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GRANDPARENTS' VISITATION RIGHTS: A SURVEY OF RECIPROCAL KINSHIP-TIES BASED IN HISTORICAL COMMON LAW AND LEGISLATIVE POLICIES

JANE E. ATKINSON*

*Blood is a destiny. One's genius descends in the stream from long lines of ancestry.*¹

—A. Bronson Alcott, *Tablets*, 1868.

INTRODUCTION

This article examines the legal issues emerging in recent years surrounding grandparents' petitioning the courts for access to their grandchildren. Rather than viewing this legal issue from the traditional standpoint of the autonomous family unit, this article adopts the perspective of the disenfranchised parties and asserts the existence of an inviolable kinship tie to have access to the progeny of one's children and they to their grandparents.²

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True to the reciprocal kinship values expressed in this article, I am currently caring for my mother, Rebecca, who was diagnosed with terminal cancer during my first year of law school. Rebecca is my inspiration for this article; seeing her pain at the loss of the relationship with her grandson provided me the focus to search for antecedent kinship ties, so that she may ground this relationship more deeply than that afforded by enacted law, but rather in tradition and the body of common law—the precursors to law.

1. The author interprets this quotation to mean that the roots of our ancestral family heritage began long ago and traversed through the many branches of our family tree, culminating in each of us—the legatees of these ancestral roots; all who went before us, remain within us. Cf. Christine Davik-Galbraith, *Grandma, Grandpa, Where Are You?—Putting the Focus of Grandparent Visitation Statutes on the Best Interests of the Child*, 3 ELDER L.J. 143 (Spring, 1995) (arguing that familial problems should not end the grandparent-grandchild relationship; rather, it is the right of both parties to visit with one another).

2. David M. Rosen, *What Is a Family? Nature, Culture, and the Law*, in FAMILY IN TRANSITION 55-56 (Arlene S. Skolnick & Jerome H. Skolnick eds., 10th ed. 1999) (writing "In American kinship, . . . the world of relatives is constructed out of deeply felt assumptions about nature and culture" (citing DAVID SCHNEIDER, AMERICAN KINSHIP: A

The methodology employed to illuminate the basic issues is to create an analogy between a grandparent's visitation rights situation and another situation for which rules do exist. It is plausible that an applicable rule is already binding on the analysis, even though it has yet to be explicitly recognized by the court. This inquiry into coterminous codes of law begins in the annals of historical common law, which illustrate these enduring reciprocal kinship ties that have survived for centuries as an informal moral imperative.³ This reciprocal filial relationship was later formalized⁴ within the common law of estates that secured the rightful flow of compensation for this exchange of duties and rights between kin during their lives.

Underlying the expressly stated law lies the unstated law. It is the unstated law "which itself presupposes some background conventions that allow us to decide what counts."⁵ The ontology of the stated and unstated law sheds light on the norms of societal values that we seek to define and protect. These are the deep-seated values that are the driving force behind the written law.⁶ In the case of reciprocal kinship rights and duties, it is the moral imperative that kin are obligated to perform certain duties for one another, and in this process of filial exchange, certain rights are born. "Law considered as a 'complex phenomenon' is a mixture of normative and factual elements Law is seen as a system of rules, but these rules constitute social facts as well as psychic experiences, related to values according to a favoured version of axiology."⁷ Within this scheme of civilization, the evolution of reciprocal kinship ties preceded the written legal

CULTURAL ACCOUNT (1980). Within this system of symbols, the "order of nature" refers to the persons deemed to be relatives because they share a common heredity or blood. This system of symbols defines certain human characteristics as inherent)).

3. *Id.* at 56. This is termed the "order of culture" and refers to the "system of symbols that stands for . . . the customary beliefs, codes of conduct, and traditions created and [self-] imposed by human beings to serve as guidelines for [our social interactions]."

4. *Id.* at 56, (citing SCHNEIDER). This is the formalizing process we know as the "order of law" which denotes "other persons are relatives because they are bound together under law or custom."

5. Jerzy Wroblewski, *On the Unstated in Law: Implicit Pre-suppositions and Conventions*, in *CONTROVERSIES ABOUT LAW'S ONTOLOGY* 91 (Paul Amselek & Neil MacCormick eds., Edinburgh 1991).

6. See *Moore v. City of East Cleveland*, 431 U.S. 494, 505 (1977). Justice Harlan surmised, "[e]ven if conditions of modern society have brought about a decline in extended family households, they have not erased the *accumulated wisdom of civilization* [that] supports a larger conception of the family." (emphasis added).

7. Wroblewski, *supra* note 5, at 92 (referred to sometimes as our collective consciousness—cultural values that are so innate and implicit within the textual law that they require no articulation).

code.⁸

A new national consensus is in progress in the dominion of grandparents' rights.⁹ Every state provides for grandparent visitation in some form reflecting both the needs for such remedial legislation and the collective responsiveness of representatives (acting *en masse*) to codify the legitimate legal interests of both grandparents and grandchildren.¹⁰ This illustrates further that the progression of "[c]ivilization is a movement and not a condition, a voyage and not a harbor."¹¹ These "evolving standards of decency . . . mark the progress of a maturing society."¹²

The strength of our historical kinship traditions are further bolstered by legislative policies which reveal contradictions in how courts have construed grandparents' visitation rights as subordinate within the present legal equation. These facts are manifest in who we are as a people, and these organizing principles of early antiquity continue to impact modern society. The categories of nature and culture remain the prime symbolic vehicles through which issues of family and kinship are addressed. "Judges will continue to bend and shape these categories, [which] are not so easily abandoned."¹³ These will continue to be the cultural tools used to craft legal decisions.¹⁴

THE DYNAMICS OF KINSHIP TODAY

The configuration of our kinship structure has been influenced by the longevity of our elder population.¹⁵ "As four or even five generations of many families are now alive at the same time, we

8. Rosen, *supra* note 2, at 56. The "order of law" is a "subdomain of the order of culture;" the informal customs preceded the "codes of conduct created by judges, courts and legislatures" and as such, mirrors the legitimacy already attached to these relationships.

9. *Troxel v. Granville*, 530 U.S. 57, 74 (2000) (plurality opinion). This national consensus is evident by the passage of grandparent visitation statutes across the United States, the behavior of juries, international opinions, and the judgment of organizations with expertise in the field.

10. *Id.* An unmarked footnote on page seventy-four lists the statutory provisions in all fifty states. The Supreme Court found some states' visitation statutes to be broad, such as section 26.10.160(3) of the Revised Code of Washington, which gives *any* person the right to seek visitation of a fit parent's child when it serves the best interest of the child. Therefore, some state statutes are invalidated.

11. ARNOLD TOYNBEE, *CIVILIZATION ON TRIAL* 55 (1948).

12. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

13. Rosen, *supra* note 2, at 62.

14. *Id.*

15. Matilda White Riley, *The Family in an Aging Society: A Matrix of Latent Relationship*, in *FAMILY IN TRANSITION* 492 (Arlene S. Skolnick & Jerome H. Skolnick eds., 10th ed. 1999).

can no longer concentrate primary attention on nuclear families of young parents and their children who occasionally visit or provide material assistance to grandparents or other relatives."¹⁶ Looking up the generational ladder, increasing numbers of a child's four grandparents survive, providing new opportunities for the members of this enlarged kinship structure to activate and form close family bonds.¹⁷ This decline in mortality means that "[f]or the first time in history, most adults will live long enough to get to know most of their grandchildren, and most children have the opportunity to know most of their grandparents."¹⁸

Today's complex kinship structure forms a matrix of latent relationships—so labeled because they each have the potential to become close and significant during one's lifetime.¹⁹ Given the intricacies of the current kin networks, perhaps we need to now think of a family less as the members of one household with incidental linkages to kin in other households and more as a continuing interplay among intertwined lives; perhaps we need to be open to the benefit from the mutual support provided by these relationships.²⁰ "As [these] family relationships are prolonged, socialization is . . . recognized as a reciprocal process that potentially extends throughout the lives of [these members]."²¹

This is especially significant when the nuclear family breaks up. When children maintain contact with grandparents following a divorce or the death of a parent, the grandparents can bridge the gap between other relatives of the estranged families (e.g., aunts, uncles, cousins) and maintain the sense of kin connectedness.²² These relationships require a reciprocal investment of contact to create (or re-create) relationships that will last a lifetime.²³ The trend in the proliferation of nonparental visita-

16. *Id.* at 374.

17. *Id.* at 377.

18. ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., *THE NEW AMERICAN GRANDPARENT: A PLACE IN THE FAMILY, A LIFE APART* (1987), cited in Andrew J. Cherlin & Frank F. Furstenberg, Jr., *The Modernization of Grandparenthood*, in *FAMILY IN TRANSITION* 385, 386 (Arlene S. Skolnick & Jerome H. Skolnick eds., 10th ed. 1999).

19. Rosen, *supra* note 2, at 55. The more this "new family relationship [is] modeled on a traditional relationship grounded in culture, the more likely it is that the law will legally recognize the new relationship."

20. Riley, *supra* note 15, at 374.

21. *Id.* at 379.

22. *Id.* at 381.

23. *Id.* at 500.

tion statutes signals the "changing realities of the American family."²⁴ In *Troxel v. Granville*, the seminal case addressing this visitation, the Supreme Court reiterated that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this court."²⁵ The dissent in *Troxel* found this type of reasoning to treat children as chattel.²⁶ But the question of children's access to grandparents should not be framed in the context of fathers' rights, mothers' rights, or parents' rights;²⁷ it is about the right of the child to emotional integrity and continuity in filial relationships.²⁸ Further recognition that certain rights cannot be bargained, usurped, or curtailed is noted in state tort caselaw. The inviolability of certain rights is evinced by the fact that even parents lack the authority to waive a minor's future right to a cause of action for injuries due to third-party negligence.²⁹ "It must be remembered that grandchildren . . . have the natural right to know their grandparents and that they benefit greatly from that relationship."³⁰

STATE LEGISLATIVE RECOGNITION OF GRANDPARENT VISITATION RIGHTS

There is much criticism surrounding grounding grandparents' rights of access to their grandchildren within the adversarial process of the family courts. In the current legal framework, a judge must balance the parents' fundamental liberty interest under the Due Process Clause³¹ against grandparents' visitation rights, an inferior right created by the legislature that is enforceable at the discretion of the court. First, grandparents normally do not readily tread in the area of family court litigation unless they are having serious difficulty with one or more of the parents and, as a result, are not seeing their grandchildren regularly. The grandparents have most likely tried to reach some kind of an informal agreement with the parents but were un-

24. See *Troxel*, 530 U.S. at 64.

25. *Id.*

26. *Id.* at 89.

27. The acrimony of marital dissolution can supersede and swallow the best interests of the children, where the parents' choices are motivated by self-interest and reflect their own adult relationship preferences.

28. See *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992).

29. See, e.g., *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 10 (Wash. 1992) (en banc).

30. See Brief for Petitioners at 43, *Troxel* (No. 99-138).

31. See *Troxel*, 530 U.S. at 65.

cessful.³² Or perhaps there are problems in their grandchildren's home environment that moves them to intervene on the children's behalf.³³ If the parents are unstable, either emotionally or financially, visitation may be important not only for the security of the grandchildren, but also for allowing the grandparent an informal way of monitoring their grandchildren's situation to see if more serious intervention needs to be taken.³⁴

There are a variety of situations where it is appropriate and beneficial for the children if the grandparents pursue court-ordered visitation. For example, if the parents are engaged in a bitter divorce and custody battle and the grandparents have always been close to their grandchildren, this visitation may help give the children some continuity and stability. This may be particularly true where the grandparents are the parents of the non-custodial parent. The custodial parent may be unwilling to permit the soon-to-be-former-in-laws to visit the grandchildren, and the parents of the noncustodial parent may not want to infringe on his or her limited time with the children. In this case, the grandparents can seek separate court-ordered visitation. Other instances where grandparents have sought visitation through the court occur when the noncustodial parent does not, or cannot, exercise visitation periods.³⁵

Court-ordered visitation may be necessary where the relationship between the grandparents and their adult child is strained, and as a result, they do not get to see their grandchildren when they have visitation.³⁶ In *Stacy v. Ross*,³⁷ the Mississippi Supreme Court was confronted with a challenge to the court-ordered grandparent visitation in an "intact" family.

32. TRACI TRULY, GRANDPARENTS' RIGHTS 9 (3d ed., Sphinx Publ'n 2001).

33. The reasons grandparents sue for visitation are numerous. For example, the child may be abused or neglected, or the grandparent may wish to relieve the parent of the burden of childcare costs. Intangible reasons such as wanting a child to feel a sense of connectedness to a deceased parent through the surviving members of the family, may be less persuasive grounds for visitation than abuse or neglect but are none the less important to giving the child a sense of stability.

34. TRULY, *supra* note 32, at 13.

35. *Id.* "If you are seeing your grandchild but there is frequent conflict over scheduling, having the court set ground rules may remove a source of conflict. This will also assure that you get at least some regular contact with your grandchild, and you avoid being at the mercy of one or both parents regarding your time with your grandchildren. Certainly, you may expect opposition from your own son or daughter as well as the other parent."

36. *Id.*

37. *See generally* *Stacy v. Ross*, 798 So. 2d 1275 (Miss. 2001); *see also* *Jackson v. Tangreen*, 18 P.3d 100, 106 (Ariz. Ct. App. 2000) (applying rational basis scrutiny to the Arizona statute, which accords due judicial weight to the parent's decision regarding the visitation and the extent of the visits sought by the grandparent).

There the court distinguished *Ross* from the Washington statute at issue in *Troxel*, based on the express intent of the state legislature to grant such visitation to grandparents. An additional factor in the *Ross* decision was the poor relationship between the parties that was likely to persist and eliminate any chance for a grandparent-grandchild relationship without court-ordered visitation. Truly further emphasized court-ordered visitation where the relationship between the grandparents and both parents is bad:

[C]ourt intervention may be [the] only hope of maintaining a relationship with [their] grandchild[ren]. Although the fact that [the grandparents] have a poor relationship with the parents may be used by the parents in an attempt to block the visitation [they] have requested. [But] courts generally realize that the grandparent statutes were passed in the first place to accommodate families with fractured relationships.³⁸

In *Herndon v. Tuhey*,³⁹ the Missouri Supreme Court upheld the grandparent visitation statute, which permitted a grandparent's petition upon an unreasonable denial of visitation for more than ninety days, so long as this contact was deemed to be in the best interest of the children.⁴⁰ This particular case involved contentious lawsuits over money, property, and physical altercations between the parties.⁴¹ Fortunately, the court was unswayed by these exhibitions and concluded that the statute was reasonable; it was minimally intrusive to the family, and "it was narrowly tailored to adequately protect the interests of parents and children."⁴² Maine's Grandparents Visitation Act survived a challenge when the Supreme Judicial Court held that the statute was narrowly tailored to serve a compelling state interest and did not violate the Due Process Clause of the Fourteenth Amendment.⁴³ Wyoming weighed into the fray over court-ordered grandparent visitation, holding that their statute was

38. TRULY, *supra* note 32, at 13.

39. 857 S.W.2d 203, 210 (Mo. 1993) (en banc).

40. *See, e.g.*, *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997) (permitting either grandparent of a deceased parent to petition for visitation did not create undue interference in the parental relationship).

41. *Herndon*, 857 S.W.2d at 210.

42. *Id.* (basing its conclusion on a showing that visitation is in the best interest of the child).

43. *See generally* *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000).

constitutional.⁴⁴ The Wyoming court stressed the benefits of the bond between grandparents and grandchildren:

[G]randparents and grandchildren normally have a special bond [that] cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents.⁴⁵

If one or both of the parents have died, the grandparents may consider filing in order to continue a regular relationship with their grandchild. This is especially true if it is the grandparents' child who is the deceased parent, as was the case in *Troxel*. The surviving parent may not emphasize keeping up family contact with the deceased parent's relatives. Depending on the venue, the grandparents may have to meet certain threshold requirements before they can assert legal standing to petition for visitation. These statutory requirements may confer standing only in cases involving divorce or separation, where visitation has been denied for a significant period of time and the petition is dependent upon a showing that the grandparents have an established relationship with their grandchildren. The latter recognition requirement can be especially troubling and impossible to meet in cases involving an infant with no previously established relationship with his grandparents. Ultimately, if the grandparents meet the threshold requirements for a visitation petition, they will gain an opportunity to convince the court that the visits are in their grandchild's best interest because they serve to strengthen the grandchild's sense of family.⁴⁶

The Supreme Court did not address, in *Troxel*, "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation" but left it to the states

44. *Michael v. Hertzler*, 900 P.2d 1144, 1145 (Wyo. 1995).

45. *Id.* at 1149.

46. TRULY, *supra* note 32, at 13.

to adjudicate the visitation standards on a case-by-case basis.⁴⁷ In the wake of the *Troxel* decision, many states now impose new requirements on grandparents seeking access to their grandchildren. In some cases, grandparents must prove the existence of a psychological attachment on the part of the child to this relationship and that denial of this contact would cause real and significant emotional loss to the child.⁴⁸ Clearly, provisions such as this pose an insurmountable challenge to grandparents seeking enforceable visitation rights in cases involving young grandchildren and can effectively foreclose the development of such a connection between the child and his grandparents.⁴⁹ The narrowing of these legal rights, in response to the perception that parents' rights and family autonomy were threatened, will result in fewer grandparents winning in court.⁵⁰

A COMMON HERITAGE OF RECIPROCAL RIGHTS AND DUTIES BETWEEN KIN

As a civilization and former colony of England, we share common historical patterns of kinship that point to the existence of a common law custom of uncodified kinship or filial rights. These rights derive from this ancient body of laws that codified these customs over the centuries, forming the common law foundation for our modern-day law in America. The movement of the progressive societies has been uniform in one respect—with the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual has steadily substituted for the family, as the unit that civil laws take into account. In this transition, the kinship ties between filial members has been replaced by forms of reciprocity in rights and duties originating in the family. These customary bonds, long forsaken, have had a renaissance in the recent state legislative trends “creating” grandparents' visitation statutes in response to the rise in disenfranchised grandparents seeking access to their grandchild-

47. See *Troxel*, 530 U.S. at 73. This is an exact inversion of the Wisconsin court's reasoning; this analytical framework would provide a bright-line rule for administering these cases.

48. See *Troxel*, 530 U.S. at 73.

49. Cf. *Roth v. United States*, 354 U.S. 476 (1957) (delving into the issue of pornography).

50. JEFF ATKINSON, AMERICAN BAR ASSOCIATION GUIDE TO FAMILY LAW, Ch. 12, at 25 (1997), available at www.abanet.org/publiced/practical/books/family/home.html (last visited Nov. 4, 2004).

dren.

Sir Henry Maine studied the evolution of early societal customs and rules that eventually gave rise to the more complex legal system that orders civilization. Maine described our social history as a movement from the dictates of filial status to one of individualized contractual status with each citizen acting as his own agent. More recently, however, social scientists have detected a reverse tendency in the law, and, as evidenced in Maine's *Ancient Law*, "legal ideas and institutions have a real course of development as much as the genera and species of living creatures."⁵¹ In the history of political ideas, kinship unity preceded recognition of the significance of local contiguity; much like "[c]orporations never die, accordingly primitive law considers the entities with which it deals, *i.e.* the patriarchal or family groups, are perpetual and inextinguishable."⁵²

The family, then, is a type of archaic society in all the modifications in which it is capable of assuming; the person, theoretically amalgamated into a family by their common descent, is practically held together by common obedience to their highest living ascendant—the father, grandfather, or great-grandfather. "The patriarchal authority of a chieftain was as necessary an ingredient in the notion of the family group as the [presumed] fact of its having sprung from his loins . . ."⁵³ Starting from this historical point, from a condition of society in which all the relations of persons are summed up in the relations of family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals. "All of the forms of status taken notice of in the laws [structuring family relations] were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the family."⁵⁴

Within the family structure is a method of classification and nomenclature to aid in the organization of these filial relationships. "Every man is related to an extraordinary number of men called his brothers, . . . to an extraordinary number called his uncles."⁵⁵ Therefore, it is not only convenient but also necessary for

51. SIR HENRY SUMNER MAINE, *ANCIENT LAW*, xiv (10th ed. 1906) [hereinafter *ANCIENT LAW*].

52. *Id.* at 122.

53. *Id.* at 128.

54. *Id.* at 164-65.

55. SIR HENRY SUMNER MAINE, *LECTURES ON THE EARLY HISTORY OF INSTITUTIONS—A SEQUEL TO ANCIENT LAW*, 70 (1878) [hereinafter *LECTURES*].

us to define our kinship community. A clear understanding how one member was associated with another by tie of blood established the common responsibilities and rights between them.⁵⁶ "It simplifies the conceptions of kinship and of conjoint responsibility, first in the patriarchal family and ultimately in the Clan or Tribe."⁵⁷ Familial responsibilities established and embraced through moral obligations rather than through laws:

The existence of the *filius familias* unity appear to point at certain duties of the primitive patriarchal chieftain which balanced his rights . . . with a liability to provide for all members of the brotherhood out of the common fund. In Roman times these obligations to the kinship network were not yet conceived of as a legal duty, 'for law had not yet penetrated into the precincts of the family;' this was rather a moral obligation, a duty semiconsciously followed and enforced rather by instinct and habit than by definite sanctions.⁵⁸

Similarly, "[i]n the mature Greek jurisprudence, . . . [there are] many traces of stringent family obligation [that] remain, the direct authority of the parent is limited, as in European codes, to the . . . minority of the children . . ."⁵⁹

This rudimentary tribal society gradually evolved into territorial confederations and governmental structures began to emerge as modern law took shape. Roman law, with its emphasis on custom, heavily influenced the development of modern law in much of Europe, because many European countries derived their civil codes from the Justinian Code of Rome.⁶⁰ Before the Norman Conquest in 1066, England was a loose confederation of societies and the laws were largely tribal and local; however, under the Anglo-Norman rule a system of centralized courts operating under a single set of laws replaced the earlier tribal rules.⁶¹ This legal system was the common law of England, beginning with common customs and, over time, involving the courts in lawmaking that was responsive to changes in soci-

56. *Id.*

57. *Id.*

58. ANCIENT LAW, *supra* note 51, at 140-41.

59. *Id.* at 132.

60. Walter Probert, *Law*, Microsoft Encarta Online Encyclopedia 2004, at http://encarta.msn.com/encyclopedia_761576108/Law.html (last visited Oct. 28, 2004).

61. *Id.*

ety.⁶² The break up of the feudal groups in the European countries brought us to the state of society in which we live.⁶³ This phase in the development of civilization gave rise to the modern state—one of many names for the more extensive community held together by a common country and the foundations for a system of jurisprudence. Without the demise of feudalism, the theory of sovereignty and the activity of a participatory legislature might never have been devised.⁶⁴

The "phenomena of primitive land ownership [suggests our] earliest cultivating groups were formed of kinsmen," and property law of today grew from the eventual "dissolution of these assemblages."⁶⁵ These changes were not abrupt and certain periods of history are distinguished by the predominance of these patterns of land ownership.⁶⁶ With the expansion of these groups, no longer held together exclusively by kinship, society was giving way to the bonds of land ownership. However, the feudal conception of social relations still had powerful influence. The English common law was saturated with these principles, which shaped evolving customs.⁶⁷ This "mixture of refined Roman law is known to us deceptively by name of feudalism," which had been revived after many of its features had "died out in the Roman world."⁶⁸ The modern law of nations embodies these distinctly legal conceptions in force from the sixteenth century onwards, when Roman law was generally received throughout the western regions of Europe. This became a kind of universal law.⁶⁹

The conception of the family, as linked together by *Patrias Potestas*, comes to us from the ancient tribal institutions.⁷⁰ "[A]ccording to ideas which appear to have been once common to the primitive Romans, to the Irish and Welsh Celts, and to the original observers . . . of the English custom," members who

62. *Id.*

63. LECTURES, *supra* note 55, at 86. "It is not, however, difficult to see that without the ruin of the smaller social groups, and the decay of the authority which, . . . they possessed over the men composing them, we should never have had several great conceptions which lie at the base of our stock of thought . . . [such as] the conception of land as an exchangeable commodity, differing only from others in the limitation of the supply . . ."

64. *Id.*

65. *Id.* at 87-88.

66. *Id.* at 88.

67. *Id.* at 86-88.

68. ANCIENT LAW, *supra* note 51, at 130.

69. *Id.* app. at 410.

70. LECTURES, *supra* note 55, at 223-24.

were most emphatically part of the family when it was dissolved by the death of its head were preferred within the inheritance scheme.⁷¹ The basic principle is that "the right of each member of a family accrues at his birth and, as the family has in theory a perpetual existence, there is no particular reason why, if the property is divided at all, it should be exclusively divided at a death."⁷²

THE CULMINATION OF KINSHIP RIGHTS AND DUTIES IN TESTACY

"[I]n the primitive jurisprudence everything turned on the continuity of succession."⁷³ In this scheme, the family patriarch had extensive rights and "it [was] impossible to doubt that he lay under an equal amplitude of obligations": if he governed the family, it was for its collective benefit.⁷⁴ "[H]e was lord of its collective possessions, and held them as trustee for his children and kindred."⁷⁵ The family was a corporate entity and the family patriarch, being at the helm, was its representative.⁷⁶

The history of jurisprudence shows a gradual process of societal dissolution where by "gradations [of] the relation of man substituted itself for the relation of the individual to his family and of families to each other."⁷⁷

Even when this revolution had been accomplished and the civil tribunal had assumed the place of the domestic forum, "the whole scheme of rights and duties administered by the judicial authorities remained shaped and influenced by these 'obsolete' privileges."⁷⁸ The devolution of the *Universitas Juris*,⁷⁹ the older form of society, remained a part of testamentary and intestate succession law. This resulting prolongation of a man's legal existence in his heir, or group of co-heirs, is a reflection of the family transferred by a fiction to the individual. Succession in corporations is necessarily universal, and as such, the family was viewed as a corporation and "corporations never die."⁸⁰

71. *Id.* at 224.

72. *Id.* at 196.

73. ANCIENT LAW, *supra* note 51, at 176.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 179-80.

78. *Id.* at 180.

79. *Id.* at 172-73. A universal succession is defined as a succession to a *universitas juris*, or university of rights and duties.

80. *Id.* at 180.

The jurists of the seventeenth century commonly asserted that the power of testation itself was derived of natural law.⁸¹ Their teaching held that the right of dictating or controlling the posthumous disposal of property is a necessary or natural consequence of the proprietary rights themselves.⁸² This view "treated succession *ex testamento* as the mode of devolution, which the property of deceased persons ought to primarily follow," and "succession *ab intestato* was the incidental provision of the lawgiver for the discharge of a function . . . left unperformed through neglect or [untimely] death of the proprietor."⁸³ These opinions are expanded forms of the "doctrine that testamentary disposition was an institution of the law of nature."⁸⁴ It is universal, to the extent "that nations are prompted to sanction it by an original instinct and impulse."⁸⁵

The effect of the family classification system, whether derived from Canon Law⁸⁶ or simply from a method of shorthand, helps kin grasp their greater number of kindred in association with themselves. The advantage gained was in the clarity of discerning the various degrees of consanguinity, because each of these classes usually stood under some sort of conjoint responsibility to the other.⁸⁷ Coterminous with the consanguine social ordering was the invention of the will.⁸⁸ The Romans are credited with inventing this instrument that, next to the contract, has exercised the greatest influence in transforming human society.⁸⁹ Initially the will was used as a way to transfer representation of a household rather than as a method for distributing goods:

It was at first not a mode of distributing a dead man's goods, but one among several ways of transferring the representation of the household to a new chief. The goods descend no doubt to the heir, but that is only because the government of the family carries with it in its devolution the power of disposing of the filial common stock.⁹⁰

81. *Id.* at 170.

82. *Id.*

83. *Id.* at 170-71.

84. *Id.* at 171.

85. *Id.* at 170-71.

86. The official dictates of the Roman Catholic Church; coexistent with the Roman Law.

87. LECTURES, *supra* note 55, at 214.

88. *Id.*

89. *Id.*

90. ANCIENT LAW, *supra* note 51, at 188.

The will or testament is properly understood as a series of conceptions. "In itself a will is simply the instrument by which the intention of the testator is declared."⁹¹ The testament prescribes the manner of devolution of an inheritance that is a form of universal succession or university (or bundle) of rights and duties, which, having belonged at one time to a particular person, can be described as his "legal clothing."⁹² These are "[t]he ties which connect a number of [property related] rights" such as "rights of way, rights to legacies," and obligations—forming a bundle of legal privileges and duties that attach "to some individual capable of exercising them."⁹³ The university of rights and duties operated among kin as a self-perpetuating reciprocal arrangement, arising informally among the kinship group and having the force of law upon death.⁹⁴

These earliest systems of law left a plain and broad mark in the resonating authority of the ancestor over the person and property of his descendants, "authority which may [be] conveniently call[ed] by its Roman name of Patria Potestas."⁹⁵ "The person or class of persons who succeeded did not simply represent the deceased, . . . but continued his legal existence."⁹⁶

The ancient Irish law reveals a society similarly settled upon and influenced by land rights, but preserving an exceptional number of ideas and rules belonging to the time when kinship, not land, was the basis of social union:

This 'natural communism,' . . . [did] not arise from any theory or . . . assumption as to the best or [most just] mode of dividing the land of a community, but from the simple impossibility, according to primitive notions, of making a distinction between a number of kinsmen solely connected by their real or assumed descent from a common ancestor.⁹⁷

As the common ancestry fades away, the community considers itself less of an assemblage of blood relations and more of a body

91. *Id.*

92. *Id.* at 172-73.

93. *Id.*

94. *Id.*

95. *Id.* at 130.

96. ANCIENT LAW, *supra* note 51, at 183.

97. *Id.* at 188.

of co-villagers.⁹⁸ The Irish variation on succession was eventually subsumed with the English tribal succession scheme, known as Gavelkind, where "[t]he descendants of the latest holder take his property, to the exclusion of everybody else."⁹⁹ What rights that remain of the "portion of the community outside the family dwindle to a veto on sales, or to a right of controlling the modes of cultivation."¹⁰⁰

The Irish are credited with an extension of the kinship scheme to include the Law of Fosterage, which established in great detail "the rights and duties attaching to all parties when the children of another family were received for nurture and education."¹⁰¹ This practice was denounced by many of the English, who thought that this endowment of consanguine rights and close affections flouted the significance of the bonds of common paternity. "Fosterage was an institution, which though artificial in its commencements, was natural in its operations" with the bonds between a foster-parent and a child becoming "indistinguishable from the relations of [consanguine] father and son."¹⁰² Fosterage "created the same Patrias Potestas as actual paternity;" thus, the foster-father has a claim in life to "portions of the property of the literary foster-son."¹⁰³

There is no difference in principal effect, between the mode of succession of the Scottish Highlander clans circa 1730 and "the way in which a Hindoo Joint Family was affected by the death of one of its members."¹⁰⁴ "All the property was held in common, and all earnings [were contributed] to this 'common chest or purse,' and the lapse of any one life would have the effect . . . of distributing the dead man's share among all the kindred united in the family group."¹⁰⁵ "Each household included in the Joint Family gains a firmer hold on its share of the lands as the distance increases from the common ancestor" until it is unconditionally appropriated and is "transmitted exclusively to

98. LECTURES, *supra* note 55, at 188. In this construct, each household clings with increasing tenacity to the allotment that it controls and re-divisions of the land among the whole community became increasingly rare until ceasing altogether.

99. *Id.*

100. *Id.* at 189.

101. *Id.* at 241.

102. *Id.* at 242 ("[w]ith such races a very sacred tie was necessarily of the nature of a family tie, and carried with it the same associations and the same order of feeling").

103. *Id.* at 242-43.

104. *Id.* at 187.

105. *Id.*

offshoots from its own branch."¹⁰⁶ In these kin groups, "each family [that] separated from the rest tend[ed] to expand [into] a joint family or sept."¹⁰⁷ Under the more advanced system of property distribution that grew out of the archaic joint family form careful attention was paid to lineal descent from the ancestor and the separate rights reserved to direct descendants at his death. At this point, property in its modern form has been established; but the joint family has not yet ceased to influence successions.

When the line of direct descent fails, the rules of the joint family determine inheritance.¹⁰⁸ "This consanguinity is either lineal, or collateral."¹⁰⁹ Lineal consanguinity is defined as the blood tie that connects persons, where one is descended in a direct line from the other. This would include direct descent from a father to his grandfather, his great-grandfather, "and so upwards in the direct ascending line . . . or from [father] to son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards" ¹¹⁰

The archaic phrases used to denote these consanguine ties have one salient peculiarity; they indicate that what actually passed from the testator to his heir was the family, in the form of this aggregate of rights and duties. The original testament was, therefore, an instrument by which the devolution of the family was regulated—the "mode of declaring who was to have the chieftainship, in succession to the testator."¹¹¹ With this objective in mind then, it is not unusual that the transfer be solemnized by the *sacra*, or family rites. "These included the ceremonies by which the brotherhood of the family [was] commemorated, the

106. *Id.* at 192.

107. *Id.*

108. *Id.* at 195-96.

109. SIR WILLIAM BLACKSTONE, *Of the Nature of Laws in General, in 7 COMMENTARIES ON THE LAWS OF ENGLAND* 377 (George Chase ed., 4th ed. Baker 1929). Collateral kindred descend from the same common ancestor (or root stock) but differ from the lineal descend in that these kinsmen do not descend one from the other. *But see* Inheritance Act, 1975, c. 63, § 1 (1)(a)-(e) (Eng.). England's 1975 amended legislation covers the decedent's surviving spouse, former spouse who has not remarried, children, persons treated by the decedent as children during any of the decedent's marriages, and any person maintained in whole or in part by the decedent immediately prior to the decedent's death.

110. BLACKSTONE *supra*, note 109, at 377.

111. ANCIENT LAW, *supra* note 51, at 185.

pledge and the witness of its perpetuity."¹¹² These ceremonies were an attestation of "sacredness of the family relation."¹¹³

With the Romans, the conception of a universal succession seemed to be a natural process of devolution of rights and obligations, where a testator lived on in his heir or group of co-heirs.¹¹⁴ These testamentary dispositions were considered defective and subject to rejection if this legal fiction¹¹⁵ was even constructively violated, and the inheritance would pass to "the kindred in blood" who was capable of fulfilling the conditions conferred by heirship.¹¹⁶ This interchange was regarded as a reciprocal arrangement stemming from "the primeval period in which property is owned, not by the family, but through their family."¹¹⁷

A testamentary diversion of family property outside of the ancestral line or distribution in uneven proportions stems from the later portion of the Middle Ages in which feudalism was completely consolidated.¹¹⁸ To properly secure the ancestral claim, in the event that the heir is an infant and unable to defend his right of heirship, the eldest of the kin was appointed as fiduciary of the kinship estate to secure the proper continuation of filial succession.¹¹⁹

When modern jurisprudence first showed itself in the rough, wills were rarely allowed to dispose, with absolute freedom, of a dead man's assets, and over the greater part of Europe, moveable or personal property was the subject of testamentary disposition.¹²⁰ Only when families ceased to hold together through a series of generations did the domain get divided equally among the members of each successive generation; a privilege was no longer reserved to the eldest son.¹²¹ The movement from the family unit to the Agnatic group of kinsmen, followed by dissolution of this group into separate

112. *Id.*

113. *Id.*

114. *Id.* at 184.

115. *See id.*

116. ANCIENT LAW, *supra* note 51, at 182.

117. BLACKSTONE, *supra* note 109, at 4.

118. LECTURES, *supra* note 55, at 201, 203-04.

119. *Id.* As observed under the reign of Henry the Second "[w]hen anyone dies leaving a younger son and a grandson (i.e., the child of his eldest son), great doubt exists as to which of the two the law prefers in the succession to the other, whether the son or the grandson. [There are those who are inclined] to think that the grandson ought to be preferred . . ."

120. ANCIENT LAW, *supra* note 51, at 217.

121. *Id.* at 221.

households, culminated in the modern version of testacy where the household was supplanted by the individual.¹²²

REDISCOVERY OF A CONSANGUINE RIGHT

"The common law of England, as it existed at the time of the Revolution, was adopted in many of the States by Constitutional provisions or legislative enactment."¹²³ This ancient body of law¹²⁴ encompassed the principles, usage, and rules of action applicable to the government and security of person and property, which did not rest for its "authority upon any express and positive declaration of the will of the legislature."¹²⁵ A canvass of ancient attitudes, the common law, English statutory law, and American law yield vestiges of a distinct consanguine right. The ancient constitution of the family has ceased to affect all things, except for inheritance.¹²⁶ All laws of inheritance are, in fact, made up of the debris of the various forms that the family has assumed since the beginning of civilization.¹²⁷ "Our laws are mixed as [is] our language; and as our language is so much the richer, the laws are the more complete."¹²⁸

The system of kinship succession under common law¹²⁹ and the whole French law of inheritance, are "derived from Roman law, which in its latest condition is a mixture of rules having their origin in successive ascertainable stages of the Roman Fam-

122. *Id.* at 261.

123. BLACKSTONE, *supra* note 109, at 33 n.1.

124. *Id.* at 30-31. The British as well as the Gallic druids and the Saxons committed all their laws to memory (due to profound ignorance of the "letter" i.e., illiteracy en masse) and these oral laws were passed from the former ages to the next solely by word of mouth until such time as these legal customs came to be recorded in the "several courts of justice, in books of reports and judicial decisions and in the treatises of learned sages of the profession, preserved and handed down to us from the times of the highest antiquity." Because their original institution and authority were not set down in writing, they received their binding power and their force of laws, "by long and immemorial usage, and by their universal reception throughout the kingdom."

125. *Id.* at 33 n.1.

126. *Id.* at 30-31.

127. *Id.* Through the ages, the informal exchange and intermixture of customs of the Romans, Picts, Saxons, Danes, and Normans gradually improved "the texture and wisdom of the whole" (i.e., English common law) by the accumulated wisdom of these countries.

128. *Id.*

129. *Id.* at 376 ("In the English common law, the doctrine of descents or law of inheritances is a point of the highest importance, because all of the rules relating to purchases, whereby the legal descent is altered or broken, refer to this universally known and settled law.").

ily, and is a sort of compromise between them."¹³⁰ Kinship is a universal phenomenon that connotes certain basic human attachments made by all people. Anthropologists and social historians have approached the study of inheritance from succession patterns and property transfers across social forms,¹³¹ and these findings reflect that the kinship networks chronicled by Henry Maine and William Blackstone are still at the core of the inheritance process¹³² codified in statutory standards found in the states and nations abroad.¹³³

"Primary groups are important for adults as well as children.¹³⁴ We have a personal status in primary groups. Primary groups, in other words, are crucial to our well-being as functioning humans."¹³⁵ There is general agreement that social scientists can no longer ignore the legal and social issues surrounding inheritance patterns of contemporary family forms due in part to the increasing number of older people and the potential effects of statutory standards of inheritance on interpersonal dynamics and decision-making of contemporary families.¹³⁶ In countries, like the United States, that share a common origin for their legal statutes on inheritance based on English common law, the post-industrial age prompted changes in the laws affecting the selection of heirs in response to changes in marriage patterns and

130. LECTURES, *supra* note 55, at 219-20. See also BLACKSTONE, *supra* note 109, at 376. An heir is he upon who is cast the estate (the inheritance) immediately upon the death of the ancestor. "Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right or representation, as his heir-in-law."

131. See John H. Hartung, *On Natural Selection and the Inheritance of Wealth*, 17 CURRENT ANTHROPOLOGY 607, 608 (1976).

132. Martin S. Smith & Bradley J. Kish et al., *Inheritance of Wealth as Human Kin Investment*, 8 ETHNOLOGY & SOCIOBIOLOGY 171 (1987) (analyzing 1000 probated wills showed that beneficiaries are favored according to their relatedness and reproductive value). In essence, the writers found that "humans, like other highly social animals, may have evolved dispositions toward aiding kin in order to maximize the number of copies of an individual's genes in a population." *Id.*

133. See Kris Bulcroft & Phyllis Johnson, *A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics* 2 J. L. & FAM. STUD. 1, 1 (2000). The legal standards of succession and inheritance are reviewed in two countries through the examination of statutory regulations in British Columbia and Washington State and the implications for family dynamics that may result from the statutory standards on inheritance and succession. "The authors speculate that in both Canada and the United States the current statutes on estate bequests foster conflict in families as a result of testamentary decision-making within the context of the present laws."

134. ROBERT H. LAUER, SOCIAL PROBLEMS AND THE QUALITY OF LIFE 434 (6th ed. Brown 1995).

135. *Id.*

136. See Bulcroft & Johnson, *supra* note 133.

family forms.¹³⁷

The Rule Against Perpetuities, enacted by the many state legislatures¹³⁸ as an attempt to eliminate ancient clogs on property title,¹³⁹ would come to intercede in the process of devolution. But one case that eluded application exemplifies the extent to which the court will go in recognition of the filial ties that bind heirs to one another. In *Brown v Independent Baptist Church of Woburn*, Sarah Converse died in 1849 and left a parcel of land to the Church of Woburn, for so long as it shall "continue a church" with its present religious beliefs.¹⁴⁰ In the event of change in belief or dissolution, the land was devised in equal portions to ten named legatees, along with the residue of the estate to the same.¹⁴¹ Sarah's husband retained a life estate in both the residue and the real estate.¹⁴² In 1939, when the church ceased to be a religious organization, the estate reverted back to the testator.¹⁴³

A receiver sold the land for \$34,000 under a court order.¹⁴⁴ Sarah's ten residuary legatees and twenty-five heirs, as of 1849, had been dead for decades and so began the arduous process of searching for the missing heirs, which was guided by a professional genealogist.¹⁴⁵ By this time there had been three or four devolution's of the fractional shares in Sarah's possibility of reverter, with split-ups into subfractions and sub-subfractions, but, ultimately, the remote descendants of the residuary devisees were located and given their share of the estate of Sarah Converse.¹⁴⁶ While there is much criticism for the dogged ef-

137. See generally REMI CLIGNET, *DEATH, DEEDS AND DESCENDANTS: INHERITANCE IN MODERN AMERICA* (Gruyter 1992).

138. See generally William Hubbard, *Communicating Entitlements: Property and the Internet*, 22 *YALE L. & POL'Y REV.* 401, 426 n.161 (Spring 2004) (discussing the determination of the costs involved in communicating property entitlements).

139. See, e.g., *Walton v. City of Red Bluff*, 3 Cal. Rptr. 2d 275 (Cal. Ct. App. 1991); *Ludington & Northern Railway v. The Epworth Assembly*, 468 N.W.2d 884 (Mich. Ct. App. 1991). But cf. *Board of Education v. Miles*, 207 N.E.2d 181 (N.Y. 1965) (striking down retroactive application as unconstitutional).

140. *Brown v. Independent Baptist Church of Woburn*, 91 N.E.2d 922, 923 (Mass. 1950).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* See also W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 *HARV. L. REV.* 721, 741-45 (1952).

forts¹⁴⁷ on the part of the court to "repatriate" these monies to the kindred of Sarah Converse, it signifies the perpetual force of the system of kinship succession operating well into the twenty-first century.

Despite the changes in family form over the last 100 years, the predicted demise in family inheritance postulated by renowned social scientist, Emile Durkheim, has not been borne out.¹⁴⁸ According to the majority of studies that have interpreted bequest patterns among probate records,¹⁴⁹ primary beneficiaries of inheritance remain to be kin and other affective ties.¹⁵⁰ Prior to the Industrial Age in America, inheritance norms functioned in farm transfers that were tied to the fulfillment of filial commitments to older parents.¹⁵¹ Under the English scheme, lineal ancestors shall inherit in preference to collateral kindred. The American law of descent closely corresponds with the English rule; however, the inheritance passes to collateral kindred in the event that lineal descendants or ancestors, who are entitled to inherit the property first, are unable to do so.¹⁵² The "classes

147. I.e., economic inefficiency to literally "spend" a major portion of the estate in order to pass nominal sums to the distant collateral clansmen of this woman.

148. T.P. Schwartz, *Durkheim's Prediction About the Declining Importance of the Family and Inheritance: Evidence From the Wills of Providence, 1775-1985*, 37 SOC. Q. 503, 503 (1996). Emile Durkheim predicted nearly fifty years ago that because family was declining in significance as an economic agency in the larger society, individuals would increasingly make bequests that favored formal agents, such as voluntary organizations over kin.

149. See generally Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 225-28 (2001). The movement to reform the inheritance scheme cites the under-inclusiveness of the intestate definition of "natural objects of the decedent's bounty," which results in preferential treatment for some kin and legal indifference to the need of other kinship survivors (e.g., destitute parent, elderly grandparent, disabled sibling, or infant grandchild left without financial provision). See, e.g., *In re Estate of Biewald*, 468 N.E.2d 1321, 1324 (Ill. App. Ct. 1984) (awarding the intestate estate to the decedent's cousins in first and second degrees rather than her cohabitant of more than fifty years); *Vasquez v. Hawthorne*, 994 P.2d 240, 243 (Wash. Ct. App. 2000), *vacated en banc*, 33 P.3d 735 (2001) (rejecting the claim of decedent's same-sex partner of thirty years to a share of the intestate estate); *Gonzalez v. Satrustegui*, 870 P.2d 1188, 1195 (Ariz. Ct. App. 1993) (allowing the passing of the decedent's estate to his sister despite the presence of a mail order will giving his estate to his cohabitant and business partner for fourteen years).

150. Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409 (1987); see generally Debra S. Judge & Sarah B. Hardy, *Allocation of Accumulated Resources Among Close Kin: Inheritance in Sacramento, California, 1890-1984*, 13 *Ethnology & Sociobiology* 495, 495-522 (1992) (analyzing legacies of 1538 testate decedents showed that spouses and children received, on average, ninety-two percent of the estate in Sacramento, California from 1890-1984).

151. See Bulcroft & Johnson, *supra* note 133, at 4.

152. See Foster, *supra* note 149, at 199, 228. "The definition may be under-inclusive because it excludes many currently existing family groups . . . [it] may be over-inclusive because legal ties do not necessarily create familial ties." But see BLACKSTONE, *supra* note

of relatives who shall inherit in such a case are specially designated by the statutes of the . . . states."¹⁵³

THE SOCIAL CONTRACT AMONG KIN

Implicit in these property transfers is the idea of a social contract between kin and next of kin, for care and companionship, in return for the trickle-down effect of accumulated wealth upon death.¹⁵⁴ Today, however, the norms of inheritance have moved toward more individualistic and affective motivations.¹⁵⁵ Recasting these processes of social exchange and filial responsibility along voluntary lines, combined with the longevity of our aging population, has raised legitimate concerns for policy makers.¹⁵⁶ As the basic social group unites through bonds of kinship or marriage, the family¹⁵⁷ provides its members with protection, companionship, security, and socialization.¹⁵⁸ "[T]he family becomes a problem when it does not fulfill its purposes,"¹⁵⁹ such as assuming responsibility for the care of its elder members. Based on the social exchange perspective, it is important for inheritance to act as an agent for encouraging solidarity and reciprocity within the institution of the family.¹⁶⁰ The emphasis in this perspective suggests the importance of intergenerational trans-

109, at 391. The true feudal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person (earned by him and for the benefit of his kin).

153. BLACKSTONE, *supra* note 109, at 390-95 n.7. See generally Foster, *supra* note 149, at 199-202. Professor Foster argues that inheritance, with its rigid adherence and presumption in favor of strict kinship succession, has failed to keep pace with the realities of modern American society. Locked in this family paradigm:

[T]he inheritance system [is] frozen in time, remnants of a bygone era of nuclear families bound together by lifelong affection and support . . . [I]nheritance law continues to define people by family categories[,] [with] [d]ecedents and their survivors remain[ing] first and foremost spouses, parents, children, and siblings [including], rather than individuals with particular human needs and circumstances that increasingly defy conventional family norms.

154. If parents do not survive, wealth changes hands from the grandparents to the next of kin—the grandchildren.

155. Bulcroft & Johnson, *supra* note 133, at 6.

156. *Id.*

157. I.e., defined as the nuclear, single, and extended units that include the grandparents.

158. Ida Harper Simpson, *Family Sociology*, Microsoft Encarta Online Encyclopedia 2004, at http://encarta.msn.com/encyclopedia_761558266/Family.html (last visited Oct. 28, 2004).

159. LAUER, *supra* note 134, at 434.

160. Bulcroft & Johnson, *supra* note 133, at 9 (quoting MARRIN B. SUSSMAN & JUDITH N. CATES ET AL., *THE FAMILY AND INHERITANCE* (Sage 1970)).

fers across the family life course. According to Durkheim, the inheritance functions as a system of economic transfers in society.¹⁶¹

The "American filial responsibility statutes stem from the English Elizabethan 'Poor Laws,' which were enacted in 1601."¹⁶² These laws dictated that blood relatives were the primary source of support for family members, including the elderly, with resort to public assistance in cases only where the private family resources were deficient.¹⁶³ The American colonies had similar laws, such as that in Pennsylvania which imposed tax and support obligations on "the father and grandfather and the mother and grandmother and the children"¹⁶⁴ of the infirm family member. The existence of such laws¹⁶⁵ is further evidence that the notion of reciprocal filial rights and duties is not a new concept, but rather it springs from our early Anglo roots. For hundreds of years, custom provided for the informal execution of these rights and duties in families. Later, some of these functions were codified in the testate succession laws.¹⁶⁶

In the ancient organized political society, "the great bulk of men derive their rules of life from the customs of their village or city"; in the movement from the informal tradition of custom to the sovereign of today that actively legislates on principles of its own, local custom and idea have faded.¹⁶⁷ As the informal laws have given way to the formalized political system, their charac-

161. *Id.* Those individual behaviors in the context of the family hold to the tenet that we tend to enter into relationships in which we can maximize the benefits and minimize the costs.

162. See Robin M. Jacobson, Note, *Americana Healthcare Center v. Randall: The Renaissance of Filial Responsibility*, 40 S.D. L. Rev. 518, 527-28 (1995).

163. Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL'Y 709, 711 (2001) (citing 43 Eliz. 1, ch. 1-4, 12, IV (Eng.) (1601)).

164. Colonial Laws of Pennsylvania 1705-6, ch. CLIV, § II, at 251-53.

165. Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?* 36 FAMILY L. Q. 502, n.8 (Fall, 2002). Thirty states currently have filial responsibility statutes. These statutes have also withstood constitutional challenge. See e.g., *Americana Healthcare v. Randall*, 513 N.W.2d 566, 573 (S.D. 1994) (citing *Swoap v. Super. Ct. of Sacramento County*, 516 P.2d 840, 851, (Cal. 1973) (holding that this imposition of support was reasonable and appropriately imposed on direct lineal descendants who themselves were the recipients of care in their minority)). *But cf.* *Dept. of Mental Hygiene v. Kirchner*, 388 P.2d 720 (Cal. 1964) (holding that the care of the mentally-ill elder came within the class of persons supported with public funds, and it was not appropriate to shift this debt to the children).

166. This particular formalization was necessary to safeguard the proper alienation of land and other property to the next of kin.

167. BLACKSTONE, *supra* note 109, at 2 n.1 (quoting SIR HENRY MAINE, THE EARLY HISTORY OF INSTITUTIONS, Lect. xiii).

ter has been distinctly altered.¹⁶⁸ Customary law is not “obeyed” in the same way as enacted law, but to a far greater extent—custom is followed by instinct.¹⁶⁹ Blackstone agrees, stating that rules are not supported the same when they come from the legislature:

The actual constraint which is required to secure conformity with usage is inconceivably small. When, however, the rules which have to be obeyed . . . emanate from an authority external from the small[er] natural group and forming no part of it (the legislature), they wear a character wholly unlike that of a customary rule. They lose the assistance of . . . opinion, [and] certainly that of spontaneous impulse.¹⁷⁰

Every human society relies to some extent on the cooperation of its members to achieve social purposes that include the care of its elder members.¹⁷¹ Adam Smith supposed that “man has almost constant occasion for the help of his brethren,” and that “the propensity to truck, barter and exchange one thing for another was ‘common to all men.’”¹⁷² This reciprocal relationship between kinship members can be likened to an unwritten bilateral contract¹⁷³ comprised of a right-duty relationship derived from the moral obligations on each side¹⁷⁴ that gives rise to both a right and a duty on each side. These “[s]ocially endorsed models of family relationships . . . inform both inheritance and guardianship case decisions.¹⁷⁵ Many believe that the younger

168. *Id.*

169. *Id.* See generally Foster, *supra* note 149, at 273 (rejection of the family paradigm will not mean the demise of the family; this institution will remain, but American inheritance law must become cognizant that the “ties of human affection” do not run solely along family lines).

170. BLACKSTONE, *supra* note 109, at 2 n.1 (quoting MAINE, THE EARLY HISTORY OF INSTITUTIONS, Lect. xiii.).

171. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 11 (1811 ed., bk. 1, ch. II).

172. E. Allan Farnsworth, *The Past of Promise: A Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 576 (1969).

173. See generally WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923). Professor Hohfeld made a lasting contribution to legal literature through the development of his Hohfeldian terminology. The *right* and *duty* are correlative—there can never be a *right* without a *duty*, nor a *duty* without a *right*. See also Re-statement (Second) of Contracts § 1 (Reporter’s Note).

174. I.e., promises owed of care and companionship that culminates in compensation in the form of the filial property succession scheme.

175. Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1, 33 (2003).

generation gains a right to an elderly person's assets, a belief [re-inforced by] past decades when families toiled together on farms or in family. . . businesses."¹⁷⁶

Few societies have been able to develop far without recognizing at least some promises as enforceable,¹⁷⁷ and the law of wills addresses such controversies about family promises.¹⁷⁸ Guardianship law clearly contemplates a preference for family, with many state guardianship statutes expressing a clear preference for the appointment of a family member to act in this protective, caregiving role.¹⁷⁹ Some kin learned that there was added security if this informal, obligatory exchange among them was formalized in an explicit contractual promise for care and filial companionship during life, in exchange for a provisional inheritance. In a formalized version of this reciprocal filial relationship, in *Tuckwiller v. Tuckwiller*,¹⁸⁰ the Tuckwillers rented and farmed the Hudson family farm owned by John Tuckwiller's aunt, Metta Hudson Morrison.¹⁸¹ When Metta became ill with Parkinson's disease at the age of seventy, she gave up her residence in New York and moved back to the family farm where some rooms had been reserved for her.¹⁸² Following a brief hospitalization for symptoms of dizziness and a possible stroke and cognizant of the progressive dependence of her condition, she formalized a caregiving arrangement with her nephew and his wife.¹⁸³ John Tuckwiller agreed to take care of his aunt for the remainder of her lifetime:

[B]y that I mean [to] provide her 3 meals per day—a good bed—do any possible act of nursing and provide her every pleasure possible. In exchange she will will me her farm at her death keeping all money made from it during her life. She will maintain [the] expense of her medicine.¹⁸⁴

That same day, Metta suffered another fainting spell and sustained a fall that resulted in her hospitalization, rapid decline

176. *Id.*

177. Farnsworth, *supra* note 172, at 578-82.

178. Barnes, *supra* note 175, at 33 n.207.

179. *Id.* at 24.

180. *Tuckwiller v. Tuckwiller*, 413 S.W.2d 274, 274-76 (Miss. 1967).

181. *Id.* at 275.

182. *Id.* at 276.

183. *Id.* at 275.

184. *Id.* at 276

in health and death within three years.¹⁸⁵ This agreement was challenged following her death.¹⁸⁶ The court upheld specific performance of this caregiving agreement:

Aware of her future outlook and having no immediate family to care for her, Mrs. Morrison was understandably appreciative of the personal care and attention of plaintiff and concerned with the possibility of routine impersonal care over a long period of time in a nursing home or similar institution. Having no immediate family which might be the object of her bounty, she undoubtedly felt more free to agree to dispose of the farm without insisting upon an exact quid pro quo.¹⁸⁷

Regardless of the absence of a direct consanguine line between Metta and her nephew, the strength of the kinship institution was operational, provisions were in place for the reciprocal exchange between these relatives, and the court gave it due recognition. These are the orders of nature, culture, and law that coalesce to create the American ideas of kinship.¹⁸⁸ The primary elements combine the order of nature and the order of culture, which together form the "informal" kinship structure that may or may not be codified by law.¹⁸⁹

185. *Id.*

186. *Id.* Because of her sudden accident and ensuing decline in health, she was not able to change her pre-existing will, which provided for the sale of the family farm and proceeds to be used for a student loan fund at Davidson College. See Barnes, *supra* note 175, at 29 n.167. ("[E]lders become a threat to conventional social order when they choose to spend their assets in ways that do not benefit their heirs. . . ."). Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 244 (1996). It is said that "an influence is not undue if it merely involves persuasion, please calculated to arouse the testator's sympathy, or the courting of favor, even with the intent to obtain benefits under a will."

187. See *Tuckwiller*, 413 S.W.2d at 279. *But cf.* *Craddock v. Berryman*, 645 P.2d 399, 402 (Mont. 1982) (stating that "[c]ontracts to make wills are looked upon with disfavor"); *Bentzen v. Demmons*, 842 P.2d 1015, 1020 (Wash. Ct. App. 1993) (stating that "[w]hile equity will recognize oral contracts to devise, such contracts are not favored"). Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576-77, 629 (1997). Madoff contends that courts use the undue influence doctrine to deny donative freedom to testators who fail to provide for biological family members.

188. Rosen, *supra* note 2, at 529.

189. *Id.* at 529-30. These relationships as they exist in nature and culture may or may not have any legally defined rights and obligations. "Thus for Americans, much of what is called kinship is symbolized as a cultural recognition of biological or natural facts. Many of these relationships, (e.g., mother and father) also exist in the order of law, in that law-making bodies have created a special symbolic code for governing these relationships."

THE EXCLUSIVE STATE DOMAIN OF FAMILY LAW

The nature and function of law have varied throughout history and serve to order society and assure stability in both public and private realms. Private law encompasses the body of family law, which defines the rights and duties of kin. "These laws may fall under the gloss of family law, domestic relations law, estate law, [and] the law of wills."¹⁹⁰ Because private law involves the various relationships that people have with one another and the rules that determine their legal rights and duties among one another, historically, government involvement has been minimal.¹⁹¹ Under the structure of federalism, certain areas of the law (domestic, criminal, and education law) fall under the exclusive purview of state control; within this domain, the federal government and the judiciary must tread carefully and must only get involved when a compelling federal or constitutional question concerns the nation.¹⁹² The lineage of the prominent due process cases raised questions pertaining to an extension of the fundamental rights then recognized by the constitution.¹⁹³ The in-roads made by these due process cases have increasingly "constitutionalized" the area of family law.

The enduring tradition of family autonomy in American law holds parental authority as pre-eminent over the minor children with little unwarranted state intervention. However, the Supreme Court has upheld a state's role, acting as *parens patriae*, to regulate the family upon a showing of harm or threat to a child.¹⁹⁴ Within this autonomous family construct, the

190. *Id.* at 535 n.1.

191. Probert, *supra* note 60.

192. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 76 (2d ed., Aspen 2002). Traditionally, the "whole subject of the domestic relations of husband and wife, parent and child, belong[ed] to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890). State control of family law issues was so exclusive that even diversity of citizenship did not give federal courts authority to hear domestic relations cases—a principle known as the "domestic-relations exception" to federal diversity jurisdiction.

193. *See generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that a right of privacy exists for using birth control), *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (declaring that state regulations placing a "substantial obstacle" in the way of choosing an abortion of a nonviable fetus are unconstitutional); *Roe v. Wade*, 410 U.S. 113 (1973) (declaring that the state's anti-abortion statutes violated plaintiff's personal liberty right). These cases generally illustrate how fundamental rights have been expanded through case law.

194. *See generally* *Prince v. Massachusetts*, 321 U.S. 158 (1944) (declaring that stopping a minor from selling magazines on the street under supervision of a guardian is not unconstitutional). In this role, the state will determine what is in the best interests of the

grandparents are considered legal strangers to the same degree as third party strangers. The legislatures in *every* state have responded to the ensuing disputes between parents and grandparents seeking access to their grandchildren by enacting statutes that provide for some form of child visitation rights for these grandparents.¹⁹⁵ The courts have also increasingly regarded the resolution of these seemingly private matters or disputes as vehicles for response to changing social conditions and values.¹⁹⁶ In June of 2000, when faced with the question of whether a grandparent's right to a relationship with his grandchild could prevail over the objections of the autonomous family unit, the Court was thrust into a highly charged constitutional, private matter. In *Troxel*,¹⁹⁷ the grandparents were seeking expanded access to their two granddaughters following the death of their son, over the objection of the girls' mother.¹⁹⁸ The Court sided with Washington high court in striking down a state law that allowed anyone—even a nonrelative—to seek the right to visit if it served the best interest of the child.¹⁹⁹ In ruling for the mother, the Supreme Court maintained that the state's visitation law was over-broad, but stressed that this decision was not intended to affect visitation laws in other states.²⁰⁰

Yet, the *Troxel* decision appears contradictory to the Court's previous stance in *Moore v. East Cleveland*, another case involving the issue of extended family relationships.²⁰¹ This plurality opinion struck down a zoning ordinance prohibiting the shared residency of extended family members in a "single family" dwelling.²⁰²

The Court invalidated the ordinance on substantive due

child pursuant to the requisite statutory criteria. See generally *Bailey v. Menzie*, 542 N.E.2d 1015 (Ct. App. Ind. 1989) (allowing continuing contacts between an adopted child and his or her biological grandparents in limited circumstances if it is in the child's best interest).

195. See *Troxel*, 530 U.S. at 73.

196. Probert, *supra* note 60.

197. See *Troxel*, 530 U.S. at 73.

198. *Id.*

199. *Id.*

200. *Id.* The plurality held that a statute, which gives no special weight to a parent's preferences, was unconstitutional as applied to a mother who had not cut off all contact with the grandparents. The Court refused to hold that visitation statutes were per se unconstitutional or to require the rigorous strict scrutiny standard be applied to them.

201. *Moore v. East Cleveland*, 431 U.S. 494, 495-96 (1977). See also *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988). The Fifth Circuit recently observed that the "most essential and basic aspect of familial privacy—[is] the right of the family to remain together without the coercive interference of the awesome power of the state."

202. See *Moore*, 431 U.S. at 495.

process grounds, applying a "stricter" scrutiny than deferential rationality review, because "before a zoning ordinance can be declared unconstitutional it must be shown to . . . [have] no substantial relation to the public health, safety, morals, or general welfare."²⁰³ The most troubling aspect of the city's argument was its assertion that the right to live together as a family should be limited to the situation of "the nuclear family" composed of parents and their offspring.²⁰⁴ Justice Powell held that the principles enunciated in *Meyer* and *Pierce* addressed "extended family" relationships.²⁰⁵ Quoting from Justice Harlan's concurrence in *Griswold v Connecticut* and his dissent in *Poe v. Ulman*, he cautions the Court to tread carefully in the realm of family rights. This does not mean abandonment, "nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary, the boundary of the nuclear family."²⁰⁶ "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie society.'"²⁰⁷ As Justice Powell wrote in the leading opinion:

Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition [Even] if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization [that] supports a larger conception of the family.²⁰⁸

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 499.

207. *Id.* at 495.

208. *Id.* at 503-05.

Whether or not such a household is established because of personal tragedy,

Justice Powell's heavy reliance in *Moore* on Justice Harlan's tradition-oriented approach to due process within the family context is comparable to the explanation offered by the Court to justify and counter challenges to religious symbolism and convocations by secular government entities, which seems to collide with the prohibitions under the Establishment Clause of the First Amendment. This lineage of cases challenging religious symbolism on currency, engraved plaques on government property and religious utterances by government officials at public ceremonies has been successfully defended on the basis of tradition—our shared common heritage.²⁰⁹

The Court's retreat from reliance on kinship tradition in *Troxel* has left little guidance for state courts in its wake; despite the Court's admonition that the holding had limited applicability to the over-breadth nature of Washington's statute, this decision has had a "chilling effect" on grandparent visitation rights in state courts that have followed suit and held their own visitation laws to be unconstitutional.²¹⁰ Still other states, including Maine, have reacted to the Court's ruling by narrowing their existing grandparent visitation laws²¹¹ by imposing requirements such as the grandparent having served as the grandchild's primary caregiver in the past, or in Maine, the grandparent must demonstrate for the court the existence of a close relationship

the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. [The] Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns. *Id.* at 505-06.

The court distinguished its prior decision in *Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding an ordinance that restricted unrelated individuals from residing within a family-oriented zone).

209. See generally *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that a Nativity display on city property does not violate the establishment clause by conferring a religious advantage on religion, nor does the inclusion of "In God We Trust" on currency and other permissible religious references); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a government prayer observance).

210. Christopher J. Gearon, *Visiting the Grandkids Gets Harder*, at <http://www.aarp.org/bulletin/yourlife/Articles/a2003-06-26-visitingthekids.html> (last visited October 28, 2004). Since the ruling, Arkansas, Connecticut, Illinois, Iowa, Kansas, and South Dakota have declared their visitation laws unconstitutional, joining Florida, Georgia, Oklahoma, Tennessee, and Washington.

211. *Id.* Even in states that have upheld the constitutionality of their laws, there has been a narrowing of the law (Kentucky, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, Virginia, West Virginia, and Wyoming).

with the grandchildren in order to get visitation rights.²¹² These new limits reverse a thirty-year trend in which grandparents had seen an effort by state courts across the nation to confer legal standing to them in their pursuit of visitation rights within the courts.²¹³

"[L]egislation is not the only 'source of law.' Even in countries of written (statutory) law, other sources also exist";²¹⁴ this is the paradigm of the unstated in law, "we accept certain consequences that flow from enacted rules as themselves validly established."²¹⁵ To count these as rules of law, but not as belonging to the stated in law, we must presuppose a notion of validity different from systemic validity of the codified law. It is well known that custom lacks obligatory force in systems of written law, and that is one of the characteristic contrasts between the former and common law systems. For customary rules, which are sanctioned by usage in the practical application of law, they seem to have the force of law. "So the notion of legal validity has to be modified to deal with precedents and customs functioning as law actually in force. But if we accept this construction, we see that the field of the unstated is based on presupposed notions of validity."²¹⁶ These being the strong and pervasive influence of the kinship ties—this is clearly a custom embedded in both common law and statutory law.

Perhaps the Court will find a way to skirt this collision course of rights by applying the best interests of the child as the exclusive balancing factor in this equation (to associate with his grandparents). In this way, the inquiry would no longer pit the constitutionally grounded family autonomy rights of parents against the legislatively created rights of the grandparents. Changing the focus removes the court from the precarious position of asserting whose rights trump whose within the private ordering of family relationships. Or the Court could seize on

212. 19-A M.R.S.A. § 1803(1)(B). See generally *Berg v. Bragdon*, 695 A.2d 1212 (Me. 1997) (child's visitation with grandparent would not significantly interfere with parent-child relationship or mother's rightful authority over her child and would be in child's best interest); *Rideout*, (The Grandparent Visitation Act (Act) was narrowly tailored to serve compelling state interest and could be applied in this case without violating the constitutional rights of parents, who were competent, and the Act did not violate the Due Process Clause; the best interest of the child standard must be bolstered by a significant previous grandparent-grandchild relationship to warrant state interference in parent's decision-making).

213. Gearon, *supra* note 210.

214. Wroblewski, *supra* note 5, at 93.

215. *Id.*

216. *Id.* at 95-96.

common law tradition to reinforce these kinship ties and sidestep the constitutional question altogether. In keeping with the wisdom of the Supreme Court in avoiding constitutional questions when the issue at hand may be decided upon other grounds, locating a right within the state common law provides sufficient legal basis.²¹⁷

RECIPROCAL RIGHTS DERIVE FROM BOTH MEMBERS OF THIS DYAD

Profound questions of political and moral philosophy surround the parents' rights-child's rights dilemma and the issues of the proper relationship of children to their family and the family to the state. The pendulum now seems to be swinging more in the direction of the rights of children.²¹⁸ This raises profound legal and ethical questions—questions that have not been fully answered by the courts. The Supreme Court has heard few cases related to these questions, which have yet to be framed properly as federal questions probing the depths of our fundamental paradigm of individual rights. Statutes and regulations may provide some answers,²¹⁹ but a larger question still looms before us—when will children realize their inherent rights and no longer be treated as objects of these proceedings,²²⁰ but as participants by and through legal counsel.²²¹ Children have a right to grow up in their own families and to remain connected to

217. *In re Estate of Longeway*, 549 N.E.2d 292, 297 (Ill. 1989).

218. James L. Jenkins et al., *Child Protective Services: A Guide For Workers*, 196 (U.S. Government 1979) (guiding Child Protective Services workers on the abuse and neglect response process. It consists of identifying and reporting abuse, investigating, and interviewing child and family members, and finally assessing and implementing a service plan). In the context of foster care, this change emerges as a new directive to give children stable family relationships whether they are with their natural families, adoptive families, or permanent foster families.

219. ANDREA SALTZMAN & KATHLEEN PROCH, *LAW IN SOCIAL WORK PRACTICE* 183 (Nelson-Hall 1997).

220. Lewis Pitts, *The Bar's Ethical Responsibility to Children*, 5 A.B.A. J. SEC. OF CHILD. RTS. LITIG. COMMITTEE 1, 1-3 (Spring 2003) (quoting Susan Cockfield).

221. Leigh Goodman, *Providing Legal Services To Prevent the Unnecessary Involvement of the Child Protection System*, 5 A.B.A. J. SEC. OF CHILD. RTS LITIG. COMMITTEE 1, 1-6 (Winter 2003). *Cf. In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the 14th Amendment nor the Bill of Rights is for adults alone.” “Under our Constitution the condition of being a [child] does not justify a kangaroo court.” *Id.* at 29.). In the context of child protection proceedings, this debate is beginning to take shape. Children’s rights advocates maintain that fewer at-risk children and families will be set adrift in the unknown territory of the child welfare system if the legal equation is expanded to include the full legal standing of the third party at interest in each of these cases—the child.

their extended kinship group. Benefits of kinship care include continuity in past family relationships and in the child's heritage.²²² This inquiry should not turn on the de facto status of children as property in our legal system, but as persons with constitutional rights. They are routinely denied the due process right to counsel and legal standing when they have significant interests at stake.²²³

In *Kingsley v. Kingsley*,²²⁴ Judge Thomas S. Kirk permitted twelve-year-old Gregory Kingsley to bring a termination of parental rights proceeding in his own right. Although the appellate court went on record denouncing the court's legal recognition of an unemancipated minor's right to bring his own legal action through counsel,²²⁵ the decision of the lower court withstood reversal.²²⁶ The appellate court held this to be an error rendered harmless by the separate filings by other parties on his behalf,²²⁷ but recognized that the "minor is [the] real party in in-

222. See generally Megan M. O'Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 VAND. L. REV. 1427, 1451 (1998). Children can avoid the stigma of foster care while at the same time maintaining their sense of filial belonging. "[T]he child remains a part of the family he . . . has known and continues the relationships that define him . . . : sister, brother, grandchild, cousin, nephew, niece." (emphasis added).

223. Pitts, *supra* note 220. There is a huge gap between our rhetoric proclaiming children as "our national treasure" and the reality of how we accord them "less than full personhood status" in the eyes of the law.

224. 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

225. *Id.* at 784. Cf. *In re T.W.*, 551 So. 2d 1186 (Fla.1989) (citing the parental consent statute, section 390.001(4)(a) and the related Florida Rule of Civil Procedure 1.612 specifically authorize a pregnant, unmarried minor to petition the circuit court for relief without resort to a legal conduit). See also *Santosky v. Kramer*, 455 U.S. 745, 754 n.7 (1982) (recognizing "liberty interests of the child").

226. *Id.* at 782 The court affirmed the "trial court's orders terminating [the biological mother's] parental rights and [denied] the motion for summary judgment; however, [the court] reverse[d] the trial court's order granting the adoption petition."

227. *Id.* at 785. Cf. *Miller v. Miller*, 677 A.2d 64, 66 (Me. 1996), the Maine Superior Court (Penobscot County, Mead. J.) granted the motion of three minor children to intervene as parties in the divorce action between their parents and be represented by legal counsel independently of the guardian ad litem (GAL) appointed previously to represent their interests. The matter was appealed to the Maine Supreme Judicial Court that reasoned: Although, at common law, minor children have a right to sue and be sued, children do not possess the requisite legal capacity to participate in litigation in their own names. 43 C.J.S. *Infants* § 215 (1978). This incapacity is premised on age, inexperience, and immaturity. The court ultimately rejected the children's argument that they had a constitutional right to separate representation, relying on their significant liberty interest in the outcome of their parents' divorce because of the custodial issues involved. The court agreed that the children have a definitive legal interest with respect to the custodial (and financial) outcome, but it remained satisfied that the GAL could adequately secure these due process interests in the proceeding.

terest."²²⁸ The court qualified this diminishment in legal rights stating that "[o]bjective criteria, such as age limits, restricting exercise of legal rights, although inevitably arbitrary, are not unconstitutional unless they unduly burden minor's pursuit of [a] fundamental right."²²⁹ Certainly, one could argue, in the case of filial rights to visitation with one's grandparents, a significant interest is at stake and one that may soon ascend to the stature of a fundamental right.

Due to their incapacity, children must bring or defend a legal proceeding through an adult representative, such as a next friend²³⁰ or a *guardian ad litem* (GAL).²³¹ However, a significant distinction can be drawn between the more limited role of a GAL or next friend and that of an independent legal advocate acting on behalf of the children's legal interests. It is clear: a GAL will try to discern what is in the child's best interests, regardless of whether this perspective actually aligns with the child's expressed wishes, as opposed to the attorney's professional mandate to act zealously in advocating for the client's expressed interests (i.e., the former leads, while the latter follows the lead of the client).²³²

228. See *Kingsley*, 623 So. 2d at 784. If a minor brings his/her own action, this is a defect, which can be cured by appointing a next friend or a GAL. The child is still the real party in interest, but courts require that a reasonable adult person conduct the litigation on behalf of the minor.

229. *Id.* at 782 ("[T]he trial court ruled that Gregory, as a natural person who had knowledge of the facts alleged, had standing to initiate the action for termination of parental rights, . . . [T]he trial court implicitly accorded [him] capacity to file the petition . . .").

230. The term "next friend" is of English origin. *In re Beghtel's Estate*, 20 N.W.2d 421, 423 (Iowa 1945). According to Blackstone, a next friend is any adult person who volunteers to undertake a minor child's legal cause (citing WILLIAM BLACKSTONE, COMMENTARIES at 464 (Sharswood ed.)). A next friend represents a minor child in the absence of a regularly appointed guardian. *Garcia v. Middle Rio Grande Conservancy Dist.*, 664 P.2d 1000, 1006 (N.M. Ct. App. 1983), *cert. denied*, 663 P.2d 1197 (1983), *overruled on other grounds*; *Montoya v. AKAL Security, Inc.*, 838 P.2d 971 (N.M. 1992). There is no formal appointment required for a next friend. *Dye v. Fremont County School Dist. No. 24*, 820 P.2d 982, 985 (Wyo. 1991). However, a next friend is *not a party to the suit that she prosecutes on behalf of a minor child* but is an officer of the court and, as such, is *under the control of the court* and can be removed if the best interest of the child so requires. *In re Beghtel's Estate*, 20 N.W.2d at 423-24 (emphasis added).

231. A *guardian ad litem* (GAL) is a representative appointed by a court to represent a child in a specific legal matter, such as in abuse and neglect proceedings, *see, e.g.*, 22 M.R.S.A. § 4005; and in estate proceedings, 18-A M.R.S.A. § 1-403(4). As an officer of the court, the rights and duties of the GAL are essentially the same as that of the next friend. *Missouri ex rel. Dept. of Soc. Serv., Div. of Child Support Enforcement v. Kobusch*, 908 S.W.2d 383, 385 (Mo. Ct. App. 1995).

232. The model rules provide guidance to the attorney who is engaged to represent the legal interests of a client whose "capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority . . . or for some

Although the Supreme Court has occasionally held that freedom of personal choice in matters of family life *is* protected by the Due Process Clause,²³³ still the Court has refrained from stating whether children have a liberty interest in maintaining a relationship with a parent.²³⁴ "[W]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent in maintaining her filial relationship."²³⁵ Maine's court, likewise, retreated from a ruling on this related issue. "We also have no occasion in this case to decide whether minor children have a constitutionally protected liberty interest in the outcome of the divorce of their parents."²³⁶

But the Supreme Court has identified exceptions to the parental child-rearing prerogatives. The state can intervene and override religious beliefs that dictate the withholding of lifesaving medical care to a minor child.²³⁷ Acting under the doctrine of *parens patriae*, officials can petition the court on behalf of the child in need of the exigent medical care. Most courts have compelled the treatment over the religious wishes of the parents, on the theory that the state's interest in protecting the minor's welfare outweighs those rights of religious liberty (including subrogation of their family autonomy and child-rearing rights).²³⁸

other reason," and advise that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Comment (1) elaborates on this further, stating that the "normal client-lawyer relationship is based on the assumption that the client, when properly assisted, is capable of making decisions about important matters" and offers an example of "children as young as five or six years of age, and certainly those of ten or twelve, who are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Comment (4) advises that whether a lawyer should look to the parents as natural guardians may depend on the nature of the proceedings and explicitly warns that in cases where a guardian for the ward is acting adversely to his interests, "the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Model Rule 1.2(d).

233. See *Miller*, 677 A.2d at 68 n.6.

234. *Id.*

235. *Id.*

236. *Id.* (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989)).

237. BARRY R. FURROW ET AL., *BIOETHICS: HEALTH CARE LAW AND ETHICS* 344-45 (5th ed., West 2001). "The Supreme Court has always held that children are not permitted to become martyrs to their parents' (or their own) religious beliefs." *Id.* at 273. Where the treatment is not highly invasive, courts have universally ordered the treatment of the child (e.g., blood transfusion for a Jehovah's witnesses child). See, e.g., *In re D.R.*, 20 P.3d 166 (Okla. Civ. App. 2001) (ruling that parents' refusal to permit medical treatment based on religious beliefs are subject to criminal prosecution in death of child).

238. See *Troxel*, 530 U.S. at 74-75. However, these "rights" are not absolute and must cede to the separate and distinct interests of the child. See *infra* note 318.

While in *Wisconsin v. Yoder*,²³⁹ the Court invalidated Wisconsin's refusal to exempt the students of the Old Order Amish from the state's mandatory school attendance policy until the age of sixteen. The Amish argued that school attendance beyond this age burdened the practice of their religion by interfering with the spiritual inculcation of farming and nonsecular pursuits. The Court ultimately reasoned that the state's interest in having a well-educated citizenry was not seriously compromised by this sect, which functions independently of the mainstream community. The majority conceded that the Amish children who failed to attend high school would not receive the same level of intellectual learning, but the informal vocational training provided by their sect would prepare them well for life in the Amish community. Justice Douglas was the sole dissenter in *Yoder* and argued that the majority was wrong to decide the case without determining whether each of the children involved desired to attend high school over the objections of his parent; he contended that the child's desires should be pre-eminent.²⁴⁰

Judicial recognition of the emerging autonomy of a mature minor has been codified in the judicial bypass laws permitting a pregnant minor to petition the court directly to exercise her right to an abortion.²⁴¹ This mechanism, in particular, illustrates the

239. 406 U.S. 205 (1972).

240. *Id.* at 241-49. The words of his solitary dissenting opinion fell on deaf ears, as often happens when an idea is too novel and threatening to the entrenched legal paradigm of the day. Justice Douglas was a man ahead of his time, suggesting that children may have interests, *even rights*, that are separate and apart from those of their parents and that the Court should recognize this compelling third-party interest. See, e.g., Albert J. Krieger, *Chair's Report to Members: Gideon—40 Years Later* 18 A.B.A. J. SEC. OF CRIM. JUST. 1 (Spring 2003). The Supreme Court may address this question again and create a new rule regulating our relationship with our government. Facially, that rule will appear to be based upon precedents that may be relevant by rationale or community experience. "The evolving nature of our law is a constant challenge—we are not content to mire our relationships with our society in a matrix that is unyielding and unfeeling of the emotional senses and spirit that marks our interchanges." Krieger is a criminal defense attorney in Miami, Florida and chair of the Criminal Justice Section.

241. In states requiring parental consent to a minor's abortion, the Supreme Court has made it clear that a procedural mechanism for judicial bypass must be in place; whereby, a minor can appear in court and have the opportunity to persuade a judge that she is sufficiently mature enough (or emancipated) to make this decision herself. Upon such a showing, the court must override the parental veto. See generally *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976) (holding that the spouse or parents of a woman do not have absolute right to bar an abortion); *Bellotti v. Baird*, 443 U.S. 622 (1979) (holding that a pregnant minor is entitled to show that she is mature enough to make an abortion decision or that such a decision would be in her best interests); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (ruling that the state may require consent for a minor deemed insufficiently mature, but judicial bypass procedure must be available).

court's recognition that the interests of a minor and her parents may actually diverge on a matter having serious religious implications and demonstrates the court's willingness to permit the minor to supersede the traditional parental authority. These cases illustrate why a legal inquiry should not turn on the de facto status of children as property in our legal system, but as persons with constitutional rights.²⁴²

That the Supreme Court would be inclined to sidestep this "loaded issue" for now is not surprising in light of the principle of judicial restraint on offering advisory decisions,²⁴³ the federalism concerns and the domestic relations exception in the federal judicial forum.²⁴⁴ The inevitable storm of controversy, sure to follow such a ruling can frequently act as a deterrent for the Court to carefully sidestep the legal fray.²⁴⁵ But the extension of these rights to children at the center of certain family law proceedings need not herald the anarchy of minors from their parent's rightful authority.²⁴⁶ Legal recognition of children's rights need not herald a "parade of horrors."²⁴⁷ It is not necessary to

242. See Pitts, *supra* note 220. See, e.g., Scott, 834 P.2d 6 (holding that the inviolability of certain rights is evinced by the fact that parents lack the authority to waive a minor's future right to a cause of action for injuries due to third-party negligence). The "inviolability of a person" has strong historic roots in Anglo-American law that it was not to be curtailed without clear and unquestionable authority of the law. See also *New York v. United States*, 505 U.S. 144, 147 (1992) (holding that even states cannot acquiesce a constitutional right, referring to state sovereignty, despite the existence of a compelling government objective).

243. While some state supreme courts are authorized to issue advisory opinions, the Supreme Court is constrained in doing so pursuant to the negative limitations imposed on the judicial branch under Article III, Section 2, Clause 1 of the U.S. Constitution. In a series of rulings that have evolved from case law, the Court has "avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J. concurring). Because of this judicial restraint, the Court will not issue advisory opinions in advance of the necessity of deciding them, nor will the Court decide a controversy in broader terms than are required by the precise facts of the case before it.

244. See generally U.S. const. arts. I-III; Bill of Rights. The federal government is one of limited, enumerated powers among the three branches. Under the Tenth Amendment, the states retain all powers not delegated to the federal government by the Constitution, nor prohibited by it. See U.S. const. amend. X. Family law, education, and criminal law come within the traditional domain of the states for purposes of regulation.

245. *Id.*

246. See *infra* note 247. A similar warning of the dreaded "slippery slope" is cast in this article on expansion in organ donation programs. Cf. Charles Krauthammer, *Yes, Let's Pay for Organs—Not from the living, which would be degrading but the dead are a different story*, TIME, May 17, 1999 at 100 (objections to novel donor programs, such as Pennsylvania's plan to reward organ donation with a payment of \$300 to decedent's relatives to offset funeral expenses, cite this as the beginning of a full-scale market in human body parts).

247. See *Miller*, 677 A.2d at 70. The court forecasts a "slippery slope" of children's rights, warning that it cannot afford to "indulge in a myopic view" in ruling on this specific case, "for none of the implications noted are fanciful once intervention is permitted." The

establish a "fence" around the law; with limitations intended only to keep us away from more serious encroachments into the area of parental authority, a new line can be drawn and fence moved inward²⁴⁸ without crossing a fateful line.²⁴⁹

Because society and culture are dynamic, our government must, of necessity, be adaptable and adjust to the changing times and relationships that life brings us. With changing times, come differences in how we view each other and how we look upon our government.²⁵⁰ While our catalogue of individual rights may not change, their exercise may vary as our society's survival requires. Even precedent cannot resist a condition of dissonance, because what is right, even when it seems to conflict with our body of law, is still more right than wrong.²⁵¹

court explains that "divorce litigation would be complicated exponentially by the involvement of children as parties," protracting the litigation with the resultant financial burden to the parties and the court system. The Supreme Court has frequently warned of landmark cases that foretell passage beyond "a point of no return," where the flood of litigation in response to an expanded definition in constitutional rights will create utter pandemonium. Hindsight has proven otherwise. *Cf., e.g., Goss v. Lopez*, 419 U.S. 565 (1975) ("[The majority opinion] justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right . . ." (Powell, Burger, Rehnquist, JJ. and Blackmun, C.J. dissenting)). *See also Matthews v. Eldridge*, 424 U.S. 319 (1976) (narrowing of due process requirement in deference to administrative resources; yet another example of the "rights" balancing act).

248. *See Miller*, 677 A.2d. at 70.

249. *Id.*

250. *See Krieger, supra* note 240, at 1. Krieger is quick to remind all practicing attorneys that it is difficult to conceive of a person unrepresented in a criminal court, and yet, "for roughly the first 175 years of the republic's existence, the U.S. Supreme Court did not accept the right to counsel as one of the fundamental rights that the states were compelled to recognize under the 14th Amendment." For nearly twenty-one years, based on its decision in *Betts v. Brady*, 316 U.S. 455 (1942), the Court remained steadfast in holding that the right to counsel was not one of the *fundamental rights*, until the Court's reversal of *Betts* in *Gideon v. Wainwright*, 372 U.S. 335 (1963). "What happened to change the Court's mind? *Did someone find precedents that did not exist before?*" The doctrine of *stare decisis* is an imperfect methodology, but it is malleable to correction by the Court. (emphasis added). Acting as devil's advocate, Krieger challenges the legal reader:

After all, we are a nation governed by law and not by the changing moods of a society in constant metamorphosis. To substitute the subjective "what is right" test for the specificity of the law is, at the very least, an invitation to disorder—at worst it's anarchy. [As lawyers] trained to respect precedent as if it were the words of the deity, spoon-fed the doctrine of *stare decisis* to the exclusion of tastier morsels that appeal to rationality and reality. My legal foundations were rendered unstable when a mentor said, "I am more interested in what is right than precedent."

251. *Id.*

A CHILD'S VESTED INTEREST IN HIS FILIAL HERITAGE

The compelling nature of the familial blood tie is unavoidable and continues to impact judicial decision-making.²⁵² Within the realm of advanced reproductive technologies, the state courts have been repeatedly faced with competing parties on family matters,²⁵³ regarded as highly private concerns under the auspices of the Fourteenth Amendment Due Process Clause.²⁵⁴ One such battle, decided by California's Supreme Court, involved a custody dispute between the unrelated gestational mother and the natural, "genetically-related" mother and the "genetically-related" father.²⁵⁵ Here, the court found no reason to recognize a multiple parent arrangement:

[The court] decline[d] to accept the contention of amicus curiae . . . that [it] should find the child has two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, [the court] see[s] no compelling reason to recognize such a situation here. The Calverts are the genetic and intending parents of their son [and] to recognize parental rights in a third party would diminish [Mrs. Calvert's] role as the mother.²⁵⁶

The court also commented on the legislative intent and concluded that, while the Act may recognize both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman the law of California will recognize the "natural"

252. See FURROW ET AL., *supra* note 237, at 135-36.

253. *Id.* at 136. *Cf., e.g.,* Belsito v. Clark, 67 Ohio Misc. 2d 54 (Ohio Ct. Com. Pl. 1994) (rejecting, in part, the reasoning in Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Belsito, an Ohio case involving a dispute over whose name would be listed on the child's birth certificate, held that parentage would be determined solely by genetic contribution and not the intent of the parties to the surrogate agreement).

254. See, e.g., lineage of family privacy, autonomy cases, *supra* notes 193-94; Griswold, 381 U.S. 479 (1965) (finding penumbra of privacy surrounding marital relationship; J., Goldberg proposed the Ninth Amendment be viewed as a "catch-all" category of rights not specifically enumerated in the Bill of Rights but intended by the framers to be "retained by the people" against encroachment by the federal government).

255. Johnson, 851 P.2d at 776. See generally *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (invalidating the surrogate contract and emphasizing the inviolable nature of blood ties when granting the genetically-related gestational mother liberal, unsupervised visitation with the child of this arrangement).

256. Johnson, 851 P.2d at 781.

mother.²⁵⁷ Beyond the court's recognition of the special blood ties in these cases is the other common thread in the analysis—that of the “best interests” of the child being the ultimate “tie-breaker” in these contested cases.²⁵⁸

In a number of states, courts have addressed this question of filial rights from the standpoint of the grandparent seeking visitation rights with their grandchildren. The Supreme Court of Kentucky in *King*, for example upheld the constitutionality of a statute, which a trial court used to order visitation by a child's grandfather over the objection of the child's parents.²⁵⁹ There the court stated, “[t]his statute seeks to balance the fundamental rights of the parents, grandparents, and the child,” and that the legislature has “determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent”²⁶⁰ The pragmatism of the court in *King* is also reflected in the New York grandparent visitation statute, which provides for the petitioning for contact when “circumstances show that conditions exist which equity would see fit to intervene.”²⁶¹

The dissenting opinion in *King* held that the majority's fatal flaw was in its conclusion that a grandparent has a “fundamental right” to visitation with a grandchild. But perhaps the flaw in this opinion was in not defining this right as a reciprocal right—a fundamental filial right flowing between grandparent and grandchild. Both are entitled to lay claim to this relationship right²⁶² derived from primordial society and to salvage this blood connection, irrespective of parental marital status or circumstances. Additionally, the child's competing right to main-

257 See FURROW ET AL., *supra* note 237, at 136 (determining maternity under the Uniform Parentage Act of 1973).

258. See generally *Johnson*, 851 P.2d at 799 (applying the “best interests” standard serves to assure that in the judicial resolution of disputes affecting a child's well being, protection of the minor child is the foremost consideration) (Kennard, J., dissenting); *In re Baby M*, 537 A.2d 1227 (applying the best interest standard in placing child in custody of biological father); *Doe v. Doe*, 710 A.2d 1297 (Conn. 1998) (applying best interest test in determination of custody between biological father and unrelated mother; the child was born as a result of artificially inseminated surrogate mother).

259. *King*, 828 S.W.2d at 631.

260. *Id.* at 632.

261. N.Y. Dom. Rel. Law § 72 (McKinney Supp. 2004).

262. Due to the legal minority status of the children subject to these proceedings it is incumbent upon the grandparent to assert the claim, but the right originates with *both* grandparent and grandchild.

tain this consanguine tie is on parity with the parent's assertion of "family autonomy." In these cases, the Court should act as the tiebreaker, not in applying the typical "best interests balancing test," but rather in permitting the visitation unless it can be demonstrated that such contact would not be in the best interests of the child. In these instances, the only "significant triggering event" required for a legal assertion of court ordered visitation is to establish "substantial interference by the parent" with the grandparent-grandchild relationship.²⁶³ However, this statutory formula is similar to that rejected by the Court in *Troxel*.²⁶⁴

In *Troxel*, "it bears noting that several justices spoke at length about the rights of children despite the fact that [the] children in the case had not asserted any rights independent of the family autonomy claims of their mother."²⁶⁵ The plurality opinion, written by Justice O'Connor, carefully avoided articulating a hierarchical scheme of family rights that would have entitled parents to strict scrutiny of any state visitation rules that sought to protect children's relations with extended family at the expense of parent's autonomy. In a separate opinion, Justice Kennedy emphasized that the constitutional importance of familial relationships depended on the emotional attachments that derived from daily contact, and he indicated that a best interest standard in deciding cases about visitation was "not inherently unconstitutional."²⁶⁶

263. Cf. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (illustrating the exact inversion of the Wisconsin Supreme Court's use of the "significant triggering event" that would justify a court's intervention in the relationship between a child and a natural or adoptive parent; further holding that it was not limited in its equitable powers by the visitation statute (referring to the marital dissolution "triggering" provisions) but could act to protect and secure the best interest of a child in circumstances not included in the statute), *overruled by In re Z.J.H.*, 471 N.W. 2d 202 (Wis. 1991).

264. See *Troxel*, 530 U.S. at 58. The plurality found it problematic that the state trial court had given no special weight to the mother's determination respecting the best interest of her children. "In effect, it placed [on a fit parent] the burden of *disproving* that visitation was in the best interest of her daughters . . .," a rebuttable presumption that grandparent visitation was in the child's best interests.

265. *Id.* at 64-65. (O'Connor, J., plurality opinion). Grandparents should not be relegated to the status of *any third party stranger* (emphasis added). Perhaps, the commentary of the justices acknowledging the rights of children who are the focus of these "contests" foretells a change in the Court's perspective. Cf. DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 541-44 (1998), (documenting that similar "foreshadowing by the Court," evinced by Justice Brennan's choice of the '*bear or beget*' language in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that dissimilar treatment of married versus unmarried persons with respect to the legality of contraceptive dissemination did violate the Equal Protection Clause), resulted from Justice Brennan's anticipation of the abortion decision), *quoted in WEISBURG & APPLETON, supra* note 192.

266. *Troxel*, 530 U.S. at 57.

In his dissent, the comments of Justice Stevens revealed that the door had not been closed on the issue of children's rights, but rather the debate in this forum was just beginning to take shape:

While this Court has not yet had occasion to elucidate the nature of a child's liberty interest in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.²⁶⁷

Justice Stevens also accused the plurality of treating children as chattels. This prompted Justice O'Connor's explanation that the Court did not regard children as parental property and that discussions of parents' rights were not a rejection of other rights but a recognition that visitation cases could raise issues of constitutional importance.²⁶⁸ The plurality's careful use of language and the resounding absence of exclusivity in parental autonomy, taken together, seemed to foreshadow the Court's recognition of the emerging rights borne by children.

AN IMPLICIT POLICY CONSENSUS IN THE LEGISLATIVE PREFERENCE FOR KINSHIP TIES

Certainly, the legal posture of a child viewed as a sovereign individual holds a compelling claim to maintain his kinship ties. This premise is reflected in the very origins of the filial unit and has become ingrained in our human consciousness as an inherent right of affinity flowing both to and from the progeny of our kin. That a consanguine connection is inviolable resonates often in the administration of the legal rights of inheritance and the great lengths to which this ancestral continuum is observed and protected by the court in child protective proceedings initiated by the state. Under the section relevant to the permanent dives-

267. *Id.* at 88 (Stevens, J., dissenting). These are "reciprocal rights" that flow to-and-from the respective parties and, as such, the legal consideration must not be unilateral but must encompass the rights that emanate in both directions. These reciprocal rights and duties in the filial context spring from the very beginning of organized communities that were later formalized in the context of property succession within families. *See* ANCIENT LAW, *supra* note 51.

268. *Id.* at 64-65 (O'Connor, J., plurality opinion).

ture of the parent-child relationship, the statute emphasizes that the inheritance rights shall remain. "An order terminating parental rights divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, except the inheritance rights between the child and his parent."²⁶⁹ Still further, kinship-based protection is extended pursuant to section 4056(3) which states, "[n]o order terminating parental rights may disentitle a child to benefits due him from any 3rd person [grandparents and other filial kin], agency, state or the United States; nor may it effect the rights and benefits that a native American derives from his descent from a member of a federally-recognized Indian tribe."²⁷⁰

This basic common law right is also mirrored in other foundational elements of Maine's codified child protection statutes. Maine's Child And Family Services And Child Protection Act²⁷¹ accords enhanced recognition for kinship placement of a child in cases of temporary and more permanent removal of children from the custody of their abusive parents. Pursuant to section 4005-B, the grandparents are recognized as legitimate candidates to become parties to the child protection action by petitioning the court for intervenor status.²⁷²

Section 4005-E(2) of the grandparent visitation and access statute states 'that [a] grandparent who is designated as an interested person or a participant . . . who has been granted intervenor status under the Maine Rules of Civil Procedure, Rule 24 may request the court to order that the child be placed with the grandparent. A grandparent who has not been designated as a participant . . . may make the request for placement in writing. In making a decision on the request, the court shall give the grandparents priority for consideration for placement if that placement is in the best interests of the child . . .'²⁷³ In so doing, the State has expressly recognized grandparents as the preferred child protective wards to their grandchildren (as opposed to foster care with families who are kinship 'strangers' to the child).²⁷⁴

269. ME. REV. STAT. ANN. tit. 22, § 4056(1) (West 2004).

270. § 4056(4).

271. § 4033.

272. § 4005-B.

273. § 4005-E(2).

274. § 4053(3). In addition to this kinship preference, if the child protective matter involves a mature minor, defined as a minor between 12 and 14 years of age, he has the right

State and federal legislative enactments reflect this deference for the filial connection. The Minnesota court of appeals upheld a lower court's ruling,²⁷⁵ which granted custody to the maternal grandparents in a dispute with the foster parents who also sought to adopt the child. Under the relative preference of the Minority Adoption Act,²⁷⁶ the court is required, in the absence of good cause to the contrary, to give preference first to placement with a relative of the child. The court's consideration of the child's race, in this placement decision, was challenged by the child's GAL and the NAACP which argued that the Minnesota provision²⁷⁷ gave impermissible weight to the issue of race in adoption proceedings in violation of the Fourteenth Amendment's Equal Protection Clause, the core purpose of which is to do away with government sanctioned discrimination based on race.²⁷⁸ The appellate court held that the racial classification failed under the Equal Protection Clause because it was not necessary to the legislative purpose.²⁷⁹ The court stated:

The heritage of minority children can be protected without the [race] classification by making the preferences for relatives applicable to all children. . . . There is . . . both longstanding common law which favors providing custodial preference to near relatives, and a strong legislative policy of awarding the permanent care and custody of a child to a relative . . . as opposed to a strangers.²⁸⁰

The legislature, thus, emphasized the importance of preserving the biological family.²⁸¹

Based on the record, the appellate court affirmed the trial court's finding that the child would benefit from her placement with her grandparents and the support afforded by extended

to object to the severance of his filial rights and in the case of a 14 year-old, the court *cannot* order the termination. § 4055(3).

275. *In re D.L.*, 479 N.W.2d 408, 410 (Minn. Ct. App. 1991).

276. MINN. STAT. § 259.28(2) (repealed 1997).

277. § 259.28(2) (requiring the court, in the absence of good cause to the contrary, to follow certain placement preferences in the adoption of a child of "minority racial or minority ethnic heritage").

278. *In re D.L.*, 479 N.W.2d at 412.

279. *Id.* at 416.

280. *Id.* at 413.

281. *Id.* at 414.

kinship ties.²⁸²

Congressional recognition of inviolable kinship ties has been emphatic in regard to Native American children. In *Mississippi Band of Choctaw Indians v. Holyfield*,²⁸³ the Supreme Court delivered an opinion on the provisions of the Indian Child Welfare Act of 1978 (ICWA)²⁸⁴ that establish exclusive tribal jurisdiction over child custody proceedings involving Indian children domiciled on the tribe's reservation.²⁸⁵ In the 1974 Congressional Hearings, older Indian children who had been removed by local welfare authorities testified "that society was putting on them an identity which they did not possess and taking from them an identity that they did possess."²⁸⁶ Further testimony from the 1978 hearings focused on the impact on the tribes of the massive removal of children, yet "the only real means for the transmission of the tribal heritage is through the children as they are raised among their own people."²⁸⁷

This argument is compelling and plausible in the context of any extended kinship tie whether, that filial kinship group is Irish, Anglo, Franco, Latino, or African-American.²⁸⁸ These kinship networks are not distinct from the other inasmuch as they are structured with the same purpose. These groups are defined, thus, as "a social system of various forms governing the reciprocal obligations between members of a culture who are held to be related."²⁸⁹

Quite simply, a tribe is defined as a "human community composed of blood-relatives that acts to preserve its own cus-

282. *Id.* at 416. The United States Supreme Court denied certiorari sub nom. in *Sharp v. Hennepin County Bureau of Soc. Serv.*, 506 U.S. 1000 (1992). The Minnesota legislature revised the statutes to apply the listed preferences to relatives of *all* children. MINN. STAT. ANN. § 259.57 (West 1996). Ultimately, all reference to race was deleted, and an explicit preference for placement with relatives was enacted in its place.

283. 490 U.S. 30, 33 (1989).

284. 25 U.S.C. §§ 1901-1963. The Indian Child Welfare Act was the product of rising concern in the mid-1970s over the consequences to Indian children, their families, and tribes as a result of their separation in foster homes and adoption due to judicial findings of child abuse.

285. *Mississippi Band of Choctaw Indians*, 409 U.S. at 30.

286. *Id.* at 33.

287. *Id.* at 35. This observation was made by Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association in his testimony before the Senate Select Committee on Indian Affairs of the ninety-fifth Congress in 1977.

288. *Cf.* ETHNICITY & FAMILY THERAPY, Preface xii - xiii (Monica McGoldrick et al. eds., Guilford Press 2d ed. 1996).

289. THE NEW LEXICON OF THE ENGLISH LANGUAGE: WEBSTER'S DICTIONARY 542 (1991 ed.) [hereinafter WEBSTER'S].

toms and beliefs within the larger social network."²⁹⁰ In the absence of a statutory definition, the Court will "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."²⁹¹ Certainly, then, all kinship groups could fit these definitions. To hold otherwise would constitute the simple language of another word—racism.²⁹² The right to one's heritage should not be limited to the children within the jurisdiction of a federally recognized tribe.

At the close of the 1974 Senate Hearings, Senator Abourezk noted the critical importance of the extended family concept in the care of Indian children and the inculcation of their tribal identity.²⁹³

The congressional findings that were incorporated into the ICWA reflect these sentiments. Congress found that there is no resource more vital to the continued existence and integrity of Indian tribes than their children . . . [and] that the [s]tates, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.²⁹⁴

The ICWA Title I safeguards, designed to preserve the *recip-*

290 *Id.* at 1053 (emphasis added).

291. *Richards v. United States*, 369 U.S. 1, 9 (1962); *Russello v. United States*, 464 U.S. 16, 21 (1983). See also BLACK'S LAW DICTIONARY 1188 (abridged 8th ed., West 2000). The plain-language movement in the law encourages legal writers and business writers to write clearly and concisely – without legalese – while preserving accuracy and precision. The opinions of Antonin Scalia, associate justice of the Supreme Court (1986 – present) are notable for this plain-language interpretation. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW – AN ESSAY (Princeton University Press 1997), reviewed by David Franklin, *Judge Dread*, Jan. 22, 1997, available at slate.msn.com/id/2960 (last visited Oct. 28, 2004). Cf. Letter from Thomas Jefferson to William Johnson (June 12, 1823) reprinted in GORDON CARRUTH & EUGENE EHRLICH, THE GIANT BOOK OF AMERICAN QUOTATIONS (Portland House 1988) ("Laws are made for men of ordinary understanding, and should therefore be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure.")

292. WEBSTER'S, *supra* note 289, at 823.

293. *Mississippi Band of Choctaw Indians*, 490 U.S. at 35 ((statement of Sen. Abourezk construing Indian Child Welfare Act: Hearing Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs,) 93d Cong., 2d Sess.). See also *Wisconsin Potawatomes of Hannahville Indian Cmty. v. Houston*, 393 F.Supp. 719 (WD Mich. 1973) (discussing custom of extended family in the care and responsibility of children).

294. *Mississippi Band of Choctaw Indians*, 490 U.S. at 35-36; 25 U.S.C. § 1901.

rocal filial rights of the Indian children and their extended tribal kin, include various procedural and substantive standards for state child custody proceedings²⁹⁵ with a clear emphasis that adoptive placements be made preferentially with members of the child's extended family.²⁹⁶ As stated in the House Report, ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian . . . tribe" to maintain these connections.²⁹⁷ The deference shown to extended filial ties in the text of ICWA and its legislative history and hearings speak to the congressional concern for filial rights that are reciprocal in nature between these tribal members.²⁹⁸ The concern and enhanced protection afforded to this group based on their Native American ethnicity²⁹⁹ mirrors that of a non-Indian child similarly situated who is denied access to his extended kin or they to him. "[H]e has absolutely no idea who his relatives are, and . . . effectively make him a non-person and . . . destroy him."³⁰⁰

Internationally, the idea that children possess rights is universally accepted by every nation in the world community, but the United States has refused to sign on to the United Nations Rights of the Child (CRC) convention,³⁰¹ though it has signed

295. These procedural safeguards include requirements concerning notice and appointment of counsel; parental and trial intervention and petition for invalidation of proceedings for lack of jurisdiction; procedures governing voluntary consent in termination of parental rights; and full faith and credit obligation to tribal court decisions. See 25 U.S.C. §§ 1901-1914.

296. *Mississippi Band of Choctaw Indians*, 490 U.S. at 37; see *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) (holding that it is in child's best interest that his relationship with tribal members be protected). See also ME. REV. STAT. ANN. tit. 22, § 4062 (1999) (giving preference to an adult relative over a nonrelated caregiver in placement of child within child protective custody).

297. *Mississippi Band of Choctaw Indians*, 490 U.S. at 37.

298. *Id.* at 56 (explaining § 1915 of ICWA as conferring upon tribes certain rights, not to restrict the rights of parents of Indian children, but to complement and effectuate the reciprocal rights of the child and tribal kin).

299. *Id.* at 52. (ICWA recognizes that the tribe [comprised of extended kin] "has an interest in the child which is distinct from *but on a parity with the interest of the parents.*" (emphasis added) (quoting *In re Adoption of Halloway*, 732 P.2d 962, 970 (Utah 1986)). State actors must use caution in the denial of a parallel interest in other "non-Indian" ethnic cultures for the obvious facial challenge brought on equal protection grounds. There are a multiplicity of "white" ethnic groups in the United States having a distinct cultural heritage; these groups should not be transformed into one amalgamate, homogenous and indistinct class of "white" people not warranting deference by the Court.

300. *Id.* at 50 (quoting Louis La Rose, chairman of the Winnebago Tribe, in S. REP. ON THE ICWA at 43).

301. Davik-Galbraith, *supra*, note 1, at 158 n.71. See United Nations Convention on the Rights of the Child [hereinafter CRC], G.A.A. Res. 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 (Nov. 20, 1989); see art. 3, 28 I.L.M. 1448. Ironically, although the United States was a key player in the drafting of the UN's convention on children's rights

various Hague treaties that deal with inter-country adoption issues, child labor, and custody. According to the CRC scheme, children are viewed as interdependent members of a family with an emerging individuality that parents and government entities must respect. They are entitled to support and care by their parents, the right not to be separated from their parents except where it is in their best interests, and the right to a family identity.³⁰²

In contrast to the international movement in recognition of children's rights, the American scheme of family law doctrine appears reticent to elevate a child's interests or needs to the legal stature of a right. Perhaps this is out of fear that this would position the child on equal legal footing to challenge a parent or other entity in court. But a periodic re-examination of these rights and responsibilities insures that our legal schemes remain viable within the larger context of evolving societal conceptions of basic justice.³⁰³ Rigid adherence to a hierarchy of family rights, with the parents' power reigning supreme,³⁰⁴ will continue to obfuscate what should be the central concern—the rights emanating from the child with respect to the legal battles that rage around him. The rights of the parents need not “trump” the rights of the grandparents in a standoff to stay connected to their grandchildren. The court need only consider the “unnamed party” in this triad—the grandchild, and unless visitation is not in his best interests, the inquiry need not go any further than this. Johnston explains, “[a]s children mature, they become better able to make sense of connections that are not just social and are more interested in the distinctions. Genetic relatives provide some explanation for how one looks and for the special skills one possesses for certain physical, intellectual, or artistic endeavors.”³⁰⁵ The importance of a child's filial connections is

and provided many of the child-centered doctrines that form the basis of this treatise, it did not ratify the CRC.

302. See *id.* CRC art. 3 (best interest of the child), art. 8 (preservation of identity), art. 9 (separation from parents), & art. 10 (rights to reunification with parents).

303. Barbara Bennett Woodhouse, *Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 B.Y.U. J. OF PUB. L. 321, 324 (1994).

304. National Interdisciplinary Colloquium on Child Custody Law, *LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES*, 208-09 (Robert J. Levy ed., 1998).

305. Patricia Irwin Johnston, *Sibling Attachment 2-3*, at <http://www.pactadopt.org/press/articles/sib-attach.html> (quoting DR. ANNE BERNSTEIN, *FLIGHT OF THE STORK: WHAT CHILDREN THINK AND WHEN ABOUT SEX AND FAMILY BUILDING*. (Perspectives Press 2000)) (last visited Nov. 4, 2004).

gaining recognition by the courts, in the context of siblings who become separated as a result of a state child protective proceeding.³⁰⁶ At least ten states have programs, laws, or policies that promote sibling placements and mandatory visitation schedules.³⁰⁷ California already recognizes a foster child's right to maintain a consanguine tie among his siblings and, in 1998, adopted a bill that contains provisions aimed at facilitating post-adoptive contact between siblings who are not placed together. Under the new law, recommendations for sibling visitation are to be included in children's adoption case plans.³⁰⁸ This inviolable ownership in one's personal history enhances the sense of family that each of us takes into adulthood. This connection gives children a core sense of who they are and where they come from. When we are gone, it is this store of family history and memories that we will leave our children who share these kinship roots.³⁰⁹ "With that knowledge and sense of belonging, they can move more confidently into the future."³¹⁰

CONCLUSION

The idea of an exclusive, autonomous family unit is a legal fiction authored by the Supreme Court.³¹¹ There are no absolutes

306. *Id.* See also Diane Riggs, *Sibling Ties Are Worth Preserving*, ADOPTALK (A Publication of the N. Am. Council on Adoptable Children) Spring 1999, at 1. Separated siblings are robbed of future family connections as well; they may never know their nieces and nephews, and their children will miss out on knowing aunts and uncles.

307. See Riggs *supra* note 306, at 1-3. In Chicago, a new sibling program run by the Jane Addams Hull House Association pays foster parents an annual salary of \$16,000 plus benefits (in addition to the state's monthly payment per child) when they assume care for a group of brothers and sisters. New York offers rent-free housing plus extra money and benefits for taking sibling groups. Kentucky offers financial incentives for foster families who take sibling groups and Florida has a pilot program similar to the Hull House. In 1996, the Illinois Department of Children and Family Services (DCFS) implemented a visitation policy for children in care. The policy states that the Department will schedule visits "among all siblings in substitute care who are placed apart at least twice per month, beginning no later than two weeks after the Department is awarded temporary custody of any siblings." Thereafter, these "[v]isitation goals then become [a mandatory] part of the children's case plans, and are subject to examination at each child's administrative case review."

308. *Id.*

309. See Johnston, *supra* note 305, at 2-3.

310. See Riggs, *supra* note 306, at 3. In the words of one adoptive mother, "[k]nowing her birth siblings has helped to make [her daughter] whole." Many children who are adopted have holes from lost connections with their birth family members. "I can provide the love and nurturing, but I can't plug the other holes unless I can help my children take ownership of their histories."

311. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (prohibiting instruction in any language other than English is unconstitutional and holding that pursuant to the Fourteenth Amendment, parents have the right to raise their children free from state interference);

in the overlapping and competing penumbra of rights cloistered within the Constitution—where your rights end where mine begin.³¹² The major historical change in family values from one of a collective view of family to one of individualization, over the last several decades, has led to an exaggerated emphasis on emotional nurture, intimacy, and privacy as the major base of family relations. “It has contributed considerably to the liberation of individuals, but it has also eroded the resilience of the family and its ability to withstand crises. Moreover, it has contributed to a greater separation among family members and especially to the isolation of older people,”³¹³ under the guise of “parental rights.”³¹⁴ In most cases, it is appropriate that laws empower parents to act on behalf of their minor children’s welfare regarding decisions that require knowledge and maturity that they may be lacking. But in some cases, immersed in marital acrimony, empowering the parents has the effect of defeating, rather than promoting, children’s empowerment.³¹⁵

There are also times when children’s rights will reinforce those of the parent, and sometimes they are in tension with

Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (finding a law requiring attendance at public schools was unconstitutional and violated the Fourteenth Amendment right of parents to direct the upbringing and education of children under their control). The Court has made numerous rulings that have interpreted the rights of parents to raise their children free from state interference.

312. Cf., e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that criminal laws that “incidentally” interfere with a religious practice do not impermissibly burden the free exercise principles). The Oregon officials did not have to give an exemption. Is this to be a nation of exceptions where legislation serving legitimate public health, safety, or welfare concerns must be conformed to each citizen who steps forward with a religiously based complaint? See *Reynolds v. U.S.*, 98 U.S. 145 (1878). The early free exercise challenge, waged by devout Mormons intent on practicing bigamy pursuant to their religious edicts, were held to be legitimately proscribed under the federal territory laws. The Supreme Court likened the practice to religiously motivated human sacrifice; both were conduct that violated the social duties and warranted prohibition by the state. The Supreme Court has recognized that religious rights are not absolute when they collide with certain state interests (e.g., the states need not accommodate religious-based exceptions to the criminal code).

313. Tamara K. Hareven, *Continuity and Change in American Family Life*, in *FAMILY IN TRANSITION* 40, 47 (Arlene S. Skolnick & Jerome H. Skolnick eds., 8th ed. 1994).

314. See generally John Dewitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 *FAM. L. Q.* 187 (Spring 2002) (concluding that family autonomy and its concomitant parental authority are under an unrelenting attack from the new child savers). See, e.g., John Dewitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 *WASH. & LEE L. REV.* 351, 361 (1998). Despite the Supreme Court’s long silence with respect to third-party visitation, there has been an abundance of state court decisions and legislative enactment on the subject.

315. Barbara Bennett Woodhouse, *Talking About Children’s Rights in Judicial Custody and Visitation Decision-Making*, 36 *FAM. L. Q.* 105, 118 (Spring 2002) (referring to cases involving the “mature” minor’s acquisition of judicial override in parental consent required to obtain an abortion).

those rights. But when families seek protection from the intrusive intervention of the state, talking about children's rights lends added weight to their claims of family autonomy, privacy, and the right to maintain family relationships. The occurrence of domestic discord (or other state intervention) alters this picture, however, and when a judge must decide the matter giving due weight to the child's rights will actually clarify—not hinder—the search for the just resolution among the parties.³¹⁶ As Justice Stevens stated in *Troxel*, these cases “do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is, at a minimum, a third individual whose interests are implicated in every case to which the statute applies—the child.”³¹⁷

Troxel may be a landmark decision, but it stopped short on the status of grandparents' visitation rights. The American Association of Retired Persons (AARP) supports [both] parents' rights and the visitation rights of grandparents when it is in the best interest of the child. There is no doubt grandparents are important, even crucial, to their grandchildren's well being, and visitation can only enhance those relationships.³¹⁸ While very few family disputes go to court, grandparent visitation rights are crucial, because most grandparents play an invaluable role in the lives of grandchildren.³¹⁹ Prior to 1965, that role was not well recognized, and grandparents who were blocked from seeing their grandchildren had no legal recourse to assert visitation rights, but state legislatures soon recognized the need for this legal remedy in light of the high rate of divorce and separation.³²⁰ According to an article published in AARP Modern Maturity magazine, “the latest census figures show that 4.5 million children under 18 live in grandparent-headed households, placed in kinship care as opposed to foster care due to issues of neglect or abuse.”³²¹ In *Troxel*, the Supreme Court reiterated that “the in-

316. *Id.* at 132-33.

317. See *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting).

318. Gearon, *supra* note 210, at 28.

319. *Id.*

320. *Id.*

321. Sander M. Reese, *You Can't Say No To Blood*, 46 AARP MODERN MATURITY 52 (Jan./Feb. 2003) (“The total is up 30 percent since 1990—even though the total under-18 population increased just 14.3 percent in the same period. And contrary to the stereotype of the poor, inner-city grandmother raising her children's children, the phenomenon now reaches across all economic and ethnic groups.”), available at

terest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court³²² but noted that the proliferation of grandparent visitation laws among the states speaks to the "changing realities of the American family."³²³

But the laws have failed to keep pace with the changing composition of the American family; many of "the laws regarding custody, adoption, and parental rights remain as they were written decades ago."³²⁴ The courts and family law are in a period of flux and must resort to "realism" in the context of the changing view of family relationships. "Legal realism is not so much a philosophical theory as it is an attitude that calls for an instrumental utilitarian use of the law that rejects legal fictions."³²⁵ Consanguinity, or kindred, is an inviolable connection, or relation, of persons descended from the same stock or common ancestor; this tie has historical consequence. The current legal paradigm cannot turn a blind eye to grandparents in the broad definition of family and relegate them to the status of third-party strangers. To do so risks a condition worse than mere perpetuation of a legal fiction. Legal precedent such as this, that flouts common sense, will not have the legitimacy necessary to sustain itself in the long term. It is a paper castle built on legal contradictions, and it will surely fold against the winds of change.

The current fragmented approach by the states on the issue of grandparent visitation rights³²⁶ was further exacerbated by *Troxel's* failure to address the multiplicity of situations in which access to the grandchild can be denied entirely.³²⁷ A more cogent

http://www.aarpsegundajuventud.org/english/issues/2003-oct/your_own_blood.htm (last visited Oct. 28, 2004).

322. See *Troxel*, 530 U.S. at 65.

323. *Id.* at 64.

324. Reese, *supra* note 321, at 52.

325. See Rosen, *supra* note 2, at 535. By family law, the author includes the entire body of law that defines the rights and duties of kin. These laws fall under the gloss of family law, domestic relations law, estate law, the law of will, etc. See also WEBSTER'S, *supra* note 289, at 565. That persons related to one another can be characterized in legal discourse as a third-party stranger is truly a "legal fiction" (an assumption conventionally allowed in law) and flouts the common understanding attributed to the word as evinced by this source's definition of a stranger as "a person who is not known to one."

326. The proliferation of disparate grandparent visitation statutes among the states does not detract from legitimacy of this legislatively recognized filial right and remedy, but rather it speaks more to the need for the drafting and adoption of a uniform statute to ease the diverse lineage of cases across the United States.

327. An intact parental unit denies access to grandchildren, leaving absolutely no recourse for the grandparent due to the absence of a triggering event that creates the requisite

legislative response to this issue would be a shift in focus from the adversarial parties (i.e., grandparent vs. parent) to the heart of the matter—what would most benefit the children who are the subject of the proceeding.³²⁸ Presumably, then, all of the players should be “on board,” because the state, the parents, and the grandparents would all share the same objective—doing what is in the “best interests” of the child.

In contrast to the values of individualism that govern much of family life today, traditional values³²⁹ of collectivity have persisted among various ethnic groups,³³⁰ much like the interdependence of early kinship networks, which first gave to law the prominent place it has since occupied in the evolution of human society.³³¹ During the nineteenth century, in working class and ethnic families the relationships between husbands and wives, parents and children, and other kin were based upon reciprocal assistance and support. Such relations, often defined as “in-

standing: a divorce, separation, or parental death. *See Hawk v. Hawk*, 855 S.W.2d 573, 575 (Tenn. 1993) (deciding that the granting of reasonable visitation to a grandchild in the case of an intact marriage would be overly intrusive of the parent’s right to decide this question pursuant to the state constitution); *Cf. Emanuel S. v. Joseph E.*, 577 N.E.2d 27 (N.Y. 1991) (explaining that the New York grandparent visitation statutes are broadly drafted, allowing for a “catch-all” equity category that confers standing for petitioners “in circumstances in which equity would see fit to intervene); *Lehrer v. Davis*, 571 A.2d 691 (Conn. 1990) (explaining that the court could not render a decision in the matter due to the issue of “ripeness” but offered an advisory opinion in dicta; the status of the parents’ relationship as intact does not automatically invalidate a petitioner’s standing, to do so would call the fitness of other parents into question based solely on their relationship status and perhaps the legislature could find sufficient public interest grounded within a child’s filial association with his grandparents) (emphasis added).

328. *King*, 828 S.W.2d at 632 (holding that regardless of whether a family was “intact” the inquiry as to the grant of visitation to grandparents should be child driven. If visitation is deemed to be in his best interests, the Supreme Court’s identification of exclusivity in parental child-rearing decisions, without undue government interference, will not block visitation deemed to be appropriate in the judgment of the Court) (emphasis added).

329. Grandparenthood is both custom and tradition. It is woven into the very fabric of the American family and has become the traditions that define us as a nation. On each September 15, our calendars note this as the date to honor and celebrate grandparents nationwide. The “tradition” argument has also been invoked by the Court in defense of the continued use of “God” uttered in proceedings of the state and noted prominently on our currency. This emphasis on tradition and the permissible usage of this symbolism in the face of apparent conflict with the fundamental religious freedom protected by the First Amendment is not unlike the collision occurring between parental autonomy and the historic tradition of the grandparents’ relationship with their grandchildren.

330. Telephone Interview with the author, Oct. 24, 2004 (explaining S. E. Thorne’s general reference to collectivist arrangements among tribes – specifically Irish – compared to ethnic collectivist arrangements in the U.S. today, as set forth in *BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 1997* (translated by S. E. Thorne, translator, professor of legal history, Harvard University).

331. *See generally* ANCIENT LAW, *supra* note 51; BLACKSTONE, *supra* note 109.

strumental," drew their strength from the assumption that family members were all engaged in mutual obligations and in reciprocity. These assumptions grew, not from law, but from social values:

[These] obligations were not specifically defined by contract, they rested on the accepted social values as to what family members owed to each other. In the period preceding the welfare state [these] instrumental relationships among family members and more distant kin provided important supports to individuals and families, particularly during critical life situations. A collective view of familial obligations was the very basis of survival.³³²

The increase in adult life expectancy means that grandparenthood extends into old age much more often; this means that a person will get a chance to spend more time being a grandparent.³³³ The trend of earlier retirement and more leisure time, combined with a longer life span, results in more time available to get to know and enjoy this special intergenerational relationship with their grandchildren.³³⁴ Fostering a sense of intergenerational connectedness is no longer just a nice idea but has become a critical piece of the familial support network.³³⁵ "[A] new theme has emerged: 'generational justice.' Many now ask, 'how much do the young owe the old?'"³³⁶ The interdependence of lives within the new kinship structure need not be viewed as a threat to the young adult generation's family independence or as a social problem to be managed by the family and community.³³⁷ The Supreme Court may be pressed to address this question and create a new rule regulating our kinship relationships, and only the future will reveal whether the rule satisfies the subjective testing of what is right, regardless of the rule's intellectual sub-

332. See Hareven, *supra* note 313, at 46.

333. CHERLIN & FURSTENBERG, JR., *supra* note 18, at 106.

334. *Id.* at 109.

335. See generally LAWRENCE A. FROLIK & ALISON MCCHRISTAL BARNES, *ELDER LAW: CASES AND MATERIALS* 19-21 (Lexis 3rd ed. 2003). See also Stephanie Coontz, *The Way We Wish We Were*, in *FAMILY IN TRANSITION*, 71 (Arlene S. Skolnick & Jerome H. Skolnick eds., HarperCollins 8th ed. 1994). The purpose is not to berate people for abandoning past family values, nor to extort them to adopt better values in the future—the problem is to build the institutions and social support networks that allow people to act on their best values rather than on their worst ones.

336. *Id.* at 26.

337. See RILEY, *supra* note 15, at 499.

stance.³³⁸

Healthy members of the elder generation are willing to earn their place in the family by creating their own personal ties with the descendant grandchildren. "Without contact with grandparents, a child loses a vital and natural way to see and understand that he is part of a continuum, that he has roots, that he is the future and the hope of all those who preceded him."³³⁹ And perhaps, at the close of their lives, the younger kin, having experienced this sense of connectedness, will be poised to reciprocate with advice and emotional support to their elder kin.³⁴⁰ After all, these "[f]amily faces are magic mirrors[;] looking at people who belong to us—we see the past, present and future."³⁴¹

338. See Krieger, *supra* note 240, at 27 ("One thing is certain, if the new rule fails to establish what is right, [the legal profession] is equally bound to struggle for its change. It is in this process that liberty's definition thrives."). See also BLACKSTONE, *supra* note 109, at 28. "From this method of interpreting laws, by the reason of them, arise what we call equity."

339. Davik-Galbraith, *supra* note 1, at 144 (quoting *Grandparents Rights: A Resource Manual Before the House Select Comm. On Aging*, 102D Cong. (statement of the Chairman of the Subcomm. On Human Serv.)).

340. See RILEY, *supra* note 15, at 500.

341. JANET L. WARD, A QUESTION OF BALANCE 17 (Edna McConnel Clark Foundation 1997) (quoting Gail Lument Buckley, Court Appointed Special Advocate).