

University of Michigan Journal of Law Reform

Volume 18

1985

Introduction

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Recommended Citation

Michael S. Wald, *Introduction*, 18 U. MICH. J. L. REFORM 799 (1985).
Available at: <https://repository.law.umich.edu/mjlr/vol18/iss4/2>

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INTRODUCTION

Michael S. Wald†

*Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.**

*We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.***

Virtually everyone agrees that the family is a vital institution. Because of the perceived importance of the family to the state, our society always has tried to regulate both the form and functions of families. Laws prescribe who may form a family, the rights and obligations of family members towards each other, and the substantive and procedural rules for dissolving families.¹

In recent years, a substantial debate has developed regarding the appropriate nature and degree of state intrusion in family affairs.² The debate is complicated. It is argued that government has intruded both too much and not enough into the domain of family affairs. States have been expanding intervention in some

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* *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

** *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

1. Of course, in all these areas many people act as they wish, regardless of the formal law. For example, the absence of state blessings has not prevented people from living together, nor from separating.

2. In the past twenty-five years there has been a substantial shift in the rules of the family game. The rules have been changed in many areas: the grounds for formation and dissolution of marriages; the rights and obligations of husband to wife, wife to husband, parent to child and child to parent; even the definition of family has changed, often expanding to include cohabitators, children born out of wedlock, parents following a divorce, and persons living in communal settings. Many of the changes in law have followed, not preceded, changes in ways people acted. In areas of personal behavior, it is inevitable that legal change will often be dictated by the reality that large numbers of people will follow their personal predilections, regardless of the formal legal rules.

aspects of family life, while withdrawing control in other areas. For example, public concern over child abuse has resulted in passage of many laws that greatly increase state involvement in childrearing. At the same time, several states have experimented with school voucher plans, giving parents more control over their children's development. Similarly, while states were deregulating the family with regard to rules about management and control of property and the dissolution of the family, they were increasing government involvement in domestic violence, support enforcement, and child custody. Individuals and groups who are anti-interventionist in one area often are pro-interventionist in another.

The reason for these conflicts is not difficult to identify. The various functions we expect families to perform are in tension, if not totally incompatible. On the one hand, the family serves as the ultimate domain for developing private, intimate relationships. Promotion of such relationships serves many goals. It is through such relations that individuals can realize their human needs for love, trust, and sharing. Many legal rules—for example, community property laws, which encourage sharing notions, and evidence rules, which make marital communications privileged—recognize and try to promote the development of intimate relations within the family.

Protecting the privacy and autonomy of families furthers other values we deem important. As social commentators like Christopher Lasch argue,³ autonomous families buffer individuals from large, all-encompassing institutions, such as corporations, and from the state itself. Protecting family autonomy also promotes social pluralism, and helps preserve ethnic and cultural heritages.

In addition, family privacy and autonomy enhance the child-rearing functions of the family. In past times, courts seemed to view parental autonomy in childrearing as a "natural right," requiring no justification. As the Supreme Court stated in *Prince v. Massachusetts*⁴: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁵ Today, natural right arguments are buttressed by the views of child welfare experts, like Anna Freud, Joseph Goldstein, and Albert Solnit, who con-

3. C. LASCH, *HAVEN IN A HEARTLESS WORLD* (1977).

4. 321 U.S. 158 (1944).

5. *Id.* at 166.

tend that a parent must have autonomy in order to perform the role of parent adequately. According to Goldstein, Freud, and Solnit, "[t]o safeguard the right of parents to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, is to safeguard each child's [essential] need for continuity."⁶

Unfortunately, while the ability to provide privacy and intimacy may be the family's greatest strength, it may also be the family's greatest weakness. Families are places of substantial abuse and coercion as well as places of love and sharing. Protection of family privacy can mean protection of the ability of one person to destroy another. Therefore, the ways in which family members act towards one another justifiably raise substantial public concern. A policy of strict non-intervention is as undesirable as any policy that involves substantial regulation.

Most public concern over the coercive aspects of families focuses on children. Clearly, society has legitimate interests in the way in which parents rear their children. These interests are of two kinds. First, there is a communal interest in insuring that children receive adequate care and training, so that they will gain the ability to be productive members of society. Second, the state is legitimately interested in seeing that children are not harmed by their parents. Unfortunately, not all parents are able, or willing, to provide even minimal care of their children. The state, acting as representative of the child, intrudes to insure the child's well-being.

Families can be coercive and abusive settings for their adult members as well. Most obviously, family members often are physically violent towards one another.⁷ Family members also may violate the assumption of trust and sharing by misappropriating communal assets, or by failing to meet support obligations. Until recently, such abuses were facilitated by a gender hierarchy, legally compelled through domestic relations laws, that made males the head of the household. Even in a world of formal equality, misuse of power within the family may require state intervention to protect weaker parties.

State intervention is further necessitated because family structures do not always last forever. In fact, the break-up of

6. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7 (1973). Most child welfare and legal commentators accept the view that children are best off when primary responsibility for childrearing is left to individual parents, although many have reservations about the extent to which Goldstein, Freud, and Solnit carry their position.

7. See *THE DARK SIDE OF FAMILIES* (1983).

family units is almost as commonplace as their formation. When dissolution occurs, the assumptions of love, trust, and sharing frequently disappear. The family, unable to resolve its disputes, must call upon the state for help, so family autonomy is not possible. While the law can encourage people to plan for dissolution through contracts, and to resolve disputes through private negotiations, the private decisions will be shaped by the content of the rules that govern in the absence of a contract. Moreover, society has an interest in insuring that private ordering does not violate principles of fairness. Considerations of fairness may require limiting the scope of private ordering reserved to families.

Finally, state regulation of family structure can serve as a statement of the value preferences of a society. Policies that deny the right to marry to homosexuals, that limit the economic rights of cohabitators, that deny custody rights to fathers of children born out of wedlock, all attempt to establish a preferred form of family life. Of course, many people oppose any form of state regulation based solely on moral or value judgments. Yet there is little doubt that legislators and judges are influenced by these considerations.

Because families can prevent, as well as promote, the attainment of important societal goals, some regulation of the family is essential. In fact, as discussed by Professor Olsen in this volume, the state can never be neutral towards the family. Both regulation and non-regulation affect the relative well-being and power of men and women, adults and children, in the family context.

What type of government policies or legal regulations can best protect the need for family privacy and autonomy, while also protecting against the abuses such privacy facilitates? Is it possible to develop a theory of "state intervention" that adequately resolves the tensions among these competing goals? In the articles that follow, each author addresses some aspect of the problem of state regulation of the family. They address the question both at the level of general principles, and in the context of specific policy areas. There is no consensus in their views. However, each author adds to our understanding of the complexity of the problem.

In the first article, Professor Chambers proposes that state policy towards the family should be guided by the principle of "supportive neutrality." Under this principle, government "would not directly prohibit or coerce (or make adverse decisions based on judgments about) any form of family conduct, unless it could point to specific and substantial secular harms

caused by the conduct.”⁸ Absent a showing of harm, government should be “supportive of individual choices regarding family arrangements and styles of living.”⁹

Is “supportive neutrality” desirable? Possible? Professor Burt has his doubts. In essence, he argues that the state can never be truly neutral, nor can it be non-coercive. All state policies, including non-intervention, will influence the outcome of family decisions. Professor Burt is concerned that policies which attempt to be neutral often favor the status quo and those with the greatest power within the family—whether “power” is economic, psychological, sexual, or based merely on size. He believes that state intervention is needed to protect the less powerful.

Professor Olsen questions the framework used by Professors Chambers and Burt. She argues that the concepts of state intervention and non-intervention in the family are better understood as ideological, rather than analytical, terms. She believes that an emphasis on neutrality misses the point because it fails to address the question of how a particular distribution of power comes to seem natural and how policies supporting that distribution therefore come to seem neutral.

If the articles by Professors Chambers, Burt, and Olsen indicate, as I believe they do, the tremendous difficulty of developing *general* principles to guide state intervention, the articles by Professors Hollinger, Minow, and Mnookin reveal that it is not much easier to develop ideal solutions to specific problems. Professor Hollinger addresses the legal problems raised by recent technologies that allow parents to beget children in a variety of new ways. Professor Minow explores debates over laws regulating the care given, or withdrawn from, handicapped newborns. Professor Mnookin examines some of the limits of deregulating the divorce process.

In each of these areas, a strong case can be made for private ordering—that is, for a position permitting the relevant decisions to be made solely within the family unit. Yet, for differing reasons, strict neutrality does not seem desirable (or possible?) with regard to any of these issues. Professor Hollinger fears that strict neutrality would fail to adequately protect the child’s interest. Professor Mnookin demonstrates that there are situations, probably rather common, where a policy of strict neutral-

8. Chambers, *The “Legalization” of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REF. 805, 814 (1985).

9. *Id.* at 815.

ity would not meet the goals of protecting weaker parties, or of promoting fair outcomes. Professor Minow does not believe that neutrality is possible, and instead maintains that the debates over intervention obscure deeper social and psychological divisions over who can be treated in our society.

The last article, by Professor Schneider, is not directly related to the question of state intervention. Professor Schneider issues a call for the development of more theoretical work in family law. He defines theory as "systematic explanation at some level of abstraction of how a law acts or of why it should act in a particular way."¹⁰ He states that there is "hardly any" theory in family law.

As an academic, I can certainly sympathize with Professor Schneider's desire for theory. While I might quibble about the amount of existing theoretical work, I cannot deny that we need more. Yet, as you read the articles in this Symposium, reflect on the difficulty of the task. Family law, more than any other area of law, raises issues regarding what kinds of individuals, and what kind of society, we wish to be. It touches areas where opinions are formed by everyone's personal experience, as well as by gender, religion, sexual preferences, and ethnicity. It is an area where virtually every academic discipline justifiably may claim unique insights. Because the problems are so personal, and so *important*, we may never develop a general theory of family law that generates consensus about the appropriate relationship of state and family. But as the articles in this Symposium demonstrate, family law is a flourishing field. As it flourishes, we may realistically hope for more theory, and for wiser answers to particular problems, even if we prove unable to develop a general theory of family law.

10. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039, 1041 (1985).