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ON THE DUTIES AND RIGHTS OF PARENTS

*Carl E. Schneider**

THE law of the family is the law of the absurd. Law is a system of rules administered institutionally, and thus it must treat people categorically. When law regulates economic life, it finds people at arguably their most schematic, motivated—perhaps—by a relatively unitary conception of their interest pursued in relatively rational ways. But in family life, people are at their least schematic and at their most frustratingly human, various, idiosyncratic, irrational, and perverse, and the law's efforts to affect them are thus often quixotic. In *Parents as Fiduciaries*,¹ Professor Scott and Dean Scott strikingly and boldly deploy the conceptual vocabulary of the former kind of law to reinterpret the latter kind.

The result—contrary to what one might expect given the awkwardness of the problem, but just as one might expect given the distinction of the authors—is an exceptionally engaging and provocative essay in the best tradition of legal scholarship. It is fair-minded, judicious, and sensible. It is a sober and steadying contribution to a flighty and faddish field, yet it is creative. It is doctrinally based, informed, and perceptive, yet it is also a large survey of causes. And in its crucial aspects, it is animated by the most needed kind of moral insights.

Indeed, so absorbing have I found this article that I have abandoned my original plan to go off on a frolic of my own and have instead devoted this Commentary to examining it in some depth and detail. In a way, though, I have found this enterprise difficult, since I agree with so much of what the Scotts have set out to do. I hope, then, that my remarks may be accepted as a friendly amendment, amplifying a bit here, raising some questions there, and finally speculating about what efforts like the Scotts' portend for legal scholarship.

I take the Scotts' article to be a response to recent criticism of the law of parent and child. One branch of this criticism (which has recently been intensified in the press by cases like those of Jessica DeBoer) might be

* Professor of Law, University of Michigan. Readers of some of my earlier articles may wonder at the archaic citation forms used in this Comment. Let me therefore say for the record that, for the reasons given in Richard A. Posner, *Goodbye to the Bluebook*, 53 U. Chi. L. Rev. 1343 (1986), I followed the University of Chicago Manual of Legal Citation (1989) in writing this piece.

¹ Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401 (1995).

called the child-advocate's critique. Simply put, the gist of this view is that the law advantages parents at the expense of their children. Another branch of this criticism has been particularly concerned with the consequences of rights discourse for the law of parent and child specifically and for American social relations generally. This branch might be called the communitarian's critique.

The Scotts' response to this two-tined criticism is that the law of parent and child needs to be "reconceptualized" in terms of the fiduciary principle more familiar to us from the law of agency. The central mechanism of their article, then, is to take a concept from the law of agency and apply it to the law of the family. This mechanism, like any such borrowing, raises a set of initial, basic questions: How is family law to understand the borrowed concept? Is that concept to be imported bodily as a rule? As a guiding principle? On this score, I am not entirely confident I understand the Scotts' proposal. They refer to the fiduciary idea variously as a "metaphor," an "analogy," and a "heuristic." These terms all appear to imply that the borrowed concept is not to be powerfully directive. But how directive then should it be, and how useful can it be if its teachings are not fairly emphatic?

We may see the importance of that question more clearly when we consider the next question the device of borrowing raises: To whom is the proposal made? Who is to receive and apply the new concept? Are we trying to affect, for instance, parental behavior, judicial actions, or scholarly thinking? Much of the article is (quite properly) concerned with how the public in general and parents in particular understand the concepts and language of the law. Thus the Scotts seek to discover the means through which a legal regulation can best motivate parents to invest the effort necessary to fulfill the obligations of child-rearing.² Is the borrowed doctrine, then, directed at that audience? Is it, in other words, intended to divert parents' attention away from the prerogatives of their rights toward the welfare of their children?

This explanation seems unlikely, since one may doubt that the general public knows the meaning of a term (fiduciary) even many law students only vaguely understand. Is the audience for the fiduciary proposal then the judiciary? Should courts expressly adopt, or at least implicitly consult, the doctrine of fiduciary obligation? This is surely a more promising proposition, since judges presumably are well acquainted with that doctrine. On the other hand, the language the Scotts use to describe their proposal—"metaphor," "analogy," "heuristic device"—does not evoke

² Id. at 2415-18.

the kind of concept that could be easily parsed and promulgated judicially.

This kind of language does, however, seem aptly pitched for the academic ear. But whether the concept is intended for judges or scholars (or both), our next question will be the same: How much weight can the fiduciary principle bear? How much guidance can it give us?

The advantage of borrowing a concept from another area of law is the advantage of buying asparagus from the grocer instead of growing it yourself. Both the concept and the asparagus come ready to use; someone else has done all the work of developing the product. The danger in both cases is that the product may not be apt for your purposes. The asparagus might be fine for long boiling, but too old, tired, tough, and woody for the light steaming your more delicate dish demands. The concept may be well-suited to its original home, but not to the new area of law.

As the Scotts describe it, the law of fiduciary obligation is a protean doctrine which assumes different forms depending on the relationships involved. And none of the relationships to which it ordinarily applies much resembles the situation of parent and child. Indeed, the Scotts scrupulously chart a number of ways in which fiduciary and parent-child relationships differ significantly. For example, they note that a new fiduciary can generally be substituted for an old one without intolerable disruption, while parents are not so readily replaced.³ The Scotts also suggest that it can be harder to gauge whether parents have acted in their child's interest than whether corporate directors have made a decision within the range of acceptable business practices.⁴ These and other differences between the parent's situation and the fiduciary's raise the question I posed at the beginning of this Commentary: whether commercial law is generally suited for an arena so different from family life as to make borrowing from it problematic for family law.

Despite the differences between the situations of the fiduciary and the parent, fiduciary law might well have worked out concrete instantiations of its general principle, and the legal doctrines thus developed might well speak cogently to particular problems in family law. This is not, however, the direction the Scotts go. They rarely mention specific rules of fiduciary law. And in the main exception to this generalization—their discussion of the prohibition on self-dealing—the Scotts convincingly show why fiduciary law cannot readily be applied to family law.⁵ Thus it seems that,

³ *Id.* at 2428, 2430.

⁴ *Id.* at 2437-41.

⁵ *Id.*

as developed legal doctrine, fiduciary law does not brightly illuminate many of the dark dilemmas of family law.

Perhaps, then, the benefit of recruiting fiduciary law into family law is that the former incorporates general principles the latter lacks but needs. This does seem to be much closer to what the Scotts have in mind. They argue that fiduciary law distinguishes itself among legal fields as instinct with a sense of moral obligation and that introducing fiduciary law into family law would therefore promote a sense of moral obligation to greater prominence in the eyes of courts and parents.

I confess that my interest in this line of reasoning grows out of an article I wrote a decade ago in which I argued that the law has decreasingly discussed family issues in moral terms.⁶ The Scotts' article appears to be part of what may be a trend which bespeaks some unease about that tendency. This trend—if such it be—comprises just the strange bedfellows politics is said to make, for to it contribute, in their various ways, feminists and conservatives, scholars and politicians, the press and the public. That trend has perhaps been most apparent in discussions of child support. But, as the works the Scotts cite suggest,⁷ its scope is altogether broader. While the ultimate nature, strength, and permanence of this movement are yet uncertain, I believe it has sparked a rewarding examination of the tendency away from moral discourse in family law.

Nevertheless, I wonder whether fiduciary principles may not be problematic as a general statement of what parents should do for their children. In its original, pure form, the fiduciary principle appears to require fiduciaries to put their loyalty to the benefited person's interest above all else. As the famous (and inevitable) passage from Cardozo puts it, "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty"⁸ But the interests of children probably should not invariably trump the interests of parents. The Scotts acknowledge this, and remind us that we do not expect parents always to sacrifice themselves to serve their children.⁹ Courts acknowledge this too when, for example, they make a custodian's wealth irrelevant in child-custody proceedings. Other things being equal (and probably even if some things aren't equal), most children would

⁶ Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803 (1985). I continued my exploration of this theme in *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. Rev. 197; *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992); and *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 Utah L. Rev. 503.

⁷ Scott & Scott, *supra* note 1, at 2413 n.44.

⁸ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

⁹ Scott & Scott, *supra* note 1, at 2413-14, 2432, 2432.

probably prefer to live in a well-to-do household than a poor one. In a capitalist society, this is sensible enough. As John Rawls reminds us, money is a primary good, something "it is supposed a rational man wants whatever else he wants. . . . With more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be."¹⁰ We exclude this otherwise relevant consideration, I suppose, out of an unarticulated sense of fairness to the adults who are candidates for custody. But exclude it we do.

In short, in one sense the fiduciary standard seems higher than the standard we might expect from parents. This is because the fiduciary's relationship with the benefitted party is commonly of limited scope, while the relationship between parent and child involves broad swaths of both of their lives. It may be practical to impose a high standard of selflessness within a limited strip of a person's life; it is less practical to do so more globally.

The Scotts are well aware of this kind of problem with applying the fiduciary standard to parents. And they also understand that the state's limited enforcement powers and the family's need for privacy tightly constrict what the law can demand of parents.¹¹ But by the time the Scotts have taken all these limitations into account, the standard the fiduciary principle demands of parents seems rather modest. In short, there winds up being so little moral meat left in the stew that it begins to look almost vegetarian.

This problem becomes clearer when we look at what the law (and, as I understand them, the Scotts) actually ask of parents. Essentially, the law only intervenes in an intact family when parents have drastically affronted the most modest kinds of standards, when they have abused or neglected their children. Even parents who have abused or neglected their children are basically held only to the law's minimal standards of parental decency. And when the law deals with divorced parents, it effectively asks little more than that they pay what they owe. The law would deny unmarried fathers parental standing only when they have in some useful sense abandoned their children. In child-custody disputes, parents are not judged by any objective standard, but are only compared with each other. In all these cases, the fiduciary principle in its aspirational form is irrelevantly high, and in its applied form incongruously low.

I say "incongruously low" because the gravamen of the fiduciary principle is presumably to inspire an elevated standard of moral conduct in

¹⁰ John Rawls, *A Theory of Justice* 92 (1971).

¹¹ Scott & Scott, *supra* note 1, at 2430-31.

parents: "By establishing a standard of performance that emphasizes heightened obligations of loyalty and integrity, and by the use of hortatory moral rhetoric, the law invokes a personal sense of moral obligation in the performance of fiduciary duty."¹² But the fiduciary principle as applied to parents is much, much weaker than the standard of moral behavior socially applied to parents. In American culture, a mother or a father's obligation to a child is potentially greater than virtually any other kind of obligation one person can pledge to another. The fiduciary obligation, so often essentially commercial, is of a weaker sort. The fiduciary standard is "loyalty and reasonable diligence."¹³ The parental standard is altruism.

In sum, it is hard to get concrete and convincing guidance about what the fiduciary principle means for family law from the general moral principle it is usually taken to embody. Thus we are relegated to a hypothetical bargain the Scotts posit as the source of our understanding of that meaning. How far can such a bargain take us?

The device of the hypothetical bargain has an illustrious history in both law and philosophy. That history teaches that the usefulness of the device depends on how richly and accurately the original position of the parties is gauged. Professor Scott has set a high standard for using this kind of device in her influential article *Rational Decisionmaking About Marriage and Divorce*.¹⁴ There she suggested that couples contemplating marriage might wish to bind themselves to each other more firmly by using "precommitments." However, the bargaining that might lead to such precommitments was in a sense real bargaining involving people in quite a specific and realistic situation. Professor Scott was able to make their situation yet more specific and realistic by adducing the relevant social science literatures about couples' preferences.

In contrast, the bargain envisioned here is entirely and genuinely hypothetical. It involves an almost undifferentiated mass of people in a quite imaginary negotiation. Thus assigning the parties powers, interests, and arguments becomes an awkward task. Consider, for example, the bargaining power assigned the state. In the paper they presented at the conference, the Scotts stated in explicit terms the assumption which survives in the current version: that "rearing children in a family unit is subject to state approval."¹⁵ This is rather daring. It conflicts with our feeling that

¹² Id. at 2425.

¹³ Id. at 2402.

¹⁴ Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990).

¹⁵ Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, Paper Presented at the John M. Olin Program in Law and Economics and Virginia Law Review Conference on

the family is in important senses prior to the state. It also conflicts with the reality that the state cannot effectively prevent people from raising their own children (because it lacks the resources and skill to raise them itself).

Nor is it clear that the Scotts' assumptions about the interests of the parties are completely described. We are told that "the overarching purpose of the state is to protect the interests of children in receiving from their parents the care and nurture necessary to enable them to develop into healthy adults."¹⁶ But doesn't the state have other interests? What about the cost of that project? And doesn't the state have an interest in promoting even the parents' interests?

We may ask similar questions of the motive assigned to the parents, which is "to maximize the returns from parenthood."¹⁷ Might the parents not want to minimize the burdens of parenthood? Might the parents want to be able to slip the bonds of parenthood where the costs seemed to exceed the benefits? Might they simply want to maximize their happiness, of which the returns of parenthood would only be one part? Many parents might simply want to be left alone. Such parents might have views—for instance, opinions about disciplining children—that would violate even the minimalist rules the law presently embodies. Other parents would value their privacy intensely. In short, what prospective parents would really say would greatly depend on their own understanding of their own situation, and such understandings would differ a good deal.

The Scotts obviously know how much parents differ. Why do they not take those differences more fully into account? We may get a hint from their occasional use of the term "precommitments." What the Scotts do not say in terms but seem to be arguing is that parents might recognize that the ideals with which they enter parenthood can be lost in the shuffle, and that therefore parents might want the state to hold them to those ideals. But would parents really think this way? For example, parents with heterodox religious views might regard the chances of falling short of their ideals as rather low, and the dangers of state intervention as rather great, and thus prefer no intervention. Other parents might prefer other kinds of precommitment devices in which the state did not play such a regulatory role.

"New Directions in Family Law" 39 (March 3-4, 1995) (on file with the Virginia Law Review Association). This implicit premise survives in the final Article, as the Scotts presume that "in rearing children parents must fulfill the fundamental objective of the state: to provide the care and nurture necessary for children to develop as healthy, functioning adults." Scott & Scott, *supra* note 1, at 2432.

¹⁶ *Id.* at 2431.

¹⁷ *Id.* at 2432.

To rescue the hypothetical bargain from the many ways differently situated parents could conceive of their interests, we might say that we are assuming purely hypothetical parents, so that they are blinded by the veil of ignorance John Rawls imagines. But this raises exactly the kinds of problems traditionally directed at Rawls' version of the hypothetical bargain. These problems are intensified by the fact that we are not imagining an entire society *de novo*, but rather trying to decide how to regulate real families in a present society with a long history. Further, I am inclined to think that, once the bargainers become so abstracted from real people in real situations, it is possible to imagine them taking many positions, all reasonable, but not all identical. To get them to agree, if you could do so at all, you would have to formulate your principles so broadly and vaguely that they would offer little guidance. In short, can the hypothetical bargain be determinate enough to provide useful guidance?

Furthermore, something may be lost by not confronting the problem of social regulation more directly. The hypothetical bargaining device seems, for instance, to assume that the state and parents agree enough about essentials to reach agreement on them. This may be true, but I am skeptical. I wonder whether it might be franker and more realistic to say that the state imposes rules in order to prevent parents from harming their children, not because they and the state have reached some kind of hypothetical contract. The state presumably would argue, as the Scotts do, that its rules are right and that parents therefore should want them. But the rules were adopted because they were right, and not because the parties would have agreed to them.

I have asked what kind of guidance the fiduciary principle can give family law. I have examined each source of guidance that principle might offer, and I have raised the possibility that each is in important ways mute or garbled. Ultimately, then, *Parents as Fiduciaries* may be not so much a demonstration that the fiduciary principle should be borrowed for family law, but an argument that the parents' rights principle has come to be misunderstood and that properly understood it incorporates a concern for children's welfare. As the Scotts write, "The central insight of the fiduciary heuristic is to focus attention on the reciprocal relationship between parental rights and children's interests."¹⁸

I quite agree with the Scotts that the parental-rights doctrine may be conceived of as a rule intended to serve children's interests. And I believe the Scotts perform an estimable service in reminding us of this fundamental assumption. Parents' rights have commonly been assumed to protect children exactly because people have thought that, as a rule,

¹⁸ *Id.* at 2474.

parents and children have a community of interest and that parents thus have a duty and ability to speak for their children, children who are presumptively unable to speak for themselves.

These assumptions find a variety of expressions. In our family law casebook, for instance, Margaret Brinig and I suggest eight justifications for assigning parents rights.¹⁹ First, parents ordinarily know their child and their child's situation better than anyone else can, since they have cared for and lived with their child in the most complete kind of way from its birth, and since no governmental agency is well situated to acquire equally good information. Second, decisions about children implicate questions about the dynamics of child development and of family interactions about which many judges and bureaucrats are not particularly expert. (Parents may be no more expert, but at least the state will often be unable to assert superior insight to override the parents' judgment.)

Third, the situations in which children live are so various, complex, and unpredictable that no adequately comprehensive, detailed, and principled set of standards could be drawn up that would satisfactorily guide courts or agencies in making decisions about children. Furthermore, in a large pluralistic society it is hard to reach a satisfactory social agreement about what kind of adults we want children to become, about what child-rearing methods will produce what kind of adults, or about what child-rearing methods are otherwise appropriate. And yet further, some kinds of considerations—like religious belief or ethnic tradition—may be desirable in rearing children but illegitimate for the state to employ. Finally, at least some decisions about children ought not obey the impersonal standards the law must use, but should heed the standards of accommodation, affection, and love which parents commonly feel for their children.

The fourth justification for parental rights has to do with the enforcement problem. Much of the interaction between parents and children occurs in private, and government therefore cannot easily find out about it or supervise it. Much that influences parents involves psychological motives which are both strong and ill perceived and which thus are so imperative that even governmental sanctions may be vain. Furthermore, parents will often feel that their upbringing of their children is not the concern of outsiders (and particularly not any of the government's business), so that parents will resist attempts to enforce government's rules and decisions. And finally, governmental attempts to enforce rules or decisions against parents may provoke them to retaliate against the very people the government is trying to protect—the children.

¹⁹ Carl E. Schneider & Margaret F. Brinig, *An Invitation to Family Law* (1996). We discuss these questions in Chapter 8.

Fifth, governmental intervention, by bringing into the family outsiders from social workers to prosecutors, may disrupt the stability of the relationship between parent and child. As Goldstein, Freud and Solnit, for example, put the point, one justification for parental rights is that children need stable authority figures and that governmental intervention in the family injures parents in that role.²⁰ Sixth, and relatedly, state inquiry into the world of parent and child may injure parents and children by diminishing the privacy of both in ways that do genuine harm.

Notably, these first six rationales for parental rights are based on the belief that giving parents power is good for children. These rationales are pragmatic and prudential. They are essentially generalizations which reason that the state will ordinarily raise children less successfully than parents and so should presumptively be excluded from doing so.

These six prudential justifications do not, however, exhaust our list of reasons to attribute rights to parents. While the six say little about the interests of parents, the seventh draws on the principle that it is normatively preferable for people to organize their own lives, particularly their own intimate lives. Thus our seventh justification for parental rights is that parents should be able to organize their relationship with their children. This justification might be inadequate by itself, and it should be read in conjunction with the other justifications. Nevertheless, it does look at parents' interests in their relationship with their children, and thus I believe captures an integral part of American thinking about this subject perhaps more directly than the Scotts seem to allow.

But the children's interests and the parents' interests do not exhaust our justifications for parental rights. Our eighth justification has to do with what might be considered the state's interests: Allowing parents freedom to raise their children as they prefer allows parents to perpetuate whatever communities, orthodox or heterodox, the parents prefer, thereby helping to preserve the range of communities necessary to make pluralism meaningful. Pluralism as Americans have commonly understood it depends on the persistence of cultural communities, and that persistence is most likely where parents may raise children in a cultural heritage. If the state would promote a pluralist society, it can usefully recognize parents' rights. Thus like the seventh argument for parents rights, the eighth extends beyond the state's interest in seeing children well reared.

As I said at the beginning of this piece, the present wave of family law reform holds that parents' interests have been exalted over children's.

²⁰ See Joseph Goldstein, Anna Freud & Albert J. Solnit, *Beyond the Best Interests of the Child* 7 (1973).

Ironically, the preceding wave used the kind of reasoning the Scotts and Brinig and I instantiate to argue that parents' rights may serve children's welfare. In two influential articles, for instance, Michael Wald advocated stricter adherence to parental rights.²¹ He contended that the state was too willing to separate children from their parents and to place them in unsatisfactory foster homes, and he wanted to temper that willingness through a strategy of parents' rights.

If the parents' rights principle is substantially based on the child's interests, as the Scotts and I contend, why is it presently criticized as inimical to children's interests? Let me suggest two among the several possible causes. The first has to do with the nature of American rights discourse. As the Scotts note, the rhetoric of rights has a force of its own both in legal and popular culture, a force which can drive parents, officials, and judges to an enthusiasm for parents' rights that quite outstrips the rationale for them. In addition, our rights language sadly lacks an adequate vocabulary for expressing countervailing interests. In technical terms, constitutional rights-analysis has generally scanted the state interests that may conflict with the parent's right.²² Thus the prudential origins of parental rights are all too easily forgotten. To put the point somewhat differently, parents' rights can be so unyielding that the only thing powerful enough to blast them loose is a countervailing right, like children's rights.

A second cause of the present discontent has to do, I think, with the fact that *any* legal regime governing the relations of parent and child will inevitably produce some deplorable cases. Any such regime must rely on some combination of rules and discretion, and both rules and discretion regularly fail. Discretion may be abused, and the people to whom discretion is confided will sometimes err. Rules are a kind of generalization, and all generalizations are false. Error is thus inevitable. Unhappily, we too easily respond to error by assuming that our grant of discretion was improvident or that our rule is unwise. Our rule has been parents' rights, and it has produced its errors. We now seek to prevent such errors from arising in the future by instituting a new rule—children's rights. Yet this

²¹ Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 *Stan. L. Rev.* 985 (1975); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 623 (1976).

²² I develop this argument at some length in *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, *Law & Contemp. Probs.*, Winter 1988, at 79.

rule will ineluctably cause errors (possibly more numerous and more distressing) of its own.

Ultimately, I doubt there really is much disagreement about the broad goal of legal policy regarding children. At base, rather, there is a consensus about the centrality of children's well-being, at least within the rather narrow ambit of the law's capacity. The question is just how you reach that goal. I am not even sure how much genuine difference there is among the controversialists. Indeed, as I have been implying, the presumably conflicting tests tend to collapse into each other. The Scotts, for instance, say that the law should focus "principally on the relationship between parent and child, rather than on the child's needs per se."²³ But an important part of what the child needs is a good relationship with its parents, and that relationship partly depends on the child's needs being met. Parents' rights take children's claims into account. Children's interests depend on good relations with their parents.

The Scotts recognize how interrelated the contending rules are. Indeed, their article could be taken as an effort to show how readily those rules can be reconciled. However, the Scotts continue to feel that the choice among the rules matters.²⁴ And this brings me to my last point. As I have argued, the debate to which the Scotts have so ably contributed is largely about what rule we need to write to produce good results. I have suggested that there is rough social agreement about what a good result is. There is, however, real disagreement about how to produce it. To resolve that disagreement, we need to ask the right questions: How do courts and agencies interpret the various possible rules? How would the rules thus interpreted actually affect the behavior of courts and of agencies? And what effect would that behavior have on the short- and long-term well-being of children and their parents?

These crucial questions cannot be answered by doctrinal analysis, however acute, nor by theoretical argument, however keen. They are questions that demand empirical investigation. To be sure, such empirical work must be informed by other kinds of scholarship. To be sure, such empirical work will rely on normative assumptions and have normative consequences. But everything depends on that empirical work.

I am on record in favor of scholarship that undertakes the labor of definition, generalization, and theory in family law.²⁵ Family law has moved markedly in that direction in the decade since I wrote that article

²³ Scott & Scott, *supra* note 1, at 2415.

²⁴ *Id.* at 2416-18.

²⁵ Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. Mich. J.L. Ref. 1039 (1985).

(although not, I am sure, because of it). My own work in family law has irredeemably been in that vein. I continue to think theoretical work essential to legal scholarship. But I am increasingly inclined to believe that such work is idle without an extensive empirical foundation and without exhaustive empirical monitoring.

Nevertheless, family law scholars have not, I think, been eager to do that kind of work.²⁶ This is understandable. Empirical research can be difficult. It is often time-consuming. At its most satisfying, it may be prohibitively expensive. It can require skills lawyers may lack. It is not always properly rewarded: Law review students commonly underestimate its importance; faculty sadly and foolishly tend to regard only theoretical work as worthy of a great mind. In my darker moments, I see a danger that theory may drive out empiricism, that family law scholarship may skip from the doctrinal to the doctrinaire without ever pausing for the empirical.

Yet the case for such work almost makes itself. In brief: "It is no doubt true that you cannot get from *is* to *ought*. But you ought to know what *is* is before you say what *ought* ought to be."²⁷ We need empiricism to ward off hyper-rationalism. "Hyper-rationalism is essentially the substitution of reason for information and analysis. It has two components: first, the belief that reason can reliably be used to infer facts where evidence is unavailable or incomplete, and second, the practice of interpreting facts through a [narrow] set of artificial analytic categories."²⁸ Hyper-rationalism thus "tempts us to believe that we can understand how people think and act merely by reasoning, and not by investigating. Hyper-rationalism seductively justifies discussing human behavior without doing the empirical work necessary to discover how people actually behave. Hyper-rationalism is the conceptualist's revenge for the world's complexity."²⁹

The legally trained mind seems specially susceptible to hyper-rationalism. The case method intrudes empirical reality only anecdotally; rights thinking prefers the lofty heights of ratiocination. But when legal scholarship has ventured to ask empirically whether law works as it is intended to, and even whether it has much effect at all, the answers have hardly been reassuring. Stewart Macaulay reports that businesses widely do not

²⁶ I must stress that I am not exempting myself from these criticisms. If anything, I have exacerbated the problem by incitement and example. My only plea in mitigation can be that I am now doing empirical work in the field of law and medicine. And I have found it valuable (and absorbingly interesting).

²⁷ Carl E. Schneider, *Bioethics with a Human Face*, 69 *Ind. L.J.* 1075, 1077 (1994).

²⁸ Carl E. Schneider, *Lawyers and Children: Wisdom and Legitimacy in Family Policy*, 84 *Mich. L. Rev.* 919, 932 (1986).

²⁹ Schneider, *supra* note 27, at 1078.

think of themselves as using contracts and avoid settling disputes contractually.³⁰ Robert Ellickson finds that the ranchers and farmers of Shasta County, California, do not know the rules of liability for damage done by wandering cattle, and do not much care.³¹ Despite the Patient Self-Determination Act and much state legislation, "[n]o more than 10 percent of the population has either a living will or a durable power of attorney."³² I could go on at some length.

When good empirical work has been done in family law, it has been revealing and even confounding. Among the generation of family law scholars most prominent when I entered the field, for example, there are several who have done crucial empirical work (as well as noteworthy theoretical work). Robert Mnookin, for example, discovered in his empirical work that not all his theoretical speculations about divorce negotiations were fully borne out.³³ David Chambers perhaps found that jail, whatever its other disadvantages, was a more effective tool for collecting child support than he might originally have supposed.³⁴ The contributors to *In the Interest of Children*³⁵ learned that people avail themselves of due process mechanisms a good deal less than courts and scholars comfortably contemplate.³⁶

More particularly, Michael Wald, a principal proponent of stronger parents' rights in abuse-and-neglect law, examined that law's actual effects.³⁷ His work raised the possibility that the rules of law we have been considering may matter less than one might suppose *a priori*. He concluded that, considering only "what happened to the children from the time we first saw them until the end of the study, two years later, there was not a great deal of difference between home and foster care."³⁸ In short, such research establishes that the legal principles the Scotts, and

³⁰ Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55 (1963).

³¹ Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991).

³² Arthur L. Caplan, *Can Autonomy be Saved?*, in *If I Were a Rich Man Could I Buy a Pancreas? and Other Essays on the Ethics of Health Care* 256, 261 (1992).

³³ Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992).

³⁴ David L. Chambers, *Making Fathers Pay: The Enforcement of Child Support* (1979).

³⁵ Robert H. Mnookin, Robert A. Burt, David L. Chambers, Michael S. Wald, Stephen D. Sugarman, Franklin E. Zimring & Rayman L. Solomon, *In the Interest of Children: Advocacy, Law Reform, and Public Policy* (1985).

³⁶ *Id.* For an amplification of my point about this study, see my review of it: Carl E. Schneider, *Lawyers and Children: Wisdom and Legitimacy in Family Policy*, 84 *Mich. L. Rev.* 919 (1986).

³⁷ Michael S. Wald, J.M. Carlsmith & P.H. Leiderman, *Protecting Abused and Neglected Children* (1988).

³⁸ *Id.* at 183.

I, and others have considered at such length may not lead to consequential changes in outcomes.

In sum, *Parents as Fiduciaries* is an admirable work of legal scholarship. But it is not part of the genre of work I have come to believe is most likely to contribute to real progress in our understanding of the kinds of issues it raises. It is exactly because this article is so fine that this Comment is a suitable vehicle for what I want to say about legal scholarship. If even so skillful, thoughtful, and wise a piece cannot be expected, and indeed does not intend, to penetrate to the key questions we need to ask about how the law in this area works, then we need to consider how to change the agenda of family law scholarship.³⁹

³⁹ I am also emboldened to make my perhaps impertinent suggestions about empirical work in the context of commenting on the Scotts' article because Professor Scott is herself distinguished for bringing empirical learning to bear on family law. See, e.g., Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 *Ohio St. L.J.* 455 (1984); Scott, *supra* note 14; Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 *Vill. L. Rev.* 1607 (1992).