

The Morality of Choice: Estate Planning and the Client Who Chooses Not to Choose

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I. INTRODUCTION

The Symposium focuses around two hypotheticals.¹ The question posed about each—whether it is ethical for an estate lawyer to represent spouses, one of whom *chooses* subservience to the interests of the other—provokes discussion of a broad set of concerns about the scope and meaning of the contemporary family, and about the appropriate parameters of legal representation of family members.

American law is deeply grounded in an ideology² that assumes autonomous individuals as the subjects and objects of legal activity. The morality of legal representation is a morality of individualism. Western law generally, and American law specifically, are vastly superior at, and more comfortable with, delineating and elaborating the rights and obligations of individuals than of groups. In general, American law has worked best at protecting *individual* rights.³ Other

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1. For the text of Hypotheticals I and II, see 22 SEATTLE U. L. REV. 1, app. at 14 (1998).

2. By “ideology,” this essay does not mean propaganda or a set of political beliefs. Rather, “ideology” refers to a pervasive system of beliefs (often unarticulated) that underlies people’s thoughts and anchors their lives. The definition is close to that of the French Indologist, Louis Dumont:

Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational, or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

LOUIS DUMONT, FROM MANDEVILLE TO MARX 22 (1977).

3. As de Tocqueville recognized almost two centuries ago, American law has a limited moral function. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 1-2 (1991) (noting de Tocqueville’s hesitance to attribute to law the power to mold

goals—for instance, communitarian goals—have been less well served by the law.⁴ For this very reason, it is essential to guard against sacrificing individual autonomy and liberty in a quest for other, less attainable goals.

Legal ethics specifically, and the law more generally, reflect a society that for over two centuries has increasingly valued autonomy and choice, and has insisted (almost obsessively) on preserving choice in everyday life.⁵ In such a society, morality favors the elaboration of choice. This has long been evident within the marketplace, where putatively equal, autonomous individuals negotiate the terms of their everyday lives.⁶

For the first century and a half after the start of the Industrial Revolution, the comparative absence of choice within the world of home and family contrasted sharply with the significance of choice in the marketplace. Within families, roles followed status, itself understood as the inexorable consequence of natural (*e.g.*, biological) truth. Whereas work was identified with money—the most fungible commodity—home was identified with love and enduring connection.⁷ The so-called “traditional” family was understood as a pleasing counterpoint to the harsh realities of the marketplace. “Home” (the domain of women and their treasured children) was idealized⁸ as a

human conduct). On the whole, American law protects rights more successfully than it mandates duties. See Robert L. Spaeth, *Commentary*, WASH. TIMES, Dec. 5, 1991, at G4, available in LEXIS, News Library, Arcnws file.

4. Within the American constitutional tradition, protection of individual autonomy and dignity have been integrally connected to communitarian goals. I am grateful to Professor Monroe Freedman for framing the significance of the connection.

5. Equality and liberty—the central values of American constitutional history and of the society more generally—are in constant and inevitable conflict. The success of each limits that of the other. In the contemporary world, a world defined through advertising and the substitutable commodities it promotes, liberty—or rather, the illusion of liberty—seems increasingly to prevail. See LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* 67-68 (1979) (describing the “excitement of commodities” as the “excitement of possibility”).

6. Correlatively, lawyers are expected to represent individuals, not groups. When lawyers do represent groups (*e.g.*, corporations), or when the law regulates group behavior, or provides for group interests, the group is almost invariably likened to an individual. As a result, family representation has been problematic for American law.

In Western culture, the individual is the basic unit of social reference. See Janet L. Dolgin & JoAnn Magdoff, *The Invisible Event*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 352-55 (Janet L. Dolgin et al. eds., 1977).

7. See DAVID M. SCHNEIDER, *AMERICAN KINSHIP* 48-49 (1968).

8. The image of the family elaborated and extolled in the nineteenth and twentieth centuries largely excluded poor families. For example, the role of the middle-class wife-homemaker was unavailable to poor women who were compelled to spend their everyday lives in the marketplace rather than in the home. See, *e.g.*, Janet L. Dolgin, *Transforming Childhood: Apprenticeship in*

sphere characterized by bonding and affection.⁹ Here, relationships were defined in status terms, delineated largely through differences in age and gender. In contrast, people at work (men) were defined as putatively equal, autonomous individuals.

The law responded to the sharp differentiation between home and work that developed with the Industrial Revolution by regulating domestic relations through a set of rules grounded in religious tradition.¹⁰ These rules contrasted as starkly with the rules that regulated behavior in the marketplace as views of home contrasted with views of work. However, family lawyers were expected to act like lawyers, not like ministers, priests, or rabbis. As a result, the role of family and estate lawyers was problematic.

In the second half of the twentieth century, new patterns clearly emerged within the domestic sphere. Egalitarian options, grounded in a world of contract rather than a world of status, increasingly replaced or displaced the hierarchical differences that defined family members in the preceding period. The law responded in kind by redefining family members (at least adult family members)¹¹ as autonomous individuals, connected only insofar as they *chose* connection. Increasingly, relations within families were understood through the terms of modernity (the terms of choice and autonomous individuality).¹²

American Law, 31 NEW ENG. L. REV. 1113, 1162 (1997).

9. See STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 43-65 (1988).

10. Max Rheinstein gives a startling example of the extent to which American family law relied on religious traditions to regulate family life. Rheinstein writes:

When Chester G. Vernier's Survey of the Divorce Laws of the Forty-eight American States, Alaska, the District of Columbia, and Hawaii was closed in October of 1931, the statutory grounds for divorce . . . [as] enumerated in the statutes of a significant number of jurisdictions were forms of marital misconduct, as they were stated by Martin Luther and his successors in their interpretation of the New Testament. Divorce was regarded as repudiation of a guilty spouse by the innocent as punishment for misconduct.

RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 51 (1972).

11. The law has been more reluctant to understand childhood and to define the parent-child relationship through the terms of the marketplace. With regard to children, the law, reflecting the society, has been unwilling to easily abandon an understanding of childhood as a special status that precludes children's enjoying the rights and bearing the obligations of autonomous individuality. See JANET L. DOLGIN, *SUFFER THE CHILDREN: NOSTALGIA, CONTRADICTION AND THE NEW REPRODUCTIVE TECHNOLOGIES* 473, 487-90 (1996) (considering legal responses to changing visions of family and of childhood).

12. At the same time, Americans continue to define families through notions of love and affection. Family members, though able to invoke separate identities and to create the terms and limits of their own relationships, generally continue to define those relationships in contrast to relationships in the world of work insofar as relationships at home are relationships of love. No longer, however, are social visions of family predicated on underlying (natural or supernatural) truths.

Thus, as the sharp differences that once conclusively distinguished the worlds of home and work fade, family law merges with the law of the marketplace. In more and more contexts, the task of the family lawyer begins to resemble the task of other lawyers representing clients involved in tort, contract, or property matters.¹³

Although the two hypotheticals that provide the focus of this Symposium concern an area of practice generally not categorized as “family law,” in fact, the estate lawyer, much like the family lawyer, is concerned with law as it affects the “person” in his or her private life, and can, therefore, be seen as one kind of “family lawyer.” Indeed, the ideology—and therefore inevitably the morality—of family life informs and defines the role of the estate lawyer. More specifically, as social visions of family have shifted during the past century, so has the law governing wills and estates.¹⁴ In estate planning, as in other familial matters, the law has begun clearly to reflect the society by focusing on, and by struggling to protect, the unending elaboration of choice rather than custom.

The stories of Bob and Ruth (Hypothetical I) and Joseph and Susan (Hypothetical II) represent a distinct set of choices by spouses about their relationships. In each story, the spouses ask for legal assistance that will significantly limit the rights of one spouse (Ruth, in Hypothetical I, and Joe, in Hypothetical II) vis-à-vis the other spouse. To ask—as this Symposium does—whether a lawyer should accept either couple as clients is to ask about the moral dimensions of the law as arbiter and director of familial relationships. In responding to the Symposium’s questions about these couples, this essay concludes that, at present, for reasons intricately connected to the history of families (and to the connected history of the law’s regulation of testamentary dispositions), the risks (to each spouse as well, perhaps, to the couple as such) inherent in one lawyer’s representing a wife and husband in estate matters are clear, present, and serious. However, the risks of separate representation in such cases—especially the risk that lawyers will create antagonism among family members where none exists—are real and suggest that estate lawyers should not be prohibited from representing spouses together. If they do so, however, they

13. This is so insofar as the law has increasingly permitted the creation and operation of families to be governed by negotiation and choice. See Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1560-61 (1994) (describing changes in family law since the 1960s). See *infra* notes 33-52 and accompanying text.

14. Increasingly, for instance, legal interpretations of contested wills are informed by an understanding of family members as separate individuals who may, or may not, choose continued association. See *infra* notes 53-75 and accompanying text.

should be constantly alert to both the potential risks that such representation poses and the parameters of familial relationships within the family groups being represented.¹⁵

The next section (II of this essay) briefly reviews alternative approaches to legal representation of family members in estate matters. Then, in Section III, the essay examines more fully transforming notions of person and group that underlie the reformulation of family law and estate law in the second half of the twentieth century. Finally, Section IV expressly considers the concrete choices facing the couples described in this Symposium's two hypotheticals. Throughout, it is assumed that conclusions about the moral dimensions of estate representation must be premised on a clear understanding of the ideologies of American families.

II. ALTERNATIVE APPROACHES TO LEGAL REPRESENTATION OF SPOUSES IN ESTATE PLANNING

Several approaches to representing spouses involved in estate planning have been described. A few of these are reflected in, or expressly approved by, official codes of ethics.¹⁶ Others have been proposed by commentators.

Briefly, these approaches include:¹⁷ (1) an "individualist approach" which views each family member as an autonomous individual, and suggests or requires¹⁸ that family members be represented

15. This later task, in particular, is not one for which most lawyers are trained. Thus, in many cases, individual representation is to be preferred. See *infra* Section IV.

16. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9, 1.13, 2.2 (1983) [hereinafter MODEL RULES]; *Report of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association*, 28 REAL PROP. PROB. & TRUST J. 763 (1994) [hereinafter *Real Property Section Recommendations*].

17. See Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453, 1457-58 (1994) (describing four varieties of representation in family estate planning contexts) [hereinafter *Intergenerational*]; Russell G. Pearce, *Proceeding of the Conference on Ethical Issues in Representing Older Clients: Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1294-95 (1994) (delineating five modes of representation in estate planning context).

An additional model, beyond those described, involves "separate simultaneous representation by one lawyer." Teresa Stanton Collett, *And the Two Shall Become as One . . . Until the Lawyers are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 119 (1993) [hereinafter *And the Two Shall Become as One*]. Under this model, which has been described by Professor Pennell, the confidences of each spouse remain protected from the other. Jeffrey Pennell, *Professional Responsibility: Reforms Are Needed to Accommodate Estate Planning and Family Counseling*, 1991 MIAMI INST. ON EST. PLAN. 18-3, 18-29 (cited in Collett, *supra* this footnote at 104, n.20). This model is merely noted here and is not considered further.

18. As proposed in this essay, the "Individualist Approach" would not be mandatory. See *infra* Section IV.A.

separately by different lawyers; (2) a “family approach” which requires lawyers to represent estate clients as familial wholes and that thereby identifies the “family” as the client;¹⁹ (3) “joint representation,”²⁰

19. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

20. This approach is widely institutionalized and supported by the Model Rules of Professional Conduct. MODEL RULES, *supra* note 16, Rule 1.7. The Rules themselves do not refer expressly to the propriety of one lawyer’s representing a husband and wife involved in estate planning. However, comment 13 to Rule 1.7 (concerning conflicts of interest) refers to “[c]onflict questions that may arise in estate planning and estate administration.” The comment continues:

A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration, the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

MODEL RULES, *supra* note 16, Rule 1.7 cmt. 13. The comment is misleading insofar as it suggests that the relevant conflict arises after the initiation of legal representation.

Professors Geoffrey Hazard and W. William Hodes have described the “modern approach” to conflicts of interest to “focus on the degree of the risk that a lawyer will be unable to satisfy all of the legitimate interests that compete for attention in a given matter.” GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.7:101 (Supp. 1994). See also MONROE FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS* 174-79 (1990) (differentiating potential from actual harm). However, the “potential for harm” (as contrasted with actual harm) in the estate planning context (which differs in significant regards from other contexts in which lawyers represent clients as groups) is such that joint representation should only be undertaken in unusual cases. See *infra* Section IV (discussing such unusual cases).

Rule 1.7 itself reads:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES, *supra* note 16, Rule 1.7.

The approach is also supported by the recommendations of the ABA Special Probate and Trust Division Study Committee on Professional Responsibility.

The recommendations encourage lawyers to engage in joint representation of spouses. *Real Property Section Recommendations*, *supra* note 16, at 771-72. The rules rely on what Professor Pearce calls a “Don’t Ask, Don’t Tell” approach. Pearce, *supra* note 17, at 1285-87.

The recommendations have not been approved by the ABA House of Delegates. Malcome A. Moore & Anne Hilker, *Representing Both Spouses: The New Section Recommendations*, PROP. & PROB. 26 (1993).

Professor Pearce insightfully explains the recommendations’ conclusions to follow from the Section’s assumption that the ethical rules should conform “to the actual behavior of trusts and

which identifies both spouses as the clients of one lawyer²¹ and which treats the spouses as individuals except insofar as they consent to treatment as a unit;²² (4) an "intermediation approach,"²³ which also involves joint representation, but focuses more fully on individual concerns of each spouse than the third approach;²⁴ and finally, (5) "optional family representation."²⁵

Professor Pearce describes optional family representation to "allow[] family members to determine how they will be represented. The approach permits families the option of deciding whether to obtain representation as a family or as a collection of individuals."²⁶ While similar to established doctrine in presuming to recognize group and individual aspects of familial constellations, optional family representation differs from established approaches in giving more control to clients in defining the form of their representation, in encouraging lawyers, together with their clients, to focus on "family harmonies" as well as on "family disharmonies,"²⁷ and in "prohibit[ing] a duty of confidentiality to any individual family member with regard to information relevant to another."²⁸

Two of these approaches—the first and the fifth—are preferred to the others. The individualist approach, as envisioned here, best protects family members in their role as putatively equal, independent individuals. The approach mitigates the consequences of, even if it does not entirely preclude, a lawyer's identifying one spouse as the primary client, and harmonizes with the law's individualist orientation as well as with widespread recognition by society of family members

estate practitioners." Pearce, *supra* note 17, at 1287-88.

21. See Collett, *And the Two Shall Become as One*, *supra* note 17, at 119.

22. See Pearce, *supra* note 17, at 1295.

23. See MODEL RULES, *supra* note 16, Rule 2.2.

24. *Id.* See Collett, *Intergenerational*, *supra* note 17, at 1458 (describing intermediation approach). Rule 2.2 provides for a lawyer's acting as an "intermediary" between clients. Unlike the comments to Rule 1.7, however, the comments to Rule 2.2 make no reference to estate planning. Moreover, the comments that do exist seem to envision application to situations generally unlike that involved in estate planning. For instance, comment 3 asserts:

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. . . .

MODEL RULES, *supra* note 16, Rule 1.7.

25. Pearce, *supra* note 17, at 1294-95.

26. *Id.* at 1295.

27. *Id.* at 1295-96.

28. *Id.* at 1308-09.

as autonomous individuals. Optional family representation, in contrast, aims to preserve communitarian goals while recognizing the individuality of spouses.

Each of the other approaches noted either assumes a definition of the domestic sphere that is largely unreflected by actual families or fails adequately to consider the moral consequences of the shifts that have transformed the domestic sphere in the past several decades. Professor Shaffer's "family representation" would, as a practical matter, be difficult, if not impossible, to institutionalize because the ideology and morality of family that it reflects are increasingly unrelated to mainstream families.²⁹ The other two approaches (joint representation and the intermediation approach in application to family groups) permit family representation, but are insufficiently cognizant of the ideological parameters of contemporary families.³⁰ In addition, these approaches represent the voice of the lawyer more than that of the client and more adequately resolve lawyers' than clients' dilemmas.³¹ This last point is true as well of the individualist approach. However, that approach protects the client from lawyers' assumptions that may place one spouse or the other at a disadvantage.

Finally, an individualist approach (which sides unconditionally with individualism and choice)³² is preferable in most cases to the approach proposed by Professor Pearce. The goals of optional family representation are lofty. The approach, however, is only as impressive as its central presumption—that lawyers can serve communitarian ends while protecting the choices of autonomous individuals—is accurate.

29. See *supra* note 19 and accompanying text.

30. See Pearce, *supra* note 17, at 1278-79, 1285-86.

31. For instance, the solutions proposed to handle irreconcilable conflicts (at least of the sort that arise, or become apparent, after representation has begun) assist lawyers much more clearly than they assist clients. Lawyer withdrawal in the face of newly discovered or newly exacerbated conflicts among or between clients protects the lawyer far more conclusively than the client(s) who are unlikely to be relieved of the conflict(s) by the lawyer's departure.

32. The individualist approach, though generally preferable to others, does have shortcomings. See *infra* Section IV.A. In most cases, individual representation will be more expensive than other forms of representation, including optional family representation. Moreover, individual representation is more likely to lead to the creation (or exacerbation) of an adversarial relationship between spouses than are other forms of representation.

The approach may also make it more difficult for lawyers to obtain information. Professor Pearce suggests that optional family representation is advantageous because the lawyer will know more about the clients' family situation. Pearce, *supra* note 17, at 1301. With regard to objective facts (*e.g.*, whether a spouse is likely to inherit property and if so what sort of property; the scope of the other spouse's life insurance or pension benefits, etc.), it will generally be true that a lawyer representing both spouses will have a better view of the couple's situation. With regard to other sorts of information (*e.g.*, descriptions of children's personalities and needs; the character of the spousal relationship, etc.), the advantage will often be lost.

The shifting contours of American families, as well as of family and estate law, challenge that assumption.

III. MODERNITY RE-DEFINES THE FAMILY: INTENTION AND CHOICE

In order to consider fairly the comparative advantages of optional family representation and an individualist approach to estate representation of spouses, it is necessary to review the transformation of American families (and correspondingly of family law and of estate law) within the past half-century. That task, in turn, requires a grasp of the history of the so-called "traditional" family.

A. *The Transforming Family: In Life and in Law*

In domestic life, as in other matters, modernity offers choices where tradition offered at least the illusion of certainty. Thus, modernity presents people with unending possibilities, and refuses to commit itself to *any* particular form that limits the identities of family members by grounding those identities in *inexorable* truths. In consequence, family members today—whether they *choose to view themselves* as old-fashioned or as modern—inevitably face the possibility of competing choices at the periphery of their current choices. More important, people frequently make such choices unconsciously, unaware of, and unconcerned with, the motivations on which such choices rest, and unconcerned with the consequences to which such choices may lead, and they make assumptions that may contrast with the assumptions of their spouses—or lawyers.

Ironically, apparent choices *between* modernity and tradition in family matters are products of modernity's obsession with choice. A marriage statute passed in Louisiana in 1997 provides a clear illustration. The statute offers two options to engaged couples.³³ Couples may choose a "covenant marriage," which can be terminated "only when there has been a complete and total breach of the marital covenant commitment," as demonstrated through accusations of fault, defined in familiar terms to include behaviors such as adultery, abandonment, imprisonment, or abuse.³⁴ Alternatively, Louisiana

33. LA. REV. STAT. ANN. § 272 (West 1997 & Supp. 1998); LA. CIV. CODE ANN. art. 86 (West 1997 & Supp. 1998).

34. LA. REV. STAT. ANN. § 307. In addition to traditional fault grounds, the statute allows termination of a covenant marriage upon proof that "the spouses have been living separate and apart continuously without reconciliation for a period of two years." Those choosing a "covenant marriage" must sign a "declaration of intent" containing a recitation to the effect that the parties "agree to live together as husband and wife for so long as they both may live," that they "have

couples may select a standard marriage which can be terminated without accusations of fault upon agreement between the spouses to divorce. The statute was apparently backed by "pro-family" conservative Christian groups anxious, in opposing divorce, to preserve traditional family life.³⁵ Therein lies the irony: the statute, by presenting forms of marriage as a matter of choice, ultimately confirms the success of modernity far more than it safeguards tradition. Traditional domestic life, understood as *chosen* rather than as an inevitable correlate of natural or supernatural truths, illustrates the allure of modernity more firmly than it represents the preservation of a hallowed past.

Family law, reflecting society, has widely acknowledged and provided for the legitimacy of multiple assumptions about, and diverse patterns of relationships within, the domestic arena. Family law has recognized family members as autonomous individuals, free to negotiate the terms of their relationships. For about one hundred years, the law strenuously safeguarded traditional rules that reflected a vision of families as hierarchical, holistic units that contrasted in almost every important regard with the world of the marketplace. Then with astonishing speed, beginning in the second half of the twentieth century, the law shifted course and, within little more than a decade, widely approved a panoply of alternatives for creating and regulating family life that were previously almost unimaginable. For example, California enacted the first "no-fault" divorce law in 1969.³⁶ Within a decade almost every state had followed California³⁷ and approved at least some form of no-fault divorce.³⁸ Moreover, in the same period courts began widely to accept and to enforce cohabitation contracts³⁹ and antenuptial agreements.⁴⁰ Previously both had been

chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into [the] marriage," and that they "have received premarital counseling on the nature, purposes, and responsibilities of marriage." *Id.* at § 273.

35. See Kevin Sack, *Tough Marriage Compact*, N.Y. TIMES, June 29, 1997, at 4, p.2; Katha Pollitt, *What's Right About Divorce*, N.Y. TIMES, June 27, 1997, at A29.

36. See Act of Sept. 4, 1969, ch. 1608, 1969 CAL. STAT. 3312.

37. See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 66 (1987) (noting that between 1969 and 1985 almost every Western country reformed its divorce law). See also Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions (as of June 1, 1974)*, 8 FAM. L.Q. 401 (1974) (listing grounds for divorce by state).

38. Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 667 (1984).

39. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (enforcing nonmeretricious contracts between cohabitants); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (upholding express contract between domestic partners).

seen as violative of public policy's concern with encouraging and preserving marriage.⁴¹ Further, a majority of states have recognized family members as autonomous individuals in abrogating the common law doctrine of interspousal tort immunity.⁴²

The shift in the law's perspective on domestic matters is represented (and was perhaps further encouraged) by a 1972 decision of the United States Supreme Court. In *Eisenstadt v. Baird*,⁴³ the Court declared unconstitutional a Massachusetts statute that prohibited the distribution of birth control to unmarried people.⁴⁴ The *Eisenstadt* case is frequently viewed as following unremarkably from the Court's 1965 decision in *Griswold v. Connecticut*.⁴⁵ In both cases, the Court invoked a "right to privacy" to invalidate a birth control statute. However, in *Griswold*, the right attached to the family unit as a social whole. In *Eisenstadt*, in stark contrast, the right attached to autonomous individuals. The Court wrote:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the 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. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁴⁶

The Court's unhesitating description in *Eisenstadt* of the marital couple as simply two autonomous individuals who choose to associate with each other represents a clear renunciation of a traditional view of family—one reflected clearly in *Griswold's* description of the right to marital privacy. That right, the *Griswold* Court declared, is "older than the Bill of Rights. . . . Marriage is a coming together for better

40. See, e.g., *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981). In enforcing such agreements, courts usually rely on standard principles of contract law. See Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 417, 560 (1988).

41. See, e.g., *Posner*, 233 So. 2d at 384 (taking judicial notice of increase in divorce as compared with marriage within society).

42. See, e.g., *Burns v. Burns*, 518 So. 2d 1205 (Miss. 1988); *Klein v. Klein*, 376 P.2d 70 (Cal. 1962). See also Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989).

43. 405 U.S. 438 (1972).

44. The implications of *Eisenstadt* are analyzed in much greater detail than is possible here in Dolgin, *supra* note 13.

45. 381 U.S. 479 (1965).

46. *Eisenstadt*, 405 U.S. at 453.

or worse, hopefully enduring, and intimate to the degree of being sacred."⁴⁷ Thus, between 1965 and 1972—the years in which state lawmakers began widely to reform family law in harmony with the presumption that family members are autonomous individuals⁴⁸—the Court redesigned⁴⁹ its public portrait of the family.⁵⁰

In short, in the last decades of the twentieth century, American constitutional law acknowledged the demise of the American family as a hierarchical social whole firmly anchored in a set of natural truths about the creation and operation of familial relationships. In place of that traditional family, the law recognized families as collections of individuals, free to structure the scope of their association, much as they might structure the terms of a business deal.

The family represented by *Eisenstadt* is the modern "family of choice."⁵¹ The morality of that family is a morality of choice which replaces hierarchical associations with associations between putative equals. It also, however, assumes (and thus encourages) the disruption of secure community.⁵² The private, putatively equal individual family member assumed by the Court in *Eisenstadt* is free from the restraints and burdens imposed by the sorts of hierarchical relationships on which the traditional family was predicated. In consequence, that individual loses the security of enduring community.

47. 381 U.S. at 486.

48. See *supra* notes 33-46 and accompanying text.

49. In both judicial and statutory forums, only the open acknowledgment of families as collections of autonomous individuals was novel. In fact, changes in this direction had been accumulating for most of the past two centuries. Lawrence Friedman makes this point in the context of the dramatic move toward no-fault divorce statutes beginning in 1969. The statutory revolution followed an earlier, less express transformation in patterns of divorce. As Friedman notes, despite strict divorce laws in the late nineteenth and early twentieth centuries, "[a] cynical traffic in runaway and underground divorce flourished in the shadows." LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 504 (2d ed. 1985) (footnote omitted).

50. In the years following *Eisenstadt*, the Court has frequently reached decisions that seem to reflect the ideology of *Griswold* and of the traditional family far more than that of *Eisenstadt*. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (referring approvingly to "sanctity traditionally accorded to the relationships that develop within the unitary family"). However, after *Eisenstadt*, such references become choices rather than the inevitable conclusions of uniform truths defining family life.

51. For an anthropologist's consideration of the contours of "families of choice" see KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991).

52. See, Dolgin, *supra* note 13, at 1564-70 (considering moral implications of shift from *Griswold* to *Eisenstadt*).

B. *The Transformation of the Law of Inheritance:
From Status to Contract*

The resulting choice—or rather, apparent choice—between equality and community is central to the contemporary debate about family.

It is also a choice that has been central in the transformation of the laws of inheritance in the West since feudal times. As family members, once bound through strict rules of moral community, have become free to negotiate their own relationships, so, within the context of inheritance, family members as property owners, once unable to direct the inheritance of their holdings, have become free from communal dictates which once determined patterns of inheritance. As a result, property owners may now select their own heirs.⁵³

The process through which inheritance law has been transformed since feudal times parallels the transformation of family law (and of the family more generally). Increasingly, contracts—and with them, negotiation and choice—have replaced status as the primary determinant of inheritance.

In feudal times, there was, at least in theory, no testamentary power.⁵⁴ The right to property, especially realty, followed inevitably from the right to a particular status. Thus, the property of feudal lords, and of others who held feudal tenure, generally passed at their deaths to their eldest sons under a rule of primogeniture.⁵⁵ Daughters could inherit (generally as coinheritors rather than under a rule of primogeniture) but only in families that had no sons.⁵⁶ Rules for the inheritance of personalty differed over time, but here also testamentary powers were the exception. A significant part of a man's personalty descended to his wife and children. The Magna Carta required only

53. The term "heir" here is used in a popular, rather than a technical, sense. Technically, the term under the common law refers to "[t]he person appointed by law to succeed to the estate in case of intestacy." BLACK'S LAW DICTIONARY 854 (4th ed. 1968).

There remain a few significant constraints on a wealth holder's right to dispose of assets at death. Among these are a spouse's right of election, *see, e.g.*, N.Y. EST., POWERS & TR. LAW § 5-1.1 (McKinney 1967), and property "set off" for a surviving spouse or children, *see, e.g.*, N.Y. EST., POWERS & TR. LAW § 5-3.1 (McKinney 1967).

54. Carole Shammass, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 145 (1987).

55. *Id.* at 146. Pollack and Maitland see the development of the primogeniture rule to have occurred slowly in England with the rule becoming firmly institutionalized only in the thirteenth century. SIR FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 273-74 (2d ed. 1959).

56. POLLACK & MAITLAND, *supra* note 55, at 274-75.

that this be a "reasonable part," typically two-thirds of an estate's personalty.⁵⁷

In England, testamentary privileges were officially recognized in the early modern period. The Statute of Wills of 1540 gave property owners significant powers to devise realty to "heirs of their choice."⁵⁸ In fact, English property owners did not generally use the testamentary privilege to deviate broadly from traditional patterns of inheritance. Rarely, for instance, did testators with children use testamentary powers to increase significantly the wealth left to wives and to collateral kin or to nonkin, though such powers were used to alter distributions to children so as to limit the traditional control enjoyed by eldest sons.⁵⁹ Thus, it can be surmised that the grant of testamentary powers signaled not so much dissatisfaction with traditional modes of inheritance as a fledgling concern with the recognition of autonomous individuality and a concomitant interest in intentionality and in the individual's general right to choose.

That development eluded women who, unlike their fathers, brothers, and husbands, were not defined, even for limited purposes, as autonomous individuals until the nineteenth century.⁶⁰ English

57. Shammass, *supra* note 54, at 146. Even the basic pattern of inheritance was complicated and can only be hinted at here. For instance, inheritance rules for villagers in the medieval world differed from those for feudal lords. Moreover, local variations were significant. Thus, inheritance rules varied from place to place and everywhere varied depending on the kind of property involved and the status of the dead property owner. *Id.* at 145-46.

58. *Id.* at 149.

59. *Id.* at 151.

60. Until the second half of the nineteenth century, women had very limited rights to own property and direct the disposition of such property at death. Thus, despite the recognition of individual autonomy and choice in the early modern period for male wealth holders, women, and wives in particular, remained subject to broad social assumptions about gender. Not yet recognized as autonomous individuals, and thus denied the privileges that that identity afforded their husbands in the early modern period, wives were arguably better served under a more ancient system that granted widows (as dower) the right to some share (perhaps one-third) of their husband's landed property for use during life. Under the "dower" system, widows were often able to control one-third of their dead husband's estates through much of their lives. See EILEEN SPRING, *LAW, LAND, & FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND, 1300 to 1800* 41 (1993). That ancient system was declared formally at an end in 1536 with the promulgation in England of the Statute of Uses. That Statute seriously limited widows' opportunities to become dowagers by completely barring from dower a widow whose husband, before marriage, had made a settlement of jointure upon her. Among the wealthy, at least, such settlements were common. Indeed, Eileen Spring concludes from her description of the history of widow inheritance rights that they "became an invariable accompaniment of aristocratic marriage." *Id.* at 48. Although, in theory, brides, if of majority, were able to negotiate prenuptial settlements, in fact, the disparate power held by the parties to those negotiations almost always worked to the detriment of the future wife. *Id.* at 64.

During the early modern period, middle-class English widows, who had more frequently been potential beneficiaries of personalty than of realty left by dead husbands, were cut off from their

limitations on the right of married women to inherit from their husbands were transported to the American colonies.⁶¹ Moreover, women in the colonial period and in the early years of the Republic forfeited control of their own property to their husbands at marriage. Only in the second half of the nineteenth century did many states in the United States pass married women's property acts that removed or eased earlier limitations on the right of wives to ownership and inheritance.⁶²

During the same period, English law recognized a broad right to choose with the promulgation of the Wills Act of 1837. That Act, which quickly became a model for estate law in the United States,⁶³ set the parameters for broad powers of testamentary privilege with regard to realty and personalty, and thus recognized clearly, though still nervously, a general *right to choose* in testamentary matters. The nervousness was expressed in the rigid formalities the Act demanded for a will to be created.⁶⁴

The Act's strict formalism modulated the striking transformation of inheritance law as assumptions of fixed inheritance patterns were

right to a "reasonable part" of their husband's personalty (generally defined as one-third) by alterations in law over a several-hundred-year period that granted males complete testamentary control over personalty. *Id.* at 61-63.

61. Shammas, *supra* note 54, at 161.

62. CAROLE SHAMMAS, MARYLYNN SALMON & MICHEL DAHLIN, *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 83 (1987) [hereinafter *INHERITANCE IN AMERICA*].

These new laws, however, had little effect for many women. The typical widow, for example, had no wealth but that "derived from the labor she had put into her marriage," and she could claim but one-third of her husband's property after his death. *Id.* at 101. Wives (and widows) were better off in those states that joined the United States in the second half of the nineteenth century as community property states. *Id.*

In the first century of the Republic's existence, as later, American testators were offered wide latitude to select their own heirs. In fact, widows often fared badly under this system, not because their husbands were precluded from naming them as heirs but because they often did not provide bountifully for them. During this period, the law's apparent focus on the powers of testation continued to contrast with testators' actual choices, which in significant degree mirrored patterns of inheritance mandated by the laws and customs of former times.

63. Other states modeled their statutes on the Statute of Frauds of 1677. LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW* 164 (1991).

64. Even earlier, almost a century and a quarter after the Statute of Wills of 1540 institutionalized the testamentary right in England, the Statute of Frauds began the process of channeling that right. Thus, the Statute of Frauds (1677) mandated the use of a written will, signed by the testator in the presence of three witnesses, in order to effect the transfer of land at death. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS AND ESTATES* 178 (5th ed. 1995). A century and a half later, the Wills Act of 1837 stiffened these requirements (though it did reduce the requisite number of witnesses to two) by demanding that both witnesses be present at the moment of attestation or acknowledgment by the testator. *Id.*

replaced by the acknowledgment of increasingly wide choice.⁶⁵ When the Act was passed, English and American societies were struggling to separate the domestic world from that of the marketplace. Thus, the extension of choice and the recognition of individuality within the estate context (a context that reflected the worlds of work, property, and home) was welcomed, but with significant tension. The rigid rules that made the Wills Act of 1837 even more strict than the 1677 Statute of Frauds⁶⁶ arguably encouraged hasty testators to reconsider unusual dispositions, and frequently provided judges with a tool for invalidating such dispositions.⁶⁷

Although the right of the testator (especially the male testator) to freely express his "will" about the inheritance of his property was assured by the mid-nineteenth century, controls were apparently viewed as necessary to limit and direct the enormous power the testamentary right afforded wealth-holders to redefine social relationships generally, and familial relationships in particular. The formalities incorporated into estate law during the nineteenth century confined and channeled this power. For example, American statutes modeled on the 1837 Act gave judges wide latitude to invalidate wills that did not conform adequately to social custom.⁶⁸

65. The purposes of the "requirements of [will] execution[s]" were explained in 1941 by Ashbel G. Gulliver & Catherine J. Tilson. They suggest:

[First, t]he court needs to be convinced that the statements of the transferor were deliberately intended to effectuate a transfer. . . . This purpose of the requirements of transfer may conveniently be termed their *ritual function*.

Secondly, the requirement of transfer may increase the reliability of the proof presented to the court. . . . This purpose may conveniently be termed their *evidentiary function*.

Thirdly, some of the requirements of the statutes of wills have the state prophylactic purpose of safeguarding the testator, at the time of the execution of the will, against undue influence or other forms of imposition. . . . It may conveniently be called the *protective function*.

Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2-5, 9-10, (1941) reprinted in DUKEMINIER AND JOHANSON, *supra* note 64, at 175-77.

66. See WAGGONER, *supra* note 63, at 164.

67. Commentators have argued that courts have frequently demanded "perfect performance of these formalities" before validating a will submitted for probate. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

68. Support for this hypothesis would depend on a detailed examination of cases in which judges invalidated wills on the ground that they failed to comply with legal formalities, but were in fact influenced by dispositions perceived to defy social custom. A 1969 English decision suggests the nature of such an inquiry. In *In re Groffman*, a probate judge invalidated the will of Charles Groffman because the two witnesses, friends visiting in Groffman's home during the evening of the attempted will attestation, were not literally together in one room with Groffman when Groffman acknowledged the signature on the will to each as his own. The invalidated will had not provided for Groffman's wife. Under intestacy she stood to inherit the whole of it. See DUKEMINIER & JOHANSON, *supra* note 64, at 185-86 (considering implications of *Groffman*).

From the start of the nineteenth century until the last decades of the twentieth century, estate law, as written and as interpreted, demanded careful observance of statutorily prescribed formalities relating to the creation—and especially to the execution—of wills. Beginning in the second half of the twentieth century—in the same decades in which American family law, with startling rapidity, redefined domestic relationships as pertaining between autonomous individuals⁶⁹—probate courts became less exacting about statutorily mandated formalities in wills. In place of concern with proper forms of attestation, for example, courts began more and more often to ignore minor deviations from proper execution as defined by statutory law and to examine the *intent* of testators. Similarly, legislatures began to reduce both the scope and quantity of formalities required to create a will.⁷⁰

Such changes were spearheaded by a set of calls for reform. Among these was John Langbein's proposals that courts develop a doctrine of "substantial compliance" in deciding whether or not a document submitted for probate is a will⁷¹ and, alternatively, that courts be given freedom to validate defectively executed documents in cases in which clear and convincing evidence exists that the document represents the author's intentions.⁷² This so-called "dispensing power" self-consciously replaces concern about compliance with strict, formalistic rules that focus on the intentions of property owners regarding the disposition of their property at death. The approach discards almost completely a lingering concern that property dispositions reflect social custom.⁷³ Instead, the disposition of property at

69. See *supra* notes 33-52 and accompanying text.

70. The National Conference of Commissioners of Uniform State Laws and the American Bar Association proposed adoption of the Uniform Probate Code in 1969. That Code decreased the number and the dimensions of formalities required in order for a will to be accepted to probate. See Sarajane Love, *Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly*, 67 KY. L.J. 309, 329-31 (1978-79).

71. John Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975). Some courts have relied on this doctrine to probate formally defective wills.

72. See, e.g., John Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987). The dispensing power allows validation of documents without regard for compliance with statutorily required elements. In contrast, substantial compliance looks to the statute and validates wills that come close to fulfilling the requirements of the statute. ROGER W. ANDERSEN, *UNDERSTANDING TRUSTS AND ESTATES* 59 (1994).

73. Other areas of inheritance law continue to reflect social custom. To a large extent that is the case with intestacy rules. See UNIF. PROBATE CODE, §§ 2-101-103 (amended 1990). These rules, however, are expressly formulated to dispose of the property of a wealth holder who failed to choose and are thus designed to reflect typical choices of testators who do choose by writing wills.

death is increasingly regulated without regard to ensuring the preservation of traditional familial patterns and is increasingly assimilated to the laws of the marketplace.⁷⁴ Moreover, statutory changes in estate law in the second half of the twentieth century have eradicated many surviving inequalities. Most states have repealed and amended inheritance laws that treated men and husbands differently than women and wives in inheritance matters.⁷⁵

In sum, changes in the law of inheritance in the past two centuries (in laws relevant to the creation and interpretation of wills and to treatment of women in inheritance matters) are remarkably like changes in family law during the same period—especially in the increased focus on intention and autonomous individuality to the exclusion of concern with safeguarding custom. In regulating both families and inheritance, the law has fitfully, though consistently, moved for almost two-hundred years toward a view of people (wealth-holders, parents, spouses) as autonomous individuals, committed to one another only insofar as they choose commitment, but not compelled by inexorable truths (e.g., biological links) or by established social custom to define their relationships in fixed terms.

C. *A Morality of Individualism and a Morality of Community*

Every ideology⁷⁶ bespeaks a moral perspective or set of connected perspectives. And so, a moral vision is central to—indeed often indistinguishable from—the ideology of family and familial relationships, including those connected to inheritance decisions, that has become predominant in the last several decades. That contemporary vision differs in significant regards from the moral vision implicit in understandings of the traditional⁷⁷ family.

74. Other recent changes in inheritance law suggest a similar, though somewhat slower, move away from fixed options toward the recognition of potentially unending choice. For instance, dower and homestead exemption laws are being repealed. SHAMMAS, *INHERITANCE IN AMERICA*, *supra* note 62, at 175.

75. *Id.* at 176. In 1975, for instance, California revised its law so as to treat wives equally to husbands in the probate process. *Id.* at 175. Previously, surviving husbands and surviving wives had different roles in the process of probating their deceased spouse's estate. At the same time, California amended its statutory law to treat husbands and wives similarly with regard to their role in managing community property. *Id.*

76. See *supra* note 2 (defining ideology).

77. The term "traditional" family is used here to refer to the family that developed in the years after the start of the Industrial Revolution and that represented the culture's central vision of "family" until the second half of the twentieth century. In the colonial period, the later division between home and work had not yet developed. Men, women, and children worked together productively within or close to the home. See BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN* 8 (1978).

Despite the remarkable self-consciousness of society at present about shifts in the meaning of family, people living their everyday lives are not always—or even usually—aware of the presumptions that govern their actions and thoughts. Moreover, a new ideology and morality of domestic relationships have not simply replaced older ones. Rather, a wide set of options reflecting “modern” and “traditional” families are present at once.

Inevitably, ambivalence and confusion abound. The traditional family survives, and many voices call for its continued preservation. Yet at the same time, American society increasingly accepts, and American law has begun to institutionalize, the view that families (or at least adults within families)⁷⁸ are collections of autonomous individuals.

As the law’s understanding of the domestic sphere changes, so do the roles of family and estate lawyers. In certain regards, the role of such lawyers becomes clearer as family (and estate) law merge with commercial law. However, insofar as conflicting views of family compete for social acceptance, the task of the family and estate lawyer has become especially complex.

Until the latter part of the twentieth century, estate lawyers could assume (because their clients so often assumed) a morality of family life grounded on shared understandings of families.⁷⁹ Within families, each person was understood as essential to the whole, and the scope of familial relationships was grounded in inexorable (e.g., natural or supernatural) truths. Those truths served to justify patterns of familial interaction by defining them as inevitable. Thus, for instance, domination was an expected component of domestic relationships. To a greater or lesser degree, children and wives were expected, in the nature of familial relationships, to receive protection from, and to give obeisance to, their parents and husbands. For clients and for lawyers, an ideology of paternalism was implicit in the traditional family.

78. For analysis of the complicated understanding of children and of the parent-child relationship within American law, see Janet L. Dolgin, *The Fate of Childhood: Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345 (1998).

79. Such morality contrasted sharply with the morality of the marketplace. In the marketplace, individuals are expected to seek the best bargains for themselves, and to further their own interests. After the best bargain is entered into by putatively equal bargaining partners, the partners are expected to fulfill the bargain’s terms. In fact, of course, as a brief survey of twentieth-century contract law confirms, even this principle has been violated with fair frequency. However, the fact that actual behavior does not conform to moral rules does not necessarily gainsay the strength of those rules. See GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY* 14 (1994).

Thus, estate lawyers represented husbands and fathers when representing families, and clients expected that sort of representation.

No longer can lawyers assume that familial relationships are hierarchical. On the other hand, however, they cannot assume egalitarian relationships among family members. Further, lawyers can no longer assume that to serve one family member is, in effect, to serve the family as a whole. Yet lawyers cannot assume that family members view themselves, and hope to be viewed, as society and law view people in the marketplace—as autonomous individuals. Even couples such as Bob and Ruth, described in Hypothetical I,⁸⁰ who predicate their relationships on divine guidance and view themselves as of “one flesh,” may, at some later time, choose to define themselves in different, even conflicting, terms. Thus, estate lawyers can rely securely on almost no assumptions about either families in general or about the constancy of particular families whom they represent.

As a result, lawyers representing spouses must see even their most apparently traditional clients as individuals whose conjoined interests potentially conflict. As a further result, legal ethicists, concerned with the role of lawyers in estate planning, must recognize and account for the variety of potentially shifting forms through which family members define and redefine their domestic relationships.

IV. PREFERRED APPROACHES

A. *Bob and Ruth, Joseph and Susan: The Motivations of Choice*

Once, inequality and holism were assumed to define family relationships. Today, choice predominates. Some wives and some husbands may view themselves as essentially autonomous and may, accordingly, view their financial affairs as separate. Other wives (such as Ruth in Hypothetical I) may *choose* to subordinate their identities to those of their husbands. “Wives,” Ruth explains, quoting St. Paul, should “be submissive to [their] husbands.” And other husbands (such as Joseph in Hypothetical II) may make choices regarding their own identities and/or financial interests that allow them to be encompassed by those of their wives.

Both of the couples described in the hypotheticals have made deliberate choices about the dimensions of their relationships. These choices raise particular questions for a lawyer representing the couple, as well as for a separate lawyer representing either spouse alone. In both hypotheticals, one spouse agrees to allow the other to make basic

80. See *supra* note 1.

decisions about assets that do, or could, belong to the couple. Thus, to that extent at least, one spouse chooses subservience to the other. Moreover, Ruth, in her relationship with Bob, has apparently chosen subservience (or the illusion of subservience) that extends well beyond her acquiescence in Bob's financial decisions.

In deciding what sort of legal representation best serves the interests of these parties, it is necessary to consider the choices they have made as well as the potentially different, even conflicting, choices they could make in the future.

In the first hypothetical, Ruth grounds her choice in supernatural truth.⁸¹ She believes that Bob should make family decisions because her church counsels wives to "be submissive" to their husbands. Ruth and Bob have chosen a relationship that mirrors central components of traditional families insofar as traditional husbands were expected to make essential financial decisions and traditional wives were expected to reap the rewards or bear the burdens of those decisions. However, Ruth and Bob's family differs from families of yore in that the terms of their relationship were the products of self-conscious choice, not a reflection of broadly institutionalized, culturally unassailable modes of familial interaction. In consequence, Bob and Ruth—together or separately—can, and may well at some point in the future, examine their choices anew, and refashion the terms of their relationship in light of those later choices. In this regard, Ruth and Bob are unlike "traditional" spouses. A century ago, people and couples did choose untraditional forms of familial interaction, and, as a result, were understood as culturally marginal and morally suspect.⁸² Today, in contrast, the fact of choice is, as a cultural matter, as important as any particular choice. Although Ruth and Bob may see their relationship as more "moral" than the relationships of other couples, society does not view their relationship as morally superior.

In the other case, that of Joseph and Susan, Joseph self-consciously subordinates his potential financial interests to those of Susan, a neuroophthamologist, because she is the higher wage-earner in the family. Joseph's decision to be a homemaker-husband and to defer to the decisions of his professionally accomplished wife is a modern choice. It mirrors traditional family patterns only insofar as it defines

81. In certain crucial regards, natural and supernatural explanations are similar. Both, for instance, are inexorable. For example, relations grounded in biology are understood as "real," and in need of no further justification. Similarly, relations preferred, or designed, by a supernatural force are "real," and, therefore, in need of no further justification.

82. See, e.g., HIMMELFARB, *supra* note 79, at 23-26 (describing untraditional choices among famous Victorians).

the financial decisions of one spouse (Joseph) as subordinate to the decisions of the other spouse. However, a century ago, Joseph and Susan's choice would not have been understood as a reasonable one. It would have been marginal in fact and suspect in theory.

Both cases differ from the more usual contemporary family in several regards. First, both couples have made clear, self-conscious decisions about the parameters of their relationships. Each couple seems to recognize that the terms of their relationship, though clearly acceptable in the modern context (insofar as virtually all choices are acceptable), are unusual. Second, neither couple strives for equality—or even the illusion of equality—between the spouses.⁸³ Thus, neither Ruth nor Joseph is likely to be an active participant in family estate planning.

For couples such as these, optional family representation has certain obvious advantages over an individualist approach. The optional family approach harmonizes with the parties' own understandings of their relationship, while offering some protection to the spouse who chooses subservience. These couples are both perfectly certain about, and comfortable with, their decisions to subordinate the financial control and decision-making power of one spouse to the control and power of the other. Even were Ruth and Joseph forced to be represented separately from their respective spouses, neither would be likely to benefit from the protection that form of representation might afford different spouses. Through optional family representation as described by Professor Pearce, the lawyer must mold his or her representation to the specific character of each couple's relationship. By working in harmony with the couple's self-definition rather than in opposition to that definition (as might occur were an individualist approach forced on these couples), the lawyer may be more effective in warning the husband and wife about potential risks for each. Moreover, because this approach uniquely requires lawyers to focus on the choices of each spouse *within the larger familial context*, lawyers involved in optional family representation may themselves become better attuned than other lawyers to the sources and implications of a couple's estate-planning decisions.

The most obvious risk facing both of these couples (and their lawyers) in estate planning is that, though both couples claim security in their chosen roles, Ruth and Joseph may not always desire the

83. This is more clearly the case with regard to Ruth and Bob. We are not told enough about the nonfinancial aspects of the relationship between Joseph and Susan to reach clear conclusions about the dimensions of that relationship in general.

subservient role they now choose for themselves. Indeed, in a world in which choice is central to moral life, nothing guarantees that either couple will remain committed to its present definitions of self and family. One can easily imagine Joseph, five years hence, preferring a more equal spousal role or, more seriously, involved in divorce proceedings, regretting his passive acceptance of Susan's proffered release five years before. One can also imagine Ruth, five years hence, reexamining the relevance of St. Paul's admonition to her own life. However, since both couples (and Ruth and Joseph, in particular) are comfortable with their present arrangements, they would be unlikely to plan with such eventualities in mind even were they compelled to hire separate lawyers. In short, for these couples, who have chosen *not* to define themselves as putatively equal, autonomous individuals, legal representation geared toward protecting autonomous individuals will not be particularly advantageous.

In contrast, the potential advantages of an individualist approach—with each spouse obtaining separate representation, but with each lawyer able to consult with the other spouse—are more likely to be actualized in cases involving couples who have not already made concerted choices to reject individualistic definitions of self and family. Most couples define their relationships far less explicitly than do Ruth and Bob or Joseph and Susan. Most couples are less certain about which spouse is, or should be, responsible for financial or other decisions. For such couples, separate representation, which can make clear to each spouse, separately, the implications of the couple's estate planning, can be particularly useful. A separate lawyer for each spouse is far more likely to focus on the particular needs and potential concerns of that person than is a lawyer representing the couple as the "family." Even more important, unconscious identifications between the lawyer and one spouse—to the exclusion of the other—cannot occur if each spouse is separately represented.

Both of these potential advantages of separate representation are least likely to be actualized in cases such as those of the two couples described in the hypotheticals; these couples have benefited from modernity's presentation of unending choice by choosing deliberately and, as they now understand things, permanently. For other couples, choices about the scope of their relationships are less intentional and less predictive of estate planning decisions. Moreover, spousal relationships are less often dictated by broad cultural assumptions about the essence of familial interactions than was the case fifty years ago. For most couples, therefore, the most general and most obvious

benefit of separate representation is its focus on, and consequent protection of, each spouse's (each client's) individuality.⁸⁴

B. Bob and Ruth, Joseph and Susan: The Law's Limitations

In general, within the American context, communitarian goals are better served by nonlegal, than by legal, institutions. Thus, the preservation and strengthening of familial relationships are more likely to be accomplished within a religious or a therapeutic frame, than within a legal frame. Especially in recent decades, legal commentators have urged that the law focus more intently and more often on serving communitarian ends.⁸⁵ As a moral matter, the goal is laudable. As a practical matter, it is unlikely that American law, so long geared toward serving autonomous individuals, will succeed in serving communitarian ends. In fact, in the last several decades, despite intensified calls for the law better to serve community,⁸⁶ family law has proceeded rapidly to merge with the law of the marketplace.⁸⁷

For these reasons, optional family representation may be less useful in fact than its theoretical justifications suggest.⁸⁸ In general, the law—and legal ethics—*assume* an individual client, or at least a client (such as a corporation) that can be viewed as an individual. In consequence, the law offers scant protection to—and probably *cannot* adequately protect—individual family members being represented by one lawyer.⁸⁹ This suggests clearly that in most cases the individual-

84. This is not to say that optional family representation can never benefit this more prototypic "modern" couple. For instance, such representation precludes separate lawyers creating adversity where none exists at the start. Still, such couples are generally best represented by lawyers who, because they represent one spouse alone, view their clients as autonomous individuals.

In any actual case, however, choices about the form of legal representation should belong primarily to potential clients educated by a lawyer about the advantages and disadvantages of available options.

Clients should play a central role in selecting client identity vis-à-vis the lawyer. See Collett, *Intergenerational*, *supra* note 17, at 1458-59 (stating that the Model Rules of Professional Conduct "seem to contemplate" that lawyer and person or people seeking legal representation together make choice about identity of client).

85. See GLENDON, *supra* note 3, at 76-89 (noting absence of legal duty to assist person in need of rescue).

86. See, e.g., GLENDON, *supra* note 3.

87. In the last decades of the twentieth century, it became possible for family members to enter into enforceable contracts with each other, see, e.g., *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981); *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), and to sue each other in tort, see, e.g., *Klein v. Klein*, 376 P.2d 70 (Cal. 1962).

88. See Pearce, *supra* note 17, at 1296-1301 (describing advantages of approach).

89. The major protections suggested by ethics codes are attorney withdrawal and client consent. See *supra* Section II.

ist approach is preferable to others (including optional family representation—itself the most protective of spouses among approaches providing for joint representation). Moreover, society (including attorneys and their clients) increasingly reflects the law's perspective in assuming families to be collections of autonomous individuals rather than holistic social units.

Perhaps the greatest advantage of optional family representation is its potential role in inspiring lawyers to focus intently on their clients' welfare and on the risks facing them in estate planning. The best protection against client abuse in cases such as those at issue in this Symposium is an aware and caring lawyer. Optional family representation is more likely to encourage lawyers to be aware and careful than alternative approaches.⁹⁰ This is so for two reasons. First, the approach explicitly requires lawyers to acknowledge individual and communal concerns and to be aware of areas of harmony as well as areas of disharmony between spouses. In addition, and more important, the approach actively involves clients in designing the terms of their own representation. Thus, lawyers undertaking this form of representation must concentrate on the concerns and choices of their clients.

In fact, however, many lawyers representing families involved in estate planning—under this approach or under any other—will not be adequately attuned to the communal interests at stake in such representation. Some will identify consciously or less consciously with one spouse or the other. Others will presume, but will fail to investigate, their clients' individual and communal concerns and needs.

Professor Pearce, in supporting optional family representation, notes that "family therapy perspectives" "emphasize attending to both the group and individual aspects of the family."⁹¹ Lawyers, however, are not psychologists, and even were a particular lawyer especially insightful, the law assumes the autonomous individual as its subject far more conclusively than does family psychotherapy. In short, even were lawyers able, without extensive training, to understand family identities,⁹² the law itself limits the usefulness of that understanding by failing—or perhaps refusing—to recognize communal rights.

90. Arguably, this advantage would be short-lived. Were the approach to be widely institutionalized, lawyers might well become less alert to the care and perceptivity the approach demands of them.

91. Pearce, *supra* note 17, at 1296.

92. *Id.* at 1296-97.

V. CONCLUSION

As family law and estate planning merge with the laws of the marketplace, family members (in deciding how to live together, in deciding no longer to live together, in planning for the distribution of property at death) are increasingly able to rely on the law to effect diverse choices, many of which were unimaginable or unattainable three or four decades ago. In these areas of legal practice, lawyers are faced continually with varied, conflicting views of personhood and of interpersonal relationships.

As a result of the vast transformations in American family life during the second half of the twentieth century, lawyers can no longer safely rely on traditional assumptions about the scope of relationships within particular families or about the meaning those relationships hold for family members. To the extent that family members do resemble business associates—and the law increasingly views them in that fashion—an individualist approach to estate planning must be preferred to others. To the extent, however, that particular families—such as those of Ruth and Bob or Susan and Joseph—have self-consciously defined themselves so as to preclude a wide set of choices, optimal family representation is preferable.

For the majority of clients, estate planning for spouses will include two broad, often contradictory social goals: the goals of equality and of community. An individualist approach serves the first goal by allowing each spouse to be the focus of the lawyer's concern, uninfluenced by conscious (or less conscious) identification with the other spouse. It does not serve, and may actually *interfere with*, the second goal. In contrast, optimal family representation promises to serve both ends. But because few lawyers are as perceptive and socially adept as that model demands, and because the law itself increasingly views spouses as autonomous individuals, the approach is unlikely to fulfill its promise. It should thus be reserved for unusual cases—cases such as those at issue in this Symposium.