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Introduction

In Genesis, God commands Abraham to sacrifice his beloved son, Isaac.¹ God puts Abraham to this "test" for no apparent reason and even though Isaac has done no wrong. Abraham goes through all the "murderous motions,"² asking no questions, making no protest, perfectly willing, it seems, to obey God's command. Isaac soon discovers that he is the sacrifice but nevertheless advances the proceedings by offering no resistance. The message is clear and horrible: the innocent child is in mortal danger from his parent and his God, both of whom are supposed to love him. The Genesis story has a happy ending when God orders Abraham not to raise his hand against Isaac or do anything to him. Yet, there is a persistent tradition that Abraham did do some harm to Isaac as he lay bound on the altar.³ Whichever version we accept, the most amazing thing about the story is that none of its three protagonists seems to consider it morally wrong for God to ask Abraham, and for Abraham to agree, to murder his son. The story may be descriptive of parent-

* Joseph E. Wargo, Anoka County Bar Association, Professor of Family Law, University of Minnesota Law School.

1. *Genesis* 22:1-18.

2. The phrase is from JACK MILES, *GOD* 59 (1995).

3. SHALOM SPIEGEL, *THE LAST TRIAL* xii-xiv (1967). Wilfred Owen best describes this version in his poem:

So Abram rose, and clave the wood,
and went, And took the fire with him, and a knife.
And as they sojourned both of them together,
Isaac the first-born spake and said, My Father,
Behold the preparations, fire and iron,
But where the lamb for this burnt-offering?
Then Abram bound the youth with belts and straps,
And builded parapets and trenches there,
And stretched forth the knife to slay his son.
When lo! an angel called him out of heaven,
Saying, Lay not thy hand upon the lad,
Neither do anything to him thy son.
Behold! Caught in a thicket by its horns. A Ram.
Offer the Ram of Pride instead.
But the old man would not so, but slew his son,
And half the seed of Europe, one by one.

Wilfred Owen, *The Parable of the Old Man and the Young*, in WILFRED OWEN: *THE COMPLETE POEMS & FRAGMENTS* 174 (John Stallworthy ed., 1983).

child relations at the time it was written⁴ and is prophetic about the future. Indeed, the history of childhood has been a "nightmare" in which children have been "killed, abandoned, beaten, terrorized, and sexually abused."⁵ This is so in whatever place and time we pick and despite the fact that adults have always found children useful to further adult aims—for example, for "acquiring and perpetuating family property,"⁶ as "political hostages, security for debts,"⁷ "negotiable assets,"⁸ and "for the services they could provide," including care of aging parents.⁹

In America today, we are obsessed with children.¹⁰ We debate the best methods of raising them, worry about their physical, moral, and sexual problems, and struggle to teach and amuse them in an elaborate system of schools and playgrounds built for those purposes.¹¹ Experts in psychology, psychiatry, and pediatrics study children and bombard parents with their findings.¹² Yet, we do not seem to have awakened completely from the nightmare. Children

4. SPIEGEL, *supra* note 3, at 8-12; Lloyd deMause, *The Evolution of Childhood*, in HISTORY OF CHILDHOOD 1, 51 (Lloyd deMause ed., 1974). The story of Abraham cannot be treated as strictly historical but it certainly has "genuine contemporary colour." 10 ENCYCLOPEDIA BRITANNICA 93 (1969) (discussing the book of *Genesis*); see also JOHN VAN SETERS, ABRAHAM IN HISTORY AND TRADITION 65-103 (1975); cf. *Psalms* 27:10 ("When my father and my mother forsake me, then the Lord will take me up. . ."). In any event, child sacrifice and infanticide were widely practiced in the ancient world for the purpose of propitiating the gods and other reasons. BARBARA K. GREENLEAF, CHILDREN THROUGH THE AGES: A HISTORY OF CHILDHOOD 17-19 (1978).

5. DeMause, *supra* note 4, at 1. Many sources provide us with this information: official biographies of the famous, historical sociologists, literary historians, social historians, and psychoanalysts. *Id.* at 4. Those writing about the subject seem to have rejected a linear or evolutionary model of cultural development for one of cultural uniqueness centered around in-depth case studies. See, e.g., DAVID HUNT, PARENTS AND CHILDREN IN HISTORY 6 (1970) (discussing France from 1550-1700); PHILIPPE ARIES, CENTURIES OF CHILDHOOD (1962) (Robert Baldick trans., 2d. ed. 1970) (discussing France in the 15th-18th centuries); cf. GREENLEAF, *supra* note 4.

6. Using children to acquire and pass property is accomplished through "carefully arranged marriages" and adoptions. GREENLEAF, *supra* note 4, at 24.

7. *Id.*

8. Children, as negotiable assets, "could be sold into slavery for a father's profit." *Id.* at 24-25. Greenleaf describes the sale of children into slavery for profit as a practice of the Babylonians. *Id.*

9. *Id.* at 25; see MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 46 (1994); see also W.K. LACEY, THE FAMILY IN CLASSICAL GREECE 117 (1968).

10. See, e.g., *What Grown-Ups Don't Understand: A Special Issue on Childhood in America*, N.Y. TIMES, Oct. 8, 1995, § 6 (Magazine).

11. *Id.*; see also commission reports, *infra* note 13; Sonia L. Nazario, *Education: Schoolteachers Say It's Wrongheaded to Try to Teach Students What's Right*, WALL ST. J., Oct. 8, 1992 at B1; Terri Hamlin, *Skepticism a Sad Shield for a Teacher Education*, L.A. TIMES, Aug. 30, 1992, at B2; John Leo, *Sex and Schools*, TIME, Nov. 24, 1986, at 54.

12. See, e.g., DR. BENJAMIN SPOCK, BABY AND CHILD CARE (1946). The book was a best-seller, and was first published in 1946. *Id.* There were subsequent revisions of *Baby and Child Care*, more than 200 printings, and sales of more than 20,000,000

are still in danger—increasingly at risk from poverty, suicide, drugs, sex, dropping out of school, and family violence.¹³ Children are victims of violence—indeed, “any juvenile between ages 12 and 17 is more likely to be the victim of violent crime than persons past their mid twenties.”¹⁴ Children are perpetrators of violence as well. For example, in 1992, “juveniles accounted for 13% of all violent crimes reported to law enforcement agencies and 18% of all violent crime arrests.”¹⁵ Experts blame these ills on parents and their failure to form and maintain strong, stable families in which their children can grow up.¹⁶ As the National Commission on Children stated:

[A]t every age, among all races and income groups, and in communities nationwide, many children are in jeopardy. They grow up in families whose lives are in turmoil. Their parents are too stressed and too drained to provide the nurturing, structure, and security that protect children and prepare them for adulthood. Some of these children are unloved and ill tended. Others are unsafe at home and in their neighborhoods. Many are poor, and some are homeless and hungry. Often they lack the rudiments of basic health care and a quality education. . . .

....

. . . The conditions of children's lives and their future prospects largely reflect the well-being of their families. When families are strong, stable, and loving, children have a sound basis for becoming caring and competent adults. When families are unable to give children the affection and attention they need and to provide for their material needs, children are far less likely to achieve their full potential.¹⁷

copies. Michael Zuckerman, *Dr. Spock: The Confidence Man*, in *THE FAMILY IN HISTORY* 179, 183-84 (Charles Rosenberg ed., 1975).

13. NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* vii-viii, 33-37 (1991) [hereinafter *COMMISSION REPORT*]. Other prestigious commissions agree. See, e.g., CARNEGIE COUNCIL ON ADOLESCENT DEVELOPMENT, *TURNING POINTS: PREPARING AMERICAN YOUTH FOR THE 21ST CENTURY* (1989); NATIONAL COMMISSION TO PREVENT INFANT MORTALITY, *TROUBLING TRENDS: THE HEALTH OF AMERICA'S NEXT GENERATION* (1990); PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICAN BAR ASSOCIATION, *AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION* (1993). See also Peter Applebome, *Study Says Society Fails 19 Million Youths*, N.Y. TIMES, Oct. 12, 1995, at A8. David S. Broder, *Nation Reflects Damage to Family*, STAR TRIB. (Minneapolis), Mar. 25, 1993, at A18.

14. HOWARD M. SNYDER & MELISSA SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: A FOCUS ON VIOLENCE* 14 (1995).

15. *Id.* at 3; see also FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991*, at 279 (1992) [hereinafter *F.B.I.*]; John J. Wilson & James C. Howell, *Serious and Violent Juvenile Crime: A Comprehensive Strategy*, JUV. & FAM. CT. J., Fall 1994, at 3.

16. See *COMMISSION REPORT*, *supra* note 13, at 251-55.

17. *Id.* at xvii, xxix (executive summary).

The thesis of this article is that the law bears some responsibility for this parental failure and for the corresponding plight of children. Ideally, the law should act as teacher,¹⁸ clearly articulating societal expectations that parents will be responsible, and that children will be good, and encouraging and rewarding such behavior. Actually, the law entrusts parents with the entire child-raising task but articulates only three clear expectations: (1) parents are to provide financial support for their children;¹⁹ (2) parents are to send their children to school;²⁰ (3) parents are to refrain from neglecting or abusing their children or risk state interference in their families.²¹ Beyond these unexceptionable messages the law is ambivalent.²² On each of five important issues, namely family form and function,²³ the economic value of children,²⁴ parents' responsibility for the antisocial acts of their children,²⁵ and the primacy of children's interests in deciding issues that affect their welfare,²⁶ the law seems unable to choose between two opposite positions.²⁷ The law reflects both and, thus, fails as a teacher. This article begins

18. As one of my great teachers put it:

In ancient days, there was a vision that appeared almost simultaneously to the best minds of the Hellenic and Hebraic worlds. Great sages voiced the hope that the law could serve as a pedagogue to the people, instructing them in the maxims of enlightenment, righteousness, and self-rule. No less than the Psalmist in the Bible, Plato and Aristotle believed that the law should be employed as "a lamp unto the feet and a light unto the path."

EDMOND CAHN, *THE MORAL DECISION* 5 (1955).

19. See IRA M. ELLMAN ET AL., *FAMILY LAW* 355 (1991).

20. MASON, *supra* note 9, at 86. Parents are required to send their children to school by compulsory school attendance laws. *Id.* Some states permit parents to teach their children at home in accordance with state prescribed requirements. See ELLMAN ET AL., *supra* note 19, at 1063.

21. *E.g.*, MINN. STAT. ANN. § 518B.01 (West 1994 & Supp. 1995); see ELLMAN ET AL., *supra* note 19, at 1121-27.

22. In this way, it reflects the ambivalent nature of the family as an institution and the ambivalent nature of parental attitudes to children. The family can be heaven or hell for its members, a potential perpetrator of great good or great evil. Parental attitudes to children are similarly mixed: children are "loved and hated, rewarded and punished, bad and loving all at once." DeMause, *supra* note 4, at 8.

23. See *infra* part II.

24. See *infra* part III.

25. See *infra* part IV.

26. See *infra* part V.

27. The two opposite positions on each of these important issues are:

Family form: family form matters; family form does not matter.

Family function: the biological family is best regardless of function; the functioning family is best regardless of biology.

The economic value of children: children are a valuable commodity and this should be frankly acknowledged; children are not a commodity and the law should prohibit commerce in them.

Parental responsibility for the antisocial acts of their children: parents are responsible for these acts; parents are not responsible for these acts.

with a selective overview of the law's treatment of the family from colonial times to the present, criticizes its current ambivalence on family matters, and proposes reforms.

I. The Family From Colonial Times to the Present

The European nations that settled America brought with them two legal systems—the common law, which prevailed in England, and the civil law, which prevailed on the continent.²⁸ Both were founded on the Christian ideal of marriage. Thus, neither was ambivalent about family matters. Marriage was the exclusive sanctioned form of cohabitation: a divine, monogamous, lifelong institution designed to produce and nurture children.²⁹ Accordingly, ecclesiastical courts had jurisdiction over marriage,³⁰ a religious

The primacy of children's interests in deciding issues that affect their welfare: children's interests should be paramount; children's interests should be subordinate to those of parents and the state.

28. Wigmore included both in his list of the world's 16 legal systems; he called the former "Anglican" and the latter "Romanesque." 3 JOHN WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 981, 1054 (1928). "Civil," as used here, does not mean "Roman," but rather, the then prevailing law of France and Spain which Wigmore called "Romanesque." This "civil" law was a composite of Roman and Germanic law. *Id.* at 1037. American community property systems are primarily Spanish. French law was displaced by the Spanish system or by the English common law. WILLIAM Q. DE FUNIAK & MICHAEL S. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 37 at 55 (2d ed. 1971). In any event, the differences between the French and Spanish systems were not significant. *Picotte v. Cooley*, 10 Mo. 312, 318 (1847).

29. On marriage as the only permissible form of cohabitation, see 1 *Corinthians* 7:1, 9 (One should marry to avoid fornication; "[i]t is better to marry than to burn.") On the divine and therefore life-long, indissoluble nature of the bond, see *Mark* 10:9 (man cannot break a bond of marriage created by God); *Matthew* 19:5-6 (man and wife become one when married). On monogamy, see *Matthew* 19:5 (man is joined to one wife); 1 *Corinthians* 7:2 (each man must have his own wife, and each woman, her own husband). On the function and organization of the family, see *Genesis* 1:28 (duty to multiply and raise children); 1 *Timothy* 2:15 (woman must bear children to be saved spiritually); *Genesis* 3:16 (wife must obey husband); 1 *Corinthians* 7:3 (mutual duty to render spouse his or her conjugal rights). *But see* 2 GEORGE E. HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 19-23 (1904) (noting inconsistencies in the Biblical views on the availability of divorce). The canon law that grew from these Biblical precepts became the dominant force governing marriage and divorce in England and other European countries. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 406-07 (2d ed. 1988).

The conception of marriage as an indissoluble bond was an important influence in both England and Spain. 2 HOWARD, *supra*, at 30. Even after the Reformation in England in 1534, the Anglican Church maintained a strict divorce policy designed to preserve the indissoluble character of marriage. *Id.* By 1603 the Church prohibited all divorce. *Id.* Catholic Spain and other civil law countries followed the doctrines of the Catholic Church and treated marriage as a sacrament creating an indissoluble bond. This was reflected in the early Spanish Code. DE FUNIAK & VAUGHN, *supra* note 28, § 219, at 502 n.69 (citing LAS SIETE PARTIDAS pt. IV, tits. IX & X (1263)).

30. By the middle of the twelfth century in England, the ecclesiastical courts claimed exclusive jurisdiction over marriage and its incidents. *See* Franklyn C. Sertaro, *A History of English Ecclesiastical Law*, 18 B.U. L. REV. 102, 119-21 (1938),

ceremony was required to enter it,³¹ divorce was not generally available to dissolve it,³² criminal penalties were imposed for conduct that threatened it,³³ and spouses were assigned sex-based roles within it reflecting the husband's superior status and the family's expected function.³⁴

and sources cited therein. These courts passed this jurisdiction to the Anglican Church in 1534. *Id.* Ecclesiastical jurisdiction was maintained until the Matrimonial Causes Act was passed in 1857. *Id.*

After the repeal of the Edict of Nantes in 1685, France became a purely Catholic state once again. MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 26, 194-201 (1972). As a result, except for a few civil statutes requiring registration, the church completely governed marriage. *Id.* The church retained its dominance until the French Revolution in 1789. *Id.* at 194-95. At that time the concept of individual liberty encouraged the secularization of marriage for a portion of the community. *Id.*

In Spain, the Catholic Church took jurisdiction over marriage from the civil authorities between the thirteenth and fourteenth centuries. See CHARLES E. CHAPMAN, *A HISTORY OF SPAIN* 143-44 (1918).

31. At the Council of Trent in 1563, the Church of England formally adopted the position that marriages would not be valid unless contracted in the presence of a priest and two witnesses. 1 HOWARD, *supra* note 29, at 315-16. A religious ceremony was required for a valid marriage in Spain. See DE FUNIAK & VAUGHN, *supra* note 28, § 55.1, at 95. In England, however, the necessity of a religious ceremony was not accepted, and informal marriages were apparently valid until the passage of Lord Hardwicke's Act in 1753. 1 HOWARD, *supra* note 29, at 435-60. This was true notwithstanding the opinions of several judges in *Regina v. Millis*, 8 Eng. Rep. 844 (Ire. 1843), asserting that a marriage without ceremony was never recognized in England.

32. For a history of divorce in England, see 2 HOWARD, *supra* note 29, at 109-17; RHEINSTEIN, *supra* note 30, at 24 ("From the late seventeenth century on, parliamentary divorce developed into a regular practice. But the proceedings were so cumbersome and expensive that they were available only to the most affluent. The number of parliamentary divorces thus remained low, one to three a year."). Legal divorce came to France in 1792, although many did not wait for it. *Id.* at 201. There was no absolute divorce in Spain. DE FUNIAK & VAUGHN, *supra* note 28, § 219, at 501-02.

33. As to the civil law, see LAS SIETE PARTIDAS, *supra* note 29, pt. VII, tit. VIII, law VIII (abortion), tit. XVII, laws I-XV (adultery), tit. XVII, law XVI (bigamy), tit. XVIII, laws I-III (incest), tit. XIX, laws I-II (seduction), tit. XXI, laws I-II (sodomy), tit. XXII, laws I-II (procuring); CARL L. VON BAR, *A HISTORY OF CONTINENTAL CRIMINAL LAW* 286-87 (1916) (adultery, bigamy, crimes against nature, pandering, and incest). As to the common law, see 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 619 (adultery, procuration, incest), 620 (unnatural offenses, bigamy) (1966); 4 HOLDSWORTH, *supra*, at 504 (sodomy, bigamy).

34. Married women were subordinate to their husbands under English common law. See 2 FREDERICK POLLOCK & FREDERICK MAITLAND, *THE HISTORY OF ENGLISH LAW* 405-14 (2d ed. 1898) (criticizing reliance on Biblical concepts as justification but nevertheless characterizing the husband's role as the wife's "guardian"); 1 AMERICAN LAW OF PROPERTY 760-62 (A. James Casner ed., 1952) (noting that decisions by royal judges in this area hardened early notions of male protectiveness inherited from the Germanic Law).

Spanish civil law also recognized the dominance of the husband in the family unit and supported his position by designating him head of the household and granting him authority over major family decisions. DE FUNIAK & VAUGHN, *supra* note 28, at 328 (citing G. SCHMIDT, *CIVIL LAW OF SPAIN AND MEXICO* 11 (1851)).

In America there were no ecclesiastical courts and few clergymen; marriage thus became a matter for secular regulation.³⁵ Early American laws authorized marriage by civil ceremony,³⁶ divorce on the basis of fault,³⁷ and alimony awards to innocent, needy wives.³⁸ Monogamy³⁹ remained the only legal form of marriage, and spouses retained their assigned, sex-based roles.⁴⁰ The married father was the preeminent family member under the colonies' version of English common law.⁴¹ The spouses were one and the one was the husband.⁴² He was the only legal personality in the

35. See 2 HOWARD, *supra* note 29, at 121-327 (discussing civil marriage in the New England colonies, the Southern colonies and the Middle colonies).

36. At first, the New England colonies *required* a civil marriage ceremony. 2 HOWARD, *supra* note 29, at 125-32, 135-40. Eventually, they relaxed their stand and allowed either a civil or an ecclesiastical ceremony. *Id.* Civil ceremonies also were authorized in the middle colonies of Pennsylvania, New York, and New Jersey. *Id.* at 267-327. In Louisiana, a statute granted civil authorities the power to solemnize marriages after 1807. *Id.* at 419-20.

37. 3 HOWARD, *supra* note 29, at 3-18, 31-33, 96-101. For a period following the American Revolution, courts had no jurisdiction to grant divorce as state legislatures alone possessed this authority. *Id.* at 4. Even after the courts obtained jurisdiction over divorce, several state legislatures continued to grant legislative divorces to unhappy couples who lacked grounds for judicial divorce. NELSON BLAKE, *THE ROAD TO RENO* 55-56 (1962) (citing 1832-33 Mo. Acts, chs. xcvi-cix). As divorce grounded on fault became more widespread, legislative divorce became less attractive. By 1860, legislative divorce was a dead letter in most American states. 3 HOWARD, *supra* note 29, at 31-50, 96-101.

38. For alimony awards in common law jurisdictions, see *Glover v. Glover*, 16 Ala. 440, 445 (1849) (granted in equity); *Campbell v. Campbell*, 16 S.E. 960, 960-61 (Ga. 1893); *Foote v. Foote*, 22 Ill. 425, 426 (1859); *Parker v. Parker*, 97 N.E. 988, 989-90 (Mass. 1912); *Sheafe v. Sheafe*, 24 N.H. 564, 567-69 (1852). For alimony awards in community property jurisdictions, see *Eidenmuller v. Eidenmuller*, 37 Cal. 364, 366 (1869); *Madison v. Madison*, 1 Wash. Terr. 60, 62 (1859).

39. Marital monogamy withstood at least two early assaults. One came from the Mormon Church, which supported the institution of polygamy as a religious duty from 1843 until 1890. The Church abandoned this position in the face of decisions like *Reynolds v. United States*, 98 U.S. 145 (1878), which upheld as constitutional a federal anti-bigamy act, and popular prejudice, which threatened Utah's chance for admission to the Union.

The second assault came from the Shaker sect, which rejected marriage in favor of celibacy and communal family life. Shaker communities peaked in the late 1800s and declined in the twentieth century. See generally MARGUERITE MELCHER, *THE SHAKER ADVENTURE* (1941).

40. The husband was the financial provider obligated to support the family. For common law examples, see *Neil v. Johnson*, 11 Ala. 615, 618 (1847); *Shelton v. Pendleton*, 18 Conn. 417, 420 (1847); *Jones v. Gutman*, 41 A. 792, 794 (Md. 1898); *Keller v. Phillips*, 39 N.Y. 351, 355 (1868). For community property examples, see *Williams v. Williams*, 243 P. 402, 404 (Ariz. 1926); *Edminton v. Smith*, 92 P. 842, 843-44 (Idaho 1907); *Callahan v. Patterson*, 4 Tex. 61, 66 (1849). The wife was an economic dependent obligated to perform domestic services. See, e.g., *Smyley v. Reese*, 53 Ala. 89, 96 (1875); *Brooks v. Brooks*, 119 P.2d 970 (Cal. 1941); *Mewhirter v. Hatten*, 42 Iowa 288 (1875); *Coleman v. Burr*, 93 N.Y. 17 (1883); *Frame v. Frame*, 36 S.W.2d 152 (Tex. 1931).

41. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 184-85 (1973).

42. *Id.* at 184.

family and the virtual owner of its children and their labor⁴³ during marriage and after divorce.⁴⁴ The married mother, the unmarried biological father, and the unmarried biological mother had no rights to their children.⁴⁵ Parents of illegitimate children were subject to criminal penalties for fornication,⁴⁶ and their children were *filius nullius*—children and heirs of no one.⁴⁷ They became charges of the community,⁴⁸ as did children whose parents were too poor to support them.⁴⁹ However, all children were economic assets in colonial times, providing “a controllable and skilled labor force to the new country.”⁵⁰ A large number were apprenticed in the home of a master;⁵¹ children raised by their parents worked at home.⁵² Slave children were the property of, and served, their masters.⁵³ The primary unit of social and economic organization during the colonial period was not the family but was the multipurpose colonial household.⁵⁴ As one commentator describes it:

All the important interactions between adults and children occurred within this self-contained unit; there, children were born, raised, schooled in religion, and, as soon as they were productive, put to useful labor. These children could be blood relatives or merely be hired help. . . . Within the hierarchy of the household the adult roles relevant to child custody, in descending order, included: father, master, putative father, guardian, stepfather, married mother, mistress, widow, stepmother, unwed mother, and slave mother. Children could be sons or daughters, apprentices or servants, orphans, bastards, or slaves.⁵⁵

Children were expected to be obedient; masters and fathers were supposed to maintain, train, and control them.⁵⁶ If these expectations were not met, community officials could step in and take over responsibility for the children.⁵⁷ Clearly, economic needs deter-

43. MASON, *supra* note 9, at 6-7, 13.

44. *Id.* at 15 (citing Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth Century Massachusetts*, 33 WM. & MARY Q. 586, 586-614 (1976); LINDA KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 158-83 (1980)).

45. MASON, *supra* note 9, at 14, 24.

46. *Id.* at 25 (noting that Massachusetts was the first to pass such a law).

47. *Id.* at 24.

48. *Id.* at 25.

49. *Id.* at 33-34.

50. *Id.* at 30.

51. *Id.* The terms of these arrangements were supervised by the courts. *Id.* at 31.

52. *Id.* at 46.

53. *Id.* at 39-40.

54. *Id.* at 4.

55. *Id.*

56. *Id.* at 12.

57. *Id.*

mined children's custodial arrangements.⁵⁸ The law supervised and enforced the work relationship, unconcerned with children's emotional needs.⁵⁹

After the colonial period, the law began a shift away from its emphasis on married fathers' common law rights to a view of children with interests of their own⁶⁰—"the American rule [in custody disputes] quickly became the 'best-interests-of-the-child.'"⁶¹ These interests became increasingly identified with those of the mother⁶²—the tender years doctrine, preferring mothers to fathers in disputes about young children, dates from at least 1813.⁶³ By the late nineteenth century, illegitimate children were firmly placed in their mothers' families by state legislation.⁶⁴ Slavery was abolished,⁶⁵ home industry declined,⁶⁶ indentured servitude for children was increasingly frowned upon,⁶⁷ and fathers increasingly left home to find work.⁶⁸ Home was transformed from family workplace to retreat from the "competitive world" and bonds of affection came to dominate economics in family relationships.⁶⁹

In colonial times, families had cared for children other than their own but there was no mechanism by which such children could become legal family members.⁷⁰ Starting with Massachusetts in 1851, all states passed modern adoption statutes.⁷¹ Under these statutes, the adoption had to be in the best interests of the child and approved by a judge.⁷² During the nineteenth century, the social and economic status of women improved dramatically.⁷³ "As the factory revolution proceeded, countless thousands of women

58. *Id.* at 46.

59. *Id.* at 46-47.

60. *Id.* at 50, 61.

61. ELLMAN ET AL., *supra* note 19, at 492.

62. MASON, *supra* note 9, at 50, 61.

63. ELLMAN ET AL., *supra* note 19, at 502.

64. MASON, *supra* note 9, at 68.

65. "The [Civil War], the Emancipation Proclamation, and the 13th, 14th, and 15th Amendments ended American slavery and gave the blacks the right to vote." FRIEDMAN, *supra* note 41, at 440.

66. MASON, *supra* note 9, at 51.

67. *Id.* at 76-77.

68. *Id.* at 51.

69. *Id.*

70. *Id.* at 73.

71. Burton Z. Sokoloff, *Antecedents of American Adoption*, FUTURE OF CHILDREN, Spring 1993, at 17, 22. The American adoption system, unlike the Roman, is supposed to promote the welfare of the adopted children rather than that of the adopting adults. WALTER WADLINGTON, CASES AND MATERIALS ON DOMESTIC RELATIONS 827 (1995).

72. WADLINGTON, *supra* note 71, at 827.

73. FRIEDMAN, *supra* note 41, at 186.

worked."⁷⁴ This increased women's stake in society and freed them from home.⁷⁵ The divorce rate rose.⁷⁶ The married women's property acts, passed in all the states between 1839⁷⁷ and 1877⁷⁸ "did not signal a revolution in the status of women" but merely "ratified and adjusted a silent revolution" which had already occurred.⁷⁹

At the beginning of the twentieth century, states became more involved in the family, passing compulsory education laws, laws imposing controls on child labor, and laws allowing state intervention into families in which parents neglected or abused children.⁸⁰ At this time, states first began to help poor mothers support their children rather than removing them.⁸¹ Women finally received the right to the vote,⁸² enabling them to work effectively for reforms in family law.⁸³ Following Louisiana's lead in the 1930s, state legislatures began to enact so-called parental liability laws making parents vicariously liable for the torts and crimes of their children.⁸⁴ By this time, a majority of states recognized common law marriage for which no ceremony, civil or religious, was required.⁸⁵ Marriage could thus be purely consensual. Divorce became easier as no fault divorce grounds replaced or supplemented fault grounds in every state.⁸⁶ Courts and legislatures, in the wake of expanding equal protection doctrine and state equal rights amendments, eliminated sex-based legal roles in marriage,⁸⁷ and sex-based presumptions in

74. *Id.* at 434.

75. *Id.* at 186, 434.

76. *Id.* at 438.

77. Mississippi was the first state to enact such a statute. *Id.* at 185-86. For the current version of this statute, see MISS. CODE ANN. § 93-3-1 (1972).

78. "The last State to fall into line was Virginia, in 1877." JAMES SCHOUER, A TREATISE ON THE LAW OF HUSBAND AND WIFE 254 n.2 (1882).

79. FRIEDMAN, *supra* note 41, at 186.

80. MASON, *supra* note 9, at 86, 101; GREENLEAF, *supra* note 4, at 105; see Prince v. Massachusetts, 321 U.S. 158 (1944).

81. MASON, *supra* note 9, at 119. This was the beginning of the modern welfare system.

82. Women's right to vote was secured via the nineteenth amendment to the Constitution. See ELEANOR FLEXNER, CENTURY OF STRUGGLE 319-337 (1975).

83. See FRIEDMAN, *supra* note 41, at 434-40; Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma H. Kay eds., 1990).

84. L. Wayne Scott, *Liability of Parents for Conduct of Their Child Under Section 33.01 of the Texas Family Code: Defining the Requisite Standards of "Culpability,"* 20 ST. MARY'S L.J. 69, 72-73 (1988). These laws gained "new momentum" in the 1980s because of growing concern about juvenile crime. S. Randall Humm, *Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children*, 139 U. PA. L. REV. 1123, 1125-26 (1991).

85. 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 26, at 102, 106-09 (1931).

86. MASON, *supra* note 9, at 124. See also *infra* notes 112-14 and accompanying text.

87. See, e.g., Orr v. Orr, 440 U.S. 268 (1979) (invalidating Alabama statute authorizing alimony awards only for wives); Kirchberg v. Feenstra, 450 U.S. 455 (1981)

custody disputes.⁸⁸ Beginning in 1968, the United States Supreme Court made a massive foray into family law, using the Equal Protection Clause to endow illegitimate children with most of the entitlements of legitimate children from their parents.⁸⁹ The Court also expanded the constitutional rights of parents to privacy and autonomy in making decisions about marriage, procreation, and child-raising⁹⁰ and expanded the group of parents so protected to include the unmarried as well as the married.⁹¹ While all but fourteen states and the District of Columbia⁹² have now renounced common law marriage, an increasing number have granted "marriage-like" rights to cohabitants with the same effect.⁹³

II. Family Form and Function

The Christian ideal, on which American family law was founded, chose a particular family form to perform desired functions.⁹⁴ The married heterosexual monogamous couple with sex-based roles was thought to be the best arrangement for producing and raising children.⁹⁵ Today in the United States, the ideal has eroded and so has its model. This erosion is apparent in the law which is now much more ambivalent about family form. The visions of marriage as an exclusive, special, protected status arising on compliance with prescribed requirements⁹⁶ and of divorce as a carefully regulated privilege available only on limited prescribed

(invalidating Louisiana statute making husband head of the family). Approximately one-third of the states have equal rights amendments. See Bruce E. Altschuler, *State ERAs and Employment Discrimination*, 65 TEMP. L. REV. 1267, 1267 n.6 (1992).

88. MASON, *supra* note 9, at 126.

89. ELLMAN ET AL., *supra* note 19, at 960-965. See *infra* text at notes 104-08.

90. See cases cited *infra* notes 100-03, 144.

91. See cases cited *infra* notes 100-03.

92. ELLMAN ET AL., *supra* note 19, at 29. The common law marriage jurisdictions are Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia. *Id.*

93. The effect is to erode legal distinctions between the married and unmarried. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Evans v. Wall*, 542 So. 2d 1055 (Fla. Dist. Ct. App. 1989); *Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989); *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980); *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987). But fornication is still a crime in more than one-fourth of U.S. jurisdictions, and adultery is still a crime in about half the states and the District of Columbia. Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1661, 1671-72 (1991) [hereinafter Note, *Constitutional Barriers*].

94. See *supra* notes 29-40 and accompanying text.

95. *Id.*

96. *Id.*

grounds⁹⁷ have all but vanished from the law. The spouses are legally equal in marriage⁹⁸ and, although only fifteen jurisdictions now recognize common law marriage,⁹⁹ legal distinctions between the married and unmarried have faded. The unmarried now have the same constitutional rights as the married to obtain contraceptives¹⁰⁰ and abortions,¹⁰¹ and to participate in hearings on custody¹⁰² and adoption¹⁰³ of their children. Their children, though illegitimate,¹⁰⁴ have substantial entitlements, including rights to death benefits,¹⁰⁵ support,¹⁰⁶ inheritance,¹⁰⁷ and welfare.¹⁰⁸ Various forms of discrimination based on marital status are prohibited¹⁰⁹ and state courts are "divorcing" the unmarried, dispensing marital benefits as they do so.¹¹⁰ Legislatures have repealed, and courts have invalidated, laws imposing criminal sanctions for sexual conduct inimical to marriage.¹¹¹ Divorce is easy,¹¹² as it is a purely consensual procedure in many jurisdictions.¹¹³ In other jurisdictions, even consent is unnecessary—divorce is available at the

97. *Id.*

98. Spousal equality is a result of equal protection doctrine and state equal rights amendments. See *supra* note 87.

99. See *supra* note 92.

100. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

101. *Roe v. Wade*, 410 U.S. 113 (1973).

102. *Stanley v. Illinois*, 405 U.S. 645 (1972).

103. *Caban v. Mohammed*, 441 U.S. 380 (1979); see also *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

104. This is no longer true in the eight states that have adopted the Uniform Parentage Act. The act eliminates the classification of illegitimacy and provides that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." UNIF. PARENTAGE ACT § 2, 9B U.L.A. 296 (1987).

105. *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

106. *Gomez v. Perez*, 409 U.S. 535 (1973).

107. *Trimble v. Gordon*, 430 U.S. 762 (1977). But see *Lalli v. Lalli*, 439 U.S. 259 (1978).

108. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973).

109. Unmarried couples now are protected from discrimination on the basis of their marital status in employment, housing, use of public accommodations, and credit. See John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal For The Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991).

110. See *supra* note 93.

111. Even where criminal penalties are still imposed, enforcement is often lax. See generally D. MACNAMARA & E. SAGARIN, *SEX, CRIME, AND THE LAW* ix-xi, 186-88, 190-92 (1977). Typical of the current legal tolerance is the opinion of the Court of Appeals of New York in *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1981). In invalidating the provision of the New York Penal Law that made consensual sodomy a crime, the court held: "In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct." 415 N.E.2d at 941; see also Note, *Constitutional Barriers*, *supra* note 93.

112. See *supra* note 86.

113. See, e.g., CAL. FAMILY CODE § 2400 (West 1994).

option of one spouse despite the other's objection.¹¹⁴ Far from being favored by the law, the married are worse off than the unmarried in some respects. For example, in cases of dissolving relationships, the married are limited to the provisions of the state prescribed marital regime while the unmarried may battle each other with all the weapons of the common law.¹¹⁵ Income tax law imposes various penalties on some married couples.¹¹⁶ Indeed, the Internal Revenue Code, as a whole, is a paragon of ambivalence, providing a great disincentive to marriage under some circumstances and a significant incentive to marry under others.¹¹⁷ In light of this legal ambivalence about family form, it is not surprising that the traditional two parent heterosexual married couple with a male breadwinner, a female homemaker, and their children is now a vanishing breed. More children are living with two married working parents, with single mothers or fathers, in stepparent families, in unmarried cohabiting heterosexual, and homosexual households, and in polygamous families.¹¹⁸ Some blame these departures from the traditional family model for the instability of modern American families and the attendant risks to their children.¹¹⁹

Whether the blame is well- or ill-founded is beside the point, however. Whatever the reason or reasons, it seems clear that American families now face an uncertain future.¹²⁰ The need to strengthen and stabilize them seems obvious and calls for a change in legal perspective. Instead of favoring a particular family form, as it used to do, or reflecting confusion, as it presently does, the law

114. This is "the inevitable consequence of abandoning the fault grounds This result also recognizes that in American society today there is little or no likelihood that the law can force married persons to live together when one of them is determined to end the marriage." 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 41-42 (practitioners' 2d ed. 1987).

115. Such weapons include express or implied contracts, constructive or resulting trusts, or quantum meruit. See *supra* note 93, in particular *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), and *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980); *Kozlowski v. Kozlowski*, 403 A.2d 902 (N.J. 1979).

116. David J. Roberts & Mark J. Sullivan, *The Federal Income Tax: Where Are the Family Values?*, 57 *TAX NOTES* 547, 547 (1992).

117. *Id.*

118. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 *HARV. L. REV.* 1640, 1640 (1991); see also Dirk Johnson, *Polygamists Emerge from Secrecy, Seeking Not Just Peace But Respect*, *N.Y. TIMES*, Apr. 9, 1991, at A22; Dirk Johnson, *More and More, the Single Parent Is Dad*, *N.Y. TIMES*, Aug. 31, 1993, at A1.

119. The single parent family has been the subject of most criticism. See, e.g., Peter Steinfeld, *Seen, Heard, Even Worried About*, *N.Y. TIMES*, Dec. 27, 1992, § 4, at 1; COMMISSION REPORT, *supra* note 13, at 3-37, 251; Michael Ingrassia, *Endangered Family*, *NEWSWEEK*, Aug. 30, 1993, at 17; Barbara D. Whitehead, *Dan Quayle Was Right*, *ATLANTIC MONTHLY*, Apr. 1993, at 47. See generally Daniel P. Moynihan, *Defining Deviancy Down*, 62 *AM. SCHOLAR* 17 (1993).

120. See EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* 269-70 (1975).

should embrace all families so long as they function well for their children. Thus, the new ideal would become the "functioning family." By "functioning family," I mean one that is good at caring for, and nurturing, children. In such a family, the adults, of whatever sex and number, and the children will have developed "strong, mutual, irrational emotional attachments,"¹²¹ the adults will be "committed to the [children's] well-being and development . . . for life,"¹²² and the adults' personal satisfactions will be subordinate to the children's welfare.

If the ideal functioning family is to become a reality, the law will have to encourage and reward it. Unfortunately, current law looks at the functioning family with ambivalence, sometimes destroying it and sometimes supporting it. Two recent, much publicized cases illustrate the law's destructive effect. They are the Baby Jessica¹²³ and Baby Richard¹²⁴ cases, in which would-be adoptive parents battled their biological counterparts. Both Jessica and Richard were born to unmarried mothers,¹²⁵ who gave them up for adoption, forty hours,¹²⁶ and four days,¹²⁷ respectively, after their births. One mother named the wrong man as father¹²⁸ and he consented to the adoption, though he was not biologically related to the child.¹²⁹ The other mother refused to identify a father though she knew who he was,¹³⁰ and told the father that the child was dead.¹³¹ The biological fathers entered the proceedings to assert parental rights, thirty-two,¹³² and fifty-seven days,¹³³ respectively, after the babies were born. In the Baby Jessica case, the adoption did not take place;¹³⁴ in the Baby Richard case, it did.¹³⁵ In both cases, the biological parents ultimately married each other¹³⁶ and fought, in protracted proceedings, to regain their children who remained in

121. Urie Bronfenbrenner, *What Do Families Do?*, FAMILY AFFAIRS, Winter-Spring 1991, at 2.

122. *Id.*

123. *In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

124. *In re Kirchner*, 649 N.E.2d 324 (Ill. 1995).

125. *Clausen*, 502 N.W.2d at 652; *Kirchner*, 649 N.E.2d at 236.

126. 502 N.W.2d at 651 n.l.

127. 649 N.E.2d at 364.

128. 502 N.W.2d at 652.

129. *Id.*

130. 649 N.E.2d at 327.

131. *Id.*

132. 502 N.W.2d at 652.

133. 649 N.E.2d at 327.

134. 502 N.W.2d at 652-53.

135. 649 N.E.2d at 327.

136. Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 56, 57; *Adoptive Parents Hand Over Boy in 4-Year Custody Fight*, N.Y. TIMES, May 1, 1995, at A13 [hereinafter *Adoptive Parents*].

families with the would-be adopters for 2 1/2 years in Baby Jessica's case¹³⁷ and almost 4 years in Baby Richard's.¹³⁸ Though neither father showed much promise as a prospective parent,¹³⁹ the courts held that their conduct with respect to the babies was not sufficiently remiss to cause them to forfeit parental rights. Accordingly, each baby was ordered rerouted¹⁴⁰ just like a misdirected package, to its biological parents, destroying two functioning families to the detriment of the children and the adults in them.

There are two rules of current law that compelled these harsh results. They are (1) that in custody disputes between biological parents and nonbiological parents, biological parents prevail unless they are shown to be unfit or to have abandoned the child;¹⁴¹ and (2) that parenthood is exclusive, that is, that the law recognizes only one set of parents for a child at any one time and that recognition determines the child's placement.¹⁴² The first rule, sometimes called the "parental right doctrine,"¹⁴³ is based on a line of Supreme Court cases in which the rights of biological parents with respect to their children have been accorded constitutional status.¹⁴⁴ As the

137. Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 44, 47.

138. *Adoptive Parents*, *supra* note 136, at C11.

139. Schmidt did not show much interest in Baby Jessica or in two other children he fathered earlier. *In re Clausen*, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993). Kirchner was actually found to be unfit by one court. *Kirchner*, 649 N.E.2d at 327. The testimony, according to a dissenting member of the Illinois Supreme Court, gave some detail:

Indeed, the court knows nothing about the character of Kirchner, except that which surfaced from testimony at the adoption hearing. Testimony from various witnesses indicated that the biological mother of the child had characterized Kirchner as being abusive, that she sought and procured residence in a shelter for abused women; that he was a gambler (Kirchner himself testified that he won \$28,000 by gambling in Atlantic City in September 1991); that he was too busy to get married to the woman with whom he lived and impregnated, even though they had procured two marriage licenses.

Id. at 343 (McMarrow, J., dissenting).

140. *Clausen*, 501 N.W.2d at 198; *Kirchner*, 649 N.E.2d at 340.

141. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 823 (students' 2d ed. 1988).

142. See Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 883-93 (1984); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian Mother and Other Nontraditional Families*, 78 GEO L. REV. 459, 468-473 (1990). See also Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) in which Justice Scalia stated, "California law, like nature itself, makes no provision for dual fatherhood." Compare *Smith v. Cole*, 553 So. 2d 847 (La. 1989), in which the Louisiana Supreme Court allowed a child who had a presumed father to bring suit to establish another man as her biological father.

143. CLARK, *supra* note 141, at 821.

144. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) ("Under the doctrine of *Meyer v. Nebraska* . . . we think it

Supreme Court glowingly stated it in *Prince v. Massachusetts*: "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."¹⁴⁵ As rigidly applied in the Baby Jessica and Baby Richard cases, the doctrine made the child's interests completely irrelevant.¹⁴⁶ Ironically, even in jurisdictions which adhered rigidly to the parental right doctrine, unwed fathers did not come within the scope of its protection before 1972. Thus, in many states, mothers, acting alone, could give up unacknowledged illegitimate children for adoption.¹⁴⁷ The law thus reflected the societal expectation that an unwed father was not likely to assert his paternity but would rather try to escape it. In 1972, the Supreme Court, in *Stanley v. Illinois*,¹⁴⁸ effectively brought unwed fathers within the protection of the parental right doctrine. Stanley was an unwed father who lived with his children and their mother. Under Illinois law the mother was considered the sole parent and when she died the children became wards of the state. Stanley, as an unwed father, was not entitled to a hearing on his fitness to keep the children under Illinois law. The Supreme Court held that this violated Stanley's due process and equal protection rights. Of adoption, it said:

We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.¹⁴⁹

entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see also *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); *Prince v. Massachusetts*, 321 U.S. 158 (1944). See *infra* note 145 and accompanying text. The doctrine may have "antedated" the cases basing it on the Constitution. See CLARK, *supra* note 141, at 821 n.15 (citing *Roche v. Roche*, 25 Cal. 2d 141, 151 P.2d 999 (1944) and cases cited therein).

145. *Prince*, 321 U.S. at 166.

146. See Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1281-85 (1994) [hereinafter Comment, *The Struggle for the Child*]; Comment, *Rights of Unwed Fathers and The Best Interests of The Child: Can These Competing Interests be Harmonized? Illinois Putative Father Registry Provides an Answer*, 26 LOY. U. CHI. L.J. 703, 731 (1995).

147. See WADLINGTON, *supra* note 71, at 847.

148. 405 U.S. 645 (1972).

149. *Id.* at 657 n.9.

Accordingly, many states modified their adoption laws and thus fathers like those in the Baby Jessica and Baby Richard cases acquired rights to object and be heard.¹⁵⁰

These tragic cases could, nevertheless, have been resolved more happily were it not for a second governing legal rule—the doctrine of exclusive parenthood, that is, that a child can have only a single set of parents. Thus, an award to biological parents in these cases would automatically end the child's placement with the nonbiological parents and an award to nonbiological parents would have ended the biological parents' rights. In the absence of such a rule, the Illinois and Michigan courts could have confirmed parental rights in the biological parents but left custody of the children with their nonbiological parents in functioning families. Such a result would be possible under the new Uniform Adoption Act¹⁵¹ which, when a petition for adoption is denied, requires the court to make an independent determination on custody using a standard which reflects the welfare of the child.¹⁵² In the words of the official comment, the Act

does not treat a minor as an object that "belongs" to a parent or would-be parent and has to be shifted back and forth in the event "ownership" rights are changed or reinstated. The fact that a birth parent's status as a legal parent may be restored or recognized . . . is *not* tantamount to a determination that the minor must be placed in that parent's custody.¹⁵³

Current law sometimes protects the functioning family. This protection is apparent in the jurisdictions which soften the parental right doctrine in custody disputes between nonbiological and biological parents by inquiring about the best interests of, or detrimental effect on, the child.¹⁵⁴ Another widely publicized case aptly illustrates this. In *Twigg v. Mays*,¹⁵⁵ an intermediate appellate Florida court held that changing the custody of a child from the man who raised her to biological parents who, at her birth, mysteriously took home the wrong baby, would be detrimental to the child.¹⁵⁶ The *Twigg* court, therefore, left her in the custody of the father who raised her and terminated the biological parents' rights.¹⁵⁷ Ironically, the child, after a tiff with her father and stepmother, went to

150. See ELLMAN ET AL., *supra* note 19, at 913.

151. 9 U.L.A. Ann. §§ 1-101 to 8-106 (Supp. 1995)

152. *Id.* §§ 2-408 (e)-(f), 2-409 (e)-(f), 3-704. In the custody determination the court is to consider either the best interests of, or detrimental effect on, the child. *Id.*

153. *Id.* § 2-408 cmt.

154. See 2 CLARK, *supra* note 114, at 824.

155. No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993).

156. *Id.* at *6.

157. *Id.*

live with her biological parents¹⁵⁸—a practical, though not legal, acknowledgment of the utility of having more than one family.¹⁵⁹ Similarly, in *Michael H. v. Gerald D.*,¹⁶⁰ an analogous, but not identical, scenario, Justice Scalia's plurality opinion emphasized the importance of the functioning family. At issue was a California law denying a biological father the right to assert paternity of a child born to a married woman and living in a functioning family with her mother and the mother's husband. In upholding the law, Scalia said:

What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within and born into an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.¹⁶¹

Justice Scalia's focus, in framing the issue in this opinion, is on the family relationship which the biological father sought to disrupt. As Justice Brennan pointed out in his dissent,¹⁶² this was not the Court's focus in earlier cases on fathers' rights. In earlier cases, the Court focused on the relationship which the biological father was trying to preserve—his own relationship with the child—instead of the relationship he was trying to disrupt—that of the child¹⁶³ with its functioning family. Unique though Justice Scalia's approach may be in this line of fathers' rights cases, it is the correct one because it supports and rewards the functioning family in which the child already lives.

The Baby Jessica and Baby Richard cases seem especially harsh in light of these more sensitive rulings but they teach us two things: (1) adults can be very selfish¹⁶⁴ and (2) the law which compels such results needs drastic revision. The first and narrowest possible remedy would take care of these cases by returning to pre-

158. William Booth, *Tangled Family Ties and Children's Rights: Teen's Change of Mind Revives Debate*, WASH. POST, Mar. 11, 1944, at A3.

159. See Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 MINN. L. REV. 891, 913 (1992); see also Pepper Schwartz, *Children's New Bonds: Para-Dads, Para-Moms*, N.Y. TIMES, Nov. 9, 1995, at B1, B4 ("a growing number of adults are coming to view children as a collective commitment that is more than biological in its impulse").

160. 491 U.S. 110 (1989) (plurality opinion).

161. *Id.* at 127.

162. *Id.* at 142-43 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 436 U.S. 248 (1983)).

163. See *supra* notes 102-03.

164. Compare the Baby Pete case in which the biological father and the adoptive parents reached a settlement; the adoptive parents kept physical custody; while the biological father's name appeared on the birth certificate and he had visitation rights. Comment, *The Struggle for the Child*, *supra* note 146, at 1285.

1972¹⁶⁵ law which, in effect, said to men: "If you want rights and privileges vis-à-vis your offspring, make sure that you marry their mother before you conceive them or before they are born." In the Baby Jessica and Baby Richard cases this rule would have thrown the fathers out of court. This is not an unreasonable legal position,¹⁶⁶ but such a narrow approach would not help would-be adoptive parents in battles against biological mothers or in battles against biological mothers and fathers who were married to each other at the baby's conception or birth.

The second possible remedy would be to nullify the bad effects of the parental right doctrine by separating the question of parental rights from the question of custody and making the custody determination depend on a standard reflecting the child's interests. That was the court's approach in the *Twigg* case without statutory authorization,¹⁶⁷ it is the approach of the new Uniform Adoption Act,¹⁶⁸ and it is now mandated by statute in Illinois when an adoption is denied or revoked on appeal.¹⁶⁹ Unfortunately, in the *Twigg* case, the Court, to reach the right result, was compelled, by the exclusive parenthood doctrine, to terminate the biological parents' rights, a harsh and oppressive punishment.

The third possibility for revision would be to change the legal framework for resolving disputes of this kind. Under present law, when these cases arise, we ask two questions: (1) is either of the contestants a biological parent? If the answer is "yes," as it was in the Jessica and Richard cases, the next question is (2) has he or she forfeited his or her rights to the child? If the answer to the second question is "no," as it was in these cases, the game is up for the nonbiological parents. We could easily change the questions, asking two others instead: (1) is the child in a family? If the answer is "yes," the second question should be (2) is that family good for the child, or in other words, is the family functioning well with respect to the child? If the answer to this alternative second question is "yes," then the child should stay where it is. If the child is not in a family, or if it is in a family which is not functioning well with respect to the child, then the law should try to find and place the child in a good family that will function well with respect to it.

165. See *supra* notes 147-49 and accompanying text.

166. Some would argue that this deprives a child of a biological link which is an essential to parenting. See, e.g., DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 24, 25, 107 (1968). The importance of the biological tie is overstated. See ELIZABETH BARTHOLET, *FAMILY BONDS* 163-86 (1993); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 211 (1995).

167. See *supra* notes 155-57 and accompanying text.

168. See *supra* text accompanying notes 151-53.

169. ILL. COMP. STAT. ANN. ch. 750, para. 50/20 (West Supp. 1996).

Ideally, the law should move to a combination of the second and third possibilities. That would mean that in a case like *Twigg v. Mays*,¹⁷⁰ a court would not have had to terminate the biological parents' rights¹⁷¹ in order to leave the child with the man who raised her from birth, and that in a case like *Michael H. v. Gerald D.*¹⁷² the biological father would not have to be denied all paternal rights¹⁷³ in order to leave the child in her functioning family.

III. The Economic Value of Children

The *Michael H. v. Gerald D.*¹⁷⁴ case illustrates the proposition that children have value, at least to their parents.¹⁷⁵ Today in America we value children as objects of emotional attachment. They are to be loved, nurtured, educated, and amused but not economically exploited. Yet, not very long ago, in colonial times, children were frankly acknowledged as economic assets.¹⁷⁶ They worked and parents or masters controlled their wages and services in exchange for maintaining and training them.¹⁷⁷ The law enforced and supported the economic relationship.¹⁷⁸

170. No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993).

171. See *supra* notes 155-57. See also Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983).

172. 491 U.S. 110 (1989).

173. As the plurality opinion stated it:

But if Michael were successful in being declared the father, other rights would follow—most importantly, the right to be considered as the parent who should have custody . . . a status which "embrace[s] the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship." . . . All parental rights, including visitation, were automatically denied by denying Michael status as the father.

491 U.S. at 118-19 (plurality opinion) (citations omitted).

174. 491 U.S. 110 (1989).

175. Indeed, Michael was still pursuing his parental rights three years after he lost his case in the United States Supreme Court.

He continues to seek her out, flying all the way across the country to wait at the eleven-year-old's school bus stop, hoping for a chance to tell her who he is. He says, "She is really the only living attachment to me." She says, "That's the crazy man from California who thinks he's my father."

Barbara Bennett Woodhouse, *Hatching The Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1865 (1993) (citing Peter Marks, *The Quest of the Fathers*, NEWSDAY (Nassau Cty. ed.), Apr. 1, 1992, § II, at 56).

176. See *supra* text accompanying note 50.

177. See *supra* text accompanying note 56.

178. See *supra* text accompanying note 59.

During the nineteenth century, children continued to work in mines and factories,¹⁷⁹ “perhaps in greater numbers and in worse conditions than before, but they . . . remained in the custody and control of their own parents; their employer had only limited control over them at the workplace and no obligation for their welfare.”¹⁸⁰ In the mid-nineteenth century, social reformers, motivated by a desire to save “suffering children,”¹⁸¹ and organized labor, motivated by self interest to eliminate a child labor system which depressed wage rates,¹⁸² joined together to secure the passage of protective labor legislation limiting the kinds and hours of work children could do.¹⁸³ Compulsory education laws followed¹⁸⁴ and, together, they helped reduce the number of children at work.¹⁸⁵ Only in the twentieth century did child-raising become the subject of scientific inquiry¹⁸⁶ and childhood come to be looked upon as the key to understanding adult behavior.¹⁸⁷ We love, or pretend to love,¹⁸⁸ our children and downplay their economic value. Yet they remain economically valuable commodities and current law has not completely denuded them of this characteristic. Again, the law is ambivalent. It increasingly recognizes children as persons while it simultaneously treats them as consumer goods to be enjoyed or discarded; it prohibits some kinds of economic exploitation of children while permitting others. In addition to prohibiting child labor¹⁸⁹ and requiring children to go to school¹⁹⁰ instead of work while parents support them,¹⁹¹ the law prohibits “baby selling” in connection with adoptions¹⁹² and surrogacy contracts.¹⁹³ In apparent contradiction, the law allows a free market for in-vitro fertilization¹⁹⁴ and the sperm and ova needed to accomplish it.¹⁹⁵ The

179. FRIEDMAN, *supra* note 41, at 491.

180. MASON, *supra* note 9, at 78.

181. FRIEDMAN, *supra* note 41, at 491.

182. *Id.*

183. *Id.* at 492.

184. *Id.*

185. *Id.*

186. MASON, *supra* note 9, at 161.

187. GREENLEAF, *supra* note 4, at 124.

188. See Roger Rosenblatt, *The Society That Pretends to Love Children*, N.Y. TIMES, Oct. 8, 1995, § 6 (Magazine), at 58.

189. See *supra* text accompanying notes 80, 183.

190. See *supra* text accompanying notes 80, 184.

191. See *supra* text accompanying note 19.

192. Joan Heifetz Hollinger, *Adoption Law*, FUTURE OF CHILDREN, Spring 1993 at 43, 49. “By statute or case law, all states decry baby selling, and most prohibit finder’s fees to agencies or other intermediaries.” *Id.*

193. For summaries of existing legislation on this subject in the United States, see ELLMAN ET AL., *supra* note 19, at 1326-28; Linda D. Elrod, *Family Law in the Fifty States*, 28 FAM. L.Q. 573, 602-03 (1995).

194. BARTHOLET, *supra* note 166, at 209-12.

law allows the use of children as bargaining chips by parents in divorce negotiations;¹⁹⁶ and it allows everyone to procreate¹⁹⁷ without inquiry into purpose.¹⁹⁸ Adoptions are supposed to be gratuitous transfers under the present regulatory scheme but, in fact, economically valuable promises to support and care for children, as well as money, pass from adoptive parents to placement agencies or directly to biological parents.¹⁹⁹ The law, itself, provides for payment of subsidies to those who adopt hard-to-place special needs children and also for payments to those who act as foster parents.²⁰⁰ "[I]n virtually all states the adoption subsidy rate is significantly lower than the foster care rate for the same child."²⁰¹ This differential transmits the erroneous message that temporary families are better than permanent ones and "can be, and frequently is, a serious disincentive to adoption. . . ."²⁰² Despite legal prohibitions on selling children,²⁰³ a black market in babies exists.²⁰⁴ The gains from this market go mostly to doctors, lawyers, and other middlemen who arrange the transactions, instead of to birth mothers.²⁰⁵

The differential between adoption subsidies and foster care payments should be abolished and the law should freely acknowledge the economic value of children. Adoption should be made eas-

195. Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES, June 18, 1995, § 6 (Magazine), at 31; see, e.g., *A Baby of Your Own Through Egg Donation*, N.Y. TIMES, June 25, 1995, at A12 (advertisement); Jan Hoffman, *Egg Donations Meet a Need and Raise Ethical Questions*, N.Y. TIMES, Jan. 8, 1996, at A1, A7.

196. See, e.g., *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

197. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

198. For an example of procreation for the purpose of using the resulting child as a tissue donor, see Patricia Brennan, *A Mother Saves Her Child by Giving Birth to Another*, WASH. POST MAG., May 9, 1993, at 6.

199. Hollinger, *supra* note 192, at 49.

200. Irving Schulman & Richard E. Behrman, *Overview and Major Recommendations*, FUTURE OF CHILDREN, Spring 1993, at 4, 8.

201. *Id.* See also Judith K. McKenzie, *Adoption of Children With Special Needs*, FUTURE OF CHILDREN, Spring 1993, at 62, 73; MARY FORD & JOE KROLL, *THERE IS A BETTER WAY: FAMILY-BASED ALTERNATIVES TO INSTITUTIONAL CARE 10-11* (1995) (research brief for North American Council on Adoptable Children).

202. Schulman & Behrman, *supra* note 200, at 8; see also McKenzie, *supra* note 201, at 73.

203. See *supra* note 192 and accompanying text.

204. See J. Robert S. Prichard, *A Market for Babies*, in FAMILY MATTERS 56, 57 (Martha Minow ed., 1993); Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 337-42 (1978); see also Margaret V. Turano, *Black Market Adoptions*, 22 CATH. LAW. 48 (1976); Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 124 (1994); Comment, *Curtailling the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoption*, 14 U. PA. J. INT'L BUS. L. 623 (1994).

205. Prichard, *supra* note 204, at 57.

ier²⁰⁶ and surrogacy should be permitted. I am suggesting the enactment of permissive regulation of the kind imposed on lawyers and doctors. Producing babies for others should be done, like the practice of law and medicine, by a cadre of professionals,²⁰⁷ carefully chosen, trained, and licensed. Professionals work for money, of course, but often donate their services free of charge in appropriate cases.

IV. Parents' Responsibility for Antisocial Acts of Their Children

People want to be parents and the law encourages them to do so by making procreation a fundamental constitutional right.²⁰⁸ Few who embark on the adventure of parenthood carefully consider the legal (or other) responsibilities involved. Colonial law made clear that the head of the colonial household was expected to control the children within it.²⁰⁹ If he did not, the community stepped in and took over.²¹⁰ In the ensuing 200 years, a series of Supreme Court cases²¹¹ has wrapped the American family in a constitutional shroud of autonomy and privacy. The family now stands isolated from the community in trying to control its children and in performing its other tasks. This constitutional protection has caused the states, traditional arbiters of family matters, to virtually abandon the field, leaving parents to flounder alone.²¹² States cannot formulate public policies to prefer the functioning family, enforce familial obligations, demand family responsibility, protect family rights, or enforce family identity without running afoul of the Constitution. There remain on the books, however, a potpourri of parental responsibility laws which have withstood constitutional chal-

206. BARTHOLET, *supra* note 166, at 231 ("We need to *deregulate* adoption.").

207. This is not a job for amateurs. See Judith T. Younger, *What the Baby M Case is Really About*, 6 LAW & INEQ. J. 75, 80 (1988); see also Susan Ince, *Inside the Surrogate Industry*, FAMILY MATTERS, *supra* note 204, at 104; Arthur Serratelli, *Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?*, 26 GEO. WASH. J. INT'L & ECON. 633, 672-73 (1993).

208. See cases cited *supra* note 197.

209. See *supra* note 56 and accompanying text.

210. See *supra* note 57 and accompanying text.

211. See cases cited *supra* note 144.

212. See John T. Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U. L. REV. 255, 268 (1973) ("The state, it is concluded, must leave the field; each person is to be free to make his or her own sexual style as he or she is free to make his or her own religion."); U.S. DEP'T OF EDUCATION, *THE FAMILY: PRESERVING AMERICA'S FUTURE* 16-17 (1986) ("[T]hese . . . decisions . . . have crippled the potential of public policy to enforce familial obligations, demand family responsibility, protect family rights, or enhance family identity.").

lenge²¹³—state statutes which impose token liability on parents for the torts and crimes of their children.²¹⁴ Some of them focus on parents' behavior—for example, the statutes penalizing parents for contributing to the delinquency of minors.²¹⁵ Others focus on children's behavior, imposing vicarious liability on parents for their children's acts—for example, the Louisiana law making parents liable to a third person for damage caused by their minor children²¹⁶ and the California law subjecting parents to criminal prosecution for failing "to exercise reasonable care, supervision, protection, and control" over minors.²¹⁷ The stated purposes of these laws is to compensate victims of personal or property injury,²¹⁸ to make parents more careful in supervising their children,²¹⁹ and to curb juvenile delinquency.²²⁰ The statutes are all very limited in scope, however. The California "failure to control" law provides for a maximum fine of \$2,500 and/or imprisonment for up to a year.²²¹ The Minnesota malicious injury law provides for a maximum liability for injury to person or property of \$1,000 and that, in turn, is limited to special damages only, like medical expenses, lost wages and other damages for unusual effects of the injury.²²² The ambivalent message from these laws to parents is, "You are responsible for your children's transgressions but not very!" and the assumptions that underlie the law are questionable.

Parents are, of course, initiators of the family enterprise. It is convenient to assume that they have a degree of control over its minor members, and it is easy to blame parents for the delinquencies of the children they produce. Experts and nonexperts do so. For example, from the *Uniform Crime Reports* comes this statement: "Many social scientists believe that much of the violence re-

213. See, e.g., *Williams v. Garcetti*, 853 P.2d 507 (Cal. 1993); see also Note, *Constitutional Limitations On State Power To Hold Parents Criminally Liable For The Delinquent Acts of Their Children*, 44 VAND. L. REV. 441 (1991) [hereinafter Note, *Constitutional Limitations*].

214. See Toni Weinstein, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. CAL. L. REV. 859 (1991); S. Randall Humm, *supra* note 84; L. Wayne Scott, *supra* note 84; Ellenmarie Shong, *The Legal Responsibility of Parents for Their Children's Delinquency*, 6 FAM. L.Q. 145 (1972).

215. See Note, *Constitutional Limitations*, *supra* note 213, at 447.

216. LA. CIV. CODE ANN. art. 2318 (West 1979 & Supp. 1996).

217. CAL. PENAL CODE § 272 (West 1988 & Supp. 1990).

218. Weinstein, *supra* note 214, at 863-64.

219. *Id.* at 864.

220. For example, the California legislature, in enacting its law, found that "California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." CAL. PENAL CODE § 186.21 (West 1988 & Supp. 1990).

221. CAL. PENAL CODE § 272.

222. MINN. STAT. ANN. § 540.18 (West 1988 & Supp. 1995).

flects a breakdown of families. . . . Some studies suggest that 70 percent of juvenile offenders come from single parent homes."²²³ And from *Vogue* magazine comes this one:

It's about bailing [out] on the kids . . . Family values *are* what keep the button off self-destruct. Just look at the seventies media, look at *Ms.* magazine or *Playboy*. The media told people, "Go ahead, do what you want. Bail [out] on your relationships and fuck the kids." So people did, and so now their kids are shooting them in the street, and there's a kind of poetic justice in that.²²⁴

But is the blame justified? Do parents really have the ability to control their children? There are at least two other factors that have the capacity to override parental efforts in this regard: genes and societal attitudes.

Most of us believe, before we have children, that we will be able to mold the personalities of our offspring by teaching and training and a mellifluous home environment. In other words, that nurture, rather than nature, is the predominant factor in determining personality. We discover the truth after our children are born. They arrive with personalities, which turn out to be quite different from each other, and quite different in some ways from those we may have liked to instill in them. Nature does not wait for nurture to operate. Nature makes the children, from their conception, very much what they are. Recent studies seem to bear this out. Genetic endowment, not environment, accounts for much of our children's personalities.²²⁵ As one expert puts it: "Study after study has shown that the interfamilial variance in personality is about the same as the intrafamilial variance—once you control for genes. . . . Childhood events—even childhood trauma—and childrearing appear to have only weak effects on adult life."²²⁶ In light of this revision of long-standing tenets, it may be unreasonable to hold parents responsible for their children's personalities and resulting behavior. Assuming for the purpose of argument that parents *can* affect these things, a second overriding factor is that package of views prevailing in a given society at a given time. These societal attitudes can ruin a child with the best genes brought up by the best parents.

223. F.B.I., *supra* note 15, at 279.

224. Marina Rust, *Split Decision*, VOGUE, Feb. 1994, at 66.

225. Auke Tellegen et al., *Personality Similarity in Twins Reared Apart and Together*, 54 J. PERSONALITY & SOC. PSYCHOL. 1031 (1988); Thomas J. Bouchard, Jr. et al., *Sources of Human Psychological Differences: The Minnesota Study of Twins Reared Apart*, 250 SCIENCE 223 (1990).

226. MARTIN E.P. SELIGMAN, *WHAT YOU CAN CHANGE & WHAT YOU CAN'T* 236-37 (1994).

The first question we have to ask ourselves is, "Does this society really want good children?"²²⁷ That is certainly the general assumption and few individuals would say "no" if asked. I think, however, that few of us really view good children as a primary goal. We would rather have brilliant students, good athletes, and ultimately successful professionals. We are not that interested in good people. We do not reward decency or kindness or compassion but rather good grades, making the football team, and getting into medical or law school. As one outstanding child psychologist puts it:

In the United States, it is now possible for a person 18 years of age to graduate from high school, college, or university without ever having cared for, or even held, a baby; without ever having looked after someone who was old, ill, or lonely; or without ever having comforted or assisted another human being who really needed help. No society can long sustain itself unless its members have learned the sensitivities, motivations and skills involved in assisting and caring for other human beings. For some years I have been advocating the introduction in our schools, from the earliest grades onward, of what I have called a *curriculum for caring*. The purpose would be not to learn *about* caring but to engage in it: children would be asked to take responsibility for spending time with and caring for others—old people, younger children, the sick and the lonely.²²⁸

Taking it down a notch to young people themselves, we know that they want most of all to be popular. We encourage them in that goal; we want them to be popular too.²²⁹ Unfortunately, in our society, there is very little connection between youthful popularity and decency. The most "popular" kid is the "coolest," most athletic, or most beautiful, and not necessarily the decentest, tenderest, or most compassionate.²³⁰ Furthermore, as a society, we are anxious to be off the moral hook. As one commentator recently put it, the old value system "which recognized real differences between good and evil, that there are good and bad actions, good or bad societies, good or bad people"²³¹ is under attack. In the family context, this

227. Dennis Prager, *Do We Really Want Good Children?*, *ULTIMATE ISSUES*, Jan.-Mar. 1988, at 16. I am indebted to Mr. Prager for the discussion of nonlegal societal attitudes. The ideas are his. I agree with him. See also Roger Rosenblatt, *Teaching Johnny To Be Good*, *N.Y. TIMES*, Apr. 30, 1995, § 6 (Magazine), at 36.

228. Brian Hall, *Families and Children First*, *CORNELL MAG.*, Nov. 1995, at 35, 38 (quoting Urie Bronfenbrenner); see also URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT* 53-54 (1979).

229. See, e.g., Maja Radevich, *'90s Family Struggling with Parents, Pressure*, *L.A. TIMES*, May 31, 1995, at E3.

230. See, e.g., Mary Jo Kochakian, *Middle School Popularity May Pose Some Risks*, *HARTFORD COURANT*, Sept. 27, 1994, at E1.

231. Dennis Prager, *The War Against Differences*, *ULTIMATE ISSUES*, Summer 1985, at 5; see also Kay Miller, *Me vs. Morality*, *STAR TRIB.* (Minneapolis), June 5, 1995, at E1.

system shows up as a parental belief that parents bear no responsibility for the misconduct or failures of their children. Parents do not discipline children; they treat them as equals. Children call adults by their first names. Adults do not tell children what to do; they talk to children as pals, as if they, adults, had as much to learn from children as children do from adults.²³² In sum, as Lucinda Franks put it, in a recent piece in the *New York Times Magazine*, adults treat children as "little big people,"²³³ instead of giving them the kind of parental attention they need—setting limits, being in authority, maintaining a proper distance—in short, treating children as children. When behavioral problems erupt,²³⁴ parents compound the damage by taking children to psychiatrists and other health professionals who reinforce parental belief that parents are not responsible for the children in their charge or for improving their lives.²³⁵ The professionals diagnose the children as having mental disorders and prescribe drugs to control their behavior.²³⁶ Prescribing medication is unnecessary and damaging to the children so treated.²³⁷ The other side of this coin is that many adults behave like children, by dressing like them, playing with toys, and shirking responsibilities,²³⁸ and we condone it.²³⁹

The same lack of moral judgment is reflected in our laws. As a society, we have entrusted the whole task of child-raising to parents. But we give them very little help in performing the task, though they desperately need and would probably welcome it.²⁴⁰ Certainly, punishing parents with token liability for the sins of their children makes little sense. Parents are failing at a job which

232. Prager, *supra* note 231, at 5.

233. Lucinda Franks, *Little Big People*, N.Y. TIMES, Oct. 10, 1993, § 6 (Magazine), at 28.

234. See Franks, *supra* note 233, at 28; Bruce Weber, *It's Not Fun to be the Boss of Your Parents*, N.Y. TIMES, Oct. 8, 1995, § 6 (Magazine), at 82.

235. See Peter R. Breggin, *Symposium: Are Behavior-Modifying Drugs Overprescribed for America's School Children?*, INSIGHT, Aug. 14, 1995, at 18; PETER R. BREGGIN, *TOXIC PSYCHIATRY* 269-92 (1991); Barbara Crosette, *Agency Sees Risk in Drug to Temper Child Behavior*, N.Y. TIMES, Feb. 29, 1996, at A7.

236. See Breggin, *supra* note 235, at 18; BREGGIN, *supra* note 235, at 269-92; Crosette, *supra* note 235, at A7.

237. See Breggin, *supra* note 235, at 18; BREGGIN, *supra* note 235 at 269-92; Crosette, *supra* note 235, at A7.

238. Prager, *supra* note 231, at 7-8.

239. Indeed, we've elected a President who is not the usual father figure but who, in the words of one commentator, is a "gifted adolescent," the first of his kind. Maureen Dowd, *On Washington, We Are The President*, N.Y. TIMES, Jan. 23, 1994, § 6 (Magazine), at 18. Ms. Dowd is referring to President Clinton. Her main point is that the one thing "[w]e can now say about the Clinton Administration" is that "[t]here's never going to be any certainty." *Id.*

240. See Ronald Smothers, *Tell It to Mom, Dad and the Authorities*, N.Y. TIMES, Nov. 14, 1993, § 4, at 4.

no one has told them how to perform and which is too big for one or two people acting alone. The law should help parents to be responsible and children to be good: these are the behaviors that society should expect. To help members of society to behave in these ways, the law should set up standards for parenting and limits for children. The standards for parenting should take the form of incentives and rewards for functioning families. The limits for children should include municipal curfews;²⁴¹ tickets for truancy;²⁴² controlled fare on television;²⁴³ and educational programs which teach children to say "no" to premarital sex,²⁴⁴ in addition to those which hand out condoms, as if children were responsible adults with enough sense to use them.²⁴⁵ We should be emphasizing decency²⁴⁶ over skill on the football field, and improving pre-school²⁴⁷ and school systems so parents would not need to add these functions to their already difficult tasks.

V. The Primacy of Childrens' Interests in Deciding Matters That Affect Them

Even with standards for parents and limits for children, the law will need a basis for determining disputes that affect child welfare. The best interests of the child standard²⁴⁸ which now comes into play in custody, adoption, and visitation cases, is theoretically sound. It carries the right message, which is that the child's interests should be paramount in deciding. Here again, the law is ambivalent. While giving lip service to the best interests standard, courts frequently allow it to be diluted by other considerations that reflect the interests of one or both parents or the state. The first diluting factor in applying the best interests standard is gender bias. Gender bias begins with the preeminence of the father in colonial days as the head of the family and the custodian of the chil-

241. *Id.*

242. Verne G. Kopytoff, *Where Truancy is Punished by Law*, N. Y. TIMES, May 10, 1995, at B11.

243. Congress has recently voted to require all new television sets to have V-chips ("V" stands for violence). Elizabeth Kolbert, *Americans Despair of Popular Culture*, N.Y. TIMES, Aug. 20, 1995, § 2, at 1, 23. These would enable parents to block out objectionable shows. *Id.*

244. See Jane Gross, *Sex Educators for Young See New Virtue in Chastity*, N.Y. TIMES, Jan. 16, 1994, at A1.

245. See Elmer DeWitt, *Making the Case for Abstinence*, TIME, May 24, 1993, at 64. See also Nancy Gibbs, *How Should We Teach Our Children About Sex?*, TIME, May 24, 1993, at 60.

246. See BRONFENBRENNER, *supra* note 228.

247. See Steve Greenhouse, *If The French Do It, Why Can't We?*, N.Y. TIMES, Nov. 14, 1993, § 6 (Magazine), at 59 (on the French system of day-care).

248. See *supra* text accompanying notes 61, 152-53.

dren.²⁴⁹ Fathers' rights gave way to the tender years doctrine, a strong preference for mothers as custodians of young children.²⁵⁰ The tender years doctrine gave way, in turn, in the wake of equal protection doctrine and state equal rights amendments,²⁵¹ to two facially neutral rules of thumb which, nevertheless, operate to favor one sex over the other. The two rules are the preference for joint custody and the primary caretaker presumption. Joint custody is an appealing doctrine; it enables courts to avoid difficult choices, as well as the appearance of discrimination.²⁵² However, it unfairly rewards fathers who, during the marriage, were not the primary caretakers of the children and gives them leverage at divorce to wring concessions from their wives.²⁵³ The primary caretaker presumption favors mothers over fathers because most primary caretakers of young children are women. In fact, mothers get custody in ninety percent of all cases.²⁵⁴

Other parental rights can be diluting factors in the application of the best interests standard. They are rights to relocate, First Amendment rights, rights to privacy and free association, and rights to divorce. Whenever a court allows the custodial parent to move to a new community with the child, leaving the other parent behind,²⁵⁵ the best interests standard is subordinated to the custodial parent's right to relocate. The child then has to face not only the breakup of the family into two households but a break in the contact with one of its parents.

Parental First Amendment rights can similarly override the child's interests. The courts curtail inquiry on the subject of parents' religious beliefs and practices or lack of them²⁵⁶ though they may affect the child. Similarly, parental rights to free association

249. See *supra* text accompanying note 41.

250. See ELLMAN ET AL., *supra* note 19, at 502.

251. *Id.*

252. *Id.* at 577-81.

253. See generally Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497 (1988).

254. See ELLMAN ET AL., *supra* note 19, at 508-09.

255. See, e.g., *Aldrich v. Aldrich*, 516 N.Y.S.2d 328 (App. Div. 1987) (allowing a mother to move from New York to California where her husband resided); *Blumenthal v. Klimberg*, 15 Fam. L. Rep. (BNA) 1146 (N.Y. Sup. Ct. Dec. 14, 1988) (holding that a mere intent to remarry an out-of-state resident sufficient as an "exceptional circumstance"); see also *Tropea v. Tropea*, Nos. 1, 2, 64 WL 137476 (N.Y. Mar. 26, 1996) (holding that presumptions and threshold tests that artificially skew the analysis of these cases in favor of one outcome or the other should be rejected but petitioners' requests to move upheld); *Russenberger v. Russenberger*, 669 So. 2d 1044 (Fla. 1996) (holding that demonstration of good faith by custodial parent seeking to relocate gives rise to a presumption in favor of the request to relocate).

256. See, e.g., *Johnson v. Johnson*, 564 P.2d 71 (Alaska 1977), *cert. denied*, 434 U.S. 1048 (1978).

and privacy may limit the best interests inquiry into parents' sexual practices and morality.²⁵⁷ The parental privacy right has been held to invalidate a grandparents' visitation statute based on the best interests of the child.²⁵⁸ The court held that the child's married, fit parents were the sole arbiters of the child's best interests in this regard.²⁵⁹

Perhaps the most telling example of parental interests being allowed to override the child's interests is the complete absence of any best interests inquiry²⁶⁰ on the vital question of family breakup. Parents are permitted to divorce without regard to how the divorce will affect the children or any investigation of alterna-

257. See, e.g., *In re Marriage of Thompson*, 449 N.E.2d 88 (Ill. 1983); *Hansen v. Hansen*, 562 A.2d 1051 (Vt. 1989).

258. See, e.g., *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

259. *Id.*

260. Divorce reformers earlier considered and rejected the idea of making child welfare a factor—but they were working in the sixties, before the dramatic changes in family structure occurred. As the Archbishop of Canterbury's group explained:

We need hardly say that the interests of any children of a marriage alleged to have broken down have been much in our minds. It has sometimes been suggested that divorce should not be available for any cause to spouses with children still of school age. We cannot think it just, however, that there should be one law of divorce for those with children and another for those without. If there were, it is by no means inconceivable that, at any rate in some marriages, childbearing might be inhibited by desire for divorce or precipitated by a wish to avoid it. But, that possibility apart, there exists no significant evidence to show which is the worse for children, to live with parents who are at odds with each other, or to be given into the charge of one parent after divorce. We certainly have no reason to believe that it would invariably be to the benefit of children to live with parents who had been refused a divorce on their account.

ROBERT EXON ET AL., *PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY* 40 (1966). As Professor Levy's analysis for the Uniform Commissioners on Uniform Marriage and Divorce Legislation explained:

When the issue is whether to impose an absolute ban [on divorce for couples with minor children] or to take account of the father's present and likely future financial circumstances, there is no basis for differentiating children from wives—it is not sound to deny a divorce to a father with several children simply because his income is marginal. It would make more sense to try to insure that he did not remarry after the divorce—although that course also has obvious risks. The most appropriate course is to design child support enforcement doctrines which are fair, flexible and expeditious.

ROBERT J. LEVY, *UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS* 110 (1968) (document prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws). The Uniform Marriage and Divorce Act does provide that a divorcing court may set aside a portion of the parents' joint or separate estates in a separate fund "for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children." UNIF. MARRIAGE AND DIVORCE ACT § 307(b) (Alternative A), 9A U.L.A. 239 (1973).

tive solutions²⁶¹ designed for the children's protection. The best interests of the child standard does appear belatedly in divorce actions after the family is already broken, and then only in the relatively small number of disputed custody cases. In those cases that are settled, courts merely rubber-stamp parents' custodial arrangements.²⁶²

Still another diluting factor in applying the best interests standard is the state's interest in achieving racial equality. Race is a factor which may be considered in adoption and foster care placements. Indeed, racial matching²⁶³ of children to prospective parents is permitted and widely practiced even though it holds up the child's placement. For Native American children, Congress created a statutory preference for placement in Indian homes, overruling otherwise applicable state law and jurisdiction in favor of tribal law and courts.²⁶⁴ Custody disputes between divorcing couples, however, are governed by a different rule. Here, race may not be considered even though it bears on the child's best interests. The state's interest in preserving racial equality has been held to override the child's welfare. The United States Supreme Court, in *Palmore v. Sidoti*,²⁶⁵ conceding that living with a step-parent of a different race might subject the child to pressures and stresses it would not otherwise face, nevertheless held that this could not be considered.²⁶⁶

The law should be changed to require an independent judgment about the child's best interests before parents divorce even in settled cases. The best interests standard should not be diluted by considerations that reflect parents' or state interests.

261. Some commentators have suggested limitations on divorce during children's minority. See, e.g., Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981) (proposing the marriage for minor children); DEBRA FRIEDMAN, *TOWARDS A STRUCTURE OF INDIFFERENCE* 133-35 (1995) (discussing a child-centric alternative).

262. At least the court does not become deeply involved in undisputed cases. See Robert H. Mnookin & Lewis Korhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-56 (1979), and sources cited therein.

263. See, e.g., *Drummond v. Fulton County Dep't. of Family & Children's Serv.*, 563 F.2d 1200 (5th Cir. 1977); *In re R.M.G.*, 454 A.2d 776 (D.C. 1982); see also Steven A. Holmes, *Bitter Racial Dispute Rages Over Adoption*, N.Y. TIMES, Apr. 13, 1995, at A8.

264. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified in large part at 25 U.S.C. §§ 1901-1963 (1983)).

265. 466 U.S. 429, 433 (1984).

266. *Id.*

VI. Conclusion

America's children are at risk because of their parents' failure to form strong, stable families. The law is society's instrument for communicating societal expectations to society members. American family law, therefore, is the vehicle that should tell American parents that strong, stable families, responsible parents, and good children are what society expects. Currently, American family law fails to accomplish this important task because it is ambivalent on important family matters such as family form and function, the economic value of children, parental responsibility for the antisocial acts of their children, and the primacy of the children's interests in deciding matters that affect their welfare. Current law thus bears some responsibility for the failures of American families and the concomitant risks to their children. The law should be reformed so that it clearly articulates societal expectations. Specifically, the reforms should include encouragements and rewards for functioning families, regardless of form or biological connections; acknowledgment of the economic value of children and facilitation of adoptions and surrogate parenthood, subject to professional regulation; repeal of existing parental responsibility laws and their replacement with standards for parents and limits for children; and elevation of the *best interests of the child standard* in matters that affect children's welfare to primacy over parental and state interests.