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Bioethics and the Family: The Cautionary View from Family Law

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I. INTRODUCTION

For many years, the field of bioethics has been specially concerned with how the authority to make medical decisions should be allocated between doctor and patient. Today the patient's power—indeed, the patient's right—is widely acknowledged, at least in principle. But this development can hardly be the last word in our thinking about how medical decisions should be made. For one thing, sometimes patients cannot speak for themselves. For another, patients make medical decisions in contexts that significantly include more participants than just the patient and doctor. Now, as this conference demonstrates, bioethics is beginning to ask what role the patient's family should play in making medical decisions.

In addition, bioethics has in recent years increasingly been required to address another kind of problem: How should we resolve the ethical dilemmas associated with matters of reproduction—particularly novel means of reproduction, like *in vitro* fertilization and surrogate motherhood? As the technical capacities of medicine have expanded, these bioethical questions have raised

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** Professor of Law, University of Michigan. This Article is a somewhat altered version of a paper presented at the University of Utah College of Law and *Utah Law Review* Symposium on Ethics, Bioethics, and Family Law. An earlier incarnation of that paper was presented at a conference at the Hastings Center on the Family and Bioethics. I am grateful to the conferees at both the University and the Hastings Center for their helpful comments and to both institutions for providing an atmosphere so admirably conducive to the rational discussion of controversial questions. Finally, I am glad to thank my colleague Patricia D. White for her insightful responses to an earlier draft of this manuscript.

For the reasons described in Richard A. Posner, *Goodbye to the Bluebook*, 53 U Chi L Rev 1343 (1986), I will adhere to *The University of Chicago Manual of Legal Citation* (Lawyers Co-Op, 1989). As a great man once said, "*Faites simple.*" I am enthusiastically grateful to the editors of the *Utah Law Review* for the uncommonly generous way in which they have accommodated my wish to strike a blow for freedom from the formalisms and fatuities—no, the inanities and insanities—of *The Bluebook*.

pressing and puzzling issues about what a family is and how it should and should not be created.

In short, bioethics today confronts ultimate and essential questions about the ethical and social bases of family life. My task here is to ask what bioethics might learn about these troubling questions from the experience of another field which has wrestled with them for centuries—family law. I have a second task as well. This is, after all, a symposium on family law, and I hope that I might make myself useful to that field by providing in brief form and with concrete illustrations a taxonomy and survey of some of family law's basic conceptual approaches.

Family law *ought* to have something to say to bioethics about these problems. To begin with, many bioethical issues directly concern family law. For instance, family law seeks to regulate the situation in which children are created and given families. Many other bioethical issues deal with matters—like decisions about medical care—that impinge on family life and that family law has thus been interested in. More generally, family law has long experience with a multitude of ethical problems involving the relations between and the regulation of family members. Family law therefore should have developed vocabularies and approaches that could illuminate bioethical problems.

At the very least, we might expect family law to offer bioethics some concept of the family. Family law ought to have developed some definition of "family," since it needs to know what it is about a grouping of people that makes a grouping a family. It ought also to have reached some understanding about what the moral and social relationships of family members are, so that it can know what claims they may make on each other and what duties they owe each other. Such a conception of the family is surely crucial to both major branches of bioethics, since they deal precisely with the creation of families and often with the responsibilities of family members.

My paper will be divided into several sections, each devoted to a particular conceptual approach to the problems of family law. Each section will describe the approach, briefly evaluate its current status in family law, and then ask what usefulness the approach might have for bioethical problems. Ultimately I will

argue that family law offers no vocabulary or approach that can directly and readily be adopted in analyzing bioethical issues. This conclusion should not be surprising. Family law is law operating at its outer limits, trying to govern the most ungovernable of human relationships, seeking to understand the most mysterious and controversial aspects of social life.[1]

Yet all this does not mean that bioethics can learn nothing by looking at family law. On the contrary, there is much to be gained by looking at the reasons for family law's conceptual limits and practical constraints; for those reasons reveal something about the claims, conflicts, and contradictions that make bioethical questions so painful and contemporary family law so problematic.

II. MORAL DISCOURSE

By definition, bioethical problems raise moral issues. What kind of discourse about moral issues does family law use and how might that discourse be recruited to deal with bioethical issues? Until recently, we might plausibly have tried to answer that question, since over the preceding century family law had developed a tolerably clear definition of the family and a reasonably coherent body of beliefs about the relations among family members and the purposes of family life. That definition and those beliefs had a fairly well understood moral basis, they were articulated in moral terms, and they required courts to analyze many individual cases at least partly in moral language. In the last two or three decades, however, family law has increasingly eschewed moral discourse. That is, there has been (with some exceptions) growing reluctance to have the law serve expressly moral goals, to articulate legal principles in moral terms, and to have courts analyze problems in moral language. Simultaneously, many moral decisions have been transferred from the law to the

1. For an investigation of these features of family law, see Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U Mich J L Ref 1039 (1985).

people the law once sought to regulate.[2] No-fault divorce exemplifies this trend:

> [B]efore no-fault divorce, a court discussed a petition for divorce in moral terms; after no-fault divorce, such a petition did not have to be discussed in moral terms. Before no-fault divorce, the law stated a view of the moral prerequisites to divorce; after no-fault divorce, the law is best seen as stating no view on the subject. Before no-fault divorce, the law retained for itself much of the responsibility for the moral choice whether to divorce; after no-fault, most of that responsibility was transferred to the husband and wife.[3]

The waning of moral discourse in family law has a number of causes, including the doctrine of family autonomy,[4] the tradition of liberal individualism, a series of modern upheavals in moral beliefs, the constitutionalization of family law, and the medicalization—especially the "psychologization"—of social issues. But several of the trend's most central causes can be summarized by the phrase "the standards problem." An important justification for the doctrine of family autonomy has long been that people disagree about how families ought to be organized and run and that those disagreements often reduce to unresolvable disputes over unverifiable beliefs. Americans have grown increasingly sensitive to cultural and individual variations in views on these subjects and have increasingly felt that society should not impose its standards on people, particularly where those standards affect people's intimate relations. For all these reasons, it is increasingly felt that standards for governing family relations cannot and should not be written.

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2. For a full statement of this hypothesis, see Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich L Rev 1803 (1985). In that Article, as here, I argue only that the developments I describe are a trend, not a fully accomplished fact. For a (partial) normative evaluation of the trend, see Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L Rev 197, 233-57. For characteristically thoughtful comments on the trend, see Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 Mich L Rev 430 (1985).

3. Schneider, 83 Mich L Rev at 1810 (cited in note 2).

4. This is the standard principle of family law that the state ought wherever possible to refrain from "intervening" in the family. For a discussion of what "intervention" might mean, see Schneider, 1991 BYU L REV at 235-43 (cited in note 2).

What consequences do the diminution in moral discourse and the standards problem which partly underlies it have for family law's usefulness to bioethics? One consequence has been that a plausible (if not always optimal) means of resolving such questions—directly addressing the moral issue presented by the bioethical issue—is made less attractive or is even foreclosed. *Roe v. Wade* exemplifies this point in two ways. First, *Roe*'s holding largely removed from the law's purview the issue of the morality of abortion in general and of any individual's abortion in particular. Second, the opinion's reasoning expressly sought to reach a conclusion without discussing the morality of abortion. Less dramatically, the diminution in moral discourse and the standards problem have meant that family law's cupboard is increasingly bare of moral concepts of the family that might inform discussions of such bioethical dilemmas as surrogate-mother agreements and of the role families should play in making medical decisions for their incompetent members.[5] There is in fact some evidence that courts directly confronting bioethical problems have sought to do so without embarking on moral inquiries. As Allen Buchanan notes, for instance, "From *Quinlan* on, the courts have attempted to avoid the fundamental philosophical and constitutional issues raised by the task of developing a more adequate concept of the person and hence of the death of a person."[6]

For us, however, the most momentous consequence of the trend away from moral discourse in the law and of the unremitting prominence of the standards problem has been that the law is more and more driven to find ways around the standards problem. That is, the law has increasingly had to ask, if we cannot directly address the moral aspects of the issues we face, what other ways can we find of analyzing and resolving them? The rest of this paper will examine some of the leading alternatives.

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5. It is worth observing that there are institutional differences in the willingness to engage in moral discourse. Such discourse is likeliest to occur in legislatures, partly because the need to write statutes and pressure from constituents and interest groups often bring moral issues to the fore.

6. Allen E. Buchanan, *The Limits of Proxy Decision-Making,* in Rolf Sartorius, ed, *Paternalism* 153 (U Minn Press, 1983).

III. THE PROTECTIVE FUNCTION

One way out of the dilemmas caused by the diminution of moral discourse and by the standards problem has been to justify governmental action in terms of one of family law's least controversial enterprises—the protective function. That function 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.[7] Moral discourse in family law is presently strongest and the standards problem is presently weakest in those areas where it can be said that the law is protecting someone who cannot protect himself, who is helpless against a more powerful person. Thus some of the topics in family law most often discussed today in moral terms are spouse abuse, child abuse, and child support. In other words, the protective function can sometimes seem uncontroversial enough or pressing enough to escape some of the strictures of the standards problem.

Family law's protective function might seem to offer useful approaches at least to some bioethical problems. Thus it is sometimes said that surrogate-mother contracts ought to be prohibited in the interest of protecting surrogates from the pains of having to give up a child who is (often) genetically theirs and (always) gestationally theirs. And thus it is sometimes suggested that the ability of parents to refuse medical treatment for their defective newborn infants ought to be supervised and superseded in order to protect those infants.

But the protective function is subject to (at least) four generic problems which, in bioethics as in family law, will often prove disabling. The first is that protection easily degenerates into paternalism: It will often seem improper to protect people who do not want protection or who even actively resist it. It was this fear, for example, that in important part motivated Justice Brennan's dissent in *Cruzan v. Director, Missouri Department of Health*.[8] He

7. For an extended treatment of the protective function, see Carl E. Schneider, *Family Law: Cases and Materials* (West, forthcoming 1993).

8. 58 USLW 4916 (1990). Nancy Cruzan was a young woman who had fallen into a persistent vegetative state after an automobile accident. Her parents sought to have the hospital in which she lay discontinue her food and water. A Missouri statute, however, required anyone asking that food and water be withheld from a patient in a persistent vegetative state show by clear and convincing evidence that that withdrawal was what

argued that the state was protecting Nancy Cruzan's life, but that she found that life a burden, wished to end it, and was entitled to do so.[9] Similarly, a blanket prohibition of surrogate-mother contracts could be justified as protecting women from the misery of losing children they had borne and wished to keep. But such a prohibition would be regarded by many prospective surrogates as an undue interference with their liberty and an inaccurate reflection on their ability to make decisions for themselves.

A second generic problem of the protective function is that it will not always be clear what "protection" in a given case means. Was Nancy Cruzan being protected by the state, which wished to preserve her life, or by her parents, who wished to save her from what her life had become? Would statutes prohibiting abortion protect the lives of unborn children? Or does *Roe v. Wade* protect pregnant women from the dangers of abortion statutes? As these questions are intended to suggest, attempts to serve the protective function can return us to the standards problem and to its underlying issues about what makes life good, matters as to which answers are obscure and agreement is elusive.

The protective function's third characteristic problem is that, in trying to protect people from one harm, the state—because it is large, complex, cumbersome, and obliged to follow rules that must often be broadly phrased and inflexibly interpreted—will sometimes, perhaps frequently, injure people in unanticipated ways. Worse, the injured people can easily be those the law is most anxious to help. For instance, we might want to judicialize medical decisions in order to protect patients from improvident decisions to terminate treatment. But the classic defect of such judicialization is that it imposes painful burdens in time, trouble, expense, and misery on doctors, nurses, families, and, what is worst, on the patients themselves.

The fourth generic problem with the protective function is that sometimes the law cannot safeguard all the people who may seem to need help because their interests conflict. In a surrogate-mother case, do you protect the surrogate, whose deep attachment

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the patient would have wanted. The Missouri courts held that Cruzan's parents had not made such a showing. The United States Supreme Court held that nothing in the United States Constitution prevented Missouri from imposing such a requirement. I discuss *Cruzan* and the rights thinking that undergirds it in some detail in Part VI.

9. Id at 4926-34 (Brennan dissenting).

to her child is threatened? Do you protect the contracting parent, for whom surrogacy may be the only way of having a biologically related child and who has nurtured months of expectations and hopes? Do you protect the infant, the one person in the story who cannot speak for himself?

In sum, the flaw of the protective function as a path of escape from the standards problems is that it works best in the easy cases. In poorly explored and daunting areas like the bioethical conflicts we are discussing, resorting to the protective function as justification is likely only to force us back to those moral questions we had hoped to escape.

IV. OFFICIAL DISCRETION

When the law finds itself unable to write standards, it often transfers decisions to the discretion of an official or a judge. This is an old technique in the law generally, and for excellent reasons. Courts and bureaucracies often need flexibility to adjust their decisions to the world's complexity. Judges and administrators are frequently accorded discretion because would-be rule makers realize that they cannot anticipate all the circumstances in which they might wish a rule to be applied, because they hope that judges will be well-situated to construct rules by accretion as they gain experience deciding cases in an area, and simply because rule makers find they cannot agree on a rule.[10]

According judges discretion is, of course, a recurring family-law technique for avoiding direct confrontations with the standards problem. A particularly vivid example of the technique in that field is the law of child custody, which uses the markedly discretionary criterion of the child's "best interest." It is a technique which has found fresh favor in the law governing the allocation of a couple's property on divorce, in which courts may now be directed to divide the spouses' property "equitably."

Despite the regularity with which family law has substituted discretion for standards, the technique is not in good odor in the field. Virtually every major figure in the field has condemned

10. For a more extensive survey of the merits and demerits of rules and discretion, see Carl E. Schneider, *Rules and Discretion: A Lawyer's View*, in Keith Hawkins, ed, *The Uses of Discretion* (Oxford U Press, forthcoming 1993).

child-custody law's best-interest standard as deplorably indeterminate.[11] Equitable distribution *simpliciter* is not well-established and is currently under attack. Federal law now calls for mechanical guidelines to replace discretionary awards of child support. And there is notable sentiment in favor of substituting elaborately specific criteria for intervention in families in child-abuse-and-neglect cases for the old and discretionary intervene-whenever-it's-necessary standard.

The reasons official discretion is unloved in family law largely apply to bioethics. These reasons are too familiar to bear prolonged reiteration here, since they are the standard objections to discretion. They include the arguments that discretion allows officials and judges to let their prejudices affect their decisions, that discretion leads to inconsistent decisions, and that discretionary standards give affected parties insufficient guidance about what the law expects of them or will do to them. Further, granting officials and judges discretion solves the standards problem only in the sense of relieving a legislature of the tasks of formulating, articulating, and getting the votes to enact standards. After all, an official or judge must base a decision on some kind of principle, even if it is unarticulated or even unconscious. Discretion does not eliminate the question whether the principle chosen is a good one and whether it is right to hold people to it rather than allowing them to choose for themselves how to behave. These kinds of problems with discretion may be made more concrete by imagining what the Court's reaction to confiding a decision in *Cruzan* to the unfettered discretion of a judge or official would have been. Many of the Justices, at least, would have protested that such a rule grievously violates a patient's rights to decide what care to receive and to enjoy the benefits of due process.[12] Thus, while awarding

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11. For two first-rate examples of those criticisms, see Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, L & Contemp Probs 226 (Summer 1975); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich L Rev 477 (1984). For a critical review of those criticisms and a cautious and constrained defense of discretion, see Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 Mich L Rev 2215 (1991).

12. There are, however, many forms of official discretion, and it is often extremely difficult to formulate rules for resolving complex problems without confiding a good deal of discretion in some official. The opinions in *Cruzan* generally seem to contemplate that, at least in many instances, a court would have to decide whether an incompetent patient would have wanted treatment terminated. Given the probable quality of evidence in

grants of discretion may in fact be a good way of handling many bioethical problems, family law is at best uneasy authority for that conclusion.

V. FAMILY AUTHORITY

If the state cannot promulgate standards, and if it cannot finesse the problem away by giving officials or judges discretion, it must transfer decisions to someone else. As I said earlier in my discussion of moral discourse, this is exactly what family law has tried to do. Even before the "transformation" of family law, numerous decisions were assigned to "the family." Thus courts have long refused to resolve many kinds of disputes between family members on the grounds that families ought to be encouraged to work out their own problems in their own way. And thus states have long confided responsibility for most decisions about children to their parents.

The application of this view to a number of bioethical issues is obvious and appealing. Some of the bioethical decisions associated with reproduction already have been or might plausibly be resolved by referring them to the family. Thus decisions about the morality of an abortion have been transferred to the pregnant woman, in part with the expectation (but not compulsion) that she will share that decision with the father. Decisions about medical care for incompetents are, at least in practice, often made by the patient's family,[13] and many people believe, as the dissents in *Cruzan* indicate, that this is right and proper.[14] Nevertheless, family law's experience suggests some difficulties with solving the standards problem by deferring to "the family."

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many of these cases, this is a decision which it will often be impossible to make without a considerable exercise of discretion.

13. See, for example, Stewart B. Levine, et al, *Informed Consent in the Electroconvulsive Treatment of Geriatric Patients*, 19 Bul Am Acad Psych L 395 (1991); Clara C. Pratt, et al, *Autonomy and Decision Making Between Single Older Women and Their Caregiving Daughters*, 29 Gerontologist 792 (1989). In practical fact, of course, the family's power is, at best, shared with physicians. For an illuminating investigation of the relationship between doctors and families in medical decisions, see Robert Zussman, *Intensive Care: Medical Ethics and the Medical Profession* (U Chi Press, 1992).

14. For an influential statement of this position, see Nancy K. Rhoden, *Litigating Life and Death*, 102 Harv L Rev 375 (1988).

Perhaps the most basic of these difficulties is that the conceptual basis for this deference has been eroded in recent years. Traditionally, as I suggested a moment ago, the law assumed that family members are united by bonds of mutual concern so strong that the law could and should treat each family as a whole and not just as a collection of individual family members.[15] Thus the law was willing to have family members make decisions for each other and even (as I suggested above) to insist that decisions be made within families rather than by courts.

Increasingly, however, courts and commentators have attacked this view of the family. To some critics, deferring to "the family" really means confirming the power of its most powerful member.[16] To some of these critics, such deference simply affirms the patriarchal principle. To others, it denies the rights and personhood of children. To still others, it threatens the autonomy and self-sufficiency of all members of the family. Yet other critics find the entity view simply mistaken, on the reasoning that families are irreducibly made up of individuals and have no interests other than those of their members. Finally, critics who are concerned about the standards problem find the entity view objectionable because it embodies and promotes a normative ideal—however vague—of the family.

Family law has thus more and more come to regard family members as individuals who no doubt have important relationships with each other but who should be treated as legally distinct. As Justice Brennan wrote in a telling and influential passage, "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[17] Professor Hafen describes the new view of the family as contractual. He suggests that families are increasingly united by a merely contractual solidarity, one whose "main motivation is 'purposive,

15. For a thoughtful statement of this view, see Bruce C. Hafen, *The Family as an Entity*, 22 UC Davis L Rev 865 (1989).

16. See, for example, Lee E. Teitelbaum, *Family History and Family Law*, 1985 Wis L Rev 1135; Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U Mich J L Ref 835 (1985). For comments on this view, see Schneider, BYU L Rev at 235-43 (cited in note 2).

17. Eisenstadt v. Baird, 405 US 438, 453 (1972).

implicitly egoistic, utilitarian,' and lacking in a 'sense of sociocultural oneness of the parties.' Each party typically enters the relationship 'for his own sake, uniting with the other party only so far as this provides him with an advantage (profit, pleasure, or service).'"[18]

The law now recognizes the individuality of family members in a variety of ways. For example, no-fault divorce, by making divorce available on demand, forswears any legal effort to hamper each spouse's ability to leave the family. Family law has increasingly allowed spouses (and unmarried cohabitants) to contract with each other. The ever-more-common practice of appointing lawyers to represent children in cases—like custody or medical-care proceedings—in which their parents are litigants further recognizes the legal separateness of family members and the possible (or even presumptive?) adversity of their interests.[19] This pattern similarly presents itself in cases raising bioethical issues. *Bellotti v. Baird*[20] makes one important kind of decision—whether a child should have an abortion—essentially a decision for the child alone, and not one for the family.[21] *Planned Parenthood of Central Missouri v. Danforth*[22] makes the wife's decision whether to have an abortion one she may make without obtaining her husband's consent.[23]

We have looked at the way family law has tried to escape the standards problem by referring decisions to the family. But, I have been arguing, the standards problem itself (at least in some of its more sweeping versions) undercuts the basis for any such referral.

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18. Hafen, 22 UC Davis L Rev at 895-96 (cited in note 15.)

19. See, for example, *Michael H. v. Gerald D.*, 491 US 110 (1989), where a wife allegedly bore the child of a man other than her husband. Id at 113-14. The child's putative natural father sued to be declared the legal father. Id at 118. When the child was a little less than two years old, the court appointed a lawyer to represent her. Id at 114. When the Supreme Court decided the case the child was slightly over eight years old, and she was still represented by counsel. Id at 130-32. For an examination of the case in light of the state's interest in the family as an entity, see Carl E. Schneider, *The Channelling Function in Family Law,* 20 Hofstra L Rev 495 (forthcoming 1992). For investigations of the problems posed when lawyers represent clients who cannot speak for themselves, see Robert H. Mnookin, et al, *In the Interest of Children: Advocacy, Law Reform, and Public Policy* (WH Freeman & Co, 1985); and Carl E. Schneider, *Lawyers and Children: Wisdom and Legitimacy in Family Policy,* 84 Mich L Rev 919 (1986).

20. 443 US 622 (1979).

21. Id at 643-44.

22. 428 US 52 (1976).

23. Id at 69.

The referral is best justified by a moral view of the family that makes it an appropriate decision maker. The law once accepted such a view. Now, partly because of the standards problem, it is disinclined to do so. Thus the rationale for deferring to the family is markedly weakened.[24]

The problem with referring bioethical decisions to the family is not just that the basis for such a referral has been eroded. It is also that, unless "family" is quite broadly defined, some number of people will have no family to which a decision can be referred (and even if it is broadly defined, some people will still not have a family able and willing to take on the burden of their bioethical decisions). For example, within the ordinary understanding of the law, a single adult like Nancy Cruzan[25] has been emancipated from her family, so that her parents can no longer make decisions for her. But why not simply define Nancy Cruzan's family to include her parents? In her case, and in many cases, that is no doubt the right thing to do. But whatever the wisdom of defining "family" broadly in particular cases, family law may hesitate to do so when writing generally applicable rules. Let us ask why.

The family to which decisions are ordinarily referred is essentially the nuclear family.[26] Within it are two kinds of relationships. There are special reasons to expect people in each of these relationships to make good decisions for each other. The first relationship is marital. Husbands and wives should make good decisions for each other because they have confided special love and trust in each other. The second relationship is parental. Parents should make good decisions for their children because of the perhaps-instinctual feelings of love, concern, and responsibility parents have for their young children. The quality of both kinds of decisions should be enhanced where families live in households: People who are committed to living intimately together for many

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24. I use "weakened" advisedly. The entity view of the family retains many adherents even in the remotenesses of academe. See, for example, Hafen, 22 UC Davis L Rev (cited in note 15). It is probably the conventional wisdom among much of the rest of the country. See Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, L & Contemp Probs 79, 107-110 (Winter 1988). And even people who reject it will still often find reasons in particular cases to prefer familial to governmental decisions.

25. It appears that her marriage ended sometime after her accident. *Cruzan*, 58 USLW at 4917.

26. See, for example, *Michael H.*, 491 US at 117-30.

years should act wisely for each other because they come to know each other deeply and because their interests become so richly intertwined.[27]

Of course, parents are still, today as yesterday, bound by ties of blood, love, and experience to their adult children. But more and more, American society expects parents to raise their children to develop their own values, to leave their parents' homes, to establish their own households, to lead their own lives. "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh."[28] Partly in pursuit of that goal, family law has increasingly promoted the autonomy of minor children. *A fortiori*, will it not promote the autonomy of adult children?[29] If the idea that parents of an adult child should not be legally considered part of the child's family seems plainly wrong, consider the cases we now sometimes see in which parents of an incompetent adult contend with his homosexual lover for the power to make decisions for him.

I have been discussing the problems with broadening the definition of family in its easiest form—to include parents of adult

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27. This argument, however, should not be pushed too far. There is evidence that many people do not discuss their preferences about medical care with their families. See, for example, Dallas M. High, *All in the Family: Extended Autonomy and Expectations in Surrogate Health Care Decision-Making*, 28 Gerontologist 46 (Supp 1988); Bernard Lo, et al, *Patient Attitudes to Discussing Life-Sustaining Treatment*, 146 Archives Internal Med 1613 (1986). Worse, there is some direct reason to doubt that families in fact accurately learn their members' preferences about medical care from living with them. See, for example, Tom Tomlinson, et al, *An Empirical Study of Proxy Consent for Elderly Persons*, 30 Gerontologist 54 (1990); Joseph G. Ouslander, et al, *Health Care Decisions Among Elderly Long-Term Care Residents and Their Potential Proxies*, 149 Archives Internal Med 1367 (1989); Allison B. Seckler, et al, *Substituted Judgment: How Accurate Are Proxy Predictions?*, 115 Annals Internal Med 92 (1991); Richard F. Uhlmann, et al, *Physicians' and Spouses' Predictions of Elderly Patients' Resuscitation Preferences*, 43 J Gerontology M115 (1988).

Despite all this, there is also evidence that people generally prefer that their families participate in making medical decisions while they are competent and make medical decisions for them when they cannot do so themselves. See, for example, Madelyn A. Iris, *Guardianship and the Elderly: A Multi-Perspective View of the Decisionmaking Process*, 28 Gerontologist 39 (Supp 1988); Dallas M. High and Howard B. Turner, *Surrogate Decision-Making: The Elderly's Familial Expectations*, 8 Theoretical Med 303 (1987).

28. Genesis 2:24. See Leslie Francis, *The Roles of the Family in Making Health Care Decisions for Incompetent Patients*, 1992 Utah L Rev 861.

29. For insightful reflections on the autonomy and responsibility of adult children, see Lee E. Teitelbaum, *Intergenerational Responsibility and Family Obligation: On Sharing*, 1992 Utah L Rev 765; Hilde L. Nelson and James L. Nelson, *Frail Parents, Robust Duties*, 1992 Utah L Rev 747.

children. All these problems worsen when we consider broadening the definition to include people unrelated by blood. What may we infer from family law's experience with this problem? The law has become more willing to treat as a "family" a group of people whose relationship performs the functions that a traditional family performs. Thus *Marvin v. Marvin*[30] offers protections to people leaving non-marital cohabitation that resemble those offered to people ending marriages.[31] And thus *Braschi v. Stahl Associates*[32] treats a homosexual couple as a family for purposes of New York City's rent control program.[33]

But this "functional equivalence" approach has its difficulties and drawbacks. Thus courts have hesitated to extend *Marvin*'s principle to reach other ways of treating cohabitants like spouses. They have done so for reasons that are relevant to our inquiry. Marriage represents a specially serious and binding commitment two people make to each other. That commitment forms the basis for treating spouses in special ways. Of course, people don't have to marry in order to make such commitments, and some unmarried couples may be as deeply and solidly bound as any husband and wife. But unless people go through the public affirmation of the commitment that marriage constitutes, the law cannot know that they have made it. The law could, of course, inquire into the quality of each non-marital commitment to see whether it met "marital standards." And indeed *Marvin* calls for just such inquiries.[34] But they seem a distasteful invasion of privacy. Nor is it clear what standards and evidence would be used in evaluating the quality of a commitment.

In addition, there is a slippery-slope problem, a problem created by the way common-law courts tend to use precedent. Marriage, I have been arguing, provides what lawyers call a bright-line rule. It is easy to tell when a couple is married, and the law treats them as married whatever the true nature of their

30. 557 P2d 106 (Cal 1976).
31. Id at 116, 122-23.
32. 543 NE2d 49 (NY 1989).
33. Id at 53-55.
34. The *Marvin* court anticipated investigations into whether the parties' sexual relations were a severable part of their contract, into whether the parties had tried to avoid a marital relationship, and into any facts that might form the basis for any kind of equitable relief.

emotional relationship is. But once a court starts asking whether a non-marital relationship is the functional equivalent of marriage, it starts a process in which it compares the case at hand with the weakest case in which a couple has been found to have achieved the functional equivalent of marriage. The case at hand will sometimes seem just close enough to the weakest precedent to justify saying that it qualifies as the functional equivalent of marriage. That case then becomes a precedent, and the process begins again. The process is partly driven by the dynamics of our system of precedent. And it is accelerated by the fear that to refuse to call a relationship the equivalent of marriage is to deny its importance to the parties and is thus to demean the relationship.

Why might this process be a problem? At the end of the day lies the risk that extending the regime of functional equivalents will tend to assimilate relatively transient and shallow relationships to marriage. Yet the usefulness of marriage as a social institution depends in significant part on people's understanding that it is special, and that it is special in the seriousness of commitment that it demands. The risk, in other words, is that extending the regime of functional equivalents will erode the special qualities of marriage and reduce marriage to just one more "life style choice."[35]

This brings us to our next reservation about functional-equivalence approach. Marriage is not just an outward sign of inward commitment. It is a social and legal institution which reinforces that commitment. People who marry assume a role which carries social expectations with it, expectations most people have to some degree internalized and which are not avoided without cost. This increases the likelihood—although only the likelihood—that the quality of the relationship justifies according one member the power to make momentous decisions for the other.[36]

I have been discussing some of the knotty problems of definition that would need to be untied before deference to family authority could be fully useful in solving bioethical problems. But

35. For more complete comments on the "functional-equivalence" approach, see Schneider, 20 Hofstra L Rev (cited in note 19).

36. For an extended exposition of the role and value of social institutions in the familial realm, see id.

there is a final problem with deferring to the family, however it is defined.[37] Many of the bioethical decisions we might ask families to make are enormously consequential. They are literally questions of life and death. Yet two factors (at least) can make it hard for people in intimate relationships to decide them wisely. First, love is not the only strong feeling to which intimacy gives rise. Love can be mixed with equally potent but harsher feelings of jealousy, resentment, and even hate. Second, people in such relationships may have conflicts of interest that inhibit dispassion and diminish wisdom. Those conflicts include even the crassest kind of wish that one's relative should die so that one can receive an inheritance.[38] Less drastically and more sympathetically, they include concerns that one relative's lingering illness is damaging the well-being of

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37. Of course, family law has not burdened itself by trying to adopt a single definition of the family. Rather, it has adopted different definitions for different purposes.

38. This is, as I say, the crassest way in which a family member's decisions might be distorted. But that does not mean that only the crassest people will be influenced by it. Archdeacon Grantly is not a bad man, but it is only after "he thought long and sadly, in deep silence, and then gazed at that still living face" that he "at last dared to ask himself whether he really longed for his father's death" so that he might be appointed to his father's bishopric. Anthony Trollope, *Barchester Towers* 12 (Doubleday, nd). In addition to the fact of this distorting motive is the fear that it arouses. Prince Hal apparently is speaking the truth when he explains that he took the crown from his father's pillow because "I never thought to hear you speak again." But the king retorts,

> Thy wish was father, Harry, to that thought:
> I stay too long by thee, I weary thee.
> Dost thou so hunger for mine empty chair
> That thou wilt needs invest thee with my honours
> Before they hour be ripe?

And he has already expostulated:

> See, sons, what things you are!
> How quickly nature falls into revolt
> When gold becomes her object!
> For this the foolish over-careful fathers
> Have broke their sleep with thoughts, their brains with care,
> Their bones with industry;
> For this they have engrossed and piled up
> The canker'd heaps of strange-achieved gold;
> For this they have been thoughtful to invest
> Their sons with arts and martial exercises:
> When, like the bee, culling from every flower
> The virtuous sweets,
> Our thighs pack'd with wax, our mouths with honey,
> We bring it to the hive; and, like the bees,
> Are murder'd for our pains.

William Shakespeare, *The Second Part of King Henry the Fourth,* act IV, sc. v.

other family members. Such concerns presumably contributed to the majority's reluctance in *Cruzan* simply to hand over treatment decisions to the family.[39] And such concerns have helped motivate family law's long-standing reluctance to cede families complete control over decisions for their members. It is worth remembering, for example, that the law of child abuse requires parents to provide needed medical care for their children, and that the criminal law is in principle prepared to punish as homicide any failure to do so that results in a child's death.[40]

Obviously, I am not arguing that families should not participate in making bioethical decisions for their members. My inclinations are quite to the contrary. But I think that the lesson of family law's experience is once again cautionary. Familial decisions can be acutely troublesome and troubling. Writing rules to govern such decisions is not without its complexities and even its dangers. Further, the atomizing tendencies of the age and its law—the ever-sharpening urge to treat family members as independent of each other—conflict harshly with the desire to confide crucial bioethical decisions to families. In short, what we have been calling "family authority" offers only partial and problematic solutions to the kinds of bioethical issues we are discussing.

VI. RIGHTS DISCOURSE

Yet another common and conventional answer to the standards problem is to analyze issues in terms of rights.[41] Rights solutions confer on rights holders the power to resolve ethical questions and thereby relieve the state of the burden of doing so. Since rights thinking is one of the dominant modes of

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39. See *Cruzan*, 58 USLW at 4922. The Court also noted that "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent." Id.

40. For a challenging and illuminating illustration of the difficulty of family decisions in even the most benign circumstances, see John Hardwig, *The Problem of Proxies With Interests of Their Own: Toward a Better Theory of Proxy Decisions*, 1992 Utah L Rev 803.

41. When I say "rights discourse," I will be referring primarily to the discourse about constitutional rights in the United States today. For an analysis of that discourse and its use in family law, see Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 Cal L Rev 151 (1988). For an extended critical treatment of American rights discourse, see Mary Ann Glendon, *Rights Talk* (Free Press, 1991).

discourse in America today, it should be no surprise that there are few areas of family law which someone has not suggested should be constitutionalized, and that there are not a few—entry into marriage, reproductive freedom, parental rights, and some aspects of child custody, for instance—which have been.

Rights solutions have seemed attractive in both areas of bioethics. *Roe v. Wade* obviously has something—often a great deal—to say about bioethical issues related to reproduction. And many of the questions about how medical-care decisions should be made have been analyzed in terms of rights, as the opinions in the *Cruzan* case suggest. Too many people (including me) have written too often and too long about *Roe v. Wade* to justify another inquiry into what it teaches about the usefulness of rights discourse. But we may learn something about three systematic problems with that discourse by looking more generally at family law's experience with it.

The first of these systematic problems is that "the origin, scope, justification, and purpose" of many of the constitutional rights at issue in family law cases are uncertain.[42] The rights at stake are generally what are loosely called "privacy" rights. These rights are essentially of recent origin, and the textual basis for them is slight. The case law through which they have been developed has not always labored to explore their nature or rationale. This is troubling on the familiar principle that in a democratic society courts, as non-majoritarian institutions, should not thwart decisions of majoritarian institutions without well-founded, well-articulated authority.[43] But it is also troubling at a more practical level. To see why, we need to understand something about how the Supreme Court analyzes family-law rights. The Court has commonly denominated most of these rights "fundamental," and it has (albeit somewhat erratically) imposed on any statute with which these rights conflict a generally unbearable burden of justification. Thus the question whether a litigant can

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42. Schneider, 76 Cal L Rev at 158 (cited in note 41).

43. One of the unfortunate problems with rights discourse is that its underlying principles are—reasonably enough, under the circumstances—poorly understood by even quite sophisticated publics. It now seems to be true that a dismaying number of people simply expect the Supreme Court to put into law desirable social policy, not to interpret the Constitution. For a particularly sympathetic but still dismaying example of this confusion, see Pete Busalacchi, *How Can They?*, Hastings Center Rep 6 (Sept/Oct 1990).

assert a right is crucial. Yet because of its uncertainty about the nature of these rights, the Court has regularly had difficulty answering that question coherently and predictably.

The second systematic problem with family-law rights analysis lies in its difference from most other rights discourse. Ordinarily, we talk in terms of what I have called the Mill paradigm: "That is, we think in terms of the state's regulation of a person's actions. In such conflicts, we are predisposed to favor the person, out of respect for his moral autonomy and human dignity."[44] That predisposition also rests on our assumption that the state can bear any risks of an incorrect decision better than the individual can. "In family law, however, the Mill paradigm often breaks down, because in family law conflicts are often not between a person and the state but between one person and another person."[45] For example, we say that parents have a right to make decisions for their children. Yet we also say children have a right to life. If parents decide to deny their children treatment necessary to save their lives, how are we to choose between the two rights?

The third systematic problem with rights discourse in family law has been its inability to deal convincingly with the interests the state asserts to justify its infringement of rights. The Court often says that where a "fundamental" right is at stake, a statute must be "necessary" to serve a "compelling" state interest. But in practice the Court has been unwilling to apply this standard consistently or to define the standard's terms comprehensibly. In large part, this is probably because the test essentially requires the Court to compare two incommensurable values—the importance of the right with the importance of the state interest. On what scale, to take the example of *Zablocki v. Redhail*,[46] do you weigh the right of a person to marry against the state's interest in assuring that parents will support their children?[47]

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44. Schneider, 76 Cal L Rev at 157 (cited in note 41).

45. Id.

46. 434 US 374 (1978). In *Zablocki*, the state had forbidden people to marry who already had children they could not or would not support. Id at 375.

47. For detailed criticisms of the Court's state-interest analysis in family-law cases, see Schneider, L & Comtemp Probs, at 79 (cited in note 24); and Carl E. Schneider, *State-Interest Analysis and the Channelling Function in Privacy Law*, in Stephen Gottlieb, ed, *Public Values in Constitutional Law* (Mich U Press, forthcoming 1993).

These three problems with rights discourse will often infect attempts to analyze bioethical issues in rights terms, if only because of the considerable overlap between family law and bioethics. Let us briefly examine some of the ways in which this happens by looking at the recent and familiar case of *Cruzan v. Director, Missouri Department of Health*.[48] The first of the problems of rights thinking we discussed was the obscurity of the origins, scope, justification, and purpose of family-law rights. I would suggest that such uncertainties about the nature of the right at stake in *Cruzan* explain much of the disagreement between the majority opinion and Justice Brennan's dissent. Justice Brennan vehemently insisted that Nancy Cruzan had a right to decide whether to receive food and water. But as the majority noted, "The difficulty with [that] claim is that in a sense it begs the question: an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right."[49]

The importance of Cruzan's incompetence lies in the nature of the right asserted for her. It is a right to decide. If we ask why we might attribute such a right to people, we are likely to suggest two reasons. The first is that people will make better decisions for themselves than the state can, since they know their own situation better than the state and have every incentive to make a more careful decision than the state would. But this rationale did not apply in *Cruzan*, since Nancy Cruzan could not know anything or respond to any incentives. The second reason we might attribute such rights to people is "out of respect for their status as independent moral agents."[50] But once again there is a problem with this basis for the privacy right in *Cruzan*, since "it makes little sense to attribute rights to people who cannot be independent moral agents."[51] The dissents needed, then, to explain why the origin

48. For a statement of the facts of *Cruzan*, see note 8. For an extended treatment of the case as a social, moral, and political question, see Carl E. Schneider, *Cruzan and the Constitutionalization of American Life*, 17 J Med & Phil (forthcoming 1992). For good analyses of *Cruzan* as a constitutional problem, see John A. Robertson, Cruzan *and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 Ga L Rev 1139 (1991); and Yale Kamisar, *When is There a Constitutional "Right to Die"? When is There No Constitutional "Right to Live"?*, 25 Ga L Rev 1203 (1991).

49. *Cruzan*, 58 USLW at 4920.

50. Schneider, 76 Cal L Rev at 165 (cited in note 41).

51. Id.

and purpose of the right made it applicable to Cruzan. Instead, they formalistically and dogmatically insisted that she had a right to decide whatever her ability to claim, comprehend, or exercise it.

Cruzan instantiates the breakdown of the Mill paradigm in several related ways. First, that paradigm assumes a competent right-holder, which Nancy Cruzan was not. This might not have been crucial had she had only one right and had it been incontrovertible that she would have wanted to exercise it. But the second way in which *Cruzan* departs from the Mill paradigm is that she had not just one right, but almost a cacophony of rights, rights which potentially conflicted. She had a right to life; she had a right to refuse treatment necessary to preserve her life; she had a right (Justice Stevens believed) to have a decision made in her best interests. Finally, there were in her case two sets of potential right-holders—Nancy Cruzan and her parents. Yet the interests of the two sets potentially conflicted in the ways I earlier described.[52]

Finally, underlying much of the debate in *Cruzan* was the question how the state's interests should be analyzed. The dissents essentially argued that the state has no interest in the life of a person who does not want to live and that therefore the state cannot require that it be shown by clear and convincing evidence (instead of a mere preponderance of the evidence) that an incompetent person wishes to refuse treatment. This, I think, unduly (and characteristically) depreciates the state's interests. For one thing, the state has an interest arising out of its protective function. The evidentiary standard challenged in *Cruzan* was to be applied in *all* cases in which the issue was whether life-sustaining treatment should be denied an incompetent patient. It may well be that Nancy Cruzan would have wanted not to be treated in her circumstances. But I think it is at least constitutionally reasonable for the state to assume that, while many and perhaps most people would choose at some point to refuse medical treatment, most people prefer life to death and will struggle to retain it as long as

52. One way of resolving the potential conflict would be to say that Cruzan's parents had no distinct rights of their own, but were merely exercising her rights for her. However, this does not really make the problem go away, since there remain not only the questions whether her parents in fact had no right of their own and whether a right like Cruzan's could be exercised by an unappointed proxy but also the fact that her interests and their interests potentially conflicted.

they feel they can. On this view, the state protects people who cannot protect themselves by setting a general evidentiary standard that errs on the side of treatment.[53] This view is made more plausible by the consideration that the people—the family—who will usually be seeking to end treatment will be people who will not uncommonly stand to benefit in some way from doing so. And even when, as will ordinarily be the case, patients ultimately do not need to be protected from their families, the state can point out that they may still need to be protected from the other people who may participate in making decisions about the patient—namely, the relevant medical personnel.[54]

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53. It is, as the dissents pointed out, no doubt true that Missouri's evidentiary standard would sometimes result in treatment being given where the patient would not have wanted it. See, for example, *Cruzan*, 58 USLW at 4926 (Brennan dissenting). But as the majority noted, such a result is quite unremarkable in our legal system. Id at 4921. We regularly decline to give effect even to a clearly expressed intention where that intention has not been given the proper legal form, as the laws of wills, gifts, conveyancing, and contracts (to name only a few) all testify. We do so in part for reasons of efficiency: Where people have followed the correct legal forms in expressing their wishes, we are relieved of the burden of ad hoc inquiries into their true intent. But we also do so because we have the deepest doubts about the success of any such inquiries. In addition, we impose on people the obligation of making their preferences clear so that everyone who needs to know can know with confidence what those preferences are. Finally, we ordinarily decline to enforce preferences that are not expressed in the correct legal form because of our fear that even a clearly and accurately expressed wish may not be what the person truly wants. We have all had the experience of thinking that if some situation arose we would want some particular result, but nevertheless discovering that, when pressed to make an actual decision, our impulse was not our true wish. For a moving expression of such a discovery, see Vicki Williams, *The Horror Is Worth It*, Newsweek 14 (Oct 9, 1989), a wife's account of how her terminally ill husband reversed his initial decision to refuse aggressive treatment. Less dramatically, see Jay J.J. Christensen-Szalanski, *Discount Functions and the Measurement of Patients' Values: Women's Decisions During Childbirth*, 4 Med Decision Making 47 (1984), which reports that a significant proportion of women who had chosen to forego analgesics during childbirth changed their minds during delivery. (It should be said that not all studies of patient preferences indicate this kind of instability. See, for instance, Maria A. Everhart and Robert A. Pearlman, *Stability of Patient Preferences Regarding Life-Sustaining Treatments*, 97 Chest 159 (1990).) The forms and formalities associated with preparing and signing legal documents are intended to bring home to their signers that a binding and consequential decision is being made and thus to promote as "true" a decision as possible.

Part of the problem in *Cruzan* is probably that Nancy Cruzan was caught in a transitional period when new legal responses to the problems of incompetent patients are being created and publicized. It is possible that, as living wills and durable powers of attorney become more common, people like Cruzan will come to know about them and, where they want to, sign them. At least at that point it will be more reasonable to expect people to do so and to deny effect to any wishes they express that are not in a form clearly announcing that their wishes are intended to have legal effect.

54. On the propensity of some physicians to see treatment issues as exclusively

In addition, is it true that society has no interest in the lives of its citizens once they have decided not to live? Suppose, for instance, that A had irrevocably decided to commit suicide and had taken poison which would inevitably result in his death. Suppose further that B then killed A. Is B innocent of homicide because A's life has ceased to be of interest to society? Surely not. B is guilty of homicide partly because of the social interest in maintaining a sense of the sanctity of human life in order to encourage people to respect it. But the social interest in A's life also arises out of the belief that few things are more basically important than human life, that it is valuable in itself and not just to the holder, that "each man's death diminishes me." If there is a social interest in rocks, louseworts, and snail darters, why not in people's lives?[55]

In criticizing contemporary rights discourse and in surveying its limitations, I have not intended to say that rights solutions should never be sought, that that discourse does not serve valuable purposes, or that all the problems with our rights discourse are insuperable. But in America today rights solutions have so powerful an appeal that the greater danger is that they will be unreflectively adopted and dogmatically defended. Thus I have been more concerned here with some of the cautionary experiences family law has encountered in using rights discourse than with the well-known advantages that flow from it.

VII. THE FACILITATIVE FUNCTION

Another response to the standards problem has recently grown abundantly in popularity. This response is to expand what I call the law's "facilitative function." The facilitative function

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medical and not at all moral or social, see Allen E. Buchanan, *Medical Paternalism or Legal Imperialism: Not the Only Alternatives for Handling* Saikewicz-*Type Cases*, 5 Am J L & Med 97 (1979). For a more realistic look than any of the opinions in *Cruzan* offers of the actual practice of "informed consent," see B.W. Levin, *The Culture and Politics of "Baby Doe" Decisions,* Paper presented at the 108th Annual Spring Meeting of the American Ethnological Society (1986); and Zussman, *Intensive Care* (cited in note 13).

55. Justice Scalia's concurring opinion took an even stronger line on the state-interest question. It argued that what was at stake in the case was whether Cruzan could commit suicide and that the state's interest in preventing suicide was solidly established by centuries of statutory and case-law precedent. *Cruzan*, 58 USLW at 4924-26 (Scalia concurring).

allows people to deploy the law's power to arrange their lives in ways they prefer. It has two primary forms. First, it offers people a legally enforceable way of specifying how their affairs should be handled, as when it allows them to specify in a will how their assets will be distributed. Second, it provides people with a legally enforceable way of arranging their relationships, as when it allows them to enter into contracts. An attraction of both forms is that they permit people to choose their own standards, so that the law need not prescribe standards for them.[56]

Family law has long resisted the use of contracts in most family settings. Recently, however, it has become markedly more willing to allow couples both before and during marriage to enter into contracts regulating some of their relations during and after marriage. And it has also become more welcoming of contracts between unmarried cohabitants. Nevertheless, family law's attitude toward contracts remains cautious. Why? For one thing, family relationships often involve emotive, fluid, and personal attitudes and behavior that are not consonant with the kinds of rationalistic and calculating attitudes that we associate with contract law. For another thing, people in family contexts may be unable or unwilling to bargain aggressively, to guard against internal and external emotional pressures, and to foresee far into the future how they will feel about complex and intractable problems they cannot now even imagine. Family law's protective function thus may well call for it to safeguard at least the weaker party to the contract. Further, many contracts affect people besides the contracting parties. These people will not have had the choice of standards the parties to the contract had, and so for them the facilitative function will not have solved the standards problem. What is worse, these third parties may be injured by the contract, thus calling the protective function into play. And, of course, there is always the awkward fact that many people will not make a contract despite every incentive to do so, just as many people will not write a will despite centuries of encouragement and admonishment. In sum, family law has resisted contract as an

56. For an exploration of the facilitative function and of contract in family law, see Schneider, *Family Law: Cases and Materials* (cited in note 7). For a more extended and favorable view of the use of contract in family law than I offer in this essay, see Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 Cal L Rev 204, 244-65 (1982).

ordering principle because of doubts about the appropriateness of using a commercial mechanism in a personal setting, and families seem often to share that resistance.

Similar concerns will inhibit solving bioethical problems through the facilitative function. Consider, for instance, surrogate-mother contracts. Can prospective surrogates think with the rationality contracts require about something as fiercely "emotive, fluid, and personal" as how they will feel about giving up the child they have borne for someone else? Will they be economically or psychologically vulnerable and be pressured into making agreements they will ultimately regret and even abjure? Will they be willing and able to bargain aggressively to protect their interests? Will they foresee when they sign the contract how they will feel when the time comes to execute it? And, of course, the contract produces a person who was not party to it—the child. The law will have some interest in protecting that child, and in doing so the law will again be returned to the standards problem.[57]

The other aspect of the facilitative function—the one which allows people to recruit the law's power to effectuate their individual intentions—has also emerged as a solution to some bioethical problems. Primary examples are the living will and the durable power of attorney. But these devices are also subject to some of the uncertainties that characterize the facilitative function. How far will people signing such a document fully understand the circumstances in which it might be applied, fully have thought about their own feelings about these distressing subjects in the present, and accurately anticipate how they will feel in the future? Will they have been unduly influenced by the people around them? These questions are intended to suggest, of course, that medical decisions are brutally hard to make under the best of circumstances and that making them in a present that might be unrecognizably different from the future is to make them under quite deplorable circumstances. It is thus not surprising

57. For a fuller treatment of this problem, see Carl E. Schneider, *Surrogate Motherhood from the Perspective of Family Law,* 13 Harv J L & Pub Pol 125 (1990); Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues* (Harv U Press, 1990); Symposium, In re Baby M, 76 Georgetown L J 1719 (1988). For discussions of the related question of a market for adoptive children, see Elisabeth M. Landes and Richard A. Posner, *The Economics of the Baby Shortage,* 7 J Legal Stud 323 (1978); Symposium, *Adoption and Market Theory,* 67 BU L Rev 59 (1987).

that there is evidence that advance directives have a good deal less effect than we might like to believe.[58]

All these considerations suggest that we should constrain our ever-soaring hopes that the devices of the facilitative function will solve the bioethical dilemmas we now face. They also counsel us that, if the facilitative function is to be given substantial legal standing in bioethical decisions, it should at least be in a carefully formalized way. Casual substitutes for careful thought should not be encouraged, for the facilitative function achieves its deepest justification only when it backs with the force of law people's genuinely considered wishes. The questions I asked above are hard enough where the prospect of signing a binding legal document has brought home the fact that serious issues are being resolved.[59] These questions become next to impossible when, as in *Cruzan*, the only evidence is the possibly quite casual remarks to friends of a young person who is not aware that what she says will have actual consequences and who does not expect to have desperate medical problems for decades. And when the patient was never in his life competent to formulate an opinion on treatment, any attempt to decipher his intention must be wholly fictional.[60]

VIII. CONCLUSION

This attempt to glean lessons for bioethics from family law has yielded no determinate answers or easy principles. I have suggested that family law has recently struggled to avoid the

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58. See, for example, David Orentlicher, *The Illusion of Patient Choice in End-of-Life Decisions*, 267 JAMA 2101 (1992). Lawyers are regularly surprised when the world ignores legal rules, but by now they should not be. See, for example, Stewart Macaulay's classic study of the use of contracts in business: *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am Soc Rev 55 (1963). On the distance between law and life in one significant area of family law, see Schneider, 1991 BYU L Rev at 203-209 (cited in note 2).

59. For a masterly demonstration of just how baffling those questions can be even in optimal conditions, see Patricia D. White, *Appointing a Proxy Under the Best of Circumstances*, 1992 Utah L Rev 849.

60. See, for example, *Superintendent of Belchertown State School v. Saikewicz*, 370 NE2d 417 (Mass 1977), where the court struggled hopelessly to solve the problem by attempting to do what the patient would have done had he been competent to decide for himself. Id at 431. For a good statement of the limits of this "substituted judgment" procedure, see Allen E. Buchanan and Dan W. Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* 112-22 (Cambridge U Press, 1989).

standards problems. Yet I have argued that each method of doing so is itself importantly flawed and sharply limited. I must confess that, if anything, this survey has been too pessimistic, that it has looked more assiduously for the drawbacks than the benefits of each approach. I should also say that my survey has confined itself to examining broad approaches, rather than seeking the surely valuable lessons to be learned from family law's concrete, common-law resolutions of particular fact-patterns.

On the other hand, if my cautionary approach is essentially correct, two conclusions might follow. The first is that the standards problem might be confronted directly. My own inclination is that there is something in this. I am not persuaded, despite some real evidence to the contrary, that the processes of democratic government are wholly incapable of resolving the kinds of value conflicts that family law and bioethics present or that allowing them to do so is wholly incompatible with a free society. But I readily admit that this is only an inclination, and that I have not fully worked out all my own views on the subject.[61]

The other conclusion that might be drawn from family law's quandary is that we must content ourselves with imperfect solutions to the perplexing issues family law and bioethics present us. Perhaps one reason the approaches I have canvassed seem so inadequate is that too much has been expected of the law. We want the law always to reach the right result, and when in a given case it fails to do so, we demand in our distress that somehow the law should be changed. We insist that the law must get every case right, and we are indignant when it fails (by our lights) to do so. But family law and bioethics, like much of law, are areas where it is hard to know what the right result is, where often there will be no right result, and where there is no way of assuring that the right result will consistently be reached. Both areas, like much of law and life, involve what have been called "tragic choices"—irreducible conflicts between legitimate interests.[62] We may, then, have to content ourselves with picking

61. For an attempt to work out some of those views in the particular context of the law of alimony, see Schneider, 1991 BYU L Rev (cited in note 2).

62. For a general description of this problem, see Guido Calabresi and Philip Bobbitt, *Tragic Choices* (WW Norton & Co, 1978). For a further treatment of it, one that has much to say in particular about its appearance in the dispute over abortion, see Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public*

eclectically whichever approach seems best adapted to the particular problem at hand, consoling ourselves with the realization that often human institutions can do no better than to muddle through.

Law Problem (Syracuse U Press, 1985).