Marriage, Morals, and the Law: No-Fault divorce and Moral Discourse

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The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught a priori. Nor is it a short experience that can instruct us in that practical science, because the real effects of moral causes are not always immediate; but that which in the first instance is prejudicial may be excellent in its remoter operation, and its excellence may arise even from the ill effects it produces in the beginning. The reverse also happens: and very plausible schemes, with very pleasing commencements, have often shameful and lamentable conclusions.

Edmund Burke
Reflections on the Revolution in France
I. INTRODUCTION

Everything which is a source of solidarity is moral, everything which forces man to take account of other men is moral, everything which forces him to regulate his conduct through something other than the striving of his ego is moral, and morality is as solid as these ties are numerous and strong. We can see how inexact it is to define it, as is often done, through liberty. It rather consists in a state of dependence. Far from serving to emancipate the individual, or disengaging him from the environment which surrounds him, it has, on the contrary, the function of making him an integral part of a whole, and, consequently, of depriving him of some liberty of movement. We sometimes, it is true, come across people not without nobility who find the idea of such dependence intolerable. But that is because they do not perceive the source from which their own morality flows, since these sources are very deep.

Emile Durkheim
The Division of Labor in Society

In this Essay, I want to reflect on no fault-divorce and the social attitudes that underlie it. In particular, I want to consider that reform in light of an article I wrote some years ago entitled Moral Discourse and the Transformation of American Family Law.¹

¹ Carl E. Schneider, Moral Discourse and the Transformation of American
There I argued that in recent years the language of American family law has changed notably: today family law issues are decreasingly discussed in the language of morality. In other words, legal institutions have decreasingly talked about those issues in moral terms. Rather, they have tended to avoid handling some moral issues altogether—often by transferring responsibility for such decisions to the people the law once regulated—or to discuss those issues in other than moral terms.

This argument might be misunderstood in one respect. I am not suggesting—I have never suggested—"that lawmakers’ decisions are necessarily less moral, that family law is necessarily deprived of a moral basis, or that lawmakers may not have moral reasons for avoiding moral discourse."2 Quite obviously, much of this change can be defended in quite conventional moral terms—as an expression, for instance, of a number of standard liberal views.3 My point, rather, is that "the terms lawmakers use in explaining (and presumably in thinking about) their work are decreasingly drawn from the vocabulary of morals and are increasingly drawn from the discourse of economics, psychology, public policy studies, medicine, or from those aspects of legal doctrine which speak in other than moral terms."4 Thus the language of morals is being displaced by other discourses or even by silence.

In yet other words, this Article and Moral Discourse (if I may refer to my earlier article in this jaunty way) are about the language of the law, about the terms judges, legislators, and other officials use in writing opinions, statutes, and regulations. They are about the kinds of vocabularies on which legal institutions draw in doing their work. I am interested in these vocabularies for the by-now banal reason that the languages we use affect how we think, what we do, and how we are understood. By studying the law’s languages, we can better see how it reasons, how it acts, and what

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4. Schneider, 1991 BYU L Rev at 234 (cited in note 2). Obviously, these alternative discourses may have a moral component, if only because each of them presumably has some kind of moral justification. But both legal actors and the rest of us distinguish between these alternative discourses. What is quite as important, these alternative discourses use different verbal and conceptual vocabularies, and those different vocabularies affect what courts and legislatures think, say, and do.
it seeks to do. Quite as importantly, the law is understood by the people it seeks to regulate partly through the languages it speaks. Listening to those languages is the beginning of comprehending what people perceive the law to be saying and how they react to it. And since law is part of a broader discourse, understanding its languages may help us better comprehend the world in which we live.  

No-fault divorce classically exemplifies the trend away from moral discourse in family law. Before that reform, “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.” For a while, it might have appeared that the petition had rather to be discussed in psychological terms, since the “irretrievable breakdown of the marriage” was the criterion of divorce a number of jurisdictions formally articulated. However, it has since become clear that courts are not enforcing that requirement, so that no-fault divorce means divorce on the demand of one spouse. Thus a petition for divorce now does not need to be discussed in any terms at all, since the moral decision whether to seek a divorce has been transferred to the husband and wife.  

The task of Moral Discourse was primarily analytic, not normative, and thus I did not attempt to evaluate the trend I described. In this essay, I wish to take some steps toward such an evaluation. I put my goal in this cautious form because the trend away from moral discourse is too complex to evaluate in a single essay. It is complex first in its causes, which are multiple and which interact in intricate and elaborate ways. The trend is complex as well in its workings, since it operates differently in different areas of family

5. For admirable and illuminating examples of some of these benefits in the context of family law, see Mary Ann Glendon, Abortion and Divorce in Western Law (Harv U Press, 1987); Regan, 1994 Utah L Rev 605 (cited in note 3). To some extent, this article raises issues about family law’s “expressive” function. (For a description of and comments on that function, see part IV.B.2.) However, I will be interested not just in the ways the language of family law can be recruited to express ideas and influence behavior, but in the ways that language shapes family law’s ideas and operations.


7. I should stress that the trend away from moral discourse is only a trend, and not a fully accomplished fact. There is even some hesitation about fully stripping “fault” language from the law’s treatment of divorce. Some jurisdictions, for example, retain fault-based grounds along with no-fault grounds for divorce. Some jurisdictions continue to take fault into account in making decisions about marital property and alimony. And there have been recent intimations that “fault” should be factored back into divorce deliberations by way of tort remedies for wrongs committed during the marriage. See, e.g., Ira Mark Ellman, Should The Theory of Alimony Include Nonfinancial Losses and Motivations?, 1991 BYU L Rev 259.
law. Finally, the trend is complex in its desirability. For one thing, it makes more sense in some areas of family law than others. For another, in no area of family law is the trend an unequivocal gain or loss; in perhaps every area it represents a benefit in some ways and a loss in others. In short, a single, uniform reaction to the waning of moral discourse in family law must be too simple. Here I will attempt to evaluate the trend only in respect to no-fault divorce. And even that evaluation will carry us far afield.

In this Essay, I will be particularly interested in how no-fault divorce and the law's trend away from moral discourse affect and reflect American cultural attitudes. My central preoccupation will not be the political theory of divorce, but rather the more ordinary social perceptions and understandings that more directly affect the way legislators, judges, lawyers, spouses, and the population at large think and feel about divorce socially, politically, and morally. My concern is not primarily with high culture, though of course I recognize its undoubted influence. Rather, in this paper I am primarily interested in ideas which have their origin in high culture but which are popularized and disseminated. In the course of that transformation, these ideas invariably lose depth, precision, and subtlety. But they gain so much in social currency and power that they generously repay attention. Understanding them should offer insight into the way lawmakers and citizens actually think about the law and thus insight into what the law really means today, into the justifications people would advance for the present state of family law, into the factors that sustain the law socially and politically, and into the social and moral context in which the law operates.

Unfortunately, however, the social assumptions that underlie modern family law can be frustratingly obscure. They are not always consistent from person to person and place to place. They are often not formally described and analyzed. They manifest themselves in reactions to specific cases, not in abstract formulations. They are often internally inconsistent. Further, their life has not been logic; it has been experience: People commonly do not think logically about these ideas; they respond psychologically.

In this Essay, I want to try to get at some of these elusive assumptions about the law, morals, and the family through one vivid instantiation of them. For several years, I gave my family-law classes a hypothetical and asked them to tell me whether the husband in that hypothetical was morally entitled to the divorce he sought. The classes' reactions to the hypothetical seem to me richly revealing.

This is not, of course, an empirical study. Rather, I will use my classes' reactions because they concretely and memorably exemplify some strong and broad currents in American thought. Of course, my classes' reactions were complex and difficult to summarize. And they are not necessarily typical of the way all Americans think about these issues, or even the way all law students approach them. But, as I shall shortly explain, I think that, at the very least, they illuminate the way influential elements—affluent, lengthily educated, politically powerful, culturally prepotent—of American society approach these kinds of questions, and that they probably represent, albeit in a pronounced form, views that pervade American life and that are waxing stronger.  

II. THE HYPOTHETICAL

Faithfulness and constancy mean something else besides doing what is easiest and pleasantest to ourselves. They mean renouncing whatever is opposed to the reliance others have in us, whatever would cause misery to those whom the course of our lives has made dependent on us.

George Eliot

*The Mill on the Floss*

Each year, I began the discussions I now want to describe with a hypothetical—the story of Mr. and Mrs. Appleby, of Milan, Michigan. He is fifty-eight, she is fifty-six; they have been married for thirty-five years. He has been a salesman all his life, she a housewife. Their only child, Meg, is now thirty-two and living in New Mexico. Mrs. Appleby has always spent most of her time at home, in large part because her husband has always insisted on it and become angry when she does not. Mrs. Appleby consequently has few friends of her own, and what social life the couple has revolves around Mr. Appleby's friends. Mr. Appleby has been spending less

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and less time at home, and Mrs. Appleby has become more and more distressed. One evening, he tells her that he has fallen in love with his nineteen-year-old secretary and wants a divorce so that he can marry her. Mrs. Appleby's religion forbids divorce, she still loves her husband and doesn't want to be separated from him, and she feels that her situation and status in the world depend on being married. She therefore detests the idea of divorce. Mr. Appleby has never earned much, and they have never saved much. If they are divorced, all his modest income will be consumed supporting his new wife and her twin sons. Mrs. Appleby has a high-school education and hasn't been on the job market for thirty-five years.

I originally developed this hypothetical because I thought it exemplified some of the ways commitments may develop in a marriage and some of the more disquieting consequences of divorce. It seemed to me that, on the sketchy facts presented, Mr. Appleby had several (related) sets of serious moral issues to consider. The first concerned his obligation to adhere to the understanding he and his wife had almost surely entertained when they married that they were making a lifetime commitment to each other, that they were forsaking all others until death them did part. The second set of moral issues had to do with the commitments that arise out of a shared life. Over thirty-five years of marriage, the Applebys had presumably come to rely on each other in profound ways, even to the extent of building identities and realities based on their marriage. Even if they were not as happy as Baucis and Philemon, they were likely to be just as intertwined. The third set of moral issues spoke to the bitter, intense, and enduring distress—psychological, economic, social, and religious—in which Mrs. Appleby would surely be left by a divorce. These issues were all exacerbated by the indications that Mr. Appleby was the strong partner in the marriage, that his wife's dependence and isolation were in some measure his responsibility, and that, having taken

10. I used two hypotheticals in addition to the Appleby saga. In one, the husband told his wife that their child, who was born with a birth defect, was burdening his time and career, and that he would divorce his wife unless she agreed to institutionalize the child. In the other, the young husband of a young wife wanted a divorce because after a few years he had grown bored with their marriage and restless at its restrictions. I also asked the classes whether their analysis would change in each of the three hypotheticals if the genders were reversed. The students were somewhat readier to believe that the husband in the former of the two additional hypotheticals confronted moral barriers to divorce than Mr. Appleby, and virtually no one saw any moral inhibition to divorce in the last hypothetical.

what he wanted from her and their marriage, he was abandoning it and her. I did not think that the answers to those questions were obvious; but the questions seemed to me grave enough that Mr. Appleby was morally obliged to answer them before seeking a divorce.

I always began the discussion of the hypotheticals by stipulating that legally Mr. Appleby could undoubtedly have a divorce if he wanted one. However, I explained that it would help us to understand the bases of the law of no-fault divorce if we postponed any question about what the law should do and confined ourselves exclusively to a prior question: Was Mr. Appleby morally entitled to a divorce? Despite this careful, emphatic, and reiterated statement of the issue, my students' first reaction was invariably to say fervently that the law should not require anyone to be married who would rather be divorced. Furthermore, they continued, even if the law should be able to say that people ought to stay married, it could not make them do so. In short, the moral issue was instantly transformed into a legal one.

My attempt to press beyond the question of the law's authority and capacity never satisfied at least some of my students. They commonly began by telling me that in inquiring about moral entitlements to a divorce, I had asked an incomprehensible question. As one student said reprovingly, "If you had asked whether it would be psychologically healthy for Mr. Appleby, I could understand your question. But it doesn't make any sense to ask whether he is morally entitled to one." I believe that this response had several roots.

In part, these students did not understand what I meant by "moral." I explained that moral questions are questions about right and wrong. This was clearly not what "moral questions" meant to many of these students. One year, after I had defined the term, the editor of our law review told me that my definition would make murder a moral issue, which it clearly wasn't. How could she have thought so? My best guess is that, for a number of students, "morality" has come to refer to sexual issues, and even to sexual issues rather narrowly understood.

I would next try to direct the discussion back into moral issues by suggesting that I wanted to explore the questions Mr. Appleby should be asking himself when he thought about whether to seek a divorce. I said that he would want to ask himself whether he actually desired a divorce, but that he would presumably also inquire whether he should have one even if he wanted one. The responses to this formulation of the question lead us to the next reason students found my question incomprehensible. Some students said that
there is no such thing as "morality." Rather, some people believe one thing, some another, and there is no way of saying that one of these is correct and the other mistaken. As James Q. Wilson comments, "Ask college students to make and defend a moral judgment about people or places with which they are personally unfamiliar. Many will act as if they really believed that all cultural practices were equally valid, all moral claims were equally suspect, and human nature was infinitely malleable or utterly self-regarding." In short, to invite a moral discussion is to invite an exchange of illusions.

This moral relativism led some students to say that they could not comment on Mr. Appleby's choice because they did not know what his "values" were. When I asked what his values should be, these students replied that he had to decide that for himself and that no one could help him do so or evaluate his success. Pertinacious, I asked these students how, applying their own values, they would think about this problem were it their dilemma. Interestingly and importantly, they generally held to their moral relativism strongly enough to apply it to themselves as well as other people. That is, they told me not just that a moral system is something people must choose for themselves, but that the choice is essentially arbitrary, rooted in the happenstance of upbringing. Thus what they would do could not be explained (except historically) and would be irrelevant to anyone else.

This view of morality as essentially arbitrary led to another kind of comment. A number of students suggested that it would be bootless for Mr. Appleby to ask himself what moral considerations should restrain him from seeking a divorce, since morality can have no restraining force. People will do what people want to do. They will find ways of rationalizing the decisions they want to reach, or morality will be simply overborne by self-interest. Morality is mere superstructure.

A number of students pressed beyond moral relativism to argue that systems of morality are not just arbitrary, but actively dangerous. They cited several dangers. Most prominent was the peril of intolerance. As James Q. Wilson reports, "In my classes, college students asked to judge a distant people, practice, or event will warn one another and me not to be judgmental or to impose your values on other people. These remarks are most often heard when they are discussing individual life-styles, the modern, nonjudgmental word for what used to be called character." My

13. Id at 7.
students explained this the way Wilson's did: “If asked to defend their admonitions against ‘being judgmental,’ the students sometimes respond by arguing that moral judgments are arbitrary, but more often they stress the importance of tolerance and fair play, which, in turn, require understanding and even compassion.”14 And for my students, as for Wilson’s, the nonjudgmental imperative ran deep: “[D]uring a class in which we were discussing people who at great risk to themselves had helped European Jews during the Holocaust, I found that there was no general agreement that those guilty of the Holocaust itself were guilty of a moral horror. It all depends on your perspective, one said. I’d first have to see those events through the eyes of people affected by them, another remarked.”15 In sum, my students, like Wilson’s, saw morality as a mask for and an incitement to callousness, narrow-mindedness, hypocrisy, prudery, and prejudice.

A second peril of morality, my students felt, is that systems of morality have been substantively discredited. Systems of sexual morality are prime but hardly exclusive candidates for this honor. I recall one student saying that in recent years we had seen moral systems badly discredited, as we had realized that racism and the Vietnamese war were wrong. The systems of morality associated with the family are particularly discredited, poisoned by patriarchy and instinct with coercion and oppression. In short, time has upset many fighting faiths, and who is to say which faith may be next.

A third peril of morality is that it causes people to feel badly when they ought not, or need not, do so. Moral systems are more than regimes of prohibitions and duties; they also import blame, shame, and stigma. But as the therapeutic ethos is understood to say, feelings of guilt are undesirable. Often, people feel guilty about doing things that are not wrong. But even where people have erred, guilt is dysfunctional. It rests on misapprehensions about the extent to which people can control their own conduct, it makes people unhappy and neurotic, and it interferes with the therapies people might recruit to improve their lives and psychological health. Guilt is an injury people do themselves.

Students had a number of other ways of making Mr. Appleby's

14. Id.
15. Id at 8. My students occasionally proposed yet another reason Mr. Appleby, or anyone else, ought not be judged. This argument followed the position of “the postmodern relativists [who] . . . are asserting far more than the self-evident point that people in different societies live in somewhat different worlds of meaning. They are claiming that each of these worlds is truly unique—incommensurable and largely incomprehensible.” Robert B. Edgerton, Sick Societies: Challenging the Myth of Primitive Harmony 28 (Free Press, 1992).
moral problem go away. Some of them said that we just knew too little about the case. We did not fully know, for instance, what the nature of the Applebys' relationship had been, or how lasting Mr. Appleby's relationship with his secretary might be. My reading of many of these comments was that they represented a search for reasons that Mrs. Appleby had no legitimate claim on her husband. I saw in them something of what Wilson saw when he asked his students about people who had declined to help Jews during the Holocaust: "What worried me was not that the students were prepared to accept some excuses, but that they began their moral reasoning on the subject by searching for excuses. They seemed to assume that one approaches a moral question by taking a relativist position and asking, 'How, given the interests and values of another person, might we explain what happened?'" Nevertheless, I also thought, and said, that the desire for more information was quite understandable, and that easily imaginable new circumstances might greatly alter the case.

Another way some students made the moral problem disappear was to transmute it into a psychological problem. They argued that Mr. Appleby simply misunderstood his psychological situation. He would find it harder than he expected to leave the wife with whom he had lived so long. He would discover that his attraction to his secretary was nothing more than a passing infatuation. He would learn that he had dangerously little in common with someone so much younger than he. He would be unpleasantly surprised to relearn what life is like in a household with two young children. He would find it more disagreeable than he suspected to have so little money to live on. All this struck me as quite plausible. But I said that, in his infatuation, he might be a poor judge of his future reactions, so that he would still need to evaluate his moral situation.

A more striking way of making Mr. Appleby's moral dilemmas disappear was to say that he was morally entitled to a divorce because Mrs. Appleby was wrong to oppose one. She was wrong for several reasons. First, it was not in her own interest to stay married to someone who did not want to be married to her. She could not receive what she wanted from Mr. Appleby—which the students assumed to be love—if he did not want to give it to her. Even if Mr. Appleby forced himself to stay in the marriage, he would be unable to offer her love. Worse, he would inescapably resent being trapped in his marriage, and this resentment would inevitably infect his dealings with his wife. Also, some students seemed to suggest that

it was inconsonant with her dignity to ask him to stay when he wanted to go. And a number of students suggested that she would be happier after a divorce, since her husband seemed unattractive and since they believed that, once on her own, she would develop a financial and social independence that would do her good.

This argument easily extended itself into a disquisition about what marriage is. Marriage, on the view some students advanced, exists only when both spouses truly love each other. Thus the Appleby marriage had ended when Mr. Appleby stopped loving Mrs. Appleby. Further, marriage is an institution intended to promote the personal growth of both parties. Where one party wishes not to be married, such growth becomes impossible, and the marriage has ended. As Marx wrote, "Divorce is nothing but the declaration that a marriage is dead and that its existence is only pretense and deception. It is obvious that neither the arbitrariness of the legislator nor that of private persons can decide whether or not a marriage is dead."17 To insist that the Applebys stay married would be to insist that they live together in something other than marriage, which would be unfair to both spouses, and inconsistent with a proper understanding of marriage.

Another reason Mrs. Appleby was thought wrong to oppose Mr. Appleby’s request for a divorce was that Mrs. Appleby was herself responsible for many of the ills she would face after a divorce. She would no doubt suffer economically and socially were she to live alone. But she was vulnerable in these ways because of decisions she had made during the marriage: She did not develop saleable skills; she did not make friends of her own; she did not develop a life of her own; she relied too heavily on her husband for meaning and happiness. People are obliged to maintain their independence, to be their own person, and not to rely for their well-being, worth, and identity on someone else. Mrs. Appleby had failed in those duties. What provisions had she made for widowhood? Given today’s divorce rate, could she reasonably think her marriage would last a lifetime? Even if she expected to be married all her life, did she not see how vulnerable her dependence made her, and how much less than a whole person? In short, Mr. Appleby should not now be held responsible for his wife’s weakness, unwisdom, and improvidence.

This leads us to my students’ next point. Mr. Appleby was morally entitled to a divorce because he had never committed himself to stay in his marriage, or even if he had originally done so, he had

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gradually been absolved of such an obligation by the changing social meaning of marriage. Marriage may once have been regarded as lifelong. But _autre temps, autre moeurs_. As divorce rates have climbed, as religious ideas of marriage have waned and secular ones have waxed, it has become clear that when people marry, they are not making a permanent commitment. “For better or for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part,” if they are spoken at all, become words of hope, a romantic effusion, merely precatory, without binding effect. Just as it gradually came to be accepted that the entail was inherently liable to be barred, it is now commonly understood that marriage is inherently liable to be terminated in divorce.

Furthermore, this is the proper, healthy, and realistic view of marriage. People should not expect to be able to live together years into the future, much less for a lifetime. It is particularly unreal for people to expect to live together monogamously for long periods. People’s interests, affections, and needs change, and sometimes their relations should change with them. It is idle, naive, and foolish to suppose otherwise.

But Mr. Appleby was morally at liberty to divorce his wife for a stronger reason than that he had not promised—and should not have been asked to promise—to stay married. He was free to divorce her because he, like anyone else, was entitled to try to find personal growth, self-fulfillment, and happiness. Indeed, he might have a moral obligation to himself to seek those ends. And if Mrs. Appleby truly loved her husband, she would not want to impede him from attaining those ends. Furthermore, we should not expect Mr. Appleby to find the happiness to which all people are entitled except by obeying the commands of his preferences. He could not help falling in love with his secretary. He could not help falling out of love with his wife. He could not manipulate himself out of the former love or back into the latter.

Finally, some of the students felt that to deny Mr. Appleby, or even for Mr. Appleby to deny himself, a divorce would be “punitive.” By “punitive” these students often meant nothing more than that unpleasant consequences attached, not that anyone intended to inflict punishment. They associated the idea of punishment with the idea of morality, argued that binding him was a moral idea, and concluded that because the consequences of being bound were painful, they were punitive. In addition, they associated punitiveness with harshness, argued that binding him to his wife for the rest of her life was harsh, and thus again concluded that doing so would be punitive.

As this last paragraph suggests, driving much of this discussion
was the sharp sense that if Mr. Appleby was not morally entitled to a divorce, and if morality was given some kind of binding force, then Mr. Appleby's range of choice had been curtailed. This the students regarded with great seriousness, particularly since this was not just any choice, but a choice about a specially intimate and consequential question. And the choice was not temporarily surrendered, but—arguably—given up (or at least compromised) early in his life for perhaps the rest of his life. If he could not divorce his wife, he would be trapped. Indeed, at least one student argued that to say Mr. Appleby was not morally entitled to a divorce would be to reduce him to the status of a slave. It was, then, unfortunate that Mrs. Appleby would suffer in a divorce, but one of them had to suffer, and Mr. Appleby had responsibilities to himself and his own welfare and happiness and claims to freedom and fulfillment. Mr. Appleby was responsible to and for himself; Mrs. Appleby to and for herself.

In sum, the preponderant view in class after class was that Mr. Appleby was morally entitled to a divorce. The grounds were multiple and included a narrowed definition of "morality," various versions of moral relativism, the theory that morality has proved socially dangerous and hence should not be relied on, the position that Mrs. Appleby was wrong to oppose a divorce, the belief that marriage is not forever, the feeling that Mr. Appleby was entitled to be happy, a distaste for the "punitive" quality of any other conclusion, an underlying commitment to personal autonomy, and an aversion to social constraint.

I have described the usual course of the discussion, but not the whole of it. Throughout it, I solicited opinions that Mr. Appleby might in some way be morally constrained not to seek a divorce. Usually a few students would say, in a gingerly way (and sometimes only after class, in private), that while they could not make judgments about other people, they might themselves think that there were moral difficulties with a divorce where Mrs. Appleby had so much come to rely on her husband and where his reasons for leaving the marriage seemed so suspect. The students who made this argument most comfortably and publicly were often those who could place Mrs. Appleby in a category of people—usually older women—who occupied a socially disadvantaged status and who could see Mr. Appleby as exploiting an oppressive social role. In addition, a few students based their doubts (somewhat apologetically) on religious views about marriage and personal obligation.

Another group of students thought that, whatever Mr. Appleby's original marital commitment, he might have become bound by his actions during the marriage. If Mr. Appleby had insist-
ed that Mrs. Appleby not work outside the house, if he had isolated her from her friends, if, in short, he was in some reasonably direct way responsible for the distress she would feel on divorce, then he had bound himself morally (and perhaps legally). He had, in other words, entered into a contract implied in law, and possibly in fact.

However, this reasoning left open two crucial questions: what did Mr. Appleby bind himself to, and what was the remedy for the breach of his contract? The discussion rarely distinguished clearly between these two issues, but its conclusion was generally plain enough: Mr. Appleby was obliged to do no more than pay money damages; he could not be asked for anything like specific performance. It did not matter that Mrs. Appleby might want to stay married, at least in form, and not just to receive money. It did not matter that Mr. Appleby could not support two families at once and thus could not pay damages. In this analysis even those students who thought Mr. Appleby had to some extent committed himself when he married Mrs. Appleby concurred. If Mr. Appleby would do wrong by divorcing his wife, it would be a wrong without a remedy.

It might be supposed that the reactions I have described would be unique to law students. I think that there were elements of the discussion in which their relative youth and inexperience affected their views. Their sanguine view of Mrs. Appleby's fate after her divorce strikes me as one example. Their view of marriage as overwhelmingly a romantic and hardly a social or economic relationship may be another. I also think that there were places in the discussion in which their legal education influenced them. Their discussion of the commitments Mr. Appleby undertook in marrying, for instance, drew on ideas about contracts which would be more prominent in the minds of law students than the laity. But even if the entire discussion were an artifact of legal inclinations and training, it would be significant as representing the attitudes of a group of well-to-do, well-educated, well-placed people—the soon-to-be elite lawyers who disproportionately influence the speech and shape of the law.

18. Not only are most students in my school in their early to middle twenties, but few of them are married.

19. I have taught the same hypothetical in family-law classes at the University of Connecticut and Brigham Young University. At both schools, the discussion followed essentially the same course, although there was somewhat more feeling at Connecticut that Mr. Appleby was not morally entitled to a divorce, and yet a bit more at BYU. By way of confirmation, Lee Teitelbaum tells me he teaches a similar hypothetical at the University of Utah with similar results. In addition, at Michigan I have had parallel discussions about women who take illegal drugs while pregnant, about whether there is a moral duty to give blood or to donate a kidney to a close relative suffering from end-stage renal disease, and about moral duties adult children may owe their aged parents. Finally, I have heartlessly imposed the Appleby story
However, I doubt that the views I have been describing are limited even to this consequential caste. I find some modest confirmation for this suspicion in a parallel discussion I have had with medical students. I ask them whether people have a moral obligation to donate blood. I get reactions greatly—eerily—similar to the ones I have just recounted. But more broadly and weightily, there is considerable reason to think that my students were reflecting attitudes that run deep and strong in contemporary American life. Throughout the rest of this essay, I will present evidence of how widespread these attitudes and ideas have become. I conclude that the views I have delineated have more to do with my students’ place in the social and cultural structure of American life than with their legal training. I suspect, that is, that these views reflect the opinions of powerful elements of the American elite, elements sometimes described as the “new class,” as the “knowledge workers.” In cultural terms, these elite elements are the vanguard of the bourgeoisie. Their views repay attention because they are the opinions of culturally influential people, because they are clear statements of views that in less emphatic forms have already found notable acceptance in American society generally, and because they bid fair to become the conventional wisdom of tomorrow.

In short, I believe the discussions I have described have considerable resonance. They seem to me particularly frank and vivid expressions of some powerful elements in American thought generally. I stress, I emphasize, I insist that they are elements only. But they are elements that contend in important ways with more traditional views about the nature of social life and the place moral thinking should have in it.

We are going to need a convenient way of referring to this set of ideas. Unfortunately, every term that is accurate is too ponderous, and every term that is convenient has inaccurate or contentious connotations. For want of a better word, then, let us call this somewhat inchoate congeries of attitudes and ideas the “revised”

on people in as many walks of life as possible whom I have encountered in social settings and often found quite similar reaction. Perhaps the most striking comment was this:

It got me to thinking. My grandmother would have been horrified at the very idea of Mr. Appleby’s leaving; she was coming mostly from a religious basis. My mother would have said, “The rat.” I would say “OK, lady, get a life.” My daughter would say, “What is marriage, anyway?” But what I say is one thing and what I do is another. I’m honoring a marriage that hasn’t existed for ten years. I don’t know quite why. Maybe some of that idea of contract, and maybe because it was good for twenty years. Maybe I just lack courage.

20. See the material cited in note 9.
view, in contradistinction to the more traditional views against which it reacts.

III. NO-FAULT DIVORCE, MORAL DISCOURSE, AND THE LAW

To evade the bondage of system and habit, of family maxims, class opinions, and, in some degree, of national prejudices; to accept tradition only as a means of information, and existing facts only as a lesson to be used in doing otherwise and doing better; to seek the reason of things for oneself, and in oneself alone; to tend to results without being bound to means, and to strike through the form to the substance—such are the principal characteristics of what I shall call the philosophical method of the Americans.

Alexis de Tocqueville
Democracy in America

No-fault divorce law, as I said earlier, exemplifies the trend away from moral discourse in family law. But what animates that trend? In Moral Discourse, I identified four motive forces: the tradition of liberal individualism, the legal doctrine of non-interference in the family, society's changing moral beliefs, and the rise of a therapeutic society. Here, I want to use my classes' reaction to the Appleby hypothetical to amplify and sharpen this explanation. That reaction can help us understand the trend away from moral discourse in family law in two ways. First, it illustrates more precisely how the four factors I identified in Moral Discourse promote that trend. But second, it points us to yet another force behind the trend away from moral discourse: changing ideas about the nature and role of morality itself. I will suggest that, for some people and in some ways, morals—and thus moral discourse—has become a diminished and disfavored category not just in law, but in life, and that this change has helped impel the law away from moral discourse.

A. Four Causes of the Trend

The law is the witness and external deposit of our moral life.

Oliver Wendell Holmes
The Path of the Law

We begin by asking how the four causes of the trend away from moral discourse that I originally identified in Moral Discourse work in the area of no-fault divorce. First, no-fault divorce is easily un-
derstood in terms of standard liberal individualism. The liberal tradition, of course, holds that the state should be neutral among conceptions of the good, so that citizens may follow their own understandings of it. On this view, the state has no legitimate way of choosing standards for evaluating whether a couple is better off married or ought to stay married, while the husband and wife are well-situated both to choose and apply those standards. It is just this tradition which my students so adamantly invoked at the beginning of our discussion of the Appleby case when they insisted on responding in legal terms to my moral question. Seen in this light, the problem with traditional divorce law was exactly that it required moral discourse; no-fault divorce was necessary precisely to excise moral discourse from the law.

Nevertheless, we can understand neither the origins of no-fault divorce nor the trend away from moral discourse if we stop with liberal individualism. Indeed, the goals of the original no-fault reformers look, in retrospect, oddly modest, almost technical. As Lynn Wardle describes them, no-fault laws were primarily intended to “reduce the acrimony of divorce proceedings, eliminate a major incentive for perjury, close the ‘gap’ between the written divorce law and the law as actually enforced and reflect the modern notion that charging and proving marital misconduct should not be necessary to obtain a divorce when the parties have mutually agreed to divorce.”

The reformers seemed primarily to have in mind the case Newland Archer feared:

that, in his case and May’s, the tie might gall for reasons far less gross and palpable. What could he and she really know of each other, since it was his duty, as a “decent” fellow, to conceal his past from her, and hers, as a marriageable girl, to have no past to conceal? What if, for some one of the subtler reasons that would tell with both of them, they should tire of each other, misunderstand or irritate each other?


23. Edith Wharton, The Age of Innocence 41 (Modern Library, 1920). In fact, Archer does marry May, a woman “so lacking in imagination, so incapable of growth, that the world of her youth had fallen into pieces and rebuilt itself without her ever being conscious of the change.” Id at 351. Yet “[t]heir long years together had shown him that it did not so much matter if marriage was a dull duty, as long as it kept the dignity of a duty: lapsing from that, it became a mere battle of ugly appetites.” Id at 350.
The reformers, that is, asked Hume's question and answered it with his answer: "How often does disgust and aversion arise after marriage, from the most trivial accidents, or from an incompatibility of humor; where time, instead of curing the wounds, proceeding from mutual injuries, festers them every day the more, by new quarrels and reproaches? Let us separate hearts, which were not made to associate together." In such cases, the reformers believed, the couple would find a way apart whatever the law said or did. There is thus a sense in which this element of the trend away from moral discourse was driven by "the legal tradition of non-interference in the family." That tradition grows in part out of family law's enforcement problem—the difficulty it has in making people do what it wants. The enforcement problem pervades all of law. The law can call spirits from the vasty deep, but they often will not come when summoned. More frequently than lawyers like to think, people do not know what the law is, do not care to find out, do not obey it, do not suffer consequences from disobedience, and do not plan to comply even if punished.

The enforcement problem is particularly severe in family law. Family law's enforcement problem has multiple sources, all of which hobble fault-based divorce. First, despite the valiant efforts of several social sciences, we know sadly little about how families behave and about how to help them or make them behave well. Second, we often disagree about how we want families to behave. Third, family law tries to regulate people in the most intensely emotional relationships in their lives, relationships in which people are often acting under emotional pressures which they hardly understand and which they may find overmastering. Fourth, the privacy in which family life is lived (and which we are properly reluctant to violate) can prevent us from discovering misconduct within families. Fifth, even where information about misconduct can be had, remedies for it are often either ineffective or as likely to injure the innocent as punish the guilty. These enforcement difficulties combine, then, to make it prudent for the law to foreswear attempts to prevent divorce, much less to try to distinguish between legitimate and illegitimate divorces. Thus family law's traditional reluctance to intervene in families helps explain its current reluctance to enter into the moral discourse fault-based divorce required.

However, in a deeper sense no-fault divorce also grows out of another of the forces driving the law away from moral dis-

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24. David Hume, Essays: Moral, Political and Literary 187 (Liberty Classics, 1985). Nevertheless, Hume concluded that the "exclusion of . . . divorces sufficiently recommends our present EUROPEAN practice with regard to marriage." Id at 190.
course—"society's changing moral beliefs." That is, a change in moral views about two related family law issues—the nature of marriage and the permissibility of divorce—promoted the trend away from moral discourse by hastening the removal of a crucial set of moral issues from the law's ken. The no-fault reform became necessary, even in its modest early form, because social opinions about divorce had changed. People came to believe that marriage need not involve a permanent commitment. And this change occurred partly because, as Lawrence Friedman writes and as the Appleby discussion revealed, "Marriage had a new task; it was becoming a mode of self-fulfillment. It was a freely chosen arrangement, a partnership. Each partner had to satisfy and enrich the life of the other. If a marriage failed to provide this kind of fulfillment, each partner had the moral right to break off and try again." In short, divorce came to be seen as morally more acceptable.

More and more people so reconciled themselves to divorce that they were willing to insist on having divorces and even to perjure themselves to get them. Lawyers and judges so far partook of this change of opinion that they were willing to countenance and even cooperate in this fraud because, one supposes, they saw no overwhelming moral objections to many divorces. Or at least, with James Fitzjames Stephen, and harking back to the enforcement problem, they concluded that a "law which enters into a direct contest with a fierce impetuous passion, which the person who feels it does not admit to be bad, and which is not directly injurious to others, will generally do more harm than good; and this is perhaps the principal reason why it is impossible to legislate directly against unchastity, unless it takes forms which every one regards as monstrous and horrible." In the years since no-fault was instituted, these reformations in social attitudes toward divorce have persisted and hardened, as the Appleby discussions and American divorce rates suggest.

This change in social attitudes has diminished the law's impecuniosity to discuss divorce in the language of morals for two reasons. First, the change has made divorce morally less problematic, and thus the law has had less need to evaluate it in moral terms. Second, the change has made divorce seem less suited for legal regulation, and thus the law has had less need to analyze it in any terms.


26. This striking observation (and many others equally arresting) may be found in James Fitzjames Stephen, Liberty, Equality, Fraternity and Three Brief Essays Essays 152 (U Chi Press, 1991).
The story of the Appleby hypothetical also instantiates another cause of the trend away from moral discourse in family law: the flowering of the therapeutic society. This development—whose consequences animated so much of the Appleby discussions—has crucially contributed to each of the other causes of the trend, and has particular significance for the redefinition of American marriage and the triumph of no-fault divorce. It will therefore repay special attention. The rise of the therapeutic society has both promoted changes in social and moral attitudes toward marriage and divorce and provided an alternative language for analyzing those subjects. Historically, marriage was a moral (and religious), as well as a personal and social, relationship. The Book of Common Prayer describes it as "an honourable estate" that "is not by any to be entered into unadvisedly or lightly; but reverently, discreetly, advisedly, soberly, and in the fear of God." The parties to a marriage assumed a series of moral (and social and economic) obligations to each other "before God and this company."

In our time, however, the very ends of human life have been reconceptualized in ways that tend to replace moral ideas with psychologic ones.27 A particularly apt and revealing measure of

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27. Peter Berger was able to make this argument even about psychoanalysis (which is only one slice of the broader psychologic enterprise I have in mind) some thirty years ago:

[psychoanalysis has become a cultural phenomenon, a way of understanding the nature of man and an ordering of human experience on the basis of this understanding. Psychoanalysis has given birth to a psychological model that has influenced society far beyond its own institutional core and surrounding fringe. American law, especially in such new branches as juvenile and domestic relations courts, but by no means only there, is increasingly permeated with psychoanalytically derived conceptions. American religion, both in its thought and in its institutional activities, has been deeply influenced by the same psychological model. American literature, both "high" and "low," would be unthinkable today without it. The media of mass communication are filled with materials derived from the same source.]

that alteration, as of alterations in our moral language, is the changing conceptual vocabularies of American Christianity. As Tocqueville wisely said, "It must never be forgotten that religion gave birth to Anglo-American society. In the United States, religion is therefore mingled with all the habits of the nation and all the feelings of patriotism, whence it derives a peculiar force." Reli-
gion has traditionally formed one of the bedrocks of American moral seriousness, not to say earnestness. Shifts in that bedrock thus cause and reflect notable changes in general social attitudes, for "if the salt have lost his savour, wherewith shall it be seasoned?"

Like the society of which it is a part, American Christianity thinks and speaks in a remarkably therapeutic language. A bright and telling light is shed on this psychologized discourse by Marsha Witten’s fascinating study of the sermons Presbyterian and Southern Baptist ministers preached on the parable of the Prodigal Son. In those sermons, "notions of the deity as sovereign of the collectivity are displaced by portraits of God as Significant Other, who provides comfort, counsel, and understanding for the individual’s psychological concerns." God is reconstituted as a person like ourselves, with emotional states much like our own. "The God created in this speech validates human beings' incessant interest in their private inner workings." "As religion has lost some of its wont and will to make objective claims about truth, its "speech is positioned as relevant for satisfying a person’s psychological needs; hence the elaboration on the depths of the individual psyche."

28. Alexis de Tocqueville, 2 Democracy in America 6 (Vintage, 1958). Trends in religious belief and behavior are particularly relevant to family law issues, since “the overall similarity between trends in religious beliefs and participation and trends in family norms is striking. There are also good theoretical reasons for believing that family and religious values are interrelated—with the causal influences being recip-
rocal—and relationships in family and religious trends have been noted . . . .” Arland Thornton, Changing Attitudes Toward Family Issues in the United States, 51 J Marriage & the Family 873, 890 (1989).


30. Id at 130-31.

31. Id at 132. “God is more likely to ‘feel’ than to ‘act,’ to ‘think’ than to ‘say.’ . . . God’s emotions differ from those of human beings solely with respect to their magnitude and, for the positive emotions of love and joy, with respect to the largess with which they are experienced.” Id at 40.

32. Id at 131.
These sermons present religion as the best therapy. They "offer self-esteem regardless of the merit one actually earns," promise God "as a perfect interpersonal partner," and "teach people how to 'get in touch' with their feelings." The sermons, in short, bespeak a creed which has accepted "the exile of religion into the region of private life, in its concerns largely for the psychology and affect of the individual," a creed which transmutes spiritual life into psychological "issues," the divine into the therapeutic.

As with the general, so with the specific. Just as our language and thought have migrated from morals to medicine, the moral aspects of marriage have receded, and its psychologic functions have become more prominent. Marriage is ever more seen as a forum for satisfying human needs, as part of the search for psychological health and personal fulfillment. In particular, marriage serves the implacable psychologic yearning for intimate relationships. As Francesca Cancian writes, "Many Americans believe that to develop their individual potential, they need a supportive, intimate relationship with their spouse or lover."

This reconceptualization of marriage in therapeutic terms has a number of components and consequences. To begin with, that reconceptualization tends to shift the focus of concern from duties to others to duties to oneself. As Friedman writes, in a society of expressive individualism "the primary duty is to the self, and the primary job in life is development of this self." When such a society is medicalized, its members are called to heed the leading requirement of the sick role—to devote themselves to healing themselves. And the psychologic perspective makes everyone a life-long patient. Mr. Appleby was entitled to a divorce because he had overriding obligations to himself, obligations to care for himself, to maintain his psychological health (as to maintain his physical health), to strive for personal growth, to fulfill his human poten-

33. Id.
34. Id at 133.
35. Id at 134. Surveying a broader field, Cleck shows, "In their popular contemporary forms, Christian notions of salvation have taken on much of the hedonistic and therapeutic cast of secular American culture." Peter Cleck, America's Quest for the Ideal Self: Dissent and Fulfillment in the 60s and 70s 10 (Oxford U Press, 1983). Significantly, this shift seems to have affected even quite conservative Christians. See, e.g., James Davison Hunter, Evangelicalism: The Coming Generation 64-71 (U Chicago Press, 1987).
38. As I remark elsewhere, Americans have in recent years vigorously been charged with a personal
tial, to achieve happiness. These obligations comport well with the moral relativism that pervaded the Appleby discussion, for they are standards that, because they can be phrased in terms of health, can seem (however superficially) non-moral, value neutral, and thus relatively uncontroversial. And these obligations fit with and further the law’s withdrawal from moral discourse, since who is better situated to determine and enforce the duty one owes oneself than oneself? And since morality is so centrally about duties one owes other people, the shift I have described considerably reduces the salience of moral discourse.

If the primary duty is to oneself, independence becomes a virtue; dependence a fault. Some of my students criticized Mrs. Appleby because she had allowed herself to decline into a debilitating reliance on her husband. This criticism is reflected in the reformed law of alimony, which by limiting the availability and duration of alimony seeks to encourage independence and which thereby makes dependence dangerous. And of course independence becomes a virtue in an era of impermanent marriage: the wise spouse will always be prepared for going it alone.

The duty of independence is importantly associated with another crucial element in the reconceptualization of marriage. If there is one idea that Americans cherish as passionately, as fiercely, as jeal-

moral responsibility for taking care of their own health, and they have incessantly been reminded that the wages of sin is death. They have been admonished to jog more, eat less, smoke never, check for radon, “use a gas mask and a veil, then you can breathe, long as you don’t inhale.” They have been told that they can do more for their own health than any doctor can do for them, and urged to do it. It has even become fashionable to do it. In our secularized and multicultural society, health has become one of the few uncontroversial moral imperatives, and personal responsibility for health one of the most eagerly taught moral lessons.

Carl E. Schneider, Patients, Doctors, Decisions, and the Practice of Autonomy (forthcoming). For a rather heated review of some of these developments, see Robert Crawford, You are Dangerous to Your Health: The Ideology and Politics of Victim Blaming, 7 International J Health Services 663 (1977). See also Barry Glassner, Fitness and the Postmodern Self; 30 J Health & Social Behavior 180 (1989), and Renée C. Fox, The Medicalization and Demedicalization of American Society, in Essays in Medical Sociology: Journeys into the Field 465 (Transaction Books, 1988).

39. I detect a similar exaltation of independence and depreciation of dependence in the chronically ill people I have been interviewing for an empirical study of how patients make medical decisions. A number of these patients accept the ideology that they not only may, but should, make their own medical decisions. Some of them carry independence to the point of insisting on making those decisions without consulting their families. In these attitudes, they are strongly encouraged by some central trends in current bioethical thinking. For comments on these attitudes and trends, see Carl E. Schneider, Patients, Doctors, Decisions, and the Practice of Autonomy (forthcoming).
ously as any other, it is autonomy, particularly as that idea finds expression in the language of rights. Thus Friedman identifies two premises revealed by the “behavior and language of people in Western societies . . . . [F]irst, the individual is the starting point and ending point of life; second, a wide zone of free choice is what makes an individual. Choice is therefore vital, fundamental: the right to develop oneself; to build up a life suited to oneself uniquely, to realize and aggrandize the self, through free, open selection among forms, models, and ways of living.”

And thus Mary Ann Glendon observes that “American rights talk is set apart by the way that rights, in our standard formulations, tend to be presented as absolute, individual, and independent of any necessary relation to responsibilities.” In sum, rights talk has become “one of the few bases for making morally legitimate claims in our society,” and the principle of autonomy that undergirds that talk has become the lodestar of American life.

Two core ideas about marriage follow from the primacy of autonomy. First, people should be able to choose the kind of marital relationship they prefer. Second, people should not be trapped within a marriage they would rather leave. As Friedman writes, even by the end of the nineteenth century, American marriage was no longer indissoluble and irreversible. It was becoming, more and more, a contract in the full sense—in other words, an option, an agreement, a matter of choice. Like other choices and options in life, it began to be influenced by norms that disfavored the irreversible. A marriage, if it cannot be dissolved, can become a trap, a slavery, a burden; such a marriage interferes with individual growth and development; it stifles the unfolding of the self.

The duty of personal growth toward self-fulfillment and the imperative of autonomy crucially alter the modern morality of marriage. In particular, permanence can no longer be a principal marital ideal, for no relationship should persist that does not promote its true end—personal fulfillment. Since the search for fulfillment

44. Anthony Giddens notes that “relationship” is a relatively new usage in this context. He suggests the term “pure relationship” to refer to “a situation where a social relation is entered into for its own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so
demands probing and developing one's identity and responding flexibly to one's discoveries, people are likely to change, sometimes becoming unsuitable partners in the quest for selfhood. As Ann Swidler observes in a penetrating essay: "The value of love, and its challenge, is that it must stimulate and absorb perpetual change." Thus, "permanence, which was the hallmark of success in the earlier model of identity formation, becomes almost a sign of failure. After all, is it likely that one can keep growing and changing with the same partner? Doesn't permanence in a relationship necessarily require some compromise of individual possibilities for growth?"

This is neither to say that an unadulterated narcissism has become the moral standard of American marriage nor that love has been rendered irrelevant to a good life. Rather, there is "a new ideal of continuing mutual revelation. 'Struggle' becomes a sign of virtue in a relationship, and loving comes to mean facing one crisis after another in which two autonomous, growing people work to deepen communication, to understand each other, and to rediscover themselves." The point, then, is that "one can love most fully by deepening the honesty and communication in a relationship, even if the relationship ends as a consequence."

Nor is this to say that people do not hope, and even expect, that their marriages will last a lifetime. As Norval Glenn reports, "The ideal of permanence in marriage in this country is not dead, only weakened." Ideally, people want to find spouses with whom they can grow over a lifetime, with whom they can develop the kind of intimacy that intensifies with long-shared experience. Finally, this is not to say that people marry with no sense of commitment. But the commitment is not to permanence; rather, the commitment is to trying to make the marriage work. As two of Naomi Quinn's interviewees say:

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far as it is thought by both parties to deliver enough satisfactions for each individual to stay within it." Anthony Giddens, The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies 58 (Stanford U Press, 1992).


46. Id at 130.

47. Id at 128. Swidler continues, "Even the terms of evaluation change. Whereas once we might have spoken of 'true love' or of a love one would die for (or die without), now 'deep,' 'meaningful,' or 'alive' seem more appropriate terms for praising a love relationship." Id.

48. Id at 129.

And I think no it's much more a commitment to making certain that we're pretty clear where each of us are in our growth, in our lives, in our living, not—what I don't feel, in what you asked is, not to keep the relationship together but because we have a relationship. I truly could conceive of us in our evolution of things, feeling that an ongoing relationship, living together, does not make sense. When we're at a point in growth and who we are or because of another person or another opportunity that seems to be there, that says, okay, you know, we need not and probably should not perpetuate this.\textsuperscript{50}

I think we are committed to making our marriage work. Making the effort to do the best we can until some—unless at some point doing the best we can doesn't work—simply doesn't work, doesn't meet our need, doesn't make anybody happy and that kind of thing. So that primary commitment to make the effort, to work, to work together, understand each other, I think is what I mean by our primary commitment to each other.\textsuperscript{51}

Thus the new marriage has its moral obligations, obligations that grow out of our psychologized view of marriage. As Swidler observes, there is even “a new moralism in personal relationships—not the old concern with personal virtue but a new passion for honesty, fairness, equality, and communication.”\textsuperscript{52} But whatever requirements may remain, permanence is not one of them.

Mr. Appleby, then, was entitled to a divorce if for no other reason than that he had decided—as he was uniquely situated to do—that his marriage was no longer one “in which two autonomous, growing people work to deepen communication, to understand each other, and to rediscover themselves.”\textsuperscript{53} He could no longer “learn[ ] about himself from the relationship” with his wife.\textsuperscript{54} Perhaps this was because Mrs. Appleby had ceased to be an autonomous, growing person working to deepen communication. But whatever the reason, the marriage had lost its \textit{raison d'être}, and he was no longer obligated to it. What is more, he was freed from any such obligation whatever he might have promised to the contrary, since any prom-

\textsuperscript{50.} Naomi Quinn, “Commitment” in American Marriage: A Cultural Analysis, 9 American Ethnologist 775, 781–82 (1982). (In this and the succeeding quotation, “commit” and all its cognates were italicized in order to flag their use to the reader. I have removed those italicizations.)

\textsuperscript{51.} Id at 794. As Cancian notes, “Americans increasingly described a good marriage or love relationships in terms of both partners communicating openly, developing an autonomous self, and working on the relationship.” Cancian, \textit{Love In America} at 8 (cited in note 36).

\textsuperscript{52.} Swidler, \textit{Love and Adulthood in American Culture} at 135 (cited in note 45).

\textsuperscript{53.} Id at 128.

\textsuperscript{54.} Id at 129.
ise of permanence would directly have contradicted the ultimate purpose of marriage—to be a vehicle for personal growth.

More basically, any such promise would directly have contradicted the ultimate purpose of life—to discover, develop, and express one's true self. This goal cannot be achieved without the widest and deepest kind of autonomy, for autonomy is absolutely necessary to the good life. Mr. Appleby needed freedom to choose the person who would best help him in his inward search, who would give him the richest ways of developing himself, who would allow him the truest expression of all he had found. He needed to be able to choose his most intimate associates. He needed freedom because, as Swidler says, "our culture now seeks moral significance in acts of choice, in attempts to discover, clarify, or deepen the self, whether or not these choices lead to or remain within a commitment." 55

But of course the crucial problem with Mr. Appleby's autonomy is that it apparently cannot be exercised in the way he prefers without injuring Mrs. Appleby. Should she have to suffer for Mr. Appleby's autonomy? Essentially, yes. First, she should be just as aware as he of the meaning of marriage, and she should no more want a dead marriage to be perpetuated than he. Second, she stands to benefit just as much as he from the freedom the new definition of marriage gives them, for had it been she who had found the marriage oppressive, she could have left. Third, she cannot expect Mr. Appleby to be able to understand, much less accommodate, her needs. Such intimate demands can be understood, if they can be understood at all, only by the person who feels them. Fourth, who is to say that she will suffer if her husband leaves her, or that in the long run she will not be better off freed from what she may come to recognize as an unsatisfactory husband and marriage? The jolt of divorce may spur her to make new friends, learn new skills, find new self-respect, and lead a new richer and more rewarding life. 56 Finally, in autonomy begins responsibility. She, just as much as he, has duties to herself. One of those duties is to be an independent person. She should wish to be "a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes

55. Id. at 143.

56. Of course, that argument could be turned around. The students assumed that Mr. Appleby was doomed to unhappiness if he did not marry his secretary. A few of them thought he might eventually find that the age difference would corrode the marriage with his secretary. Nobody suggested that he could not find happiness on the ashes of his wife's well-being, in betraying the beliefs he might once have had, and might still have, about constancy and beneficence. Nobody said that Mr. Appleby might be able to find happiness if he reconciled himself to remaining with his wife and tried to make the best of things.
which affect me, as it were, from outside." Indeed, it might well
ever have been her very failure to bear that kind of responsibility which
caused her husband to find their marriage unsatisfying.

This analysis can help us better understand why the state
should not regulate the decision to leave a marriage and why moral
discourse is particularly inapt to any such discussion. Most broadly,
the state need not regulate the decision to leave a marriage because
permanence is no longer an element of marriage. If marriage is not
permanent, the state need not try to regulate it, and thus need not
engage in moral or any other kind of discourse about it.

But there are other reasons the state may not properly treat
the dissolution of marriage in moral terms. The state could ask
whether Mr. Appleby had kept his commitment to "work" at the
marriage. But this inquiry would be even more obscure and baffling
than the traditional inquest into marital fault. For one thing, there
is no social understanding of what such a commitment requires. For
another, some people are better able to keep such a commitment
than others, and it would not be fair to hold people to commitments
they are psychologically unequipped to fulfill. Finally, acquiring
evidence about the breach of such a commitment would be virtually
impossible, since only Mr. Appleby himself could truly know wheth­
er he had done his best.

Further, examining commitments of any sort is misguided, for
the decision to leave a marriage is essentially a question about
psychological health, not moral duty. Any residual question of moral
duty to the spouse is offset by the primary moral duty to oneself.
And whether Mr. Appleby would psychologically and morally benefit
from a divorce is best answered by the person with the truest in­sight into his psychology and his values—Mr. Appleby himself.

In any event, the need for the state to safeguard spouses dur­ing divorce is diminished by the new understanding of marriage.
Future Mrs. Applebys will need the state’s protection less than our
Mrs. Appleby because they will better understand that marriage
does not involve a permanent commitment and that they have a
duty of independence. Indeed, they will be different people, for they
will have grasped that “modern society changes the nature of identi­
ty, making it more flexible, less fixed, and less permanent than tra­
ditional models of personal development have allowed.” They will
thus rely less on their spouses and be better able to respond to the
end of their marriage. And, in the end, costs to Mrs. Applebys are

57. Isaiah Berlin, Two Concepts of Liberty, in Four Essays on Liberty 131 (Ox­
58. Swidler, Love and Adulthood in American Culture at 131 (cited in note 45).
59. Mrs. Appleby’s misfortune may be that she was born at the wrong time.
justified by the greater social need to maintain a system in which, overall, individual autonomy is maximized.

These ideas about autonomy and slavery are, of course, just those my students so passionately expounded on Mr. Appleby’s behalf. As Friedman suggests, the idea of personal autonomy in marriage has found expression in a more contractualized conception of that relationship. Family law is certainly far from adopting a completely contractual view of marriage. But it continues to progress in that direction. For example, the permissible scope of antenuptial agreements has expanded, as the Uniform Premarital Agreement Act suggests, and separation agreements encounter fewer difficulties than before. Commentators have urged that family law press a good deal further toward contractualization.60 One prominent proposal for reforming alimony law rests on essentially contractual grounds, on a view of marriage as a compensable investment and of alimony predicated on recovering lost earning capacity.61 Similarly, some of the cases treating the division of professional degrees upon divorce sound in contract more than property.62 Indeed, the reader of this volume will notice that contractual approaches to marriage and divorce were a central subject of interest at this symposium.63

Contract law might be thought as much a way of imposing obligation as liberating people from it.64 This is surely true in principle, but I do not think that this is what animates family law’s growing enthusiasm for it. Rather, contract law is primarily seen as a way of relieving people of obligations the law and social norms have historically embodied. This use of contracts is also associated

The social and legal standards of marriage changed importantly during her lifetime, as has women’s involvement in the labor market. Women entering marriage today are presumably on notice of the new definitions of marriage and the risks women who do not enter the job market run.

60. See, e.g., Marjorie Maguire Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal L Rev 204 (1982).
64. Scott, 1994 Utah L Rev at 720 (cited in note 63).
with the developments I have been describing. Thus Swidler writes,

The self is vulnerable, and its integrity must be protected by clear understanding—no expectations, no strings, no demands for involvement. Relationships are required to have an explicit constitution in which nothing is left to chance, no tentacles of unrecognized attachment can reach out to strangle, no illegitimate expectations can develop. . . . Contemporary ideology, with its serious attention to the work of loving, also reflects a fear of dependency, an assertion that people are bound only to what they have agreed to. Good lovers, like good workers, cannot afford unlimited attachments.65

This drive to protect the integrity of the self by limiting the obligations which may be imposed on it is evidenced by changing attitudes toward self-sacrifice in marriage. Historically, spouses were admired for sacrificing themselves for each other.66 But one of the most striking features of the Appleby discussions—the dog that did not bark in the night—was that no one suggested that, even if Mr. Appleby was in some sense morally entitled to a divorce, he might sacrifice his own wishes in order to soften his wife's distress. And Mrs. Appleby was positively criticized for apparently having sacrificed her interests to her husband's. Her sacrifices, it was said, were in the long run apparently unappreciated, and, worse, they diminished her. In short, Swidler notes, "Self-sacrifice, which once seemed the ultimate proof of love, now seems suspect. For people to try to realize themselves through the sacrifices they make for others comes to seem not nobility but parasitism."67 As one person commented about the Appleby case: "This sacrificing oneself for spouse and children is an excuse in some ways. You don't have to go through the hard work of justifying yourself as yourself. They have

65. Swidler, Love and Adulthood in American Culture at 135 (cited in note 45).
66. One study of popular magazines in the 1950s and early 1960s concluded that fundamental to their view of personal relationships was the principle that an individual should make "others" happy. Paramount among the suggestions for accomplishing this goal was the admonition, "Above all, think of the other's problems before you think of your own." This putting aside of self was defined as loving behavior, and conversely thinking of self first was unloving and displayed lack of genuine concern for others. Virginia Kidd, Happily Ever After and Other Relationship Styles: Advice on Interpersonal Relations in Popular Magazines, 1951-1973, 61 Quarterly J Speech 31, 34 (1975).
67. Swidler, Love and Adulthood in American Culture at 138 (cited in note 45). She further notes that "in contemporary literature even the sacrifice of parents for their children has been brought into question." Id. Again, this is not to say that marriage is unanimated by any moral ideals. Rather, "[t]he obligation to sacrifice oneself for another is replaced by the duty to respect the other person's separateness, to recognize the other's needs for growth and change, to give to the other in return for what one receives." Id at 136.
to do it for you.”

Contract law, then, is in important part a way of protecting people against the ambitious and almost open-ended kinds of moral standards traditional family law seemed to set. Thus in family law a leading purpose of contracts has been to limit antenuptially the claims one spouse might make on another postmaritally. And my students primarily used contractual arguments to resist the suggestion that Mr. Appleby might have lost the moral entitlement to divorce his wife. For instance, most students seemed significantly influence by their conclusion that Mr. Appleby had never intended to contract for a permanent marriage (and that such a contract ought in any event to be against public policy). Some students adopted contract law's assumption that all agreements may be abrogated by the parties, that no contractual arrangement is inescapably permanent. Some students advocated a version of the doctrine of efficient breach: Mr. Appleby should feel free to divorce his wife if he pays damages (though they were reluctant to say that he was not entitled to a divorce if he could not do so). And the students overwhelmingly accepted the contract-law preference for money damages over specific performance, even where the latter remedy was self-imposed.

The rise of contract in family law diminishes moral discourse in it by transferring responsibility for setting standards for marriage and divorce from the law to the parties to the contract. Under a contractual regime, no public agency need decide when spouses are morally entitled to a divorce; the parties establish the criteria for any such decision themselves. As I wrote in 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.”

There are, to be sure, two ways courts may still be required to evaluate contracts in moral terms. The first is where there is an issue about a contract's unconscionability; the second is where a contract's terms are ambiguous, and the court must interpret them. However, unconscionability's scope has always been narrow, and when courts interpret contracts, they inquire primarily into the

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parties' intent, not into the substantive moral dispute between the parties. Thus I believe the net effect of contractualization is probably to reduce the occasion for moral discourse.

I have been finding the roots of the trend away from moral discourse in four forces: the tradition of liberal individualism, the legal preference for nonintervention in the family, changing social and moral views about the nature of marriage and the permissibility of divorce, and the rise of the therapeutic society. As should already be clear, these forces are hardly distinct, and they interact intricately and elaborately. For example, the liberal tradition is given practical impetus by family law's enforcement difficulties. The rise of the therapeutic society has helped reorient our moral views and intensify our individualistic traditions. Our changing moral views have made liberalism's abdication from moral judgments seem not just less troublesome, but actively desirable, providing the freedom people need to find and fulfill their true selves. In short, these four forces have combined and interacted to make divorce seem less problematic and to make governmental regulation of divorce more problematic. Since this made governmental supervision of divorce less acceptable, it drove the law out of the business of making and thus talking about the moral distinctions fault-based divorce required.

B. A Fifth Cause of the Trend

The very name of moralist seems to have become a term of disparagement and to suggest a somewhat pretentious and a somewhat stupid, perhaps even a somewhat hypocritical, meddler in other men's lives. In the minds of very many in the modern generation moralists are set down as persons who, in the words of Dean Inge, fancy themselves attracted by God when they are really only repelled by man.

Walter Lippman
A Preface to Morals

My report of the discussion of the Appleby hypothetical can help us identify yet another force impelling the law away from moral discourse, one I did not expressly consider in Moral Discourse: The law uses moral discourse less because moral discourse has become a socially weaker force. In some ways in some influential circles, moral language—particularly when applied to many of the issues family law treats—is actively distrusted. In the revised view, to some important extent, morality has come to be understood as only narrowly relevant, as merely relative, as prone to abuse, as associated with the ills of rule-based thinking, as out of step with
the remissiveness of American life.

Recall first my students' initial incomprehension of the question whether Mr. Appleby was morally entitled to a divorce. That incomprehension is easier to understand if we see that the tendency away from moral discourse is a pervasive social phenomenon. Alan Wolfe, for instance, observes, "A moral code is a set of rules that define people's obligations to one another. Neither the liberal market nor the democratic state is comfortable with explicit discussions of the obligations such codes ought to impose. Both view social obligation as a by-product of individual action."70 Wolfe charts the waning of that discourse in several of its former strongholds: "Religion, to take the most prominent example, is certainly no longer the source of moral authority it once was."71 Historically, no source has been as prolific of influential moral ideas as religion. As Gertrude Himmelfarb writes of George Eliot,

Long after she lost faith in Evangelicalism, she retained the deepest respect not only for religion but also for religious conformity, and precisely because she saw them as having the most intimate relationship with morality. With or without faith, she once explained, the mere attendance at church or chapel signified a "recognition of a binding belief or spiritual law, which is to lift us into willing obedience, and save us from the slavery of unregulated passion or impulse."72

Today, however, religious discourse has become decreasingly moral and, among other things, increasingly therapeutic, as I will shortly argue.

Wolfe goes on to suggest that philosophy's concerns have changed in ways that make it no longer "an adequate source of ideas about moral behavior."73 Similarly, literature "can no longer be counted on to serve as a guide to moral understandings."74 Further, those institutions likeliest to speak in moral language have lost social power to institutions less likely to do so. As Richard Merelman observes, there has been "a crucial shift in power in the

71. Id at 3.
74. Id at 4. Some years ago, Trilling wrote that the greatness and practical usefulness of the novel "lay in its unremitting work of involving the reader himself in the moral life." But he went on to say that "[a]t the moment, its impulse does not seem strong, for there never was a time when the virtues of its greatness were so likely to be thought of as weaknesses." Lionel Trilling, Manners, Morals, and the Novel, in The Liberal Imagination 215 (Doubleday, 1953).
primary agencies of American culture formation—from older institutions of church, state, and social class to newer institutions of education, the mass media, and advertising. Correspondingly, Bellah and his collaborators found in their study of middle-class Americans a discourse in which individualism flourished, but in which other moral strains had withered. In short, my question about Mr. Appleby surprised the students partly because moral discourse has become so much less salient in American life.

My report of the Appleby discussion directs us to another important change in the social position of moral discourse. Recall again the incomprehension of many of my students when I asked whether Mr. Appleby was morally entitled to a divorce. As my report suggested, the very term “moral” has in some milieux taken on a narrow—and derogatory—meaning. Specifically, it is at best confined to questions of sexual morality. “Morality” means “traditional morality” which means sexual morality.

The relegation of morals to sexual morals does little to advance the dignity of moral thought, for sexual morals have come to connote a narrow, rigid, prudish, restrictive, and repressive regime of outdated ideas hypocritically stated and heartlessly imposed. “Puritan” and “Victorian” are not complimentary adjectives. They suggest, first, attitudes toward sexual and thus personal relations that

75. Richard M. Merelman, Making Something of Ourselves: On Culture and Politics in the United States 1 (U Cal Press, 1984). Similarly, Trilling observed: “Sexual conduct is inextricably involved with morality, and hitherto it has been dealt with by those representatives of our cultural imagination which are, by their nature and tradition, committed to morality—it has been dealt with by religion, social philosophy, and literature. But now science seems to be the only one of our institutions which has the authority to speak decisively on the matter.” Lionel Trilling, The Kinsey Report, in The Liberal Imagination at 217 (cited in note 74).

76. Bellah, et al, Habits of the Heart at 6 (cited in note 27). Years ago, Durkheim observed, “As all the other beliefs and all the other practices take on a character less and less religious, the individual becomes the object of a sort of religion . . . . It is thus, if one, wishes, a common cult, but it is possible only by the ruin of all others, and, consequently, cannot produce the same effects as this multitude of extinguished beliefs.” Emile Durkheim, The Division of Labor in Society 172 (Free Press, 1933). For another description of the drying up of the springs of moral discourse in American life, see Barry Schwartz, The Battle for Human Nature: Science, Morality and Modern Life (W.W. Norton, 1986).

77. Walter Lippmann suggests an intriguing—if not entirely convincing—reason for this narrowing of the definition of morality. He suggests that most people can manage “to live without ever attempting to decide for themselves any fundamental questions about business or politics. But they can neither ignore changes in sexual relations nor do they wish to.” Walter Lippmann, A Preface to Morals 284 (Macmillan, 1929). He concludes, “That obviously is the reason why in the popular mind it is immediately assumed that when morals are discussed it is sexual morals that are meant.” Id at 285.
are not just unreasonable, but in the therapeutic view, actively unhealthy, that inhibit successful sexual and thus personal exchange, that burden sexual life with guilt, that repress what is natural, that darken with gloom what ought to be bright with joy. They suggest, second, moral attitudes that are unwholesome: grim, hypocritical, meddlesome, censorious, unreasoning, rigid, and harsh. Worse, such moral arguments seduce their makers into an arrogance that blinds them to the error and even immorality of their position. In short, moral has come to mean moralistic.  

Even when “morality” is understood to encompass more than sexual life, it has assumed some undesirable meanings. A number of the participants in the Appleby discussions were convinced that morality broadly understood as well as morality understood only in sexual terms has historically been recruited to justify intolerance, to mask the exercise of power, to legitimate the intolerable. Racism and sexism, they said, were advanced and accepted as systems of moral argument. A form of argument that could so deeply mislead so many so badly so long demands at least skepticism, if not outright rejection.

Moral thinking also incurs doubts because it is associated with some broader developments in the way we think about and structure social relations. Some of these have to do with the association

78. This sense of “Victorian” and “Puritan” is conventional, but probably wrong. It has persisted at least partly for reasons that say a good deal about our own views of personal relations. As Michael Mason writes, “Our modern sexual consensus is in its very essence reactive, and impossible even to state without the notion of an ideological enemy being brought into play. Our current sexual positives are not just activity, but liberation, emancipation, freedom; not just hedonism, but disinhibition; not just tolerance, but hostility to taboos and censorship.” Michael Mason, The Making of Victorian Sexuality 3 (Oxford U Press, 1994). Mason’s study is a detailed corrective of the conventional view of “Victorian” personal relations. For other salutary correctives, see Edmund Leites, The Puritan Conscience and Modern Sexuality (Yale U Press, 1986); Peter Gay, Education of the Senses (Oxford U Press, 1984); Peter Gardella, Innocent Ecstasy: How Christianity Gave America an Ethic of Sexual Pleasure (Oxford U Press, 1985). For an insightful view of the Victorian “construction of intimacy,” particularly in relation to family law, see Regan, Family Law and the Pursuit of Intimacy at 6–33 (cited in note 27).

79. For a more thoughtful and better-developed version of this argument, see Scott, 1994 Utah L Rev at 735 (cited in note 63). For a brief response to it, see part IV.B.3. The kinds of dangers this argument describes have hardly gone unnoticed by moralists. Thus Trilling remarked that “the moral passions are even more willful and imperious and impatient than the self-seeking passions. All history is at one in telling us that their tendency is to be not only liberating but also restrictive.” Lionel Trilling, Manners, Morals, and the Novel, in The Liberal Imagination at 215 (cited in note 74). He continued, “Some paradox of our natures leads us, when once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion.”
of morals with rules. And not just with rules; with exigent and inflexible rules. As Hampshire notes, in “certain quite distinct and clearly marked areas of action,” particularly including “the taking of human life, sexual relations, [and] family duties and obligations,” one meets “moral prohibitions, apparent barriers to action, which a man acknowledges and which he thinks of as more or less insurmountable, except in abnormal, painful and improbable circumstances.” Moral systems, that is, typically formulate rules and centrally employ them in analyzing moral problems.

The association of morality with rules is disadvantageous because of recent changes in attitudes toward rules. In the modern, romantic, Promethean spirit of rationalism, doubt, and liberation, rules—particularly rules of the kind Hampshire describes—are shackles to throw off, not insights to employ. The spirit of Keynes and the friends of his youth is not dead. They

entirely repudiated a personal liability on us to obey general rules. We claimed the right to judge every individual case on its merits, and the wisdom, experience and self-control to do so successfully. This was a very important part of our faith, violently and aggressively held, and for the outer world it was our most obvious and dangerous characteristic. We repudiated entirely customary morals, conventions and traditional wisdom .... [W]e recognized no moral obligation on us, no inner sanction, to conform or to obey. Before heaven we claimed to be our own judge in our own case.81

Even people who would not, like Keynes, describe themselves as “immoralists” may partake of elements of his rule-skepticism. Frederick Schauer, for instance, describes a tradition in American law and legal theory that

starts with an intuitively appealing goal—getting this case just right. But that goal and the tradition embracing it are in tension with the very idea of a rule, for implicit in rule-based adjudication is a tolerance for some proportion of wrong results, results other than the results that would be reached, all things other than the rule considered, for the case at hand. In many of the most important areas of American adjudication, the tolerance for the wrong answer has evaporated, often for good reason, and the current paradigm for adjudication in the American legal culture may already have departed from rule-bound decisionmaking. This new paradigm instead stresses the importance not of deciding the case according to the rule, but of tailoring the rule to fit the case.82

As P.S. Atiyah concludes, "Modern man is unwilling to accept the authority of a principle whose application seems unjust in a particular case, merely because there might be some beneficial long-term consequence which he is unable to identify or even perceive." Like Newland Archer, we recurrently find ourselves "face to face with the dread argument of the individual case. Ellen Olenska was like no other woman, he was like no other man: their situation, therefore, resembled no one else's, and they were answerable to no tribunal but that of their own judgment.

In short, rules offend in several ways. They seem to infringe the principle that people may and ought to work out for themselves each choice in their own lives, that they ought to do their own thinking, that they ought not simply accept conventional wisdom. Rules are associated with authority, and authority should be doubted, questioned, and challenged. Rules conduce to a reluctance to accord sufficient respect to the individuality of people and cases. Rules have historically been applied to unjust ends. And rules are associated with morality. Logically, one may of course have a moral system which encourages the most discriminating attention to the differences between cases. But the moral traditions most relevant to American thought about family relations have centrally relied on rules, and rules of a particularly exigent kind. In the revised view, moral thought suffers because of that history.

A yet more crushing blow to the reputation of moral discourse is moral relativism. For reasons I will shortly describe, my students are not thorough-going moral relativists. Yet, as the Appleby saga indicates, a strong and deep strain of relativism crucially shapes their thinking. This relativism is in part simply prudential. The tra-

83. P.S. Atiyah, From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law, 65 Iowa L Rev 1249, 1270 (1980). The modern view is not unambiguously committed to a regime of discretion, however. My students, for example, are delicately sensitive to the possibility that discretion may be a cloak for racial, ethnic, religious, and gender prejudice, and today the dominant view among commentators is that rules are preferable to discretion in child-custody law. See Carl E. Schneider, Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard, 89 Mich L Rev 2215 (1991).

84. Wharton, Age of Innocence at 309 (cited in note 23). Our changing attitudes toward rules, and our changing religious perspective, are nicely caught in the cartoon showing Moses on the mountaintop saying to God, "Well, then, if 'commandments' seems too harsh to me, and 'guidelines' seems too wishy-washy to you, how about 'The 10 Policy Statements'?"

85. Clecak notes, "[A]t the end of the seventies expressions of dissent became habitual, even addictive, and as a consequence, authority in every sphere—political, cultural, social, religious, moral, parental—was subject to automatic challenge and deep skepticism." Clecak, America's Quest for the Ideal Self at 223 (cited in note 35).
dition of liberal individualism, and particularly the ethos of pluralism, multiculturalism, diversity, and tolerance which is so central to their thinking leads my students to believe that no moral belief not supported by a "consensus" of the population may effectively—or legitimately—be a basis for public policy. Thus, in "asserting a radical pluralism and the uniqueness of each individual, they conclude that there is no moral common ground and therefore no public relevance of morality outside the sphere of minimal procedural rules and obligations not to injure."

Yet more deeply, however, the acids of modernity have corroded their belief in the foundations of their belief. My students are keen epistemologists, and if they know anything, they know they can know nothing. They thus readily accept that "all evaluative judgments and more specifically all moral judgments are nothing but expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character." On this view, moral discourse is quite empty. It reflects no truths. It is arbitrary and idiosyncratic.

This combination of prudential, normative, and epistemological relativism promotes a powerful and persistent reluctance to make moral distinctions between people and otherwise to engage in the evaluations moral thought requires. This effect may be observed, for example, in our language. The classical music station I grew up with advertised itself as "for discriminating listeners." Today, this would be nearer a confession than a boast. And that desirable quality "judgment" is adjectivally transformed into the deplorable quality "judgmental" (just as "moral" declines into "moralistic"). "Judgment" similarly degenerates when it becomes a "value judgment."

This leads us to another way in which the revised view has shied away from moral discourse. Moral discourse is about what must be done and what may not be done. But that crucial aspect of morality is in tension with the bountiful remissiveness of so much

86. "Consensus" is a word my students almost invariably used in this context. To be sure, "consensus" was left undefined. And concealed in this purportedly prudential judgment was a normative one, for they did not require a consensus to justify laws directed against behavior they deplored, however frequently those laws were violated.

87. Bellah, et al, Habits of the Heart at 141 (cited in note 27). For a brief survey of some of the more sophisticated literature on moral relativism, see Regan, 1994 Utah L Rev at 660–63 (cited in note 3). For an interesting treatment of the way relativism has influenced and been influenced by anthropologists, see Edgerton, Sick Societies (cited in note 15).

American thought. As Philip Rieff, the master chronicler of the therapeutic, writes, "[t]he new religiosity is remissive."89 This sentiment grows importantly out of the psychologic view, which stresses the environmental causes of human behavior and the therapeutic possibilities of human life. This therapeutic remissiveness expresses itself in popular psychologic language. People are urged to give themselves "permission" to do things they feel constrained from doing, to avoid any feelings of guilt, to have high self-esteem (whatever their character or behavior might otherwise warrant), to accept themselves as they are for the valuable people they are. This remissiveness also expresses itself in the law: "More pervasive, perhaps, is an attitude of legal leniency toward people's mistakes and neglect that is particularly characteristic of contemporary law."90

The remissiveness of my students helps explain their anxiety, their yearning, to find reasons Mr. Appleby should not be said to have behaved badly and arguments that he should not suffer from his behavior. Similarly, it helps explain, for example, their determined unwillingness in other class discussions to visit consequences, or even criticism, on pregnant women whose drug use causes their children to be born devastated.

Once again, an apt and telling measure of the social extent of the remissive ethos lies in the changing attitudes of American Christianity. Historically, central strains of American Christianity portrayed God as the transcendent judge and man as the sinner brought to judgment: "To me belongeth vengeance, and recompence; their foot shall slide in due time: for the day of their calamity is at hand, and the things that shall come upon them make haste."91

The Book of Common Prayer set an order for daily morning prayer which contained the familiar confession:

Almighty and most merciful Father; We have erred, and strayed from thy ways like lost sheep. We have followed too much the devices and desires of our own hearts. We have offended against thy holy laws. We have left undone those things which we ought to have done; And we have done those things which we ought not to have done; And there is no health in us.

Of course, God's forgiveness featured ineradicably in American Christianity. But in most denominations that forgiveness was not lightly won, and many denominations thought it undeserved, the product of God's grace and not man's merit. "For by grace are ye

89. Rieff, Triumph of the Therapeutic at 20 (cited in note 27).
90. Friedman, Republic of Choice at 102 (cited in note 25).
91. Deuteronomy 32:35 (King James version). This was the text of Jonathan Edwards' celebrated sermon Sinners in the Hands of an Angry God.
saved through Faith; and that not of yourselves; it is the gift of God.”

In light of this unremissive history, consider again Witten’s study of Presbyterian and Southern Baptist sermons on the parable of the Prodigal Son. These sermons “suggest the many ways in which the concept of ‘sin’ has been accommodated to fit secular sensibilities.” That accommodation has been underway for some time: “Developments in the late nineteenth and early twentieth centuries contributed the notions of optimism about human nature and the ineluctable march of human progress, both of which deemphasized sinfulness …” Today, this second Reformation has achieved quite dazzling success. Thus one of the Presbyterian sermons Witten studied told the congregation, “That’s what God is saying to you. It’s not “Go to your room.” It’s “Come to the party”.”

The therapeutic turn has been crucial in this softening of American Christianity. In Witten’s sermons, “God is portrayed exclusively or predominantly in terms of the positive functions he serves for men and women. Chief among these functions is one that can be labeled ‘therapeutic.’ God relieves negative feelings, especially anxiety and doubt.” Thus a telling way in which contemporary Christianity has domesticated the idea of sin has been “therapeutic tolerance, through which sin is translated as errant behavior, explanations for misdeeds are sought in the social context rather than in the individual, and the response of judgment is replaced by that of empathy.” God’s love becomes “a relief from the judgment of self that comes from within: the psychological torment of guilt and self-blame.” This change in American Christianity is apparently occurring even in some of its most conservative parts. For instance, Hunter quotes the popular clergyman, Robert Schuller, as saying that “the traditional theological definition of sin (i.e., rebellion

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92. Witten, All Is Forgiven (cited in note 29).
93. Id at 101.
94. Id at 33.
95. Id at 39.
96. Id at 35. Another Presbyterian sermon continues the theme, directly sum­moning up, only to reject, Jonathan Edwards famous sermon: “Perhaps all of us can cease to see ourselves as sinners in the hands of an angry God and know we are children held in the arms of a loving Father—a Father who seeks to throw a party in our honor.” Id at 39. In addition, “the picture of God in his transcendent role as awesome sovereign and judge is laboriously debunked. The two images are treated as if categorically incompatible with each other; the God who is motivated by nurturing love cannot, even in other circumstances, castigate and judge.” Id at 38–39.
97. Id at 101.
98. Id at 38.
against God) 'is not incorrect as much as it is shallow and insulting to the human being' . . . . 'Reformational theology failed to make clear that the core of sin is a lack of self-esteem' . . . ."99

The remissiveness of the revised view is motivated partly by the distrust of moral reasoning which I have described. If moral reasoning is inherently arbitrary, is an invitation to hypocrisy and intolerance, blame should not easily be assessed on moral bases. But remissiveness is also impelled by beliefs about the extent to which people can reasonably be held responsible for their acts. The students who defended Mr. Appleby’s entitlement to a divorce often argued that he was not responsible for the social distance that apparently had grown up between him and his wife, for having fallen out of love with her, or for having fallen in love with his secretary. He was not responsible because people cannot help how they feel. The revised view draws on an understanding of psychologic teachings that holds that feelings arise because of environmental forces and psychological factors which one cannot control and which one may not even perceive.

Because Mr. Appleby was not responsible for his changed feelings, the reasoning further ran, he should not be made to suffer for them. People’s freedom should not be limited because of things they cannot help. As Friedman observes, one of the “ruling ideas” of modern American law is that

[p]eople should not suffer harm because of events, traits, and conditions over which they have no real control. When there is no real choice, no real losses, disadvantages, or punishment should attach. A person should accept the legitimate consequences of free choices. But any calamity or misfortune is unfair if it is not the result of free choice and is “undeserved”; and any suffering that ensues is a form of injustice.100

The question, of course, is when a change is a “choice,” and when that choice is “free.” On the revised view, Mr. Appleby might not even have made a choice; his feelings might just have “happened” to him. And even if he made a choice, it was coerced by “events, traits, and conditions over which [he had] no real control.”

Even if Mr. Appleby had tried to compel himself into different feelings, his attempt would not only have failed, it might even have been dysfunctional. Stigmatizing his feelings and brooding about them might well have made him feel guilty, might well have lowered his self-esteem. Without that esteem, burdened by guilt, he might too easily have sunk into self-reckoning and misery. Any-

100. Friedman, Republic of Choice at 96 (cited in note 25).
one in such a condition would be unlikely to behave well or to form loving and lasting relationships. One's first obligation is to oneself partly because that is the only way of fulfilling one's obligations to everyone else.

Another aspect of the revised view's remissiveness needs to be considered. Some of the students who believed Mr. Appleby should not feel obliged to stay married felt he had probably behaved badly and that a divorce would harm his wife. However, they deeply believed in the sanctity of choice and were painfully reluctant to visit permanent consequences even on people who had behaved immorally. As Friedman remarks, "Twentieth-century people are inclined to go easy on themselves in another regard: legal arrangements betray a pronounced bias against irreversibility—against choices and arrangements that cannot be undone."\(^{101}\) As I observed earlier, some students even equated holding Mr. Appleby morally barred from divorce with one of the worst evils they could imagine—slavery.

This leads us to another feature of the Appleby discussions—the belief that to deny Mr. Appleby a divorce would be "punitive." My dictionary tells me that "punitive" means "[i]nflicting or aiming to inflict punishment."\(^{102}\) But, significantly, the term has taken on a derogatory connotation. It has come to suggest a harsh moralism. In other words, "punitive" seems to have undergone the same kind of transformation "moral" has. And like the latter transformation, the former bespeaks a reluctance to make and act on moral judgments.

But even if "punitive" had assumed no such connotations, it would be significant that the term showed up so regularly in discussions. For it is hard to see who wanted Mr. Appleby to be punished. True, if he were denied a divorce, or if he denied himself a divorce, he would be deprived of something he desired. But not every deprivation is a punishment. A punishment "is intended as a judgment of someone who has done something wrong."\(^{103}\) But Mr. Appleby would have been morally prevented from divorcing his wife because that would fulfill his duties to her, because it was the right thing to do, or, at most, because it was the only way to keep her from suffering because of things he had done and might do. He would want

\(^{101}\) Id at 101.

\(^{102}\) My OED says essentially the same thing and gives as its first example of the word's use a sermon from 1624: "Woe be to them ... that, by the dam of their bribes, labour to stop the due course of punitive justice!"

\(^{103}\) Carl E. Schneider, Religion and Child Custody, 25 U Mich J L Reform 879, 883 (1992). See id at 883-84 for a discussion of another example of the tendency to see punishment where none is intended.
to stay married, or an observer would want him to stay married, because he had assumed obligations to his wife, not because he had broken them and was being punished. The discussion was about what he was morally called on to do, not about what sanctions should be visited on him.\textsuperscript{104} Calling the conclusion that he was not morally entitled to a divorce a punishment again evidences, I think, the remissiveness of the revised view.

In the last few paragraphs, I have been suggesting that the revised view promotes remissive sentiments first because it is delicately sensitive to the weaknesses of moral thinking and magnetically drawn to moral relativism. Further, the revised view sees much human thought and behavior as outside people's control, and it reasons that people are not responsible for things they cannot help doing. Remission should be more easily obtained than it often is because without it people are too easily blamed for things they cannot help doing. Thus the remissive impulse leads to a reluctance to act on moral language even when it is used. But the remissive view has taken on a strength of its own, and it not only is promoted by, but itself helps promote, the reluctance to speak in moral terms.

More broadly, I have argued in this section that moral discourse is being displaced in broad swaths of American life, and that this sea change in the way moral ideas and language are used and perceived helps account for the displacement of moral discourse in family law. A reasonable response to this argument is that moral fervor is hardly dead in the United States. Elements of the political and religious right have contended for a re-moralized view of the family. And many of the left's causes—tolerance, multiculturalism, or environmentalism, for instance—are both based on moral ideas and embraced in what its critics consider moralistic ways.\textsuperscript{105} Let me now briefly explain why all this is not inconsistent with the argument I have been making.

Parts of the right have certainly championed revitalizing moral language in our discourse about family affairs. But I have never purported to describe all the thought of every aspect of American society. The "revised view" on which I have concentrated has its home primarily toward the left of the political spectrum and in social strata which are not predominantly the province of the

\textsuperscript{104} In the discussions, I labored to make that point. My most frequent formulation of the question was: "What should Mr. Appleby have said to himself when he was trying to decide whether getting a divorce would be the right thing to do?"

\textsuperscript{105} I use "left" and "right" and "liberal" and "conservative" with pained reluctance and very much \textit{faute de mieux}. These terms have assumed such varied meanings over time, and have acquired such inflammatory connotations, that they would be worse than useless if some more satisfactory alternatives were at all available.
right. In addition, the adamancy and strength of the right on these questions should not be over-estimated. Politically, for example, despite what seemed like imposing electoral power and twelve years of Republican presidents, the right’s “social program” remains scarcely advanced. Culturally, the revised view is gaining ground quite broadly. There is, for example, striking evidence it is making inroads even among what one would have thought were the most steadfast exponents of giving moral ideas and language pride of place—Evangelical Christians.

One remarkable measure of the social proliferation of the revised view is to be found in the talk shows of the Phil Donahue, Geraldo Rivera, Sally Jessy Raphael, Montel Williams, Maury Povich, Ricki Lake, Oprah Winfrey, Bertice Berry, Jerry Springer, Jenny Jones ilk which pervade daytime television. I do not think that one can fully understand contemporary American culture without watching these exhibitions. To a remarkable extent, their participants exemplify the moral assumptions that characterized the Appleby discussions and that underlie what I have called the revised view. The guests have frequently done morally questionable, and even unquestionably immoral, things. They are apparently not ashamed to show their faces on national television. Indeed, they often defend themselves. What is more telling is the nature of their defense and the reaction of the host and the audience.

The defenses (at least those not based on wrangling over facts) are of two kinds. The first claims that the behavior in question was not wrong. Sometimes this argument is statistical: more people do what I have done than you think, so many that it must not be wrong. At other times, the argument calls on some version of moral relativism: you think what I did was wrong, I think it was right, and who is to judge between us? The second kind of defense admits that the behavior is in some sense dysfunctional, but claims that it was caused by environmental factors (I abused my children because I was abused as a child), that it was not within the person’s controls (I couldn’t help what I did), and that it is now being dealt with therapeutically (I am in counseling, I see my support group regularly). Even the guest’s appearance on the show often has therapeutic implications, since self-examination gives the guest insight, and since the guest’s display instructs other sufferers of the guest’s

106. See the material cited in note 9.
107. I discuss this point at greater length in Schneider, 83 Mich L Rev at 1870–75 (cited in note 1).
ailment in the normality of the disease and the road to recovery.

The reactions of the audience and the host similarly reflect many of the attitudes toward moral reasoning which characterize what I have been calling the revised view. To be sure, audiences generally contain censorious members. But at least as common—I would say much more common—are people who rise to urge the danger of value judgments, the virtues of tolerance, the merits of nonconformity, the power of environmental forces and psychological drives, and the benefits of therapy. They sit down to a considerable degree of applause. The hosts, of course, are there to keep things lively, to spur revelation, and to spark emotion. And there is certainly some variation among the hosts. Nevertheless, much of the time their implicit and often even explicit position is that “lifestyles” are matters of personal choice, that criticism of such choices is at least presumptuous and possibly perilous, and that interpersonal conflict is best resolved therapeutically.

These attitudes are evinced, inter alia, by the hosts’ very telling choice of an expert to appear after the guests and audience have said their pieces. These experts comment on the guests’ stories, expound on the broader issues those stories raise, and recommend personal and social solutions to the problems presented. These experts are overwhelmingly therapists of some description. They are professionally committed to avoiding moral discourse. The closest they come to making moral distinctions is when they criticize the audience for judging the guests and the guests for failing in the therapeutic virtues—interpersonal and therapeutic honesty, self-revelation, commitment to therapy, and tolerance.

In short, the revised view probably flourishes most successfully in the kinds of social strata my students typify—well-educated, well-heeled, politically liberal, socially liberated. But that view affects all of society. It is a cultural force with which everyone must contend, which has to some degree at least been incorporated into American popular thought and practice. This is the lesson of the talk shows. Their guests seem if anything to be largely lower-middle and working class. The studio audiences appear to be middle-middle class. The expert guests are middle-middle to upper-middle class. The hosts are cultural icons. And the shows are watched by millions upon millions of people. These dramas, then, both exemplify and promote the cultural success of the revised view.

But what of the proponents of the revised view? They can hardly be called morally passionless. And as their moral criticism of morality as immoral shows, my students are not thorough-going moral relativists. Indeed, the moral beliefs they hold they often hold passionately. How then, can I say that they are skeptical of moral ar-
argument? For one thing, those passionate moral beliefs are significantly limited, for they are perhaps predominantly about non-discrimination. My students’ very distrust of distinctions between people rests on deep moral beliefs about human equality. This skepticism is most forcefully felt as to distinctions based on category, particularly race, ethnicity, and gender. It also emerges in demands for governmental regularity, for due process and non-discrimination. On these subjects, my students can be fervent, fierce, and even moralistic.

The other idea that stirs moral fervor in the revised view is the principle of autonomy. That principle might be supposed to open the way to a full-fledged system of morality, to structuring human relations in a fairly thorough way. But however plausible such an extension of the autonomy principle might be, it is not, I think, the primary direction in which the principle has been taken in popular culture. In its popular form, autonomy finds its primary drive not in a set of moral obligations growing out of the ideas about human dignity on which the principle draws, but rather in a set of ideas (exemplified in the Appleby discussions) about liberation from social constraint. And the principle finds its most prolific popular expression in the language of rights. These ideas and that language, it need hardly be said, have a crucial moral basis and, as I have tried

109. Kekes wryly comments,

As to moralizing, only the convictions of a previous generation can seem to be overstated in the opinion of its children. The relentlessly labored contemporary opinions about ecology, equality, racism, and commercialism cannot, apparently, be moralizing. Our parents mutter tu quoque as they turn in their graves. And if we shall complain likewise about our children, then all is well, for the moral life of our society is going as it should.


For some in the progressivist alliance, moral ambiguity itself acts as an absolute of sorts . . . . [S]ometimes the ideal of tolerance assumes a kind of dogmatism of its own. For many progressivists, intolerance is utterly intolerable, and should be met with an equal measure of vehemence. The progressivist communities find it difficult to tolerate positions that are considered choice restrictive and thus “intolerant.”

Hunter, Culture Wars at 154 (cited in note 9). Indeed, Hunter suggests that now “the conflict is in large part about whose definition of moral parochialism (and, therefore, what is tolerable and intolerable) should prevail.” Id at 156.

Here I should perhaps say again that my primary interest in this Essay is not with high culture, but with more popular attitudes. Sophisticated thought has long since recognized the frailty of moral relativism as a basis for liberal tolerance. As Joel Feinberg writes, “The liberal had better beware of ethical relativism—or at least of a sweeping ethical relativism, for his own theory is committed to a kind of absolutism about his favorite values.” Joel Feinberg, Harmless Wrongdoing 305 (Oxford U Press, 1988).
to show, are wielded with significant moral effect. But the structure of privacy rights—for these are the rights most commonly at issue in family law—is designed exactly to shield moral relations from scrutiny and discussion.110

For our purposes, what is significant about the elevation of non-discrimination and even, to some degree, autonomy to overriding moral importance is exactly that they are so little relevant to most family controversies. They create predominantly a morality for public, not private life.111 The human capacity for cruelty, rapacity, and betrayal is hardly limited to the various forms of discrimination with which the revised view is importantly concerned. Even if, for example, we lived in a society in which misogyny were unknown and in which men and women operated from positions of equal strength, the intricate and intimate relationships within families would furnish abundant opportunities for husbands and wives and parents and children to injure each other. The non-discrimination principle and, to a lesser extent, the autonomy principle, then, contribute to a morality based more centrally on ideas about (one kind of) social justice than about personal relations. Indeed, many of their proponents in popular discourse do not regard them as moral arguments, and would not be pleased to be told that that is what they are.

In sum, the trend away from moral discourse in family law has been driven by the forces I described in Moral Discourse: the tradition of liberal individualism, the legal tradition of non-interference in the family, changing moral beliefs, and the rise of the therapeutic society. These forces interact with and reinforce each other, and together with other social and intellectual forces, they give rise to yet another factor in the diminution of moral discourse: a broad distrust of moral argument in general. It is a distrust that defines "moral" in narrow terms, regards moral arguments as insufficiently founded in reason, and fears the misuses to which moral reasoning has been and may be put. Combined, all these forces help explain both the waning of moral discourse in family law and the prosperity of no-fault divorce. And they suggest that the trend away from moral discourse has such potent and pressing causes that it will continue to remain a critical force in American family law.

110. Schneider, 76 Cal L Rev. 151 (cited in note 40).
111. As Joseph Raz notes, "Influential voices among political theorists argue for the existence of a relatively independent body of moral principles, addressed primarily to the government and constituting a (semi-)autonomous political morality." The Morality of Freedom 4 (Oxford U Press, 1986).
IV. SOME REMARKS ON THE WANING OF MORAL DISCOURSE IN FAMILY LAW

[A]s licentious as I am thought to be, I have in truth observed the laws of marriage more strictly than I had either promised or expected. It is no longer time to kick when we have let ourselves be hobbled. A man must husband his freedom prudently; but once he has submitted to an obligation he must keep to it under the laws of common duty, at least make an effort to. Those who make this bargain only to behave with hatred and contempt act unjustly and harmfully. . . . If a man does not always do his duty, at least he must always love and acknowledge it. It is treachery to get married without getting wedded.

Michel de Montaigne  
On Some Verses of Vergil

What ought we make of the changes in family law's moral discourse and of no-fault divorce which exemplifies it? Ultimately, no-fault divorce was inevitable. As I have tried to show, cultural views about marriage, divorce, and morality had changed so much that the law had to respond by loosening the bonds of matrimony. In the intervening years, those sentiments and that need have only become more pronounced. Therefore, I cannot see how the law can turn back from no-fault divorce in any truly substantial way.

But why should it want to? However limited its original aims and however inadvertent its eventual scope, no-fault divorce has over the last quarter of a century acquired a significant moral rationale, a rationale this Essay has substantially been devoted to describing. Is no-fault divorce, then, not only necessary, but desirable? And is the same not true of the waning of moral discourse in family law? In this Essay on no-fault divorce, I cannot fully assess all the consequences of all the changes in the way the law discusses moral problems. But several things need to be said about the developments I have delineated. I will begin by sketching some of their advantages in the context of divorce law.

A. Some Advantages of the Trend

Not even the intercourse of the sexes is exempt from the despotism of positive institution. Law pretends even to govern the undisciplinable wanderings of passion, to put fetters on the clearest deductions of reason, and by appeals to the will, to subdue the involuntary affections of our nature. Love is inevitably consequent upon the perception of loveliness. Love withers under constraint; its very essence is liberty; it is compatible neither with obedience, jealousy, nor fear, it is there most pure, perfect, and unlimited, where
its votaries live in confidence, equality, and unreserve.

John Milton
The Doctrine and Discipline of Divorce

First, there was much to regret in the law's traditional moral discourse about divorce. That discourse was flawed for reasons that run deep in the nature of law. The categories the law employed in that discourse were too often crude and inapt. The problem was partly that those categories sometimes seemed anachronistic—too much concentrated on sexual morality, too little concerned with the full range of ways spouses can betray a marriage, too much based on now-obsolete ideas about gender. But the development of more contemporary moral categories has been impeded by the tendency I have been describing away from analyzing interpersonal problems in moral terms. The most serious and prolonged legal attempt to create such a category was the rise of cruelty as a ground for divorce. But that category was quite overwhelmed by pressures on courts to use it as a default category to justify any divorce.

In addition, the moral relations of people who have been dealing intimately and extensively with each other over a long period are commonly so byzantine, so baroque as to resist analysis even under the best of circumstances. But the law does not work under the best of circumstances. It must try to propound moral rules that are simultaneously broad enough to cover the multiplicity of circumstances likely to arise in marriage and yet precise enough both to be applied in the day-to-day work of the law and to deter abuses of discretion. It must try to handle each case expeditiously and efficiently. These requirements often conflict with the goal of satisfactorily understanding the moral relations of the divorcing couple.

Further, the quality of a discussion of the moral problems a case presents will depend in part on the adequacy of the evidence the parties can muster. Litigants of all kinds regularly have trouble providing a truly reliable evidentiary base. In divorce proceedings, however, the evidence is specially likely to be unsatisfactory. The parties will rarely have kept records of the disintegration of their marriage, and their memories will hardly have been improved by the bitterness common in divorce proceedings and by the many

112. For a hilarious description of some of those categories and a marvelous attack on the traditional law of divorce, see A.P. Herbert, Holy Deadlock (Doubleday, 1934).

incentives for self-serving recollection such litigation provides. What is more, the husband and wife will generally have established their own categories for analyzing their marriage, categories that shape their perceptions, recollections, and explanations of what happened during it. Indeed, "the motives people use[ ] to explain their divorces can only be understood as rhetorical devices that impose[ ] a sense of order onto situations that were otherwise fraught with ambiguous and contradictory events, emotions, and inclinations toward behavior." 114

A further problem any moral discourse of divorce law must confront is suggested by a passage from Holmes:

The degree of civilization which a people has reached, no doubt, is marked by their anxiety to do as they would be done by. It may be the destiny of man that the social instincts shall grow to control his actions absolutely, even in anti-social situations. But they have not yet done so, and as the rules of law are or should be based upon a morality which is generally accepted, no rule founded on a theory of absolute unselfishness can be laid down without a breach between law and working beliefs. 115

The problem is that a moral discourse about marriage would presumably articulate an aspirational morality, even if not "a theory of absolute unselfishness." But a level of aspiration high enough to comport with our social ideals for marriage is likely to set too high a standard for use in divorce courts. And a standard satisfactory for the latter purpose would sadly disappoint the former.

I have been saying that one advantage of the trend away from moral discourse in family law is that there was much to regret in the law's moral discourse about divorce. But there is a second advantage to that trend. Even if a court's analysis of the moral basis for a divorce claim could be firmly grounded in an adequate view of the moral issues the claim raised and could be satisfactorily addressed by the evidence the parties presented, we still might not want that analysis performed. We live in an age in which social standards of privacy are wretchedly degraded (as my discussion of television talk shows may remind us). All the more reason, then, to avoid situations in which the most intimate and agonizing details, the least admirable moments, of people's lives are hauled out for public scrutiny and comment. Even if the parties do not mind, we

should not want to make social tolerance for breaching the barrier of privacy any greater than it already is. Sufficient unto the day is the evil thereof.

A third attraction of the trend away from moral discourse arises from the fact that many couples, most pressingly couples with children, will need to deal with each other productively after their divorce. The very fact that their marriage has collapsed suggests that the divorcing couple has had trouble getting along. And, as Hopper observes, “studies have noted that most divorcing people describe their divorces as non-mutual.”\(^{116}\) Even where both spouses have entertained the idea of divorce, the decision of one to initiate it tends to lead the other to oppose it, thus further setting the parties at odds. When the marriage has been disharmonious and the divorce contentious, the parties will hardly be well-prepared to cooperate with each other after their divorce. Their relations with each other and—what is more, with their children—are likely to be much smoother if their divorce was not made rockier by a protracted and all-too-memorable exchange of moral accusations and recriminations.

These drawbacks of moral discourse in divorce law are, of course, familiar. They are among the traditional justifications for no-fault divorce. I reiterate them here because they are also recurring problems with moral discourse in family law. It is, for example, frequently difficult to articulate moral rules that are sufficiently complex to take the full range of spousal interactions into account, and to amass enough satisfactory evidence to use in applying those rules. This is one reason modern marital-property law resigns itself to calling vaguely for an “equitable” distribution of the spousal assets, why the common-law marital-property system contented itself with a fairly crude principle of following title, why child-custody law has made such extensive use of the best-interest principle, and why the criminal law has proved an awkward tool with which to attack spousal abuse. Similarly, a reluctance to breach familial privacy has led to high thresholds before a moral analysis may be undertaken even in areas as urgent as the law of child abuse and neglect. And the fear that a legal contest over moral issues might exacerbate tense spousal relations has historically discouraged courts from adjudicating economic disputes between husbands and wives and even today may be deterring courts from accepting more eagerly spousal contracts regulating relations during a marriage. For all these kinds of familiar reasons, moral discourse in family law is

\(^{116}\) Hopper, 55 J Marriage & Family at 805 (cited in note 114).
clumsy and costly. On the other hand, exactly because these problems are so familiar, and so widely acknowledged, I do not think I need dwell on them at length, but rather can move on to examine the other side of the equation.

B. Some Costs of the Trend

He reddened under the retort, but kept his eyes on her. “May is ready to give me up.”

“What! Three days after you’ve entreated her on your knees to hasten your marriage?”

“She’s refused; that gives me the right—”

“Ah, you’ve taught me what an ugly word that is,” she said.

Edith Wharton

The Age of Innocence

Because the costs of trying to deal with family law problems in non-moral terms are less often noticed than the benefits, I will devote the rest of this paper to them. These costs vary from rather practical dilemmas in constructing a system of legal regulation to some of the most basic quandaries of human society. However, it may be fair to say that they primarily grow out of the near tautology that, when moral discourse is withdrawn from the law, the law can become morally shallow. In the discussion that follows, I will try to show why the shallowness of the law’s moral view of marriage and divorce might matter.

1. Moral Discourse and the Work of Family Law

We, at great peril only, drift into legal rules which diminish the taste for beauty or for the unspoiled. We always must be on guard that those allocations which lessen short run costs by reducing moralisms or offense do not mindlessly lead us, in the long run, to tastes and values which today we would find appalling.

Guido Calabresi

Ideals, Beliefs, Attitudes, and the Law

Some of the costs of the waning of moral discourse in family law, and particularly in divorce law, relate to the practical difficulties that development presents for the day-to-day work of the law. This change in its language affects the way the law speaks to and understands the people whose attitudes it seeks to shape, whose be-
behavior it seeks to regulate, and whose disputes it seeks to adjudicate. For one thing, the law cannot easily escape the need to adopt and apply a moral theory of marriage. Perhaps the law does not need such a theory to decide whether a couple should be allowed to divorce, for it may say—as it has said—that the morality of the divorce is for the couple (or, more accurately, the spouse seeking a divorce) to determine. But this solution is less satisfactory where the question is whether one spouse owes the other alimony or how the spouses’ property should be divided. In such situations, the law cannot escape the burden of decision (except by requiring the parties to arrange for the resolution of such disputes by contract). The law therefore needs principles for resolving those conflicts, and such principles ultimately must rest, in part, on some understanding of the moral nature of marriage.117

The gravitational pull of no-fault divorce, however, has exacerbated the trend away from moral discourse and left the law of alimony and marital property unsupported by any satisfactory moral understanding of marriage. The only practical way of relieving the law of the burden of those decisions is, as I just observed, to require spouses to arrange their affairs contractually before (or at least during) the marriage. For good reasons, courts and legislatures have hesitated to do so.118 And even if couples could be persuaded or compelled to arrange their post-marital economic relations contractually, the law would probably still need a theory of marriage with which to evaluate the conscionability of those contracts.119

Moral discourse serves another practical purpose in the quotidian work of family law. If the law is to operate predictably and fairly, it needs to stay in some kind of contact with the assumptions on which people base their lives. Many people do, despite everything, take moral considerations into account in conducting their mar-

117. For a fuller exploration of this problem in the context of alimony, see Schneider, 1991 BYU L Rev 197 (cited in note 2). The trend toward the “equitable distribution” of marital property seems on its face to invite a judicial examination of the parties’ moral relations. The cases, however, do not seem to indicate that this is what is happening. And even if it were happening, it would be uninformed by a satisfactorily developed and articulated moral understanding of marriage.

118. For extensive examinations of those reasons, see Carl E. Schneider, Family Law (forthcoming); and Regan, 1994 Utah L Rev 638–50 (cited in note 3). For some doubts about those reasons, see Weisbroad, 1994 Utah L Rev 777 (cited in note 63); and Scott, 1994 Utah L Rev 687 (cited in note 63).

119. Similarly, the law needs a theory of the relationship between parents and children if it is to act wisely in, for example, establishing the obligations of noncustodial parents to their children and deciding questions of child custody. Similarly, the law needs a theory of what a family is in order to analyze “functional-family” proposals intelligently.
riage, and a law that tries to listen to their descriptions and explanations of their marriages with an ear deaf to their moral language will misconstrue what they are saying. Furthermore, couples will to some extent expect the law to take their moral relations into account, and they will base decisions on that assumption, however mistaken it may be. A law that is out of touch with common social practices and beliefs will thus lead too often to situations in which people misunderstand the law and the law misunderstands people.

2. Family Law and Human Nature

In short, we repudiated all versions of the doctrine of original sin, of there being insane and irrational springs of wickedness in most men. We were not aware that civilisation was a thin and precarious crust . . . only maintained by rules and conventions skilfully put across and guilefully preserved. We had no respect for traditional wisdom or the restraints of custom . . . . It did not occur to us to respect the extraordinary accomplishment of our predecessors in the ordering of life (as it now seems to me to have been) or the elaborate framework which they had devised to protect this order.

John Maynard Keynes

My Early Beliefs

I have been describing some practical problems that arise when family law loses a moral vocabulary with which to handle the analytic problems and social realities it confronts. But I want to raise a more basic concern about the trend away from moral discourse in family law, one which seems to me at the heart both of that trend and that law. I have suggested that that trend is associated (although not exclusively associated) with what I have called the re-

120. See, e.g., Regan, 1994 Utah L Rev at 636–38 & n.156 (cited in note 3). I do not think this observation is at all inconsistent with the argument I have been making. First, as I have said before, I have never purported to be describing all the discourse of all Americans. Many people continue to think and talk about many matters in moral terms. Second, as I will say in Part V, people do not always act the way they talk. Some people appear to talk as though moral considerations were immaterial, but to behave quite differently. This is hardly surprisingly when one considers that few areas of life have been as intensely moralized for as long as family relations. It would be surprising if moralized understandings of family relations did not retain considerable residual power. Third, it is easier to see the force of a moral argument when it is applied to another person. In marriage, the other person is generally there to remind one of that force. Thus in (even informal) marital negotiations moral ideas may loom large.

121. For a more complete statement of this point, see Schneider, 1991 BYU L Rev at 244 (cited in note 2), and Riessman, Divorce Talk at 22–23 (cited in note 114).
vised view, with, that is, the kinds of ideas about marriage, divorce, and morality which have become increasingly prevalent and potent in recent decades and which I have used the Appleby discussions to exemplify. Those ideas rest, I believe, on what Dennis Wrong calls a "complacently positive attitude toward human nature, social order, and social conformity." 122 This attitude is not monolithic, and it is not consistently held, if only because few people think explicitly, much less systemically, about the basic tendencies of human nature. But there is in popular modern belief, at least, a powerful if unarticulated assumption that people are basically inclined to behave well and thus that they can safely be relieved of social constraint in making choices. This view of human nature is more consequential than students of family law have generally acknowledged. As Tocqueville commented: "It can hardly be believed how many facts naturally flow from the philosophical theory of the indefinite perfectibility of man or how strong an influence it exercises even on those who, living entirely for the purposes of action and not of thought, seem to conform their actions to it without knowing anything about it." 123

Keynes provides an especially vivid description of the benignant view of human nature that I am describing. In explaining his youthful repudiation of "customary morals, conventions and traditional wisdom," he says that "it was flimsily based, as I now think, on an a priori view of what human nature is like, both other people's and our own, which was disastrously mistaken." 124 Keynes and his friends "repudiated all versions of the doctrine of original sin, of there being insane and irrational springs of wickedness in most men." 125 They believed instead "in a continuing moral progress by virtue of which the human race already consists of reliable, rational, decent people, influenced by truth and objective standards, who can be safely released from the outward restraints of convention and traditional standards and inflexible rules of conduct, and left, from now onwards, to their own sensible devices, pure motives and reliable intuitions of the good." 126

123. Tocqueville, 2 Democracy in America at 35 (cited in note 28).
124. Keynes, My Early Beliefs at 252-53 (cited in note 81).
125. Id at 253.
126. Id. "A similar assumption, of course, underlies some of our best writing of the last seventy-five years, in which the hero of literature has regularly been conceived as someone whose special endowment of sensitivity or imagination or spirit puts him beyond the reach of ordinary moral imperatives." Diana Trilling, The Image of Women in Contemporary Literature, in The Woman in America 57 (Robert J. Lif-
Keynes considered his friends "the last of the Utopians, or meliorists as they are sometimes called." As Keynes knew when he wrote, he was describing opinions formed before the First World War and before the proliferation of Freudian thought. As he did not know, he was writing just a year before the Second World War. But despite the chilling and chastening lessons of those wars and that thought, the view of human nature Keynes details continues to command allegiance. Some of its appeal persists from America’s long-standing optimism and faith in human progress. Tocqueville remarked in the 1830s that the "idea of perfectibility is . . . as old as the world," but that American thought has "imparted to it a new character." The appeal of the optimistic view of human nature also finds a vital source in the therapeutic ethos. Popular psychology has transmuted Freud’s leaden forebodings into golden hopes. In common parlance, *Civilization and its Discontents* must bow to *I’m O.K., You’re O.K.* In much popular therapeutic thought, "dysfunctional" behavior is due not to any rapacity in human nature, but to poorly structured social environments. And that thought offers its own hopeful answer even to such dysfunction in the form of psychological therapies.

Once again, an apt measure for the social authority of this view is its power in religious thought. Speaking historically, Lovejoy could write, "Of most Western religion, Greek, Hebrew and Christian, the lowering of man in his own eyes, it may on the whole be said, has been the first, though not always the final, concern . . . ." In late-twentieth-century America, however, Witten finds that, in the sermons which addressed the issue, "human nature is either presented as thoroughly good or an unbalanced admixture of good and bad, with good prevailing." Contemporary American Christianity is much likelier to see human beings as made in God’s image than as creatures of the Fall, to interpret human misery in terms of the Social Gospel than in terms of human weakness, and to evoke the heirs of Sigmund Freud than the descendants of John Calvin.

I do not at all want to suggest that this benignant understanding of human nature prevails uncontested even in the revised view. The last few decades have repeatedly produced lamentations about

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130. Witten, *All Is Forgiven* at 110 (cited in note 29).
the iniquities of a “me generation,” about the triumph of “greed,” about the decline of “caring.” The debate over these subjects “re­capitulates and often caricatures a significant chapter in the intellec­tual history of the modern period: the broad transition from ortho­dox notions of human nature in Western religious and political thought—that of *homo homini lupus*—to more genial Enlighten­ment views . . . .” 131 In the revised view, the possibility of human evil has come to be centrally represented in racism, along with prejudices of every description. And among family law issues, incest and domestic violence have achieved unparalleled social visibility.

But these darker visions do not, I think, lead the revised view to reject an essentially hopeful picture of human nature, for ulti­mately misbehavior is ascribed to reformable social circumstance rather than individual character or even the irreducible tensions of social life. Domestic violence may thus be transformed into a prob­lem of people immured in poverty, misery, and oppression respond­ing to the strains of such a life by lashing out at their families. Or again it may be transformed into a problem of psychological dys­function caused by parental errors and animus in child-rearing. In addition, the revised view tends to understand the problem of hu­man nature not so much in terms of morals as in terms of justice. Domestic violence is transformed from a problem of individual peo­ple behaving badly into a problem of a dominant class of people—men, or adults—abusing the rights of oppressed classes of peo­ple—women, or children. It is not man’s inhumanity to man that makes countless thousands mourn; it is men’s inhumanity to wom­en and adults’ inhumanity to children. Furthermore, the solutions to the problems of domestic violence are thought to lie more promis­ingly in the direction of basic political or social reordering than moral reformation, and of therapy than morality. 132 At base, in

131. Clecak, *America’s Quest for the Ideal Self* at 268 (cited in note 35). Clecak’s illuminating study is a helpful corrective to such often-simplistic lamentations.

132. Let me recount one example of this reluctance to think about sanctions in moral terms. If there is any family-law subject about which students express moral feeling, it is domestic violence. In teaching a class on spousal battery, I suggested that, given the inadequacy of conventional responses to such crimes, we should add to the law’s armory of responses Braithwaite’s proposal “that the key to crime control is cultural commitments to shaming in ways that I call reintegrative.” John Braithwaite, *Crime, Shame and Reintegration* 1 (Cambridge U Press, 1989). Virtually no one thought this a good idea; most students were horrified. The reasons for their horror clearly had to do with the proposal’s use of “terms which connote moral indig­nation,” id at viii, its willingness to assign public moral blame, and its failure to make social restructuring and individual therapy central. My students objected that the proposal is “stigmatising,” as in part it is (though Braithwaite intends that the stigma not be permanent). Like “morality,” “discrimination,” and “punitive,” “stigma”
other words, the revised view tends to understand domestic violence more readily as a manifestation of an improperly ordered society than as further evidence of the Fall, and to find solutions more easily in social restructuring than in social regulation. The fault, dear Brutus, lies not in our selves, but in our society.133

Not only does at least a central strain of the revised view see human nature as basically benign; it sees society's impositions and constraints as a source of, not a solution to, human misconduct.134 Combined, these two notions do a good deal to explain the way the revised view approaches the regulation of family life. That approach resembles the classical liberal regulation of economic life. It assumes that people know what is best for themselves; that left to their own devices, they will negotiate with other people to secure what is best for themselves; that part of knowing what is best for yourself is knowing what and who may be harmful and how to protect yourself from harm; that people are responsible, and ultimately solely responsible, for looking after themselves; and that an invisible hand will secure the maximum possible human happiness from the sum of all these individual decisions and interactions. This set of assumptions is made more plausible and less perilous by the

has undergone a telling change in meaning. "Stigma" once could be used to describe a legitimate social condemnation. Now the word has largely negative connotations and is associated with unfair disapproval and even racial prejudice.

133. Thus the currently popular "family preservation" approach to child abuse and neglect "adopts what Richard Gelles . . . calls a 'compassionate approach to maltreatment.' It views abusive parents, Gelles says, as victims themselves. It sees the cause of child abuse and neglect in the personal history and current circumstances of the abuser, not in the character of the abuser himself." Heather Mac Donald, The Ideology of "Family Preservation," 115 Pub Interest 45, 47 (Spring 1994). And thus the remedy the family preservation approach proposes is generally to provide families with services and, "according to the Clark Foundation, . . . to counsel the abusing or neglectful single mother 'to the point of self-acceptance, so that she understands that she and her children are a valid family, too.'" Id at 58.

134. Schneider, 83 Mich L Rev at 1849-50 (cited in note 1). This corruption of Freud has achieved considerable social power, especially in regard to sexual repression, partly under the influence of figures like Kinsey, who "sought above all else to separate human sexual experience from its elaborate emotional associations . . . . Only when repressed did sexual urges threaten emotional stability . . . ." Paul Robinson, The Modernization of Sex: Havelock Ellis, Alfred Kinsey, William Masters and Virginia Johnson 194 (Harper & Row, 1976). More broadly, it is often thought that psychological success leads to moral success. "Thus Abraham Maslow assumes that self-fulfillment naturally leads to an altruistic concern for others. As self-actualizing people gratify their needs for belonging, affection, and respect, Maslow argues, the idea of the self becomes enlarged 'to include aspects of the world.' They become interested in 'seeing justice done, doing a more perfect job, advancing the truth,' and their goals become 'transpersonal, beyond-the-selfish, altruistic satisfactions' . . . ." Cancian, Love in America at 185 (cited in note 36).
belief that people are at heart well disposed to each other.135

But it should not require, and historically has not required, the savage lessons of the twentieth century to understand why the benignant view of human nature is "disastrously mistaken."136 People are driven by too many interests they cannot deny, too many feelings they do not understand, too many passions they cannot control, too many temptations they will not resist. Selfishness, lust,

135. For a much more modulated and sophisticated attempt by an economist to explain why altruism may be in one's self-interest, see Robert H. Frank, Passions Within Reason: The Strategic Role of the Emotions (W.W. Norton, 1988).

136. Thus Aristotle believed that

[living under the dictates of passion, they [most people] chase the pleasures fit for such natures and the means of gratifying them, and they shun the pains which are the opposite of those pleasures. But the honourable and the truly delightful—of that they have no conception . . . .

The Ethics of Aristotle 310 (Penguin, 1953). Thus St. Paul wrote that he was carnal, sold under sin . . . . For I know that in my (that is, in my flesh,) dwelleth no good thing: for to will is present with me; but how to perform that which is good I find not. For the good that I would I do not: but the evil which I would not, that I do.

Romans 7:14, 18-19 (King James version). Thus Voltaire expostulated that

[men in general are foolish, ungrateful, jealous, covetous of their neighbor's goods; abusing their superiority when they are strong, and tricksters when they are weak . . . . Power is commonly possessed, in States and in families, by those who have the strongest arms, the most resolute minds and the hardest hearts. From which the moralists of all ages have concluded that the human species is of little worth; and in this they have not departed widely from the truth.

Dieu et les hommes, quoted in Lovejoy, Reflections on Human Nature at 6 (cited in note 129). Thus Freud warned that

men are not gentle creatures who want to be loved . . . . [Their neighbour is for them not only a potential helper or sexual object, but also someone who tempts them to satisfy their aggressiveness on him, . . . to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and to kill him. Homo homini lupus.

Sigmund Freud, Civilization and its Discontents 65 (W.W. Norton, 1961). And thus, as James Q. Wilson concludes, every society has tried to curb our elemental, and thus our especially powerful, passions. The clear implication is that learning, culture, norms—all of the components of the social bond—are quite precarious, for they are contrivances, not instincts, created for collective but not individual advantage and maintained by creaky and uncertain institutions rather than by powerful and always-present emotions.

Wilson, The Moral Sense at 24 (cited in note 12). Thus, as Harpham observes, [n]o matter how hedonistic, materialistic, self-indulgent, wicked, or atomistic they may be, all cultures impose on their members the essential ascetic discipline of "self-denial," formulated by the Christian ascetics as the resistance to what Augustine calls "nature and nature's appetites."

sloth, pride, envy, and cruelty are ineradicable human failings. And "at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can." This self-preference, however legitimate it may be, all too easily stretches beyond the justifiable, as people become judges in their own cases. Even people who are essentially good and not evil, well-disposed and not malevolent, kind and not cruel cannot easily escape disappointing and even injuring their fellows. As Elizabeth Scott observes, "In most marriages, even successful ones, one or both spouses will on occasion be tempted to engage in uncooperative behavior. The values of care, commitment, and responsibility translate into choices that may seem to offer remote rewards and high immediate costs." "We are all of us," George Eliot concludes, "born in moral stupidity, taking the world as an udder to feed our supreme selves . . . ."

To be sure, human nature is no more purely vicious than it is purely virtuous. "Malice and philanthropy, greed and generosity, selfishness and altruism, hostility and friendliness, aggression and gentleness exist in juxtaposition to each other." And to be sure, much human indifference, self-seeking, and brutality is sparked by social circumstances and may be moderated by social reform. But there will persist "insane and irrational springs of wickedness in most men." And people's motives are tinctured and tainted with a self-interest that is easily perverted but not readily constrained. Society can never be organized so edenically as to obviate those drives; even Eden was not.

Both the likelihood of misbehavior and its costs may be particularly great in family life, for there people are most impelled to behave badly, and there people are most vulnerable. Because people's deepest emotions are engaged in their familial relations, what happens in their families will matter most fiercely to them, so that there they have specially strong incentives to act wantonly to get what they want. The emotions that provoke them to do so are exactly those that people recognize with the most difficulty, that they understand least, that are least subject to rational calculation, that are the hardest to subdue. In family life, people are also least inhibited, for familial relations are precisely those in which we expect

freedom to be most ourselves, where diffidence and constraint are least necessary, where we are shielded from the world’s critical scrutiny, where transgressions are most readily forgiven.

Further, people are most vulnerable in family life. Exactly because people’s deepest and richest emotions are engaged, they are most susceptible to injury. Family members depend on each other for love, reassurance, comfort, and protection. They assume that they can trust each other. This trust is all too easily betrayed, and betrayed at special cost. What is more, the standard of behavior in family life is high. Family members expect more of each other than non-maleficence. They trust each other to be kind, generous, appreciative, and even selfless. And the betrayal of even that extraordinary trust can cut deeply ("How sharper than a serpent’s tooth it is/To have a thankless child!"). In short, the very privacy, intimacy, and passion that make family life most valuable also make it the place where people have the strongest temptations to harm each other, and where doing so is most injurious. "Then I saw that there was a way to hell, even from the gates of heaven."

3. Family Law and Social Norms

"The perduring message," Robert Edgerton writes, "is the same: if humans are to succeed in adapting to one another and to the environments in which they live, they must devise social and cultural mechanisms to control certain aspects of their biological nature." If human nature and family life are as Edgerton suggests and I have described them, people need somehow to be discouraged

141. Edgerton, Sick Societies at 61 (cited in note 15). He adds, "It is self-evident that no population has yet done so with complete success." Id.
from injuring each other within families. How is this to be done? Obviously I cannot here fully answer that question, even if I—or anyone—knew how to. But I can make some comments about how to proceed that relate to our problem of moral discourse in family law.

To begin with, we need to act cautiously and carefully. First, we must realize that there are limits to how well we can hope to constrain injurious behavior, as there are to any substantial social goal. For just the reasons I have been describing, people will always hurt each other in families. No family is perfectly harmonious; some families will always be wretched. No set of remedies can ever obviate this inescapable fact, however much we might wish it otherwise. Second, some forms of family injury are more serious than others, and some forms will not be great enough to evoke a social response. As James Fitzjames Stephen aptly warned, “A very large proportion of the matters upon which people wish to interfere with their neighbours are trumpery little things which are of no real importance at all. The busybody and worldbetterer who will never let things alone, or trust people to take care of themselves, is a common and contemptible character.”142 Third, like any large social undertaking, reducing cruelty within families exacts costs. These are costs not just in the administrative and social apparatus needed, but in human privacy and liberty. We will never do all we might to prevent people from harming each other within families because we want people to be able to act freely in them, to organize their own lives, and to escape the glint of the public eye. For all these reasons, whatever we do will be partial and problematic, will be a series of compromises of the commanding but conflicting goods we wish to attain. The best will sometimes be the enemy of the good, and an undue perfectionism will be a danger meticulously to be avoided.

But by what means may we try to temper the harms people do each other in families? Of course, family law directly addresses some of the problems I have considered through its protective function, which “effectuates the law’s duty to protect citizens against the various harms that might befall them, and particularly to protect them from injuries done them by other citizens.”143 Thus, for example, we criminalize spousal assault. We use both civil and criminal remedies to compel parents to support their children. We may criminally punish parents who seduce, brutalize, or neglect their

children, and we may also remove those children from their parent’s home.

In addition, the law of divorce and its consorts, the law of alimony and marital property, were historically used (and to an important extent are still used) to constrain the various kinds of damage—social, psychological, and financial—spouses might try to do each other during and after a marriage. Fault-based divorce laws were intended, among other things, to deter spouses from violating the basic assumptions of marital conduct. Much of the present justification for the law of alimony and marital property lies in its attempt to make it safe for spouses to commit themselves to their marriage and to make good at least the financial injury one spouse may have done another.144 All this and more we try to do directly through family law. But the enforcement problem keeps our success rate disappointingly low. As James Fitzjames Stephen wrote with characteristic panache, “To try to regulate the internal affairs of a family, the relations of love or friendship, or many other things of the same sort, by law or by the coercion of public opinion, is like trying to pull an eyelash out of a man’s eye with a pair of tongs. They may put out the eye, but they will never get hold of the eyelash.” 145 We want most to deter misbehavior, and not just to mend its consequences, yet the law’s capacity to do so is unimpressive. We therefore rely in central (though of course not exclusive) ways on systems of morality to temper the excesses of human nature. Those systems of morality interact with the law in two primary modes. First, the law affects the moral constraints that people impose on themselves. Second, the law influences the moral constraints embodied in social institutions. Let us now consider these two forms of interaction.

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144. Thus Brinig and Crafton write in an intriguing article,
This, then was the “old marriage,” an enforceable contract designed for the most part to be permanent, which encouraged values of altruism, sharing, and investment in the marriage. The idea of fault and of alimony as damages for breach of the terms of the marriage contract, was central to the stability of this scheme, for the threat of an action for damage would encourage women to invest specifically in the marriage while encouraging their husbands to adhere to their portion of the marriage bargain.
Margaret F. Brinig & Steven M. Crafton, Marriage and Opportunism, 23 J Legal Studies 869, 875-76 (1994). They go on to present empirical arguments that the weakening of the role of fault in divorce deliberations has increased the amount of “opportunistic” spousal behavior. The “protective” functions of divorce law are further helpfully developed in Margaret F. Brinig & June Carbone, The Reliance Interest in Marriage and Divorce, 62 Tulane L Rev 855 (1988); and Ira Mark Ellman, 77 Cal L Rev 1 (cited in note 61).

Although lawyers tend to forget it, much of the work of restraining human nature is done not by law but by individuals. Most people attempt to govern their own behavior and impose limits on themselves. They may do this in ways that have no very direct relationship to moral norms. They may seek the help of a therapist in understanding their behavior and moderating it. They may enter into contracts or informal agreements with family members that constrain their capacity to do harm. But people may also call on moral thinking. Systems of morality typically direct people's attention to the kinds of injuries they may do each other. And allegiance to a system of morality gives people one kind of incentive to curb their inclinations to harm their fellows. Such a system spurs people to recognize and resist their own impulses and even, in some senses, their own interests. Thus many systems of morality would require Mr. Appleby to ask himself what injuries his wife might suffer after a divorce, what obligations he had incurred to her, and how urgently he needed to leave her.

I have not been arguing that the law either can or should directly impose some complete set of moral principles of family life upon the citizenry. But the way the law talks and acts may affect people's regard for, understanding of, and reliance on moral reasoning in ways we should be aware of. Law helps shape the way people view their lives because law has an expressive capacity, the function "of interpreting our culture to ourselves, of summing up our ideals while at the same time reinforcing them. If law has an interpretive and constitutive function, then changing the law so as to eliminate a duty where one has long existed cannot help but have some effect on behavior and attitudes." The law's expressive function works by deploying the law's power to impart ideas through words and symbols. It has two (related) aspects: Law's expressive abilities may be used, first, to provide a voice in which citizens may speak and, second, to alter the behavior of people the law addresses. The ERA exemplifies both aspects. Its proponents had (among other things) two kinds of expressive purposes in mind. They proposed it partly because they wanted the law of their country—their law—to make a symbolic statement about the relationship between men and women. And they also believed that such symbolic statements can promote changes in social sentiment which in turn may promote a reformation of social behavior.
To be sure, the expressive function is multiply handicapped: The law must speak through instruments primarily designed for other (e.g., regulatory) purposes; the law, speaking as it does in many voices and over long spans of time, often contradicts itself; most people do not hear all that the law says; what people do hear is often heard inaccurately; and what people hear is frequently interpreted in the light of misunderstandings of the law (like the widespread belief that a denial of certiorari represents a binding judgment on the merits). But while the law communicates sporadically, fuzzily, and erratically, still, it communicates. We therefore need to be aware of the law's expressive implications.

But what does the law communicate about the use of moral ideas as a constraint on human nature? I have been suggesting that a central problem with the decline of moral discourse in family law is that it rests on and promotes too Panglossian a view of human nature, too superficial an understanding of marriage and divorce, and too limited a regard for moral thinking. In short, the diminution of moral discourse resonates with and reinforces the least admirable features of the revised view which I described in the early pages of this essay. And those features seem to me morally too superficial to be useful as a self-imposed means of restraining the less admirable side of human nature.

This already long Essay is not the place for a full-dress examination of what seems to me the moral shallowness of the revised view of marriage and morality which the law seems to embody and thus to promote. But I can give some brief examples of my concerns. Most generally put, they have to do with my sense that the revised view improperly disvalues moral language and reasoning. More specifically, the revised view strikes me as too often calling on an inadequately considered moral relativism. It is too willing to elevate preferences and desires into “needs,” and too ready to concede that people cannot control their thoughts and emotions.148 It is too re-

148. This perhaps-heterodox opinion may need a little clarification. That clarification may be had by quoting from Shirley Letwin's illuminating commentaries on Trollope's novels. She interprets Trollope as believing that the “notion that human sexuality is a ‘natural drive’, which demands satisfaction that can only be denied by repression, has no more place in the gentleman’s world than the notion that men have a natural need to commit violence.” Shirley Robin Letwin, The Gentleman in Trollope: Individuality and Moral Conduct 161 (Harv U Press, 1982). She also concludes that Trollope believed that a “disposition to love” can be “governed.” Doing so does not exclude spontaneity and has nothing to do with repression because it is not like pulling the strings of a purse to shut in the disorder. It is an effort to interpret experience in one fashion rather than another and to find satisfaction in a different quarter . . . . That “there are things that should not be thought of” is therefore a constant refrain in Trollope’s novels and in
luctant to make moral judgments and moral distinctions. It is too remissive, all too ready to relieve people of the burden of moral inquiry, regret, and reform. Its call to elevate one’s duties to oneself to lordly prominence is an invitation all too likely to be accepted and abused. Its exaltation of independence tends to deny our inevitable reliance on those who love us and even on the kindness of strangers, to depreciate the consolations of dependence, and paradoxically to make people more vulnerable by forcing them to be constantly prepared for independence.

In particular, by declining to discuss divorce in moral terms, the law wrongly suggests that divorce is not a moral issue. To be sure, the law could be understood as saying something rather different—that there are moral aspects to many, perhaps most, divorces, but that they are the responsibility of the spouses, not the law. This is no doubt what many legislators and jurists believe. It is standard liberal doctrine. However, that inference from the law’s silence is not likely to be the common one, partly because the law will in many quarters be understood to draw on the kinds of moral ideas my students expressed in their discussion of the Appleby hypothetical. That is, no-fault divorce will chime with, and thus be understood to confirm, the socially widespread ideas about marriage and divorce that I have associated with the revised view. As Glendon aptly observes,

In the United States the “no-fault” idea blended readily with the psychological jargon that already has such a strong influence on how Americans think about their personal relationships. It began

connection with all activities and being “unable to help what one thinks” is a sign not of a passionate nature but of moral ignorance and weakness.

Id at 147.

149. Thus, Plato wrote,
The greatest of all evils for the mass of human beings is something which grows naturally in the soul, and everyone, by excusing it in himself, fails to devise any way to escape it. This is shown by the way people talk, when they say that every human being is by nature a friend to himself and that it is correct that he should be so. The truth is that the excessive friendship for oneself is the cause of all of each man’s wrongdoings on every occasion. Everyone who cares for something is blind when it comes to the thing cared for, and hence is a poor judge of what is just an good and noble, because he believes he should always honor his own more than the truth . . . . So every human being should flee excessive self-love . . . .


to carry the suggestion that no one is ever to blame when a marriage ends: marriages just break down sometimes, people grow apart, and when this happens even parents have a right to pursue their own happiness. The no-fault terminology fit neatly into an increasingly popular mode of discourse in which values are treated as a matter of taste, feelings of guilt are regarded as unhealthy, and an individual's primary responsibility is assumed to be himself.\footnote{Glendon, \textit{Abortion and Divorce in Western Law} at 107–08 (cited in note 5).}

I have been arguing that a crucial constraint on human nature is morality that is in some useful sense self-imposed. But "[p]ure moralizing, ethical theories, the preaching of elevated ideas, have not proved adequate, though they are indispensable, remedies for man's disorders . . . ."\footnote{Lovejoy, \textit{Reflections on Human Nature} at 9 (cited in note 129).} Morality must help restrain "fierce impetuous passions." A system of morality capable of doing so will have to make deep calls on people's allegiance. To do this, it must be more than just a set of principles. It must evoke people's basic, and even non-rational, assumptions and long-standing, even non-rational prohibitions and taboos.\footnote{For this argument, see Schneider, 51 L & Contemp Probs at 97–122 (1988) (cited in note 9), and Stuart Hampshire, \textit{Morbidity and Conflict} (Harvard U Press, 1983). For an illuminating discussion of the role of emotions in moral life, see Frank, \textit{Passions Within Reason} (cited in note 135).} It needs to spark people's aspirations, to rouse hopes as well as fears, to inspire as well as forbid. It must become deeply engrained in behavior and habit, for "[m]oral goodness . . . is the child of habit . . . ."\footnote{Aristotle, \textit{Ethics} at 55 (cited in note 136). For a helpful study of the concept of habit in sociological thought, see Charles Camic, \textit{The Matter of Habit}, 91 Am J Sociology 1039 (1986). "Habit" understates the point. Moral ideals may become so much a part of oneself that they become an essential aspect of one's very identity. For an extended development of this point, see Kekes, \textit{Moral Tradition and Individuality} (cited in note 109).} All this is unlikely to happen unless that system of morality can call on social resources. Effective systems of morality, in other words, rely on the institutionalization of social relations and what I have called the "channelling function."\footnote{For a more complete and nuanced description of the channelling function and of the family as a social institution, see Schneider, 20 Hofstra L Rev 495 (cited in note 147).}

Let me briefly explain. In America, almost everyone wants to marry. Almost everyone does marry. Almost everyone expects that marriage to last a lifetime. Almost everyone hopes to be a faithful and affectionate spouse. Almost everyone hopes to be a dedicated and generous parent. Almost everyone looks forward to the satisfactions of a lifelong commitment to a spouse and of rearing children to
successful adulthood. But despite their rewards, marriage and parenthood can be perplexingly and painfully difficult. People almost always disappoint their own hopes for themselves and their family, as well as their family's for them. People try to make their marriages and their ties to their children stronger and better through a host of personal devices. They remind themselves of the ideals they brought into their relationships. They calculate the long-term benefits of overcoming short-term family disappointments. They talk with their families about means of improvement. They undertake therapy terminable and interminable. They pray for divine guidance. They reflect on their moral obligations.

However, people are not left to struggle toward their ambitions for their family life alone. Nor is society's not-insubstantial interest in those relationships entirely left to the private strivings of family members. Marriage and parenthood are social institutions. A social institution is "a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative." Such institutions critically shape the lives of individuals and crucially form the life of society, for, as James Fitzjames Stephen wrote, "The life of the great mass of men, to a great extent the life of all men, is like a watercourse guided this way or that by a system of dams, sluices, weirs, and embankments . . . . [I]t is by these works, that is to say, by their various customs and institutions—that men's lives are regulated."

Social institutions are vital not just because they provide some forms for family life; they also embody specific norms that are thought to serve desirable social ends. In the American institution of the family, members are conventionally expected, among other things, to be affectionate, considerate, and fair, to be animated by mutual concern, to sacrifice for each other, and to sustain these commitments for life. These ideals compose a kind of social prescription for enduring, pacific, and considerate family relationships which people may generally benefit by following. They also form the basis for the social sanctions, positive and negative, which can sustain people in civilized family life when other incentives temporarily fail.

Social institutions, then, offer patterns of behavior that channel people into family life, that support them in their efforts to fulfill

the obligations they undertake, that help hold them to the commit-
ments they make, and that constrain them from harming other
family members. Richard Randall comments usefully on the work of
social institutions when he observes,

Control or regulation of sexual energy through repression, inhibi-
tion, channeling, and rechanneling is a task of all social systems.
Although protecting the family as the primary institution of repro-
duction, nurturance, and early socialization of the young is usually
considered its chief end, some degree of regulation is necessary
simply to have reliable expectations about the behavior of others.
Not least, social regulation reinforces the often precarious internal
controls every person has had to place on his or her erotic energies
and desires.159

And what Randall says of the domestication of sexual energy is true
of all the human energies that, undomesticated, may cause people
to do each other harm.

Of course, the usefulness of any social institution will critically
depend on the wisdom of the norms it embodies. No social institu-
tion will promote only the best norms. No one would suggest that
all the norms of the social institution of the family are optimal. Nor
should anyone deny that those norms, like any social norms, like
any social tool, can be, have been, are, and ever shall be twisted and
abused. But the family's status as a social institution more impor-
tantly provides an indispensable way of doing good. In any event,
the absence of social institutions would impose its own, intolerable,
costs. As I have tried to show, social institutions serve crucial func-
tions. And were such institutions destroyed, it would be necessary
to substitute more direct, less flexible, and perhaps quite ineffective
forms of regulation.

I have been describing what sociologists call the "ideal type" of
social institutions generally and of the institution of the family
particularly. Of course, as Karl Llewellyn warned, too much can be
"thought and written as if we had a pattern of ways that ma[k]e up
marriage."160 Of course, as Llewellyn knew, "The norm is none too
uniform."161 But as he also knew, "major features are observed,
are 'recognized,' are made the measure of the 'right.' Right in such
matters is most powerfully felt: these are compacted patterns,
backed by unreasoning tradition, built around interests that lie

159. Richard S. Randall, Freedom and Taboo: Pornography and the Politics of a
160. Karl N. Llewellyn, Behind the Law of Divorce: I, 32 Colum L Rev 1281,
1285 (1932).
161. Id at 1286.
And even if few institutions have ever entirely had the kind of effect I have been positing, this is not undesirable: the limits and even weaknesses of social institutions allow people the room to adjust, vary, and sometimes reject social patterns. This is an important part of freedom. 163

Nevertheless, there is some reason to believe that, in recent decades, the American family has begun to be deinstitutionalized, and that that development is in some part associated with the trend away from moral discourse in family law. In particular, the models of family life and the norms the institution of the family has proffered have been widely challenged. I am not, of course, suggesting that any change in an institution must weaken it. Not at all:

Each new being is received into a style of life prepared by tradition and held together by tradition, and at the same time disintegrating because of the very nature of tradition. We say that tradition "molds" the individual, "channels" his drives. But the social process does not mold a new being merely to housebreak him; it molds generations in order to be remolded, to be reinvigorated, by them. 164

Many recent developments in family life have been simply the kind of evolution that is quite normal in the history of any social institution and which need not diminish the family's ability to serve the ends of a social institution. Most significantly, common understandings about gender roles within the family have shifted seismically. But that shift is generally not only compatible with the institutional role of the family; it might well be demanded by it as a continued working out of the familial principles of affection, consideration, and mutuality I described earlier. Yet while some institutional changes will not alter the patterns that make an institution distinctive and the sanctions that make it effective, others will. And this may be happening to the institution of the family.

The deinstitutionalization of the family is relevant to us because the waning of moral discourse in family law contributes to it and is propelled by it. The social institution of the family rests on, among other things, a set of moral ideas about family relations. As the law loses its vocabulary for talking about moral ideas in moral terms, its ability to shape social institutions is impaired in two ways. First, it loses a language for expressing and promoting the

162. Id.
163. For a sensitive exploration of the interaction between social norms and personal liberty, see Kekes, Moral Tradition and Individuality (cited in note 109).
moral ideas instinct in social institutions. Second, it loses the ability even to understand what functions social institutions serve, for the remaining languages—and particularly the prepotent American language of rights—lack the conceptual basis for that understanding. Thus our constitutional rights talk has highly developed ways of talking about individuals’ claims of rights, but only the scantest language for discussing the social interests that might compete with those claims.165

But I believe the problem is wider than this. The standard modern response to the diminution in the law’s capacity to shape the social institutions of family life is to welcome it, since the state should not impose values on people; rather, people should be allowed to impose values on themselves. In other words, we are brought back to the liberal tradition and the principle that government should strive for neutrality and restrain human liberty as little as possible, allowing people to choose their own values and levy their own restraints on themselves. The assumption, of course, is that they will do so. The crucial question, however, is whether they will. The possibility I wish to raise is that, just as the revised view leads people to reject legal constraints, so also may it erode social and even self-constraint.

Consider again my students’ response to the Appleby hypothetical. While they emphatically insisted that the moral permissibility of a divorce was none of the law’s business, many of them also argued that that question was not a social question, was not a moral question, was not even a comprehensible question. They shut off any avenue, public or private, for questioning the moral desirability of a divorce (although they were open to questioning it on practical or psychological grounds). Alert to resist the encroachments of government, they do not clearly distinguish encroachments from non-governmental social constraints or even from the self-imposed constraints of personal morality. Why? I suspect that two things are going on here.

First, people tend to conflate legal and social constraints, to see them as coterminous, to apply the same limits to both (as I discover every time I try to teach the state-action doctrine). Thus not only law students, but also medical students, instantly convert a question about the moral duty to give blood or donate a kidney to a relative into a question about a legal duty to do so. This is hardly

165. For this argument, see Schneider, 51 L & Contemp Probs at 97–122 (cited in note 9); and Carl E. Schneider, State-Interest Analysis and the Channeling Function in Privacy Law, in Public Values in Constitutional Law 97 (Stephen E. Gottlieb, ed, U Mich Press, 1993).
surprising in “one of the most law-ridden societies that has ever existed on the face of the earth,”¹⁶⁶ a country in which law plays a pervasive part and in which people are obliged to borrow in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings . . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.¹⁶⁷

As Tocqueville foresaw, Americans today truly do resolve political—and moral—questions into judicial questions. As Abraham Lincoln hoped, the Constitution has indeed “become the political religion of the nation,” and many Americans now “take for granted that the Constitution embodies moral as well as legal rules.”¹⁶⁸ We revere the Supreme Court as the great arbiter of American moral life, as performing a “prophetic function,” as expressing what “we stand for as a people.” Trial courts, L.A. Law wants to teach us, are forums for the apotheosis of social and moral reasoning. The legalist error proliferates that “moral rights [necessarily] represent claims that ought to be made into legal rights, that ought to be protected and enforced by law.”¹⁶⁹ When law and morality are so much conflated in popular (and sometimes even professional) thought, it is hardly surprising that people should want to place the same limit on morality’s ambit as on the law’s.

In this conflation of law and morality, the language of rights plays a specially salient part. Rights-ideas dominate some of the most prominent, accessible, and appealing parts of American law. As Glendon comments, “Discourse about rights has become the principal language that we use in public settings to discuss weighty questions of right and wrong . . . .”¹⁷⁰ For this reason, and because rights may be moral and social as well as legal, rights discourse

¹⁶⁹. Id at 14–15.
¹⁷⁰. Glendon, Rights Talk at x (cited in note 41). The quoted sentence continues: “but time and again it proves inadequate, or leads to a standoff of one right against another.” For examinations of the language of rights in family law, see Schneider, 76 Cal L Rev 151 (cited in note 40); Carl E. Schneider, Cruzan and the Constitutionalization of American Life, 17 J Medicine & Philosophy 589 (1992).
readily slides from legal to social life.\textsuperscript{171} People believe their rights are precious, that they should be defended, even that they should be exercised.

As a logical matter, of course, one may have a right without exercising it or feeling encouraged to use it. But I have been speculating about what we might call the socio-psychological consequences of the mode of rights discourse that prevails in the United States today. My sense... is that this mode has encouraged us to feel that "to demand our rights, to assert ourselves as the moral agents we are, is to be able to demand that we be dealt with as members of the community of human beings. This is what moral dignity involves..."\textsuperscript{172}

If a right is a freedom necessary to human dignity, why should not a social as well as a governmental limitation on it be rejected?

I have been suggesting that people resist social and moral as well as legal constraints because they tend to conflate law and morality and thus are inclined to restrict morality in the same way they restrict law. In addition, the same social and cultural forces that drive people to question governmental impositions of morality also lead them—psychologically if not logically, in fact if not in necessity—to question any imposition of it, even including self-imposition. As Friedman puts it, we live in the "republic of choice": "We are rights-conscious and individualistic, at least as compared to people in the past. There is a central concern with the development of the self and the molding of unique individuals. The core mechanism for constituting the self, according to the prevailing point of view, is through free and unrestrained choice, exercised with regard to many and competitive options."\textsuperscript{173} All forces that limit choice are enemies of the republic, whether they be the government or society, law or convention, court or community.

This hostility to the enemies of choice coincides with and exacerbates the weakening of many of the standard agencies of socialization and constraint, not least among them the family, the church, and the neighborhood. Our very system of law may enhance this effect, since "informal social controls are limited by the legal rules controlling the process of conflict resolution, so that even outside of its formal purview a rule-centered legal system weakens if not displaces other means of social control."\textsuperscript{174} In addition, we now live in

\textsuperscript{171} For an examination of this tendency in the context of bioethics, see Schneider, 24 Hastings Center Report 16 (cited in note 167).


\textsuperscript{173} Friedman, \textit{Republic of Choice} at 5 (cited in note 25).

\textsuperscript{174} Frank K. Upham, \textit{Law and Social Change in Postwar Japan} 7 (Harv U
a relatively anonymous, relatively mobile society in which the force of social pressures on people is diminished. Thus, non-governmental as well as governmental and personal sources of social restraint may be simultaneously losing some of their effectiveness.

In short, the liberal tradition assumes that the work of social restraint, which the government is barred from doing insofar as that means abandoning neutrality about the good, will somehow get done. The possibility I have been broaching is that citizens in the republic of choice may conflate social and moral with governmental action, and that the same forces that inhibit government's power to restrain may also erode the force of non-governmental agencies of restraint, from social institutions to systems of morality. Whence, then, will come the social energy to constrain the darker elements of human nature?

In this section, I have argued that the trend away from moral discourse in family law and the revised view with which it is associated crucially rest on a relatively benign view of human nature. I have suggested that this view errs too much on the side of optimism and thus leads the law, citizens, and social institutions to underestimate the need to provide human beings with a language and set of social institutions capable of mediating between the imperative of liberty and the imperative of restraint. I have proposed that moral thinking plays a foundational role in the work of restraint, both at a personal and on a social level. I have reasoned that, as the law abjures moral discourse, it impairs its ability to buttress and bulwark the intellectual and social forces that help cabin human nature.

As the Appleby discussions suggest, the revised view is skeptical of this analysis, and not just because of its bleak view of human nature. The revised view is also suspicious of power mobilized in the name of morality, since that power has been misused in the past. As I have already acknowledged, this power, like all power, may be and will be abused. The power to do good is the power to do ill. No human idea, no social institution, no conceptual language, no legal doctrine is exempt from this risk.

This seems to me to suggest that the fact that a language has been put to undesirable purposes in the past is not a reason to re-
ject it, at least where it has also been and may still be deployed to
good effect. That social institutions may be misused is no more
reason to foreswear that useful tool than the fact that moral argu-
ment may be used for malign ends is a reason to give up that way
of understanding human relations. Just as a necessary cure for the
ills of bad moral reasoning is better moral reasoning, so the best re-
sponse to bad social institutions is better ones. After all, moral
reasoning is not just a powerful way of criticizing misuses of moral
reasoning; it is also one that is relatively easily available to people
and groups who otherwise lack power. This is surely one lesson of,
for example, the civil-rights and women's movements. And one of
the most effective ways of countering the undesirable effects of a
social institution is to summon up the tool of channelling. This is, I
take it, the response that feminists and their allies are currently
undertaking to the traditional view of gender relations within the
family.

Indeed, one might reasonably wonder whether some of the
goals that exponents of the revised view most earnestly wish to
achieve can be attained without recruiting moral thinking in the
ways I have been discussing. Consider, for instance, the wish to
eliminate spouse abuse and the abuse and neglect of children by
their parents. I doubt that criminal and civil penalties will do the
job by themselves, even helped by the armory of the therapist. Re-
ducing poverty and its attendant miseries will help, but hardly
suffice (for as proponents of the revised view often remind us, do-
mestic violence is not exclusively the province of the poor). People
injure each other for reasons that run deep in human nature, that
probably cannot be eradicated, and thus that can only be controlled
by mobilizing a wide range of solutions. Hence, in addition to the
criminal law and structural reform (which will inevitably succeed
only partially), we need to draw upon a set of moral ideas that are
already available in our culture, ideas about civility, kindness, con-
straint, and obligation. We need to support the social institutional-
ization of those ideas, to reinforce them with social as well as legal
sanctions.

4. Moral Discourse and Mutual Concern

Participation in social morality will, then, shape how we think and
feel about our lives and how we judge the disclosures of our social
experiences. But by being so shaped, we become part of a society
whose members share the vision and sensibility of their common
ways of judging and responding to the world.

John Kekes

Moral Tradition and Individuality
I have been surveying some of the disadvantages of the waning of moral discourse in family law. I have pointed out some of the practical problems the law encounters when it tries to confront questions of family life without a vocabulary drawn from morals. I have considered at some length the relationship among the trend away from moral discourse, the revised view’s understanding of human nature, and the need for the social constraint of harmful behavior. We now reach the last cost of the trend away from moral discourse. It is often thought that the law should avoid moral discourse because of the standards problem: because, that is, in a multicultural society adopting one moral language will alienate the many people who speak a different language. There is surely something in this standard liberal argument. But surely there is also something in the standard communitarian response that by foreswearing moral discourse we sacrifice something crucial to a liberal society—the chance for a sense of duty and commonality that might bind people together and cause them each to be concerned for the welfare of the others.

As Arland Thornton notes, the norm of tolerance has in recent decades gained impressive ground. The demotic expression of that norm talks about one person’s affairs not being another person’s business. But if your life is none of my business, why shouldn’t I leave you alone when you need help, as well as when you don’t? If you are the captain of your fate and the master of your soul, and I of mine, why should I worry about what happens to your ship? If, as the revised view seems to suggest, your moral views are beyond criticism, beyond discussion, and even beyond my comprehension, should I care what you think and do? If you live barricaded by your sphere of privacy, and I by mine, why should I notice whatever unhappiness you may be suffering in yours?

To be sure, however autonomous you and I are, I may be well-advised to consider the advantages of caring about you. I may conclude that I will be better off if I establish social welfare programs. I might decide that if I help you individually, you will reciprocate. But self-interest and rational calculation are weak reeds. As Durkheim recognized,

if interest relates men, it is never for more than some few moments. It can create only an external link between them. In the fact of exchange, the various agents remain outside of each other, and when the business has been completed, each one retires and is left entirely on his own. Consciences are only superficially in contact; they neither penetrate each other, nor do they adhere . . . .

[W]here interest is the only ruling force each individual finds himself in a state of war with every other since nothing comes to mollify the egos, and any truce in this eternal antagonism would not be of long duration. There is nothing less constant than interest. Today, it unites me to you; tomorrow, it will make me your enemy.177

Even if it is objectively in my interest to help you I may calculate incorrectly and thus fail to recognize the coincidence of our interests. These calculations are inherently complex and speculative, and they are made harder by the ease with which short-term advantage obscures long-term interests. Furthermore, there is the free-rider problem: it will often be beneficial not to behave altruistically, and to rely on the altruism of others to promote social welfare programs.

What, then, can give people the sense of mutual concern without which social life becomes callous, and, carried far enough, brutal, and, carried yet further, even impossible? Tolerance is crucial, for intolerance is the enemy of mutual concern. But something more than tolerance is needed. Moral discourse helps supply that something else in two ways. First, it provides a language capable of explaining why we should feel some obligation to other people generally and to strangers particularly. Such a language can spur concern when natural sympathy fails.

Natural sympathy may falter in a populous and diverse country peopled by strangers separated by great physical distances, by the many differences in their occupations, by ethnic and religious variation, by diverse experiences, by their social class, and by their conflicting interests. People care most easily for those with whom they have something—particularly something important—in common. America is deeply, firmly, and crucially a pluralist country. But pluralism has worked because it has been accompanied by a degree of cultural commonality.

Culture, as Alan Wolfe observes, "ties together distant strangers who would otherwise not recognize their mutual interdependence and gives them a stake in what others do."178 But as Wolfe argues, American culture

cultures unify and, in the harmony that results, leave differences unresolved.\textsuperscript{179}

One unifying and essential element of American culture is its commitment to tolerance. But as I have just noted, the adhesive force of that commitment is weak, for tolerance ordinarily can not hope to do more than moderate people's distrust for other people's practices. Little in the ideal of tolerance effectively gives one person active and abiding reasons to care for a distant stranger. Such concern is unlikely without some cultural commonality, some ability to speak a moral language with some points of coincidence. As Wolfe argues,

\begin{quote}
Modern liberal democrats are able to live together with strangers because their choices are to some degree organized by culture. When cultures work well, they do so by uniting members of a group around a set of common stories that define their identity. In most cases these stories emphasize the need for some kind of restraint on individual desires so that meeting obligations to others becomes as important as satisfying the needs of the self.\textsuperscript{180}
\end{quote}

It is, of course, hard to specify just where the proper boundary between diversity and commonality lies, and that line it will change as society changes. But a proper balance between those two goods is necessary for the long-term survival of a pluralist country.\textsuperscript{181}

V. CONCLUSION

The Americans... are fond of explaining almost all the actions of their lives by the principle of self-interest rightly understood.... In this respect I think they frequently fail to do themselves justice; for in the United States as well as elsewhere people are sometimes seen to give way to those disinterested and spontaneous impulses that are natural to man; but the Americans seldom admit that they yield to emotions of this kind; they are more anxious to do honor to their philosophy than to themselves.

\textit{Alexis de Tocqueville}

\textit{Democracy in America}

In this paper, I have explored the relationship between no-fault divorce and a trend in family law away from discussing the issues it confronts in moral terms, and toward discussing them in other terms, or transferring responsibility for them to the people the law

\textsuperscript{179} Id at 94-95.
\textsuperscript{180} Id at 94. To like effect, see Kekes, \textit{Moral Tradition and Individuality} at 65-66 (cited in note 109).
\textsuperscript{181} On the fragility of a pluralist society, see Arthur Mann, \textit{The One and the Many} (U Chi Press, 1979); Arthur M. Schlesinger, Jr., \textit{The Disuniting of America: Reflections on a Multicultural Society} (Whittle Direct Books, 1991).
once sought to regulate. I have noted that no-fault divorce instantiates that trend and exemplifies its causes. In particular, I have proposed that to understand both the reform and the trend we need to recognize a shift in the way Americans regard and use moral language and ideas, a shift toward what I have described as the revised view. That view is skeptical of moral language and reasoning.

I have argued that the trend away from moral discourse has both benefits and costs. But I did not try to weigh those benefits and costs against each other to reach a final conclusion either about the desirability of that trend generally or of a system of divorce that no longer speaks in moral terms. Ultimately, Holmes provides the best, or at least, a very practical, answer to that question: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."\(^{182}\) As I have tried to show, American attitudes toward morals in general and the morals of marriage in particular are changing. Among some influential elements of American society, those changes have been marked and major. Even in the broader society, they have been considerable. They have already proved so powerful that the social foundation for fault-based divorce collapsed. The law could not impose what so many people disbelieved. Indeed, the law could not even explain in comprehensible terms what might be regrettable about no-fault divorce and the revised view that undergirds it.

What might be regrettable about the new regime, I have been arguing, is that it deprives us of a language with which to recognize the moral element in family relations generally and divorce particular. I have tried to explain why this loss is troubling. Especially, I have been concerned with the role of moral language and reasoning both in the day-to-day work of family law and in helping to structure social relations. But I do not want to be understood to be speaking bleakly about the present or the future. I have been dwelling on the problematic aspects of the revised view because its beneficial aspects are so uncontroversial. That view rests basically on ideas about human autonomy and freedom that are accepted virtually universally in the United States. The revised view calls on ideas about tolerance and generosity that are estimable and even indispensable. The rise of the therapeutic society, with which the revised view is so much associated, may well have been richly worthwhile for many Americans. Peter Clecak argues, for instance,

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"that the material, political, and cultural prerequisites for achieving full personhood were democratized significantly during these years. And I take seriously the subjective reports of tens of millions of citizens who claimed some degree of success, a significant increase in available cultural space, and a healthy thickening of individuality." The problem, as always, is to find a via media, to search out the best attainable balance between liberty and constraint, to accommodate both individual autonomy and social institutions, to accept the blessings of the revised view while rejecting its excesses.

Moderating the force of the revised view is the fact that, as I have tried to suggest, it is neither uncomplicated nor uncomplicatedly held. Furthermore, the way my students talk may not be the way they act. Like Tocqueville, the authors of Habits of the Heart thought that Americans generally behave more altruistically and circumspectly than their language would seem to suggest or require. Their paradigmatic interviewees "are responsible and, in many ways, admirable adults. Yet when each of them uses the moral discourse they share, what we call the first language of individualism, they have difficulty articulating the richness of their commitments. In the language they use, their lives sound more isolated and arbitrary than, as we observed them, they actually are." Similarly, Wilson finds that "[a]s with self-interest, so with individual rights: we assert large claims to freedom, spontaneity, and self-expression but act in ways that for the most part respect constraints, moderate excesses, and reveal our capacity for self-control."

Nevertheless, these things are hard to measure. It is extremely difficult to assay accurately how well people's behavior matches their language or to gauge adequately how that behavior may be changing. We therefore need to recall that language matters, and that it is difficult to talk one way and act another. Thus it is legitimate to wonder how long people may be expected to act well without the spur and sustenance moral language provides.

On the other hand, it is not inevitable that we will continue to move away from moral discourse either in family law or in society generally. History has not moved in any such straightforward way. Furthermore, doubts about the way we talk about the moral relations among family members are expressed by both the Christian right and elements of the feminist left, to say nothing of oc-

183. Clecak, America's Quest for the Ideal Self at 8 (cited in note 35). To like effect see Cancian, Love in America (cited in note 36).
186. Schneider, 51 L & Contemp Probs at 107 (cited in note 9).
casional groups—like communitarians—in between. Indeed, one of the most striking features of the discussion at this symposium was the discomfort many participants expressed at the way we have come to talk—or not to talk—about the moral relations of the parties to a divorce. Thus we should not too readily accept the completion of the trend away from moral discourse in family law as a foregone conclusion.

Because of the trend's costs, and because we are venturing into uncertain waters, I would have the law be a follower and not a leader. When, as in the case of no-fault divorce, it becomes clear that "the common practice of society" demands that the law cease to employ moral language, the law should comply. But ordinarily the law ought not precede public opinion in abandoning moral discourse. To be sure, family law is egregiously complex in its purposes and methods, and it is driven away from moral discourse by many forces, practical as well as conceptual, good as well as dubious. Thus the law will sometimes abandon moral discourse for reasons—like efficiency—that have little to do with attitudes toward morality or governmental neutrality. But I would seek to graduate family law "to the existing level of morals in the time and country in which it is employed." Thus, for example, I would not have the law break a path toward recognizing the "functional" family, toward a "value-neutral" theory of alimony, or toward a de-moralized law of child custody.

In the end, family law can only act interstitially. The fate of the family in America is, if anything, more a social than a legal enterprise. As Carol Weisbrod wisely writes, "The problem is centrally that we care so much, and that law, finally, can do so little." If the moral elements of family life are—at appropriate junctures—to be recognized by the law, if the social institutions of the family are to be made useful, the bulk of the work will be done not primarily through law, but through all the standard processes of social change. Yet it is not necessarily bad news that law is not the only way of pursuing social change. Other methods of doing so exist, they are well known, and they are open to those who would use them.

But I must close this paper with the same caution that I hope has characterized all of it. Preserving a language through which the law can recognize the moral elements of family life may well be a desirable goal in a number of areas. So also is the goal of devising a

187. For thoughts on some remaining founts of moral discourse, see Schneider, 83 Mich L Rev at 1828–33, 1871–75 (cited in note 1).
189. 22 U Cal–Davis L Rev at 1007 (cited in note 147).
compassionate, just, and generous family law that both secures for us all our necessary freedom and deters us from betraying the obligations we assume toward our family members. But that these goals are desirable does not mean that they are achievable, that a proper balance can be found. Human nature invariably disappoints. Human institutions inevitably fail. In human affairs, to muddle through is to succeed.