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In Search of Family Value: Constructing a Framework for Jurisprudential Discourse

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IN SEARCH OF FAMILY VALUE: CONSTRUCTING A FRAMEWORK FOR JURISPRUDENTIAL DISCOURSE

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I. INTRODUCTION

In examining the contemporary notion that the modern family is "in crisis," Professor Stanley Hauerwas, a theologian, suggests that the difficulty in understanding present family issues arises from a lack of consensus about the moral value of the family.[1] Hauerwas suggests that there are those who believe in families and see them as morally good—both for society and for those who choose to form families.[2] However, moral value is difficult to define and our contemporary language on morality is ill-suited to facilitate the inquiry.[3] Without a common moral frame of reference, the debate rings hollow and shallow.

Professor Carl E. Schneider explores the concept of the moral value of the family from a legal perspective by considering "the relationship between

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1. STANLEY HAUERWAS, A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC 155 (1981).

2. An exploration of the concept of the moral value of the family aids the inquiry into the crisis facing the family today. High divorce rates, teenage pregnancies, child custody and support battles, domestic violence, and other ills suggest that belonging to a family is not always that wonderful. The bride and groom do not always live happily ever after. In spite of the reports on the family's demise, this article argues that the family has significant moral value.

3. Hauerwas observes:

> Ethicists provide little help in recovering the experience of the family. For modern ethical reflection the family is simply an anomaly, a curiosity left over from previous ages. From the "moral point of view" identification with relatives appears at best a sentimental attachment—more likely an irrational commitment. Nowhere in contemporary ethical literature is there discussion of the simple but fundamental assumption that we have a responsibility to our own children that overrides responsibility to children who are not ours. Although a powerful assumption, there is no adequate account in contemporary ethical reflection of why we hold it or if it is justified. Instead, the best my colleagues can offer is the doubtful thesis that children ought to have rights.

HAUERWAS, *supra* note 1, at 156.

morals and family law."[4] He reflects on the reasons and implications for the current, revolutionary changes in the area of family law.[5] Schneider theorizes that "the tendency toward diminished moral discourse and transferred moral responsibility in family law" has transformed modern family law.[6] In exploring this thesis, he challenges us not to view this inquiry as a search for " 'moral images' of the family in the law"[7] but rather as a "search . . . for the law's moral *discourse*, between institutions, over time, about families."[8]

Schneider's statement concerning "discourse between institutions, over time, about families" is vividly captured in our domestic relations jurisprudence. Each case is the real-life drama of a family working out what is valuable and important to it, while at the same time remaining within the bounds of the law. When our lives interact with the law, a discourse arises about who we are, what our hopes and dreams are for our family, how we form companionate relationships, and how we view raising children.

Responding to the challenge to search for moral value, this article is an exploration of the historical and contemporary moral discourse in the law. Our Constitution suggests that having and forming a family is an inherent, inalienable right, the exercise of which demands the fulfillment of certain moral obligations.[9] The interrelationship of family rights and family obliga-

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4. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1806 (1985).

5. *Id.* at 1807-08. In contemplating these changes, Professor Schneider makes the following central premise:

> Four forces in American institutions and culture have shaped modern family law. They are the legal tradition of noninterference in family affairs, the ideology of liberal individualism, American society's changing moral beliefs, and the rise of "psychologic man." These forces have occasioned a crucial change: a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated. *Id.*

6. *Id.* at 1809.

7. *Id.* at 1823.

8. *Id.* at 1826 (emphasis in the original). Schneider describes what he means by discourse:

> By legal discourse I refer to the ways the law expresses ideas, both among legal institutions and between legal institutions and the people and social institutions the law wishes to affect. The discourse that I will explore is primarily of two kinds: first, the use by courts or legislatures of moral language and ideas, and second, the prohibition of conduct on moral grounds. The latter category raises questions about whether the law's *failure* to prohibit conduct also is part of moral discourse.

Id. at 1827 (emphasis in the original). Schneider also defines what he means by a moral decision: "A decision made on moral grounds turns on whether particular conduct is 'right' or 'wrong,' whether it accords with the obligations owed other people or oneself." *Id.*

9. The family, as the basic social unit for individuals, is charged by society to provide those individuals with emotional support and economic necessities, and to socialize the family members, enabling the individual members to participate in the larger society. These obligations, as de-

tion, as reflected in family law, is a source of enlightenment on the moral value embodied in the family.

This article proceeds from the assumption that the moral value of the family has been, and continues to be, articulated in unique ways through family law, which is society's system of regulating family relationships. Family law recognizes and accommodates the constitutional right to form and maintain a family. This article will further examine how and why society, through law, requires individuals to fulfill certain moral obligations that are a concomitant part of the right to form and maintain a family.

Finally, the concept of family right and obligation will be explored by analyzing the differing textures of each, starting with a consideration of the family as a basic civil right guaranteed by our republican form of government and continuing with a study of how the nature of that right is shaped by legal obligations. This analysis will be made in light of the interrelationship between family and society, and society and law. The goal of this article is to achieve a better understanding of the concept of the moral value of a family and how this value influences the legal rights and obligations that arise at family formation.

II. METHODOLOGICAL FRAME OF REFERENCE

Family values, individuals who seek to establish families, and the values of the family legal system (the law of domestic relationships) all interact. A relationship exists between families and family members on one side and family law on the other. The family helps to shape the law as the law shapes the family. Stated in terms of moral value, the moral values of the family shape the law and the moral values of the law shape the family.

Within this broad approach, I will borrow from the theological methodology as developed by James Gustafson in his two-volume work, *Ethics from a Theocentric Perspective*.[10] His goal is similar to the one pursued in this article—to search for moral value in the various aspects of our lives, including marriage and the family. Gustafson's scope and purpose is far more encompassing, as the following passage indicates:

> I shall develop an account of moral life and ethical thought around a central concept of human life. *Man (individual persons, communi-*

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scribed by family constitutional law, are directly related to the costs each family member must bear for the right to have a family, the basic integrity of which is protected by the society itself through the law. These legal obligations are attendant upon and relate to the legal rights to form a family. *See* Steven H. Hobbs, *We Are Family: Changing Times, Changing Ideologies and Changing Law*, 14 CAP. U. L. REV. 511 (1985); *see generally*, WILLIAM J. GOODE, THE FAMILY (1964) (discussing essential functions of the family).

10. 2 JAMES M. GUSTAFSON, ETHICS FROM A THEOCENTRIC PERSPECTIVE (1981).

> *ties, and species) is a participant in the patterns and processes of interdependence of life in the world.* . . . Man has capacities to affect subsequent courses of events and states of affairs, whether in the lives of friends and family members, the conduct of political affairs, or the ways in which nature itself will be developed.[11]

For Gustafson, we are agents and actors in this world with a relationship to God and God's purposes.[12] His account of moral life and ethical thought, therefore, is theocentric. As a result of that perspective he poses the following moral question:

> What is God enabling and requiring us, as participants in the patterns and processes of interdependence of life in the world, to be and to do? The general answer can also be [stated]. We, as participants, are to relate ourselves and all things in a manner appropriate to our and their relations to God.[13]

This is the heart of his approach to theocentric ethics. Gustafson's framework illustrates the central issue of this article when it asks and examines the question: "What is God enabling and requiring us to be and to do as participants in the patterns and processes of interdependence in marriage and family life?"[14] Gustafson answers the question as follows: "We are to relate ourselves and all things in a manner appropriate to our and their relations to God."[15] Consequently, our marriage and family relationships are structured according to our relationship with God.

Although expressed in theological language, Gustafson suggests that the inquiry can be made in secular terms by considering values not necessarily based in religion.[16] Restating Gustafson's formula in very broad terms, this article poses the following question: What is the law and society enabling and requiring us, citizens or members of society, to be and do as participants in the patterns and processes of interdependence in marriage and family life? A secular answer expressed in Gustafson's terms would be that we must relate not only ourselves, as families and family members, but also all things pertaining to family in a manner appropriate to our relationship with society and its laws. This answer acknowledges the fact that through

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11. *Id.* at 145 (emphasis in the original). However, Gustafson does warn us that our power to effect change is limited by "aspects of the world beyond our intentions and control." *Id.* Also, our participation is limited by our temporal nature. He describes us as "stewards; we are temporary, responsible custodians of, and contributors to, the realms in which we participate." *Id.*

12. *Id.* at 146.

13. *Id.*

14. *Id.* at 153.

15. *Id.*

16. *See id.* at 146-47 & nn. 4 & 6.

our societal and legal relationships, we are shaping and influencing the very nature of society and law.

A. Value Defined

With politicians often espousing "traditional family values" as one of their qualities of fine character, the diverse electorate must apply its own sense of meaning to this talisman in order to understand the worth of such values. Let us now consider, therefore, what is meant by value when used in conjunction with family (as defined in the section below).

In describing value, we begin with the classic definition from the Latin valere, "be worth, be strong,"[17] defined in part as: "1. worth: the quality of a thing that makes it desirable, desired, useful, or an object of interest. 2. of excellence: that which is esteemed, prized, or regarded highly, or as a good."[18]

A legal text provides another definition for value as: "[T]he utility of an object in satisfying, directly or indirectly, the needs of human beings."[19]

These textbook definitions suggest that our inquiry must focus on fundamental human needs which are desirable, regarded highly, or of importance. Again Gustafson is instructive when he discusses moral value in the context of human needs. He suggests that when we focus on human needs, we are engaging in an ordering of our human relationships and our communities in a way that promotes the survival and flourishing of human life.[20] In terms of the family, Gustafson suggests a way in which value can be defined and discerned:

> Moral reflection about marriage and family seeks to provide direction to natural drives and social needs; it is rational activity based upon what is given both in "nature" and in particular social circumstances in given times and places. Values and principles are backed by these needs, and when they are objectified in rational ways they can provide direction to the ordering of relationships so that these needs are more properly met.[21]

Gustafson couches his discussion in terms of the natural drives and social needs of individuals who seek to form families.[22] These drives and

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17. PETER A. ANGELES, THE HARPER COLLINS DICTIONARY OF PHILOSOPHY 329 (2d ed. 1992).

18. *Id.*

19. BLACK'S LAW DICTIONARY 1551 (6th ed. 1990).

20. 2 GUSTAFSON, *supra* note 10, at 158-59.

21. *Id.* at 159.

22. *See* RICHARD A. POSNER, SEX AND REASON 70 (1992) (examining sexuality in terms of the legal treatment it has received).

needs can be discerned by a study of the "particularities and intimacies of marriage and family relationships,"[23] which are discussed in fuller form below. One should note, as Gustafson does, that failure to meet human needs, either as individual actors or as a society, may cause some of the societal problems that we face today.[24]

To place this definitional endeavor into a relational context, we must ask several questions. First, what is the nature of the interaction among individuals in families, among families and the state (society), and between individual family members and the state (society)? Second, what makes a family desirable, useful, and highly regarded? Third, how do we measure a family's utility in satisfying the needs of human beings? Fourth, why is society interested in the family? Fifth, by whom and by what "judgment of importance"[25] is the family form considered to be a preferred form of social relationship? These are the questions that our domestic relations jurisprudence ultimately attempts to answer and this article explores those jurisprudential attempts.

B. Family Defined

As a society, we find it difficult to decide what exactly constitutes a family. In some circles we tout the nuclear family as the model family; yet divorce has broken up many "model" families, causing a disproportionate increase in single parent, female-headed households.[26] Therefore, it would be unrealistic and elitist for us to choose one particular family style or category as having the greatest moral value. Each family style reflects some aspects of the moral values deemed important by society. Because such a broad range of family styles and relationships exists, we need to expand our scope in order to capture a more universal definition of family.

What is the essence of the family? What makes the family what it is, regardless of style, shape, or size? A working, formal, law-based definition

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23. 2 GUSTAFSON, *supra* note 10, at 159.

24. Gustafson aptly notes this cause-and-effect relationship when he writes:

> Failure to establish and to maintain certain relationships and failure to meet fundamental needs leads to disorder and to consequences which are detrimental both to the institution of marriage and family and to the well-being of individual members. Since relations within the institution are not those of biological cause and effect, or of action and reaction, the importance of human agency, of capacities for self-determination and for directing interactions, obviously has to be taken into account.

Id.

25. *See* WILLIAM L. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION 604 (1980).

26. *See* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S.: 1991, at 43-50 (111th ed. 1991) (giving the increase in single parent, female-headed households between 1970-1980 as 58.3%, and between 1980-1990 as 25.1%).

of the family could be: "[A] fundamental [legal] relationship established by birth, adoption or choice in which persons are responsible to each other for basic intellectual, emotional, physical, social and spiritual nurture."[27] This relationship creates a unique species of legal rights and obligations.[28] A legal, domestic relationship is generally classified as a status. Husband-wife, parent-child, and guardian-ward are the universal status relationships that are domestic or familial in nature.[29] These status relationships are created, ordered, and protected by the state. The concept can be expanded to include alternative forms of family relationships, such as cohabitating heterosexual or homosexual couples and surrogate parenting arrangements, which have been given consideration in law.[30]

This formal definition of family recognizes the legal concept of status but does not adequately contextualize the legal fullness of the relationship. A more comprehensive and functional definition of family would attempt to encompass what functions the law requires families and family members to perform.[31] In a prior work, I addressed this concept of function as a definition task by utilizing the following formulation:

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27. William E. Diehl, *Conclusions and Conference Actions*, ACADEMY: LUTHERANS IN PROFRESSION: SOCIETAL CHANGE AND THE FAM., Vol. XLI 1985, at 79.

28. Even in a single-parent household, the legal and moral obligations do not change. Unless the absent parent's rights have been terminated, he or she continues to have state-imposed familial rights and obligations. But this definition does not encompass the notion of extended familial relationships created by kinship nor does it include the formal or informal clan concepts of family.

29. *See* 1 JAMES SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS 1 (6th ed. 1921) ("The law of the domestic relations is the law of the household or family, as distinguished from that of individuals in the external concerns of life. Four leading topics are embraced under this head: *First*, husband and wife. *Second*, parent and child. *Third*, guardian and ward. *Fourth*, infancy.").

30. *See* Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1830-35 (1987); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270-76 (1991); Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J. FAM. L. 497, 501-03 (1991).

31. *See* Hobbs, *supra* note 9, at 520-21. In a previous article, I provided a fuller explanation of this premise:

> The history of the family is in part the history of the law offering protection to the family unit from outside interference with the relationship. The law also offers protection to the individual within the familial relationship from loss of valued rights by acts of other family members. The legal protection offered is based on society's articulation of the collective conscience operating through governmental mechanisms. The law thus becomes a reflection of the interrelationship between the demands of the society and the demands of individual family units. It gauges normative behavior and codifies the norms establishing a system of rights and responsibilities. The familial rights and responsibilities of individual family members are owed in part to society and in part to other individual [sic] within the family units.

Id. (footnotes omitted).

> The law provides that at the instant of birth, the operation of a valid marriage ceremony, or the judicial recognition of a quasi-legal or legal relationship, a legal family relationship is constituted. Collective society has, at a minimum, demanded that the legal family unit must socialize its members, provide the necessaries of life and provide emotional security. The law imposes upon the family primary responsibility for fulfilling these functions. This is reflected in laws which require the support and emotional nurture of children, the support of dependent spouses, the provision of education, and familial responsibility for the control and discipline of juveniles.
>
> The nature of that legal family relationship is such that if you do not fulfill these functions as agreed upon by society, society, operating through the judicial mechanisms of the state, will intervene in the relationship. The state may reorder the relationship by temporarily or permanently removing a member of the unit. The state may also demand that family members demonstrate behavior which falls within norms set by the collective society. Failure to demonstrate such behavior will result in loss of the full benefits of the legal relationship or complete termination of the family relationship.[32]

This article provides an opportunity to expand upon and further develop this family-as-function definition. It will consider how and why individuals enter into companionate relationships of legal cognizance. It will consider why individuals form relationships and why society has a legal interest in what is by nature and custom a private matter. The discussion will not, by necessity, be a complete account and other articles have considered this issue in far more detail.[33] For that same reason, this article will not present an account of the parent and child relationship.[34]

What this article attempts to convey is a sense of the private and public dichotomy of family relationships by considering the process of family creation and dissolution from the viewpoint of both the individuals involved and the state, which is deeply concerned about those individuals. The creation process is partly private and partly public: private because the individuals involved have free choice; public because the state certifies the marital institution and the parental relationship. Likewise, the dissolution process also has a private and a public component. The following sections will consider these twin themes of family law.

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32. *Id.* at 523.

33. *See generally*, AUGUSTUS Y. NAPIER, THE FRAGILE BOND: IN SEARCH OF AN EQUAL, INTIMATE AND ENDURING MARRIAGE (1988).

34. *See* Katharine T. Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

1. The Love Connection—A Private Choice

Essentially, the traditional marital relationship is spawned by love between a consenting man and woman.[35] Although simply stated, love is a baffling topic that at times is unfathomable. In *Habits of the Heart*, Robert Bellah and his co-authors attempt to illuminate the coming together of two individuals in love.[36] Bellah posits that "[a] love relationship is good because it works, because it 'feels right,' because it is where one feels most at home."[37] It is as if love is a fundamental emotion that, once ignited, draws individuals into intimate association spontaneously.[38] Although bards might be better able to describe love, we romantically know it when we see it.[39]

Within the love relationship an individual can express and feel intimacy. "Many speak of sharing—thoughts, feelings, tasks, values, or life goals—as the greatest virtue in a relationship."[40] However, locked within a love relationship is the concept of the individual self.[41] It is the individual who chooses through love to give and receive self. In fact, the very process of loving completes or moves us toward a more complete definition of who and what we are individually.[42] Bellah's description of the relationship of a couple supports this proposition: "[T]heir relationship embodies a deep sense of their own identity, and thus a sense that the self has found its right

35. *See* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 90 (1985).

36. *See generally id.* at 85-112 (describing the tension caused by conflicting conceptions of love and marriage in our society).

37. *Id.* at 91.

38. *Id.* Bellah notes that such a relationship "seems so natural, so spontaneous that it carries a powerful sense of inevitability." *Id.*

39. *See* Paul Gregory, *Eroticism and Love*, AM. PHIL. Q., Oct. 1988, at 339; Cindy Hazan & Phillip Shaver, *Romantic Love Conceptualized as an Attachment Process*, J. PERSONALITY & SOC. PSYCHOL., 1987, at 511; Carin Rubinstein, *The Modern Art of Courtly Love*, PSYCHOL. TODAY, July 1983, at 40.

40. BELLAH, *supra* note 35, at 91. Bellah describes one of the subjects interviewed for his study:

> Nan Pfautz, a divorced secretary in her mid-forties, describes how, after being alone for many years, she fell deeply in love. "I think it was the sharing, the real sharing of feelings. I don't think I've ever done that with another man." Nan knew that she loved Bill because "I let all my barriers down. I really was able to be myself with him—very, very comfortable. I could be as gross as I wanted or I could be as funny as I wanted, as silly as I wanted. I didn't worry about, or have to worry—or didn't anyway—about what his reaction was going to be. I was just me. I was free to be me." The natural sharing of one's real self is, then, the essence of love.

Id.

41. *Id.* at 55-57 (Bellah examines the individual and actualization of self).

42. *Id.* at 90-93.

place in the world. Love embodies one's real self."[43] In opening oneself up to the intimacies of a love relationship, one comes face to face with one's true self.

But therein lies love's greatest paradox. Ultimately, "[t]he very sharing that promises to be the fulfillment of love can also threaten the self. The danger is that one will, in sharing too completely with another, 'lose oneself.' "[44] Sharing, therefore, can create the very seeds that will destroy the love relationship and lead to dissolution. Giving so much to one person threatens the loss of self by becoming that person's alter ego.[45] As another's alter ego, an individual either will smother the other person in love or become an unattractive shell of the person whom the other initially loved.[46]

To have a flourishing love relation, one must mitigate the damage to the self that may arise in the giving of the self through love.[47] When two people enter into a marital relationship, each partner's unique individuality should not be lost. A sense of individuality should be maintained for a healthy

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43. *Id.* at 91.

44. *Id.* at 92.

> Love, then, creates a dilemma for Americans. In some ways, love is the quintessential expression of individuality and freedom. At the same time, it offers intimacy, mutuality, and sharing. In the ideal love relationship, these two aspects of love are perfectly joined—love is both absolutely free and completely shared. . . . The sharing and commitment in a love relationship can seem, for some, to swallow up the individual, making her (more often than him) lose sight of her own interests, opinions, and desires. Paradoxically, since love is supposed to be a spontaneous choice by free individuals, someone who has "lost" herself cannot really love, or cannot contribute to a real love relationship. Losing a sense of one's self may also lead to being exploited, or even abandoned, by the person one loves.

Id. at 93.

45. *See id.* and *infra* note 47.

46. *See infra* note 47.

47. The wisdom of Kahlil Gibran's Prophet is apropos:

> Then Almitra spoke again and said, And what of Marriage, master?
> And he answered saying:
> You were born together, and together you shall be forevermore.
> You shall be together when the white wings of death scatter your days.
> Ay, you shall be together even in the silent memory of God.
> But let there be spaces in your togetherness,
> And let the winds of the heavens dance between you.
>
> Love one another, but make not a bond of love:
> Let it rather be a moving sea between the shores of your souls.
> Fill each other's cup but drink not from one cup.
> Give one another of your bread but eat not from the same loaf.
> Sing and dance together and be joyous, but let each one of you be alone,
> Even as the strings of a lute are alone though they quiver with the same music.

relationship. In many ways the affirmation of self provides the drama in divorce.[48]

The importance of considering the nuances and complexities of the private choices we make when creating familial relationships cannot be overstated. The private choice of love is intricately connected to the right to procreate, the right to parental relationships, the right to intimate associations, and other cognizable family rights. These private family matters are fundamental liberties protected by state regulation.

When family is considered as a fundamental liberty, it is not just a theoretical abstraction to those who privately choose to make a love connection. It is personal, it is about self, and it matters. Consequently, much of who we are and how we see the world is determined by what we define as constituting our familial relationships. Divorce is a legally sanctioned, domestic reorganization of that fundamental relationship. Because one's self-dignity is at stake, the dissolution process should facilitate a celebration or affirmation of the individuality of both spouses.[49]

2. Marriage—A Public Concern

The state's role in relationship formation and realignment processes must be recognized in order to fully understand what is at stake in the effort to define family and family value. As indicated earlier, the state establishes the new legal relations and responsibilities attendant after marital dissolution.[50] Therefore, the state is the party that is intimately concerned with the consistent fulfillment of marital and post-marital responsibilities.[51] Under this premise, an assumption can be made that some connection should exist between marital regulations and marital reality. This article will now address that proposition.

Give your hearts, but not into each other's keeping.
For only the hand of Life can contain your hearts.
And stand together yet not too near together:
For the pillars of the temple stand apart,
And the oak tree and the cypress grow not in each other's shadow.

KAHLIL GIBRAN, THE PROPHET 15-16 (1985).

48. *See* MEL KRANTZLER, CREATIVE DIVORCE 17-19 (1973)(approaching divorce as an opportunity for personal growth).

49. *See* Steven H. Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325, 375-76 (1988).

50. *See infra* notes 136-138 and accompanying text.

51. *Id.*

In *The Legal Enterprise*, Robert Rodes explores conceptions of our legal order and how we utilize that legal order.[52] In discussing the history of marriage, Rodes briefly traces the institution from its days as a mere business transaction, based on a contract, to the modern era where marriage is usually based on love.[53] Implicit in a modern era conceptualization of marriage is the idea that the relationship is *personal* to the individual because an individual is generally free to choose marriage.[54]

For Rodes, and indeed for most romantics, love is a free-will gift.[55] As previously noted, marriage represents the surrendering of self, of expressing choice by freely welcoming the bonds of matrimony and the accompanying duties.[56] The law does not force a man and a woman to love each other or to stay committed and obligated to the chosen lover,[57] but those who do choose to enter a marital relationship receive the endorsement and the pro-

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52. ROBERT E. RODES, JR., THE LEGAL ENTERPRISE (1976). For a discussion of Rodes, methodology for this endeavor, see *id.* at 3-10. I am indebted to my colleague, Tom Shaffer, for suggesting this work.

53. *Id.* at 144-45.

54. Rodes specifically noted:

> In more recent times, we have widened still further the gulf between marriage and business by deciding that someone who talks an engaged person out of marrying is not subject to the same liabilities as outsiders who interfere with other contracts. Indeed, by now most people seem to feel that a contract to marry should not be enforced at all: it is inappropriate to make anyone pay damages for not marrying.

Id.

55. *Id.* at 146.

56. *Id.* Certainly Bellah would agree. *See supra* notes 35-44 and accompanying text for a discussion of Bellah's viewpoint.

57. *See* RODES, *supra* note 52, at 147.

tection of the state.[58] However, marital choice entails the assumption of marital duties.[59]

The legal recognition of marital choice (the personal relationship) and marital duty (the obligations to one another) has significance to the principle of legal order. As Rodes notes:

> My purpose with [my sketch of the law of domestic relations] is simply to establish that the commitment married people have to one another is not so coercively enforced as to prevent their adhering to it freely if they adhere at all, and yet that it gives rise to sufficient expectations to be regarded as a source of rights. The law, like other institutions of Western society, has undergone a long evolution in its attitude toward the personal relation between man and woman, but it has now settled on support for those who keep the personal and juridical relations together and marry for love.[60]

Rodes implies that a couple can commit to each other in love, but can separate from each other should either love or the will to give and receive love fade. This concept has legal significance. An orderly (lawful) way to separate is recognized in the marital dissolution process. Thus, the law not

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58. *Id.* at 147-48. To assist in the maintenance of purity, the state offers the family protection from within and without. *See* Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 178 (1916), where he discussed how the interests of individuals are protected by society:

> Accordingly two elements must be taken into accounting securing interests in domestic relations. On the one hand there is the individual spiritual existence. From the beginning the social interest in general security has required that the law secure adequately this feature of these relations since injuries thereto touch men on their most sensitive side, and no injuries are more certain to provoke self-redress and even private war. With the development of civilization, the social interest in the moral and social life of the individual, i.e., in his claim to a social existence as a human being, reinforces this requirement. On the other hand, there is the individual economic existence in which the purely economic side of such relations may be of great importance. Here, sometimes, along with the social interest in the individual moral and social life, the social interest in the relations as social institutions may require careful securing of the purely economic advantages.

Another example is found in tort law that offers compensation for the economic loss of a family member under workman's compensation laws or wrongful death suits.

The state is criticized when it does not offer adequate protection, as in the case of the federal income tax system that penalizes a married couple who file a joint or separate information returns. *See* Pamela B. Gann, *The Earned Income Deduction: Congress's 1981 response to the "Marriage Penalty" Tax*, 68 CORNELL L. REV. 468, 469-85 (1983). When domestic violence threatens to destroy the family, the state is chastised for failure to respond quickly to the imminent threat. *See* Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* Deshaney *in Context*, 68 N.C. L. REV. 659, 661-65 (1990).

59. Both Rodes and Bellah consider the paradox of offering love and self freely to another, yet in so giving taking on the constraints of marital duties. Fidelity is perhaps the most essential such duty. *See* BELLAH, *supra* note 35, at 93-97; RODES, *supra* note 52, at 146.

60. RODES, *supra* note 52, at 147-48.

only enables us to be in an autonomous love relationship but also allows us to leave it once love or the marital purpose has failed.

Marriage creates certain expectations.[61] One expectation is that the marriage will be a commitment providing emotional and physical sustenance. The relationship also involves a recognition of parental status, and whether the couple should have children or should adopt.[62] A further expectation is the acquisition of an interest in the economic fruits of the marriage.[63] The marital formation and dissolution process should be constructed to facilitate the fulfillment of these expectations.[64] Consequently, in recognizing expectations, the law necessarily recognizes what society values and the requirements society imposes on family relationships.

Family law attempts to delegate the responsibilities that flow from family formation. Consider what society, through the law, demands of families. The family is the only private, social institution that is required by society to provide necessities (emotional and physical) for the individuals within the family and yet equip those same individuals for life in the larger society. If the family fails at either function, the state has the obligation not only to modify or end the relationship, but also to fulfill these functions. These responsibilities can be recast as the moral obligations or values that underlie family law. In Gustafson's terms, society requires the participants to assume the responsibilities arising out of the patterns and processes of interdependence in marriage and family.

Familial legal rights and obligations are grounded in those moral values that society deems important. The moral values of society intersect family law at numerous points. Consider, for example, the issue of sex and its consequences. Sexual fidelity, which is a vital part of the familial relationship, may become a factor in child custody disputes.[65] Similarly, if sexual relationships are morally condoned within the bonds of matrimony, then the law views nonmarital sexual relations as meretricious.[66] Therefore, the burden of proving that the relationship was not meretricious is always on the party claiming a legal right to property division or support from a former sexual partner.[67] Putative marriages and nonmarital cohabitations are

61. Indeed, the expectations created include both civil rights and civil obligations. *See* Robert A. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329 (1979).

62. *See* UNIF. PARENTAGE ACT § 3, 9B U.L.A. 297-98 (1987).

63. In fact, the expectation of sharing in the economic fruits of the marriage is so strong that if a contrary intention is indicated, it should be declared prior to marriage in an antenuptial agreement. *See* UNIF. PRE-MARITAL AGREEMENT ACT § 1-13, 9B U.L.A. 369-80 (1987).

64. *See* Hobbs, *supra* note 49.

65. *See* Jarrett v. Jarrett, 400 N.E.2d 421, 423 (Ill. 1979), *cert. denied*, 449 U.S. 1067 (1980).

66. *Id.* at 424.

67. *See* Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976).

ready examples.[68] Sexual relationships outside of marriage often result in pregnancy. The mother is automatically given the legal status of parent with attendant parental responsibilities of care and custody. The biological father can claim moral or legal parental status or have parental status thrust upon him in a paternity action.[69]

Other examples of this intersection between society's moral values and family law are worth noting. Although health care is largely a private responsibility of families, the state requires that parents have their children immunized against certain communicable diseases.[70] Certain fundamental values such as honesty and respect for property are generally transmitted through the family. If this transmission of values is not successful, the criminal justice system will punish juveniles and adults who violate society's standards. Education is also a province of the family, but society considers it so important that parents may be required to provide a higher education for their children.[71]

3. Summary

When we search for family value we, as individuals, are searching for something large, important, and special; something that other relationships and institutions outside the family cannot fulfill. We search for family value in that place described by Robert Frost as "the place where, when you have to go, [t]hey have to take you in."[72] When we arrive at that special, desired place, we find what identifies and shapes us as human beings. The search tells us how to act within a family relationship. How we conduct ourselves within and outside that relationship is of great importance.

Yet, family values have utility and desirability for the state in the role of parens patriae. An examination of family worth is an examination of how we, as members of society, conduct ourselves in the creation and maintenance of family and in the realignment of our lives when families dissolve.

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68. *Id.*

69. *See* UNIF. PARENTAGE ACT § 6, 9B U.L.A. 302 (1987); *see also* Steven H. Hobbs & Mary F. Mulligan, *Centrist Judging and Traditional Family Values, or Why Papa Can't Be a Rolling Stone*, 49 WASH. & LEE L. REV. 345 (1992) (discussing the proper role of the state in family matters).

70. *See* Okianer Christian Dark, *Is the National Childhood Vaccine Injury Act of 1986 the Solution for the DTP Controversy?*, 19 U. TOL. L. REV. 799, 805 (1988).

71. *See* Turner v. Turner, 579 So. 2d 1381 (Ala. Civ. App. 1991); Neudecker v. Neudecker, 577 N.E.2d 960 (Ind. 1991). *Contra Ex parte* Bayliss, 550 So. 2d 986 (Ala. 1989); Grapin v. Grapin, 450 So. 2d 853 (Fla. 1984); Wannamaker v. Carr, 362 S.E.2d 53 (Ga. 1987); Smith v. Smith, 447 N.W.2d 715 (Mich. 1989).

72. ROBERT FROST, COMPLETE POEMS OF ROBERT FROST 53 (1962) (from the poem "The Death of the Hired Man").

What evolves in this discourse on family values is a system of beliefs, philosophies, and outlooks on life through which the proper functions, rules, and responsibilities of family relationships are ordered. Implicit in this discourse are notions about the importance of taking care of one's family and having the government's support in doing so.

In Gustafson's terms, the discourse on family values allows us as a society to determine what should be required of individuals when forming families. This discourse should proscribe the behavior of participants in the patterns and processes of interdependence in marriage and family life. As a result, we, individually and as a collective society, receive in return something good or desired—something of value. It is this treasure, hopefully found in the human spirit, that gives the family its value and moral grounding.[73]

III. FAMILY AS CIVIL RIGHT AND CIVIL OBLIGATION

This section will consider only our constitutional jurisprudence on the family because a complete account of constitutional theory is beyond the scope of this article.[74] However, a portion of the theoretical foundation of the constitutional jurisprudence will be analyzed by examining *Maynard v. Hill*,[75] the Supreme Court's first "real" family law case.[76] This case presents an opportunity to consider specifically the public nature of the private family arrangements. It further provides the basic analytical framework used by the Court in most family law cases. *Maynard* is a useful tool for testing Gustafson's methodological inquiry of how the law and society

73. The family and those things that affect the family fall within the rubric of "a subject of interest to the community." Goode has observed the family performing tasks that have extensive societal implications:

> More broadly, it is widely believed that the collective needs of the whole society are served by some of the activities individual families carry out. In short, it is characteristic of the varieties of the family that participants on an average enjoy more, and gain more comfort, pleasure, or advantage from being in a familistic arrangement than from living alone; and *other* members of the society view that arrangement as contributing in some measure to the survival of the society itself. Members of societies have usually supposed it important for most *other* individuals to form families, to rear children, to create the next generation, to support and help each other - whether or not individual members of specific families do in fact feel they gain real advantages from living in a familistic arrangement.

GOODE, *supra* note 9, at 12 (emphasis in original).

74. For additional accounts of the Supreme Court's jurisprudence in family law, see Burt, *supra* note 61; and Leonard P. Strickman, *Marriage, Divorce and the Constitution*, 22 B.C. L. REV. 935 (1981).

75. 125 U.S. 190 (1888).

76. *Id.* at 192.

enable and require individuals to participate in the patterns and processes of interdependence in marriage and family life.

Using the secularized version of Gustafson's theory, the family can be examined as a civil right (enablement) and a civil obligation or duty (requirement).[77] Political philosophers and theoreticians have considered the right to a family as a fundamental liberty—part of the bundle of political rights guaranteed by the Constitution.[78] Our representative and constitutional form of government enables us to exercise precious civil rights, but also requires us to contribute to the general welfare of the larger community. Civil right and civil obligation viewed in the family context calls for a delicate and somewhat fluid balance, as demonstrated in *Maynard*.[79]

A. Maynard v. Hill: *A Case Study*

Maynard provides an instructive and careful study of the civil right and obligation of the family and the impact it has on the familial rights and duties as reflected in the operation of positive law. The decision is a proper example of what the civil law in a constitutional republic requires and enables its citizens to do in the formation of families. This section will examine the private rights and public duties of the family as implicated by the issues presented to the *Maynard* Court. Such a consideration will aid our search for the law's moral discourse on family.

B. Background

David and Lydia Maynard married in Vermont in 1828.[80] In 1850, the Maynards and their two children, Henry and Frances, moved to Ohio. David traveled on to California to seek his fortune, promising to send for his family or to return within two years. He settled in the Territory of Oregon and took advantage of a land grant program in April 1852. In order to claim full title to the 640 acres he settled, David had to fulfill two conditions: First, to work the land for four years, and second, to prove he was a resident of the Territory and a married man as of December 1850. Once he met both conditions, half of the land would be conveyed to David and the other half would be conveyed to his wife.

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77. A functional definition of a civil liberty, or right, can be delineated as "[p]ersonal, natural rights guaranteed and protected by [the] Constitution." BLACK'S LAW DICTIONARY, *supra* note 19, at 246.

78. *See* Henry H. Foster, Jr., *Marriage: A "Basic Civil Right of Man"*, 37 FORDHAM L. REV. 51, 52 (1968).

79. *See Maynard*, 125 U.S. at 205-09.

80. *Id.* at 191 (for the relevant facts of *Maynard*, see *id.* at 191-96).

On December 22, 1852, David petitioned for and received a legislative act dissolving the bonds of matrimony between himself and Lydia.[81] On January 15, 1853, David married Catherine Brashears. In April 1856, the territorial land officer, believing that David and Catherine had satisfied all statutory requirements, issued one certificate for the west half of the tract to David and another for the east half to Catherine. After several administrative hearings, Catherine's certificate to the east half of the tract was canceled "because she was not [David's] wife on the first day of December, 1850, or within one year from that date, which was necessary, to entitle her to one-half of the claim under the statute . . . ."[82]

Henry and Frances Maynard brought an action against Hill and Lewis, the holders of United States patents for the east tract.[83] Henry and Frances claimed to be equitable owners of the land that should have belonged to their mother, Lydia, and "pray[ed] that the defendants may be adjudged to be [equitable] trustees, and directed to convey the lands to them by a good and sufficient deed. . . ."[84]

The Court considered the following two issues: whether the divorce was valid; and whether, if valid, the divorce defeated the property rights of Lydia. In considering the first issue, the Court initially had to determine whether the territorial legislature had the authority to pass an act of divorce. This crucial question has broad implications because its answer illustrates the sweep and scope of authority a state possesses in regulating domestic relationships. It is, essentially, a discourse on what society values.

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81. David was a power in the territorial legislature and was instrumental in the establishment of the State of Washington. For an examination of his life and times, see THOMAS W. PROSCH, DAVID S. MAYNARD AND CATHERINE T. MAYNARD: BIOGRAPHIES OF TWO OF THE OREGON IMMIGRANTS OF 1850 (1906).

82. *Maynard*, 125 U.S. at 194. Specifically, the Court stated:

> This certificate was [originally] annulled by the Commissioner of the General Land Office, on the ground that, as it then appeared, and was supposed to be the fact, Lydia A. Maynard, the first wife, was dead, and that her heirs were therefore entitled to half of the claim.
>
> On a subsequent hearing before the register and receiver, the first wife appeared, and they awarded the east half of the claim to her and the west half to the husband. From this decision an appeal was taken to the Commissioner of the General Land Office, and from the decision of that officer to the Secretary of the Interior. The Commissioner affirmed the decision of the register and receiver so far as it awarded the west half to the husband, but reversed the decision so far as it awarded the east half to the first wife; holding that neither wife was entitled to that half.

Id. at 193-94.

83. *Id.* at 195.

84. *Id.*

C. *The State's Authority to Regulate Family Affairs*

In the first step of a two-step process, the Court found that Congress had properly passed the organic act creating the territory of Oregon and establishing a legislature with the power to act.[85] The second step of the process involved an analysis of the scope of that legislative power and the limitations upon it—what may a civil government require and enable in the realm of family? Nowhere is the character of this legislative power more evident than in its nascency. The organic statute extended the legislative power of the territory " 'to all rightful subjects of legislation.' "[86] In this regard the Court observed:

> [T]he legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future.[87]

Legislative power must respect constitutional limitations and individual rights. There are certain private family matters that a citizen should be enabled to do and that the government may only restrict with due regard of those rights. Yet, the government has the power to require certain family conduct and to order relationships of individuals in families.

In *Maynard*, the Court focused on the future domestic relationship and rights of the parties.[88] Because no legislative provision existed for the judicial resolution of divorce disputes, the question was whether the legislature had the power to initiate, *sua sponte*, its own divorce process. The Court found that the legislature was competent to do so and held:

> The granting of divorces was *a rightful subject of legislation* according to the prevailing judicial opinion of the country, and the under-

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85. *Id.* at 203. The Court provided a brief historical legislative history of this act:

> The act of Congress creating the Territory of Oregon, and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the Territory in an Assembly, consisting of two boards, a Council and a House of Representatives. 9 Stat. 323, c. 177, § 4. . . . The grant is made in terms similar to those used in the act of 1836, under which the Territory of Wisconsin was organized. It is stated in *Clinton v. Englebrecht*, that that act seemed to have full consideration; and from it all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations.

Id. at 203-04 (citation omitted).

86. *Id.* at 204.

87. *Id.* at 205 (citation omitted).

88. *Id.* at 203-05.

> standing of the profession, at the time the organic act of Oregon was passed by Congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature.[89]

Because the phrase "rightful subjects of legislation" was ambiguous, the Court considered four factors in determining the propriety of legislative acts for divorce. First, the Supremacy Clause of the United States Constitution draws definite borders for state legislative action.[90] The state cannot take or improperly restrict the federal rights of its citizens.[91] Furthermore, the state cannot legislate in areas pre-empted by Congress.[92] Second, the established custom and practice of legislatures provided some guidance. Legislative divorces were widely accepted in England and many of the Colonies.[93] Third, with respect to the citizens who are governed by the legislature, "[a] long acquiescence in repeated acts of legislation on particular matters, is evidence that those matters have been generally considered by the people as properly within legislative control."[94] This factor suggests that the citizenry generally agrees with the values expressed or implied in the legislative acts. Fourth, changing government philosophy and wisdom does not negate the legitimacy of validly passed acts. Rights and obligations created through the use of legislative power cannot be changed by the winds of time but only by proper legislative amendment or repeal of the act.[95] This is especially true with respect to the legislative act of divorce, where a host of rights and social relationships are involved, and should be given the benefit of repose in the status quo.[96]

In reaching its conclusion that the divorce was valid, the Court noted that custom and practice enhanced the validity of legislative authority to end marriage.[97] Legislatures, in developing legislative divorce processes, acted with the detailed formality of a judicial proceeding by allowing the parties to appear with counsel, take testimony from witnesses, and consider questions of fact.[98] These measures arguably satisfied the principles of fair-

89. *Id.* at 209 (emphasis added).

90. *Id.* at 203.

91. *Id.*

92. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878), *overruled by* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981).

93. *Maynard*, 125 U.S. at 206-08.

94. *Id.* at 204.

95. *Id.*

96. *Id.* at 204-05. The Court observed in particular that "when the validity of acts dissolving the bonds of matrimony is assailed, the legitimacy of many children, the peace of many families, and the settlement of many estates depend [ ] upon its being sustained." *Id.*

97. *Id.* at 206.

98. *Id.* at 208.

ness and due process, thereby lending further legitimacy to the legislative custom.

D. The Public Nature of Family Status and Civil Contract—A Constitutional Inquiry

Having established the legitimacy of legislative authority to grant an act of divorce, the only other issue of statutory validity was whether the act of divorce was constitutional.[99] According to the Court, the only constitutional provision theoretically applicable was the contract clause.[100] The Court held this constitutional protection inapplicable to this act of a legislature, grounding its holding on the concept that the private domestic relationship begins as a *public* civil contract.[101] This concept reflects what society requires of individuals who form families and how society enables individuals to do that. Accordingly, Justice Field provided an excellent description of marriage as a civil contract:

> It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.[102]

There are three observations to make about marriage as a civil contract. First, as a civil contract, the marital relationship is "deemed an institution of society"[103] rather than a creature of the Church (generic) or purely a matter of individual free choice.[104] As a social relation created by law, the

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99. *Id.* at 206. Of course, this was the principal issue to be decided in this case.

100. *Id.* at 210. The Court refers to the "obligation of the contract of marriage." *Id.* (citing U.S. CONST. art. I, § 10).

101. *Id.* at 210-16.

102. *Id.* at 210-11.

103. *Id.* at 214.

104. *See* Kandoian, *supra* note 30, at 1835-39; *see also supra* notes 67-68 and accompanying text.

legal characteristics of marriage are established by the sovereign power of the state. As stated earlier, even if the public philosophy changes concerning the nature of these legal characteristics, the characteristics themselves cannot be changed except by amendment or repeal of the law.[105] As an institution of society, the domestic relationship can only "be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties would thereby be subserved."[106] The sovereign thus requires much from the individuals, yet it enables the individuals to determine the content and context of their family relationships and to form a private love connection.[107]

Second, the creation of the domestic relationship is relatively simple—the parties need only agree to enter into the relationship. The parties must give their consent, each to the other, to live together as husband and wife.[108] If they choose to become parents, they mutually consent to bring a child into their relationship through birth or adoption. At the same time, they also consent to a bundle of obligations and liabilities that are embedded in positive law and that are deemed valuable and essential by society.[109] However, mere consent to live together or to parent a child is insufficient to create a domestic status with concomitant legal obligations and rights. The "consent" of the sovereign, and thus the conferring of legal obligation and rights, is obtained via the marital licensing process, the parentage determination process, and the adoption process. Increasingly, when the law is silent, sovereign consent to form family relationships in creative and alternative ways is being issued by judicial fiat.[110]

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105. *See* Posner v. Posner, 233 So. 2d 381, 384-86 (Fla. 1970); WALTER O. WEYRAUCH & SANFORD N. KATZ, AMERICAN FAMILY LAW IN TRANSITION 1-4 (1983).

106. *Maynard*, 125 U.S. at 212 (citing Maguire v. Maguire, 37 Ky. (7 Dana) 181, 183 (1838)).

107. CALEB FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 217-58 (3d ed. 1985).

108. *Maynard*, 125 U.S. at 211-12 (quoting Adams v. Palmer, 51 Me. 480, 483 (1863)). The Court described this consensual coming together as "a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress." *Id.*

109. *Id.* at 211.

110. *See supra* note 30. Generally, the consensus of these articles is that nonmarital relationships or cohabitations are becoming increasingly popular and recognized methods of ordering one's personal relationships. However, states are reluctant to use the judicial system to protect individuals who shun the obligations and liabilities of civil family laws and yet then request divorce-like remedies in ending nonmarital relationships.

The trend toward official acceptance of alternative lifestyles may foretell a more profound social change in the character of domestic status. Historically, the parties did not have the ability to change the terms of the civil contract of marriage. They simply had no bargaining power to change the obligations and liabilities of marriage. Furthermore, they could not terminate the relationship at will. Without judicial or legislative fiat ending the relationship, one spouse could be charged with abandonment.

The parties could also enter into the civil contract of marriage informally. At common law, the expressed or implied intent to live together and to appear to the public as if husband and wife over a requisite period of time conferred common-law marital status.[111] Common-law marriage has largely been abolished in this country, mainly because it is difficult to prove the requisite intention to take on liabilities and obligations normally created by the official operation of the law.[112] Also, the alleged immorality of nonmarital, meretricious relationships dictates a strong public policy favoring formal marriage.[113] This is particularly evident when one notes the ease of entering the marital relationship.[114] The simple marital regulatory scheme is highlighted by the fact that no formal preparation or instruction is needed to enter into marriage.

Third, marriage as a civil status encompasses the notion that "the maintenance of . . . its purity" is a matter of public concern.[115] As suggested earlier, the family is the basic unit of society. Family has been called "a great public institution, giving character to our whole civil polity."[116] Perhaps for this reason, Justice Field expounded that civilization depended upon the basic marital unit.[117] Moreover, he asserted that the protection and preservation of the marital institution was a sign of progress.[118] From time to time various societies have attempted to hasten progress by proposing alternatives to the basic structure of nuclear families.[119] But even with all its shortcomings, the nuclear family created by private choice seems best adapted for civilization and progress.[120]

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111. *See supra* note 30 and accompanying text; *see also* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 45-62 (2d ed. 1988).

112. *See* CLARK, *supra* note 111.

113. *See* § 21-18.1, *Solicitation for Fornication, Sodomy or Adultery*, Code of the City of Roanoke, Virginia (1979); *Victims of the City Solicitation Law*, ROANOKE TIMES & WORLD NEWS, Dec. 24, 1990.

114. CLARK, *supra* note 111, at 35-37 (describing the requirements for receiving a marriage license).

115. *Maynard*, 125 U.S. at 211.

116. *Id.* at 213 (quoting Noel v. Ewing, 9 Ind. 37, 49-50 (1857)).

117. *Id.* at 211.

118. *Id.*

119. *See* Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) (Justice McReynold's discusses Plato's contention that the welfare of his ideal state would force all children to be separated from their natural parents and raised communally with other children with suitable qualifications).

120. On a personal note, I am married with four children. The care and feeding of four children is, to say the least, a challenge. The tasks are made easier because I share them with my wife. I recognize how difficult it must be for a single person to raise children. All of us can do a better job with help from a partner, other family members, or friends. What this suggests to me is that we ought to talk about a broader, more fluid definition of nuclear family. Perhaps a place to start is to study that tight group of individuals who always show up at family-oriented events, such as graduation from nursery school, soccer games, and family counselling sessions.

E. Other Rightful Subjects of Legislation Connected to the Divorce Process

With respect to the Court's resolution in *Maynard* of the ultimate issue of property, one should note that the rightful subjects of state legislation directed toward the family fall into three broad categories: property, economic (support), and social (child custody, living arrangements, and morals).[121] All three were implicated in the *Maynard* opinion.[122]

1. Property

a. Spousal Property

After a determination that a disputed item is property, distribution upon marital dissolution usually involves five basic inquiries: (1) who has title to the property; (2) when was it acquired (before or during the marriage); (3) should it be classified as marital or nonmarital property; (4) what is its value; and (5) how should it be divided.[123]

In *Maynard*, the Court held that Lydia had no interest in the property because under the statutory scheme of the land grant program, David could not obtain a vested interest in the land until after he had settled and cultivated it for four years.[124] At the time of the divorce in 1852, David possessed only an inchoate interest and, consequently, Lydia could not have an interest greater than her husband's.[125] Because she was not his legal wife at the time David satisfied the land grant requirements, Lydia did not qualify as a grantee to half of the settled property.[126]

b. Children as Property Heirs

The decision in *Maynard* demonstrates another aspect of marital property: The property rights of heirs may be contingent on the marital status of their parents. Here, Henry and Frances lost because Lydia possessed no property rights and, consequently, no property rights could pass to them by

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121. Property can be classified as an economic or wealth issue. It is classified separately because property is regulated by a separate body of substantive law. Property rights also have implications outside of the family relationship. Additionally, property in divorce is usually quickly disposed and its disposition, absent fraud or mistake, is usually not subject to modification. Economic issues involve the accessories of life and are subject to continued judicial supervision.

122. *See infra* notes 123-141 and accompanying text.

123. *See* JOAN M. KRAUSKOPF, CASES ON PROPERTY DIVISION AT MARRIAGE DISSOLUTION 240-46 (1983).

124. *Maynard*, 125 U.S. at 214-16.

125. *Id.*

126. *Id.*

intestate succession. The question arises why they asserted a claim for their mother's property and not their father's property, assuming, of course, that nothing actually passed to them from their father's estate? Answering that question reveals even more about marital property regulation. At the time David perfected his rights in one half of the tract of land, he was not married to Lydia but to Catherine. As his legal wife, Catherine acquired an interest in, but not title to that property. Because no testamentary device existed at the time of David's death in 1873, the property most likely passed completely to Catherine by intestate succession. When Catherine died, the property passed beyond the claims of David's children because they were not Catherine's natural heirs.

Henry and Frances no doubt felt they had a right to some land, either their father's or their mother's, because they brought their claim to the state court for an adjudication of their rights. If they had been able to appear before the religious elders for resolution of their claim according to biblical adjudication principles, at the very least Henry might have claimed the property as a birthright. But, because marital property regulation involves a civil right, other factors important to the state are determinative. Mainly, the state has an interest in quickly settling any property claims, especially those in marital property.[127]

Interestingly, had David and Lydia's divorce been found invalid, Catherine probably would have been classified as a putative wife.[128] The question then would have been what marital property rights, if any, did either Lydia or Catherine possess.[129]

Another interesting aspect of this case to contemplate is the validity of David and Lydia's marriage in Vermont in 1828. If their marriage had been invalid, many issues arise. Would David and Lydia have satisfied the requirements for a common-law marriage? Which state's law would apply in that determination: Vermont, Ohio, or the Territory of Oregon? Would Henry and Frances be considered illegitimate? How would their illegitimacy have affected their rights to the intestate succession of property? These questions demonstrate the broad range of legal issues that arise from the state regulation of family as civil right and obligation.

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127. *See* Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751 (1988).

128. *See* Christopher L. Blakesly, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 2-13 (1985).

129. *See id.* at 52-60; *see also* CLARK, *supra* note 111, at 53-56.

2. Support

Economic issues in divorce usually involve support, which is simply the means for providing for the necessities of life to the spouse and children. When David left Lydia and the children in Ohio (a new domicile for the family), he provided no support for them and never afterwards met his support obligation.[130] Although Justice Field castigated David for his dereliction of duty, he reasoned that "the loose morals and shameless conduct of the husband can have no bearing upon the question of the existence or absence of power in the Assembly to pass the act [of divorce]."[131] It is significant to note, however, that the Court uses the language of morality to describe the requirement of support. The use of such language supports the conclusion that the obligation of support is valued by society and should be taken very seriously.[132]

3. Social Issues

a. Custody

Custody, living arrangements, and proper moral conduct are the social issues typically involved in a divorce. Had David and Lydia's divorce been handled in a more traditional manner, the responsibility for child custody might have been contested. Would the children have lived in Ohio or Oregon? What visiting privileges would have been granted? In a more contemporary divorce setting, would a court have considered joint physical and legal custody?[133]

b. Moral Approbations

The proper moral conduct of each spouse also becomes an issue in divorce. Because the facts in *Maynard* are only circumstantial, the question not asked in that case is whether David Maynard committed adultery

130. *Maynard*, 125 U.S. at 192.

131. *Id.* at 210. Since Congress retained legislative oversight of the legislation passed by territorial governments, Justice Field posited that "if the facts stated had been brought to the attention of Congress, that body might and probably would have annulled the act." *Id.*

132. *See* REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 381 (Supp. 1992); DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 165-97 (1979); HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 51-95 (1981).

133. As a society, we continue to engage in discourse on the proper methods of determining child care and custody. *See* Beverly Horsburgh, *Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs*, 25 U. MICH. J.L. REF. 423, 468-79 (1992); Barbara Bennett Woodhouse, *Who Owns the Child?:* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992); Stephanie Simon, *Joint Custody Loses Favor for Increasing Children's Feeling of Being Torn Apart*, WALL ST. J., July 15, 1991, at B-1.

before his divorce. No evidence exists that suggests David's living arrangement with Catherine Brashears was meretricious before David did the "honorable thing" and married Catherine three weeks after his divorce. Historically, extra-marital relations have been condemned by society.[134] Although sexual promiscuity is generally tolerated by today's society, extant laws in some states prohibit fornication.[135] Incest, bigamy, and domestic violence are other social issues that receive the moral condemnation of society and the state through prohibitory laws.

F. Selected Conclusions To Be Drawn From Maynard

Maynard sharpens the focus of the civil nature of the domestic relationship. Consider the role and function of the government in this area. As a general proposition, the state is responsible for the overall regulation of domestic relations. The state establishes the ground rules for marriage, divorce, and the care of children.[136]

Many reasons or purposes may account for why individuals marry, among them religion, convenience, family pressure, and economic and social advancement. If any of these purposes are not fulfilled, the state provides a process by which the relationship terminates. Justice Field articulated the state's justification for allowing the parties to dissolve the relationship:

> Many causes may arise, physical, moral, and intellectual—such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity or hopeless idiocy, or a conviction of a felony—which would render the continuance of the marriage relation intolerable to the other party and productive of no possible benefit to society.[137]

The state's dual justifications for dissolution focus on both the interests of the individual and the interests of society. The individual is freed from the obligations of the marital contract because of frustration of purpose, a concept based in contract law. The modern-day version of this concept in family law is reflected in the no-fault legislative standards of irreconcilable differences and formal separation requirements.[138] Thus, society supposedly benefits because an unhealthy, unproductive family unit is abandoned and because the individual members who have separated now can contribute to society in other forums or in new domestic relationships.

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134. *See* Griswold v. Connecticut, 381 U.S. 479 (1964).
135. *See* VA. ANN. CODE § 18.2-344 (Michie 1990); WIS. STAT. § 944.15 (1979-80).
136. *See Maynard*, 125 U.S. at 205.
137. *Id.*
138. *See* VA. ANN. CODE § 20-91 (Michie 1990).

Another aspect of the state's role and function in the family concerns the establishment of the divorce process; the *how* of achieving a family dissolution. Dissolving a marriage requires judicial investigations in order to consider the legal standards that justify the dissolution. Even if the parties come to court with a prenegotiated divorce settlement, the power of the state to end the marriage is usually exercised by a judicial decree. No dissolution is possible until the legal fact of dissolution is recognized in a final court order.

IV. CONSTITUTIONAL ACKNOWLEDGEMENTS OF MORAL DISCOURSE

Most domestic relations cases reflect *Maynard*'s jurisprudential approach. Issues are addressed in such a manner as to examine the public concerns in the private choices of family and family relationships. The Court essentially applies Gustafson's framework and factors in society's interest. In doing so, the Court seeks the appropriate balance between public concern and private choice. A brief consideration of the two most often cited constitutional cases in domestic relations jurisprudence illustrates this proposition.

In *Meyer v. Nebraska*,[139] the Court considered a statute prohibiting foreign language instruction in any public, private, or parochial school to any pupil until the completion of eighth grade.[140] The Court considered whether the statute was an infringement of a liberty interest protected by the Constitution.[141] While acknowledging that liberty was a concept without exact definition, the Court declared:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God . . ., *and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*[142]

Liberty must, therefore, include the right to have a family, a right which also entails "the natural duty of the parent to give his children education suitable to their station in life."[143]

While acknowledging the right of the state "to improve the quality of its citizens, physically, mentally and morally,"[144] and its right to select curric-

139. 262 U.S. 390 (1922).
140. *Id.* at 397-98.
141. *Id.* at 399.
142. *Id.* (emphasis added)(citations omitted).
143. *Id.* at 400.
144. *Id.* at 401.

ula for common education, the state must, nevertheless, respect the constitutionally protected liberty interests of its citizens.[145] In other words, it is essential for the orderly pursuit of happiness that free parents educate and train children in such a manner as deemed appropriate by them.[146]

Although critics contend that *Meyer* went too far in its protection of the liberty interest in family, this case provided the basis for constitutional review of other state intrusions into "the private realm of family life."[147] In *Pierce v. Society of Sisters*,[148] the Court considered whether Oregon could require all children under the age of sixteen to attend only public school.[149] The Society of Sisters operated a parochial school that provided "[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church."[150]

Oregon's scheme for public education was challenged on the theory that parents had a fundamental liberty interest in educating their children, an interest which could not be "abridged by legislation which has no reasonable relation to some purpose within the competency of the State."[151] The Court, again acknowledging the power of the state to enact "reasonable" legislation concerning compulsory education,[152] held that under the doc-

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145. *Id.*

146. *See id.* at 399.

147. See *id.* at 399-401. The case has been criticized for stretching the concept of liberty too far. In the companion case of Bartles v. Iowa, 262 U.S. 404 (1923), which reversed convictions for violating similar statutes prohibiting foreign language instruction on the authority of *Meyers*, Justice Holmes, in dissent, stated:

> [I]t is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment. . . . But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

Id. at 412 (Holmes, J., dissenting) (citations omitted); *see infra* notes 148-190 and accompanying text on the role of the court in defining the extent of the right to family.

148. 268 U.S. 510 (1925).

149. *Id.* at 532-35.

150. *Id.* at 535.

151. *Id.* at 534-35.

152. *Id.* at 534. The Court further asserted:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id.

trine enunciated in *Meyer*, the Oregon legislative scheme impermissibly interfered with the liberty interests of parents. The Court reasoned:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[153]

Both *Meyer* and *Pierce* unconditionally proclaim that there is a fundamental liberty interest in the family. However, both do so without specifically defining the contours of the family right. Also implicit in these cases is the recognition of an appropriate role for the state in the private realm of family life. As much as there is a civil right to family, there also exist civil duties (also not defined with specificity) that society expects the family or family member to fulfill "as essential to the orderly pursuit of happiness by free men."[154] A closer examination of the family as civil right (enablement) and civil duty (requirement) highlights the contours and multitextured nature of family as a civil enterprise of enabling and requiring.

V. How Valuable a Right

The final aspect of family to consider is the issue of constitutional protection of civil right and civil duty as applied to the family. More broadly, how free are we to privately order the nature and content of our familial relationships? In other words, how should the state enable us to exercise the right? As pointed out in *Maynard*, the state has a powerful interest in, and the necessary authority to consider, the family institution as a rightful subject of regulation.[155] However, as constitutional guarantees limit the extent of that regulation, this analysis suggests an appropriate judicial review standard for domestic relations legislation: Did the legislature have the authority to enact the law; and does the law infringe upon constitutionally protected rights? If the law satisfies these standards, then the court will not inquire into the motives behind the enactment.[156] An examination of several areas of family legislation that have come under constitutional attack reveals the complexities and nuances of constitutional analysis involving civil rights and civil obligations. Such an analysis seems at times too ethe-

153. *Id.* at 535.
154. *Meyer*, 262 U.S. at 399.
155. *See* Maynard v. Hill, 125 U.S. 190, 205 (1888).
156. *Id.* at 207-08.

real to define and describe with specificity. This section will note several key areas and offer observations about them.[157]

A. Right to Marry

The state regulates who can get married, at what age they may marry, whom they may marry, and what prerequisites they must complete before marriage. Some of these regulations are of a practical nature. For example, marriage is an event that emancipates a minor but, as a practical matter, some couples are too young to assume the serious responsibilities of adulthood. Some marry in haste without thoughtful reflection; thus, many states require a short waiting period between the marriage license application and the marriage ceremony. Some enter marriage after engaging in active sexual lives; therefore, this is an appropriate opportunity to require a health examination in order to protect the new partner and any progeny.

However, even pragmatism has its limits. For instance, some individuals enter a subsequent marriage while still financially obligated to children of a prior marriage. Fearing that the children of prior marriages might become welfare wards of the state, Wisconsin enacted legislation prohibiting subsequent marriages without court permission, which was given upon proof that all child support obligations were current and could be met in the future.[158] In *Zablocki v. Redhail*, the Supreme Court held that although this statutory scheme to protect the out-of-custody child was a "legitimate and substantial interest" of the state, it could not be sustained because "the means selected by the State for achieving these interests unnecessarily impinge on the right to marry. . . ."[159]

Moreover, on a deeper level, marital regulations are grounded on much more than pragmatism. Because they reflect the moral values of society, the context of these moral values may determine the constitutional value of the right to marry. For instance, before 1968, antimiscegenation laws prohibiting interracial marriages were on the books of sixteen states.[160] The Supreme Court declared such laws unconstitutional when it held that "[t]he

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157. This section will not detail the constitutional methods of analysis suggested by theories of substantive due process, procedural due process, or equal protection and privacy.

158. Zablocki v. Redhail, 434 U.S. 374, 375 (1978) (constitutionality of WIS. STAT. §§ 245.10 (1), (4), (5) (1973)).

159. *Id.* at 388.

160. Loving v. Virginia, 388 U.S. 1, 6 (1967). At the time the Court decided *Loving*, fourteen other states had repealed their laws prohibiting interracial marriage since 1952. *See id.* at 6 n.5. Virginia and other states believed miscegenation was a rightful subject of legislation " 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy." *Id.* at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).

Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. . . . [T]o marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[161]

Reynolds v. United States[162] provides another example of societal moral value impacting the civil right of family. George Reynolds challenged the constitutionality of a bigamy conviction under a congressional statute for the Territory of Utah.[163] Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, stated that he believed in the "accepted doctrine of that church 'that it was the duty of male members of said church, circumstances permitting, to practise [sic] polygamy. . . .' "[164] After discussing the worldwide history of societal prohibition of polygamy, the Court rejected Reynolds's claim that religious belief justified polygamous marriage when it held:

> [W]e think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence [sic] against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.[165]

B. Right to Procreate

Moral factors also influence regulation of the most intimate aspects of the marital relationship. Included in the civil right to marry is the freedom to engage in private, consensual, sexual conduct, regardless of whether procreation results. In *Skinner v. Oklahoma*,[166] the Supreme Court considered a statute authorizing the sterilization of habitual criminals who "hav[e] been convicted two or more times for crimes 'amounting to felonies involv-

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161. *Id.* at 12. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942); *see also Maynard* 125 U.S. at 190. The Court in *Loving* further held that "[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Loving*, 388 U.S. at 12 (Stewart, J., joined by Douglas, J., concurring).

162. 98 U.S. 145 (1878), *overruled by* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981).

163. *Reynolds*, 98 U.S. at 145.

164. *Id.* at 161.

165. *Id.* at 165.

166. 316 U.S. 535 (1941).

ing moral turpitude . . . .' "[167] The State sought to eliminate the possibility that habitual criminals would produce "socially undesirable offspring."[168] Using a Fourteenth Amendment equal protection analysis because not all habitual criminals were treated alike, the Court found:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[169]

The Court in *Griswold v. Connecticut*[170] held that forcing a married couple to procreate by forbidding the use of contraceptives is equally as intrusive on the right to a family.[171] The *Griswold* Court held that constitutional guarantees in the Bill of Rights created a zone of privacy within which the marital relationship was protected from governmental intrusion.[172] A criminal statute banning contraceptives would allow "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."[173] The State not only attempted to discourage extramarital and nonmarital sexual relations as a way of upholding high moral standards, but condemned the very use of contraceptives as immoral.[174] As Justice Harlan so aptly noted in his dissent in a case proceeding *Griswold, Poe v. Ullman*:[175]

> It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies

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167. *Id.* at 536.

168. *Id.* at 538.

169. *Id.* at 541.

170. 381 U.S. 479 (1965).

171. *Id.* at 484-85.

172. *Id.* at 485.

173. *Id.* at 485. Justice Douglas, viewing this not only as an intrusion into the home but also into the very essence of the marital relationship, asserted:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

174. *See* Poe v. Ullman, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting) (the Court refused to reach the constitutionality of the Connecticut law at issue in *Griswold* on ripeness grounds).

175. *Id.*

> inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.[176]

The issue of procreation is not as clear cut when it involves nonmarried individuals engaging in private, consensual, sexual conduct. However, in *Eisenstadt v. Baird*, the Court struck down, on Fourteenth Amendment grounds, a Massachusetts statute that required doctors and pharmacists to dispense contraceptive devices by prescription only to married individuals.[177] Applying the low-level scrutiny of the rational relationship analysis under the Equal Protection Clause, the Court found "that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of [the statute]."[178] The Court found it "plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication."[179] The Court further reasoned that the State's justification for the law was dubious when it noted that both sections of the statute "do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease."[180] Chief Justice Burger's dissent articulated the disagreement over how much constitutional protection the right to family deserves and how far the right is to be extended. He asserted that the right of privacy should not be extended "into the uncircumscribed area of personal predilections."[181]

C. Right to Create a Nontraditional Family

Nowhere is the debate over the constitutional character and value of family right more evident than in the nonfamily areas of state regulation that nevertheless impacts the family. In *Moore v. City of East Cleveland*, the Court considered a single-family zoning ordinance which described in detail *who* could belong to the single family.[182] Moore lived with her son, his child, and the child of another of her other sons. The presence of this

176. *Id.* at 553 (Harlan, J., dissenting).

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

178. *Id.* at 443.

179. *Id.* at 448. The Court also found it incongruous that the distribution of devices for contraceptive purposes was classified a felony but that the conduct sought to be proscribed, fornication, was classified a misdemeanor. *Id.* at 449-50.

180. *Id.* at 449. For a more complicated version of the problem of nonmarital sexual relationships, see Planned Parenthood v. Heckler, 712 F.2d 650 (D.C. Cir. 1983), where the court struck down the "squeal rule," which required federally-funded family planning programs to inform the parents of an unemancipated minor any time a contraceptive device or a prescription for a contraceptive device was given to that minor.

181. *Eisenstadt*, 405 U.S. at 472 (Burger, C.J., dissenting).

182. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

second grandchild, whose mother had died while he was an infant, violated the ordinance.[183]

In a plurality opinion highlighting the "venerable" tradition of extended families, Justice Powell found a protectable liberty interest in a household with kinfolk beyond the nuclear family circle.[184] He utilized the substantive due process analysis as articulated by Justice Harlan in *Poe v. Ullman*.[185] Justice Brennan, in a stirring concurrence "underscor[ing] the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance,"[186] stated that:

> The prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the "extended family" pattern remains a vital tenet of our society. It suffices that in prohibiting this pattern of family living as a means of achieving its objectives, appellee city has chosen a device that deeply intrudes into family associational rights that historically have been central, and today remain central, to a large proportion of our population.[187]

Justice Stevens based his concurrence on the property clause and the zoning standards articulated in *Euclid v. Amber Realty Co.*[188] and *Nectow v. Cambridge*.[189] Chief Justice Burger dissented because Mrs. Moore failed to exhaust her administrative remedy of seeking a zoning variance before coming to federal court.[190] Justice Stewart, joined by Justice Rehnquist in dissent, could find no basis in the freedom of association guarantee of the First Amendment for extending the right of familial privacy in this context.[191] He wrote:

> When the Court has found that the Fourteenth Amendment placed a substantive limitation on a state's power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed "implicit in the concept of ordered liberty." The interest

183. *Id.* at 496-97.

184. *Id.* at 504-06 (Justice Powell delivered the opinion in which Justices Brennan, Marshall, and Blackmun joined).

185. *Id.* at 501-02.

186. *Id.* at 507 (Brennan, J., concurring, joined by Marshall, J.).

187. *Id.* at 510 (footnote omitted).

188. 272 U.S. 365 (1926).

189. 277 U.S. 183 (1928). The "ordinance constitutes a taking of property without due process and without just compensation." *Moore*, 431 U.S. at 521 (citing *Euclid*, 272 U.S. 365 (1926) and *Nectow*, 277 U.S. 183 (1928)). In reviewing additional prior cases, Justice Stevens concluded that "[t]he intrusion on that basic property right has not previously gone beyond the point where the ordinance defines a family to include only persons related by blood, marriage, or adoption." *Id.* at 519.

190. *Id.* at 521 (Burger, C.J., dissenting).

191. *Id.* at 533-35 (Stewart, J., dissenting, joined by Rehnquist, J.).

> that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.[192]

D. Observations

The question of what society through law can require of families and what they should be enabled to do lies at the heart of the debate over the nature and value of the family. How do we define the family, in jurisprudential terms, with certainty? What aspects of familial relations can be valued as fundamental liberties? Which concept of due process, substantive or procedural, should be applied?[193] What is the role of the Supreme Court in evaluating the state's right and authority to legislate in the domestic relations area? Does the judiciary or legislature's particular ideological frame of reference in family matters enter into the determination?[194] Answers to these questions vary over time and depend upon current social thought.

An examination of the jurisprudential nature of family as civil rights and civil duties demonstrates the multifaceted nature of the issues involved. The civil right of family is of immense value to the individual; it confers a mixture of rights, liabilities, and obligations. The civil right of family is also

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192. *Id.* at 537 (Stewart, J., dissenting, joined by Rehnquist, J.) (citations omitted).

193. *See* Santosky v. Kramer, 455 U.S. 745 (1982); and Lassiter v. Department of Social Services, 452 U.S. 18 (1981). Even if the members of the Court agree on the appropriate standard of review, they may reach differing results. Consider the question of whether the state has afforded adequate due process safeguards in termination of parental rights, as considered in *Santosky*. The Court engaged in a balancing of the three factors that had been set forth in Mathews v. Eldridge, 424 U.S. 319, 335, (1976). Justice Blackmun stated the issue as follows:

> In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.

Santosky, 455 U.S. at 758.

Justice Rehnquist, in a dissenting opinion joined by Chief Justice Burger and Justices White and O'Connor, would have deferred to the wisdom of both the state legislature that had enacted a comprehensive, multi-level termination procedure and the state judiciary that had sat at the hearing and considered all the evidence of parental unfitness. *See id.* at 776-81 (Rehnquist, J., dissenting, joined by Burger, C.J., White, J., O'Connor, J.). In contemplating the proper role of the Court in reviewing such legislation, Justice Rehnquist concluded that the majority's decision "cavalierly rejects the considered judgment of the New York Legislature in an area traditionally entrusted to state care. The Court thereby begins, I fear, a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems." *Id.* at 791.

194. *See generally* Hobbs, *supra* note 9.

of such essential value to society that it is a rightful subject of legislation. The state seeks to promote the good of the individual family and the individuals within the family, which in turn promotes the good of society. In this sense, the family is truly a public institution.

Standards of familial conduct as reflected in the notion of family civil right and civil duty are influenced and determined by state regulation when the state acts with proper legislative authority. But there must be restraints on legislative enactments affecting familial conduct. Indeed, the legislative process has its own internal restraints in a representative democracy. States are restrained from unnecessary interference in the domestic relationship by constitutional imperatives. Balancing the tension between enabling private civil rights and requiring public civil duties becomes the task of both courts and legislatures. More significantly, the task of balancing that tension falls on us, the people who ultimately influence these institutions.

Constitutional imperatives intersect and influence the development of laws drafted to encompass the values of society. The morality and values of society, ever changing, may or may not determine the extent of family civil rights and obligations. For instance, an individual does not have a right to a polygamous marital relationship—the predominant societal moral philosophy being determinative. However, a person may simultaneously be obligated to support both a present and a former spouse as serial marriage becomes a predominant social pattern. This phenomenon has spawned a new debate on the purpose and use of alimony.

An individual has a right to marry someone of another race—the predominant moral philosophy not being determinative. However, the interracial marriage must be with someone of the opposite sex who is not within a prohibited degree of consanguinity—again, the predominant moral philosophy being determinative. However, moral philosophy is being challenged as we debate the issue of same-sex marriages.

Yet, claiming a civil right to family brings us full circle. We claim the right by taking on the domestic status of companion or parent and accepting the public benefits, such as intestate property succession, use of the judicial system to obtain support or divide property, or acceptance of government largesse contingent on domestic status. This is a tacit acceptance of the civil and personal obligation attendant to the right. This is the civil obligation aspect. By the mere act of demanding a constitutional right to

the integrity of one's family, an individual personally adopts the minimum standards of acceptable conduct within the family.[195]

A more accurate description might liken this to a personal pact with the state. Personal or religious beliefs may inspire a higher level of moral conduct in the family—for instance, as demonstrated by a desire to educate one's children in a parochial school or on an Amish farm. But personal or religious tenets will never justify breaking the personal pact with the state or changing its terms. The possible exception is a religious belief or a secular value system of such moral imperative that civil disobedience is an acceptable, personal alternative. In that case, one willingly faces the legal consequences.

Ultimately, it is in the state's best interest to optimize the opportunities to successfully fulfill these civil responsibilities and to enable citizens to enjoy the right to a family. The morals and well-being of the larger community depend upon the *health* of individual family units. What constitutes "good family health" changes over time as the values of society change.[196] The collective values of society shape the customs, practices, and legislative enactments on family to which the members of society will acquiesce and look to for guidance in their own family conduct. This interactive process provides the foundation for the larger concept of family as civil right and duty.

VI. CONCLUSION

The family values discourse by politicians is arguably high on moral tone but embarrassingly low on substantive content. All have a vision of family grounded in their own ideological backgrounds, which captures only a portion of the American family collage. Their visions reflect the fact that we can not agree, as a society, on what family values are or should be.

Individuals fall in and out of love, have children with and without the benefit of marriage, and basically struggle to fulfill their emotional and social needs that define fundamental human relationships. *Maynard* demonstrates that although the government can rightfully draft marriage, divorce, and child custody legislation, the Constitution limits the power to require individuals to conform to moral values esteemed by only some, not all, of

195. The current moral discourse on same-sex marriages is about being enabled to make the claim of a civil right to form such a family, to be entitled to the public benefits, and to be equally required to fulfill the public obligations.

196. Witness the revolutionary changes in family law during the past three decades: no-fault divorce, joint custody, and the development of new concepts of marital property. The will of the people as to what is socially desirable is expressed through the legislature, subject only to the Constitution and the laws of the United States. *See supra* notes 139-153 and accompanying text.

our citizens. Those who hold public office can lead by moral suasion and example but ultimately must respect the myriad private love choices of our citizens.

However, the government can legitimately enable families to fulfill functions useful to the welfare of our society. For example, it can provide options for child care and older adult care for those who work. Because society requires the family to be ultimately responsible for health care and education, government can ease those burdens by making access to quality health care and education a right for all. When family members must financially support the family, government should strive to direct or assist economic growth. This is particularly critical as old industries fade and new, high technology jobs are required to effectively compete in a global economy. Additionally, our tax system should be structured in a way that does not penalize families and that lightens the tax burdens of those who have family members dependent upon them.

This is family values in action. We, as a society, should recognize the limits of what we can require of families. And yet we should strive to enable families to accomplish those things which are of value and use to our society.