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FAMILY TRAITS

Inga Markovits *

THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE. By *Mary Ann Glendon*. Chicago: The University of Chicago Press. 1989. Pp. xv, 320. \$32.50.

Make any assertion about the state of the modern family, and there is a good chance that its opposite will be just as plausible. The family seems a fragile and threatened institution, yet it also appears remarkably resilient. Most Americans believe American family life to be in a sad state of decline, yet most think that their own family lives are healthy and satisfying.¹ Record divorce rates challenge the very concept of marriage, yet most divorced people are quick to try marriage again.² Women have made dramatic gains in their quest for equality with men, yet crucial differences in earnings and household duties refuse to disappear.³

American family law doctrine and case law are equally filled with riddles and contradictions. Has state interference with family decisions increased or decreased during the past twenty-five years? While entering or leaving a marriage has become easier than ever before, property and custody matters after divorce increasingly are left to judicial discretion. Are spouses more or less restricted in contracting with each other? While courts are more ready to allow prenuptial agreements, they also are more ready to disregard them if the marriage breaks up. Do fathers, no longer constricted by sexual stereotypes, now play a larger role in the lives of their children? While joint legal custody upon divorce is on the rise, sole physical custody by fathers is not.⁴ How much control does a child have over his own life? The Supreme Court, in two cases decided on the very same day, has de-

* Morris and Rita Atlas Family Centennial Professor, The University of Texas School of Law. Referendar, 1960, Dr. jur. 1966, Free University of Berlin; LL.M. 1969, Yale. — Ed.

1. MASS. MUT. LIFE INS. CO., MASS. MUTUAL AMERICAN FAMILY VALUES STUDY 29-30 (1989).

2. Nearly half of all recent marriages in the United States are remarriages for one or both partners. Levine, *The Second Time Around: Realities of Remarriage*, U.S. NEWS & WORLD REP., Jan. 29, 1990, at 50.

3. Fuchs reports that while women, on average, earn 60% of men's wages, they do more than twice the amount of housework and childcare. V. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 50, 78 (1988).

4. Maccoby, Depner & Mnookin, *Custody of Children Following Divorce*, in IMPACT OF DIVORCE, SINGLE-PARENTING, AND STEP-PARENTING ON CHILDREN 91, 112 (M. Hetherington & J. Arasteh eds. 1988).

clared children both capable⁵ and incapable⁶ of the "sound judgment[]"⁷ needed to make important decisions affecting their welfare.

There can be little doubt that recent decades have brought amazing changes to family life and law not only in the United States but elsewhere in the industrialized world. Consider only the rise in divorce rates⁸ or in extramarital births,⁹ the widespread acceptance of unmarried cohabitation, the almost universal victory of no-fault divorce, or the total remodeling of marital property law. "Revolution" does not seem too big a word to describe what has happened.¹⁰ But what, exactly, has happened? What has this revolution brought, what ideology keeps it together, what promises does it hold out for the future?

In her book *The Transformation of Family Law*, Mary Ann Glendon¹¹ looks at the bewildering changes affecting Western family life and behavior during the past quarter-century through the medium of law. Not that Professor Glendon believes that the law is at the bottom of these changes. She is skeptical about the law's power to affect people's behavior, alert to the stubborn resilience of custom, and aware of the many ways in which the addressees of the law can quietly subvert or defeat a legislature's intentions. But she also believes that connections exist between law and social change, that legal rules may give some shape and direction to uncertain social developments (p. 311), that the law's powerful symbolism may affect the ways in which we perceive our relations with others (pp. 194, 312), and that, in any case, the law can tell "stor[ies]" about "roles and relationships that are central in most people's lives" (p. 2). By comparing recent developments in the family law of England, France, the United States, and West Germany (with occasional glances at Sweden), Glendon wants to trace the narrative lines of these stories. She looks for patterns in the ways in which our laws have changed, for the shared or divergent beliefs that these patterns reflect, and for what these beliefs can tell us about ourselves, our relations with others, and our views of the state.

The Transformation of Family Law is a successor to Glendon's

5. *Fare v. Michael C.*, 442 U.S. 707 (1979) (children capable of waiving *Miranda* rights).

6. *Parham v. J.R.*, 442 U.S. 584 (1979) (children incapable of deciding about their need for mental health treatment).

7. *Parham*, 442 U.S. at 603.

8. Divorce rates in the United States rose from 2.2 per 1000 population in 1960 to 5.2 per 1000 population in 1980. Since then, divorce rates have dropped slightly to 5.0 per 1000 population in 1985. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 85 (109th ed. 1989).

9. Extramarital births in the United States rose from 10.7% of all births in 1970 to 23.4% of all births in 1986. *Id.* at 66.

10. The word "revolution" is used, for instance, both by V. FUCHS, *supra* note 3, at 10, and by Teitelbaum & DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1093 (1988).

11. Professor of Law, Harvard University. — Ed.

State, Law and Family,¹² published in 1977, when the developments that both books describe were about to gather full strength. Originally, the new volume was simply meant to update its predecessor. In the end, much of the material was rearranged, many passages were rewritten, and emphasis was redistributed throughout the text. But the work's structure and methodology have remained largely the same and the thirteen years since its original appearance have not been enough to allow the new book to speak with finality about the changes it depicts. On the contrary, like its predecessor, *The Transformation of Family Law* conveys a dizzying sense of events still in flux. This unruly and Protean quality of her subject matter — the fact that we are dealing with a field that is alive and full of surprises — makes Glendon's search for the leitmotifs which might guide and steady our interpretations even more urgent.

If you look for the significant lines of development running through as large a field of learning as comparative family law, two different methods suggest themselves. You can either zoom in on the essential patterns you discover, outline the common concerns or convictions running like colored threads through the entire fabric of family law, and use concrete examples only to illustrate overall themes. Or, you can describe the developments in different areas of family law, highlight in each area those details which manifest common strands of thinking, and in the end pull these strands together to arrive at a meaningful picture. The first approach will require you to articulate your themes at the outset, will allow you to pick and choose your supportive evidence, will encourage theoretical speculation, and thus is likely to produce forceful and consistent results. But it will also tempt you to overstate your case, will make it easier to disregard conflicting evidence, will hide from your readers how you discovered your themes in the first place, and thus will make criticism and disagreement more difficult. The second approach will require extensive description, obliging you to spend much time on matters only tangentially related to your search for common patterns of development, will limit occasions for analytical speculation, and will produce more conflicting results. But it will also guard against theoretical overstatements, will put your cards on the table, and will educate readers sufficiently about the field to allow them to make up their own minds.

Professor Glendon uses the second, more descriptive, approach. Choosing six topics (the formation of marriage, the law of ongoing family relationships, divorce, the legal effects of divorce, inheritance, and cohabitation), she outlines for each the state of the law prior to the reforms in each of her four chosen countries, compares problems and solutions across national borders, points to telling differences and simi-

12. M. GLENDON, *STATE, LAW AND FAMILY* (1977).

larities, and in this fashion — knowledgeably, perceptively, gracefully, in language both warm and precise — alerts us to the common themes running through the developments under review. The result is both a comprehensive survey — what a wonderful text to use in a class on comparative family law! — and a sympathetic portrait of marriage and family everywhere besieged by social and economic change. The patterns of this change emerge indirectly, almost unobtrusively. As we read on, we are struck by the recurrence of themes — “There it is again,” we think, as if hearing by now familiar bars of music — and although the final chapter pulls the strands together, it does so in an understated fashion, more to remind us of what we have learned and to reflect on its meaning than to force the different elements of the book into a sharply defined theoretical framework.

Professor Glendon is too careful and honest a scholar, and too much interested in the variety of detail revealed by her comparative survey, to condense her findings into a structure which, after all, might be too rigid and too unambiguous to do justice to the richness of her material. Many readers, looking for a perceptive survey of Western family law, will agree.¹³ But to me, the thematic consistency of Glendon’s overall picture is by far the most interesting aspect of her book, and for argument’s sake, I would have liked her to overstate — rather than understate — its significance. So let me retrace for you, although not always in Glendon’s terms and at times in perhaps too categorical a fashion, the most striking lines of her portrait of West European and American family law.

1. *The privatization of marriage.* Marriage, once a relationship about which the state had a great deal to say, has increasingly become a matter determined by the partners themselves. Getting married is considerably easier than it used to be: marriage requirements (like parental consent (p. 42) and minimum age-levels) have been relaxed; marriage impediments (based on affinity or remote consanguinity) have gradually been dropped (p. 56-57); even when prohibitions remain (like those against bigamy), their violation will be less strictly prosecuted than in the past and will most likely not affect the legitimacy of offspring (p. 54); and the freedom to marry, in three of the four countries under review, has taken on constitutional dimensions (pp. 75-82).

Once married, the spouses are expected to fashion their relationship to suit their own purposes rather than to conform to the state’s codified marriage model (pp. 87-93). The law thus no longer assumes a standard division of functions between breadwinning husband and housekeeping wife, leaves it up to the spouses whether or not to share a common name or residence (pp. 90, 103-10), and has renounced its

13. A friend of mine, to whom I lent my review copy for a week, returned it after two days. “I ordered my own copy,” she said, “it’s the kind of book you’ve got to own.”

former position that prenuptial agreements contemplating divorce are against public policy (p. 137; discussing American law).

The state has also relinquished control over the exit from marriage. With the demise of divorce systems based on fault, officially accepted reasons for leaving one's spouse are no longer required (p. 149). No-fault divorce, accompanied (in the U.S. more than elsewhere) by the limitation of alimony rights, has made it easy and cheap to abandon unsatisfactory unions. Although theoretically a marriage's irretrievable breakdown must be proved before a court will grant a divorce, courts will almost always accept the spouses' own diagnosis of the state of their relationship (p. 190).

All these changes add up to what Glendon calls the "dejuridification" (p. 293) of marriage: its transformation from a relationship authenticated and molded by legal rules to a relationship deriving its dignity from the spouses' personal choices and feelings. Specific consequences will still follow from legal marriage, especially in areas affecting private property interests, such as inheritance law. But the legal impact of marriage is rapidly diminishing; for many purposes, it may no longer matter whether spouses are married or not (e.g., if child custody or welfare issues are at stake). Any legal shackles can easily be cast off if one side so chooses, and many couples will simply not marry at all. What matters is not law but love.

2. *The socialization of the family.* While the state has largely withdrawn from the regulation of marital choices, it has returned, with a vengeance, to manage the economic and pedagogic consequences of our emotional commitments: the relationships between parents and children, the support needs of children and ex-spouses, the allocation of custody upon divorce. State agencies administering public education, health care, or welfare have taken over many family functions. If conflicts arise between family members, courts seem less concerned with the adjudication of formal disputes than with the dispensation of substantive justice. Putting into practice the almost unlimited discretion conveyed by the "best interest" standard, judges can decide whether a child needs an abortion, may get married, has been abused or neglected, or which of two contesting spouses would make the "better" parent. And although the best-interest test applies only to children, family court judges will, in fact, also try to find the solution which is "best" for the adults involved. Where alimony and marital property disputes were once resolved on the basis of formal rules (focusing on legal title, premarital contract, the spouses' respective fault, and the like), they are now decided almost exclusively by judicial discretion (pp. 200, 228). As a result, the power of courts over individual lives has greatly increased. Where in the past judges were passive, they now are active; where they once applied legal criteria to

narrowly defined disputes over rights, they now devise practical solutions to take care of the needs of families in trouble.

3. *The move away from legal formalism.* With the dejuridification of marriage and the growing importance of discretionary decisionmaking, statutory language and doctrinal distinctions are losing significance. Regardless of whether they follow the community-property or the separate-property scheme, for instance, virtually all American states allow some form of discretionary division of property upon divorce (p. 228). Marriage, once the only respectable form of sexual partnership, has lost its exclusive legal status and is becoming the "source of convenient analogies" (p. 287) for problems that also arise between cohabitants unconnected by legal ties (like disputes over property or custody issues). Indeed, as far as public law benefits are concerned, long-term cohabitation may even entail legal consequences that short-term marriage does not (p. 290). If the welfare of children is at stake, all legal systems under review are particularly willing to disregard legal distinctions and to focus instead on blood-ties and actual need: discrimination based on a child's extramarital birth is no longer considered legitimate (p. 290). And with judicial attention centered on needs rather than rights, judges can no longer base their decisions on legal reasoning alone and must increasingly rely on the advice of nonlegal experts like psychologists and social workers.

4. *The fragmented image of the family.* As formal legal ties between family members are losing importance, the unit they hold together seems to become of less concern to the law than its individual members. Legal rules protecting the marriage relationship itself against attacks from the outside (like the American tort of "criminal conversation" or English "heart balm" actions) have either been abolished or are rarely used (p. 142). Tort law is abandoning spousal immunity rules; evidence law increasingly facilitates one spouse's testimony against the other (p. 143). Constitutional law protects the husband's or wife's individual privacy rights even in situations in which the unilateral exercise of these rights cannot but damage the relationship between the spouses (as in the case of abortion).¹⁴ Public assistance programs and social security laws, meant to ensure the satisfaction of base-line, everyday needs, focus on the individual in need regardless of family status (p. 296).

The law thus conveys an "atomistic image of the family";¹⁵ people appear unconnected, bent on pursuing their own happiness as each defines it, and if the new view brings more individual freedom, it also brings more exposure to the state and its agencies. While, for instance,

14. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (married woman does not need her husband's consent to obtain an abortion).

15. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1857 (1985).

the husband's or father's authority will no longer be enough to close the door to state intervention protecting family members (e.g., police interference in cases of family violence), the law's tendency to "break the family down into its component parts" (p. 295) may also weaken family ties. At a minimum, it will *reflect* a weakening of family ties — since simple causal connections between law and social change seem rather doubtful — and thus contribute to a picture of society in which individuals, already robbed of such mediating structures as churches and extended kinship networks, are increasingly left on their own when facing the state (p. 298).

5. *Changing notions of morality.* In the old days, when divorce was based upon fault, the law seemed to know what was morally right or wrong. Marriage was presumed to involve a life-long commitment which, if broken, entitled the innocent and injured spouse to compensation for the other's transgressions. Husbands and wives had different marital roles, which were reflected in property and support rules (pp. 112-16). The marriage relationship deserved moral and legal approval and children born from extramarital unions could not be allowed to intrude with equal claims upon the legitimate family.

With the introduction of divorce based on marital breakdown, family law "has abandoned its high-minded aspirations" (p. 145). Marriage is no longer seen as a moral commitment but as an attempt to achieve personal happiness.¹⁶ If it breaks down, it is more important to restructure disrupted lives than to search for a culprit. In the interest of a therapeutic clean break, continuing responsibilities between the ex-spouses should be kept to a minimum. As a result, life-long alimony after divorce — always more important in theory than in practice — has almost disappeared.

Family law today does not pretend to know how people should lead their lives — which is just as well, since lifestyles that once were considered objectionable (like unmarried cohabitation) are now commonplace. But even if people lead lives that by modern standards are still unconventional (as in the case of homosexual couples), courts will increasingly try to disregard unorthodox sexual behavior and treat it as private as long as it does not affect a person's social performance (as in custody disputes).¹⁷ Moral issues, if they are thought to exist at all, are thus increasingly compartmentalized and defused.¹⁸ Family law has become morally "bland" (p. 145) and nonjudgmental, focusing on

16. On the diminution of moral discourse in modern family law, see *id.*

17. See, e.g., *Doe v. Doe*, 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983); *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985).

18. Agreements by which unmarried cohabitants regulate the details of their relationship, for instance, once viewed as immoral and thus invalid in their entirety, are now judged by "a narrower and more precise standard" and are considered "unenforceable only to the extent that [they] explicitly rest[] upon the immoral and illicit consideration of meretricious sexual services." *Marvin v. Marvin*, 18 Cal. 3d 660, 669, 557 P.2d 106, 112, 134 Cal. Rptr. 815, 821 (1976).

the outer rather than on the inner man, interested not in moral questions but in socially practicable answers, and — within these parameters — leaving each to pursue the good life on his own.

6. *The growing importance of public law.* As family law has switched its attention from enforcing private commitments (as under the fault system of divorce, for instance) to solving social problems (the protection of children or the integration of divorced women into the work process, for example), its style of dealing with issues has also begun to change. Private law is increasingly being pushed out by public law regulation. Substantively, welfare law, social security law, tax law, and the like affect the ways in which families live more than ever before (p. 295). Procedurally, family-law judges use their virtually unbounded discretion to solve family problems in ways that look less like adjudication than welfare administration. Jurisprudentially, family law's focus on needs rather than rights implies also the rejection of traditional notions of fairness in favor of social engineering.

7. *The democratization of family law.* In earlier centuries, family law dealt primarily with marriage-related issues of property and contract, and thus with the affairs of the wealthy. Since then, it has come down in the world:¹⁹ from serving the rich, by way of the middle classes, to attending to the needs of the poor, and from a preoccupation with "old" property (like investments or real estate) to a concern with various forms of "new property" derived from employment relationships or social welfare policies (p. 294). This "democratization"²⁰ is mirrored within the family structure itself, where former hierarchies between husband and wife, and to a lesser extent between parent and child, are slowly being leveled and replaced by more egalitarian relationships.

So these are the dominant themes running through Professor Glendon's account of the transformation of family law. Of course, it would not be difficult to find counterthemes. Take just one example: the "demoralization" of modern family law, with its refusal to endorse specific notions of the good life,²¹ seems contradicted by recent signs of a "greening" of family law, of attempts to encourage warmer family interactions and to foster greater solidarity among family members through statutory admonitions (for instance, the famous Swedish no-spanking law (p. 99)) or through the further extension of family obligations (for example, obligations to support children beyond the age of minority²²). But such countervailing trends — and there are others —

19. See Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984).

20. The term is used on p. 111.

21. See *supra* note 16 and accompanying text.

22. See Moore, *Parents' Support Obligations to Their Adult Children*, 19 AKRON L. REV. 183 (1985).

do not detract from Glendon's overall picture. Her main themes ring very true. And the fact that the different strands of Glendon's pattern of change mesh so well — that often the same phenomenon seems to express several of the new modes of thought Glendon describes²³ — also speaks for the internal consistency of her portrayal.

And yet, somehow, I find myself not quite satisfied. For all its persuasiveness, reading Glendon's book is a bit like observing the innards of an old-fashioned watch: you see the numerous cogwheels turn, you see that they are obviously interconnected, but you still do not know what really makes the thing tick. Unlike Glendon's previous book on abortion and divorce, whose powerful dominant theme can be captured in one sentence,²⁴ *The Transformation of Family Law* lacks a central thesis, lacks the thrust of a focused argument. Maybe the structure of Glendon's book — its attempt to relate accurately the developments in a large field of law — has stood in the way of condensing her findings into a single theoretical punchline. Maybe there can be no such punchline. Maybe the attempt to force diffuse and contradictory developments into a single argument explaining their movement could not possibly do justice to the complexity of the issues.

Yet Glendon herself alludes to one possible thesis that I wish she had explored further. In her final chapter, she returns to the theme of the "democratization" of family law, mentioned more or less *en passant* in the preceding chapters (pp. 9, 111), and tells us that many of the legal changes described throughout her book "can be regarded as adjustments to the needs of new clienteles to whom much of traditional family law was irrelevant because they were without significant property or social position." She goes on to list modern family law's preoccupation with "new property" issues and "the appearance of new forms of state intervention in family life" as examples (p. 294).

Indeed, the switch from private law to public law regulation might well be due to the fact that family law's "hitherto neglected groups"²⁵ will not be served by a law preoccupied with property or contract rights (which they are unlikely to possess) but by legal policies ensuring the satisfaction of minimum needs. The same rationale could explain other developments. The new family law's reluctance to moralize, for instance, might be seen to reflect the realistic insight that

23. The modern legal treatment of unmarried cohabitation, for instance, reflects the *privatization of marriage* (the law attaches legal consequences to private unions which do not conform to the state's marriage model); corresponds to the *changing notions of morality* (the law no longer ignores cohabitation as being immoral and therefore outside of the law's protection); and expresses the *move away from formalism* (the factual relationship, like the parties' economic cooperation or the birth of common children, counts more than legally sanctioned ties).

24. Mary Ann Glendon's *Abortion and Divorce in Western Law* deals with the law's role in affirming or denying our moral responsibilities toward others (be it the fetus or those left behind in a broken marriage relationship). M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

25. Max Rheinstein's phrase is quoted by Glendon on p. 9.

self-righteous principles of proper behavior are a luxury that only the rich can afford. The law's focus on individuals rather than family units corresponds to the actual fragmentation of families under the pressures of poverty and to the fact that family members in need cannot always turn to each other for help but must increasingly rely on the state. If there is one key to Glendon's analysis, one common denominator which could help us to understand her stories, I think it must be the poverty and dependence of family law's new clients. This explanation would interlock with another intriguing theme that Glendon touches upon but does not pursue: the historical connection between family law and the development of property structures.

In the following pages, I want to look at the "new clients" of modern family law, and at the question of how the changes recorded by Glendon affect their lives, from my own specific comparative angle: the viewpoint of socialist law. This approach is less far-fetched than it may at first seem — even if we consider that socialists always had something to say about law and the propertyless. But there is another, and somewhat surprising reason which makes me draw the connection: Glendon's picture of the transformation of modern capitalist family law corresponds — feature for feature — to the family law ideals of early Soviet socialism. Let me explain.

Marxist theory had always been critical of the hierarchical structure of capitalist family life and had accused the bourgeoisie of "reduc[ing] the family relation to a mere money relation."²⁶ Engels had compared the position of wives to that of the proletariat (with husbands in the role of the capitalists) and had listed as "the first premise for the emancipation of women . . . the reintroduction of the entire female sex into public industry . . ."²⁷ Marxists foretold that in a future communist society men and women would be free and equal producers, that the "economic foundations of monogamy . . . will disappear,"²⁸ that marriage, liberated of all property concerns, would be based only on mutual love and thus would be moral only as long as that love persisted,²⁹ and that society would enable women to join men in the production process by taking over such former family tasks as household duties³⁰ and the care and education of children.³¹ Accord-

26. Marx & Engels, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER 469, 476 (R. Tucker 2d ed. 1978).

27. Engels, *The Origin of the Family, Private Property and the State*, in *id.* at 744.

28. *Id.* at 745.

29. *Id.* at 750-51.

30. August Bebel, in *Die Frau und der Sozialismus* predicted that "central food production institutions" would render domestic kitchens "completely redundant" and that public laundries and cleaning establishments would take over the washing of linen and clothes and the cleaning of carpets. A. BEBEL, *DIE FRAU UND DER SOZIALISMUS* 471 (1920) (my translation).

31. *Id.* at 449; Engels, *The Origin of the Family, Private Property and the State*, in THE MARX-ENGELS READER, *supra* note 26, at 746.

ing to this ideological blueprint, early Soviet family legislation³² introduced the legal equality of the spouses,³³ permitted unilateral divorce,³⁴ put informal "*de facto*" marriages on the same legal footing as formally registered marriages,³⁵ abolished illegitimacy,³⁶ and — while still providing for family support obligations — structured these obligations in a way that demonstrated the belief that family members would have to fill in only temporarily for a state that soon would be economically able to care for all of its members.³⁷

If one steps back to survey the leitmotifs of *this* legislation, it turns out that they are extraordinarily similar to those traced by Glendon in her account of recent Western developments. Like our family law, early Soviet family law believed in the *privatization of marriage*: marriage was seen as an emotional union relieved of its economic and child-rearing functions and therefore of no concern to the state, legitimated solely by the mutual affection of the spouses,³⁸ and thus — of course! — subject to divorce if that affection should fade.³⁹ Even more than we, early Soviet socialists believed in the *socialization of the fam-*

32. The main pieces of legislation were: the Decree on the Introduction of Divorce of Dec. 19, 1917; the Russian Socialist Federative Soviet Republic (RSFSR) Code on Marriage, the Family and Guardianship of Oct. 17, 1918; and the RSFSR Family Code of Nov. 19, 1926. Excerpts of all three statutes are translated in R. SCHLESINGER, *CHANGING ATTITUDES IN SOVIET RUSSIA: THE FAMILY IN THE USSR* (1949). For a thoughtful description and analysis of pre-Stalinist Soviet family law development, see W. GOLDMAN, *THE "WITHERING AWAY" AND THE RESURRECTION OF THE SOVIET FAMILY, 1917-1936* (1987) (unpublished dissertation).

33. The 1918 Family Code introduced the spouses' right to choose their common marital name (§ 100) and to maintain separate residences (§ 104), gave both spouses equal parental rights (§§ 150-51), and introduced separate property (§ 105). The 1926 Code abolished the need for a common surname (§ 7), entitled the spouses to choose their respective trades or occupations (§ 9) and to enter into contractual relationships with each other (§ 13), and — to protect the economically weaker wife — established community property. Upon divorce, the couple's shared property was to be divided according to the court's discretion (§ 10). See R. SCHLESINGER, *supra* note 32, at 35-39, 155-56.

34. The 1918 Code allowed consensual divorce at the Civil Registrar's office (§ 91) and unilateral divorce before a court (§§ 87, 90). Under the 1926 Code, an application by only one of the spouses was sufficient to register a divorce at the Civil Registrar's office (§§ 18, 19). *Id.* at 34-35, 157.

35. "De facto" marriage, as introduced by the 1926 Family Code, resembled in form the American common-law marriage, since it required, in addition to cohabitation, some evidence suggesting the existence of marital relations (though not necessarily consent). However, unlike common-law marriages, *de facto* marriages could be dissolved by *de facto* divorce, since registration had only evidentiary importance (§§ 19, 20). *Id.* at 157.

36. Even before the introduction of *de facto* marriage in 1926, the 1918 Code established equal rights for children born inside and outside of marriage (§ 133). *Id.* at 37.

37. The 1918 Family Code thus provided that "parental obligations . . . are suspended in the event of the children being maintained by public or government care." Note to § 161 in *id.* at 40.

38. Alexandra Kollontai, Commissar of Social Welfare, said in 1921: "The family — deprived of all economic tasks, not holding responsibility for a new generation, no longer providing women with the basic source of their existence — ceases to be a family. It narrows and is transformed into a union of the marital pair based on mutual contract." See W. Goldman, *supra* note 32, at 47-48.

39. In Lenin's words: "[O]ne cannot be a democrat and a socialist without demanding full freedom of divorce . . ." W. Goldman, *supra* note 32, at 42-43.

ily: in public child-rearing and in a society in which "[s]ewing, cleaning and washing, like mining, metallurgy and machine production, would become branches of the people's economy."⁴⁰ And what the Soviet economy in the 1920s could not even vaguely afford, capitalist economies have since achieved: McDonald's and its competitors, like the "great public cauldron"⁴¹ envisaged by early Soviet reformers, have largely replaced the "nervewracking and stultifying drudgery"⁴² of private household production, and "[f]ree education for all children in public schools" — once a demand of the Communist Manifesto⁴³ — has become commonplace.

More thoroughly than we, early Soviet family law *rejected legal formalism*: unconstrained by concerns for individual rights and optimistic about soon-to-be-achieved economic abundance, Soviet reformers saw even fewer reasons to be conceptually precise about the determination of family law obligations than we do today.⁴⁴ For example, while modern Western family law, in even its most radical version, still preserves distinctions between legal marriage and cohabitation,⁴⁵ early Soviet law, with its recognition of "factual" marriage, simply equated the two. Still, both approaches reveal the same disbelief in the constitutive powers of law and the same reliance on virtually unguided discretionary judicial decisionmaking.⁴⁶ And both modern Western and early Soviet family law reflect the same *atomistic view of the family*, which looks not to the unit but to its individual members — so much so, that the Soviet 1918 Family Code even outlawed adoption, since it would make no sense to create artificial family ties that in any event would soon be replaced by state care.⁴⁷ But then, the Soviets, like other revolutionaries before and after them,⁴⁸ had strong ideological reasons for rejecting mediating groups standing be-

40. W. Goldman, *supra* note 32, at 40 (describing Kollontai's views).

41. *Id.* at 41 (quoting Soviet economist Evgeny Preobrazhenskii).

42. *Id.* at 41 (quoting Lenin).

43. Marx & Engels, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER, *supra* note 26, at 490.

44. The relaxed Soviet attitude toward legal precision was reflected, for example, in the 1926 Code's rules on the determination of paternity. If in a paternity case several men were found to have had intercourse with the mother, Soviet law did not — like other civil law systems at the time — apply the *exceptio plurium* rule which excluded the liability of all suspects. Instead, § 32 of the Code gave the court free rein to pick any father it wanted from among the different candidates. R. SCHLESINGER, *supra* note 32, at 160.

45. Even Swedish law, which has largely merged the legal treatment of the *consequences* arising out of marriage and cohabitation, continues to assign to marriage the "central position" in family law. P. 274.

46. During the debate preceding the enactment of the 1926 Family Code, Nikolai Krylenko (later Commissar of Justice) thus compared — approvingly — the power of Soviet judges to determine whether or not cohabitation arrangements qualified as *de facto* marriages with the lawmaking powers of American judges. See R. SCHLESINGER, *supra* note 32, at 93.

47. See W. Goldman, *supra* note 32, at 64.

48. For a comparison of the family law legislation of the French Revolution, Maoist China, and Soviet Russia, see Müller-Freienfels, *Zur revolutionären Familiengesetzgebung, insbesondere*

tween citizen and state, and between the old and the "new" man, and thus set out actively to attack institutions (like the family or the church) that under capitalism were allowed to wither more gradually.⁴⁹

However, it is with respect to their common *moral ambivalence* that early Soviet and modern Western marriage philosophies most resemble each other. Both believed or believe man to be the product of social circumstances: the Soviets because of their faith in economic determinism, their modern counterparts because of their faith in the behavioral sciences. Both early Soviet and our modern family law approach marriage breakdown not as a matter of personal guilt but as a social disfunctioning, requiring a quasi-medical rather than a moral response. Both put few or no brakes on unilateral divorce and concentrate instead on the ex-spouses' factual needs. As a result, both ideologies downplay the spouses' individual responsibilities for each other. Both preach a minimal morality: freedom "[f]rom the ties of law, justice and civil authority,"⁵⁰ and the overwhelming importance of personal gratification.⁵¹ When, during the debate of the draft of the 1926 Soviet Family Code in the R.S.F.S.R. Central Executive Committee, a peasant delegate objected to unlimited freedom of divorce with the almost desperate insistence that "[o]ne must have an important reason," the house responded with laughter. "What reason?" Comrade Krylenko shouted from his seat.⁵² He spoke for us.

Finally, like our modern family law, early Soviet law aimed to *replace private law with public law regulation* and strove for a *democratization of family law*. "[A]ll law is public," Lenin advised the drafters of the first Soviet Civil Code;⁵³ therefore, all socialist law (like much of our own family law) should address legal disputes as matters of social policy rather than of individual rights. And as proletarian law, Soviet

zum Ehegesetz der Volksrepublik China vom 1.5.1950, in 2 IUS PRIVATUM GENTIUM: FESTSCHRIFT FÜR MAX RHEINSTEIN ZUM 70. 843 (1969).

49. See p. 298 (discussing the loss of intermediaries between state and individual).

50. This was one of the aspects of socialist love that Lenin acknowledges in a letter to Inesse Armand. Letter from Vladimir Lenin to Inesse Armand, Jan. 17, 1915, reprinted in R. SCHLESINGER, *supra* note 32, at 26-27.

51. Compare M. GLENDON, *supra* note 12, at 144 with Schneider, *supra* note 15, at 1847. One could argue that the early socialists had a less self-centered view of marital happiness than we do today; after all, Lenin, in his letter to Inesse Armand, *supra* note 50, at 26, also reproaches her for promoting "free love" and for downplaying such important socialist values as "seriousness in love" or childbirth. But Lenin was more prudish than most of his comrades; his views conflicted with August Bebel's libertarianism, A. BEBEL, *supra* note 30, at 475 ("The satisfaction of sexual drives is as much the personal business of each individual as the satisfaction of any other natural drive.") and with Alexandra Kollontai's refusal to see sexuality as a moral issue at all, see W. Goldman, *supra* note 32, at 45 ("[i]n nature there is neither morality nor immorality"). Even Lenin, however, like the drafters of the 1918 and 1926 Soviet Family Codes, would not have seen it as the law's task to enforce notions of morality.

52. Excerpts of the debate are translated in R. SCHLESINGER, *supra* note 32, at 26.

53. See J. HAZARD, COMMUNISTS AND THEIR LAW 77 (1975).

family law, like ours today, rejected hierarchies within the family and showed less interest in the family problems of the rich than in those of the poor.⁵⁴

So where does this comparison leave us? It suggests that early socialist and modern capitalist family law share many of the same jurisprudential assumptions about what law should do. Both focus on the satisfaction of human needs rather than on the vindication of legal entitlements. Both aim for socially correct solutions rather than for individual fairness: redefine conflicts, which once were thought to have moral dimensions, as personal crises,⁵⁵ try to realize the "best interest" of all persons involved, search for therapeutic, flexible, pragmatic responses, and are ready to enlist the help of social science experts in this search.⁵⁶

Both early Soviet and modern Western family law reformers look more to the future than to the past: they are less concerned with redressing bygone injuries or with honoring promises between spouses than with rearranging people's lives in ways that will best enable them to deal with the problems ahead of them. Both therefore favor flexible solutions, are willing to alter decisions if circumstances have changed,⁵⁷ and — since easy modification reduces the costs of initial mistakes — are not particularly finicky about standards of proof.⁵⁸ Both early socialist and latter-day capitalist family law reformers seem to reject the cold, technical precision of traditional legal doctrine in favor of "warmer" law, using loose legal language, relying heavily on "human experience,"⁵⁹ and searching for substantive rather than pro-

54. Hence, for instance, the early and short-lived Soviet abolition of rights of inheritance. See Griffin, *The About Turn: Soviet Law of Inheritance*, 10 AM. J. COMP. L. 431 (1961).

55. See Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 733, 744-60 (1988).

56. For a discussion of the significant impact of one social science theory — the "psychological parent" thesis of Goldstein, Freud, and Solnit — on our case law, see Davis, *"There is a book out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) (commenting on J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)).

57. For a socialist example, consider the practice of "cassation" or "review in the supervisory instance," which allows the Procuracy or certain high courts to appeal a judicial decision even after it has become final between the parties. See J. HAZARD, *supra* note 53, at 115-16. For a family law example, consider the pervasive practice of judicial custody modification.

58. Most family law controversies — such as custody, alimony, child support, visitation, etc. — can fairly easily be relitigated and are decided on the basis of "a preponderance of the evidence." See e.g., TEX. FAM. CODE ANN. § 11.15(a) (Vernon 1986). Only the termination of parental rights, being "final and irrevocable," requires at least "clear and convincing evidence" of parental unfitness. See *Santosky v. Kramer*, 455 U.S. 745, 747-49, 759 (1982); see also TEX. FAM. CODE ANN. § 11.15(b) (Vernon 1986).

59. Melton has drawn attention to the Supreme Court's proclivity to appeal to "human experience" especially when dealing with children, citing references to the "pages of human experience," *Parham v. J.R.*, 442 U.S. 584, 602 (1979), the "ordinary course of human experience," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), and the "reality of human experience," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 617 (1982). See Melton, *The Clashing of Symbols: Prelude to Child and Family Policy*, 42 AM. PSYCHOLOGIST 345, 347 (1987).

cedural justice. If Marxism and its "parental law"⁶⁰ seem to "have taken the family as their model of human order,"⁶¹ our family law, from the looks of it, might have copied many of its solutions from the Marxist classics.

The transformation of family law that Glendon has chronicled, and its "socialist" overtones that I have just described, seem to be part of a general movement toward a more activist state, of which socialism was just the beginning and of which our family law will not be the end. Many people have pointed to similar developments outside of family law. Abram Chayes has drawn attention to the recent phenomenon of "public law litigation" involving the realization of forward-looking policy goals rather than the vindication of already established individual rights.⁶² Judith Resnik has analyzed the rule of "managerial" judges who no longer simply adjudicate the cases brought before them but plan and negotiate a case's progress until its resolution and beyond.⁶³ Patrick Atiyah has noted the change in judicial focus "from principle to pragmatism" and from a preoccupation with generally applicable rules to attempts to do justice to the facts of each individual case.⁶⁴ Lawrence Friedman and Robert Percival⁶⁵ and David Clark⁶⁶ have written about changes in the functions of courts from settling disputes to routine administration. Everywhere, it seems, our law is turning more "socialist."

This is not the place to discuss such overall changes. But I do want to talk about their implications for our family law and for the people whose lives it affects. What started out as a liberation movement — both for the early socialists and for modern advocates of family law reform — ended up as a legal system increasing dependence. The new family law's focus on needs rather than rights and its search for solutions which are socially correct rather than fair to the individual parties have led to a shift in authority: from the individual right-holder (the "aggrieved" spouse, the custodial parent, etc.), who in the past more or less knew what to expect from the law, to the court, which in its unbridled wisdom can fashion that solution to a family's problems that appeals most to the judge's paternal instincts and val-

60. The analysis of Soviet law as "parental law" was developed by Harold Berman. See H. BERMAN, *JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW* 6 (1963).

61. C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 472 (1980).

62. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

63. Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

64. Atiyah, *From Principle to Pragmatism: Changes in the Functions of the Judicial Process and the Law*, 65 IOWA L. REV. 1249 (1980).

65. Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC. REV. 267 (1976).

66. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981).

ues. And while most family disputes will in fact not be decided by courts — about ninety percent of domestic cases are settled⁶⁷ — the absence of clear-cut rules and the resulting uncertainty of outcomes will nevertheless put the disputants at the mercy of legal experts who know the ropes, who control the process (judges and mediators⁶⁸), or who claim special insight into its workings (the lawyers⁶⁹), and so can pressure the parties into accepting solutions that suit the professionals' goals but that often seem unresponsive to the spouses' personal senses of justice and to their self-defined needs.⁷⁰ Judges thus lean on spouses to settle;⁷¹ attorneys "sell" solutions to clients who do not understand the legal implications involved;⁷² and divorce mediators may engage in "twisting arms"⁷³ to get reluctant spouses to compromise.

There has always been a connection between the search for "warmer" law and procedural informality;⁷⁴ between procedural informality and the belief in the law's capacity to achieve substantive

67. Only about 10% of all custody cases and about 10 to 15% of all divorce cases are contested in court. For custody cases, see L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 217 (1985). For divorce cases, see Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525, 530 (1984).

68. On the practice of English divorce mediators to subtly guide the disputants toward outcomes that the mediators themselves prefer, see Greatbatch & Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC. REV. 613 (1989).

69. Sarat and Felstiner have shown how divorce lawyers tend to emphasize their usefulness to clients by characterizing the divorce process as so irrational and confusing that only an insider's know-how and connections can ensure satisfactory outcomes. See Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989) [hereinafter, Sarat & Felstiner, *Law Talk*]; Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC. REV. 93 (1986).

70. On the fundamentally different ways in which lawyers and their clients perceive their goals in the divorce process, see Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?*, 20 LAW & SOC. REV. 135 (1986).

71. See Melli, Erlanger & Chambliss, *The Process of Negotiation: An Explanatory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1154 (1988).

72. Priest & Whybrow, *Child Custody in the Divorce Court and the Domestic Court*, 17 FAM. L. 57 (1988). The authors report on the practice among English solicitors of persuading their clients (especially women) to accept joint custody as a means of defusing arguments over physical custody and thus as a useful strategy to avoid contested hearings. Solicitors will advocate joint custody even though they do not believe "that there is any lay appreciation of a possible distinction between custody and care and control" and even though they are convinced that their clients "have only a very limited conception of parental rights" and "find it difficult or impossible to grasp the full implications of a joint [custody] order." *Id.* at 60.

73. Bruch, *And How Are the Children? The Effect of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INTL. J.L. & FAM. 106, 119 (1988).

74. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), for example, the Supreme Court rejected the need for jury trials in juvenile courts since they would not significantly improve the accuracy of the courts' factfinding and would interfere with the juvenile justice system's unique pedagogical tasks, stating: "[T]he formality . . . and the clamour of the adversary system" is at odds with the "concern, . . . sympathy, and . . . paternal attention that the juvenile court system contemplates." 403 U.S. at 550 (Blackmun, J.). In a similar vein, see Chief Justice Burger's dissent in *In re Winship*, 397 U.S. 358 (1970), where he argues that the "benevolent" goals of the juvenile justice system and its ambition to provide "compassionate treatment" rather than pun-

justice; between substantive justice and the need for technical experts who know how to define it; and between reliance on technical experts and contempt for the subjects of their expertise. Soviet family theorists felt contempt for the Russian peasants whose "petty-bourgeois tendencies"⁷⁵ led them to oppose a divorce reform that threatened the family-centered working and living style of the villages. Early proponents of no-fault divorce felt contempt for family members when they suggested that divorce law should focus on "family rehabilitation, not the assertion of individual rights."⁷⁶ Modern family law displays thinly disguised contempt for its addressees if its "[n]eeds-based dispute resolution takes for granted the desire of expert helpers to meet needs"⁷⁷ And since the neediest clients of our family law will be women and children,⁷⁸ the law, rather than being "a shield for autonomy and an instrument for realizing authentic projects,"⁷⁹ will help to reinforce preexisting economic and social inequalities. Consider only this run-of-the-mill family law issue: the modification of custody rights — based upon some more or less vague "best-interest" standard — in situations in which the custodial parent intends to move out-of-state and thus would make it more difficult for the noncustodial parent to see his or her child on a regular basis. Conventional doctrine requires either the noncustodial spouse's or the court's consent to such relocation plans. But since ninety percent of single-parent children live with their mothers and since seventy-five percent of custodial mothers want to move within four years after separation (often to live with new husbands),⁸⁰ almost all relocation restrictions in custody cases affect women and thus make them triply dependent: on an ex-husband for permission to move, on a new husband whom a woman is likely to follow to his place of employment, and on a judge who must be asked to supply a permission the former husband refused. In this scenario, a woman's factual and legal dependencies feed on each other. Far from emancipating family members, our law continues to hold them hostage.

But can the law ever emancipate family members who in real life

ishment require "not more but less of the trappings of legal procedure and judicial formalism. . . ." 397 U.S. at 376 (Burger, C.J., dissenting).

75. W. Goldman, *supra* note 32, at 285.

76. Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377, 394 (1937).

77. Silbey & Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DEN. U. L. REV. 437, 495 (1989).

78. There is a large literature documenting the disproportionate economic impact of divorce upon women and children. See especially L. WEITZMAN, *supra* note 67; J. BEKLAAR & M. MACLEAN, *MAINTENANCE AFTER DIVORCE* (1986).

79. See Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, LAW & CONTEMP. PROBS. Autumn 1988, at 111, 125 (describing the traditional liberal view of the purpose of law).

80. See Spitzer, *Moving and Storage of Postdivorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1, 2-3.

are weak and dependent? Why, for instance, did early Soviet family law reform not produce its hoped-for liberation? Because of the reformers' total disregard for economic and social realities. Believing that the law could "lead the wide working masses forward"⁸¹ (and as Marxists they should have known better⁸²), socialist legislators enacted a radical marriage philosophy that was backed neither by the enormous public funds its realization would have required, nor by the customs and morals of the vast majority of a largely agrarian population. And while it would be too easy to blame the law for the widespread family disintegration and for the thousands of homeless children roaming the streets throughout the period of the reforms⁸³ (post-war disorders, revolution, and famine⁸⁴ would have undermined the most timid family policy), the spectacular failure of Marxist family ideology legitimated the brutally conservative retrenchment of the law under Stalin.⁸⁵ The early reformers had been "caught within the tragic contradiction of trying to build socialism in an underdeveloped country."⁸⁶

Why has our own family law reform, if anything, increased the dependence of the family's weakest members? Maybe because we have not been willing to acknowledge and live up to our implicitly "socialist" family vision. Modern family law, like its early Soviet counterpart, presumes the unlimited freedom to cast off marital bonds, downplays family members' responsibility for each other, and legitimates substantial state involvement in child-rearing and education. Yet, despite these "socialist" attitudes and despite the fact that modern capitalist countries would be much better able to afford "socialist" family policies than Soviet society was in the 1920s, we are reluctant to accept and to underwrite the social and economic costs of our changing family ideology. To put it pointedly: as far as our family policy is concerned, we might well be caught within the tragic contradiction of not building socialism in a developed country. Especially in the United States, our "socialist" family-law imagery clashes badly with our capitalist public-spending habits. As Glendon's evidence shows,

81. R. SCHLESINGER, *supra* note 32, at 110 (quoting Krylenko, Senior Deputy Public Prosecutor, during the debate of the Draft of the 1926 Family Code by the RSFSR Central Executive Committee, Oct. 17, 1925).

82. Consider Marx's classic shorthand formula in his "Critique of the Gotha Program," in K. MARX & F. ENGELS, *AUSGEWÄHLTE SCHRIFTEN IN ZWEI BÄNDEN*, VOL. II 7, 17 (1961) ("The law can never surpass the economic organization and resulting cultural development of society.") (my translation).

83. On the *besprizorniki* (shelterless ones), the estimated seven-and-a-half million children "starving and dying" in Russia by 1922, see W. Goldman, *supra* note 32, at 78.

84. On the 1921 famine in Russia, see *id.* at 89.

85. See *id.* at 338. In 1936, abortion was outlawed in the USSR; in 1944, factual marriage and the right of unmarried mothers to bring paternity suits and support claims against extramarital fathers were abolished. See R. SCHLESINGER, *supra* note 32, at 373.

86. W. Goldman, *supra* note 32, at 329.

Western European family law systems have been more successful in integrating family ideology and policy: either by reemphasizing private responsibilities⁸⁷ or by strengthening the state's financial support for the family.⁸⁸ But European countries, too, with the possible exception of Sweden, have been reluctant to pick up the tab for family legislation and case law that would work best in a socialist utopia.

What is to be done? We cannot expect our family law to undo dependencies that are grounded in social conditions outside of the law — in poverty, unequal earning capacities, childcare or housing problems, drug abuse, and the like. The real solutions will have to focus on what Glendon calls "family ecology" (p. 306): the fashioning of general policies dealing with urban renewal, welfare, tax matters, and other issues in ways that are mindful of the need to encourage "nurturing environments" (p. 308) in which family members will find it easier to care for each other and to gain control over their own lives. As Glendon and others have suggested, such policies should focus on children rather than adults, in order to bypass legal distinctions arising from different family structures and to meet the needs of the family's weakest members.⁸⁹

But what can the law do? Our present family law has intentionally personalized the resolution of family disputes by providing only the vaguest of legal guidelines and by placing decisions almost entirely in the hands of those people who manage the disputing process: judges, who fill the void of discretionary provisions with their own values (and prejudices?), and lawyers, who devise their clients' negotiating strategies based on what they think the judges will do.⁹⁰ By allowing so much human input, the law hoped to foster solutions that would be sensitive to each family member's individual needs. But despite its ambitions to be parental and therapeutic, our family law, unlike a real-life parent, has cared for the strong better than for the weak. It has made it easy for spouses to walk out on each other, has deprived the spouse left behind of bargaining advantages that had been available under previous legal regimes, has disavowed all but the most minimal post-divorce responsibilities between former spouses, has eliminated or reduced alimony and child-support obligations,⁹¹ and has undermined

87. Sweden, despite its welfare-state policies, considers child support to be the primary obligation of parents. P. 226.

88. Elsewhere, Glendon notes the "relatively generous package of public benefits and services for one-parent families that exists in Sweden and, to a lesser degree, in France and West Germany." P. 237.

89. Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1173 (1986) (proposing a "children first" principle in divorce law); see also, e.g., V. FUCHS, *supra* note 3, at 130.

90. On lawyers' claims to special insight into the likely behavior of judges, see Sarat & Felstiner, *Law Talk*, *supra* note 69, at 1676.

91. On the decrease in real monetary value of child-support awards under no-fault divorce law, see Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for*

the position of custodial parents vis-à-vis their noncustodial ex-spouses.⁹² With the best of intentions, the law has weakened people's control over their lives at a time when their autonomy is most threatened by emotional disarray and by economic uncertainties.

Socialists would not have been surprised at this outcome. They have learned, over the decades, to distrust legal systems which claim that legal formalism stands in the way of caring and benevolent policies and today are trying to restore to their law its "age-old"⁹³ function of protecting individual self-determination. Nonsocialist legal professionals, too, have become suspicious of the state's capacity to sustain a truly parental relationship with its citizens. *In re Gault*⁹⁴ marks the disappointment of our hopes to turn the law into a vehicle of "care and solicitude"⁹⁵ in the context of juvenile delinquency. More recently, our doubts about the law's ability to promote human warmth and interconnectedness have led to a reevaluation of alternative dispute resolution (ADR). Like our family law (and like socialist law), ADR rejects traditional win-or-lose outcomes in favor of compromises, tries to develop "a consensus about future conduct rather than [assign] responsibility for events in the past,"⁹⁶ views personal conflicts as embedded in social contexts, and looks to the satisfaction of needs rather than the vindication of rights.⁹⁷ But we now begin to suspect that without the safeguards of procedural formalism the weak are likely to be outmaneuvered by the strong, that lawyers and mediators follow their own rather than their clients' agendas,⁹⁸ and that substantive justice, at least for those least able to look out for themselves, is as elusive as ever.⁹⁹ The state, whatever the *parens pa-*

Child Custody, Support and Visitation After Divorce, 12 U.C. DAVIS L. REV. 473 (1979). From 1983 to 1985, after adjusting for inflation, both child-support awards and actual support payments fell by about 12% despite the fact that the real average income of male workers rose from \$19,630 to \$20,650. See Handler, *The Transformation of Aid to Families With Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 511 (1987-88).

92. On the negative impact of joint custody statutes and of custody mediation, see Bruch, *supra* note 73.

93. See *What Should a Law Governed State Be?* (roundtable discussion), SOVIET L. & GOVT., Summer 1989, at 51, 53.

94. 387 U.S. 1 (1967) (holding juvenile has right to notice of charges as well as to counsel, confrontation, and cross-examination of witness, and has privilege against self-incrimination in juvenile commitment proceedings).

95. 387 U.S. at 15.

96. Silbey & Sarat, *supra* note 77, at 453.

97. *Id.* at 485.

98. See Greatbatch & Dingwall, *supra* note 68, at 638-39.

99. Empirical studies of custody mediation suggest that mediation is more attractive to higher than lower status litigants and that men decide to mediate because they anticipate losing in court. See Pearson, Thoennes & Vanderkooi, *The Decision to Mediate: Profiles of Individuals Who Accept and Reject the Opportunity to Mediate Contested Child Custody and Visitation Issues*, 6 J. DIVORCE 17 (1982). Studies also show that fathers tend to be more satisfied with mediation results than mothers and that mediation leads to more joint custody arrangements than litiga-

triae doctrine may tell us, is not our parent; it does not love us, does not put us to bed at night or get us up in the morning, does not laugh at our jokes or console us in our grief.¹⁰⁰

I therefore propose that we listen to our self-doubts, learn from our socialist cousins, and redirect our attention in family law to legal formalism and to the protection of individual rights. Rights have recently come under attack not only in family law. Critical legal theorists have accused rights of being too indeterminate to ensure our protection, of reinforcing our separation from others, of masking the persistence of hierarchies, and of fooling us into accepting the law's questionable claims to legitimacy.¹⁰¹ But I doubt that rights are all that "alienating" or "mystifying." As E. P. Thompson said: "[People] will not be mystified by the first man who puts on a wig."¹⁰² On the contrary, they usually know what they want, go rationally about achieving it,¹⁰³ and like best those judicial procedures that give them control over the disputing process and that respect their autonomy.¹⁰⁴

The fashionable anti-rights talk in our law reviews, with its smell of privilege, thus has not appeared very convincing to people of color or to the poor, to whom a court is one of the very few "outsider[s] with clout"¹⁰⁵ who may listen to their side of an argument. Barbara

tion. See Emery & Weyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULTING & CLINICAL PSYCH. 179 (1987). Because joint custody, as presently practiced, tends to assign to mothers a comparable amount of physical custody as under sole custody standards, *cf. id.* at 185, but allows fathers more input into decisions affecting the child, joint custody in fact reduces the mother's rights though not her work load.

100. The Irish Supreme Court, in a recent decision, thus has declared invalid all care orders in which state health boards were awarded custody over neglected children. Corporate bodies, the court held, could not be described as "fit person[s]" to care for children under the 1908 Children's Act; only real men and women, foster parents or social workers individually named by the court, could do so. Reported in *Bull. of Legal Developments*, No. 22, Nov. 17, 1989, at 251.

101. For a typical survey of the Critical Legal Studies movement's objections to the concept of rights, see Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984).

102. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 262 (1st American ed. 1975).

103. See Galanter, *Vision and Revision: A Comment on Yngvesson*, 1985 WIS. L. REV. 647, 650 (Complainants "shop[] rationally for effective remedies. The powerful avoid the courts because they can take care of themselves, and the powerless use courts to make up for their weakness."). For minority objections to the denigration of rights, see Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

104. A recent empirical study comparing tort litigants' attitudes toward trial, court-annexed arbitration, and judicial settlement conferences found that while litigants were not particularly interested in the absence or presence of formalism itself, they did want hearings to be careful, unbiased, and dignified and wanted to exercise some control over the handling and the ultimate outcome of their cases. For these reasons, litigants preferred trial and arbitration over settlement conferences. See E. LIND, R. MACCOUN, P. EBENER, W. FELSTINER, D. HENSLER, J. RESNICK & T. TYLER, *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* (1989).

105. Galanter, *supra* note 103, at 649.

Yngvesson, for instance, has reported how poor urban women use courts in domestic disputes to shore up their cases against neighbors or abusive husbands or lovers and how courts have slowly begun to assume a more activist role in processing such complaints.¹⁰⁶ We should take our cue from such strategies and ask how courts could be turned into more reliable allies of dependent family members in other disputing contexts such as in divorce or custody conflicts, which under present law are too unresponsive to legal argumentation to hold out much promise for the restoration of the parties' autonomy.

But in looking to rights as a means to empower the powerless, we must also remember that rights will not *automatically* be useful to underdogs. Like knives, rights cut at least as well in the hands of the strong as in the hands of the weak. If the law is to protect those who need it most, we must not repeat the mistakes of the early socialists, must not assume that the law's clients are self-reliant and strong, but instead must acknowledge the reality of their dependence and devise rights that do not require special resources, savvy, or stamina to be wielded effectively.

That suggests a family law that is dominated by fixed rules and is hostile to bargaining. Some people might disagree. Martha Minow, for instance, has tried to salvage rights-discourse by praising its openness and its capacity to further conversations between the protagonists who, in appealing to rights, affirm a common vocabulary and a shared understanding of values.¹⁰⁷ In this view, talking and listening to an opponent, giving reasons and responding to the reasons of others, and, I suppose, even down-to-earth bargaining, would lend warmth and interconnectedness to the use of a concept as fraught with potential for reinforcing hostility and alienation as the concept of rights. If rights-discourse in this fashion should keep doors open for "continuing conversations,"¹⁰⁸ fixed rules and nonnegotiable rights, with their cut-and-dried answers, could only serve to shut people up.

But even if I believed that rights-talk needed "salvaging"¹⁰⁹ (and I do not), it seems to me that a process-oriented justification of rights does not fit the realities of family-law litigation. In a world in which ninety percent of all disputes are settled, courts do not "orchestrate" discourses¹¹⁰ between the litigants. Most discourses will take place between the parties' attorneys, who in turn, in explaining the legal pro-

106. Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623, 641.

107. Minow, *Are Rights Right for Children?*, 1987 AM. B. FOUND. RES. J. 203, 211 (1987) [hereinafter Minow, *Rights for Children*]; see also Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

108. Minow, *Rights for Children*, *supra* note 107, at 211.

109. The term is taken from Milner, *The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait*, 14 LAW & SOC. INQUIRY 631, 637 (1989).

110. Minow, *Rights for Children*, *supra* note 107, at 212.

cess to their clients, will represent it as irrational, arbitrary, dependent on personal pull, and as best left to the experts.¹¹¹ Most clients, moreover, do not share their lawyers' perception of the dispute as one centering mainly on money but look for interpersonal justice and for emotional vindication.¹¹² If we want to shore up the fragile autonomy of family members in a process that now is only remotely determined by legal rules, we must make the parties immune to the manipulation of judges, lawyers, or higher status opponents.

One way to do that would be to reduce judicial discretion with more precisely drafted statutory language. Rather than awarding custody based on an amorphous best-interest standard, for instance, we should imitate those jurisdictions that follow the "primary caretaker" rule.¹¹³ Rather than promoting a bland "joint custody" policy — which now may cover a multitude of custodial arrangements, most of which differ from former sole custody only by giving the primary caretaker (most likely the mother) fewer rights than before — we should limit joint custody to joint physical custody and thus to those relatively few cases in which father and mother genuinely share child-rearing duties. Promising examples of such greater statutory precision are the new child support guidelines (prodded by federal legislation),¹¹⁴ now effective in forty-three states,¹¹⁵ that use quantitative formulas to determine child-support obligations as a percentage of the supporting parent's disposable income.¹¹⁶ While in the not-so-distant days of judicial illusions of grandeur the "mechanical application of a percentage formula" was thought to violate demands of individualized justice,¹¹⁷ legislators have come to realize that discretionary support awards, set by mostly male judges against mostly male defendants, too often underestimate what it costs to raise children.

But even precise legal standards will not necessarily protect parties in those ninety percent of all cases in which domestic disputes are settled. Detailed statutory guidelines may cast more of a shadow over

111. Sarat & Felstiner, *Law Talk*, *supra* note 69, at 1682; *see also supra* note 69.

112. Griffiths suggests that "lawyers and clients are in effect largely occupied with two different divorces: lawyers with a legal divorce, clients with a social and emotional divorce." Griffiths, *supra* note 70, at 155.

113. *See Garska v. McCoy*, 278 S.E.2d 357, 363 (W.Va. 1981).

114. *See Child Support Enforcement Amendments of 1984*, § 18(a)-(b), 42 U.S.C. § 1305 (1982) (as amended by the Family Support Act of 1988, Pub. L. No. 100-485, § 103, 102 Stat. 2343 (1988)).

115. Freed & Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 568 (1990).

116. On the impact of child support guidelines, *see Pearson, Thoennes & Tjaden, Legislating Adequacy: The Impact of Child Support Guidelines*, 23 LAW & SOC'Y. REV. 569 (1989).

117. *Cooper v. Cooper*, 102 Ill. App. 3d 872, 876, 430 N.E.2d 379, 382 (1981); *Rundle v. Rundle*, 107 Ill. App. 3d 880, 884, 438 N.E.2d 229, 232 (1982). It is ironic that the trial court's attempt to limit judicial discretion "in the interest of judicial economy and consistency" was in itself considered "an abuse of discretion." *Rundle*, 107 Ill. App. 3d at 884, 438 N.E.2d at 232.

the attorneys' bargaining process than bland "best-interest" or "just-and-right" standards, since they announce in advance the costs of failing to reach an agreement. Still, the persuasive powers of even the most carefully drafted statutory directives are easily undermined. Most guidelines tend to include a catch-all escape clause, meant to assure justice in the unforeseeable circumstances of an individual case, but nonetheless compromising the quest for judicial precision. Most family judges, used to operating under conditions of unlimited discretion, may not pay much attention to the carefully worded language of the law.¹¹⁸ The parties to a domestic dispute may not insist on their rights, for fear of losing custody, for instance, or to get out of a burdensome marriage as quickly as possible. They may underestimate their future financial needs.¹¹⁹ They may lack the advice of a lawyer,¹²⁰ or their attorney, eager to get on with the case, may be too quick to compromise. Empirical research thus suggests that while a party's persistent opposition to the divorce increases the likelihood of an advantageous settlement,¹²¹ spouses nevertheless often do not insist on their rights and that women especially (as the most likely recipients of support) often forgo claims to which they would be legally entitled.¹²² This may explain why the first reports on the impact of child-support guidelines show increases in award levels which fall far short of the anticipated and hoped-for results.¹²³

If we want to strengthen the protective power of rights, we therefore should think about removing at least those rights from the bargaining process which because of their financial character lend themselves easily to exact statutory determination. Child support, measured in percentages of the obligor's disposable income, should be made mandatory — California's mandatory minimum-support rule

118. At least, this seems to be the lawyers' view of what judges do. See Sarat & Felstiner, *Law Talk*, *supra* note 69, at 1673 (quoting a Massachusetts lawyer in a case involving substantial marital property: "[I]n this state the statute requires judges to consider fifteen separate things. . . . It is a pretty comprehensive list, but I've never seen a judge make findings on all of those things. They just hear a few and then divide things up.").

119. Pearson, Thoennes & Tjaden, *supra* note 116, at 587, report on studies suggesting that divorcing parents themselves may seriously underestimate the post-divorce costs of raising their children. Since most support awards are based on parental agreements which courts will examine in only the most cursory fashion, such unwarranted parental optimism at the time of divorce may undermine much of the new support guidelines' protective effect.

120. Pearson, Thoennes & Tjaden, *id.*, found that parental support agreements were most likely to fall short of the guidelines' suggested award levels if neither party was represented by an attorney. *Id.* at 587.

121. Melli, Erlanger & Chambliss, *supra* note 71, at 1169.

122. Caesar-Wolf, Eidmann & Willenbacher, *Die gerichtliche Ehelösung nach dem neuen Scheidungsrecht: Normstruktur und Verfahrenspraxis*, 5 ZEITSCHRIFT FÜR RECHTSZOLOGIE 202, 236 (1983).

123. While researchers originally projected that actual child support amounts would more than double after the adoption of the new guidelines, Pearson, Thoennes and Tjaden found a rather modest average increase of 15 percent above pre-guideline award levels. Increases were highest for low-income divorces. See Pearson, Thoennes & Tjaden, *supra* note 116, at 585.

seems to me a step in the right direction.¹²⁴ Pension-splitting along the lines of the West German *Versorgungsausgleich*, an equalization-of-benefits scheme, under which all pension claims accumulated by both spouses during their marriage are computed, compared and equally divided,¹²⁵ should also be mandatory. Since most families must make do with very few resources, even rules like these would do little to alleviate the financial worries that in most cases predate and are only aggravated by a divorce. But they would equalize the economic burden of marital failure now borne primarily by custodial mothers and children, would allow spouses to face the disruption of marriage with certainty about at least some of its consequences, and would reduce people's dependence on the generosity of judges and on the professional ardor of lawyers. And don't say that "mandatory rights" like the ones here suggested are contradictions in terms which reflect contempt for the spouses' contractual autonomy. Rights that protect against manipulation and exploitation by others betray as little contempt for their bearer as flu shots betray contempt for a patient. If the law, at least occasionally, can inoculate people against their dependence on others, if it can brace their position in a precarious world, it will better enable family members to take control of their lives than if it continues to let professionals with titles and degrees decide what is good for them.

Have I strayed too far from my original topic? Professor Glendon wanted to outline the major themes running through Western family law and ideology. In the process, she has painted a portrait of the family in which we recognize not only ourselves but also unremembered ideological forefathers. I think we can learn from the resemblance even if Glendon may never have intended it. Not that it matters. It is the mark of any good portrait that it makes us speculate about the character of its sitter, and the mark of any good book that it sends our thoughts out into unexpected adventures.

124. See Agnos Child Support Standards Act of 1984, CAL. CIV. CODE §§ 4720-4732 (Deering Supp. 1990).

125. § 1587-1587p BGB (German Civil Code); see also p. 218.