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CORRESPONDENCE

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Inaugurating the Michigan Law Review*'s "Correspondence" section, Professor Teitelbaum comments on Carl E. Schneider's* Moral Discourse and the Transformation of American Family Law, *published in the August 1985 issue of this Review. The editors invite contributions to "Correspondence" in the form of brief comments on legal scholarship recently published here or elsewhere.*

It seems appropriate in the early stages of an experiment in legal publishing to say something about it, if only because few forms have been as resistant to innovation as the law review. The creation of a section for correspondence regarding recent articles provides a medium for conducting just the national discourse which scholarship aspires to provoke and which does occur in private conversations or letters and, occasionally, in panels at professional meetings. To talk in print about a colleague's work — to praise it, qualify it, pursue suggested or alternate lines of thought — is not only an enjoyable thing to do but promises to facilitate more focused interchanges of ideas and research than has previously been possible.

What I have to say about Carl Schneider's elegant *Moral Discourse and the Transformation of American Family Law*[1] wanders down several of the avenues mentioned above. The first thing is to praise it. Professor Schneider sets out to examine a familiar phenomenon in a new way, and this he does clearly and persuasively. His principal thesis can be stated simply enough. A major transformation in American family law has taken place over the last two decades, which is characterized by two related developments: a diminution of "moral discourse" and a transfer of responsibility "from the law to the people the law once regulated." This transformation can be seen in virtually every sub-domain of domestic relations. Looking first at discourse, courts no longer talk in terms of spousal fault as they dissolve mar-

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1. 83 MICH. L. REV. 1803 (1985).

riages; child custody determinations no longer express the moral fitness of parents; "moral neglect" rarely now serves as a basis for custodial decisions. This shift in the terms of discussion is associated with a change in the locus of responsibility for decision. Whereas law once defined the obligations of spouses, husbands and wives now are substantially free to end and, to a lesser degree, to arrange the terms of their marriages. While courts and agencies once felt confident in relying on their judgments regarding what "good" and "moral" parents should do for their children, those "value judgments" now seem insensitive to non-middle-class families. And, of course, procreative issues are now generally regarded as matters for individual, rather than community or even family, determination.

Professor Schneider seeks to explain these developments by reference to four forces which have shaped family law in this country: a legal tradition of noninterference in the household; an ideological commitment to liberal individualism; a social experience of changing moral beliefs; and the immanent appearance of "psychologic man." It is impossible to trace here the detailed support Professor Schneider adduces for his thesis. What may be useful is to emphasize one or two further themes regarding the recent history of the family, perhaps to add a voice to his call for further theoretical and interdisciplinary work in this field.

There is, I think, no reason to doubt Professor Schneider's central observations: that both rules of family law and talk by courts and legislatures about family law have changed dramatically and, as these things go, suddenly. Moreover, that change seems associated with a diminution of "moral discourse," meaning the frank invocation by courts of value-laden language to justify both doctrine and particular results.

I do not understand Professor Schneider to say, however, that the diminution in moral discourse by courts and public officials reflects a wholesale abandonment of morality. Rather, it seems to follow from the abandonment of a moral theory to which the use of expressly moralistic language is especially suited. Until several decades into this century, discussions of family law and structure seemed to rely upon a teleological framework, according to which each "thing" has a goal or purpose and it is the goal of each thing to be or act consistently with the distinctive characteristics or functions of its kind. This was, for Aristotle, true of professions as well as things, and the goodness of a course of conduct is determined by its consistency with the purpose or nature of the thing, activity, or relationship to which it is directed. In the simplest case, the function of a watch is to keep time; to make a

good watch is to make a watch that keeps time accurately. The function of medicine is health; good medical practice or a good doctor is one which achieves that goal. Not only things and professions but relationships can be treated in the same way. Friendships are of various kinds, but Aristotle assumed that the characteristics of each can be identified and the goodness of practices evaluated accordingly. The undesirability of having a large number of good friends flows from the special characteristics of friendship, which include the sharing of life together, the sharing of sympathy, and the mutual relationships of one's friends among each other as well as with oneself. Because it is not possible, Aristotle concluded, to distribute oneself among many people, nor to sympathize sincerely with the joys and pains of many people, nor for one's friends (if they are many) to pass all their time together, that course of conduct should be avoided.[2]

Although a teleological view talks in terms of functions, those functions occur more or less naturally, like the beating of a heart, or are the product of reason; they express the essence of a thing, activity, or relationship. These seem to be the terms in which family relationships were evaluated until recently. A "good family" was determined by reference to the characteristics of families; a "good husband" was known by the consistency of his conduct with the functions of husbands. Nineteenth-century cases and commentary frankly defined these propositions by direct reference to natural law and to a Christian understanding of marriage and the family. Bishop's treatise on Marriage and Divorce, for example, declares that the source of marriage, understood as "one man and one woman legally united for life," lies in "the law of nature, whence it has flowed into the municipal laws of every civilized country . . . ."[3] In *Reynolds v. United States,*[4] the Supreme Court condemned plural marriage because of its inconsistency with the function of the family in western society:

> Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous and polygamous marriages are allowed, do we find the principles on which the government of the people . . . rests. Professor Lieber says, polygamy leads to the patriarchal principle, and [sic] which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.[5]

2. ARISTOTLE, NICHOMACHEAN ETHICS, Bk. IX, ch. 10 (J.A.K. Thompson trans. 1953).

3. J. BISHOP, COMMENTARY ON THE LAW OF MARRIAGE AND DIVORCE § 29 (Boston 1852).

4. 98 U.S. 145 (1878).

5. 98 U.S. at 165-66.

This passage seems in some respects modern, particularly in its invocation of the social scientific authority of Professor Francis Lieber. Indeed, this citation has been described as an "early and unheralded use of social science findings."[6] However, Professor Lieber's own views were consistent with a teleological theory of marriage, for which comparative experience served primarily as confirmation. Monogamy, in his view,

> is one of the primordial elements out of which all law proceeds . . . . Wedlock, or monogamic marriage, . . . is one of the frames of our thoughts, and moulds of our feelings; it is a psychological condition of our jural consciousness, of our liberty, of our literature, of our aspirations, of our religious convictions, . . . the foundation of all that is called polity.[7]

The Supreme Court's acceptance of this view can be seen even later when it reiterated in a subsequent Mormon case that "The organization of a community for the spread and practice of polygamy . . . is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."[8]

Roles within, as well as the constitution of, marriage were understood by reference to the same framework in nineteenth-century cases. The now notorious opinion of Justice Bradley, sustaining an Illinois decision denying women access to the practice of law, observed that:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[9]

As for unmarried women, they are regarded as exceptional cases, and "the rules of civil society must be adapted to the general constitution of things . . . ."[10]

Much the same sense emerges from judicial discourse, still common enough, which invokes the "status" aspect of marriage and the family. We are all accustomed to Maine's theory of legal and social progress, according to which the development in social organization

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6. Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 232.

7. [Lieber], *The Mormons. Shall Utah Be Admitted into the Union?,* 5 PUTNAM'S MONTHLY 225, 234 (1855), *quoted in* Weisbrod & Sheingorn, Reynolds v. United States: *Nineteenth-Century Forms of Marriage and the Status of Women,* 10 CONN. L. REV. 828, 835 (1978).

8. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).

9. Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

10. 83 U.S. at 141-42 (1872) (Bradley, J., concurring).

from a patriarchal, family-centered style to a mode in which individuals are the locus of rights and duties is reflected in the shift in legal thought from status to contract.[11] Yet until recently, and to some extent still, judges relied upon a theory that supposes that the characteristics of the family are given rather than individually or even locally determined.

As Professor Schneider observes, it is hard now to read the language of nineteenth- and early twentieth-century cases without embarrassment, and its appearance even in current casebooks has much to do with the marginality of family law at many schools. Contract and tort cases, even in the nineteenth century, rarely talk in terms of Christian ideals of responsibility or natural law principles of obligation, much less in terms of status; tax cases never do.

This is, in itself, an interesting thing, which cannot be pursued in detail here. Why is it that the discourse of family law, which I take to reflect a teleological view of morality, was unblushingly employed in domestic relations but not in other areas of law? Professor Schneider suggests some answers to this question, among them the salience in domestic relations law of obligations to others and the particular relevance of a core meaning of morality — that is, sexual morality. These are surely imaginative and plausible conjectures, but not — and not intended to be — exhaustive. Contracts and torts, after all, could also be regarded as relational matters. Indeed much ancient and much current thinking is directed to just that view. By the end of the nineteenth century, however, notions of economic utility rather than moral obligation dominated legal talk in these areas, and the resulting emphasis on leaving parties to define their relationships contrasts sharply with the emphasis in family law on the public role in defining the characteristics and functions of domestic relationships.

What has diminished, over time and variously across sub-domains of family law, is a view that the family has certain characteristics and functions, universal at least within our culture, against which the goodness of behavior and rules can be measured. Professor Schneider has identified four forces which contributed to its disappearance, and I would add three. One of these was the ambiguity of republican political and social theory.[12] A teleological framework suited the early nineteenth-century effort to create a theory of free citizenship, when freedom was largely understood in terms of possession of a domain. Relegation of women to a "natural" domestic sphere confirmed the

11. H. MAINE, ANCIENT LAW (2d ed. 1864).

12. I am indebted to Hendrik Hartog for this suggestion.

dependent relationship essential to the male householder's claim to citizenship in the external political community. However, a complete subordination of women to men also seemed morally wrong in republican eyes; wives have never been regarded in this country as slaves or incompetents. Nineteenth-century discourse thus came to insist upon the equality and even the superiority of women *within* the household, a view which may have suspended the sense of ambiguity but carried within it the seeds of more general egalitarian talk about rights.

A second force, which came to function interactively with the first, might be called a sense of social realism, for lack of a better term. The teleological framework depended on universal characteristics and functions associated with marriage and the family, premises which were impeached by apparent changes in the family over the course of the nineteenth century. Colonial families were conceived as extensions of the larger community and the principal foci of economic production and consumption, of education and discipline of the young, and of social activities. By the turn of this century, urban families undertook virtually no economic productive activities, education had been mandatorily committed to public agencies, and socialization beyond the tender years of youth came to seem more a function of peers and schools than of parents.

Such changes in social conditions made teleological assumptions seem at best romantic and at worst anachronistic. How can we say that a "good family" is one which educates its children well, when most of the responsibility for education lies outside the family and, moreover, professional educators deny the capacity of parents generally to discharge that function? Can we say, as both colonial and nineteenth-century opinion did, that a "good wife" is one who manages the household economy efficiently when most consumer goods are now produced outside the household and when substantial numbers of married women are employed outside the home?

The process by which this change in perspective occurred warrants more extended examination than has yet been done. Some of the perceived changes were "real," in the sense that they were observable effects of industrialization and urbanization. The decline of domestic economic production and the increase in female employment outside the home are two such effects. The fact of changed patterns of conduct, however, does not itself explain why courts and legislatures chose to incorporate these developments into their normative framework rather than to regret them or condemn them as deviant. A partial answer may lie in the circumstance that some of these changes were sponsored by the same groups which shifted the framework of

family discourse. Commitment of education to professionals was an officially supported alteration in family function, congruent with the aspirations and claims to expertise of those same professionals. Much the same can be said of the assumption by juvenile courts and other socio-legal agencies of responsibility for dealing with deviance. It was an essential aspect of this social realism that families were not considered generally capable under modern conditions of discharging functions traditionally assigned to them. Thus, family function came to be regarded as a social construction founded on empirical bases rather than as the product of nature or reason.

A third source of change was the assumption by courts throughout the nineteenth and twentieth centuries of general authority over family matters. Feminist and popular literature frequently invoked the "natural capacity" of mothers for child-rearing against common-law paternal rights, and courts often enough employed similar language. However, legal standards did not merely substitute one teleology for another, but from the early part of the nineteenth century relied upon judgments regarding the child's "best interests," understood partly as an empirical question. The empirical aspect of this issue is revealed by the incidence of cases in which courts declared the natural superiority of women as nurturers but, under the circumstances, determined to place custody elsewhere.[13]

As the premises of the teleological view weakened, a new basis for family law rules was needed. The development of that basis surely did not occur in a linear or conscious fashion. It was worked by a multiplicity of courts and judges, most of whom did not address directly the moral philosophical premises of the doctrines they were creating or replacing. Characteristics and goals were talked about as if they were natural, but some sense of qualification and contingency nonetheless played a part. Professor Schneider, with considerable justification, identifies the ultimate successor to teleology as John Stuart Mill's amalgamation of utilitarianism and rights theory. On this view, the goodness of rules or conduct is not determined affirmatively, by their fitness for some articulated function, but negatively, according to the probability that they will cause harm to others. The problems with reconciling utilitarianism with rights theory are familiar and produce much of the tension now felt in family law. To a utilitarian, nothing is sacrosanct as long as the long-term consequences are beneficial. This aspect of current discourse is plainly revealed by the emphasis one finds on the empirical effects thought to be associated with family law

13. *See* M. GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 248-53 (1985).

and policy. Rights theory, however, usually supposes a "space" around the individual. This space has a special claim to respect not well accounted for in utilitarian approaches, and it is this aspect of post-teleological theory which seems to be reflected in cases and commentary that emphasize "family autonomy" and "family privacy."

The combination of empiricism and rights talk bears considerable responsibility, I suspect, for the remarkable volatility which has characterized family law for the last two decades. While empiricism might imply stagnation rather than radical change, it is most likely to do so when there exists some convincing support for traditional rules which must then be overcome by equally convincing evidence. And, although family law discussions routinely make empirical claims, little reliable data exist to support those claims. On reflection, this state of affairs is hardly surprising. Classical research through experimental testing of hypotheses about custodial arrangements, marital dissolution, alimony, and most other questions of public importance is simply impossible. Random assignment of children to one or another parent, or the random granting and denial of divorce petitions, is neither constitutionally nor socially acceptable. Second-choice methodologies, such as quasi-experimental research, are only relatively less difficult. The issues covered by family law are so complex, the populations involved so large and diverse, and the effects potentially so variable over time, that only massive longitudinal research sensitive to a vast number of variables could hope to yield defensible results. The most usual empirical approach, some form of post-hoc reconstruction of effects, is in all events a problematic undertaking and surely provides a shaky basis for policy decisions of immense importance.

Absence of data is particularly likely to result in change when that change is founded on claims of individual rights. The burden is on those who would restrict such claims, and that burden cannot convincingly be discharged. So family law develops as a continuing natural experiment, in which rules result from value-based preferences for one claimed set of effects or another.

Lest this seem cynical, and it is not meant to be, consider as one instance the recent history of child custody laws. Until perhaps fifteen years ago, it was widely agreed that wise custodial policy included a preference for maternal custody, disfavor or prohibition of joint and divided custodial arrangements, and refusal to place a child with a parent who displayed atypical sexual preferences. Recent justifications have been largely empirical in tone. Goldstein, Freud, and

Solnit[14] emphasized the importance of continuity to the emotional development of children, which was interpreted to support placement of the child with the parent with whom he or she had formed the strongest bond. Typically, this was the mother. Emphasis on continuity also served to justify disfavor for joint and divided custodial arrangements, which were seen as threatening the stable living arrangements and emotional ties necessary to the young child's development. Antipathy to placement of children with parents who displayed atypical sexual preferences often rested on a prediction about the effects on the child of exposure to those practices, although it is surely also true that some sense of "unfitness" in some or even many instances founded or supported that prediction.[15]

All of these hypotheses are plausible. They have nevertheless been replaced, in some or even many jurisdictions, by contrary or different suppositions about the world. In many states, the maternal preference has disappeared. Although state Equal Rights Amendments and their implications contributed substantially to this development, so did claims that fathers can also be fine caretakers of children. Indeed, fathers' rights groups commonly take just that position in urging equal treatment for custodial purposes. Joint custody is now permitted in a number of jurisdictions and is formally regarded as preferable in some.[16] Proponents of this change have typically denied that continuity within a household is indispensable and urged that shared legal responsibility will encourage both parents to retain significant relationships with their children.[17] And, of course, the import of atypical sexual preferences has diminished in a number of jurisdictions.[18]

These substitute hypotheses are also plausible. Neither the set of beliefs supporting traditional rules, nor that supporting family law change, rests upon reliable research bases. There is, true enough, evidence supporting the benefits of joint custody, but there is also research and opinion to the contrary.[19] Some expert opinion indicates

14. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979).

15. *See generally* Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy,* 25 BUFFALO L. REV. 691 (1976).

16. *E.g.,* CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1986).

17. *See, e.g.,* M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY (1978).

18. Courts in at least eleven states have held that sexual orientation per se does not justify denial of custody or visitation privileges to gay parents. However, the implementation of this principle remains hard to evaluate. *See* Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties,* 19 HARV. C.R.-C.L. L. REV. 497, 515-46 (1984).

19. *See* Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications,* 16 U.C.D. L. REV. 739 (1983).

that atypical sexual preferences are just that, while other expert opinion considers those preferences to reflect a maladjustment for which treatment is appropriate.[20]

It has already been suggested that the volatility of family law doctrine, of which custody doctrine is but one instance, results in part from a discourse that relies on empirical claims which cannot authoritatively be proved. There is more to the story than that, however. The unavailability of data to support empirical assumptions upon which rules are founded is hardly unique to family law. Commercial law presumes the existence of various attitudes and behaviors on the parts of both merchants and consumers, for which little or no evidence exists or has been sought. Who knows whether consumers care about warranties when they buy cigarette lighters, or whether they read their contracts? Criminal law, for its part, talks routinely in deterrence terms, although the tenuousness of claims of this sort has been thoroughly explored. Perhaps wrongly, these areas do not produce the sense of anchorlessness which pervades discourse in family law.

The special discomfort we experience in domestic relations is associated, I think, with the lack of obvious fit between both utilitarian and rights talk and our sense of the family. The utilitarian approach seems unsatisfying not only because the data it supposes are unavailable, but because its application ordinarily permits only negative statements. In Mill's formulation, what is good is determined not by constitutive goals but by the absence of harm to others, and in practice it is far easier to talk about what is wrong to do in families than what is right to do. It does not seem enough, however, to content ourselves with saying only that some rule cannot be shown to produce evil. While that may suffice for a commercial contract or the occasional tort, there is some feeling that family relationships should be founded on rules and practices we can call good.

Nor does rights theory satisfy this longing. As Professor Schneider observes, we have a long and profound commitment to liberal principles and particularly to individualism, which can conveniently (if perhaps quite wrongly) be incorporated in many areas of law. We can think of contracts as the products of individual wills rather than as primarily relational in nature. We can think of torts in much the same way, focusing on the notion of individualized culpability.

20. The American Psychiatric Association removed homosexuality from its list of approved mental disorders in 1973, by a vote of 5854 in favor, 3810 opposed, and 367 abstentions. Hunter & Polikoff, *supra* note 15, at 726 n.137. Nonetheless, expert witnesses and courts often regard, at least implicitly, homosexual preferences or conduct as deviant. *See* Comment, *supra* note 18, at 515-46.

It is also true, of course, that talk of "family autonomy" and "family privacy," which invokes categories familiar in rights theory, now appears with some frequency in casebooks and court decisions. However, that is not an easy way to think of families, and the fact that there is some real movement in both torts and contracts away from strictly individualistic theories makes their invocation in family law peculiarly uncomfortable. Use of such categories requires that the family be treated as a unit or entity, rather like the corporation or the state. To some extent, that treatment is plausible, because what we regard as a family is not in fact naturally occurring but socially created. People who live together are roommates or families not according to universal characteristics but according to the operation of socially created rules.

Nonetheless, notions like family autonomy or family privacy are artificial and misleading. While the family is not a naturally occurring phenomenon, it is also not an entity. To speak of it in that way is a fiction we use to discuss things which, truth be told, do not fit within our theory. The fictive character of this discourse is revealed by even a quick glance at the meaning of decisions which rely upon it. Courts typically justify refusal to review the financial and other relations of spouses in an existing marriage on the ground that doing so would invade the right of the parties to work out their own roles within the marriage. When, however, one spouse (usually the husband) owns or manages all of the property, the plain effect of nonintervention is autonomy for him and him alone. It is unclear how one could say that either the wife or the family is made autonomous by the court's inaction. Similarly, when a court invalidates a statute declaring that attendance at parochial school will not satisfy compulsory education requirements, it empowers parents to choose their child's educational setting but does not empower the child in any way, nor take into account the relationship between the child and the parent. And when a court holds that to require a hearing prior to parental commitment of a child as mentally retarded would constitute "statist" intervention in the family, the result is to allow the parents (with some professional agreement) to take such action as they wish. Neither the child nor the family is made or left autonomous by such a decision.[21]

In these cases, as well as in the abortion cases which empower women but certainly not their parents or even the progenitor of the fetus, there is talk about family relationships and even speculation about the effect of the decision upon those relationships. However, the legal is-

21. For a more extended analysis, see Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135.

sues are understood in sharply restricted and individualistic terms, and the results, as we have seen, ultimately confer upon or confirm the power of one or another member of the family. Family relationships may be seen as a limitation upon a grant of power to that member, as was argued in the abortion cases, but the member always stands apart from the relationship.

Like Professor Schneider, I am not suggesting that we should go back to the *ancien régime* in family law. He says, quite rightly, that you cannot go home again, and if you could you would not like it. The romantic images of the colonial family seem romantic only at a safe remove from indenture and the stocks. Nor is it sensible to claim functions for the family that have plainly disappeared under current economic, social, and political conditions. It is equally plain, however, that rights talk has not provided a satisfactory basis for discourse about the family. This, as much as any other circumstance, justifies the broad agenda for research in family law which Professor Schneider proposes. It is essential to consider how we can talk about families as relationships. A revised teleological view, directed to functions and characteristics we now value in those relationships, may provide one way of thinking about these questions. This approach may have the virtue of reintegrating individuals and those with whom they deal, by judging the rightness of particular conduct in terms of a universalistic framework. It may also be that other conceptualizations will emerge which will deal successfully with our sense of families as social constructs that are neither simply collections of independent actors nor simply metaphysical entities. Only through some such act of imagination can we talk again about families in ways that make sense.