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Individualism and Autonomy in Family Law: The Waning of Belonging

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SYMPOSIUM ON FAMILY LAW

Introduction

Individualism and Autonomy in Family Law: The Waning of Belonging

*Bruce C. Hafen**

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* Provost and Professor of Law, Brigham Young University. I presented an earlier version of portions of this Article in November, 1989, to an interdisciplinary conference at Stanford University sponsored by Stanford's Center for the Study of Families, Children and Youth; the Institute for American Values in New York City; and the William Petschek National Jewish Family Center in New York City. That paper is included, along with others from that conference, in *Rebuilding the Nest: A New Commitment to the American Family* (D. Blankenhorn, S. Bayme, & J. Elshtain eds. 1990). A still earlier version of the section on autonomy was part of a paper I presented at a symposium on the Twentieth Anniversary of the Encyclical Humanae Vitae at Princeton University in August, 1988, sponsored by the Roman Academic Center Foundation and the Aquinas Institute. I express appreciation to the participants and sponsors at both conferences for their support and for their constructive suggestions. Additionally, I thank Mark Hutchinson for research assistance.

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INTRODUCTION

With some variations, most of the articles in this symposium issue were originally presented in a Family Law Symposium at Brigham Young University's J. Reuben Clark Law School in October, 1990. The conference audience included scholars, students, and practitioners of both law and the social sciences. Rather than summarize the other articles, this introductory Article will offer a general perspective on what has become a dominant background theme underlying many specific family law issues, including those presented in this symposium on divorce and children's rights: individualistic autonomy vs. the idea of "belonging."

In family law, as in family life, the individualistic cultural currents of the past quarter century have eroded the mortar of personal commitment that traditionally held the building blocks of family life—people—together in intimate relationships. Fortunately, an emerging body of family law scholarship is beginning to challenge the sources and implications of this trend.

For example, Carl Schneider, who presented a paper at the instant symposium and was one of its informal co-organizers, elsewhere has thoughtfully traced the recent decline in family law's "moral discourse." He noted that Americans' growing acceptance of the self-contradictory notion of "nonbinding commitments" has begun to strip our attitudes toward family life of a sense of "prolonged responsibility."[1] The increasingly obvious

1. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1855-60 (1985).

limitations of rights-oriented liberation models have also led Katharine Bartlett to propose that we seek family law perspectives based on "notions of benevolence and responsibility" that "reinforce parental dispositions toward generosity and other-directedness" rather than "parental possessiveness and self-centeredness."[2] Similarly, Martha Minow has stressed that "belonging is essential to becoming";[3] therefore, our approach to divorce reform must beware of creating "obstacles to affiliation" that underestimate "the dependence of freedom itself on interpersonal connections."[4]

To probe the assumptions underlying an entire generation of wrenching legal and social change is a daunting task for family law scholarship, if only because those assumptions now seem so widely, even if often uncritically, accepted. We are dealing here not with short-range statutory tinkering, but with the "*transformation* of family law,"[5] a development so far-reaching as to be "the most fundamental shift [in the state's legal posture toward the family] since . . . the Protestant Reformation."[6] A movement so massive is terribly complex in both its causes and its effects, and we can unpack such complexity only one modest increment at a time.

In that spirit, this Article of consciously limited scope barely touches one of the "transformation's" major themes—the emergence of autonomous individualism. This theme has implications across the entire spectrum of legal subject matter and political theory, but it is relevant to family law because the changes of the past generation have produced what Martha Minow calls "[a] body of family law that protects only the autonomous self"—an orientation that fails "to nurture the relationships between individuals that constitute families."[7] I will discuss three variations on this theme: autonomy as a constitutional concept, the recent shift from "familistic" to "contractual" attitudes in family relationships, and a general observation about "the waning of belonging."

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2. Bartlett, *Re-expressing Parenthood*, 98 YALE L.J. 293, 294 (1988).

3. Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894.

4. Minow, *Consider the Consequences* (Book Review), 84 MICH. L. REV. 900, 918 (1986) (reviewing L. WEITZMAN, THE DIVORCE REVOLUTION (1985)).

5. M. GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989); Schneider, *supra* note 1, at 1803.

6. M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 63 (1987).

7. Minow, *supra* note 3, at 894.

I. Autonomy as a Constitutional Concept

A. The Historical Decline of Community Interests

A natural and usually desirable tension has always existed between individual and community interests. Traditionally, the family mediated between these two interests as a legal and even political entity[8] that protected the autonomous development of personal values and preferences among family members, while also teaching the value of belonging to a larger social order.

Over time, history has witnessed a gradual decline in the community's legal and social significance. As Robert Nisbet put it, in a broad sense, all of Western history represents "the decline of community."[9] As part of this process, the family's role as a legal institution has correspondingly declined, as reflected in Sir Henry Maine's generalization: "The movement of the progressive societies has . . . been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. . . . The [legal and social] unit of an ancient society was the Family, of a modern society the Individual."[10]

Despite the gradual development of this historical current, and despite a gradual narrowing of the economic functions performed by families during the past century, American laws and judicial decisions continued until well past 1950 to be premised on our fairly stable nineteenth century family law inheritance. That traditional model took for granted that the family's institutional character and its nurturing of other-directed values represented an ideal paradigm for the *domestic* realm, even though the presuppositions of nineteenth century American *economic* and *political* thought were grounded in the less altruistic concept of individualistic self-interest. However, the individual rights movements of the 1960s and 1970s launched a forceful attack upon both the family's institutional authority and the cultural norms on which that authority was based. This development was not primarily the result of conscious and documented dissatisfaction with existing patterns in family law; rather, the family was only one of many institutions whose authoritarian and role-oriented traditions were subjected to the searching

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8. *See* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 479-84 (1983).

9. R. Nisbet, The Quest for Community 75 (1953).

10. H. Maine, Ancient Law 163 (1st Am. ed. 1870).

scrutiny of a general social and political movement that viewed the family's "vital role in authoritarianism" as "entirely repugnant to the free soul in our age."[11]

In American family law's post-1960 transformation, Carl Schneider sees two primary themes: "a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated."[12] As a result of these legal shifts, our once idealistic attitudes toward marital commitments, spousal support obligations, and sexual behavior outside marriage have been replaced by a more realistic ethic that is far less judgmental and demanding. Courts are now less likely to rely on moralistic language or moral judgments in the entire range of domestic relations issues, from divorce to child custody and child neglect.

In addition, family law now reflects less confidence in the value of marriage-and-kinship-based models of family form, in part because of increased sensitivity to those who have felt the social disapproval of not fitting ideal patterns. Indeed, the legal system is generally less confident about the normative posture of many former notions of morality and ideal behavior, even in the context of criminal law.[13]

These developments are not merely reflections of reduced attention to moral standards as such. They also mirror a new level of concern with American society's increasing heterogeneity, which has made courts and legislatures reluctant to impose values other than tolerance, equality, and individual liberty. Judges and legislators have welcomed this "posture of legal neutrality," because they are "otherwise hard put to justify preferring the values of one sector of the population to those of another."[14] Whatever its causes, our declining confidence in ideal forms seems more the result of recent, general trends in modern law than the result of conscious policy choices that balance the costs and benefits of traditional models in family law. For this reason, many "normative legal propositions" in family law "have tended to be phased out" in recent years "even when they are quite widely shared."[15]

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11. Adams, *The Infant, the Family and Society*, in CHILDREN'S RIGHTS 51 (1971).
12. Schneider, *supra* note 1, at 1807-08.
13. *See* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 19-20 (1981).
14. M. GLENDON, *supra* note 5, at 297.
15. *Id.*

Thus, American law's extreme preoccupation with individual liberties virtually has captured the field of family law, much as it has captured the field of constitutional law. For example, Mary Ann Glendon's recent comparative study found that, despite some sharing of common assumptions with other systems, American divorce law gives the individual greater freedom to terminate a marriage than do the laws of any other developed Western country.[16] The American approach also reflects a kind of "carelessness" about "the economic casualties of divorce [that is] unique among Western countries."[17] This extreme orientation toward individualism causes the natural and historic tension between individual interests and the interests of larger orders to lose its balance and, ultimately, to sever the connections between personal values and social values. European legal systems, in contrast,

> have imagined the human person as a free, self-determining individual, but also as a being defined in part through his relations with others. The individual is envisioned, more than in our [American] legal system, as situated within family and community; rights are viewed as inseparable from corresponding responsibilities; and . . . [p]ersonal values are regarded as higher than social values, but as rooted in them.[18]

These observations are of course subject to some qualification. Despite the pervasive and growing influence of individualistic tendencies, American family law has in some ways remained surprisingly resistant to the pressures of cultural fragmentation. As noted below,[19] the Supreme Court has not yet extended the concept of constitutional privacy to include sexual relations between unmarried adults. Moreover, even though the Court now protects certain personal decisions regarding the prevention and termination of pregnancy outside marriage, and even though it protects parent-child relationships outside marriage, it does not give preferred constitutional status to relationships between unmarried partners. Also, in spite of constitutional challenges, no state yet recognizes the legality of homosexual marriage. In addition, state laws that define the term "family" have remained relatively stable. The rights of

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16. M. GLENDON, *supra* note 6, at 78.
17. *Id.* at 105.
18. *Id.* at 113.
19. *See infra* notes 21-63 and accompanying text.

children and spouses under inheritance, tax, and wrongful death laws are confined to relationships based on marriage and/or kinship. Even the famous Lee Marvin "palimony" case in California was based on a contract theory, because the California Supreme Court did not equate cohabitation with marriage and it viewed the state's family law code as inapplicable.[20]

B. *Family-Related Interests and Autonomy in Constitutional Law*

Nonetheless, individualistic legal concepts borrowed primarily from the context of constitutional law heavily influence the way modern courts and legislatures approach family-related issues. Constitutional doctrines underscore individual interests largely because the potent political theory of the American Constitution begins with natural rights as its major premise. Yet it is easy for the contemporary mind to forget that the concepts embodied in the Bill of Rights were originally intended to define only the *political* relationship between individual citizens and the State—not the domestic and personal relationships among the citizens themselves.[21]

In recent years, the U.S. Supreme Court has dealt in constitutional terms with so many family-related issues that we have witnessed what some scholars call "the constitutionalization of family law."[22] Because this process has drawn the Court into the larger debate over unenumerated rights and substantive due process, the justices' forays into the family cases have led them into uncharted territory. Here they often have found themselves (at times have nearly lost themselves) in impossible analytical thickets that can confuse more than clarify our understanding of the relationship between individual and community interests.[23] This confusion both reflects and amplifies the ambivalence of the surrounding culture about that same relationship. The debate over the status of personal autonomy in constitutional law is a prime example of such confusion.

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20. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

21. *See infra* note 123.

22. *See, e.g.*, Schneider, *supra* note 1, at 1872.

23. *See infra* notes 65-87 and accompanying text.

1. Bowers v. Hardwick, *privacy, and autonomy*

The Court's 1985 experience with *Bowers v. Hardwick*[24] revealed profound differences of opinion about both the meaning and the implications of personal autonomy. *Bowers* arose from these facts: a policeman in Georgia entered a dwelling looking for Michael Hardwick, who was wanted for questioning regarding a minor offense. Someone in the dwelling pointed toward a bedroom door. The policeman entered the bedroom, where he found Mr. Hardwick engaged in homosexual activity. The state conducted a preliminary hearing against Mr. Hardwick on the charge of violating Georgia's sodomy law, but decided to drop the charge rather than take it to a grand jury. Mr. Hardwick himself then brought suit in federal court to challenge the constitutionality of the law. The Eleventh Circuit eventually held the state statute unconstitutional on the ground that it violated Mr. Hardwick's fundamental rights of privacy and intimate association.[25]

In a controversial and highly publicized 1986 decision, the Supreme Court reversed the Eleventh Circuit's decision by a vote of five to four, holding that the constitutional right of privacy does not guarantee the right to engage in homosexual sodomy.[26] Justice White's majority opinion acknowledged that while no right of privacy is mentioned in the text of the Constitution, the Court's prior decisions, including *Roe v. Wade*,[27] did establish a constitutional right of privacy. However, wrote White, the right of privacy recognized in these prior cases was limited to circumstances involving the family, marriage, and procreation; and the rule of those cases does not extend to all forms of "private sexual conduct between consenting adults."[28]

The fifty or so privacy cases of which Justice White wrote involved illegitimacy, unwed fathers, foster parents, the right to marry, children's rights, contraception, and abortion. I have elsewhere summarized these cases in an attempt to provide a rationale for the distinction Justice White drew between, on the one hand, interests arising from marriage and kinship and, on the

24. 478 U.S. 186 (1986).

25. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, Bowers v. Hardwick, 478 U.S. 186 (1986).

26. *Bowers*, 478 U.S. at 186.

27. 410 U.S. 113 (1973).

28. *Bowers*, 478 U.S. at 191.

other, interests arising from sexual expression unrelated to marriage and kinship.[29]

Justice White expressed concern about the risks of subjective judicial lawmaking when a new substantive right is identified outside the express limits of the constitutional text. He noted that the Court "comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[30] In stating the test for determining when courts should recognize a right, such as privacy, that is not enumerated in the text of the Constitution, Justice White quoted earlier cases that establish such extraordinary protections only for personal liberties that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[31]

Justice White found that homosexual conduct, long rejected by Western culture as deviant behavior, did not fall within these categories.[32] The Court did not directly address the question whether the recognized area of constitutional protection would protect the sexual privacy of heterosexual, as distinguished from homosexual, unmarried adults. That issue could well become a major point of focus before some future Supreme Court. The question then would be whether the Court's treatment of *Bowers* was based primarily on Hardwick's sexual orientation, his status as a single person, or both.

Justice Blackmun, who had written for the majority in *Roe v. Wade*[33] thirteen years earlier, wrote a vigorous dissent speaking for four of the justices. He stated that Michael Hardwick's right to express his own sexual orientation and to choose his own form of intimate association is protected by " 'the most comprehensive of rights and the right most valued by civilized men,' namely, '*the right to be let alone.*' "[34] Justice Blackmun argued forcefully that this right of privacy protects one's intimate personal decisions, especially if those decisions involve conduct in one's own home.[35] He based this view on the premise that individual autonomy is a core constitutional right: "We protect

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29. *See* Hafen, *supra* note 8, at 463.
30. *Bowers*, 478 U.S. at 194.
31. *Id.* at 191-92.
32. *Id.* at 190-91.
33. 410 U.S. 113 (1973).
34. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (emphasis added).
35. *Id.* at 206-08.

those rights not because they contribute . . . to the general public welfare, but because they form so central a part of an individual's life."[36] Thus, Justice Blackmun reasoned, the Constitution protects the right to marry and to have children not because of society's interest in childbearing or "a preference for stereotypical households," but because "individuals define themselves in a significant way through their intimate sexual relationships with others."[37]

The Blackmun opinion expressly rejected the view that a long-established cultural consensus may determine the moral values of society: "[T]he fact that [homosexual acts] 'for hundreds of years, if not thousands, have been uniformly condemned as immoral' is [not] a sufficient reason to permit a State to ban them today."[38] Indeed, the dissent continued, the ultimate test of a constitutional freedom is whether it protects the personal "right to differ as to things that touch the heart of the existing order."[39] Having thus given personal autonomy a preeminent analytical position, the dissent then shifted the burden to the state to show a truly compelling interest that would justify intrusions on so fundamental a freedom.[40] None of the state's arguments about public morality and the interests of society rose to the demanding level of the Blackmun test, essentially because he found that the case involved "no real interference with the rights of others."[41]

Justice Blackmun's autonomy theory clearly reflects the dominant view of the literature in contemporary legal journals. Indeed, Laurence Tribe, a prolific scholar on such matters, wrote the brief and argued the case for Michael Hardwick. In addition, the Blackmun opinion is significant because it almost became a plurality opinion. The *Washington Post* reported shortly after the decision was announced that Justice Lewis Powell had originally voted to overturn the sodomy statute because it permitted what he thought was a cruel and unusual punishment; however, Justice Powell changed his mind for undisclosed reasons and eventually voted to uphold the statute.[42]

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36. *Id.* at 204.
37. *Id.* at 205.
38. *Id.* at 210.
39. *Id.* at 211.
40. *Id.*
41. *Id.* at 213.
42. Wash. Post, July 13, 1986, at A1.

2. Effects of judicial adoption of personal autonomy concepts

Prior to *Bowers*, most state and lower federal courts had not reached definitive decisions on sexual privacy issues. However, in 1980 the highest courts of two influential states, New York and Pennsylvania, upheld rights of non-marital sexual privacy among consenting adults. In the New York case, the court protected the right to seek "sexual gratification" in "private settings" that included vehicles parked on city streets in the early morning hours.[43] The Pennsylvania Supreme Court gave constitutional protection to sex acts performed in a public lounge between dancing performers and lounge patrons, holding that a law prohibiting deviate sex acts only between unmarried persons discriminated on the basis of marital status.[44]

Court decisions that constitutionally protect sexual behavior have a very different effect from legislative decisions that remove statutory penalties or otherwise "de-criminalize" sexual conduct. If a *legislature* removes criminal penalties against fornication, for instance, this action would protect unmarried cohabitants from prosecution for sexual acts; but it would not give their relationship the same constitutional status as marriage. Thus, decriminalization of fornication laws would not give unmarried couples such marriage-related legal rights as tax preferences, inheritance rights, or marital property interests. In addition, the state legislature would have an easier time imposing regulations that regard unmarried cohabitation as potentially harmful, even if it is not criminal. For example, even after repealing its criminal laws against fornication, a state could, upon a reasonable showing of potential harm, constitutionally prevent a child custody placement with a cohabiting parent, or it could decide not to hire pregnant but unmarried elementary school teachers because of their arguably bad example for impressionable students.

However, if a *court* finds that a state's fornication or sodomy laws violate a constitutional right of privacy and autonomy, sexual conduct between unmarried people would not just be legally *permitted*, but would be constitutionally *protected*. As a result, the state's interest in protecting traditional sexual morality in a variety of non-criminal ways would then be suspect, because regulation of custody placements or standards affecting

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43. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).
44. Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

the personal lives of school teachers would invade constitutional rights.

For example, after the New York Court of Appeals in 1980 struck down that state's anti-sodomy law on constitutional privacy grounds, a lower New York court permitted one adult homosexual to adopt another adult homosexual.[45] This decision in effect created a "family" relationship, even though homosexual marriage is not permitted in the state of New York. The lower court noted that pre-1980 New York case law would have barred such adoptions as violating public policy; however, it found that the Court of Appeals' 1980 sexual freedom opinion disposed of the public policy issue by conveying "eloquent pronouncements hav[ing] considerable import for the wider public policy considerations of public morality."[46] In 1989, the New York Court of Appeals further developed its earlier precedent by holding that the term "family" should not be construed so narrowly that it justifies the eviction of a homosexual companion from a rent-controlled apartment following his lover's AIDS-related death.[47]

In other words, the constitutional "protection" implied by *judicial* adoption of a personal autonomy theory as an extension of the right of privacy probably has broader social and legal effects than *legislative* action that merely "permits" sexual conduct. Thus, if the Supreme Court should overrule *Bowers* or if it should uphold a right of sexual privacy between unmarried heterosexual adults, marital status as a legislative category could become a relatively suspect classification in any policy context. Those who advocated Michael Hardwick's position undoubtedly understood this distinction between judicial and legislative action. Because no prosecution was actually pending, the case was not concerned with actually protecting Hardwick. Rather, the case was a forum for urging the Court to lead the way in shaping a new cultural consensus.

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45. *In re* Adoption of Adult Anonymous, 106 Misc. 2d 792, 435 N.Y.S.2d 527 (N.Y. Fam. Ct. 1981).

46. *Id.* at 798.

47. Braschi v. Stahl Assocs., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). The court was required to address the meaning of the word "family" because a New York City rent regulation provided that "upon the death of a rent-control tenant the landlord may not dispossess 'either the surviving spouse of the deceased tenant or some other member of the deceased tenant's *family.*' " *Id.* at 206 (citation omitted).

3. Autonomy and the source of cultural norms

A key issue arising from the constitutional questions in *Bowers v. Hardwick* is whether society's moral values, which unavoidably affect our ideas about family relationships, should originate within majoritarian electoral and legislative processes or should be shaped through judicial deference to the claims of political minorities. Justice Blackmun's autonomy-oriented position posits that deference to the traditional moral values of the majority inherently violates the civil liberties of minorities. Under this view, personal autonomy is such a central constitutional value that no majoritarian policy or process should be allowed to limit the choices of individuals unless those choices cause serious and demonstrable harm to others.

Because of the way individual rights analysis creates a nearly unassailable presumption in favor of interests categorized within the constitutional right of privacy, judicial recognition of personal autonomy claims requires society to carry the burden of justifying its own traditional moral norms. For Justice Blackmun, this is as it should be: from his perspective of autonomous privacy, the right of individuals outside the social mainstream to choose "deviant" behavior is at the heart of what the Constitution is all about. It is for such reasons that today's interest in personal autonomy as a source of constitutional protection has such significant potential implications for our social and political system.

The Blackmun approach in the *Bowers* dissent finds support in a recent school of jurisprudential thought—neo-natural law. The influence of natural law, which had dominated legal thinking from Aristotle to Aquinas to John Locke, has been in a state of obvious decline for many years, having been virtually displaced by legal positivism, legal realism, and most recently by the critical legal studies movement. However, during the last quarter century, neo-natural law has emerged in the work of such legal philosophers as Ronald Dworkin and John Rawls.[48] Neo-natural law holds that there *are* some moral absolutes, which distinguishes this view from the relativism of most prior twentieth century legal theory.[49] A beginning premise in this vision of moral absolutes is the primacy of individual autonomy.

48. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); J. RAWLS, A THEORY OF JUSTICE (1971).

49. *See* R. DWORKIN, *supra* note 48, at 92.

This school of thought also emphasizes the autonomy rights of the least advantaged—those whose personal rights have been most abused by the traditional assumptions of law and social power during the recent past.[50]

Under this analytical model, one's framework for meaning begins not from an objective set of natural law principles that surround the individual within a social or even a cosmic context; rather, society and the universe must find *their* meaning by reference to individual interests. Thus Dworkin assumes that individual rights, rather than broad legal policy "rules," should dictate judicial decisions in close cases.[51] Similarly, Rawls argues that individual dignity should be assigned an independent status that does not derive from maximizing the social good.[52] Moreover, inequalities should be arranged not according to the greatest good for the greatest number, but according "to the greatest benefit [for] the least advantaged."[53]

Ultimately, this extreme version of autonomous privacy can not only alter the balance between individual and community interests, but can also reverse our way of thinking about constitutional relationships in ways that potentially challenge our long-term social stability. As a brief explanation of this point, consider the development of pre-*Hardwick* privacy theory.

The Supreme Court first mentioned a constitutional right of privacy in 1965 in *Griswold v. Connecticut*,[54] which held unconstitutional a state law that prohibited the use of contraceptives by married couples. The best known opinion from that case, although it did not speak for a majority of the justices, was the plurality opinion of Justice Douglas. Douglas expressly acknowledged that the Court should not recognize constitutional rights that are not part of the constitutional text.[55] He recalled the heavy criticism that was directed at the Court's use of "substantive due process" theory in the 1930s, when the justices had wandered from a base fixed in the founders' language.[56] He then, nevertheless, proceeded to locate the constitutional right of pri-

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50. *See* J. RAWLS, *supra* note 48, at 151.

51. R. DWORKIN, *supra* note 48, at 81-84.

52. Fried, Book Review, 85 HARV. L. REV. 1691, 1693 (1972) (reviewing J. RAWLS, A THEORY OF JUSTICE (1971)).

53. *See* E. BODENHEIMER, JURISPRUDENCE 157 (2d ed. 1974).

54. 381 U.S. 479 (1965).

55. *See id.* at 482.

56. *Id.* at 481-82.

vacy within the emanations and shadows of several express provisions of the Bill of Rights.[57]

Other justices in *Griswold*, influenced by the approach of Justice Harlan in a related case,[58] agreed that the state could not constitutionally regulate contraceptive use by married couples; however, they feared that the Douglas theory was too much of an invitation for judges to roam freely, breaking new constitutional ground wherever their fancy took them.[59] They preferred to ground the concept of marital liberty in what came close to a natural law approach. They recognized explicitly that a few cherished personal rights were so obviously established and so universally accepted in our traditions and our social consciousness that our most fundamental sense of justice required their recognition.[60] Such personal rights included the right of persons accused of crimes to be protected by the rudimentary safeguards of a fair hearing or the right of parents to direct the upbringing of their children.[61]

As a justification for recognizing interests not explicitly protected by the constitutional text, the strength of Justice Harlan's test was its reliance on the *universal recognition* of the protected interest as evidenced by long tradition and widespread acceptance.[62] Evidence of universality gave external validation to the fundamental character of the right in question and thus ensured that a constitutional right would never represent only the subjective and contemporary bias of a few judges.[63]

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57. *Id.*

58. See the predecessor case to *Griswold*, Poe v. Ullman, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

59. *See Griswold*, 381 U.S. at 485-86.

60. *Id.* at 493 (Goldberg, J., concurring).

61. *Id.* at 495.

62. *See Poe*, 367 U.S. at 542-43 (Harlan, J., dissenting).

63. In his dissenting opinion, Justice Harlan wrote,

> [T]he supplying of content to [the substantive due process "liberty"] concept . . . has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . .
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> . . . .
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> . . .[T]o attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern *a range of subjects with which every society in civilized times has found it necessary to deal.* The laws regarding marriage which provide both when the sexual powers may be used and the legal and social context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosex-

The justices' differences about the underlying theory for non-textual constitutional rights in the area of personal privacy next surfaced seven years after *Griswold*, when the Court extended the right to obtain contraceptives to unmarried persons based on a confusing equal protection theory.[64] Then, in 1973, the Court decided *Roe v. Wade*,[65] which relied expressly on the right of privacy as part of due process liberty to protect a woman's right to obtain an abortion. Our ongoing and passionate national debate about the merits of abortion ranks *Roe* among the most controversial cases the Court has ever decided. But quite apart from the rightness or wrongness of the Court's result on the merits of abortion, Justice Blackmun's *analysis* in *Roe* created hopeless confusion by indiscriminately mixing Justice Harlan's concept of a universally validated community tradition with Justice Douglas' opposing concept of subjective personal autonomy in order to justify recognizing a right not enumerated in the Constitution.[66]

Consistent with Justice Harlan's view of *Griswold*, the Supreme Court's privacy cases (including *Griswold* and *Roe*) *can* be understood as flowing from a broad view of the preferred position of kinship and family life in our constitutional heritage.[67] Under that view, these cases do not create a right of personal autonomy; rather, they seek to protect the traditional institutions of kinship and formal marriage, in significant part because of the universally recognized importance of family life for the continuity of democratic society. Though not well developed,

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> ual practices which express the negative of the proposition, confining sexuality to lawful marriage, form *a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.*
>
> . . . .
>
> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which *always and in every age* it has fostered and protected.

Id. at 542, 546 & 553 (emphasis added) (citation omitted). *See also* Hafen, *supra* note 8, at 517-27, 538-44. For further discussion of the significance of universality in establishing the meaning of due process, see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

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

65. 410 U.S. 113 (1973).

66. *Id.*; *see also* Hafen, *supra* note 8, at 532-38.

67. *See* Hafen, *supra* note 8.

Justice White's majority opinion in the *Bowers* case is consistent with this interpretation.

However, the broad personal autonomy view expressed in Justice Blackmun's *Bowers* dissent, which comes from a nearly opposite theoretical direction, has already gained acceptance among many legal scholars and lower court judges. In addition, as the current Supreme Court has become less willing to expand the Court's earlier notions of privacy, a number of state supreme courts (as suggested by the New York[68] and Pennsylvania[69] cases above) may continue to develop their own theories of autonomy and privacy in the name of rights derived from state constitutions.

To make autonomy the major premise in judicial reasoning about privacy and due process liberty would reverse the long-standing presumption that those challenging the status quo have the burden of proof. Of course our traditional social values may at times require alteration, as amply illustrated by the case of racial discrimination. But in the area of personal and social moral norms—those "habits of the heart," as Tocqueville called them[70]—a special set of problems still obtains from the way a core constitutional preference for autonomy can alter our entire attitude on so fundamental a question as whether society may sustain *any* normative values at all. This is especially problematic in cases where it is impossible to prove in the short run whether a particular practice is in fact harmful.

John Stuart Mill argued over a century ago that society has the right to regulate personal conduct only to prevent harm to others.[71] The Supreme Court has not yet accepted this basic postulate as a general proposition, although it has flirted with doing so. But what do we do when we simply cannot demonstrate immediately whether a given behavior harms others in the society? In such cases, the placing of the constitutional presumption essentially determines the outcome. Who, then, should bear the *risk* of harm in the midst of such uncertainty? The majority in *Bowers* placed that risk on the individual, but the *Bowers* dissent's principle of autonomy would place it on society.[72]

It is impossible to prove or disprove conclusively all of the

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68. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).
69. Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).
70. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 287 (1969).
71. J. MILL, ON LIBERTY 93 (1859).
72. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

individual and social risks at stake in following or abandoning many of the normative values that underlie our culture. For example, available social science research is simply inconclusive on the question of whether non-violent pornography is personally or socially harmful.[73] It may be harmful, but we cannot yet prove it—perhaps because we lack adequate empirical methods. Just as we may not be certain whether we have irreparably harmed the ozone layer of the atmosphere until it is too late to reverse the consequences of pollution, we may be unable to prove that sexual permissiveness can destroy a society until it is too late. Because of the sheer gravity of the risks at stake in such questions, our society previously has assumed that we should make cautious choices and resolve empirical doubts in ways that protect society's interest in its own cultural continuity—in no small part because this traditional preference for social stability actually sustains the conditions that maximize the nurturing of individual liberty in the long run.[74] But the moralistic passion for personal autonomy as a first principle could change our assumptions.

C. *A New Constitutional Balance Between Autonomy and Others' Interests:* Michael H. v. Gerald D.

In a recent case involving a conflict between state family laws and federal constitutional privacy claims, Justice Scalia introduced a new analytical methodology that has significant potential to improve courts' ability to balance constitutional autonomy claims against competing individual interests.[75] More broadly, the opinion arguably challenges what has been the Court's dominant form of individual rights analysis over the past twenty years.[76]

In *Michael H. v. Gerald D.*, the Court upheld the constitutionality of a California statute containing a nearly irrebuttable presumption that a child born to a married woman who lives with her husband is the child of the marriage.[77] Michael H., who

73. *See, e.g.*, Final Report of the Attorney General's Commission on Pornography (1986).

74. *See* Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 911-14 (1989).

75. *See* Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).

76. *See* Nagel, *Constitutional Doctrine and Political Direction*, TRIAL, Dec. 1989, at 72.

77. 109 S. Ct. at 2333 (plurality opinion by Scalia, J., joined by Rehnquist, C.J., and joined in part by O'Connor & Kennedy, JJ.).

claimed to be the child's natural father, argued that the Court's prior unwed fathers' cases[78] gave him a due process right to prove his paternity.[79] The parties did not dispute that Michael had had "an adulterous affair" with the child's mother during her marriage to Gerald D., but the mother and her husband treated the child as their own.[80] Writing for four justices, Justice Scalia (joined by Chief Justice Rehnquist and by Justices O'Connor and Kennedy) concluded that Michael had not established a sufficient due process "liberty interest" to justify his claim to constitutional protection.[81] Because the Court found no liberty interest, it did not pursue the further analysis of weighing the state's interests against Michael's alleged liberty interest.[82]

If the Court had uncritically applied its prior analytical model, its first step might have been to conclude that the alleged biological parentage of an unwed father establishes the father's due process "liberty." Whether Michael could successfully challenge the statute might then have turned on whether, given his constitutional interest, the statute as written gave him an adequate procedural opportunity to assert his parental claims.[83] Or perhaps his claim would then have turned on whether California's interest in protecting a child's legitimacy and in protecting an existing marriage are sufficiently "compelling" or "significant" state interests to outweigh the liberty interest of a putative natural father. Under prior cases, this inquiry might have included a review of the level of responsibility Michael assumed for the child and how early he asserted his claim. But whatever the specific issue, Michael's position would have been much stronger (presumptively stronger than the competing interests)

78. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972); *see also* Hafen, *supra* note 8, at 496-501.

79. *Michael H.*, 109 S. Ct. at 2342.

80. *Id.* at 2337.

81. *Id.* at 2341-45. Only the Chief Justice joined footnote six of Justice Scalia's opinion. There Justice Scalia wrote that the Court's use of a "tradition" test in substantive due process analysis should identify "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 2344. Justices O'Connor and Kennedy thought this approach unnecessarily narrowed the confines of the Court's earlier approaches to defining an historical tradition. *See id.* at 2346 (O'Connor & Kennedy, JJ., concurring in part).

82. *See id.* at 2341-45.

83. This approach led Justice Stevens to concur in the result. *See id.* at 2347 (Stevens, J., concurring).

once it was buttressed by the label of a constitutional liberty interest. This is because, under applicable tests of constitutionality, the establishment of Michael's liberty interest would have weighted the analytical balance heavily in favor of his claim, subjecting the relevant "state interests" (which in this case included the interests of the other parties to the dispute) to "heightened judicial scrutiny."[84]

Justice Scalia's analytical approach departed in a fundamental way from prior approaches, because he weighed the adulterous circumstances and the interests of the parties other than Michael *before* determining whether Michael had a due process liberty interest, not after that determination. In other words, Justice Scalia did not allow the claim of autonomous constitutional privacy to shift the burden of analytical proof before weighing the interests other than Michael's.[85]

Justice Brennan's dissenting opinion argued that, in determining whether Michael had a liberty interest, the Court should "look at Michael's relationship with [the child] in isolation, without reference to the circumstance that [the child's] mother was married to someone else when the child was conceived, and that that woman and her husband wish to raise the child as their own."[86] However, Justice Scalia could not look "at the act which is assertedly the subject of a liberty interest *in isolation from its effect upon other people*."[87] This approach allowed the Court to weigh and balance—all on the same level scale—the putative father's kinship interest, the child's interest in legitimacy, and the married couple's (and society's) interest in a stable marriage.

In what has been called "perhaps the best known essay in the history of family law,"[88] Roscoe Pound urged that "[i]t is important to distinguish the *individual* interests in domestic relations from the *social* interest in the family and marriage as social institutions."[89] Years before the emergence of contemporary individual rights analysis, Pound recognized that individual and social interests in family law must be compared "on the

84. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

85. *Michael H.*, 109 S. Ct. at 2341-45.

86. *Id.* at 2342 n.4.

87. *Id.* (emphasis added).

88. Foster, *Relational Interests of the Family*, 1962 U. ILL. L. REV. 493, 493.

89. Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 177 (1916) (emphasis added).

same plane," lest the very decision to categorize one claim as "individual" and the other as "social" cause us to "decide the question in advance in our very way of putting it."[90] Pound thus precisely anticipated the problem, described above, caused by prematurely placing an extraordinary burden of proof on the parties whose claims oppose a constitutionally protected right. This problem has contributed significantly to constitutional law's tendency to give claims couched in the language of individual rights priority over all other claims—claims that include not only state and social interests, but also, ironically, the claims of other "individuals" whose interests unavoidably overlap with those of the constitutional claimant. Justice Scalia's insight helps to correct this imbalance, because it engages the tension between competing individual interests and social interests at the first and most fundamental level of theoretical analysis.

In a closely related but more controversial dimension of his opinion, Justice Scalia implicitly criticized the tendency of the Warren Court and the Burger Court to formulate unenumerated constitutional rights in abstract rather than specific terms.[91] In so doing, he exposed a weakness in the Court's previous use of such broad terms as "liberty" and "privacy" to define the substantive meaning of the due process clause.[92]

The Court's early cases recognized the "liberty" interest of parents in directing the upbringing of their children[93] and the "privacy" interest of married couples in deciding whether to use contraception.[94] However, as the facts of *Michael H.* make clear, a broad and abstract extension of autonomous liberty or privacy could stretch far enough to protect "an adulterous natural father" in ways that undermine the interests of other individuals and the interests of society in maintaining stable marriages and stable childrearing patterns.[95] Thus, Justice Scalia found that "liberty" defined narrowly can *protect* the "sanctity . . . traditionally accorded to the relationships that develop within the unitary family,"[96] while "liberty" defined broadly can *undermine* that same sanctity: the Court's disposition of *Michael H.*

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90. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943).

91. *See Michael H.*, 109 S. Ct at 2341.

92. *Id.*

93. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

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

95. *Michael H.*, 109 S. Ct. at 2344 n.6.

96. *Id.* at 2342.

cannot "expand a 'liberty' of sorts without contracting an equivalent 'liberty' on the other side" of the balance.[97]

In part due to differing assumptions about levels of abstraction used to define "privacy," judges and commentators have argued for years about whether the concept of constitutional privacy excludes or protects sexual relations outside marriage.[98] This question is only part of the larger debate reflected in *Bowers v. Hardwick* concerning whether the Court should look to the due process clause to reflect obvious and longstanding social patterns or, instead, should use due process to reject such patterns in the name of protecting unconventional preferences.[99] Justice Scalia's opinion attempts to clarify this debate by pointing out that the more abstractly the Court defines due process interests, the more the Court will "permit judges to dictate rather than discern society's views."[100] Because the purpose of the due process clause is "to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones,"[101] Justice Scalia believes that due process liberty should include only the most specific possible formulation of a traditionally protected legal interest.[102] Thus, he considers not just the biological interests of fatherhood, but the interests of "a natural father *in [Michael's] circumstances*."[103] At that level of specificity, it is clear that American law has not traditionally awarded parental rights "to the natural father of a child conceived within and born into an extant marital union that wishes to embrace the child."[104]

Justice Scalia's methodology leaves the putative natural father's claim on the same analytical plane as the claims of the mother, the child, and the marital father. Neither claim should enjoy the advantage of a label based on individual autonomy, because if the law arbitrarily recognizes the autonomy of one claimant, it would arbitrarily discount the autonomy of the other. The Court's "disposition does not choose between those

97. *Id.* at 2345.

98. *See generally* Hafen, *supra* note 8 (discussing the constitutional status of marriage, kinship, and sexual privacy).

99. *See supra* text accompanying notes 24-42.

100. *Michael H.*, 109 S. Ct. at 2344 n.6 (opinion by Scalia, J., joined by Rehnquist, C.J.).

101. *Id.* at 2341 n.2.

102. *Id.* at 2344 n.6.

103. *Id.* at 2344.

104. *Id.*

two 'freedoms,' but leaves that to the people of California."[105] This approach leaves the determination of morally charged cultural norms in the hands of a majoritarian process. It also keeps the potent instrument of constitutional law from altering the terms of a family dispute by arbitrarily applying an abstract notion of autonomy to the claim of one party, when in fact three other parties also have the same human interest in pursuing their autonomous choices.

Over the past twenty-five years, much of the law's scholarly literature and a good deal of case law have proceeded from the assumption that the Constitution—especially the recent doctrine of autonomous privacy—should inaugurate a new era, liberated from the constraints of normative values in order to protect each person's "right to differ as to things that touch the heart of the existing order."[106] The *Michael H. v. Gerald D.* decision challenges that assumption with "an exuberant affirmation that change can be opposed and that the Constitution is a link to the past rather than a slide into the future."[107]

II. From Familistic to Contractual Relationships

A related theme that reflects the development of individualism in family law may be characterized as our having shifted from "familistic" to "contractual" paradigms in our expectations within family relationships.[108]

A. *Familistic, Contractual, and Compulsory Relationships*

The Russian-American sociologist Pitirim Sorokin once distinguished among three distinct types of personal relationships: familistic, contractual, and compulsory.[109] According to Sorokin's definitions, *familistic* relationships involve an intermingled and organic unity in which shared commitments of mutual attachment transcend self-interest.[110] Such interaction derives from an *unlimited* personal commitment, not merely to another person, but to the good of the relationship or the family entity as a larger order. Because of the unlimited nature of such

105. *Id.* at 2342-46.

106. Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting).

107. Nagel, *supra* note 76, at 73.

108. For further development of this theme, see Hafen, *supra* note 74, at 893-905.

109. P. Sorokin, Society, Culture, and Personality: Their Structure and Dynamics 99-108 (2d ed. 1962).

110. *Id.* at 99-102.

commitments, detailed lists of rights and duties can neither describe nor prescribe a familistic relationship. Familistic ties may appear to require considerable personal sacrifice, even to the point of seeming at times to be "a frightful slavery";[111] however, familism can yield a productive and even liberating sense of personal fulfillment and belonging. As the term "familistic" implies, the ideal prototype for this social system is a harmonious family life even though, obviously, not all or even most families actually live consistently at this level.[112]

Most interaction in a democratic, market-oriented society is *contractual*, mixing solidary and antagonistic elements in relationships that by definition are *always limited* in both scope and intensity.[113] Parties enter a contractual relationship primarily because of self-interest; therefore, their commitment is measured by the extent to which the relationship assures them of profit, pleasure, or service.[114] Thus, the defined sphere of contractual solidarity is "coldly legalistic," to the point of being "a lawyer's paradise," and the parties may "feel quite virtuous . . . if they conform to the legal rule" even if their conduct is otherwise unethical or unfair.[115] Neither party to a contract may assume that the other acts in constant good faith, because, reflecting free market assumptions, both parties are expected to interpret the limits of their commitment according to self-interest.[116]

Compulsory relationships are exclusively antagonistic: master and slave, conqueror and captive.[117] The dominant parties in compulsory relationships frequently develop ideologies—such as reference to pure and impure races—that justify their coercion of a subordinate party on the grounds that the subordinates are "fundamentally different in nature."[118] Sorokin observes that compulsory interaction may at times appear "pseudo-familistic" or "pseudo-contractual" when the coercing party wishes to legitimize a false claim that he or she is moti-

111. *Id.* at 101.
112. *Id.* at 102.
113. *Id.* at 102-03.
114. *Id.* at 104.
115. *Id.* at 104-05.
116. *Id.* at 104.
117. *Id.* at 106-07.
118. *Id.* at 108.

vated by benevolence or that the subordinate party is acting voluntarily.[119]

B. A Shift Toward Contractual Family Relationships

Western history reflects a long but steady increase in the proportion of relationships that are best described as contractual. This developmental pattern has occurred in two ways. I will note both ways but discuss only the second way. One strand is a liberating trend that has freed increasing numbers of people from the oppression of compulsory relationships in favor of more contractual interaction. The other strand of development reflects a reduced proportion of familistic relationships, as families and other institutions that were traditionally paternalistic and quasi-familistic have become more contractual. Although this movement from familistic to contractual interaction has long been underway, in recent years it has greatly accelerated its pace.

Robert Bellah and his colleagues, for example, have documented a new ethos of marriage in American society which is shifting from familistic to contractual attitudes.[120] Contemporary men and women frequently, perhaps typically, now enter marriage with contractual assumptions of self-interest. They view marriage with a self-focused "therapeutic attitude [that] denies all forms of obligation and commitment in relationships."[121] In the legal context, Carl Schneider has similarly observed that family members today tend to think of themselves "as a collection of individuals united temporarily for their mutual convenience and armed with rights against each other."[122]

The Supreme Court's cases of the past generation reflect this same kind of shift from a familistic to a contractual emphasis, in part because the political rights doctrines the Court has employed to vindicate personal claims in the domestic context are inherently oriented toward self-interested contractualism.[123]

119. *Id.* at 107.

120. R. Bellah, R. Madsen, W. Sullivan, A. Swidler & S. Tipton, Habits of the Heart 85 (1985) [hereinafter R. Bellah].

121. *Id.*

122. Schneider, *supra* note 1, at 1859.

123. Under the prevailing theory at the time the Constitution was drafted, there was a clear distinction between the individualistic political tradition and the domestic civil tradition. The Court's modern approach has uncritically blurred this distinction without much explanation. *See* Hafen, *supra* note 8, at 569-74.

For this reason, the use of constitutional concepts is both a cause and an effect of the movement away from familistic assumptions. For example, when the Court recognized the right of unmarried persons to obtain contraceptives, Justice Brennan stated, "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[124] In another case, the Court reasoned from similar assumptions to conclude that the father of an unborn child may not veto the mother's decision to have an abortion and that parents may not veto their unmarried minor daughter's abortion decision.[125]

1. *Divorce law context*

The reform of American divorce laws during the 1960s and 1970s also reflected the shift from familistic to contractual assumptions.[126] Divorce was clearly an available legal remedy prior to the reform era, but our domestic relations laws were then based on the familistic assumption that marriage is an unlimited, life-long commitment. Divorce was theoretically obtainable, but only upon proof of such serious, fault-based conduct as adultery or desertion. The prior laws also reflected some marital role assumptions in families with young children. These laws established rebuttable but meaningful legal presumptions favoring maternal child custody, duty-oriented alimony, and child support obligations following divorce.[127] Because increasing numbers of families experienced unfulfilled familistic expectations under these tradition-oriented laws, the reality of divorce practice became increasingly separated from the idealistic expectations of the law. Indeed, the frustration of state legislators with the hypocrisy of the old laws was itself a major impetus for reform.[128]

The divorce reform movement intended to shift the focus of a family court's inquiry away from evidence of fault and toward evidence of actual and irretrievable marital breakdown. Theoretically, the original no-fault divorce laws implicitly reflected society's interest in familistic marital continuity by imposing on

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124. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

125. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

126. *See* H. JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988).

127. *See id.* at 127-31.

128. *See id.* at 61.

judges the duty to grant a divorce only upon real proof that the marriage could not be salvaged. However, today's family courts routinely and superficially arrive at findings of marital breakdown. In virtually all states now, if both spouses wish to terminate a marriage, they may do so regardless of their reasons and regardless of the actual potential for continuity in their relationship.[129] And a number of states now allow unilateral termination.[130] It is in this respect that American law has "taken the idea of individual freedom to terminate a marriage" further than the law of any other Western nation.[131]

The divorce reform movement also intended, among its other goals, to foster equal gender treatment between divorcing parties. However, the shift away from gender-based presumptions that once favored paternal support obligations, maternal custody, and alimony may have *reduced* rather than increased gender equality in the economic effects of divorce.[132] The empirical evidence is not yet complete regarding the long-term effects of these reforms; but, for example, some gender inequity evidently results today from the common practice in which women bargain away their claims to equitable financial settlements in exchange for child custody rights—rights which they continue to seek to a much greater degree than do their husbands.[133]

The difficulty with transferring individualistic civil liberties approaches to the divorce context is that an abstract commitment to individualistic preferences does not help to determine whether the party desiring to terminate a marriage should be entitled to greater legal protection than the party who desires to remain married. The atomistic, metaphysical overtones of the concept of "autonomy," however, clearly argue in favor of protection for the person who desires to be left alone. That was the essential point of Justice Blackmun's dissent in *Bowers*, which relied on language from a celebrated search-and-seizure case to assert that "the right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men."[134] However, it is one thing for the Constitution to assure a personal

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129. *See generally* M. GLENDON, *supra* note 6.

130. *See id.*

131. *Id.* at 78.

132. *See generally* L. WEITZMAN, THE DIVORCE REVOLUTION (1985).

133. *Id.* at 310-14.

134. Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting)).

right to be "let alone" from government surveillance; it is quite another for a vague sense of constitutionally protected autonomy to assure a right to be "let alone" from a sense of familistic commitment.[135] In surveillance cases, the Constitution weighs an individual's privacy interest against the state's interest in efficient prosecution. By contrast, in family cases, the Constitution weighs one individual's interest against another—or several other—individuals' interests.

2. *Children's rights context*

The individualistic themes of autonomy and contractualism also apply to legal developments related to children. The traditional doctrine of minority legal status for underage children was originally designed to protect children against their own immaturity. Thus, contractualist assumptions did not apply to children, because they were thought to lack the capacity needed to enter into voluntary and binding contracts. Our social and legal institutions in many ways treated children as the preferred beneficiaries of a familistic paternalism, as suggested by our traditional commitments to public education, juvenile courts, and legal protections against the harms of parental neglect. However, as feminism followed on the heels of the civil rights movement, some social scientists and lawyers began to see children not in familistic terms, but in "compulsory" terms that viewed children as one more class of victims of unfair discrimination.

As a result, a "children's rights movement" began in the late 1960s and early 1970s that extended certain forms of constitutional rights to children in such areas as public schools, juvenile courts, contraception, and abortion.[136] The Supreme Court also found that state laws that disfavor children born out of wedlock violated the Constitution's equal protection clause.[137] Moreover, a national movement against child abuse introduced a

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135. *See supra* text accompanying notes 24-42.

136. For some discussion of the children's rights movement in these contexts, see Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663 (1987) [hereinafter *Public Schools*]; Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605 [hereinafter *Children's Liberation*].

137. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).

higher level of legal concern with abusive parents and other adult caretakers.[138]

However, as legal policy makers, especially the judiciary, tested the limits of children's liberation against experience over time, this movement fell far short of eliminating the general concept of minority status—the result urged by some children's rights advocates. For example, the Supreme Court recently narrowed the concept of free expression rights for children in public schools[139] and has stressed children's lack of legal capacity by refusing to extend the death penalty to underage juveniles.[140]

At the same time, the children's rights movement has clearly contributed to an altering of the public consciousness regarding the appropriateness of familistic paternalism in behalf of children. For example, recent empirical research on the background and effects of major child advocacy cases suggests that the model of discretionary paternalism that previously characterized most child-related institutions has been replaced by an adult-style due process model.[141] However, this same research casts doubt on whether due process approaches actually reduce harmful state intervention. The research also implies that such approaches may deprive children of needed guidance by, in effect, abandoning them to their procedural rights.[142]

Even though the legal concept of minority status remains intact, adults and children in a subtle but pervasive sense now seem increasingly liberated from one another in a kind of contractual egalitarianism. Not long ago a contemporary cartoon showed a man and woman standing with two smiling children in front of a neighbor's door, which the neighbor had just opened. The man said to his neighbor, "Hi! We're you're new neighbors! I'm Jack Jones; this is my wife, Mary Smith; and these are our kids, Jason Brown and Beth Townsend." Even a common "familistic" name can create a sort of psychological claustrophobia.

When Laurence Tribe applies the principles of contractual-

138. *See* Hafen, *Children's Liberation*, *supra* note 136.

139. *See* Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685.

140. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988).

141. *See generally* R. MNOOKIN, R. BURT, D. CHAMBERS, M. WALD, S. SUGARMAN, F. ZIMRING, & R. SOLOMON, IN THE INTEREST OF CHILDREN: ADVOCACY LAW REFORM AND PUBLIC POLICY (1985) [hereinafter IN THE INTEREST OF CHILDREN].

142. *See* Hafen, *Exploring Test Cases in Child Advocacy*, 100 HARV. L. REV. 435 (1986) (reviewing IN THE INTEREST OF CHILDREN, *supra* note 141).

ism and autonomy to children, he expects future legal developments to lead to a liberation of "the child—and the adult—from the shackles of such intermediate groups as [the] family."[143] Some of this emancipation has already begun to occur. For example, children's lack of capacity once made them seem conceptually ineligible to interact fully at adult levels—now, however, television's mass appeal necessarily erases distinctions between adults and children;[144] the sexual revolution and marital instability seem to have made children equal partners, and at times equal victims, with their parents—which creates the false illusion that children have the capacity for unrestricted adult experience;[145] and the fragmentation of our cultural morality has now combined with individual rights concepts in public school litigation to imply that children are "capable of choosing their own morality as long as they do not commit crimes."[146]

However, the autonomous spirit of the fourth amendment's "right to be let alone" as "the right most valued by civilized men"[147] applies to children even less than it does to the divorce context. One can leave a child alone as a matter of individualistic autonomy, or one can leave a child alone as a matter of parental and social abandonment. It is easy to confuse these two opposing motivations, especially because the affirmative overtones of "autonomy" can subtly favor the parent or adult caretaker whose own subliminal desire is to be "let alone" from the burdens of child nurturing. The alluring idea of autonomy does not serve society and its children well when that idea indirectly, and ironically, serves the "autonomous" self-interest and personal convenience of parents and teachers in the name of respecting a child's autonomy. Children are not truly autonomous—free to act—until they have developed meaningful capacity for action.[148] That arduous, long-term, educational process requires not a spirit of contractualist autonomy, but a spirit of adult commitment and familistic sacrifice.

143. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1418 (2d ed. 1988).

144. *See* N. POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 79-80 (1982).

145. *See* M. WINN, CHILDREN WITHOUT CHILDHOOD (1983).

146. Grant, *The Character of Education and the Education of Character*, 18 AM. EDUC. 37, 44 (1982).

147. *See* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citation omitted).

148. *See* Hafen, *Public Schools*, *supra* note 136, at 663.

III. The Waning of Belonging

This section of the Article is consciously anecdotal and interdisciplinary, drawing on a trend one sees in other contexts to learn from personal, but still relevant, stories and experiences. This approach allows a concluding, general observation about the larger cultural patterns that both reflect and are reflected in the problem of individualism in family law.

A friend shared this experience with me: his daughter came home from elementary school one day, crying and upset. "Is it true that I don't really *belong* to you, Mom?", she asked her mother. Knowing this was her natural child, the startled mother asked what her daughter meant. The girl explained that her teacher had told her class that everyone is free to control his or her own life, and no one *belongs* to anyone else. Children don't belong to parents; husbands don't belong to wives; nobody belongs to anybody. The girl looked up at her mother and asked, "I *am* yours, aren't I, Mom?" The mother took the child in her arms and said, "Of course you're mine—and I'm yours, too." As the two embraced, they both felt the love and the security of really belonging to each other.

A couple I know adopted a young child after having had other natural children. When the adoption was to be finalized, the child was old enough to speak a few sentences. As soon as the formal adoption proceedings ended, the family members reached out their arms to the child in a gesture of complete acceptance. The little boy smiled broadly as he looked into his parents' eyes and exclaimed, "Now we are *ours*!" Note the possessive form: ours.

A man and woman who love each other also feel joy and meaning in the thought that they could "belong" to each other. Many of our phrases in the language of romantic love are based on the idea of belonging. "Be mine," say the little candy hearts we see on Valentine's Day. "I'm yours," proclaimed a hit song of the 1950s. And the opening line of another once-popular song reads, "If I give my heart to you, will you handle it with care?"

A red heart has become our symbol for the word "love," as used in everything from bumper stickers to billboards. In its highest form, this symbol represents the ultimate gesture of giving our hearts to those we love. To offer our hearts is to offer our innermost selves. And if the offer is accepted, there may one day be a wedding—that ancient and sacred ritual in which a man

and woman gladly give themselves to each other in the "bonds" of matrimony.

We have always known that people who offer their hearts to others take the risk of getting those hearts banged up, and sometimes getting them broken. Much poetry and music have been written on just that theme. I recall hearing a honky-tonk tune that treated the broken heart theme with vivid Western simplicity: "You just stomped . . . on my aorta . . . and smashed that sucker flat!"

These days, however, a fear more bewildering than the risk of a broken heart clouds our willingness to give ourselves to one another. The teacher's comment to her school class reminds us appropriately that family members should not treat each other as slaves or inanimate objects. But it also intimates that many people in today's society are increasingly unsure whether the bonds of kinship and marriage are valuable ties that bind, or are sheer bondage.

The sense of possession implicit in the concept of belonging can imply relationships as beautiful as romantic love (familistic relationships) or relationships as ugly as slavery (compulsory relationships). In earlier times, our common sense told us the obvious differences between these opposite ends of the spectrum of human interaction. But in these days of personal liberation, some say we are not really free until we break loose from *all* relationships and commitments that seem to tie us down. For these people, belonging is by definition enslaving rather than enriching. Yet those who break loose from the arms and bonds that hold them may replace their previous sense of belonging only with a sense of longing, as this age of liberation becomes more and more the age of isolation and loneliness. Ours is the age of the waning of belonging.

Of course, there are people who exploit and abuse the trust placed in them by marriage partners and family members. When I express concern about the waning of belonging, I am acutely aware of the harm inflicted by abusive parents and spouses, or by insensitive authority figures who take advantage of those who are dependent on them. Still, the fact that some have used the vulnerability of intimate relationships to harm others is no reason to suppose that sustained intimacy itself is the problem. Yet many voices in our culture have become deeply suspicious of the serious, long-range commitments on which marriage and family ties are based.

For example, as noted in section II's discussion of the children's rights movement, some wish to "liberate" children from the "captivity" of their family ties. As one writer put it, "[t]he child's subjugated status [is] rooted in the same benevolent despotism that kings, husbands, and slave masters claimed as their moral right."[149] Yet the deepest psychological and emotional needs of children require continuity and stability in their relationships with parents—relationships that can be the key factor in their eventual development of mature, personal freedom.[150] Ironically, the most ardent advocates of children's liberation gloss over the reality that prematurely cutting children's family ties can have the effect of abandoning them.

Similarly, Albert Ellis, a psychiatrist who describes himself as representing mainstream attitudes in his profession, worries about the "emotional stability" of people who commit themselves to "unequivocal and eternal fidelity or loyalty to any interpersonal commitments, especially marriage."[151]

This reluctance to "get tied down" stems in part from the understandable fear that broken commitments and broken hearts will lead to pain and disappointment. But the same relationships and loyalties that seem to tie us down are the very sources of strength most likely to lift us up. Becoming fundamentally skeptical about such ties may reduce the risk of pain or guilt caused by disappointed expectations, but that skepticism also severely reduces the possibility of finding the highest human fulfillment.

Some writers have begun to describe the costs of our skepticism about family relationships, as illustrated by this Article's opening references to the recent work of some family law scholars.[152] At a more general level, an essay in a popular magazine about American children noted that "[a] motif of *absence*—moral, emotional and physical—plays through the lives of many children now. It may be an absence of authority and

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149. Wald, *Making Sense Out of the Rights of Youth*, 4 HUMAN RIGHTS 13, 15 (1974).

150. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979).

151. Ellis, *Psychotherapy and Atheistic Values: A Response to A.E. Bergin's "Psychotherapy and Religious Values"*, 48 J. CONSULTING AND CLINICAL PSYCHOLOGY 635, 638 (1980) (table 2).

152. *See supra* notes 1-13.

limits, or of emotional commitment. . . . '[Whatever it is,] [t]here appears to be a new form of [adult] neglect: absence.' "[153]

In *Habits of the Heart*, Robert Bellah and his colleagues drew on their empirical studies to describe how Americans have shifted their view of marriage from that of a relatively permanent social institution to a temporary source of personal fulfillment.[154] As a result, when marriage commitments intrude on their preferences and their convenience, people feel entitled—even normatively obliged—to walk away. Yet, ironically, Bellah's group also found that despite Americans' preoccupation with self-interest, most of the people they interviewed still cling, perhaps in a hopelessly dreamy sense, to the nostalgic notion of marriage and family life based upon loving and permanent commitments as "the dominant American ideal."[155]

Amid these paradoxical impressions of a desire for self-protection on one hand and a need for familial commitment on the other, many perceive the legal system as having become less judgmental of what people should expect of one another. This creates an impression that family law has lost its normative expectation that family members should feel a sense of personal responsibility to uphold their commitments. Thus, it is easy to assume that the law no longer seeks to restrain our almost unwilling self-indulgence. The very absence of demands by the law now seems to confirm our spreading fear that long-term, loving relationships are impossible to find anymore.

We find a stirring echo of this thought in a recent anthology of American poetry dealing with the subject of father-son relationships.[156] This collection purports to include the best American poems ever written on the theme of fathers and sons. Interestingly, nine-tenths of the selected poems were written after 1950.[157] Stanley Kunitz, author of several poems in the anthology, speculates that this disproportionate interest in father-son poetry in recent years may have occurred because family relationships did not begin to stir the poetic imagination in more stable times, when family ties were so much taken for granted.[158]

153. Morrow, *Through the Eyes of Children*, TIME, Aug. 8, 1988, at 32 (emphasis added) (citation omitted).

154. *See supra* note 120-21 and accompanying text.

155. R. BELLAH, *supra* note 120, at 86.

156. DIVIDED LIGHT: FATHER AND SON POEMS (J. Shinder ed. 1983) [hereinafter DIVIDED LIGHT].

157. *Id.* at v.

158. Kunitz, *The Poet's Quest for the Father*, N.Y. Times, Feb. 22, 1987, § 7, at 36, col. 1.

But the spirit of the recent era, Kunitz writes, is "a summons to testify about a failed intimacy, a failed life, perhaps to redeem it through a new effort of understanding."[159]

Kunitz continues:

> With the disintegration of the nuclear family, the symbol of the father as a dominant, or domineering presence is fading away. Whole sections of our nation are living in fatherless homes. . . . Often the father is more than absent; he is lost, as he has been lost to himself for most of his adult life. . . . The son goes in search of the father, to be reconciled in a healing embrace.[160]

This is a theme with which Kunitz feels instinctive identification, having earlier written the following after his own father's death:

> . . . down sandy road
> Whiter than bone-dust, through the sweet
> Curdle of fields, where the plums
> Dropped with their load of ripeness, one by one
> Mile after mile I followed, with skimming feet
> After the secret master of my blood,
> Him, steeped in the odor of ponds, whose indomitable love
> Kept me in chains.
>
> . . . .
>
> At the water's edge, where the smothering ferns lifted
> Their arms, "Father!" I cried, "Return! you know
> The way. I'll wipe the mudstains from your clothes;
> No trace, I promise, will remain. Instruct
> Your son, whirling between two wars,
> In the Gemara of your gentleness,
> For I would be a child to those who mourn
> And a brother to the foundlings of the field
> And friend of innocence and all bright eyes.
> O teach me how to work and keep me kind.[161]

Here we sense the paradox of loving bondage, the spirit of belonging—liberating while yet confining: "After the secret master of my blood," whose "indomitable love kept me in chains."[162] Perhaps our attitude toward morally demanding cul-

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159. *Id.* § 7, at 36, col. 3.
160. *Id.*
161. DIVIDED LIGHT, *supra* note 156, at 20-21.
162. *Id.*

tural and legal expectations is like our feeling about father figures—we dislike authority that temporarily represses in order to teach. When the authoritarian father, a symbol of our legal and social norms, gives in to our pleas to be left alone, there may be a momentary sense of autonomy; but when that sense is prolonged for a time, it can become a sense of abandonment. In this way, the cry for failed intimacy represented by the new father-son poetry of today may be an anguished reaching out for help: "O[, father,] teach me how to work and keep me kind."[163]

Such poetry and music,[164] like Bellah's findings, document Americans' recent tendency to cling to the idea of long-term belonging even when that idea appears to be discouraged by such normatively formal sources as law and psychotherapy. This same tendency is also illustrated by the difference between private aspirations and published theology regarding the implications of death. Yale University Press recently published the work of two historians, *Heaven: A History*,[165] which traces the concept of heaven in Western history. In describing twentieth century attitudes, this work draws upon a variety of empirical sources to conclude that a large majority of the American people still believe not only in a life after death, but in the idea of heaven.[166] Interestingly for our discussion of human belonging, "[b]y far the most persuasive element of the modern heaven for many contemporary Christians is the hope of meeting the family again."[167] Yet, significantly, these personal "[e]xpressions of the eternal nature of love and the hope for heavenly reunion" "are not situated within a theological structure."[168] Instead, with few exceptions, modern Christian theology evidently has concluded that its earlier ideas about immortality are not socially relevant and, besides, are too speculative to be acceptable to contemporary theological scholarship.

In another related context, extensive interviews with chil-

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163. *Id.*

164. The "failed intimacy" reflected by the father-son poetry's attempt for redemption "through a new effort of understanding," *see supra* note 156, is also reflected in a surprising number of poignant father-son songs that have caught the imagination of audiences of contemporary music over the past twenty years. These songs include M. Rutherford & B. Robertson, *The Living Years* (1988); D. Fogelberg, *Leader of the Band* (1982); H. Chapin, *Cats in the Cradle* (1974); D. Gates, *Everything I Own* (1973).

165. C. McDANNEL & B. LANG, HEAVEN: A HISTORY (1988).

166. *Id.* at 307.

167. *Id.* at 309.

168. *Id.* at 312.

dren have revealed that "the bond between grandparents and grandchildren is second in emotional power and influence only to the relationship between children and parents."[169] Yet, despite the natural spirit of kinship and belonging frequently found in the grandparent/grandchild relationship, this relationship is seldom included in contemporary discourse or research on family life or on the needs of the elderly. One study found that, as with other elements in our withering sense of belonging, "the isolation of grandparents from grandchildren is a recent event" that "devalues the emotional needs and attachments of children in the name of 'individual autonomy' . . . designed by and for a society of 'adults only.' "[170] This conventional wisdom fails to reflect what children and grandparents actually feel toward each other, when such relationships in fact exist.

In summary, it appears that such behavior-oriented disciplines as law, psychotherapy, and theology are now less likely to reinforce any serious hope for the ideal of enduring relationships of commitment. It may be that many Americans have uncritically come to assume that there is an unbridgeable gap between their private, personal hopes and what they hear society and its intellectual leaders telling them to expect in family life.

Carl Schneider has noted just such a general attitudinal shift in his comparison between two concepts of morality—"aspirational morality" and "the ethic of the mean."[171] In an earlier era, American society generally shared what Max Weber called a "heroic ethic"—an aspirational morality that "imposes on men demands of principle to which they are generally *not* able to do justice except at the high points of their lives, but which serve as signposts pointing the way for man's endless *striving.*"[172] Now, however, we have come to accept " 'the ethic of the mean,' which is content to accept man's everyday 'nature' as setting a maximum for the demands which can be made."[173]

These developments are not without some benefits. For example, reducing our normative expectations of intimate relationships does have the effect of reducing the gap between everyday

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169. A. KORNHABER & K. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION xii (1981).

170. *Id.* at xx.

171. Schneider, *supra* note 1, at 1819 (quoting letter from Max Weber to Edgar Jaffe (1907)).

172. *Id.*

173. *Id.*

reality and the ever elusive ideal, thereby reducing both our sense of hypocrisy and our feelings of frustration and guilt when abused intimacy leads to psychological pain. Further, the new skepticism about relationships of dependency has exposed certain patterns of abuse and domination that cried out for closer public and legal scrutiny. And surely we can welcome American society's increasing sensitivity to the personal needs of those who have felt the social disapproval of not fitting excessively idealistic and rigid cultural patterns.

But we must resist the naive belief that individuals can be liberated from the apparent bondage of family ties and nonetheless be assured, somehow, of the personal support systems found only in long-term commitments. To this end, we must be willing to take the risk that not everyone will consistently live up to such commitments. To insist on protection against all risk in this no-fault society may diminish our highest human possibilities even while it protects us against some of our fears.

Anne Morrow Lindbergh, whose baby was kidnapped and murdered in the 1920s, looked back on the sorrows of her life with these words: "I do not believe that sheer suffering teaches. If suffering alone taught, all the world would be wise, since everyone suffers. To suffering must be added mourning, understanding, patience, love, openness, and the willingness to remain vulnerable."[174] To nurture the value of belonging, we must be willing in some degree to remain vulnerable.

At the least, we should not allow our attitudes toward the concept of belonging to confuse the extreme differences between familistic love and compulsory bondage. Nor should we assume that moving toward contractual interaction from the familistic pole has the same value as movement toward contractual interaction from the compulsory pole.

Some critics of Western family patterns begin with the assumption that our social and legal institutions were established by men for the purpose of protecting male power over women and children. This view sees the traditional American family not in familistic terms, but as an example of *compulsory* interaction.

The widespread evidence of gender inequality in traditional American culture makes such an interpretation plausible; because of such inequality and discrimination, both the husband-wife and the parent-child relationship conceivably appear com-

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174. *Lindbergh Nightmare*, TIME, Feb. 5, 1973, at 35.

pulsory in nature. The male oppressor can be seen as implicitly believing "that the parties are fundamentally different in nature" (male and female, adult and child) and as deceitfully employing pseudo-familistic terminology to justify his continuing domination.[175] This deceit would, of course, consciously overromanticize the domestic realm, marriage, and motherhood, and would stress the natural dependency of children. With this picture of deceit in mind, one can logically conclude that shifting to a contractual notion of marriage and family life is hardly a backward step away from relationships of enduring and genuine commitment; rather, contractualism may be seen as a forward step away from centuries of oppression toward legally assured protection.

However, a major question that lingers in this hypothesis of the family as a compulsory relationship is whether the contrasting familistic model ever has or ever could exist in the way Sorokin defined it.[176] If one assumes that the familistic model of marriage and family life is essentially an unrealistic myth, our future attempts at reform should not aspire beyond contractual family ties. Otherwise, perpetuation of the myth would move relationships toward the compulsory model and would allow continuation of unfair oppression. But if the familistic model is not just a myth, excluding it from our aspirations discourages the potential source of our most transcendent human relationships.

This section has suggested that there is considerable evidence to support the proposition that familistic aspirations are not only possible but natural. Despite the growing relaxation—the waning—of expectations about "belonging" in some academic and professional literature, the innate human intuition to belong occurs, and is often fulfilled, at the most fundamental levels of both human experience and aspiration.

Finally, a relatively practical thought on the value of thinking about families and belonging in familistic terms illustrates not only that belonging may bring fulfillment, but also *how* such fulfillment occurs. When commitments among spouses and children are unqualified, we learn and grow to an extent not possible in self-oriented, limited relationships of contract. As Michael Novak wrote,

> Being married and having children has impressed upon my

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175. P. Sorokin, *supra* note 109, at 108.
176. *Id.* at 99-102.

> mind certain lessons. . . . The quantity of sheer . . . selfishness in . . . my breast is a never-failing source of wonder. . . . Seeing myself through the unblinking eyes of an intimate, intelligent other, an honest spouse, is humiliating beyond anticipation. . . . My dignity as a human being depends perhaps more on what sort of husband and parent I am than on any professional work I am called to do. My bonds to [my wife and children] hold me back . . . from many sorts of opportunities. And *yet these do not feel like bonds. They are I know, my liberation.* They force me to be a different sort of human being, in a way in which I want and need to be forced.[177]

I once saw how this kind of development occurs. One of our children was in great difficulty in his fourth-grade class. If he didn't complete a certain hand-made project by the next day, he would face certain disaster. After dinner, my wife, Marie, told me she had thought of a way to help him. I ushered our other children into another room for other activities, and the handicraft project began in the kitchen. Periodically, I heard outbursts from our fourth-grader, who kept tormenting his mother and insisting he wouldn't do another thing. I was ready to send him to his room and forget it, but my wife calmly proceeded with her plan.

After about three hours, as I was tucking the other children into bed, the little builder and his mother entered the bedroom. Carrying his project as proudly as if it were a birthday cake, he invited his two brothers to come and see it. It was obvious from looking at it that he had made every stitch of it himself. He placed it on a counter and started for his bed. Then he looked back at his mother with a broad, boyish grin. He ran across the room, threw his arms around her waist, and hugged her tightly. As he grinned at her again, the two of them exchanged glances that carried great meaning. He went back to his bed and we left the room.

"What happened?," I asked Marie. "How did you do it?" She replied that she had simply made up her mind that no matter what he said or did, she wouldn't raise her voice or lose her patience. She had just decided that leaving him was not an alternative, even if the project took all night. Then she made this significant observation: "*I didn't know I had it in me.*"

She discovered within herself a reservoir of patience and en-

177. Novak, *The Family Out of Favor*, HARPER'S, Apr. 1976, at 37.

durance she never would have found without a nearly irrevocable commitment that grew from a sense of real belonging. "Belonging" is for thick and thin, and this was one of the thin times. From such immovable loyalty to another person, we learn how to love. Our bonds, in that sense, are our liberation. Without a sense of belonging, we may never know—and never see the effects of—the reservoirs of strength and compassion we carry within ourselves. That is a loss not only to ourselves, but a major loss to society.

Our bonds liberate us in another, related sense. Ironically, when our undisciplined quest to be "let alone" reaches some of the extremes we see today, that quest actually undermines the mediating institutions that best foster the development of actual autonomy. As most vividly illustrated by the case of children, a child's nurtured sense of "belonging" is crucial to the eventual development of the psychological stability required for autonomous action. The capacity to act autonomously is also contingent upon one's having developed the ability to act rationally, a power gained only through a disciplined educational process. Based upon experience with this process, we have long recognized the *right* of American children to education. Children may regard the constraints of *compulsory* school laws as bondage, but those bonds are their liberation.[178] A school is for this reason a vital mediating institution between a child and a free society. In a similar but more pervasive sense, families are also mediating institutions that prepare not only children but adults for the democratic interaction that literally depends upon a rational willingness to obey the unenforceable. The experience that best informs that willingness is a family life fed by wellsprings of personal commitment. Thus, "maintenance of the family tradition is in fact a prerequisite to the existence of a rational and productive individual tradition."[179] For such reasons, the waning of belonging contributes ultimately to the waning of actual autonomy and meaningful individualism.

As I participate with others in a symposium dealing with marriage, divorce, and the rights of children, I am grateful for those in the scholarly community who have urged us to reflect on how the law can find ways, as Martha Minow wrote, "to nurture the relationships between individuals that constitute fami-

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178. *See* Hafen, *Public Schools*, *supra* note 136, at 709-12.

179. Hafen, *Children's Liberation*, *supra* note 136, at 657.

lies."[180] It is in this constructive spirit that I express my own concern as well as my own hopes about the waning of belonging.

The law is clearly not the primary cause of the broad and complex attitudinal changes on this subject during the past quarter century, even if the law's acquiescence has influenced the pace and nature of change. As Mary Ann Glendon put it, "[i]f in fact our societ[y is] producing too many individuals who are [not] capable . . . of sustaining personal relationships, it is probably beyond the power of law to reverse the process."[181] Yet I share Professor Glendon's further observation that "it is far from clear that we are in such a dismal situation."[182] Her comparative law research reveals a gap similar to what has been noted here in other contexts—namely, that "[t]he tale currently being told by the law about marriage and family life is probably more starkly individualistic than the ideas and practices that prevail"[183] at the level of much personal interaction, and certainly at the level of private, personal aspiration.

Even though the law is only one voice in the cultural chorus that sings the pluralistic song of American family life, its historical role demonstrates that law can be a voice that leads, not merely follows, other voices. The law can even establish the pitch by which other voices seek to stay in tune. For the sake of giving greater meaning to the personal fulfillment made possible by a long-term view of individual liberty, I hope that family law will find ways to sing more clearly the melody of belonging.

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180. Minow, *supra* note 3, at 894.

181. M. GLENDON, *supra* note 5, at 312.

182. *Id.*

183. *Id.*