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Family law,[1] like law in general, has two different aspects: an apologetic aspect and a utopian aspect.[2] In its apologetic as-

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1. I use "family law" broadly to include statutes, regulations, and court decisions involving (1) the formulation of families, (2) the rights and duties of family members to each other, (3) the relationship of outsiders to family members, and (4) the effects of dissolving a family. I do not deal here with the important question of what is a "family." On this question, see, *e.g.*, Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (treating unmarried father and children as family), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968) (overturning state law denying wrongful death recovery to mother of illegitimate decedent). *Compare* Restatement of Property § 293 (1940) ("family" includes spouse and the issue, and no other persons), *with* Thompson v. Vestal Lumber & Mfg. Co., 208 La. 83, 119, 22 So. 2d 842, 854 (1944) (unmarried couple and illegitimate children constitute "family"); Goss v. Klipfel, 112 Colo. 87, 146 P.2d 217, 218 (1944) (members of religious order who lived and worked together as "family"); Little Neck Community Ass'n. v. Working Organization for Retarded Children, 52 A.D.2d 90, 94, 383 N.Y.S.2d 364, 367 (1976) (group home for retarded children is a "family"). The most recent White House Conference on Families spent considerable time debating a definition for "family." *See* N.Y. Times, June 6, 1980, at B4, col. 1; *id.*, Jan. 7, 1980, at D8, col. 1.

2. In this article, I use "apologetic" to mean intending to excuse or justify the status quo by making its unjust aspects seem inevitable, or legitimate, or both. I use "utopian" broadly to include both reformist and revolutionary efforts to perfect society, or to reduce society's imperfections. The double motive, apologetic and utopian, is characteristic of most or all fields of law, not just family law. E.P. Thompson, the English historian and peace activist, has traced the apologetic and utopian aspects of England's 18th century criminal law. *See* Edward Thompson, Whigs and Hunters: The Origin of the Black Act (1976). *See also* Douglas Hay, *Property, Authority and the Criminal Law*, in Albion's Fatal Tree 17-63 (D. Hay, P. Linebaugh, J. Rule, E. Thompson & C. Winslow eds. 1975) (detailing the indirect support provided to England's class system by the 18th century practice of both providing the death penalty for numerous minor offenses, and granting frequent reprieves). *Cf.* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205, 210 (1979) (adopting the premise that legal thinking involves both "an attempt to deny domination and injustice" as well as "an effort to discover the conditions of social justice"). *See generally*, Vilhelm Aubert, In Search of Law (1983) (law both a coercive mechanism for maintaining the status quo and a vehicle for expressing human aspirations and needs).

pect, family law tends to justify the domination of women by men and the oppression of children by parents. Family law reinforces the most common forms of male domination and parental oppression by characterizing them as legal. Family law tends to pacify family members by concealing from their scrutiny how damaging and restrictive family relationships often are.[3] Furthermore, family law makes our present forms of family life seem "natural,"[4] and therefore unlikely to change very much. In this way, family law encourages minor reforms and individual adjustments, while discouraging imaginative speculation or creative changes in family structure. We forget that a radically different form of social life would seem equally natural once we had established it.

In its utopian aspect, family law records successive efforts to make the reality of human association live up to our hopes and aspirations. Legal struggles have resulted in a variety of family reforms and have increased the options available to each individual. Lawyers and judges have introduced notions of fairness into family life; they have created the vocabulary necessary to argue for justice for women and for children.[5] Family law helps to shape our culture and contributes to the development of shared meanings and aspirations regarding family life.[6]

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3. For a variety of criticisms of contemporary family life, see Michelle Barrett, Women's Oppression Today (1980); David Cooper, The Death of the Family (1971); Anna Demeter, Legal Kidnapping (1977); Carolyn Heilbrun, Reinventing Womanhood 171-97 (1979); Eli Zaretsky, Capitalism, the Family, & Personal Life (1976). *See also* Barbara Easton, *Feminism and the Contemporary Family*, in Socialist Rev., May-June 1978, at 11, *reprinted in* A Heritage of Her Own 555 (Nancy Cott & Elizabeth Pleck eds. 1979).

4. *See* Michelle Barrett & Mary McIntosh, The Anti-Social Family 34-40 (1982) (examining the role of the claim that the family is "natural" in the ideology of familialism and criticizing the implication that humans cannot or should not construct radically different forms of social life).

5. For example, the concepts of "women's rights" and "children's rights" in family law are largely a creation of family law judges and practitioners. *But cf.* Fran Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 62 Texas L. Rev. (forthcoming 1984) (demonstrating that the language of "rights" can impede discussions of justice for women). The early history of the child protection movement poignantly illustrates the failure of 19th century law to conceptualize children as rights-bearing individuals: the first cases of child abuse were dealt with under the laws for the prevention of cruelty to animals, because there were no laws against cruelty to children. *See* 2 Children and Youth in America 185-89 (Robert Bremner ed. 1971).

6. As James Boyd White puts it: "[T]he law can more properly be seen not as a set of commands or rules, even with a set of restatable principles or values behind them, but as the culture of argument and interpretation through the operations of which the rules acquire their life and ultimate meaning." James White, *Law as Language: Reading Law and Reading Literature*, 60 Texas L.

When I say that family law legitimates oppression or that it contributes to our utopian aspirations, I am much more concerned with the kinds of arguments that courts and attorneys frame and accept than with the particular outcomes of legislative battles or with the direct results of court decisions. The arguments presented in these battles and decisions illustrate and support particular patterns of thought and behavior. Family law both reflects and helps create an ideology of the family—a structure of images and understandings of family life. This ideology serves to deny and disguise the ways that families illegitimately dominate people and fail to serve human wants. Embedded within the ideology of the family are notions of (1) the kinds of roles that individual members should serve within the family and what they should get out of these roles, (2) the kinds of bonds that hold families together, (3) the actual and the proper role of families in society, and (4) what the state or law can and should do to encourage desirable family life.

Most family law scholarship focuses on the utopian aspect of law,[7] and ignores law's apologetic, legitimating role. In family law, perhaps more than in any other field of law, the literature tends to rationalize and criticize existing doctrine on a low level of abstraction,[8] and to focus attention primarily upon some proposed reform. Most family law scholars argue in favor of some minor change in the law and analyze previous cases to show that the legal reasoning or the results of the cases sup-

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Rev. 415, 436 (1982). White maintains that law establishes a community in many of the same ways that literature does. "The lawyer's work . . . contributes to a process of collective or cultural education that is in structure analogous to that experienced by the single reader of the literary text." *Id.* at 435.

7. A great deal of what is written on family law purports to be primarily descriptive, and for a commentator to deal with even the utopian aspirations of law—that is, to intend to promote reform—seems sometimes to require an explanation or justification. When Homer Clark included his "own criticisms of legal principles" in his family law treatise, and "suggest[ed] the directions in which the law ought to move," he considered it appropriate to alert the reader to this fact in his preface, and he asserted that "there is probably much more of personal opinion here than in most law books." Homer Clark, The Law of Domestic Relations in the United States xi (1968).

8. By this I mean that most family law scholars write about doctrine—that is, about legal rules and the arguments advanced to justify or oppose these rules—and do not attempt to derive from this doctrine any more general or abstract principles. More importantly, they do not attempt to examine the deeper assumptions that are taken for granted in family law arguments. Most reformist or utopian family law scholars do not presuppose any highly abstract, integrated system of legal reasoning that would treat a large variety of specific rules in family law doctrine as logically related or intimately bound together such that a change in one rule would require major changes in other rules.

port the proposed change.[9] Occasionally, scholars vary this method by presenting the reasoning or results of earlier cases as an abomination, thereby dramatizing the great need for the particular reform they have proposed.[10] Regardless of their intentions, these scholars help perpetuate oppressive family institutions. By advocating only minor reforms in family law, they convey the message that family law is basically fair. Because they discourage us from considering more radical change, their work contributes to the apologetic project of legitimating the status quo.

This essay explores the political significance of family law. Part I argues that we need a more thorough understanding of the complex relationship between individual legal skirmishes and broader, general battles for social change. Part II places the issue in its historical context by relating it to the "liberalization of the family"—the major historical shift that has taken place in the family over the past two centuries.[11] Part III uses the theoretical language and structures introduced in Part II to analyze the "tender years doctrine" of child custody law. I examine how women were both helped and hurt by the rise of the tender years doctrine and similarly helped and hurt by its recent abolition. I conclude that legal reform paradoxically serves both to legitimate our oppressive and patriarchal status quo, and to promote emancipation. We have no simple, a priori formula that we can apply to decide whether to support legal reforms. The choice to support or not to support any particular reform is a political decision we cannot avoid. To choose wisely, we must undertake a complex and contextual evaluation of all the effects of the reform,[12] a project that this essay attempts to assist.

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9. *See, e.g.*, Briggitte Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 Calif. L. Rev. 978 (1977); Carol Bruch, *The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change*, 65 Calif. L. Rev. 1015 (1977).

10. *See, e.g.*, Briggitte Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand. L. Rev. 1207, 1207-16 (1969); Leonard Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. Cal. L. Rev. 183, 183-96 (1965).

11. *See infra* p. 6.

12. There are also other advantages to a complex and contextual evaluation. In the case of the tender years doctrine, for example, such an evaluation suggests alternatives to the doctrine that retain many of the doctrine's positive aspects, while diminishing its negative aspects. *See infra* pp. 18-19.

I. Law and Politics

Many feminists believe that the legal system is inherently patriarchal—that patriarchal principles are deeply embedded within the structure of legal thought and legal reasoning.[13] Feminist attorneys realize that whenever they win a lawsuit that appears to further women's rights, their victory is seldom, if ever, a pure victory. Although a successful court battle wins a practical benefit for a woman and satisfies a need or want of hers, the method of meeting this need or want disempowers her. Moreover, participating in the existing legal institutions, which are generally oppressive toward women, may legitimate both the legal system and the ideological structure on which it is based.

This analysis is correct as far as it goes, but it is incomplete. A court victory results not only in good practical effects, but also in bad practical effects.[14] Also, rather than having only bad ideological effects, a court victory simultaneously has good ideological effects. Thus, it is important to evaluate each particular battle in terms of its actual overall effect, from both a practical and an ideological point of view.

We can counteract some of the negative effects that often accompany legal victories. The lawyer's characterization of a legal outcome can serve to enhance the positive and diminish the negative ideological effects of using the court system for a partial gain.[15] A particularized evaluation of the actual effects of a lawsuit is important also because the practical benefits may be unexpectedly insignificant[16] or counterbalanced by un-

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13. *See, e.g.*, Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 Harv. Women's Law J. 83 (1980); Diane Polan, *Toward a Theory of Law and Patriarchy*, in The Politics of Law (D. Kairys ed. 1982); Adrienne Rich, *Introduction* to Anna Demeter, Legal Kidnapping (1977); Zillah Eisenstein, Feminism and Crisis in Liberal America 124-27 & *passim* (forthcoming 1984). *See generally* Catharine MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979); Catharine MacKinnon, Book Review, 34 Stan. L. Rev. 703 (1982) (reviewing Ann Jones, Women Who Kill (1980)).

14. For example, the classic Muller v. Oregon case, 208 U.S. 412 (1908), which upheld ten-hour day legislation for women only, was an important practical victory for women working in sex-segregated jobs, but a practical defeat for women who were pushed out of non-segregated jobs by men who could work longer hours.

15. For example, Jeanne Charn of the Legal Services Institute has suggested that poverty lawyers should emphasize to their clients that, however nice it might be to have just won a lawsuit, the victory obtained is only a portion of what the client actually deserves and should get. Jeanne Charn, Panel on Law and the Working Class Family, Sixth National Conference on Critical Legal Studies, Harvard Law School (March 19, 1982).

16. Consider the Supreme Court case of Kahn v. Shevin, 416 U.S. 351 (1974). It

anticipated disadvantages. If we anticipate or recognize only negative ideological effects and positive practical effects, our analysis is less accurate than it should be. Almost every legal change has both practical and ideological advantages and disadvantages. It is crucial for us to recognize and analyze each of these effects.

II. The Liberalization of the Family

The phenomenon I refer to as the "liberalization of the family"[17] should be understood in the context of these complex effects. The pre-liberal family, which I characterize loosely as the "feudal" family, was a social, economic, and political unit of feudal society.[18] For many years after the disintegration of feudal society, the image of the "feudal" family continued to exert an influence on law. The "feudal" family was a communal hierarchy, based on unequal duties of protection and obedience, and was expected to serve important public functions.[19] The "liberal" family, on the other hand, is thought to be a voluntary collection of individuals held together by bonds of sentiment in an egalitarian structure. Supposedly, it constitutes a private realm, clearly divorced from the "public sphere."[20] Although there are relatively few defined roles in the "liberal" family, the few family obligations that do exist are considered properly enforceable by the state, generally through broad discretionary standards.[21] It is said that standards, unlike rules, permit the state to deal with each situation on the basis of its own particu-

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appeared to be a practical victory, because it saved money for certain women, but an ideological defeat, because it reinforced the ideology of sexual inequality. Upon examination, however, the actual practical effects turn out to be minimal. The statute in question provided that women who outlived their husbands could avoid an *ad valorem* tax on $500 worth of their property. Even if the tax rate were 10%, this "savings" would amount to only $50.

17. *See* Fran Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1517 (1983).

18. *See* Jean Flandrin, Families in Former Times 1-2 & *passim* (1976). For a criticism of many uses of the term "the family" and for a warning that the use of concepts such as the "feudal" family may tend "to impose an essential similarity on highly diverse institutions and practices," see Barrett & McIntosh, *supra* note 4, at 39.

19. *See* Flandrin, *supra* note 18.

20. *See* Robert Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. Pa. L. Rev. 1429 (1982). *But see* Olsen, *supra* note 17, at 1504-28.

21. Child custody law presents the most striking example of the shift toward broad, discretionary standards. *See* Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, Law & Contemp. Probs., Summer 1975, at 226, 233. ("The history of the legal standards governing custody disputes between a child's parents reveals a dramatic movement from

lar facts.[22]

The shift from the "feudal" to the "liberal" family, which has occurred in America during the last three centuries, is often conceptualized as progress: the bad, old, rigid, patriarchal family was replaced by the modern, all-American, egalitarian family.[23] Alternatively, some see this change in negative terms: the feudal, or at least the openly-patriarchal family is romanticized as a stable, loving refuge from the world of commerce and industry, in contrast to the modern, "liberal" family, which is considered alienated, isolated, atomistic, and even pathological.[24] Both of these characterizations—the positive and the negative—are severely flawed. We must develop a richer and more detailed description of the liberalization of the family to understand and begin to unravel the structure of thought and the patterns of behavior that affect our present conception of "the family" and its relationship to the state.[25]

The liberalization of the family has entailed significant changes along many different dimensions.[26] This essay explores two of these dimensions: the hierarchy ⟶ equality dimension, and the group ⟶ individual dimension.

Each of these dimensions describes gradual changes in the substantive behavior and roles expected of family members. The hierarchy ⟶ equality dimension involves the shift from an intentional, acknowledged hierarchy, to a supposedly

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rules to a highly discretionary principle gradually shorn of narrowing procedural devices.")

22. For a good discussion of the relationships between rules and standards, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1687-1701 (1976).

23. *See, e.g.*, Alexis DeTocqueville, Democracy in America 228-33 (R. Heffner ed. 1956); 1 James Schouler, A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations § 4 (6th ed. 1921); Michael Gordon, The American Family 17-22 (1978). *See generally* Robert Nisbet, History of the Idea of Progress (1980).

24. *See, e.g.*, Christopher Lasch, Haven in a Heartless World: the Family Beseiged (1977). *See generally* William Goode, World Revolution and Family Patterns 6-7 (1963) (noting the same double-view in attitudes toward the kind of families many people falsely imagine existed in early America).

25. For a criticism of treating "the family" as a pre-given entity and thus as natural rather than social, see Barrett, *supra* note 3, at 187-88; Barrett & McIntosh, *supra* note 4. It may be helpful to think of "the family" not as a thing, but as an idea, or a cluster of ideas.

26. I discuss the six dimensions I consider to be the most important in a work-in-progress on the history of child custody law in the United States. I characterize these dimensions as (1) rules ⟶ standards, (2) enforcement ⟶ non-enforcement (or direct enforcement ⟶ indirect enforcement), (3) hierarchy ⟶ equality, (4) group ⟶ individual, (5) public ⟶ private, and (6) duty ⟶ sentiment. Fran Olsen, A History of Child Custody Law as Ideology (Feb. 4, 1982) (unpublished manuscript).

egalitarian family of juridical equals. The group ⟶ individual dimension involves the shift from the family as a corporate unit to the family as a voluntary association of individuals.

A. The Hierarchy Dimension

Each of these dimensions can best be conceptualized as a continuum, involving matters of degree rather than an all-or-nothing choice.[27] The hierarchy continuum, however, also involves gradual shifts between four different structures of hierarchy. With some overlap, these four structures have succeeded one another chronologically.[28]

1. *Structures of Hierarchy.* — In the more-feudal, less-liberal family—for example, the family described by Blackstone[29]—the father was the undisputed head of the family, and the wife and children were all subordinate to him: 

.[30] Within this structure, there were differing images of the father as the sovereign head or as the representative of the family, and differing notions of the extent and nature of the subordination of the family to the father. There was, however, basic agreement that the father had the authority and responsibility to act for the family.

Successful political and legal struggles eroded some of the father's power, and the family began to have a new structure:

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27. In other words, it is not the case that one family is hierarchical and another egalitarian, or one communal and another individualistic. Rather, one is more or less hierarchical than another, and more or less communal than another.

28. These structures of hierarchy emerged from my work with child custody law, and I explain them in greater detail in that work. *See* Olsen, *supra* note 26. The following is an empirical description of the changes I believe actually took place historically. Logically, none of the changes would have had to take place as they did. For example, the *structure* of hierarchy could have remained unchanged, or there could have been more than four structures, or none at all. Also, as a logical matter, the structures could have shifted in a more random pattern.

29. *See* 1 Sir William Blackstone, Commentaries *430-33. In Blackstone's scheme, the wife lost her separate legal identity upon marriage, and the husband was empowered to act on her behalf. For example, in lawsuits, the husband generally had to be named as co-plaintiff or co-defendant with his wife, and she generally could not enter into contracts without his concurrence. Children were similarly subordinate to the father. He could discipline them and had a right to their "services" until the age of 21. *Id.* at *441.

30. In this, and in subsequent diagrams, "F" refers to father, "M" to mother, and "C" to child or children.

. The father was still head of the family and still the hierarchical superior, but the hierarchy itself became more open to question. If the father were removed from the family, the mother would become the new head of the family. Under the first structure, according to Blackstone, the mother was entitled to nothing more than "reverence and respect;"[31] under this second structure, in the father's absence, the mother had the same kind of authority enjoyed by the father. Although the father in this second structure still retained considerably more authority than the mother, and although his authority took complete precedence over the mother's, the change was nevertheless important. The second structure treated the mother as a separate person with a juridical personality of her own. If the father died, the mother became entitled to the custody and services of her children, just as the father had been during his life.[32] Also, some courts claimed the authority to find a father unfit, remove him from the hierarchy, and award custody to the mother.[33]

The third and fourth structures embody today's ideologies of legal equality in family life. The third structure represents a significant shift: 

. Here, the mother and the father are juridical equals. Theoretically, both have similar rights over their children, and neither spouse is legally superior to the other. The fourth structure is the least hierarchical: 

. Here, the child comes into her own as a legal personality, and each person in the family is treated as a juridical equal.

2. *The Legitimation of Hierarchy*. — Different explanations or rationalizations for the inferior status of women correspond to these different hierarchical structures. Within each of

31. *See* 1 Blackstone, *supra* note 29, at *441 ("[A] mother, as such, is entitled to no power, but only to reverence and respect.")

32. In 19th century England, the father was entitled to appoint a testamentary guardian for his children so that, upon his death, the mother might have virtually no power over them. For an American case recognizing this power in a father but granting a period of delay—in order to protect the interest of the children—before implementing the father's will, see Wood v. Wood, 5 Paige Ch. 596, 605-06 (N.Y. Ch. 1836).

33. *See* Rollin Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 47-48 (1858).

these four structures, men have offered somewhat different justifications for the subordination of women.

The first two structures involved similar justifications. In the first structure, 

, the subordination of women was so taken for granted that it was almost invisible. The father was the head of the family; fathers had been the heads of families since time "immemorial."[34] In the second structure, 

, women were said to be inferior because God or nature made men superior.[35] Apologists of male supremacy generally did not argue that women implicitly consented to an inferior status when they agreed to marry men, but these apologists explained the hierarchy as natural or as a matter of convenience, if not necessity.[36]

In the third structure, 

, apologists deny the inferior status of women. Women are not subordinate to men; they are just different from men. Men have their sphere, and women have their separate "but equal" sphere. The apologists hope that no one notices the very real differences between these two spheres—that men keep wealth, power and influence in their sphere, and leave in women's sphere unpaid service and nurturance obligations.

Current justifiers claim that in the fourth structure, 

, everyone is equal. Here, they say, perceived differences among family members are simply private, isolated occurrences. Members of the family are juridically equal, in the same sense that workers and their bosses are juridically

34. The concept of "immemorial" custom, custom followed since "time out of mind," was developed by the English jurist Lord Coke, who, in the 17th century, explained and justified English common law on the basis of custom. *See* John Pocock, The Ancient Constitution and the Feudal Law 30-55 (1957).

35. *See, e.g.*, 1 *Corinthians* 11:3-11:16, 1 *Timothy* 2:8-2:15.

36. For an analysis of Blackstone's use of necessity, convenience and implied consent to justify hierarchy, see Kennedy, *supra* note 2, at 304-11. In 1861, a New York court refused to follow the state's equal guardianship statute (each parent has equal guardianship rights over the child) because the judge believed that the family hierarchy was necessary. *See* People *ex rel.* Brooks v. Brooks, 35 Barb. 85 (N.Y. App. Div. 1861).

equal.[37] This view treats women's subordination as though it occurred by chance. That men happen to earn almost twice as much money as women, and that this affects the social relations between the sexes is, according to this view, not the state's concern. Similarly, that children are economically dependent upon their parents, and that parents sometimes use this dependency to dominate or exploit their children, is likewise not the state's concern. Rather, the mistreatment of wives and children is simply a series of unfortunate individual occurrences.

B. The Group Dimension

The group ⟶ individual dimension places the family as a corporate unit at one end of a continuum, and the family as a collection of individuals at the other end. The more communal or collective direction focuses on the family as a single, undifferentiated unit; the more individual direction focuses not on the family unit itself, but rather on the particular members of the family and on their contractual agreements, implied or express.

Historically, the hierarchy dimension and the group dimension were related—the more hierarchical family was also more communal, and the more egalitarian family was also more individualistic. This was empirically true, but not logically necessary. It could have been different. A communal (or juridically intermingled) family could be non-hierarchical, just as a hierarchical family could be non-communal. Nevertheless, we often forget the contingency of history and unnecessarily limit our conception of the possibilities of human association. Our historical experience with the liberalization of the family makes us assume—often without realizing it—that the only alternatives are patriarchy on one hand, and atomistic individualism on the other.[38] This is similar to the choices available to the nineteenth century woman: she could join a patriarchal family or be alone.[39] There were almost no other alternatives. Many of today's right-wing women similarly see no alternatives and urge a return[40] to the patriarchal family as the only way to

37. *See* Olsen, *supra* note 17, at 1515.
38. *See id.* at 1530.
39. On the difficulties faced by women who did not marry in 19th century England, see the novels of Jane Austen, especially *Emma*. Jane Austen, Emma (1816).
40. Frequently, those who romanticize the patriarchal family assume that present families are far less patriarchal than they actually are.

achieve closeness and commitment.[41]

We can understand the group ⟶ individual continuum best by considering each of its two poles. The early notion that the legal personality of a married woman merged into her husband's is an extreme illustration of communalism.[42] The ideas of guardianship and wardship of children likewise are classic communal notions.[43] At the opposite end of the continuum, the individualism pole ignores group membership and focuses on the autonomous individual.

The significance of marriage varies across the continuum. In the more communal direction, marriage creates the group; it marks the beginning of a new family. In the more individual direction, marriage alters the individual rights of the two people who marry. As one moves along the continuum from the more communal toward the more individual direction, people's rights cease to change automatically by marriage and begin to change only by the implicit or explicit agreement of the parties. Marriage ceases to create an entity or to be a status;[44] instead, it becomes a contract negotiated between two individuals.[45]

Concrete examples can illustrate the relationship of these two dimensions, hierarchy and group, to an analysis of the positive and negative effects of changes in family law. This essay presents two such examples: the rise and the fall of the tender years doctrine.

III. The Tender Years Doctrine

The "tender years doctrine" is actually not a single doctrine, but a collection of various rules that once gave preference

41. *See* Andrea Dworkin, Right-Wing Women (1983).

42. *See* 1 Blackstone, *supra* note 29, at *430.

43. Although guardianship and wardship originated as proprietary institutions concerned with the devolution of real property, by the 19th century they had lost this quality and become purely protective. The rules that characterize the relationship of guardianship or wardship are those that embody the ideals of regulation, paternalism, community, and informality, in contrast to the individualistic ideals of facilitation, self-determination, autonomy, and formality. *See generally* Kennedy, *supra* note 22, at 1732-37.

44. Joel Bishop introduced the idea that marriage created a status, Joel Bishop, Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits, § 29-30, at 25-26, and § 41, at 34-35 (1852), and the idea immediately became popular. *See* Joel Bishop, New Commentaries on Marriage, Divorce and Separation as to the Law, Evidence, Pleading, Practice, Forms and the Evidence of Marriage in all Issues on a New System of Legal Exposition, § 34 at 13-14 (1891).

45. *See* Marjorie Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 Calif. L. Rev. 204, 280-86 (1982).

to the mother in a custody battle over a child of tender years.[46] It arose in the nineteenth century, flourished early in the twentieth, and was abolished in the latter part of the twentieth century.[47] The rise and the fall of this doctrine were both partial victories and partial defeats for women. To understand why this is so, we must examine the ideological significance of the tender years doctrine as well as its more immediate, practical effects.

A. The Rise of the Tender Years Doctrine

Throughout the nineteenth century, there were scattered custody cases in which courts preferred the mother simply because she was the mother,[48] but this practice did not actually become a doctrine until early in the twentieth century. In some jurisdictions the tender years doctrine was a "tie-breaker": if other factors were equal, the court placed a child of tender years in the custody of the mother.[49] In its strongest form, the tender years doctrine mandated that a court award custody of a young child to the mother unless she were proven unfit or a danger to the child.[50]

1. *As a Victory for Women. — (a) Ideological Victory. —* The rise of the tender years doctrine was an ideological victory for women insofar as it acknowledged and established that women were capable of heading families. Not only could women head families after their husbands died, but they were also the preferred parent upon the breakup of a marriage. This maternal preference both reflected and reinforced a greater acceptance of female-headed families. The rise of the tender years

46. *See* Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. Fam. L. 423 (1976-77); Rena Uviller, *Father's Rights and Feminism: The Maternal Presumption Revisited*, 1 Harv. Women's L. J. 107 (1978). *See also*, Nancy Polikoff, *Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 Women's Rts. L. Rep. 235, 235 n.1 (1982).

47. *See* Polikoff, *supra* note 46, at 235-36.

48. *See, e.g.*, Foster v. Alston, 7 Miss. (6 Howard) 406 (1842) (dissent); Commonwealth *ex rel.* Myers v. Myers, 18 Pa. C. 385 (1896); DeHauteville v. Sears (Court of General Sessions for City and County of Philadelphia, Nov. 14, 1840), *reported in* Hurd, *supra* note 33, at 481-83.

49. *See, e.g.*, McCreery v. McCreery, 218 Va. 352, 237 S.E.2d 167 (1977).

50. *See, e.g.*, Bruce v. Bruce, 141 Okla. 160, 285 P. 30 (1930).

doctrine marked a clear shift from the second structure of hierarchy towards the third, that is, from  to  .

(b) Practical Victory. — The rise of the tender years doctrine was an important practical victory for women, especially for separated or divorced women who wanted custody of their children. Not only was the doctrine an improvement over the common law rule preferring the father as custodial parent,[51] but it also provided an appealing alternative to the "fault rule"—followed by some courts—that the parent not at fault in the marital breakup should receive custody of the children. During the nineteenth and early part of the twentieth centuries, the law defined "fault" in such a way that a husband could make married life intolerable without giving his wife legal grounds for a separation.[52] Often, the wife's only recourse was to leave the family home. More often, her only weapon against such abuse was to threaten to leave. If a wife exercised her only option, or carried out her threat, her husband could charge that she deserted him and take away her children.[53] For women, the tender years doctrine marked a clear improvement over child custody decisions based on fault.

In addition to enabling more women to leave abusive husbands without losing their children, the tender years doctrine also increased the power of women both during the marriage and in the event of separation or divorce. Men usually had, and continue to have, more economic power and greater earning potential than women. This has given men greater power within

51. *See* Tarkington v. State, 1 Ind. 171 (1848); Hurd, *supra* note 33. *But see* Blisset's Case, 98 Eng. Rep. 899 (K.B. 1774) (Mansfield, L.).

52. For example, although a wife's single act of adultery would constitute grounds for divorce, an adulterous husband would not give his wife grounds for divorce unless his adultery was repeated or flagrant. *See* Clark, *supra* note 7, § 12.2, at 328 & n.9. Similarly, a husband's single act of brutality was usually not grounds for divorce. *See id.* Moreover, the wife had the burden of proving—sometimes by more than a mere preponderance of the evidence—repeated or particularly vicious acts of cruelty. Habitual drunkenness was often a ground for divorce, but again, sufficient proof could be difficult. For a particularly striking example of the plight of an abused wife, see Bryan v. Bryan, 34 Ala. 516 (1859).

53. *See, e.g.*, People *ex rel.* Sternberger v. Sternberger, 12 App. Div. 398 (N.Y. 1896); People *ex rel.* Brooks v. Brooks, 35 Barb. 85 (N.Y. App. Div. 1861); Bryan v. Bryan, 34 Ala. 516 (1859); Taylor v. Taylor, 103 Va. 750 (1905); Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203 (1834).

their marriages; women generally have had a greater economic incentive to make their marriages successful. The tender years doctrine began to redistribute power somewhat in the woman's favor.[54] When fathers stood to lose their children upon separation or divorce, men had a greater emotional incentive to keep their marriages intact.[55]

2. As a Defeat for Women. — (a) Ideological Defeat. — The rise of the tender years doctrine was also an ideological defeat for women. The characteristics attributed to women and said to make them ill-suited for public life were the very same characteristics embraced by the rhetoric of the tender years doctrine.[56] The doctrine reinforced the ideology of inequality, which stated that a woman's place is in the home. The doctrine therefore helped keep women in their place—that is, in the home serving others, and not out in public gaining power or making money.

(b) Practical Defeat. — The rise of the tender years doctrine was also a practical defeat for women. The doctrine always allowed courts discretion to deny custody to a mother found "unfit," and judges manipulated the concept of unfitness to keep women subservient to their husbands.[57] If a woman were too independent, or did not fit the pedestal image of the tender years doctrine, courts would label her unfit. Thus, a woman might compromise her own happiness within the marriage

54. *See* David Daube, *Dividing a Child in Antiquity*, 54 Calif. L. Rev. 1630, 1633 (1966).

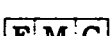
55. One might question whether it really benefits a woman if a man remains in a relationship with her only because he wants to be around his children. This is similar to the question whether it benefits a man if a woman struggles to keep their relationship intact because of her economic dependence on him. The easy and appealing answer is that neither spouse benefits—that human relations should be independent of any such ulterior motives. The Soviet Union puts this ideal as follows: "Soviet legislation on marriage and the family is designed to actively encourage the final liberation of family relations from materialistic calculations. . . ." Basic Principles of Legislation in the USSR and Union Republics on Marriage and the Family (as amended on June 25, 1968, by the Supreme Soviet of the USSR), *quoted in* O. M. Stone, *The New Fundamental Principles of Soviet Family Law and Their Social Background*, 18 Int. & Comp. L. Q. 392, 410 (1969). However, this easy and appealing answer neglects the complexity of relationships and of human motives. These concerns cannot be divorced from human relationships. People exist in a social and economic setting and this setting necessarily affects all of their relations with others.

56. *See* Annamay Sheppard, *Unspoken Premises in Custody Litigation*, 7 Women's Rts. L. Rep. 229, 229-30 (1982).

57. This, of course, has an ideological as well as a practical component. As a practical matter, women could be punished or penalized for overstepping the role prescribed for them by men. Ideologically, this power enabled the courts to shape society's view of what behavior was "fit" for women.

and make considerable personal sacrifices only to be branded "unfit" and have her children taken away. The tender years doctrine discouraged women from pursuing their own goals and encouraged women to be subservient and obedient.

B. The Fall of the Tender Years Doctrine

In the late twentieth century, the tender years doctrine came under increasing criticism. Fathers argued that it discriminated against them irrationally on the basis of their gender, and that courts should decide custody simply on the basis of the child's best interests. Each case, according to these fathers, should be decided on its individual facts, and the gender of the parental contestants should be irrelevant.[58] The majority of courts accepted these arguments and most states have now abolished any custodial preference for the mother.[59] The fall of the tender years doctrine correlates with the shift from the third to the fourth structure of hierarchy, that is, from  to  .

1. As a Defeat for Women. — (a) Practical Defeat. — One practical effect of the fall of the tender years doctrine is that many more mothers are losing custody of their children.[60] Practicing lawyers complain that almost any father who really tries can now win custody of his children.[61] It is not necessary to know the precise statistics in order to know that for most mothers, the risk of losing their children in a custody battle is considerably greater after the fall of the tender years doctrine than it was before. This risk increases women's fear of divorce and it may well reduce their power within the marriage. The husband still maintains his economic advantage,[62] but the wife has lost the emotional advantage she might have had.[63] Moreover, fathers can extract significant economic concessions from mothers and can generally harass and intimidate women with the threat of a custody battle. The outcome of a custody fight is very unpredictable because custody decisions are now highly

58. *See Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1333-38 (1980).
59. *See* Henry Foster & Doris Freed, *Divorce in the Fifty States: An Overview*, 14 Fam. L.Q. 229 (1981).
60. *See* Polikoff, *supra* note 46.
61. *See id.*
62. *See id.* at 237-39.
63. *See id.*

individualized determinations made on a case-by-case basis, rarely subject to meaningful appellate review.[64] This creates an anomaly: the more devoted a mother is to her child, the more the mother has to lose in a custody fight. To avoid the risks of a custody battle, many mothers who are clearly the better custodian for their children are nevertheless intimidated into giving up alimony, property settlement and child support money that they and their children need in order to live comfortably.[65] This dynamic contributes to the widespread poverty of women and children.[66]

(b) Ideological Defeat. — Although the fall of the tender years doctrine is usually considered an ideological victory for women,[67] it is also an ideological defeat. The individualized nature of current custody decisions denies the political significance of women as a group: when women lose custody of their children, the state, and many people, consider the phenomenon to be a private, individual matter. They overlook the fact that custody decisions also reflect and shape society's attitude toward women and motherhood. Within this privatized perspective, women lose their group identity. Women no longer have a political definition as women, and the custody of children ceases to be an issue of gender politics. The fall of the tender years doctrine thus depoliticizes the issue of custody and deprives individual mothers of their children one at a time, mother by mother.

2. As a Victory for Women. — (a) Ideological Victory. — The fall of the tender years doctrine is an ideological victory for women because it is an assertion of sexual equality; it reinforces notions of co-parenting and of fathers sharing responsibility for the emotional development of children. The fall of the tender years doctrine legitimates the desires of those men who wish to nurture children; it also legitimates the wishes of those mothers who do not want custody of their children. An implication of the tender years doctrine, that only unfit mothers do not have custody of their children, loses some of its strength with the fall of the doctrine.

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64. *See* Mnookin, *supra* note 21.

65. *See* Garska v. McCoy, 278 S.E.2d 357, 360, 362 (W. Va. 1981), discussed in Polikoff, *supra* note 46, at 241-43.

66. On the "feminization of poverty," see Barbara Ehrenreich & Karen Stallard, *The Nouveau Poor*, Ms., July-Aug. 1982, at 217.

67. *See infra*, p. 17.

(b) Practical Victory. — There are practical benefits that result from the fall of the tender years doctrine. In some cases, the absence of the doctrine leads to a better custody decision for the child. Additionally, the courts' focus on the best interests of the child enables some women who do not fit the stereotypical maternal image associated with the tender years doctrine to present a coherent argument and occasionally to obtain custody. Under the tender years doctrine, for example, courts frequently decided that any evidence of non-marital sexual activity proved a mother "unfit."[68] From such a perspective, lesbianism would certainly be the epitome of unfitness. While it is still extremely difficult for lesbians to keep custody of their children,[69] they now have a better chance at custody because of the current focus on the child's needs.

C. An Alternative to the Tender Years Doctrine

My assertion that there are both good and bad effects to every reform or to every change does not imply that these effects balance out and, therefore, make little difference. Rather, I maintain that we must or should be far more thorough in evaluating any proposed reform or change. An important reason for examining the particular good or bad effects of any proposal is that, by doing so, we can make a more precise and correct evaluation of the actual overall effect of any reform.

A close examination may also help to devise alternatives or a middle ground between the status quo and a proposed change. For example, in the case of child custody, a possible middle ground is a doctrine giving custodial preference not to the mother, but to the child's primary attachment figure,[70] be it the mother or the father.[71] Such a rule, like the abolition of the

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68. *See* Henry Foster & Doris Freed, *Child Custody (Part I)*, 39 N.Y.U. L. Rev. 423, 429-31 (1964). *See generally* Mary Dunlap, *Toward Recognition of "A Right To Be Sexual,"* 7 Women's Rts. L. Rep. 245 (1982) (discussing different judicial attitudes toward sexuality of women and men).

69. *See* Nan Hunter & Nancy Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 Buffalo L. Rev. 691 (1976).

70. John Bowlby has widely disseminated this concept of a primary attachment figure. *See* John Bowlby, Maternal [sic] Care and Mental Health (1951); John Bowlby, Attachment (1969); John Bowlby, Separation: Anxiety and Anger (1973); John Bowlby, Loss, Sadness and Depression (1980).

71. Nancy Polikoff has made the very interesting, related suggestion that there be a preference for the parent who has been the child's primary caretaker. *See* Polikoff, *supra* note 46, at 241-43. *See also* Ramsay Klaff, *The Tender Years Doctrine: A Defense*, 70 Calif. L. Rev. 335 (1982) (apparently supporting the primary attachment figure proposal, but referring to it as the tender years doctrine).

tender years doctrine, would avoid sexual stereotyping and encourage male responsibility for children. But because the "primary attachment" test is more determinate than the "best interests of the child" test, the suggested rule would reduce the potential intimidation that fathers can now exercise by threatening a custody battle. This change is especially important in the case of an economically dependent mother who has devoted most of her married life to child care. Moreover, a court applying the "primary attachment" test will have greater difficulty taking custody away from a lesbian mother who proves that she is the child's primary attachment figure.

Although I support the primary attachment doctrine, I recognize that it has disadvantages. The doctrine tends to make child custody decisions dependent upon the "experts" who determine "primary attachment." Many people believe that experts already determine too much of our lives.[72] Furthermore, the doctrine presupposes that a child will be primarily attached to *one* person. Thus, the doctrine reinforces some of the worst aspects of the nuclear family ideology, including the assumption that one person is primarily responsible for child care.[73] Also, the proposal assumes child custody determinations will remain adversarial and create winners and losers in a patriarchal legal system.[74] Finally, the primary attachment doctrine diverts attention from the destructiveness of a society trying to raise children in unstable nuclear families with no significant group support.

IV. Conclusion

Legal reforms have ambiguous and contradictory effects. Yet the only way to bring about major changes may be to begin with minor ones. We must make political decisions and act, even though our efforts may sometimes backfire. The more completely and accurately we analyze reforms, the greater the possibility we have to promote those reforms that—sometime in the future—we will recognize to have been the beginnings of a revolution.

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72. *See, e.g.*, Lasch, *supra* note 24.

73. For good discussions of the problems created by this system, see Nancy Chodorow, The Reproduction of Mothering (1978); Dorothy Dinnerstein, The Mermaid and the Minotaur (1977). *See also* Isaac Balbus, Marxism and Domination (1982).

74. Andrew Watson writes poignantly on the dangers and disadvantages of such decisions. *See* Andrew Watson, *Children of Armageddon: Problems of Custody Following Divorce*, 21 Syracuse L. Rev. 55 (1969).