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Review of The American Family and the State (J. Peden & F. Glahe)

Craig W. Dallon

The American Family and the State

Edited by Joseph R. Peden & Fred R. Glahe. San Francisco: Pacific Research Institute for Public Policy. 1986. Pp. 488.

> *Compared to classical or early modern thinkers, political theorists of the twentieth century have largely ignored the family as a central concern. As a result, the subject has tended to become the province of psychologists, who generally ignore the family's relationship with the state, or sociologists, who often assume the propriety of its subordination to the organized will of the political authorities. This book is an attempt to open a wider dialogue on the family, with a focus on its dynamics and interaction with the state in American society.*[1]

The American Family and the State explores from several perspectives the relationship between the American family and the state. The authors both criticize the way the state defines and influences the family and suggest different theoretical approaches to apply to the family. The book attempts to bring consideration of the family into the forefront of modern political thought.

I. Introduction

The book consists of fifteen chapters authored by scholars from various fields including law, sociology, economics, political science, and family science. Each chapter is completely independent of the others and focuses on a different topic relating to families and the state. This mix of disciplines provides a broad view of how the state has influenced the family.

The book is relevant in several ways. To a newcomer to family studies, the book serves as a helpful introduction to the many issues that arise when considering interaction between the family and the state, especially the impact of state policies on the family. To policymakers and political leaders, the book serves as a warning that many of their decisions may impact the family. The book also points to areas which need change or at a minimum require rethinking. To social scientists, the book emphasizes the powerful influence which the state and its policies

1. The American Family and the State 1 (J. Peden & F. Glahe eds. 1986).

may have upon families and thus upon individuals. The book also provides some in-depth analysis of data regarding housing, teenage pregnancy, welfare and poverty. To legal scholars, the book suggests different approaches for dealing with families within a legal framework.

The book is divided into four parts. Part one, entitled "Thinking About the Family," explores the major theoretical bases of the family which help explain the tensions and interaction between the family and the state. Part two, entitled "The Nineteenth- and Early Twentieth-Century Experience," explains from a historical perspective how the state, through political maneuvering and public education, has sought to impose a collectivist ideology upon the American family. Part three, entitled "The Legal Status of Personal Relationships," exposes and attacks some of the basic philosophical assumptions which have influenced our modern jurisprudence regarding the family and calls for greater protection of individual rights. Part four, entitled "The Impact of Economic and Social Policy on Family Life," points out, just as the title indicates, the effects of economic and social policies on the family, including an analysis of inflation, housing policy, sex education, foster care, and welfare support.

This book note will give a brief review of each of the chapters in parts one, two, and four of the book. Chapters in these sections, while relevant to the discussion of law and the family, are not directly concerned with legal theories or concepts and are not written from a legal perspective. A more in-depth review of these chapters is left to philosophers and social scientists with expertise in these areas. After reviewing parts one, two, and four, the book note will focus on part three, "The Legal Status of Personal Relationships," especially chapters six and seven. The note applauds the thought-provoking observations and suggestions found in this section. However, the note also questions the wisdom of exalting individual rights at the expense of the "common good" and the strict contractual approach to marriage which this section suggests.

II. Overview

A. Thinking About the Family

In chapter one William Baumgarth educates readers on modern political theories of the family and the state. Baumgarth

notes that while the great political-philosophers of history including Plato, Aristotle, Hobbes, Locke, Hegel and Marx recognized the importance of addressing the family in their works, contemporary political-philosophers ignore the family. Baumgarth suggests: "The disregard for the family is a function of a turning away from the concept of nature in modern political thought and a focusing on the concept of equality in its stead."[2] Baumgarth credits Rousseau's emphasis upon individual will and Kant's resulting "historicism"—"the self-making of man by man"—with the resulting indifference or hostility to the family.[3] Baumgarth notes the state of contemporary political philosophy:

> Discussions of the family . . . are usually, then, either subordinated to matters of historical note or else they occur in the context of theories about equality. The main question of the contemporary political theorists regard [sic] either the outliving by the family of its once functional historical role or the extent to which the family assists or impedes efforts in the direction of moral autonomy or equality.[4]

To the classical thinkers, however, the family was part of the natural order and therefore deserved attention.

Baumgarth illustrates contemporary social thought about the family by discussing views of five theorists: Mark Poster, John Rawls, Yves Simon, Robert Nisbet, and F. A. Hayek. Mark Poster, building on Marxist views, attacks the "bourgeois family" (which dominates our society) because it is oppressive and restrictive. Poster calls for "democratization of relationships between husband and wife and between parents and children within the family, the integration of the family into a wider democratic community, and the disappearance of sex, age, and class as sources of social status."[5] Poster believes that children should "not be closely tied to any particular parental authority figures."[6] Relating his own theories to the contemporary social and political scene, Poster vigorously approves of efforts to legalize homosexual marriages and abortion rights.[7]

John Rawls' theory of the family is based on the bedrock

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2. Baumgarth, *The Family and the State in Modern Political Theory*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 19.

3. *Id.* at 21-22.

4. *Id.* at 22.

5. *Id.* at 26.

6. *Id.* at 27.

7. *Id.*

values of liberty for all and fair equality of opportunity.[8] Rawls recognizes that due to the natural lottery, some people are born with natural advantages, just as others are born with natural disadvantages. Rawls calls for equal distribution of "social primary goods—liberty and opportunity, income and wealth, and bases of self-respect."[9] Baumgarth explains that in Rawls' view "[a]s long as the family persists, there will be inequality between individuals . . . . The family, then, remains as an accident of history: at best, tolerable; at worst, the subject of interventionist educational and redistributional projects of a theoretically punitive kind."[10]

Yves Simon's theory of the family is discussed in connection with his theory of the state's proper role. Simon believes government is good. He looks to "authority" and "autonomy" as controlling principles in the study of the state.[11] The purpose for authority is to pursue the common good.[12] Autonomy, however, limits authority, because

> no task which can be satisfactorily fulfilled by the smaller unit should ever be assumed by the larger unit. . . . Whenever a larger unit does the task of a smaller, the latter unit does not have the opportunity to fulfill itself through work . . . . [W]here a task can be done better by the family, or where it can be done despite some loss of efficiency, it is desirable and just that the family, not the state, attempt that task.[13]

The family provides a forum for accomplishing "particular good," while the state provides a system for accomplishing the larger "public good."[14] Simon is critical of undue emphasis on equality of opportunity which he sees as threatening the family. Calling for equality of opportunity at the expense of the family ignores the value of stable family life.[15]

Robert Nisbet's theory of the family recognizes the value of the family. Nisbet believes that "unlike the anonymity the citizen shares in the state, within the family (and other 'intermedi-

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8. *Id.* at 28.
9. *Id.* (quoting J. RAWLS, A THEORY OF JUSTICE 303 (1981)).
10. *Id.* at 31.
11. *Id.* at 31-32.
12. *Id.* at 33.
13. *Id.* at 34.
14. *Id.* at 32-33.
15. *Id.* at 34-35.

ate institutions') there is genuine community."[16] Moreover, "the family provides the individual with genuine protection of his rights and happiness, the main danger to which is the growth of the state."[17] Nisbet is critical of Rousseau and finds the social man fundamental to society. Moreover, "man is made social only by his membership in the smaller associations of family, church, community, and guild."[18] Nisbet, therefore, seeks to protect the family.

F. A. Hayek's theory of the family stems from his belief that civilization progresses due to spontaneous order.[19] Hayek approves of diversity and varied life-styles and objects to demands for equal opportunity. State interference to equalize members of society hinders spontaneous order and thus progress.[20] The family plays an important role in encouraging spontaneity and passing on traits to successive generations.

Baumgarth's discussion of these five views is important because theories of the family shape attitudes of policy-makers, legislators, jurists, electorates, and therefore governments. Different theories suggest different roles for the state in its interaction with the family.

Chapter two, by Barry W. Poulson, embarks on an economic analysis of the family.[21] Poulson explains the traditional view that the family functions as a "welfare-maximizing institution."[22] In a sense, the family is like a firm, seeking to maximize profits of its individual members. The family is an economically efficient unit because it allows specialization and division of labor, economies of scale, and joint production and consumption of "family goods."[23] The family, like a business enterprise, acts as a monitoring agent and fulfills the metering function[24] essen-

16. *Id.* at 36.

17. *Id.*

18. *Id.* at 38 (quoting Nisbet, *The Politics of Pluralism: Lamennais*, in TRADITION AND REVOLT 31, 39 n.4 (1968)).

19. *Id.* at 39.

20. *Id.* at 40-41.

21. Poulson, *The Family and the State: A Theoretical Framework*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 49.

22. *Id.* at 51.

23. *Id.* at 53-55.

24. Poulson explains, "Metering here refers to both measuring output and apportioning output among family members." *Id.* at 59 n.10.

tial in an efficient business.[25] Poulson also explores the family's role as an agent of its members.[26]

In chapter three, Lyla H. O'Driscoll addresses the concept of unequal liberty and specifically considers "the justification of adult dominion over children."[27] Children are people with rights, but these rights are limited by society. In considering the relationship between parents and children, O'Driscoll suggests four conceptions:

> The *authoritarian* conception emphasizes the parents' right to command and the child's duty to obey. The *sentimental* view focuses on the emotional and psychological aspects of the relationship between parent and child. The *paternalistic* outlook stresses the parents' role in limiting the child's liberty in order to secure his good. The *economic* vantage point emphasizes the role of financial factors in the family structure.[28]

O'Driscoll notes that while the right of parents to raise their children is well recognized in American jurisprudence, the right of the state to regulate the family in the raising of children is also well established.[29]

B. The Nineteenth- and Early Twentieth-Century Experience

In chapter four, Murray N. Rothbard employs an historical analysis to reveal how state mechanisms can be used by a dominant group to impose that group's values upon a minority or a competing group.[30] He gives the example of public education in San Francisco. Rothbard explains how the upper- and middle-class Anglo-Saxon Protestants, by controlling the political system, shaped public education. Through the public schools they directly attempted to impose their own moral values upon the largely Catholic working class.[31] Rothbard notes: "The molding of children was of course the key to homogenization and the key

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25. *Id.* at 59-62.

26. *Id.* at 65.

27. O'Driscoll, *Toward a New Theory of the Family*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 82.

28. *Id.* at 87 (emphasis added to "paternalistic"; other emphasis in original).

29. *Id.* at 88.

30. Rothbard, *The Progressive Era and the Family*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 109.

31. *Id.* at 116.

in general to the progressive vision of tight social control over the individual via the instrument of the state."[32]

Rothbard also discusses how the ethno-religious conflict between the Anglo-Saxon Protestant "pietist" and the Continental European Catholic and Lutheran immigrant "liturgicals" played a major role in immigration laws, women's suffrage, and acceptance of birth control. As liturgicals became more numerous, the pietists sought to counter the liturgicals' increasing political strength by manipulating immigration and state voting laws which disenfranchised aliens. Women's suffrage was important because while Protestant women were likely to vote and be politically active, Catholic women were more likely to remain home in their traditional role. Widespread use of birth control was considered by some to be a potential method of curbing the high birthrate among Catholics and immigrants.

Chapter five, by Barry W. Poulson, discusses the change in America from private and family education to public education. Poulson notes those behind the public education movement and evaluates their motives. Poulson writes: "Underlying the demands for educational reform was a hidden agenda for the common school movement. That hidden agenda included a diverse range of goals to be achieved by shifting responsibility for education from the family to the state. The particular goals, of course, depended upon the interest group concerned."[33] The overriding goal was to use public education to advance "social progress."[34] Of course, the difficulty is that the ruling elite's definition of social progress may not be in harmony with a particular group or family's values. Public schools are not as responsive to parents' wishes as church and other private schools which they replaced. Because everyone is taxed to support public schools, people are unable to simply withdraw their children from school and place them in a private school when the parent becomes displeased with the public schools.[35] Poulson's main concern is the impact of public education on the family and education of individuals.

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32. *Id.*

33. Poulson, *Education and the Family During the Industrial Revolution*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 152.

34. *Id.*

35. Average Americans, one could argue, generally cannot afford to pay for both public schools through their taxes and private schools by paying tuition.

C. *The Impact of Economic and Social Policy on Family Life*

In chapter ten, Lowell Gallaway and Richard Vedder investigate possible economic factors which impact divorce in this country.[36] They recognize that several economic factors are important in explaining the divorce rate, but they confine their discussion to the impact of inflation upon the divorce rate. They attempt to harness economic statistics and historical divorce rates to show that unanticipated inflation has increased the divorce rate in this country.[37]

Chapter eleven, by Dwight R. Lee, attacks government policy which has distorted the family housing market and led to inefficiencies in the overall economy.[38] The policy's aim is to encourage home ownership by the greatest number of citizens possible. This policy includes tax inducements to home purchasers and programs to assign home buyers. Lee's argument is stated simply:

> The effect of artificially encouraging homeownership has worked, at least over the short run, by creating what might be considered relatively mild distortions in the allocation of resources. Over the longer run, however, housing policy has combined with undisciplined macroeconomic policy to generate economic dislocations of major significance. The result has been an undermining of the productive potential of the economy, which has not only been disastrous to economic performance in general, but has also frustrated the very objectives housing policy was supposed to accomplish.[39]

Government housing policy is an example of how the state indirectly affects the family.

Chapter twelve, by Jacqueline R. Kasun, is a most provocative and telling chapter. Kasun takes to task proponents of family planning for their campaign of misinformation and unbridled attack on the family.[40] Kasun argues that government programs to control teenage pregnancy established in the 1960s and early

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36. Gallaway & Vedder, *Inflation, Migration, and Divorce in Contemporary America*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 285.

37. *Id.* at 288-93.

38. Lee, *Government Policy and the Distortions in Family Housing*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 309.

39. *Id.* at 310.

40. Kasun, *The State and Adolescent Sexual Behavior*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 329.

1970s were nothing less than attempts to bring down the overall population growth.[41] The federal government funded groups of self-proclaimed experts who easily marshalled the media and public opinion in opposition to the "epidemic" of teenage pregnancy. Kasun acknowledges that there were many teenage pregnancies but notes that many were to married teenage women. Moreover, fertility among teenagers was already declining and continues to decline at the same rate as fertility of all women generally.[42] Kasun notes: "Thus although young mothers are having fewer babies . . . they are having a markedly larger portion of them outside of marriage. If illegitimacy is a social problem, as most people believe, it is one that has grown *worse*—notably worse by one indicator—as government birth-control programs have expanded."[43]

Kasun directly attacks sex education in public schools and birth control programs and explains that the most notable effect of these programs is a dramatic increase in teenage abortion.[44] Kasun does not attempt to duck family planners' statistics and claims, but addresses them directly, points out their defects, and challenges them with competing studies.

In chapter thirteen, Brigitte Berger addresses the foster care system as an illustration of the limits of the welfare state.[45] State involvement in foster care brings questions of state involvement with the family into sharp focus. Undoubtedly, the state has the authority to remove a child from its parents when the well-being of the child is seriously endangered. The question becomes what form state action should take.

Berger is concerned with the shifting conceptualization of foster care. "Instead of providing relief, we now speak of 'rehabilitation'; instead of giving support, we now supply 'services.' "[46] As a result, foster care has become more of "a permanent way of life with service professionals as permanent fixtures."[47] Berger observes that the state's foster care program is not meeting the needs of children.

Berger does not argue for more government spending or

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41. *Id.* at 332.
42. *Id.* at 334-36.
43. *Id.* at 335 (emphasis in original).
44. *Id.* at 354.
45. Berger, *On the Limits of the Welfare State: The Case of Foster Care*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 365.
46. *Id.* at 367.
47. *Id.*

more programs. On the contrary, decreasing regulation of private adoption and placement, encouraging involvement of private organizations, and placing greater reliance upon "mediating structures"[48] are her answer.[49]

Chapter fourteen, by Gregory B. Christainsen and Walter E. Williams, deals with the effect state welfare has upon out-of-wedlock births.[50] The authors' main purpose, however, is to explore institutional arrangements as alternatives to our current welfare programs, and to consider these alternatives' impact upon out-of-wedlock births. The data presented appears to be inconclusive as to the effects of different welfare programs on out-of-wedlock births.

The authors consider proposals to turn over all welfare programs to state and local governments. Another proposal discussed suggests a constitutional mandate which forbids redistribution of wealth altogether. Under such a scheme, private individuals will naturally redistribute their own wealth in a more cost efficient manner than the state. The authors do not appear to fully endorse this alternative but wish to encourage discussion and reconsideration of basic assumptions about the state's role in redistributing wealth.

The final chapter of the book, by J. Craig Peery, discusses the private sector's role in providing support to families.[51] Peery notes that government has long neglected consideration of the family in its policymaking and recognizes that the private sector has numerous programs which assist families much more efficiently than government programs. Peery argues that rather than increasing public programs to assist families, the government should seek to foster an environment which encourages the private sector to develop more programs to assist the family.[52]

III. Legal Status of Personal Relationships

Chapters six through nine deal directly with legal issues and

48. Mediating structures are groups or organizations—such as "ethnic or racial subcultures, neighborhood, church, and voluntary associations"—which provide either formal or informal support to individuals or families. *Id.* at 378; *see also* P. Berger & R. Neuhaus, To Empower People (1976).

49. Berger, *supra* note 45, at 373-79.

50. Christainsen & Williams, *Welfare, Family Cohesiveness, and Out-of-Wedlock Births*, in The American Family and the State, *supra* note 1, at 381.

51. Peery, *The Family: Federal Policy and Private Alternatives*, in The American Family and the State, *supra* note 1, at 425.

52. *Id.* at 438-41.

the family. This section of the note will briefly summarize chapters eight and nine before attempting in-depth discussions of chapters six and seven.

Chapter eight[53] is based on the theory of contract in marriage. The theory of contract is discussed more thoroughly in chapter seven. Chapter eight, by Paul Horton and Lawrence Alexander, is descriptive of the state of marriage in society today. The main thrust of the chapter is summed up by the authors in one sentence: "We believe commentators may have leaped too quickly from the perceived withdrawal of state control to the arrival of freedom of contract for the family."[54] The chapter recognizes societal changes in attitudes toward marriage which have led to increased freedom of contract for the family but asserts that this increased freedom of contract should not be attributed to any increased state respect for freedom of contract, but rather to broader changes in society.

Chapter nine by John M. Johnson, discusses "the changing concept of child abuse."[55] This chapter is mentioned only briefly in this note because although focusing on child abuse legislation, the chapter is not a legal discussion but a social and historical analysis. Johnson looks at the history of child abuse and focuses on the high visibility and national concern which has surfaced in recent decades. Johnson also discusses development of legislation and political definitions of abuse which developed in response to this national concern.

A. Individual Rights Versus the Collectivism

In chapter six, Henry Mark Holzer explores and vigorously attacks philosophic assumptions underlying United States Supreme Court jurisprudence.[56] Holzer attacks the Supreme Court, which he believes tolerates expansive state power at the expense of individual liberty. Holzer points to numerous, seemingly arbitrary and often inconsistent decisions based upon collective notions of morality.[57]

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53. Horton & Alexander, *Freedom of Contract and the Family: A Skeptical Appraisal*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 229.

54. *Id.* at 231.

55. Johnson, *The Changing Concept of Child Abuse and Its Impact on the Integrity of Family Life*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 257.

56. Holzer, *Philosophic Assumptions of Some Contemporary Judicial Doctrines*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 165.

57. *Id.* at 166-68.

Holzer bemoans the ethical doctrines of altruism and collectivism and their enforcement by means of statist government.[58] Altruism is "unselfish regard for or devotion to the welfare of others,"[59] while collectivism is "a political or economic theory advocating collective control."[60] Holzer objects to the collective (majority) imposing its ethical, moral judgment of what is good for society as a whole upon individuals.

Holzer chooses three areas of case law for analysis: marriage, definition of the family, and procreation. Holzer first turns to *Reynolds v. United States*,[61] which upheld the federal statute outlawing polygamy. Despite a claim of free exercise of religion, the Court held that members of the Church of Jesus Christ of Latter-day Saints (Mormons) could not practice polygamy. Why? Because, as Holzer notes, polygamy is "an offense against society."[62] "'Society' (lots of other people, but not the Mormons) opposed polygamy; therefore, society's values had to prevail. Since Mormon values, then, were to be sacrificed, the Court was doing so in the name of altruism."[63] The majority's notion of what was a proper marriage was enforced upon a dissenting minority.

The courts have also imposed the collectivist will by approving restrictive definitions of the family which serve governmental purposes.[64] Even where the Court struck down an overly restrictive statutory definition of the family,[65] the Court's rationale "rested not on any proper, defensible theory of family, but on naked, traditional collectivism."[66] To Holzer, the offending passage reads:

> 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.[67]

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58. *Id.* at 166.
59. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 76 (1988).
60. *Id.* at 259.
61. 98 U.S. 145 (1878).
62. Holzer, *supra* note 56, at 172.
63. *Id.*
64. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 12 (1974); Holzer, *supra* note 56, at 175.
65. Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).
66. Holzer, *supra* note 56, at 176.
67. *Moore*, 431 U.S. at 503; *see* Holzer, *supra* note 56, at 176.

Cases concerning procreation are similarly disheartening to Holzer. Holzer enthusiastically approves of the outcomes in *Griswold v. Connecticut*[68] and *Roe v. Wade*,[69] but he vigorously objects to the rationale of these cases. In *Griswold*, the Court struck down a law prohibiting the use of contraceptives. Holzer attacks the creation of an ill-defined "right of privacy" *ex nihilo*. He also objects to finding the right in the ill-defined concept of "fundamental rights." Allowing the "traditions and collective conscience of our people"[70] to define what fundamental rights are covered by the Constitution invites the collective (society) to define those rights.

Holzer objects to the same altruist-collectivist rationale in *Roe*. Again he rejects the amorphous "right of privacy," which is nowhere in the Constitution.[71] The language of the *Roe* opinion is heavy-laden with discussion of balancing the legitimate state interests against the constitutional right to privacy. For Holzer, there should be no balancing but only recognition of the individual's right to choose; a balancing test is as good as no protection at all. Holzer criticizes a balancing test because he see the following scenario:

> This time around—in this case—antiabortion laws have been struck down and some women permitted to have abortions. Next time around—in some future case—antiabortion laws may be upheld and no women permitted to have abortions. The time after next—depending on the current "state interest"—women may even be *compelled* to abort.[72]

Undoubtedly Holzer would see *Webster v. Reproductive Health Services*[73] as yet another case based upon the same collectivist rationale and a reaffirmation of his distrust of "legitimate state interest" arguments. Holzer, apparently, would rather use a due process analysis which would emphasize individual rights to find an unquestionable right to abortion and contraception.[74] Holzer argues: "Perhaps most people have lost sight of the fact that

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68. 381 U.S. 479 (1965).
69. 410 U.S. 113 (1973).
70. *Griswold*, 381 U.S. at 493.
71. Holzer, *supra* note 56, at 183-84.
72. *Id.* at 187-88 (emphasis in original).
73. 492 U.S. 490 (1989).
74. *See* Holzer, *supra* note 56, at 176-77, 184-85.

rights flow, not from accommodation, compromise, or 'balancing,' but from defensible moral principle."[75]

Sterilization is another topic which the courts have improperly dealt with. In some cases, the courts have upheld the practice for the "public welfare."[76] Holzer notes that "today fully half of the states in America . . . still have laws on their books allowing for the involuntary sterilization of 'incompetents.' "[77]

In conclusion Holzer complains,

> [i]t is not a pleasant story, this relentless violation of individual (and by implication, family) rights by the principal sworn to uphold them . . . . Some of the most important choices we make as human beings are being significantly controlled by the government in the name of others' values. And they will continue to be--until we replace that government control with an unyielding commitment to individual rights.[78]

B. Individual Rights Panacea?

Holzer's contribution to the book is engaging and raises valid issues which merit attention. So long as the majority is allowed to define societal norms and the state is able to articulate a "legitimate state interest" based upon those societal norms, individual liberties will be in jeopardy.

But before adopting Holzer's approach of absolute respect for individual rights, the possible implications of such an approach should be explored. Professor Mary Ann Glendon cautions that people have a tendency when speaking of rights to "exaggerate the absoluteness of whatever right is under discussion at the moment."[79] She notes two other problems with many discussions of individual rights. First, "hyper-individualism": "We tend to envision the possessor of rights—like women in the abortion cases—as a person alone against the world—with no family, no community, no relationships and no responsibilities."[80] (To Holzer this would be simply more altruist-collectivism.) Second, the "tendency to consider the immediate benefits to be secured by rights without reckoning their long-term

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75. *Id.* at 187.
76. *Id.* at 190.
77. *Id.* at 191.
78. *Id.* at 193.
79. Address by Professor Mary Ann Glendon, Brigham Young University Commencement Exercises (April 26, 1990).
80. *Id.*

costs."[81] Glendon, therefore, concludes that "in a well-intentioned effort to protect individuals, [we] may be withdrawing support from, and undervaluing, the long-term conditions—stable families, the vital communities and the strong religious associations on which all human freedom and security ultimately depend."[82]

Holzer's absolute emphasis on individual rights has important implications. Perhaps individual rights are not absolute and *should not* be absolute. We live in a community of individuals which requires order and some limitations on individual liberty for the good of the whole. We agree to obey traffic laws to facilitate safe and orderly movement of traffic. Traffic laws, to a small degree, limit our individual right of movement. The individual right of freedom of speech can be limited, for example, in cases of "fighting words" or obscenity.[83] People are required to pay income tax (and at different, arbitrary rates) which directly impacts an individual's right to property, yet few seriously argue that the state may not tax individuals. Moreover, we do not have the right to harm others in ways that will limit their liberty. Hopefully, Holzer would recognize that individual rights have some limits.

Once one recognizes that individual rights do have their limits, resort to a balancing test with legitimate state interests is unavoidable. How else does a court determine the proper limit or scope of individual rights? Holzer argues against this balancing of the individual's right with the legitimate state interest, but what alternative is there given that individual rights are not absolute? Perhaps Holzer would argue that individual rights are absolute; but if they are absolute, how do we justify protecting people against each other and limiting their rights?

One threshold question not discussed by Holzer is just what are "individual rights?" The right to be left alone? The right to do what we wish? The right to use our bodies as we choose? The rights found expressly in the Bill of Rights? Or is the scope of these rights defined by what most people (the collective) would consider fundamental to their liberty? Accordingly, the scope of the term "individual rights" needs to be defined.

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81. *Id.*

82. *Id.*

83. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Holzer, in another work, criticizes *Chaplinsky*, and apparently believes that obscenity is protected by the first amendment. *See* H. HOLZER, SWEET LAND OF LIBERTY? 73-90 (1983).

Holzer argues for greater protection to families by protecting individuals. However, the family which Holzer would protect in many cases would not be the traditional family, but one of a different variety—a family which perhaps would not merit protection. For example, in *Reynolds*, the Court recognized the value of the traditional family throughout history and sought to protect it by allowing the elected legislative body to illegalize nontraditional forms of marriage (at least nontraditional to western cultures). If, as Holzer's argument suggests, any form of marriage and sexual conduct must be legally recognized or at least allowed, the traditional family, which most people (admittedly the "collective") would agree has great value to society, would be undermined.

Under Holzer's rationale, *Bowers v. Hardwick*,[84] which sustains Georgia's anti-sodomy statute, is an unjustifiable assault on individual rights and simply one more manifestation of the altruist-collectivist ethic which is the basis for Supreme Court decisions. According to Holzer's rationale, the majority does not have the right to outlaw sodomy merely because the majority finds the practice morally "wrong." In *Bowers*, Justice White, writing for the Court, expressly approves the concept that laws which are simply moral choices may be constitutionally firm. Justice White noted:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than a presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.[85]

Under Holzer's rationale, no justification or legitimate state interest would permit the state to discourage sodomy.[86] Furthermore, the state could not prefer traditional heterosexual marriage over homosexual marriage. This rationale might also lead to the adoption of children by homosexual couples. Holzer's ra-

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84. 478 U.S. 186 (1986).

85. *Id.* at 196.

86. For Holzer's views of the anti-sodomy laws, see H. HOLZER, *supra* note 83, at 93-99.

tionale would also suggest that the state may not forbid prostitution.

The deification of individual rights appears to require the legalization of plural marriage, group marriage and homosexual marriage. Legitimization of such relationships would inevitably encourage their frequency at the expense of the traditional family. The traditional family provides a stable environment for raising and rearing children and a mode for passing on cultural values. Granted, any particular individual may disapprove of some of these cultural values, but most would agree that many values are worth passing on to future generations, and the traditional family is a vehicle for transmitting those values. True, some nontraditional family arrangements might be successful in transmitting these values, but the traditional family, which transcends cultures and political systems, has a proven track record.

Holzer's rationale in this chapter is applied to family related topics, but the rationale appears to apply to other areas of the law. For example, one might ask whether gambling could be forbidden if individual rights are supreme over more generalized societal concerns. Also, if individual rights are the only consideration, could suicide by a "rational" individual be prohibited? Also, in the area of commerce, could the collective, acting through state police powers, limit the number of hours a worker contracts to work? Where does this analysis stop? At what point do the state's needs become relevant and allow limiting individual rights?

Granted, these criticisms can be written off as more traditional collectivism; the point is, maybe traditional collectivism has some justification. If the state perceives from data or experience that the traditional family is an important institution, basic to the foundations of our society, why should we say that the state may not legislate to encourage the traditional family? The specific rights of the Constitution and the Bill of Rights remain intact to protect against infringement in many areas, and the amorphous right of privacy provides additional protection. To assert that the Bill of Rights' protections are essentially no protection to individual rights is inaccurate and unfair. New protections should not be created by asking judges to emphasize individual rights.

If, in fact, the state is right and the traditional family is valuable, the state has, arguably, improved society (and therefore individuals) by encouraging the traditional family. If, how-

ever, the state is wrong in its altruist-collectivist judgment, individual rights are limited or denied and individualism is stifled. In my view, if the state is wrong in its collectivist judgment about the traditional family, then the minority should seek to marshall the evidence and the power of persuasion to effect change in the laws and convince the collectivist state.

Holzer, in applying his recommendation to procreative rights, does not deal with a number of issues. He approves the "restoration" of procreational freedom under *Griswold v. Connecticut* and *Roe v. Wade* as correct results but criticizes the constitutional and rational basis of these decisions. The right of privacy relies upon the collective's judgment. Under Holzer's approach, these decisions should be decided based upon the principle of individual rights. Holzer, however, does not state under what constitutional framework he would find broadly defined individual rights supreme. For example, applying either a strict constructionist view or the Supreme Court's view, laws forbidding sodomy and fornication have stood from the adoption of the Constitution to the present.[87] Clearly, the Constitution and its amendments were not intended to overrule those laws.[88]

Holzer also assumes that the adoption of an individual rights framework would unquestionably guarantee the right to abortion. If, however, individual rights are supreme, when does the fetus become an individual whose rights merit protection? Holzer does not deal with this question. Does the fetus become an individual at birth and only then merit the protection of the state against abuse or premature death? What about the day before birth? Is the unborn, yet viable, fetus subject to an abortion up to the moment of birth? Or does birth even make a difference? Maybe a baby does not obtain the status of "individual" until sometime after birth. Some states may view a fetus as an "individual" during the first or second trimester. Are these states forbidden under Holzer's approach from extending individual rights to the defenseless unborn? If the state has the right to protect minor children, why can't the state protect un-

87. *See* Bowers v. Hardwick, 478 U.S. 186, 192-93 (1986) (giving the long history of criminal sodomy laws); *id.* at 197 (Burger, C.J., concurring); Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 253-54 (1978) (regarding fornication).

88. The Supreme Court agrees that the Constitution does not prohibit laws against sodomy, fornication or adultery. Bowers v. Hardwick, 478 U.S. 186 (1986) (regarding sodomy); Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (regarding adultery and fornication).

born children? One presumes much to assert that "an unyielding commitment to individual rights"[89] would guarantee abortion rights.

Beyond the question of whether abortion is available, may abortion even be regulated? Holzer hints that individual procreative rights are so important that regulation of abortion would be inappropriate.[90] However, a strong commitment to individual rights does not grapple with the issue of parental consent for minors seeking abortions or abortion counseling. Surely an individual rights framework does not automatically trump parents' rights to influence and interfere with decisions of minors.

Holzer's chapter raises important issues and has far-reaching implications. Of course, Holzer was limited to one chapter in which to engage the reader, and he could not go into great depth in exploring the scope of his ideas.[91] His suggestions, however, must be carefully considered with a view to the possible implications of implementing his suggestions.

C. *Natural Rights Framework and Freedom of Contract*

Chapter seven, by Roger A. Arnold, suggests a natural rights framework as a basis for marriage and divorce law.[92] Arnold briefly reviews the history of marriage and then discusses the state's involvement in the marriage contract. He notes:

> As far as the 'public policy doctrine' goes, courts have had a history of ruling on matters of marriage and divorce with one eye open—if not two—to the effects on the public. They have, without any embarrassment whatsoever, been willing to state that society has a decision-making role to play with respect to the marriage between two individuals.[93]

Specifically, courts have been skeptical of antenuptial agreements and have often refused to enforce them, noting that contracts in contemplation of divorce are against public policy because their enforcement would make divorce more likely.[94]

Arnold argues that failure to recognize antenuptial agree-

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89. Holzer, *supra* note 56, at 193.

90. *See generally id.* at 176-88.

91. For a greater understanding of Holzer's concerns and rationale, see H. HOLZER, *supra* note 83.

92. Arnold, *Marriage, Divorce, and Property Rights: A Natural Rights Framework*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 195.

93. *Id.* at 201.

94. *Id.* at 202.

ments in fact discourages marriage. Discouraging marriage has some of the same effects as encouraging divorce—fewer marriages. Arnold suggests that antenuptial agreements be recognized and enforced. However, Arnold fails to adequately recognize that discouraging marriage and encouraging divorce have different impacts. A divorce can have many more harmful effects than failure to marry. In a divorce, not only the divorcing parties suffer, but children who have been born to that marriage suffer, and their lives will be heavily impacted. Furthermore, no support is provided, other than logical assumption, for the proposition that any significant number of marriages are discouraged by refusing to enforce antenuptial agreements. It is unlikely that marriage is often so rational and calculated that the prospects of uncertain enforcement of an antenuptial agreement is any obstacle. Encouraging marriage is not a strong rationale supporting legal recognition of antenuptial contracts.

Arnold notes that the state-imposed marriage contract may discriminate against atypical couples[95] and argues that in these atypical cases, marriage is less likely to occur due to failure to recognize antenuptial contracts. Again, Arnold provides logical explanations to support this assertion, but no actual examples, studies, or statistics are provided. It may be that Arnold overestimates the significance of failure to reach an enforceable legal contract.[96]

Whether or not agreements are legally enforceable, an atypical couple who wish to enter into a formal arrangement would have to negotiate an agreement to their satisfaction. In fact, all couples must enter into some agreements, formal or informal, to accommodate each other—where to live, how to divide the domestic duties, who will provide income, how the income will be spent, when and if to have children. Marriage is full of agreements which do not require legal recognition to satisfy the parties. Perhaps a greater obstacle to marriage is not the nonenforceability of antenuptial agreements or other marital contracts, but rather the inability to agree and live up to those agreements.

When the law refuses to enforce antenuptial agreements, it simply says that the law does not want to encourage those agree-

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95. *Id.* at 203-04.

96. *See* Horton & Alexander, *Freedom of Contract and the Family: A Skeptical Appraisal*, in THE AMERICAN FAMILY AND THE STATE, *supra* note 1, at 241 (discussing the concept of legal enforceability).

ments because the resulting in-depth negotiations may cause contention and stress, thereby discouraging marriage. Moreover, the contracts may cause marital strife as circumstances and perceptions change after marriage. Perhaps it is better to allow the parties to enter into marriage and then work out on an ad hoc basis a flexible, workable contract. The contract would then be subject to frequent, informal renegotiation not clouded by any threats of legal enforceability.

Arnold argues that marriage should be viewed in a natural rights context. These natural rights are: "1. The right to self-ownership. 2. The right to previously unowned natural resources that a person first occupies and brings into use. . . . 3. The right to make contracts that concern his property."[97]

Arnold argues that limiting recognition of marriage to a state-imposed marriage contract infringes upon an individual's natural rights. Freedom of contract in the marriage should, therefore, be encouraged.[98] Arnold acknowledges two main arguments against allowing freedom of contract in marriage. First, marriage and divorce affect third parties, and therefore, state regulation is appropriate (the externality argument).[99] Second, a negotiable marriage contract is subject to abuse due to unequal bargaining power of the parties.[100]

Regarding the externality argument, Arnold recognizes in a footnote, that to an extent, this argument is well founded. He states: "Some will say that courts should concern themselves with third-party effects if, for example, the third parties are children (within the marriage). There is little disagreement with this. However, many of the third-party effects that courts have dealt with have had nothing to do with children (within the marriage)."[101] Arnold believes that the only time the state should protect individuals against others is when natural rights are infringed.

Arnold also dismisses the unequal bargaining power argument. He states:

> The "unequal bargaining power" argument has too long been the rationale for negating the absolute freedom of contract. But not only can unequal bargaining power not be

97. Arnold, *supra* note 92, at 210-11 (footnotes omitted).
98. *Id.* at 226.
99. *Id.* at 211.
100. *Id.* at 214.
101. *Id.* at 211 n.40.

> proved, even if we assume that it does exist in certain cases, this is no reason to abrogate the absolute freedom to contract. In a world where freedom to contract were allowed, individuals planning marriage would no doubt write their own contracts—but not usually without expert assistance.[102]

Lawyers should love this concept; not only do people need lawyers to get divorces and write wills, but now lawyers are to become an integral party of a typical marriage as well. To solve the unequal bargaining power problem, both sides would require separate counsel to be certain each side is fairly represented. Furthermore, divorce litigation might become more interesting (and lengthy) as, rather than applying standard legal principles surrounding marriage, contract law concepts would govern. Then, unequal bargaining power, fraud, deceit, breach and damages could all be fully litigated.

Arnold's approach, however, has several limitations. In a marriage context, emotions play an important role; these emotions are not present in typical contract settings. The presence of "expert assistance" does not necessarily mitigate this vulnerability because the weaker party will ultimately feel compelled to capitulate, even over the objections of counsel. After all, the goal is to get married, not to resolve hypothetical or future problems. Also, feelings and perceptions change after entering into marriage, and one of the parties who accepted terms in the contract may become dissatisfied and wish to renegotiate. By legally formalizing the whole process, renegotiation becomes more difficult and costly. Furthermore, parties to a marriage are not totally analogous to partners in a business relationship or parties to a commercial contract. True, business partners may work together closely over a long period of years, but marriage is different. A marriage relationship is much more intimate and requires closer and more frequent contact. For example, the task of raising children is not the same as training employees or producing widgets.

Arnold's natural rights framework also addresses the status of children in a family.[103] In a natural rights framework, children are property, and parents hold the property rights. This concept, however, is subject to a major qualification which Arnold acknowledges in a footnote:

> Parents are not absolute owners, but simply trustee own-

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102. *Id.* at 216.
103. *Id.* at 222.

> ers. This distinction is an important one, because if parents were absolute owners, they could do anything they wanted to with their children. Since children are potential adults and, as such, full possessors and exercisers of natural rights, they cannot be owned in an absolute sense, even during that time when they cannot exercise their own natural rights.[104]

Arnold claims that each parent has "homesteading rights" in their children, with the mother claiming the major property right (due to the nine months that the mother carries the child). As a result, women as majority owners should have custody in a divorce.

It is not clear why the nine months that the mother carries the child automatically grants her a greater property interest in the child than the father. Apparently a first in time rationale is determinative. But even applying homesteading concepts, the mother's right is not clear. In a typical property context, the homesteader must make affirmative acts to establish his or her homestead rights. In the child bearing context, after conception in which both partners have an equal role, the woman, by taking no affirmative acts, has "homesteaded" the child. Such a result seems inconsistent with property rights concepts.

Arnold's chapter is interesting and thought provoking. His work provides an enlightening view of the family and the state's regulation of the family, but his framework has limitations.

IV. Conclusion

The American Family and the State covers a wide spectrum of family topics. The book demands consideration by individuals, policymakers and scholars. All the authors seem to agree that the family as an institution is valuable, and they point out that more needs to be done to allow the family to function uninhibited by state interference. The state's policies do affect the family, and it is time to consider those effects and rethink some established state policies.

Reviewed by Craig W. Dallon

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104. *Id.* at 223 n.61.