; by attempting to add to their intensity it robs them of some of their elements, for they are never stronger than when left to themselves.

— Alexis de Tocqueville
Democracy in America (1836)

[It] is so far from being natural for a man and woman to live in a state of marriage, that we find all the motives which they have for remaining in that connection, and the restraints which civilised society imposes to prevent separation, are hardly sufficient to keep them together.

— Samuel Johnson
Boswell's Life of Johnson (1791)

Perhaps the oldest impediment to moral discourse in family law is the legal tradition of noninterference in the family. That tradition rests in large measure on the practical difficulties of enforcing family law and the practical consequences of trying to do so. Because of this tradition, the moral problems associated with many kinds of family disputes do not enter legal discourse. The tradition is an old one, has telling rationales, and may be growing in appeal.

The strength of the tradition of noninterference is attested to by its age,¹²⁰ by the extreme circumstances in which the law has heeded it, and by the multiplicity of reasons for it. Each of these testimonies may be illumined by examining the unusually direct, eloquent, and

119. See generally Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981).

120. As family law traditions go, this one, because it dates at least to the mid-nineteenth century, is quite old. But it is worth recalling that the view of the family as a haven and regard for family privacy and autonomy are primarily products of the nineteenth century. Earlier centuries did not perceive clear boundaries between the family and society, and were willing to intervene directly in families and to use families to carry out the policies of the state. See generally L. STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* (1977).

provocative opinion in *State v. Rhodes*,¹²¹ an 1868 criminal prosecution of a husband for the assault and battery of his wife. The court condemned the evil the husband had done and expressly denied he had any "right" to do it. Nevertheless, the court forbade intervention in the absence of "permanent or malicious injury" or "intolerable" conditions, since each family has a "domestic government . . . formed for themselves, suited to their own peculiar conditions, and . . . supreme, and from [which] there is no appeal except in cases of great importance requiring the strong arm of the law"¹²²

Several fears underlay the court's holding. First, the court feared the burden of dealing with "every trifling family broil."¹²³ Second, it feared the complexities of deciding "what would be the standard?"

Suppose a case coming up to us from a hovel, where neither delicacy of sentiment nor refinement of manners is appreciated or known. The parties themselves would be amazed, if they were to be held responsible for rudeness or trifling violence. . . . Take a case from the middle class, where modesty and purity have their abode but nevertheless have not immunity from the frailties of nature, and are sometimes moved by the mysteries of passion. . . . Or take a case from the higher ranks, where education and culture have so refined nature, that a look cuts like a knife, and a word strikes like a hammer; where the most delicate attention gives pleasure, and the slightest neglect pain; where an indignity is disgrace and exposure is ruin. Bring all these cases into court side by side, with the same offence charged and the same proof made; and what conceivable charge of the court to the jury would be alike appropriate to all the cases¹²⁴

Third, the court feared that, once in court, each family member would endeavor "to justify himself or herself by criminating the other, [and] that which ought to be forgotten in a day, will be remembered for life."¹²⁵ Finally, the court feared "the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber."¹²⁶

Each of these rationales applies in substance, if not in language or in particulars, today. Indeed, although a modern court would be unlikely to use them to dismiss a criminal prosecution for assault, they are regularly used in discussions of how police and prosecutors should handle spousal-assault complaints. And, to take an example from the civil side, courts commonly use them in declining to intervene in fam-

121. 61 N.C. (Phil. Law) 453 (1868).

122. 61 N.C. (Phil. Law) at 457-59.

123. 61 N.C. (Phil. Law) at 458.

124. 61 N.C. (Phil. Law) at 458-59.

125. 61 N.C. (Phil. Law) at 457.

126. 61 N.C. (Phil. Law) at 457.

ily disputes even where a husband and wife have by prenuptial agreement solicited intervention.¹²⁷

The law not only suspects that intervention will do harm; it doubts that intervention will do good: in family law as in few other areas of the law, the enforcement problems are ubiquitous and severe. Consider the frustrations of the law's attempts to prevent divorce; to enforce spousal-support obligations; to compel alimony and child support payments; to deter spouse and child abuse; to enforce fornication, cohabitation, sodomy, and adultery statutes; to regulate the use of contraceptives; to prevent abortions;¹²⁸ to supervise neonatal euthanasia;¹²⁹ and to enforce visitation rights. Nor is this inefficacy surprising — the very nature of family law suggests that it should be peculiarly and inherently difficult to enforce.

Enforcement difficulties arise first because much of what family law seeks to regulate — from child and spouse abuse to fornication — occurs in private. The distastefulness of investigating private life is sharp enough to have been used to justify the doctrine of constitutional privacy¹³⁰ and to have contributed to the rise of no-fault divorce. Family privacy is often hard to breach because the parties all participated in the violation of law, because they wish to protect those who did participate, or because they are ashamed to have people know about the incident in which the state is interested. Families may also seek to maintain their privacy because they disagree with the law's definition of immoral behavior (as the *Rhodes* court suggested), because they dislike the law's meddling in family affairs, or because they feel the common urge of a family to unite against outside criticism.

Family law's second enforcement problem is that the person enforced against is often specially able to injure the very person the law intervened to protect. The spouse who wishes to resist divorce, the abused child or spouse, the pregnant woman, and her fetus are all vulnerable in this way. Legal intervention in these situations thus may be fruitless, or, worse, might provoke the person enforced against to retaliate against the person the law wants to protect. Because the person to be protected often depends on the person enforced against, even legal punishment itself can injure the person to be protected by depriving him or her of the presence or affection of the other.

127. *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So. 2d 885 (1958) (declining to consider whether to enforce a prenuptial agreement that children of the marriage would be educated in a parochial school).

128. See Zimring, *Of Doctors, Deterrence, and the Dark Figure of Crime — A Note on Abortion in Hawaii*, 39 U. CHI. L. REV. 699 (1972).

129. Mnookin, *supra* note 48, at 667-68.

130. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

The third enforcement difficulty arises from the fact that, in many critical areas of family law, the people the law wishes to regulate live in emotional settings and under psychological pressures which make them little susceptible to the law's persuasion or even coercion. None of us is immune "from the frailties of nature," and we are all "sometimes moved by the mysteries of passion,"¹³¹ but many of those whom family law most wants to reach lead lives so distressful they can hardly control themselves or their circumstances.¹³²

In short, the law has long avoided many of the moral issues facing families under the authority of the tradition of "nonintervention." The bureaucratic and economic capacity of the state to intervene is now greater than ever before, and we now have graphic examples of the state's power to enforce some family laws.¹³³ Yet the doctrine of nonintervention was probably never stronger. Indeed, the very scope of the state's capacity makes us anxious to cabin its activities,¹³⁴ an anxiety that has been increased by the more romantic efforts — Prohibition, for instance¹³⁵ — of our own government to enforce its will, as well as by the rise of the modern dictatorship.¹³⁶

The tradition of noninterference persists not only because we fear the state's power, but also because we doubt the state's efficacy. The state's retreat from direct regulation of some areas of family life has reinforced the popular belief that "you can't enforce morality." And that retreat has encouraged people to believe that family law's ultimate goals of permitting, inspiring, and sustaining decent relations between husbands and wives and parents and children can be secured — if society can secure them — only through comprehensive and costly social services and social reform. But the programs such people advocate are so comprehensive and so costly that they are politically absurd.¹³⁷ Furthermore, there is now a sense that even comprehensive

131. *State v. Rhodes*, 61 N.C. (Phil. Law) 453, 458 (1868).

132. See, e.g., Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1021 (1975).

133. See, e.g., D. CHAMBERS, *supra* note 20, at 138-61.

134. Thus in the forebodings of our time's anti-utopias the state is made to use its technologically extended powers to destroy the family. A. HUXLEY, *BRAVE NEW WORLD* (1932); G. ORWELL, *NINETEEN EIGHTY-FOUR* (1949); Y. ZAMYATIN, *WE* (1920) (English translation published 1972).

135. "If any man supposes that a mere law can turn the taste of a people from ardent spirits to malt liquors, he has a most romantic notion of legislative power." Fisher Ames, *quoted in* H. ASBURY, *THE GREAT ILLUSION* 28 (1950).

136. The beginnings of modern fourth amendment jurisprudence, for example, may be traced in part to a reaction to European totalitarianism.

137. For a proposal for such programs, see K. KENISTON & THE CARNEGIE COUNCIL ON CHILDREN, *ALL OUR CHILDREN* 85-211 (1977); *but see* G. STEINER, *THE FUTILITY OF FAMILY POLICY* 193-215 (1981).

social reform has proved unsuccessful,¹³⁸ and a sense that social science lacks the predictive and analytic power to reverse that failure.¹³⁹

In sum, the traditional difficulties of enforcing family law persist. The sense that they persist has increased. And fresh doubts are now expressed that even large-scale governmental action can accomplish family law's ends. The tradition of nonintervention in family affairs thus continues to deter family law from addressing moral problems whose resolution it cannot enforce.

B. *The Tradition of Liberal Individualism*

'Tis all in peeces, all cohaerence gone;
All just supply, and all Relation:
Prince, Subject, Father, Sonne, are things forgot,
For every man alone thinks he hath got
To be a Phoenix, and that then can bee
None of that kinde, of which he is, but hee.

— John Donne
An Anatomy of the World:
The First Anniversary (1633)

The legal tradition of noninterference in the family is in large part based, as we have seen, on practical difficulties encountered in trying to enforce family law. That tradition has been reinforced by an ideological development — the increasing displacement of the old republican ideal and the elevation to legal orthodoxy of that dictum from Mill's *On Liberty* that asserts

that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.¹⁴⁰

Family-law thinking has, in places, incorporated this moral preference against social intervention in personal affairs that do not do "harm to others."¹⁴¹ That moral preference has, for instance, underlain reforms of divorce law, of laws regulating sexual activities between consenting adults, and of laws regulating reproductive matters; indeed, it has probably informed legal attitudes about every aspect of the relationship between the family and the state.

138. See, e.g., C. MURRAY, *LOSING GROUND* (1984).

139. See, e.g., F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 25 (1981); Wald, *supra* note 132, *passim*.

140. J. S. MILL, *On Liberty*, in *THE PHILOSOPHY OF JOHN STUART MILL* 197 (M. Cohen ed. 1961). Cf. B. SEMMEL, *JOHN STUART MILL AND THE PURSUIT OF VIRTUE* (1984).

141. Comment, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605 (1970).

However, Mill's principle applies uneasily to much of family law, for one of the traditional difficulties with that principle — the uncertain meaning of "harm to others" — is particularly acute in family law, which, by definition, deals with one person's relationship with another person and therefore with a situation in which harm is always possible. And, because of the ties of affection (and finance) that bind family members, they are peculiarly vulnerable to each other: One spouse's suit for divorce will harm the other spouse, to say nothing of the distress caused their children¹⁴² and the penury inevitable when the divorcing spouses cannot support two households. (Precisely this vulnerability has, for instance, slowed the law's acceptance of marital contracts.) Not only are there many opportunities within families to harm other members; there are many incentives. The very people to whom the law transfers moral decisions will be "interested parties" — that is why they have been accorded the power to make the decision — and will often have a psychological or even financial interest in a decision adverse to the interests of other family members. That the law has been so greatly influenced by Mill's principle in the face of these difficulties is testimony to the power that principle has acquired in family law.

One explanation of the law's fondness for Mill, and a related cause of the trend toward diminished moral discourse in family law, is the law's increasingly pluralistic view of American society. Pluralism has strengthened the trend by inhibiting society's impulse to impose its moral principles on discrete groups within society and by nurturing a relativistic view of moral principles.¹⁴³

Although pluralism seems to us self-evident among American virtues and implicit in the first amendment, especially in the religion clauses, that amendment did not acquire its modern meaning until well into the twentieth century, long after the country's plural composition had become clear. But the burgeoning political and social power of ethnic groups, the admonitory example of Nazi Germany, the war against poverty, the civil rights movement, and the international passion for regional, ethnic, religious, and national particular-

142. See, e.g., J. WALLERSTEIN & J. KELLEY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

143. As Professor Allen writes, Contemporary efforts, often strongly resisted, to decriminalize offenses involving private sexual behavior, the uses of alcohol and other drugs, gambling, and the like, reflect not a search for consensus so much as a recognition of its absence. One of the arresting aspects of the current abortion controversy is its demonstration of the extraordinary divisions in American society on what it means to be a criminal. F. ALLEN, *supra* note 139, at 29 (footnote omitted). For a brief discussion of family law and pluralism, see C. Schneider, *supra* note 48.

ism,¹⁴⁴ among other causes, have made us self-conscious, if cautious, pluralists, as is evidenced by the impossibility of reading many late-nineteenth and early-twentieth century family-law opinions without embarrassment.¹⁴⁵ And one way to accommodate diverse views about family morals has been to avoid resolving family law issues in terms of morals.

In principle, the need to accommodate diverse views about the family is diminished by the fact that responsibility for family law is confided to the states: any state is socially less plural than the country as a whole and consequently should be better able to adjust family laws to fit the preferences of its citizens. In practice, however, family law is increasingly subject to national influence. States may, if they choose, reject that influence when it is exerted by scholars or by groups like the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The Supreme Court's contributions to family law, however, are more than precatory, and more than few. The Court's discovery in the fourteenth amendment of the "privacy" doctrine — which, in the Court's open-armed terms, has "some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . and child rearing and education"¹⁴⁶ — has raised constitutional doubts in virtually every area of family law.¹⁴⁷ With that substantive due process provision always in the background, the fourteenth amendment's guarantee of procedural due process and its equal protection clause have further helped nationalize family law.¹⁴⁸ Finally, as the federal government furnishes more social serv-

144. There are nationalist movements, for example, among the Welsh, Scots, Irish, Basques, Corsicans, Ocs, and Quebecois, to name just a few, and it is said that there are "80,000 French-speaking Swiss of the Jura Mountains who want to be detached from the German speaking canton of Berne and form one of their own . . ." N.Y. Times, Mar. 23, 1975, at A20, col. 3, *quoted in* R. NELSON, ZONING AND PROPERTY RIGHTS 44 (1977).

145. See, for example, Justice Douglas' opinion in *Cleveland v. United States*, 329 U.S. 14, 18-19 (1946), in which he quotes *Reynolds v. United States*, 98 U.S. 145, 164 (1878), to the effect that "'Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of Asiatic and of African people,'" and *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890), to the effect that "'The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.'"

146. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

147. See *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

148. As to procedural due process, see, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977); *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976). As to equal protection, see, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

ices and continues to be the most convenient means for interest groups to reach their ends, we may expect to see more congressional and administrative participation in family law. Thus the Department of Health and Human Services has conditioned receipt of federal funds on compliance with its "Baby Doe" regulations,¹⁴⁹ the House of Representatives recently passed its first "sense of Congress" legislation dealing with a family-law issue (visitation rights for grandparents),¹⁵⁰ and the President recently signed legislation making federal funds to states contingent on a state's using wage assignments to collect child-support payments even where the custodial parent receives no federal funds.¹⁵¹

The nationalization of family law thus conduces to the trend toward less moral discourse in the law by increasing the number of groups whose moral preferences must be accommodated. Finally, it probably also promotes the trend by accentuating the influence of the relatively elite individuals and institutions who, I have hypothesized,¹⁵² are especially likely to favor the changes that have led to diminished moral discourse, to whom liberal individualism seems natural.

C. *Society's Changing Moral Beliefs*

Civilization has to use its utmost efforts in order to set limits to man's aggressive instincts and to hold the manifestations of them in check by psychical reaction-formations. Hence, therefore, the use of methods intended to incite people into identifications and aim-inhibited relationships of love, hence the restriction upon sexual life, and hence too the ideal's commandment to love one's neighbour as oneself — a command-

149. 45 C.F.R. § 84.55 app. C (1984). This regulation is an irresistible example of the gradual nationalization of family law, but it hardly exemplifies the trend toward diminished moral discourse. It is, I suggest, rather an example of the rightist, fundamentalist reaction to that trend, see Part V. *infra*, and it has correspondingly provoked much displeasure. See, e.g., *United States v. University Hosp., State U. of N.Y. at Stony Brook*, 729 F.2d 144, 152-53 (2d Cir. 1984); *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395, 397 (D.D.C. 1983). See generally Mnookin, *supra* note 48; C. Schneider, *Rights Discourse and Neonatal Euthanasia* (unpublished manuscript).

150. See H. Con. Res. 45, 98th Cong., 1st Sess. (1983). The Senate equivalent, S. Con. Res. 40, 98th Cong., 1st Sess. (1983), was approved on Feb. 23, 1984, by the Separation of Powers Subcommittee for full committee consideration. However, the bill was never acted upon by the full committee and has not been reintroduced in the 99th Congress. 1 1983-84 CONG. INDEX (CCH) 20,552 (1984).

151. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1305.

152. See Part II. B. *supra*.

ment which is really justified by the fact that nothing else runs so strongly counter to the original nature of man.

— Sigmund Freud
*Civilization and
its Discontents* (1930)

Liberal individualism, I have suggested, has increased our national tolerance for heterodox moralities, and has diminished the urge to impose morality profligately. Yet those changes might have altered family law less had not the old family law morality itself lost much of its meaning. As Mill wrote in a related context,

so natural to mankind is intolerance in whatever they really care about, that religious freedom has hardly anywhere been practically realized, except where religious indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale.¹⁵³

To put it schematically, less is immoral; moral discourse in the law occurs most readily (especially in a law reluctant to be aspirational) when there is something to condemn; because there is less to condemn, there is less moral discourse.

"The sexual revolution" has become the name for that change in moral attitudes toward family and sexual life that has been developing at least since the end of the nineteenth century, when the "'new morality' . . . proclaimed the joys of the body, defended divorce and birth control, raised doubts about monogamy, and condemned interference with sexual life by the state or community."¹⁵⁴ The revolution changed attitudes about every area of sexual morality quite as spectacularly as it changed rates of nonmarital sexual activity and of divorce. Professor Shorter reports, for instance, that "the percent of Americans who believe 'it is wrong for people to have sex relations before marriage' fell from 68 percent in 1969 to 48 percent in 1973. . . ."¹⁵⁵ So great has the revolution's influence been that, even when it has not changed a person's behavior or his standards for himself, it has commonly softened his standards for other people.¹⁵⁶

One cause of the sexual revolution has been the waning influence of Christianity among the relatively affluent, educated elite.¹⁵⁷ There

153. J. S. MILL, *supra* note 140, at 195.

154. C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 10 (1977).

155. E. SHORTER, THE MAKING OF THE MODERN FAMILY 114 (1975).

156. See, e.g., T. CAPLOW, H. BAHR, B. CHADWICK, R. HILL & M. WILLIAMSON, MIDDLETOWN FAMILIES 54 (1982).

157. See Shriver, *Neighbors on the Religious Landscape: Churches and Church Membership in the United States, 1980*, 1983 Y.B. AM. & CANADIAN CHURCHES 264, 266 (reporting a decline in membership in "liberal" churches); and McKinney & Roof, *A Social Profile of American Religious Groups*, 1982 Y.B. AM. & CANADIAN CHURCHES 267, 269 (showing a statistical correlation between membership in "liberal" churches and high levels of income and education).

are, surely, many believers left among this group. But many of them believe in a liberal Christianity whose moral views on family law matters have long parted from those of traditional Christianity and of conservative churches.¹⁵⁸ And even Catholics and conservative Protestants now give sexual relations — albeit only within marriage — that same unctuous importance given them by psychologized nonbelievers.¹⁵⁹

These changes in religious beliefs deeply undercut traditional family law, for much of it comes from the law of the English ecclesiastical courts and rests on classic Christian attitudes toward sexual matters. About those attitudes, Professor Rieff writes, “renunciatory controls of sexual opportunity were placed in the Christian culture very near the center of the symbolic that has not held.”¹⁶⁰ Quoting von Harnack, Rieff continues,

At bottom, only a single point was dealt with, abstinence from sexual relationships; everything else was secondary: for he who had renounced these found nothing hard. Renunciation of the servile yoke of sin (*servile peccati iugum discutere*) was the watchword of Christians. . . . Virginity was the specifically Christian virtue, and the essence of all virtues; in this conviction the meaning of the evangelical law was summed up.¹⁶¹

Such beliefs are now rejected or even unrecognized by many Christians,¹⁶² and the altered social role of American Christianity has

158. HABITS OF THE HEART, *supra* note 5, at 62-65, 219-49. Christianity's influence on American family law deserves much more thorough treatment than is possible here. That influence has necessarily been great, since the U.S. is a more religious country than any of its Western counterparts. *Id.* at 219; T. CAPLOW, H. BAHR, B. CHADWICK, D. HOOVER, L. MARTIN, J. TAMNEY & M. WILLIAMSON, ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDELTOWN'S RELIGION 26-27 (1983). In the Progressive era, for instance, much of the debate over divorce rates and divorce reform was carried on among spokesmen for the various branches of Christianity. W. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA (1967). And in a country whose religious forms are so much more varied than those of its Western counterparts, that influence has been necessarily complex. Consider, for instance, this sample of American Christian thought on the nature of marriage: Mormons once practiced polygamy (some still do, as demonstrated by *In re Black*, 3 Utah 2d 315, 283 P.2d 887, *cert. denied*, 350 U.S. 923 (1955)); liberal Protestants see benefits in serial monogamy, conservative Protestants countenance it, Roman Catholics do not; some liberal Protestants would permit homosexuals to marry, some conservative Christians would prefer to see them burn; some Christians believe marriage the only proper locus of sexual relations, many do not; and the Shakers practiced celibacy, while Christian Scientists look forward hopefully to the day when sexual relations will be unnecessary for reproduction.

159. See P. GARDELLA, INNOCENT ECSTASY: HOW CHRISTIANITY GAVE AMERICA AN ETHIC OF SEXUAL PLEASURE (1985).

160. P. RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 16 (1966).

161. *Id.* at 16-17, quoting A. VON HARNACK, 3 HISTORY OF DOGMA 128 (English translation 1894-99).

162. “Current apologetic efforts by religious professionals, in pretending that renunciation as the general mode of control was never dominant in the system, reflect the strange mixture of cowardice and courage with which they are participating in the dissolution of their cultural functions.” P. RIEFF, *supra* note 160, at 16.

made them virtually incomprehensible to many Americans.

In other words, because religious views are less universally and strongly held,¹⁶³ statements of moral aspiration linked to religion have slipped more readily from legal discourse. This change is visible, for example, in the child-custody area, where evidence of concern for the moral welfare of the child — as instanced, for example, by evidence that the parent sends the child to Sunday school — is increasingly thought irrelevant. Because religious views on marital obligations have changed, the move to no-fault divorce was eased, and perhaps even made more necessary. Similarly, because religious views on sexual relations outside of marriage have changed, the law's tolerance, and even encouragement, of such relations has increased, as *Marvin et al.* indicate. Abortion, neonatal euthanasia, and homosexuality are but a few more examples of areas in which the changing nature and weight of religious views have helped change legal views and language.

D. *The Rise of Psychologic Man*

1. *The Social Change*

If man were independent, he could have no law but his own will, no end but himself. He would be a god to himself and the satisfaction of his own will the sole measure and end of all his actions.

— John Locke
Ethica (1693)

When so little can be taken for granted, and when the meaningfulness of social existence no longer grants an inner life at peace with itself, every man must become something of a genius about himself. But the imagination boggles at a culture made up mainly of virtuosi of the self.

— Philip Rieff
*The Triumph of the
Therapeutic* (1966)

Sexual mores are not the only part of the old "family morality" to have lost their meaning; there has also been a larger shift from a "moral" to a "psychological" view of personal affairs. This shift is, of course, a cause (and probably also a consequence) of our changing view of sexual morals, it has sharpened our appreciation of the enforcement problem, and it shapes and is shaped by the tradition of liberal individualism. This shift may not be the most crucial cause of the trend away from moral discourse in family law; indeed, it is point-

163. See note 157 *supra*. The recently emerged fundamentalist movement represents a counterexample to the general decline in currency of religious views. For a discussion of the limits of this counterexample, see notes 262-75 *infra* and accompanying text.

less to attempt such a distinction at this stage of our knowledge. However, the psychologic view merits particular attention here for several reasons. First, while psychology has, of all the social sciences, contributed most abundantly to family law scholarship, the consequences for family law of the psychologic view have not been sufficiently analyzed. Second, the rise of the psychologic view provokes specially intriguing questions about how ideas from "high" and "popular" culture enter legal thought and about the interplay between modes of popular and of legal thinking. Third, and perhaps most important, because the psychologic view interacts in important ways with each of the other origins of the trend, and because the psychologic view so directly affects the terms of modern discourse, a detailed study of its consequences for the law is an apt way to elaborate a description of the new discourse in family law. I shall therefore devote disproportionate space to it.

a. *The complexities of the shift.* The shift to psychologism has, of course, been described before, usually in apocalyptic woe or messianic joy. Nevertheless, the shift confounds description because it is intellectually fragmented and complex. Its patriarch and paradigm, surely, is Freud. But no important thought achieves social power undegraded, and Freud's thought has reached its present power in a gaudy array of vulgarizations which have, in the public mind, overwhelmed the sophisticated variants.

The shift further confounds description because it is also sociologically complex.¹⁶⁴ Nevertheless, its scope and significance cannot be doubted.¹⁶⁵ Thus three leading students of the shift announce "the

164. One difficulty with using social generalizations in scholarship is that they are read in light of the social caricatures of journalism. Psychologic man shares characteristics of the member of the "me generation," but I resist any equation of the two. The caricature of the "me generation" has many inaccuracies: it hides the reasons for the popularity of the psychologic view, it conceals the virtues of that view, it exaggerates the selfishness of modern human beings, and so on. The caricature also hides the extent to which human opinions are shaped by the words and ideas that are available in a culture. As the authors of *HABITS OF THE HEART*, *supra* note 5, argue, the acts of modern Americans are often much less selfish than their attitudes, a discrepancy that can be understood partly in terms of the failure of modern culture to provide the language with which to articulate moral aspirations. See particularly *id.* at 290-94.

165. Psychologic man, as I have suggested, appears in many guises. He is well — or provocatively — described in *HABITS OF THE HEART*, *supra* note 5; C. LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1978) [hereinafter cited as *THE CULTURE OF NARCISSISM*]; C. LASCH, *THE MINIMAL SELF: PSYCHIC SURVIVAL IN TROUBLED TIMES* (1984); P. RIEFF, *FREUD: THE MIND OF THE MORALIST* (1959); P. RIEFF, *supra* note 160. Among the better empirical investigations is the study of changes in American attitudes from 1957 to 1976 in J. VEROFF, *supra* note 24. This study uses a survey of 2460 "normal adults" made in 1957 as part of a congressional study of "national resources for coping with the human and economic problems of mental illness." *Id.* at 2. It compares that survey with a somewhat more elaborate study of 2267 "normal adults" in 1976.

introduction of the 'era of psychology.'"¹⁶⁶ A 1957 study on which those scholars rely "spoke of a psychological orientation, as distinguished from material or moral orientations, and suggested that this way of looking at life experiences and life problems might increase significantly in the future."¹⁶⁷ By 1976, they conclude, "this shift had indeed occurred."

b. *From morals to medicine: the role of human happiness.* For our purposes, a central feature of the psychologic view is that it replaces moral discourse with medical discourse and moral thought with therapeutic thought. That shift may usefully be understood in terms of the role attributed to human happiness in social life. The old view held that men and women were obligated to lead a good life as that was defined by religious or social convention. Happiness was not the purpose of these conventions, but was expected to be a by-product of performing one's duties. If it did not come, however, one would be consoled by knowing one had led the right kind of life. The psychologic view, at least in its ideal type, denies that there are religious or social conventions that are independently valid. It holds that life's goal is the search for personal well-being, adjustment, and contentment — in short, for "health."¹⁶⁸ Adherence to a religious or social convention may serve that end, but if it does not, other paths to well-being should be tried and used.¹⁶⁹ In short, says Rieff mordantly,

[E]vil and immorality are disappearing, as Spencer assumed they would, mainly because our culture is changing its definition of human perfection. No longer the Saint, but the instinctual Everyman, twisting his neck uncomfortably inside the starched collar of culture, is the communal ideal, to whom men offer tacit prayers for deliverance from their inherited renunciations.¹⁷⁰

On the old view, the right life was difficult: one's duties were numerous and onerous (though not necessarily unpleasant); distractions from duty were numerous and dangerous. Thus codes of family morality were aspirational and ascetic. As Professor Rieff observes:

Heretofore, the saving arrangements of Western culture have appeared as symbol systems communicating demands by stoning the sensual with deprivations, and were thus operated in a dynamically

166. J. VEROFF, *supra* note 24, at 24.

167. *Id.* at 24-25.

168. The World Health Organization, for instance, defines health as "a state of complete physical, mental and social well being and not merely the absence of disease or infirmity." M. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 119 (1984).

169. "Our cultural revolution does not aim, like its predecessors, at victory for some rival commitment, but rather at a way of using all commitments, which amounts to loyalty toward none." P. RIEFF, *supra* note 160, at 21.

170. *Id.* at 8. Rieff continues, "Freud sought only to soften the collar; others, using bits and pieces of his genius, would like to take it off."

ambivalent mode. Our culture developed, as its general technique of salvation, assents to moral demands that treated the sensual part of the self as an enemy. From mastery over this enemy-self there developed some triumphant moral feeling; a character ideal was born.¹⁷¹

The psychologic view concedes that "stoning the sensual with deprivations" can work, but doubts it will. That view sees the drive of the instincts as crucial to understanding human motivation, believes that confining the drive of the instincts tends to be unhealthy,¹⁷² and, more specifically, sees sexual expression as central to human happiness.

c. Antinomianism, pragmatism, and nonbinding commitments. In his search for health, psychologic man must be skeptical and analytic in method and pragmatic in evaluation. In particular, psychological man must learn not to judge himself, his relationships, or other people according to moral rules; to do so is dysfunctional, since it asks the wrong question ("Is it right?") and blinds him to the answers to the right question ("Does it work?").¹⁷³ In other words, psychological man cannot come to rest in any relationship, or any community, or any creed; he must keep asking whether they are working for him.¹⁷⁴ This is the doctrine of "nonbinding commitments."¹⁷⁵ Personal and familial relations, on this view, become "arrangement[s] of convenience designed to advance the personal satisfactions and self-fulfill-

171. *Id.* at 49. The problem of the "ascetic ideal" in American family law, to which I referred in Part II. B. *supra*, deserves much closer attention than this already lengthy article permits. The subject's complexity makes any brief description of it incorrect, and ill-informed preconceptions about the subject make any brief description of it certain to be misread. The Puritans were less puritanical, the Victorians less Victorian, than those adjectives imply. But changing attitudes toward pleasure generally and sexual expression particularly have directly influenced areas of family law as diverse as incest restrictions, sodomy statutes, divorce, alimony, child custody, and abortion, and have probably influenced many other areas indirectly.

172. See, e.g., S. FREUD, "Civilized" Sexual Morality and Modern Nervousness, in *SEXUALITY AND THE PSYCHOLOGY OF LOVE* 20 (P. Rieff ed. 1963). But cf. S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1930).

173. Insofar as psychological man validates his normative views by reference to something besides his own health, he does so sociologically. As Lionel Trilling wrote of the Kinsey Report, it accumulates facts with the intention of showing that standards of judgment of sexual conduct as they now exist do not have real reference to the actual sexual behavior of the population. So far, so good. But then it goes on to imply that there can be only one standard for the judgment of sexual behavior — that is, sexual behavior as it actually exists; which is to say that sexual behavior is not to be judged at all, except, presumably, in so far as it causes pain to others.

L. TRILLING, *The Kinsey Report*, in *THE LIBERAL IMAGINATION* 216, 235 (1953).

174. Psychologic man:

takes on the attitude of a scientist, with himself alone as the ultimate object of his science. . . . [I]deally, all options ought to be kept alive because, theoretically, all are equally advisable — or inadvisable, in given personal circumstances.

. . . A high level of control is necessary in order to shift from one perspective to another, so to soften the demands upon oneself in all the major situations of life — love, parenthood, friendship, work, and citizenship.

P. RIEFF, *supra* note 160, at 50-51.

175. This ravishing phrase is from Nena and George O'Neill, quoted in *THE CULTURE OF NARCISSISM*, *supra* note 165, at 200.

ment of [their] members."¹⁷⁶

d. *The search for self and the psychologic view of human nature.* In the psychologic view, happiness comes from discovering and expressing one's unique true self. That self is discovered by peeling off society's false impositions and is expressed by peeling off its false constraints. Among the false impositions and constraints to be peeled off in the search for the "more personalized self-consciousness" are the roles and statuses into which society places people. Thus Veroff, Douvan, and Kulka announce as one of their "central themes" that "[s]ocial organization, social norms, the adaptation to and successful performance of social roles all seem to have lost some of their power to provide people with meaning, identity elements, satisfaction. In fact, role and status designations have become objects of suspicion. . . ." ¹⁷⁷

The psychologic attitude seems to imply an optimistic account of human nature; if its proponents thought people base and vile, they could hardly advocate a Hobbesian world without the Leviathan or be so cheery about man's quest to find and express himself. Much psychologic writing explicitly argues that human nature is benign enough that, freed of socially imposed constraints, men will behave better than they do now. This benignity is buoyed by faith in human malleability: If people behave badly, it is because of environmental factors, which can be manipulated, or because of patterns of thought and behavior, which can (on some therapeutic views) be changed even if they cannot be understood.

Yet psychologic man's view of human nature is profoundly ambiv-

176. F. ALLEN, *supra* note 139, at 22. See HABITS OF THE HEART, *supra* note 5, at 97-100. Similarly, "All binding engagements to communal purpose may be considered, in the wisdom of therapeutic doctrines, too extreme . . ." P. RIEFF, *supra* note 160, at 242.

Veroff, Douvan, and Kulka confirm that there is progress toward these attitudes. Thus the well educated are more likely than the uneducated to see their marriages as "the coexistence of two separate people rather than as the bond of a couple," J. VEROFF, *supra* note 24, at 188, people in general and the young in particular are more skeptical about marriage, which they increasingly find burdensome and restrictive, *id.* at 147-48, 182, and marriage terminable replaces marriage interminable. And although people are unhappier now than twenty years ago about "interpersonal aspects of marriage," *id.* at 164, they take slightly greater pleasure than they used to in being independent and in their own characteristics as sources of happiness. *Id.* at 58-59. Finally, there is a "shift from moral-virtuous terms in 1957 to personality terms in 1976 [which] seems a clear shift from normative concepts of morality to more individuated and morally neutral bases of self-conception." *Id.* at 118. As Veroff, Douvan, and Kulka note, "Structuring personal strengths in normative moral categories means the ever-present possibility of failure to meet the norm and the consequent negative self-evaluation, while the more neutral personality categories imply an aesthetic distance and an appreciation of self." *Id.* at 120. Thus the incestuous gentleman described in note 181 *infra* said that he had learned from therapy that what he had done was natural and not wrong, but was dysfunctional (i.e., his daughter was mad at him, his wife divorced him, and the police arrested him) and therefore to be avoided.

177. *Id.* at 17.

alent. Against the optimism described in the preceding paragraph are pitted a vivid sense of the power and ubiquity of the passions, a dark sense of their cruelty, and a resigned sense that character is irrevocably and inevitably formed by early and universal experiences.¹⁷⁸ Psychologic man's strain of pessimism about individual human nature is matched by a strain of pessimism about the capacity of systematic social activity to enhance human happiness. Professor Allen, in explaining why psychologism has been inimical to penal rehabilitation, notes the movement's frequent anti-intellectualism, its absence of public purpose, and the perverse fact that it "has not generally nourished the autonomy of individuals but has expressed a weariness with selfhood."¹⁷⁹ Even "contemporary expressions of confidence in human malleability are often accompanied by a pervasive pessimism about the effectiveness and integrity of social institutions."¹⁸⁰

e. *The psychologic view of privacy.* Psychologic man's ambivalence about human nature extends to his views about privacy. On one hand, searching for one's self and peeling off social constraints seem to require privacy, and "privacy" at least as a slogan has more social (and legal) cachet than it used to. But those most enthralled by the psychologic attitude seem the least interested in privacy, as we may infer from the phrase "let it all hang out," from the techniques of psychotherapy, from the proclivity to use those techniques in ordinary conversation, from the itch of celebrities to discuss the intimacies of their lives on television, from the eagerness of the rest of us to become celebrities by retailing and living the intimacies of our lives on television,¹⁸¹ from our willingness to tell survey researchers whatever they want to know, from the belief in first names at first sight, and from the compelled contemplation of intimate and ultimate questions imposed on us by the pictures of the dead, the dying, and the *déshabillé* which accost us in the daily papers and the monthly magazines. And some sacrifice of privacy seems inherent in the free expression of one's true personality, in the desire to reduce the power of social roles, and in the

178. The *locus classicus* of this view is S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1930). See also J. DEESE, *AMERICAN FREEDOM AND THE SOCIAL SCIENCES* (1985). However, the more popular versions of psychologism are less dark.

179. F. ALLEN, *supra* note 139, at 26-28.

180. *Id.* at 19.

181. I will confine my examples to a chaste few and to the area of family law. I once saw a Phil Donahue show in which a mother (voluntarily) met, for the first time, the daughter she had given up for adoption at birth. I once heard a National Public Radio "All Things Considered" program in which a man who had committed incest with his young daughter was, with his family interviewed at length about their experiences. I am told that, in the case of a man who had hired a surrogate mother and who, when the baby arrived with birth defects, claimed that the baby was not his, all the parties involved went on television to receive the results of the paternity test. To say nothing of the Louds, who came onto television to come apart.

instant intimacy with family, friends, and colleagues that is also part of the psychologic creed.¹⁸²

The apparent conflict in psychologic man's view of privacy may perhaps be resolved, however, if we recall that privacy has come to have two meanings. The first, conventional, meaning speaks to the secrecy in which one conducts one's affairs. The second, newer, meaning speaks directly to the ability to conduct one's affairs autonomously. It is privacy in the second meaning psychological man wants, for without autonomy his efforts to find and express himself may be thwarted. And it is privacy in the first meaning that psychological man does not need, for, to him, secrecy is desired by those who are ashamed of what they do, and psychologic man's moral relativism and his awareness that all men serve unconscious drives make shame shameful. *Honi soit qui mal y pense*.

f. A case study. Perhaps greater concreteness can be given to psychologic man by reporting one version of his rise. Professor Susman suggests that in the nineteenth century, "character" was the word most revelatory of the modal American type, but that in the twentieth century, that word was "personality." The nineteenth century held "that the highest development of self ended in a version of self-control or self-mastery, which often meant fulfillment through sacrifice in the name of a higher law, ideals of duty, honor, integrity. One came to selfhood through obedience to law and ideals."¹⁸³ The words "most frequently related to the notion of character" were "*citizenship, duty, democracy, work, building, golden deeds, outdoor life, conquest, honor, reputation, morals, manners, integrity*, and above all, *manhood*."¹⁸⁴ The twentieth century, on the other hand, "stressed self-fulfillment, self-expression, self-gratification. . . ." Its "essentially antinomian . . . vision . . . with its view not of a higher law but of a higher self, was tempered by the suggestion that the self ought to be presented to society in such a way as to make oneself 'well-liked.' "¹⁸⁵ The adjectives most frequently associated with personality "suggest a very different concept from that of character: *fascinating, stunning, attractive, magnetic, glowing, masterful, creative, dominant, forceful*."¹⁸⁶

182. J. VEROFF, *supra* note 24, at 20.

183. Susman, "Personality" and the Making of Twentieth-Century Culture, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 212, 220 (J. Higham & P. Conkin eds. 1979).

184. *Id.* at 214 (emphasis in original).

185. *Id.* at 220.

186. *Id.* at 214 (emphasis in original).

2. *The Legal Consequences of the Rise of Psychologic Man*

The wisdom of the next social order, as I imagine it, would not reside in right doctrine, administered by the right men, who must be found, but rather in doctrines amounting to permission for each man to live an experimental life. . . . All governments will be just, so long as they secure that consoling plenitude of option in which modern satisfaction really consists. In this way the emergent culture could drive the value problem clean out of the social system and, limiting it to a form of philosophical entertainment in lieu of edifying preachment, could successfully conclude the exercise for which politics is the name.

— Philip Rieff

The Triumph of the Therapeutic (1966)

The legal consequences of a new character ideal are, inevitably, tangled and obscure, especially where that ideal is variously shaped and varyingly accepted. Nevertheless, the psychologic character ideal is now so well-established that its influence on the law is inescapable. That influence is exerted in two ways: first, lawmakers respond to changes in the behavior and beliefs of the people they seek to regulate. Second, the new ideal alters the language, assumptions, and acts of the lawmakers themselves. The legal effect of the psychologic view can thus be substantial. But my argument in this Part will be modest — not that the rise of psychologic man has, of its own force, created wholly new doctrine, but rather that it has, in concert with the other social forces I have described, shaped the ways we use doctrines and ideas already present in the law.

a. *From morals to medicine.* In the preceding section, I identified, to borrow Professor Boorse's words, "a strong tendency . . . to debate social issues in psychiatric terms. . . . This growing preference for medicine over morals . . . might be called the *psychiatric turn*."¹⁸⁷ Of course, that "turn" itself constitutes a change in discourse, because it directly substitutes one kind of discourse for another. Consider, for instance, situations in which family law looks at the whole of someone's personality, as when it evaluates the suitability of a guardian or the best interests of a child. The psychologic approach looks to that person's "health," mental and physical,¹⁸⁸ while the old view holds that the guardian's qualifications and the child's interests include (prominently) the state of his mind and his morals.

The medical view also discards the old view that there is such a thing as "moral character" and that it should be considered in, for instance, child-custody decisions. The idea of "moral character" as-

187. Boorse, *On the Distinction Between Disease and Illness*, in *MEDICINE AND MORAL PHILOSOPHY* 3 (M. Cohen, T. Nagel & T. Scanlon eds. 1981) (emphasis in original).

188. *E.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 402(5), 9A U.L.A. 197-98 (1973).

sumes that moral qualities are relevant to every aspect of one's personality, and that one's moral nature is essentially unitary. The disuse of "moral character," then, marks a shift away from a broad, if not global, way of looking at personality. Thus the Michigan legislature once believed it had said enough when it authorized courts to commit neglected children to the care of "some reputable citizen of good moral character."¹⁸⁹ And thus to be of bad moral character was, under the old view, almost to be barred from winning custody of a child. In the law's new view, however, moral character becomes, at best, one trait among many. At worst, the idea of moral character vanishes altogether, to be replaced by the view that a person's moral qualities are unrelated to each other. For instance, modern family law holds that even if you have erred morally the law cannot infer that you are likely to commit the same fault again, or that you are likely to commit other faults.¹⁹⁰ The eclipse of "moral character" thus diminishes the quantum of moral discourse by depreciating the contribution of a person's moral nature to his entire personality and by removing from the law a useful (whether or not accurate) predictive theory.

Also implicit in the idea of "moral character" are the beliefs that one's moral nature is within one's own control, and that it is helpful to talk about one's conduct in moral terms. Psychologic man and, increasingly, the law doubt both of these beliefs. "No-fault" divorce, for instance, captures neatly the psychologic attitude toward the latter belief: There ought be no sense of guilt when a marriage doesn't work, because there was simply a technical dysfunction; there ought to be no sense of prolonged responsibility, because that would itself be dysfunctional; and there ought to be no regulation of those technical problems except, possibly, a technical one, i.e., counselling.¹⁹¹

189. 1907 Mich. Pub. Acts 325.

190. See, e.g., *Nada A. v. State*, 660 P.2d 436 (Alaska 1983); *Gratrix v. Gratrix*, 652 P.2d 76 (Alaska 1982).

191. See, e.g., WIS. STAT. ANN. § 767.081 (West 1981) (requiring counseling in actions for divorce or legal separation). Cf. J. VEROFF, *supra* note 24, at 542-43 (emphasis in original):

Although there is a large increase in perceived problems in marriage, there is no comparable increase in [perceived] inadequacies in performing the marital role. We can only suggest that the interpersonal orientation that has become so dominant a theme in American life has for some reason *reduced* the *personal* sense of responsibility people have in performing these roles. . . . Could it be that the new vision of marital role difficulties as a *system of interpersonal communication problems* rather than ones in which one spouse or the other is at fault, *reduces guilt* that men and women feel about marital difficulties? . . . As it becomes more normative to think about interpersonal difficulties in both marriage and parenthood, perhaps difficulties can be thought of as system problems, rather than personal flaws.

There may be a legal analogy to the sociological view of morals to which psychologic man subscribes in the judicial tendency to justify legal change by referring to the extent of change in family life. See, e.g., the opening sentence of *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) ("During the past 15 years, there has been a substantial increase in the number of couples living together without marrying"); and *Dosek v. Dosek*, 8 FAM. L. REP.

The law's turn from morals to medicine is further evidenced by the difficulty the law has with the view — implicit in the the "moral character" idea — that moral conduct is within one's control. The medical viewpoint poses two (related) challenges to that belief: first, that some moral faults are illnesses, and therefore beyond one's responsibility; and second, that all behavior is determined by forces beyond one's control. The law, obviously, cannot fully accede to the second challenge, but family law, at least, has been influenced by both. This influence can be seen even in an area as instinct with moral problems and feeling as child abuse, where the law has "accepted in principle the therapeutic approach."¹⁹²

The "psychiatric turn" diminishes moral discourse in family law in yet another way. The tendency to see family law problems in medical terms readily leads law to rely on specialists from other disciplines — medicine, psychiatry, psychology, social work, and so on. As it relies on experts from these disciplines, the law adopts their language, thereby diminishing moral discourse. Further, the law to some extent confides direct power to such experts — to doctors admitting patients to state hospitals,¹⁹³ to social workers, to probation officers — and to some extent relies on their recommendations. To the extent the law does so, it replaces legal discourse (with its traditionally substantial quantum of moral discourse) with the discourse of another discipline. That substitution is noticeable, for example, in child-custody law, where a psychiatric recommendation can seem so encompassing, so authoritative, and so portentous that it overwhelms all other considerations.

The celebrated case of *Painter v. Bannister*,¹⁹⁴ for instance, is usually taken as an example of Iowa stubbornness and invincible provincialism. However, a careful reading reveals the central influence of the psychiatric testimony in the case. The court began by comparing the "philosophies" of Mark Painter's father and of his grandparents, conceded its preference for the "stable, dependable, conventional, middle-class, middlewest" home of the grandparents, and said "security and stability in the home are more important than intellectual stimulation in the proper development of a child," but then stated that a father has a special claim to custody of his child. However, instead of resolving

(BNA) 2530 (1982 Conn. Super. Ct.) (justifying a similar change in the law by saying that its holding was "but another example of the truth of Holmes' famous dictum that 'the life of the law has not been logic, it has been experience'").

192. Newberger & Bourne, *The Medicalization and Legalization of Child Abuse*, 48 AM. J. ORTHOPSYCHIATRY 593, 600 (1978).

193. An especially significant example is *Parham v. J.R.*, 442 U.S. 584 (1979).

194. 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966).

this moral and legal conflict, the court devoted the final two pages of the opinion to extensive quotations from the psychologist who had testified that the grandparents were the psychological parents and that "the chances are very high (Mark) will go wrong if he is returned to his father." With testimony of this astonishing scope and assurance, the court apparently felt itself relieved of further inquiry into the moral, social, and legal problems it faced.

b. Nonbinding commitments. A second consequence of the psychological view for my theory arises from the doctrine of "nonbinding commitments." That doctrine, fully accepted, could eliminate many of the moral problems over which family law has puzzled, since many of them have to do with how binding commitments should be, with whether, when, and how one spouse may leave another or a parent may leave a child.¹⁹⁵ The doctrine finds its legal analogues in the law's tendency to see families in terms of their individual members and not as units and in the legal tendency to make it easier to leave a family. Like the doctrine of nonbinding commitments, these legal tendencies are sustained by psychology man's pragmatic view of personal relations — the view that a relationship should be maintained only if it "works," that "options" should be kept numerous and open to "facilitate personal growth," and that living in a family is a matter of psychological adjustment, a technical matter of finding happiness, not a matter of moral relations. This view prefers temporary marriages, temporary nonmarital arrangements, and temporary children, and the law is coming to accommodate it.

No-fault divorce exemplifies that accommodation, along with the various procedural reforms designed to make divorce speedy and simple. And coordinate with this view of no-fault divorce are its companions, the trend toward permitting couples to contract in anticipation of divorce, the trend toward short-term "rehabilitative" alimony, and whatever trend there may be toward diminished responsibility for child support after divorce.¹⁹⁶ The law has also accommodated itself to the view of "marital" relations as temporary by creating — and, not inconsiderably, legitimizing — temporary alternatives to marriage.¹⁹⁷

195. Or a child a parent. See *In re Snyder*, 85 Wash. 2d 182, 532 P.2d 278 (1975).

196. See text at notes 20-29 *supra*. Note that, as to the last of these, there is much to suggest the larger trend is in the other direction.

197. See text at notes 36-41 *supra*. Courts have not only countenanced nonmarital contracts (even, at least in principle, to the extent of finding them implied in fact or in law), but they have also begun to allow such contracts to give rise to "alimony," e.g. *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980), and begun to toy with the notion of creating an action for loss of consortium for cohabitators, e.g. *Bulloch v. United States*, 487 F. Supp. 1078 (D. N.J. 1980); *Sutherland v. Auch Inter-Borough Transit Co.*, 366 F. Supp. 127 (E.D. Pa. 1973); *Butcher v. Superior Court*, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (Cal. Ct. App. 1983). But see *Hendrix v. General Motors*

Finally, the dwindling of family-responsibility statutes¹⁹⁸ reflects the temporary quality of family relations from a somewhat different angle.

The law's increasing propensity to see the family in terms of its component members rather than as an entity is specially visible in, and in part arises from, the law's increasing propensity to see issues in terms of individual rights. The Court's shift from *Griswold v. Connecticut*¹⁹⁹ to *Eisenstadt v. Baird*²⁰⁰ (from its first modern "privacy" case to its second) catches those propensities near their origin. In *Griswold* (which held unconstitutional a statute criminalizing the use of contraceptives), the Court's discovery of a "right to privacy" was expressly the discovery of a special right, one "older than the Bill of Rights — older than our political parties, older than our school system," a right that grew out of the special relationship of marriage. The Court apostrophized marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." Allowing police "to search the sacred precincts of marital bedrooms" would be "repulsive."²⁰¹ But in *Eisenstadt*, where contraceptives were distributed to the unmarried, the Court held that the Equal Protection Clause requires that the right of access to contraceptives "must be the same for the unmarried and the married alike." The Court conceded that "in *Griswold* the right of privacy in question inhered in the marital relationship." However, the Court discarded *Griswold*'s encomium to marriage for something akin to its opposite:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.²⁰²

The law of abortion provides two further examples of situations in which the Supreme Court's "rights" perspective has encouraged it to regard the family as a collection of individuals. In *Planned Parenthood of Central Missouri v. Danforth*,²⁰³ the Court held unconstitutional a statute requiring a married woman seeking an abortion in the first twelve weeks of pregnancy to obtain her husband's consent,

Corp., 193 Cal. Rptr. 922 (Cal. Ct. App. 1983); *Sawyer v. Bailey*, 413 A.2d 165 (Me. 1980); *Childers v. Shannon*, 183 N.J. Super. 591, 444 A.2d 1141 (Super. Ct. App. Div. 1982).

198. See text at notes 30-31 *supra*.

199. 381 U.S. 479 (1965).

200. 405 U.S. 438 (1972).

201. 381 U.S. at 485-86.

202. 405 U.S. at 453 (emphasis in original).

203. 428 U.S. 52 (1976).

unless the abortion was necessary to preserve her life. The state had justified the statute on the grounds of its "perception of marriage as an institution" and its view that "any major change in family status is a decision to be made jointly by the marriage partners."²⁰⁴ The Court quoted the passage from *Eisenstadt* that I just quoted, and reasoned that "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period."²⁰⁵ However desirable the Court's result may be, its reasoning is fragile. As Justice White noted in dissent, the state was not delegating a power, but rather "recognizing that the husband has an interest of his own in the life of the fetus. . . ."²⁰⁶ But even Justice White seemed not to credit that the state might be trying to impose, however unwisely, the view that the husband and wife ought to make the decision together.

The second example from the abortion area is represented by *Bellotti v. Baird*.²⁰⁷ The Court's judgment in that case was that if a state "decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained."²⁰⁸

These examples suggest that once a court sees a problem as a question of constitutional right, it is easily driven toward psychologist's view of human relations — driven, that is, to treat the problem as one involving individuals, not families, to project an atomistic image of the family, and to regard family problems as matters to be settled between the law and a single member of the family. A constitutional right, after all, is a right an individual has against the government; that is the point of the state-action requirement. Where a right exists, we *prima facie* prefer the individual, as the law of substantive due process illustrates. But the rights schema is often inapposite

204. 428 U.S. at 68.

205. 428 U.S. at 69.

206. 428 U.S. at 93 (White, J., concurring in part and dissenting in part). In *Roe v. Wade*, 410 U.S. 113, 153 (1973), in the passage in which the Court seemed to be justifying its discovery of a right to privacy, the Court listed the many "detriment[s] that the State would impose on the pregnant woman by denying this choice altogether. . . ." Except for the detriment of medical harm, of which the Court made oddly little, each of the detriments could be suffered by a father.

207. 443 U.S. 622 (1979). *Carey v. Population Servs. Intl.*, 431 U.S. 678 (1977), raises the same point as to contraception.

208. 443 U.S. at 643 (footnote omitted). Massachusetts did decide to require parental consent and did set up an alternative procedure. In the first two years of that procedure's operation, 1300 girls sought judicial consent. All but four girls received authorization from the trial court, three of the girls who lost in the trial court won on appeal, and the fourth girl simply went to another state to receive her abortion. R. MNOOKIN, *Bellotti v. Baird: A Hard Case*, in *IN THE INTEREST OF CHILDREN* 149 (1985) [hereinafter cited as *IN THE INTEREST OF CHILDREN*].

in the family context, since there a right against the government is also a right against other family members.²⁰⁹ And because we dislike compromising a right against the government, we are inhibited from looking for ways to encourage compromises or even discussion within the family.²¹⁰ Indeed, the very appeal to law — to an external set of standards enforced by might — is atomistic in that it circumvents the (no doubt idealized) standards of family decision: private persuasion and eventual accommodation based on solicitude for the person with whom one disagrees.

To put the point somewhat differently, our tendency to constitutionalize family law and thus to think of it in terms of rights means that, when the law transfers moral decisions, it transfers them to individuals rather than to families, thus sustaining the image of the family as a collection of discrete individuals.²¹¹ And the rights approach must be, in one sense, hostile to moral discourse, because the resolution of moral problems must commonly be particularistic and delicate, while the promulgation and enforcement of rights is often generalistic and insensitive to nuance.

Even where the “rights” approach is used to unite the components of the family in principle, it is likely to divide the members of the family in practice, because in such situations one member of the family is often using the law to force his way on others in the family. For example, those favoring visitation rights for grandparents justify them not only in terms of the interests of the child, but also in terms of the “rights” of the grandparents.²¹² Court-ordered visitation is presumably necessary only where the child’s parent objects to such visitation, and we thus see the law compelling the parent to submit to the intrusion of that cliché and source of popular wit, the intermeddling in-law.

A final irony of the “rights approach” is that the situation in which it is used most often to unite the family — when parents’ rights are

209. See generally C. Schneider, *supra* note 48.

210. Cf. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 331 (characterizing the Supreme Court’s role in family law jurisprudence as “addressing conflicting claims of individual and community, of liberty and authority”).

211. The “rights” viewpoint probably sustains the tendency to think of families atomistically in other ways. For example — given the American enthusiasm for legalism and for thinking of problems in terms of rights, given most people’s ignorance of the state-action requirement and their consequent tendency to blur rights against the state and rights against other individuals, and given the tendency to believe that if you have a right, you use it or lose it — I suspect that, as family law becomes constitutionalized, people will increasingly tend to think of their intra-familial relations in terms of rights.

212. See, e.g., S. Con. Res. 40, 98th Cong., 1st Sess. (1983) (which also reports that four “grandparents’ rights organizations have been established for the purpose of focusing national, state, and local attention on the issue of grandparents’ visitation rights”).

invoked to limit the state's interference in the family²¹³ — is also the situation in which it can be abused to mistreat or even eject a member of the family.²¹⁴ This possibility is most grimly raised when parents refuse lifesaving medical aid for their children.²¹⁵

Family law's movement toward contract likewise comports with psychologic man's tendency to see the family as a collection of individuals united temporarily for their mutual convenience and armed with rights against each other. Contracts are, by definition, made between individuals competent to deal with each other at arm's length. Contracts by definition give each individual rights against the other. And contracts by doctrine may be renounced, as long as the breaching party gives the other the benefit of that part of the bargain that can be reduced to economic terms. Indeed, if the breaching party can compensate the other party and still come out ahead, it is thought economically efficient — that is, socially desirable — for him to do so.

Finally, psychologic man's view of families as made up of individuals is encouraged by and encourages egalitarianism. The practical problem with seeing the family as a unit is that units are often called upon to speak as units; and historically, when the family has spoken, the voice has been the husband's. Egalitarianism has had the greatest effect in financial matters,²¹⁶ but it has also spurred the attack on spousal tort immunity, on the spousal testimonial privilege, and on the law's handling of spouse abuse. Egalitarianism may well be compati-

213. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

214. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584 (1979). In *Parham* the Court held that as long as a state mental hospital's procedures made it likely that the decision to admit and retain a child was not arbitrary, no adversary proceeding need be held. One need not accept Justice Brennan's brutal intimation that any child sent to a state mental hospital has been "ousted" from his family to acknowledge that that can happen. Further, *Parham's* symbolic importance for the family is ambiguous. The holding is based in part on the notion that the law presumes parents make decisions in the interests of their children. But the Court also holds that no different procedures are necessary where the child is committed not by a parent but by the state acting for one of its wards, since "we cannot assume that when the State of Georgia has custody of a child it acts so differently from a natural parent in seeking medical assistance for the child." 442 U.S. at 618.

215. *See* my discussion of the *Phillip B.* case, text at notes 50-52 *supra*. *See* also the argument by Dr. Raymond Duff as to neonatal euthanasia, an argument Professor Goldstein describes as "persuasive":

Families know their values, priorities and resources better than anyone else. Presumably they, with the doctor, can make the better choices as a private affair. Certainly, they, more than anyone else, must live with the consequences. Most of these families know they cannot place that child for adoption because no one else wants the child. If they cannot cope adequately with the child and their other responsibilities and survive as a family, they may feel that the death option is a forced choice. . . . But that is not necessarily bad, and who knows of a better way?

Kelsey, *Shall These Children Live? A Conversation With Dr. Raymond S. Duff*, 72 REFLECTION 4, 7 (1975) (Yale Divinity School Magazine), *quoted in* Goldstein, *supra* note 49, at 656.

216. In those matters, egalitarianism's effect may actually have been to strengthen the view of the family as a unit by strengthening the presumption that the property of one spouse is the property of both.

ble with a view of the family as a unit; indeed, most modern views of the family as a unit are based on a view of husband and wife as equals. But family law's sense that the patriarchal concept of the family must be extirpated and compensated for has perhaps led to a form of egalitarianism whose effects can be atomistic.

c. *The search for self.* Psychological man, as we have seen, constantly seeks to find his unique "true self," to escape society's imposed roles. Family law, increasingly, lets him do so. This helps explain some of the appeal of recent attempts to ensure accurate, individualized trials by expanding procedural rights, as the Court did in *Santosky v. Kramer*,²¹⁷ *Lassiter v. North Carolina*,²¹⁸ and *Stanley v. Illinois*.²¹⁹ It also helps explain attempts to eliminate "stereotypes" as to child custody (by making inadmissible evidence about a parent's sexual habits where those habits do not demonstrably affect the parent's ability to raise children and by weakening the tender-years presumption), as to illegitimacy (by eliminating disabilities based on a characteristic outside the control of the person affected), as to alimony and spousal support (by eliminating the assumption that the man should support the woman), and as to age (by allowing children to have an abortion without telling their parents if they can convince a court they need one).

How these developments affect the quantum of moral discourse in the law is unclear. On one hand, treating people as they are individually rather than according to roles and generalizations could allow the law to make more complex moral judgments about them and their situations, and trials that produce more information about litigants might give courts more material with which to make fuller moral judgments.

On the other hand, the "stereotypes" being attacked could also be seen as generalized resolutions of particular moral questions, and the attacks on those stereotypes as attempts to eliminate those moral questions from the law's purview and to substitute an inquiry into the particular psychological characteristics of the litigants and a search for the psychologic solution that "works." Furthermore, the effect of individualizing decisions is clouded by our ignorance about how legal

217. 455 U.S. 745 (1982).

218. 452 U.S. 18 (1981). I take the sensible view of that case propounded by Professor Besharov in *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 FAM. L.Q. 205, 217 (1981) (suggesting that "*Lassiter* may be the first evolutionary step in an ultimately revolutionary recognition of the due process right of indigents to appointed counsel in 'civil' proceedings" because "eight out of nine Justices opened the door to the future provision of counsel in some, if not all, termination proceedings").

219. 405 U.S. 645 (1972). Cf. *Lehr v. Robertson*, 463 U.S. 248 (1983).

actors decide cases where no rules guide their discretion. While individualized decisions may permit more complex moral judgments, they may also make them less likely. Legal decisions are those made on the basis of rules, and legal decisionmakers thus tend to look for rules to guide them. Where a factor is not expressly embodied in a rule, it is perhaps likely to be excluded, at least from conscious decisionmaking. In other words, we simply do not know whether freeing the decisionmaker from generalizations and rules will liberate him to make richer moral judgments or simply restrict the set of moral standards he is willing to employ. Finally, while the law expends much effort elaborating and using procedures, it is not clear that the procedural reforms of family law actually alter the outcomes of cases.²²⁰ It is thus possible that family law's procedural reforms might, anticlimactically, have little effect on any kind of discourse.

d. Removing false constraints. A further consequence of the psychologic view is weightier than the preceeding consequence, for insofar as the law responds to that view's command to peel off society's false constraints and to that view's preference for pragmatism and flexibility, the law will eliminate rules. Family law, as we have said, is gradually but widely doing just that. The most interesting evidence of the law's direction here is in the area of substantive due process, where the personal right to be free of a legal rule directly confronts the state's moral or social justification for the rule.

For present purposes, the significance of substantive due process is that the Court has used both sides of the substantive due process equation in ways that suggest a predisposition to peel off rules. The Court's treatment of the personal rights side of the equation has been expansive to an extent made remarkable by the obscure origins of the "right to privacy." Its handling of the state-interest side of the equation shares the imprecision of its handling of the rights side, but the former is as narrow as the latter is broad: The Court almost invariably finds that the state interests advanced in support of a statute that infringes on a "fundamental" constitutional right are insufficient to justify the statute. No doubt the Court sometimes peeks at the state's interests before it decides whether the right violated is fundamental. But as Professor Nagel showed in his celebrated Note,²²¹ the Court's application of the state-interest test has been so mechanical, so clumsy, so literalistic, that one may infer that the Court is not sensitive to many of the moral purposes of states.

220. See, e.g., *Wald & Chambers, Smith v. OFFER*, in *IN THE INTEREST OF CHILDREN* *supra* note 208, at 67.

221. Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 *YALE L.J.* 123 (1972).

The removal of false constraints is, in part, a removal of the religious and social conventions that, we noted earlier, psychologic man need use only instrumentally and pragmatically. Psychologic man's antinomianism neatly complements the American commitment to pluralism. That antinomianism, in other words, like American pluralism, acknowledges the possible importance and usefulness of beliefs and conventions, but denies that any particular belief or convention has inherent or independent justification. Under both views, many beliefs and conventions should be available to be used in a society; none should be imposed by it.

e. The psychologic view of human nature. Another consequence of the psychologic view arises from psychological man's assessment of the goodness and perfectibility of human nature. Curiously, both sides of that ambivalence may diminish moral discourse in family law. First, insofar as the psychologic view is pessimistic about the malleability of man, and sees man as governed by passions he cannot understand and cannot resist, it calls for the law to make as few attempts to regulate him as possible. This is the attitude reflected in the aphorisms endemic in discussions of family law: "You can't change human nature." "You can't legislate morality." Psychologic man's particular pessimism about the capacity of social institutions is widely echoed in the increasingly expressed doubts about, for example, the state's ability to intervene satisfactorily in child custody disputes,²²² to provide adequate foster care, or to furnish decently run, effective asylums for retarded or mentally ill children.²²³ This pessimism, in other words, increases sensitivity to the enforcement difficulties that, we have seen, recur in family law.

Second, insofar as the psychologic view is optimistic about man's nature, it would still require the law to make few attempts to guide or regulate him. Indeed, on this view it may be the constraints themselves that are the problem.²²⁴ Thus both consequences of the psychologic view diminish the desirability of regulation of families, and both therefore diminish the law's need to evaluate the moral problems of families.

f. The nature of privacy. The final consequence of the psychologic view concerns the fundamental rights side of the substantive due process test — specifically, the right to privacy. I said that the psycho-

222. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1979).

223. Some of these doubts may actually be based as well on an optimistic view of humans, for the doubts often rest on a belief that even despondent, troubled, and ill people can get along better for themselves in society than is commonly supposed.

224. See Part IV. D. 1. *supra*.

logic view's attitude toward privacy is paradoxical.²²⁵ That view seems at first to demand privacy, but its adherents seem not to seek it nor the doctrine, on reflection, to require it. For its part, the law has elevated "privacy" to a fundamental right. I suggest that the law's "privacy" is the kind of "privacy" the psychological view requires. That kind is not privacy in the sense of secrecy; secrecy psychologic man seems not to want, and the law abandoned it as a protected right when it moved from *Griswold* to *Eisenstadt*. The privacy psychologic man needs is the kind the law comes closer to granting — autonomy from state control. And this is the kind of privacy that, when elevated to a right, is peculiarly incompatible with the law's moral discourse, for once a right to autonomy from state control is found, the issue of state intervention on "moral" grounds *vel non* is largely resolved and the state's moral interest is virtually irrelevant.

g. *A concluding comparison.* I conclude our consideration of the legal reactions to the psychologic view of man by proposing a modest analogy between the rising view of family law and the rise of classical liberalism. Each has its prototypical man: psychologic man for one, economic man for the other. Those personality types are in Professor Rieff's view related: "We will recognize the case history of psychological man the nervous habits of his father, economic man: he is anti-heroic, shrewd, carefully counting his satisfactions and dissatisfactions, studying unprofitable commitments as the sins most to be avoided."²²⁶ Each type believes the greatest good for the greatest number is to be had by allowing the market, in goods or in "interpersonal relations," to work as free of government regulation as possible. Each view is primarily associated with the bourgeoisie. Each favors the contract as the market's mechanism, and thus family law has seen the rise of the antenuptial contract, the postnuptial contract, contracts for surrogate motherhood,²²⁷ a contractual view of career choices made by husbands and wives, and hostility to contractors preferred by status.²²⁸ Both were born in attacks on an older system of law and mores; and both employ egalitarianism in making those attacks. Both raise the questions to which we will shortly turn.

3. *A Case Study: Roe v. Wade*

Up to this point, I have described the trend toward diminished moral discourse in family law and the transfer of moral decision from

225. See Part IV. D. 1. *e. supra*.

226. P. RIEFF, FREUD: THE MIND OF THE MORALIST, 356 (3d ed. 1979).

227. The legal effectiveness of which is uncertain.

228. Thus we see attacks on the preference for women in alimony and child-custody cases.

family law in necessarily general terms. At this point, I will attempt to make the nature of the trend clearer through extended exegesis of a specific text. I have chosen *Roe v. Wade*,²²⁹ the Court's well-known abortion opinion, as that test. I have done so for several reasons. First, *Roe* is an important case, the opinion — whatever its quality — was carefully considered, and the opinion and the problems it raises will be familiar to many readers. Second, *Roe* exemplifies the trend toward diminished moral discourse well: it not only removes from the law's (if not politics') purview a major moral issue, it does so without addressing that moral issue. Third, *Roe* illustrates the fit between psychologic man and modern family law in general and between the psychologic view and substantive due process in particular.

I said earlier that an expansive treatment of the private-rights side of the substantive due process equation typified the modern approach to family law. Just how expansive that treatment is may be seen in *Roe*. The case turns on the constitutional "right to privacy," a right inferred from the fourteenth amendment's provision that no state may deprive a person of life, liberty, or property without due process of law. Since little in the language, structure, or intent of the clause establishes the nature or limits of that right, since the Court has never defined those limits, since the right has little to do with "privacy" in the colloquial sense, and since the right of privacy is a "greedy" one,²³⁰ the right has long seemed menacingly capacious. The Court in *Roe* opens its discussion of the right to privacy with a sentence that acknowledges that the Constitution mentions no such right.²³¹ In its next two sentences, the Court attempts to identify the origin of the right:

In a line of decisions . . . going back *perhaps* as far as . . . [1891], the Court has recognized that a right of personal privacy, *or* a guarantee of certain areas *or* zones of privacy, does exist under the Constitution. In varying contexts, the Court *or* individual Justices have, indeed, found *at least* the roots of that right in the First Amendment . . .; in the Fourth and Fifth Amendments . . .; in the penumbras of the Bill of Rights . . .; in the Ninth Amendment . . .; *or* in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. . . .²³²

After this disjunctive jumble of precedent (which may establish no more than "the roots of that right"), and after adding that the right has "some extension to activities relating to" various family law issues,

229. 410 U.S. 113 (1973).

230. Freund, *Privacy: One Concept or Many*, in *PRIVACY* 182 (J. Pennock & J. Chapman eds. 1971).

231. 410 U.S. at 152.

232. 410 U.S. at 152 (emphasis added).

the Court closes its attempt to define and defend the right, having established neither the principle that justifies nor the principle that limits it.

Nevertheless, the Court next says, "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²³³ *Why* that right is "broad enough" the Court does not say. The Court does follow this sentence with a list of "detriments" a woman would suffer who could not have an abortion, and one may infer that it is the severity of the detriments that gives rise to the right. But while the Court cannot mean that "detriments" create rights — since all statutes impose "detriments," and since most "detriments" do not give rise to a legal right — the Court does not say why detriments create a right here, or why these particular detriments create this particular right.

One might suppose that *Roe* is an example of the trend toward transferring the moral decision whether a particular abortion is justifiable from the state to the citizen. That is, of course, its effect. But the Court seems uninterested in building any argument for the wisdom of such a transfer. Indeed, when the Court reflects on the nature of the decision whether to have an abortion, the "factors the woman and her responsible physician necessarily will consider in consultation"²³⁴ turn out to be those consonant with the psychologic viewpoint. That is, they are largely "therapeutic," having almost exclusively to do with the woman's medical and psychological health, although other factors presumably, if vaguely, enter in one sentence: "There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."²³⁵ But the central question of the morality of abortion itself, the subsidiary moral questions about the extent to which the woman's conduct and situation influence the morality of her particular abortion, and the moral questions about how the abortion affects the woman's relations with the father of the child are all conspicuously absent.

The Court's "therapeutic" viewpoint is similarly apparent in the centrality of the role it sees for the doctor. So powerful is that viewpoint that at one point the Court actually attributes primary responsibility for the decision to the doctor: "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy

233. 410 U.S. at 153.

234. 410 U.S. at 153.

235. 410 U.S. at 153.

should be terminated.”²³⁶ Significantly, the Court seems not to expect that the doctor will give the woman the empirical medical information as to the nature of fetal life about which he should be expert and which many people believe relevant to the moral propriety of abortion. Nor does the Court acknowledge that there is hardly any medical expertise, except where continued pregnancy will endanger the mother’s health, relevant to the decision whether to have an abortion. Nevertheless, the Court stresses that the doctor will be consulted — will be worth consulting and available for consultation — on the psychological, social, and moral issues the Court believes are relevant to the decision.

When the Court in *Roe* turns to the state’s interests, it feints toward dealing with the central moral question the case presents — whether abortions destroy something we value in the way we value human life. But the Court immediately veers off to ask whether the fetus is a “person” within the meaning of the fourteenth amendment, on the theory that, if it were, “of course . . . the fetus’ right to life would . . . be guaranteed specifically by the Amendment.”²³⁷ The Court then embarks on a macabre inquiry into whether the Constitution ever refers to a “person” when it also means a fetus. The Court canvasses, *inter alia*, the apportionment clause, the emolument clause, the electors provisions, the provision setting qualifications for the presidency, and the extradition provisions, and discovers that “in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.”²³⁸

The Court then returns to its central moral problem, but declines to confront it:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.²³⁹

Thus relying on its own incapacity to resolve the question of when life begins, and without explaining its reasoning, the Court says that “by

236. 410 U.S. at 163.

237. 410 U.S. at 156-57. Perhaps Justice Blackmun is correct, but his conclusion does not follow from the language of the fourteenth amendment, which only prohibits *states*, not private citizens, from depriving “any person of life, liberty, or property, without due process of law.”

238. 410 U.S. at 157. Ironically, the Court has held that corporations *are* “persons” within the meaning of the fourteenth amendment. If a fetus could incorporate under state law, would it be a person, within the meaning of the fourteenth amendment? Justice Blackmun’s discussion reminds one of *Punch’s* railroad conductor, who says, “Cats is dogs and rabbits is dogs, but tortoises is hinsects and goes free.”

239. 410 U.S. at 159.

adopting one theory of life, Texas may [not] override the rights of the pregnant woman that are at stake."²⁴⁰

The Court's attitude in *Roe* fits well with the moral skepticism and relativism that are part of psychologic man's world view. Courts may reasonably respond to the increased respectability of those attitudes by looking skeptically at moral justifications for statutes. But they might just as reasonably respond by deferring to any plausible moral justification propounded by the branch of government whose function is to represent democratic opinion. This latter response seems particularly appropriate in *Roe*, for if "the respective disciplines of medicine, philosophy, and theology" can't agree, the legislature's choice must be backed by some substantial arguments from each discipline. Further, the legislature's choice can, in principle, be better informed than the Court's (because the legislature has, if it will use them, better facilities for gathering information), and it can, as it always has, represent public opinion as to how society should define and protect human life. In *Roe*, as in other substantive due process cases, the Court has avoided examining all the possible rationales for a statute, although conventional doctrine prescribes otherwise.²⁴¹ And among the unexplored rationales is what is surely a common one — that the state is protecting the state's classic police power interest in morality.²⁴² The Court has announced (in an obscenity case) that such a rationale is legitimate (although the Court did not decide whether it is also "compelling").²⁴³ In sum, the Court uses the rhetorical device of implying that the legislature made an arbitrary choice between arbitrary definitions to avoid dealing directly either with the crucial moral issue presented by the case or with the justification for holding that the legislature could not legitimately consider and decide that moral issue.

The *Roe* Court's next steps further demonstrate the artificial, ad hoc nature of the Court's state-interest analysis and of the Court's refusal to explain its decision in moral (or even morally comprehensible) terms. Although the Court had denied that Texas could, by defining "life," deprive a woman of her right to decide whether to have an

240. 410 U.S. at 162.

241. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 234-35 (1981).

242. As Justice Harlan wrote,

[T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.

Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

243. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973).

abortion, the Court next finds that Texas has an "important and legitimate interest in protecting the potentiality of human life," and that that interest "grows in substantiality as the woman approaches term, and at a point during pregnancy, . . . becomes 'compelling.'"²⁴⁴ The Court then holds that that point is reached at "viability,"²⁴⁵ which the Court indicates is reached after twenty-four to twenty-eight weeks of pregnancy. "This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."²⁴⁶ The Court does not say why its definition of "meaningful life" (which deprives a woman of a constitutional right to an abortion in the last trimester) is reasonable when the legislature's is not. Nor does the Court say why the "potentiality of life" which the Court concedes exists through the second trimester is not something the state may protect.

One approach to these questions is suggested by the practice, in substantive due process cases, of striking the balance between the individual and the state "having regard to what history teaches are the traditions from which [the country] developed as well as the traditions from which it broke."²⁴⁷ On one view, then, courts might substitute an analysis of the law's historical treatment of a moral problem for a direct analysis of the moral problem itself. This might be the purpose of Justice Blackmun's curious historical excursion in *Roe*. However, the Court's use of history, for whatever purpose it is advanced, is disquieting.²⁴⁸ It begins by noting that, while the Persians severely punished abortion, the Greeks and the Romans did not.²⁴⁹ Justice Blackmun agonizes for two pages over the awkwardness that the Hippocratic Oath flatly proscribes abortions. He concedes that with the rise of Christianity, "[t]he Oath 'became the nucleus of all medical ethics' and 'was applauded as the embodiment of truth,'" and he concedes that the oath is "a long-accepted and revered statement of medical ethics."²⁵⁰ Nevertheless, he discovers that "the late Dr. Edelstein" thought the oath " 'a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.' "²⁵¹ He thinks this "a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity."²⁵² It is revealingly indicative of the psychologic attitude of

244. 410 U.S. at 162-63.

245. 410 U.S. at 163.

246. 410 U.S. at 163.

247. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

248. See Note, *supra* note 16, at 268-69 n.84.

249. 410 U.S. at 130.

250. 410 U.S. at 132.

251. 410 U.S. at 132.

252. 410 U.S. at 132.

the opinion that that "apparent rigidity" is something that needs to be explained away instead of accepted as a statement of a considered moral judgment.

The Court then reports that the common law may have made abortion after quickening a crime; that in 1821 American states began to make such abortions criminal; and that, beginning in the middle of the nineteenth century, abortions before quickening were also made criminal. The Court concludes that "throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect."²⁵³ But the Court's own history demonstrates that abortion itself was condemned by the relevant ethical tradition for two thousand years, that never in the history of Anglo-American law was there any doubt about the state's power to prohibit abortion,²⁵⁴ that abortion before quickening was criminalized by statute in the early-middle nineteenth century, that abortion before quickening was criminalized as soon as anyone could diagnose pregnancy before quickening, and that abortion has been a felony in virtually every state for a century.²⁵⁵

Finally, *Roe* is consonant with the psychologic viewpoint sociologically and tends to confirm the sociological amendment to the hypothesis propounded in Part II. B. Crudely put, the same groups that most partake of the psychologic outlook also have the most liberal views of abortion, while those groups that partake of it least have the most conservative views of abortion. Indeed, abortion is an issue that is being used in the political debate over the desirability of the psychologic world view, a debate in which positions are greatly influenced by social class.²⁵⁶

My point is not to show yet again that the opinion in *Roe* is uncommonly unpersuasive.²⁵⁷ Rather it is to propose that that unpersuasiveness indicates that the explanation for the Court's result lies, more than usually, outside the realm of theories embedded in judicial

253. 410 U.S. at 140.

254. Indeed, by the Court's own testimony Bracton held that abortion was murder, and Coke and Blackstone both thought it criminal. 410 U.S. at 134-36. See also Gavigan, *The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. LEGAL HIST. 20 (1984).

255. The usual tactic at this point is to discover in our history a pattern of allegiance to some "deeper" value which dictates recognizing the presence of a constitutional right. But the Court does not make that argument (unless it can be said to do so in the casual listing of precedent I described above at note 232), and instead presents us with the history I have just analyzed.

256. See K. LUKER, *supra* note 68, at 7-8.

257. The opinion was attacked in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 926-32 (1978); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: the Abortion Cases*, 1973 SUP. CT. REV. 159; Morgan, *supra* note 65.

decision. It is, further, to suggest that the result of *Roe* and the Court's attitude toward substantive due process doctrine are consonant with the viewpoint of psychologic man.²⁵⁸

E. *A Brief Speculation on the Future of the Trend*

If the changes that we fear be thus irresistible, what remains but to acquiesce with silence, as in the other insurmountable distresses of humanity? It remains that we retard what we cannot repel, that we palliate what we cannot cure.

— Samuel Johnson
*Preface to the
Dictionary* (1755)

We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.

— Oliver Wendell Holmes
The Path of The Law (1897)

I have described four causes of the trend toward diminished moral discourse in family law: the tradition of nonintervention in the family, the ideology of liberal individualism, changing moral views of family relations, and the rise of psychologic man. I suspect, but do not insist, that these causes will persist, and that the trend itself will therefore continue. The first factor may persist because the tradition of family autonomy is well-seated, and because the problems of enforcement are, in some ways, increasingly severe. The second factor may persist, despite the forces like television that tend to homogenize society, because immigration continues, a culture of poverty remains, groups with a self-conscious identity proliferate, and pluralism has more overt ideological attraction than ever before. The third factor may persist as upper-middle-class Christianity continues to lose its influence and its traditional view of morals. The fourth factor may persist as the social forces described in the preceding section encourage people to look to themselves for gratification and as the "helping professions" and their auxiliaries burgeon.

The trend is also impelled by the synergistic effect of the four factors. That is, the four factors reinforce each other in ways complex beyond recounting. For example, the enforcement problem is given

258. Several other attitudes I have discussed may also have contributed, *sub rosa*, to the result. Among these is egalitarianism: the Court may have been sensitive to the fact that rich women could by 1973 secure abortions distinctly more easily than poor women and to the feminist sentiment that helped propel abortion reform. And the Court may, at some level, have feared the ugly enforcement problems of abortion regulation. See generally Zimring, *supra* note 128.

depth and importance by liberal individualism. Liberal individualism's view of the world is given resonance by psychologism, in ways suggested by the analogy I made between psychologic and economic man.²⁵⁹ The social weakening and doctrinal liberalization of mainstream Protestantism is caused and encouraged by liberal individualism's view that adherence to religion is a purely individual choice that family and tradition should not influence.²⁶⁰ The psychological view increases resistance to government regulation of private life, thereby intensifying the enforcement difficulty.

In short, the four causes interrelate endlessly, because they are all prominent parts of the culture that produced American family law and within which that law acts. Furthermore, the four causes are themselves caused by larger underlying social trends. Insofar as those trends continue to invigorate the four causes, the trend toward diminished moral discourse in family law seems likely to continue.

None of this is inevitable, however; it is the most common and most false assumption of social prediction that, once begun, a trend must continue. Trends of exactly the kind I discuss in this paper have been reversed before. For example, sexual mores in eighteenth-century England were, if anything, relaxed, but they tightened remarkably in the nineteenth century. Each of the causes I have described could come to be perceived as pernicious, and since such perceptions can spread quickly in modern societies, each factor could change abruptly. Forces we cannot now predict — social, economic, political, and technological changes (like the nineteenth century's "discovery" of the asylum,²⁶¹ the Vietnamese War, the Depression, and the pill) — can work large and unexpected shifts, some temporary, some protracted, in social life.

There is, furthermore, a force whose presence we cannot forget, but whose future we cannot predict — a force roughly described as reinvigorated conservatism, politicized fundamentalism, and traditional Roman Catholicism. This "new conservatism" holds that many family law issues are of central importance, wishes to reinstate many of the morally based prohibitions of family law, and seeks to revive many of the moral bases for decision in family law. It could well summon the strength to work significant political changes, as the temperance movement, even as late as the second decade of the twentieth

259. See *HABITS OF THE HEART*, *supra* note 5, at ch. 6, for an extended examination of the relationship between psychologism and individualism in the United States.

260. *Id.* at ch. 9.

261. See D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971). But see Schneider, *The Rise of Prisons and the Origins of the Rehabilitative Ideal* (Book Review), 77 MICH. L. REV. 707 (1979).

century, did with Prohibition. Perhaps ironically, such changes are made somewhat more possible by the constitutionalization of family law. The popular sense that the Court has taken too much on itself is growing,²⁶² and, since *Roe v. Wade*, that sense has been directed particularly toward family law issues. Thus some of the changes I have described could be reversed as the composition of the Supreme Court changes.²⁶³

It is at least true that, as the political power of conservatism has increased in the last few years, its attitudes have affected the degree and nature of moral discourse in many areas of family law. Consider the controversy over abortion, perhaps the most prominent of the "social issues" that disturb conservatives. A number of state legislatures have continued to enact measures intended to find the constitutional limits of the state's power to regulate abortion; and Congress has continued to restrict the use of federal funds to pay for abortions. The conservative reaction is also visible, for instance, in the Reagan administration's "Baby Doe" regulations,²⁶⁴ an attempt to retrieve for public decision a moral choice that had been left to parents and doctors.

In addition, the conservative reaction has sometimes allied itself, however oddly, with the women's movement in ways that have stimulated moral discourse. Thus the last few years have seen an efflorescence of statutes attempting to enforce child-support obligations.²⁶⁵ Under the aegis of that same coalition, the view of domestic violence as a "sickness" is being challenged by a reinvigorated view of it as "badness," a view expressed in new sex-offender legislation.²⁶⁶

The new conservative moral view has thus injected moral discourse into the law, and it has certainly become prominent in political and social discourse. But the extent to which that moral view has been enacted into law is less dramatic than the vehemence of political and

262. See M. JANOWITZ, *THE LAST HALF-CENTURY* 379-83 (1978). Janowitz reports: [I]n 1949, 83.4% of the population expressed approval and trust in the Supreme Court, but by 1973, the figure had decreased to 32.6%. The Harris Survey for 1975 showed even lower "confidence"; namely, 28%. . . . [T]his drop was more extensive than for any other institution in the United States.

Id. at 383 (footnote omitted).

263. *But cf.* *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (V. Blasi ed. 1983).

264. 45 C.F.R. § 1340.14 (1985) (requiring states to institute systems to respond to reports that newly born infants have been denied medical treatment).

265. See note 20 *supra*. One might also note as products of the same coalition the recent attempts, occasionally successful, to pass local ordinances restricting pornography. Indianapolis, Ind., Gen. Ordinances 24 (Apr. 23, 1984), 35 (June 11, 1984) (held unconstitutionally vague in *American Booksellers Assn. v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd.*, 771 F.2d 323 (7th Cir. 1985), *aff'd. per curiam*, 54 U.S.L.W. 3560 (U.S. Feb. 24, 1986) (No. 85-1090)); Minneapolis, Minn., Ordinance Relating to Civil Rights (Dec. 30, 1983) (vetoed Jan. 5, 1984).

266. See Weisberg, *supra* note 47, at 45-55.

social discussion of it suggests. For example, despite the prominence of the abortion issue, none of the attempts to reverse or seriously undermine *Roe v. Wade* has been successful. Or consider what was to have been the legislative centerpiece of the new conservative view of the family — the Family Protection Act.²⁶⁷ That bill was intended to “preserve the integrity of the American family, to foster and protect the viability of American family life by emphasizing family responsibilities in education, tax assistance, religion, and other areas related to the family, and to promote the virtues of the family.”²⁶⁸ It would have, *inter alia*, instituted a presumption in favor of an expansive interpretation of parental rights; required parental notification whenever a program receiving federal funds gave abortion or contraception counseling or services; required federal programs not to change state legislation on juvenile delinquency, child abuse, or spouse abuse; prevented federal funds from being used to promote homosexuality “as a life style” or to provide legal services for securing a divorce; and extensively amended tax and education law in ways thought to secure the general purpose of the bill. The bill’s scope is thus striking; its appeal to a substantial portion of the population is clear; and it probably would not have received the attention the press has paid it had it been introduced earlier. For our purposes, however, perhaps the significant fact is that the bill has never become law.

Similarly revealing of the strength and limits of the new conservative moral view is the example of the Adolescent Family Life Program. Under the Carter Administration, the Office of Adolescent Pregnancy Programs had been “a small service program for pregnant teenagers”²⁶⁹ whose underlying rationale was not that it is wrong for teenagers to have sexual relations, but rather that teenage pregnancy is a problem for the teenager and society, to be solved by whatever practical means are available. After President Reagan had been elected and the Republicans had won control of the Senate, Senator Jeremiah Denton proposed legislation²⁷⁰ designed to “promote self-discipline and chastity, and other positive, family-centered approaches to the problems of adolescent promiscuity [i.e., sexual intercourse out of wedlock] and adolescent pregnancy.”²⁷¹ One might have anticipated that Senator Denton’s legislation would have had clear sailing: he was

267. S. 1378, 97th Cong., 1st Sess. (1981).

268. S. 1378, 97th Cong., 1st Sess. § 2(a) (1981).

269. M. Vinovskis, *Historical and Political Perspectives on Adolescent Pregnancy* 44 (unpublished manuscript). The material in this paragraph is drawn from Professor Vinovskis’ illuminating study of the history and politics of contraception and adolescent pregnancy.

270. S. 1090, 97th Cong., 1st Sess., 127 CONG. REC. 7968 (1981).

271. S. 1090, 97th Cong., 1st Sess., 127 CONG. REC. 7969, § 1901(b)(1) (1981).

opposed by no significant interest group, he expressed the feelings of a significant and angry portion of the population, and his views might easily have been seen as a way of reducing the costs of welfare. In the end, however, Senator Denton had to remove the bill's condemnation of teenage sexual activity, had to compromise on the bill's attempt to attack the use of abortion as a solution to teenage pregnancy, and had to concede that only a quarter of the funds allocated to the program should be used to prevent premarital sex among teenagers. Thus, although "the new emphasis on preventing premarital sexual activity nicely illustrates the dramatic recent political and moral changes that occurred in the Congress and the White House in 1981,"²⁷² the change is far more modest than one might expect.

The new conservative movement has undoubtedly brought religiously motivated people into politics. It has no doubt "shaped America's political agenda in a negative fashion by discouraging the raising of issues such as public funding of abortions"²⁷³ But the movement's strength has limits. Some of those limits derive from the reluctance of significant elements of the Republican party to become involved in issues so controversial. Some of the limits derive from the fact that, prominent as the "social issues" are in public discussion, they seem to have startlingly little effect on the outcome of elections.²⁷⁴ Some of the limits derive from the reluctance of conservatives to use the federal government to achieve their ends.²⁷⁵ And of course the federal government is not well-placed to affect the many areas of family law that are historically confided to the states, like divorce law, the law of alimony, the law regulating marital property, child custody law, and so on. Finally, it is worth recalling that, even though the country is generally more conservative now than a decade ago, attitudes relating to the family and sexual relations seem to have resisted the conservative trend.

Finally, one other factor that may help perpetuate the trend toward diminution of moral discourse in family law should be mentioned: The trend itself becomes one of its own causes. As moral

272. M. Vinovskis, *supra* note 269, at 60.

273. G. PEELE, *supra* note 68, at 119.

274. See, e.g., Jackson & Vinovskis, *Public Opinion, Elections, and the "Single Issue,"* in *THE ABORTION DISPUTE AND THE AMERICAN SYSTEM* 64 (G. Steiner ed. 1983); Vinovskis, *Abortion and the Presidential Election of 1976: A Multivariate Analysis of Voting Behavior*, 77 MICH. L. REV. 1750 (1979), reprinted in, *THE LAW AND POLITICS OF ABORTION*, *supra* note 65, at 184; Vinovskis, *The Politics of Abortion in the House of Representatives in 1976*, in *THE LAW AND POLITICS OF ABORTION*, *supra* note 65, at 224.

275. This consideration helped shape conservative attitudes toward Senator Denton's bill. M. Vinovskis, *supra* note 269.

discourse in family law becomes rarer, judges, legislators, and the public are increasingly likely to feel that such discourse is inappropriate.

V. RECAPITULATION: WHAT NEXT?

All binding engagements to communal purpose may be considered, in the wisdom of therapeutic doctrines, too extreme. . . . It is in this sense that the contemporary moral revolution is anti-political; more precisely, it serves the purposes of the present anti-politics, representing a calm and profoundly reasonable revolt of the private man against all doctrinal traditions urging the salvation of self through identification with the purposes of community.

— Philip Rieff
The Triumph of the Therapeutic (1966)

And as I sat there brooding on the old, unknown world, I thought of Gatsby's wonder when he first picked out the green light at the end of Daisy's dock. He had come a long way to this blue lawn, and his dream must have seemed so close that he could hardly fail to grasp it. He did not know that it was already behind him, somewhere back in that vast obscurity beyond the city, where the dark fields of the republic rolled on under the night.

Gatsby believed in the green light, the orgastic future that year by year recedes before us. It eluded us then, but that's no matter — tomorrow we will run faster, stretch out our arms farther. . . . And one fine morning —

So we beat on, boats against the current, borne back ceaselessly into the past.

— F. Scott Fitzgerald
The Great Gatsby (1925)

I began this paper by intimating that the study of moral discourse in family law can direct our attention to some of the basic problems underlying family law. The reader will have noticed many of these problems along the way. I will close by describing one group of them and suggesting some ways in which their study might be pursued. .

Implicit in this paper, and underlying any systematic inquiry into family law, is a concern with what sociologists call "culture." Every culture

has two main functions: (1) to organize the moral demands men make upon themselves into a system of symbols that make men intelligible and trustworthy to each other, thus rendering also the world intelligible and trustworthy; (2) to organize the expressive remissions by which men release themselves, in some degree, from the strain of conforming to the controlling symbolic, internalized variant readings of culture that constitute individual character.²⁷⁶

276. P. RIEFF, *supra* note 160, at 232-33.

Culture in this sense is central to family life; culture in this sense is centrally learned in family life. And culture in this sense is a central concern of the law; courts are even now admonished to help formulate society's "values."²⁷⁷ But the moral demands men make upon themselves are changing; some of the people I have quoted suggest that those demands are so diminished that "the social order lacks either a culture that is a symbolic expression of any vitality or a moral impulse that is a motivational or binding force. What then," these people ask, "can hold the society together?"²⁷⁸

A study of family law in light of these questions must be illuminating, since it will direct us to the hopes and history that have, however indirectly, shaped the law. And an investigation of these questions as they are presented in family law may be even more rewarding. For family law, since it deals with society's basic unit, since it deals with the formation and perpetuation of basic social attitudes, since it is the voice through which society speaks, is in one sense the easiest case for the proposition that common values may (and should) be expressed through law. Yet family law is, in another sense, also the hardest case for that proposition, since expressing common values through family law interjects the state into the most private part of life.

In view of these concerns, a justification of the trend toward diminished moral discourse in family law would argue that we live in a socially pluralist, morally relativist, and largely secular society; that law practically must and philosophically should regulate the family lightly, allowing everyone as much social and moral leeway as possible. It would argue that, whatever might hold society together, it is not law, and surely not family law.

Yet any society must socialize its young and enforce its basic norms. Does family law's avoidance of moral discourse and decision inhibit those tasks? The modern mood is to think not, is to believe that although the morality of public behavior is important to law, the morality of private behavior is not. Yet even some of those most com-

277. See the list of commentators compiled in Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358-60 (1981). "Whenever I hear the word 'value,' I reach for my wallet . . ." P. RIEFF, *FELLOW TEACHERS* 7 n.4 (1973).

278. D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 84 (1978). This question and these issues have, of course, absorbed sociologists since Durkheim and Weber. But just as this article was being completed, a flourishing of books speaking directly to these problems — and particularly to the role of moral discourse in and the problems for social cohesion posed by the modern state and liberal individualism — emerged. See, for example, *HABITS OF THE HEART*, *supra* note 5; R. MERELMAN, *MAKING SOMETHING OF OURSELVES: ON CULTURE AND POLITICS IN THE UNITED STATES* (1984); W. SULLIVAN, *RECONSTRUCTING PUBLIC PHILOSOPHY* (1982). These works have in turn been influenced, as I have, by A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); and M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

mitted to the modern mood find times when they wish to express through the law their moral outrage at some kinds of private behavior, and at these times they often see social benefits in doing so. For example, even people committed to "neutral" family law argue for the deterrent and educative benefits of automatic criminal prosecutions of spouse abusers. Any society must give its members a sense of stability and mutual concern. Is some commonality of belief about the central moral issues family law poses necessary to that sense? In other words, can a liberal, secular, pluralist, individualist society be a moral community? Can a society prosper that is not a moral community?

One approach to such questions is historical. Sociologists regularly urge the virtues of cultural coherence by comparing the present to a past in which people lived in communities harmonized by a common moral view. Historians too look back from *Gesellschaft* to *Gemeinschaft*, and see a Paradise before the Fall. But the paradise is always the period just before the one the historian is studying; it is always the introductory chapter of his book. *Gemeinschaft* is always around the corner we just turned.

But let me speak less globally. Was there ever actually a time when family law could rely for its coherence on a unified moral image of the family? This is a question we cannot now answer for lack of evidence, but it is one historians of family law could profitably address, as I will try to show by suggesting both some reasons to expect such a period and some doubts about those reasons.

Two factors combine to suggest that, at some point in the latter part of the nineteenth century, law might have produced a moral image of the family, and not just moral discourse about it. The first factor is the development in the early part of the nineteenth century of not only the modern family, but also of a public ideology of the family, a morality of domesticity based on an aspirational, religiously based — though not just religious — set of views about the moral relations of family members. The second factor is the extraordinary modernity of family law: it is in surprising part a product of the nineteenth century. The list of family law subjects that were either invented or greatly reformed in the nineteenth century contains, we should remind ourselves, virtually every important part of that law, including the law governing marriage formalities, divorce, alimony, marital property, the division of marital property, child custody, adoption, child support, child abuse and neglect, contraception, and abortion. In other words, new law was being made just when, or just after, society evolved a new moral image of the family. The conditions were apt for the transfer of that image to the law.

But to have doubted one's own first hypotheses is the mark of modern man, and I have many doubts. First, one must wonder whether the early nineteenth century genuinely had a coherent moral image of the family. True, several historians have written plausibly about the new image of the family, but other historians have not yet tried to find competing images or to describe the kinds of resistance to the new image. We do not know enough about class, regional, or ethnic differences that might have produced divergent views of family morality. Nor have we yet seen analyses of the morality of domesticity that might reveal its inconsistencies. Furthermore, that morality may have been greatly subversive of other beliefs about the proper relationship of men and women and of children and adults.

Second, even if society had a reasonably coherent moral view of the family, could it have been transferred intact to the law without being fragmented by the pressures of precedent, by judicial recalcitrance, by doubts about the proper scope of law, by concerns about the enforcement problem, by preferences for family autonomy, or by the interstitial character of family law? Were there not greater regional differences in family law than we have now, since there were greater regional differences and less national law? Could even a nationally coherent moral view of the family survive the fracturing force of the institutional structure of the law I described earlier in this paper?²⁷⁹ And even if the law presented a coherent moral image of the family, did family law have enough prominence and authority to affect the way people thought about their families and themselves? If so, what social circumstances made that influence persuasive? What, if anything, began to erode that influence? And with what consequences?

Another approach to questions about the cultural purposes of family law is psychological. In particular, concern about those purposes should lead us to ask more penetratingly what assumptions about human nature underlie family law generally and the trend toward diminished moral discourse particularly. Most basically, most traditionally, most anachronistically, we may ask whether man is good or evil. More particularly, we may ask how man responds to the absence of social controls, how he reacts to a more spontaneous and active emotional life, what the nature of his need for privacy is, to what extent his behavior may be deliberately reformed, to what extent he needs aspirations beyond himself and attachments to his community.

A third approach to questions about the cultural purposes of family law is sociological. Of course, to ask about the cultural purpose of

279. See notes 74-81 *supra* and accompanying text.

family law is to raise questions that are all in a basic sense sociological. But in asking about the use of family law in creating and sustaining culture we will find ourselves asking provocative and useful questions about the social and political functions that family law serves in this society. Is our society actually secularized or secularizing? What functions do family law issues serve in class conflicts in the United States? To what extent is it actually true that "the family" is a necessary, or even desirable "building block" of society? To what extent can conscious social policy sustain "the family"? Does the family in fact need to be sustained?

A final approach to questions about the cultural purposes of family law is philosophical. We will want to know not just what cultural functions family law can serve, but what cultural functions it should serve. Cultural coherence has costs, costs America has paid in the past, costs to which it has become sensitive. We need to ask in a systematic way, one that rises above the doctrinal divisions and rigidities of the law, which of those costs is worth paying.

VI. CODA

"And you, Mr. Arabin, what do you think?" said Eleanor. . . .

"What do I think, Mrs. Bold?" and then he rumbled his money with his hands in his trousers pockets, and looked and spoke very little like a thriving lover. "It is the bane of my life that on important subjects I acquire no fixed opinion. I think, and think, and go on thinking; and yet my thoughts are running ever in different directions. I hardly know whether or no we do lean more confidently than our fathers did on those high hopes to which we profess to aspire."

"I think the world grows more worldly every day," said Eleanor.

"That is because you see more of it than when you were younger. But we should hardly judge by what we see — we see so very very little." There was then a pause for a while, during which Mr. Arabin continued to turn over his shillings and half-crowns.

— Anthony Trollope
Barchester Towers (1857)

In this paper, we have seen how family law has become ever more reluctant to discuss and resolve moral problems. We have seen that the trend has been impelled by legal, intellectual, and social attitudes of great strength and tenacity. We have noted forces that might reverse that trend, though we have discounted their strength. Finally, in the last section, we have glimpsed the troubling and intractable problems — legal, intellectual, and social — the trend ultimately raises.

"So [said the doctor]. Now vee may perhaps to begin. Yes?"

THE PARTHENON BEFORE RECONSTRUCTION

Photo Credit: Alinari/Art Resource, N.Y.